



## **The offending**

[2] Mr Kim's offending arose from his involvement in a large-scale drug syndicate that imported and distributed methamphetamine, cocaine and MDMA. His participation in this offending was summarised by Edwards J when sentencing Mr Kim:

[5] Members of the syndicate had different roles. Some were referred to as "storage" or "storemen". They were engaged to stockpile and repackage drugs. Others were referred to as "runners" or "drivers". They were primarily responsible for delivering drugs and collecting cash payments. It is common ground that you played a storeman role in the syndicate. Mr Valent [who orchestrated the drug syndicate] would communicate with those in his drug syndicate, using applications such as the voice over internet protocol app, Wickr.

[6] The syndicate was in operation from August 2017 to February 2020. Your methamphetamine-related offending covers a period of approximately 11 months, from late 2017 to September 2018.

[7] In late 2017, Mr Valent arranged for the manufacture of methamphetamine at a remote location in Northland. During a two-month period, six or seven manufactures were carried out with the total methamphetamine produced estimated to be at least 22 [kg]. You came into possession of the methamphetamine from three of those manufactures.

[8] Furthermore, at the end of December 2017, you received a package containing approximately 10 [kg] of methamphetamine. You provided this package to Mr Hall and Ms Newton-Kearney for delivery to a customer in Christchurch. You received a large amount of cash and approximately six AR-16 assault rifles as payment for the methamphetamine on their return. The cash and firearms were held by you and later collected by another member of the syndicate.

[9] In July 2018, you received one kg of methamphetamine from Mr Hall for onwards delivery to customers of Mr Valent.

[10] The total weight of methamphetamine possessed for supply is not known, but it is estimated to be at least 15 [kg] and that is the agreed quantity on which I am to sentence you today.

[11] The possession of MDMA for sale arises out of events in 2018. In March of that year, you took possession of approximately two [kg] of MDMA, which was then provided to Mr Hall and Ms Newton-Kearney for delivery to a customer in Christchurch. The payment for that delivery was approximately \$600,000 in cash, which you received from Mr Hall and Ms Newton-Kearney on their return to Auckland, and which you held on behalf of Mr Valent.

[12] In July 2018, you received one kg of MDMA from Mr Hall for onwards delivery to customers of Mr Valent.

[13] Subsequently, in early September 2018, you received four [kg] of MDMA from Mr Hall which you stored on behalf of the drug syndicate.

[14] For the purposes of sentencing, it is agreed that the total MDMA possessed for supply is seven [kg].

[15] Finally, in relation to the charge of possession of cocaine, you received two ounces of cocaine between September 2017 and 26 August 2019. The cocaine was delivered to you by Mr Hall and Ms Newton-Kearney on the instructions of Mr Valent. They uplifted \$10,000 in cash from you as payment.

[16] The Police terminated Operation Mystic on 5 February 2020. You were arrested together with others in the drug syndicate on that day. A search of your home address found a money counting machine, scales and bags containing unknown residue.

### **The sentence**

[3] By reference to the guideline judgment of this Court, *Zhang v R*,<sup>4</sup> the sentencing of Mr Kim's co-offenders,<sup>5</sup> and two other sentencing decisions,<sup>6</sup> the Judge took a starting point of 14 years' imprisonment for the methamphetamine offending.<sup>7</sup> An uplift of 18 months' imprisonment was applied for the MDMA charge and Mr Kim's possession of cocaine.<sup>8</sup> A 20 per cent discount was given for Mr Kim's guilty pleas,<sup>9</sup> and a further 10 per cent credit for remorse, prior good character and matters relating to his rehabilitation.<sup>10</sup> This led to the end sentence of 10 years and 10 months' imprisonment.<sup>11</sup> Because of the need for additional denunciation and to deter others who may engage in similar offending, Mr Kim was ordered to serve at least 40 per cent of his sentence.<sup>12</sup>

### **The appeal**

[4] Mr Kim brings his appeal on five grounds. He alleges:

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<sup>4</sup> *Zhang v R* [2019] NZCA 507, [2019] 3 NZLR 648.

<sup>5</sup> *R v Ramos* [2020] NZHC 2257; *R v Montgomery* [2022] NZDC 4244; *R v Edmands* [2022] NZHC 246; *R v Mazuela* [2021] NZHC 1606; *R v Macalalad* [2020] NZHC 2930; *R v Maciel* [2021] NZHC 836; and *R v Hall and Newton* [2020] NZDC 7291 — the adjusted starting point was 13 years' imprisonment.

