IN THE SUPREME COURT OF NEW ZEALAND
I TE KŌTI MANA NUI O AOTEAROA

SC 32/2022

BETWEEN **JASON BRENDON PHILIP**

Appellant

AND **THE QUEEN**

Respondent

SUBMISSIONS OF COUNSEL FOR THE APPELLANT
Dated the 29th day of August 2022

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MAY IT PLEASE THE COURT:

Introduction

1. Mr Philip's childhood was characterised by violence, neglect and alcohol abuse by the adults in his life. His mother worked in shearing sheds and as a result the family moved around frequently. His mother often left Mr Philip and his sister for days at a time, with only weetbix and potatoes for food. There were frequent parties at the family home, which would often denigrate into alcohol-fuelled violence. In addition, Mr Philip was physically and sexually abused by his stepfather on multiple occasions, and his mother did nothing to stop this. He was in state care for a time and was physically abused there also.

2. Mr Philip's father had separated from his mother when Mr Philip was young. His father tried to maintain contact with the family but his mother prevented this. He did, however, pay maintenance and sent money orders to local business so that the children would be clothed and fed.

3. Mr Philip left school at the age of 12 or 13, able to read and write at only a very basic level, possibly as the result of undiagnosed ADHD or FASD. He has worked as a shearer since the age of 15.

4. Unsurprisingly perhaps, Mr Philip began sniffing glue at the age of eight or nine, with other neighbourhood children while his mother was partying. He started using cannabis at the age of 11, and has remained a heavy cannabis user, although he now uses medicinal cannabis. Mr Philip described using drugs to "blot out his past, support his sleep and calm him down".[1] He had given up methamphetamine at one point but started using it again when his partner was using it.

5. Mr Philip, until very recently, has been totally disconnected from his Māori identity, culture and tikanga. Like many who have suffered from this

[1] Section 27 report at [2.2] (CA Case on Appeal page 98.

disconnection, he turned to gang membership to fill the cultural void in his life. He began to engage with tikanga Māori for the first time during his attendance at the marae-based Kahukura rehabilitation programme, pending his sentencing on these matters.

6. Mr Philip has three adult children, the first of whom was born when he was 15 years old. He now has two young children with his partner Ms Hayman, ████ who is two years old and ████ who was born on 1 August 2022. They lived as a family while Mr Philip was on EM bail and on home detention, with support from Ms Hayman's parents and Mr Philip's father. Mr Philip's close bond with his son ████ and the impact of a prison sentence on him, was the subject of a psychological report filed for sentencing.

7. Mr Philip and Ms Hayman became involved in a methamphetamine operation where they would transport quantities of methamphetamine from Auckland to Wellington in order to feed their own addiction. By the time of sentencing, Mr Philip had completed the Kahukura rehabilitation course, was committed to remaining free of methamphetamine, and was playing an active role in raising their young child. Justice Gwyn recognised that Mr Philip had been motivated by addiction and had made no profit, found that he played a "lesser role" in the operation, and adopted a starting point of six years, the same as for Ms Hayman. An end sentence of home detention was reached. That sentence was overturned following a successful appeal by the Solicitor-General, and Mr Philip was incarcerated until being granted bail by this Court.

8. This appeal highlights the problems inherent in the application of a guideline judgment which prioritises quantity as the "first determinant of sentencing".[2] However, this Court has previously declined to engage in a "wholesale re-litigation" of *Zhang*,[3] and counsel does not understand the

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[2] *Zhang v R* [2019] NZCA 507 at [103].

[3] *Berkland v R* [2020] NZSC 125.

grant of leave in the present case to be an invitation to revisit the sentencing bands.

9. Instead, the submission for the appellant is that *Zhang* itself emphasises the need for a holistic assessment of culpability, including role, and expressly allows for starting points below the bands. The six year starting point adopted by Gwyn J in this case appropriately recognised Mr Philip's "lesser" role and particularly the fact that his offending was driven by addiction and he made no profit. Additionally, it was consistent with the approach taken for his partner Ms Hayman whose offending was identical to his, and three co-accused who received even lower starting points for band 5 quantities. The Court of Appeal erred accordingly in increasing the starting point from six to eight years.

10. The discounts originally granted were orthodox and warranted in this case – in fact, they could have been greater. The Court of Appeal erred in finding that the discount of 30 per cent, which the High Court allowed for a combination of deprivation, addiction, mental health, remorse, and rehabilitative prospects, was "inarguably generous",[4] and it erred in finding, on the basis of the "generous" discount for those factors, that the 10 per cent discount recognising the impact of sentencing on Mr Philip's young child (now two young children) was not justified.

11. Ultimately, the end sentence of home detention was the correct sentence, given the principles of sentencing in s 8 of the Act, and also s 16 of the Act, which provides that the Court "must have regard to the desirability of keeping offenders in the community as far as that is practicable and consonant with the safety of the community," and restricts the circumstances in which a sentence of imprisonment can be imposed. The Court of Appeal made no reference to ss 8 or 16 in sentencing Mr Philip to imprisonment, despite being bound to apply those provisions.

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[4] Court of Appeal decision at [149].

12. Nor did the Court of Appeal accept the argument that it was unjust and inhumane to sentence Mr Philip to prison when he had served seven months of his home detention sentence, had pursued rehabilitative steps, and continued to play a major role in his child's life, concluding that "regrettably" those factors did not warrant divergence from the "appropriate response".[5] This was also in error.

13. Counsel is aware of the arguments made in the *Berkland* and *Harding* appeals, particularly regarding the Courts' approach to personal mitigating factors. The matters of general principle raised in those appeals may be relevant to this appeal also. However, the distinguishing feature in this case is the complete absence of any suggestion that Mr Philip made a profit. As a result, the issue of whether there is any limitation on discounts that are otherwise available for personal mitigating factors in cases of "serious commercial" methamphetamine dealing does not arise in this appeal.

Facts

14. Mr Philip pleaded guilty five charges of possession of methamphetamine for supply and two charges of possession of cannabis (simpliciter). One of the methamphetamine charges related to the search of a vehicle enroute from Auckland to Wellington driven by a third party (Mr Minns), which was seized by the Police in Taupō. The four other charges related to possession of methamphetamine in Auckland, at the entry and exit of the commercial premises captured on CCTV footage. The two charges of cannabis related to Mr Philip's arrest in Taihape.

15. Mr Philip's role was driving or being in the car with his partner who was also a driver. His addiction was the prime motivator of his involvement. The key players were Mr James who appeared to be the kingpin and who during the operation went with full knowledge of the authorities to Los Angeles and never returned, others in Auckland who faced charges, Mr McMillan

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5 At [155].

who was described as the principal offender in the sentencing, and various other defendants in Wellington who were also sentenced by the same Judge.

16. Mr McMillan was related to Mr Philip (Mr Philip's daughter was Mr McMillan's partner) and Mr McMillan used the family connection to get Mr Philips and Ms Hayman to do his driving.

17. On each of the four occasions the appellant was accompanied by Jazinda Hayman, his partner and co-offender. They are described as working together throughout the SOF.

18. The packages of methamphetamine were hidden in a sealed airbag compartment in the vehicles. When the car driven by Mr Minns was seized in Taupō, the Police did not find the methamphetamine in their initial search. Only when another co-offender, Mr Paulo, tried to have the car released from Police impoundment, was the hiding place discovered by the Police.

19. In relation to the first charge (12 December 2018), Mr Philip and Ms Hayman are described in the SOF as each removing a cardboard box, containing an unknown quantity of methamphetamine, from another vehicle and placing it in the Mitsubishi vehicle.[6] On the other four occasions, the methamphetamine was placed into the secret compartment of the vehicle by another person, and they did not handle it or see it themselves.[7] They were told where to pick up the vehicles and where to take them to.

20. Mr Philip's plea of guilty is acknowledgement that he knew methamphetamine was concealed in the car and being transported. It is also an acknowledgement that six kilograms were transported, although

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[6] SOF page 8, CoA Casebook page 49.

[7] SOF page 9-10 (19 December 2018); page 10-11 (16 January 2019); page 12 (24 January 2019); page 16-17 (in relation to the vehicle driven by Mr Minns which was seized by the Police in Taupō on 12 March 2019 and subsequently searched).

the only amount actually quantified by the Crown was the two kilograms seized in Taupō.

21. The motivation for Mr Philip's offending was almost exclusively the addiction to methamphetamine of himself and his partner. It is not to be underestimated that the cost of supplying a habit for two people would be considerable and the motivation for both of them to undertake the driving to satisfy their habits was high.

