IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA713/2022
[2023] NZCA 259

	BETWEEN	RHYS McCASLIN-WHITEHEAD Appellant
	AND	THE KING Respondent

Hearing:	23 February 2023
Court:	Clifford, Wylie and Whata JJ
Counsel:	M J English and C A Hardy for Appellant I S Auld for Respondent
Judgment:	27 June 2023 at 10.00 am

JUDGMENT OF THE COURT

A **Leave to appeal is granted.**

B **The appeal is allowed.**

C **The sentence of four years and two months imprisonment imposed by the High Court is quashed. It is substituted for a two month and two day sentence of home detention, on the same conditions as were imposed in the District Court, commencing on 27 June 2023 and expiring on 29 August 2023.**

REASONS OF THE COURT

(Given by Clifford J)

Introduction

[1] In November 2021 Rhys McCaslin-Whitehead pleaded guilty to 23 charges involving the importation and supply of MDMA and LSD. On 29 August 2022 Mr McCaslin-Whitehead was sentenced by Judge Sellars KC in the District Court to 12 months' home detention.[1] With the permission of the Solicitor-General, the Crown appealed that sentence.[2] In the High Court Davison J, in a decision released on 19 December 2022, quashed that sentence and replaced it with one of four years and two months' imprisonment.[3]

[2] Mr McCaslin-Whitehead now applies for leave to bring a second appeal against that High Court decision.[4] Mr McCaslin-Whitehead's application for leave and substantive appeal are to be determined together.

Background

Mr McCaslin-Whitehead's offending

[3] The charges to which Mr McCaslin-Whitehead pleaded guilty involved him having imported a total of approximately 11 kg of MDMA over five separate transactions and 5,000 tabs of LSD in another transaction. That offending came to the attention of the police during an investigation targeting money laundering. Mr McCaslin-Whitehead had used the money launderer who was the target of that investigation to facilitate payment for those drugs to the Bitcoin wallet of his supplier. When police executed a search warrant at Mr McCaslin-Whitehead's address items seized included his phone, a large quantity of cannabis and small quantities of LSD and MDMA. Analysis of data from that phone revealed not only communications between Mr McCaslin-Whitehead and his supplier using encrypted applications, but

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1 *R v McCaslin* [2022] NZDC 18355 [District Court judgment].
2 Criminal Procedure Act 2011, s 246(2).
3 *R v McCaslin-Whitehead* [2022] NZHC 3517 [High Court judgment].
4 On 22 December 2022 Mr McCaslin-Whitehead was granted bail pending his appeal by Miller J. See *McCaslin-Whitehead v R* [2022] NZCA 663 [Court of Appeal bail judgment].

also evidence of Mr McCaslin-Whitehead's activities in supplying the drugs he obtained to persons within New Zealand. The Crown estimated that, based on what it described as a conservative estimate, the street value of the MDMA would be between $1 million to $1.65 million.

[4] As a result, Mr McCaslin-Whitehead faced, and pleaded guilty to, the following charges:

(a) eight charges of importing the controlled drugs LSD and MDMA, LSD being Class A and MDMA Class B;

(b) one charge of supplying LSD;

(c) two charges of supplying the Class B controlled drug MDMA;

(d) seven charges of money laundering;

(e) unlawful possession of explosives;

(f) two charges of unlawful possession of a firearm;

(g) cultivating cannabis;

(h) possession of the Class A controlled drug LSD for supply; and

(i) possession of the Class B controlled drug ecstasy for supply.

The District Court sentencing decision

[5] In the District Court, the Judge, having carefully recorded the details of Mr McCaslin-Whitehead's offending, identified a starting point sentence for the MDMA offending of eight years' imprisonment.[5] The Judge considered that the offending fell into category 2 of the bands identified by this Court in *R v Wallace*.[6]

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5 District Court judgment, above n 1, at [16].

6 At [9] referring to *R v Wallace* [1999] 3 NZLR 159 (CA).

The starting point was then uplifted by two years in light of Mr McCaslin-Whitehead's other offending.[7] She then allowed the following discounts:[8]

(a) on account of Mr McCaslin-Whitehead's guilty plea, 25 per cent;

(b) on account of the personal mitigating factors, including as informed by the s 27 report prepared on Mr McCaslin-Whitehead's background and circumstances – 30 per cent; and

(c) on account of time on bail and "various other matters", 25 per cent.

