IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI O AOTEAROA

SC 32/2022

JASON BRENT PHILIP
Appellant

v

THE QUEEN
Respondent

CROWN SUBMISSIONS ON SECOND APPEAL AGAINST SENTENCE
Dated: 5 September 2022

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MAY IT PLEASE THE COURT

1. Mr Philip pleaded guilty to five charges of possession of methamphetamine for supply[1] and two charges of possession of cannabis.[2] The methamphetamine charges related to his role in a methamphetamine distribution network and resulted from two police operations, Operation Superdry (Wellington) and Operation Maddale (Auckland).

2. In the High Court, Gwyn J gave Mr Philip a sentence indication with a starting point of eight years' imprisonment and a maximum end point of six years and two months' imprisonment.[3] The sentencing indication was given on the required summary of facts agreed on by the prosecutor and Mr Philip.[4]

3. At sentencing, the starting point was reduced to six years imprisonment.[5] Her Honour then reduced that by 67 per cent to give an end point of two years' imprisonment, which was then converted into 12 months' home detention.

4. The Solicitor-General appealed Mr Philip's sentence on the basis that it was manifestly inadequate and wrong in principle. The Court of Appeal allowed the appeal.[6] Mr Philip's sentence of 12 months' home detention was quashed and substituted with a sentence of two years and 11 months' imprisonment.

5. The Supreme Court has granted Mr Philip leave to appeal this sentence to the Supreme Court. The approved question is "whether the Court of Appeal was correct to allow the appeal by the Solicitor-General against the sentence imposed on Mr Philip in the High Court". The Court has asked counsel to focus on the approach taken by the Court of Appeal in this case to the guideline judgment of *Zhang v R*.[7]

Factual background — agreed summary of Facts

6. Mr Philip pleaded guilty to being involved in five delivery trips between December 2018 and March 2019 transporting, and in the final trip attempting to transport, methamphetamine from Auckland to Mr McMillan in Wellington.[8] His guilty pleas

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1 Misuse of Drugs Act 1975, s 6(1)(f) and (2)(a); and Crimes Act 1961, s 66.
2 Misuse of Drugs Act, s 7(1)(a) and (2).
3 *R v Philip* [2021] NZHC 42; Court of Appeal case on appeal [**CA COA**] at 73.
4 Criminal Procedure Act 2011, s 61(3)(a).
5 *R v Philip* [2021] NZHC 2393; CA COA at 170.
6 *McMillan v R* [2022] NZCA 128 [**Court of Appeal judgment**]; Supreme Court case on appeal [**SC COA**] at 10.
7 *Zhang v R* [2019] NZCA 507, [2019] 3 NZLR 648.
8 SOF at 7; CA COA at 48.

related to round trips between Wellington and Auckland on 10–12 December 2018, 19 December 2018, 15–16 January 2019 and 22–25 January 2019.[9] On the final trip in March 2019, two kilograms of methamphetamine was found by Police in Taupō following the delivery car being impounded after the driver, Mr Minns, drove while suspended on the trip back to Wellington.

7. Methamphetamine was transported in sophisticated hidden compartments inserted in two purpose-modified cars, initially a Mitsubishi and later a Nissan Tiida.[10] The compartments were capable of carrying up to two kilograms of methamphetamine at a time.

8. The methamphetamine in question was purchased by Mr McMillan from Andre James, who operated from a complex in Bentinck Street, Auckland. Mr McMillan came to an arrangement with Mr Philip – the father of his previous partner – to collect and make payments for the methamphetamine and to make arrangements to transport it back to Wellington.[11] There is a photo record of one of the occasions when Mr Philip was entrusted with a partial payment for the methamphetamine approximately $180,000 in cash.[12]

9. In all instances, Mr Philip was accompanied by his partner and co-offender, Ms Hayman.

10. On 30 January 2019, Mr Philip obtained an Audi vehicle from the Bentinck Street supplier. It was registered in Mr Philip's name later that day.[13]

11. In turn, Mr Philip and Ms Hayman enlisted one of their associates, Mr Minns, to drive the modified cars containing methamphetamine on at least two occasions.[14] Mr Minns was not known to either Mr McMillan or his supplier. When in Auckland Mr Philip would take over the modified car that was going to be used to transport the drug shipment down to Wellington and conduct the face-to-face dealings with Mr James or Mr James' associates.[15]

12. The first four methamphetamine charges[16] arose from Operation Maddale. The methamphetamine was concealed in cars driven by Mr Philip, Ms Hayman, and

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9 SOF at 8-13 and 16-18; CA COA at 49-54 and 57-59.
10 See SOF at 6, 21 and 29; CA COA at 47, 62 and 70.
11 SOF at 3; CA COA at 44.
12 SOF at 19; CA COA at 60.
13 SOF at 13; CA COA at 54.
14 SOF at 4; CA COA at 44.
15 SOF at 10-12 and 16-17; CA COA at 51-53 and 57-58.
16 See charging documents; CA COA at 16-23.

Mr Minns. Mr Philip and Ms Hayman would go to the Bentinck Street address to make payments for and to collect methamphetamine for transport down to Mr McMillan:

(a) On the first occasion, in December 2018, Mr Philip and Ms Hayman were provided with the keys to a BMW driven by Mr James. They each removed a cardboard box containing methamphetamine from the boot of the BMW and placed those in the modified Mitsubishi they were driving. Mr James was given a bag containing cash for the methamphetamine supplied.[17]

(b) On the next three occasions, between December 2018 and January 2019, Mr Philip and Ms Hayman brought the Mitsubishi to the Bentinck Street address and left it there.[18] Methamphetamine was placed by Mr James or his associates in the hidden compartment in the car. Cash for the methamphetamine was provided; on one occasion Mr Philip provided a backpack of cash directly,[19] and on the others, the cash was taken from the hidden compartment before being replaced with methamphetamine.[20] On the first trip involving Mr Minns, he did not go to the Bentinck Street address but was later given the Mitsubishi by Mr Philip and Ms Hayman to drive back down to Wellington.[21]

13. The fifth methamphetamine charge[22] arose from Operation Superdry. In March 2019, Mr Philip and Ms Hayman drove in their car, accompanying Mr Minns, driving the modified Nissan car, to Auckland to collect two kilograms of methamphetamine.[23] Mr Philip and Ms Hayman drove both cars up from Wellington; they collected Mr Minns in Palmerston North where he lived. It was on this occasion, while in Palmerston North, Mr Philip allowed Mr Minns to take a photograph of his (Mr Philip's) Mongrel Mob gang patch and approximately $180,000 of cash that was part payment for the methamphetamine to be purchased.[24]

14. As previously, the methamphetamine was concealed in a hidden compartment in the car which Mr Minns was to drive back to Wellington.[25] However, Mr Minns was stopped mid-journey for, stupidly, driving while suspended and the car was impounded in Taupō.

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17 SOF at 8-9; CA COA at 49-50.
18 SOF at 9-13; CA COA at 50-54.
19 SOF at 9; CA COA at 50.
20 SOF at 11-12; CA COA at 52-53.
21 SOF at 11-12; CA COA at 52-53.
22 See Crown Charge Notice; CA COA at 37.
23 SOF at 16; CA COA at 57.
24 SOF at 19; CA COA at 60.
25 SOF at 17; CA COA at 58.

He was arrested after small quantities of drugs were found on his person.[26] Ms Hayman made a booking at around midday for her and Mr Philip to fly to Queenstown from Auckland that evening.[27] After Mr Minns was bailed by Police in the afternoon, Mr Philip went to the Bentinck Street address and engaged in a heated argument with Mr James.[28] Mr Philip and Ms Hayman did not check in for their flight to Queenstown.

15. After obtaining a search warrant for the car, Police discovered two kilograms of methamphetamine concealed in the secret compartment.[29]

16. Police estimated a total of 4-8 kilograms of methamphetamine was transported to Wellington in the first four trips for which charges were brought, with the further two kilograms intercepted in Taupō — making 6 to 10 kilograms in total.[30] For the purposes of sentencing, Gwyn J in the High Court proceeded on the basis that six kilograms in total were transported.

17. The cannabis charges relate to two bags of cannabis found at Mr Philip and Ms Hayman's address, following termination of Operation Superdry, on 10 May 2019.[31] The first bag contained 28 grams and the second bag contained 10 grams. A police radio scanner was also located at the address. No methamphetamine or methamphetamine paraphernalia was found.

Decision under appeal

18. The Solicitor-General's appeal against Mr Philip's sentence was heard with the appeal of two of his co-offenders, Mr McMillan and Mr Taui.[32] The essence of the Solicitor-General's appeal was that home detention as an end sentence should not have been available for this offending by this offender. The maximum penalty for the offending is life imprisonment. Here, the end sentence of home detention was the consequence of Gwyn J adopting a starting point that was manifestly too low for an offender who came to an agreement with his daughter's then-partner — Mr McMillan — to arrange to transport at least six kilograms of methamphetamine to Wellington in five separate trips over four months.

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26 SOF at 27-18; CA COA at 58-59.
27 SOF at 18; CA COA at 59.
28 SOF at 19; CA COA at 60.
29 SOF at 21; CA COA at 62.
30 SOF at 27-28; CA COA at 68-69.
31 SOF at 29-30; CA COA at 70-71.
32 Court of Appeal judgment; SC COA at 10.

19. The Crown's essential submission was that the starting point should have been a minimum of eight years' imprisonment, as her Honour earlier indicated. This was generous to Mr Philip, whose own experienced counsel had submitted at the sentencing indication that the starting point should be nine years' imprisonment given his role and relative culpability to Ms Hayman. The eight year starting point indicated by Gwyn J reflected Mr Philip's role as evidenced in the summary of facts agreed to by the parties for the sentencing indication — which indication was then accepted by Mr Philip.

20. Reducing the starting point to align with Ms Hayman's starting point was in error. Ms Hayman's starting point of six years' imprisonment had been adopted by Gwyn J because she considered that *R v Phillips* (one of the appeals considered by the Court of Appeal in *Zhang*) was the most similar to Ms Hayman's situation. In *Phillips*, which is referred to further below, Ms Phillips accompanied her partner, Mr Smith, to Auckland on two occasions in March 2017 to supply a total of 6 kilograms of methamphetamine.[33] Ms Phillips was considered to have merely accompanied her partner out of a sense of loyalty and it was accepted that he would have offended without her participation.[34] On appeal, the Court of Appeal agreed with the starting point of five years' imprisonment.[35]

21. The Court of Appeal held that the Crown was given insufficient opportunity to contend for the sentencing analysis as agreed in the summary of facts.[36] This, coupled with the Court's view that there were grounds for the submission that the end sentence was manifestly inadequate, meant the Court went on to undertake its own sentencing analysis by reference to the guideline decision *Zhang v R*. Applying *Zhang*, the Court considered that Mr Philip's possession for supply of an agreed amount of six kilograms put him "well into" band 5.[37] The quantity of methamphetamine in a commercial operation remains the first determinant of an offender's sentence. It reflects the social harm and potential illicit gains to be made, and is highly relevant to culpability and the need for greater denunciation. Given that quantity, any reduction below the bottom of the band at 10 years would generally require involvement that falls in the lesser category.

