

manufactured at the address. He was charged with possessing methamphetamine for supply, possession of cannabis for supply, possessing LSD, manufacturing methamphetamine and possessing equipment for its manufacture.

[3] Mr Bird elected trial by jury. On 12 November 2019 he was granted EM bail to attend The Retreat, a rehabilitation facility in South Auckland. He stayed there for six months.

[4] On 18 May 2020 his EM bail was varied to allow him to live at home in New Plymouth on a 24-hour curfew and otherwise standard conditions of EM bail.

[5] On 21 April 2021 his EM bail was further varied to allow him to work as a builder.

[6] On 24 April 2021 a woman was brought into the New Plymouth Police Station by a taxi driver. She had been picked up from Mr Bird's address, only to fall unconscious in the taxi. Mr Bird acknowledged giving her gamma-hydroxybutyric acid (GHB). The home was searched and the police found all of the precursors, materials and equipment necessary to manufacture methamphetamine. The equipment showed signs of use. A crystal substance containing methamphetamine, ephedrine and pseudoephedrine was found, along with bags containing cannabis bagged into 60, 25, 25, 20, 20, 10 and five gram lots. Also found was approximately \$40,000 in cash. He was charged with offences of supplying GHB, possessing cannabis, possessing chemical ingredients and equipment to manufacture methamphetamine, and manufacturing methamphetamine.

[7] On 1 July 2021 an application for EM bail was declined.¹ So was a subsequent application,² which was appealed unsuccessfully.³

[8] The September 2019 and April 2021 charges were joined. Mr Bird sought severance, unsuccessfully.⁴

¹ *R v Bird* [2021] NZDC 12936.

² *R v Bird* [2021] NZDC 15787.

³ *Bird v R* [2021] NZHC 2375.

⁴ *R v Bird* [2022] NZDC 6693 at [52].

[9] On 28 June 2022 a sentence indication hearing was held. The Court offered a starting point of seven years' imprisonment with a discount of 15 per cent for Mr Bird's guilty plea and the possibility of an uplift for his previous conviction for possession of methamphetamine for supply.

[10] He accepted the sentencing indication on 14 July 2022 and was sentenced on 16 November 2022. The Judge had a pre-sentence report and a s 27 report, both of which referred to a history of violence in Mr Bird's childhood home. His mother confirmed that she had been regularly assaulted by his father throughout the relationship and the family lived in fear. She confirmed Mr Bird's account that he was introduced to drugs by his father.

[11] The Judge who sentenced Mr Bird was sceptical about this information. He noted that Mr Bird has two brothers who have lived good lives, and he was unhappy about relying on Mr Bird's mother's uncorroborated narrative.⁵ He described a s 27 report as a piece of advocacy and indicated that he would not give any discount for factors mentioned in it.⁶

[12] It appears the Crown had initially accepted that a discount should be given for deprivation and addiction but retreated from that concession at sentencing.⁷ It was left to the Judge to decide how much credit to give for these factors. He was not invited to schedule a sentencing hearing under s 24 of the Sentencing Act 2002 to deal with proof of Mr Bird's claims about his upbringing and his introduction to methamphetamine.

[13] However, the Judge did make an allowance of 10 per cent for addiction and the possibility that Mr Bird had a difficult childhood which lessened his overall culpability.⁸

[14] The Judge expressed concern that defendants charged with commercial methamphetamine dealing are entering not guilty pleas and electing trial, so delaying

⁵ *R v Bird* [2022] NZDC 22647 at [30]–[31].

⁶ At [31] and [36].

⁷ See at [27].

⁸ At [40].

resolution while they undertake rehabilitation, only to plead guilty on evidence that is very little different to the evidence first presented. He believed that Mr Bird was “rotting” the system.⁹ Nonetheless he allowed Mr Bird a 15 per cent discount for his guilty plea.¹⁰

[15] The Judge declined credit for time spent on EM bail, noting that Mr Bird was denying the charges for which the evidence was overwhelming and reoffended in a substantial way while on bail.¹¹

[16] The claims made in the s 27 report were also recorded by the writer of the pre-sentence report, and both report writers had spoken to Mr Bird’s mother. If that account was disputed and the information would have had a material effect on the sentence, a sentencing hearing would have been the appropriate course. Neither party called for one.

[17] In the circumstances, we think the appropriate course is to accept the account given in the pre-sentence report at face value. It points to a connection between an abusive parent and Mr Bird’s use of methamphetamine which would justify the allowance of 15–20 per cent sought by Mr Ryan.

[18] However, the question is whether the end sentence was manifestly excessive.

[19] The Judge was evidently concerned that Mr Bird had pleaded not guilty to charges on which the evidence was overwhelming and used the time on remand, first to undertake rehabilitation, and then to resume offending until such time as he was finally declined bail.

[20] We accept Mr Ryan’s submission that it was an error to criticise Mr Bird for using time spent on remand to undertake rehabilitation. That effort was to be encouraged. As Ms Woodcock submitted, he would have earned significant credit for it had he taken the opportunity to resolve the 2019 charges by plea on leaving The Retreat.

⁹ At [37]–[38].

¹⁰ At [40].

¹¹ At [39].

[21] But the Judge was not required to ignore the long delay in pleading guilty to charges for which the Crown case was plainly overwhelming. He could reasonably form the opinion that these proceedings were never going to reach trial. There is no reasonable explanation for the delay. It does not appear that there was any material change in the 2019 charges or the evidence. The 2021 charges were more recent, but Mr Bird evidently had no defence to them either. It is true that guilty pleas save the state the costs of a trial and this case had yet to be given a fixture, but as the Supreme Court held in *Hessell v R*, the allowance for a guilty plea is evaluative and the strength of the Crown case may be taken into account.¹² It remains the case that a full guilty plea discount is appropriately reserved for a plea at the first reasonable opportunity.¹³

[22] For these reasons, we think that the additional allowance we would make for deprivation and addiction is offset by the generous allowance made for Mr Bird's guilty pleas.

[23] Mr Ryan argued that Mr Bird ought to have been given an allowance for time spent on EM bail, initially during his six months in the rehabilitation facility and then for the 11 months before his EM bail conditions were varied to allow him to work. Counsel suggested that he began offending again after he was allowed to resume work.

[24] The Judge was obliged to consider a discount for EM bail, but he need not have granted one. As the Court explained in *Paora v R*, an allowance may be required for strict bail conditions to ensure the sentence is proportional.¹⁴ The assessment is highly evaluative.

[25] The time on EM bail falls into two periods. The first six months were spent at the rehabilitation facility. Because Mr Bird was monitored there, we are prepared to accept that he complied with his conditions. But that period was not long, and he submitted voluntarily to supervision there in the interests of his rehabilitation.

¹² *Hessell v R* [2010] NZSC 135, [2011] 1 NZLR 607 at [70], [72]–[74] and [77].

¹³ At [75].

¹⁴ *Paora v R* [2021] NZCA 559 at [42]–[48].

[26] Most of the time spent on EM bail was at home. He was on a 24-hour curfew for 11 months, but his bail conditions did not prevent him receiving visitors or limit his electronic communications. He reoffended at the address. He is not entitled to the benefit of an assumption that he complied with his bail terms before the search on 24 April 2021. There being reason to doubt that he complied after returning home, the onus was on him to satisfy the court that he did.¹⁵ We cannot accept Mr Ryan's submission that the offending had begun recently. The cash found at the address suggests otherwise.

[27] The Judge was not wrong to decline credit for time spent on EM bail.

[28] The appeal is dismissed.

Solicitors:
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¹⁵ At [60].