22. His addiction was identified in the AOD assessment report undertaken by Mr John Duncan, the s27 report, and the activities and outcomes report following his rehabilitation programme. It was not challenged by the Crown.

23. When the Police executed the search warrant at the Taihape property where he was arrested, a small quantity of methamphetamine for his own use was found.[8] He admitted that the methamphetamine was his.

24. There were widespread interception warrants and other surveillance undertaken in Auckland and Wellington. Comprehensive investigation was undertaken by the Police into bank accounts, assets and other possessions. It has never been suggested that Mr Philips and Ms Hayman have any assets of significance or that they profited financially from their offending.

Sentencing process and decision

Sentencing Indication

25. A sentencing indication hearing took place on 1 February 2021.[9] In assessing the starting point, the Judge distinguished *R v Smith* (where the defendant had transported 15 kg of methamphetamine from Auckland to Wellington) on the basis that Mr Smith displayed all the indicia of significant

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8 The weight in the charging document Casebook 37 is incorrect – weight was minimal

9 *R v Philip* [2021] NZHC 42 (CoA Casebook page 73).

role, including the accumulation of serious wealth, while Mr Philip had received little financial gain, with no assets having been found or seized since his arrest. The Judge also distinguished cases involving defendants who travelled internationally to New Zealand for the purposes of assisting with the importation of Class A drugs.

26. Instead, her Honour found that the more useful reference point was the indication she had given for Ms Hayman, "given you are charged with almost identical offending".[10] The six year starting point for Ms Hayman had been determined by reference to the appellant Ms Phillips in *Zhang*.

27. Justice Gwyn accepted that some indicia of "lesser role" were present, as well as some indicia of "significant role". The Judge noted that she had been unwilling to draw an inference that Ms Hayman was the "leader" between the two of them, and that although certain "objective factors" such as the difference in age and the fact Mr Philip was a patched member of the Mongrel Mob, "might point in the opposite direction", she could not "conclusively determine" Mr Philip was the leader.[11] The "primary distinguishing feature" was that there was no evidence (at that stage) that Mr Philip was motivated by his own addiction, as Ms Hayman was.[12]

28. Accordingly, a starting point of eight years was adopted. The Judge also indicated a two month uplift for unrelated previous convictions, a 20 per cent discount for plea, and a discount of five months for time on EM bail. Her Honour expressly reserved the possibility of further discounts if the appellant's personal circumstances warranted that at sentencing.[13]

29. The indication was accepted, and guilty pleas entered on 9 February 2021.

30. The trial against Mr McMillan commenced on 15 February 2021. By that point, all of the co-accused had pleaded guilty. Mr Paulo had been

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10 At [18].
11 At [21].
12 At [22].
13 At [28] and [34].

sentenced by Justice Cooke much earlier, in July 2020. Ms Hayman and Mr Minns had pleaded guilty following sentencing indications and were awaiting sentencing. The other co-accused, Mr Stone, had pleaded guilty the week before the trial.

31. After Mr McMillan's trial, on 19 March 2021, the Judge issued a Minute noting the Crown's change of position in relation to Mr Stone, indicating her view that the Crown's change in position in relation to Mr Stone may amount to a material change in circumstances that would be relevant to the other defendants, and also indicating that the trial of Mr McMillan had provided a more complete view of the role played by each of the defendants than was available to the Court when the indications were given. The Crown was invited to have regard to those factors in preparation for the sentencing hearings.[14]

32. Ms Hayman, Mr Minns and Mr Stone were all sentenced by Justice Gwyn on 26 March 2021. Starting points well below band 5 were adopted for each of them. Ms Hayman and Mr Stone were sentenced to home detention, while Mr Minns was sentenced to two years' imprisonment and was due for release on a time served basis.

33. The appellant was due to appear for sentence on 14 April 2021. A Court-ordered alcohol and drug report, and a cultural report had been prepared for sentencing.

34. On that day, sentencing was adjourned because the probation report was not available. At that appearance the possibility of a sentence of home detention was discussed. Counsel raised the possibility as to whether a rehabilitation programme could be part of a sentence of home detention or whether sentencing should be deferred to enable completion of a rehabilitation programme.

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[14] Minute of Gwyn J, 19 March 2021.

35. The matter then was further adjourned. Following a hearing on 8 June 2021 Her Honour granted the application for an adjournment of sentencing in a minute dated 10 June 2021, to enable the appellant to attend the 8 week Kahukura rehabilitation programme commencing on 5 July 2021.

36. These adjournments were opposed by the Crown. The Crown's approach was that any rehabilitative needs of the appellant could be addressed by custodial programmes or parole conditions. The Crown also objected to the Kahukura programme stating the Police opposed it. In fact the Deputy Commissioner of Police made a public statement stating that she supported the Kahukura programme and the funding for it.

37. The appellant was to get an insight into his offending, it was to provide him the skills to change and provide motivation and to support his motivation to do so. The target of the programme was achieved, and the report evidences this.

38. Mr Philip was sentenced on 13 September 2021. In her sentencing notes, her Honour referred to the evidence that had been given at Mr McMillan's trial. Her Honour said that "of particular relevance" was that the Crown's evidence did not establish that Mr Philip played a significant role in Mr McMillan's business, and that in closing the Crown had referred to him as "a mule and hired muscle". Her Honour noted that his gang connections were largely irrelevant, as his connection to Mr McMillan was through his daughter, who was Mr McMillan's former partner, not through the gang. Her Honour also recorded that the evidence disclosed that neither Mr Philip nor Ms Hayman were trusted to see the methamphetamine or cash being loaded into the secret compartments in the cars, and that he had limited contact with Mr James and limited knowledge of the details of his operation with Mr McMillan.[15]

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[15] Sentencing notes at [35] (CoA casebook at 180).

39. As a result, the Judge concluded, Mr Philip and Ms Hayman operated together, and neither could be described as the leader between the two of them. Additionally, it was clear from the reports that Mr Philip was motivated by his addiction to methamphetamine. Further, the Crown's evidence at the trial was that Mr Philip had no money or assets at the time of his arrest, which supported the submission that he was motivated by his addiction, not monetary gain.[16] Accordingly, the Judge found that Mr Philip performed a "lesser" role, with reference to the indicia from *Zhang*. A six year starting point was adopted.

40. Her Honour then declined to uplift for Mr Philip's previous convictions, in recognition of Mr Philip's addiction, poverty and trauma, which diminished his ability to make rational choices, had not previously been addressed by rehabilitation or counselling, and accordingly the Judge reasoned, "adding more time to your sentence is not going to have a deterrent effect".[17] As well, the previous convictions were "not particularly relevant" as he had no convictions for drug-related offending.

41. A 20 per cent discount was allowed for plea.

42. A 30 per cent discount was allowed for the combination of Mr Philip's "very difficult background", drug addiction issues, mental health issues, remorse, and prospects of rehabilitation.

43. A 10 per cent discount was allowed to mitigate the impact of sentencing on Mr Philip's young child, on the basis of a psychological report which had described his son's secure attachment to him, his strong bond with his son, and the adverse effects on young children of a family member being imprisoned.

44. Finally, six months was discounted for time on EM bail.

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16 At [36].
17 At [47].

45. That resulted in a sentence of two years, enabling the Judge to consider home detention. Her Honour concluded that was the appropriate sentence in the circumstances, and imposed home detention for 12 months.

Court of Appeal decision

46. The Crown appealed on the basis that the Judge had wrongly not followed the SoF and the sentence was manifestly inadequate.

47. The Court of Appeal rejected the Crown's first submission that the Judge did not have the power to depart from the SOF, finding that, in light of s 116 of the CPA, the Judge was entitled to take into account further information. However, the Court of Appeal also found that the three Minutes issued by the Judge did not have enough specificity to give the Crown notice that the Judge was minded to differ from the position in the agreed SOF, in terms of s 24(2)(a) of the Sentencing Act.[18]

48. The Court of Appeal then accepted a number of factual propositions advanced by the Crown, and concluded on that basis, that Mr Philip's role was "the cusp between lesser and significant participation".[19] The Court found that a nine year starting point should have been imposed, but given Mr Philip had accepted an indication with an eight year starting point, and given it was a Crown appeal, a starting point of eight years was adopted.[20]

49. The Court found that the discount of 10 per cent for the impact on Mr Philip's young children could not be justified,[21] but did not interfere with the other discounts that had been allowed.

