

**IN THE COURT OF APPEAL OF NEW ZEALAND**

**I TE KŌTI PĪRA O AOTEAROA**

**CA323/2023  
[2024] NZCA 379**

BETWEEN PO-CHEN CHIEN  
Appellant  
AND THE KING  
Respondent

Hearing: 22 July 2024  
Court: Mallon, Fitzgerald and Jagose JJ  
Counsel: E M Gresson for the Appellant  
R D Butler and M A Beattie for the Respondent  
Judgment: 9 August 2024 at 4 pm

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**JUDGMENT OF THE COURT**

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**The appeal is dismissed.**

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**REASONS OF THE COURT**

(Given by Fitzgerald J)

## Introduction

[1] On 11 May 2022, following a sentencing indication given by Judge Recordon,<sup>1</sup> the appellant, Mr Chien, pleaded guilty to the following charges:

- (a) possession of a Class A drug, namely methamphetamine, for supply (x 2);<sup>2</sup>
- (b) possession of a Class B drug, namely ephedrine, for supply (representative);<sup>3</sup>
- (c) unlawful possession of a firearm (representative);<sup>4</sup> and
- (d) unlawful possession of explosives, namely ammunition (representative).<sup>5</sup>

[2] On 24 May 2023, Judge Yelavich sentenced Mr Chien to five years, two months' imprisonment.<sup>6</sup>

[3] Mr Chien now appeals against his sentence. As filed, there are three grounds of appeal:

- (a) First, the final sentence was manifestly excessive.
- (b) Second, the sentence should have been imposed by the Judge who gave the sentencing indication and heard the various adjournment applications.
- (c) Third, the discount allowed for Mr Chien's rehabilitative efforts and progress, namely a 10 per cent discount granted for *both* rehabilitation and remorse, was insufficient.

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<sup>1</sup> *R v Chien* DC Papakura CRI-2021-092-003071, 4 May 2021 [sentencing indication].

<sup>2</sup> Misuse of Drugs Act 1975, s 6(1)(f) and (2)(a). Maximum penalty: life imprisonment.

<sup>3</sup> Section 6(1)(f) and (2)(b). Maximum penalty: 14 years' imprisonment.

<sup>4</sup> Arms Act 1983, s 45(1). Maximum penalty: four years' imprisonment or fine of \$5,000.

<sup>5</sup> Section 45(1). Maximum penalty: four years' imprisonment or fine of \$5,000.

<sup>6</sup> *R v Chien* [2023] NZDC 10408 [sentencing notes].

[4] Ms Gresson, appearing for Mr Chien on the appeal, confirmed that the three appeal grounds collapse into one proposition, namely that the discount for rehabilitation was inadequate. It is submitted that the discount for rehabilitation and remorse ought to have been separated to give a five per cent discount for remorse and a 35 per cent discount for rehabilitation. We address the appeal on that basis.

[5] An appeal against sentence may only be allowed by this Court if it is satisfied that there has been an error in the imposition of the sentence and that a different sentence should be imposed.<sup>7</sup> The focus is not on the process by which the sentence was reached, but on whether the end result is manifestly excessive.<sup>8</sup>

### **Background facts**

[6] The basis upon which Mr Chien was sentenced was set out in an agreed summary of facts put before the Judge.

[7] On 16 April 2021, and as part of a broader investigation into the importation and distribution of drugs, the National Organised Crime Group of the Police executed a search warrant at Mr Chien's home address in Flat Bush. A shoebox containing 159 g of methamphetamine was located in his bedroom. Police also located just over \$1 million in cash in the bedroom.

[8] Mr Chien's motor vehicle was searched, and a .22 calibre revolver was located, which Mr Chien said was given to him by a friend. He has never had a firearms licence.

[9] A storage unit in East Tamaki, rented by Mr Chien, was also searched on 16 April. Concealed in the false bottom of a crate in the storage unit was 3,850 g of ephedrine, which had been imported into New Zealand by post on or around 27 March 2021.

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<sup>7</sup> Criminal Procedure Act 2011, s 250(2) and (3).

