

were inadequate allowances for time spent on electronically monitored (EM) bail, rehabilitation, and remorse.

Offending

[2] The nature of the offending was summarised in Judge B A Gibson's sentencing notes as follows:

[1] Mr Miles, you are a 48-year-old man and you appear for sentence on a number of charges following a sentence indication that I gave you some time ago. You were initially caught up in a police operation in 2020 which was given the codename Operation Coupeville. You were the head of a group that was involved in the manufacture and supply of methamphetamine. There are two distinct, separate events covered by the charges. There is the offending that took place between 1 February 2020 and 10 August 2020 when you manufactured methamphetamine on a commercial scale at least four times and there were others involved. You supplied about 580 grams to an associate and that was methamphetamine you had manufactured yourself.

[2] That particular set of offending came to an end after search warrants were executed at an address in Muriwai on 10 August 2020 and you were found at the time actively involved in a relatively sophisticated clandestine laboratory in the manufacture and further you were found in the possession of two kilograms of methamphetamine for the purpose of supply. There were another 452 grams of methamphetamine, numerous precursor substances and manufacturing equipment present at the site and also \$315,350 in cash was also found plainly the proceeds of drug dealing.

[3] Eighteen months later while you were on e-bail another warrant was executed at your bail address and you and Mr Leslie Swainson were found to be in the actual process of manufacturing methamphetamine. There was 120 grams of methamphetamine found at that time, there were precursor substances that were also found, another two lots of methamphetamine were found at the premises 150 grams and 70 grams and drug paraphernalia was also found and \$7,870 in cash. The Crown seek forfeiture of the cash and obviously forfeiture orders will have to follow.

[3] This offending gave rise to the following 20 charges:

(a) First set of offending (2020):

(i) one representative charge of manufacture of methamphetamine;²

² Misuse of Drugs Act 1975, s 6(1)(b) and (2). Maximum penalty: life imprisonment. Crimes Act 1961, s 66(1) and (2).

- (ii) three charges of supply of methamphetamine;³
 - (iii) three charges of manufacture of methamphetamine;⁴
 - (iv) two charges of possession of methamphetamine for supply;⁵
 - (v) one representative charge of possession of a precursor substance;⁶ and
 - (vi) one representative charge of possession of equipment.⁷
- (b) Second set of offending (2022):
- (i) one charge of possession of methamphetamine for supply;⁸
 - (ii) two charges of possession of a precursor;⁹
 - (iii) four charges of possession of material;¹⁰
 - (iii) one representative charge of possession of equipment;¹¹ and
 - (iv) one charge of manufacture of methamphetamine (for which he was jointly charged with a co-defendant).¹²

³ Misuse of Drugs Act, s 6(1)(c) and (2). Maximum penalty: life imprisonment. Crimes Act, s 66(1) and (2).

⁴ Misuse of Drugs Act, s 6(1)(b) and (2). Maximum penalty: life imprisonment. Crimes Act, s 66(1) and (2).

⁵ Misuse of Drugs Act, s 6(1)(f) and (2). Maximum penalty: life imprisonment. Crimes Act, s 66(1) and (2) (in respect of one charge only).

⁶ Misuse of Drugs Act, s 12A(2)(b) and (3)(b). Maximum penalty: five years' imprisonment.

⁷ Section 12A(2)(a) and (3)(b). Maximum penalty: five years' imprisonment.

⁸ Section 6(1)(f) and (2)(a). Maximum penalty: life imprisonment.

⁹ Section 12A(2)(b) and (3)(b). Maximum penalty: five years' imprisonment.

¹⁰ Section 12A(2)(a) and (3)(b). Maximum penalty: five years' imprisonment.

¹¹ Section 12A(2)(a) and (3)(b). Maximum penalty: five years' imprisonment.

¹² Section 6(1)(b) and (2)(a). Maximum penalty: life imprisonment.

District Court sentence

[4] Mr Miles pleaded guilty after accepting a sentencing indication on 24 March 2023. Convictions were entered on the same day. His bail was then varied to allow him to attend a residential rehabilitation programme at Odyssey House pending sentencing. Following graduation from that programme, he was sentenced on 4 July 2024.

[5] The Judge adopted a starting point of 13 years, six months' imprisonment.¹³ There is no challenge to the starting point.