50. After deducting the seven months already served on home detention, the Court of Appeal sentenced Mr Philip to two years and 11 months' imprisonment.

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18 Court of Appeal decision at [134]-[136].
19 At [140].
20 At [146].
21 At [52]

Starting point

51. It is submitted that the six year starting point adopted by Justice Gwyn was correct in the circumstances, and the Court of Appeal erred in increasing the starting point to eight years.

52. Specifically, it is submitted the Court erred by:

52.1 Applying the guideline in *Zhang* too rigidly and without reference to the need for flexibility and discretion emphasised in that decision; and

52.2 Finding that the Judge departed or differed from the agreed SOF, when for the most part the additional matters referred to were not the subject of comment either way in SOF;

52.3 Accepting the Crown's submissions regarding certain factual matters, when these had not been raised at sentencing, and were for the most part not contained in the SOF;

52.4 Finding, on the basis of the matters raised by the Crown on appeal, that Mr Philip was on the cusp of "lesser" and "significant" roles, without any reference to or analysis of the indicia of "significant" role as set out in *Zhang* (when none of the indicia of "significant" role applied except perhaps some awareness of the scale of the operation);

52.5 Failing to acknowledge the sentencing Judge's reasons for finding Mr Philip had a lesser role, or to make their own assessment of Mr Philips against the "lesser role" indicia;

52.6 Finding that a six year starting point was not justified, when there were valid reasons for the Judge to adopt this starting point; and

52.7 Not applying principles of parity both in relation to Ms Hayman, whose offending was identical to Mr Philip's, and the other co-defendants (Mr Paulo, Mr Stone, and Mr Minns) who each received starting points well

below the band 5 entry point despite pleading guilty to offending involving band 5 quantities.

Zhang

53. This Court will be aware of the guideline judgment in *Zhang* and the bands set out in that case. Counsel does not propose to traverse them in detail. However, there are some statements of principle in *Zhang* that are particularly pertinent to this appeal.

54. The Court of Appeal in *Zhang* quoted, not once but three times in its decision, the requirement stated by this Court in *Hessell v R* that sentencing "must involve a full evaluation of the circumstances to achieve justice in the individual case".[22] The third reference is worth quoting in full:

> [120] First, we restate the Supreme Court's fundamental observation that sentencing must involve "a full evaluation of the circumstances to achieve justice in the individual case". That injunction calls for flexibility and discretion in setting sentences. *A guideline judgment is not supposed to alter that fundamental requirement.*

55. The Court of Appeal also said:

> [118] ... In particular, we confirm that the role played by the offender is an important consideration in fixing culpability and thus the stage one sentence starting point. Due regard to role enables sentencing judges to properly assess the seriousness of the conduct and the criminality involved, and thereby the culpability inherent in the offending, in the holistic manner required by *Taueki* and *Hessell.* It means that a more limited measure of engagement in criminal dealing deserves a less severe sentence than a significant or leading role. Role may result in an offender moving not only within a band — as currently happens or is supposed to happen under *Fatu* — *but also between bands*.

56. The Court (in the same paragraph) went on to explain its reasons for rejecting a "grid" approach, which would give roughly equal weight to quantity and role in setting the starting point:

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22 *Hessell v R* [2010] NZSC 135, [2011] 1 NZLR 607 at [38], quoted in *Zhang* at [104], [105], and [120].

> As already mentioned, it was suggested role could be formalised by adopting the United Kingdom Sentencing Council two grid matrix (using quantity and role category) discussed at [114]–[115] above. However, after significant debate, we decline to take that course because we consider it is likely to encourage a "tick box" approach to sentencing, *replacing one form of undue rigidity with another.*

57. Despite the repeated references in *Zhang* not only to the importance of role but also to flexibility, discretion, and the need to apply the Sentencing Act,[23] in the present case *Zhang* has been applied with undue rigidity by the Court of Appeal. Ultimately, every defendant must be sentenced based on an assessment of their actual culpability, and in accordance with ss 7, 8, 9 and 16 of the Sentencing Act 2002.

58. Importantly too for present purposes, the Court in *Zhang* said:

> [104] Quantity is valuable in assessing culpability, as this Court observed in *Fatu*, but it alone cannot determine culpability. The Crown accepts that that is so. Quantity is highly relevant to culpability, because it is an indicator of harm or potential harm to the community. *It may also be indicative of commerciality, which is deserving of greater denunciation*. But as the Crown accepts, there are other considerations that flow into the assessment of culpability on an objective basis, in setting a starting point under the first stage of sentencing under the *Taueki* model.

59. It is implicit in *Zhang* that a large quantity is generally presumed to be indicative of commerciality, and therefore greater culpability. This passage can be read as an acknowledgement that, where there is a band 5 quantity of methamphetamine but a complete absence of any suggestion of a monetary profit, a starting point below that band may be justified.

60. It is therefore submitted that whilst quantity remains "*an important consideration in fixing culpability and thus the stage one sentence starting point*" it is but one factor. This case highlights that there are many others. Whilst *Zhang* referred to stage one and stage two analysis there are cross-overs in the stage two analysis. Addiction, mental health, duress, and deprivation are also relevant in assessing the role of the offender. The

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23 *Zhang* at [58]-[65] and [134]-[135]

evidence of them based on reports assists the court in deciding several of the indicia of lesser role set out in *Zhang*: whether the role of the person was limited, whether there was pressure, whether they were motivated by their own or others' addiction, whether they were truly drivers or had another important role and whether their involvement was non-commercial.

Departure from SOF?

61. The Court of Appeal has assumed that the Judge "departed" or "differed" from the Summary of Facts,[24] when that is not the case.

62. The reasons for the difference between the original eight year starting point and the six year starting point actually imposed were clearly stated by the Judge. Her Honour had originally distinguished between Ms Hayman and Mr Philip primarily on the basis that Ms Hayman was motivated by addiction while Mr Philip was not known to be at that point. Her Honour had also noted that the age difference and fact Mr Philip was a member of the Mongrel Mob "might point" against Ms Hayman being the leader between them, but did not conclusively determine this.

63. Whether Mr Philip was addicted to methamphetamine was not the subject of comment either way in the SOF. Reports filed by the time of sentencing showed that he was in fact addicted. This removed what had been expressed as the primary basis for the distinction between him and Ms Hayman. This change in position was completed unrelated to either Mr McMillan's trial or the SoF.

64. The other matters, which had played a minor part (if any) in the Judge's original differentiation between Mr Philip and Ms Hayman, were simply the basis for an inference that the Judge had suggested *might be* available. Her Honour subsequently changed her mind about this, in part as a result of Mr McMillan's trial. This was not a departure from the SoF, which describes

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24 CA decision at [123] and [134].

Mr Philip and Ms Hayman as working together throughout and does not suggest either of them is the leader.

65. The Judge changed her view about the possibility that Mr Philip may have been the leader between himself and Ms Hayman for several reasons:[25]

65.1 The Crown's description of Mr Philip in closing as a "mule and hired muscle";

65.2 The fact his gang membership was only peripherally relevant and not the basis for his connection to Mr McMillan.

65.3 The fact that neither Mr Philip nor Ms Hayman was trusted to see the methamphetamine being loaded into the vehicles (this was implicit already in the SOF which describes another person loading methamphetamine into the secret compartment in the car at least in relation to charges 2-5)[26]

65.4 Mr Philip's limited contact with Mr James and limited knowledge of the details of the operation with Mr McMillan.

66. The possibility that Mr Philip may have been the leader between the two of them was only ever a matter of inference. The Judge was entitled to suggest that inference might be available on the materials available at the sentencing indication stage, but her Honour was also entitled to change her mind about it when more information became available. Neither the drawing of the inference nor the decision not to draw that inference involved any departure from the SoF. As noted, the SoF described them acting together and did not suggest Mr Philip was the leader.

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25 At [35].

26 19/12/18 CoA Casebook page 51 line 2; 16/1/19 page 52 line 15; 24/1/19 page 53 line 22; 12/3/19 (Taupo) page 58 (but Mr McMillan and Ms Hayman not driving the vehicle on that occasion).

67. The other reference to evidence in the trial was that Mr Philip "had no money or assets at the time of your arrest", which the Judge found supported the submission that Mr Philip was motivated by receiving methamphetamine to feed his addiction, not monetary gain. Again, this is entirely consistent with the SoF which does not suggest that Mr Philip did receive any financial gain. If he had been found with money or assets, this would have been recorded in the SoF.

