IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI O AOTEAROA

SC 15/2023
[2023] NZSC 56

BETWEEN	ROBERT JASON TAUI Applicant
AND	THE KING Respondent

Court: O'Regan, Ellen France and Kós JJ

Counsel: C B Hirschfeld, B Tūpara and T D Thompson for Applicant
J A Eng for Respondent

Judgment: 16 May 2023

JUDGMENT OF THE COURT

The application for an extension of time to apply for leave to appeal is dismissed.

REASONS

[1] Mr Taui dealt methamphetamine around Wellington, purchasing 1.524 kilograms from one of his co-defendants, a Mr McMillan, a wholesaler who had obtained the product from Auckland.[1] The High Court Judge, utilising the guideline judgment *Zhang v R*,[2] found Mr Taui had played a "significant" role in the operation, albeit displaying some features of a person in a "leading" role (the scale was commercial in nature and he expected significant financial gain in his own right).[3] The Judge adopted a starting point of 12 years' imprisonment for the methamphetamine

1 This was the High Court Judge's finding after a disputed fact hearing: *R v Taui* [2021] NZHC 594.
2 *Zhang v R* [2019] NZCA 507, [2019] 3 NZLR 648.
3 *R v Taui* [2021] NZHC 2123 (Gwyn J) [HC sentencing notes] at [27].

offending.[4] He received a final sentence of nine years, one month's imprisonment for that offending.[5]

[2] Mr Taui's sentence appeal to the Court of Appeal focused on parity, but failed.[6] In the course of its judgment the Court of Appeal noted:[7]

> [82] In addition, Ms Cooper submitted that there was a lack of parity with co-offenders, five of whom were attributed starting points between three and six years' imprisonment for their parts in dealing in larger quantities (between two and six kilograms of methamphetamine). It was submitted that Mr Taui's role was in many ways indistinguishable from those co-defendants.
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> [83] There were material differences between the roles played by Mr Taui and Mr McMillan's other co-defendants. The evidence at the latter's trial suggested that he had varying levels of trust in some of those co-defendants, leading to their doing his bidding more loosely supervised. In particular Mr Philip and Ms Hayman made numerous trips to Auckland in vehicles supplied by Mr McMillan with secret compartments, to swap large sums of money for large quantities of methamphetamine. Messrs Stone and Paulo were drivers and ran errands for Mr McMillan. None of them had an independent role in taking ounce quantities of methamphetamine out of Mr McMillan's control and turning it into cash.
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> [84] We acknowledge a potentially concerning gap between the 12-year starting point for Mr Taui and six years for Mr Philip. The Crown's appeal against Mr Philip's sentence is addressed below. As noted above … an overly lenient sentence for one co-defendant does not necessarily afford a ground for revisiting another co-defendant's sentence that is otherwise within range — the threshold for intervention is a high one requiring the disparity to be present to such an extent that a reasonably minded observer would be led to believe that something had gone wrong with the administration of justice.
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> [85] We are satisfied that the relativity of the starting points adopted does not give rise to a concern that something significant has gone wrong in the sentencing process. We do not accept that an error can be made out on the ground that Mr Taui's sentence lacks parity or proportionality with those imposed on co-defendants.

[3] Since then, Mr Philip's sentence appeal has been heard in this Court, where his sentence was reduced.[8] Mr Taui now seeks an extension of time for leave to appeal his sentence to this Court. He seeks leave to file affidavit evidence to explain the

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4 At [31]. She added an uplift of six months for firearms offending: at [32]. The offending and the starting point adopted were broadly consistent with those in *Wellington v R* [2020] NZCA 277 and *Chai v R* [2020] NZCA 202 – both post-*Zhang* decisions of the Court of Appeal.

5 At [56].

6 *McMillan v R* [2022] NZCA 128, (2022) 30 CRNZ 245 (Dobson, Brewer and Edwards JJ) [CA judgment] at [98].

7 Footnote omitted.

8 *Philip v R* [2022] NZSC 149, [2022] 1 NZLR 571.

lateness of the application, the broad reasons for which are explained in his submissions.

Extension of time and proposed appeal

[4] Mr Taui submits that an extension of time for leave to appeal should be granted because he had not perceived or understood that parity had arguable merit as a ground of appeal prior to the expiry of time to appeal. Once *Berkland v R* was delivered,[9] he responsibly took all the steps that he could.

[5] Mr Taui wishes to contend the Court of Appeal erred in stating that the relativity of "the starting points adopted does not give rise to a concern that something significant has gone wrong in the sentencing process" when it adopted a starting point of 12 years imprisonment for the applicant, but a "similarly charged" co-accused received a three year starting point and a final sentence of 11 months home detention.[10] He contends that his sentence is also out of step with the result in *Berkland*. Further, that the Court of Appeal erred in utilising the test for parity laid down in *R v Lawson* when that test considers only public perception, without factoring any justifiable sense of grievance on the part of the offender with the heavier sentence.[11] He submits that parity principles are a matter of general and public importance and wishes to advance an argument that tikanga principles buttress the parity argument presented. Further, that if leave is not granted, there will be a substantial miscarriage of justice.

Our assessment

[6] Where an application for leave is filed out of time, the applicant must provide an adequate explanation for the delay and compelling reasons for extending time.[12] The applicant must show that, in all the circumstances, the interests of justice favour granting leave.[13]

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9 *Berkland v R* [2022] NZSC 143, [2022] 1 NZLR 509.

10 CA judgment, above n 6, at [85], apparently referring to another co-offender: *R v Stone* [2021] NZHC 636.

11 At [33]. See *R v Lawson* [1982] 2 NZLR 219 (CA); and also *Lowe v R* (1984) 154 CLR 606 (HCA) at 623 per Dawson J.

12 *Palmer v R* [2011] NZSC 25 at [2]; *Afamasaga v R* [2019] NZSC 16 at [8]; and *Lincoln v New Zealand Law Society* [2020] NZSC 4 at [3].

13 *Thom v Davys Burton* [2007] NZSC 107, (2007) 18 PRNZ 766 at [2].

[7] We do not consider the criteria for leave are made out here. This Court in *Berkland* held that the amendments made to the significant role profile in *Zhang* applied to all "appeals against sentence dealt with under *Zhang* but only where the application of the amended significant role profile in *Zhang* would result in a more favourable outcome" to the applicant.[14] Mr Taui, a commercial drug dealer in his own right, still clearly fits within the significant role profile as amended by *Berkland*. In contrast, Mr Taui's co-offender, Mr Philip, lay on the cusp between lesser and significant roles. The decision of this Court in *Philip* effectively restored the sentence starting point adopted in the High Court, which was half that the Judge had applied to Mr Taui, reflecting the Judge's appreciation of the different offending and culpability of each co-offender. The Court of Appeal upheld that assessment and nothing before us suggests the Court was wrong to do so. Nor do we see tikanga principles assisting Mr Taui's argument. As a result, we do not apprehend the likelihood of a miscarriage of justice.[15]

[8] As the leave criteria are not met, there is no need to address Mr Taui's request for leave to file further evidence explaining the lateness of his application.

Result

[9] The application for an extension of time to apply for leave to appeal is dismissed.

Solicitors:
Crown Law Office, Wellington for Respondent

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14 *Berkland*, above n 8, at [72(c)] per Winkelmann CJ, William Young, Glazebrook and Williams JJ.
15 Senior Courts Act 2016, s 74(2)(b).