



Supreme Court of New Zealand | Te Kōti Mana Nui o Aotearoa

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MEDIA RELEASE

WILLIAM ALLAN BERKLAND v THE KING (SC 40/2020)

BROWNIE JOSEPH HARDING v THE KING (SC 64/2020)

[2022] NZSC 143

PRESS SUMMARY

This summary is provided to assist in the understanding of the Court's judgment. It does not comprise part of the reasons for that judgment. The full judgment with reasons is the only authoritative document. The full text of the judgment and reasons can be found at Judicial Decisions of Public Interest: www.courtsofnz.govt.nz.

Background

William Berkland and Brownie Harding were sentenced for various offences related to their involvement in separate large-scale methamphetamine operations in New Zealand. They appealed against those sentences to this Court. Their appeals were heard together because they raised similar issues in relation to the Court of Appeal's judgment in *Zhang v R* [2019] NZCA 507 which set out new sentencing guidelines for methamphetamine-related offending.

In 2018 Mr Berkland pleaded guilty to charges related to his role in a commercial methamphetamine supply operation in the Wellington region. He also pleaded guilty to weapons charges and charges in relation to the retail supply of other drugs. It was estimated that during the investigation period the operation supplied on average one kilogram of methamphetamine per week to drug retailers in the Wellington area. The total profit for this part of the operation was estimated at approximately \$1.6 million. Mr Berkland was the right-hand man for the leader of the operation, Steven Blance. Among other things, Mr Berkland was responsible for purchasing methamphetamine on behalf of Mr Blance and for counting and concealing much of the operation's revenue.

In June 2016 Mr Harding pleaded guilty to charges relating to his leadership of a commercial methamphetamine manufacture and supply operation in Northland. The operation employed around 11 others and produced at least 6.5 kilograms of methamphetamine in total. Under his direction, the product was then transported to Auckland for distribution.

Lower court judgments

In the High Court, Collins J adopted a starting point of 16 years and six months' for Mr Berkland's involvement in the operation with a one-year uplift for his additional firearms and supply charges. Discounts for an early guilty plea and a six month allowance for personal background factors, such as methamphetamine addiction, were then given. The Judge reached an end sentence of 13 years and three months' imprisonment for all of Mr Berkland's offending. A minimum period of imprisonment (MPI) of six years and six months was imposed.

On appeal against sentence to the Court of Appeal, the Court applied *Zhang* although that case was decided after Mr Berkland was sentenced in the High Court. The Court found that on the basis of *Zhang* the starting point adopted in the High Court was appropriate. However, it accepted that due to an administrative oversight certain background information filed in the High Court had not been brought to the attention of Collins J. The Court of Appeal allowed a further reduction of six months for personal background factors addressed in that information, resulting in an overall end sentence of 12 years and nine months.

As to Mr Harding, Moore J in the High Court found his (Mr Harding's) offending was one of the most serious of cases of methamphetamine manufacturing within the meaning of s 8(c) of the Sentencing Act 2002. The Judge adopted a starting point of 30 years' imprisonment with an 18 month discount for late guilty pleas. He reached an end sentence of 28 years and six months imprisonment for all charges. The maximum available MPI of 10 years was also imposed.

On appeal against sentence to the Court of Appeal, the Court was once again required to consider Mr Harding's sentence in light of the new guidance from *Zhang*. The Court upheld Mr Harding's sentence, finding that the sentence reached was within range.

Issues before the Supreme Court

Both Mr Berkland and Mr Harding applied to this Court for leave to appeal against the Court of Appeal's decisions on sentence. The Supreme Court granted leave to appeal and determined the two appeals should be heard together given they both raise similar issues. This Court noted that it did not wish for either appeal to proceed as a wholesale re-litigation of the Court of Appeal's guideline judgment in *Zhang*. Rather, the issues before this Court were more specific. They related, for the most part, to the interpretation and implementation of *Zhang*. In summary they were:

- 1) How should the Court assess Mr Harding's culpability for manufacturing methamphetamine?
- 2) In setting a starting point for Mr Berkland, did the *Zhang* role criteria applied by the Court of Appeal ensure that all facts relevant to culpability were appropriately considered?
- 3) In relation to both appeals, how should the Court take account of personal background factors when sentencing for serious offending?
- 4) Based on the Court's views of the above issues, was Mr Berkland's end sentence appropriate?
- 5) Based on the Court's views of the above issues, was Mr Harding's end sentence appropriate?

Result

The Supreme Court has unanimously allowed the appeals against sentence. Williams J gave the reasons for Winkelmann CJ, Glazebrook and William Young JJ. Ellen France J agreed with the result but wrote separately on some matters. Where she did so, that is indicated in the summary below.

Mr Berkland's sentence of 12 years and nine months' imprisonment is quashed and a sentence of eight years and eight months' imprisonment is substituted. No MPI is imposed. Mr Harding's sentence of 28 years and six months' imprisonment is quashed and a sentence of 21 years' imprisonment is substituted. The MPI of 10 years is unaffected.

On the first issue, the Court applied the approach adopted in *Zhang*: irrespective of whether the charge is manufacturing, importing or supplying methamphetamine, culpability must be assessed on the facts of the particular case not the offence category. For Mr Harding, the Court accepted that, on the facts, the complexity of his manufacturing operation was greater than that which might be expected in importation or supply of the same quantity, but the offending was not "within the most serious of cases" of commercial methamphetamine dealing in terms of s 8(c) of the Sentencing Act. The Courts below therefore overestimated Mr Harding's culpability rendering his overall starting point excessive.

On the second issue, the Court (with the exception of Ellen France J) considered that *Zhang*'s profile for the "significant" role should be adjusted to ensure that, alongside other relevant considerations, sentencing courts reflect on the distinction between operational and management functions within the significant category. The Court disagreed with the Court of Appeal's view that Mr Berkland's role was located at the upper end of *Zhang*'s "significant" profile. While he was Mr Blance's right-hand man, Mr Berkland did not exercise significant autonomy, had no decision-making authority and did not manage others. These factors meant his role was properly located in the mid-range of the significant category. Writing separately on this point, Ellen France J agreed that Mr Berkland's starting point must be reduced but did not agree amendments should be made to the role criteria in *Zhang*. Rather, she was of the view that the Court of Appeal placed Mr Berkland higher up the "significant" category than the facts warranted.

On the third issue, the Court confirmed that background factors such as deprivation, historical dispossession and addiction are important considerations for sentencing at all levels of seriousness. These factors are likely to mitigate sentence where they contribute causatively to the offending. That is, where they help to explain in some rational way why the offender has come to offend in the way they have. The strength of the causative contribution will then bear on the potency of their mitigatory effect. On the other hand, the Court accepted that there may be some situations where other considerations, such as protecting the community from harm, will limit the effect of background on sentencing outcomes. Ellen France J, writing separately on this point, agreed that "causative contribution" appropriately described the required nexus between background and offending, but that an analysis of Court of Appeal cases already applying that approach indicated it was workable.

Applying this approach to these appeals the Court unanimously held that, in relation to Mr Berkland, he should receive a 10 per cent discount for relevant background factors including his addiction, history of deprivation and trauma. The Court also considered there ought to be

a further 10 per cent discount for his rehabilitation efforts. This aspect of Mr Berkland's background was genuinely exceptional and warranted a significant sentencing response despite the gravity of the offending.

By contrast, the Court considered that Mr Harding's background did not causatively contribute to the scale and extent of his offending and therefore did not warrant any discount.

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