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33 *Zhang*, above n 7, at [207]-[208] and *R v Phillips* [2018] NZHC 2119. Ms Phillips did engage in some of her own supplying of cannabis and methamphetamine to her own associates, leading to additional representative charges of supplying each drug.

34 *R v Phillips*, above n 33, at [10].

35 Uplifted by one year to account for the personal drug dealing charges.

36 Court of Appeal judgment, above n 6, at [134]-[136]; SC COA at 47.

37 At [138]; SC COA at 48.

22. In considering Mr Philip's role, the Court considered that Mr Philip's involvement could not justify a categorisation lower than the cusp between lesser and significant participation, even taking into account Mr Philip's addiction as a motivating factor for his offending.[38] The Court also considered that Mr Philip's gang involvement was not relevant to his offending, and therefore did not (or should not have) changed Gwyn J's analysis as to role.[39]

23. Taking all considerations into account, the Court of Appeal considered that absent an accepted sentence indication, it would be difficult to justify a starting point lower than nine years' imprisonment.[40] Based on the indication, the starting point was set at eight years' imprisonment.

24. The Court of Appeal held that the sentencing Court was not required to sentence Mr Philip at the same level as his co-offender and partner, Ms Hayman, and accepted the Crown's submission that Ms Hayman's sentence was also manifestly too low.[41] A disparity between sentences does not necessarily result in a co-offender receiving a reduction in sentence; the Court applies the principle that no greater adjustment is made than is required to protect the integrity of the criminal justice system. In this case, the Court held, upholding a manifestly inadequate sentence purely on the basis of parity would do more to diminish public confidence in the administration of justice.

25. Considering personal circumstances, the Court held that the 20 per cent credit for guilty pleas one week before trial should not be interfered with, given the complications with the trial process.[42] It was held that the s 27 report made a "compelling case" for a meaningful discount for Mr Philip's personal background, but the High Court's 30 per cent credit for this factor was "inarguably generous".[43] The Court did not alter that reduction, but held that a further 10 per cent reduction to take into account the impact that Mr Philip's imprisonment would have on his family could not be justified and amounted to "unwarranted additional leniency".[44]

26. Taking into account the time that Mr Philips spent on EM bail (adjusted for his breaches of bail conditions), the end sentence came to three years and six months'

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38 At [140]-[144]; SC COA at 49.
39 At [142]; SC COA at 49.
40 At [145]; SC COA at 50.
41 At [146]; SC COA at 50.
42 At [147]; SC COA at 50-51.
43 At [148]-[149]; SC COA at 51.
44 At [152]; SC COA at 52.

imprisonment.[45] The Court acknowledged the harsh effect that the appeal would have on Mr Philip, after he had started serving a home detention sentence, but considered this did not justify a different outcome.[46] Deducting the time Mr Philip had already served on home detention resulted in a final sentence of two years and 11 months' imprisonment.

THE LAW

The law applying to a second appeal against sentence

27. A second appeal against sentence is a rare occurrence. Leave is only granted where:[47]

(a) there is some important question of general principle arising; or

(b) there is plainly an appearance of a substantial miscarriage of justice.

28. This Court has noted that "appellate oversight of sentencing is the principal responsibility of the Court of Appeal".[48] There is no question of general principle arising — such as that in *Hessell*, which determined the appropriate approach to discount for guilty plea.[49] Rather, the Court has granted leave on the question of whether the Court of Appeal was correct to allow the Solicitor-General's appeal, with counsel asked to focus essentially on whether the Court has appropriately applied the guideline judgment of *Zhang* to Mr Philip's case. In other words, the issue on appeal is whether the Court of Appeal did its job correctly in applying that appellate oversight to sentencing.

29. Section 256 of the Criminal Procedure Act 2011 governs the powers of the Court on a second appeal against sentence:

> **256 Second appeal court to determine appeal**
> (1) A second appeal court must determine a second appeal under this subpart in accordance with this section.
> (2) The second appeal court must allow the appeal if satisfied that,—
> (a) for any reason, there is an error in the sentence imposed on conviction; and
> (b) a different sentence should be imposed.
> (3) The second appeal court must dismiss the appeal in any other case.

30. As with a first appeal, the appellate court must identify an error and then be satisfied that a different sentence "should be imposed". The appeal court does not simply

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45 At [153]; SC COA at 52.
46 At [155] ; SC COA at 52.
47 Senior Courts Act 2016, s 74(2); and see *Burdett v R* [2009] NZSC 114.
48 *King v R* [2016] NZSC 13 at [5].
49 *Hessell v R* [2010] NZSC 135, [2011] 1 NZLR 607.

substitute its own opinion for that of the original sentence. Only if there is an error of the requisite character will the appellate court form its own view of the appropriate sentence. In *R v Shipton* the Court of Appeal commented that:[50]

> It follows that to establish that an error was involved in the imposition of the sentence, it must be shown that in sentencing the trial Judge has indeed made an error whether intrinsically, or as a result of additional material submitted to the Court of Appeal on the appeal. The error principle was framed for a review of sentencing discretion for cases in which the sentence is unreasonable, or has not been fixed in the due and proper exercise of the Court's authority.

Sentencing for methamphetamine offending – *Zhang v R*

31. The approach to methamphetamine sentencing is set out in the Court of Appeal's guideline judgment *Zhang v R*.[51] As with all sentencings in New Zealand, the Court follows a two-step process:

(a) first, identifying the appropriate starting point based on the offending itself – the gravity of the offending and the culpability of the offender for it;

(b) second, adjusting that sentence — either upwards, downwards or both — to account for the aggravating and mitigating features of the offender themselves. This includes credit for any guilty plea.

Stage one: starting point

32. At stage one of sentencing, the function of *Zhang* is to promote consistency in sentencing levels by establishing five bands of starting points for sentences.[52] The Court of Appeal emphasised that the bands are not to be applied in a mechanistic way.[53] The bands are based primarily on the quantum of methamphetamine involved as "a reasonable proxy both for the social harm done by the drug and the illicit gains made from making, importing and selling it".[54] It is therefore an important consideration in fixing culpability at the first stage.

33. The Court also held that that the role played by an offender is an important consideration in fixing culpability. Focusing on the specific role undertaken by the defendant enables the sentencing judge to properly assess the seriousness of their conduct and the criminality involved, and thereby their culpability inherent in the

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50 *R v Shipton* [2007] 2 NZLR 218 (CA) at [139].
51 *Zhang,* above n 7.
52 At [47].
53 At [48].
54 At [103].

offending. Logically, a more limited measure of engagement in criminal dealing deserves a less severe sentence than a significant or leading role.[55] Role may result in moving within a band, as well as between bands, where the a person plays a diminished role in methamphetamine dealing or the offending involved "minimal participation"[56]

34. The *Zhang* bands are as follows:

Band one: < 5 grams	Community to 4 years
Band two: < 250 grams	2–9 years
Band three: < 500 grams	6–12 years
Band four: < 2 kilograms	8–16 years
Band five: > 2 kilograms	10 years to life

35. The Court referred to the United Kingdom Sentencing Council's descriptions of roles and relevant indicia as being "helpful" for sentencing Judges to take into account, noting that any discount for mitigating personal considerations is a matter for the second sentencing stage:[57]

55 At [118].
56 At [123].
57 At [126].

Role		
Lesser	**Significant**	**Leading**
1. Performs a limited function under direction;	1. Operational or management function in own operation or within a chain;	1. Directing or organising buying and selling on a commercial scale;
2. engaged by pressure, coercion, intimidation;	2. involves and/or directs others in the operation whether by pressure, influence, intimidation or reward;	2. substantial links to, and influence on, others in a chain;
3. involvement through naivety or exploitation;	3. motivated solely or primarily by financial or other advantage, whether or not operating alone;	3. close links to original source;
4. motivated solely or primarily by own addiction;	4. actual or expected commercial profit; and/or	4. expectation of substantial financial gain;
5. little or no actual or expected financial gain;	5. some awareness and understanding of scale of operation.	5. uses business as cover; and/or
6. paid in drugs to feed own addiction or cash significantly disproportionate to quantity of drugs or risks involved;		6. abuses a position of trust or responsibility
7. no influence on those above in a chain;		
8. little, if any, awareness or understanding of the scale of operation; and/or		
9. if own operation, solely or primarily for own or joint use on non-commercial basis.		

36. The Court considered that it was not necessary to explicitly include commerciality, links to organised crime and the exploitation of others as indicia, because they are sufficiently provided for and reflected in the three "role" categories identified above.[58] In other words, placement within the bands outlined at [34] above is to be a function of an assessment of quantity and role, thereby reflecting the seriousness of the offending and the culpability of the offender for it.

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58 At [128].

37. In terms of proof of role, the Court held that:[59]

> [127] We are conscious that role is a matter more likely to be known by the offender than the Crown. The prosecution may have difficulty establishing the exact nature of the offender's role. By virtue of s 24(2) of the Sentencing Act, the Crown has the burden of proving aggravating facts in dispute, and disproving mitigating facts in dispute, that relate to the offender's part in the offence. But this issue exists already inasmuch as this Court has already said in *Fatu* that where an offender fits within any particular band will also depend on the role played by the offender. *In practice the facts necessary to establish guilt often justify inferences about role, knowledge and gain. Where these inferences are sufficient to prove an aggravating fact, an evidential burden will move to the offender to displace the inference*. The Crown already faces the need to disprove mitigating role-related factual assertions advanced by offenders in Class A drug sentencing. We do not see this decision as altering that, simply as a consequence of reinforcing and enhancing the consideration of role in assessing culpability.

38. In this respect, the Crown notes that the process for agreeing, or disputing matters in, a summary of facts is outlined in r 5A.1 of the Criminal Procedure Rules 2012. The combined effect of r 5A.1 and s 24 of the Sentencing Act in this context is, the Crown submits, as follows:

(a) at the time a guilty plea is entered, the prosecutor must present the Court and the defendant with a summary of facts about the offence and the facts alleged against the defendant;

(b) the defendant must advise the court whether the summary of facts is accepted. If it is not, the defendant must identify the facts in dispute and the defendant and prosecutor must try to resolve the dispute. The Crown submits this must include the inferences that can legitimately be drawn from that summary as to role, knowledge and gain. If there is to be a dispute about those and that inference displaced, this should be raised at that stage;

(c) if the dispute is not resolved within 10 working days, the prosecutor and defendant must notify the court of that and seek an indication in accordance with s 24(2) of the Sentencing Act; and

(d) if the party wishes to rely on the disputed facts, then a disputed facts hearing is held — and that requires the parties to adduce evidence as to its existence. Either party may cross-examine any witness called by the other party at such a hearing. It is for the prosecutor to prove beyond reasonable doubt any

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59 *Zhang*, above n 7 (emphasis added).

aggravating fact, and negate beyond reasonable doubt any disputed mitigating fact raised by the defence.

Stage two: aggravating and mitigating factors of the offender

39. At the second stage, the Court of Appeal confirmed that personal mitigating and aggravating circumstances are not to be relegated simply because of the seriousness of the offending itself. Such circumstances are to be "weighed in the balance with the needs of deterrence, denunciation, accountability and public protection".[60] This is consistent with the approach taken in all sentencing exercises for any other offending.

