

IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI O AOTEAROA

SC 39/2023
[2023] NZSC 115

BETWEEN SELAIMA FAKAOSILEA
Applicant

AND THE KING
Respondent

Court: Glazebrook, Williams and Kós JJ

Counsel: G N E Bradford for Applicant
N J Wynne for Respondent

Judgment: 30 August 2023

JUDGMENT OF THE COURT

A The application for an extension of time to apply for leave to appeal (*R v F* [2018] NZHC 3377) is dismissed.

B The application for leave to appeal (*Fakaosilea v R* [2021] NZCA 401) is dismissed.

REASONS

[1] The applicant has applied for leave to appeal against two sentences imposed in 2018 and 2019 for drug offending.

2018 sentencing

[2] In early 2018 the applicant pleaded guilty to two charges of supplying methamphetamine (14.9 kilograms and nine kilograms) and one charge of supplying 1.9 kilograms of cocaine. She was sentenced to 14 years and six months’

imprisonment,¹ in reliance on the then-applicable guideline in *R v Fatu*.² The applicant has sought leave to appeal directly against that sentence.

2019 sentencing

[3] The applicant was later convicted after a High Court jury trial on one charge of importing 501 kilograms of methamphetamine and one charge of participating in an organised criminal group.³ She was sentenced to 12 years and six months' imprisonment with an MPI of seven years.⁴ This was cumulative on the sentence the applicant was already serving of 14 years and six months. The applicant's effective end sentence was therefore 27 years.

[4] The applicant appealed to the Court of Appeal against conviction and sentence. Applying what was then the new guideline for sentencing drug offenders in *Zhang v R*,⁵ that Court allowed her sentence appeal and reduced the effective end sentence to 24 years.⁶

[5] In early 2022 this Court dismissed Ms Fakaosilea's application for leave to bring a second appeal against the 2019 conviction and sentence, but reserved leave for her to reapply in relation to sentence if this Court's judgment in *Berkland v R* (issued later that year)⁷ provided any basis for reconsideration of the applicant's sentence.⁸ She now reapplies pursuant to that reservation of leave.

¹ *R v F* [2018] NZHC 3377 (Palmer J). Palmer J set the starting point for the first charge of supplying methamphetamine at 13 years' imprisonment. He uplifted it by four years for the second methamphetamine charge and one year for the cocaine charge, resulting in an overall starting point of 18 years' imprisonment. He then discounted the sentence by 22 months for Ms Fakaosilea's personal history and 20 months for her guilty plea.

² *R v Fatu* [2006] 2 NZLR 72 (CA).

³ *R v Cullen* [2019] NZHC 2088 (Gordon J).

⁴ That sentence was for the lead charge of importing methamphetamine, uplifted to reflect the additional charge of participating in an organised criminal group. Ms Fakaosilea was concurrently sentenced to seven years' imprisonment for the offence of participating in an organised criminal group.

⁵ *Zhang v R* [2019] NZCA 507, [2019] 3 NZLR 648.

⁶ *Fakaosilea v R* [2021] NZCA 401 (Miller, Venning and Peters JJ). The High Court sentencing occurred before the Court of Appeal delivered its decision in *Zhang*. The Court of Appeal considered the applicant was entitled to any advantage from the new guideline.

⁷ *Berkland v R* [2022] NZSC 143, [2022] 1 NZLR 509.

⁸ *Fakaosilea v R* [2022] NZSC 17 (O'Regan, Ellen France and Williams JJ).

Submissions

[6] Mr Bradford for Ms Fakaosilea submits that her personal circumstances ought now to be reconsidered under the framework for methamphetamine sentencing in *Berkland*. He suggests that greater allowance could have been made for the causative contribution the applicant's background made to her offending. He makes no substantive submissions in respect of the out of time application for leave to bring a direct appeal against the 2018 sentencing but we address the merits of that application in any event.

[7] The Crown opposes leave, arguing that the effective discount of 16 per cent for background factors in relation to the second sentencing was within range, particularly in light of the seriousness of the offending. The Crown emphasises the proposition adopted by this Court in *Berkland* that in particularly serious offending other sentencing purposes and principles may wholly or partially occlude the mitigatory effect of background.⁹ The Crown makes no substantive submissions on the direct appeal against the 2018 sentencing.

Analysis

[8] Setting aside for the moment any doubts we may have on jurisdiction,¹⁰ there is no appearance of inconsistency between the 2018 sentence and the approach in *Zhang*, as modified by *Berkland*, given the quantities involved and Palmer J's treatment of the applicant's background.

[9] As to the 2019 sentencing, the causative contribution of the applicant's background was traversed in the pre-sentence reports, including a careful and comprehensive s 27 report. Despite the seriousness of the offending, the Judge discounted the applicant's sentence by four years due to those background factors.

[10] We do not consider the requirements for leave are met in relation to either application.¹¹ No question of principle requiring consideration by this Court has been

⁹ *Berkland*, above n 7, at [111]–[112].

¹⁰ See *Berkland*, above n 7, at [72]; and *Zhang*, above n 5, at [187]–[191].

¹¹ Senior Courts Act 2016, s 74.

identified.¹² Rather, the arguments advanced relate to the application of what are now settled matters of judicial sentencing policy. Nor are we satisfied that there is any risk of substantial miscarriage of justice in either case.¹³ It follows that the requirements for a direct appeal in relation to the 2018 sentencing cannot be met.¹⁴

Result

[11] As the criteria for the grant of leave are not met for the 2018 sentencing, there is no point in granting an extension of time. The application for an extension of time to apply for leave to appeal (*R v F* [2018] NZHC 3377) is dismissed.

[12] The application for leave to appeal a second time against the 2019 sentence (*Fakaosilea v R* [2021] NZCA 401) is dismissed.

Solicitors:
Crown Law Office, Wellington for Respondent

¹² Section 74(2)(a).

¹³ Section 74(2)(b).

¹⁴ Section 75.