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

SC 40/2020
SC 64/2020
[2021] NZSC Trans 4

WILLIAM ALLAN BERKLAND

Appellant in SC 40/2020

BROWNIE JOSEPH HARDING

Appellant in SC 64/2020

v

THE QUEEN

Respondent

TE HUNGA RŌIA o AOTEAROA – THE MĀORI LAW SOCIETY

(Intervener)

Hearing:	23-24 March 2021
Coram:	Winkelmann CJ William Young J Glazebrook J Ellen France J Williams J
Appearances:	L C Ord and E T Blincoe for the Appellant Berkland R N Park for the Appellant Harding S K Barr and A J Ewing for the Respondent K D W Snelgar and J Spelman for the Intervener

CRIMINAL APPEAL

MS ORD:

Thank you. Tēnā koutou e ngā Kaiwhakawā, ko Ms Ord, ko Ms Blincoe ō māua ingoa. E tū atu nei mō te kaipīra, Mr Berkland.

WINKELMANN CJ:

Tēnā kōrua.

WILLIAMS J:

Well done.

MR BARR:

Tēnā koutou e nei Kaiwhakawā. Barr and Ms Ewing for the Crown.

WINKELMANN CJ:

Tēnā kōrua.

MS PARK:

Tēnā koutou ngā Kaiwhakawā. May it please the Court, counsel's name is Ms Park and I appear for Mr Harding.

WINKELMANN CJ:

Tēnā koe, Ms Park.

MR SNELGAR:

E te Kōti Mana Nui, tēnā koutou. Counsel's name is Snelgar. I appear together with Ms Spelman on behalf of Te Hunga Rōia Māori o Aotearoa.

WINKELMANN CJ:

Tēnā kōrua. Now, counsel, have you had a discussion about order of events?

MS ORD:

Yes, we have. I can indicate that after discussions with my learned friend, subject to the Court's views, it's been agreed that Mr Berkland's appeal could go first.

WINKELMANN CJ:

Yes.

MS ORD:

If I can indicate in relation to that, your Honours, that the first and third question will be dealt with by myself and the second question in relation to the grant of leave will be dealt with by Ms Blincoe, and so we are going to –

WINKELMANN CJ:

So will you sit down then pop back up?

MS ORD:

I think that's right because ultimately the third question relates to the minimum mandatory periods of imprisonment and that imposition, and that's the last matter that needs to be dealt with in terms of the sentencing exercise, so I would be suggesting that I will deal with the issue of role and the Court of Appeal and then Ms Blincoe the issue of the discounts and causation.

WINKELMANN CJ:

And then you will stand back up and deal with MPI?

MS ORD:

I will, thank you.

WINKELMANN CJ:

Yes, that's fine.

MS ORD:

If that's agreeable to the Court?

WINKELMANN CJ:

Yes.

MS ORD:

Thank you.

WINKELMANN CJ:

Just to clarify, so it's going to be you'll present the case on behalf of Mr Berkland, then Mr Barr on behalf of Mr Harding, then the Intervener, and then the Crown, is that the proposal?

MS ORD:

I think that's the proposal.

ELLEN FRANCE J:

Mr Barr for the Crown.

MS PARK:

Just to clarify.

WINKELMANN CJ:

Yes, sorry. Ms Park, yes.

MS PARK:

So Mr Berkland, Mr Harding, I would propose the Crown then address both matters in response in the sense that there's an overlap in the issues rather than dealing with each –

WINKELMANN CJ:

Yes, that's right. Let the Crown address once?

MS PARK:

Yes.

WINKELMANN CJ:

Right, and counsel for the Crown, does that suit you?

MS PARK:

I'm counsel for Mr Harding. But yes, that does suit me.

WINKELMANN CJ:

Yes, all right, thank you. All right, let's get under way.

MS ORD:

So the first question that is to be dealt with in terms of the appeal for Mr Berkland was whether sufficient weight was given to his more limited role by the Court of Appeal in setting his starting point. So I want to make the following submissions. In order to look at role in this case it necessarily involves an analysis of the facts, perhaps not the usual start for an appeal in this Court. Now essentially both Mr Berkland and his co-offender at the time they were sentenced came within band 4 of *R v Fatu* [2006] 2 NZLR 72 (CA) and now as a result of *Zhang v R* [2019] NZCA 507, [2019] 3 NZLR 648 band 5, but essentially the same sentencing range of 10 years to life applied to them both.

But essentially, as I've said, a real comparison needs to be undertaken of their roles and first it was clear that Mr Blance was in charge of this operation. It was he that was purchasing and on-selling kilogram quantifies of methamphetamine from Auckland suppliers. It was his address that was heavily fortified. He had CCTV surveillance and electronic sensor beams. He had a network of associates to alert him to possible surveillance from the police and he used an unmanned drone in counter-surveillance measures. He deliberately limited his cellphone use and it was he that arranged the contact with the Auckland suppliers, he organised the deliveries and he negotiated the prices.

Between the 20th of February 2017 and the 11th of April it was Mr Berkland's co-offender, not Mr Berkland, who had over 700 visitors to his address.

This was in Coates Street, Linden, and it was he that was wholesaling methamphetamine to other drug dealers.

WINKELMANN CJ:
So the summary of facts, which is quite a complex document, does not –

MS ORD:
Very.

WINKELMANN CJ:
It tends to group a lot of this up.

MS ORD:
Yes.

WINKELMANN CJ:
So how do we find out that it was Mr Blance who had 700 visitors to his address?

MS ORD:
What I simply say is if one looks at the summary of facts, it's paragraph 39 of the summary of facts, and the discussion that it was he selling from the Coates Street address and was wholesaling the methamphetamine to other drug dealers, that's –

WINKELMANN CJ:
So when you say "he" you mean Mr Blance?

MS ORD:
That's correct, and I'm referring to paragraphs 141 and 145, through to 145, of the summary of facts. Also when I have just summarised the involvement of Mr Blance, the fact that he was in charge is acknowledged in the summary of facts at paragraph 30. The fact that he was dealing with the Auckland suppliers is acknowledged at paragraphs 44 to 52 of the summary. The fact

that it was his address that was heavily fortified with the CCTV footage and electronic sensors is at paragraph 30. The fact that it was he who –

WINKELMANN CJ:
Just need to slow down a tiny bit. Can you slow down a little bit, Ms Ord?

MS ORD:
Sorry.

WINKELMANN CJ:
That's all right. So can we just go back through those paragraphs because I think I've lost the thread?

MS ORD:
Yes, I'm sorry, I apologise.

WINKELMANN CJ:
Because it's important. This is important because part of your appeal is that in fact through some – the fact that you say the summary of facts is internally inconsistent.

MS ORD:
Yes.

WINKELMANN CJ:
Mr Berkland has been sentenced on an incorrect basis?

MS ORD:
That's correct.

WINKELMANN CJ:
And so these points you are making are important to your appeal.

MS ORD:
And the difficulty –

GLAZEBROOK J:
The paragraph numbers are referenced in your submissions, aren't they?

MS ORD:
They are but I suppose what I've done is tried to condense it, but I have in my oral submissions, I've got a reference to each of those paragraph numbers to assist.

GLAZEBROOK J:
Yes.

WINKELMANN CJ:
Okay, right.

MS ORD:
And if I could just say at this stage because of the difficulty with the summary of facts being internally inconsistent and because it conflated their roles in general propositions, it led the sentencing Judge, in my submission, into error in the lower Court and to some extent that was corrected in the Court of Appeal who engaged and could more clearly see some of the differences. Nonetheless there wasn't an adjustment and I'm going to come to the reason why that happened which was effectively the Court of Appeal fell into error when assessing role by looking at it as a disparity argument, and this is not in the written submissions, but having gone back and reflected on what happened in the Court of Appeal because they did correct some of those factual errors, nonetheless they utilised a disparity argument and the test for disparity to decide the difference in roles. But I'll come to that a bit later.