Factual matters relied on by Court of Appeal

68. Because the Court of Appeal erred in assuming that the Judge departed from the SoF when in fact the Judge did not do so, the proposition that the Crown was not given sufficiently specific notice of that intention must also be in error. In any event, counsel for the Crown clearly understood what the Judge was proposing. Submissions filed for the Crown on 5 May 2021 record that "the Court has indicated that it now agrees with the Crown that Ms Hayman and this defendant had equivalent culpability for their joint offending,"[27] and proceeded to respond to that proposition.

69. The Court of Appeal, at para [139] of its decision, listed, and accepted uncritically, a number of "matters", raised for the first time by the Crown in that Court.

70. For the most part, these matters had no basis in the SoF. It was accordingly the Court of Appeal, not the High Court, that departed from the SoF. To do so on appeal when these matters had not been raised by the Crown in the High Court, and when a disputed facts hearing had never been sought, was in error.

71. For example:

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27 Further Supplementary Crown Sentencing Memorandum 5 May 2021 at [12].

71.1 the SoF alleged "at least five shipments", not eight. Mr Philip could not have been sentenced on the basis of eight shipments when this was not the allegation against him.

71.2 The SoF records that Mr McMillan was in Chile from 5 January 2019 to 21 February 2019, but also records that during that time "he regularly accessed the internet and was contactable".[28] There is no basis for the suggestion that Mr Philip was somehow acting independently of him during that time.

The SoF records that a Mr Skinnon flew from Auckland to Wellington at Mr James's direction and communicated with him – entirely independently of Mr Philip who he had no contact with.[29] There was also a Mr Millar who also flew to Wellington and met up with Stone who was driving McMillan's car. Millar then flew back to Auckland where he met James in a car park near Auckland airport.[30] Accordingly Mr Philip and Ms Hayman were not the only ones of Mr McMillan's associates to engage Mr James.

72. It was also incorrect to find that "inferentially" the Audi was paid for out of methamphetamine profits. The short point is that this was never alleged in the SoF, and the inference has no basis. The longer point is, as explained above, the car was in fact the end result of a Honda (purchased years earlier) being traded in for another vehicle which was faulty and subsequently exchanged for the Audi. The Audi was from 2006 and of very limited value – and not considered "worth restraining" by the Commissioner of Police.

73. Finally, Mr Philips involvement with the vehicle that was impounded in Taupō was minimal and less than other co-accused, as the SoF sets out. There is nothing in this point that suggests a greater degree of involvement than the Judge was already aware of from the SoF and from the trial.

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28 SoF at page 10, CoA Casebook at page 51.
29 SoF at page 15, CoA Casebook at page 56.
30 SoF at page 14, CoA Casebook at page 55.

74. Ultimately, for all of these reasons, the Court of Appeal erred in taking these matters into account. The factual basis for consideration of the sentence should be the factual basis in the SoF and as set out by the Sentencing Judge. Having presided over the five week trial, her Honour was entitled to make findings of general impression, but in any event, as noted, none of these findings actually departed from the SoF. Rather, the primary basis for the change in starting point was Mr Philip's addiction, which had nothing to do with the trial, and the other matter was simply a change of mind about a potential inference, which her Honour had not drawn conclusively to begin with.

75. It is ironic that the Court of Appeal criticised Justice Gwyn for supposedly departing from the SoF without giving sufficiently specific warning to the Crown, but then proceeded to accept and take into account factual matters that were not contained in the SoF and that were raised by the Crown only on appeal. The Court of Appeal's approach was contrary to the Crown's burden of proof in s 24 of the Sentencing Act and the process for resolving disputed facts in the same provision, and as a result was in error.

None of the indicia of "significant" role applied

76. Having accepted the matters raised by the Crown set out above, the Court of Appeal concluded that Mr Philip was on the cusp of "lesser" and "significant" role without any reference to or analysis of the indicia of either role categorisation as referred to in paragraph [126] of *Zhang*. This is illustrated by the table referred to in *Zhang* on the left and comments on behalf of the appellant on the right:

Significant	
1. Operational or management function in own operation or within a chain;	No. No operation or management function. Only drivers. Not in own operation or in a chain of operation or management.

Significant	
2. involves and/or directs others in the operation whether by pressure, influence, intimidation or reward	No. Did not involve or direct others. The only other participant was Minns. He travelled to Auckland separately in a Nissan vehicle. Philip went in another car. The drugs were placed into a secret compartment in Auckland into that Nissan vehicle. He was to return it to McMillan in wellington. That vehicle was stopped in Taupo. There was no evidence that Philip or Hayman received anything in relation to this offending. They were aware of that journey. No issue of intimidation or pressure
3. motivated solely or primarily by financial or other advantage, whether or not operating alone;	The only advantage was to receive methamphetamine. The fact that both of them operated together was by virtue of their relationship. There was no evidence of any other financial benefit other than the use of a 2006 Audi motor vehicle from the principal offender who was a car importer (which was put into Philip's name following the return of another car) The vehicle was not seized as proceeds of crime.
4. actual or expected commercial profit; and/or	No.

Significant	
5. some awareness and understanding of sale of operation	Yes. Some awareness. But the operation involved the sale of drugs throughout Auckland, the South Island and the transportation of the drugs by others. Appellant's only role was driver to and from Wellington. Millar and Skinnon were independent sources of supply to Wellington

Gwyn J's reasons for "lesser role" finding correct

77. In a similar vein, the Court of Appeal erred by not considering the indicia of "lesser role" or the Judge's reasons for adopting that categorisation.

78. The Judge had referred to the indicia in *Zhang* in finding that Mr Philip had a lesser role, finding specifically that he performed a limited function under direction, was motivated primarily by his own addiction, received limited or no financial gain, was paid in drugs to feed his own addiction or cash disproportionate to the quantity of drugs or risk involved, and had no influence on those above him in the chain.[31]

79. For an example Mr McMillan amassed what the Court of Appeal described as substantial assets consistent with earning very extensive profit. Some assets were obscured by being in the ownership of "associates".[32] In contrast the only asset of any value found on or under the control of the appellant was a 2006 motor vehicle which is no longer on the road and has a value of around $4,000.00. It was given to them by the principal offender (James) who is no longer in New Zealand. He was an importer of cars as a

31 Sentencing decision at [37].
32 Court of Appeal decision at [27].

front. They had originally exchanged a Honda for another car which was faulty. The 2006 Audi was a replacement for that car.

80. In relation to Mr Philip and Ms Hayman, there was no cash or any other items indicating an accumulation of wealth beyond their means. There is a CCTV footage shot in Auckland of Mr James giving Mr Philip $50.00 in petrol money before he left on one of the trips. The judge was right to conclude that there was little or no actual or expected financial gain other than the methamphetamine that they consumed.

81. The drugs that they were supplied for their own habits were disproportionate to the quantity and risks involved being point 6 of the lesser role indicia in *Zhang*. There was no commercial basis to their involvement. The sentencing judge had found the same assessment of the role of Ms Hayman his co-offender.

82. At the same paragraph as referring to role the Court of Appeal then referred to the sentencing judge's characterisation of the defendant as "*a mule and hired muscle*". At paragraph [139] the Court of Appeal referred to submissions by the Crown Solicitor, who had in Mr McMillan's trial argued and downplayed the role of Mr Philip, and then in the sentencing of Philip tried to change the argument and say that Philip played a role the Crown had not argued in the McMillan trial. The Judge would have none of this and rightly so. Unfortunately the Court of Appeal were persuaded otherwise.

83. It is submitted the Court of Appeal did not undertake a proper analysis of the individual components or examples of the table describing the roles in *Zhang*. Also, the sentencing judge had the considerable advantage of sentencing five co-offenders and conducting a five week trial where Mr McMillan's defence was that Mr Philip was the principal offender and Mr McMillan was an underling. The judge truly had all of the necessary information to make her own assessment as to role, and correctly categorised Mr Philip as having a "lesser" role in terms of *Zhang.*

Principled basis for 6 year start point

84. Justice Gwyn had adopted the six year starting point for Ms Hayman by reference to the appellant Ms Phillips in *Zhang*. Ms Phillips and her partner Mr Smith had driven from Auckland to Wellington on two occasions and supplied six kilograms of methamphetamine. She was also a "low level supplier in her own right". The Court of Appeal upheld a starting point of five years for the six kilograms and uplift of one year for her personal charges. In doing so the Court rejected the appellant's submission that the starting point had been "dictated by quantum".[33] The Court also observed that a starting point well below the entry point had been adopted because of "the very limited role played by Ms Phillips", and endorsed that approach.[34]

85. The decision in relation to Ms Phillips in *Zhang* is an application of the need for flexibility and discretion in setting the starting point that is emphasised throughout the decision.