40. The Court of Appeal noted that the following mitigating factors might be particularly germane to methamphetamine offending:

(a) addiction;

(b) mental health;

(c) duress or undue influence; and

(d) social, cultural and economic deprivation.

41. The Court went on to say:[61]

> [138] These considerations are relevant in three ways. The first is because each can impair the rational choice made to offend, and thereby diminish moral culpability. The second is that diminished opportunity to make a rational choice also diminishes the deterrent aspect of sentencing, both general and specific, as we have discussed already. The third is that some of these impairments alter the effect of a term of imprisonment on the individual offender and add to its severity. This third consideration is one of proportionality.

Presumption of imprisonment

42. Section 6(4) of the Misuse of Drugs Act provides:

> (4) Notwithstanding anything in Part 1 or section 39 or section 81 of the Sentencing Act 2002, where any person is convicted of an offence relating to a Class A controlled drug—
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> (a) against paragraph (c) or paragraph (f) of subsection (1); or
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> (b) against paragraph (a) or paragraph (b) of subsection (1) committed in circumstances indicating to the Judge or court an intention to offend against paragraph (c) of that subsection,—

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60 At [133].

61 *Zhang*, above n 7.

> the Judge or court shall impose a sentence of imprisonment (within the meaning of that Act) unless, having regard to the particular circumstances of the offence or of the offender, including the age of the offender if he is under 20 years of age, the Judge or court is of the opinion that the offender should not be so sentenced.

43. In *Zhang* the Court of Appeal noted that the presumption applies to end sentence, rather than starting point. Where there is a presumption of imprisonment for a particular type of offending, the "particular circumstances" required to displace that presumption must necessarily be exceptional. It must be something distinct or extraordinary from the usual or ordinary case— given that imprisonment is to be presumed in such cases. To strain or extend that discretion would be to negate Parliament's intention in creating the statutory presumption.

44. In *Zhang* the Court went on to say:[62]

> In (it has been said) relatively exceptional circumstances, the presumption for imprisonment may be displaced. Youth, for instance, is a material consideration. Similarly, realistic prospects of rehabilitation may displace the presumption. There is a significant body of cases in relation to the approach to be taken to the imposition of home detention in cases of Class A drug offending, given the existence of the presumption of imprisonment. In *R v Hill* this Court noted that sentences of home detention have usually been imposed in cases where the offender 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.

45. The issue of whether that presumption should have been given effect to does not, in the Crown's submission, arise here, because the Court of Appeal's decision was that the final sentence should have been three years' and six months' imprisonment (which was then reduced to two years and 11 months' imprisonment to take into account the home detention period served). It did not come down to the level of two years' imprisonment necessary to make home detention a consideration.[63]

CROWN SUBMISSIONS ON APPEAL

Starting point

46. In the Crown's submission, the Court of Appeal's approach to setting the starting point at nine years' imprisonment, reduced to eight, was an orthodox application of the *Zhang* principles.

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62 *Zhang*, above n 7, at [55]. Gwyn J referred to this section in holding home detention to be appropriate in Mr Philip's case.

63 Sentencing Act 2002, s 15A(1)(b).

Quantity

47. Relying on *Zhang*, the Court first noted the quantity of methamphetamine involved, commenting that:[64]

> The quantity of methamphetamine in a commercial operation remains the first determinant of an offender's sentence, it reflects both the social harm and the potential illicit gains made from dealing in the drug. Quantity is also highly relevant to culpability and can also be indicative of commerciality which requires greater denunciation.

48. At the outset, the Crown notes the submission on behalf of Mr Philip that as quantity is indicative of commerciality, which requires greater denunciation, then if there is an "absence of any suggestion of a monetary profit, a starting point below the band may be justified".[65] With respect, that proposition is not correct. As the passage above makes clear, commercial scale drug dealing, of itself, requires greater denunciation. Commerciality of course does not necessarily mean monetary profit — it is the exchange of goods and services. It is submitted that commerciality at this point refers to the operation itself – as the passage states "the potential illicit gains", and not the profit to an individual person. Where a large quantity of drugs is possessed for supply, it indicates a wide level of drug distribution and therefore (a) a large amount of harm to the community attaches and (b) it indicates this is being done regardless of that harm.[66] Suggesting that simply an absence of personal profit justifies going below the band is to conflate the assessment of quantity and that of role prematurely. Whether a person personally profits factors into the second stage of the stage one analysis-role— and personal profit is but one of the indicia of role. A "leader" of a commercial drug operation is still going to be considered highly culpable even if no profit is made (for example if the sale is prevented by a police operation or the purchasers fail to complete the payment).[67] As submitted further below, an operational level of involvement in a large scale commercial drug operation where a person has awareness of the scale of the operation is deserving of denunciation and deterrence, irrespective of what financial gain the person has ultimately derived from that involvement.

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64 Court of Appeal judgment, above n 6, at [138]; SC COA at 48. This principle has been reaffirmed in *Wan v R* [2020] NZCA 328 at [18].

65 Appellant submissions on second appeal at [59].

66 As cited by the Court of Appeal in *Zhang*, above n 7, at [80], the Ministry of Health has attempted to analyse the social harm associated with methamphetamine use through the "Drug Harm Index", which put the total social costs (in 2016) at $1,239,000 per kilogram. Six kilograms of methamphetamine gives rise to a high level of social harm.

67 It is noted that in *R v Fatu* [2006] 2 NZLR 72 (CA) at [26] the Court of Appeal held that the most helpful measure of culpability is the quantity of the drug involved rather than anticipated monetary yields given that prices vary and would often depend on availability. This was not something revisited by the Court of Appeal in *Zhang*.

49. The Court held that Mr Philip's possession of the agreed amount of six kilograms "put him well into band 5 of Zhang" and called "for a strong response in terms of deterrence, the promotion of accountability, and public protection".[68]

50. Six kilograms is, of course, three times the two kilogram entry point into band 5. Band 4 ends at two kilograms; anything above two kilograms falls within band 5. Starting points for band 5 begin at 10 years' imprisonment. The upper end of starting points for band 4 offending is 16 years' imprisonment. Although *Zhang* includes an overlap in lower and upper starting points as between bands 4 and 5, the Crown submits that given the quantum here is six kilograms, "well into band 5", the initial assessment of starting point should be higher than the bottom starting point for band 5 and certainly a good deal higher than the lower starting point for band 4. And although quantum is not the only factor which reflects an offender's culpability, orientating the starting point within the bands by reference to quantum is the clearest way to ensure fairness through broadly consistent sentencing. As *Zhang* noted:[69]

> At the first stage culpability for the offending, assessed objectively, is weighed, setting a starting point. Starting points almost inevitably will be higher when serious commercial Class A dealing is engaged. Consistency is important at this stage, so one case can be compared with another in future sentencing.

51. It is submitted for Mr Philip on appeal that quantity is "not the most useful indicator in this case" for two reasons — that there was "no suggestion he knew at the time what the quantities were" and "the six kilogram quantity was in a sense relatively arbitrary". This can be dealt with briefly:

(a) First, by agreeing the content of the summary of facts, and then pleading guilty to the charges, Mr Philip has acknowledged he possessed that quantity of drugs, for the purpose of supply, at the time he possessed it. There are numerous reasons, set out below, why it is clear he was aware of the scale of the operation and quantity of drugs he was involving himself with.[70]

(b) Second, six kilograms is not an arbitrary figure; it is the lowest end of the amount agreed to in the summary of facts. To the extent the assessed quantity is arbitrary it is a) conservative, and b) favours Mr Philip.[71] Had this been

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68 Court of Appeal judgment, above n 6, at [138], referring to *Zhang* at [103] and [104]; SC COA at 48.

69 *Zhang*, above n 7, at [134].

70 See below at [63].

71 The agreed SOF refers to an additional trip in February 2019 involving 2 kg, which was not the subject of a charge: SOF at 14; CA COA at 55. Gwyn J also found as a fact that Mr Philip had been

> challenged, the Crown would have proved, either at trial or as it did in Mr McMillan's disputed facts hearing, that the actual amount was more than six kilograms.[72]

52. Given the quantum, the Court of Appeal held that any reduction below the bottom of the band – 10 years' imprisonment – would generally require a 'lesser' role categorisation for the offending.[73] Again, in the Crown's submission this is entirely consistent with *Zhang***.** *Zhang* mandates that the bands set out, and then placement within those bands, are going to be a function of both quantity and role. A sentencing Judge must assess those factors and place the offending in the appropriate band. Of course, lesser involvement may well justify placement at the low end of the relevant band – and minimal involvement may justify placement below the relevant band for methamphetamine quantity. But in the Crown's submission, the Court of Appeal in *Zhang* was clear that the bands are intended to still have application to all three role descriptors — the bands do not operate or apply only if a person is considered to be have a "leading" or "significant" role in the operation. The Court of Appeal in *Zhang* stated:[74]

> Access to the lower sentence starting points may be expected only by those whose role is found to be lesser in degree, and where quantities are at the lower end of the relevant range. We record that although the new entry points are intended to encompass most cases of low culpability in setting a starting point, we do not exclude the possibility of a case involving *minimal participation* which might fall below even those entry points. The data in the schedule indicates two such cases historically. There will be other cases in the future, where this is necessary to do justice in a particular case. The *Phillips* appeal before us raises this very issue.

53. In other words, in a case where the level of methamphetamine is well within band 5, "lesser" participation and low culpability is intended to fall at the lower end of that band — the entry point of that band. Going below the band or the relevant entry point was not excluded by the Court in *Zhang*, but it was anticipated that would occur in a case involving *minimal participation*. The example given was Ms Phillips' case, where she was essentially the passenger in the car with her partner when they drove to Wellington on two occasions to supply at least six kilograms of methamphetamine. The Judge at sentencing observed that Ms Phillips was "clearly not the party taking a lead" in the supplies and accepted that she accompanied her partner out of a sense of loyalty.[75]

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involved in three trips in February 2019, transporting one kilogram of methamphetamine to Mr McMillan on each occasion: see *R v McMillan* [2021] NZHC 1993; SC COA at 136.

72 *R v McMillan*, above n 71, at [50]-[53].

73 Court of Appeal judgment, above n 6, at [138]; SC COA at 48.

74 *Zhang*, above n 7, at [123] (emphasis added).

75 *R v Phillips* [2018] NZHC 2119.

Significantly, there is no suggestion from the report of the Phillips case that Ms Phillips obtained any benefit from her participation in the offending[76] or did anything much other than accompany her partner as a "driving companion", such that her input in the offending could truly be described as "minimal".[77].