WINKELMANN CJ:
Can I just make a point now so you have some time to think about it and your junior might like to take a note? One issue we are interested in hearing from you about is the fact that this is a distribution operation and whether distribution when you're assessing seriousness is truly to be just equated in terms of quantity with manufacture and importation.

MS ORD:

I think we have formed a view about that although that issue is not specifically addressed in our submissions.

WINKELMANN CJ:

Well, you might want to come back to it. I don't want to take you out of order but I'm just highlighting that as something.

MS ORD:

I can indicate that our view is that we are inclined to agree with *Zhang* and that the artificial distinctions between importation, manufacturing and supply should be one of the leading considerations which it was in terms of *Fatu* and…

WINKELMANN CJ:

I suppose the reason I'm asking it is because when you talk about role it is possible to see a situation where you're led into error if you just look at the operation in isolation whereas in fact drug supply is not actually a thing that occurs in operation. There is an entire network.

MS ORD:

That's correct.

WINKELMANN CJ:

And if you were looking at the impact on society, you could say the most serious thing is when the drugs are introduced into New Zealand, whether that's through importation or manufacture, and that distribution – there's an argument to be made and I don't know if it's an argument you wish to make – distribution is therefore not to be equated with manufacture and importation because it's not introducing the drug into New Zealand. It's just simply effectively carrying out the task of monetising it.

MS ORD:

That's right, it's effectively importation and manufacturing is like the production of the drug into the system, if I can describe it like that, and, of course, in this case it was clear, given the substantial quantities involved, there was an importation coming into New Zealand and that was arriving in Auckland and then there are the Auckland suppliers who are regularly travelling to Wellington and distributing this methamphetamine in kilo amounts.

WINKELMANN CJ:

Right, so I didn't want to take you out of your order. I just want you to post-note that: "Come back to later."

GLAZEBROOK J:

Can you just quickly say what you mean by "disparity" so that we've got it in our head at the start? I know you're coming back to it but just…

MS ORD:

So when I reflected on the written submissions and on the leave question as it was framed, I considered that the Court of Appeal to some extent had corrected the factual errors that were present in the sentencing Court below, for instance, profit, attribution of profit. In the High Court Justice Collins had indicated that Mr Berkland was to receive a profit of about 1.5 million together with Mr Blance. The reality is the profit was around about $50,000, about 3% of the overall profit, and I think even the Court of Appeal put to one side the mythical amount of a $100,000 nest egg that might be available to Mr Berkland at some time in the future if he behaved himself and learned to stop spending. So I –

WILLIAMS J:

Well, only because it didn't matter, according to the Court of Appeal.

MS ORD:

That's right. That's what the Court found because clearly they accepted that he, if one's looking at profit as part of trying to tease out the issue of role, we

can see that the profit was grossly disproportionate to the overall level of profit in the operation, the supply of the methamphetamine to Mr Berkland who was an addict at the time. It was about seven grams a week, quarter of an ounce, and the money one to two thousand dollars a week over a six months period, which equated to about $50,000 and, as we said in the Court of Appeal and it was accepted, about 3% of the profit, because that, of course, helps determine role in a case like this. And I'm diverting from my submissions but –

WINKELMANN CJ:

So you were saying that they'd wrapped up, they corrected the facts but they –

MS ORD:

To some extent. Not necessarily the underlying motivations for Mr Berkland's offending which we say are threefold, of course: his addiction, the fact that he wanted to be able to feed his children, look after his children, and thirdly, of course, there was a financial motivation as well. So I'm not sure that the Court entirely accepted all of that but they did accept and correct some of the factual errors that –

WINKELMANN CJ:

Can I just ask you about that because you said they found error because they wrapped it up with the question of disparity. Is there –

MS ORD:

See it says –

WINKELMANN CJ:

Could I just ask you this question? Did they actually understand that you were making the submission that the Judge had misunderstood the summary of facts, because at 61, as you say, they seem to have thought that you were actually taking issue with the summary of facts?

MS ORD:

That's correct and what we were simply saying is look, he just needs to be sentenced in accordance with what's in the summary of facts, and it's a difficult summary of facts and that was the problem for the Judge in the lower Court, but…

WINKELMANN CJ:

So the next question I have for you is therefore is the error not rather that the Court of Appeal made that they didn't understand – when they narrated the correct facts from the summary of facts that they were actually – that was actually a finding that the Judge, or implicitly a finding, the Judge has sentenced on the wrong facts? So they don't ever sentenced the Judge sentenced on the wrong facts, do they?

MS ORD:

No.

WINKELMANN CJ:

So they didn't actually understand your submission?

MS ORD:

I think they –

WILLIAM YOUNG J:

Does that matter?

WINKELMANN CJ:

Well, it might do.

MS ORD:

Our submission was clear in our written submissions and it was made clearly in our oral submissions.

WINKELMANN CJ:

Yes. My point is the Court of Appeal doesn't say: "Okay, well, this is a different factual basis so we need to look at role again." They don't ever do that point.

MS ORD:

No. They just ignore the argument altogether and what I'm saying for this Court to understand what's happened and how the role wasn't properly teased out in the lower Courts, it's –

WILLIAM YOUNG J:

But just pause there. Does it really matter if the Judge sentenced on the wrong basis if the Court of Appeal gave its sentencing decision on the right factual basis?

MS ORD:

Well, we say they didn't because they, although they corrected –

WILLIAM YOUNG J:

Okay, well, that would be of more interest to me if you say the Court of Appeal was wrong rather than that…

GLAZEBROOK J:

I think Ms Ord was just about to explain why she thought they came to that view in terms of this disparity argument. Just quickly, because I think she's coming back to it later.

MS ORD:

That's right, I am coming back to it, but essentially the submission was that the Court had to follow the method set out in *Zhang* and tease out the issue of role and our submissions were squarely based on the fact that his role was not the same as his co-offender who had a leading role. We argued it was at the lower end of significant and we pointed out the errors in the High Court and some of our submissions in relation to the facts, if one drilled down into

the summary of facts, were accepted, some were not, but ultimately the Court didn't deal with the issue at all, it did of course confirm, as I have said, an acceptance that Mr Berkland had a much lower share of the profit, and obviously that's relevant to role. But what it then said, because the submissions were always directed at role in applying the principles in *Zhang.* But what the Court then said, was the starting point too high for reasons of disparity? But disparity was never argued –

GLAZEBROOK J:
Oh, okay, I see.

MS ORD:
– in the Court of Appeal, but our submissions were always directed as to role and to arguing that Mr Berkland had a lesser role but the Court had become confused perhaps and taken it as a disparity argument. But certainly from the appellant's point of view disparity was never mentioned, so that the Courts then are looking at it as a disparity argument applying a disparity test, which is, the question is was the disparity unjustifiable and gross and led a reasonably minded observer to the belief that something had gone wrong with the administration of justice – I'm referring to paragraph 67 of the Court of Appeal decision. And the interesting thing, even if it was a disparity test –

GLAZEBROOK J:
Yes.

MS ORD:
– which it was not, is that – at paragraph 68 – the Court of Appeal accept that in this case other judges may well have imposed a greater differential, possibly in the order of two years, but they say that the test of gross and unjustifiable is not met – that's again at paragraph 68. So essentially they've misdirected themselves inadvertently, and this was comparatively recently after *Zhang* this appeal was argued, so the issue of role and how it might be

teased out and into the three categories, lesser, significant and leading in *Zhang*, perhaps, I don't know what's gone wrong.

GLAZEBROOK J:
Understand these.

WILLIAMS J:
I'm interested in what I think are two separate issues. One is properly getting to a sophisticated understanding of the facts of role, which is what you've just been submitting on, and the second is a kind of a disparity point, and that is the gap between significant and leading, isn't that the other…

MS ORD:
That's correct.

WILLIAMS J:
Right. To get your submission on whatever the role is within significant, what the gap should be between that and leading.

MS ORD:
Exactly.