<sup>6</sup> *R v Cutler* [2019] NZHC 2737; and *Chai v R* [2020] NZCA 202.

<sup>7</sup> Sentencing decision, above n 3, at [20]–[35].

<sup>8</sup> At [39].

<sup>9</sup> At [59].

<sup>10</sup> At [56].

<sup>11</sup> At [60].

<sup>12</sup> At [66].

- (a) the level of his culpability arising from his role in the syndicate was overstated;
- (b) the starting point was manifestly excessive and did not accord with other sentences for similar offending;
- (c) the Court erred in failing to allow a discount for factors canvassed in the s 27 cultural report;
- (d) the starting point and end sentence lacked parity with Mr Kim’s co-offenders; and
- (e) the Court erred by imposing a minimum period of imprisonment based on a need for additional denunciation and deterrence.

[5] We address each of these grounds in turn.

### **Mr Kim’s role and level of culpability**

[6] The Judge assessed the sentence starting point by taking into account the quantity of methamphetamine involved in Mr Kim’s offending.<sup>13</sup> This has been recognised as a reasonable proxy for both the social harm done by the drug and the illicit gains made from trafficking it.<sup>14</sup> The Judge also analysed the role Mr Kim played in the drug operation.<sup>15</sup>

[7] As Mr Kim’s offending related to an amount of methamphetamine exceeding two kg, the Judge accurately placed Mr Kim’s offending in band five of the graduated starting points outlined in *Zhang* that attracts a starting point of between 10 years and life imprisonment.<sup>16</sup> The Judge characterised Mr Kim’s role as “towards the lower end of the significant category”,<sup>17</sup> the intermediate category falling between the “lesser” and “leading” roles for commercial methamphetamine offender profiled in

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<sup>13</sup> At [20] citing *Zhang v R*, above n 4, at [125].

<sup>14</sup> *Zhang v R*, above n 4, at [10(b)].

<sup>15</sup> Sentencing decision, above n 3, at [22]–[29].

<sup>16</sup> *Zhang v R*, above n 4, at [125].

<sup>17</sup> Sentencing decision, above n 3, at [29].

*Zhang*.<sup>18</sup> The Judge’s determination of Mr Kim’s level of involvement was based on her assessment that he was primarily motivated by financial reward, had an “operational function within a chain”, and some awareness of the scale of the operation.<sup>19</sup>

[8] Since Mr Kim’s sentencing, the Supreme Court, in *Berkland v R*,<sup>20</sup> has largely confirmed the approach taken by this Court in *Zhang*. However, there has been some fine tuning of the descriptions of the roles offenders may perform within a distribution network, including, relevantly, that relating to the “significant” role, which the Supreme Court modified as follows:<sup>21</sup>

- (a) Operational and management functions are now distinct. Management functions will generally be at the upper end of the significant role, whereas operational functions will generally be at the lower end.
- (b) Commercial profit is no longer an indicator for the significant role and is replaced with financial reward.

#### *The argument*

[9] It was submitted by Mr Pati, on behalf of Mr Kim, that the Judge’s conclusion that Mr Kim was primarily motivated by financial reward was not an available inference from the circumstances of his offending. It was acknowledged Mr Kim had some financial motivation but it was argued this was not the primary reason for his participation, rather, greater weight should have been given to Mr Kim’s cocaine addiction when assessing his culpability. It was emphasised that the criterion for an offender performing a significant role, described in both *Zhang* and *Berkland*,<sup>22</sup> was a person “motivated solely or primarily by financial or other advantage”, and that, as observed in *Berkland*, unlike Mr Kim, the taking of profit is often an indication of seniority within an operation that attracts greater culpability.<sup>23</sup>

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<sup>18</sup> *Zhang v R*, above n 4, at [126].

<sup>19</sup> Sentencing decision, above n 3, at [29].

<sup>20</sup> *Berkland v R* [2022] NZSC 143, [2022] 1 NZLR 509.

<sup>21</sup> At [72].

<sup>22</sup> *Berkland v R*, above n 20, at [71]; and *Zhang v R*, above n 4, at [126].

<sup>23</sup> *Berkland v R*, above 20, at [70].

