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

**I TE KŌTI PĪRA O AOTEAROA**

**CA799/2023**
**[2024] NZCA 585**

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| BETWEEN | ZION HAMUERA HOLTZ<br>Appellant |
| AND | THE KING<br>Respondent |

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| Hearing: | 1 August 2024 |
| Court: | Courtney, Mander, Walker JJ |
| Counsel: | E P Priest for the Appellant<br>I L M Archibald for the Crown |
| Judgment: | 13 November 2024 at 11 am |

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**JUDGMENT OF THE COURT**

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**The appeal against sentence is dismissed.**

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**REASONS OF THE COURT**

(Given by Walker J)

[1] Mr Holtz appeals the sentence of seven years and 10 months' imprisonment imposed by Judge J Jelaš in the District Court at Auckland on one charge of possession of methamphetamine for supply (jointly with another) and one representative charge of supply of methamphetamine.[1] Mr Holtz contends the sentence imposed was manifestly excessive. In particular, he says that the starting point was too high, the credit for his guilty plea was too low and the discount for personal background factors,

1 *R v Holtz* [2023] NZDC 26547 [judgment under appeal].

rehabilitative prospects and remorse was insufficient. He also argues that the end sentence lacked parity with the sentence imposed on his co-offender.

**Background**

[2] Mr Holtz lived with his co-offender at an address in Auckland, having been released from prison on 16 November 2022. He was subject to release conditions including monitoring by a GPS tracking bracelet. Within a few days of release, he allowed his tracking bracelet to go flat. He remained unmonitored for a period of approximately 22 hours leading to a charge of breaching prison release conditions.[2]

[3] On 19 December 2022, Mr Holtz communicated with several people on Wickr, an encrypted messaging application.[3] They discussed the prices Mr Holtz would charge for providing ounces of methamphetamine to them.

[4] On 20 December 2022, Mr Holtz communicated with an associate on Wickr about buying a kilogram of methamphetamine from them for $145,000. The associate advised Mr Holtz to sell ounces of methamphetamine more cheaply so that they would sell faster, suggesting to him "let's flood the market". The associate told Mr Holtz that the price would come down for future deals if he sold the kilogram of methamphetamine quickly.

[5] On 21 December 2022, Mr Holtz again messaged several people on Wickr, this time about calling in debts for methamphetamine he had earlier supplied to them. The messages demonstrated that Mr Holtz had supplied methamphetamine valued at $36,000, the equivalent of at least 170 g.

[6] On 22 December 2022, police executed a search warrant at his home. Both he and his co-offender were at the house. When police arrived, they saw his co-offender dropping a shopping bag out of the bedroom window. The bag contained seven individually wrapped snap lock bags with a combined weight of 984.6 g of

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2 Mr Holtz was convicted and discharged of this offence: at [26].

3 Police analysed Mr Holtz's phone after execution of a search warrant at his home.

methamphetamine. Other items consistent with the supply of methamphetamine were found including plastic wrap, snap lock bags, digital scales and $1,762.90 in cash.[4]

[7] Mr Holtz initially faced the charge of possession of methamphetamine for supply. This related to the 984.6 g of methamphetamine that his co-offender dropped out the bedroom window. In April 2023, police laid further charges of offering to supply methamphetamine and supply of methamphetamine. Those charges arose from the analysis of Mr Holtz's phone, seized on execution of the search warrant.

[8] The first case review of the charges against Mr Holtz was scheduled to take place on 19 April 2023, but was adjourned to a trial call-over by agreement of both parties. A joint memorandum of counsel acknowledged the administrative adjournment would not affect any early guilty plea credit and recorded that counsel for Mr Holtz raised outstanding disclosure was necessary to give full and proper legal advice.

[9] The trial call-over was scheduled for 21 June 2023. It was adjourned to a further call-over date because the police charges had yet to be transferred to the Crown to be amalgamated with the existing file. The further call-over on 18 July 2023 was then adjourned for the purpose of resolution discussions. This sequence is relied on by the appellant in support of his argument that insufficient credit was given for a guilty plea.

[10] Mr Holtz entered guilty pleas on 8 August 2023. The resolution involved the Crown withdrawing one charge of offering to supply methamphetamine.

[11] Mr Holtz was sentenced on 24 November 2023. Sentencing proceeded on the basis that Mr Holtz and his co-offender jointly possessed the 984.6 g of methamphetamine. His co-offender was sentenced some months later.[5]

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4 Ms Priest, counsel for Mr Holtz, took issue with the reference to cash in the sentencing notes as this was not in the summary of facts to which Mr Holtz pleaded guilty. However, she also submitted that the small sum of cash was indicative of the low level of profit which she relied on to characterise Mr Holtz's role.