WILLIAMS J:
Because *Zhang* doesn't give us any guidance on that.

MS ORD:
It doesn't.

WILLIAMS J:
Be good to get some from you, irrespective of Mr Berkland's own wrong.

MS ORD:
That's right, yes, and we've –

WINKELMANN CJ:

In the order you want to take us to it.

MS ORD:

And we've endeavoured to do that in the written submissions by referring to the UK Sentencing Council guidelines…

WINKELMANN CJ:

Which is 70%.

WILLIAMS J:

Yes.

MS ORD:

Which suggest a sort of a 30%, a third difference between leading and significant.

WILLIAMS J:

So is that your argument?

MS ORD:

That's where we're saying, maybe I think in our submissions we've used that as an analogous argument, we're probably sitting between the 20 and 30% in terms of the difference between leading and significant.

WILLIAMS J:

But is that between the top end of significant and the bottom end of leading?

MS ORD:

Yes, well, that's one of the issues that arises here, because the overlap's not clear, and also we argued in the Court of Appeal that whilst his role fell within significant it did have some indicia of a lesser role as well, so…

WILLIAMS J:

Yes, I'm not – I know you're going to talk to, about that.

MS ORD:

Yes, so we've got the overlap there.

WILLIAMS J:

I'm interested in what you say about the actual gap between these two. Do they overlap of one another or is there clear air between them?

MS ORD:

I think we're saying in this case there's very clear air between them.

WILLIAMS J:

Okay. I mean in general, not in this case, in general.

MS ORD:

Yes. I think we're also making that submission as well, because if one has a leading role the sentences, particularly when you have quantities of methamphetamine, you know, over five kilos, the sentences are hugely significant, and that is why role is so important to reduce the sentencing outcome and to properly reflect what we say is culpability and involvement in the offending.

WINKELMANN CJ:

So yes, that's an important point to place this is the context about what you're trying to achieve with your sentencing policy because the deterrent effect, if – we're going to come onto that at some point – if there's a justification for deterrence it must be directed most particularly at those at the top end.

MS ORD:

That's correct.

WINKELMANN CJ:

And…

MS ORD:

If there is, but I don't want to stand on Ms Blincoe's toes about that.

WINKELMANN CJ:

Right, Ms Blincoe is going to talk about that. But 70% is a pretty rough and ready kind of thing, isn't it?

MS ORD:

It is. It is rough and ready, but in this case Mr Berkland didn't fit all the indicia of "significant" anyway. There's five factors there. We say he had three factors and we had – there were factors which involved a lesser role as well, indicia, so he's not at the top end of significant, we say, in any event.

So probably the best thing to do is to go back to the facts now if that's helpful. So I'll slow down a bit.

So the summary of facts says that Mr Blance was in charge of the operation – that's at paragraph 30 – that he was purchasing and on-selling kilogram quantities of methamphetamine from these Auckland suppliers. That's at paragraphs 44 to 52 of the summary of facts. It was his address that was heavily fortified, had the CCTV and the electronic sensors. That's at paragraph 30. It was Mr Blance that had the network of associates to alert him to possible surveillance. That's at paragraph 34 of the summary of facts, and it was he who used that unmanned drone in what is described as counter-surveillance techniques at paragraph 35. He limited his cellphone use. That's at paragraph 22, and it was –

WINKELMANN CJ:

Well, they both did, didn't they? Didn't they use burner phones?

MS ORD:

No, only the suppliers and only Mr Blance. Mr Berkland was completely unsophisticated. He chatted on the phone all the time. He chatted to the undercover officers and he'd text people he was supplying. He was not a sophisticated offender in the sense of Mr Blance at all. So he chatted away, if I can describe it like that, in quite a contrast to his co-offender.

So between the 20th of February and the 11th of April 2017 it was Mr Blance, not Mr Berkland, who had 700 visitors to his Coates Street address. That's at paragraph 39, and it was clear it was Mr Blance who was wholesaling the methamphetamine to other drug dealers in the Wellington region. That's paragraphs 141 to 145. By way of example, I think there's mention of wholesalers such as McGoldrick-Savaii who were also, once this operation was terminated, faced significant charges.

So Mr Berkland was described in the summary of facts as the right-hand man. That's at paragraph 30. I think in the Crown submissions at sentencing in the High Court he was a lieutenant and Mr Stevenson, who was counsel in the lower Court, described him like an assistant. But he definitely had an awareness of the scale of the operation and he was in charge of counting and concealing large quantities of cash and he would bring them to Mr Blance's address at Mr Blance's request to pay these Auckland suppliers. Also the summary is clear that the money and drugs were stored at addresses associated with Mr Berkland. However, this money and these drugs were still under Mr Blance's direction and control.

ELLEN FRANCE J:
And the firearms, Ms Ord?

MS ORD:
So both of them had firearms, and there are firearms at those addresses located at the same addresses as the drugs and money were stored, and of course Mr Berkland faced charges in relation to those firearms and the miscellaneous lower level drug dealing and he got a year uplift, and that's not challenged in this case.

WINKELMANN CJ:
So you say addresses associated with him. He lived in a state house. What other addresses did he have access to?

MS ORD:

Yes, exactly. They are all addresses within two or three streets. They're across the road, down the road…

WINKELMANN CJ:

Were they friends' houses or something?

MS ORD:

I presume a relative, something…

WILLIAMS J:

Wasn't there a garage across the road where he did most of his dealing room?

MS ORD:

There was a garage across the road that he seemed to have access to, he used to fix motorbikes and vehicles in there and it also seems to have been used to store methamphetamine.

The important submission in this case is but for the intervention of the undercover officer Mr Berkland himself only supplied small quantities of methamphetamine, during the undercover operation it seems as though about five grams in total was sold by him.

WINKELMANN CJ:

Now in relation to that, does the summary of facts describe an interaction – this is my recollection – where the undercover officer declined to buy a small quantity? I mean, why is….

MS ORD:

That's right. It seems the undercover officer was placed there to try and obtain larger quantities. The undercover officer's not interested in the two grams that Mr Berkland offers him on a couple of occasions because he can't supply the quarter of an ounce that the undercover officer is asking him for.

But that will be a police operational policy as to why the undercover officer was directed to try and purchase these one-quarter ounces, and then he did that twice and subsequently purchased half an ounce off Mr Berkland. So that's the interesting feature of this case is but for that involvement of the undercover officer it seems most unlikely that Mr Berkland would have ever become involved in selling those types of quantities. It's not a situation where Mr Berkland offered those quantities out of the blue to the undercover officer, in fact it was the undercover officer who, once he was introduced to Mr Berkland, endeavoured to ask, who made enquiries about purchasing these quarter of ounces, and I've got some dates for that if that's relevant, but the undercover officer first speaks with Mr Berkland on the 1st of February 2017, he enquires about purchasing a quarter of an ounce, obviously Mr Berkland hasn't got that sort of quantities on him. The 21st of February, the undercover officer speaks with Mr Berkland again about trying to purchase quarter of an ounce, that's the occasion where Mr Berkland can only offer him two grams, I think he doesn't want to be cleaned out. 23rd of February, so that's a couple of days later, the undercover officer's again asking for that quarter ounce and Mr Berkland's reluctant to sell him a quarter and again offers him a much smaller quantity. It's not till the 28th of February, so the officer's really been at Mr Berkland for a month before Mr Berkland finally is in a position to supply that quarter of an ounce, and that happens on the 28th of February.

WILLIAMS J:
Wasn't that delay all about Berkland…

MS ORD:
Yes, there were some issues about supply as well.

WILLIAMS J:
Oh, I thought it was Berkland saying: "You have to give me the money now," and the undercover officer was rather reluctant to do that.

