NOTE: HIGH COURT ORDER MADE IN [2016] NZHC 2881 PROHIBITING PUBLICATION OF NAME, ADDRESS, OCCUPATION OR IDENTIFYING PARTICULARS OF DEFENDANT "M" PURSUANT TO S 200 OF THE CRIMINAL PROCEDURE ACT 2011 REMAINS IN FORCE.

IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI

SC 145/2021
[2022] NZSC 17

BETWEEN	SELAIMA FAKAOSILEA Applicant
AND	THE QUEEN Respondent

Court: O'Regan, Ellen France and Williams JJ

Counsel: G N E Bradford for Applicant
M R L Davie for Respondent

Judgment: 4 March 2022

JUDGMENT OF THE COURT

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

B The application for leave to appeal is dismissed with leave reserved as set out in [13] below.

REASONS

[1] The applicant was charged, along with three others, on one charge of importing a class A drug (methamphetamine) and one charge of participating in an organised criminal group. She was convicted on both charges after a High Court jury trial.

[2] The applicant appealed to the Court of Appeal against conviction and sentence. That Court dismissed her appeal against conviction, but allowed her appeal (in part) against sentence.[1]

[3] The applicant now seeks leave to appeal to this Court against conviction and sentence. Her application was out of time but the respondent takes no issue with an extension of time being granted.

Conviction

[4] The point which the applicant wishes to advance on appeal to this Court if leave is given turns on the interpretation of "import" in s 6(1)(a) of the Misuse of Drugs Act 1975.[2]

[5] The background to this is that the drugs (over 500 kgs of methamphetamine) were transported to New Zealand in a "mother ship", which anchored off the coast of Northland, inside New Zealand's territorial waters. Arrangements were made to retrieve the drugs from the mother ship but, for reasons that are not material, there was a considerable delay between the arrival of the mother ship and the retrieval operation.

[6] The applicant's argument is that her involvement in the importation began after the arrival of the mother ship in New Zealand's territorial waters but before the retrieval operation. She wishes to argue that the importation of the drugs had concluded once the mother ship arrived at the agreed retrieval point in New Zealand's territorial waters. That means, she argues, that she cannot have been a party to the importation because it had happened before she became involved.

[7] This argument was rejected by the Court of Appeal.[3] The Court referred to its earlier decision, *R v Hancox*, in which the Court had described importation as being concerned with "those acts designed to bring the goods from outside New Zealand to the point where they are available to the intended consignee".[4] It said that, in the

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1 *Fakaosilea v R* [2021] NZCA 401 (Miller, Venning and Peters JJ) [CA judgment].
2 The term "import" is not defined in the Misuse of Drugs Act 1975.
3 CA judgment, above n 1, at [35].
4 At [33], quoting *R v Hancox* [1989] 3 NZLR 60 (CA) at 63.

present case, the earliest point at which the drugs were "available to the intended consignee" was when the men who travelled to the mother ship to retrieve the drugs and bring them ashore had uplifted the drugs and were returning to shore.[5] It added that the better analysis was that the methamphetamine importation did not conclude until the boat from the mother ship came ashore, "and possibly even after that".[6]

[8] On that analysis, there was no doubt that the applicant's involvement in the actions associated with the importation began before the importation had been completed.

[9] The applicant argues that a matter of general or public importance arises, given the lack of a definition of "import" in the Misuse of Drugs Act.[7] She contrasts this position with the Customs Act 1966, which contained a statutory definition of "import". Additionally, the applicant submits that the interpretation of "import" taken by the Court of Appeal may have occasioned a miscarriage of justice.[8]

[10] We do not consider it is in the interests of justice to grant leave on this point. While it may be useful to consider the question of when an importation is complete for the purposes of s 6(1)(a) of the Misuse of Drugs Act, we do not consider this is an appropriate case to do so. As we see it, the argument that the importation was complete when the mother ship arrived at the agreed retrieval point in New Zealand's territorial waters has no real prospect of success. That being the case, any consideration of the issue the applicant wishes to raise could not affect the outcome. We add that we see no prospect of a miscarriage in this case either.

Sentence

[11] The applicant was sentenced to a term of imprisonment of 12 years and six months on the importing charge and a concurrent sentence of 7 years' imprisonment on the organised criminal group charge.[9] However, the effective sentence of 12 years

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5 At [39].
6 At [40].
7 Senior Courts Act 2016, s 74(2)(a).
8 Section 74(2)(b).
9 *R v Cullen* [2019] NZHC 2088 (Gordon J). The High Court Judge also imposed a minimum period of imprisonment of seven years.

and six months' imprisonment was cumulative on a sentence of 14 years and six months that had been imposed on the applicant earlier for other drug offending, so the effective sentence for the totality of her offending was 27 years.

[12] The High Court sentencing occurred before the Court of Appeal delivered its decision in *Zhang v R*.[10] In the present case, the Court of Appeal considered the applicant was entitled to any benefit *Zhang* offered to her.[11] Ultimately, it reduced her sentence for the importation offending to 9 years and 6 months' imprisonment to be served cumulatively on the earlier sentence of 14 years and six months. It also reduced the minimum period of imprisonment imposed by the High Court Judge for the importation offending from 7 years' imprisonment to 5 years, four months' imprisonment.

[13] We do not propose to engage in any detail with the sentence appeal. We do not see any appearance of error in the Court of Appeal's re-evaluation of the applicant's sentence in light of its decision in *Zhang*. We therefore dismiss the application for leave to appeal in relation to the applicant's sentence. However, there is currently before this Court a sentence appeal relating to drug offending in which judgment is reserved. We reserve leave for her to reapply for leave to appeal against sentence if the outcome in that case provides any basis for reconsideration of the applicant's sentence.[12]

Result

[14] The application for an extension of time to apply for leave to appeal against conviction and sentence is granted but the application for leave is dismissed (with leave reserved subject to the terms noted above).

Solicitors:
Crown Law Office, Wellington for Respondent

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10 *Zhang v R* [2019] NZCA 507, [2019] 3 NZLR 648.
11 CA judgment, above n 1, at [78].
12 *Uhrle v R* [2020] NZSC 62, [2020] 1 NZLR 286 at [21].