**IN THE COURT OF APPEAL OF NEW ZEALAND**

**I TE KŌTI PĪRA O AOTEAROA**

**CA687/2022**
**[2023] NZCA 312**

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| BETWEEN | RICHARD ALAN DUTHIE<br>Appellant |
| AND | THE KING<br>Respondent |

Hearing: 10 May 2023

Court: Mallon, Moore and Fitzgerald JJ

Counsel: J W Wall for Appellant
H D L Steele for Respondent

Judgment: 24 July 2023 at 10 am

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**JUDGMENT OF THE COURT**

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**A The appeal is allowed.**

**B The sentence of four years and nine months' imprisonment imposed in the High Court is quashed and substituted with a sentence of three years and nine months' imprisonment.**

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**REASONS OF THE COURT**

(Given by Fitzgerald J)

## Introduction

[1] Richard Duthie pleaded guilty in the High Court at Hamilton to three charges relating to methamphetamine offending.[1] He was subsequently sentenced by Wylie J to four years and nine months' imprisonment.[2]

[2] Mr Duthie now appeals against his sentence on the basis that:[3]

(a) the combined starting point adopted by the Judge of 10 years' imprisonment was too high, given the limited evidence as to Mr Duthie's role in the offending; and

(b) the discounts applied for mitigating factors, namely a 20 per cent discount for guilty pleas, a 15 per cent discount for cultural factors, and a 25 per cent discount to reflect an instrument forfeiture order, were too low.

[3] An appeal against sentence may only be allowed by this Court if it is satisfied that there has been an error in the imposition of the sentence and that a different sentence should be imposed.[4] The focus is not on the process by which the sentence was reached, but on whether the end result is manifestly excessive.[5]

## Background facts

[4] The basis upon which Mr Duthie was sentenced was set out in an agreed summary of facts put before the Judge.

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1 One charge of manufacturing methamphetamine, s 6(1)(b) and (2)(a) of the Misuse of Drugs Act 1975, maximum penalty of life imprisonment; one charge of possession of methamphetamine for the purpose of supply, s 6(1)(f) and (2)(a) of the Misuse of Drugs Act, maximum penalty of life imprisonment; and one charge of possession of equipment capable of being used in the manufacture of methamphetamine, s 12A(2)(a) and (3)(b) of the Misuse of Drugs Act, maximum penalty five years' imprisonment.

2 *R v Duthie* [2022] NZHC 3023 [Sentencing notes].

3 A further ground of appeal, that the Judge had made a mathematical error in applying the percentage discounts to the starting point, was not pursued.

4 Criminal Procedure Act 2011, s 250(2) and (3).

5 *Tutakangahau v R* [2014] NZCA 279, [2014] 3 NZLR 482 at [36]; and *Ripia v R* [2011] NZCA 101 at [15].

[5] The charges against Mr Duthie followed an investigation by the Waikato Police into the large-scale manufacture and distribution of methamphetamine in the Waikato area. The investigation uncovered a core group of people involved in a criminal enterprise for that purpose — Mr Duthie was identified as having an association with a member of this group.

[6] Following the execution of a search warrant at Mr Duthie's Lichfield property in July 2020, drugs and other indicia of methamphetamine manufacture and commercial supply were located at the property. The police found the following items in a safe in Mr Duthie's bedroom:

(a) a container holding 92 g of methamphetamine;

(b) a case containing 17 zip lock bags, each holding approximately 20.4 g of methamphetamine; and

(c) $41,510 in cash.

[7] The total amount of methamphetamine found was 438.8 g.

[8] The police also located the following items at Mr Duthie's property:

(a) 162 mg of methamphetamine hydrochloride dried on a glass baking dish;

(b) 1.615 g of methamphetamine hydrochloride within plastic containers (dried and in liquid form);

(c) various items of glassware; and

(d) numerous indicia of supply, including unused zip lock bags, NIK (drug testing) kits, a money counter and electronic scales.

[9] By his guilty plea to the manufacturing charge, Mr Duthie accepted that he had manufactured methamphetamine in the kitchen of his property. The amount of

methamphetamine manufactured was not known, but it was accepted that Mr Duthie manufactured the drug on at least one occasion.