[10] Mr Pati maintained his client’s motivation involved a complicated mixture of misguided loyalty to members of the syndicate and his cocaine addiction. In regards to the latter, Mr Pati was critical of the Judge having discounted the role Mr Kim’s addiction had played in his offending because it was based on “mere self-reporting”,<sup>24</sup> yet had accepted that it had been his “gateway into [Mr Kim’s] involvement with the syndicate.”<sup>25</sup> It was emphasised the greater the addiction, the greater the financial expense to support such a habit, and that cocaine was highly addictive.

[11] In support of his submission, Mr Pati referred to a number of observations made by the Supreme Court in *Berkland*. First, that it should not be assumed that effectively all methamphetamine addicts who offend on a commercial scale do so “in a clear-eyed and cynical way”.<sup>26</sup> Second, that while the stated preference in *Zhang* for independent evidence to support claims of addiction is understandable and likely to be more cogent than self-reporting,<sup>27</sup> there was no reason to disqualify the latter as being incapable of proving this relevant fact. The Supreme Court described this as a matter for the assessment of the sentencing judge in the usual way.<sup>28</sup>

[12] A recognised characteristic of those who may play a significant role in a drug syndicate includes the performance of an operational function, whether operating alone or with others.<sup>29</sup> It was acknowledged that Mr Kim’s involvement in the syndicate exhibited elements of performing an “operational function”. However, it was argued his involvement was of a “quasi-operational” nature which better fell within the parameters of a person performing a “lesser role”: a limited role under direction. Mr Pati emphasised Mr Kim did not contribute any specialist expertise or knowledge and, as recognised by the sentencing Judge, took directions from others in the syndicate.

[13] It was also suggested Mr Kim was paid in drugs to feed his own addiction, or in amounts of cash significantly disproportionate to the quantity of the drugs with which he was involved or the risks associated with such quantities, and had no

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<sup>24</sup> Sentencing decision, above n 3, at [49].

<sup>25</sup> At [27].

<sup>26</sup> *Berkland v R*, above n 20, at [128] citing *Zhang v R*, above n 4, at [148].

<sup>27</sup> At [129].

<sup>28</sup> At [129].

<sup>29</sup> At [71].

influence on those who sat above him in the chain. Mr Pati's overall submission was that Mr Kim's role more accurately sat within the "lesser" category.

### *Analysis*

[14] There can be no dispute that the amount of methamphetamine with which Mr Kim was involved over the 11 months he performed his role for the syndicate places him well within band five of the offending described in *Zhang*. Mr Pati sought to make something of the sentencing Judge's description of the total weight of methamphetamine possessed for supply as being *at least* 15 kg, whereas the summary of facts estimated the total weight to have been *no more than* 15 kg.

[15] It was suggested the Judge may have been labouring under a misapprehension that the amount of methamphetamine in Mr Kim's possession was more than 15 kg. However, we consider the Judge's accurate recitation of the relevant facts, including the various amounts of methamphetamine involved in the described transactions leads to the opposite conclusion. It is apparent from the approach taken by the Judge that she proceeded on the basis that Mr Kim's offending involved an amount of methamphetamine that could be proven as being in the region of 15 kg. The Judge expressly stated that was the agreed quantity on which he was to be sentenced. This is well within band five that applies to amounts greater than two kg. There is no indication the Judge inflated the starting point because of any false apprehension Mr Kim's offending involved an amount of methamphetamine in excess of that described in the summary of facts.

[16] The nub of this ground of Mr Kim's appeal is that his involvement should have been categorised as falling within the profile of a person fulfilling a "lesser" rather than "significant" role in the offending. However, when assessed in accordance with the further analysis undertaken in *Berkland* regarding the profile of offenders who have carried out a "significant role", we do not consider the final placement of Mr Kim towards the lower end of that category can be faulted.

[17] The Judge described Mr Kim as having an “operational function within a chain” where he did not exercise managerial functions.<sup>30</sup> It was accepted he did not have a large degree of autonomy, nor could he be described as a trusted lieutenant to those sitting above him in the hierarchy. However, we agree with the Crown’s submission that other indicia supported the Judge’s placement of Mr Kim at the lower end of the significant category, rather than as an offender carrying out a lesser role.

[18] Mr Kim was entrusted with large amounts of drugs and cash and, in carrying out his function as a “storeman” for the syndicate, demonstrated he was a trusted member of the chain. He was responsible for collecting payments that included large amounts of cash and firearms and passing them on to others. We reject the contention that Mr Kim would not have had an accurate understanding of the extent of the operation of which he was a part, or would have garnered only limited knowledge of its size. The amounts of cash and drugs he was handling and the frequency of his involvement over a relatively long period, including the receipt of one payment of \$600,000, not only speaks to the trust that was placed in him but also his insight into the magnitude of the dealing enterprise in which he was participating.

