IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA409/2024
[2025] NZCA 2

BETWEEN	TONY JOHN LOOKER Appellant
AND	THE KING Respondent

Hearing:	6 November 2024
Court:	Ellis, Peters and Muir JJ
Counsel:	N P Bourke for Appellant J E Bourke and J M Woodcock for Respondent
Judgment:	4 February 2025 at 11.00 am

JUDGMENT OF THE COURT

A The appeal is allowed.

B We set aside the sentence of five years and six months imprisonment and substitute a sentence of four years and three months imprisonment.

REASONS OF THE COURT

(Given by Muir J)

Introduction

[1] Tony Looker appeals his sentence of five years and six months' imprisonment imposed in respect of a single charge of supplying the Class A drug methamphetamine to which he pleaded guilty.[1] His grounds are:

[1] *R v Looker* [2024] NZDC 12099 [judgment under appeal].

(a) the starting point adopted by Judge Greig in the District Court was manifestly excessive in that it gave insufficient recognition to Mr Looker's limited role in the relevant drug supply; and

(b) insufficient credit was given for personal mitigating factors and, in particular, his addiction to methamphetamine.

Background

[2] Mr Looker was sentenced on an agreed summary of facts.

[3] The summary of facts records that, in August 2023, the Taranaki Organised Crime Unit began an investigation into the sale of methamphetamine in the area by Mr Anthony Richards.

[4] On 12 October 2023, at a time when Mr Richards' address was being monitored, he was visited by Mr Looker, who had driven from Tauranga. Mr Looker supplied Mr Richards with 588 grams of methamphetamine sourced from a supplier, likely in the Tauranga region. Mr Richards gave Mr Looker $113,000 in cash to be remitted to the supplier as payment for the methamphetamine, and 44 grams of methamphetamine as part of Mr Looker's agreed compensation for the delivery. Mr Looker stayed at the house overnight and left the next morning at 11.50 am. Police subsequently stopped his vehicle and searched it, identifying the cash and the 44 grams of methamphetamine. Subsequent searches of Mr Richards' home identified a firearm, $40,000 in cash, MDMA, and 544 grams of methamphetamine.

[5] Mr Looker was arrested and interviewed by police. During his interview, he admitted to being in possession of everything in his car. He stated he would get $2,000 per trip to deliver methamphetamine to Mr Richards.

The District Court sentencing

[6] Having set out the facts, Judge Greig referred at length to Mr Looker's personal history — noting that he had begun using methamphetamine in 2000 when he owned and managed a hotel in Cambridge which involved long hours and high work pressure.

He noted a Provision of Advice to Courts (PAC) report, in which a probation officer recorded that Mr Looker's statement that his methamphetamine use "seemed to make things work better".

[7] The Judge then referenced the breakup of Mr Looker's marriage, subsequent insolvency of his business, and the large personal claims against him by the Inland Revenue Department relating to the business failure. The Judge said that this resulted in Mr Looker "taking up methamphetamine use again to cope and mask [his] feelings".[2]

[8] The Judge referred to Mr Looker's efforts to separate himself from the drug community by purchasing a property in Tauranga, which was closer to his son, and that Mr Looker suffered a heart attack on the day he moved, resulting in an inability to work. Shortly afterwards his wife made a relationship property claim which further compounded his financial problems. He began renting out the house and living in a shed adjacent to it, however, the income was insufficient to cover his mortgage payments. Life and financial stresses again lead him to using methamphetamine and mixing with what the Judge described as "antisocial associates" who in turn became aware of his financial situation.[3] The Judge noted that they:[4]

> … suggested a courier role in their drug enterprise which [Mr Looker] saw as easy money and an avenue out of [his] financial dilemmas. [Mr Looker] said that [his] previous job was driving trucks and so this was an opportunity to just be the driver and it seemed to [him] ideal.

[9] The Judge noted the guideline judgment of *Zhang v R* and the fact that the quantity of drugs involved placed the case within band four, inviting a sentence of between eight and 16 years' imprisonment.[5] He then noted the requirement that "before finally setting where in that [he] fit", it was necessary to determine:[6]

> … what category of offender [did Mr Looker] fall into within that band by determining [his] role in the operation you were involved with. Did [he] play a lesser role, a significant role, or a leading role?

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2 At [13].
3 At [15].
4 At [15].
5 At [21], citing *Zhang v R* [2019] NZCA 507, [2019] 3 NZLR 648.
6 Judgment under appeal, above n 1, at [21].