**Materials before the Judge at sentencing**

[10] At sentencing, the Judge had before him Mr Duthie's criminal and bail history, a Provision of Advice to the Courts (PAC) report, a cultural report for the purposes of s 27 of the Sentencing Act 2002, and a psychological report prepared by Dr Loshni Rogers, a registered clinical psychologist.

*Criminal history*

[11] Mr Duthie is 56 years old. He has an extensive criminal history dating back to 1983. Most of his convictions involve drugs, but he also has some convictions for violence, firearms and driving related offences. In 2008, Mr Duthie was sentenced to 11 years' imprisonment for various drug-related offending, including possession of methamphetamine for supply.

*PAC report*

[12] The PAC report writer describes Mr Duthie's offending history, at least in relation to drugs, as "recidivist offending".

[13] The report records Mr Duthie's advice that, after he was released on parole in 2015, he worked hard and stayed away from drugs, but in about 2019 he started to use methamphetamine again. Mr Duthie said he regretted having been involved with drugs and that given he was (then) 55 years old, he felt like he was "running out of time to do anything else" that would give him a purpose going forward.

*The s 27 cultural report*

[14] The cultural report describes Mr Duthie's childhood as involving socio-economic deprivation after his parents' separation when he was five years old. Mr Duthie described his mother as being loving and supportive but that she struggled to provide for the family as a solo parent.

[15] The report also highlights Mr Duthie's poor relationship with his stepfather, who came to live in the family home when he was about 10 years old, as well as his experience of violence during his childhood, including at the hands of his stepfather.

[16] Despite initially doing well at school, Mr Duthie reported that he was sexually abused by a male adult from about 10 years old. He said that the abuse led him to start using cannabis and drinking alcohol at a young age, and by adulthood he was addicted to various drugs, primarily methamphetamine.

[17] Consistent with the PAC report, the cultural report records that Mr Duthie had abstained from drugs for a number of years following his release on parole in 2015, but by 2020 he had started to use methamphetamine again. Mr Duthie also reported that around this time he had been contacted by his biological brother (Mr Duthie had been adopted as a baby) and, after they started to form a relationship, his brother abruptly committed suicide.

*Psychological report*

[18] Dr Rogers observes that the abuse Mr Duthie experienced as a child appears to have had a significant impact on his life since adolescence, including using drugs and alcohol as a coping mechanism. She opines that Mr Duthie's dependence on drugs and ongoing association with antisocial peers has likely perpetuated his recidivist drug-related offending over the last 40 years. Dr Rogers considers that Mr Duthie's present offending appears to have been triggered by traumatic events that occurred in his life in around 2019 (including the sudden death of his biological brother), which led him to relapse after four years of abstinence from methamphetamine.

[19] Dr Rogers' report confirms the positive extent of pro-social support Mr Duthie has, including from his siblings and his former partner. The Judge also recorded in his sentencing notes that, following Mr Duthie's assessment by Dr Rogers, he had sought a referral to Odyssey House and that he was in the process of applying for assessment for the Higher Ground programme.

**Sentencing in the High Court**

[20] Consistent with counsel for Mr Duthie's submission, the Judge took the possession of methamphetamine for supply as the lead offence.[6] On the basis that the quantity of methamphetamine involved was 438.8 g, the offending fell towards the upper end of band 3 in *Zhang v R*,[7] attracting a potential starting point in the range of six to 12 years' imprisonment.[8]

[21] The Judge then turned to consider Mr Duthie's role. He noted that the evidence of Mr Duthie's role and "position in the criminal hierarchy" was limited.[9] The Judge considered that Mr Duthie's role must have been of more than minor significance because he was involved in the manufacture of methamphetamine on at least one occasion as well as the supply of the drug.[10] The Judge noted that Mr Duthie was financially motivated, referring to the substantial quantity of cash and a money counter located in his possession, in conjunction with a large quantity of methamphetamine.[11] The Judge stated:[12]

> Your assertion that you were only supplying yourself can be ignored. The amount of methamphetamine and other indicia of dealing put the lie to that claim. While your precise role is not known, it is reasonably clear that you were more than just a bit player in the overall enterprise.

