IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA504/2023
[2024] NZCA 199

BETWEEN	WAYNE TE AWAWA JOHN CLARKE Appellant
AND	THE KING Respondent

Hearing: 20 May 2024

Court: Wylie, Lang and Campbell JJ

Counsel: J J Rhodes for Appellant
C P Paterson and L Dalton for Respondent

Judgment: 31 May 2024 at 11 am

JUDGMENT OF THE COURT

A The appeal against sentence is allowed in part.

B The sentence of five years and one month's imprisonment is set aside and substituted with a sentence with a sentence of four years and eight months' imprisonment on the lead charge of being in possession of methamphetamine for supply. The lesser concurrent sentences imposed by the Judge on the remaining charges remain intact.

REASONS OF THE COURT

(Given by Lang J)

[1] Mr Clarke entered guilty pleas in the District Court to charges of being in possession of methamphetamine for supply, a representative charge of being in unlawful possession of a firearm, attempting to manufacture a firearm, threatening to

kill (x 2), threatening to cause grievous bodily harm and threatening to destroy property. He also pleaded guilty to a charge of failing to comply with his obligations in relation to a computer search and failing to comply with COVID-19 orders. On 10 August 2023, Judge Maxwell sentenced Mr Clarke to five years and one month's imprisonment.[1]

[2] Mr Clarke appeals against sentence. He contends the Judge adopted a starting point on the methamphetamine charge that was too high and then applied uplifts that were excessive for the remaining charges. He also says the Judge failed to provide him with adequate discounts for mitigating factors. Mr Clarke contends these errors resulted in the Judge imposing an end sentence that was manifestly excessive.

The offending

[3] Mr Clarke was sentenced on the basis of an agreed summary of facts. This recorded that at the time of the offending Mr Clarke was a prospect for the Head Hunters motorcycle gang, having previously been a senior member of the Black Power gang. Between April and September 2020, he was serving a sentence of 17 months' imprisonment imposed on charges of being in possession of methamphetamine for supply and being in unlawful possession of a firearm and ammunition.

[4] Whilst in prison, Mr Clarke was able to procure access to a cell phone. During April and May 2020, he sent several text messages to persons whom he believed owed him money. The messages threatened in graphic terms to kill or cause serious injury to the unknown recipients. He also threatened to kill one recipient and burn her house down. This series of events led to Mr Clarke facing a representative charge of threatening to kill and cause grievous bodily harm. He also faced two discrete charges of threatening to kill and a charge of threatening to destroy property. The charges of threatening to kill and threatening to cause grievous bodily harm carry a maximum sentence of seven years' imprisonment. The charge of threatening to destroy property carries a maximum sentence of three years' imprisonment.

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1 *R v Clarke* [2023] NZDC 25285 [sentencing notes].

[5] On 17 August 2021, the New Zealand Government announced the country would move to COVID-19 Alert Level 4 at 11.59 pm that evening, imposing a lockdown. Residents of Auckland, where Mr Clarke lives, were not permitted to travel out of the area for several months. On or about 20 September 2021, Mr Clarke breached the Auckland southern COVID-19 control border by travelling through it whilst hidden in the back of a truck. He then obtained the use of another vehicle and travelled to Wellington, where he spent the next two days staying with his mother. The police arrested him at a service station in Wellington Central on 22 September 2021. Communications intercepted from his cell phone confirmed that Mr Clarke had travelled to Wellington to track down associates who owed him money.

[6] When the police arrested Mr Clarke, they noticed three cell phones on the passenger seat of the vehicle. They seized these and, when they asked Mr Clarke to provide the access code numbers, he refused to do so. Mr Clarke said the devices did not belong to him. This led to Mr Clarke being charged with failing to comply with his obligations in relation to a computer search.