86. The Judge in this case correctly identified that Ms Phillips was a more useful comparator than the cases relied on by the Crown, where starting points of between 11 and 15 years had been imposed on defendants who had travelled to New Zealand for the purpose of assisting the importation of class A drugs, and a more significant role.[35] It was entirely open to her Honour to make this finding.

87. In this case it is the combination of Mr Philip meeting the indicia of lesser role, and the additional factor of a complete absence of profit, that warrants a starting point below the band – particularly in light of the comment in *Zhang* that quantity may be indicative of commerciality.

88. It should also be noted that quantity was not the most useful indicator of culpability in this case for two other reasons. First, there is no suggestion

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33 *Zhang* at [217]

34 At [218].

35 At [40].

that Mr Philips knew at the time what the quantities were, as he did not see or handle the drugs himself.

89. Secondly, the six kilogram quantity was in a sense relatively arbitrary. The only amount that had been quantified was the two kilograms intercepted from the car impounded in Taupō – driven by Mr Minns and owned Mr Paulo. The proposition that the four trips that Mr Philips and Ms Hayman took to Wellington involved at least one kilogram each is simply an estimate. It is acknowledged that Mr Philip pleaded guilty to the six kilograms and there is no issue with that – the submission is simply that in these particular circumstances the quantity of the drug may assume less significance.

Parity

90. Although the six year starting point was justified on its own terms, it was also justified on a parity basis, with reference to not only Ms Hayman but also Mr Paulo, Mr Stone and Mr Minns.

91. There is a direct and compelling issue of parity with Ms Hayman. They acted together throughout, and there is no basis for the proposition that Mr Philip was more culpable. In fact the original Crown position at the sentencing indication stage was that both Mr Philip and Ms Hayman "had equivalent culpability for their offending, which is effectively identical".[36] The sentencing Judge was entirely correct to adopt the same starting point for both.

92. Ms Hayman also pleaded guilty to an additional charge of supplying methamphetamine on 18 October 2019 relating to the sending by courier of the drug to a Cromwell address not connected to a police operation.[37]

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[36] "Further supplementary crown sentencing memorandum" 5 May 2021 at [5] referring to their earlier position which had by that point changed.

[37] *Hayman* sentencing notes at [16].

93. The Court of Appeal in the present case recorded the Crown's submission that Ms Hayman's sentence was also manifestly inadequate but did not expressly record whether it was of the same view. The Court also referred to the Crown's "reasons" for not pursuing a sentence appeal against Ms Hayman, namely her two young children (who are also Mr Philip's children) and the fact she had no previous criminal convictions.[38]

94. The Court of Appeal then referred to authority that "a gross and unjustifiable disparity does not necessarily result in a co-offender receiving a reduction in sentence", and that "no greater adjustment is made than is required to protect the integrity of the criminal justice system".[39] However, these comments were made in the context of appellants seeking lesser sentences for reasons of parity, not in the context of Crown appeals. The approach is necessarily different in a Crown appeal, when the same Judge has sentenced a number of co-defendants as has done so in a consistent way.

95. There could not be a more compelling example of parity being required than two defendants who acted together and are alleged to have offended identically. Justice Gwyn was entirely justified in adopting the same starting point and ultimately (although on the basis of slightly different discounts) the same end sentence for Mr Philip as for Ms Hayman.

96. There is also an issue of parity with the other co-accused.

97. Mr Paulo was sentenced by Justice Cooke on 23 July 2020 to nine months' home detention.[40] He had pleaded guilty to a representative charge of supplying methamphetamine involving three separate factual aspects. The first was that he accompanied Mr McMillan on one occasion to retrieve a bundle of cash "in the tens of thousands" from a carpark in central Wellington.[41] The second was that the Nissan Tiida impounded in Taupō

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38 Court of Appeal decision at [146].

39 At [146].

40 *R v Paulo* [2020] NZHC 1797.

41 At [5].

(containing two kilograms of methamphetamine) was registered in Mr Paulo's name. Mr McMillan instructed him to get the car back from the Police. He agreed to do this, knowing that the vehicle was important to Mr McMillan's methamphetamine supply operation, but not knowing methamphetamine was in the vehicle. He then took various steps to arrange for the vehicle's release. The third aspect was drug utensils, GBL, and cannabis, located on his arrest.

98. The Judge found that a starting point based on the two kilogram quantity would result in a disproportionate sentence given the nature of his involvement. The Judge found that Mr Paulo did not have any knowledge of the quantities or scale of the activities,[42] but did infer that he knew there were drugs in the vehicle, which he was trying to retrieve by dishonest means.[43]

99. The Judge reasoned that the cash in the carpark might equate to around 30 grams of methamphetamine, and that that quantity was "much more proportionate to your normal role, and could be considered as a kind of proxy for quantity."[44] His Honour observed that, although in *Zhang* the Court of Appeal indicated that using money to approximate quantity was problematic, "it needs to be remembered that quantity is itself only a proxy for culpability and I only use it as a very approximate guide to the level of involvement and your culpability."[45] A three year starting point was adopted on that basis.

100. The reasoning in relation to Mr Paulo is exactly the kind of "flexibility and discretion" emphasised by the Court of Appeal in *Zhang*.

101. The position in relation to quantity for Mr Philip is not that different than the position for Mr Paulo. As noted above, Mr Philip did not handle the drugs himself and there is no suggestion he was aware of the specific

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42 At [20](b)
43 At [21].
44 At [22].
45 At [22].

quantities. The six kilograms is an extrapolation from the two kilograms intercepted in Taupō which Mr Philip had very limited involvement with (and far less involvement than Mr Paulo). Similar reasoning can be adopted by standing back and looking at Mr Philip's overall culpability.

102. Mr Minns and Mr Stone were sentenced by Justice Gwyn.

103. Mr Stone assisted Mr McMillan to retrieve cash or methamphetamine from the central Wellington carpark on a number of occasions, accompanied him to the airport twice (where Mr McMillan provide an associate with cash to be taken to Mr James in Auckland) and was the registered owner of one of the cars with a hidden compartment used to transport methamphetamine.[46] He was sentenced on the basis that his offending involved aiding the supply of two kilograms or more.[47]

104. Mr Stone had been given a sentencing indication on 9 November 2020 where the Crown sought a starting point of 10 years imprisonment. The Judge indicated five years, on the basis that the quantity involved was at least two kilograms and his culpability was between Mr Paulo and Ms Hayman.[48] The indication was rejected at the time.

105. Subsequently, a week before the trial against Mr Stone and Mr McMillan, Mr Stone pleaded guilty following an indication from the Crown that (as recorded subsequently by the Judge) "at sentencing, it would seek a recalibration (essentially, a downgrading) of Mr Stone's role in the offending, which would support a sentence less than imprisonment.[49] His plea of guilty was more than likely of some assistance to the Crown in the trial against Mr McMillan.

106. The SOF in respect of Mr Stone did not change between his sentencing indication and sentencing, except that a charge of possession of

46 *R v Stone* [2021] NZHC 636 at [5]-[8].
47 At [10].
48 *R v Stone* [2020] NZHC 2962 at [42] and [46].
49 This is recorded in Gwyn J's Minute of 19 March 2021 at [3].

methamphetamine for supply was amended to a charge of possession simpliciter. That charge related to 21.1 grams of methamphetamine found on his arrest.

107. The sentencing notes for Mr Stone record that the Crown had a "slightly different view" following Mr McMillan's trial and the evidence in the trial, and that the Crown accepted at that stage that he played a similar role to Mr Paulo.[50] At sentencing, the Judge adopted a starting point of three years six months, and reached an end sentence of home detention.

108. Mr Minns was sentenced at the same time as Ms Hayman, 26 March 2021.[51] The main aspect of his offending was driving the car that was impounded in Taupō and found to contain two kg of methamphetamine. He had also accompanied Ms Hayman and Mr Philip on an earlier trip to Auckland. Mr Minns had, like Ms Hayman, pleaded guilty following a sentencing indication. At sentencing, Justice Gwyn noted the sentences that had been imposed on the co-offenders. Her Honour found that Mr Minns had a lesser role, although did observe from the photo of his phone of the bags of cash totalling around $160,000 with Mr Philip's gang patch that he had some awareness of the scale of the operation. Bearing in mind parity, her Honour adopted a starting point of four years six months' imprisonment. The Judge reached and end sentence of two years' imprisonment, and recorded that he would be released on a time served basis.

