IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA88/2022
[2022] NZCA 556

BETWEEN	MARK TUMU GLASSIE Appellant
AND	THE KING Respondent

CA201/2022

BETWEEN	JAMES PATRICK DUFF Appellant
AND	THE KING Respondent

Hearing:	28 September 2022
Court:	Miller, Brewer and Moore JJ
Counsel:	M J Taylor-Cyphers and G D Burns for Appellant (CA88/2022) S L McColgan for Appellant (CA201/2022) A L McConachy for Respondent
Judgment:	16 November 2022 at 2.00 pm

JUDGMENT OF THE COURT

A The appeal in CA201/2022 is allowed.

B The sentence of 15 years' imprisonment is quashed and substituted with a sentence of 14 years, two months' imprisonment.

C The appeal in CA88/2022 is allowed.

D The sentence of seven years' imprisonment is quashed and substituted with a sentence of six years, two months' imprisonment.

REASONS OF THE COURT

(Given by Miller J)

[1] These appeals are brought against the sentences imposed on James Duff and Mark Glassie for their roles in a substantial drug dealing operation. They were respectively the President and Vice President of the Central Chapter of the Rebels Outlaw Motorcycle Gang at the time. Mr Duff was sentenced to 15 years' imprisonment,[1] and Mr Glassie to seven years.[2]

The offending

[2] Operation Ulysses was an investigation into the supply of methamphetamine by the gang in the Bay of Plenty region. It ran from 3 July to 4 October 2019. The operation led to 100 charges being laid against 12 defendants.

[3] The drug dealing charges against the two appellants related to methamphetamine, cannabis, LSD and MDMA. A second group of charges involved crimes against the administration of justice, and a third involved crimes of violence or, in Mr Duff's case, unlawful possession of a pistol and conspiracy to access a computer system.

[4] The two appellants were sentenced separately by Judge Hollister-Jones, Mr Duff on 24 March 2022 and Mr Glassie on 11 February 2022, but the summaries of fact which they accepted were relevantly identical. We deal with the two appeals in parallel for that reason and because the Judge's methodology and elements of his sentence calculations are in issue in both appeals for similar reasons.

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1 *R v Duff* [2022] NZDC 5098 [Sentencing notes of Mr Duff].
2 *R v Glassie* [2022] NZDC 2232 [Sentencing notes of Mr Glassie].

The appellants' roles

Mr Duff

[5] The quantity of drugs dealt could not be known, but it was common ground at sentencing that Mr Duff was involved in supplying approximately three kilograms of methamphetamine and 22 pounds of cannabis.[3]

[6] It was also common ground that he had a leading role in the business. Judge Hollister-Jones considered his role to be essentially that of a "working CEO of a medium-sized methamphetamine and other drug distribution business".[4] The Judge accepted that as President, Mr Duff established and maintained the commercial purpose of the operation, negotiated the purchase of bulk quantities of methamphetamine, and established supply networks. He was also involved in personally supplying his distributors with methamphetamine in ounce amounts, and he led the enforcement side of the operation.[5]

[7] With respect to the cannabis offending, Mr Duff was involved in the supply of 22 pounds in Auckland in July 2019 and involved in arranging a major outdoor growing operation. On termination he was found to be in possession of 838 grams of cannabis.

[8] An aggravating feature of the offending was a manhunt that Mr Duff arranged to track down a defaulting debtor, a Mr King, who had purchased one kilogram of methamphetamine from him but failed to pay. He directed the debtor's capture and engaged in a conspiracy to bring about a false arrest by having an associate lay a complaint with the police. On another occasion he developed a plan for a non-patched gang member to take responsibility for a drug deal that had gone wrong. He was also found to be in possession of a pistol.

[9] Mr Duff faced the following charges:[6]

Methamphetamine Charges

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3 Sentencing notes of Mr Duff, above n 1, at [17]–[18].
4 At [58].
5 At [56].
6 We take this summary from the Crown submissions on appeal.

a. Charge 1 - participation in an organised criminal group (drugs);

b. Charges 6, 24, 26, 27, 28, 30, 37, 47, 51 - supplying methamphetamine;

c. Charges 34, 50 – possession of methamphetamine for supply;

d. Charge 59 – offer to supply methamphetamine;

e. Charges 32, 54 – conspiracy to supply methamphetamine;

Cannabis charges

f. Charges 15, 61 – possession of cannabis for supply;

g. Charge 25 – cultivating cannabis;

h. Charge 36 – supplied cannabis;

i. Charge 56 – conspiracy to cultivate cannabis;

LSD / MDMA charges

j. Charges 35, 38, 49, 58 – supplied LSD;

k. Charge 40 – supplied MDMA;

l. Charge 41 – conspiracy to supply MDMA;