MS ORD:

Yes. So the summary of facts does contain various conversations between the undercover officer and Mr Berkland, but Mr Berkland makes clear that he doesn't have those sorts of quantities on him, that it's a matter for Mr Blance about whether they can be sold in that quantity, and that Mr Blance also sets the price and the method of payment, and it's Mr Blance who's saying: "No, money up front and then we'll give you the drugs." And on the occasions where those drugs are supplied – except for, I think, when one was available in the garage – my recollection is that Mr Berkland had to go to Mr Blance's home to collect the drugs and bring them back to his address to provide to the undercover. So even though in theory these large quantities of money and drugs were stored at addresses associated with Mr Berkland, he clearly didn't have control over it. He had to go to Mr Blance on each occasion.

So obviously in teasing out role we can see that whilst Mr Berkland is present sometimes at the address of Mr Blance when he is engaged in this drug-dealing activity and, of course, brings these large quantities of cash when the Auckland suppliers come down, nevertheless his personal on-selling is in these small quantities and there's no suggestion that he's ever sold wholesale quantities to any of the other wholesalers who were named in that summary of facts and got caught up and ultimately charged with charges themselves.

So I turn to the issue of profit only to try and – this is important as to role. This is perhaps where it went wrong a bit in the lower Court where the Judge felt that both of them were going to be receiving this one and a half million odd dollars but the reality was quite different and Mr Berkland talks freely with the undercover officer and tells him that he gets about a thousand a week and sometimes he could get twice that amount. He also used to be given by Mr Blance half an ounce of methamphetamine a week but it's been reduced to a quarter. That's seven grams. If you're a user and a heavy user you're easily using a gram a day. So ultimately we can see there that the methamphetamine that has been given to Mr Berkland in part-payment is

feeding his addiction and there's only very small quantities available for on-sale.

Mr Berkland also told the undercover officer that he'd managed over three months to save the sum of $10,000 towards a Harley-Davidson and then, of course, that he hoped to receive this nest egg that had supposedly been put aside for him, and, as we know, the Court of Appeal in a way in considering Mr Berkland's actual profit really put that matter to one side and ultimately that means that he received about 3% of the total estimated profit of the 1.5 million over that six-month period. So that's a really –

WINKELMANN CJ:
Well, the Court of Appeal didn't quite put it to one side. Didn't they say it doesn't matter that the nest egg wasn't there? He expected it, so in terms of his expected commercial participation, what do you say about that?

MS ORD:
I think the Court weren't really saying it –

WINKELMANN CJ:
I think they were.

MS ORD:
That's not how I read it. But…

ELLEN FRANCE J:
Paragraph 53.

MS ORD:
Just have to locate the relevant paragraph in the decision.

WINKELMANN CJ:
53?

MS ORD:

So they say: “Mr Berkland was motivated primarily by financial advantage,” and an issue is taken with that in this Court and so that’s…

WINKELMANN CJ:

Yes, and they then use the nest-egg point.

MS ORD:

And he expected to profit and he did profit, so they say that, and then they say whether or not there was this nest egg for $100,000 doesn’t matter because ultimately they’re saying he did receive this 1,000, maybe 2,000, a week.

WINKELMANN CJ:

No, no, they’re not. They’re not saying that. They’re saying: “What matters is that Mr Berkland genuinely thought there was.” So they’re saying he was motivated by expectation of very significant profit. So they are holding that against Mr Berkland.

MS ORD:

I can see the way that your Honour has interpreted that. For myself, I didn’t read it quite like that.

WINKELMANN CJ:

Well, I do, but anyway.

MS ORD:

I read it as accepting of the amount that he actually received. If you have a look at paragraph 54 it says: “In any event, in addition to the promised reward of a $100,000 nest egg, there were weekly payments,” so that –

WINKELMANN CJ:

All right.

GLAZEBROOK J:

Well, you say anyway 100,000 isn't 1.5 million divided by two. Was it 1.5? Sorry, I've probably got the figure wrong but…

MS ORD:

Yes, it's 10%.

GLAZEBROOK J:

So whatever it was, and it was in the future.

MS ORD:

Yes, that's right, and it only amounts to 10% of the overall profit and that's just a good example of role and that's why the indicia in *Zhang* refer to the amount of profit or anticipated profit as being relevant to determining where they fall, whether they are leading, significant or a lesser role.

As I've just said to the Court, it's always been counsel's submission on behalf of Mr Berkland that he was not motivated solely or primarily by financial gain. There has always been very clear evidence of his own addiction. He said to the undercover officer that he was motivated in part to feed his children. At the time he was only getting a benefit for one of the three that were living with him and he was having difficulties making ends meet, but also he was receiving the cash and that's accepted.

This might be an opportune moment to look at *Zhang* and I've used the case, *Zhang*, the case filed in the Crown's materials, and at page 684 of the decision and 685…

WINKELMANN CJ:

Can you give us the paragraph reference?

MS ORD:

It's 20, 25 – 126, apologies. Sorry, it's just got line references on it as well but it's 125 and 126 of *Zhang*. So just over that two pages the Court usefully sets

out the bands that were in *Fatu* and it also sets out the new bands in *Zhang*, and for this appeal's purposes essentially whether Mr Berkland was at band 4 in terms of *Fatu*, which was the case under which he was originally sentenced, or band 5 now in terms of the new *Zhang* bands, ultimately the same period of imprisonment, 10 years to life, is available and the same for his co-offender.

The Court then looks at the approach adopted which is described as the double axis approach of the United Kingdom Sentencing Council and the Court has modified those indicia, and we can see clearly set out in the judgment there is the lesser, significant and leading roles.

So as I've already said, it was submitted in the Court of Appeal that Mr Berkland's role, even though he was the right-hand man, was at the lower end of "significant" and he also met some of the lesser role indicia in *Zhang*. So in relation to that, if one looks at the lesser role set out there, we submitted that he was performing a limited function under direction, so we say he was under the direction of Mr Blance. We say also, in terms of the lesser criteria, he was motivated partly by his own addiction, and that is a factor that is set out in the categories for lesser role, and we say he was paid in drugs or cash significantly disproportionate to the quantity of drugs or risks involved, so we say, look, he's got that indicia, that's set out under lesser role, and…

WILLIAMS J:
Though it does say "primarily", doesn't it?

MS ORD:
That's right, it does.

WILLIAMS J:
So you don't quite make that one.

MS ORD:

And then we say he's got no influence on Mr Blance, so he's got no influence on anyone up the chain. So we also say, look, we accept that some of the significant indicia were also met, if one looks at the five that are set out in the judgment we accept he did have an operation role, we say it wasn't a management function because he didn't make any of the decisions, he was simply doing as he was told, but nevertheless it's accepted he had an operation role. He was motivated, at least to some extent, by financial or other advantage, so he wasn't, so we say he wasn't solely motivated primarily by financial or other advantage, we say there was the addiction and the need for money to help him look after and support his children. We accept there was actual or expected commercial profit, such that it was, and of course he absolutely had some awareness and understanding of the scale of the operation. So makes three of the five criteria that we can see set out. So –

WINKELMANN CJ:

But you would say it's not mechanical?

MS ORD:

No, it's not. And the other matter is that this issue of the overlap between lesser and significant roles isn't really dealt with either. Does the fact that he's got about four of the lesser role indicia mean, even though he meets three out of the five significant factors, does that mean drag it down a bit so he's at the lower end of significant, which is essentially what we said in the Court of Appeal and what we're saying now? Does leave it leave him at the middle? But we say whatever happens he's not really not at the higher end of significant.

ELLEN FRANCE J:

Might that suggest that you do need to look at it in a sort of a slightly less tick-box type of a…

MS ORD:

Yes, I agree, and there are surely other factors that might be present that could be slotted into these headings and probably some will be developed in the future.

WINKELMANN CJ:

Well, aren't they indicating something, those headings? So for instance, "engaged by pressure, coercion, intimidation and addiction", they're looking at the extent to which someone's compelled by circumstances, perhaps their addiction, or else by manipulation or coercion and so into offending. So you're looking – it's things that are minimising their personal culpability –

MS ORD:

That's right, reducing culpability for the offending.