109. Mr Philip's involvement and culpability is very similar to Mr Minns. They both transported methamphetamine from Auckland to Wellington in a sealed compartment of a vehicle. The only major difference is that for Mr Minns there was only one occasion whereas for Mr Philip there were four (plus the one where Mr Minns was stopped in Taupō). The six year starting point for Mr Philip appropriately recognised this degree of difference.

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[50] *R v Stone* [2021] NZHC 636 at [20].

[51] *R v Minns* [2021] NZHC 638.

110. Ultimately, both Justice Cooke in Paulo and Justice Gwyn in relation to Ms Hayman, Mr Stone and Mr Minns adopted an approach which was in accordance both with the decision of *Zhang* in relation to Ms Phillips, and with the principle expressed by this Court in *Hessell* and endorsed in *Zhang* that sentencing "must involve a full evaluation of the circumstances to achieve justice in the individual case".[52] Justice Gwyn was correct to take the same approach for Mr Philips as she had with the other co-accused. To have done otherwise would have offended against parity principles.

Discounts

Deprivation, addiction, and mental health

111. The High Court allowed a combined discount of 30 per cent for the combination of Mr Philip's "very difficult background, drug addiction issues, mental health issues, remorse, and prospects for rehabilitation".[53] There is no issue with the global approach the sentencing Judge adopted in relation to these matters.

112. However, the Court of Appeal appears to have treated the entire 30 per cent discount as being for Mr Philip's childhood trauma and intergenerational deprivation, and did not acknowledge that it was also for addiction, mental health, remorse, and rehabilitative prospects. Although there is of course significant overlap, both conceptually and factually, between issues of deprivation and trauma, and consequent mental health and addiction issues, these are each treated as distinct grounds for discounts in *Zhang*. Remorse and rehabilitative prospects have quite different conceptual underpinning and warrant separate consideration.

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[52] *Hessell v R* [2010] NZSC 135, [2011] 1 NZLR 607 at [38], quoted in *Zhang* at [104], [105], and [120].

[53] Sentencing decision at [58].

113. The s27 report shows a shocking upbringing, a helpful summary at the start of the report lists:[54]

- Disconnection from his birth father at an early stage;
- Parental neglect;
- Undiagnosed disorders which may include foetal alcohol spectrum disorder, attention deficit hyperactivity disorder and dyslexia;
- Exposure to violence as a child;
- Physical abuse by step-father and in State care;
- Sexual abuse by step-father;
- Unstable upbringing;
- Disconnection from culture;
- Poor physical health including throat cancer in remission;
- Drug abuse and addiction; and
- Unresolved trauma.

114. The report is based on information provided by the appellant, his father, his sister and the information before the court. His childhood involved sexual abuse by his step-father, physical abuse in State care in Dunedin, poverty and neglect – cultural and physical. He started sniffing glue at aged 8 or 9, smoking cannabis at aged 11 and later using methamphetamine.

115. The report explains that *"Drugs were used to blot out his past, support his sleep and calm him down"* – in effect a means of self-medication. He needed something and nothing else was available.[55] The report provides for bleak reading.

116. There is an undeniable and compelling link between the appellant's upbringing, his drug abuse, his membership of a gang, and his offending.

117. The report from John Duncan, the alcohol and drug clinician, was requested by the Court. Mr Duncan is an experience clinician in this field. He also

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54 Casebook page 97.

55 Casebook p98 para [2.2].

referred to Mr Philip's upbringing noting early exposure to substance abuse since late childhood and early teens.

118. He reported a positive goal of abstinence and reported that Mr Philip identified a need for significant support in achieving this. He had family support to do so. Mr Duncan reported that Mr Philip said he had been paid to be the driver with methamphetamine and that "it was the worst mistake he ever made".

119. Mr Duncan concluded that his use of methamphetamine was from his late twenties with use of inhalants commenced at age 9. He readily concluded that Mr Philip met the DSM V criteria for sever inhalant use disorder in sustained remission. His diagnosis was severe cannabis disorder, severe sedative/hypnotic/anxiolytic use disorder and stimulant use disorder. He also met the criteria for persistent gambling disorder.

120. He said that Mr Philip engaged well in the interview and was friendly and honest. He advised that Mr Philip said he would like to be able to abstain entirely. Mr Duncan stated Mr Philip was unable to achieve this of his own volition and identified that he would like to do a programme to support him in achieving this, believing that Mr Philip may receive a custodial sentence, he recommended he be referred to admission to the Drug Treatment Unit. A residential treatment facility was recommended.

121. On this basis, there was clearly a causal link between Mr Philip's addiction and his offending of the kind envisaged in *Zhang.*

122. The reference to "mental health" in the sentencing decision is likely a reference to the possibility of undiagnosed ADHD, PTSD and/or FASD referred to in the reports of Mr Duncan and Mr Tam,[56] and to the "flashbacks and low mood" that resulted from his traumatic childhood, causing him to use drugs to "block out memories".[57] All of these matters

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56 CoA Casebook page 94-96 and 108-110.
57 At 94.

were referred to earlier in the sentencing notes,[58] and were legitimately taken into account by the sentencing Judge.

Rehabilitative prospects

123. While discounts for matters such as deprivation, mental health and addiction are allowed on the basis that those factors have contributed to the offending, reducing moral blameworthiness and therefore reducing the defendant's culpability, the conceptual bases for discounts for both rehabilitative prospects and remorse are distinct.

124. Discounts for rehabilitative prospects before sentencing are not related to the defendant's culpability, but to their future risk. When rehabilitation has already occurred before sentencing, discounts on this basis recognise that several sentencing purposes have already been met. Rehabilitation and reintegration are of course purposes of sentencing in and of themselves.[59] In addition, rehabilitative programmes usually involve holding the offender accountable,[60] promoting a sense of responsibility,[61] and, by virtue of the fact that rehabilitated defendants are less likely to reoffend, protecting the community.[62] There is therefore less that the sentence itself needs to do.

125. In addition, of course, rehabilitation engages the principles that the least restrictive outcome must be imposed,[63] that the Court must take into account any particular circumstances of the offender that would mean a sentence would be disproportionately severe,[64] that the Court must take into account cultural background in imposing a sentence with a rehabilitative purpose,[65] and, potentially (although perhaps not in most

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58 Sentencing Notes at [15] and [18].
59 Section 7(1)(h)
60 Section 7(1)(a)
61 Section 7(1)(b)
62 Section 7(1)(h).
63 Section 8(g).
64 Section 8(h).
65 Section 8(i).

drug cases) that the Court must take into account any outcome of restorative justice processes.[66]

126. In *Zhang* the court encouraged sentencing Judges to adjourn sentencing to enable rehabilitation to occur: [67]

> Counsel and sentencing judges are encouraged to make greater use of the power in s25 of the Sentencing Act 2002 to adjourn sentencing to enable rehabilitation programmes to be undertaken. Use of that power is appropriate where independent evidence suggests the offending was caused by the factor(s) which the proposed programme is designed to target.

127. The Court of Appeal in *Zhang* also expressed the view that that completion of rehabilitative programmes would generally result in sentencing discounts.[68]

128. The Kahukura programme was targeted to address the appellant's drug abuse issues and was based at the Te Tapairu Marae. The programme was an 8 week residential programme and 6 weeks of subsequent wrap-around support involving 12 men who lived at the Marae. In attendance were drug and alcohol counsellors and other professionals.

129. The assessment report[69] stated that the appellant was *"motivated and engaged in every aspect of the programme, he spoke openly about his motivation and goal to be drug free and to be back into the workforce"*.

130. It stated that he consistently participated in group activities and was open to new learnings and tools. The participants were given a plan so that they could apply the plan to their daily lives. They were also educated in addiction processes. Then it stated he was ready to accept the challenge

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66 Section 8(j).

67 *Zhang* at [10](m) and [175]-[186].

68 At [184]: "It may well be that successful completion of a programme warrants a reduction in the length of the prison sentence that might otherwise have been imposed." And [185]: "Finally, we note the point that even if an offender does not complete the programme, valuable progress may still have been made and we agree with counsel that this should be carefully considered and acknowledged or rewarded as appropriate."