#### *Decision*

[19] We think it clear that Mr Kim had become a valuable member of the syndicate who could be relied upon to distribute large amounts of drugs to others and receive equally large amounts of cash in his role as a “middleman” or “storeman”. We are fortified in this view by the observations of the Supreme Court in *Berkland v R*. Mr Pati placed emphasis on the “operational function” Mr Kim carried out, which was contrasted with those who had “management functions” that attracted a higher level of culpability. We accept that is so, but Mr Kim’s fulfilment of his operational function also qualifies him to be categorised as having discharged a significant role in the drug operation, albeit at a lower end of the scale than would otherwise have been the case had he been carrying out a management function in the chain of distribution. This accords with the Supreme Court’s analysis in *Berkland*:<sup>31</sup>

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<sup>30</sup> Sentencing decision, above n 3, at [29].

<sup>31</sup> *Berkland v R*, above n 20, at [68]–[69].

[68] Those at the upper end of the significant range can be expected to manage aspects of the overall operation with at least some knowledge of how the pieces fit together. They will direct and engage others in the course of managing a significant aspect of the operation. Purely operational functions will not usually place the offender at the upper end of significant unless they exercise a high degree of autonomy in the performance of functions that are significant to the operation or there is some distinctive element of the operational role justifying its placement at the upper end. In either capacity, those at the upper end will take payments, often comparatively large payments, from the leaders in return.

[69] Those falling within the middle and lower end of the significant range are unlikely to be exercising managerial functions or have real autonomy in the performance of their functions.

[20] Mr Kim falls within the description of those who fall within the middle to lower end of the significant range because of their operational responsibilities, despite not exercising managerial functions.

[21] Mr Kim received cash for his efforts on behalf of the syndicate. He was not paid in drugs. While he had an addiction, it appears to have been limited to cocaine. Although Mr Kim may have needed money to support his habit, and we accept, as did the sentencing Judge, that he did not appear to have an excessive or luxurious lifestyle as a result of trafficking drugs. We, like the Judge, do not consider he fits the profile of an addict whose involvement is directed to obtaining some of the product to feed his own addiction. We accept his cash rewards were relatively modest in comparison to the value of the drugs he was handling and the size of the overall operation. However, to be balanced against that is the period of time over which he continued to discharge his role and the fact his involvement remained ongoing up until the time of his apprehension.

[22] Mr Pati, particularly in his oral submissions, impressed upon us Mr Kim's misplaced loyalty to assist friends and associates, which he submitted may have possibly been reinforced by what he described as "latent cultural norms and childhood trauma." Mr Kim was supported at the hearing of his appeal by a large group of relatives and friends of diverse cultures who viewed Mr Kim's offending as aberrant. We appreciate that Mr Kim's fulfilment of the operational role he played in the drug syndicate may have included some element of misguided loyalty to individuals he viewed as his friends, but we do not consider that can realistically account for his

persistent offending, nor, given the role he was playing within the syndicate, materially mitigate his involvement.

### **Alleged manifestly excessive starting point**

[23] The sentencing Judge's analysis of the appropriate starting point included a review of a number of sentencing authorities. The first group of those authorities concerned sentences imposed on co-offenders, some of whom played leading roles in the syndicate and others whose offending was less serious.<sup>32</sup> Reference was made to the offending of Mr Hall and Ms Newton-Kearney with whom Mr Kim was involved.<sup>33</sup> They were sentenced on charges of possessing 1.5 kg of methamphetamine and two kg of MDMA for supply, and importing three kg of MDMA.<sup>34</sup> A starting point of 12 years' imprisonment was adopted for their methamphetamine offending.<sup>35</sup> An adjusted starting point for all their offending was set at 13 years' imprisonment. The Judge also referred to starting points of 13 and a half and 13 years imposed on co-offenders whose role was described as being on par to Mr Kim's but involved lesser quantities of methamphetamine (7.816 kg and 7.096 kg respectively, compared to 15 kg) over a shorter period. Those aspects led the Judge to conclude Mr Kim's offending was more serious.<sup>36</sup>

