IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI O AOTEAROA

SC 32/2022
[2022] NZSC 149

BETWEEN	JASON BRENDON PHILIP Appellant
AND	THE KING Respondent

Hearing:	8 September 2022
Court:	Winkelmann CJ, Glazebrook, O'Regan, Ellen France and Williams JJ
Counsel:	P V C Paino and E T Blincoe for Appellant G J Burston, J E Mildenhall and K L Kensington for Respondent
Judgment:	16 December 2022

JUDGMENT OF THE COURT

A The appeal against sentence is allowed. The sentence of two years and 11 months' imprisonment is quashed and a sentence of one year and seven months is substituted.

B The standard conditions under s 14(1) of the Parole Act 2002 apply but expire on the sentence expiry date.

REASONS

WINKELMANN CJ, ELLEN FRANCE AND WILLIAMS JJ
(Given by Ellen France J)

Table of Contents

Introduction

[1] Mr Philip was convicted having pleaded guilty to five charges of possession of methamphetamine for supply;[1] and two charges of possession of cannabis.[2] He was sentenced by Gwyn J to one year's home detention.[3] On appeal by the Solicitor-General, the Court of Appeal quashed the sentence of home detention and substituted a term of two years and 11 months' imprisonment.[4] Mr Philip had by then served approximately seven months of his sentence of home detention.

[2] Mr Philip appealed with leave to this Court.[5] His appeal raises the question whether the Court of Appeal was right to find that the sentence of one year's home

---

1 Misuse of Drugs Act 1975, s 6(1)(f) and 6(2)(a); and Crimes Act 1961, s 66.
2 Misuse of Drugs Act, s 7(1)(a) and (2).
3 *R v Philip* [2021] NZHC 2393 [HC sentencing notes]. Mr Philip was discharged in relation to the cannabis offending.
4 *McMillan v R* [2022] NZCA 128 (Dobson, Brewer and Edwards JJ) [CA judgment].
5 *Philip v R* [2022] NZSC 88 [SC leave judgment].

detention was manifestly inadequate. The correctness of the Court of Appeal's decision turns primarily on the assessment of Mr Philip's role in terms of *Zhang v R*,[6] the guideline judgment for offending involving methamphetamine as amended by this Court in *Berkland v R*;[7] the importance of role in determining culpability; and the appellate approach where rehabilitation is to the fore on an appeal by the Solicitor-General. Finally, there is a question about whether a discount should have been allowed to reflect the impact of sentencing on Mr Philip's young child.[8]

[3] It will be necessary to come back to the factual matrix when we discuss these issues but, to put matters in context, we first set out the background.

Background

[4] We begin with a brief summary of the facts giving rise to the charges.

Facts

[5] The charges resulted from two police operations, one in relation to Wellington-based drug offending and the other predominantly Auckland-based. Mr McMillan was the main individual targeted in the Wellington enterprise. Mr James was the key player in the Auckland-based offending.

[6] Between December 2018 and March 2019, Mr Philip was involved in the transport of five shipments of methamphetamine from Auckland to Mr McMillan in Wellington. In terms of Mr Philip's links to Mr McMillan, we understand that Mr Philip's daughter was formerly Mr McMillan's partner. On each of these trips Mr Philip was accompanied by Ms Hayman, his current partner. On one occasion, Mr Philip's son drove one of the two cars involved in the trip from Wellington to collect the methamphetamine in Auckland. In addition, Mr Philip and Ms Hayman engaged an associate, Mr Minns, to act as a driver on their behalf. Mr Minns was involved in two of the five trips. In the second of these trips, the methamphetamine was concealed in the car driven by Mr Minns. He was stopped by police along the

---

6 *Zhang v R* [2019] NZCA 507, [2019] 3 NZLR 648.
7 *Berkland v R* [2022] NZSC 143.
8 At the time of sentencing Mr Philip and Ms Hayman had one child. They now have a second child.

way, and the car was impounded in Taupō for an unrelated driving offence. The methamphetamine was subsequently retrieved by the police.

[7] These trips gave rise to the five methamphetamine charges. The exact amount of methamphetamine transported was not known but Mr Philip was sentenced on the basis that a total of six kilograms of methamphetamine was transported.

[8] The two cannabis charges arose from the end of one of the police operations as part of which police executed a search warrant at Ms Hayman's parents' house. Mr Philip and Ms Hayman were found at the address in possession of 28 grams of cannabis. A second bag containing some 10 grams of cannabis was located inside a backpack on the floor of the bedroom where Mr Philip and Ms Hayman were found.

The sentencing process

[9] For a variety of reasons the sentencing process was quite drawn out, as we now explain. Gwyn J gave Mr Philip a sentencing indication on 1 February 2021. The Judge indicated a starting point of eight years' imprisonment with an uplift of two months to reflect previous offending. With the available discounts, the indication was that a maximum end sentence of six years and two months' imprisonment would be appropriate.

[10] Ms Hayman was sentenced on 26 March 2021 having accepted a sentence indication given by Gwyn J on 2 November 2020 and pleading guilty. From a starting point of six years' imprisonment, Ms Hayman was sentenced to 11 months home detention because of various personal mitigating circumstances, including an approximately 20 per cent discount for the impact on a dependent child.

[11] Mr Philip pleaded guilty to all charges following his sentence indication. Various reports were then prepared for the purposes of sentencing. Those reports comprised a comprehensive alcohol and drug assessment report dated 19 March 2021; a cultural report under s 27 of the Sentencing Act 2002 dated 24 March 2021; the provision of advice to courts (PAC report) dated 27 May 2021; a psychological report dated 8 June 2021 which reviewed Mr Philip's interactions with his young son who was born subsequently to Mr Philip's arrest; and, finally, there was a report dated

7 September 2021 which canvassed Mr Philip's attendance at a residential rehabilitation programme over July to August 2021. Sentencing had been adjourned to enable Mr Philip to attend the programme which was targeted at addressing his drug abuse issues.