[22] On this basis, the Judge adopted a starting point of nine years' imprisonment for the lead offence of possessing methamphetamine for supply, which fell in the middle of band 3 in *Zhang*.[13] The Judge then adopted an uplift of one year's imprisonment to reflect the remaining charges of manufacturing methamphetamine and possessing equipment for manufacture.[14] An overall starting point of 10 years' imprisonment was reached.

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6 Sentencing notes, above n 2, at [20].
7 *Zhang v R* [2019] NZCA 507, [2019] 3 NZLR 648.
8 Sentencing notes, above n 2, at [20].
9 At [21].
10 At [21].
11 At [21].
12 At [21].
13 At [23].
14 At [23].

[23] The Judge then turned to consider factors personal to Mr Duthie. He considered a personal aggravating factor to be Mr Duthie's extensive history of drug offending, and adopted the uplift of nine months suggested by Mr Duthie's counsel, or 7.5 per cent, to recognise that recidivism.[15]

[24] The Judge then turned to consider the discount for Mr Duthie's guilty pleas.[16] The pleas were entered a short time before trial. The Judge acknowledged the fact the Crown had indicated that it was prepared to significantly amend the Crown Charge Notice and the desirability of the resolution given the uncertainty associated with a lengthy trial in the (then) COVID-19 environment. On the other hand, the Judge considered that there was nevertheless a strong Crown case against Mr Duthie, particularly on the lead charge of possession of methamphetamine for supply. He acknowledged that Mr Duthie's co-offender, Mr McQuade, had been given a 25 per cent discount for his guilty pleas, which had been entered at the same time as Mr Duthie's. The Judge stated that, as he understood matters, the case against Mr McQuade was not as strong as the case against Mr Duthie and accordingly adopted a discount of 20 per cent.[17]

[25] The Judge then turned to the matters addressed in the cultural and psychological reports, accepting that these could properly be attributed as having impaired Mr Duthie's choices in life and to have diminished his culpability. He accordingly allowed a discount of 15 per cent "to recognise the various factors identified by the report writers".[18]

[26] The Judge then turned to consider an instrument forfeiture order which had been made in respect of 50 per cent of the equity in Mr Duthie's Lichfield property.[19] The interest being forfeited was valued at approximately $325,000. By way of background, under s 142N of the Sentencing Act a court may make an order that an instrument of crime (or any part of it) be forfeited to the Crown. Section 10B(2) of

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15 At [25].
16 At [27].
17 At [27].
18 At [34].
19 *R v Duthie* [2022] NZHC 2851 [Instrument forfeiture order].

the Sentencing Act provides that the court must take into account an instrument forfeiture order when sentencing an offender.

[27] The Judge referred to this Court's decision in *Macpherson v R*, in which the Court stated that there is no set discount for an instrument forfeiture order, and that an appropriate discount requires the exercise of judgement on the part of the sentencing court.[20] Referring to s 10B(2), the Judge noted that the Court must take into account the value of the property that is the subject of the forfeiture order, and the nature and extent of the offender's interest in it.[21] He noted that not insubstantial discounts have been allowed in past cases,[22] referring to *Vant Leven v R* (a 50 per cent discount);[23] *R v Gray* (a 25 per cent discount);[24] and *R v Corless* (a 20 per cent discount).[25]

[28] The Judge agreed with Mr Duthie's counsel that the most helpful case was *Macpherson*, in which a starting point of four years' imprisonment had been adopted for various drug-related offences.[26] The High Court in that case had made a forfeiture order for 50 per cent of the appellant's interest in a property; the interest being forfeited was valued at $380,000. On appeal, this Court reduced the forfeiture order to 25 per cent of the appellant's interest in the property (valued at around $160,000).[27] The Court did not disturb any other aspects of the sentence, including the 50 per cent discount to the appellant's sentence to reflect the forfeiture order.