5 *R v Bracken* [2024] NZDC 5080.

**Sentencing in the District Court**

[12] The Judge set the starting point by reference to the bands in the guideline case of *Zhang v R*.[6] It was common ground that Mr Holtz's offending fell into band four given the quantum of methamphetamine involved. Offending within band four encompasses quantities between 500 g and two kg and generally attracts a starting point of between eight to 16 years' imprisonment.[7]

[13] In respect of Mr Holtz's role in the offending, the Judge accepted that the messages indicated that there was an expectation of large payments coming to Mr Holtz even though the evidence of actual profit, in terms of what was found at the property, was small.[8] She set a starting point of 10 years, being halfway between the entry and mid points of band four.[9] The Judge did not expressly identify the factors which led to her adopting the starting point submitted by the Crown but having recorded the Crown submissions in her sentencing notes, we infer that she accepted:[10]

(a) Lesser culpability cannot arise simply because of dealing in larger quantities.

(b) It must be inherent in Mr Holtz's role as a dealer of large quantities that he gained a level of trust amongst the criminal network with which he was associated.

(c) With those volumes there must be some level of higher commercial gain though Mr Holtz's involvement was in part to support his own personal habit.

(d) The quantities and resulting profit significantly distinguished his dealing from street dealing even if the process may not be dissimilar.

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6 *Zhang v R* [2019] NZCA 507, [2019] 3 NZLR 648.
7 At [125].
8 Judgment under appeal, above n 1, at [11].
9 At [12].
10 At [9] and [11].

[14] The Judge applied an uplift for the earlier supply charge, noting that on its own it could attract a starting point of between four and six years. Having regard to totality, she adopted an uplift of one and a half years, bringing the global start point to 11 and a half years.[11]

[15] The Judge also applied an uplift of six months for Mr Holtz's prior convictions.[12]

[16] Turning to personal mitigating factors, the Judge awarded credit of 20 per cent for the guilty plea.[13] She identified the two most relevant factors being the timing of the plea and the strong, if not overwhelming Crown case against Mr Holtz. She did not accept that the timing of the plea was at its earliest stage, particularly in respect of the most serious charge, but considered that 20 per cent was still a high level of credit.

[17] The Judge referenced a comprehensive s 27 report prepared by Shelley Turner and specifically noted her as being a very experienced writer of such reports.[14] Having regard to all the factors documented, including Mr Holtz's addictions developed early in life, she considered credit in the range of 15 per cent was available, resulting in a total credit (when combined with that given for the guilty plea) of 35 per cent.[15] While not providing a discrete credit for rehabilitative potential, the Judge acknowledged the efforts Mr Holtz had undertaken in custody to demonstrate a level of insight and a willingness to find a different pathway.[16]

[18] The result was an end sentence of seven years and 10 months' imprisonment. However, as both counsel acknowledged before us, this calculation did not follow the

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11 At [12].

12 At [13]. Ms Priest submitted that the Judge adopted a starting point of 12 years. In her submission Ms Priest aggregated the six month uplift for prior convictions with the starting point. We disagree. Instead, we approach the appeal on the basis that the starting point was 11 years and six months, and the uplift was a personal aggravating factor rather than part of the global starting point.

13 At [14]–[15]. Mr Holtz was seeking a guilty plea credit of 25 per cent. At sentencing, the Crown did not dispute that 25 per cent was available.

14 At [16].

15 At [17]–[21].

16 At [20].

orthodox two-step approach in *Moses v R*.[17] Mr Holtz was the beneficiary of this error which effectively reduced his sentence by around two months.

**Discussion**

[19] We must allow Mr Holtz's appeal against sentence if it was imposed in error and a different sentence should be imposed.[18] The focus is on the end sentence rather than the process by which it is reached.[19] The Court will allow the appeal where the sentence appealed is manifestly excessive and is not justified by the relevant sentencing principles.[20]

*Starting point*

[20] Ms Priest submitted that the starting point was too high for three reasons: the limited offending time frame of three days and small number of transactions involved; an overemphasis on quantity as an indicator of the level of commerciality when there was no evidence of the level of profit on Mr Holtz's part; and a lack of parity with his co-offender's equivalent starting point given her offending involved a greater total amount of methamphetamine.[21]

[21] Ms Priest submitted that the quantities are explained by Mr Holtz's high-level familial gang connections rather than indicating large-scale commerciality which, when combined with the motivating force of addiction, lessens his overall culpability. She contended that Mr Holtz was a middleman or intermediary in the dealing chain, moving quantities for low financial gain or payment in methamphetamine.

