IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA840/2024
[2025] NZCA 566

BETWEEN	JACOB KENNETH BIRCHALL Appellant
AND	THE KING Respondent

Hearing:	4 September 2025
Court:	Thomas, Brewer and Isac JJ
Counsel:	E Huda for Appellant O A Jessop Boivin and K B Bell for Respondent
Judgment:	29 October 2025 at 9.30 am

JUDGMENT OF THE COURT

The appeal is dismissed.

REASONS OF THE COURT

(Given by Brewer J)

Introduction

[1] Mr Birchall pleaded guilty to a representative charge of importing methamphetamine, a representative charge of offering to supply methamphetamine and a charge of importing MDMA. On 4 December 2024, Judge Kellar sentenced Mr Birchall to 11 years' imprisonment.[1]

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1 *R v Birchall* [2024] NZDC 29313 [sentencing decision] at [48].

[2] Mr Birchall now appeals his sentence. The sole ground of appeal is that the Judge should have given Mr Birchall a credit of 25 per cent for his pleas of guilty rather than the awarded discount of 15 per cent.

[3] We must allow Mr Birchall's appeal if we are satisfied that there was an error in the sentence such that a different sentence should be imposed.[2] Our focus is necessarily on the end sentence.[3] If it is manifestly excessive then we must allow the appeal.[4]

Background

[4] We take the factual background from the Judge's sentencing notes:[5]

> [6] The facts can be relatively shortly stated. You were an associate of the Head Hunters. You were relatively young at the time, just 26 years of age, and your co-defendant, Ms Pomare, is your partner. Mr Murray, who is going to trial, is a senior patched member of the Head Hunters.
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> [7] In terms of the importations, between 22 January and 26 January 2024 you and the others communicated with an overseas party known as Lebara to arrange importation of controlled drugs. You communicated with Lebara through an encrypted app known as Telegram. The primary device which was used was yours.
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> [8] On 22 January 2024, a conversation took place over the app in which it was said, and I quote:
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> > Greetings to our Dutch brother from the Head Hunters MC Lebara L3B4R4. This is our new profile as we don't want to trade under Head Hunters MC anymore in case they ever find this burner phone. We tried to transfer your funds but every time we try it has to be verified by photo ID etc. Have you any suggestions on how we can give you bitcoin without revealing our identity. We have 5,000.
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> [9] There were conversations regarding payment options, including by Bitcoin and cryptocurrency. Packages would be sent with a GPS tracker so the supplier could track the location of the package. Other messages indicated that you had previously imported drugs from this supplier. There was this exchange that took place. Lebara stated:
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> > Did they like the quantity. I have shipped the other batch. I hope you will receive it ASAP.
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> [10] The offender stated:

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2 Criminal Procedure Act 2011, s 250(2).
3 *Tutakangahau v R* [2014] NZCA 279, [2014] 3 NZLR 482 at [32]–[35].
4 At [36]. See also *Vallance v R* [2025] NZCA 304 at [61].
5 Sentencing decision, above n 1.

> Your funds should be in tonight my friend. I'm on to the conversion of the Bitcoin now. Quality was suitable for New Zealand market and [sic] we are happy.

[11] Lebara then stated:

> Yes I have 7 different types of meth I can also send you a sample of all products if you want then you can test and look at which ones you like the most.

[12] And the offender has stated: *"Yes can we please have 100 grams sent to the previous address to brother [(ADDRESS OMITTED)]",* which happens to be a vacant lot, although an associate of yours apparently lives next door.

[13] The conversation continued to discuss quantity, type and costs of methamphetamine, locations of where it was to be sent were also discussed along with payment options.

[14] In terms of a summary of the imports. In the relatively short period between 4 March and 26 April, you imported approximately 1.8 kilograms of methamphetamine with a current street value of $630,000 and five kilograms of MDMA with a street value of $1.5 million, in nine separate packages addressed to fictional names at various addresses. The parcels were intercepted by Customs. A further unknown quantity of methamphetamine was imported which was not intercepted by Customs, that is estimated to have been a minimum of 2.5 kilograms.

