

IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

**CA379/2022
[2023] NZCA 146**

BETWEEN FARSHAD ESFEHANI-BAHADORI
Appellant

AND THE KING
Respondent

CA470/2022

BETWEEN JALAL ASMATULLAH SAFI
Appellant

AND THE KING
Respondent

Hearing: 28 March 2023

Court: French, Dunningham and Cull JJ

Counsel: T M Cooper KC and O Kazmierow for Mr Esfehni-Bahadori
M J Taylor-Cyphers for Mr Safi
J V Barry for Respondent

Judgment: 9 May 2023 at 2.15 pm

JUDGMENT OF THE COURT

- A Mr Esfehni-Bahadori's appeal is dismissed.**
- B Mr Safi's appeal is allowed.**
- C Mr Safi's sentence of 11 years' imprisonment is quashed and is substituted with a sentence of 9 years and six months' imprisonment.**
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REASONS OF THE COURT

(Given by Dunningham J)

Introduction

[1] The appellants were both convicted following a police investigation, codenamed Operation Maddale, into a significant methamphetamine distribution syndicate run out of an Auckland car yard.

[2] Mr Esfehni-Bahadori was sentenced by Judge Muir in the District Court at Auckland to five years and six months' imprisonment on three counts of possession of methamphetamine for supply.¹

[3] Mr Safi was sentenced by Judge Gibson in the District Court at Auckland to 11 years' imprisonment on two charges of possession of methamphetamine for supply and one of money laundering arising out of the same operation, as well as subsequent charges which arose from offending when he was on electronically-monitored (EM) bail for the methamphetamine offending.² These included a further possession of methamphetamine for supply charge, two firearms charges, a charge of dangerous driving, and a charge of operating a vehicle in a race.

[4] Both men appeal their sentences on the grounds they were manifestly excessive.

[5] Mr Esfehni-Bahadori says:

- (a) the Judge adopted a starting point which was too high; and
- (b) he received insufficient credit for mitigating factors, including for s 27 factors and his relative youth.

[6] Mr Safi says:

- (a) the Judge adopted a starting point which was too high;

¹ *R v Esfehni-Bahadori* [2022] NZDC 14540 at [30].

² *R v Safi* [2022] NZDC 16499 at [32].

- (b) inadequate discounts were given in respect of personal factors, including addiction; and
- (c) the end sentence offends the principles of totality and parity.

Facts of the offending

Mr Esfehni-Bahadori

[7] During the Operation Maddale investigation, the police found that significant quantities of methamphetamine were being distributed from commercial premises operating as a car sales yard on Bentinck Street in Auckland. Through the use of covert surveillance, Mr Esfehni-Bahadori was seen making three trips to this address, each time with Mr Slaimankhel and other associates, where they purchased commercial quantities of methamphetamine for cash. The quantities of methamphetamine transacted on each occasion were:

- (a) 15 November 2018: one to two kilograms. Mr Safi was also involved in this transaction.
- (b) 4 December 2018: at least one kilogram.
- (c) 17 December 2018: at least half a kilogram.

[8] In all, Mr Esfehni-Bahadori was convicted for being in possession of at least 2.5 kilograms of methamphetamine for supply.

Mr Safi

[9] In Mr Safi's case, his offending involved two trips to Bentinck Street, each time with Mr Slaimankhel and an associate, to purchase commercial quantities of methamphetamine for cash. The quantities transacted on each occasion were:

- (a) 15 November 2018: one to two kilograms. Mr Esfehni-Bahadori was also involved in this transaction.

(b) 11 March 2019: at least one kilogram.

[10] In all, Mr Safi was convicted for being in possession of at least two kilograms of methamphetamine for supply.

[11] On 6 July 2019, Mr Safi was also found in possession of \$230,000 in cash when travelling from Dunedin to Auckland. The cash was the proceeds of distributing methamphetamine, and he intended to engage in a money laundering transaction with those funds.