69 Casebook p 157.

to change. During the programme he had regular contact with his whanau and they were supportive of his changes. There was some interruption as a result of Covid during the programme. The conclusion was that he responded well to treatment.[70]

131. A discount was available to recognise not only Mr Philip's prospects of rehabilitation but the actual rehabilitation he had undertaken by the time of sentencing. Although it was open to the Judge to include this within the 30 per cent discount, a greater discount could have been allowed if this factor was considered separately.

Remorse

132. Remorse has a statutory basis in s 9(2)(f) of the Sentencing Act, and, where the Court accepts that it is genuine, is a distinct personal mitigating factor warranting its own discount. It "need not be extraordinary" to warrant a discount, but "tangible evidence" is required.[71]

133. Although only mentioned briefly,[72] the Judge accepted that Mr Philip's expression of remorse warranted recognition. Her Honour was correct to factor this in to the discount she allowed.

Summary regarding 30 per cent discount

134. In summary, there was ample evidence for the 30 per cent discount allowed by the judge. The turnaround in the appellant's attitude as assessed by reports and the judge was quite remarkable.

135. The only hiccup which may have affected the discount was a positive urine test for cannabis. The judge did express some concern about this but it did not affect the discount. Now the appellant has sought professional

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70 Casebook p 161.

71 *Moses v R* [2020] NZCA 296 at [24]. See also *Hessell* at [64].

72 Sentencing decision at [56]

specialist advice and has been prescribed medicinal cannabis as administered by an addiction specialist.[73]

136. The discount is not just an acknowledgement of the appellant's dysfunctional background but also provides him with credit for recognising his dysfunctional lifestyle, his remorse, the clear link between his addiction and the offending and his determination to attend rehabilitation against Crown opposition and his attendance and follow-up.

137. Accordingly, the Court of Appeal erred in finding that the discount was "generous". It was entirely justified, and deserved, on the material before the sentencing Judge. If the individual factors had been considered separately, the discount could have been even greater. Although the Court of Appeal did not overturn this discount, this point is significant because the Court then (inexplicably) used this discount to overturn the discount for the impact of sentencing on Mr Philip's young children.

Young children

138. This was dealt with at paragraphs [59] to [61] of the sentencing notes. This was the one discount that the Court of Appeal did not allow. It is referred to in paragraphs [150] to [153] of the judgment.

139. A comprehensive psychological report had been prepared by Dr Thomson while the appellant was on electronically monitored bail. The psychologist had earlier prepared a report for Ms Hayman for her sentencing. During the assessment of Ms Hayman, the psychologist also observed the interaction between the appellant and their son ▇▇▇ The report provided valuable information about the appellant's background. It said he was welcoming and hospitable to the psychologist and candid in the follow-up video call. ▇▇▇ had a secure attachment with both of his parents. The EM

[73] The specialist report indicates that medicinal cannabis assists in sleeping better, anxiety, problems with anger and a more settled mood. It was continued to be administered to him in the prison. His involvement with the clinic and addiction treatment commenced on 20 September 2021 and continues – see report

bail sentence enabled him to form a remarkable bond with his son. There is now an additional child, a male child, [redacted] born 1 August 2022.

140. In the report Dr Thomson stated:

> It was also reassuring to observe Mr Philip behave in a playful, unaffected manner despite my presence.

And further:

> There was an authenticity to his comments about his previous distain for parents talking proudly about their children and how he understands the motivation for that now. Mr Philip's approach to parenting seems in direct contrast to his previous experiences, which is to his credit.

He added:

> It seems reasonable to suggest that, if Mr Philip were to be in prison, [redacted] would experience a significant sense of loss and, more practically, the effect of that on Ms Hayman could have detrimental impact on her ability to provide the quality and stability of care she seems to provide currently.

141. Although he thought that the quality of care would continue if Mr Philip were imprisoned, he also considered that the separation would disrupt the strong attachment between them "*and perhaps inhibit Mr Philip's future capacity to reintegrate himself into the relationship after his release*".

142. Following his return to custody the appellant applied for compassionate bail which was then combined with an application for bail pending this appeal. The court granted the application for bail. [redacted] was born on the expected due date, 1 August 2022. At the time this appeal is heard [redacted] will be approaching six weeks. As Justice Gwyn observed in referring to the experienced psychologist's opinion the quality of the infant parent attachment is a powerful predictor of a child's social and emotional outcomes later in life. The child would be at a heightened risk into adulthood for poor health-related quality of life.

143. The discrete discount provided by the judge was fully justified. The evidence for it came from an experienced psychologist who had had a

home visit to Taihape from Wellington and follow-up audio visits with Mr Philip. His observations were clear. His opinion referred to by Justice Gwyn is uncontroversial. The imprisonment of a parent has a direct impact on the child.

144. Section 7 of the Sentencing Act 2002 refers to the purposes of sentencing as *"to assist in the offender's rehabilitation and integration"* (h). Section 8(i) states the court must take into account the offender's personal, family, whanau, community and cultural background in imposing a sentence or other means of dealing with the offender with a partly or wholly rehabilitative purpose.

145. Clearly the appellant's rehabilitation will be assisted by his presence within his loving whānau both in a wider context and within the household where he will be living with his two infant children supporting his partner and absorbing the advantages of parenthood in his rehabilitation. He clearly sees his connection and relationship with his children as motivation for his rehabilitation. Gwyn J gave Ms Hayman a 20% discount for the impact of imprisonment on her dependent child.

146. Justice Gwyn stated that the range in other cases had been 10-20%. In the sentencing of Ms Hayman, the judge referred to *Theodore v Police*, a decision of Justice Ellis in the High Court at Gisborne.[74]

147. In *Theodore* Justice Ellis at [38] refers to the English decision *R v Petherick*:[75]

> A criminal court ought to be informed about the domestic circumstances of the defendant or whether family life of others, especially children, will be affected it will take into consideration. It will ask whether the sentence contemplated is or is not a proportionate way of balancing such effect with the legitimate aims that sentencing must serve.
>
> ... It will be especially where the case stands on the cusp of custody that the balance is likely to be a fine one. In that kind of case the

74 *Theodore v Police* [2018] NZHC 2364,

75 *R v Petherick* [2012] EWCA Crim 2214 at [20] and [22] – [24].

> interference with the family life of one or more entirely innocent children can sometimes tip the scales and means that a custodial sentence otherwise proportionate may become disproportionate and ... in a case where custody cannot proportionately be avoided, the effect on children or other family members *might* (our emphasis) afford grounds for mitigating the length of the sentence but it may not do so. If it does it is quite clear that there could be no standard or normative adjustment or conventional reduction by way of percentage or otherwise. It is a factor which is infinitely variable in nature and must be trusted to the judgment of experienced judges.

148. In providing a discount of 10% there was no reason why a discount should not be provided to more than one person. The Judge provided half of the discount to Mr Philip than to Ms Hayman. If he did not have a leading role in parenting his children then it was undoubtedly significant. Definitely not lesser.

149. It is therefore submitted that the Court of Appeal was wrong to take away a 10% discount and was incorrect to describe the discount as "granting unwarranted additional leniency" to him.[76]

Time in custody

150. Following Mr Philip's arrest and his release on bail he was in custody on remand on these charges (and no others) at Rimutaka Prison for a period of six months.

151. If a defendant is sentenced to a term of imprisonment, then the period in custody on is accounted for by Corrections in calculating parole eligibility and the sentence expiry date. When a home detention sentence is imposed, there is no automatic deduction, so the Courts generally factor this in to the sentencing decision (although the methodology for this is inconsistent).[77]

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76 Court of Appeal decision at [152].

77 See the comprehensive discussion of the different approaches that have been taken, in *Mason v Police* [2022] NZHC 1845.

152. The question remains as to what relevance time in custody has in considering whether or not a term of imprisonment could be commuted to home detention, if the sentence is otherwise greater than two years. If this Court agrees with aspects of the Court of Appeal's approach, rather than endorsing and adopting the original approach of Justice Gwyn, this issue may become significant. Counsel submitted in the Court of Appeal that if the Court considered the discounts to be overly generous then the period in custody should be taken into account in determining whether to allow the appeal and impose imprisonment. The Court dismissed this submission.[78]

153. Section 82 of the Sentencing Act 2002 provides:

> In determining the *length* of any sentence of imprisonment to be imposed, the court must not take into account any part of the period during which the offender was on pre-sentence detention as defined in section 91 of the Parole Act 2002.
>
> (emphasis added).

154. This section exists for administrative reasons, because when a person is sentenced to imprisonment, time in custody is automatically deducted from the sentence by Corrections.