Crimes against the administration of justice

m. Charge 12 – conspiracy to bring a false accusation;

n. Charge 20 – conspiracy to pervert the course of justice;

Violence

o. Charge 7 - participation in an organised criminal group (violence);

Firearms

p. Charge 46 – unlawful possession of a pistol;

Fraud

q. Charge 39 – conspiracy to access computer system;

Mr Glassie

[10] As Vice-President Mr Glassie was delegated the role of coordinating logistics and maintaining order within the chapter. The amount of methamphetamine that could

be directly attributed to him was only 10 grams.[7] The exact amount could not be known due to the use of coded messaging.[8] He took the 22 pounds of cannabis to Auckland for sale in July 2019, was also found in possession of 8.265 kilograms of cannabis, supplied at least 93 tabs of LSD, and offered to supply at least 28 grams of MDMA.

[11] Mr Glassie also initiated the drug deal with Mr King and became responsible for the manhunt, including driving to other regions searching for Mr King and targeting people close to him. He was responsible for formulating a plan to flush Mr King out by persuading an associate to make a complaint of theft to the police. The associate was compensated in drugs or money for making the false complaint. Mr Glassie told his wife that he would kill Mr King when he found him.

[12] Mr Glassie faced the following charges:[9]

Methamphetamine charges

a. Charge 2 - participation in an organised criminal group (drugs);

b. Charge[s] 63, 65, 66 - supplying methamphetamine;

c. Charge 64 – offer to supply methamphetamine;

Cannabis charges

d. Charge 16 – possession of cannabis for supply;

LSD / MDMA charges

e. Charge 67 – offer to supply LSD;

f. Charge 69 – supply LSD;

g. Charge[s] 62, 68 – offer to supply MDMA;

Crimes against the administration of justice

h. Charge 13 – conspiracy to bring a false accusation;

i. Charge 21 – conspiracy to pervert the course of justice;

Violence

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7 Sentencing notes of Mr Glassie, above n 2, at [15].
8 At [15].
9 We also take this summary from the Crown submissions on appeal.

j. Charge 8 - participation in an organised criminal group (violence).

The sentence calculations

Mr Duff

[13] The Judge took the methamphetamine offending to be the lead offences and adopted a starting point of 17 years, reasoning that the offending was similar to that upheld in *Paora v R*.[10]

[14] The Judge accepted that the cannabis offending would justify a standalone starting point of five to six years' imprisonment.[11] Having regard to totality he uplifted the starting point by two years, noting that Mr Duff's offending was more extensive than that of Mr Glassie who had been given the same uplift.[12] The administration of justice charges would justify a starting point of four to five years; the Judge added an uplift of two years.[13] There was a further uplift of six months each for possession of the loaded pistol and the LSD/MDMA offending.[14] There was no uplift for the fraud offending or Mr Duff's history.[15] The overall starting point was 22 years' imprisonment.[16]

[15] Discounts were provided for the guilty plea (15 per cent),[17] remorse (five per cent),[18] addiction in respect of recreational use of MDMA only (two months),[19] background and cultural factors (five per cent),[20] and rehabilitation (five per cent).[21] The total discounts were 30 per cent and a further two months. The end sentence of 15 years and three months was rounded down to 15 years.[22] No MPIwas imposed.

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10 Sentencing notes of Mr Duff, above n 1, at [54]–[60], referring to *Paora v R* [2021] NZCA 559.
11 At [62], referring to *R v Terewi* [1999] 3 NZLR 62 (CA).
12 At [62].
13 At [68].
14 At [63] and [69].
15 At [70] and [72].
16 At [71].
17 At [74].
18 At [75].
19 At [79].
20 At [83].
21 At [84]
22 At [85].

[16] With respect to the guilty plea discount, the Judge stated that the first unequivocal indication from defence counsel to the Crown that Mr Duff would plead guilty was given in July 2021 and the pleas were entered in August, three months before trial. He accepted that counsel had been required to review voluminous disclosure in a complex case and recognised that the plea did save costs of trial, but the pleas were entered 22 months after charge and so he thought the maximum discount available was 15 per cent.[23]

[17] The Judge rejected a submission that a greater discount ought to be provided for methamphetamine addiction. The Crown opposed a discount, pointing out that the alleged addiction was based on self-report and there was evidence Mr Duff had said he did not smoke methamphetamine and had not used it for seven years. He observed that the writer of the s 27 report, Shelley Turner, had diagnosed methamphetamine addiction but was not qualified to do so and was not in a position to offer an opinion that a methamphetamine addiction lay at the heart of this commercially-driven offending. Her opinion to that effect bordered on advocacy. He was prepared only to accept that Mr Duff made regular recreational use of MDMA.[24]