[12] We interpolate here that minutes of the Judge dated 19 March 2021, 30 March 2021, and 15 April 2021 indicated that the High Court considered the factual basis of sentencing had altered from that when the Judge gave her sentence indication. The Judge referred, for example, to evidence at the trial of Mr McMillan having clarified the roles of various participants and to the possibility of Mr Philip attending a rehabilitation programme directed towards addressing his drug addiction. Both parties were given the opportunity to respond by way of submission to the matters raised.

The High Court sentencing

[13] Mr Philip was ultimately sentenced on 13 September 2021. It was agreed that, in terms of the *Zhang* sentencing bands, the quantity of methamphetamine involved meant that the offending fell within band five. That band applies where the quantity of methamphetamine involved comprises more than two kilograms. Band five attracts sentences of 10 years to life.[9]

[14] In sentencing Mr Philip the Judge adopted a starting point of six years' imprisonment, a starting point two years lower than that indicated in the sentence indication. The starting point was accordingly the same as that adopted for Ms Hayman. The Judge explained the reasons for reducing the starting point from that indicated earlier as follows:

(a) Having heard evidence at the trial of Mr McMillan which took place over a period in February – March 2021, the Judge considered Mr Philip and Ms Hayman operated together. In the sentencing indication, by contrast, the Judge had said that Mr Philip, being the older of the two and a patched gang member, may have taken more of

9 *Zhang*, above n 6, at [125].

a leading role. The Judge took the view at sentencing that the gang connection was shown to be of "very limited relevance".[10]

(b) The Judge determined that it was clear from the reports she had received that Mr Philip's offending was motivated by his addiction to methamphetamine. In the sentencing indication the Judge had considered Ms Hayman was motivated by her addiction but that there was no evidence at that point to suggest this was the case for Mr Philip. Further, there was evidence at Mr McMillan's trial showing that Mr Philip had no money or assets at the time of his arrest. That evidence supported the view that Mr Philip was motivated by receiving methamphetamine to feed his addiction and not by monetary gain.

(c) The Judge saw Mr Philip as having performed a "lesser" role in terms of the *Zhang* criteria.[11]

(d) As Mr Philip's culpability was the same as that of Ms Hayman, the starting points should be the same.

[15] From the six year starting point, the Judge gave Mr Philip a discount for his guilty plea of approximately 20 per cent, the plea having been entered quite close to the trial date. Because of Mr Philip's "very difficult background", drug addiction issues, mental health issues, remorse, and clear motivation for and commitment to rehabilitation, the Judge gave a further discount of approximately 30 per cent.[12] In this context she said there was a clear link between his background, addiction and the offending. The Judge gave a further discount of about 10 per cent for the impact of the sentence on his young child. With a discount for time spent on electronically monitored bail of six months that led to an end sentence of two years' imprisonment. A term of one year's home detention was imposed.

---

10 HC sentencing notes, above n 3, at [42].

11 *Zhang* divides roles into three categories: lesser, significant, and leading: *Zhang*, above n 6, at [115] and [126]; and see also *Berkland*, above n 7, at [71].

12 HC sentencing notes, above n 3, at [58]. The Judge also noted the previously indicated uplift for prior offending should no longer apply in light of Mr Philip's circumstances including his addiction, poverty, other vulnerabilities and lack of convictions for drug-related offending: at [47].

The approach in the Court of Appeal

[16] The Court of Appeal began its consideration by noting that the amount of methamphetamine involved (six kilograms) placed Mr Philip "well into" band five of *Zhang* and that offending within that band "calls for a strong response in terms of deterrence, the promotion of accountability, and public protection".[13] The Court of Appeal did not accept the sentencing Judge's characterisation of Mr Philip's role as coming within the "lesser" category. Rather, the Court said Mr Philip's participation was "at least on the cusp between lesser and significant categories of involvement".[14] The Court also dismissed the notion that parity with Ms Hayman assisted Mr Philip, observing that the Crown saw Ms Hayman's sentence as manifestly inadequate but had reasons for not pursuing an appeal against her sentence.

[17] Against this background, the Court's view was that, in the absence of an accepted sentence indication it was difficult to justify a starting point lower than nine years' imprisonment. However, because Mr Philip had pleaded guilty on the basis of the indication that eight years' imprisonment was the maximum starting point, the Court adopted an eight year starting point. The Court did not interfere with the discounts given by the High Court for personal circumstances,[15] the guilty plea and time spent on electronically monitored bail but said the High Court had erred in allowing a discount for the impact of sentencing on Mr Philip's young child. Some credit was given for time served on home detention. A sentence of two years and 11 months' imprisonment was accordingly substituted.

[18] To complete the narrative of the procedural history, we note that this Court granted leave to Mr Philip to appeal against his sentence on 20 July 2022.[16] Mr Philip was granted electronically monitored bail pending the hearing of the appeal.[17] Bail was extended pending determination of the appeal at the hearing.[18]

---

13 CA judgment, above n 4, at [138].
14 At [138].
15 The Court did, however, describe this as "inarguably generous": at [149].
16 SC leave judgment, above n 5.
17 *Philip v R* [2022] NZSC 91.
18 The conditions of bail were subsequently varied on 13 September 2022.

Mr Philip's role

[19] We address first whether the Court of Appeal was correct to assess Mr Philip as being on "the cusp" of the lesser and significant roles identified in *Zhang*. That requires consideration of the various indicia for these roles as set out in *Zhang* and now updated by this Court in *Berkland*, as follows:

Lesser	Significant
1. Performs a limited function under direction; 2. engaged by pressure, coercion, intimidation; 3. involvement through naivety or exploitation; 4. motivated solely or primarily by own addiction; 5. little or no actual or expected financial gain; 6. paid in drugs to feed own addiction or cash significantly disproportionate to quantity of drugs or risks involved; 7. no influence on those above in a chain; 8. little, if any, awareness or understanding of the scale of operation; and/or 9. if own operation, solely or primarily for own or joint use on non-commercial basis.	1. Management function in operation or chain where, under direction from a leader, this entails directing others in the operation whether by pressure, influence, intimidation or reward; 2. operational function, whether operating alone or with others; 3. motivated solely or primarily by financial or other advantage; 4. actual or expected financial or other advantage, especially where commensurate with role and risk assumed; and/or 5. some awareness and understanding of the scale of the operation.