[6] From that starting point he applied the following deductions:

- (a) 20 per cent for the guilty plea;¹⁴
- (b) five per cent for addiction-related issues;¹⁵
- (c) 10 per cent for rehabilitative prospects;¹⁶ and
- (d) 10 per cent for factors identified in the cultural report.¹⁷

[7] The Judge declined to apply an uplift for prior convictions,¹⁸ and he also declined to apply a discount for time spent on EM bail.¹⁹ A discrete discount was not allowed for remorse, with the Judge considering it was already encapsulated in the guilty plea discount.²⁰

[8] The deductions applied by the Judge totalled 45 per cent.²¹ Application of those deductions resulted in an adjusted starting point of just over seven years and five

¹³ Sentencing notes, above n 1, at [7].

¹⁴ At [13].

¹⁵ At [13].

¹⁶ At [13].

¹⁷ At [13].

¹⁸ At [8].

¹⁹ At [12].

²⁰ At [12].

²¹ At [13].

months.²² The Judge then rounded that down to seven years' imprisonment to take account of other matters relating to rehabilitation which had not been quantified any further as percentages.²³

Was the sentence manifestly excessive?

[9] To allow the appeal, this Court must be satisfied that there is an error in the sentence reached, and that a different sentence should have been imposed.²⁴ It is the end-sentence imposed, rather than the process by which it is reached, which is relevant on appeal.²⁵

[10] The grounds of appeal concern the allowances for remorse, rehabilitation, and time spent on EM bail. We take each of these in turn.

Remorse

[11] Counsel for Mr Miles says there should have been an allowance for remorse. The Judge declined to apply a discrete allowance for remorse, saying it was already encapsulated in the guilty plea.²⁶ We agree with that assessment. There was no error in declining to provide a separate allowance for remorse in this case.

Rehabilitation

[12] As for rehabilitation, we agree that Mr Miles' efforts were significant. Mr Miles attended private drug and alcohol treatment centres, including House of Hope and Clean n Soberside. Mr Miles also successfully completed a treatment programme at Odyssey House, graduating in June 2024. While there, Mr Miles was administered over 80 random saliva drug tests. He produced negative results on every occasion. Mr Miles' positive rehabilitative steps and prospects are reflected in the fact that Mr Miles remained with Odyssey House in a mentoring role and in the glowing letters of support he received from the residential programmes he attended.

²² At [13]. The Judge recorded this as seven years and four months' imprisonment in his sentencing notes.

²³ At [13].

²⁴ Criminal Procedure Act 2011, s 250(2).

²⁵ *Tutakangahau v R* [2014] NZCA 279, [2014] 3 NZLR 482 at [36].

²⁶ Sentencing notes, above n 1, at [12].

[13] The Judge allowed a credit of 10 per cent for these factors. In addition, the Judge made a deduction of approximately five months (recorded in his judgment as four months) for matters “not quantified any further as percentages in terms of rehabilitation”.²⁷ The combination of these allowances totals approximately 13 per cent for rehabilitation prospects.

[14] We agree with counsel for Mr Miles that the extent of the rehabilitative efforts warranted a 15 per cent allowance in this case. However, the small difference between the 13 per cent applied and the 15 per cent allowance otherwise available would not, on its own, amount to an error justifying appellate interference. Nevertheless, as we describe below, the additional allowance available, combined with the credit for time spent on EM bail, is enough to suggest that the sentence imposed was manifestly excessive.

EM bail

[15] We turn next to the allowance for EM bail. The Judge declined to give any credit for time spent on EM bail on the basis that Mr Miles had committed major drug-related offending while on EM bail for drug offending, and there was also an issue with the tracker on one occasion.²⁸

[16] Section 9(2)(h) of the Sentencing Act 2002 makes time spent on EM bail a mandatory factor in sentencing. In taking into account that the offender spent time on bail with an EM condition, the court must consider the factors set out in s 9(3A). These include:

- (a) the period of time that the offender spent on bail with an EM condition;²⁹

²⁷ At [13].

²⁸ At [12].

²⁹ Section 9(3A)(a).

- (b) the relative restrictiveness of the EM condition, particularly the frequency and duration of the offender's authorised absences from the electronic monitoring address;³⁰ and
- (c) the offender's compliance with bail conditions during the period of bail with an EM condition.³¹

[17] The quantum of the allowance for time spent on EM bail requires an evaluative assessment of all the circumstances.³²

[18] Counsel for Mr Miles does not challenge the Judge's decision to decline a credit for the period that Mr Miles offended while on bail. However, he says that a credit was available for the two-year period that Mr Miles spent subject to EM bail while participating in residential rehabilitation programmes prior to sentencing. This includes the period spent on EM bail at Odyssey House after he was convicted, but pending sentencing.

[19] We agree. The Judge was correct to decline any credit for the period of EM bail during which Mr Miles committed the second set of offending. However, we consider the Judge erred in failing to consider whether a credit was available for the subsequent two-year period. This was a mandatory consideration under the Sentencing Act which required separate evaluation.