Role

54. In terms of role, the Crown submits that two points are important at the outset:

(a) First, the descriptions of role and relevant indicia as set out by the United Kingdom Sentencing Council Guidelines was intended to be "helpful" to a sentencing Judge.[78] But, the Court of Appeal did not adopt the "double axis approach" of the Sentencing Council — which requires addressing the offender's culpability (largely assessed through role) and the harm caused (largely assessed through quantity) and then fitting that within the sentencing levels provided for the type of drug involved.[79] In other words, the role criteria was intended to assist in that assessment of an offender's culpability without rigid adherence to the descriptors of role. That a "lesser" indicia might apply does not necessarily, overall, make an offender's role lesser and a starting point below the band applicable; that flexibility the Court of Appeal left open necessarily contemplates offenders falling on the cusp of role categories. Where the cusp is between significant and lesser roles it will result in a starting point towards the lower range of the relevant quantity band. In cases of minimal participation, such as *Phillips*, it can justify going down below the entry point of the applicable band.

(b) Second, there is a distinction — as there must be — between personal factors considered at stage one in setting the starting point, and those that are properly considered at stage two. As the Court of Appeal stated in *Zhang***,** "indicia 2, 3 and 4 for "lesser role" categorisation are descriptive of conduct. Any discount for associated mitigating personal considerations is a matter for the second

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76 See *Zhang*, above n 7, at [207]-[208]. The sentencing remarks at first instance note "Mr Smith received payment for his involvement, and the balance was then paid to his importer": *R v Phillips* [2018] NZHC 2119 at [7]. It does not reference any payment to her, other than that she would sometimes ask Mr Smith to obtain extra methamphetamine from his importer to supply to her own customers.

77 *Zhang*, above n 7, at [215].

78 At [10(f)] and [126].

79 At [10(f)] and [126].

sentencing stage".[80] In other words, addiction may be a personal mitigating factor at stage two, but to operate as a mitigating feature at stage one there must be evidence of a specific causative link — e.g., that the offending itself was "motivated solely or primarily by own addiction". In *Zhang* the Court gave the real life example of single mothers in Kawerau who were given free methamphetamine by gang members, became addicted, and subsequently sold methamphetamine to meet that addiction.[81] The culpability of the gang member who provided the free methamphetamine is considerably greater than the mother who may nonetheless have dealt a more significant quantity, given their respective roles.

55. Here, it is submitted the Court of Appeal correctly assessed Mr Philip's role and his culpability for the offending as being on the cusp of the significant and lesser roles categories. That assessment itself should be considered generous, given that Mr Philip's position through counsel in his sentencing indication submissions was that:[82]

(a) his role was in the "bottom part of the second category on the operation or management function of the chain referred to in … *Zhang*" and that he had a significant role, but "towards the lower end" of that classification;[83]

(b) he was "not in the third category" (being the lesser categorisation) and although Ms Hayman "fitted into that category that does not mean he applied pressure to her";[84]

(c) he acknowledged he was in a "role that was more involved than Hayman but it is to be remember that they were both together on all the trips, both shared driving";[85]

(d) there was "no evidence that Mr Philip received any substantial sums of cash or methamphetamine" but that, in terms of any sums of money, "clearly he would have received something but it was never much more than a relatively modest amount";[86] and

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80 At [126].
81 At [110].
82 Defence sentencing indication submissions dated 28 January 2021.
83 At [4].
84 At [11].
85 At [12].
86 At [13.5].

(e) in respect of addiction, there was nothing regarding Mr Philip having any addiction and although Ms Hayman did, he did not lead Ms Hayman into that as:[87]

> she was already addicted to methamphetamine when he met her. He tried to assist her overcome her addiction. This was during the operation and certainly afterwards when he stepped up and looked after the child while she went into rehabilitation.

56. Two months later, after the Alcohol and Drug Report and s 27 report had been prepared, it was submitted that the offending was motivated "solely or primarily by his own addiction and also by that of his partner's".[88] It was suggested there "does not appear to be any economic or financial benefit to [Mr Philip] or Ms Hayman in their offending"[89] and that "little, if any financial gain was obtained and what he received was totally disproportionate to what others gained".[90] Mr Philip self-reported being paid both in cash and methamphetamine in exchange for his involvement, but there was no evidence or assertion as to the precise extent of this (or lack thereof).[91]

57. It is now submitted on appeal that the motivation for offending was "almost exclusively the addiction to methamphetamine of himself and his partner"[92] and that the "only advantage was to receive methamphetamine". [93]

58. The changing landscape as between the sentencing indication, sentencing and now appeal stages, in the Crown's submission, highlights two things:

(a) First, the acknowledged difficulty in *Zhang* in the Crown being able to establish role, because matters like "motivation" for the offending and financial gain/advantage/profit from the offending are going to be better known to the offender. This is why, as the Court observed, in practice the prosecution is entitled to rely on inferences about knowledge, role and gain justified by the facts necessary to establish guilt. In a case such as this involving guilty pleas entered following a sentence indication given on an agreed summary of facts the prosecution and sentencing Judge are entitled to rely on justified inferences from the agreed facts. Where the inferences are sufficient to prove aggravating

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87 At [12].
88 Defence sentencing submissions dated 9 April 2021 at [21].
89 At [13].
90 At [21].
91 See Alcohol and drug report at 3; CA COA at 89; and PAC report at 2; CA COA at 117.
92 Appellant's submissions on second appeal at [21].
93 At [76].

facts, here the expectation of significant financial advantage proportionate to involvement and risk, an evidential burden moves to the offender to displace the justified inferences. Below we have addressed the inferences the Crown says are squarely available based on the summary of facts.

(b) Second, that evidential burden was not discharged in this case. As the Court of Appeal noted in *Zhang*:

> [148] Fifthly, we are more sympathetic to the Crown's second reservation. That was that any such discount should be based on persuasive evidence, as opposed to mere self-reporting. We agree. Inasmuch as a stage two discount for mitigating circumstances is engaged, the onus of proof (to the civil standard) lies on the offender to establish the extent and effect of addiction.

The appellant's submissions on appeal note that the Crown "did not challenge" the addiction as outlined in the alcohol and drug assessment report or the s 27 report. But, realistically, how could this be challenged? Importantly, such material is not evidence. It is increasingly part of the sentencing exercise but is not material that the Crown is ever realistically in a position to challenge, and nor would it be welcomed by sentencing courts if content of reports of this type became the subject of contested hearings, like disputed facts hearings. It can hardly be suggested that the report writers have not correctly recorded what Mr Philip has said. The challenge must be to the veracity of Mr Philip in saying it — but that cannot happen if he has not provided evidence in the form of a sworn affidavit and opened himself up to that challenge. This is why the Court of Appeal agreed that the onus of proof in establishing the "extent and effect of addiction" is on the defendant and must be done by "persuasive evidence" and not mere self-reporting.[94] In the Crown's submission, this means evidence in affidavit form.

59. That is exemplified in this case. It is accepted that the Court of Appeal accepted there were some aspects of Mr Philip's offending that might lend itself to the "lesser" criteria, namely the impact of addiction and motivation for offending.[95] But, on close scrutiny Mr Philip's self-reporting of his addiction and motivation for the offending is not consistent:

(a) In his Alcohol and Drug report, dated 19 March 2021, Mr Philip reported:

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94 See *Zhang,* above n 7, at [141] and [180]. See also *R v Young* [2016] SASCFC 102, (2016) 126 SASR 41 at [69] as cited by the Crown in *Zhang* at [141].

95 Although, even then, the Court of Appeal found this did not move his role truly into the "lesser" category — it remained on the cusp with significant given the other criteria engaged.

(i) he had been offered a job as a driver and been paid methamphetamine in return. He said he made no financial gain. He had become involved for a short period only before being arrested and it was the "worst mistake he ever made";[96]

(ii) at the time, things had been going well with his shearing business that he had just established and was reportedly going well just before he became associated with his co-accused, and he regretted his actions;[97]

(iii) he had been using methamphetamine from his late 20s through to the present time. He would used 5 to 6 grams for the first 10 years, but reported a slight tapering off over the past 10 years;[98]

(iv) he had a pattern of gambling, and usually gambled on poker machines or online on a regular basis, reporting a "pattern of persistent and problematic gambling behaviour".[99]

(b) In his s 27 cultural report dated 24 March 2021 Mr Philip reported:

(i) he remains a heavy cannabis user, and reported this to be his drug of choice;[100]

(ii) he also uses methamphetamine, having previously given it up but relapsing when his partner was using methamphetamine. He reported using methamphetamine to provide him with a sense of euphoria and blot out his past;[101]

(iii) prior to his arrest, he had set up his own business of shearing for lifestyle block owners, identifying a niche market;[102]

(iv) he and his partner "got persuaded into making quick money by being a drug courier".[103]

(c) In his PAC report dated 7 May 2021 Mr Philip reported:

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96 Alcohol and drug report at 3; CA COA at 89.
97 At 3; CA COA at 89.
98 At 5-6; CA COA at 91-92.
99 At 6; CA COA at 92.
100 Section 27 cultural report at [2.2]; CA COA at 98.
101 At [2.2] and [9.2]; CA COA at 98 and 104.
102 At [6.1]; CA COA at 102.
103 At [6.1]; CA COA at 102.

(i) he had been unable to meet the high cost of a methamphetamine habit when he was approached with an opportunity "too good to turn down". He said that the agreement of "cash and drugs, I thought, "what the f**k". I knew it was not good, but I still did it";[104]

(ii) he advised he had "always been a cannabis user, hated that shit (meaning methamphetamine) I'm not that type of person";[105]

(iii) he later contradicted himself by stating "I was using for a while (methamphetamine)" but considered himself to be abstinent and would refrain from further involvement with methamphetamine.[106]

(d) In the psychological report of Dr Duncan Thomson dated 8 June 2021 Mr Philip reported:

(i) he and his partner were asked to drive between Wellington and Auckland and "whilst they knew there was "something going on,", the payment in methamphetamine made it difficult to resist involving themselves";[107]

(ii) he had used methamphetamine periodically throughout his life. He had been abstinent from the drug after meeting Ms Hayman, from 2015 to 2017 but "resumed when he started driving supplies of methamphetamine to Auckland and it became easier to access";[108]

(iii) he said he would never give up drugs completely and appeared to suggest it could be possible for him to use methamphetamine with his friends, in moderation, in the future.[109]

60. Through these various reports, Mr Philip has acknowledged:

(a) things were in fact going well for him at the time of getting involved in the offending, having established a shearing business to address a gap in the market

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104 PAC report at 2; CA COA at 117.

105 At 4; CA COA at 119. This is consistent with the submission made in his sentencing indication submissions that he tried to help Ms Hayman overcome her pre-existing methamphetamine addiction when he met her: see [55(e)] above.

106 At 4; CA COA at 119.

107 Psychological assessment at 4; CA COA at 139.

108 At 4; CA COA at 139.

109 At 4; CA COA at 139.

— any drug addiction was clearly not impeding his ability to think clearly and make rational (and good) decisions;

(b) he was paid at least partly in cash for his involvement, and that he was motivated by the ability to make some "quick money";

(c) he recognised getting involved in the offending was wrong at the time but the advantages on offer — cash and methamphetamine — were too good to turn down; and

(d) his use of methamphetamine resumed *when he started offending* because he was given access to the drugs. In other words, his offending "retriggered" his addiction, as opposed to addiction triggering the offending.