[22] Ms Priest referred to two authorities of this Court, *Miller v R* and *Wellington v R*.[22] In *Miller* this Court approved a starting point of 11 years for methamphetamine offending involving 905 g, reflecting "a substantial commercial

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17 *Moses v R* [2020] NZCA 296, [2020] 3 NZLR 583 at [46].
18 Criminal Procedure Act 2011, s 250(2).
19 *Tutakangahau v R* [2014] NZCA 279, [2014] 3 NZLR 482 at [36].
20 At [32]–[36].
21 Ms Priest described this ground as lack of parity but we consider purported lack of relativity to be more apt.
22 *Miller v R* [2020] NZCA 131; and *Wellington v R* [2020] NZCA 277.

quantity" and offending which was financially driven rather than addiction driven.[23] This Court considered that Mr Miller had an operational function but must have known he was delivering to wholesalers or high-level dealers on the instructions of those further up the chain although he himself did not sit at the top of the command structure.[24]

[23] In *Wellington* this Court reduced the starting point of 13 years and eight month's imprisonment to 12 years, in accordance with the *Zhang* guidelines. That case involved a commercial quantity of methamphetamine (totalling 1.54 kg) and a significant distribution network in which Mr Wellington played a major role.[25]

[24] Ms Priest submitted that both authorities involved more serious offending than that of Mr Holtz and supported a much lower starting point in the region of eight years' imprisonment for the "totality of his offending". We understand this to mean in respect of both charges. We are unable to accept this submission.

[25] First, we do not agree that Mr Holtz's high-level familial gang connections, offered as explanation for the commercial quantities involved, diminishes Mr Holtz's culpability. Those connections may explain his ready access to commercial quantities but are not exculpatory. It is much more likely that those high-level contacts and his trusted position indicate a close connection with the source.

[26] Secondly, quantity speaks to commerciality and consequent harm to society. That is the rationale explaining why quantity is the first determinant, albeit not the sole factor, in determining the starting point. We observe that the approximate total quantity of 1,154.6 g involved in Mr Holtz's offending (being the 984.6 g relating to the possession charge and the estimated 170 g relating to the representative supply charge) is more than twice the entry level for band four, meaning that the available starting point is well above eight years.[26]

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23 *Miller v R*, above n 22, at [18]–[19]. The sentence was imposed under the guidelines in *R v Fatu* [2006] 2 NZLR 72 (CA) but the appeal was determined in accordance with the updated guidelines in *Zhang v R,* above n 6.

24 *Miller v R*, above n 22, at [17].

25 *Wellington v R*, above n 22, at [5] and [17]. The original sentence was also imposed under the *Fatu* (pre-*Zhang*) guidelines.

26 *Miller v R,* above n 22 at [13].

[27] Thirdly, an offender's addiction is only relevant in setting the starting point to the extent that it is indicative of an offender's limited participation in the offending.[27] In the case of Mr Holtz, we do not agree that his role was limited.

[28] In terms of the guidance given in *Berkland v R*, Mr Holtz's offending had many of the indicia of a significant role.[28] It is obvious that he was not a street level dealer but was dealing in wholesale quantities. Each of the seven bags of methamphetamine in the possession of Mr Holtz and his co-offender contained around 140 g — as the Crown submits, too large for street level supply. The messaging on Wickr indicates that Mr Holtz had influence, if not control, over pricing. This is not consistent with a mere middleman operating to "pass through" the drugs. Rather, it is consistent with use of high-level wholesale and source connections and contacts. While we accept that Mr Holtz's substance dependence provided some motivation, the degree of control Mr Holtz exercised is not consistent with limited participation nor an impaired rational choice to offend. Nor does the limited time frame of Mr Holtz's involvement aid him given that his activity was only interrupted by detection by authorities.

[29] We do not consider that *Miller* or *Wellington* assist Mr Holtz's appeal. On the contrary, we consider they support our view that a starting point of 11 years and six months was well within the available range. This view is further reinforced by the authorities relied on by the Crown such as *Tai v R*.[29]

[30] The third limb of challenge to the starting point is described as an issue of parity. Ms Priest submitted that the Judge erred in setting the same starting point for both Mr Holtz and his co-offender when in comparison his offending involved a lesser quantity of methamphetamine. Counsel contended that this distinction supported a lower starting point for Mr Holtz of eight years' imprisonment.

