IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA76/2024
[2024] NZCA 496

BETWEEN	TOMMY WINEERA Appellant
AND	THE KING Respondent

Hearing: 23 July 2024

Court: Hinton, Mander, Walker JJ

Counsel: A M Schulze for Appellant
J A A Mara for Respondent

Judgment: 1 October 2024 at 2.30 pm

JUDGMENT OF THE COURT

A The application for an extension of time is granted.

B The appeal against sentence is dismissed.

REASONS OF THE COURT

(Given by Walker J)

Introduction

[1] The appellant, Tommy Wineera, pleaded guilty in the Rotorua District Court and was convicted of 30 charges of supplying methamphetamine, six charges of possession of methamphetamine for supply, five charges of producing iodine capable of use in the manufacture of methamphetamine, two charges of possession of iodine,

five charges of supplying iodine, and three charges each of supplying and possessing MDMA (first suite of charges).

[2] He also pleaded guilty and was convicted of three further charges of possession of methamphetamine for supply, unlawful possession of a pistol, unlawful possession of ammunition, and receiving stolen property (second suite of charges).

[3] The quantity of methamphetamine in respect of the first suite of charges was 401.4 grams. The quantity of methamphetamine in respect of the second suite of charges was 285 grams and the total quantity overall was 686.4 grams.

[4] On 1 December 2023 Judge T R Ingram sentenced Mr Wineera to seven years' imprisonment.[1]

[5] Mr Wineera appeals his sentence. He argues that the Judge erred by adopting a starting point for the totality of the drug offending which included the iodine and MDMA offending.[2] He says that, by doing so, the Judge wrongly relied on factors relating only to the iodine charges to assess culpability in respect of all Mr Wineera's drug offending, when he ought to have assessed his culpability separately.

Extension of time application

[6] The appeal was filed 12 days out of time, so Mr Wineera applied for an extension of time to bring the appeal. The short delay was explained by Mr Wineera's counsel and the Crown is not prejudiced by it. Accordingly, we grant the application for an extension of time to appeal.

The offending

[7] The first suite of charges against Mr Wineera came about as a result of intercepted calls and text messages between 3 June 2022 and 19 October 2022, pursuant to a surveillance device warrant and production orders. The second suite of charges arose following execution of search warrants.

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1 *R v Wineera* [2023] NZDC 26791 [sentencing notes].

2 Iodine is an essential ingredient in the manufacture of methamphetamine. It is extracted from iodine tincture or potassium iodide in a separate process.

[8] The summary of facts that formed the basis for sentencing recorded that Mr Wineera obtained quantities of methamphetamine from associates within his drug dealing network to on-sell. Further, between 9 August 2022 and 15 October 2022, he also carried out iodine extractions, producing tens of kilograms of iodine. He sold the extracted iodine to methamphetamine manufacturers.

[9] We pause to interpolate that Mr Wineera was not charged with methamphetamine manufacture, although there was some cross-over in timeline with respect to the iodine extractions and the methamphetamine charges.[3]

[10] Between 27 July and 29 September 2022, Mr Wineera received a stolen BMW X6 which he drove over the following months with falsified registration plates affixed to the car. After police located the car at an address in Rotorua known to Mr Wineera, the car was towed to a local towing service company, from where it was stolen a few hours later by an unknown person.

[11] Between 4 and 5 August 2022, Mr Wineera received a stolen 2009 Sea-Doo GTX jet ski and trailer. It was located a few months later at the home of a family member of Mr Wineera.

[12] The second suite of charges arose when, a couple of months later, police executed warranted searches of addresses related to Mr Wineera and located a large quantity of methamphetamine, Mr Wineera's identification, cash totalling $19,360 and a BBM 8-millimetre, semi-automatic pistol, and ammunition.