[18] The Judge accepted that the s 27 report detailed Mr Duff's early emotional and socio-economic deprivation, which resulted in disconnection from the education system, entry into State care in his early teens and early entry into the criminal justice system.[25] However, the Court had little information about the last 20 to 30 years of Mr Duff's life. He is in a long-standing stable relationship and is the father of three boys, he had stopped offending in his late 30s, and he appears to have joined the gang at around 40 years of age. It was difficult to see a connection between his undoubtedly very difficult childhood and this offending. The Judge accepted that the connection between early deprivation and later offending need not be close, but Mr Duff's early childhood appeared to have been stable.[26] The discount was given because of Mr Duff's disconnection from te ao Māori, lack of a positive cultural framework, and a very difficult childhood through into his teenage years.[27]

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23 At [73]–[74].
24 At [78]–[79].
25 At [80].
26 At [81]–[82].
27 At [83].

[19] With respect to rehabilitation, the Judge was satisfied that Mr Duff had done all he could to access rehabilitation. Numerous certificates had been provided. He accepted that Mr Duff was genuinely motivated to change and acknowledged that the sentence would have a harsh impact on his teenage sons.[28]

Mr Glassie

[20] The Judge divided the sentencing into two groups: first, the drug charges together with that of participating in an organised criminal group for the purpose of drug dealing; and second, the crimes against justice.[29] In relation to the methamphetamine charges, which he treated collectively as the lead offence, he adopted a starting point of five and a half years' imprisonment.[30] He accepted the quantity of methamphetamine was modest and there was an absence of physical items indicating commerciality, but Mr Glassie was a senior manager of the operation and a wholesaler, and he supplied a gang member operating at a retail level.[31] He noted Mr Glassie's involvement in the transaction with Mr King, his role in the plan to sell 22 pounds of cannabis in Auckland, and his lead role in the "damage control" side of the business.[32] Responding to a submission that there was no evidence of financial gain, he observed that Mr Glassie had owned a Harley Davidson motorcycle.[33] Overall, Mr Glassie's role increased his starting point, which would otherwise be around three years, by placing him in the mid-to-upper range of band two in *Zhang v R*.[34]

[21] The uplift for possession of cannabis for supply was two years, the Judge noting that it was the most graphic example of Mr Glassie's direct involvement in the supply of illegal drugs for the gang. It was a planned operation involving significant logistics, it involved others and it required considerable determination. On a standalone basis it would attract a starting point of four to five years' imprisonment.[35] For the other drug charges, which involved direct supply to customers, the quantities

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28 At [84].
29 Sentencing notes of Mr Glassie, above n 2, at [32].
30 At [37].
31 At [33].
32 At [34].
33 At [35].
34 At [36], referring to *Zhang v R* [2019] NZCA 507, [2019] 3 NZLR 648.
35 At [38], referring to *R v Terewi*, above n 11.

were reasonably significant but the uplift was limited to six months' imprisonment.[36] So the total starting point for the drugs and organised criminal gang charges was eight years' imprisonment.

[22] Turning to the administration of justice charges, the Judge noted that the attempt to locate and kidnap Mr King was a serious operation and the attempt to have an underling take responsibility for a patched member's offence were also serious. A deterrent sentence was required. On a standalone basis these charges would warrant four to five years as a starting point. The uplift was two years, resulting in an overall starting point of 10 years' imprisonment.[37]

[23] There were no personal aggravating factors,[38] although the Judge had earlier noted that Mr Glassie held legitimate employment as a youth worker and caregiver for a trust working with at-risk youth, and he had taken one of these young persons on a drug trip to Auckland.[39]

[24] The discounts given totalled 30 per cent, comprising seven and a half per cent for the guilty pleas, which were entered on the Thursday prior to trial;[40] five per cent for remorse;[41] seven and a half per cent for Mr Glassie's connection with illegal drugs over many years;[42] and 10 per cent for efforts to rehabilitate and prospects of rehabilitation.[43]

[25] No specific discount was given for cultural and socio-economic deprivation. The Judge noted Mr Glassie was aged 43 when he got involved in this very serious drug offending. He had not been before the courts for 13 years and he was a family man holding a responsible job that involved setting an example. It was not a case of offending by an impressionable young person who had a terrible background. His life

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36 At [39].
37 At [42]–[43].
38 At [44].
39 At [4] and [8].
40 At [46].
41 At [47].
42 At [52].
43 At [54].

otherwise did not point to impaired decision-making; he is a martial arts coach and a trusted youth mentor.[44]

[26] Nor was the Judge prepared to give a separate discount for addiction. The only evidence of it came from Ms Turner, who did not appear to be qualified to make the diagnosis, and the offending was commercially driven. To the extent that Mr Glassie had a background of drug issues, that was reflected in the discount of seven and a half per cent.[45]

[27] However, the Judge did note that Mr Glassie had undertaken a recovery programme and was reported to have excellent prospects of rehabilitation, hence the discount of 10 per cent.[46] He declined a discount for time spent on EM bail, reasoning that it had given Mr Glassie the opportunity to participate in rehabilitation for which he had been given credit.[47]

The appeals

[28] Both appellants challenged the starting points adopted by the Judge and his approach to uplifts, contending that the overall starting points sought should have been lower. For Mr Duff, Mr McColgan, who appeared for him at sentencing, submitted that an overall starting point of 20 years was appropriate. For Mr Glassie, Ms Taylor-Cyphers, who was briefed on appeal, submitted that the Judge's approach to starting points was unorthodox and the starting point for the lead methamphetamine offending ought to have been much lower. She submitted that a global starting point of about six years' imprisonment was appropriate.

