

IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI O AOTEAROA

SC 135/2022
[2023] NZSC 43

BETWEEN JIRI KUPEC
Applicant

AND THE KING
Respondent

Court: Ellen France, Williams and Kós JJ

Counsel: H G de Groot for Applicant
R K Thomson for Respondent

Judgment: 3 May 2023

JUDGMENT OF THE COURT

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

REASONS

[1] In 2017, Mr Kupec was convicted of one charge of importing into New Zealand a class A controlled drug (being 20 kilograms of methamphetamine). Mr Kupec is a citizen of the Czech Republic. He travelled to New Zealand via Bangkok, where he picked up two suitcases from an unknown person in exchange for USD 5,000. The methamphetamine was sewn into the lining of the suitcases.

[2] Mr Kupec pleaded not guilty to the charge. He claimed that he did not know the suitcases contained drugs, but instead believed he was smuggling cash (ultimately into the United States). The jury did not believe him and he was found guilty on the drug importation charge.

[3] Judge McGuire found that Mr Kupec imported the methamphetamine knowingly, as opposed to recklessly.¹ He imposed a sentence of 17 years. He then found a minimum period of imprisonment (MPI) of eight and a half years (or 50 per cent of the sentence) would be appropriate here to “hold the offender accountable for the harm done to the potential victims of this offending, to denounce the conduct of the offender and to deter other people ... from committing the same or similar offence”.²

[4] Mr Kupec appealed to the Court of Appeal on both his conviction and sentence.³ He did not challenge the MPI, however. The Court of Appeal dismissed both the conviction and sentence appeals. He subsequently sought leave to appeal against conviction to this Court, but that application was declined.⁴

[5] In 2022, Mr Kupec applied for recall of the Court of Appeal judgment, now attempting to challenge the imposition of the MPI.⁵ The Court held that the application did not reach the threshold for recall. In so concluding, it said:⁶

[7] Mr Kupec imported 20 kilograms of methamphetamine in suitcases cleverly constructed to avoid any concerns on casual scrutiny. The sentencing Judge concluded that Mr Kupec not only knew he was importing illegal drugs but also “cynically” involved his mother in the enterprise so as to suggest to customs and other officials that he was undertaking legitimate overseas travel. The Judge’s consideration of the imposition of an MPI was not mechanistic.

[8] Given this is the key point in Mr Kupec’s application, the failure of his counsel, if that is what it was, to also mount an appeal against the imposition of an MPI is not a “very special reason [for which] justice requires” recall of our judgment on appeal. ...

[6] Mr Kupec seeks extended time to apply to this Court for leave to appeal the 2018 Court of Appeal judgment as regards sentence. As noted above, the previous application made in this Court was confined to conviction only.

¹ *R v Kupec* [2017] NZDC 22632 at [14].

² At [36].

³ *Kupec v R* [2018] NZCA 377 (Brown, Clifford and Williams JJ).

⁴ *Kupec v R* [2018] NZSC 113 (William Young, O’Regan and Ellen France JJ).

⁵ *Kupec v R* [2022] NZCA 410 (Brown, Clifford and Williams JJ).

⁶ Footnotes omitted.

Extension of time and proposed appeal

[7] Mr Kupec submits that an extension of time for leave to appeal should be granted because his limited understanding of English meant that, at the time of his original appeal to the Court of Appeal, he did not understand that counsel was not challenging his MPI.

[8] He submits that, if leave is not granted, there will be a substantial miscarriage of justice. The general deterrent effect of MPIs on future recruits at his level is at best negligible. Here there were several factors pointing against an MPI, including Mr Kupec's economic vulnerability, the absence of relevant prior convictions, the presence of good character and the fact that Mr Kupec's role in this enterprise meant that he assumed the greatest risk for trivial reward. A lengthy sentence had been imposed; statutory purposes will rarely be advanced by the addition of an MPI, except in cases of unusually aggravated and/or unmitigated offending.

Our assessment

[9] Where an application for leave is filed out of time, the applicant must provide an adequate explanation for the delay and compelling reasons for extending time.⁷ The applicant must show that, in all the circumstances, the interests of justice favour granting leave.⁸

[10] We observe that the discussion of MPI by the District Court predated the guidance given by the Court of Appeal in *Zhang v R* and was not as fully reasoned as that guidance encourages.⁹ Mr Kupec occupied a lower end significant role in the operation and was poorly remunerated for the risk he took.¹⁰ However, his participation was essential to what was very serious, substantial commercial drug offending, undertaken knowingly, by a foreign national travelling to New Zealand for that sole purpose. His actions were substantially indistinguishable from those of

⁷ *Palmer v R* [2011] NZSC 25, (2011) 25 NZTC ¶20-031 at [2]; *Afamasaga v R* [2019] NZSC 16 at [8]; and *Lincoln v New Zealand Law Society* [2020] NZSC 4 at [3].

⁸ *Thom v Davys Burton* [2007] NZSC 107, (2007) 18 PRNZ 766 at [2].

⁹ *Zhang v R* [2019] NZCA 507, [2019] 3 NZLR 648 at [169]–[174].

¹⁰ At [126], as modified by *Berkland v R* [2022] NZSC 143, [2022] 1 NZLR 509 at [71].

Mr Zhang in *Zhang v R*, whose 50 per cent MPI was confirmed in that decision.¹¹ We do not see any risk here of a substantial miscarriage of justice if leave is not granted.¹² The interests of justice do not, therefore, favour granting leave, or the extension of time to apply therefor.

Result

[11] The application for an extension of time to apply for leave to appeal is dismissed.

Solicitors:
Crown Law Office, Wellington for Respondent

¹¹ *Zhang*, above n 9, at [263], albeit the starting point for Mr Zhang was 15 years, and he received a discount of 50 per cent for personal factors and his guilty plea: at [257]–[259].

¹² Senior Courts Act 2016, s 74(2)(b).