[10] The Judge assessed Mr Looker's role as being at "the lower end of playing a significant role".[7] He said that the defendant performed an operational function, albeit operating alone and that he was motivated primarily by financial advantage, noting: "That is what you told the probation officer."[8] He concluded that Mr Looker had an awareness and understanding of the scale of the operation by virtue of the weight of the package he was delivering and the amount of cash he was returning to his supplier. He noted that Mr Looker had told the probation officer he was "making good money".[9]

[11] The Judge acknowledged that Mr Looker was an addict and that this was confirmed by the alcohol and drug assessment. He said that this lessened his culpability "only slightly" and that it stopped him being in the "mid-band of significant".[10]

[12] He adopted a starting point of eight years' imprisonment which is at the bottom of band four, as identified in *Zhang*.[11] From that, he allowed a 25 per cent discount for Mr Looker's guilty plea and a further 6.25 per cent (expressed as six months) on account of his poor health, age (63 at the time of sentencing) and the fact that a prison sentence would, in that context, be more arduous. The final sentence imposed was therefore five years and six months' imprisonment and an order for confiscation of Mr Looker's vehicle was also made.

Approach on appeal

[13] The appeal is brought pursuant to s 244 of the Criminal Procedure Act 2011 (the Act). This Court must allow the appeal if satisfied that, for any reason there is an error in the sentence imposed on conviction and a different sentence should be imposed.[12] In any other case, the appeal must be dismissed.[13]

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7 At [26].
8 At [26].
9 At [26].
10 At [27].
11 *Zhang v R*, above n 5, at [125].
12 Criminal Procedure Act 2011, s 250(2).
13 Section 250(3).

[14] Although s 250 of the Act makes no express reference to the concepts of a manifestly excessive or inadequate sentence, they continue to provide a helpful means of examining the significance of the error and in deciding whether a different sentence should be imposed.[14]

The appellant's case

[15] Counsel for Mr Looker submits that the starting point of eight years' imprisonment was manifestly excessive and outside the available range. He submits that an offender's level of involvement in any supply may be such as to move them not only within the bands identified in *Zhang*, but also, in appropriate cases, outside the band. He accepts that because Mr Looker was involved in the transportation of the drugs under direction, he fulfilled an operational function under the *Zhang* criteria. However, he relies on the Supreme Court decision in *Philip v R* for the proposition that ascertaining an offender's role is an "intensely factual inquiry" and that when analysed in detail, Mr Looker's role is properly assessed as being at the high end of the lesser category rather than the lower end of the significant category.[15]

[16] He further submits that the District Court Judge misinterpreted the PAC report in terms of the financial motivation for Mr Looker's offending which, he says, was primarily driven by addiction. In turn, he says that this informs proper categorisation of Mr Looker's role in accordance with the criteria identified in *Zhang* and refined by the Supreme Court in *Berkland v R*.[16]

[17] In combination, he suggests that these factors support Mr Looker being placed in a lower band than the quantity of drugs involved would otherwise predicate. He submits that a starting point of around five years would have been appropriate.[17]

[18] Next, he argues that Mr Looker was given insufficient credit for the personal mitigating factor of addiction. He submits that there was a causative link with the offending and, as put by counsel, the probation officer reported that Mr Looker had

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14 *Tutakangahau v R* [2014] NZCA 279, [2014] 3 NZLR 482 at [32]–[35].
15 *Philip v R* [2022] NZSC 149, [2022] 1 NZLR 571 at [36], citing *Berkland v R* [2022] NZSC 143, [2022] 1 NZLR 509.
16 *Zhang v R,* above n 5; and *Berkland v R*, above n 15, at [65].
17 That is at the approximate midpoint of the band two, which has a two to nine year range.

"reached a tipping point in terms of his change of attitude". He submits that a discount in the vicinity of 20 per cent should have been allowed. He further submits that Mr Looker's time on electronically monitored (EM) bail warranted recognition at sentencing, which would have resulted in an end sentence of approximately two years and three months' imprisonment.

Discussion

Starting point

[19] It is not in dispute that by quantity, Mr Looker's offending placed him within band four of *Zhang* — attracting a starting point of between eight and 16 years' imprisonment.

