

IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA294/2024
[2024] NZCA 476

BETWEEN DANIEL JAMES O'BRIEN
Appellant
AND THE KING
Respondent

Hearing: 2 September 2024
Court: Thomas, Whata and Grice JJ
Counsel: M J James and S S Pohiva for Appellant
T R Simpson for Respondent
Judgment: 23 September 2024 at 11.30 am

JUDGMENT OF THE COURT

- A The appeal against sentence is allowed.**
B The concurrent sentences of five years and five months' imprisonment are quashed.
C Concurrent sentences of four years, one month and two weeks' imprisonment are substituted.
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REASONS OF THE COURT

(Given by Grice J)

[1] Mr O'Brien was sentenced on 19 April 2024 after pleading guilty to charges of supplying methamphetamine (representative charge) and offering to supply

methamphetamine (representative charge).¹ He was discharged on application by the Crown on a further charge of possession of methamphetamine for the purposes of supply.² He was sentenced to five years and five months' imprisonment.³

[2] Mr O'Brien appeals against his sentence. He confined his appeal in submissions to one ground, contending that the sentence was manifestly excessive and specifically that the starting point adopted was too high.

Approach on appeal

[3] An appeal against sentence may be brought as of right under s 244 of the Criminal Procedure Act 2011. This Court must allow the appeal only if it is satisfied there has been an error in the sentence and that a different sentence ought to be imposed.⁴ In the vast majority of cases, the court "will not intervene where the sentence is within the range that can properly be justified by accepted sentencing principles".⁵ A sentence appeal "will almost always turn on a consideration of whether the final outcome is manifestly excessive", rather than the "route by which the Judge reached that outcome".⁶

Law in relation to serious drug offending

[4] The guideline judgment for serious drug offending is *Zhang v R*.⁷ It sets out a number of bands for methamphetamine offending. The bands articulated in *Zhang* are as follows:⁸

- (a) band one: less than 5 grams — community to four years;
- (b) band two: less than 250 grams — two to nine years;
- (c) band three: less than 500 grams — six to 12 years;

¹ Misuse of Drugs Act, s 6(1)(c) and 6(2)(a) — maximum penalty life imprisonment.

² Sections 6(1)(f) and 6(2)(a).

³ *R v O'Brien* [2024] NZDC 8758 [sentencing notes].

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

⁵ *Tutakangahau v R* [2014] NZCA 279, [2014] 3 NZLR 482 at [36].

⁶ *Ripia v R* [2011] NZCA 101 at [15]. See also *Kumar v R* [2015] NZCA 460 at [81].

⁷ *Zhang v R* [2019] NZCA 507, [2019] 3 NZLR 648.

⁸ At [125].

(d) band four: less than 2 kilograms — eight to 16 years; and

(e) band five: more than 2 kilograms — 10 years to life.

[5] A summation approach to quantity across different convictions is appropriate.⁹

[6] The role of the offender — in other words, what they actually did — is a fundamental component of the gravity and culpability assessment.¹⁰ The Court in *Zhang* subdivided the above bands into role-based categories to assist in determining where in the bands the offending belongs.¹¹ The Crown has the burden of proving any aggravating facts in dispute, and disproving any mitigating facts in dispute, that are related to the offender’s part in the offence.¹² In practice, the facts necessary to establish guilt will often justify inferences about the offender’s role, knowledge, and gain.

The District Court decision

[7] Judge Crayton noted that there was no issue over the fact that the offending fell into the lower end of band three, or the upper end of band two, in terms of *Zhang*.¹³ Those bands indicate sentencing ranges of two to nine years’ and six to 12 years’ imprisonment respectively. The analysis carried out indicated an estimated amount of methamphetamine supplied in this case was 183.5 grams, along with 101.25 grams offered for supply. The range of the amounts supplied and offered was between 0.25 grams to 28 grams of methamphetamine. Given the period covered by the data, the average was approximately 50 grams of methamphetamine for each month of offending.¹⁴

[8] The Judge then assessed the role played by Mr O’Brien in the drug operation. He noted that Mr O’Brien was effectively a “one man bandit” and was motivated both by gain and the need to finance his ongoing methamphetamine habit. While there was

⁹ *Malolo v R* [2022] NZCA 399 at [18].

¹⁰ *Berkland v R* [2022] NZSC 143, [2022] 1 NZLR 509 at [63].

¹¹ *Zhang v R*, above n 7, at [126]. The “significant” role profile was adjusted by the Supreme Court in *Berkland v R*, above n 10, at [71].

¹² *Zhang v R*, above n 7, at [127]; and Sentencing Act 2002, s 24(2)(c).

¹³ Sentencing notes, above n 3, at [6].