[7] Later the same day, the police executed a search warrant at the address in Wellington where Mr Clarke had been staying with his mother. Inside the lounge of the address, the police found a bag behind a couch. This was found to contain a .357 Magnum pistol that had four of the six chambers loaded. The police also found a separate bag containing Head Hunters gang regalia.

[8] On the day they arrested Mr Clarke, the police also executed a search warrant at his residential address in Auckland. One of his partners had access to this property and was looking after it whilst Mr Clarke was in Wellington. When the police searched the address, they found two industrial 3D printers. One of these was in the process of printing a component for an FGC-9 MKII semi-automatic pistol. Sitting beside one of the printers were further components for that pistol. These included telescopic stock pieces, a magazine, a pistol grip, a lower receiver and an upper receiver. Inside Mr Clarke's bedroom, the police found handwritten notes describing how to operate the 3D printers.

[9] The police subsequently analysed data stored on a laptop computer connected to the 3D printer that was operating when they searched Mr Clarke's address. In the search history, the police found searches conducted by Mr Clarke for 3D printable items. The computer also contained a folder labelled "3D print shit". Inside the folder were various 3D printer files that enabled various types of firearms to be printed using a 3D printer.

[10] On the following day, the police searched the motor vehicle Mr Clarke had been driving at the time of his arrest. In the centre console, they found an 8 mm modified pistol. This was loaded with a single bullet in the spring-loaded magazine.

[11] Inside the glove compartment of the motor vehicle, the police found a pencil case that contained a snaplock plastic bag containing a white crystalline substance. This was found to contain just over 28 grams of methamphetamine having a purity of 67 per cent.

The sentence

[12] The Judge selected the charge of being in possession of methamphetamine for supply as the lead charge.[2] She adopted a starting point of four years imprisonment on that charge,[3] noting that it also reflected the criminality involved in Mr Clarke illegally breaching the Auckland border and travelling to Wellington.[4]

[13] The Judge then added an uplift of 18 months to reflect the charge relating to the firearms found in Mr Clarke's vehicle and at his mother's address in Wellington.[5] She added a further uplift of 18 months to reflect the charge of attempting to manufacture a firearm.[6] Finally, she added an uplift of nine months to reflect the charge of sending threatening text messages whilst in prison.[7] This led to a starting point of seven years and nine months' imprisonment.

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2 At [20].
3 At [24].
4 At [33].
5 At [25].
6 At [30].
7 At [32].

[14] The Judge then applied a discount of 20 per cent to reflect Mr Clarke's guilty pleas.[8] She also applied discounts totalling 20 per cent to reflect other mitigating factors, including rehabilitative efforts undertaken by Mr Clarke whilst in prison.[9] This reduced the sentence to one of four years and seven months' imprisonment.

[15] Finally, the Judge applied an uplift of six months to reflect Mr Clarke's previous convictions for similar offending involving drugs and firearms.[10] This produced the end sentence of five years and one month's imprisonment. The Judge imposed that sentence on the charge of being in possession of methamphetamine for supply.[11] She imposed lesser concurrent sentences on all other charges.[12]

Analysis

The starting point on the methamphetamine charge

[16] At sentencing, both counsel agreed that Mr Clarke's offending fell within band 2 identified in *Zhang v R.*[13] This relates to offending involving less than 250 grams and calls for a starting point of between two and nine years' imprisonment

[17] The Judge considered the facts in *Joyce v R* were broadly comparable to those in the present case.[14] In that case, the appellant, Mr Joyce, had been stopped by police whilst travelling in a vehicle. He was found to be in possession of approximately 28 grams of methamphetamine. He was also in possession of approximately 16 grams of cannabis, which the sentencing Judge found was for Mr Joyce's own use. In addition, the police found a sawn-off shotgun and two air pistols in the vehicle. They also found just under $13,000 in cash and a "tick" book.[15] Mr Joyce had also pleaded guilty to charges of supplying and offering to supply 3.76 grams of methamphetamine. The police discovered these transactions when they analysed data extracted from his cell phone.