[20] Nor is it in dispute that an offender's role will not only determine their placement within the relevant band but can result in them moving between bands. In *Zhang,* this Court described the circumstances in which the latter might occur as follows:[18]

> We record that although the new entry points are intended to encompass most cases of low culpability in setting a starting point, we do not exclude the possibility of a case involving minimal participation which might fall below even those entry points. The data in the schedule indicates two such cases historically. There will be other cases in the future, where this is necessary to do justice in a particular case. [Ms Phillips'] appeal before us raises this very issue.

[21] In *Berkland,* the Supreme Court cautioned against a "box-ticking" approach whereby sentencing for methamphetamine offending simply becomes an exercise in identifying quantum and selecting one of the three role options.[19] It gave the example of a case which, despite the quantum of methamphetamine involved, would fall below the bottom of the band because the offender's role is at the lower end of "lesser". It emphasised that: "In any offending, the role of the offender (what they actually did) is a fundamental component of the gravity and culpability assessment."[20] It further

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18 *Zhang v R,* above n 5, at [123].
19 *Berkland v R*, above n 15, at [24].
20 At [63], citing Sentencing Act 2002, s 8(a); and *Zhang v R*, above n 5, at [110].

noted that "the potency of role will vary" and it can "drive movements both within and between the quantum driven bands".[21]

[22] In the subsequent Supreme Court decision of *Philip v R,* the majority stated that the example given in *Berkland* of a case justifying movement between bands was just that, and that the categories were not closed.[22] In that case, the High Court had sentenced the defendant to one year's home detention for his role in the transportation of approximately six kilograms of methamphetamine.[23] On a Solicitor-General's appeal, the Court of Appeal substituted a sentence of two years and 11 months' imprisonment.[24] On a further appeal to the Supreme Court, the sentence was reduced to one year and seven months' imprisonment, equating to "the time required to be served under a short term sentence and so will ensure Mr Philip's immediate release".[25] The case raised issues in terms of the importance of role in determining culpability, the correct appellate approach where rehabilitation is to the fore on an appeal by the Solicitor-General,[26] and what discounts should be allowed to reflect the impact of sentencing on a defendant's young children.

[23] O'Regan and Glazebrook JJ disagreed with the majority assessment that the High Court's six year starting point was "within the available range".[27] The minority said that this was irreconcilable with the guideline judgments of *Zhang* and *Berkland* — being "a departure of such a magnitude from those guideline judgments as to call into question their utility in setting starting points at stage one of the sentencing process".[28]

[24] Despite this disagreement, it nevertheless remains the case that a sentencing judge must engage in detail with the offender's role so as to avoid him or her being

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21 *Berkland v R*, above n 15, at [64].
22 *Philip v R,* above n 15, at [37] per Winkelmann CJ, Ellen France and Williams JJ.
23 *R v Philip* [2021] NZHC 2393.
24 *McMillan v R* [2022] NZCA 128.
25 At [60].
26 The majority holding at [42] that the sentence imposed by the Court of Appeal departed from the usual "conservative approach" where, on a Solicitor-General's appeal, a term of imprisonment is sought in substitution for a non-custodial sentence.
27 At [63] per Glazebrook and O'Regan JJ.
28 At [73].

trapped in a sentencing band which, on account of the quantity of drugs involved, would otherwise be indicated.

[25] In *Berkland*, the Supreme Court refined the role categories set out in *Zhang*, recognising that all facts going to role will be relevant in respect of that evaluation.[29] The updated role profile table appears below:

Updated Role Profile Table		
Lesser	**Significant**	**Leading**
1. Performs a limited function under direction; 2. engaged by pressure, coercion, intimidation; 3. involvement through naivety or exploitation; 4. motivated solely or primarily by own addiction; 5. little or no actual or expected financial gain; 6. paid in drugs to feed own addiction or cash significantly disproportionate to quantity of drugs or risks involved; 7. no influence on those above in a chain; 8. little, if any, awareness or understanding of the scale of operation; and/or 9. if own operation, solely or primarily for own or joint use on non-commercial basis.	1. Management function in operation or chain where, under direction from a leader, this entails directing others in the operation whether by pressure, influence, intimidation or reward; 2. operational function, whether operating alone or with others; 3. motivated solely or primarily by financial or other advantage; 4. actual or expected financial or other advantage, especially where commensurate with role and risk assumed; and/or 5. some awareness and understanding of the scale of the operation.	1. Directing or organising buying and selling on a commercial scale; 2. substantial links to, and influence on, others in a chain; 3. close links to original source; 4. expectation of substantial financial gain; 5. uses business as cover; and/or 6. abuses a position of trust or responsibility.