¹⁴ At [4].

some commercial profit, it was not suggested that Mr O'Brien was living the "high life". Nevertheless, the Judge concluded that Mr O'Brien would have had "clear insight" as to what was taking place given the nature of the supply chain he was in, and that he was also "permitting or availing others or another to be able to supply onwards".¹⁵ The Judge categorised Mr O'Brien's role as "significant" and, taking into account the factors he had identified, he set the starting point at seven years and six months' imprisonment.¹⁶

[9] The Judge then applied an uplift of six per cent to the starting point, noting that while Mr O'Brien was not being re-sentenced, it could not be ignored that methamphetamine had brought him before the court previously, and the offending occurred whilst he was on parole for earlier methamphetamine offending.¹⁷ It was also relevant that Mr O'Brien had been recalled on his previous sentence.¹⁸ The Judge gave a credit of a 10 per cent, as suggested by the Crown, for Mr O'Brien's guilty plea, noting that the discount was "generous" considering the plea was entered at the latest possible time without the verdict having been delivered by the jury.¹⁹

[10] The Judge accepted that Mr O'Brien's drug use "provided some motivation" for his drug dealing, and that it provided a way in which he could supplement or pay for some of his drug habit, if not all of it. However, the Judge concluded there was a significant commercial element involved which gave Mr O'Brien extra money as a result of the drug dealing, estimating the amount of methamphetamine dealt during the period to which the charges related amounted to approximately "just shy of two grams" a day.²⁰

[11] The Judge considered a credit was warranted in recognition of the fact that Mr O'Brien had been on electronically-monitored (EM) bail for just over two years, and during that time had not breached his bail conditions.²¹ In addition, the Judge

¹⁵ At [7].

¹⁶ At [8]. See the role categorisation profiles in *Berkland v R*, above n 10, at [71].

¹⁷ At [9].

¹⁸ At [10].

¹⁹ At [11].

²⁰ At [13].

²¹ At [14] and [17].

allowed a discrete 10 per cent discount for Mr O'Brien's drug issues, the time he had worked, his abstinence, and his intention not to relapse.²²

[12] Taking into account the uplift, as well as the credits awarded for the guilty plea and drug-related factors, a net overall discount of 14 per cent was applied. A further discount of 12 months and two weeks for the time spent on EM bail brought the final sentence to 65 months', or five years and five months' imprisonment. The Judge expressed that "sadly" he could not bring the sentence back further as, given the serious nature of the offending, it could not "compact to a short term of imprisonment".²³

Analysis

[13] Ms Simpson, for the Crown, submits that Mr O'Brien's offending was properly characterised by the Judge as falling within the "significant role" category, and that this was well open on the agreed summary of facts to which he pleaded guilty. She contends that the fact that Mr O'Brien was running his own operation, rather than directing others in the chain, did not render the "significant" role unavailable. Ms Simpson submits the offending was the result of a well-established, street-level operation selling wholesale quantities of methamphetamine to repeat customers and to another methamphetamine dealer for commercial gain. Therefore, the starting point of seven and a half years, which was at the bottom of band three or top of band two, was available.

[14] The Crown points to the decision of this Court in *Harris v R*, in support of its contention that the nature of the operation suggested that Mr O'Brien played a "significant" role in the offending.²⁴ Ms Harris was being sentenced on two sets of offending. The first set occurred in 2017, for which she was charged with possession of methamphetamine for supply, possession of heroin, cocaine and GBL ("fantasy"), and unlawful possession of a restricted weapon.²⁵ Ms Harris was found with 97.646 grams of methamphetamine and 54.9 grams of GBL, less than a gram of cocaine,

²² At [18].

²³ At [19].

²⁴ *Harris v R* [2021] NZCA 143.

²⁵ At [2].

96 milligrams of heroin, a contact stun taser, a “tick book”, and \$1,798 in cash.²⁶ The items were located in Ms Harris’ handbag. The second set of offending, which occurred in 2018 and 2019, involved wilful damage of an EM bracelet, unlawful possession of a pistol and manufacturing methamphetamine.²⁷ 51.5 grams of methamphetamine was found, along with various items used in its manufacture. Ms Harris admitted these items belonged to her and that she had manufactured methamphetamine on more than one occasion.²⁸

[15] This Court in *Harris* adopted a starting point of three years’ imprisonment for the lead charge of manufacturing and applied a six-month uplift for possession of the pistol.²⁹ The 2017 charges attracted a four-year starting point for the drugs found in Ms Harris’s possession, with an uplift of six months for the presence of the other items.³⁰ The sum amounted to a starting point of eight years’ imprisonment.³¹ The Crown had alleged that Ms Harris played a central role and necessarily had an awareness and understanding of the scale of the operation.³² While the Court concluded that Ms Harris’ role was at the lower end of “significant” in relation to the 2019 offending,³³ and in the “lesser” category for the 2017 offending,³⁴ it noted that she was “in the grips of addiction” at the time.³⁵ The starting point was then adjusted for totality from eight years’ to six years’ imprisonment.³⁶

[16] Mr Pohiva, for Mr O’Brien, takes no issue with the Judge identifying that the offending fell at the upper end of the *Zhang* band two and the lower end of band three as a result of the quantity of methamphetamine involved. However, he submits that a proper assessment of Mr O’Brien’s role indicates that it was not “significant”, but rather a “lesser” role.