[29] The Judge noted that in the present case Mr Duthie was required to forfeit half of his equity in his property (valued at $325,000) and accepted that the property was primarily used as Mr Duthie's residence.[28] The Judge also accepted that the property had not been set up solely for offending, or that there was anything to suggest that it had been used for offending repeatedly or over time.[29] The Judge also accepted it was Mr Duthie's only major asset.[30] He observed that Mr Duthie was 56 years old and, as

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20 Sentencing notes, above n 2, at [36] referring to *Macpherson v R* [2012] NZCA 552 at [64].
21 Sentencing notes, above n 2, at [35].
22 At [35].
23 *Vant Leven v R* [2014] NZCA 330.
24 *R v Gray* [2013] NZHC 450.
25 *R v Corless* [2014] NZHC 1211.
26 Sentencing notes, above n 2, at [36].
27 *Macpherson v R,* above n 20.
28 Sentencing notes*,* above n 2, at [37].
29 At [37].
30 At [37].

a result of the forfeiture, he would have limited means to re-establish himself.[31] In those circumstances, the Judge allowed a further discount of 25 per cent to recognise the forfeiture order.[32]

[30] Taking these discounts into account and following the two-step approach discussed by this Court in *Moses v R*,[33] the Judge reached an end sentence of four years and nine months' imprisonment.[34] He did not impose a minimum period of imprisonment, stating:[35]

> The forfeiture order made by Campbell J has already had significant consequences for you and your family. It will also have served as a warning to like-minded offenders. So will the sentence I am imposing on you. In my view, no further denunciation or deterrence is required.

**Was the starting point adopted too high?**

*Submissions*

[31] Mr Wall, who presented Mr Duthie's submissions on the appeal, accepts that Mr Duthie's offending fell within band 3 of *Zhang*, but argues that the Judge did not make an appropriate finding as to Mr Duthie's role. He further submits that the Judge should not have uplifted the sentence to take into account the remaining charges.

[32] Turning to the first point, Mr Wall submits that the evidence as to Mr Duthie's role was limited, given his offending was largely based around a single charge of possession for the purposes of supply, and there was no evidence of his position within a wider commercial chain of command. Mr Wall says that the most that could be said is that Mr Duthie "was in charge of himself". Referring to the Supreme Court's decision in *Berkland v R*,[36] Mr Wall submits that Mr Duthie should have been treated as a "one man band", and the lead charge should not have attracted a starting point approaching the upper end of band 3 in *Zhang*.

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31 At [37].
32 At [37].
33 *Moses v R* [2020] NZCA 296, [2020] 3 NZLR 583 at [45]–[46].
34 Sentencing notes, above n 2, at [38].
35 At [41].
36 *Berkland v R* [2022] NZSC 143, [2022] 1 NZLR 509.

[33] In terms of the manufacturing charge, Mr Wall submits that the Judge took the manufacturing offending into account in characterising Mr Duthie's offending as being more serious when fixing the starting point of nine years' imprisonment. He therefore argues that to further uplift that starting point by one year amounts to double counting. On the basis of the guidance gained from *Berkland* and the High Court's decision in *R v Griffiths*,[37] Mr Wall submits that the starting point should have been in the region of eight years' imprisonment.

[34] The Crown supports the Judge's starting point. It notes that one of the characteristics of the "significant" category in *Berkland* is that the offender has an "operational function, whether operating alone or with others".[38] It accordingly submits that Mr Duthie's characterisation as a "one man band" does not so much lessen his culpability as emphasise his close links to the original source. The Crown further notes that Mr Duthie displayed other characteristics of having a "significant" role, such as being motivated by financial advantage, benefitting financially from his offending and arguably having an expectation of substantial financial gain. It also submits that his possession of $41,000 in cash and a money counting machine shows he was aware of the scale of the operation.

[35] The Crown accordingly submits that nine years' imprisonment was within the available range. It says that it is untenable that the starting point should not have been uplifted to reflect the additional charges, given they reflect distinct, deliberate and undeniably serious offending that required recognition regardless of whether the amount of methamphetamine manufactured could be quantified.

*Analysis*

[36] We are not persuaded that the starting point of 10 years' imprisonment for the totality of Mr Duthie's offending was outside the range available to the Judge, though it was approaching the upper end of that range.

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37 *R v Griffiths* [2023] NZHC 357.
38 *Berkland v R*, above n 36, at [71].

[37] The starting point of nine years' imprisonment for the possession of methamphetamine for supply was not, as Mr Wall suggests, at the upper end of band 3 in *Zhang* but, as noted earlier, was at the mid-point of band 3. We do not consider the Judge erred in his characterisation of Mr Duthie's role. To the extent Mr Duthie was acting as a "one man band", he clearly played a significant role in that operation. As the Judge noted, the offending had all the indicia of not insignificant commercial dealing to others.