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8 At [36].
9 At [40]–[41].
10 At [42].
11 At [44(f)].
12 At [46].
13 *Zhang v R* [2019] NZCA 507, [2019] 3 NZLR 648 at [125].
14 *Joyce v R* [2020] NZCA 124.
15 At [6].

[18] This Court described Mr Joyce's offending in the following terms:[16]

> [19] Ms Kincade submitted Mr Joyce's role meant he fell within the description of a lesser offender in the above table because his offending was driven by his addiction to methamphetamine, he had no influence on those above him in the supply chain and he did not have any awareness of the scale of the operation. Ms Hoskin for the Crown contended the offending exhibited several of the hallmarks of a significant offender because it resulted in financial gain well beyond that necessary to fund Mr Joyce's methamphetamine habit.
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> [20] We do not see Mr Joyce's role as fitting neatly within either category referred to by counsel because it involves elements referable to both. Mr Joyce appears to have been an independent retail operator who chose to sell methamphetamine both to finance his drug habit and to meet his living costs. Although he managed and ran his own drug dealing business, his was a small operation functioning at a retail level. He was not part of a larger operation. There is no evidence to suggest his addiction to methamphetamine impaired his ability to make a rational choice as may sometimes diminish the culpability of an offender. Furthermore, although his role may be described broadly as that of a street level dealer, it nevertheless involved the sale of reasonably significant quantities of methamphetamine and is likely to have generated a considerable cash income. That is evident from the quantities of both methamphetamine and cash found in his possession on 18 October 2015. The number of firearms in his possession at the time also provides an indicator as to the level of his dealing activities.

[19] This summary led the Court to conclude a starting point of four years' imprisonment was appropriate on the charges relating to both methamphetamine and cannabis.[17]

[20] Judge Maxwell rejected a submission that Mr Clarke's offending was less serious than that in *Joyce*.[18] She considered the circumstances of the present case fit squarely within those outlined in *Joyce*. This prompted the Judge to select a starting point of four years' imprisonment.[19]

[21] There are obviously some similarities between the nature of Mr Clarke's drug offending and that of Mr Joyce. However, we accept Mr Rhodes' submission that the offending in the present case was less serious than that in *Joyce*. Although the quantity of methamphetamine found in Mr Clarke's possession was approximately the same as that in *Joyce,* Mr Joyce was found in possession of items indicating a greater

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16 Footnote omitted.
17 At [22]–[23].
18 Sentencing notes, above n 1, at [24].
19 At [24].

involvement in drug dealing activity than is the case with Mr Clarke. He also pleaded guilty to drug dealing activity that pre-dated his arrest. Those factors are not present in Mr Clarke's case. It is therefore likely that, to the extent that Mr Clarke was involved in supplying methamphetamine, it was at a lower level than Mr Joyce.

[22] We therefore consider that an appropriate starting point on the charge of being in possession of methamphetamine for supply was three years and three months' imprisonment. This includes an allowance of three months to reflect the fact that Mr Clarke illegally crossed the border to travel to Wellington to engage in drug-related activities.

The uplift on the firearms charges

[23] At sentencing, the Crown had submitted that an uplift of 18 months' imprisonment was appropriate to reflect the firearms found in Mr Clarke's possession when the police searched his vehicle and his mother's address in Wellington. Counsel for Mr Clarke had contended that an uplift of two years' imprisonment was appropriate for those charges as well as the charge of attempting to manufacture a firearm. The Judge agreed with the Crown that an uplift of 18 months' imprisonment was appropriate to reflect the representative charge relating to the firearms found in Mr Clarke's possession in Wellington.