[29] Both also challenged some of the discounts. Mr McColgan took issue with the guilty plea discount, contending that it ought to have been 20 per cent, and submitted that a greater discount ought to have been given for addiction, cultural issues and rehabilitation. Ms Taylor-Cyphers sought a discount of 15 per cent for personal factors, including hardship and addiction, and she submitted that a discount of

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44 At [51]–[52].
45 At [50] and [53].
46 At [54].
47 At [55].

15 per cent ought to have been given for rehabilitative efforts having regard to the discounts given to co-offenders who had made similarly commendable efforts. Finally, she submitted that an allowance ought to have been made for time spent on EM bail; the Judge was wrong to deny such a discount on the ground that Mr Glassie had made use of EM bail to engage in rehabilitation.

Starting points for the lead offending

[30] The parties agree that it was appropriate to take the methamphetamine offending as the lead offending.

[31] Mr McColgan argued that the Judge's methodology artificially inflated the starting point for the totality of the offending. It was overly mechanistic and led to a failure to assess the offending as a whole. He accepted that Mr Duff was at the apex of the operation and many of the leading role indicia were satisfied. But it was a relatively modest criminal enterprise geared towards the sale of methamphetamine, with the vast majority of the other offending being a by-product of that primary offending. The operation itself was relatively pedestrian; it involved diversionary tactics, coded language and multiple phones but lacked real sophistication. For the methamphetamine offending alone the appropriate starting point was 16 years' imprisonment.

[32] Ms Taylor-Cyphers emphasised that the quantity of methamphetamine involved in Mr Glassie's case was only 10 grams and submitted that too much weight was placed on his role. The Judge was wrong to rely on the transaction involving Mr King: Mr Glassie was not charged with supplying methamphetamine to him and there was a risk of double-counting since that charge attracted an uplift. She accepted that Mr Glassie had a lead role in the cannabis offending but that was not evidence of his role in the methamphetamine offending. Mr Glassie's debt collection responsibilities related to his role within the organised criminal group and were not an aggravating feature of the methamphetamine offending. The absence of physical items which might indicate commerciality suggested Mr Glassie was not a significant commercial player. A starting point of no more than three years was warranted for the methamphetamine offending.

[33] We accept that Mr Duff did not operate at a higher functional market level than his co-offenders. He was not an importer or wholesaler. Rather, he led a mid-level distribution operation. But having regard to the quantity and his leading role in the operation, we do not accept the Judge was wrong to begin with a starting point of 17 years' imprisonment. His offending is comparable to that in *Paora*, in which this Court also emphasised that role is an important consideration.[48]

[34] Nor do we accept that the starting point for the methamphetamine and organised criminal group offending was too high in Mr Glassie's case. Role matters a great deal. It may sometimes result in a starting point matching or exceeding that of subordinates who physically handled substantially larger quantities of methamphetamine.[49] We do not accept that the Judge was wrong to rely on the transaction involving Mr King when setting the starting point; he did not suggest that Mr Glassie supplied the methamphetamine, rather that the transaction evidenced Mr Glassie's central role in the gang's drug business. He was right about that. And in this case Mr Glassie undoubtedly did handle larger quantities; he is not to be sentenced on the basis that 10 grams is the full measure of his culpability. We do not accept the Judge was wrong to adopt a starting point for this group of charges of five and a half years' imprisonment.

Uplifts

Mr Duff

[35] Mr McColgan accepted that an uplift for the remaining offending was appropriate, but he argued that it should have been a bulk uplift rather than a discrete one for each group of offending. The result was that Mr Duff's offending was treated as effectively equivalent to that of, for example, Mr Yip, who had a leading role in the importation of 60.9 kilograms of methamphetamine.[50]

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48 *Paora v R*, above n 10, at [29].
49 *Zhang v R*, above n 34, at [110].
50 At [300], setting a starting point of 23 years' imprisonment.

Mr Glassie

[36] Ms Taylor-Cyphers acknowledged that the balance of the offending required an uplift but submitted that the uplift given was effectively 100 per cent of the starting point on the methamphetamine charges. She submitted that the Judge's approach offended the totality principle. The uplift for the cannabis offending ought to be lower than that of Mr Duff.