[38] Nor do we consider that the Judge erred in uplifting the starting point of nine years by one year to reflect the two remaining charges. It is correct that the Judge took into account the fact of manufacture when assessing Mr Duthie's role on the lead charge of possession for supply. However, the manufacturing offending nevertheless reflects a distinct and separate aspect of Mr Duthie's offending, which carried with it separate culpability that was properly recognised by an uplift. Given the quantity of methamphetamine could not be quantified, and that the evidence did not disclose manufacturing occurring on an ongoing or regular basis, the uplift was appropriate, and properly modest.

**Should Mr Duthie have received a guilty plea discount of 25 per cent?**

*Submissions*

[39] Mr Wall submits that while the guilty plea was not entered until shortly before trial, as the Supreme Court emphasised in *Hessell v R*, the full context ought to be considered rather than simply the timing of the entry of pleas.[39] He notes that the guilty pleas were entered immediately following a commitment by the Crown to withdraw a large number of charges that involved Mr McQuade, but that had scant evidence of Mr Duthie's involvement. Mr Wall acknowledges that the Crown had strong evidence to support the possession for supply charge, but submits the same could not be said for the remaining two charges — which then required extensive discussion around the content of the summary of facts. Mr Wall submits that this could not occur until Mr McQuade had resolved his charges, and took place in circumstances that relieved the Court from conducting a trial in challenging circumstances brought

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39 *Hessell v R* [2010] NZSC 135, [2011] 1 NZLR 607.

about by the spread of COVID-19. Mr Wall accordingly submits that Mr Duthie should have had a discount of the same level that was afforded to Mr McQuade.

[40] The Crown submits that a 20 per cent discount was appropriate and arguably generous. It says that the evidence in respect of Mr Duthie's lead offending was strong but nevertheless a guilty plea to that charge was not forthcoming until the week of the trial. It submits that to the extent the delayed guilty plea was for tactical reasons, it nevertheless reflects a delayed plea. The Crown also notes that, as discussed in *Hessell*, guilty pleas are often the result of understandings reached on the charges faced and facts admitted, and it will be necessary to have regard to all the circumstances of a case to avoid a risk of double benefit to a defendant.[40]

*Analysis*

[41] We agree with the Crown that the Judge's discount of 20 per cent for Mr Duthie's guilty pleas was appropriate, and arguably generous. The Judge expressly took into account and differentiated the discount afforded to Mr McQuade. Given that Mr McQuade's discount was the maximum available under *Hessell*, and in circumstances where Mr McQuade also did not enter his pleas until very shortly before trial, that discount was also arguably generous. Ultimately, given the very late point at which Mr Duthie pleaded guilty in circumstances where the evidence on the lead offending was strong and did not need to await discussions on the other charges, and the benefit to him of a number of charges being withdrawn, a guilty plea discount of 20 per cent was well within range.

**Should Mr Duthie have received greater discounts for his personal background?**

*Submissions*

[42] Mr Wall submits that, given the Judge did not take Mr Duthie's undoubted addiction issues into account when setting the starting point, it ought to have been more fully recognised in granting a greater discount for personal factors. Mr Wall says that overall, a discount of 20 per cent should have been granted rather than the 15 per cent.

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[40] At [62].

[43] The Crown submits that the 15 per cent discount was sufficient. It highlights the Supreme Court's observations in *Berkland* that criminogenic background factors tend to be reflected in repeat offending and that sentencing judges generally understand this and "the need for patience", though equally that at some point other sentencing principles will take over.[41] The Crown emphasises that it is difficult to avoid the fact that Mr Duthie is a recidivist drug offender who was before the Court because of further serious drug offending.

*Analysis*

[44] Mr Duthie's background was not in dispute and the Judge accepted his addiction. We agree with the Judge that there was a causal connection between Mr Duthie's background and his most recent offending. His addiction to controlled drugs helps explain him being drawn into a commercial drug dealing environment, and plainly a discount was warranted. That said, any discount must reflect that Mr Duthie is a recidivist drug offender and the nature of his present offending, which exhibits all the hallmarks of commercial dealing.

