IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA180/2024
[2024] NZCA 432

BETWEEN	JOHN BARRY BEVIN Appellant
AND	THE KING Respondent

Hearing: 27 August 2024

Court: Cooke, Peters and Grice JJ

Counsel: J C Hannam for Appellant
J M Woodcock for Respondent

Judgment: 11 September 2024 at 10.30 am

JUDGMENT OF THE COURT

A The application for an extension of time is granted.

B The appeal is dismissed.

REASONS OF THE COURT

(Given by Cooke J)

[1] Mr Bevin appeals against a decision of the District Court imposing a sentence of 10 years' imprisonment in respect of 24 charges for possessing methamphetamine and cannabis for supply, supplying methamphetamine, receiving stolen property, and unlawfully possessing a firearm.[1] In particular, he argues that the Judge was wrong to

[1] *R v Bevin* [2024] NZDC 4549 [Judgment under appeal].

make no allowance for personal mitigating circumstances, and that in all the circumstances the sentence imposed was manifestly excessive.

[2] The notice of appeal was filed out of time. Given the delay is short, we grant the necessary extension of time.

The offending

[3] On 2 March 2023, a search warrant was executed at Mr Bevin's address where police located $32,500 in cash vacuum packed in marked bundles along with 33.21 grams of methamphetamine. They also located a .22 semi-automatic firearm and ammunition.

[4] On 21 March 2023, 6 April 2023, and 18 April 2023, Mr Bevin then met with a co-defendant and supplied five ounces of methamphetamine on each occasion. The street value of the 15 ounces (approximately 425 grams) of methamphetamine supplied was $147,000. Following his arrest and a search of his vehicle, police located another 158 grams of methamphetamine, including 140 grams in five snap lock bags. A search warrant then executed on his home located 272 grams of methamphetamine in various snap lock bags, and 793 grams of cannabis in vacuum sealed bags.

[5] In addition, 137 grams of methamphetamine and 861 grams of cannabis were found to have been supplied. A search of the appellant's storage shed also located a jet ski valued at $23,154.10 that had been stolen from a transport yard in Taupō.

[6] In sentencing Mr Bevin, following the entry of guilty pleas, Judge Greig adopted the starting point he had earlier provided in a sentencing indication of 13 to14 years' imprisonment. The indication also required the starting point to be uplifted for previous offending and discounted for guilty pleas. This resulted in a sentence of 10 years' imprisonment, subject to any further discounts for personal mitigating circumstances.[2]

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2 At [31].

[7] The Judge gave no discount for personal mitigating circumstances, however. Mr Bevin had a total of 39 previous convictions for drug dealing offences. In 2009, he was sentenced to two years and 10 months' imprisonment on 38 charges relating to the supply of methamphetamine over an eight-month period. In 2020, he was sentenced to 10 months' home detention after pleading guilty to charges associated with 57.8 grams of methamphetamine, 200 grams of cannabis and a significant amount of cash. The Judge said that this was a lenient sentence, and expressed the view that it had been entered because Mr Bevin had committed to a path towards rehabilitation.[3]

[8] Given this background, the Judge declined to give Mr Bevin any further discount for rehabilitation potential, noting that he already received an "overly generous" discount for his guilty plea in the sentence he had earlier indicated.[4] The Judge considered Mr Bevin's background circumstances, including as outlined in a s 27 report. He expressed the view that the report had significant failings and that he regarded it of no value at all.[5] He noted the serious impact of the offending. He concluded that Mr Bevin was making exactly the same promises that he had made to the Court in 2020.[6] He said:

> [69] Your offending is squarely in band 4 of the tariff case. You played a leading role at the top of the pyramid for dealing in Taranaki. You directed and organised the buying and selling of methamphetamine on a commercial scale. You had influence on and directed others in the chain. You had substantial links to others in the chain and you made significant financial gain by selling methamphetamine on a commercial scale.
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> [70] The extent of that gain rules out any discount for your own use/addiction if indeed you were, because we only have your word for that and in 2020 you told the Judge that you were drug free.

Arguments on appeal

[9] For Mr Bevin, Mr Hannam argues that the Judge was wrong not to provide further reductions for personal mitigating factors given ss 7(h), 8(h), and 8(i) of the Sentencing Act 2002. The s 27 report had referred to his ignorance of the te ao Māori aspects of his heritage, difficulties arising from an ADHD diagnosis, significant

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3 At [27]–[30].
4 At [44].
5 At [60]–[64].
6 At [65].

physical abuse from his mother's partner, and a 22-year addiction and history of drug abuse including poor decision making as an adult. Both the pre-sentence report and the s 27 report highlighted these issues and Mr Bevin's willingness to engage in rehabilitation.

[10] Mr Hannam referred to authorities where personal factors had led to discounts in similar circumstances including *Tai v R*,[7] *Malolo v R*,[8] and *McMillan v R*.[9] He submitted that the Judge's approach which disregarded these personal mitigating factors was wrong, that a starting point of 13 years' imprisonment was appropriate, and with a discount of 10 per cent for personal mitigating factors in addition to the 25 per cent discount for his guilty plea a final sentence of eight years and five months' imprisonment, rather than 10 years' imprisonment, was appropriate.