<sup>8</sup> *Tutakangahau v R* [2014] NZCA 279, [2014] 3 NZLR 482 at [36]; and *Ripia v R* [2011] NZCA 101 at [15].

[10] On 19 May 2021, Police executed a search warrant at another address to which Mr Chien was connected. A crate of the same nature as that in Mr Chien's storage unit was located at the address and contained 3,400 g of ephedrine. The crate had been part of the consignment imported on or around 27 March 2021.

[11] On 27 May 2021, Police executed a search warrant at a storage unit in Mt Eden, also rented by Mr Chien. Located within the storage unit were five g of methamphetamine, electronic scales and numerous zip-lock bags, 89.8 g of ephedrine in different sized zip-lock bags and other containers, a 12-gauge, pump action Dickinson XX3B shotgun, a loaded bolt action Tikka T3x rifle, a loaded semi-automatic AK-47 rifle, and various containers holding 1,482 rounds of ammunition of various calibres.

[12] Mr Chien was remanded in custody from April 2021 until being granted bail to Ngā Kete Wānanga Solutions in October 2021.

### **Sentencing indication**

[13] Judge Recordon provided a sentencing indication on 4 May 2022. In light of the global starting point submitted by both the Crown and defence,<sup>9</sup> he considered that an overall starting point of 12 years was appropriate, but noted that the additional firearms charges would normally justify an uplift to the 12 years for the drug offences of around two and a half years.<sup>10</sup>

[14] Mr Chien's counsel had submitted that a discount of 20 to 25 per cent ought to be available for Mr Chien's guilty pleas, despite them being entered only days prior to trial. This was on the basis of counsel's submission that there had been significant volumes of disclosure, that there had been difficulty engaging with Mr Chien while in custody during the COVID-19 lockdowns, and that "partial" language issues had hampered taking instructions. The Crown submitted that a 10 to 15 per cent discount was all that was warranted in the circumstances. The Judge accepted that there had

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<sup>9</sup> Sentencing indication, above n 1. Once the firearms charges and the large amount of cash had been taken into account (the latter as an aggravating factor), Mr Chien's counsel had submitted that a starting point of 14 to 15 years would be appropriate for all charges. The Crown advanced a starting point of around 12 years for all charges, taking into account totality.

<sup>10</sup> At [5].

been difficulties taking instructions from defendants in custody during the COVID-19 lockdowns and accepted that a full 25 per cent discount for guilty pleas would be available.<sup>11</sup> The Judge also noted that further discounts for time spent on bail and for cultural factors would be available at sentencing.<sup>12</sup>

### **Materials before the Judge at sentencing**

[15] At sentencing, Judge Yelavich had before her, among other reports, Mr Chien's criminal history, two Provision of Advice to the Courts (PAC) reports, a cultural report for the purposes of s 27 of the Sentencing Act 2002, and a psychological report prepared by Jim Rensburg, a registered clinical psychologist. The Judge also had provided to her a letter from Mr Chien expressing remorse for his offending, as well as a character reference from the manager of Mr Chien's prior place of employment.

#### *Criminal history*

[16] Mr Chien is 37 years old.<sup>13</sup> He has two previous convictions for assault, for which he was ordered to come up for sentence if called upon, and operating a vehicle carelessly, for which he was fined.

#### *PAC report*

[17] The first (and principal) PAC report records that Mr Chien has resided in New Zealand since he was 15 years old. He has no family in New Zealand, other than his ex-wife and their children. The report records that following his separation from his wife, Mr Chien succumbed to gambling and drug addictions. Mr Chien told the report writer that in order to fund his gambling (and, we presume, his methamphetamine use, which he said started at around the same time as his gambling), he took out loans from "loan sharks", and his offending was committed under instruction and duress from them when he was unable to repay the loans. The report also notes that Mr Chien had reported suffering from depression for most of his life, and that he appeared to have "embraced" the support provided to him at a drug rehabilitation facility while on EM bail.

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<sup>11</sup> At [2].