[12] Mr Safi's subsequent offending occurred while he was on EM bail for the methamphetamine offending. On 19 May 2022, police executed a search warrant at his home address. They found a combined total of 27.7 grams of methamphetamine, \$2,000 in cash, digital weighing scales and unused point bags, a 12-gauge shotgun, five 12-gauge shotgun rounds and 79 rounds of .22 firearm ammunition.

[13] In a separate incident, on 27 August 2021, he was charged with two driving offences as a result of driving at speeds of up to 120 kmph in a 50 kmph area, failing to comply with road signs, including a stop sign, driving on the wrong side of the road and overtaking vehicles at high speed.

Mr Esfehni-Bahadori's appeal

Sentencing of Mr Esfehni-Bahadori

[14] Judge Muir began by describing Mr Esfehni-Bahadori's role, noting he was a member of the Comancheros gang and was "performing the role of a courier but [he was] doing so as a member of a gang knowing full well the criminal activity that [he was] undertaking and the likely impact of that activity".³ He did not describe his role in *Zhang v R* terms,⁴ though he did refer to submissions which described him as being

³ *Esfehni-Bahadori*, above n 1, at [3].

⁴ *Zhang v R* [2019] NZCA 507, [2019] 3 NZLR 648, which, at [115], described the role of offenders as falling into one of three categories, being "lesser", "significant" and "leading".

both at the lower and upper end of the lesser role.⁵ Instead, he said “your involvement was extensive even though the quantities involved were small”.⁶

[15] In setting the starting point, Judge Muir placed Mr Esfehni-Bahadori at the bottom of band five, being the band identified in *Zhang v R* for offending involving two or more kilograms of methamphetamine.⁷ He also noted that an aggravating factor was that Mr Esfehni-Bahadori had committed the offending while on bail in relation to other charges.⁸ He then cross-referenced the proposed starting point of 10 years with that for a co-offender, Mr Yousef, whose offending involved 11.5 kilograms of methamphetamine and where a starting point of 12 years was adopted.⁹

[16] After adopting a starting point of 10 years, the Judge allowed a 20 per cent reduction to take account of his guilty plea.¹⁰ He allowed a further 15 per cent for matters raised in his s 27 report, describing them as “compelling”.¹¹ He also allowed a five per cent discount for remorse and a further five per cent for totality.¹² The end sentence was five years and six months’ imprisonment.¹³

Was the starting point too high?

[17] While Ms Cooper KC acknowledges that, based on quantity, Mr Esfehni-Bahadori’s offending falls at the lower end of band five in *Zhang*, she submits his role, along with considerations of parity, should have seen his starting point below the 10 year point at which band five starts. Ms Cooper submits that he met many of the criteria for having a lesser role in that he:

- (a) performed a limited function under direction;
- (b) was paid in cash that was significantly disproportionate to the sheer quantity of drugs and risk involved;

⁵ *Esfehani-Bahadori*, above n 1, at [18] and [21].

⁶ At [26].

⁷ At [26].

⁸ At [27].

⁹ At [26]; and *R v Yousef* [2022] NZDC 3359.

¹⁰ *Esfehani-Bahadori*, above n 1, at [29].

¹¹ At [29].

¹² At [29].

¹³ At [29].

- (c) had no influence on those above him in the chain; and
- (d) had little awareness or understanding of the significant scale of the operation.

[18] She points out that a defendant need not fulfil all the criteria which are indicative of a lesser role in *Zhang*, accepting that in this case, there is no evidence of an addiction to drugs. In terms of comparing his role with others, she says two co-defendants, Mr James and Mr Worsley, were principal offenders, whereas Mr Esfehni-Bahadori and other younger gang members were lower in the chain. Furthermore, Mr Esfehni-Bahadori was not an active participant in the three transactions but was simply assisting Mr Slaimankhel, who was more senior and who played an active role in the exchanges. She describes Mr Esfehni-Bahadori's role as simply "to be present" and to act as the "muscle" for Mr Slaimankhel.