[45] We do not consider the Judge erred in adopting a 15 per cent discount for Mr Duthie's background and addiction. We note, for example, that in *Berkland* itself, Mr Berkland had a similar though perhaps more difficult background to Mr Duthie's, and the Court also accepted Mr Berkland's rehabilitation by the time of sentencing was "genuinely exceptional".[42] In those circumstances, a combined discount of 20 per cent was adopted for his deprived background, the role of addiction in his offending and for his efforts at rehabilitation.[43]

[46] In this Court's very recent decision in *McCaslin-Whitehead v R,* the Court surveyed a number of cases addressing the discount for personal background in the context of drug offending.[44] Referring to *Berkland,*[45] *Moses,*[46] *Carr v R,*[47] and

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41 *Berkland v R,* above n 36, at [94], n 105.
42 At [160].
43 At [162].
44 *McCaslin-Whitehead v R* [2023] NZCA 259 at [51]–[58].
45 *Berkland v R,* above n 36.
46 *Moses v R*, above n 33.
47 *Carr v R* [2020] NZCA 357.

*Solicitor-General v Heta*,[48] the Court accepted that the 30 per cent discount given by the District Court in *McCaslin-Whitehead* was excessive, and that a more appropriate discount was no more than 20 per cent (reflecting the conservative approach to Crown appeals).[49] Having regard to those authorities, and particularly given Mr Duthie's recidivist offending, the 15 per cent discount in this case was appropriate. While Mr Duthie's apparent willingness to pursue long-term rehabilitation is commendable, it does not persuade us that the discount provided in these circumstances was inadequate.

**Should there have been a greater discount for the instrument forfeiture order?**

*Submissions*

[47] Mr Wall submits that by reference to this Court's decision in *Macpherson*, which the Judge agreed was the most comparable case, a discount of 25 per cent was insufficient.[50] Mr Wall notes that the amount of forfeiture in this case was in the order of $325,000 and represents the loss of Mr Duthie's only major asset, with little prospect of him re-establishing himself upon release from prison. While acknowledging that Mr Duthie's offending is more serious than in *Macpherson*, Mr Wall submits that these circumstances warrant a greater discount, particularly when Mr Macpherson received a 50 per cent discount for forfeiting only 25 per cent of his equity in his property.

[48] The Crown refers to the High Court's decision in *R v Corless*, a case of serious drug offending attracting a starting point of 17 years' imprisonment.[51] In that case, Mr Corless forfeited his entire $400,000 interest in a property and received a 20 per cent discount. The Crown submits that in these circumstances, and recognising that every case is fact specific, it cannot be said that the Judge's adoption of a 25 per cent discount was in error.

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48 *Solicitor-General v Heta* [2018] NZHC 2453, [2019] 2 NZLR 241.
49 *McCaslin-Whitehead v R,* above n 44, at [59].
50 *Macpherson v R,* above n 20.
51 *R v Corless,* above n 25.

*Analysis*

[49] It is helpful first to set out the text of s 10B of the Sentencing Act, which provides that a sentencing judge must take into account the fact that an instrument forfeiture order has been made.

[50] Section 10B relevantly provides:

> **10B Court must take into account instrument forfeiture order or successful application for relief**
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> (1) In sentencing or otherwise dealing with an offender convicted of a qualifying instrument forfeiture offence, the court must take into account—
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> (a) any instrument forfeiture order made, or to be made, in respect of property used to commit, or to facilitate the commission of, the qualifying instrument forfeiture offence:
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> …
>
> (2) In deciding the weight to be given to any matter referred to in subsection (1)(a), (b), or (d), the court must take into account—
>
> (a) the value of the property that is the subject of the instrument forfeiture order or that is otherwise forfeited:
>
> (b) the nature and extent of the offender's interest in that property.
>
> …

[51] Unlike asset and profit forfeiture orders made under the Criminal Proceeds (Recovery) Act 2009, which are not dependant on a criminal conviction, instrument forfeiture orders form part of criminal proceedings and are to be regarded as a penalty.[52] In discounting a sentence to reflect an instrument forfeiture order, the High Court observed in *R v Brazendale* that instrument forfeiture orders:[53]

> … reflect a legislative intent that such orders are part of the means by which the offender before the Court and other potential offenders are deterred from committing offences. In other words, the instrument forfeiture order is doing part of the work that would otherwise need to be performed in responding to s 7(1)(f) of the Sentencing Act.