[20] The submission for Mr Philip is that the High Court was correct to characterise his role as coming within the "lesser" characterisation. The respondent supports the Court of Appeal's assessment of role for the reasons given by that Court, albeit arguing that assessment was a generous one.

[21] To put the Court of Appeal's reasoning in context, we note that the High Court in sentencing relied on the description of Mr Philip given by the Crown in closing in Mr McMillan's trial. In particular, we record that the Judge referred to the prosecutor's description of Mr Philip as "a mule and hired muscle". In contrast, the Court of Appeal set out the submission for the Crown that if "balanced regard was had to evidence at Mr McMillan's trial, then other evidence supported a higher level of

involvement by Mr Philip than in the lesser category".[19] The Court of Appeal continued:

> [139] These matters included that Mr Philip and Ms Hayman were involved in eight purchases of methamphetamine from Mr James's Auckland premises rather than the five that they were charged with. They had completed one transaction for Mr McMillan whilst he was in South America and they were the only ones of Mr McMillan's associates to engage with Mr James. They were trusted to carry substantial amounts of cash to pay for methamphetamine. On one trip to Mr James' Auckland premises they acquired an Audi motor vehicle that was registered in Mr Philip's name and which was inferentially paid for out of amounts earned for transporting methamphetamine. Mr Philip and Ms Hayman arranged for the involvement of others as drivers, in particular Mr Minns, and Mr Philip involved himself in the consequences of the Nissan Tiida motor vehicle being impounded in Taupō. At that time he confronted Mr James in what was observed to be an intimidating manner and then travelled to Taupō to participate in attempts to get the vehicle released.
>
> (Footnote omitted).

[22] The Court of Appeal saw these factors as supporting its view of the nature of Mr Philip's involvement as set out in the summary of facts. At this point we simply note that Mr Philip was not charged in relation to the other three purchases referred to in this excerpt. Nor is there is any basis in the summary of facts[20] to substantiate the first or the third factors, namely, that Mr Philip was involved in eight purchases of methamphetamine and that he was the only one of Mr McMillan's associates to engage with Mr James.[21] Nonetheless, as we explain shortly, we agree with the Court's assessment that Mr Philip's involvement was at the cusp of the lesser and significant roles.

[23] In terms of the updated *Zhang* indicia, the way in which the appeal was argued means that the focus in determining the nature of Mr Philip's role is on the scope of the operational function he undertook, whether he was motivated by addiction, and on the extent of actual or expected monetary gain.[22] Mr Philip accepts he had some awareness of the scale of the operation.

---

19 CA judgment, above n 4, at [138].

20 The summary of facts reflects the basis on which Mr Philip acknowledged guilt and, under s 24(2)(c) of the Sentencing Act 2002, the Crown must prove beyond a reasonable doubt the existence of any disputed aggravating fact.

21 It is accepted that he was one of those to associate with Mr James.

22 At the time of argument, the Court's judgment in *Berkland*, above n 7, had not been delivered so the parties addressed the indicia as they were in *Zhang*. See *Berkland* at [72(b)].

Operational function and some awareness of scale

[24] We address first the nature of the function performed by Mr Philip and whether it could be described as limited. Mr Philip was involved in transportation under direction as one of a number in the enterprise. That was an operational function under the *Zhang* indicia.[23]

[25] However, Mr Philip was not, as the Crown submits, acting in a manner akin to the manager of transport operations. Rather, as is submitted for Mr Philip, it is apparent from the summary of facts that he was simply doing what he was told. He did not, for example, choose the car that was used to transport the drugs but rather, drove the car provided for the particular trip. Nor, generally, did either of Mr Philip or Ms Hayman load the drugs into the car. It is the case that once, on the first of the five trips, Mr Philip and Ms Hayman collected boxes with the drugs from a car to which Mr James had given them the key, before driving to Wellington. After that episode, however, the methamphetamine was concealed in a hidden compartment in the cars by someone other than either Mr Philip or Ms Hayman.[24] For this reason, presumably, the summary of facts records that Mr McMillan employed Mr Philip and Ms Hayman "as couriers".

[26] In context, we do not see anything significant in the fact that on one occasion Mr Philip and Ms Hayman completed a trip while Mr McMillan was overseas. There was a level of sophistication in the operation which could have allowed ongoing supervision on the part of Mr McMillan, but whether that took place or not is simply unclear on the summary of facts.[25] What is clear is that on occasion Mr Philip and Ms Hayman were entrusted with handing over the cash for the methamphetamine supplied. A photograph found on Mr Minns' phone showed Mr Philip's Mongrel Mob

---

[23] Other illustrations of operational roles are provided by the activities of the defendant in *R v McDonald* [2020] NZDC 2606 who performed a role relating to storage and onward distribution of drugs (an appeal against the minimum period of imprisonment was dismissed: *McDonald v R* [2020] NZHC 1509); and those of the defendant in *Yu v R* [2022] NZCA 382 who was found to have rented a storage unit and property, paid fees on consignments of golf carts concealing drugs, transported the carts, obtained the equipment to extract the drugs and extracted it.

[24] For example, on 24 January 2019, Mr James is described as gesturing to Ms Hayman to move away from the car so that Mr James could take out the cash from the hidden cavity in the car and substitute it with methamphetamine.

[25] The summary of facts notes that over the period of his absence, Mr McMillan was regularly accessing the internet and was able to be contacted.

gang patch along with clear plastic bags of cash amounting to approximately $180,000. These matters indicate a level of trust and support the agreed position that Mr Philip had some understanding of the scale of the operation. But these facts do not displace the conclusion the two were acting on direction rather than exercising any more managerial type role or autonomy.