Sentencing in the District Court

[13] The Judge referred to the lengthy summary of facts and remarked that, for sentencing purposes, he was required to assess and explain the collective effect of the circumstances, rather than the particulars of each charge.[4] He recorded there was no dispute that Mr Wineera is a senior member of a local gang and had previously been heavily involved in the methamphetamine trade.[5] He described the overall picture as

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3 Counsel for Mr Wineera described the methamphetamine supply as Mr Wineera's "side hustle".
4 Sentencing notes, above n 1, at [3].
5 At [4]–[5].

one of active selling, along with organising and arranging the supply of materials for manufacture to others within the organisation, for all of which Mr Wineera was rewarded. That led to his assessment that Mr Wineera's role was at the highest ("leading") level in terms of the *Zhang v R* criteria.[6] In making this assessment, the Judge rejected defence counsel's argument that he should not conflate Mr Wineera's high position within the organisation with an ability to direct others in drug offending. He said there was not the "slightest indicia of anybody else being involved" above Mr Wineera; it was his operation, and he was the beneficiary as a result.[7]

[14] The Judge disavowed the methodology of taking the lead offending and adding discrete uplifts for other drug offending elements on the basis that it served no useful purpose. Instead, he instead assessed the overall operation in setting the starting point. The Judge determined that the amalgam of the drug-related matters attracted a starting point of 12 years' imprisonment.[8]

[15] The Judge applied a one-year uplift for the firearm and ammunitions charges; a six-month uplift for the receiving charge and an additional six-month uplift for Mr Wineera's previous history, which he described as an "appalling prior record".[9] The adjusted start point reached was 14 years' imprisonment.[10]

[16] In terms of mitigation, the Judge applied the full discount of 25 per cent for the guilty plea, despite it having taken eight months to be entered.[11] He granted a further 25 per cent discount in relation to background and addiction, relying on a lengthy letter from Mr Wineera about his upbringing and two detailed background reports. That resulted in the end sentence of seven years' imprisonment.[12]

[17] Finally, the Judge imposed a minimum period of imprisonment (MPI) of 50 per cent.[13]

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6 At [5], referring to *Zhang v R* [2019] NZCA 507, [2019] 3 NZLR 648.
7 Sentencing notes, above n 1, at [7].
8 At [14].
9 At [15]–[16].
10 At [16].
11 At [18].
12 At [17] and [19].
13 At [26].

The appeal

[18] No issue is taken with the uplifts adopted for the firearm and receiving charges and for Mr Wineera's previous convictions. There is also no challenge to the discounts for personal mitigating factors. The nub of this appeal is whether adopting a starting point for the totality of the drug offending, without distinguishing the iodine charges, led to an error in Mr Wineera's sentence.

[19] The Court must allow an appeal against sentence if it is satisfied that there was an error in the sentence and a different sentence should be imposed.[14] An appeal against sentence will be successful only if there is an error that is material to the exercise of the lower court's sentencing discretion.[15] The focus is not on the process by which the sentence was reached, but on whether the end result is within the available range.[16]

Arguments on appeal

[20] Mr Schulze, counsel for Mr Wineera, contended the Judge erred in setting the start point by reference to the overall effect of the offending. Standard sentencing methodology required establishing a start point for the lead methamphetamine offending, before imposing uplifts for the remaining drug offending. He also submitted that Mr Wineera's culpability for the methamphetamine offending, determined by reference to quantity and role, should be viewed separately from his culpability in respect of the iodine offending. He reiterated before this Court that Mr Wineera's gang leadership should not be conflated with leadership of a drug operation.

[21] In terms of Mr Wineera's role in the methamphetamine element of the operation, Mr Schulze contended that it fell within the "significant" rather than "leading" (highest) category of *Zhang* because there is no evidence to show he had a managerial as opposed to operational role. Mr Schulze pointed to the following factors:

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

15 *Tutakangahau v R* [2014] NZCA 279, [2014] 3 NZLR 482 at [30].

16 *Tamihana v R* [2015] NZCA 169 at [14].

(a) Supply to low level street dealers and no involvement in the on-sale by those dealers.

(b) Severe addiction as the motivating force, although with some commercial gain over and above funding his addiction.

(c) No direction of others within a chain to facilitate supply.

(d) Acting as a sole operator.

(e) No evidence of him being close to original supply source.

[22] Mr Schulze accepted that Mr Wineera directed others in relation to obtaining precursor substances (iodine) which would justify a significant separate uplift but contended this was unconnected offending which should not influence the assessment of a starting point for the lead offending.[17]

[23] Mr Schulze submitted that comparator cases for offenders running their own supply operation with commensurate quantities at issue attracted starting points of between nine and ten years.[18] Therefore a starting point of nine years and six months was appropriate in Mr Wineera's case.