[19] Ms Cooper points out that Mr Slaimankhel's role in the operation was determined to be at the "high end of significant", and the charges he faced involved approximately six kilograms of methamphetamine, yet his starting point was only three years higher at 13 years' imprisonment.¹⁴ Mr Yousef's role was somewhat similar to the appellant's but he was directly charged with care of a significant amount of methamphetamine at his home address, with the total methamphetamine involved in his charges being 11.5 kilograms, and yet his starting point was only two years greater at 12 years' imprisonment. Ms Cooper says even Mr Safi's role which, on the face of it, was somewhat similar to the appellant's, can be distinguished because he was entrusted with a large amount of money on behalf of the wider operation, and a starting point of 10 and a half years was imposed, which is only six months higher than the starting point for the appellant. When comparing Mr Esfehni-Bahadori's offending with the offending of those three co-offenders, Ms Cooper submits his starting point does not "adequately reflect the true spectrum of the offending between these four offenders".

[20] Ms Cooper emphasises that *Zhang* endorses a flexible approach to sentencing to ensure culpability is adequately reflected and notes that two other co-defendants,

¹⁴ *R v Slaimankhel* [2022] NZDC 14076 at [3]–[5].

Ms Chalmers and Ms Hayman, received starting points that were lower than the minimum prison sentence for their respective bands.¹⁵ Given Mr Esfehni-Bahadori falls at the lower end of band five purely on the basis of quantum, his starting point should be reduced even further to fairly reflect his limited culpability, particularly when compared to the culpability of his co-defendants. The starting point should, in Ms Cooper’s submission, be around nine years’ imprisonment.

Discussion

[21] In *Zhang*, the sentencing bands in *R v Fatu* were revisited and adjusted to provide lower starting points for bands one to four.¹⁶ The Court of Appeal observed that:¹⁷

... although the new entry points [for each band] 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 these entry points.

[22] In *Berkland v R*, the Supreme Court gave further guidance on the implementation of the new *Zhang* framework.¹⁸ The Court reiterated that the role of the offender was a “fundamental component of the gravity and culpability assessment”.¹⁹ The Court went on to explain that role could:²⁰

... drive movements both within and between the quantum driven bands. In other words, there is no reason in principle why role cannot be even more impactful than quantum, if justified in the circumstances. This may well be the case, for example, if the circumstances demonstrate that, irrespective of quantum, the offender’s role in relation to it falls within the lower end of ‘lesser’.

(footnote omitted)

[23] In the present case, we are unpersuaded that Mr Esfehni-Bahadori’s role is so limited that it warrants setting the starting point in a lower band than band five. In the District Court, the Judge appeared to accept submissions that his role should be described as lesser, though he did not state where on the spectrum

¹⁵ *Zhang*, above n 4, at [10]; *R v Chalmers* [2022] NZDC 6620; and *R v Hayman* [2021] NZHC 642.

¹⁶ *R v Fatu* [2006] 2 NZLR 72 (CA).

¹⁷ *Zhang*, above n 4, at [123].

¹⁸ *Berkland v R* [2022] NZSC 143.

¹⁹ At [63].

²⁰ At [64].

Mr Esfehni-Bahadori lay. We put little weight on the Judge’s description of his role as “extensive” but involving small amounts, as both statements are inconsistent with the summary of facts, which describe a lesser role in the production of two kilograms of methamphetamine which is a substantial quantity.²¹

[24] In our view, Mr Esfehni-Bahadori’s role had some of the indicia of being a lesser role, but there was no suggestion that his culpability was reduced by factors such as a drug addiction or coercion from an overbearing and violent partner.²² Rather, we are satisfied that Mr Esfehni-Bahadori was willing to play his part as a member of the Comancheros gang noting, in his pre-sentence report, that he said he was “proud of his membership”, and he ended the interview stating, “Comanchero forever”. This is not a case where he was paid in drugs to feed his own addiction, and there appears to be at least some financial motivation for offending, with his disclosing that he became involved “to provide for himself and his mother” and telling the pre-sentence report writer that his activities “were simply for financial gain”. It is reasonable to assume he had at least some awareness or understanding of the scale of the operation given his three visits to its headquarters and his association with other gang members who were involved in it. Thus, while we accept his offending falls within the lesser role, there are no factors present which would limit his culpability to the extent he should be sentenced in a lower band. In our view, the Judge appropriately placed him at the bottom of band five having regard to both the quantity of drugs involved and the role he played in the operation.