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27 At [14].

28 *Berkland v R* [2022] NZSC 143, [2022] 1 NZLR 509 at [71].

29 *Tai v R* [2022] NZCA 403. In that case, a starting point of 12 years' imprisonment was upheld by this Court in respect of a mid-level drug distributor with 805 g of methamphetamine in his possession. The Court in *Tai* also referred to *Martin v R* [2020] NZCA 318. In that case this Court applied a starting point of 12 years' imprisonment for 600 g of methamphetamine in a solo operation.

[31] There must be a gross and unjustifiable disparity to warrant appellate interference and for the reasons set out below, none is shown.[30] While Mr Holtz and his co-offender were due to be sentenced on the same date, she was in fact sentenced three months later due to counsel unavailability. Judge Jelaš was also the sentencing Judge in the co-offender's case.[31]

[32] Both were jointly charged with possession of 984.6 g of methamphetamine, this being the quantity thrown out of the window by the co-offender when police arrived. This accounted for the 10-year starting point on the possession for supply charge. The principle of parity supported the same starting point because, as the Judge found, their roles were indistinguishable.[32]

[33] It was only their respective second charges which involved different quantities. For Mr Holtz this was the prior supply of approximately 170 g. For his co-offender we accept the Crown submission (made on appeal and at the co-offender's sentencing) that she had offered to supply roughly 283 g (10 ounces), not 396 g (14 ounces) as Ms Priest submitted.[33] While comparatively this quantity was nearly twice as much as Mr Holtz, as was noted by the Judge at Mr Holtz's sentencing, in itself supply offending of 170 g could attract a standalone starting point in the range of four to six years.[34] Correspondingly, the Judge reduced the uplift to 18 months to reflect the principle of totality. This is unobjectionable. The Judge adopted the same uplift for his co-offender without expressly referring to the greater amount of methamphetamine involved or the principle of totality. While that may have been a lenient uplift in respect of the co-offender, it does not mean that the Judge erred in respect of the uplift for Mr Holtz.[35] Nor does it represent a gross disparity. It relates only to an uplift which recognises the totality principle — an aspect of sentencing which falls squarely within the Judge's discretion.

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30 *Tai v R,* above n 29, at [33] citing *R v Thompson* CA 245/98, 22 December 1998 at 13, *R v Rameka* [1973] 2 NZLR 592 (CA) at 594, *R v Lawson* [1982] 2 NZLR 219 (CA) at 223 and *Singh v R* [2013] NZCA 245 at [4].

31 *R v Bracken*, above n 5.

32 At [7].

33 Ms Priest contended that Mr Holtz dealt in 50 per cent less methamphetamine than his co-offender. This is not correct. On an approximate basis Mr Holtz dealt in a total of 1,154.6 g (across the two charges) and his co-offender dealt in a total of 1,267.6 g. This is a 10 per cent difference overall.

34 Judgment under appeal, above n 1, at [12].

35 *Tai v R,* above n 29, at [34], citing *Mau'u v R* [2011] NZCA 385 at [28].

[34] Finally, we pause to note that Ms Priest properly conceded that an uplift of six months for previous offending history is within range although she faintly suggested that an uplift of three months would have been more appropriate. We agree with the submission of Ms Archibald, for the Crown, that the uplift was generous in circumstances where Mr Holtz was subject to release conditions at the time of the index offending — a factor not explicitly taken into account by the Judge.[36]

[35] Accordingly, having dealt with all three limbs of Ms Priest's submission, the ground of appeal in respect of the starting point is dismissed.

*Was sufficient credit given for the guilty plea?*

[36] Ms Priest submitted that a full guilty plea credit of 25 per cent ought to have been afforded to Mr Holtz in these circumstances where he pleaded guilty after significant amendment to the charges and summary of facts. She submitted that the Judge erred when she assessed that Mr Holtz's plea was not entered at the earliest point.[37] Ms Priest further emphasised that the Crown acknowledged at sentencing that a full credit was available.

[37] Despite the Crown position at sentencing Ms Archibald submitted that the Judge was entitled to factor in an overwhelming Crown case in respect of the lead offending when assessing the appropriate deduction for guilty plea and that a 20 per cent credit was within the appropriate range. We agree. While another Judge may have awarded a full discount, the 20 per cent credit was within the Judge's sentencing discretion given the strength of the prosecution case. It follows that we do not consider that the Judge erred.