Discussion

[37] We do not accept that the Judge erred by adopting the approach that he did to uplifts. It was orthodox to divide offending having different features into several groups and consider the starting point that each group would attract standing alone, then apply a discount for totality.

[38] Nor was the Judge wrong to adjust for totality when calculating each of the uplifts. His approach made his reasoning transparent; he first assessed the starting point for each group of offending then discounted it for totality. We do not accept that something has gone wrong when, in Mr Glassie's case, uplifts collectively come close to matching the starting point for the lead offending. That is a product of the features of his particular offending.

[39] The relevant question is whether the overall allowance for totality was sufficient having regard to the fact that all this offending occurred within an organised criminal group and as part of its business dealings over a period of some months.

[40] The Judge did not record that he had stood back and considered whether the overall starting point was correct, but there is no reason to think he overlooked the need to do so. Each of the totality allowances was substantial, and in the end we are not persuaded that the overall starting points were excessive for either appellant. The cannabis offending was on a substantial scale and highly organised. We see nothing significant in the adoption of the same uplift for the two appellants; both played a leading role and totality was considered.

[41] Importantly, it would have been appropriate to impose cumulative sentences for the offences striking at the administration of justice (and, in Mr Duff's case, possession of the pistol). Offending of this kind is not to be regarded as a mere incident of commercial drug dealing. And deterrent sentences are appropriate where a real attempt is made to pervert the course of justice in a serious way, as happened in this case. The offending was brazen and calculated. The attempt to locate Mr King could have ended very badly for him. In our view the mere two-year adjustment that the Judge made for totality was, if anything, generous.

Discounts

Mr Duff

[42] As noted, the discounts given summed to 30 per cent plus two months.

(a) The guilty plea discount

[43] Mr McColgan submitted that the discount of 15 per cent was too low, relying on the need to review a very large amount of discovery and an intimation to the Crown that Mr Duff intended to plead guilty. He submitted that 20 per cent ought to have been allowed. He contended that the authorities are unclear on the relationship between disclosure and the guilty plea discount, referring to the judgments of this Court and the Supreme Court in *Hessell v R*.[51]

[44] It is true that the authorities do not say that a full guilty plea discount is available until disclosure has been completed. But the applicable principles are not unclear. Sizing the guilty plea discount is an evaluative decision.[52] The timing of the plea, relative to charge and trial, is not the only consideration.[53] As this Court explained in *Moses v R*, the discount should be fixed by reference to the established rationales, which take the form of benefits to the judicial system and participants in it:[54]

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51 *Hessell v R* [2009] NZCA 450, [2010] 2 NZLR 298 [*Hessell (CA)*]; and *Hessell v R* [2010] NZSC 135, [2011] 1 NZLR 607 [*Hessell (SC)*].

52 *Hessell (SC)*, above n 50, at [65].

53 At [70]; and *Moses v R* [2020] NZCA 296, [2020] 3 NZLR 583 at [19].

54 *Moses v R*, above n 52, at [23] (footnote omitted). We note that atonement to the victim may also contribute to the discount.

> … the relevant circumstances of the case must be those that engage any applicable rationales for the discount. The rationales established by the Supreme Court [in *Hessell*] suggest that, among other things, the scale and complexity of the trial, the proximity of the plea to first appearance or to trial, the justification for any delay, the inevitability or otherwise of conviction, the benefits of not giving evidence for victims and witnesses, and the victim's experience of atonement following the offender's acceptance of responsibility may affect the amount of the discount, which may range from 25 per cent to nothing.

The Court went on to note that an early guilty plea may be the best evidence of remorse, for which an additional discount may be available.[55]

[45] A plea should be considered early if given after initial disclosure and legal advice, which normally happens by the time of the second appearance in the District Court.[56] At that stage the defendant may have had the opportunity to take advice on the implications of the plea.[57]

[46] As this Court held in *Hessell*, a defendant is thereafter entitled to await completion of disclosure and to undertake pre-trial challenges to the defence case.[58] But that may entail loss of some of the advantages of an early plea for the State and participants in the trial. In such a case the defendant need not be given full credit for the plea.[59] However, the sentencing judge may accept that it would be unrealistic to expect pleas on the basis of initial disclosure, so that a plea entered at some later date is still considered early.[60] Each case must be assessed on its own merits.

[47] In this case, the insuperable difficulty confronting Mr Duff is that disclosure was substantially complete in March 2020. His pleas were not entered until more than a year later, 22 months after he was charged. Other defendants pleaded guilty much sooner. The Crown case was also very strong. It rested in substantial part on intercepted communications in which the defendants spoke freely.