WINKELMANN CJ:

– which is where I come in to this thing about the nest egg. I think I have to say I find it hard to read a Court of Appeal judgment as any other way than them saying that that was evidence of commercial motivation. But it seems to me the nest egg could also be seen as a manipulative thing on Mr Blance's part where he's holding out the possibility of this nest egg which may or may not exist.

MS ORD:

Yes, that could well be, and keeps him under control and still providing the services that Mr Blance needs.

WILLIAMS J:

For myself I suspect that one of the things you might have had, well, Mr Stevenson might had to contend with at sentencing, was the way in which Blance and Berkland are treated as kind of Butch Cassidy and the Sundance Kid, they're articulated as a pair all the way through the statement of facts. When all the big statements are made it's always Blance and Berkland, and it might be that that should have been challenged because your theory of the

case is that it wasn't Blance and Berkland – it was Blance and Berkland was his helper/sidekick.

MS ORD:
That's exactly. I mean I couldn't describe it better. Berkland was the sidekick.

WINKELMANN CJ:
But it didn't need a factual hearing though, did it –

MS ORD:
No.

WINKELMANN CJ:
– because actually the accurate position sat within the summary of facts. It was just a –

MS ORD:
It did and that is what has caused the difficulty, and I think I said in the Court of Appeal it was an odd summary of facts in a way because it didn't even set out the facts relevant to each charge that either of them faced. So it was difficult to tease everything out although Mr Stevenson did endeavour to do that when he addressed the issue of role in his submissions in the High Court and he used the UK Sentencing Council guidelines, which at that stage hadn't been adopted in New Zealand, but to support his argument at that time about role and, of course, ultimately he appeared, I think, for the criminal bar in *Zhang*, essentially making those same submissions in a general sense.

The other thing I just wanted to say about these indicia, it's not just about who did what or what did you do but it's also about why, why did you do it, and that is how the overall culpability, criminal culpability for what's happened, is ascertained. So the criteria, it's not just about what happened but why.

GLAZEBROOK J:

It is interesting in that it moves away from that two-stage where you look at the offence and then look at the personal circumstances, but you say in this context presumably that you can't really work out what role is without looking at motivation because matters such as addiction are so important. Is that the submission?

MS ORD:

Exactly, and also in this case there was a substantial amount of material before the Court, even in the High Court, to show addiction. It's supported in the summary of facts where he's sampling product bought from Auckland, supported in the summary of facts when the undercover officer's at his home and he's using methamphetamine with others. It's supported because he told the undercover officer that he was being paid in the methamphetamine. It's supported by the alcohol and drug assessment which said that he did meet the DSVM criteria. It's supported by the PAC report which records that he had a methamphetamine addiction and he understands that that is one of the reasons that – I think the PAC report actually says one of the major reasons he became involved in the offending was his addiction to methamphetamine. So this was a case where there were several motivations for being involved and they were there clearly before the Court and the issue about the fact that he wanted to feed his kids, that was from – it's not in the summary of facts but it was –

WINKELMANN CJ:

But that's a vulnerability, isn't it, in terms of – you would say that his poverty is a vulnerability so it's involvement through naivety or exploitation. He certainly seems naive on your account. And also we don't really know – he's functionally illiterate or was functionally illiterate at the time?

MS ORD:

He still is but the prison has been helping. He advises me he can read small words now so – but yes, he is functionally illiterate. So Mr Stevenson did put some weight on the fact that he had the three children to care for and he'd

been clear to the undercover officer that that was a motivation for him to receive enough money to essentially be able to care for them, and the PAC report also talks about his wavering commitment to his children and one can also see from the letters filed in support, a lot of which weren't before the sentencing Judge in the lower Court, that his older children confirm that commitment and have explained what sort of father he was, and quite devoted. So that supports the reason why he would have been partly motivated, fore the money for his family.

So the Court of Appeal didn't repeat some of the errors in the lower court that there were a hundred supplies, that Mr Berkland was involved in a hundred separate supplies, the Judge had just simply fallen into error about that, that was Mr Blance, and the confusion is caused by the summary of facts, and of course nor did he supply the undercover officer on 11 occasions. We've explained that that, the Judge probably fell into error because there were 11 separate interactions with the undercover officer –

WILLIAM YOUNG J:
Sorry, just pause there. Does it matter? I mean…

MS ORD:
No.

WILLIAM YOUNG J:
No.

MS ORD:
No. Because ultimately the Court of Appeal hopefully has accepted that they were errors and they haven't repeated them, as far as I can see, in their judgment.

WILLIAM YOUNG J:

Is it helpful – sorry, I mean, this is an open question, it's not a rhetorical one. Is it helpful to look at errors the Judge made which are not made by the Court of Appeal?

MS ORD:

Well, in part we have to here because given that the Judge in the lower court set that starting point of 16 and a half years essentially based on those errors, the Court repeats the facts but doesn't agree with the motivations – some of the facts – so accept some of the submissions that were made in the Court of Appeal, but then don't think that they need to revisit the starting point with that change.

WINKELMANN CJ:

Isn't your simple point that they may have corrected the factual errors but they didn't then reassess whether the starting point should be altered in light of a different factual basis?

MS ORD:

That's right, that's it, in essence.

WILLIAM YOUNG J:

I mean, did they know – so their assessment of the starting point isn't independent of that of the Judge?

MS ORD:

Sorry, is…?

WILLIAM YOUNG J:

Your position that the Court of Appeal's starting point assessment wasn't independent of that of the Judge?

MS ORD:

That's right.

WILLIAM YOUNG J:

Do they say that, or not? Is there a paragraph on…

MS ORD:

No, they just say: "We don't see the Judge got anything wrong." I mean, they just say: "Look, we agree with the Judge," I think.

GLAZEBROOK J:

Well, you say you can't agree say you agree with the Judge because the Judge sentenced on a totally different factual basis.

MS ORD:

Exactly.

GLAZEBROOK J:

You could say, as a Court of Appeal: "Well, the Judge sentenced on a different factual basis but in fact on this particular factual basis that we now have we still think that he comes within whatever the category," which would then imply that the sentencing Judge was too low, which is then a bit odd because the sentencing Judge presumably was too low and Mr Berkland's sentence should have been up with Mr Blance's or Mr Blance was under-sentenced. But you can't, you say you just can't, you just can't sort of say, well, it's the same starting point.

WILLIAM YOUNG J:

Can you just look, please, at paras 55 and 56 of the Court of Appeal judgment? I read 56 as, I read it as an independent assessment of the starting point by the Court of Appeal.

MS ORD:

Essentially what they're saying is that their view is he's at the upper end of significant and that…

WILLIAM YOUNG J:

Yes.

WILLIAMS J:

You'd have to conclude from that they concluded those mistakes were not material, and I guess that's worth looking at, because they may be.

MS ORD:

They may be.

WILLIAM YOUNG J:

Well, sorry, does it matter what they thought of the mistakes if they fixed the starting point on the correct basis? I mean, what happened in the High Court then is largely irrelevant, isn't it?

MS ORD:

Well, our argument is and was in the Court of Appeal that the starting point should have been 10 or 11 years –

WILLIAM YOUNG J:

Yes, and they disagreed.

MS ORD:

– based on role, and Mr Stevenson submitted nine years in the High Court based on role.

WILLIAM YOUNG J:

Fair enough. What I'm simply saying, I'm just trying to clear away some of the thickets of what I suspect are irrelevancies. If it is the case that the Court of Appeal stating the facts accurately came to 16 and a half years, does it really matter, do we really have to go through the exercise of wondering how the Judge got there by a different and factually incorrect route?

MS ORD:

Well, in part we do because it would seem unusual, given the quite different factual matrix, that the Court would reach the same conclusion – it's quite an experienced High Court Judge – and also they are driven by this consideration that their view is that Mr Berkland's role is at the upper end of "significant".