[6] In allowing a 30 per cent discount for personal factors, and by reference to the s 27 report, the Judge was satisfied that Mr McCaslin-Whitehead's offending had occurred, notwithstanding its commercial nature, as a result of his vulnerability.[9] She was also satisfied he had made significant steps in addressing his addiction and other issues in his life.[10] The "various other matters" the Judge referred to was evidence of assistance to the police provided by Mr McCaslin-Whitehead, as recorded in the usual way in a confidential memorandum provided to the Judge at sentencing.[11]

[7] Applying that overall discount of 80 per cent the Judge arrived at an end sentence of two years' imprisonment. The Judge then considered the possibility of home detention. Noting the acceptance by the Courts of the deterrence and denunciation that can be achieved by home detention, the need to impose the least-restrictive sentence appropriate and taking into account Mr McCaslin-Whitehead's prospects of rehabilitation and the "glowing references" from his family and employers, the Judge sentenced Mr McCaslin-Whitehead to 12 months' home detention.[12]

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7 At [17].
8 At [18]–[19].
9 At [18].
10 At [18].
11 At [19].
12 At [20].

The High Court decision on appeal

[8] With the leave of the Solicitor-General, the Crown appealed.[13] In the High Court, the Crown argued the District Court had imposed a manifestly inadequate sentence, erring:[14]

(a) by excessively reducing the starting point to account for factors arising out of the s 27 report;

(b) in aggregate, excessively reducing the starting point on account of personal mitigating factors;

(c) reaching an end sentence (two years' imprisonment) which did not adequately reflect the applicable purposes of sentencing and the seriousness of the offending involved; and

(d) commuting that manifestly inadequate sentence of two years' imprisonment to one of home detention.

[9] The Crown emphasised the importance of the sentencing principles and purposes of accountability, denunciation, and deterrence for commercial-level drug dealing offending. Those purposes were all particularly relevant in Mr McCaslin-Whitehead's sentencing. As the facts showed, the need for deterrence was heightened in the circumstances. Not only had Mr McCaslin-Whitehead engaged in commercial level offending involving Class A and Class B drugs, but his offending had only come to the attention of the police because of their focus on money laundering activities. The availability of encryption software, and the ubiquity of the internet, made it "incredibly easy", the Crown submitted, to import such drugs into New Zealand undetected. There needed to be a credible deterrent to counter balance those factors.

[10] The Crown did not, however, challenge the starting point sentence of eight years' imprisonment plus two years uplift set by the Judge. Rather, the Crown

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13 High Court judgment, above n 3.
14 At [26].

submission was that a discount of around five to 10 per cent at most could be allowed for the matters identified in Mr McCaslin-Whitehead's s 27 report. Moreover, whilst the guilty plea discount of 25 per cent and the discount of 20 per cent for "other matters" were appropriate, the further discount the Judge allowed for time spent on EM bail could only be described as "generous".

[11] Finally, the Crown submitted the Judge had failed to step back and assess the overall effect of the discounts she recognised. Having adopted a starting point at the very bottom of the available range, and even if a sentence of two years' imprisonment was within the available range which the Crown did not concede, the sentence of home detention was itself inadequate. As reflected by s 6(4) of the Misuse of Drugs Act 1975, there was a presumption that a sentence of imprisonment should be imposed. Given the large quantity of drugs imported, the extent of Mr McCaslin-Whitehead's supply undertakings in New Zealand, the amount of money involved and the amount of money laundered, on any assessment a sentence of imprisonment was required.

[12] In allowing the appeal, the Davison J first described the approach he considered appropriate in the following way:

> [45] As I have noted, the issue of whether the sentence imposed is manifestly inadequate is to be examined by reference to the end sentence, rather than the process by which that sentence was arrived at by the sentencing court. In order to determine that question it is necessary in a case such as this for the appellate court to undertake its own assessment of the appropriate sentence so as to be able to compare it with the sentence imposed and be in a position to determine whether the sentence imposed was manifestly inadequate.

[13] The Judge:

(a) agreed with the starting point of eight years set by the District Court on account of the MDMA importation offending;[15]

[15] At [49].

(b) concluded, however, that the uplift of two years for other offending was, given the nature and extent of that other offending, inadequate and that:

(i) an uplift of at least two years' imprisonment was required to take account of the importation offending involving LSD and the possession and supply offending involving both MDMA and LSD;[16] and

(ii) uplifts of 12 months to take account of the money laundering charges and of three months to take account of the firearms charges and the cannabis-related offending.[17]

[14] The Judge would, therefore, have reached an adjusted starting point of 11 years and three months.[18]

[15] Turning to the question of discounts, Davison J accepted that the 25 per cent discount on account of guilty plea and the 20 per cent discount for assistance to the police were, as the Crown acknowledged, appropriate.[19] However, he considered the 30 per cent discount for personal factors identified in the s 27 report as excessive.[20] Rather, 15 per cent would be the appropriate discount, particularly given the discount Mr McCaslin-Whitehead was to receive for cooperation with the authorities. The Judge did not consider any discount for time spent on EM bail was called for.[21] He also agreed with the Crown submission that the District Court had failed to stand back and assess the overall totality of the discounts.[22]

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16 At [50].
17 At [51]–[52].
18 At [53].
19 At [54].
20 At [56].
21 At [57].
22 At [61].

[16] On that basis, the Judge arrived at an end sentence of four years and six months' imprisonment.[23] Cross checking with comparable cases,[24] the Judge was satisfied that sentence was appropriate.

