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

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MEDIA RELEASE

JASON BRENDON PHILIP v THE KING

(SC 32/2022) [2022] NZSC 149

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.

Introduction

Between December 2018 and March 2019, Mr Philip and his partner, Ms Hayman, transported five shipments of methamphetamine from Auckland to Wellington, under the direction of Mr McMillan. On most trips the drugs were placed into hidden compartments in the car by someone other than Mr Philip or Ms Hayman. On one occasion, Mr Philip's adult son was also involved in the driving and on two other occasions, Mr Philip and Ms Hayman engaged another person to act as a driver on their behalf. Mr Philip was convicted of five charges of possession of methamphetamine for supply and two charges of possession of cannabis.

Lower Courts decisions

Mr Philip was sentenced on the basis that a total of six kilograms of methamphetamine was transported. This quantity placed Mr Philip into band five of the guideline judgment of *Zhang v R* [2019] NZCA 507. Band five attracts starting points of 10 years to life imprisonment and applies where the quantity comprises more than two kilograms. In terms of *Zhang*'s role classification, Gwyn J was satisfied that Mr Philip played a "lesser role" as, among other matters, he performed a limited function under direction and was motivated by his addiction to methamphetamine. The Judge adopted a starting point of six years, differing from an earlier sentencing indication due to changes in the factual basis for sentencing. Six years was the same starting point adopted for Ms Hayman.

The Judge also gave Mr Philip a 20 per cent discount for his guilty pleas; a 30 per cent discount for a range of personal factors, including his remorse and clear motivation for and commitment to rehabilitation; and a further 10 per cent discount 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. The Judge was satisfied that a term of one year's home detention was appropriate in the circumstances.

On appeal by the Solicitor-General, the Court of Appeal disagreed with the High Court and determined Mr Philip's role was "at least on the cusp between lesser and significant categories of involvement". The Court considered a starting point of at least nine years was justified, but because an eight-year starting point had been used in the sentencing Judge's earlier sentencing indication, the Court of Appeal adopted an eight-year starting point. The Court of Appeal did not interfere with the discounts except for disallowing the 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 substituted.

Supreme Court decision

Mr Philip was granted leave to appeal on the question of whether the Court of Appeal's decision was correct. At issue (as discussed further below) were:

1. The assessment of Mr Philip's role in the offending.
2. The proper approach on a Solicitor-General's appeal when a custodial sentence is sought in substitution for a non-custodial sentence with a rehabilitative purpose.
3. Whether a discount should have been allowed to reflect the impact of sentencing on Mr Philip's young child.

Result

The Supreme Court has unanimously allowed the appeal, quashing the sentence of two years and 11 months' imprisonment and substituting a sentence of one year and seven months' imprisonment. That sentence equated to the time required to be served under a short term sentence and the parties agreed this would result in Mr Philip's immediate release. Ellen France J gave the reasons of Winkelmann CJ, Ellen France and Williams JJ. Glazebrook and O'Regan JJ agreed with the result but wrote separately on some matters.

1. The assessment of Mr Philip's role in the offending

The Supreme Court unanimously agreed with the Court of Appeal that Mr Philip's role was on the cusp of the lesser and significant categories. However, Winkelmann CJ, Ellen France and Williams JJ disagreed with the Court of Appeal's resulting assessment of the starting point and, in particular, how role and quantum inter-related. They rejected the submission for the Crown that going below the applicable entry point for the relevant band would only occur in cases involving minimal participation. Quantum cannot be the only determinant and sentencing involves an evaluative exercise. And as this Court noted in *Berkland v R* [2022] NZSC 143, role is a fundamental component of the gravity and culpability assessment. The potency of role will vary and it can drive movements both within and between the quantum-driven bands. In Mr Philip's case, the emphasis on quantum was tempered by the fact that his offending was motivated by his addiction and there was limited monetary gain. Treating the offending of Mr Philip and Ms Hayman as comparable with another case relied on by the High Court was probably generous although it did properly reflect the fact that both were acting under direction. Consequently, Winkelmann CJ, Ellen France and Williams JJ

considered that the High Court's starting point was within the available range (or at worst, a little below).

Glazebrook and O'Regan JJ agreed that role could drive movement both within and between the quantum driven bands but did not consider that a starting point that was as low as 60 per cent of the relevant band was available in this case, taking into account both the role Mr Philip played and the quantity of methamphetamine involved. Rather, the High Court's six-year starting point was irreconcilable with the guidelines given in *Berkland* and *Zhang*.

2. *The proper approach on a Solicitor-General's appeal when a custodial sentence is sought in substitution for a non-custodial sentence with a rehabilitative purpose*

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 approach. The Court of Appeal's decision did not exemplify that approach. Although the sentence imposed by the High Court may have been lenient, it was a therapeutic response. Moreover, it was strongly supported by the factual material before the Judge that showed Mr Philip's rehabilitative prospects, the positive influence of involvement with his young child, and whānau support. In the particular circumstances of this case, where Mr Philip was well into a non-custodial and rehabilitative sentence, reversing the sentence did lead to an injustice.

Agreeing with Winkelmann CJ, Ellen France and Williams JJ on this point, Glazebrook and O'Regan JJ held that while a six-year starting point was not available, in the context of a Solicitor-General's appeal, interfering with the sentence imposed caused an injustice. 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.

3. *Whether a discount should have been allowed to reflect the impact of sentencing on Mr Philip's young child.*

The Court unanimously agreed with the High Court that a discrete discount was available given that Mr Philip was an important presence in his young child's life. Further, there was such a close relationship between Mr Philip's rehabilitation and his relationship with his child as to warrant the discount allowed. In reaching this conclusion, the Court rejected the Crown's submission that such discounts will be rare. Instead, what is required is a consideration of all the relevant circumstances, which must include the child's interests.

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