[27] The submission for Mr Philip that he did not involve or direct others in the operation cannot, however, be right given the engagement of Mr Minns and of Mr Philip's son. Mr Philip also, as the Court of Appeal said, had some involvement in the attempts to retrieve the car driven by Mr Minns following its impoundment. It was as part of this exercise that the brief confrontation between Mr James and Mr Philip took place. We agree that these aspects, taken together with some knowledge of the scale of the operation, indicate Mr Philip was not a mere courier in the sense of someone given the task of picking up a suitcase containing the drugs or cash and transporting it to the purchaser.

Motivation for offending

[28] Turning then to the motivation for the offending, the High Court found that Mr Philip was motivated by his own addiction. The Crown says first that this finding is based on Mr Philip's self-reporting and that, in any event, aspects of his self-reporting were equivocal. As to the first point, this Court in *Berkland* has said that the Court may rely on self-reporting in determining whether a mitigatory factor is proved to the required standard.[26] It is also difficult to see how an affidavit from Mr Philip would have added materially to the history of drug abuse described in the expert reports.

[29] On the second point it is the case that, as recorded, there are inconsistencies in Mr Philip's response. Certainly, it does appear that there were some periods of abstinence from the consumption of methamphetamine and it is not entirely clear to what extent the resumption of consumption preceded or was precipitated by participation in the offending. As against this, however, there is the well-documented lengthy history of drug abuse from a very young age and it is also clear that Mr Philip

---

[26] *Berkland*, above n 7, at [129].

relapsed into methamphetamine use. On balance, there is no reason to disturb the Judge's finding, particularly where there was at sentencing no challenge to the submission the offending was addiction driven.

Actual or expected financial advantage

[30] Finally, in terms of actual or expected financial advantage, in concluding the motivation for the offending was addiction and not monetary gain, the High Court noted that the Crown evidence at Mr McMillan's trial showed that Mr Philip "had no money or assets at the time of [his] arrest".[27] The Crown points to the fact the Audi vehicle was registered in Mr Philip's name and that he must have received some cash in order to support his ongoing gambling addiction.[28] Certainly, the PAC report refers to Mr Philip's description of the offending as "an opportunity that was too good to turn down. The agreement of 'cash and drugs'…".[29] That said, there was no evidence of any accumulation of assets, apart from the car which was some years old by that stage, and nor of any extravagant lifestyle, and the gambling addiction was a long-term issue. Again, we see no basis to disturb the Judge's finding.

Conclusion on the appropriate place in the Zhang *categories*

[31] When all of the facts are considered, we agree with the Court of Appeal that Mr Philip's role was on the cusp of the lesser and significant categories. He was not a mere courier, so could not be placed entirely within the lesser role. On the other hand, he was certainly not a trusted lieutenant and he exercised little autonomy within the overall operation. These factors together with the other reduced culpability indicators of addiction and limited financial advantage support his placement on the cusp. Where we part company with the Court of Appeal is in the resultant assessment of the starting point and, in particular, in the way the Court of Appeal addressed the inter-relationship between quantum and role. On the availability of the starting point

---

27 HC sentencing notes, above n 3, at [36].

28 John Duncan, the alcohol and drug clinician who prepared a report for the High Court referred to Mr Philip meeting the DSM V criteria for severe persistent gambling disorder. He at times needed financial assistance from others to support his gambling. Mr Philip reported a pattern of gambling over the bulk of his adult life and told the report writer of regularly gambling on pokie machines or online.

29 This was said in the context of Mr Philip being unable to meet the high costs of his methamphetamine habit.

adopted by the High Court we take a different view from that of Glazebrook and O'Regan JJ.

The importance of role

[32] In terms of the inter-relationship between quantum and role, the Court of Appeal noted that, in a commercial operation, the amount of methamphetamine "remains the first determinant of an offender's sentence, it reflects both the social harm and the potential illicit gains made from dealing in the drug".[30] The Court noted that quantity is "highly relevant to culpability and can also be indicative of commerciality which requires greater denunciation".[31] Given the amount of methamphetamine involved, the Court saw reductions below the bottom of the band at 10 years as "generally" requiring involvement in the "lesser" category of the three roles identified in *Zhang*.[32] Given Mr Philip had a role at the cusp of lesser and significant, the Court considered that, were it not for the accepted sentence indication, "it would be difficult to justify a starting point lower than nine years' imprisonment", that is, a year below the entry point for offending coming within band five.[33]

[33] In challenging the Court of Appeal decision, counsel for Mr Philip says that, post-*Zhang*, the approach has been to unnecessarily limit the flexibility of the sentencing judge to adopt a starting point below that of the entry point in band five.

[34] By contrast, in supporting the approach of the Court of Appeal, the respondent submits that while going below the band or the applicable entry point was not excluded by the Court of Appeal in *Zhang*, it was anticipated that this would occur in cases involving minimal participation. The respondent notes that in *Zhang* the Court of Appeal gave as an example of minimal participation the case of a Ms Phillips. Ms Phillips was a defendant whose appeal was heard alongside that of Mr Zhang and others in *Zhang*.[34] We will discuss that case shortly but the submission is that Mr Philip's offending is much more serious than in Ms Phillips' case. The fact

---

30 CA judgment, above n 4, at [138] citing *Zhang*, above n 6, at [103].
31 At [138] citing *Zhang*, above n 6, at [104].
32 At [138] citing *Zhang*, above n 6, at [123]; and *Pratap v R* [2021] NZCA 308 at [17].
33 At [145].
34 *Zhang*, above n 6. The discussion of Ms Phillips' case begins at [204].

Mr Philip's offending involved a quantity of methamphetamine three times the entry point into band five is also emphasised.