[17] The end sentence of two years' imprisonment arrived at by the Judge in the District Court was, accordingly, manifestly inadequate as was the sentence of home detention imposed in its place.[25] Davison J noted the principle that an appellate court would proceed with caution when deciding whether to substitute a custodial sentence for a community-based sentence on a prosecutor's appeal, but considered that in the circumstances applicable it was both appropriate and necessary to do so, saying:[26]

> … The sentence of 12 months' home detention is so significantly less than the sentence that I have found ought to have been imposed that having regard to the serious nature of the respondent's offending, the requirements of s 6(4) of the Misuse of Drugs Act, and the need to ensure consistency with sentences for similar offending, the imposition of a sentence of imprisonment is necessary.

[18] The Judge then took account of the four months Mr McCaslin-Whitehead had spent on his sentence of home detention, and set a sentence of 4 years and 2 months' imprisonment in substitution for that of 12 months' home detention.[27]

Bail

[19] In granting bail pending determination of the sentence appeal in this Court Miller J observed that the merit of the appeal did not appear to be strong.[28] At the same time the Court could not exclude "the reasonable possibility that this Court might choose to uphold the sentence imposed in the District Court, either because it proves on fuller analysis to be sustainable under the conservatism principle, or because the Court accepts the change of sentence would cause some injustice to the applicant."[29]

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23 At [58].
24 At [59]–[60].
25 At [62].
26 At [62].
27 At [63].
28 Court of Appeal bail judgment, above n 4, at [9].
29 At [14].

Grounds of appeal

[20] Mr McCaslin-Whitehead says the High Court Judge erred in concluding that the sentence imposed in the District Court was manifestly inadequate. In particular the Judge:

(a) failed to take the conservative approach that is required of a Solicitor-General appeal;

(b) failed to identify a specific error in the sentence before proceeding to determine whether a different sentence should be imposed, as required under s 250 Criminal Procedure Act 2011 (CPA);

(c) erred in re-determining the starting point for the offending when that was not in issue on appeal;

(d) if he was acting within his powers to re-determine the starting point, then the higher starting point used was not justified;

(e) erred in finding that the discount for the applicant's personal history was too high and lacked a causal nexus to the offending;

(f) erred in declining to give any allowance for approximately two years on bail conditions that included a curfew; and

(g) erred in asserting that discounts must be subject to a totality assessment in the same way that multiple instances of offending are.

Leave

[21] Pursuant to s 253(3) of the CPA, before granting leave for a second appeal against sentence we must be satisfied that the appeal involves a matter of general or public importance or a miscarriage of justice may have occurred, or may occur unless the appeal is heard.

[22] In *Jackson v Police*, this Court held that:[30]

> When applied in the context of an application for leave to bring a second appeal, we think that the concept of a miscarriage of justice must extend to an error, irregularity or occurrence in or in relation to the appeal that has created a real risk that the outcome of the appeal was affected.

[23] In *McAllister v R* this Court considered, in terms of the equivalent leave provision under s 264 of the CPA, that:[31]

> [T]here are various ways of characterising the approach to be taken, for example, if there is an argument reasonably available that the court below is in error, that possibility would appear to come within s 264(2)(b).

[24] Counsel for Mr McCaslin-Whitehead, Mr English, submitted a second appeal was required here to address the risk of a miscarriage of justice. The very real risk of a miscarriage had arisen in the circumstances in which the High Court had quashed the sentence of home detention and imposed one of imprisonment. In doing so the High Court had failed to take the conservative approach required when a Solicitor-General's appeal is considered and had erred in redetermining the starting point for the offending when that was not an issue raised by the appeal. The Crown opposed leave, arguing there was no error in the High Court's decision. A further appeal was appropriate only when it raised a question of whether the sentencing process had seriously miscarried. That was not the position here.

[25] We acknowledge those general principles. In applying them, we note first that whilst this is a second appeal against sentence imposed by the District Court, it would be Mr McCaslin-Whitehead's first appeal against, and his only opportunity to challenge, the sentence of imprisonment imposed on him in the High Court. Moreover, we think the question of the overall approach taken in the High Court and its review of the starting point sentence identified by the District Court both raise issues of general and public importance and the possibility of a miscarriage of justice which support a grant of leave.

[26] We grant leave accordingly.

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30 *Jackson v Police* [2017] NZCA 374 at [29].

31 *McAllister v R* [2014] NZCA 175, [2014] 2 NZLR 764 at [37]. This Court also noted at [37] that enumerating a prescriptive approach to leave applications would be unhelpful.