[20] The Crown says that any credit for EM bail is adequately reflected in the allowance for rehabilitation, and that to grant a further credit would be double counting. That is particularly so, in the Crown's submission, as the conditions to which Mr Miles was subject were largely duplicated in the conditions of the rehabilitative facilities.

³⁰ Section 9(3A)(b).

³¹ Section 9(3A)(c).

³² *Paora v R* [2021] NZCA 559 at [46], citing *Tamou v R* [2008] NZCA 88 at [19].

[21] In *Glassie v R*, this Court said that it was an error for the sentencing Judge to decline an allowance for time spent on EM bail on the basis that it allowed Mr Glassie to access rehabilitation.³³ The Court said:³⁴

... It is true that time spent complying with bail conditions evidences rehabilitative potential. To that extent there is a connection. But it does not follow that an offender who has made good use of bail by engaging in rehabilitation should be refused credit for restrictive bail at sentencing. Credit is given because strict conditions may seriously constrain liberty and time on bail is not taken into account when calculating time served.

(footnote omitted)

[22] Those observations have direct application in this case to the time spent on EM bail prior to Mr Miles pleading guilty. However, the grant of EM bail to Odyssey House after convictions were entered and prior to sentencing raises different considerations. The only purpose of granting EM bail at that time was to afford Mr Miles the opportunity to rehabilitate himself prior to sentence. The EM bail conditions were designed to facilitate that engagement, and in that context, formed part of Mr Miles's rehabilitation. We consider the connection between EM bail and rehabilitation to be much closer in those circumstances, with the potential for an overlap in the allowances for both factors.

[23] That overlap does not mean, however, that no allowance for time spent on EM bail should be made. That would be contrary to the mandatory requirement in s 9(2)(h) of the Sentencing Act, and the principles set out by this Court in *Glassie*. We consider a credit was available for the second two-year period which Mr Miles spent on EM bail and the only issue is the quantum of any credit which should apply.

[24] Mr Miles was subject to a 24-hour curfew, with electronically monitored bail absences, to attend rehabilitation programmes for approximately nine months when residing at the House of Hope and Clean n Soberside rehabilitative facilities. He was then bailed to Odyssey House and remained there for approximately 15 months. He was subject to an electronically monitored curfew between 11 pm and 7 am during that time, with exceptions to allow him to attend programmes (including overnight

³³ *Glassie v R* [2022] NZCA 556 at [73].

³⁴ At [73].

absences) which were also electronically monitored. While these conditions were not as onerous as some conditions of EM bail, they nevertheless represented an impingement on Mr Miles' liberty which should be reflected in the sentence under appeal.

[25] Counsel for Mr Miles submits that a deduction of six months from the sentence, or approximately 25 per cent of the two years spent on EM bail at residential facilities, would be reasonable in this case. However, we consider that this deduction needs to be moderated even further to account for the relaxed curfew conditions while residing at Odyssey House, the technical breach when the tracker was not charged for a period of nine hours, and the overlap with the credit applied for rehabilitative prospects. We consider a deduction of three months' imprisonment was available in all the circumstances.

[26] The Crown submits that any credit that would otherwise be available must be seen in the context of an available uplift for Mr Miles' prior convictions which was not applied, and the generous discount for the guilty plea. Counsel for the Crown submits that if the available uplift had been applied, and the guilty plea discount set at 15 per cent, then the end-sentence cannot be said to be manifestly excessive.

[27] As to the uplift, we consider the Judge was right not to apply an uplift for Mr Miles' conviction in 2017 for possession of methamphetamine for supply. The information before the Court suggests that this offending was motivated by addiction. The age of the conviction also means that any uplift would have been extremely modest.

[28] Moreover, while on its face the 20 per cent allowance for guilty pleas may be seen as generous, quantum must be assessed in the context of the resolution of two separate trials. And, as we have already noted, the allowance also encompasses a credit for remorse. On that basis we do not consider a generous guilty plea allowance can be used to offset the allowance which should have been applied for time spent on EM bail.

[29] Making allowance for the time spent on EM bail together with the small additional allowance for rehabilitation leads to a reduction of six months' imprisonment from the sentence imposed by the Judge. That leads to the conclusion that the sentence imposed was manifestly excessive and should be set aside and substituted with a sentence of six years and six months' imprisonment.

Result

[30] The appeal is allowed.

[31] The sentence of seven years' imprisonment is set aside and substituted with a sentence of six years and six months' imprisonment.

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