[24] Mr Mara, Crown counsel, submitted that even when assessed against orthodox sentencing methodology, the end sentence of seven years was entirely within range. He also advanced the argument that an offender's role is best known by the offender so that, in practice, inferences must be drawn about role, knowledge and gain. Where the inference is sufficiently available, an evidential burden moves to the offender to displace the inference.[19] Mr Mara referred to other cases in which this Court has found a leading role in a "one man" mid-level operation which was clearly commercial.[20] Implicitly, Mr Mara's submissions supported the Judge's composite approach while

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17 Mr Schulze submitted that there is nothing in the summary of facts to indicate that the methamphetamine Mr Wineera obtained was the end-product of the iodine he produced and supplied.

18 Referring to *Clark v R* [2020] NZCA 641; *Parkes v R* [2020] NZCA 203; *R v Smith* [2022] NZHC 1975.

19 *Zhang v R*, above n 6, at [127].

20 *Simcic v R* [2022] NZCA 592 and *Malolo v R* [2022] NZCA 399.

also providing a cross-check by taking the methamphetamine offending as the lead offending.

Analysis

[25] Whether the Judge's approach was orthodox or not, the material question is whether it resulted in a manifestly excessive end sentence. We consider that it did not. The result would have been no different had the Judge taken the methamphetamine offending as the lead offending and then uplifted for the remainder of the drug offending. We explain our reasons.

[26] It was common ground that *Zhang* is the guideline judgment for methamphetamine offending. This Court emphasised in *Zhang* that the quantity of drugs is an important measure of culpability but not the only relevant factor.[21] The role played by the offender is an important consideration in fixing culpability.[22]

[27] There was also no dispute that Mr Wineera's methamphetamine offending fell within the lower end of band 4 of *Zhang*. That band applies to quantities between 500 grams and two kilograms and provides for a starting point of between eight and 16 years' imprisonment.

[28] We disagree that the factors relied on by Mr Schulze pertain only to a "significant" rather than "leading" role. This Court has recognised that a "sole trader" who is commercially dealing can be both "significant" *and* "leading" in terms of the role profiles identified by the Supreme Court in *Berkland v R*.[23]

[29] In *Simcic v R,* this Court observed that a starting point of more than 11 years was available in respect of lead methamphetamine charges where Mr Simcic had a leading role in what appeared to have been a "one man" commercial methamphetamine dealing operation.[24]

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21 *Zhang v R*, above n 5, at [104].
22 At [118].
23 *Tule v R* [2023] NZCA 543 at [17] and *Tai v R* [2022] NZCA 403 at [23]; referring to *Berkland v R* [2022] NZSC 143, [2022] 1 NZLR 509.
24 *Simcic v R*, above n 20, at [31]–[32].

[30] In *Tai v R*, the offender's role fell within the "leading" categorisation although a mid-level operation. Mr Tai operated in an autonomous way, organising buying and selling on a commercial scale. He had substantial links to, and influence on, others in the chain and it was open to find that he was the key link between wholesale suppliers and lower-level dealers because of his connections. This Court upheld a starting point of 12 years in respect of a quantity of approximately 805 grams.[25]

[31] We find *Tai* to be close to the role Mr Wineera had in his sole operation. Just as Mr Tai operated autonomously, so did Mr Wineera. The intercepted communications show that Mr Wineera had the ability to negotiate price, permit part-payment and credit, and direct times for pickup and drop off. There is no evidence that Mr Wineera was being directed by others – on the contrary. We consider it is an available inference that he had substantial links to others in the chain and that he was the key link between wholesale suppliers and lower-level dealers because of his seniority in a gang. Only Mr Wineera can provide cogent information of lesser involvement and no such material is before the Court.

[32] The commerciality in the present case is evident. On execution of the search warrant, police found a large number of small, plastic snap lock bags with the "8-ball" logo on them. The sale of some 686 grams of methamphetamine (the total quantity at issue) would potentially have yielded approximately $171,500, or substantially more if sold in point bags. Mr Wineera was also found in possession of a large amount of cash (approximately $19,400).