Analysis

Overview

[27] Mr McCaslin-Whitehead was charged with a combination of category 2 and category 3 offences to which he pleaded guilty. He was, accordingly, sentenced in the District Court and the High Court was the first appeal court. Section 250(2) of the CPA provides that a first appeal court must allow an appeal against sentence if satisfied, for any reason, there is an error in the sentence imposed on conviction and a different sentence should be imposed. Whilst s 250 is expressed broadly, in *Tutakangahau v R* this Court confirmed that s 250(2) reflects a "synthesis or rationalisation" of the previous provisions in the Crimes Act 1961 and the Summary Proceedings Act 1957 and is intended to provide a single test for all sentence appeals.[32] Although the section makes no reference to the concept of a manifestly excessive or inadequate sentence, those concepts are longstanding, are consistent with the statutory language in s 250(2) and should continue to be utilised when considering the section.[33] They provide a helpful means of examining the significance of the error to decide whether a different sentence should be imposed.

[28] Most sentencing decisions involve the exercise of a discretion. Accordingly, the appellate approach identified in *Austin Nichols & Co Inc v Stichting Lodestar* does not generally apply.[34] As the Court noted in *Tutakangahau,* the focus in sentence appeals is whether the sentence imposed is within the range available rather than the process by which the sentence was reached.[35]

[29] Particular principles govern Crown appeals.[36] Crown appeals are not for borderline cases.[37] As described in *Adams on Criminal Law*:[38]

> Their main purpose is to maintain consistency in the application of sentencing principles in those cases that fall clearly below established sentencing levels,

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32 *Tutakangahau v R* [2014] NZCA 279, [2014] 3 NZLR 482 at [26]. See also [32].
33 At [32]–[35].
34 *Austin, Nichols & Co Inc v Stichting Lodestar* [2007] NZSC 103, [2008] 2 NZLR 141.
35 *Tutakangahau v R,* above n 32, at [36].
36 See Simon France (ed) *Adams on Criminal Law — Sentencing* (online ed, Thomson Reuters) at [SAB5.09].
37 *R v Cargill* [1990] 2 NZLR 138 (CA) at 140.
38 France *Adams on Criminal Law — Sentencing,* above n 36, at [SAB5.09].

> or in cases where it can be said the sentence is manifestly inadequate even though there is no established pattern of sentencing.

[30] A sentence should not be increased unless either the Court is clearly of the opinion the sentence imposed was manifestly inadequate or the prosecution is able to point to some error in principle made by the sentencing Judge.[39] As to the concept of "manifestly inadequate", in *R v Wilson* this Court noted:[40]

> Whether a sentence can be said to be manifestly inadequate turns firstly on the maximum sentence for the particular offence; then on a consideration of comparable sentences, to the extent that those are considered to be appropriate; and above all, the focus is required to be on the totality of the offending and the culpability of the offender in the particular case.

[31] The considerations justifying an increase in sentence must be more compelling than those which might justify a reduction.[41] Accordingly, the court is more reluctant to increase than it is to reduce a sentence. The court must take care to ensure it does not override the sentencing Judge's discretion to take a merciful approach or to take a course calculated to achieve rehabilitation, even in cases which would normally call for a deterrent sentence.[42] That said, a rehabilitative sentence or merciful approach must be justified by the special circumstances of the case.[43] In the absence of such circumstances, a sentence that cannot be justified according to settled principles will justify a Solicitor-General's appeal. If the court determines that a sentence is manifestly inadequate or based upon a wrong principle, it will be reluctant to interfere if to do so would cause injustice to the offender.[44] This may arise when the Court is asked to increase a community-based sentence to one of imprisonment.[45] Where the offender has been complying with the conditions of that sentence and has served the bulk of the sentence, the court on appeal will be less inclined to interfere because of the harsh effect of substituting a prison term.[46] In such circumstances the court may find explicitly that the original sentence was inappropriate to ensure that, at a general

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39 *R v Muavae* [2000] 3 NZLR 483 (CA) at [10] citing *R v Pue* [1974] 2 NZLR 392 (CA).
40 *R v Wilson* [2004] 3 NZLR 606 (CA) at [41].
41 See *R v Wihapi* [1976] 1 NZLR 422 at 424; and *R v Donaldson* (1997) 14 CRNZ 537 (CA) at 549–550.
42 *R v Donaldson*, above n 41, at 550; and *R v Hunter* [1985] 1 NZLR 115 at 121.
43 *R v Kennedy* [2011] NZCA 109 at [32]; and *R v Cargill*, above n 37, at 140.
44 *R v Donaldson*, above n 41, at 550.
45 At 550.
46 At 550.

or policy level, it does not have precedential value, while at the same time declining leave to appeal so that the sentence itself is not disturbed.[47]

[32] Finally, and importantly, where the Court finds that a sentence should be increased on the grounds of manifest inadequacy or error of principle, the increase will not be to the level that would have been imposed where the appellate court were the original sentencing court. Rather, it is to the minimum extent required to remedy the manifest inadequacy.[48] The sentence should, in other words, only be increased to the level which accords with the lowest range of appropriate sentences.

[33] Against that background we consider the issues raised by Mr McCaslin-Whitehead in this appeal.