WILLIAM YOUNG J:

It's fair enough to say you disagree with that and that's fine by me. It's just, as I say, I just see us, we're in the thickets of what seem to me to be irrelevancies when we're worrying about what Justice Collins said.

WINKELMANN CJ:

Probably the point – I think the point you're making, Justice Young, is that if there is an error it might be subsumed in the broader point about the significance of role.

MS ORD:

I would agree with your Honour.

WINKELMANN CJ:

Whether or not there's an error it's subsumed in the broader, yes, broader issue of the significance of role.

WILLIAM YOUNG J:

If I could put it more bluntly, I think actually what the approach taken by High Court is on this issue irrelevant and what we should be looking at is what the Court of Appeal said.

MS ORD:

I turn to a further point and that is that the Court of Appeal in its decision did acknowledge that Mr Berkland was not the leader and it was Mr Blance that had control and was the ultimate decision-maker. That's at paragraph 50 of their decision. And the Court also accepted that the money Mr Berkland

brought, that would be to the Auckland suppliers at Mr Blance's request, did not solely belong to him, and so that's at paragraph 51. And then the Court, as I've said, at paragraph 54 acknowledged the actual payments in methamphetamine and cash to Mr Berkland at that one, perhaps two, thousand dollars a week over that period.

So our submission is that the Court wrongly categorised the analysis of Mr Berkland's role, as I've said, at the upper end of "significant" and then it took that step that rather than looking at the issue of role and determining it, it took that step into whether or not it was a disparity argument, and that's at paragraph 61 and the Court starts: "Was the starting point too high for reasons of disparity?" and as I have indicated I am just not – I can't really explain why the Court decided to look at it in that manner when that hadn't been the way in which the appeal was presented.

WINKELMANN CJ:
But the operating error, quite apart from that, you say, is that they overstated the significance of his role?

MS ORD:
That's right, and I think we have to squarely confront the issue that the amount of money involved in this operation and the amount of drugs which were large quantities, particularly in Wellington, may have become the overriding consideration without the teasing out of role.

WILLIAM YOUNG J:
Can I just ask you a question? I'm looking at para 61 of the Court of Appeal judgment. "Ms Ord submitted that even if we were to find the starting point was available to the judge, appellate intervention was warranted because of the disparity between it and the starting point adopted for Mr Blance." So are they absolutely wrong on that?

MS ORD:
They're completely wrong about that.

WILLIAM YOUNG J:

So it was never –

MS ORD:

In fact, I'm pretty sure that we have filed our Court of Appeal submissions and you will see clearly that it was never argued on the basis of disparity and they've just –

WILLIAM YOUNG J:

This looks like it's an alternative argument.

MS ORD:

No, and I've also got a transcript of our submissions, oral submissions, in the Court of Appeal to check and I've re-read them and as far as I can see I said there should be a greater differentiation in the two starting points but it was just not put as a disparity argument.

WILLIAM YOUNG J:

But isn't that a disparity argument?

MS ORD:

Well, no, I don't think so.

WILLIAM YOUNG J:

Have we got what you did say? I mean are you simply saying there…

MS ORD:

Because ultimately *Zhang* –

GLAZEBROOK J:

Does it matter?

WINKELMANN CJ:

I don't think it matters.

MS ORD:

Ultimately *Zhang* is directing the courts to look at role and tease out role and make an assessment of role, and in doing that it's often having to sentence offenders who are involved in different aspects of the same operation. It's not a disparity argument to say that the leading person may have got 25 years and someone who was ultimately just a mule might have got, you know, three or four years. It's not a disparity argument.

WILLIAMS J:

Well, you see, pre-*Zhang* it probably would have been articulated as a disparity argument but because *Zhang* puts role, if not front and centre because you say it should be more front and centre than it is, but puts role up there and articulates it into categories, the argument becomes a role argument, not a disparity argument.

WINKELMANN CJ:

But it doesn't really matter, does it? I mean the bottom line argument that you were making is that role is the determinant here. It should have been a determinative starting point and it was overstated.

MS ORD:

That's correct.

GLAZEBROOK J:

But what you're saying though is that you don't have to show what would normally be shown in a disparity argument because that adds an artificial addition to what would happen to a sentence in terms of role.

MS ORD:

That's right and because there's quite a high legal test that has to be met in order to successfully argue disparity it's not appropriate, given the regime now. And what I did want to say is that even before *Zhang* drug sentencing often did look at role. It was in a more informal framework because ultimately the function of a mule who was just simply receiving a small payment to

transport a large quantity of methamphetamine from one place to another, they might get six to eight years for a kilo but obviously the person who was the original supplier and knows where it's going and has received money for it commensurate with the value of the drugs, he's in quite a different position and may well have a starting point of 12 or 13 years for that kilo. So it's just…

ELLEN FRANCE J:
I took from the Court of Appeal's approach that that was perhaps a favourable thing in the sense of potentially offering another avenue for your argument and in your current submissions, for example, you do make a submission that the 16 and a half year starting point for Mr Berkland was insufficiently distinct from the 18 years adopted for the lead offender –

MS ORD:
That's right.

ELLEN FRANCE J:
– which in the more traditional approach is often then viewed as a disparity argument, so I think it's perhaps understandable why it's put in the way it is.

WINKELMANN CJ:
Yes.

MS ORD:
I think in our submissions we said there should be more differentiation and I'm pretty sure that's the word we used, certainly at the beginning of our written submissions for this Court.

WINKELMANN CJ:
It's easy to confuse or to mix up a submission that his role wasn't accurately stated with one that he wasn't sufficiently differentiated from someone who's in a more senior role.

MS ORD:

That's right. So essentially I would just like to turn now to the UK Sentencing Council Guidelines which have that much greater differentiation between…

WINKELMANN CJ:

Was this just the quantification point?

MS ORD:

That's right.

WINKELMANN CJ:

And it's 70%?

MS ORD:

That's right. So if one has got five kilos of methamphetamine – I'm never sure whether it's over five kilos or under five kilos, but I'm just going to say that's their category one – the leading role starting point in that category is 14 years and the starting point for a significant role is 10 years, so there's four years' difference, and the starting point of a lesser role is seven years. So that's just a stark example of the differentiation in those sentencing guidelines in the UK, and I think we refer to an earlier version of the UK sentencing guidelines in our written submissions. The Crown have referred to the 2021 UK sentencing guidelines, but ultimately the starting points for leading role, significant role and lesser role in relation to that category one, which is a similar category to what we're dealing with in this case, has not changed. The other thing of course in the UK sentencing guidelines is that it's always been about quantity and role and they've had that sort of formal matrix system.

So what my submission is in this case is that there should be a greater difference in the starting point –

WILLIAMS J:

Mr Barr's submission refers to the updated guidelines…

MS ORD:

That's right.

WILLIAMS J:

Yes.

MS ORD:

But from our perspective we've gone and checked those updated guidelines, there's no difference in the differentiation –

WILLIAMS J:

Well, he seems to suggest –

MS ORD:

– between the starting points for leading role or significant role.

WILLIAMS J:

So, right, in the – so the gap is the same?

MS ORD:

The gap's the same

WILLIAMS J:

Yes, but…

MS ORD:

And it's about a 30% gap.

WILLIAMS J:

Yes, I think his argument is that the significant – if the predominant aim is financial, then it's likely to be significant, isn't that the effect of what the guideline says?

MS ORD:

That's right, and of course our case is different than that. I mean, the discussion was, about the UK sentencing guidelines, is simply to show the Court that this is a way –

WILLIAMS J:

Against.

MS ORD:

– another jurisdiction has dealt with the differentials between the starting points for different sorts of roles.

WINKELMANN CJ:

All right. So is there anything else of significance on this point? Because I'm just concerned about the time and we've got Ms Blincoe to get to…

MS ORD:

No.

WINKELMANN CJ:

And then back to you.

MS ORD:

No, I can leave it there, if that's convenient?

