IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA404/2024
[2024] NZCA 630

BETWEEN	CARLOS KAMEN MIRIAU Applicant
AND	THE KING Respondent

Court:	Ellis, Peters and Downs JJ
Counsel:	H G de Groot for Applicant K B Bell and T Zhang for Respondent
Judgment: (On the papers)	3 December 2024 at 11.00 am

JUDGMENT OF THE COURT

The application for leave to bring a second appeal is declined.

REASONS OF THE COURT

(Given by Peters J)

[1] The applicant, Mr Miriau, seeks leave to bring a second appeal against sentence.

[2] The proposed appeal is against a decision of Johnstone J in the High Court,[1] delivered on 21 May 2024, upholding a sentence imposed by Judge Bonnar KC in the District Court in November 2023.[2]

---

1 *Miriau v R* [2024] NZHC 1269 [High Court judgment].
2 *R v Miriau* [2023] NZDC 24831 [District Court judgment].

[3] On 12 July 2024, Cooke J directed that Mr Miriau's application for leave should be determined on the papers, and separately from the proposed appeal.

[4] We may only grant leave if satisfied 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.[3] Mr de Groot, counsel for Mr Miriau in the High Court and now in this Court, submits both grounds are made out on this application. The Crown submits neither is satisfied, and that the application must be dismissed.

Background

[5] Mr Miriau pleaded guilty to a charge of importing methamphetamine.[4] The importation, which was of 44.4 kilograms of methamphetamine, was arranged by two co-offenders, one of whom was Mr Miriau's cousin and it was he who enlisted Mr Miriau's assistance.

[6] Mr Miriau's role was relatively confined. Over the course of several weeks, he was in communication with a freight forwarding company regarding the consignment; completed documents required to progress the consignment's importation; and deposited funds to a bank account to pay the fees of the freight forwarding company. Although Mr Miriau acknowledged that he knew the importation was of illegal drugs, he did not know which drug, the quantity to be imported, nor its value. Mr Miriau's explanation was that he felt obliged to assist when his cousin asked him to do so, as his cousin had previously given him $5,000. Mr Miriau did acknowledge, however, that he had anticipated further financial reward.

[7] Judge Bonnar sentenced Mr Miriau in accordance with the guideline judgments in *Zhang v R* and *Berkland v R*.[5] The quantity involved put the offending in band five of the *Zhang* sentencing bands, and the Judge assessed Mr Miriau's role as falling

---

3 Criminal Procedure Act 2011, s 253(3).
4 Misuse of Drugs Act 1975, s 6(1)(a) (maximum penalty of life imprisonment).
5 *Zhang v R* [2019] NZCA 507, [2019] 3 NZLR 648; and *Berkland v R* [2022] NZSC 143, [2022] 1 NZLR 509.

between "lesser" and "significant".[6] Band five offending will usually attract a starting point of at least 10 years' imprisonment.[7]

[8] The Judge adopted a starting point of 11 years' imprisonment, being the least he considered available.[8] After deductions for mitigating factors totalling 55 per cent, Mr Miriau's end sentence was four years and 11 months' imprisonment.[9]

Appeal to the High Court[10]

[9] On appeal to the High Court, Mr de Groot submitted that the starting point adopted in the District Court was too high. Mr de Groot submitted that the Judge had placed too much weight on the quantum involved, and had mischaracterised Mr Miriau's role. Mr de Groot submitted that Mr Miriau's (limited) acts were performed under direction and without autonomy, he had not sought to be involved, and his cousin had exploited their relationship and Mr Miriau's naivety. There was little actual or expected financial gain and little, if any, awareness or understanding of the scale of the operation.

[10] Mr de Groot sought a starting point of six years' imprisonment on the ground that, correctly assessed, Mr Miriau's culpability fell below the level anticipated by band five of *Zhang*. Alternatively, Mr de Groot submitted the Court should put the guidelines to one side and assess Mr Miriau's overall criminality by reference to the purposes and principles of the Sentencing Act 2002.

High Court judgment

[11] Johnstone J assessed Mr Miriau's role as no more than "lesser" but upheld Judge Bonnar's starting point.[11] The Judge acknowledged the Supreme Court's statement in *Berkland* that role may have a greater effect than quantum on the appropriate starting point, and may lead to movement between the otherwise

---

6 District Court judgment, above n 2, at [26]–[30].
7 *Zhang v R*, above n 5, at [125].
8 District Court judgment, above n 2, at [35].
9 At [46].
10 A fresh summary of facts was provided on appeal to the High Court. However, Johnstone J did not consider it affected Mr Miriau's culpability and we say no more about it.
11 High Court judgment, above n 1, at [24].

quantum-driven bands.[12] However, as the Judge noted, the Supreme Court also said this was more likely to occur if the offender's role fell within the lower end of lesser.[13] Johnstone J did not consider that Mr Miriau's role could be so described,[14] hence his retention of the 11 year starting point, and thus the end sentence imposed by Judge Bonnar.