[35] The key passage in *Zhang* relied on by the Court of Appeal in this case reads as follows:

> [123] Fourthly, we consider judges must be more willing to set a starting point below the range specified in *Fatu* for a band where culpability (other than in terms of quantity) is low. Primarily that will be the case where an offender plays a lesser role in the offending. We have considered whether it would be sufficient to simply state that expectation, and leave the starting points as they are in *Fatu* (excepting of course the new band five). We have decided that this would not send a sufficiently clear message. We are particularly concerned at the need to consider more flexible sentencing solutions in band one, where community-based sentences need to be a starting point open to the court, not merely an end point. Accordingly, we shall reduce slightly the sentence starting points in bands one to four. Access to the lower sentence starting points may be expected only by those whose role is found to be lesser in degree, and where quantities are at the lower end of the relevant range. We record that although the new entry points are intended to encompass most cases of low culpability in setting a starting point, we do not exclude the possibility of a case involving minimal participation which might fall below even those entry points. The data in the schedule indicates two such cases historically. There will be other cases in the future, where this is necessary to do justice in a particular case. [Ms Phillips'] appeal before us raises this very issue.
>
> (footnote omitted).

[36] When this excerpt is considered in the round, we do not accept that the effect of *Zhang* is as restrictive as the respondent submits.[35] There must be room for gradations of culpability within the role categories or else there is no ability to reflect those gradations within the quantum-based band. Both *Zhang* and *Berkland* cautioned against taking a tick-the-box approach. It follows that sentencing for methamphetamine offending is not simply a matter of fixing quantum and selecting one of the three role options. Rather, it is necessary to engage with the detail of the offender's role in what this Court described as "an intensely factual inquiry".[36] This avoids offenders becoming trapped in a sentencing band because of the quantum of drugs involved and movement, within the band or below it, becoming unduly constrained.

---

35 Contrast *Pratap*, above n 32, at [17].

36 *Berkland*, above n 7, at [63]; and to similar effect see *Zhang*, above n 6, at [104] and [120].

[37] In recognising what will generally (the word used is "primarily") be the position, the Court in *Zhang* recognised both that quantum cannot be the only determinant and that sentencing involves an evaluative exercise. This Court in *Berkland* gave as an example of cases which will fall below the bottom of the band, despite the quantum involved, those involving offenders whose role falls within the lower end of "lesser" but the categories are not closed.[37] That must be so because, as the Court also stated in *Berkland*, "[i]n any offending, the role of the offender (what they actually did) is a fundamental component of the gravity and culpability assessment".[38] The "potency of role will vary" and it can "drive movements both within and between the quantum driven bands".[39]

[38] In Mr Philip's case, the emphasis on quantum has to be tempered by the fact that Mr Philip's offending was motivated by his addiction and the finding as to limited monetary gain. So, although on the cusp of the significant category, those other factors lessen the need for deterrence (at least personal deterrence) and accountability which was emphasised by the Court of Appeal. Mr Philip's case also illustrates the point made in *Berkland* that the borders between the categories "are likely to be porous".[40] He is appropriately placed on the cusp of two of the categories but it should be kept in mind that the categories are essentially an attempt to assist placement on what will be a continuum of behaviour.

[39] In terms of the comparisons drawn by the High Court with Ms Phillips' case, we accept her culpability was less than that of Mr Philip. Ms Phillips was sentenced under the guideline judgment for methamphetamine preceding *Zhang*.[41] The Court of Appeal in considering her sentence as part of the appeals in *Zhang*, noted that under the *Zhang* guideline, her offending engaged band five. The quantum of methamphetamine involved was, as in this case, six kilograms. The Court in *Zhang* noted the High Court finding that Ms Phillips had accompanied the main offender, her partner, on trips transporting methamphetamine "out of a sense of loyalty".[42] The

---

37 *Berkland*, above n 7, at [64]. See also *Zhang*, above n 6, at [110].
38 *Berkland*, above n 7, at [63].
39 At [64].
40 At [65]. See also *Zhang*, above n 6, at [110].
41 *R v Fatu* [2006] 2 NZLR 72 (CA).
42 *Zhang*, above n 6, at [207].

Court also referred to the sentencing Judge's observation that Ms Phillips was a "low-level supplier in her own right".[43] The Court of Appeal accepted that given the "very limited role played by Ms Phillips in an operation essentially conducted" by her partner, it was open, albeit generous, to the sentencing Judge to have adopted a starting point of five years' imprisonment, considerably below the 10 year entry point for the band.[44] A one year uplift for Ms Phillips' personal drug dealing and a further uplift of six months had been adopted to reflect previous convictions. Those uplifts were accepted by the Court of Appeal as appropriate.

[40] In sentencing Ms Hayman, the High Court saw her situation as similar to that of Ms Phillips both as to quantum and role. The starting point adopted by the High Court was a year higher than that adopted for Ms Phillips. In sentencing Mr Philip, the Judge re-iterated her view that *R v Phillips* was the closest to Ms Hayman's situation, confirming the starting point adopted as reflective of Ms Hayman's culpability. As we have said, the Judge considered their culpability was effectively indistinguishable and therefore the same starting point was appropriate for Mr Philip.

[41] Treating Ms Phillips' case as comparable probably was generous although it did properly reflect the fact that both Mr Philip and Ms Hayman were acting under direction. On balance, assessing Mr Philip's starting point in the round, our view is that the starting point imposed by the High Court, albeit at the margin, was within the available range (at the worst, a little below). At this point it is helpful to turn to the question of the approach to be taken where rehabilitation is to the fore on an appeal by the Solicitor-General.

Approach where rehabilitative purpose to the fore on a Solicitor-General appeal

[42] Where a Solicitor-General's appeal seeks to substitute a term of imprisonment for a non-custodial sentence, the usual practice of the courts is to take a conservative

---

43 At [208].
44 At [218].

approach.[45] The decision under appeal in this case does not exemplify that approach, as we now explain.