²⁶ At [3].

²⁷ At [4].

²⁸ At [6].

²⁹ At [21] and [22].

³⁰ At [22].

³¹ At [23].

³² At [19].

³³ At [21].

³⁴ At [24].

³⁵ At [23].

³⁶ At [23].

[17] The “essential characteristic” of significant players, as identified in *Berkland*, is that “they are important enablers in the chain who take the orders from leaders”.³⁷ They perform an “operational or management” function, with higher culpability attaching to managers who take the direction of leaders, rather than those whose tasks are merely operational.³⁸ Significant players may operate alone or with others, and will likely be motivated solely or primarily by financial or other advantage, particularly those at the upper end of the significant category, who are likely to be paid in a way that is broadly commensurate with the risks that are run and the profitability of the operation.³⁹ At the lower levels of significant, a person will have some awareness and understanding of the scale of the operation.⁴⁰

[18] We agree with Mr Pohiva that the circumstances of Mr O’Brien’s offending does not put his role in the “significant” category. Rather, he falls into the upper end of the “lesser” category. While Mr O’Brien did supply to one other methamphetamine dealer, his operation largely involved supplying numerous individuals with the methamphetamine, some of whom were repeat customers. The amounts supplied and offered were relatively low, although they did range from 0.25 grams to 28 grams. The value of the offending over the relevant five-and-a-half-month period was not at the higher level, with an estimated \$28,550 supplied and \$21,420 offered. There is nothing to suggest that the Mr O’Brien held an operational management function within a chain, nor that he was directing others in the operation. The overall indication was that he supplied many repeat customers and was no more than a street-level dealer. The varying quantities supplied support this. He was unlikely to have any influence on those above him in a chain, and there is nothing to suggest that he had anything other than a low level awareness or understanding of the scale of the operation.⁴¹

[19] In addition, there appears to be no dispute as to the fact that Mr O’Brien was motivated by his addiction and having a ready source of methamphetamine for his own use. While Mr O’Brien may have benefited at a low level financially, we do not consider that financial reward can be seen as his principal motivation. Information

³⁷ *Berkland v R*, above n 10, at [67].

³⁸ At [67] and [68].

³⁹ At [70] and [71].

⁴⁰ At [71].

⁴¹ In reference to the factors set out at [71].

concerning Mr O'Brien's drug addiction was before the Court. The writer of the pre-sentence report pointed out that Mr O'Brien had a drug issue, having abused drugs for 35 years. The Judge accepted the fact of Mr O'Brien's addiction and its contribution to the offending. He noted that Mr O'Brien had been a long-term user of methamphetamine for about 25 years, although the abuse of that drug had only brought him before the court for the first time in 2020. The Judge also observed that Mr O'Brien had previously been before the court for cultivating cannabis and possession of drugs.⁴²

[20] We consider that a starting point of six years, rather than seven and a half years, would more accurately reflect Mr O'Brien's role in the offending. This compares to the starting point of six years (once adjusted for totality) substituted on appeal by this Court in *Harris*.⁴³ While the amount of methamphetamine in *Harris* was less than involved here, there were two groups of methamphetamine offending involved, including manufacturing and the possession of firearms in the second set, and possession of other drugs in the first. Before us the Crown also referred to *Tang v R* in support of its submission that the operational or management functions characterising a "significant" role may be present in an offender's own operation.⁴⁴ However, in that case Mr Tang was supplying significant quantities of methamphetamine and commanding high prices, effectively running a significant commercial enterprise. We do not consider this is comparable to Mr O'Brien's offending.

[21] No issue is taken with the uplift of six per cent for Mr O'Brien's previous drug-related offending and offending while on parole, nor with the 10 per cent discount for his guilty plea and the 10 per cent discount for personal factors and drug issues. The 12 month and two week discount for time spent on EM bail was also not in contention. We agree that those various uplifts and discounts were within the range available.

⁴² Sentencing notes, above n 3, at [12].

⁴³ *Harris v R*, above n 24, at [23].

⁴⁴ *Tang v R* [2021] NZCA 266 at [19].

[22] We therefore conclude that the Judge made an error in categorising Mr O'Brien's role in the offending as "significant" rather than "lesser", and the sentence was manifestly excessive due to the excessively high starting point taken. The starting point of seven and a half years' imprisonment is substituted for one of six years. To that starting point, an uplift of six per cent must be applied for previous convictions, along with a discount of 10 per cent for the guilty plea discount and a further 10 per cent discount for drug and related personal factors. From that, 12 months and two weeks is deducted for time on EM bail, leading to a final sentence of four years, one month and two weeks' imprisonment. The resulting sentence is one of four years, one month and two weeks' imprisonment.

Result

[23] The appeal against sentence is allowed.

[24] The concurrent sentences of five years and five months' imprisonment are quashed.

[25] Concurrent sentences of four years, one month and two weeks' imprisonment are substituted.

Solicitors:

Te Tari Ture o te Karauna | Crown Law Office, Wellington for Respondent