61. This all serves to highlight and support the caution expressed by Court of Appeal about reliance on self-reporting. Had affidavit evidence been filed, this could of course been explored with him in cross-examination. What is clear, in the Crown's submission, is that there was no evidence to displace the inferences justifiably to be drawn from the agreed summary of facts as to Mr Philip's role, knowledge and gain.

62. Importantly, all criteria must be looked at — simply having an addiction or getting some methamphetamine in return for participation does not a lesser role make. The significance of addiction must be viewed against the other indicia of role – the effect of his addiction on his culpability was not comparable to offenders that are engaged through exploitation or intimidation, who traffic low level amounts commensurate with consumption. And, critically in the Crown's submission, his overall level of involvement in a commercial drug operation, about which he had information to give him considerable awareness of the scale of that operation, means his culpability remains high.

63. As the Court of Appeal found, the agreed summary of facts did not justify a finding of a role any lesser than the cusp of significant and lesser.[110] An analysis of all of the

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110 These are all borne out in the agreed summary of facts. To the extent that the Crown highlighted other facts disclosed in the evidence at Mr McMillan's trial and disputed facts hearing, this was merely in response to the fact that Gwyn J had indicated her view of Mr Philip's role had changed following hearing the evidence at trial — the Crown's rejoinder to this was that she would or should have had regard to all that evidence if that were the case, including the fact she found proved beyond reasonable doubt that there were eight trips involving Mr Philip. But in any event, this was not the basis on which the Court of Appeal considered Mr Philip's role was appropriately on the cusp of significant and lesser. That was due to what was contained in the agreed summary of facts.

lesser/significant role indicia as they apply in this case demonstrates the correctness of the Court of Appeal's role assessment:

(a) *function:* Mr Philip was heavily involved in the transportation of cash and at least six kilograms of methamphetamine for a sustained period (December 2018 to March 2019). This was not a one-off event.

(i) Mr Philip had an operational and managerial function in the chain. It is wrong to describe him as "the driver". He was akin to the transport operations manager. He managed the driver who was Mr Minns. Mr Philip's role was to distance the methamphetamine evidentially from Mr McMillan while it was being uplifted, paid for, and transported from Auckland to Wellington.[111] Moving the methamphetamine between Wellington and Auckland was an integral part of the operation but one that came with risk because potential for exposure. In doing this Mr Philip played a critical trusted lieutenant role for Mr McMillan, who, with his history of serious drug dealing, went to great lengths to conceal and distance himself from his drug dealing operation.

(ii) It was Mr Philip, not Ms Hayman, that held Mr McMillan's trust to oversee the transportation of the methamphetamine and cash. Mr Philip had a pre-existing relationship with Mr McMillan — Mr Philip knew Mr McMillan as his daughter's partner.[112] Mr Philip was also much more likely than Ms Hayman (a young woman with no criminal connections) to be of value as a protector of Mr McMillan's interests. And, in the Crown's submission, he was – he had a function as Mr McMillan's muscle should it be needed.[113]The Court of Appeal dealt with the submission that it was inconsistent for the Crown to contend Mr Philip's role was significant whilst also describing him in the closing at Mr McMillan's trial as the "mule and hired muscle". The Crown's position at Mr McMillan's trial was, of course, that it was Mr McMillan and not Mr Philip who was the leader of this Wellington operation – and that remains the case. But Mr Philip played a significant role in that operation. The Crown describing him as Mr McMillian's "mule and hired

111 SOF at 2; CA COA at 43.
112 SOF at 2; CA COA at 43.
113 See SOF at 19; CA COA at 60.

muscle" relative to Mr McMillan's role as the leader is not inconsistent with that — he was trusted by Mr McMillan with the important role of making payments for, collecting, and managing the transport to Wellington of the methamphetamine.

(b) *involvement of or with others in the drug operation:*

(i) Mr Philip was involved directing or influencing others in the operation. He involved Mr Minns as the driver of the mule car on more than one occasion.[114] It is highly significant, in the Crown's submission, that Mr Philip and Ms Hayman subcontracted some of their courier work to Mr Minns in order to keep some distance from the operation themselves. This demonstrates that they were aware of the risks involved – and this cuts squarely against a naivety of involvement purely to satisfy a methamphetamine addiction. They directed Mr Minns on matters such as when to travel to Auckland, and travelled in convoy with him.[115] But it was them, and not Mr Minns, who collected the methamphetamine from Bentinck Street. Mr Philip and Ms Hayman were the ones trusted to meet with the Auckland suppliers. Mr McMillan did not know Mr Minns until after he became involved.

(ii) Mr Philip's son was also involved in driving the mule car up to Auckland on one occasion.[116]

(iii) Mr Philip was able to perform his operational function even without Mr McMillan's direct instruction or oversight. Mr McMillan reposed significant trust in Mr Philip. He entrusted him with the January 2019 purchase, while he was overseas.[117] The Court of Appeal did not suggest that this meant Mr Philip was acting "independently" of Mr McMillan, as in, outside of his operation — he was undoubtedly carrying out this purchase for Mr McMillan's operation. But it is important, in the Crown's submission, that he was trusted to do this when Mr McMillan was not physically in the country to oversee matters or step in if things went awry (as it did later).

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114 SOF at 2 and 4; CA COA at 43 and 45.
115 SOF at 16; CA COA at 57.
116 SOF at 14; CA COA at 55.
117 SOF at 10-12; CA COA at 52-53.

(iv) When the car Mr Minns used for delivery was impounded in Taupō, Mr Philip was the one who confronted Mr James in Auckland on 12 March 2019.[118] He then met with Mr McMillan in Taupō on 16 March, when the group was deciding how to retrieve the impounded vehicle back from Police.[119] On 19 March, he drove in convoy to take Mr Minns back to Wellington to meet with Mr McMillan.[120] In other words, Mr Philip carried out a number of actions and played different roles within the methamphetamine syndicate, both to assist Mr McMillan and to ensure that their actions avoided detection. And, this involved direct engagement with those both above and below him in the chain.

(v) Mr Philip's role involved multiple interactions with Mr McMillan's Auckland suppliers. Mr Philp was both aware of and had close interactions with those above him in the chain. Although he perhaps did not have actual influence over them, he did try to exert some influence in respect of confronting Mr James – he was clearly was not intimidated, pressured or coerced by them.

(vi) Whether other associates of Mr McMillan's also engaged with Mr James is not really relevant to Mr Philip's culpability— the point is that Mr Philip was trusted to engage with Mr James on multiple occasions. In any event, those associates noted at [71.2] of the appellant's submissions on appeal are Mr James' associates, not Mr McMillan's.

(c) *awareness and understanding of scale:* Mr Philip must have known about the nature and scale of the operation:

(i) Mr McMillan operated his drug-dealing business in a sophisticated manner, including the use of encrypted telecommunications.[121] They used the "Signal" application to communicate,[122] and Police located five cell phones included an encrypted Blackberry in Mr Philip and Ms Hayman's Audi upon termination of the operation.[123]

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118 SOF at 19; CA COA at 60.
119 SOF at 21; CA COA at 62.
120 SOF at 25; CA COA at 66.
121 SOF at 4; CA COA at 45.
122 Both with Mr McMillan and with Mr Minns: SOF at 7 and 16; CA COA at 48 and 57.
123 SOF at 30; CA COA at 71.

(ii) Mr Philip and Ms Hayman completed multiple trips involving large amounts of methamphetamine. On at least one occasion they were directly involved in taking the methamphetamine from one car and putting it into their car to transport down. Mr Philip personally made payments of large amounts of cash on more than one occasion. It is not correct to suggest that neither were "trusted to see the methamphetamine"; they were well aware of the amount of methamphetamine they were transporting. Neither could be described as a mere mule/courier in the sense of a person who agrees to make a one-off delivery with an ignorance about the extent of what they are carrying.

(iii) Mr Philip allowed his Mongrel Mob patch to be pictured with $180,000 cash.[124] The photograph background was consistent with the garage at Mr Minns' home address. The reasonable inference is that this cash was part-payment for the two kilograms of methamphetamine that Mr Philip was charged with purchasing. It was clear to Mr Philip that this was a commercial distribution network. Even if he was only getting paid in methamphetamine (which is not accepted by the Crown – and not consistent with what Mr Philip himself has said), he was aware of and understood the commercial scale of the operation he was supporting from its sophisticated nature and from the amounts of cash he was handing over for the methamphetamine.

(d) *Motivation and advantages:*

(i) Nothing in the summary of facts suggests Mr Philip's involvement was *limited* to his addiction. Addiction may be a contributor, but at the scale of offending involved here, it is not feasible to see it as the sole motivator. It is true the summary does not refer explicitly to how Mr Philip and Ms Hayman were paid, nor the motivation for their involvement. Mr McMillan and his associates were careful to avoid police surveillance by using encrypted communications. As set out above, this is something the prosecution is often not privy to. But the facts set out in the summary of facts agreed on, in the Crown's submission, justify inferences about gain and are sufficient themselves,

124 SOF at 19; CA COA at 60.

in the absence of evidence to the contrary, to prove that Mr Philip's involvement in the offending was driven at least in part by gain. Mr Philip's involvement was necessary to mitigate Mr McMillan's risk of being caught. In turn, Mr Minns' involvement was necessary to mitigate the risk to Mr Philip of being caught. The reasonable inference to draw is that Mr Philip would not have taken the serious risks inherent in his involvement in Mr McMillan's drug dealing business without an appropriate level of reward.[125] He also must have had some ability to recompense Mr Minns for his involvement; Mr Philip's financial or other advantage must have been sufficient in order for him to subcontract the driving work to Mr Minns and still make something for himself.

(ii) As the Court of Appeal noted in *Zhang,*[126] to the extent that a complete absence of financial gain or motivation solely through addiction is suggested to be mitigating, the evidential burden is on the offender to establish that. Nothing in the agreed summary of facts provides such an evidential foundation. There is no evidence that would satisfy an "evidential onus" that Mr Philip did not receive an appropriate/proportionate level of reward for the risks he was taking in Mr McMillan's drug dealing operation. The self-report comments to the various report writers do not qualify as discharging an evidential burden in the sense in which that phrase is used in *Zhang*.[127] And, as outlined above, these are not internally consistent as to the motivation for the offending and advantages received.[128]

(iii) What the agreed summary does refer to is "Hayman and Philip's Audi" that was registered in Mr Philip's name on the day he took possession of it from Mr James..[129] It is a reasonable inference this this vehicle was part-payment for their work given their bank records demonstrated limited funds. There is no evidential basis for the submission that this vehicle was in fact obtained in exchange for a Honda or other vehicle. Ms Hayman was also able to book a flight to Queenstown from Auckland

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125 And, at the sentencing indication stage, he did not purport to do so – the submission was "there is no evidence of any sums of money that he received. Clearly he would have received something but it was never much more than a relatively modest amount": see [55(d)] above.

126 Discussed in the passage cited above at paragraph [37].

127 See comments above at [58] about the caveats on relying on self-report.

128 Above at [59].

129 SOF at 30; CA COA at 71.

last minute for her and Mr Philip whilst Mr Minns drove the mule car back to Wellington in March 2019;[130] there was clearly access to funds.