[24] In *Joyce,* this Court upheld an uplift of 18 months for offending involving the unlawful possession of a sawn-off shotgun and two airguns. The Court noted:

> [24] We do not accept [appellant counsel]'s submission that a lesser uplift should have been applied for the firearms charges. Mr Joyce was found in possession of three weapons, one of which was a loaded sawn-off shotgun. As [respondent counsel] points out, this Court has consistently upheld uplifts of between 12 and 18 months' imprisonment where those involved in drug dealing are found with firearms in their possession.[20] We agree with the Judge's observation that the charge of being in possession of the sawn-off shotgun was a serious charge in its own right.[21] *Zhang* has not altered the approach to be taken in relation to firearms associated with drug offending.

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[20] *Mills v R* [2016] NZCA 245 at [18], citing *Fonotia v R* [2007] NZCA 188, [2007] 3 NZLR 338 and *Haggie v R* [2011] NZCA 221.

[21] *R v Joyce* [2018] NZDC 9544 at [11].

> We therefore consider the uplift of 18 months' imprisonment was within the available range.

[25] Mr Clarke was found in possession of two pistols, both of which were loaded. Like Mr Joyce, he was a drug dealer, albeit at a lower level than Mr Joyce. We accept, as did the Judge, the Crown's submission that a deterrent response is required when loaded firearms are found in conjunction with drug dealing activity. We consider this aspect of Mr Clarke's offending to be broadly comparable to that of Mr Joyce even though Mr Joyce was found in possession of three firearms. We therefore do not consider an uplift of 18 months to be outside the available range.

Attempting to manufacture a firearm

[26] As the Judge noted, there is no guideline authority for the starting point to be selected for this type of offending.[22] The charge was laid under s 55D of the Arms Act 1983, which came into effect in June 2020. The Crown referred at sentencing to the fact that Parliamentary debate at the time the legislation was introduced indicated that the purpose of s 55D was to "keep guns out of the hands of gangs" and to significantly increase penalties for offending involving firearms.[23] The maximum penalty for illegally manufacturing firearms is 10 years' imprisonment. Given that Mr Clarke pleaded guilty to an attempt, the maximum penalty was five years' imprisonment.[24]

[27] We consider the offending had several aggravating features. First, it involved the acquisition of a laptop computer and two industrial printers. Mr Clarke had also clearly carried out considerable research before commencing to manufacture the components necessary to create a semi-automatic firearm. The manufacturing process was well underway by the time the police arrived to search Mr Clarke's address. It appears that the intervention of the police was the only factor that stopped Mr Clarke from completing the manufacture of the firearm. Further, Mr Clarke was attempting to manufacture the firearm in circumstances where he was involved in drug dealing activity himself. The fact that he was found in possession of loaded firearms in

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22 Sentencing notes, above n 1, at [26].
23 At [27].
24 Crimes Act 1961, s 311(1).

Wellington suggests that he viewed firearms as being a necessary accessory to drug dealing activity. In addition, he had close relationships with a gang.

[28] It may be necessary in the future for this Court to examine in greater detail the starting point to be applied for sentences imposed for offending under s 55D of the Arms Act. For present purposes, however, we are satisfied the aggravating features we have identified confirm that a starting point of two years' imprisonment was justified for Mr Clarke's offending. The reduction of six months to reflect totality principles was also appropriate.[25]

Sending threatening text messages

[29] At sentencing, the Crown submitted that an uplift of nine months was appropriate for this charge, whilst Mr Clarke's counsel contended an uplift of no more than six months was necessary.

[30] The Judge noted that there is no tariff or applicable guideline for this type of offending.[26] The Crown referred the Judge to the judgment of this Court in *Faaleaga v R,* in which the Court described key factors in assessing the culpability for this type of offending.[27] In that case, the appellant had sent a threatening letter from prison to his sister. This Court adopted a starting point of nine months' imprisonment.[28] In accepting the Crown's submission regarding the appropriate level of the uplift in regard to Mr Clarke, the Judge observed:

> [32] In your case, the offending involved a number of people. You were in custody at the time. It seems to me from the reports that I have read, that you continue to downplay the effect of that offending on those individuals. I am prepared to accept the uplift of nine months identified by the Crown, but in reality, that could have been higher. The language you used was appalling and the people who received those texts, Mr Clarke, would have had good reason to be fearful for their safety.