WINKELMANN CJ:

Right, thank you.

MS ORD:

Thank you.

WINKELMANN CJ:

Mōrena.

MS BLINCOE:
Mōrena.

I just wanted to start with two things to hand up to the Court, which the registrar has for you. The first is an outline of our oral submissions, which also has attached to it a diagram that I've made which just helps to illustrate, I guess, the submissions that I'll be making about section 8 of the Sentencing Act 2002 and how that fits with the *R v Taueki* [2005] 3 NZLR 372 (CA) approach to sentencing, and then it's also got just the key provisions of the Sentencing Act, so that your Honours have those in front of you. The second document is the report of Professor Berg which it came to our attention yesterday that the version that we had filed electronically with the Court had different page numbers to the version that we had been working off and there'd actually been two different versions filed in the Court of Appeal, there was an original one, which is the one that your Honours received, and then there was a final one which has different page numbering and may have had some other corrections by Professor Berg. So the one that's just been handed up is the final one in the Court of Appeal and it's also, those page numbers are consistent with the page numbers that we've referred to in our submissions.

WILLIAMS J:
You don't know whether there are any other edits?

MS BLINCOE:
No. When the first version was sent, Mr Bamford said that Professor Berg would be making some final amendments to is, but I don't know the nature or extent of those amendments.

So I will be addressing the issue of causation and personal circumstances. Our position is that only contribution and *not* causation should be required. That position is consistent with a proper interpretation of the purposes and principles of sentencing in the Sentencing Act and with the established approach to other types of discounts in New Zealand.

In our submission this Court should revisit the proposition that personal circumstances count for little in commercial drug dealing cases. The underlying rationale for this has been that personal circumstances must be subordinated to the importance of deterrence. The primacy of deterrence to the exclusion of discounts for personal factors is incorrect in our submission for four reasons. One, it is inconsistent with sections 7 and 8 of the Sentencing Act because it elevates an optional purpose of sentencing deterrence above mandatory considerations in section 8. Two, the empirical evidence is that sentence length does not have a deterrent effect. Three, other purposes of sentencing such as accountability and denunciation are, unlike deterrence, focused on punishing in proportion to moral culpability and, as a result, require full consideration of personal circumstances, and, four, there has been a shift in social values away from punishment and towards a more rehabilitative approach. In our submission personal factors such as deprivation and addiction need only contribute to the offending. In this case there was an abundance of evidence establishing both matters and discounts were warranted. A discount was also warranted for rehabilitative prospects. These three matters should have received discounts of at least 10% each or 30% in combination.

So, starting with the language of the Sentencing Act –

WILLIAM YOUNG J:

Just pause there. It's a long time since I had a direct involvement with sentencing, so going back to 2010, and the position then was essentially that the key drivers of a sentence were culpability and whether there was a plea of guilty.

MS BLINCOE:

Sorry, what was the second?

WILLIAM YOUNG J:

Whether there was a plea of guilty.

MS BLINCOE:

Right.

WILLIAM YOUNG J:

Comparatively modest allowances were made for, say, previous convictions or good character or other personal considerations. Now my impression from looking at the material is that discount of 50% or so against a starting point sentence are not uncommon. Is that right?

MS BLINCOE:

Yes.

WILLIAM YOUNG J:

Whereas, you know, it's not, I'm not harping back to the good old times, but some time ago a discount of that amount would only be conceivable for someone who gave evidence against co-offenders or something of that sort. So is there a Court of Appeal judgment that explains the change in process or is it just a matter of slowly changing practice?

MS BLINCOE:

I think it is just a matter slowly changing practice. The two major Court of Appeal judgments which we have referred to are *Churchward v R* [2011] NZCA 531, which is about youth, and *E (CA689/2010) v R* [2011] NZCA 13 , which is about mental health, and both of those cases involved generous discounts and are seen as leading cases on each of those matters, and they were from, I think, 2010 and 2011. So possibly it's been since then or since around that time that discounts are starting to become larger, certainly Ms Ord's made similar observations to me about how things were in the past, and there's definitely a shift there.

So starting with s 8 of the Sentencing Act, in our submission the emphasis on deterrence as a primary or overriding sentencing purpose to the exclusion of personal facts is contrary to the Act, and that is because while the purposes in section 7 are optional, the principles in section 8 are mandatory, as is

consideration of the aggravating and mitigating factors in section 9. These three sections express the balancing that is required of all of the considerations that go into sentencing, many of which are in tension with each other.

So turning to section 8 specifically, section 8 (a) provides that the Court must take into account the gravity of the offending in the particular case, including the degree of culpability of the offender. Gravity in New Zealand is often equated with the seriousness of the offending, and these terms can be used, are sometimes used fairly interchangeably. But by virtue of section 8 gravity must include seriousness, but it also expressly includes culpability, that is, to what extent was a defendant responsible for the offending or responsible for the particular harm, and to what extent is a defendant morally blameworthy for that offending. Weighing these what I say is these two aspects of gravity, so seriousness and culpability, is, in our submission, an exercise in proportionality.

WINKELMANN CJ:
Well, culpability on your account includes two elements: both the notion of responsibility, so to the extent you're causationally responsible, but also moral culpability, so that splits it into two, right?

MS BLINCOE:
Yes, yes, and that's expressed in that diagram that I've handed up as well, that is culpability is relevant. So, for example, in the methamphetamine context in setting the starting point culpability is reflected in the assessment of role. And then at the second stage culpability in the sense of moral blameworthiness is taken into account by looking at person mitigating factors.

So turning to subsection (b), this is about the inherent seriousness of the *type* of offence, while the degree of seriousness of the *particular* offence is referred to in subsections (c), (d) and (f). (f) relates to the impact on the victim, which is likely to be relevant to the seriousness of the offending, (c) and (d) refer to the seriousness of the offending as they relate to the most serious or near

most serious of cases, but also have their own proportionality assessment within them. These provisions require the imposition of the maximum penalty or near the maximum penalty for the most serious or near most serious of cases, "unless circumstances relating to the offender make that inappropriate". So those two provisions reinforce the mandatory consideration of personal circumstances expressed elsewhere in section 8, even in the most serious kinds of cases.

Then subsection (e), the general desirability of consistency, refers to "similar offenders committing similar offences in similar circumstances", that is, the requirement for consistency is engaged in relation to all aspects of the sentencing exercise, including personal mitigating factors. Subsection (g) is a requirement to impose the least restrictive sentence that is appropriate in the circumstances. Significantly, along with subsections (c) and (d), this principle mandates not only a process but an outcome: the least restrictive sentence must be imposed and not just considered.

Subsection (h) requires the Court to take into account any circumstances of the offender that would mean the sentence that's otherwise appropriate would be disproportionately severe. That could be circumstances that mitigate culpability or it could be other personal circumstances outside of that. (i) requires the Court to take into account "personal, family, whānau, community and cultural background" when imposing a sentence with a rehabilitative purpose. That consideration could impact both the type of sentence or the length of sentence and, of course, it complements section 27 of the Sentencing Act. Finally, (j) requires the Court to take into account the outcomes of –

WINKELMANN CJ:
Can I just ask you, why do you think (i) is limited to "in imposing a sentence or other means of dealing with the offender with the offender with a partly or wholly rehabilitative purpose"?

MS BLINCOE:

That's the wording in the Act.

WINKELMANN CJ:

Yes. What's the significance of it? Do you say there's any – because it…

MS BLINCOE:

Well, in my submission – there's two parts to my submission. I think what the legislature had in mind in community-based rehabilitative sentences, particularly for Māori, when there is a cultural background aspect to that that could aid rehabilitation, so that is, in my submission, like the primary intention of that subsection. But, also in my submission most if not all sentences should have a partly rehabilitative purpose, and so that provision is not necessarily in practice limited in that way.

Finally, so (j) refers to the outcomes of any restorative justice process, and this reference to restorative justice was new and significant in the Sentencing Act and there was a lot of reference to that by the Select Committee that there was, much of sections 7 and 8 were a restatement of the common law position but the restorative justice references were deliberately new.

