IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI O AOTEAROA

SC 78/2022
[2023] NZSC 26

BETWEEN	TEVITA SITANILEI KULU Applicant
AND	THE KING Respondent

Court:	O'Regan, Ellen France and Williams JJ
Counsel:	J E L Carruthers for Applicant M K Regan and N J Wynne for Respondent
Judgment:	27 March 2023

JUDGMENT OF THE COURT

The application for leave to appeal is dismissed.

REASONS

[1] The applicant, Mr Kulu, and his co-offender, Mr Fangupo, were found guilty of methamphetamine offending. The trial Judge found they were equal partners, playing complementary leading roles. The amount imported was substantial (around 20 kg).

[2] The trial Judge sentenced Mr Kulu to 18 years' imprisonment (from a starting point of 20 years) and Mr Fangupo to 17 years (from a starting point of 19 years).[1] Both were subject to a minimum period of imprisonment (MPI) of 50 per cent.

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1 *R v Fangupo* [2019] NZHC 2896 (Downs J).

[3] Mr Fangupo appealed to the Court of Appeal.[2] The Court concluded that the 19-year starting point was out of step with the Court of Appeal's decision in *Zhang v R* and reduced it to 17 years.[3] It also increased the allowance for personal factors from 10 per cent to 15 per cent, leading to an end sentence of 14 years and five months.[4] It reduced the MPI from 50 per cent to 40 per cent.[5]

[4] Mr Fangupo's success prompted Mr Kulu to seek an extension of time to appeal to the Court of Appeal against his sentence. The essence of his case in the Court of Appeal was that parity demanded that his sentence be reduced commensurately with the reduction in Mr Fangupo's sentence The Court of Appeal did not accept this.[6]

[5] Having considered the offenders in the *Zhang* case itself, as well as some cases decided after *Zhang,*[7] the Court concluded that the starting point adopted by the trial Judge in relation to Mr Kulu "was well within the available range mandated by *Zhang*" and was therefore correct.[8] The Court observed that it would not, therefore, alter Mr Kulu's sentence unless parity required it to do so.[9]

[6] As to parity, the Court decided that reducing Mr Kulu's sentence would mean that both the sentence for Mr Kulu and the sentence for Mr Fangupo would be wrong.[10] It said it was necessary to strike a balance between maintaining confidence in the administration of justice and not amplifying the injustice of one manifestly inadequate sentence by adding another.[11]

[7] The Court granted Mr Kulu an extension of time to appeal but dismissed the appeal, except in one respect: it reduced Mr Kulu's MPI from 50 per cent to 40 per cent.[12]

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2 *Fangupo v R* [2020] NZCA 484 (Collins, Mallon and Ellis JJ).
3 At [50], applying *Zhang v R* [2019] NZCA 507, [2019] 3 NZLR 648.
4 At [58] and [67].
5 At [64].
6 *Kulu v R* [2022] NZCA 284 (Kós P, Brewer and Davison JJ).
7 At [21]–[27].
8 At [31].
9 At [31].
10 At [33]–[37].
11 At [33].
12 At [39].

[8] Mr Kulu's initial submissions in this Court were entirely focussed on the need for parity. However, on 13 December 2022, this Court then requested further submissions dealing with the decision of this Court in *Berkland v R*.[13] In those supplementary submissions, counsel for the applicant extended his argument to say that Mr Kulu's sentence is now out of step with the revised sentencing levels from *Berkland* (and that *Berkland*, in effect, endorsed the approach taken by the earlier Court of Appeal in *Fangupo*).

[9] In this Court's decision in *Berkland*, the Court said that the amended provisions relating to "significant role" in *Zhang* would apply to all sentences and appeals against sentence dealt with under *Zhang*, but only where the application of the amended significant role profile would result in a more favourable sentence.[14] In the present case, both Mr Fangupo and Mr Kulu are in the "leading" category, and are therefore not directly affected by the change in the significant role criteria that was provided for in *Berkland*.

[10] However, Mr Kulu wishes to argue on appeal, if leave is given, that, in light of the reductions in the sentences for the two appellants in *Berkland*, his sentence is too high. He does not suggest that he should have greater allowances for personal factors; his argument is just that the 20-year starting point is too high. Having considered that argument in light of *Berkland*, particularly at [48] of that decision, we find that argument has an insufficient prospect of success to justify the grant of leave.

[11] That leaves the parity argument. We do not see that argument as raising a matter of general or public importance, given that it is specific to the facts of the present case (that of Mr Fangupo and the degree of perceived disparity between the starting points adopted for each of them).[15] Nor do we see any appearance of a miscarriage of justice in the way the Court of Appeal addressed that issue.[16]

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13 *Berkland v R* [2022] NZSC 143.
14 At [72] per Winkelmann CJ, William Young, Glazebrook and Williams JJ.
15 Senior Courts Act 2016, s 74(2)(a).
16 Section 74(2)(b).

[12] The application for leave to appeal is dismissed.

Solicitors:
Crown Law Office, Wellington for Respondent