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52 *Commissioner of Police v Skinner* [2013] NZHC 2956 at [37(e)]; *Henderson v R* [2017] NZCA 605 at [40]; and *Harris v R* [2018] NZCA 632 at [50].

53 *R v Brazendale* HC Auckland CRI-2009-092-17133, 20 August 2010 at [20]; referred to with approval by this Court in *Macpherson v R,* above n 20, at [59].

[52] It is not the statutory intention that an offender is more severely punished simply because he or she owns a substantial asset that was used to facilitate the offending.[54] This Court made a similar point on appeal in *Brazendale*, stating:[55]

> [39] In addition, in determining whether the hardship [of an instrument forfeiture order] is disproportionately severe, it is relevant that the sentence can be adjusted to take account of the financial effect of the forfeiture order. This provides a mean of ameliorating any risk that an offender is more severely punished simply because he or she owns a substantial asset. Finally, the gravity of the offending is only one factor to be weighed in the balance.

[53] As to the level of discount that is appropriate for an instrument forfeiture order, as already noted, this Court in *Macpherson* stated that it is difficult to provide broad guidance as to the relationship between the sentence that would ordinarily be imposed and instrument forfeiture, given each case must depend on its own facts and the exercise of the sentencing judge's judgement.[56] We would, however, make the following points.

[54] While the value of the property that is, or is to be, the subject of the instrument forfeiture order must be taken into account,[57] we do not consider this factor should overwhelm or necessarily be the predominant factor reflected in the extent of any discount. In the case of the forfeiture of a residential property, for example, house prices will vary significantly in different parts of the country. Accordingly a relatively modest residential property forfeit in, say, Auckland, may have a significantly greater value than an equally modest property forfeit in, say, Rotorua, but may have similar financial and practical implications for the offender and his or her family. We consider the impact of the forfeiture on the offender is a relevant factor in the assessment of the overall penalty (sentence and forfeiture order) being imposed on the offender. Other relevant factors include the extent to which the property was utilised in the offending, whether its acquisition, maintenance or improvement was funded by the proceeds of crime, and the gravity of the offending.

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54 *Elliott v R* [2011] NZCA 386, [2011] 3 NZLR 811 at [36] referring to the explanatory note to the Bill: see Criminal Proceeds (Recovery) Bill 2007 (81-1) (explanatory note) at 4–5.

55 *R v Brazendale,* above n 53, referred to in *Macpherson v R,* above n 20, at [60].

56 *Macpherson v R*, above n 20, at [64].

57 Sentencing Act 2002, s 10B(2)(b).

[55] In this case, the manufacturing of methamphetamine took place at Mr Duthie's home in Lichfield on at least one occasion. He was also found to be in possession of methamphetamine for the purposes of supply at this address. In the application for an instrument forfeiture order, Mr Duthie quite properly accepted that such an order ought to be made.[58] The Crown sought the forfeiture of 100 per cent of Mr Duthie's interest in his property. It was not in dispute, however, that Mr Duthie purchased the property with legitimate funds in June 2018 for $300,000 — the entire purchase price being financed by a loan from Avanti Finance Ltd. As at 28 April 2022, the amount owing on the loan was $297,000, suggesting that Mr Duthie had not used any financial gain from his drug offending to acquire additional equity in the property. Rather, Mr Duthie's equity in the property came about from its rise in capital value. Given the relatively limited extent to which the property had been used in Mr Duthie's criminal offending and that it had been acquired through legitimate means, we consider that the Crown's application for a forfeiture of 100 per cent of Mr Duthie's interest in it was an overreach. Mr Duthie himself proposed a 50 per cent forfeiture order, valued at approximately $325,000, which we consider was a reasonable and responsible approach in the circumstances.

[56] As noted, the property was Mr Duthie's only asset. Both Campbell J, in making the instrument forfeiture order, and Wylie J, in sentencing Mr Duthie, accepted that, at the age of 56 and on release from prison, he will find it difficult to re-establish himself.[59] Further, Campbell J held that the value of Mr Duthie's interest in the Lichfield property was many times greater than the value he was shown to have obtained from his offending, which the Judge assessed as $150,000.[60] Campbell J noted that there was also $41,510 in cash found at Mr Duthie's property. It is not clear, however, whether this was Mr Duthie's cash to keep for himself — and even if it was, it seems likely it was being used to fund his own methamphetamine addiction, rather than being spent on the trappings of a lavish lifestyle.