### *The argument*

[24] The submission made on behalf of Mr Kim, that his starting point was excessive, largely focussed on the adjusted starting point adopted by the Supreme Court in *Berkland*.<sup>37</sup> At the time of Mr Kim's sentencing, the Judge observed that the lesser importance of his role made his offending less grave than that of the appellant in *Berkland* and a number of other offenders where starting points ranging from 15 to 16 years and six months' imprisonment had been applied.<sup>38</sup> The subsequent appeal to the Supreme Court in *Berkland* resulted in Mr Berkland's starting point for his

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<sup>32</sup> *R v Ramos*, above n 5; *R v Montgomery*, above n 5; *R v Edmands*, above n 5; *R v Mazuela*, above n 5; *R v Macalalad*, above n 5; *R v Maciel*, above n 5; and *R v Hall and Newton*, above n 5.

<sup>33</sup> Sentencing decision, above n 3, at [30].

<sup>34</sup> *R v Hall and Newton*, above n 5.

<sup>35</sup> Above n 5.

<sup>36</sup> At [32] citing *R v Macalalad*, above n 5; and *R v Maciel*, above n 5.

<sup>37</sup> *Berkland v R*, above n 20; at [80].

<sup>38</sup> Sentencing decision, above n 3, at [33] citing *Berkland v R*, above n 20; *Zhang v R*, above n 4, at [246]–[264]; and *Wan v R* [2020] NZCA 328.

methamphetamine offending being reduced to 13 and a half years' imprisonment, six months less than Mr Kim. It followed, in Mr Pati's submission, that Mr Kim should have received a lower starting point. However, care is needed when examining how Mr Berkland's starting point came to be reduced by the Supreme Court.

### *Analysis*

[25] We accept the sentencing Judge, when referencing *Berkland*, proceeded on the basis that the appellant's offending was more serious because he sat higher up in the hierarchy. Mr Berkland was described as the "right-hand man" to the leader of the drug operation.<sup>39</sup> However, following the Supreme Court's reformulation of the significant role it was considered that his role was not appropriately classified as at the upper end of significant.<sup>40</sup> The Court found, as was the case with Mr Kim, that he did not exercise significant autonomy, had no decision-making authority and did not manage others.<sup>41</sup> The amount of methamphetamine with which Mr Berkland was involved, "at least 15 kilograms", was similar to the amount Mr Kim was estimated as having handled.<sup>42</sup>

[26] While Mr Berkland was described as being privy to some of the strategic decision-making,<sup>43</sup> he shared with Mr Kim an awareness of the scale of the business and was motivated by financial gain. Unlike Mr Berkland, there was no basis upon which it could be inferred that Mr Kim had direct contact with the principal of the drug syndicate. However, having regard to the reassessment by the Supreme Court of the nature of Mr Berkland's role and its recalibration of where that offender sat within the "significant" category, we do not consider it follows that the placement of Mr Kim's role in the "significant" category was erroneous. Nor, moreover, that his offending cannot be viewed as broadly comparable to Mr Berkland, albeit towards the lower end of the range.

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<sup>39</sup> *Berkland v R*, above n 20, at [73].

<sup>40</sup> At [73]–[77].

<sup>41</sup> At [76].

<sup>42</sup> At [3].

<sup>43</sup> At [73].

[27] Mr Pati also sought to place reliance on another decision of the Supreme Court, *Philip v R*, that applied a starting point of six years' imprisonment.<sup>44</sup> We do not consider the roles of those offenders, which were akin to those of Mr Hall and Ms Newton-Kearney in the present case and involved a smaller amount of methamphetamine, are comparable to that performed by Mr Kim.

[28] The other case upon which weight was sought to be placed was *R v Lidder*, a sentencing decision of the High Court in which a starting point of 14 years and six months was applied in relation to the importation of 14.87 kg of methamphetamine.<sup>45</sup> This offending was described by the sentencing Judge as having some similarities with Mr Kim.<sup>46</sup> Mr Lidder received an importation of 14.87 kg of methamphetamine, extracted it from its packaging and repackaged it for supply. His role was categorised as being towards the upper end of the "lesser" category and a starting point of 14 and a half years' imprisonment was adopted.<sup>47</sup> It was argued that Mr Lidder's offending involved a high degree of planning and that his operational involvement in the distribution of the drug was greater compared with what was described as Mr Kim's more passive role.