<sup>12</sup> At [6].

<sup>13</sup> He was 35 at the time of sentencing.

[18] The second PAC report notes that Mr Chien was contrite and remorseful for his offending, which was a change in attitude from the first PAC report, in which it was recorded that he had been unable to articulate any feelings of remorse.

[19] The first PAC report also records that Mr Chien was drug free and continuing to engage with the available rehabilitative programmes, attending Community Alcohol and Drug Services (CADS), completing Maru Tapu (a 12-step alcohol and drug counselling programme), and attending Narcotics Anonymous weekly. He was also noted as attending gambling counselling. The second PAC report provides a further list of the rehabilitative programmes Mr Chien had successfully completed, or was participating in, to May 2023, which includes “He Whakato Kakano Anti-P Ministry, Cognitive Behavioural Therapy for Justice Clients”, Ngā Kete Wānanga Solutions Rehabilitation and Reintegration three-month programme, the Mana Matua Parenting Programme, peer support work with the Asian community, and the Man Up Tu Tangata 15-week programme.

#### *Section 27 cultural report*

[20] Mr Chien’s cultural report describes his dysfunctional upbringing in Taiwan, having been raised by his grandparents from the age of five, and being sent to New Zealand to attend school at the age of 15. Mr Chien reported that during his childhood in Taiwan, he had been the subject of physical and some sexual violence (the latter at the hands of an adult male neighbour). He also reported suffering from depression from a young age, which became more persistent when he came to New Zealand as an exchange student.

[21] Mr Chien married at 18 and the couple had two children. The report records that Mr Chien’s long work hours and financial pressure put tension on the relationship and the couple separated. The report further records that the separation, combined with Mr Chien’s existing mental health condition, triggered his gambling abuse. His mental health continued to decline, he began using methamphetamine, and attempted to use gambling as a means of financially supporting himself. It was in this context that Mr Chien began his offending.

### *Psychological report*

[22] Mr Rensburg's report also notes Mr Chien's dysfunctional upbringing and his persistent depression, beginning from childhood. Mr Rensburg notes that when Mr Chien first came to New Zealand he had little English and was very isolated.

[23] Mr Chien left school without qualifications at around the age of 17 or 18 and got married soon after. As noted in the cultural report, he and his wife separated in 2012, but the report records that they still having a positive relationship. Mr Chien had been unemployed since his divorce in 2014 and, as noted, he turned to gambling rather than employment, and acquired debts of hundreds of thousands of dollars to "loan sharks". The report records that Mr Chien then agreed to work with his creditors in order to try to clear his debts and also developed a methamphetamine habit at around the same time.

[24] Mr Rensburg states that Mr Chien exhibits persistent symptoms of anxiety and depression, and that, in his opinion, there is a clear nexus between Mr Chien's mental health and his offending. Mr Rensburg considers Mr Chien to be at a medium risk of reoffending, but notes that he remained willing to participate in and would benefit from ongoing rehabilitative programmes, and that he also enjoys continuing support from his ex-wife and two teenage children.

### **Sentencing**

[25] At sentencing, Judge Yelavich adopted the starting point of 12 years' imprisonment as indicated by Judge Recordon.<sup>14</sup> She noted that Mr Chien had limited previous convictions, and agreed that no uplift was warranted for them.<sup>15</sup>

[26] Turning to discounts, the Judge applied the full 25 per cent discount for guilty pleas indicated by Judge Recordon, which were entered shortly after the sentencing indication was given.<sup>16</sup> The Judge considered the cultural and psychological reports provided, accepting that Mr Chien's background and mental health difficulties had

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<sup>14</sup> Sentencing notes, above n 6, at [8]–[9].

<sup>15</sup> At [10].

<sup>16</sup> At [11].

causatively contributed to his offending, and accordingly applying a discount of 15 per cent to recognise this.<sup>17</sup>

[27] The Judge also noted that, while on electronically monitored bail (EM bail), Mr Chien had undertaken around 21 rehabilitative courses, including courses to address his underlying drug and gambling issues.<sup>18</sup> In light of this, and Mr Chien’s letter of remorse, the Judge applied a further discount of 10 per cent.