[34] We do so, reflecting the way the appeal was argued, by considering the approach taken to the appeal in the High Court generally; the starting point; the discount for personal history; the discount for time on bail; applying the totality principle to discounts; and, finally, the approach on appeal in assessing the final sentence.

The High Court Judge's general approach

[35] For Mr McCaslin-Whitehead, Mr English argued that the general error Davison J had made was evidenced in the passage we referred to at [12] above. It was not for the Judge to re-sentence Mr McCaslin-Whitehead as he would have done if he had been the sentencing Judge. Rather it was necessary for him to identify an error or errors by the District Court Judge and then, in accordance with the approach to be taken on Solicitor-General appeals, determine the appropriate response.

[36] We acknowledge the way Davison J described the task before him in the passage referred to is susceptible to that criticism. The Judge neither referred to the need for error to be established nor, at that point, to the additional principles applying to Crown sentence appeals. As this Court said in *Tutakangahau v R*, in confirming the

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47 At 550. See also *Phillip v R* [2022] NZSC 149, [2022] 1 NZLR 571 at [43]–[45].

48 *Sipa v R* [2006] NZSC 52, (2006) 22 CRNZ 978 at [9]; and *R v Urlich* [1981] 1 NZLR 310 (CA) at 311.

continuing relevance under s 250 of the CPA, of the then existing approach to criminal sentence appeals:[49]

> [30] The practical effect of preserving the approach applied to date is that the Appellate Court does not just start afresh nor simply substitute its own opinion for that of the original sentencer. Rather, in the words of *Shipton*, it must be shown that there was an error "whether intrinsically, or as a result of additional materials submitted" on appeal. If there is an error of the requisite character, the Court will then form its own view of the appropriate sentence. ...

[37] The Court went on to quote from *Te Aho v R*:[50]

> This Court does not lightly quote a sentence of imprisonment, and in the absence of a material error in the sentencing process which requires a reassessment of the sentence, or a clearly excessive sentence, will not intervene.

[38] That said, Davison J later described the approach called for under s 250(2) of the CPA in the following terms:[51]

> [44] The appellate court will not intervene where the sentence is within the range that can properly be justified by accepted sentencing principles. Whether a sentence is manifestly excessive or inadequate is to be examined in terms of the sentence given, rather than the process by which that sentence is reached. Where the court allows a prosecutor's appeal against the sentence imposed, it may only increase the sentence to the minimum extent necessary to remove the manifest inadequacy.

[39] Moreover, he structured his assessment of the Crown's challenge to the sentence imposed around the specific errors it was argued the Judge had made. We are not, therefore, persuaded the way Davison J summarised the overall task he faced establishes error. Rather it is necessary to consider the Judge's analysis of the errors the Crown asserted.

The increased starting point

[40] Whilst accepting the eight year starting point was appropriate, albeit generous, for the importation offending of Class B drug MDMA, the Judge considered "a significant uplift was available" to take account of the charge of importing the

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49 *Tutakangahau v R,* above n 32, (footnotes omitted).
50 At [30] citing *Te Aho v R* [2013] NZCA 47 at [30].
51 High Court judgment, above n 3.

Class A drug LSD and the charges of supplying Class A and Class B drugs, and possessing those drugs for supply.[52]

[41] The challenge to that aspect of Davison J's decision is two-fold. First, the Crown had not challenged the District Court's approach to starting point. That had been clarified by counsel at the hearing of the appeal. As such, it was not addressed by Mr McCaslin-Whitehead's counsel. Furthermore, the uplift he recognised was greater than that which had been argued for by the Crown at sentencing. Accordingly, it was submitted that the uplift set in the District Court was not manifestly inadequate or otherwise in error.

[42] Justice Davison's uplift to the two years set by the Judge was said to be a breach of natural justice, as the Crown had not challenged that aspect of the District Court decision. The Crown had, however, mounted a strong challenge to the sentence as a whole. In that context it would have been difficult for the Judge to make the necessary assessment without having some regard to the various aspects of the sentence as a whole. The Judge's exchanges with counsel show his clear concern to focus on the overall result in the District Court. We therefore are not satisfied that there has been a breach of natural justice.

[43] However, we nevertheless consider that the adjusted 10 year starting point, as accepted by the Crown in its submissions, is within range, albeit at the lower end of the range. *R v Wallace* remains the guideline judgment for MDMA offending.[53] In that decision, this Court describes different bands of such offending:[54]

> [F]or commercial activity on a major scale the starting point before any allowance for mitigating factors for a principal offender will be in excess of eight years and in the very bad cases up to 14 years, especially where repeat offending is involved.
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> …

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52 At [50].

53 See *McKelvy v R* [2018] NZCA 286 at [2]; and *Clausen v R* [2021] NZCA 396 at [61], where this Court applied *R v Wallace,* above n 6, in respect of MDMA offending.

54 At [30]–[31].

> Commercial manufacture or importation on a substantial scale reflecting sophistication and organisation with operations extending over a period of time though not involving massive quantities of drugs or prolonged dealing calls for a starting point in the range [sic] five to eight years.