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55 At [25].
56 *Hessell (CA)*, above n 50, at [29]; and *Hessell (SC)*, above n 50, at [75].
57 *Hessell (SC)*, above n 50, at [75].
58 *Hessell (CA)*, above n 50, at [32].
59 At [32].
60 See *Hessell (SC)*, above n 50, at [68].

[48] So far as the intimation is concerned, counsel agreed before us that Mr McColgan emailed Crown counsel on 7 February 2021 advising that Mr Duff had provided instructions not to take his matters to trial, but that counsel sought until April 2021 to be able to properly advise him. Mr McColgan explained that he did not meet his own deadline because of the volume of disclosure, and in June Crown counsel emailed to advise the Crown was preparing its case in the expectation that the trial would proceed. No response was received until 15 July, when Mr McColgan advised that Mr Duff would plead guilty.

[49] We accept the submissions of Ms McConachy, for the Crown, that something more than the intimation given on 7 February was needed to stop time running for the purposes of the guilty plea discount. As the Court reiterated in *Paora*, it remains best practice to advise the Crown and the Court in writing of what the defendant is willing to plead to, and when.[61] The Crown Solicitor had to prepare for a complex trial. She might well have earned a rebuke from the trial court had she sought a late adjournment on the ground that she had earlier pulled up stumps, relying on an intimation that was conditional on defence counsel reviewing disclosure.

[50] For these reasons we are not persuaded that the discount given was inadequate.

(b) Addiction

[51] Mr McColgan submitted that there was sufficient evidence of a methamphetamine addiction and the Judge was wrong to discount it on the ground that it was founded on Mr Duff's self-report to the writer of the s 27 report. He argued that addiction is frequently self-reported.

[52] Following *Zhang*, addiction may mitigate sentence in two relevant respects. It may reduce moral culpability and, because addiction can be treated, it may point to potential for rehabilitation. To mitigate culpability in a material way it must have a causal connection to the offending.[62] That connection is likely to be absent where the

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61 *Paora v R*, above n 10, at [36].
62 *Zhang v R*, above n 34, at [145], [147] and [150].

offending is commercial in nature.[63] Any such discount should be based on persuasive evidence, as opposed to mere self-reporting.[64]

[53] Courts and prosecutors frequently take a pragmatic approach to proof of addiction. They may choose to rely on what the defendant has said. Although it is a stand-alone mitigating factor, it is often associated with cultural, economic or social deprivation. For that reason the defendant's claim is sometimes recounted by the writer of a s 27 report.

[54] But as *Zhang* makes clear, courts and prosecutors need not accept self-report, especially where there is nothing in the PAC report to support it and no independent evidence to support the defendant's claims.[65] Evidence may be found in the defendant's family, educational, employment or health background, including past rehabilitation efforts, and criminal history.

[55] In modern practice addiction can earn discounts of a substantial size.[66] For that reason disputes can be expected. As with any other mitigating fact, addiction must be proved under s 24 of the Sentencing Act 2002 if the prosecutor does not accept it. The procedure is that the Court will indicate the weight that it is likely to attach to the disputed fact and a sentencing hearing may then be convened. The standard of proof is the balance of probabilities.

[56] In this case submissions were exchanged very shortly before the sentencing hearing. When the Crown learned that Mr Duff claimed an addiction to methamphetamine, it supplied the Court with transcripts of intercepted communications in which he said he had not used the drug for seven years and never smoked it and spoke disparagingly of those who do. No disputed facts hearing was called for. Rather, the Judge was left to make of it what he could. We were not asked on appeal to remit the case to him for a disputed facts hearing.

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63 At [147].
64 At [148].
65 At [148].
66 At [149].

[57] We are not persuaded that the Judge was wrong to reject the claim that Mr Duff has a methamphetamine addiction, let alone that it had a causal connection to his commercial dealing in that drug. It was made both to the writer of the PAC report and to Ms Turner, but it rested on self-report. We observe that Mr Duff chose not to offer the writer of the PAC report contact details for anyone who might verify his account. He ought to have done so if he wanted to have it taken seriously.

[58] As noted earlier, Ms Turner also offered an opinion to the effect that addiction accounted for Mr Duff's behaviour. Had her opinion been given in evidence, she would have to qualify herself as an expert — which we are prepared to assume she may be able to do, by training or practising experience in her field — and undertake to abide by the Code of Conduct for Expert Witnesses. Of course she did not prepare the s 27 report in the expectation that she would be called at a disputed facts hearing. It did not take the form of an expert's brief of evidence and she advocated strongly for Mr Duff. Advocacy is permissible, even welcome, under s 27, which allows a court to hear a person called by the offender to speak on their background and its consequences, but it is not permitted in expert evidence. The Judge remarked on her failure to qualify herself and the element of advocacy because he was looking from an evidential perspective at what had become a disputed fact.[67] It was a fair point; her opinion was in dispute and he had to decide what to make of it. We are not persuaded that he was wrong to discount it.