Analysis

[11] The Court must allow an appeal against sentence if it is satisfied that there was an error in the sentence and that a different sentence should be imposed.[10] 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, however.[11] There will need to be a material error in the end sentence.[12] The focus is on whether the end sentence is within the available range rather than the process by which it has been reached.[13]

[12] Although it was not the focus of Mr Hannam's submissions, we consider that there has been a degree of unfairness to Mr Bevin arising from the robust observations of the Judge provided as part of the sentencing.

[13] When addressing issues of remorse, addiction, and rehabilitation potential, the Judge referred to Mr Bevin's attendance at a rehabilitation programme based in Auckland. This was the result of a successful EM bail appeal to the High Court which

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7 *Tai v R* [2022] NZCA 403.
8 *Malolo v R* [2022] NZCA 399.
9 *McMillan v R* [2022] NZCA 128.
10 Criminal Procedure Act 2011, s 250(2).
11 *Tutakangahau v R* [2014] NZCA 279, [2014] 3 NZLR 482 at [30].
12 *Tamihana v R* [2015] NZCA 169 at [14].
13 At [14], citing *Tutakangahau v R*, above n 11, at [36].

allowed him to attend that programme.[14] The Judge referred to this being part of a standard tactic "with the aim of kicking the whole case into touch for as long as possible" and then seeking a discount for addiction and rehabilitation potential, and that this was a pattern familiar to District Court judges.[15] He observed that these facilities were "often run by criminals" which allowed for further offending, and that it was hard to see what benefit could be gained by an offender or the community at large from attending such a programme.[16] But here there was no suggestion that Mr Bevin's programme was of this character, as the Judge appears to have subsequently acknowledged.[17] That being the case, we do not consider it was fair to Mr Bevin to make such observations suggesting they were relevant to the sentence to be imposed.

[14] Equally, the criticism of the s 27 report, because of "all the academic jargon and advocacy" it contained, and the cost that would have been involved in its preparation, with the related observation that it was reports of this type that may well lead to them being a thing of the past was also unfair to Mr Bevin.[18] Criticisms of that kind are more appropriately dealt with in other channels rather than them being incorporated in the reasons for Mr Bevin's sentence.

[15] Even if a District Court Judge addresses a claim of remorse and rehabilitation potential in a robust way, in the present case the Judge went further than was fair by using Mr Bevin's sentencing to express his general observations. The fact that Mr Bevin had previously received what the Judge considered a generous sentence that had focused on rehabilitation, but he had nevertheless reoffended, did not eliminate the need to consider the role that addiction may have played in his offending, and whether there remained potential for rehabilitation. That included consideration of his background circumstances as disclosed by both the pre-sentence report, and the s 27 report.

[16] We nevertheless accept that there were grounds to be sceptical about the effects of Mr Bevin's background, addiction, and rehabilitation potential. This was the third

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14 *Bevin v R* [2023] NZHC 2324.
15 Judgment under appeal, above n 1, at [40]–[41].
16 At [41]–[42].
17 At [42]–[43].
18 At [64].

set of drug offending for which he had been convicted and sentenced. On the second occasion he had received a more lenient sentence directed at maximising the opportunity for rehabilitation. But Mr Bevin had then engaged in this further offending. Whilst that did not eliminate the possibility of discounts for mitigating circumstances, it was quite possible that any discounts for such factors would be more modest.

[17] Moreover, the question for us is whether the end sentence was manifestly excessive. The Judge had indicated that the starting point was 13 to 14 years, and that an uplift for the previous convictions was appropriate. We do not consider that either conclusion can be criticised. The Judge had then indicated, however, that the end sentence would be 10 years' imprisonment subject to any personal mitigating discounts. The 10-year term of imprisonment the Judge had indicated involved what appears to be a calculation error.

[18] As the Judge subsequently recognised, if the starting point had been 14 years' imprisonment uplifted by six months for the previous convictions, that would involve a discount attributable to the guilty pleas of approximately 30 per cent.[19] Discounts of more than 25 per cent for a guilty plea alone are inappropriate.[20]

[19] Further, Mr Bevin did not enter his guilty pleas at the first available opportunity. He was first remanded in custody without plea on 19 April 2023 and he entered not guilty pleas on 27 July 2023. On 25 August 2023, he successfully appealed his remand in custody and he attended a rehabilitation programme while on EM bail. On 5 September 2023, a case review hearing was adjourned by consent to explore resolution, and a sentence indication was sought on 26 September 2023. The indication was given on 20 December 2023 and it was accepted on 18 January 2024.

[20] Given that chronology of events, a guilty plea discount of 20 per cent would have been more appropriate.[21] That leaves a further discount of more than 10 per cent unaccounted for with a starting point of 14 years and six months. If the starting point

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19 At [31]–[32].
20 *Hessell v R* [2010] NZSC 135, [2011] 1 NZLR 607 at [75].
21 See *Zhang v R* [2019] NZCA 507, [2019] 3 NZLR 648 at [302].

had been 13 years and six months there would have been 5 per cent discount unaccounted for. We do not consider that the personal mitigating circumstances for factors such as addiction and rehabilitation potential could have been greater than a further 5 to 10 per cent in Mr Bevin's case.

[21] For these reasons, we do not consider that the sentence is manifestly excessive. It is within range. It may have been open for the District Court to give some discount for personal mitigating circumstances as Mr Hannam argued, but given Mr Bevin's history this could only be a modest adjustment, and it falls within the required adjustment to the starting point that the Judge had erroneously calculated.

Result

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

[23] The appeal is dismissed.

Solicitors:
Crown Solicitor, New Plymouth for Respondent