[26] Although one of the indicia of a significant role is "operational function, whether operating alone or with others",[30] and although transportation under direction

[29] *Berkland v R,* above n 15, at [71].
[30] *Berkland v R*, above n 15, at [71].

can be described in these terms, we agree with the recent observation of Johnstone J in *Miriau v R* that the Supreme Court in *Philip*:[31]

> … appears to regard "mere couriers" as occupying lesser roles, notwithstanding the operational nature of their involvement. And it therefore appears that the label of "operational function", set out in *Berkland* as indicative of a significant role, requires something more than active conduct essential to the completion of the offending and of a kind that itself illustrates the offender's limited authority within the drug enterprise.

[27] In this case, Mr Looker acted as a courier transporting methamphetamine from Tauranga to the Taranaki area. In addition, he was responsible for returning payment from the customer to the supplier, who was higher up the chain of command. At the time of his arrest, he held $113,000 in cash. This evidenced the level of trust held within the organisation and the support he gave to it.

[28] In terms of the other indicia of a significant role, he must have also had some understanding of the scale of the operation on account of the weight of the delivery and the amount of cash with which he was returning. We are however conscious of the majority position in *Philip*, whereby the fact that an offender may be entrusted to carry large sums of money and have some appreciation of scale did not in that case "displace the conclusion the two [defendants] were acting on direction rather than exercising any more managerial type role or autonomy".[32]

[29] The role criteria also references the motivation of the offending and the nature of the actual or expected financial gain.

[30] In assessing whether the District Court Judge was, as counsel submits, "plainly wrong in saying that Mr Looker had told the probation officer that he was motivated primarily by financial advantage", we start with the relevant passage in the PAC report:

> Around this time his ex-wife returned from Australia and requested her part of the earnings from the aforementioned business in Cambridge. Mr Looker advised that due to a lack of finances, he began renting his house out and lived in his shed, but that the rent he received was not enough to cover his mortgage payments. He reflected that "the house was a drain". The life and financial stressors again led to Mr Looker using methamphetamine again. This new group of anti-social associates became aware of Mr Looker's financial

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31 *Miriau v R* [2024] NZHC 1269 at [24] (footnote omitted).
32 *Philip v R*, above n 15, at [26].

> situation, and in turn suggested a "driver/courier" situation which he saw as "easy money" and an avenue out of his financial dilemmas. Mr Looker stated that as his previous employment was driving trucks, an opportunity to "just be the driver" appeared to be the ideal circumstance for him.

[31] We accept, as does the Crown, that Mr Looker's financial situation and his methamphetamine consumption were at least in part interrelated given that he has, for over 20 years, spent money on methamphetamine that could have otherwise been applied to rent, business expenses, tax obligations, or the settlement of his wife's claim.

[32] However, we do not accept that the Judge mischaracterised the PAC report. There was a clear financial motivation to the offending. Mr Looker saw it as a means to make "easy money" — this to address a financial predicament possibly in part contributed to by methamphetamine consumption but also related to business failure, unresolved tax obligations, the failure of his marriage, and the employment consequences of his heart attack. His remuneration for the drug delivery included 44 grams of methamphetamine, clearly sufficient to sustain his own habit between drops, and so the $2,000 cash payment, acknowledged in the statement of facts as received "per trip", was obviously a substantial motivator for the offending. Nor can we say that the cash he received was significantly disproportionate to the quantity of drugs or risks involved, particularly because, again on his own admission, the delivery was not an isolated trip.[33]

[33] Mr Looker's acknowledgment that he saw his role as a source of "easy money" and an avenue out of his financial dilemmas is, in our view, more closely aligned with the *Berkland* indicators of a significant role than those of a lesser role. That said, we do acknowledge that he was part paid in drugs to feed his own addiction, something that we will deal with as a discrete mitigating factor.

[34] In summary, we do not consider the Judge's description of Mr Looker being "at the lower end of playing a significant role" as substantially mischaracterising the

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[33] Mr Looker was not charged on a representative basis but, in assessing the extent of actual or expected financial gain and motivation, we take into account his acknowledgment that the offending for which he was charged formed part of a longer-term arrangement.

position.[34] He was more than a mere courier. He was a trusted link in a distribution chain who, with eyes wide open and with a view to mitigating his financial position, was cognisant of the size and nature of the enterprise he was engaged in. But we accept that he had no managerial role and acted generally under direction. For our part, we would have defined his role as on the cusp of lesser and significant. But in so categorising it, we are unable to identify any reason for dropping Mr Looker out of band four, let alone into band two as counsel submits.