(iv) Any payments for the risk and role being carried by Mr Philip would not realistically be deposited by Mr McMillan into Mr Philip's bank account. The evidence from the agreed summary of facts is that Mr McMillan had access to large quantities of cash;[131] any payments to Mr Philip would have been in cash and, as such, are untraceable. It is noted that Mr Philip also reported a long-standing and serious gambling problem,[132] which may well contribute to having no identifiable money or assets at time of arrest.

64. To summarise:

Lesser	Significant
1. Performs a limited function under direction: no — operational function within the chain — see [1] in the significant criteria	**1. Operational or management function in own operation or within a chain**: yes — transport manager ;
2. engaged by pressure, coercion, intimidation: no — no evidence or suggestion of this	**2. involves and/or directs others in the operation whether by pressure, influence, intimidation or reward**: yes — involved Mr Minns as driver on more than on occasion, and directed him on his involvement. Mr Minns was not known to Mr McMillan. Mr Philip's son also drove the Nissan Tiida mule car up to Auckland on one occasion.
3. involvement through naivety or exploitation: no — no evidence of this — not naïve nor exploited, involvement with Mr McMillan independent of drug operation	**3. motivated solely or primarily by financial or other advantage, whether or not operating alone**: justified inferences to be drawn that advantages obtained proportionate to level of risk and role from the summary of facts; actual advantages: Audi car, sufficient funds to take short-notice trip to Queenstown
4. motivated solely or primarily by own addiction: self-reporting of addiction — but involvement far greater than that to be expected if motivated solely or primarily by addiction — particularly given importance of role to overall operation, involvement of others and awareness of scale	**4. actual or expected commercial profit**: no — accept no evidence of an expected share in the commercial profit

130 SOF at 18; CA COA at 59.
131 SOF at 28; CA COA at 69.
132 Alcohol and drug report at 6; CA COA at 92.

5. little or no actual or expected financial gain: no — no evidence that *no* financial gain expected — self-reported being paid in cash or understanding that he was to be paid in cash

6. paid in drugs to feed own addiction or cash significantly disproportionate to quantity of drugs or risks involved: no direct evidence of extent of payment — various suggestions of being paid in both cash and/or drugs — nothing to displace evidential burden arising from agreed summary of facts of obtaining some material advantage and that reward must have been considered proportionate to the risk being taken — see [3] in the significant criteria

7. no influence on those above in a chain: trusted associate of Mr McMillan, had involvement with those above in the chain and was not intimidated by them

8. little, if any, awareness or understanding of the scale of operation; no — see [5] in the significant criteria

5. some awareness and understanding of scale of operation: yes — must have been aware of the scale of operation given number of trips, methamphetamine involved, large cash payments, use of encrypted phones and "Signal" app, possession of Police scanner, engagement of others (Mr Minns) to distance self from risk

Appropriate starting point based on quantity and role

65. As required by *Zhang*, the Crown proved the facts — by way of the agreed summary of facts — necessary for the Court of Appeal to safely draw an inference about Mr Philip's role being, at the least, on the cusp between lesser and significant. As the Court of Appeal held: "The agreed summary of facts reflected participation at least on the cusp between lesser and significant categories of involvement".[133]

66. Following the *Zhang* bands, which were "intended to encompass most cases of low culpability"[134] in setting a starting point, the Crown submits that the starting point of nine years, reduced to eight years—which is two years below the "bottom" of band 5—was generous for offending of this type. There was 6 kilograms of methamphetamine involved and Mr Philip's culpability was far from the level of "minimal participation" which would favour a starting point below the bottom of the band.[135] Simply put, even

133 Court of Appeal judgment, above n 6, at [138]; SC COA at 48.
134 *Zhang*, above n 7, at [123].
135 At [123].

eight years' imprisonment – one year below what was submitted on his behalf at the sentencing indication stage – was lenient.

67. An important check on the leniency of the starting point was to check this against other broadly comparable sentencing decisions. As the Court of Appeal held, when considering the below cases, "absent an accepted sentence indication, it would be difficult to justify a starting point lower than nine years' imprisonment":[136]

(a) In *Faiyum v R,* Mr Faiyum assisted in importing five packages containing 3.2 kilograms of methamphetamine and 545 grams of cocaine. He picked up packages at delivery centres on behalf of the importers.[137] Mr Faiyum must have had some awareness of the operation given the number of packages and the different goods in which the drugs were concealed. It was not a one-off operation. However, Mr Faiyum was not directing others by influence or intimidation. Mr Faiyum had a drug addiction and had filed an affidavit starting that he was acting at the direction of others with whom he had become involved because of his drug-taking and drinking lifestyle — which was not challenged. The Court of Appeal held there was a degree of coercion, and that he was not entirely assisting in the operation to feed his addiction but nor was he entirely motivated by financial gain. The Court of Appeal assessed Mr Faiyum's role as between "lesser" and "significant" and held that a starting point of 10 years' imprisonment, the bottom of band five, was appropriate.[138]

(b) In *Singh v R*, Mr Singh was paid $10,000 to allow just under 4.5 kilograms of methamphetamine to be delivered to his address from the United States.[139] Mr Singh had no previous convictions and was deemed to hold a "lesser" role as he did not "have any idea of the quantities of methamphetamine involved".[140] He was engaged by fear because he was aware the person who asked him was a gang member and felt scared to back out, as well as needing the money because he was struggling financially. As a result, the appropriate starting point was below band five, eight years' imprisonment.

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136 Court of Appeal judgment, above n 6, at [145]; SC COA at 50.
137 *Faiyum v R* [2020] NZCA 523.
138 At [23].
139 *Singh v R* [2020] NZCA 211.
140 At [1].

(c) In *de Macedo v R* the appellant travelled to Auckland with 2.383 kilograms of cocaine hidden in the lining of his suitcase.[141] His role was held to be a lesser one — his role was linked to a number of the lesser criteria, and none in the significant or leading categories. He was considered to be a naïve and possibly vulnerable candidate for exploitation by others, involved only as a courier, conveying a substantial quantity of cocaine across the border into New Zealand. While this was a role critical to the success of the operation, his reward was simply the cost of his travel. The Court of Appeal adopted a starting point of 11 years.[142]

Parity

68. It was argued on appeal in the Court of Appeal for Mr Philip that was important to focus on parity with Ms Hayman's sentence. But in the Crown's submission, this focus is somewhat misplaced. The Crown's position was always that both were equally culpable and sought the same starting point — 14 years' imprisonment — for both. It was submitted that the analogy with *Phillips* was inapt. Justice Gwyn determined otherwise in setting Ms Hayman's sentence. But in any event, when it came to sentencing Mr Philip, Gwyn J said that she was "not adopting a lower starting point for [Mr Philip] solely out of a desire to achieve parity with Ms Hayman" but rather that, having heard the evidence at trial and considered Mr Philip's addiction issues, she came to the view that a six year starting point was appropriate for Mr Philip's also.[143] The Crown appealed Mr Philip's sentence on the basis that Gwyn J had erred in this conclusion, and this had led to a manifestly inadequate sentence for Mr Philip's offending. The focus for the Court of Appeal was, as it should have been, on Mr Philip's sentence – whether it was, as Gwyn J considered, appropriate to reflect his culpability.

69. It is therefore not truly relevant that Ms Hayman's sentence, whilst also considered by the Crown to be manifestly inadequate, was not also appealed. The fact is, it was not. That was a matter within the Solicitor-General's discretion, and there were reasons not to do so. Ms Hayman's personal circumstances meant that the Crown was realistic on the prospect of a successful appeal. She had a number of mitigating factors that Mr Philip did not, including a lack of any prior convictions — previous good character – and

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141 *de Macedo v R* [2020] NZCA 132.

142 While this starting point may be lesser now in light of the Court of Appeal's decision in *Cavallo v R* [2022] NZCA 276, this would be about 5 per cent lower – so about 10 years' imprisonment.

143 Sentencing notes at [42]; CA COA at 182-183.

had engaged in rehabilitation at an early stage.[144][145] The impact of her imprisonment on their first child, who was 10 months' old at the time of the sentencing indication, could also not be ignored.[146]

70. Even considering the matter in terms of parity with Ms Hayman's sentence, as the Court of Appeal noted, the remedy to a disparity is not to adjust another's sentence to a manifestly inadequate level.[147] The Crown is not aware of the authority for the proposition in the appellant's submissions that this does not apply equally in the case of a Solicitor-General's appeal;[148] to hold otherwise would be to place an unnecessary fetter on the Solicitor-General's discretion to bring an appeal in the first place. The Crown submission is that the Court of Appeal took the requirement for parity into account, identified the correct principles to be applied, and applied them.

71. In *R v K* the Court of Appeal commented:[149]

> Whilst it is vital for a sentencing Court to strive for parity in sentencing co-offenders (whether sentenced separately or together), parity will not be achieved by a simple measurement against a co-offender's culpability. Parity means treating like cases alike and others with due regard for relative differences. It is best achieved by sentencing each offender appropriately for his role in the overall offending, in light of any relevant antecedent and taking into account any aggravating or mitigating features personal to the offender.

72. In other words, parity is achieved by sentencing according to orthodox sentencing principles, applying the relevant guideline judgments or other comparable cases. The Crown's case in respect of both Mr Philip and Ms Hayman's sentencing, this was not done correctly and led to a manifestly inadequately sentence as a result.

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144 In this respect, the Crown notes the decision of the Court of Appeal of England and Wales in *Meanley v R* [2022] EWCA Crim 1065 which it was noted that "parity" must necessarily refer to overall culpability – which encompasses the circumstances of the offender themselves. In that case, where Mr Meansley was 16 and a half years' old and the other, Mr Parkes, 20 years old, the Court stated at [65]:

> We accept that Parkes played a lesser role overall, but as the judge noted, it was only just lesser, because Parkes was alongside the appellant in the car and encouraged him to shoot. But the crucially important point is that nearly four years of age separated the two. This was a "real difference": see Davies [21], cited at paragraph 56 above. The touchstone for the judge was to ensure that any disparity between them was a "fair reflection" of their age difference…

146 See below at [87]-[91]as to discussion of the discounts appropriate for impact of imprisonment on dependent children.

147 *R v Te Kaha* CA49/05, 5 July 2005 at [48].

148 Appellant submissions on second appeal at [94].

149 *R v K* (2003) 20 CRNZ 62 (CA) at [20].

73. At Ms Hayman's sentencing indication, Gwyn J considered that Ms Hayman's role was similar to that of Ms Phillips in the *Zhang* appeal – that she was essentially "merely following her partner".[150] But at the same time, her Honour considered that Ms Hayman's offending was "more serious" than *Singh v R* and "similar in seriousness" to that in *de Macedo*.[151] This led her Honour to conclude that there was a "range of starting points open".[152] But the difficulty with that conclusion is that *Phillips* a case that the Court of Appeal in *Zhang* specifically identified as being an example of "*minimal involvement*" — not simply playing a lesser role as in *Singh* and *de Macedo*. And, as her Honour later considered, both Mr Philip and Ms Hayman in fact played similar roles and neither could be considered the leader — the analogy with *Phillips* was therefore inapt because Ms Hayman and Mr Philip could not both be "merely following [their] partner" as they carried out their transport organiser and payment delivery role in the drug operation.