[44] Here, there are very large quantities of drugs involved — approximately 11 kg of MDMA and 5,000 "tabs" of LSD Mr McCaslin-Whitehead imported, possessed and supplied the drugs himself. He laundered money as a way of paying for those drugs. His offending was prolonged. There can be no doubt this was commercial activity on a major scale.

[45] It is more challenging to describe the sophistication and organisation of the offending. The Crown pointed to the use of aliases, encrypted communications and "catchers" to suggest a high level of organisational sophistication. However the appellant was largely a "one-man" band. Mr McCaslin-Whitehead undertook the majority of the offending alone. He ordered the drugs through the internet and had the drugs posted by mail. He was not part of a wider criminal network or enterprise. The decisions in *Zhang* and *Berkland* make clear acting alone generally reflects a lower level of culpability.[55] Further, the Crown acknowledged that the importing of controlled drugs through the internet is "easy to do". We are satisfied the level of sophistication and organisation involved here is moderate.

[46] Given the lower level of sophistication and organisation, it is reasonable to conclude that the overall criminality involved is towards the lower end of the first category in *Wallace*. Accordingly, we are satisfied the 10 year starting point was within the range of justifiable starting points open to the District Court Judge.

Discount for personal factors

[47] Davison J concluded the Judge erred in allowing a 30 per cent discount for the s 27 personal factors and that 15 per cent was the maximum that could be recognised. Mr McCaslin-Whitehead also challenges those conclusions.

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[55] *Zhang v R* [2019] NZCA 507, [2019] 3 NZLR 648 at [126]; and *Berkland v R* [2022] NZSC 143, [2022] 1 NZLR 509 at [65]–[71].

[48] The s 27 report provided to the Court described a combination of causative factors in Mr McCaslin-Whitehead's background that contributed to his offending. He suffered childhood trauma, including physical and emotional abuse from those close to him. As a child, he was subject to sexual abuse. Mr McCaslin-Whitehead was diagnosed with a mood disorder at 18 and since managed has his mental health, at different times, with or without medication. He has, at points in his life, regularly consumed LSD, MDMA and Cannabis. He came into the offending as a result of a relationship he formed with an international drug trafficker that he met online. The report also describes how McCaslin-Whitehead has led a pro-social life. He was in a relationship with his de facto partner for a number of years, and has two daughters. He feels a strong cultural association with arborists, tradesmen and rural living. He reported a good reputation within his community, and received a very positive reference from his employer. He is intelligent and able to pick up practical skills well. He has taken positive steps since his arrest to turn his life around and rehabilitate.

[49] The District Court Judge said the following in giving a 30 per cent discount:[56]

> Then there is your s 27 report. And despite the Crown submitting that there is not a clear nexus between your offending and your circumstances, I disagree. The s 27 report gives me insight into your background and the particular difficulties that you have faced personally, health-wise and otherwise. And really brings also something that comes out of *R v Zhang.* I am satisfied that your offending occurred, notwithstanding its commercial nature, as a result of a vulnerability. You have an addiction yourself that you have been addressing. You have made significant steps towards addressing the other issues in your life and for that, I consider that an allowance of 30 per cent is appropriate.

[50] The Crown's challenge here was not to the District Court's recognition of the causative contribution of the matters traversed in the s 27 report, or of the significance of Mr McCaslin-Whitehead's efforts at rehabilitation. It was to the size of the discount allowed. We are satisfied that, particularly with consideration to discounts provided in other cases, the 30 per cent discount provided by the District Court Judge was excessive.

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56 District Court judgment, above n 1, at [18].

[51] The Supreme Court in *Berkland* described the background of Mr Berkland as follows:[57]

> Mr Berkland's upbringing involved multiple criminogenic risk factors including poverty, trauma, chaotic home circumstances and poor educational outcomes. Some of these factors, namely poverty, unresolved trauma, poor educational outcomes and chaotic circumstances, continued into adulthood, leading to, or exacerbating, poor resilience in the face of adversity.

[52] Furthermore, the Court described Mr Berkland's rehabilitative efforts as "genuinely exceptional".[58] The Court provided a 10 per cent discount for both Mr Berkland's background and the role of addiction in his offending, as well as 10 per cent for his efforts at rehabilitation.[59]

[53] In *Moses v R,* a total combined reduction of 15 per cent was given for the connection between the appellant's methamphetamine offending, her cultural background and her prospects of rehabilitation.[60] The appellant's cultural report described the structural, social and cultural deprivation suffered by her whānau, and indicated that, in addition, there were two clear events that led to her offending: the death of her mother and her inability to work as a labourer following injury. The Court accepted that Ms Moses had a limited offending history and showed a willingness to undertake rehabilitation.