[28] Finally, from the six years’ imprisonment arrived at through the above sentence discounts, the Judge deducted a further 10 months’ imprisonment to reflect the nearly 19 months Mr Chien had been on EM bail (without breach).<sup>19</sup> This resulted in the end sentence of five years and two months’ imprisonment. No minimum period of imprisonment was imposed.

## **Submissions**

### *Appellant submissions*

[29] Ms Gresson first submits that a standalone discount of five per cent should have been allowed for Mr Chien’s “real and genuine expression of remorse”, consistent with the discounts applied in *Rogers v R*,<sup>20</sup> *Zhang v R*,<sup>21</sup> and *Glassie v R*.<sup>22</sup> In terms of a discount for rehabilitation, Ms Gresson submits that the Judge failed to give careful consideration and evaluation to the rehabilitative aspect of sentencing, and that tangible recognition should have been given to Mr Chien’s rehabilitative efforts, given that he could “scarcely have done more to demonstrate” his rehabilitative potential, as was the case for one of the appellants in *Glassie*.<sup>23</sup> Ms Gresson further submits that the Judge did not “encourage the offender” by granting a substantial “material sentencing discount” for completed and intended rehabilitation, as suggested

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<sup>17</sup> At [12]–[16].

<sup>18</sup> At [17].

<sup>19</sup> At [18].

<sup>20</sup> *Rogers v R* [2022] NZCA 39.

<sup>21</sup> *Zhang v R* [2019] NZCA 507, [2019] 3 NZLR 648.

<sup>22</sup> *Glassie v R* [2022] NZCA 556.

<sup>23</sup> At [64].



in *Berkland v R*.<sup>24</sup> With reference to the discount for remorse given in *R v Hill*,<sup>25</sup> she submits that a “full credit of 35 per cent” was justified, given that Mr Chien’s rehabilitation efforts were “truly exceptional”.

### *Respondent submissions*

[30] Mr Butler, for the Crown, submits that the Judge gave ample credit for mitigating factors. He submits that the full guilty plea discount was generous, given that Mr Chien only entered pleas 12 days before trial in May 2022, having been arrested in April 2021. Mr Butler also submits that the discounts provided for Mr Chien’s background and time spent on EM bail were appropriate.

[31] Mr Butler further submits that it was appropriate for the Judge to apply a composite discount for remorse and rehabilitation as, in this case, the two factors were intertwined, with Mr Chien’s rehabilitative efforts being the most tangible indicator of his remorse. He accepts that, per *Berkland*, credit is to be given for rehabilitative efforts and prospects, but says that the discount applied was in line with those applied in *Berkland* and also in *Glassie*. Mr Butler submits that none of the cases cited support a 35 per cent discount, especially given the commercial scale of the offending in this case. He further says that whether Mr Chien could “scarcely have done more” to demonstrate rehabilitative potential is not relevant — rather, he must show that the end sentence was manifestly excessive. Mr Butler submits that the end sentence cannot be described as manifestly excessive, given all mitigating factors were taken into consideration and a total credit of 57 per cent was applied, noting that were Mr Chien to receive the discount of 35 per cent sought, his total sentence discount would be approximately 85 per cent.

### **Discussion**

[32] We accept it would have been open to the Judge to give separate discounts for remorse and rehabilitation, reflecting what appears to be genuine and successful rehabilitative steps taken by Mr Chien, and which we agree warranted “tangible”

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<sup>24</sup> *Berkland v R* [2022] NZSC 143, [2022] 1 NZLR 509 at [161] per Winkelmann CJ, William Young, Glazebrook and Williams JJ.

<sup>25</sup> *R v Hill* [2008] NZCA 41, [2008] 2 NZLR 381.

recognition.<sup>26</sup> But we do not accept that a discount in the order of 35 per cent was required (on top of a five per cent discount for remorse), nor, most importantly, do we consider that the combined discount for remorse and rehabilitation resulted in the end sentence being manifestly excessive. Our reasoning for reaching this conclusion can be brief.