74. The crux is that if Mr Philip is also considered to be one of the cases of "minimal involvement", it is difficult to comprehend the level of additional involvement that would necessary to take it out of that category. The Crown submission is that this was plainly not offending at the extremely low level — minimal involvement — contemplated by the Court of Appeal in *Zhang*. The solution for the error was not to compound that with a further error in setting Mr Philip's starting point far too low for his culpability. The focus ought to have been, as it was in the Court of Appeal, on properly assessing Mr Philip's role and adopting an appropriate starting point applying *Zhang*.

75. Moreover, when considering parity, Ms Hayman was not the only co-offender. There were a number of other offenders sentenced for their roles in this operation. Critically:

(a) Mr Minns was sentenced only for his involvement in one of the delivery trips— the final one in March 2019 — which involved the two kilograms of methamphetamine.[153] He performed a limited role under direction — the direction of Mr Philip (and Ms Hayman). He was considered to have been motivated primarily by his addiction but had some awareness of the scale of the operation (because of the photograph involving the cash and Mr Philip's gang patch). He was considered to be "at the higher end of the lesser category". A

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150 *R v Hayman* [2020] NZHC 2866 at [18(a)] and [19]; SC COA at 72-73.
151 Both of which are set out above at [67]
152 *R v Hayman* [2020] NZHC 2866 at [20]; SC COA at 73.
153 *R v Minns* [2021] NZHC 638; SC COA at 122.

starting point of four and a half years' imprisonment was adopted. It cannot be said Mr Philip's involvement and culpability is "very similar" to Mr Minns' — Mr Philip was the one who involved and directed Mr Minns. Mr Philip was involved in many more trips and three times the amount of methamphetamine. Mr Minns was not trusted to deal with the cash, or with the Auckland suppliers. He had no relationship with Mr McMillan.

(b) Mr Paulo was sentenced on one charge of supplying methamphetamine as a party.[154] This was a representative charge that encompassed his involvement in a covert exchange of methamphetamine for cash at a carpark in Wellington (where Mr McMillan collected the methamphetamine), in recovering the Nissan Tiida with the 2 kg of methamphetamine from Taupō Police, and then drug supply materials found at his address. Mr Paulo was instructed to collect the vehicle from impoundment in Taupō and return it to Wellington. It was accepted by the Crown that he had "no knowledge of the quantity of drugs stored in the vehicle". Justice Cooke accepted he had a more limited role – the car was in his name but others drove it, and he was only called on to retrieve it because he was the registered owner. His Honour noted that "it is not suggested that you had any knowledge in terms of the quantities or scale of the activities" and characterised him as "a functionary", although still "played a role of significance".[155] A three year starting point was adopted.

(c) Mr Stone was sentenced on the basis that his offending involved aiding the supply of two kilograms of methamphetamine. Mr Stone's role was to carry out tasks such as driving him around and managing Mr McMillan's money, and was also the registered owner of the Mitsubishi Lancer mule car. He drove Mr McMillan to the carpark to complete the covert drug transactions, and accompanied Mr McMillan to the airport on two occasions where Mr McMillan provide cash to Mr James' associates. Justice Gwyn found Mr Stone fell within a lesser role – the area that gave her pause for thought was what awareness and understanding he had of the scale of Mr McMillan's operation, as "that is the one factor that might put you into a higher category".[156] She ultimately considered he had some knowledge of aspects of the business but "may not

154 *R v Paulo* [2020] NZHC 1797.
155 At [24].
156 *R v Stone* [2021] NZHC 636 at [27].

have been fully aware of the scale", and adopted a starting point of three years and six months' imprisonment.[157]

(d) Mr Taui was found to be involved in purchasing a total of 1.524 kilograms of methamphetamine from Mr McMillan — which placed him into band 4 of *Zhang*. His role was at the upper end of significant.[158] He had an operational function in his own operation. He was financially motivated — although the Judge held not "solely" or even "primarily", given addiction issues — but received commercial profit. He was held to have had some awareness and understanding of the scale of Mr McMillan's operation, given the quantities of methamphetamine he was buying. Mr Taui received a starting point of 12 years' imprisonment, which was upheld on appeal.[159] But in doing so, the Court of Appeal commented:[160]

> [84] We acknowledge a potentially concerning gap between the 12-year starting point for Mr Taui and six years for Mr Philip. The Crown's appeal against Mr Philip's sentence is addressed below. As noted above at [33]–[34] an overly lenient sentence for one co-defendant does not necessarily afford a ground for revisiting another co-defendant's sentence that is otherwise within range …

(e) Mr McMillan received a starting point of 17 years' imprisonment.[161] This was based on a quantity of 10.37 kilograms of methamphetamine[162] and a leading role in the organisation. Mr McMillan's offending clearly required a much higher starting point. But, this still factors into where Mr Philip should sit as the person tasked and trusted by Mr McMillan as carrying out a vital operational requirement of the drug operation.

Personal circumstances

76. At the second stage of the sentencing exercise, the Court of Appeal:

(a) found the 20 per cent credit for guilty plea should not be interfered with, given the circumstances of its entry;

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157 At [31]-[32].

158 *R v Taui* [2021] NZHC 2123; SC COA at 105.

159 At [31].

160 Court of Appeal judgment, above n 6; SC COA at 33.

161 *R v McMillan* [2021] NZHC 2118; SC COA at 92.

162 This is 4.37 kg more than the amount Mr Philip was sentenced on. However, by the time Gwyn J sentenced Mr Philip her Honour had given the disputed facts judgment in which she found there were seven trips between 10 December 2018 and 21 February 2019, each involving Mr Philip and Ms Hayman, and each involving one kilogram of methamphetamine: *R v McMillan* [2021] NZHC 1993 at [37], [45]-[53] and [57]; SC COA at 147-151.

(b) considered the 30 per cent reduction given for Mr Philip's social and economic deprivation, leading to dependence on drugs, was "inarguably generous". 30 per cent is the upper end of the discount available for such factors, with 15 per cent more usual when a causal link is made out between offending and a seriously disadvantaged personal background;[163]

(c) held the further 10 per cent credit for the fact of having (soon to be) two young children was not justified given the generous discount for Mr Philip's own personal circumstances;[164] and

(d) did not alter the credit for time spent on EM bail of six months, given that although Mr Philip had been on this for some 22 months, he breached that bail by consuming cannabis on more than one occasion.[165]

77. In the Crown's submission, the Court of Appeal was correct to find the discounts given inarguably generous and contributing to what was then a manifestly inadequate sentence. As with uplifts for personal aggravating circumstances, there needs to be a level of proportionality in providing discount for personal mitigating circumstances. That is, the overall sentence must reflect the balance both of what the offender has done and who that person is, their background and previous life experience. As the Court of Appeal put it in *Moses*:[166]

> [9] The authorities recognise that uplifts and discounts for personal circumstances should also be proportional. This principle is seen most clearly in cases about uplifts for previous convictions, but it also applies to discounts. So, for example, in *Taylor v R* this Court held that an uplift "must bear some reasonable relationship or proportionality to the starting point". This ensures that end sentences retain an appropriate degree of proportionality, in the offender's circumstances, to the harm done and the culpability of the offending.

78. That is, the second stage allows for consideration and reflection of other principles and purposes of sentencing that focus on rehabilitation and reintegration of the offender. But, this does not come wholly at the expense of needing to also reflect the principles and purposes applicable at the first stage – accountability, responsibility, denunciation, deterrence. And, when the offending itself is involvement in a significant commercial drug-dealing operation, those factors cannot and should not be readily discounted. As the Court of Appeal noted in *Zhang:*[167]

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163 Court of Appeal judgment, above n 6, at [148]-[149]; SC COA at 51.
164 At [152]; SC COA at 52.
165 At [153]; SC COA at 52.
166 *Moses v R* [2020] NZCA 296.
167 *Zhang*, above 7, at [134] (citations omitted).

> At the second stage, a substantial measure of discretion is vested in the sentencing judge to mitigate the starting point for personal circumstances that mean applying the starting point would be inconsistent with s 7(h) — the rehabilitation and reintegration of offenders — and the considerations expressed in the latter part of s 8.

The discounts afforded in the Court of Appeal were appropriate

79. The two primary discounts at issue are:

(a) The 30 per cent given for personal circumstances – as set out in the cultural report – was inarguably generous; and

(b) No credit should have been given for the fact of having two children, particularly on account of the generous credit already given for personal circumstances.

Personal circumstances – 30 per cent credit

80. The Court of Appeal was correct to consider that 30 per cent was at the top end of the range of discounts for personal circumstances. In *Solicitor-General v Heta*, Whata J in the High Court commented:[168]

> [63] Nor is there a clear unifying principle for applying discounts for deprivation. Rather, personal circumstances discounts tend to be informed by a multiplicity of overlapping factors, including deprivation, trauma, youth, drug and alcohol abuse, and mental health issues. "Deprivation" is in many cases difficult to separate from these other factors because it is associated with and explanatory of them. What is tolerably clear, is that larger discounts tend to rely on identifying linkages between personal circumstances and the offending and thus the moral culpability of the offender. Mercy is another apparent reason. The countervailing sentencing factors, where applicable, then curb the extent of any discount.

81. In *Heta* Whata J upheld the 30 per cent discount — albeit this encompassed personal trauma, capacity to rehabilitate along with the presence of systemic deprivation in Ms Heta's life and the link between that and her offending. In *Moses v R* the Court of Appeal concluded that there was a connection between the appellant's social and cultural background and her offending which was "sufficiently proximate to mitigate culpability to a degree".[169] The appellant also had prospects of rehabilitation which merited recognition. The Court increased the discount to 15 per cent for those two factors.

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168 *Solicitor-General v Heta* [2018] NZHC 2453, [2019] 2 NZLR 241.

169 *Moses v R* [2020] NZCA 296, [2020] 3 NZLR 583 at [70].

82. As noted above, the Crown's submission is that 30 per cent here was, as the Court of Appeal said, "inarguably generous".[170] As the Court of Appeal noted in *Zhang*,[171] factors such as addiction, mental health difficulties, and social, economic and cultural deprivation may be considered mitigating because:

(a) they can impair the rational choice made to offend, and thereby diminish moral culpability;

(b) diminished opportunity to make a rational choice also diminishes the deterrent aspect of sentencing, both general and specific; and

(c) some of these impairments alter the effect of a term of imprisonment on the individual offender and add to its severity. This third consideration is one of proportionality.

83. The Court of Appeal was aware that the discount was a global discount for all of Mr Philip's personal circumstances — not just his childhood trauma and deprivation. It was clear that the Court noted that this had led to drug use, and that overall this merited some discount — just not 30 per cent. But even then, the Court of Appeal did not disturb that finding.