### *Decision*

[29] We accept there are aspects of the offending in *Berkland* and *Lidder* that could arguably be considered more serious than Mr Kim's but we do not consider the distinctions sought to be drawn result in any materially different degree of culpability. It is trite to observe that each case must be assessed on the basis of their individual circumstances and that a combination of different factors will need to be taken into account when assessing an appropriate starting point. This is reflected in the overlapping starting points based on the graduated amounts of methamphetamine described in the bands of offending set out in *Zhang*. Band three concerns offending involving less than 500 g of methamphetamine that can attract starting points between six and 12 years. Band four involves amounts less than 2 kg, in respect of which terms of between eight to 16 years' imprisonment can be expected. As already noted,

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<sup>44</sup> *Philip v R* [2022] NZSC 149, [2022] 1 NZLR 571.

<sup>45</sup> *R v Lidder* [2020] NZHC 1738.

<sup>46</sup> Sentencing decision, above n 3, at [34].

<sup>47</sup> *R v Lidder*, above n 45, at [21].

band five can attract starting points between 10 years and life imprisonment for amounts greater than two kg. The roles of the individual offender are then required to be factored into the assessment as to where the offender sits across the range of the various bands.

[30] Ultimately, the appeal court must be satisfied the starting point adopted is within the acceptable range available to the sentencing judge in the exercise of their discretion after applying the sentencing guidance provided by the applicable tariff judgments. There is an obvious need for consistency in sentencing but, as already noted, the particulars of each individual's offending will invariably differ and require separate evaluation in each case. Having reviewed the cases referred to us, we do not consider the starting point adopted by the Judge for Mr Kim's methamphetamine offending was excessive.

#### **Discount for s 27 cultural report factors**

[31] In *Berkland*, the Supreme Court concluded that background factors may mitigate a sentence where they can help to explain, in some rational way, why or how the offender has come to offend and thus to have "contributed causatively" to that offending.<sup>48</sup> The strength of the causative contribution will bear on the potency of those factors' mitigatory effect.<sup>49</sup>

[32] When reviewing Mr Kim's background, the Judge noted he had opened an internet café and also worked as a personal trainer at the time he became involved with the drug syndicate.<sup>50</sup> The Judge observed that one of Mr Kim's clients provided him with cocaine, and it was through that person that he became involved in the commercial drug operation. No doubt that was the basis for the Judge accepting that Mr Kim's involvement with cocaine may have acted as a gateway to his criminal offending. The Judge also referred to a number of the matters set out in the s 27 report regarding the early death of Mr Kim's mother and his father's strict discipline and difficulties with alcohol.<sup>51</sup> The Judge expressed doubts regarding the causal effect of

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<sup>48</sup> *Berkland v R*, above n 20, at [16(c)] and [109]–[110].

<sup>49</sup> At [110].

<sup>50</sup> Sentencing decision, above n 3, at [46].

<sup>51</sup> At [47].

Mr Kim's cocaine addiction because it was self-reported, but, in any event, was not satisfied there was a necessary link between his addiction and the role Mr Kim played in what was described as a sophisticated and highly commercialised operation.<sup>52</sup>

### *Argument*

[33] Contrary to the findings of the sentencing Judge, it was submitted there was a strong connection between Mr Kim's offending and his personal circumstances, and that his addiction contributed causatively to his involvement. Emphasis was placed on the Judge's finding that she was prepared to accept Mr Kim's addiction to cocaine as having acted as a gateway to his involvement with the syndicate, and observations made by the Supreme Court in *Berkland* that contributory addiction can help to explain why an offender was drawn into the commercial drug-dealing environment. Reliance was also placed on Mr Kim's difficult childhood and confusion relating to his cultural identity.

### *Analysis*

[34] We accept the Supreme Court, in *Berkland*, cautioned against exclusionary rules regarding the relevance of addiction to commercial drug offending and tempered any requirement for independent evidence in relation to claims of addiction.<sup>53</sup> It was acknowledged in that case the former type of evidence is likely to be more cogent, but that should not disqualify the latter where it is capable of proving a mitigatory factor to the required standard.<sup>54</sup> However, accepting on its face the information about Mr Kim's addiction to cocaine, we do not consider his apparent introduction to this drug via a person with whom he later became involved in commercial drug-dealing demonstrates how his addiction impaired his agency or choice to offend in any way that diminishes his moral culpability.

[35] Nor do we consider the hardships Mr Kim experienced that were identified in the s 27 report to be linked with how he came to offend. It appears, at the time Mr Kim involved himself in this offending, he had enjoyed relative success in his personal

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<sup>52</sup> At [50].

<sup>53</sup> *Berkland v R*, above n 20, at [128] and [129].