[43] As the respondent accepted, at least since *R v Donaldson*, it has been the case that an appellate court will not increase a sentence unless it was manifestly inadequate but, even if the sentence is considered manifestly inadequate, the Court is still "reluctant to interfere if this would cause injustice to the offender".[46] As the respondent also accepted, that is especially so where the offender has been complying with the conditions imposed as part of the community-based sentence. That is because of the harsh effect of substituting a term of imprisonment.[47] The Court in *Donaldson* acknowledged that the latter consideration would not always result in the non-custodial sentencing being left undisturbed.[48] But, where the proper custodial sentence the Court would substitute would be two years' imprisonment or less, the "deficiency or discrepancy in the sentence under appeal may be met by the Court indicating" the appropriate term but not reversing the sentence.[49]

[44] In the Court of Appeal Mr Paino made submissions, reflecting the *Donaldson* approach, emphasising both the rehabilitative steps taken and Mr Philip's role in parenting his infant son (now, two infants). The Court of Appeal dealt with his submission in this way:[50]

> Regrettably, the Court cannot rely on that aspect to diverge from what is otherwise the appropriate response to a successful challenge to a sentence found to be manifestly inadequate. This is not a case in which the appeal was pursued solely to avoid the creation of a wrong precedent.

[45] We do not see the latter factor as determinative.[51] Although the sentence imposed may have been lenient, it was a therapeutic response and, moreover, a

---

45 See the discussion in Simon France (ed) *Adams on Criminal Law – Sentencing* (looseleaf ed, Thomson Reuters) at [SAB5.09].

46 *R v Donaldson* (1997) 14 CRNZ 537 (CA) at 550. See also *R v Wihapi* [1976] 1 NZLR 422 (CA).

47 *Donaldson*, above n 46, at 550.

48 At 550.

49 At 550.

50 CA judgment, above n 4, at [155] (footnote omitted).

51 The case cited for the latter proposition, *R v Kennedy* [2011] NZCA 109 at [32]–[33], was an application by the Solicitor-General for leave to appeal against a non-custodial sentence. The Court was satisfied that a term of imprisonment should have been imposed. Nevertheless, in their decision declining leave, the Court noted that the Crown did not seek the imposition of a custodial sentence on appeal but instead was concerned with ensuring that the original sentence did not set a precedent. Other factors were in play in that case including the fact the sentence was partially

response strongly supported by the factual material that was before the Judge. The reports before the Judge showed that Mr Philip had responded well to the rehabilitation programme he attended and that the presence of his son and his involvement with the child were positive factors in his ongoing rehabilitation prospects. He also had good whānau support. In these circumstances, where at the time of sentencing the rehabilitative prospects were to the fore, reversing the sentence did lead to an injustice. That was the case particularly given the procedural history and where the term of imprisonment imposed on the appeal was two years and 11 months, that is, not a great deal longer than the two year period seen as significant in *Donaldson*.

[46] As we now discuss, we also consider it was open to the Judge to afford Mr Philip a discount to mitigate the effect of sentencing on his young child.

Discount to mitigate effect of sentencing on Mr Philip's young child

[47] The Court of Appeal rejected this discount on the basis there was already a generous discount for Mr Philip's own background. The Court said this:[52]

> The compassionate approach enabling both participants in the significant commercial methamphetamine dealing to care for their infant children is admirable, but only possible here by granting unwarranted additional leniency to Mr Philip.

Submissions

[48] Mr Philip says the Court of Appeal was wrong not to allow the discrete discount of approximately 10 per cent given by the Judge to recognise the effect of sentencing on Mr Philip's young child. The submission is that the discount was supported by the evidence of Dr Duncan Thomson, the clinical psychologist, who visited Mr Philip and the family at home and held a follow-up video call with Mr Philip. The link between Mr Philip's rehabilitation and his ongoing relationship with the child are emphasised. Further, Mr Philip argues that there is no reason why Ms Hayman alone should receive a discount where he also plays a significant role in

---

completed and rehabilitative steps were progressing. The Court in *Kennedy* also viewed the initial sentence not as one involving a merciful approach but rather a sentence, "structured to reach a non-custodial result" which was not properly available: at [32].

52 CA judgment, above n 4, at [152].

parenting. Finally, Mr Philip points to the potentially adverse effects a period of absence may have on his children's development and future prospects.

[49] In supporting the approach of the Court of Appeal, the respondent submits that discounts of this type are usually only available where imprisonment will deprive the family of the primary caregiver. That is not the position here where Ms Hayman is still available as a carer to the children and has support from her wider whānau. Moreover, any impact on the child is said to be unlikely to be the kind of exceptional hardship that is normally required.[53] Finally, the respondent says that discounts for mitigating factors must bear some proportionality to the starting point. If that is not so, the sentence will not, ultimately, reflect the culpability inherent in the offending.

The relevant principles

[50] The Court of Appeal in *Campbell v R* stated that it was "uncontroversial" to say that the impact imprisonment has on the offender's children is a relevant factor in considering the appellant's personal circumstances.[54] The Court also observed that, the "weight to be accorded that factor depends on the circumstances. The relevant circumstances include the type of the offending and the circumstances of the child or children."[55]

[51] That approach is consistent with the earlier judgment of the Court of Appeal in *R v Harlen*.[56] It is helpful to briefly refer to *Harlen* as this Court in *R v Jarden*[57] cited the passage from *Harlen* set out below. To put the excerpt in context, the Court in *Harlen* was responding in part to another decision in which the Court of Appeal had indicated the importance of deterring offenders from thinking that a substantial prison sentence will not be imposed where they have young children and of discouraging the

---

53 The respondent submits that even if a discount were to be given it would be extremely modest.
54 *Campbell v R* [2020] NZCA 356 at [41].
55 At [41] (footnote omitted).
56 *R v Harlen* (2001) 18 CRNZ 582 (CA).
57 *R v Jarden* [2008] NZSC 69, [2008] 3 NZLR 612 at [13].

idea there might be an advantage in using women to undertake drug activities to avoid an appropriate sentence.[58] In *Harlen* the Court said this:[59]

> It is an error to read this passage as suggesting that New Zealand Courts do not take the welfare of affected children into account in the sentencing process. The family situation of a convicted person, including where applicable the wellbeing of an offender's children, will always be among the personal circumstances to which regard is had by a sentencing Judge. … What however must be recognised is that the family situation of an offender, including the wellbeing of the offender's children, is only one of a number of relevant factors. How much weight it can be accorded in any particular case depends on its circumstances. …