155. However, the section does not prevent the Court from taking into account time in custody in determining the *type* of sentence to be imposed.

156. If a deduction for time spent in custody would enable the Court to reach an end sentence of less than two years and therefore impose a sentence of home detention, then, it is submitted, it is open to the Court to allow such a discount. There is no reason in principle that such an approach is not available in appropriate circumstances. The approach of only ever considering time in custody *after* home detention has already been reached leads to the perverse result that extensive time on EM bail might bring a sentence within the range for home detention, while time in prison – which is obviously a much greater restriction on liberty – does not. This

[78] Court of Appeal decision at [154].

compounds existing disparities between defendants who are able to access EM bail and those who are imprisoned for very lengthy periods awaiting sentence.

157. Counsel acknowledges that 15A(1)(b) provides that home detention can only be imposed if "the court would otherwise sentence the offender to a short-term sentence of imprisonment". A very literal reading of that provision would support the proposition that a sentence otherwise greater than two years cannot be reduced for time in custody in order to reach a home detention sentence. However, the provision must be read purposively and against the context of the other provisions in the Sentencing Act, including s 16 which is discussed in more detail below.

158. Additionally, s 15A(1)(b) must be read against s 8 (particularly the requirements to impose the least restrictive outcome, and to take in to account personal circumstances rendering a particular sentence disproportionately severe), the fact that a number of sentencing purposes in s 9 will already have been achieved as a result of time in custody, the proposition from *Hessell* that sentencing ultimately requires individualised justice in all the circumstances, and the requirement in s 9 of NZBORA to not impose sentences that are disproportionately severe.

159. In light of those considerations, s 15A(1)(b) can be read as enabling consideration of home detention when the notional end sentence is two years or less imprisonment, even where that notional sentence has been reached after discounting for time in custody.

160. There is some authority for the proposition that time in custody can be taken into account in this way. In *Kidman v R* the Court of Appeal rejected an argument that a discount for time in custody required a particular

mathematical approach when converting a sentence to home detention, instead finding that it was discretionary and evaluative.[79] The Court said:[80]

> ... such an approach might, at least in some cases, operate to the disadvantage of convicted persons. For example, if a discretionary approach is retained, a judge may take time served into account in order to bring a person's end sentence down below two years so that home detention can be considered. The approach advocated by Mrs Hunt would prevent this.

161. Ultimately, the six months that Mr Philip spent in custody was probably the most important factor in the punitive and deterrent aspect of the sentencing. It should be recognised as such by this Court, if it is necessary in the sentencing calculation in order to reach an end sentence of home detention.

End sentence of home detention

162. Section 16 of the Sentencing Act provides:

> **16 Sentence of imprisonment**
>
> (1) When considering the imposition of a sentence of imprisonment for any particular offence, the court must have regard to the desirability of keeping offenders in the community as far as that is practicable and consonant with the safety of the community.
>
> (2) The court must not impose a sentence of imprisonment unless it is satisfied that,—
>
> (a) a sentence is being imposed for all or any of the purposes in section 7(1)(a) to (c), (e), (f), or (g); and
>
> (b) those purposes cannot be achieved by a sentence other than imprisonment; and
>
> (c) no other sentence would be consistent with the application of the principles in section 8 to the particular case.
>
> (3) This section is subject to any provision in this or any other enactment that—

79 *Kidman v R* [2011] NZCA 62 at [16].

80 At [15].

(a) provides a presumption in favour of or against imposing a sentence of imprisonment in relation to a particular offence; or

(b) requires a court to impose a sentence of imprisonment in relation to a particular offence.

163. The purposes referred to in subs 2(a) are holding the offender accountable, promoting a sense of responsibility, providing for the interest of the victim, denouncing the offending, deterrence, and community protection.

164. The Court of Appeal in *Zhang* confirmed that the presumption of imprisonment for Class A dealing offences can be displaced where the defendant has accepted responsibility for the offending by entering a guilty plea, and the sentencing Judge has been persuaded that the offender's real prospects of rehabilitation were sufficient to justify a sentence of home detention.[81] The Court in *Zhang* also referred to the prosecutorial discretion recently added to s 7(5), and reasoned that the amendment "indicates an increasing recognition that some aspects of offending need to be viewed through a therapeutic lens". The Court observed "that is particularly the case when addiction has contributed to the offending".[82]

165. As the Court of Appeal has recognised previously, home detention is "a significant sentence in its own right".[83]

166. The Judge in imposing home detention referred to Mr Philip's lack of strong connection to the Mongrel Mob, his absence of previous convictions for methamphetamine, support from his father, the "obvious benefits associated with you continuing to care for your son", the gains he had made in rehabilitation, his ongoing commitment to remaining free of methamphetamine, and his positive work prospects.[84] Her Honour said she was "optimistic" about his rehabilitative prospects, due to his demonstrated commitment to his family, his strong work ethic, his

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81 *Zhang* at [55].
82 At [56].
83 *Fairbrother v R* [2013] NZCA 340.
84 Sentencing notes at [68].

willingness to explore tikanga Māori and te Reo Māori although that was not easy for him, and that his whānau/family had demonstrated they would be there to support him.[85]

167. Mr Philip had at sentencing, and still has, the support not only of Ms Hayman, but her parents (who own the house they live in and live nearby themselves), his own father, his adult daughter, and his neighbour who offered him work.

168. Regardless of how the end sentence was reached, home detention was the correct outcome in this case, for all the reasons identified by Justice Gwyn. The Court of Appeal was wrong to overturn the home detention sentence and impose imprisonment.

169. Ultimately, sentencing is not a purely mathematical exercise. Although the *Taueki* methodology and guideline judgments can assist Judges to balance competing considerations in order to reach an end sentence in a reasoned way, they are not intended as a straightjacket, and cannot displace the provisions in the Sentencing Act (including s 16) or the fundamental requirement to "achieve justice in the individual case".[86]

170. In addition, the sentencing decision in this case is an example of s 27 of the Sentencing Act 2002 being used as intended. It is insufficient for the Courts to recognise the devastating impacts of colonisation and systemic deprivation of Māori by simply incarcerating them for slightly shorter periods of time. While that approach may be part of the solution, to embrace section 27 means that a more fundamental shift is required. Mr Philip was born into a life of neglect and abuse, and his difficulties as an adult are an entirely unsurprising consequence of that. A home detention sentence gives Mr Philip the opportunity to break the intergenerational cycle of trauma, disconnection, offending and incarceration, by enabling

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85 At [69].

86 *Hessell v R* [2010] NZSC 135, [2011] 1 NZLR 607 at [38], quoted in *Zhang* at [104], [105], and [120].

him to provide his children the love, support, and care that he himself never received.

Dated: 29 August 2022

....

P V Paino/E T Blincoe
Counsel for Appellant

TIMELINE – PHILIP v R

DATE	EVENT
12 December 2018	Charge
19 December 2018	Charge
16 January 2019	Charge
24 January 2019	Charge
12 March 2019	Charge Taupo
10 May 2019	Arrest date (RIC)
11 November 2019	Bail granted (Levin)
1 February 2021	Sentence Indication
9 February 2021	Pleas of guilty, AKL charges transferred
9 February 2021	Bail pending sentence granted
19 March 2021	A&D report
20 March 2021	Bail variation (Taihape)
24 March 2021	Cultural report (s28)
26 March 2021	Sentencing Hayman (partner)
14 April 2021	Sentencing adjourned
8 June 2021	Psychological report (Dr Thomson)
5 July 2021	Commences residential rehabilitation programme
13 September 2021	Sentencing Gwyn J
8 October 2021	SG appeal filed against sentence
23 February 2022	Appeal heard
11 April 2022	Appeal Decision
12 April 2022	Return to custody
20 July 2022	Leave to appeal granted
29 July 2022	Supreme Court bail granted

IN THE SUPREME COURT OF NEW ZEALAND
I TE KŌTI MANA NUI O AOTEAROA

SC 32/2022

BETWEEN	**JASON BRENDON PHILIP**
	Appellant
AND	**THE QUEEN**
	Respondent

SECTION 7 CERTIFICATE
Dated the 6th day of September 2022

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I, **PAUL VINCENT PAINO**, solicitor for the appellant in this matter, hereby certify that the submissions that have been made on behalf of the appellant do not include any suppressed information and that they are suitable for publication. This certificate relates to the chronology also filed with the submissions and the cases filed on behalf of the appellant.

Dated: 6 September 2022

P V Paino
Counsel for Appellant