[54] In *Carr v R*, this Court gave a 15 per cent discount for fairly extensive background disadvantages.[61] The background was described as follows:

> The cultural report prepared for Mr Carr described a disadvantaged life commencing when he was young. He grew up in poverty and started running away from home when his parents separated. As an adolescent, he associated with a criminal fraternity based on a North Shore "tinnie house" where others older than him and engaged in a life of crime were residing. He became affiliated to a youth gang, and subsequently to adult gangs. Peer group influences throughout his life were gang affiliated. The report writer identified a severe disconnection from Te Ao Māori, family violence, an incident of sexual abuse by a family member, an early exit from the education system and the absence of formal qualifications, affiliation with gangs, early entry to the criminal justice system, a first term of imprisonment at the age of 17 years, alcohol and drug abuse as well as methamphetamine addiction, and adult gang

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57 *Berkland v R,* above n 55, at [156].
58 At [160].
59 At [162].
60 *Moses v R* [2020] NZCA 296, [2020] 3 NZLR 583.
61 *Carr v R* [2020] NZCA 357.

> affiliation. The report also identified some potential for rehabilitation given Mr Carr's acknowledgment of the need for him to change in behaviour particularly for the sake of his children.

[55] There are few cases with discounts as high as 30 per cent for background factors.

[56] One example, cited by the appellant, is the High Court case of *Solicitor-General v Heta*.[62] The Solicitor-General appealed a District Court sentence wherein the sentencing Judge allowed a 30 per cent discount for background factors, as well as 10 per cent for participation in a restorative justice programme.

[57] Whata J summarised the sentencing Judge's findings:

> [10] In addressing the s 27 report, the Judge observed that Ms Heta's life reflects the significant post-colonial trauma and disruption of the cultural identity experienced by Māori whānau, hapu and iwi, where alcohol and poverty has resulted in offending of this type. The Judge noted that Ms Heta has lived a life that has involved drinking, physical and emotional violence that controlled her from childhood into her adulthood. The Judge also identified Ms Heta's linkages to her Māoritanga, the importance of her relationships with her whānau and the effect of her mental health and poor decision-making on her wairua. Ms Heta's disconnection from her community and from her family are also noted as are references in the cultural report about poor role models, Ms Heta's "fight for survival" during her childhood, and ongoing issues with alcohol and trust.
>
> (Footnote omitted).

[58] Whata J concluded that, in the circumstance, the discount did not require correction:

> [64] [I] agree with the Solicitor General that Ms Heta's "difficult upbringing" could not by itself attract a discount of 30 per cent in addition to a discount of 10 per cent for participation in the restorative justice process. That is outside the range normally afforded for these factors where no linkages are drawn to moral culpability. However, I do not accept the personal mitigating factors identified in the s 27 report are isolated to these two matters. The report identifies several key facts that directly bear on *both* culpability and rehabilitation including (in addition to personal childhood trauma):
>
> (a) Alcohol abuse is a key contributor to the offending;
>
> (b) Alcohol abuse is a learned behaviour from her parents;

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62 *Solicitor-General v Heta* [2018] NZHC 2453, [2019] 2 NZLR 241 (emphasis in original).

(c) Ms Heta was isolated from positive whānau and other pro-social influences early in life;

(d) The alcohol abuse and whānau disconnection has significantly impaired Ms Heta's wellbeing and her life choices;

(e) Ms Heta is however proud of her Māori heritage;

(f) Ms Heta now has strong whānau support; and

(g) Ms Heta has made significant strides already toward rehabilitation.

[65] While generous, the combined discount of 40 per cent for personal mitigating factors does not require correction given these facts. ...

(Footnotes omitted).

[59] The combined background factors and circumstances present here do not, in our view, warrant a similar quantum discount. While some discount was certainly warranted, we agree with Davison J that the 30 per cent discount allowed by the District Court Judge was in error. But in our view the conservative approach governing Crown appeals suggests an adjusted discount of no more than 20 per cent. Two of us would set the discount at that figure. One tends to agree with Davison J as to the correct figure. As we explain later, here we do not need to resolve that difference.

[60] We therefore agree that the figure of two years imprisonment was too low, that home detention was not available and that a term of imprisonment should have been imposed.

Discounts and the totality principle

[61] Davison J emphasised the need to stand back and to consider the overall effect where a range of discounts are identified. In this appeal, that approach was criticised. There was no basis for that criticism. There is clear authority for standing back and considering whether when added up discounts have led to a sentence that is not in proportion with the gravity of the offending.

[62] In *Hessell v R,* the Supreme Court said:[63]

> [77] All these considerations call for evaluation by the sentencing judge who, in the end, must stand back and decide whether the outcome of the process followed is the right sentence.