[25] We do not think any further adjustment is required having regard to the starting points taken for his co-offenders. The Judge was careful to place his starting point lower than those who were more culpable than him, and this was sufficient to recognise the principle of parity.

[26] This ground of appeal is dismissed.

²¹ *Esfehni-Bahadori*, above n 1, at [26].

²² For example, in *Zhang*, Ms Phillips’ low starting point was endorsed on appeal as reflecting her “very limited” role and the fact she accompanied her partner on drug deals “out of a sense of loyalty”. She was also addicted to methamphetamine. Similarly, Ms Crighton’s sentence took into account that she supplied her partner with methamphetamine to “prevent any violence”.

Did Mr Esfehni-Bahadori receive sufficient credit for mitigating factors?

[27] The second ground of appeal is that Mr Esfehni-Bahadori did not receive sufficient credit for mitigating factors, particularly when compared with the credit afforded to his co-offenders. In that regard, Ms Cooper referred to the sentencing for Mr Slaimankhel where, although not specified, it appears the discount he received for personal circumstances may have been at least 20 per cent. Mr Yousef received a 15 per cent discount for a cultural report which did not strongly point to background factors being causative of his offending.²³ That is in contrast to the Judge describing Mr Esfehni-Bahadori's cultural report as "compelling" and yet only allowing a discount of 15 per cent.²⁴

[28] Ms Cooper argues that the respective discounts afforded "engages an issue of parity", saying Mr Yousef should not receive the same discount as Mr Esfehni-Bahadori when there are no exceptional mitigating factors indicating why this approach is taken. Ms Cooper also notes that while Mr Esfehni-Bahadori was relatively young at the time, being 21 years old, there was no discount provided for this. She submits a discount of greater than 15 per cent and up to 30 per cent ought to have been applied for s 27 factors and the appellant's relative youth.

Discussion

[29] Mr Esfehni-Bahadori's s 27 report explains that he was raised by a single mother who was a refugee from Iran. As a consequence, his childhood was defined by hardship, limited social supports, and the experience of racism and discrimination based on his family's cultural identity. The financial hardship his family suffered during his childhood was his motivation to succeed financially, and that ambition to achieve financial success was the "single most causative factor in his offending". The report recorded that Mr Esfehni-Bahadori was not a drug user but had been a heavy drinker in the past. It also said that he had found brotherhood and community through his involvement with the gangs, and his recent offending was "inextricably linked with his gang affiliations".

²³ *Yousef*, above n 9, at [46].

²⁴ *Esfehni-Bahadori*, above n 1, at [29].

[30] We accept the conclusions in the s 27 report at face value. However, it served to emphasise that his primary motivation for the offending was financial. He was not suffering from an addiction, nor did he want to disassociate himself from the gang which drove this offending. While, as the Judge acknowledges, his background does explain how he came to offend, we cannot say the discount afforded was in error. Indeed, it strikes us as generously recognising the background factors which led to Mr Esfehni-Bahadori offending. By way of comparison, in *Berkland*, the appellant received a 10 per cent discount for a s 27 report which revealed an upbringing marked by violence, sexual abuse and poverty.²⁵ Mr Berkland left school functionally illiterate and joined the Mongrel Mob.²⁶ He began abusing drugs and alcohol from childhood and developed an addiction to methamphetamine later in life which drove his offending.²⁷ While parallels are not easy to draw, we cannot say a 15 per cent discount to recognise the factors which drove Mr Esfehni-Bahadori's offending was clearly wrong.

[31] We also note that to the extent Ms Cooper says Mr Esfehni-Bahadori's youth should be taken into account, the Judge did acknowledge that.²⁸ While a separate discount was not given for youth, we consider it is fairly reflected in the relatively generous discounts which were given for s 27 factors, remorse, and totality, particularly when Mr Esfehni-Bahadori's remorse was in question and there was no obvious reason to reduce the sentence for totality.