*Was sufficient discount given for Mr Holtz's background?*

[38] Ms Priest submitted that the Judge erred by failing to place sufficient weight on Mr Holtz's lifelong struggle with controlled substances caused by a background of deprivation, and the impact of addiction on his decision-making and reasoning. She contended that a deduction in the range of 20 to 25 per cent was warranted, rather than

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36 *Robertson v R* [2016] NZCA 99 at [79] confirms this is an aggravating factor.
37 Judgment under appeal, above n 1, at [15].

the 15 per cent adopted by the Judge. She referred to the case of *Ah Tong v R* to illustrate this Court's acceptance that a deprivation-stricken background and abusive upbringing warranted a discount of 20 per cent over and above the deduction for guilty plea.[38]

[39] It is well recognised that background factors that contribute causatively to culpability may mitigate sentence length.[39] In addition, offenders who exhibit a genuine willingness to take up opportunities to rehabilitate should be encouraged to do so and courts can provide such encouragement by material sentencing discounts.[40]

[40] The s 27 cultural report was prepared by an experienced cultural report writer. Her report was based on interviews with Mr Holtz, his mother and biological father (who was not involved with Mr Holtz's upbringing) along with empirical research on the concept of causal nexus.

[41] The report writer paints a compelling picture of deprivation. Mr Holtz grew up with no connection to his Māori heritage. He had no relationship with his father who separated from his mother when he was four years old. Those early years were marked by instability and dysfunction. He grew up with his mother, stepfather and stepsiblings. Mr Holtz's stepfather was a gang president. Mr Holtz reported that his childhood was characterised by violence, substance abuse and a gang lifestyle.

[42] In addition, Ms Priest pointed to the discounts his co-offender received to suggest that Mr Holtz's sentence amounted to disparate treatment. We do not accept this submission. The co-offender received a higher overall discount to recognise the negative impact imprisonment would have on her and her very young child.[41] In any event, personal mitigating factors are just that — personal. As Ms Archibald submitted, the circumstances of one offender can rarely be closely compared with

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38 *Ah Tong v R* [2024] NZCA 144 at [10].
39 *Berkland v R*, above n 28, at [109].
40 At [129].
41 *R v Bracken*, above n 5, at [12].

those of another, even when involved in the same offending.[42] That submission also addresses Ms Priest's reliance on the case of *Ah Tong*.[43]

[43] We accept that Mr Holtz's background exhibits the constellation of factors generally accepted to causally contribute to criminal behaviour — deprivation, limited education, parental neglect, cultural disconnection, parental gang involvement, substance abuse and incarceration at adolescence.[44] Further that addiction (in this case self-reported) is commonly causally connected to a traumatic childhood.

[44] However, we are satisfied that the Judge appropriately allowed for those personal mitigation factors in allowing a further 15 per cent discount over and above the guilty plea credit. That discount was within the available discretionary range in the circumstances of this serious drug offending. It did not overlook the impact of substance abuse. As noted above, on the objective material before the Court, we do not accept that this is a case where rational choice was impaired by severe addiction. In short, no error by the Judge is identified in this regard.

[45] Finally, Ms Priest submitted that Mr Holtz's rehabilitative efforts in custody support a discrete discount. She suggested that the Judge failed to recognise that this is the first time that rehabilitation, counselling, and the support to address addiction has been offered to Mr Holtz in a real and tangible way, marking an inflection point in Mr Holtz's life.

[46] We acknowledge the letter of support provided by a prison chaplain and from Mr Holtz's biological father, a counsellor who expresses his commitment to support his son's rehabilitation. We note the handwritten letter from Mr Holtz expressing contrition and the various courses he has undertaken in custody. These are positive, albeit initial steps, but in our assessment the overall discount allocated for personal

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42 Citing *R v Lawson* [1982] 2 NZLR 219 (CA) at 223.

43 We note that the issue in *Ah Tong* in relation to personal mitigating circumstances for background factors was whether the 20 per cent discount allocated by the sentencing Judge was sufficient. This Court said that the discount of 20 per cent could not be criticised and was within range. The overall mitigation discount was lifted only in respect of the impact of incarceration on the appellant's young child of whom he had primary care: see *Ah Tong v R*, above n 38, at [10] and [15]–[16].

44 The s 27 report writer describes incarceration during adolescence as the "care to custody" pipeline.

mitigating features cannot be criticised and has not led to a manifestly excessive sentence.

**Result**

[47] The appeal is dismissed.

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