[52] The provision for such discounts reflects both s 8(h) and (i) of the Sentencing Act. Section 8(h) requires the court to take into account circumstances of the offender that would mean an otherwise appropriate sentence "would, in the particular instance, be disproportionately severe". Section 8(i) directs the court to consider various personal circumstances, namely, "the offender's personal, family, whanau, community, and cultural background in imposing a sentence … with a partly or wholly rehabilitative purpose". A sentencing approach which recognises the importance to a child of the familial relationship is also supported by the United Nations Convention on the Rights of the Child (Children's Convention).[60] The Children's Convention emphasises the importance for children of growing up in a family environment and imposes an obligation on courts to treat the best interests of the child as a "primary consideration".[61]

Application to the present case

[53] We agree with the submission for Mr Philip that a discrete discount was available here given Mr Philip was an important presence in his young child's life. In reaching the view that a discrete discount was available, the High Court noted that Dr Thomson said the child had "a secure attachment" with both Mr Philip and

---

58 *Howard v R* CA315/99, 2 December 1999.

59 *Harlen*, above n 56, at [22].

60 Convention on the Rights of the Child 1577 UNTS 3 (opened for signature 20 November 1989, entered into force 2 September 1990). See Francessca Maslin and Shona Minson "What about the children? Sentencing defendants who are parents of dependent children" [2022] NZLJ 367.

61 Preamble and art 3. The Court in *Harlen*, above n 56, did not consider art 3 was relevant to the interpretation of ss 6 and 7 of the then in force Criminal Justice Act 1985: at [28]. There is sufficient support in the Sentencing Act for our view regarding discounts for children but we see the Convention as affirming this.

Ms Hayman. Dr Thomson in his report also said that if Mr Philip was imprisoned then his son "would experience a significant sense of loss". Moreover, he continued, the practical effect of imprisonment "on Ms Hayman could have a detrimental impact on her ability to provide the quality and stability of care she seems to provide currently". The PAC report, also relied upon by the High Court, said that Mr Philip was "fully focused" on his family.

[54] Further, the relationship with his son was linked to Mr Philip's rehabilitative prospects. Mr Paino put it well when he said "his relationship with his child is something that changed his life". In other words, there was such a close relationship between Mr Philip's rehabilitation and his relationship with the child as to warrant the discount allowed.

[55] The fact that a caregiver, Ms Hayman, would remain in the home for the child was acknowledged by both Dr Thomson in his report and by Gwyn J in allowing a lesser discount than that afforded to Ms Hayman. The Judge also saw the lesser discount as appropriate for Mr Philip to reflect the totality principle.

[56] The respondent relies on *Fukofuka v R* for the proposition that such discounts will be rare.[62] The Court's view of the seriousness of the offending was among the points that appear to have influenced the Court of Appeal in declining to allow any credit for the impact on the offender's family in *Fukofuka*. We do not find it helpful to characterise such discounts as "rare" or to emphasise, to the exclusion of other factors, whether the defendant is the primary caregiver or the seriousness of the offending. What is required is a consideration of all of the relevant circumstances which must include the child's interests. Those interests include, as our reference to the Children's Convention indicates, the importance for children of growing up in a familial environment.[63] We accept that there may be other factors in this consideration which take primacy including, by way of example, issues of inter-familial violence;[64]

---

62 *Fukofuka v R* [2019] NZCA 290 at [47]–[48].

63 See the discussion in *Berkland*, above n 7, at [116] on the correlation between offending in later life and environmental factors affecting children such as the lack of prosocial familial support and connection, and having a caregiver who is, or has been, in prison.

64 As in *Mau v R* [2021] NZCA 106.

an absence of remorse and/or lack of any rehabilitative steps,[65] but those factors are not relevant here.

[57] We agree that the overall discount allowed by the High Court is considerable. But the Judge did take into account totality. It is relevant also, as Mr Paino submitted, that the total discount encompassed a range of different matters. In addition to matters such as the effects of addiction, the total percentage encompassed discounts for time spent on electronically monitored bail, and for the guilty plea. Finally, we are influenced also by our view that the Court of Appeal's approach to the inter-relationship between quantum and role means that Court has treated Mr Philip's offending as more serious than we consider was warranted.

[58] We consider the discount afforded by the High Court was appropriate.

Postscript

[59] Mr Philip also made arguments based on ss 82 and 15A of the Sentencing Act which deal, respectively, with pre-sentence detention and sentence length; and when a sentence of home detention can be imposed. These arguments were advanced in the event this Court agreed with aspects of the approach in the Court of Appeal. As we are allowing the appeal it is not necessary for us to address these arguments and we do not do so.

Result

[60] For these reasons, the appeal against sentence is allowed. The sentence of two years and 11 months' imprisonment is quashed. In its place a sentence of one year and seven months' imprisonment is substituted. This sentence should not be seen as a precedent. Rather, it simply equates with the time required to be served under a short term sentence and so will ensure Mr Philip's immediate release. Mr Paino accepts that is the practical approach to adopt in the circumstances and both parties are agreed the term we impose will ensure immediate release. We add that this approach is appropriate given the time Mr Philip has spent on electronically monitored bail,

---

65 As in *Fukofuka*, above n 62.

serving the home detention sentence, and in custody. Consistent with this approach, on delivery of the judgment, Mr Philip is discharged from bail.

[61] The standard conditions under s 14(1) of the Parole Act 2002 apply but expire on the sentence expiry date. We do not impose any post-release special conditions. In these respects we accept the submissions for Mr Philip that in the circumstances, where Mr Philip has attended a residential rehabilitation course and where the Crown does not seek the imposition of any post-release special conditions beyond the sentence expiry date, nothing further by way of conditions is necessary.

GLAZEBROOK AND O'REGAN JJ
(Given by O'Regan J)

[62] We agree with the reasons of the majority except in one respect. We agree that the appeal should be allowed and with the substitute sentence imposed on the appellant. But we differ from the majority on one aspect of their reasoning.