[59] Nor was the Judge wrong to discount counsel's submission that Mr Duff was lying in the intercepted communications because gang culture prohibits use of methamphetamine. There was no evidence of that. There was evidence that Mr Duff regularly used MDMA, and the Judge gave a suitably modest discount for it. It appears that to the extent the discount for rehabilitation reflected Mr Duff's participation in drug treatment, the Judge was responding to his use of MDMA.

(c) Deprivation

[60] The Judge reviewed the s 27 report, accepting that it detailed early emotional and socio-economic deprivation and disconnection from te ao Māori. The question

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[67] Sentencing notes of Mr Duff, above n 1, at [78].

was whether Mr Duff's background had a causal connection to the offending. The Judge accepted that the connection between deprivation in an offender's early years and their later offending need not be close. But he had little information about the last 20 to 30 years of Mr Duff's life, and the material he had suggested Mr Duff had made good; he was a hard worker who was in a long-term stable relationship, he had three sons, the family earned a good income, he had stopped offending in his late 30s and he did not join the gang until around 40 years of age.[68]

[61] Mr Duff unquestionably had a hard upbringing. His history includes many markers of deprivation. He was one of nine children raised by his mother, who was 15 when he was born. His grandfather, a man who used harsh physical discipline, was the only father figure in his life. There is some inconsistency in the accounts he gave in the s 27 and PAC reports but it appears that at the age of 10 he went to live with his grandparents in Palmerston North. His education was transient and inconsistent. He was disconnected from his culture and te ao Māori. At the age of 13 he was placed in State care at Kohitere, followed by a period at Epuni Boys' Home. Those facts speak for themselves. He then spent a period in Australia before returning to live with his grandparents in Tūrangi. From them he acquired a strong work ethic. He accounted for his offending by saying he wanted to be able to give his family "nice stuff", so proving himself a winner. He says that he is no longer a member of the Rebels, who closed the chapter and threw him out after his arrest.

[62] The discount of five per cent was modest given Mr Duff's deprived youth. This was commercial offending motivated on his own account by a desire for nice things, but that does not rule out a causal connection. The Judge described Mr Duff's childhood household as stable, which is not our reading of the s 27 and PAC reports.[69] It may be that, as the s 27 report suggests, Mr Duff never ceased to behave in antisocial ways that are ultimately attributable to his severely deprived background. However, on the material before the Judge, Mr Duff had overcome his disadvantages to a considerable extent by the time he joined the gang in his 40s, and as we have said this was commercial offending which was not driven by poverty. For these reasons we are not persuaded that the Judge was wrong to limit the discount to five per cent.

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68 At [80]–[82].
69 At [82].

(d) Rehabilitation

[63] Mr McColgan pointed out that the Judge accepted Mr Duff had done everything possible to access help in prison and had exhausted virtually all rehabilitative options available to him.[70] When coupled with his genuine motivation to change, this justified a discount of more than five per cent. We accept that genuine rehabilitative efforts should receive tangible recognition, especially where they have real prospects of success as in this case.

(e) Overall assessment

[64] Were we sentencing Mr Duff we would have allowed more for his demonstrated rehabilitative efforts and potential. He could scarcely have done more to demonstrate it. This Court has often made clear that rehabilitative efforts and potential may justify significant discounts. In this case his co-offender, Mr Glassie, received 10 per cent for similarly disciplined efforts.

[65] The appellate question is not whether the allowance for a given mitigating factor was inadequate. It is whether the end sentence was manifestly excessive. The effective sentence imposed on Mr Duff was stern, deservedly so. But that does not preclude real credit for genuine and apparently successful rehabilitation. We think his efforts deserve more credit than they received here. We would increase the discount to 10 per cent, recognising that he also received five per cent for remorse. The resulting adjustment, of a little over one year, is sufficient to justify appellate intervention. The sentence must be adjusted accordingly.

Mr Glassie

[66] The overall discounts for Mr Glassie also summed to 30 per cent. The guilty plea discount of seven and a half per cent was not challenged. We mention it because in our view it was generous. A plea entered so close to trial and in the face of a very strong Crown case could have been limited to five per cent.

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[70] At [84].

(a) Addiction and cultural deprivation

[67] Ms Taylor-Cyphers dealt with these together, asking for a discount of 15 per cent. As noted above, the Judge did not accept that Mr Glassie had shown he was an addict — there was not "persuasive evidence of a clinical diagnosis of addiction"[71] — or that any addiction was causal, but the Judge did allow seven and a half per cent for Mr Glassie's "connection with illegal drugs over many years".[72] And the Judge was not prepared to allow a discount for cultural deprivation.[73]

[68] No attempt was made to invoke s 24 of the Sentencing Act to prove addiction, the Judge being left to make the best of it. For the reasons we have already given when addressing Mr Duff's appeal, the Judge need not accept the opinion of the writer of the s 27 report, Ms Turner, that methamphetamine addiction had been Mr Glassie's undoing. That opinion took his self-report at face value. However, Mr Glassie's criminal history is consistent with use of methamphetamine. The PAC report confirmed that he was also engaged in or had completed drug rehabilitation programmes. An allowance for addiction was appropriate. Mr Glassie's difficulty is that he cannot say on the material before us that the Judge was wrong to limit it to seven and a half per cent.