<sup>54</sup> At [129].

and business life. He had established a legitimate business, was continuing with his work as a personal trainer, and had a wide body of friends and associates. While his involvement with cocaine may have resulted in him developing associations with people connected with commercial drug-dealing, the information falls well short of suggesting he was compelled to do their bidding in order to feed his habit.

### *Decision*

[36] We do not underestimate the insidious effects of drug addiction, and acknowledge Mr Kim's efforts to address his reliance upon cocaine. However, having regard to the ongoing nature of his offending in what was a highly commercial operation, and his otherwise unaffected ability to successfully function both personally and in business, we do not consider the choices he made to offend were constrained to any material degree by factors outside his control. This extends to suggestions that cultural factors and misguided loyalties influenced Mr Kim. Even if that was so, we do not consider they have any material mitigatory effect given the nature and duration of his offending. We therefore do not consider the sentencing Judge erred in declining to afford a discrete discount for matters relating to Mr Kim's addiction to cocaine or hardship arising from his upbringing.

### **Parity with other offenders**

#### *Argument*

[37] As a further ground of appeal, Mr Pati argued the end sentence imposed on Mr Kim was disproportionate to that received by co-defendants whose offending, it was submitted, was more serious. That description is undoubtedly true of Messrs Ramos and Montgomery, both of whom had leading roles in the syndicate.<sup>55</sup> The sentencing Judge explicitly acknowledged that was the case.<sup>56</sup> Mr Ramos was described as having been involved with 39.911 kg of methamphetamine, and as having played the role of the primary storeman who organised and imported packages containing drugs.<sup>57</sup> He had been in a position of leadership, directing and paying other

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<sup>55</sup> *R v Ramos*, above n 5; and *R v Montgomery*, above n 5.

<sup>56</sup> Sentencing decision, above n 3, at [30].

<sup>57</sup> *R v Ramos*, above n 5, at [10] and [14].

lesser offenders, and was described as essentially the main offender's lead man.<sup>58</sup> His offending attracted a starting point of life imprisonment that was reduced to a final sentence of 12 years' imprisonment.<sup>59</sup>

[38] Mr Montgomery was also described as a person who had a leadership role within the syndicate and engaged in direct contact with the ringleader. He carried out dual roles as a storeman and runner, and recruited and directed others. Mr Montgomery was sentenced on the basis that he had a "leading role".<sup>60</sup> The District Court adopted a starting point of 15 years and six months' imprisonment for his offending that involved 10.396 kg of methamphetamine.<sup>61</sup> To that a further two and a half years was added for charges of importing methamphetamine and possession of cocaine for supply, making a total starting point of 18 years' imprisonment,<sup>62</sup> which was reduced to a final sentence of seven years and three months' imprisonment.<sup>63</sup>

#### *Analysis*

[39] We doubt a comparison between the respective starting points for Messrs Kim and Montgomery's offending gives rise to any disparity given the respective circumstances of their offending. However, insofar as this ground of Mr Kim's appeal was based on a submission that the end sentences imposed on Messrs Ramos and Montgomery gives rise to parity concerns, we consider such a submission is flawed. No meaningful comparisons can be made between the sentencing outcomes because of the distinct individual factors that apply to each offender. The circumstances of one offender can rarely be closely compared with those of another, even where they have been involved in similar offending.<sup>64</sup> While it is desirable that persons who have been party to the commission of an offence should, all things being equal, receive the same or similar sentence, rarely will that be the situation.

[40] The sentencings of Messrs Ramos and Montgomery are cases in point. The starting point of life imprisonment taken for Mr Ramos was substantially reduced

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<sup>58</sup> At [15].

<sup>59</sup> At [23] and [29].

<sup>60</sup> *R v Montgomery*, above n 5, at [14].

<sup>61</sup> At [17].

<sup>62</sup> At [18].

<sup>63</sup> At [22].