[32] Finally, we note there is little to be gained by comparing the discounts afforded to Mr Esfehni-Bahadori's co-offenders with those afforded to him. As was said by this Court in *Walker-Dahlberg v R*: "Parity has to be assessed by a comparison, not of the end sentence, but of the starting points for the offending."²⁹

[33] The end sentence of five years and six months' imprisonment was clearly not excessive, and this ground of appeal is dismissed.

²⁵ *Berkland*, above n 18, at [16] and [162].

²⁶ At [154]–[155].

²⁷ At [157].

²⁸ At [28].

²⁹ *Walker-Dahlberg v R* [2020] NZCA 661 at [54].

Mr Safi's appeal

Sentencing of Mr Safi

[34] When sentencing Mr Safi, Judge Gibson identified the main offending as the initial possession for supply and money laundering charges.³⁰ Based on the quantity of methamphetamine involved, he considered Mr Safi fell within band five of *Zhang v R*.³¹

[35] The Judge then turned to Mr Safi's role, accepting that he was not likely a person of "major influence in the drug ring" but concluding he was "operating effectively as a foot soldier" for the Comancheros gang distributing the methamphetamine.³² However, he observed that Mr Safi was "trusted", given his responsibility for carrying a large sum of money to Dunedin, and he concluded "you knew exactly what was happening, and you knew you were participating in criminal activity of a very serious nature".³³ Furthermore, he considered Mr Safi was willing to participate in the drug trade "for commercial and financial reasons".³⁴ In terms of the *Zhang* categorisation of role, the Judge considered Mr Safi was "at the upper end of lesser, and at the bottom of the significant band".³⁵

[36] The Judge then took into account parity in sentencing by reference to the starting points adopted for the co-offenders who had already been sentenced. He observed that:³⁶

- (a) Mr Esfehni-Bahadori's role was taken to be at the upper end of the lesser band, but there was no money laundering charge, and a starting point of 10 years' imprisonment had been taken for his offending;
- (b) the starting point for Mr Yousef was 12 years' imprisonment (which he described as "generous"), but he had 11.5 kilograms of

³⁰ *Safi*, above n 2, at [9].

³¹ At [9].

³² At [10].

³³ At [10] and [11].

³⁴ At [11].

³⁵ At [12].

³⁶ At [13].

methamphetamine with him, and that put him squarely in band five of *Zhang*; and

- (c) Ms Hayman was sentenced based on a six year starting point, although he accepted the Crown’s submission that that was “somewhat lenient”.

[37] The Judge settled on a starting point of 10 and a half years’ imprisonment.³⁷

[38] He then gave a 20 per cent discount for Mr Safi’s guilty plea, noting it was not offered at the first opportunity.³⁸

[39] The Judge doubted Mr Safi’s claimed remorse, noting his ongoing offending while on bail.³⁹ He held that Mr Safi was not remorseful to the extent that would warrant an additional discount over and above the discount for remorse inherent in his guilty plea.⁴⁰

[40] The Judge then referred to the s 27 report and observed: “In contrast to a great number of offenders who come before the Court, you had a good and stable family upbringing.”⁴¹ It was only when Mr Safi returned from a period living in Australia that “you managed to criminalise yourself and become involved with the Comancheros”.⁴² Despite references being supplied, the Judge did not accept Mr Safi was a person of good character, saying his previous history and his offending on bail contradicted that assertion.⁴³ He concluded:⁴⁴

I will not give you a discount for the matters raised in the cultural report simply because I am satisfied that there is no causal nexus to the offending. ... there was nothing in your background that suggests to me that your offending could be shown to be attached to it.

³⁷ At [14].

³⁸ At [15].

³⁹ At [17].

⁴⁰ At [17].

⁴¹ At [19].

⁴² At [20].

⁴³ At [21].

⁴⁴ At [22].