[69] Mr Glassie is of Cook Island heritage but has little connection with his culture. He was raised in Tokoroa, in a devout Mormon household which broke down when his mother left and moved to Australia when he was aged 11. His father is reported to have been an alcoholic and a gambler who was emotionally absent. After his mother's departure Mr Glassie was left to his own devices to some extent, but he remained at school through the 7th Form and appears to have been successful in sports. He subsequently gained employment in the timber industry and claims he moved jobs regularly to avoid drug testing. He later moved into sports teaching (mixed martial arts), then into social work. He became a successful youth mentor and life coach, eventually working in a secondary school and then as a youth worker. He and his partner of 14 years parent four children and he appears to retain strong family support. He grew up in poverty, but it does not appear his family was impoverished

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71 Sentencing notes of Mr Glassie, above n 2, at [53].
72 At [52].
73 At [52].

when he became involved in this offending. He joined the Rebels at the age of about 38 and attributes this to his need for drugs.

[70] Mr Glassie's background certainly includes family dysfunction and exposure to alcohol abuse. There appears to be an element of cultural dislocation. But it cannot be said that he is an under-achiever, nor does it appear that he was exposed to violence at home. As an adult he appears to have made a success of his life, forming a stable relationship and achieving success as a coach and youth worker. We are not persuaded that the Judge was wrong to point to the absence of a causal connection between deprivation and this offending.

(b) Rehabilitation

[71] Ms Taylor-Cyphers urged us to adopt a discount of 15 per cent rather than the 10 per cent chosen by the Judge.

[72] The PAC report and the s 27 report agree that Mr Glassie exhibits insight and is committed to rehabilitation. As we have noted, he has undertaken drug rehabilitation programmes. He offered impressive references from CareNZ, attesting to the quality of his participation. As noted, he was also given a discount of five per cent for remorse. We are not persuaded that the Judge was wrong to fix the discount at 10 per cent.

(c) EM bail

[73] It is common ground that the Judge was wrong to decline an allowance for time on EM bail on the basis that it allowed Mr Glassie to access rehabilitation, so earning a separate discount. We agree. It is true that time spent complying with bail conditions evidences rehabilitative potential.[74] To that extent there is a connection. But it does not follow that an offender who has made good use of bail by engaging in rehabilitation should be refused credit for restrictive bail at sentencing. Credit is given because strict conditions may seriously constrain liberty and time on bail is not taken into account when calculating time served.

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[74] *Paora v R*, above n 10, at [42].

[74] EM bail may afford the defendant substantially greater autonomy, including flexibility of movement and contact, than a prisoner enjoys. For that reason the allowance is unlikely to approach one-for-one.[75] Allowances of up to 50 per cent of the time spent on EM bail are commonly made, though that is not an upper limit.[76] The defendant must show that the conditions of bail were complied with.

[75] Mr Glassie spent just under two years on EM bail. He was on a 24-hour curfew. He did not work but he was permitted to leave the address to attend rehabilitation programmes. He was not permitted to possess any phone or communications device and he could not receive visitors without prior permission of the hosts. There were the usual conditions prohibiting the use of alcohol and drugs, and a non-association order with other defendants. These conditions were somewhat less stringent than those of the defendant in *Paora*, but they did confine Mr Glassie to his home for a long period. It is not in dispute that he complied with his conditions throughout.

[76] Ms Taylor-Cyphers sought a discount of 15 per cent, which we take to be based on the starting point. Allowances for restrictive bail are usually calculated as a proportion of the time spent on bail. In this case we consider that an allowance of 10 months, or approximately 40 per cent of the time spent on EM bail, was appropriate.

(d) Overall assessment

[77] The sentence must be adjusted to reflect the allowance for EM bail.

Disposition

[78] The effective sentences will be adjusted as follows.

Mr Duff

[79] The appeal in CA201/2022 is allowed.

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75 At [50]–[51].
76 At [53].

[80] The sentence of 15 years' imprisonment is quashed and substituted with a sentence of 14 years, two months' imprisonment.

Mr Glassie

[81] The appeal in CA88/2022 is allowed.

[82] The sentence of seven years' imprisonment is quashed and substituted with a sentence of six years, two months' imprisonment.

Solicitors:
Crown Solicitor, Rotorua for Respondent