<sup>64</sup> *R v Lawson* [1982] 2 NZLR 219 (CA) at 223.

because of the significant assistance he had provided to the Crown since his arrest.<sup>65</sup> This extended to providing details about the operation of the syndicate, his own role and the role of various co-offenders. As noted by the sentencing Judge in that case, discounts of up to 60 per cent may be available when an offender has pleaded guilty at the earliest opportunity and assisted the authorities.<sup>66</sup> Mr Ramos was entitled to a full 25 per cent discount for his early guilty plea.<sup>67</sup> Coupled with credit for his previous good character, of a type similarly afforded to Mr Kim, a total discount of 60 per cent resulted in Mr Ramos' sentence being converted to a final term of imprisonment of 12 years.<sup>68</sup>

[41] The situation with Mr Montgomery is not dissimilar. He received the benefit of a "very early plea of guilty" for which he received a 25 per cent discount.<sup>69</sup> Moreover, there were matters of personal mitigation, including a lifelong brain condition, which resulted in him not being able to read or write, and other mental difficulties that impacted on his functioning that were held to have causatively contributed to his offending.<sup>70</sup> In total, he received a 60 per cent discount inclusive of a 10 per cent credit,<sup>71</sup> similar to that extended to Mr Kim for remorse and other personal considerations.

### *Decision*

[42] This brief review of the differing factors in play in respect of these two co-offenders readily explains their respective sentencing outcomes. We do not consider any question of disparity arises as a result of the sentences they received.

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<sup>65</sup> *R v Ramos*, above n 5, at [27].

<sup>66</sup> At [29] citing *R v Hadfield* CA337/06, 14 December 2006.

<sup>67</sup> At [28].

<sup>68</sup> At [29].

<sup>69</sup> *R v Montgomery*, above n 5, at [22].

<sup>70</sup> At [21].

<sup>71</sup> At [22].

## **The imposition of a minimum period of imprisonment**

### *Argument*

[43] Mr Kim’s final ground of appeal was that the sentencing Judge erred in imposing a minimum period of imprisonment. In large part this submission was based on an alleged failure to take into account Mr Kim’s addiction and certain vulnerabilities said to be derived from factors outside his control that we have already addressed. It was argued these considerations militate against the need for deterrence and denunciation. Reliance was also placed on observations of this Court that have emphasised that minimum periods of imprisonment must not be imposed as a matter of routine or in a mechanistic way.<sup>72</sup> A reasoned analysis is required justifying such an order.<sup>73</sup>

### *Analysis*

[44] The Judge’s analysis of the question of a minimum period of imprisonment resulted in her putting to one side any greater need for accountability, or any requirement for personal deterrence because of the remorse Mr Kim had expressed and his positive rehabilitative prospects. However, the Judge reasoned that, because of the “irreparable and incalculable misery” methamphetamine causes to the community, Mr Kim’s participation in a sophisticated drug syndicate that had operated from overseas, and involved him handling large quantities of drugs, cash and firearms for financial reward, required additional denouncement and general deterrence.<sup>74</sup> For that reason, the minimum period of 40 per cent was considered to be justified.<sup>75</sup>

[45] We do not consider the sentencing Judge breached the requirement of reasoned analysis in her approach to the imposition of a minimum period of imprisonment. We accept that personal factors which may reduce an offender’s moral culpability and bear on their level of agency in having become involved in offending, may moderate the need for a minimum period of imprisonment which may otherwise have been thought necessary to adequately achieve the purposes of deterrence and denunciation.

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<sup>72</sup> *Zhang v R*, above n 4, at [169].

<sup>73</sup> At [169].

<sup>74</sup> Sentencing decision, above n 3, at [64]–[66].

<sup>75</sup> At [66].

However, as we have found, we do not consider the sentencing Judge erred in her conclusion that Mr Kim's ability to make rational choices about whether to involve himself in the drug syndicate was qualified by his cocaine habit. It had no apparent effect on his ability to function or to otherwise engage in his business and personal endeavours.

### *Decision*

[46] Mr Pati sought to rely on the approach taken by a different Judge regarding one of Mr Kim's co-offenders where no minimum term was imposed.<sup>76</sup> However, we do not consider the comparison is helpful. Minimum periods of imprisonment were imposed on five of Mr Kim's co-offenders, four of whom received minimum terms of 40 per cent and a 50 per cent term. Whatever the approach taken in those cases, given the circumstances and scale of Mr Kim's offending to which the Judge had particular regard, we are unable to conclude either that her decision was not supported by appropriate analysis or was otherwise unavailable to her.

### **Conclusion**

[47] Despite Mr Pati's exhaustive submissions in support of Mr Kim's appeal, we have found ourselves unable to sustain the grounds of his appeal. It follows that we do not consider the ultimate sentence imposed was manifestly excessive, nor that the imposition of a minimum period of imprisonment was not warranted.

### **Result**

[48] The appeal is dismissed.

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<sup>76</sup> *R v Lidder*, above n 45.