[63] The majority considers the starting point of six years adopted by the High Court Judge was "within the available range".[66] We disagree. In our view the eight year starting point adopted by the Court of Appeal was the lowest available, given the appellant's role (on the cusp of lesser and significant) and the quantity of methamphetamine involved (six kilograms).[67] While we accept that a starting point below the 10 year entry point for band five in the *Zhang* bands was not precluded,[68] we see the six year starting point as inconsistent with the guidelines in those judgments.

[64] An important difference between the High Court and Court of Appeal judgments is their difference of view as to the appellant's role. Whereas the High Court Judge had determined that the appellant came into the category of a lesser role, the Court of Appeal considered that the appellant's role "could not be put any less than on the cusp between lesser and significant involvement".[69]

---

66 See above at [41].

67 The Court of Appeal considered this was the appropriate starting point because the appellant had pleaded guilty after a sentencing indication where the High Court Judge had adopted an eight year starting point. We agree that was the proper approach.

68 *Zhang v R* [2019] NZCA 507, [2019] 3 NZLR 648. See also *Berkland v R* [2022] NZSC 143.

69 *McMillan v R* [2022] NZCA 128 (Dobson, Brewer and Edwards JJ) [CA judgment] at [144]. The

[65] The assessment of role was an important consideration for the High Court Judge. As she put it:[70]

> However, quantity alone does not determine the appropriate sentence – the Court [in *Zhang v R*] explained that a lesser role deserves a less severe sentence than a significant or leading role, and a lesser role may result in an offender moving not only within a band but also between bands.

[66] Having considered the factors relevant to determining the nature of the offender's role, the Judge said the "primary issue in setting an appropriate starting point" was "determining whether [Mr Philip] played a lesser or significant role in the drug business".[71]

[67] The Judge then made a finding that the appellant played a lesser role.[72]

[68] As mentioned earlier, the Court of Appeal considered the Judge was wrong in her assessment of role. This Court has upheld the Court of Appeal's finding that the appellant's role was on the cusp between lesser and significant.[73] So, while the High Court judgment set a starting point 40 per cent below the entry point for band five of *Zhang* for someone whose offending involved six kilograms of methamphetamine but who played a lesser role, this Court is effectively adopting that starting point for such an offender who played a role on the cusp of lesser and significant.

[69] As noted earlier, the High Court Judge relied on the conclusion reached in *Zhang* that movement between bands was allowed where there was a "[d]iminished role".[74] The Court of Appeal in *Zhang* explained this conclusion in greater detail later in its judgment. It said:[75]

Court noted that in a case where the quantity of drugs was lower than in the present case and the offender's role was "somewhere between lesser and significant", a starting point of 10 years was approved by the Court of Appeal: *Faiyum v R* [2020] NZCA 523 at [22]–[23].

70 *R v Philip* [2021] NZHC 2393 [HC sentencing notes] at [29] (footnote omitted), citing *Zhang*, above n 68, at [10(e)]. The Court in *Zhang*, said adopting a starting point below the entry point for the relevant band was available where "culpability is truly low; most likely where an offender plays a lesser role": at [10(i)].

71 HC sentencing notes, above n 70, at [33].

72 At [37].

73 See above at [31].

74 *Zhang*, above n 68, at [10(e)].

75 At [123]. The reference to "new entry points" is to the entry points in *Zhang* that were lower than in the previous guideline judgment of *R v Fatu* [2006] 2 NZLR 72 (CA).

> … we consider Judges must be more willing to set a starting point below [the relevant band] where culpability (other than in terms of quantity) is low. Primarily that will be the case where an offender plays a lesser role in the offending. … Access to the lower sentence starting points may be expected only by those whose role is found to be lesser in degree, and where quantities are at the lower end of the relevant range. We record that although the new entry points are intended to encompass most cases of low culpability in setting a starting point, we do not exclude the possibility of a case involving minimal participation which might fall below even those entry points.

[70] We read this passage as applying to the entry points for all of the bands in *Zhang*, including band five, which applies in this case. We do not think the appellant's role in this case is one "involving minimal participation", given that his role is on the cusp of lesser and significant. For the same reason, his role cannot be described as lesser in degree. Nor can it be said the quantity involved in this case is at the lower end of the range, given that the quantity is six kilograms, three times the quantity at the low end of band five in *Zhang*.

[71] We accept that this Court modified aspects of *Zhang* in its decision in *Berkland v R*.[76] But, in relation to the importance of role, this Court affirmed *Zhang*. It said:[77]

> [Role] can, as *Zhang* clarified, drive movements both within and between the quantum driven bands. In other words, there is no reason in principle why role cannot be even more impactful than quantum, if justified in the circumstances. This may well be the case, for example, if the circumstances demonstrate that, irrespective of quantum, the offender's role in relation to it falls within the lower end of "lesser".

[72] While we accept this formulation may allow a starting point below the 10 year entry point for an offender in the appellant's position, we do not consider a starting point that is as low as 60 per cent of the entry point for the relevant band is available.

[73] In summary, our view is that a starting point of six years in the case of the appellant is irreconcilable with the guidelines given in *Zhang* and *Berkland*. It may be that, as the majority concludes, a starting point of six years is, in fact, appropriate for offending of this level. But, if so, that would require a change to the ranges of starting points in the bands set out by the Court of Appeal in *Zhang*, which were left

---

76 *Berkland*, above n 68.

77 At [64] (footnote omitted) citing *Zhang*, above n 68, at [123].

unchanged by this Court in *Berkland*. We consider the six year starting point is a departure of such a magnitude from those guideline judgments as to call into question their utility in setting starting points at stage one of the sentencing process.[78]

[74] All of that said, we agree that the appeal should be allowed, given the factors set out in the reasons of the majority at [42]–[45]. We consider that the appropriate course for the Court of Appeal would have been to explain why it considered the starting point adopted by the Judge was not open to her, in order to establish the correct precedent, while leaving the sentence in relation to the appellant unchanged.

Solicitors:
Paino & Robinson, Upper Hutt for Appellant
Crown Law Office, Wellington for Respondent

[78] As described in *Zhang*, above n 68, at [54], n 38.