On the Judge's calculation, that brought the sentence for the initial methamphetamine offending and money laundering to eight years and four months' imprisonment.⁴⁵

[41] In respect of the subsequent offending, the Judge considered the possession of methamphetamine for supply should be placed towards the bottom of band two and then uplifted for the firearms offending.⁴⁶ He took a starting point of two years for the supply of methamphetamine and uplifted that by 18 months for the firearms offending.⁴⁷ He did not uplift for the separate driving offences, nor for previous convictions or the fact the offending occurred while on bail, citing the need to have regard to totality.⁴⁸ He then allowed a 25 per cent discount for guilty pleas on those charges, resulting in an end sentence of two years and eight months' imprisonment.⁴⁹ Added to the sentence for the first tranche of offending, that gave an end sentence of 11 years' imprisonment. He then stood back and considered the end sentence and concluded it reflected the totality of offending overall.⁵⁰

Was the starting point too high?

[42] Ms Taylor-Cyphers submits the quantity of methamphetamine involved (two kilograms) placed Mr Safi at the bottom of band five (potentially even between bands four and five), and there was no proper basis to uplift the starting point to 10 and a half years.

[43] Specifically, Ms Taylor-Cyphers argues that Mr Safi clearly was in a lesser role. In respect of the first transaction, she says Mr Safi and Mr Esfehane-Bahadori were essentially along for the ride, and their culpability arose from their mere presence while the transaction took place. She acknowledges that, in the second transaction, Mr Safi was carrying the bag which was said to contain at least one kilogram of methamphetamine, but he did so with Mr Safi and Mr Yousef, and there is no suggestion that his role was elevated in this transaction.

⁴⁵ At [23]; although noting that was generous as deducting the 20 per cent guilty plea discount resulted in a sentence of just under eight years five months.

⁴⁶ At [30] and [31].

⁴⁷ At [30] and [31].

⁴⁸ At [31].

⁴⁹ At [32]; although noting this rounded up slightly from the two year seven and a half month sentence which results from this discount.

⁵⁰ At [33].

[44] Given his limited role, Ms Taylor-Cyphers also argues that parity of sentence with co-offenders encourages a lower starting point, referring in particular to Mr Yousef's starting point of 12 years' imprisonment for being in possession of 11.5 kilograms of methamphetamine. She also points to the end sentence Mr Slaimankhel received which, after discounts, was only six years' imprisonment, almost half of what Mr Safi received.

[45] Finally, she submits that a global starting point on all offending, including the later offending, of ten years' imprisonment would be appropriate. While she acknowledges 10 years' imprisonment is at the very bottom of band five, Ms Taylor-Cyphers sees this as fairly reflecting the fact that, on the primary offending, she considers he should be placed in band four. A global starting point at the bottom of band five is therefore appropriate to reflect the further, less serious offences.

Discussion

[46] As discussed above in respect of Mr Esfehni-Bahadori's sentencing, the bands in *Zhang* are intended to accommodate the range of roles in most cases, although acknowledging that in certain circumstances, someone playing a lesser role could attract a starting point below the sentencing bands. However, the submissions for Mr Safi ignore the charge of attempted money laundering which clearly elevates his culpability and distinguishes his role from that of Mr Esfehni-Bahadori. It suggests Mr Safi had more direct knowledge of the enterprise that he was assisting and of the scale of the operation. As was said in *R v Wallace*:⁵¹

...those who launder money for drug dealers are nearly as culpable as those who actually participate in the dealing. They help the dealers avoid detection and in this way provide assistance in their activity. ... Sentences for money laundering should therefore bear a relationship to sentences for the particular principal offending and should be approached on a similar basis. The more serious the principal offending, the more serious the laundering.

[47] In our view, the money laundering charge supports the District Court Judge's view that Mr Safi's role was at the upper end of lesser. There was ample justification for selecting a starting point that was a little above the bottom of band five.

⁵¹ *R v Wallace* CA415/98, 16 December 1998 at 8–9.

[48] While we acknowledge Ms Taylor-Cyphers' submission that the subsequent methamphetamine dealing could have been reflected in the starting point adopted, we do not consider the Judge was wrong to deal with it separately, subject, of course, to considerations of totality which we address further on.

[49] The next issue is whether the starting point for the subsequent offending was too high. In that regard, the Judge adopted a starting point of two years' imprisonment for the separate methamphetamine offending and a further 18 months for the firearms offending.