[63] In *Stehlin v R,* this Court declined to give a further discount for prospects of rehabilitation on top of the 70 per cent discounts already provided for mitigating factors. Collins J noted:[64]

> [44] We accept a further discount of up to 10 per cent was available to reflect Mr Stehlin's prospects for rehabilitation. Even if, however, a further discount was given to reflect this factor other adjustments would be required to some of the generous discounts made in the District Court so as to ensure the end sentence was a proportionate response to Mr Stehlin's very serious offending. In particular, were we re-sentencing Mr Stehlin we would have allowed discounts of 20 per cent for Mr Stehlin's youth and 20 per cent for his guilty plea. In making these observations we emphasise we would not attempt to place a cap on the total discounts that are available when sentencing an offender. Rather, we would ensure the end sentence reflects the seriousness of the offending.

[64] Similarly in *Dickey v R* this Court noted:[65]

> It is always necessary to stand back and make an overall assessment when sentencing, and manifest injustice is assessed as a matter of overall impression. Discounts overlap and there is a risk that some statutory purposes of sentencing can be lost sight of when they are treated separately and simply tallied up.

[65] Finally, *Adams on Criminal Law* provides:[66]

> The extent of discount for mitigating features is a highly discretionary exercise: *Kumar v R* [2015] NZCA 460 at [81]. There is often a need in cases of serious offending to ensure discounts do not result in a sentence insufficient to mark the gravity of what occurred: *R v Mako* [2000] 2 NZLR 170, (2000) 17 CRNZ 272 (CA) at [66]; *Arona v R* [2018] NZCA 427 at [61]; and *R v Jarden* [2008] NZSC 69, [2008] 3 NZLR 612, (2008) 24 CRNZ 46 at [12].

[66] Davison J was therefore correct to "stand back" as he did, and so must we. From a starting point sentence of 10 years, a discount of 60–70 per cent results in a

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63 *Hessell v R* [2010] NZSC 135, [2011] 1 NZLR 607.
64 *Stehlin v R* [2022] NZCA 453.
65 *Dickey v R* [2023] NZCA 2 at [175] (footnotes omitted).
66 France *Adams on Criminal Law* — Sentencing, above n 36, at [SAC3].

sentence of three to four years' imprisonment. We remind ourselves that 20 per cent of that discount was given to recognise assistance to the authorities.

The appropriate appellate response here

[67] Like Davison J, we therefore conclude that the two year sentence of imprisonment arrived at in the District Court was manifestly inadequate as must, by definition, be the sentence of home detention imposed in substitution.

[68] The question becomes in these circumstances as to what is the correct appellate response to that error in terms of s 251(2) of the CPA.

[69] The decision of this Court in *R v Honan* provides a helpful example on the application of the applicable principles.[67] There the Court held that a sentence of 12 months' home detention for attempting to manufacture methamphetamine and for possession of methamphetamine for supply was manifestly inadequate and that the correct sentence should have been around four and a half years' imprisonment. However, it declined the appeal on the basis the offender had completed half the home detention sentence, had successfully undertaken a drug rehabilitation programme at Odyssey House and had stable employment and the support of employers.

[70] Similarly in *R v Potter* the Court held that a sentence of 10 months' home detention for attempting to defeat the course of justice was manifestly inadequate.[68] The sentence should have been in the vicinity of two years and nine months' imprisonment. However, the Court declined to interfere both on the basis of the principle articulated in *Donaldson*, that non-custodial sentences need not be overturned if the correct sentence which would be substituted would be two years' imprisonment or less, and because the substitution of imprisonment would now have an unjust impact on parole eligibility.

[71] Whilst the sentence of imprisonment we would have imposed is higher than the two years and nine months in *Potter*, we have also concluded the appropriate course here is to decline to interfere. In reaching that conclusion we have given

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67 *R v Honan* [2015] NZCA 94.
68 *R v Potter* [2015] NZCA 25.

particular weight to society's interests in Mr McCaslin-Whitehead's rehabilitation, and to his personal interests in that outcome and those of his family as well. He had spent four months on his sentence of home detention when the High Court imposed a term of imprisonment. He has since been on bail, on similar conditions as applied to his home detention. We think it would be unjust for him now to face a period of imprisonment. On that basis we need not determine the sentence of imprisonment we would have imposed.

[72] We reiterate that the sentence of home detention reached in the District Court was manifestly inadequate. A sentence of imprisonment was called for. However we are satisfied that maintaining the non-custodial sentence reached in the District Court is the correct course, in line with well-settled principles governing appeals by the Crown.

[73] We accordingly impose a sentence of home detention, lasting until the expiry of what would have been Mr McCaslin-Whitehead's sentence of home detention had the District Court sentence remained in place — 29 August 2023. We have had the benefit of a new PAC report prepared by the Department of Corrections which satisfies us that the conditions of s 80A(2) of the Sentencing Act 2002 are met and such a sentence is appropriate.

Result

[74] Leave to appeal is granted.

[75] The appeal is allowed.

[76] The sentence of four years and two months imprisonment imposed by the High Court is quashed. It is substituted for a two month and two day sentence of home detention, on the same conditions as were imposed in the District Court, commencing on 27 June 2023 and expiring on 29 August 2023.

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