84. Regarding the suggestion that "distinct" discounts could have in fact been given for addiction and mental health, the Crown notes:

(a) the evidence as to his addiction and the link with the offending is not entirely clear or consistent, as set out above;

(b) Mr Philip's background and addiction issues really only factor into the first of these — that a link can be seen between those personal circumstances and the "rational choice to offend", thereby diminishing moral culpability. But that, the Crown's submission, does not wholly explain Mr Philip's involvement in a significant commercial drug operation. Addiction might have been the "catalyst" for the offending — but equally, he already had a personal association with Mr McMillan. There is nothing to suggest that the extent of Mr Philip's addiction was so severe it impaired his ability to exercise rational choice about

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170 Court of Appeal judgment, above n 6, at [149]; SC COA at 51. The usual range of discounts for s 27 reports and personal circumstances is between 10 and 20 per cent: see for example *Campbell v R* [2020] NZCA 356; *Gray v R* [2020] NZCA 548; *Yelengwee Yonkwa-Dingom v R* [2021] NZCA 603; and *Tipene v R* [2021] NZCA 565.

171 And set out above at [40]-[41].

the scale of his offending. He did not get involved with Mr McMillan because of his addiction, nor his gang-membership, and even on Mr Philip's own self-reporting it was not simply addiction that led him to participate in the drug operation. The scale of involvement was significant and Mr Philip carried out a number of actions in support of the operation as a whole, including engaging others and taking action when the operation was in jeopardy. He was able to rationally distance himself from the risk involved in the organisation by engaging Mr Minns; and

(c) the "mental health issues" are only suggestions from the s 27 report writer that these "might" be present. It does not appear there has been any formal diagnosis of these, despite Mr Philip having met with a psychologist.

85. In the Crown's submission, these all cut against the rationale for allowing a significant discount for addiction. Moreover, as Whata J noted in *Heta*, countervailing sentencing factors, where applicable, must curb the extent of any discount. In the Crown's submission, the commerciality of the offending means both specific and general deterrence remain highly applicable sentencing factors.

86. It is submitted on appeal that additional discount should have been given for rehabilitative prospects and remorse. These points can be dealt with succinctly:

(a) the rehabilitation undertaken was factored into the discount for EM bail. That discount was tempered by the fact that this bail was also breached through the consumption of cannabis. In the Crown's submission, Mr Philip's rehabilitation prospects going forward do not merit a separate discount; and

(b) although Mr Philip wrote a letter to the Judge apologising for his actions,[172] it is difficult to see this as a "tangible" expression of remorse. The letter demonstrates that he clearly regrets the "bad choices" he has made and the fact that he was worried about how that would affect his son as a result. The closest this comes to an expression of genuine insight into his actions and remorse for them is that he had "never once thought of the consequences to come or the harm I have brought upon society until recently". In the Crown's submission, this falls well short of a "tangible" expression of remorse that warrants an additional and discrete discount at sentencing.

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172 CA COA at 153.

Impact on child – 10 per cent

87. In terms of the impact of a sentence on the children of an offender, this is of course a factor that may be taken into account in considering an offender's personal circumstances.[173] But the weight to be accorded to that factor depends entirely on the circumstances, including the type of offending and the circumstances of the child or children.[174] Distress and hardship to dependants are, unfortunately, almost inevitable consequences of serious criminal offending.[175] In *Campbell v R* the Court of Appeal gave a five per cent discount in a case of serious drug offending for the effect on the children of a woman who was "the primary caregiver for her children, a devoted mother and a stable presence in her children's lives".[176] Their father was in prison, serving a 14 year and seven month term of imprisonment for involvement in the same drug-related offending.

88. In *Mau v R* it was held, citing *Campbell*, that:[177]

> [36] Hardship to an offender's family can attract recognition in the form of a (generally modest) discount at sentencing if an offender's imprisonment is unduly depriving their family of a reliable source of support.

89. The Court of Appeal there declined any discount, noting that whilst he had five children with his partner, one of whom had a rare and incurable genetic disorder, the appellant was also subject to a protection order in favour of his partner and the children. Although he had been providing some support for the family at the time of the offending, including looking after his daughter on the day of the offence, there was an "insufficient basis to conclude that Mr Mau's imprisonment is unduly depriving his family of a reliable source of support".

90. Here, whilst there will undoubtedly be an impact on Mr Philip's children because of his imprisonment, that impact is not to a level of "undue deprivation" of a reliable source of support such as to warrant discount. The impact on Mr Philip and his child owing to

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173 Section 8(h) of the Sentencing Act 2002 specifically requires the court to "take into account any particular circumstances of the offender that mean that a sentence or other means of dealing with the offender that would otherwise be appropriate would, in the particular instance, be disproportionately severe".

174 In this case, the effect of Gwyn J's sentence is that there would not have been an impact on his children, because he was not sentenced to imprisonment. In cases where credit has been given under this head, it has been used to reduce the impact on the child by reducing the sentence of imprisonment.

175 *Fukofuka v R* [2019] NZCA 290 at [47].

176 *Campbell v R* [2020] NZCA 356 at [42]-[45].

177 *Mau v R* [2021] NZCA 106.

imprisonment is not unique. To give discount here would be to suggest that every offender who is also a parent would be entitled to discount.

91. Moreover, any discount would be at the extremely modest level – it is not the same level of deprivation as in *Campbell*, in which five per cent was held to be appropriate. As the Court of Appeal held, that modest discount was more than accommodated for in the inarguably generous 30 per cent for Mr Philip's other personal circumstances.

92. Ultimately, the critical point is that reduction for mitigating factors must bear a level of proportionality to the starting point — because the sentence must, at the end of the day, appropriately reflect the culpability inherent in the offending. Applying discrete discounts at particular levels or percentages for each mitigating factor runs the risk of double-counting and of creating an overall reduction of sentence that is too high. At the end of the sentencing process, the Court must stand back and ensure the end sentence is appropriate having regard to the circumstances of the case. In the Crown submission, this is what the Court of Appeal has done, and did not err in that assessment.

Time spent in custody

93. Finally, in respect of the suggestion that credit should be given for time spent in custody, the Crown notes that this argument was correctly dismissed by the Court of Appeal. This argument runs squarely into s 82 of the Sentencing Act 2002. It is well-established that time spent in custody on remand cannot be taken into account in determining the length of a sentence of imprisonment. In *Chong v R* Mander J recently dealt with an argument similar to that advanced here, and stated:[178]

> I do not accept that a sentencing court can, as a matter of course, simply credit an offender with time spent on custodial remand in order to reduce a sentence to one of a short-term sentence of imprisonment to enable it to consider a sentence of home detention. Whether an offender is potentially in sight of receiving a short-term sentence of imprisonment or whether home detention is way beyond their reach should make no difference to the operation of s 82 and its complementary provision in the Parole Act. As Simon France J explained in *Longman v Police*:
>
> > [10] In terms of the timing when this matter is to be considered, s 82 of the Sentencing Act and s 90 of the Parole Act 2002 amount to a legislative direction that a court is to disregard time served where the ultimate sentence is imprisonment. Logically, therefore, consideration of credit for time served only arises once a decision is reached that the sentence will be home detention. At that point the Court is freed from the legislative constraint because the time is no longer automatically credited.

178 *Chong v R* [2022] NZHC 869 at [36] (citations omitted).

94. A sentencing court cannot look to home detention as an option *unless* they would otherwise sentence the person to a short-term sentence of imprisonment.[179] In other words, when dealing with offending that warrants a starting point of a term of imprisonment, "type" of sentence only becomes a question once "length" of sentence has been answered. To shorten the length of the term of imprisonment by reference to time spent in custody to get to that point falls foul of s 82 of the Sentencing Act.

95. There is no disparity between those who are remanded in custody and those on EM bail pending trial or sentence (if discount is given for EM bail) because:

(a) if the end sentence is one of imprisonment for two years or less, time spent in custody on remand will count as them having served their short-term sentence (so it may well be a situation of time-served, or close to it);

(b) if the sentence one of more than two years' imprisonment, then their time on remand will count as having served part of that sentence, and their parole eligibility date calculated accordingly; and

(c) if home detention is (legitimately) able to be imposed, then time spent in custody will be credited to reduce that home detention sentence; s 82 no longer applies.

Certification

96. These submissions do not contain, to the best of counsel's knowledge, any information that is suppressed.

DATED at Wellington this 5th day of September 2022

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G J Burston/J E Mildenhall/K L Kensington
Crown Counsel

179 Sentencing Act, s 15A.

RESPONDENT CHRONOLOGY

DATE	EVENT
12 December 2018	Charge
19 December 2018	Charge
16 January 2019	Charge
24 January 2019	Charge
12 March 2019	Charge Taupō
10 May 2019	Arrest date (remand in custody)
8 August 2019	District Court case review hearing
3 October 2019	Further case review hearing in District Court
11 November 2019	Bail granted (Levin)
21 November 2019	Protocol determination made – transfer to High Court
4 February 2020	High Court Case review hearing – trial date 9 February 2021 confirmed
25 June 2020	Further High Court Case review hearing. Trial callover scheduled for 14 August 2020
28 July 2020	Pre-trial hearings involving other defendants
30 July 2020	Minute of Simon France J setting down further pre-trial hearing and timetabling any notices of objection to Crown evidence to be filed
13 August 2020	Trial callover vacated
1 October 2020	Ms Hayman seeks sentencing indication
30 October 2020	Sentencing indication for Ms Hayman
10 November 2020	Mr McMillan seeks sentencing indication
16 December 2020	Mr McMillan sentencing indication given
19 January 2021	Mr Philip seeks sentencing indication
1 February 2021	Sentence Indication
9 February 2021	Pleas of guilty, AKL charges transferred, bail pending sentencing granted Sentencing date 24 March 2021

DATE	EVENT
15 February 2021	Mr McMillan jury trial commences
15 March 2021	Mr McMillan jury trial ends
16 March 2021	Alcohol and drug report
16 March 2021	Defence request for sentencing to be adjourned
17 March 2021	Sentencing adjourned to 14 April 2021
20 March 2021	Bail variation (Taihape)
24 March 2021	Cultural report (s27)
26 March 2021	Sentencing for Ms Hayman (partner)
14 April 2021	Sentencing adjourned to 13 May 2021 as PAC report unavailable
12 May 2021	Application to adjourn sentencing to attend residential rehabilitation
13 May 2021	Sentencing adjourned to 8 June 2021 to allow Crown more time to respond to application and rehabilitation proposal
8 June 2021	Psychological report (Dr Thomson)
8 June 2021	Hearing on adjournment application
10 June 2021	Sentencing adjourned for Mr Philip to attend residential rehabilitation
5 July 2021	Commences residential rehabilitation programme
15 July 2021	Mr McMillan disputed facts hearing
4 August 2021	Mr McMillan disputed facts judgment
13 September 2021	Sentencing Gwyn J
8 October 2021	Solicitor-General appeal against sentence filed Appeal to be set down for 2 November 2021 with co-offender appeals
22 October 2021	Appeal hearing adjourned to 9 November 2021
1 November 2021	Application for adjournment of appeal hearing made by Mr Philip
2 November 2021	Application for adjournment granted
23 February 2022	Appeal heard
11 April 2022	Appeal decision

DATE	EVENT
12 April 2022	Return to custody
12 April 2022	Application for leave to appeal filed
20 July 2022	Leave to appeal granted
29 July 2022	Supreme Court bail granted