The Judge's sentence

[5] The Judge relied on this Court's guideline judgment in *Zhang v R* and the decision of the Supreme Court in *Berkland v R*.[6]

[6] Aggravating factors identified by the Judge were:

> [21] In terms of the aggravating factors that inform the gravity of the offending, they seem to be these. The first is the quantity involved. Six parcels containing 1.8 kilograms of methamphetamine were intercepted by Customs. Although it is an estimate, it is a conservative estimate of a further 2.5 kilograms which were successfully imported. That is a total of at least 3.8 kilograms of methamphetamine. The quantity alone would place that within band 5 of *Zhang*.
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> [22] The second factor is commerciality. Given the quantity, the offending is undeniably commercial in nature. This was the Head Hunters' commercial importation of methamphetamine and MDMA.
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> [23] The third factor is the degree of sophistication. The offending involved a high degree of sophistication, including the use of gang resources and contacts along with encrypted applications for communication, the use of

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6 At [15]–[18], citing *Zhang v R* [2019] NZCA 507, [2019] 3 NZLR 648; and *Berkland v R* [2022] NZSC 143, [2022] 1 NZLR 509.

> cryptocurrency, burner phones, GPS trackers on packages so their location could be monitored and close relationships with the overseas supplier who were able to provide a range of products.
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> [24] The further factor is the scale of the offending. It occurred within a relatively short period, 22 January to 26 April, it is clear though that this was an ongoing operation with you indicating to Lebara on 22 January that you were operating from a "new profile to avoid detection". The operation appears to have been ramping up with Lebara commenting - this is after sending one kilogram of methamphetamine and one kilogram of MDMA - that:
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> > I will send higher amounts now and send two/three times a week so you will receive also two/three a week then.
>
> You replied *"Sounds good brother"*.
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> [25] The next aggravating factor is the harm caused. The extent of loss or harm which likely occurred in the case of successfully imported methamphetamine, and which would have occurred in the case of intercepted packages, is significant. There has been a relatively recent report in 2023 about the harm, not only to users but by others, of methamphetamine that has significantly elevated the harm that methamphetamine causes to society.
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> [26] The next factor is the level of premeditation. There are high levels of premeditation involved in the offending.

[7] The Judge recorded the Crown's submission that Mr Birchall should be regarded as having a leading role in the offending, and defence counsel's submission that his role was merely significant, albeit at the higher end of that category.[7] The Judge did not record his own view. We are satisfied that Mr Birchall took a leading role in the offending.

[8] The Judge took the representative charges of importing and offering to supply methamphetamine as the lead charges and assigned a starting point of 16 years' imprisonment.[8] The Judge added one year and six months' imprisonment for the charge of importing MDMA.[9] The initial starting point was therefore 17 years and six months' imprisonment.[10]

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7 At [29]–[30].
8 At [42].
9 At [42].
10 At [42].

[9] The Judge allowed a 15 per cent discount for the entry of pleas of guilty, commenting that the pleas could have been entered at a much earlier stage than case review.[11]

[10] The Judge considered there to be a clear causative connection between Mr Birchall's addiction issues and the offending and allowed a further discount of 10 per cent for that factor.[12]

[11] The Judge also considered there to be a nexus between Mr Birchall's personal background, as identified in an alcohol and drug report, and his criminal activity.[13] Further, Mr Birchall had begun to take rehabilitative steps.[14] For these factors, the Judge allowed 10 per cent.[15]

[12] It follows that the Judge allowed total discounts of 35 per cent and those reduced the starting point of 17 years and six months' imprisonment to the end sentence of 11 years' imprisonment (rounded down from 11.38 years).[16]

The appeal

[13] Mr Huda for Mr Birchall submits that Mr Birchall was first charged on 2 May 2024, with the charge of importing methamphetamine being filed on 20 May 2024. Mr Birchall entered pleas of not guilty and elected trial by jury on 6 June 2024. The pleas of guilty were entered on 29 October 2024 at a case review hearing.