[31] We agree with the Judge's assessment. This aspect of Mr Clarke's offending contained several aggravating features. The first flows from the fact that it involved

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25 Sentencing notes, above n 1, at [30].
26 At [31].
27 *Faaleaga v R* [2011] NZCA 495.
28 At [16].

the use of a cell phone in prison. Prisoners are not permitted to be in possession of cell phones. Mr Clarke was therefore using a contraband item to send the messages. The offending cannot be regarded as an isolated incident. It occurred over a period of two months and involved several unknown recipients.

[32] The threats can also be regarded as serious in that they threatened to gravely injure and kill the recipients. In one instance, the threat also extended to destruction of property. Further, Mr Clarke clearly intended the threats to be taken seriously even though he was in prison at the time he made them. Taking these factors into account, and having regard also to totality principles, we do not consider an uplift of nine months to be outside the available range. We agree with the Judge that it is arguably generous.[29]

[33] It follows that we consider a sentence of seven years' imprisonment, not seven years and nine months' imprisonment, before taking into account the discounts to be applied to reflect mitigating factors personal to Mr Clarke, is appropriate.

Discounts for mitigating factors

[34] Mr Clarke does not take issue with the discount of 20 per cent the Judge applied to reflect his guilty pleas. However, he contends the Judge ought to have applied a discount of at least 30 per cent to reflect other mitigating factors identified in material that he placed before the Judge at sentencing. This comprised a report from a psychologist and a report tendered under s 27 of the Sentencing Act 2002.

[35] In applying a discount to reflect the mitigating factors identified in this material, the Judge observed:

> [38] The Crown accepts that your background has in part put you on a path to where you are today. They accept that there should be some recognition of your background, although not to the full extent as advocated by your lawyer. They refer to aspects of the psychological report which suggests that there are aspects of your personality which may have influenced your offending falling outside other aspects of your upbringing. The Crown accept that a discount in the order of 10 per cent is available.

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[29] See sentencing notes, above n 1, at [32].

> [39] Your lawyer submits that a discount more in the order of 25 per cent is available. He argued that you have been subject to an extraordinary disadvantage and that experiences in your life have directly influenced your behaviour.
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> [40] I take a view which is similar to that of the Crown. This is not a case where there is a direct relationship between your background and the offending. And any discount also has to be tempered to take into account what can be described as fairly calculated offending on your part, Mr Clarke. In the circumstances I am prepared to allow 10 per cent for that factor.

[36] The s 27 report confirms that Mr Clarke first entered the criminal justice system at the age of 17 years. This followed an extremely difficult childhood, during which he was moved between households and cared for by different family members. He was also required to reside in a state-run institution where he was subjected to abuse by his caregivers. He has received compensation for the abuse he suffered whilst in this institution. As an adult, he was housed in Auckland prison, where he became subject to a punitive regime known as the behaviour modification regime (BMR). The Supreme Court has since found that this regime breached prisoners' basic rights in significant ways.[30]

[37] The psychologist's report observes that the adverse experiences Mr Clarke suffered during his childhood have contributed materially to his addiction issues and to his pattern of offending. They have resulted in him acquiring anti-social and anti-authoritarian viewpoints that have caused his offending to escalate. The psychologist notes:

> It is also my opinion Mr Clarke's disorder of personality had a proximal and material contribution to each aspect of his historic and index offending. His antisocial personality structure has been demonstrated by his disregard for, and violation of the rights of others since childhood (prior to his being placed in care). He commissioned antisocial prior to his detention in the BMR, continuing throughout his lifespan. His sense of entitlement to contravene socially accepted norms and rules causing harm to individuals and the community is considered to remain (his having entrenched antisocial attitudes, minimisation of harm caused to others and affiliation with an organised criminal group).