[50] The respondent acknowledges this led to a combined starting point of 14 years' imprisonment, which counsel describes as "stern". We agree. Notwithstanding that the Judge did not uplift for Mr Safi's driving charges, or for the fact the offending occurred while he was on bail, we consider the effective starting point of 14 years' imprisonment was too high having regard to both totality and parity. Had the possession of the additional 27 grams of methamphetamine been included in the quantity used for setting which band Mr Safi fell in, it would have made minimal difference to the starting point. While the other offending was egregious, particularly the possession of the firearm and the fact it occurred while on bail, we cannot see, having regard to considerations of totality and parity, that it was more significant offending than, say, Mr Slaimankhel's offending which attracted a starting point of 13 years, or Mr Yousef's, which attracted a starting point of 12 years. In our view, an 18 month uplift to reach a 12 year starting point for the totality of the offending would have fairly reflected his relative culpability.

[51] Accordingly, the appeal is allowed and the sentence is to be calculated adopting a 12 year starting point for the totality of the offending.

Did Mr Safi receive sufficient credit for mitigating factors?

[52] Mr Safi seeks an additional 15 per cent discount for personal factors including addiction. Ms Taylor-Cyphers submits that both Mr Yousef and Mr Esfehni-Bahadori were afforded a 15 per cent discount for s 27 factors, and Mr Safi should receive at least the same discount given the evidence in the s 27 report of his drug and gambling addictions. Ms Taylor-Cyphers argues that, although the addiction is self-reported,

there is a sufficient basis for holding that addiction was a cause of his offending. She also points to other factors in the cultural report including the distance from his parent's place of birth, Afghanistan, his periods of homelessness, and the questions raised over his mental health. In combination, she submits these factors warrant a discount of 15 per cent.

Discussion

[53] We accept the respondent's submissions that there are difficulties in placing weight on the self-reported addictions in this particular case given the inconsistencies in what Mr Safi has told the s 27 report writer and pre-sentence report writer with regard to drug use and criminal affiliations.

[54] In the s 27 report, Mr Safi appears to have had a relatively stable background, being brought up by a stay-at-home mother and working father. Mr Safi was encouraged to pursue an education and, while his father was not an affectionate man, Mr Safi said his relationship with him was "manly and rock solid". Mr Safi was bright and commenced tertiary education at Unitec, but then dropped out. However, he was then able to run a business trading cars and car parts.

[55] In terms of addiction, Mr Safi explains he does not consume alcohol but has a history of using illicit drugs, particularly when he was involved in the clubbing scene in Melbourne. However, it appears he has been able to stop taking drugs since meeting his wife in November 2021, without any difficulty. He also explains that he became involved in offending because "he did not want to be perceived as using [his peers] to access drugs".

[56] The report clearly identifies use of drugs, but the description of Mr Safi having a drug addiction appears to be the assessment of the report writer and largely relates to his time in Melbourne. There is no clear evidence that drug addiction prompted the offending for which he was charged, and his ready ability to stop using drugs in 2021 speaks against an addiction. Similarly, there is nothing to suggest his gambling drove his offending.

[57] The evidence of any mental health issues is also lacking. The s 27 report writer confirms he has not been diagnosed with any psychiatric disorders but “may” have had ADHD when he was a child. This is insufficient evidence to suggest there is a mental health issue which is connected with his offending. Similarly, his period of homelessness was explained as a “choice”, with him choosing a “transient lifestyle, living in motels and friends’ houses until he found a place for himself.” Again, there is no connection identified between this and his offending. For these reasons we are not satisfied the Judge was wrong when he concluded there was no causal connection between Mr Safi’s background and his offending.

[58] Standing back, applying a 20 per cent guilty plea discount to the 10 years and six month starting point, a sentence of eight years five months is reached. Applying the 25 per cent discount to the 18 month uplift, a sentence of 13 months and two weeks’ imprisonment is reached. Totalling those, and rounding down, results in an end sentence of nine years and six months’ imprisonment.

Result

[59] The appeal is allowed. The sentence of 11 years’ imprisonment is quashed. In its place, a sentence of nine years and six months’ imprisonment is imposed.

Solicitors:
Crown Solicitor, Auckland for Respondent