Appellant's submissions in support of leave

[12] Mr de Groot submits the proposed appeal raises a matter of general or public importance and that there has also been a miscarriage of justice.

[13] Mr de Groot's detailed submissions on both of these points may be summarised as follows.

[14] Mr Miriau's role is an archetype of offending at what the Supreme Court in *Berkland* described as the "lower end of lesser",[15] and so well capable of justifying a lower starting point. This is so having regard to the indicia for the lesser category set out in *Zhang* and indeed to this Court's sentencing of Mr Zhang himself and the Supreme Court's assessment of the role played by Mr Philip in *Philip v R*.[16]

[15] Given that, a second appeal by Mr Miriau would provide an opportunity for this Court to address the circumstances in which it is appropriate to depart from the quantum-based bands in *Zhang*, whether by adopting a starting point within a different band or by direct reference to the relevant provisions of the Sentencing Act.

[16] Aside from that, there has been a miscarriage of justice because, having regard to Mr Miriau's role, the starting point ought not to have exceeded six years' imprisonment.

---

12 At [25], citing *Berkland v R*, above 5, at [64].
13 *Berkland v R*, above n 5, at [64].
14 High Court judgment, above n 1, at [25].
15 *Berkland v R*, above n 5, at [64
16 *Philip v R* [2022] NZSC 149, [2022] 1 NZLR 571.

Crown submissions

[17] Crown counsel, Ms Bell, submits that the case does not raise any issue of general or public importance. Ms Bell submits that the extent to which a confined role in methamphetamine offending may warrant movement between bands irrespective of quantum is well established in cases such as *Zhang*, *Martin v R*,[17] *Berkland*, and *Philip*. Ms Bell submits that what in fact Mr Miriau seeks to challenge is the High Court's factual assessment of his culpability and that is not the purpose of a second appeal.

[18] Ms Bell also submits there is no proper basis for contending that the end sentence of four years and 11 months' imprisonment is manifestly excessive. Johnstone J gave cogent reasons for upholding the starting point of 11 years' imprisonment, and the reductions made for mitigating factors were generous.

Discussion

[19] We decline leave to appeal for the following reasons.

[20] First, for the reasons Ms Bell gave, we do not consider the appeal raises a matter of general or public importance.

[21] Sentencing judges understand the starting points identified in *Zhang* are guidelines, capable of being displaced in appropriate circumstances. *Martin* is a good illustration of this point because, on quantum alone, Mr Martin's offending would have attracted a starting point in the band four range of between eight and 16 years' imprisonment. In the District Court, the Crown sought a starting point of seven years, so slightly below the minimum in the guideline, and the District Court Judge adopted that starting point. In this Court, the starting point was reduced to three years, which is at the lower end of the guideline for band two offending, so as:[18]

> ... to reflect the limited relevance of quantity in this case and the multiple factors which distinguish the seriousness of Mr Martin's offending from the paradigm case for band four, or even band three, intentional offending. As already explained, those factors require much greater weight to be given to role than to the quantity of drugs in this case.

---

17 *Martin v R* [2022] NZCA 285.
18 At [105].

[22] Sentencing judges will also be familiar with the important statements the Supreme Court made in *Berkland*, delivered after *Martin*, to the effect that sentencing is an intensely factual exercise; that an offender's role may lead to movement within and between the quantum-driven bands; that, in principle, role may have a greater impact than quantum if justified in the circumstances; and that all depends on the facts.[19] The Supreme Court's decision in *Philip*, delivered shortly thereafter, can only have reinforced the position.

[23] Accordingly, sentencing judges now have *Zhang*, *Berkland*, *Martin*, and *Philip*, and we do not consider any further guidance is required.

[24] Secondly, we do not consider there is any risk of a miscarriage of justice in this case. Judge Bonnar and Johnstone J analysed Mr Miriau's role and how he became involved in what, by any measure, was a significant importation. Mr Miriau persisted in his offending after learning that he was participating in the importation of illegal drugs, with no extenuating circumstances such as, for instance, the gullibility of Mr Martin or the addiction of Mr Philip. Mr Miriau was also given generous reductions for mitigating factors, some of which Judge Bonnar himself appeared to consider on the generous side.[20]

[25] Accordingly, and again as Ms Bell submitted, there is no realistic prospect of this Court concluding that Mr Miriau's end sentence was manifestly excessive.

Result

[26] The application for leave to bring a second appeal is declined.

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

---

19 *Berkland v R*, above n 5, at [63]–[64].
20 District Court judgment, above n 2, at [38] and [43].