[38] Mr Rhodes drew our attention to the following passage from the judgment of the Supreme Court in *Berkland v R*:[31]

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[30] See *Taunoa v Attorney-General* [2007] NZSC 70, [2008] 1 NZLR 429 at [60] per Elias CJ, at [220] per Blanchard J, at [298] per Tipping J, at [377] per McGrath J and at [387] per Henry J

[31] *Berkland v R* [2022] NZSC 143, [2022] 1 NZLR 509 per Williams J (footnotes omitted).

> [120] Of course, progressing from precarious poverty to life as [a] habitual offender is not inevitable. Not everybody raised in poverty will eventually offend. As is often said, correlation does not establish causation. But, even if the relationship between poverty and the commission of a particular offence is usually too complex to take matters further than affirming, yet again, the consistent correlation between poverty and offending, that in itself is important. Long run patterns like this demonstrate (if demonstration is still needed) that there is, nonetheless, a meaningful relationship between poverty and crime. As we have said, factors associated with lives in poverty are at least the diffuse drivers of individual offending. That is why circumstances of deprivation can have such powerful explanatory force in terms of revealing how an offender has come to offend and in guiding the court's assessment of what should now be done about it.
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> [121] For example, it is rarely possible to establish that placement in state care is the proximate cause of engagement in commercial drug offending. But few would doubt the material or logical connection between the two. It is *that* connection which must be understood and weighed. If it helps to explain how the offender has come to offend then a relevant "causative contribution" is made out. Whether such contribution, if established, is then displaced by other factors (such as extended periods of offence free living) is of course a matter of judgement. But sentencing judges should reflect on the power of background in the shaping of life opportunities and beware of imposing unrealistic expectations in hindsight.

[39] We consider these factors apply to Mr Clarke and that the Judge could have applied a greater discount to reflect them. However, the question for this Court is not only whether a greater discount could have been given and thus whether there has been an error in the sentence imposed.[32] It is also necessary for this Court to be satisfied that a different sentence should be imposed.[33] The focus in this case is on whether the end sentence is within the available range.[34] In considering this issue, it is necessary to take into account the fact that the Judge also gave Mr Clarke a discount of 10 per cent to reflect rehabilitative steps he had undertaken whilst in prison. These consisted of taking courses that were made available to him whilst on remand.

[40] The psychologist's report makes it clear that many of the causative factors that have led to Mr Clarke's offending remain intact and that it will take a major effort for him to engage in rehabilitative efforts that will enable him to abstain from criminal offending in the future. We consider that this will probably require him to sever his ties with gangs. This would be a major step for Mr Clarke to take given the fact that

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32 Criminal Procedure Act 2011, s 250(2)(a); and *Tutakangahau v R* [2014] NZCA 279, [2014] 3 NZLR 482 at [41].

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

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

gangs have formed an entrenched part of his lifestyle for many years. The rehabilitative steps that Mr Clarke undertook whilst on remand were clearly worthy of some recognition. However, we consider the discount of 10 per cent to be generous.

[41] Taking these factors into account, we are satisfied that the total discount of 20 per cent that the Judge applied to reflect mitigating factors other than guilty pleas was appropriate. No further reduction was required.

[42] The discounts to be applied for mitigating factors reduce the sentence of seven years' imprisonment to one of four years and two months' imprisonment. Mr Clarke takes no issue with the uplift of six months the Judge applied to reflect his previous convictions for similar offending. This produces an end sentence of four years and eight months' imprisonment.

Result

[43] The appeal against sentence is allowed in part.

[44] The sentence of five years and one month's imprisonment is set aside and substituted with a sentence of four years and eight months' imprisonment on the lead charge of being in possession of methamphetamine for supply. The lesser concurrent sentences imposed by the Judge on the remaining charges remain intact.

Solicitors:
Crown Solicitor, Auckland for Respondent