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58 Instrument forfeiture order, above n 19, at [3].
59 Sentencing notes, above n 2, at [37]; and Instrument forfeiture order, above n 19, at [39].
60 At [38].

[57] We have considered a number of other sentencings for drug offending in which discounts have been given for instrument forfeiture orders.[61] We agree with counsel and the Judge that the most comparable case is *Macpherson.*[62] Mr Macpherson's offending was less serious than Mr Duthie's (attracting a starting point of four years' imprisonment), but otherwise the case has some similarities to Mr Duthie's. At first instance, a forfeiture order was made in relation to 50 per cent of Mr Macpherson's interest in his residential home (that interest having a value of $380,000). The property had been used to manufacture methamphetamine at least once, as well as to grow cannabis, but was predominantly Mr Macpherson's residential home. It had been acquired by him through legitimate means.

[58] In the High Court, Mr Macpherson's sentence was discounted by approximately 50 per cent to reflect the instrument forfeiture order. On appeal, this Court was troubled by the extent of the forfeiture ordered, including because there was no evidence of commerciality in relation to the manufacturing charge and that Mr Macpherson was a secondary party. The Court reduced the forfeiture order to 25 per cent of Mr Macpherson's interest in the property but did not otherwise disturb the sentence.[63]

[59] We consider that the discount of 25 per cent to reflect the forfeiture order in this case was too low. Mr Duthie's offending is more serious than in *Macpherson*, however the gravity of the offending is only one factor to be taken into account. As in *Macpherson*, there is no evidence that Mr Duthie's property was used in anything other than a limited way in his offending. It is also Mr Duthie's only asset and it was acquired through legitimate means. Given Mr Duthie's age, and the fact the property was his only asset, it will undoubtedly be difficult for him to re-establish himself upon

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61 *Harris v R*, above n 52 (starting point of seven years' imprisonment, discounted by three months, or approximately four per cent, to reflect forfeiture that represented 10 per cent of Mr Harris' net worth); *Vant Leven v R*, above n 23 (starting point of seven years' imprisonment, manufacturing of methamphetamine at a property on at least two occasions over a two year period, a forfeiture of 60 per cent of Mr Vant Leven's equity in the property, equating to a forfeiture of $215,700, an approximately 50 per cent discount adopted); *R v Corless*, above n 25 (starting point of 17 years' imprisonment, 100 per cent forfeiture of Mr Corless' $400,000 share in a property at which methamphetamine had been manufactured on multiple occasions over a two year period, leading to a 25 per cent discount); and *R v Gray*, above n 24 (starting point of 20 years' imprisonment, property valued at $2.7 million forfeit, offender had other property, approximately 25 per cent discount provided).

62 *Macpherson v R*, above n 20.

63 At [63]–[64].

his release from prison. The forfeiture order is accordingly acting as a real penalty and goes some way to meeting the sentencing principles of personal and general deterrence. We do not consider the gravity of Mr Duthie's offending justifies a forfeiture order double that in *Macpherson* but with half the resulting discount at sentencing. We also note that in some of the other cases we have considered, discounts of around 25 per cent were given for forfeiture orders in the context of much more serious offending than Mr Duthie's.

[60] Standing back, we consider that a discount of 35 per cent is appropriate to reflect the instrument forfeiture order.

[61] Applying what we consider to be the appropriate discounts for Mr Duthie's guilty pleas, personal background and the instrument forfeiture order, the starting point of 10 years' imprisonment reduces to an end sentence of three years and nine months' imprisonment.[64] The Judge's sentence of four years and nine months' imprisonment, coupled with the instrument forfeiture order, was accordingly manifestly excessive and the appeal will be allowed.

**Result**

[62] The appeal is allowed.

[63] The sentence of four years and nine months' imprisonment imposed in the High Court is quashed and substituted with a sentence of three years and nine months' imprisonment.

Solicitors:
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Crown Solicitor, Auckland for Respondent

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64 A combined discount of 62.5 per cent, taking into account the uplift for prior offending and the discounts adjusted in light of this decision.