Mitigating factors

[35] Mr Looker is addicted to methamphetamine. That was the conclusion of the Comprehensive Alcohol, Drug and Influences on Offending Report prepared by Dr Jarrod Gilbert and others, which was before the District Court. We accept that the report was based primarily on an interview conducted with Mr Looker and to that extent was unable to be corroborated. But it also involved quantitative assessments using the revised Short Inventory of Problems (SIP-R) and University of Rhode Island Change Assessment Scale (URICA) tools. Mr Looker's 2017 convictions for procuring/possessing methamphetamine and possessing/using utensils confirm his long term use of the drug.

[36] Like us, Judge Greig acknowledged Mr Looker's addiction, but said it reduced his culpability "only slightly" and that it "stops you being in the mid-band of significant".[35] For our part, we do not think that Mr Looker's role could be accurately described as being in the mid-band of significant, even if there was no drug addiction.

[37] As this Court recognised in *Royal v R*,[36] addiction may evidence a lesser role, such as when the offender is dealing for personal use rather than financial gain and is unaware of the scale of the operation.[37] It may also impair rational choice to commit the offence and thus mitigate culpability.

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34 Judgment under appeal, above n 1, at [26].
35 Judgment under appeal, above n 1, at [27].
36 *Royal v R* [2020] NZCA 129 at [16].
37 In *Miller v R* [2020] NZCA 131 at [14], this Court said that an offender's addiction is only relevant in setting the starting point to the extent it is indicative of an offender's limited participation in the offending.

[38] Then at the second stage of the sentencing process, it:[38]

> … may further indicate that the sentence is unlikely to deter the offender or, where the addiction has been addressed since the offending, that personal deterrence is unnecessary. It may justify a merciful sentence where the sentence could be disproportionately severe. And it may suggest a rehabilitative sentence aimed at treating the cause of offending. But these last three considerations are taken into account at the second stage. To recognise this is to reduce the risk that addiction will be "double counted" or given undue weight in the effective sentence.

[39] In this case, we do not see Mr Looker's addiction as going primarily to role. He was aware of the scale of the operation and was significantly motivated by financial gain. Nevertheless, we accept sufficient casual connection between his addiction and his offending for it to be recognised as a personal mitigating circumstance. No doubt the fact that he was part paid in methamphetamine exacerbated his dependence and, in turn, his requirement to continue offending.

[40] Although acknowledging dependence, Judge Greig identified Mr Looker's methamphetamine consumption as a "lifestyle choice".[39] We consider such characterisation overlooks the extremely addictive nature of the drug and the consequences of addiction — a chronic relapsing disorder characterised by compulsive drug seeking and use despite adverse consequences.[40]

[41] We consider a discrete discount in the order of 15 per cent was appropriate to account for this factor. In the overall context of Mr Looker's offending and what motivated it, we do not consider that this gives the factor either too little or too much weight.

Supplementary ground

[42] Although not raised directly in the notice of appeal, Mr Looker also argues that he should have been given some credit for the three months spent on EM bail.

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38 *Royal v R*, above n 36, at [17] (footnotes omitted).

39 Judgment under appeal, above n 1, at [19].

40 The *General Practice Messages for the Implementation of the Substance Addiction (Compulsory Assessment and Treatment) Act* notes … "for many, addiction is a chronic relapsing condition and, despite having had previous treatment, some people with severe addiction may no longer be able to make that decision for themselves".

[43] We note that any such discount would have been minimal — in the order of one month only and could have, if the Judge had been minded, been offset by a modest uplift for Mr Looker's previous drug related offending, where a rehabilitative sentence had been unsuccessfully imposed.

[44] In any event, we are satisfied that total discounts of slightly over 46 per cent appropriately reflect Mr Looker's overall personal circumstances and guilty plea.

Result

[45] The appeal is allowed.

[46] We set aside the sentence of five years and six months' imprisonment and substitute a sentence of four years and three months' imprisonment.

Solicitors:
Bourke Law, New Plymouth for Appellant
Crown Solicitor, New Plymouth for Respondent