[33] The suggested 35 per cent discount for rehabilitation appears to be based on the discount given in *Hill*, which Ms Gresson notes was not disturbed on appeal. However, the discount for rehabilitation was not in issue in that case, hence not being addressed on the appeal.<sup>27</sup> That also appears to be a very significant discount and somewhat of an outlier. As Mr Butler submits, in *Berkland*, the Supreme Court accepted Mr Berkland’s rehabilitative efforts were “genuinely exceptional” and warranted a “significant sentencing response”, providing a 10 per cent discount for this purpose.<sup>28</sup> In *Glassie*, a discount of five per cent for Mr Duff’s rehabilitation was increased on appeal to 10 per cent, with this Court observing that Mr Duff could “scarcely have done more” to demonstrate his rehabilitative potential.<sup>29</sup> Mr Glassie, the other appellant, had also received a discount of 10 per cent for rehabilitation, reflecting his commitment to rehabilitation, that he had undertaken various drug rehabilitation programmes, and that he had offered “impressive” references from programme providers attesting to the quality of his participation.<sup>30</sup> Mr Glassie submitted on appeal that his discount for rehabilitation should be increased to 15 per cent, which this Court declined to do, holding that the 10 per cent discount was not in error.<sup>31</sup>

[34] Accepting for present purposes that a separate discount for rehabilitation of 10 per cent could have been warranted in this case, the combined discount of

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<sup>26</sup> *Glassie v R*, above n 22, at [63].

<sup>27</sup> The issue on appeal was whether the short sentence of imprisonment should have been converted to home detention; *R v Hill*, above n 25, at [14].

<sup>28</sup> *Berkland v R*, above n 24, at [160]–[162] per Winkelmann CJ, William Young, Glazebrook and Williams JJ. Ellen France J agreed with the discount provided: see at [197], n 176.

<sup>29</sup> *Glassie v R*, above n 22, at [64].

<sup>30</sup> At [72].

<sup>31</sup> At [71]–[72].

10 per cent for both Mr Chien's remorse and rehabilitation could be said to be in error. However:

- (a) A five per cent standalone discount for remorse, in addition to a full 25 per cent discount for Mr Chien's guilty pleas, is arguably generous.<sup>32</sup>
- (b) Further, we consider the full 25 per cent discount given for Mr Chien's guilty pleas to be quite generous, given those pleas were made in the context of a strong Crown case (in light of the drugs, drugs paraphernalia, cash, and firearms found in Mr Chien's possession and control), and that they were entered only a matter of days prior to trial. We accept there were difficulties engaging with defendants in custody during the COVID-19 lockdowns, but Mr Chien had been on EM bail at a rehabilitation facility since October 2021. A lesser discount for his guilty pleas would not have been in error.
- (c) The discount of 15 per cent for Mr Chien's background was also meaningful and arguably generous, particularly given that while Mr Chien clearly had a difficult upbringing, it was not hallmarked by the type and extent of deprivation that is often seen in other offenders coming before the courts.

[35] Standing back, and in the context of what was serious drug and firearms offending, we are satisfied that the discounts given of approaching 60 per cent provided a meaningful and sufficient response to Mr Chien's background, remorse, rehabilitation and guilty pleas. Particularly in light of the significant discount for Mr Chien's late guilty pleas, even if a standalone discount of 10 per cent for rehabilitation had been warranted, the combined discount of 10 per cent for remorse and rehabilitation did not lead to a manifestly excessive sentence.

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<sup>32</sup> We also note in this context Becroft J's observations in the civil forfeiture proceedings in relation to the cash found in Mr Chien's bedroom, about Mr Chien's changing explanations for that amount of money being found in his possession (*Commissioner of Police v Chien*, HC Auckland CIV-2022-404-1474, 8 August 2023 [Minute approving settlement]). This does not have the appearance of someone fully accepting of and remorseful for their offending.

## **Result**

[36] The appeal is dismissed.