[33] The fact that Mr Wineera was in a position of influence as a senior member of a local gang is relevant in the overall factual matrix. There is an air of unreality to the submission that Mr Wineera's respective roles were so neatly delineated that there is materially different culpability between the methamphetamine offending and the precursor (iodine) offending and no link between his gang leadership role and the operation.

[34] We do not find the cases referred to by Mr Schulze to be useful comparators. In *Clark v R*, the starting point adopted of nine and a half years was upheld on appeal.

[25] *Tai v R*, above n 23, at [23].

While slightly greater quantities of methamphetamine were involved (720 grams versus 686 grams), the offending occurred over a short period of time compared to several months in Mr Wineera's circumstances.[26] Additionally the number of charges was less and there were fewer sales down the chain. In *Parkes v R* the number of charges was also significantly less, as was the quantity of methamphetamine (568.8 grams versus 686 grams). This Court said the appropriate starting point was nine years' imprisonment.[27]

[35] For completeness, we do not consider that Mr Wineera's addiction (fuelling high levels of personal consumption) is a factor indicating limited participation or is causative of his offending. There is nothing to suggest that addiction impaired his rational choice to offend. On the contrary, his involvement in the precursor supply, and its nature and scale, tells otherwise. (We note also that Mr Wineera's addition and other personal circumstances were well provided for by the Judge in terms of the deductions made.)

[36] Those factors combined lead us to accept Mr Mara's submission that a starting point in the range of between 10 and 11 years' imprisonment on the methamphetamine charges alone is in line with comparable authorities.[28]

[37] An uplift of 18 months' imprisonment for the precursor offending is justified by the accepted leading role Mr Wineera played in that part of the operation. The evidence is that he directed associates to buy and deliver supplies for the extraction of iodine over a two-month period; supplied at least 11 kilograms of iodine to known associates; participated in five iodine extractions; and was in possession of 10 kilograms of iodine for use in the manufacturing of methamphetamine. The

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[26] *Clark v R*, above n 18.

[27] *Parkes v R*, above n 17.

[28] See *Martin v R* [2020] NZCA 318 – starting point of 12 years for 600 grams of methamphetamine in a sole operation; *Zhang v R*, above n 5, at [229]–[242] – starting point of nine years for importation and distribution of 300 grams of methamphetamine in role assessed to be at the lower end of leading (relating to appellant Ms Hobson); *Miller v R* [2020] NZCA 131 – starting point of 11 and a half years for supply of 905 grams of methamphetamine, involving a large scale operation in which the appellant was a significant player; and *Flavell v R* [2024] NZCA 317 – starting point of 11 years relating to approximately 868 grams of methamphetamine on sold to buyers in the defendant's network.

critical nature of this substance in the manufacture of methamphetamine cannot be overlooked.

[38] The MDMA charges attract a further uplift of six months such that the result is an adjusted starting point between 12 and 13 years. This is broadly consistent with the starting point taken for the drug offending in totality by the Judge.

[39] With no issue taken with the uplifts of two years for the remaining unrelated charges, an adjusted start point range between 14 and 15 years was available.[29]

[40] Finally, taking the same deduction for personal factors into account by way of mitigation, an end sentence in the range of seven years, two months and seven years, eight months is reached.

[41] This illustrates that the end sentence imposed by the Judge was not excessive let alone manifestly excessive. As this must be the focus of a sentence appeal, rather than the methodology employed, it follows that we must reject Mr Wineera's appeal.

Result

[42] The application for an extension of time is granted.

[43] The appeal is dismissed.

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

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[29] This Court has regularly endorsed uplifts of between 12 and 18 months' imprisonment for those found in possession of firearms in association with drug offending; see *To'a v R* [2020] NZCA 187 at [19], *R v Fonotia* [2007] NZCA 188, [2007] 3 NZLR 338 at [41]; *Mills v R* [2016] NZCA 245 at [18]; and *Joyce v R* [2020] NZCA 124 at [24]. It could also be said that the uplifts attributed to Mr Wineera were generous at only 12 months for the firearm offending.