[14] Mr Huda submits that once the disclosure process was completed, there were plea negotiations with the Crown which resulted in the Crown agreeing to withdraw 10 charges of importing methamphetamine. Pleas of guilty were then entered promptly.

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11 At [48].
12 At [48].
13 At [48].
14 At [48].
15 At [48].
16 At [48].

[15] Mr Huda submits:

> 14 Mr Birchall originally faced a large number of extremely serious charges, each carrying a maximum penalty of life imprisonment. It is not reasonable to expect anyone to plead guilty to such serious charges without the benefit of legal advice. No lawyer could responsibly provide such advice without seeking at least some basic disclosure from the prosecutor and, in a case where there were multiple charges, exploring the possibility of a plea agreement.
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> 15 The time taken to request, obtain and review disclosure; provide advice; and enter into plea [negotiations] with the Crown was, if anything, very short given the seriousness and extent of the offending. It is not clear how Mr Birchall could possibly have expedited the matter, other than by pleading guilty without the benefit of legal advice and to additional charges which the Crown accepted were unnecessary.
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> 16 Taking into account all the relevant circumstances, it is submitted that Mr Birchall entered his pleas at the first reasonable opportunity and accordingly the full 25 per cent discount was warranted.

Discussion

[16] We have reviewed the components of the Judge's sentence. The starting point for the lead offences was within range and the uplift for the MDMA charge was also within range. However, as the Judge said, the charge of importing MDMA is serious in its own right.[17] The quantity was five kilograms with a street value of $1.5 million. There were nine separate packages addressed to fictional names at various addresses. The uplift could have been higher.

[17] We consider the two discounts of 10 per cent for Mr Birchall's addiction issues and other personal factors to be within range. Given the commercial nature of the offending, its scale, and Mr Birchall's leading role, the discounts could have been lower.

[18] We consider also that the allowance of 15 per cent for the pleas of guilty was available to the Judge. A discount for entering pleas of guilty is an evaluative decision and is not to be determined solely with regard to the time between charging and entering pleas of guilty.[18] The Supreme Court in *Hessell v R* made it clear that a guilty

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17 At [32].

18 *Moses v R* [2020] NZCA 296, [2020] 3 NZLR 583 at [23].

plea discount should reflect all of the circumstances in which the plea was entered, including the timing, strength of the prosecution case and whether the defendant has benefited from a plea arrangement.[19]

[19] Ms Jessop Boivin for the Crown points out that a case review hearing was scheduled for 5 August 2024. It was adjourned so that resolution discussions could be held. The agreement to withdraw individual charges involved the charge of importing methamphetamine being made representative and the charges of importing MDMA being covered by a single charge with an encompassing date range. The substance of the summary of facts did not change.

[20] We accept that the Crown's case was a strong one. As is so often the case with serious drugs charges, the evidence against Mr Birchall consisted of text and other message data. It was clearly incriminating. Ms Jessop Boivin tells us that this evidence was included in the initial disclosure that occurred on 3 May 2024.

[21] In our view, the Judge was able to conclude that pleas of guilty entered in the above circumstances, over five months following charges being laid, were not entered at the first reasonable opportunity.

[22] Overall, the end sentence of 11 years' imprisonment, taking into account totality, is not manifestly excessive. We note that without the Judge's rounding down of the calculation, the sentence would have been four-and-a-half months longer.

Result

[23] The appeal is dismissed.

Solicitors:
Te Tari Ture o te Karauna | Crown Law Office, Wellington for Respondent

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[19] *Hessell v R* [2010] NZSC 135, [2011] 1 NZLR 607 at [62] and [74]. This Court in *Moses v R*, above n 18, at [23] expanded on circumstances that may be considered, including: the scale and complexity of the trial, the justification for any delay, and the benefits of not giving evidence for victims and witnesses.