To the weighing of seriousness and culpability expressed in much of section 8 is similar, although not identical in our submission, to the two aspects of seriousness in the UK legislation which are culpability on the one hand and harm on the other, which in the UK are the two concepts underpinning all of the sentencing guidelines, including of course the drug offending guidelines where those matters are reflected in role and quantity respectively, which is discussed in detail in *Zhang,* and that's the language that's been adopted in *Zhang* although not the grid aspect of that.

Similarly in Canada, or slightly differently in Canada, this is expressed in the legislation as a proportionality exercise. So their legislation says the fundamental principle of sentencing is that a sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender,

and in Canada their case law, particularly *R v Ipeelee* 2012 SCC 13, [2012] 1 SCR 433 is really clear that that reference to responsibility includes moral blameworthiness.

So in New Zealand section 8 is given effect by the courts through the two-stage approach to sentencing first established in *Taueki*. The starting point reflects the gravity of the offending, which includes the seriousness of the offending, including the harm caused, and the defendant's culpability for the offending, and these two matters in the drug context, as I've noted, are reflected by the assessment of quantity and role but similar consideration, although not necessarily in those terms or separated into those two concepts, exist for all types of offending. So another obvious example is manslaughter, where the harm is basically the same in every case, which is someone has died, but the defendant's culpability for that harm can vary greatly depending on the circumstances, so whether it's a one-punch manslaughter which is seen as being a low culpability, or serious sustained beating, which is obviously seen as a much higher degree of culpability. So these concepts are both part of the starting point exercise in New Zealand.

And then at the second stage the Court takes into account personal factors for various reasons. Some of those reasons relate to culpability and some of them don't. So, for example, in the context of mental health and youth and, in our submission, addiction and deprivation, either those factors reduce moral blameworthiness and therefore culpability where those circumstances contribute in some way to the offending, for example by constraining the defendant's choices or otherwise impairing their decision-making – and this is relevant to culpability – or, secondly, personal factors are taken into account for reasons unrelated to culpability or moral blameworthiness, for example, a person's mental health condition may make prison more harsh, which was one of the reasons for the discount in *E v R,* youth may make a sentence crushing, which was the reason referred to in *Churchward* or, more broadly, there could be purely compassionate grounds, which were the basis for the discount in *Jarden v R* [2008] NZSC 69, [2008] 3 NZLR 612. The focus of this

case is on the first type of discounts, which is discounts for matters that reduce culpability.

WINKELMANN CJ:
Right, so we'll take the morning adjournment at this point.

MS BLINCOE:
Thank you.

WINKELMANN CJ:
How are we going for time, Ms Blincoe? How much longer do you think you will be?

MS BLINCOE:
Well, that's almost the end of my first point, and I have about seven, so. I mean, this is the major overarching point.

WINKELMANN CJ:
Yes.

MS BLINCOE:
And the rest in a way flows from that, so…

WINKELMANN CJ:
All right, okay. We'll take the adjournment.

COURT ADJOURNS: 11.31 AM

COURT RESUMES: 11.50 AM

WINKELMANN CJ:
Ms Blincoe.

MS BLINCOE:

Thank you. So just a last couple of points about sections 7, 8 and 9. The mandatory principles in section 8 are complemented by the requirement in section 9 that the listed aggravating and mitigating factors must be taken into account to the extent that they are applicable in the case. Subsection (4) of that section provides the requirement to consider the mandatory factors in subsections (1) and (2) does not prevent the Court from taking into account "other aggravating or mitigating factors" or imply that the listed factors are to be given "greater weight than any other factor".

In this case the Court has failed to apply section 8 because deterrence as a sentencing purpose has prevailed. In section 7, deterrence is one of eight purposes for which the Court *may* sentence an offender. This permissive language means that deterrence cannot be used to override the mandatory requirements in sections 8 and 9. The Select Committee changed the introductory words in the provisions of section 8 from "should" to "must" and in section 9 from "may" to "must" while deliberately retaining "may" in relation to section 7. The Select Committee also said: "The weight to be given to any particular goal will depend on the circumstances of the offence and the offender and may also change over time according to the shifting perceptions of society, which is the reason there is no ordering according to priority."

The proposition that deterrence is a primary goal in sentencing drug offenders to the exclusion of personal factors was of course reiterated by this Court in *Jarden* in 2008 but dates back to at least the 1980s in New Zealand. The appellate courts have not yet taken the opportunity to consider whether this approach remains permissible in light of the Sentencing Act. In our submission –

WILLIAM YOUNG J:

Well, they did in *Jarden*. *Jarden* is post-Sentencing Act, isn't it?

MS BLINCOE:

Yes, it was post-Sentencing Act, but it wasn't the issue in *Jarden.* In *Jarden* the issue was that the Court of Appeal had somehow applied the wrong guideline and sentenced according to the cannabis guideline instead of the methamphetamine guideline, so it was a –

WINKELMANN CJ:

Is your point that the Court, this has not said, asked itself the question explicitly and written that down in a judgment saying does the Sentencing Act require a change?

MS BLINCOE:

Exactly.

WINKELMANN CJ:

And that's the question you're asking.

GLAZEBROOK J:

And one might say that that was based on perhaps the view that drug offending was always commercial, effectively, without an understanding of underlying addiction issues and/or commercial and cultural features, which has been a change since that. Because one can explain it in fairly traditional terms or even in Sentencing Act terms by saying, well, deterrence does become very important because in fact this is morally blameworthy and culpable because it's a personal choice and for financial gain and at the expense of misery among the population.

MS BLINCOE:

There's certainly much greater awareness, both in the public and among the judiciary, of mental health, addiction, deprivation, all of that, and it's been very recent –

WILLIAM YOUNG J:

But doesn't there have to be a recognition and sort of an insistence as part of just having a basic criminal justice system that crime doesn't pay, that the sanctions imposed for commercial offending must to some extent reflect anticipated gain and prospects in the mind of the offender of being caught. So, if there are substantial gains, it's not just part of the criminal justice system, core responsibility to ensure that the punishment is one that countervails in any sensible person's mind, and probably in the minds of those who aren't very sensible, the likely gains of the offending.

MS BLINCOE:

Yes. And I think the system can properly do that in applying, in considering the purposes of accountability and denunciation, better than it can through deterrence, because –

WILLIAM YOUNG J:

Well, it's just part of having a robust criminal justice system.

WINKELMANN CJ:

Well, isn't this taking, aren't Justice Young's questions taking you onto your deterrence point?

MS BLINCOE:

Yes. So I agree, of course we need a system that punishes people for serious offending –

WILLIAM YOUNG J:

But it has to make it not worth, must make the exercise not worth engaging on.

MS BLINCOE:

No, because deterrence has a very different conceptual basis –

WILLIAM YOUNG J:

No, I'm not, we're using the "D" word so much. Just it's just part of a criminal justice system that it must ensure that crime doesn't pay.

MS BLINCOE:

Yes. But not for deterrence reasons.

WILLIAM YOUNG J:

No, just leave deterrence out for minute. And doesn't that mean that the penalty for crime should exceed the anticipated gains?

MS BLINCOE:

Possibly, but you're measuring financial gain against years of incarceration.

WILLIAM YOUNG J:

Psychic benefit or whatever…

WINKELMANN CJ:

It's apples and oranges.

WILLIAM YOUNG J:

But you have to do it, I mean, you have to do apples and oranges occasionally…

MS BLINCOE:

And I think –

WILLIAM YOUNG J:

We do it all the time at the supermarket, we buy one or the other or both.

MS BLINCOE:

I think what your Honour, how I interpret what your Honour is saying, is that the punishment should fit the crime and that –

WILLIAM YOUNG J:

No, I'm just saying that a robust criminal justice system, I mean to say the proposition would be irreducible simplicity: *must* ensure that crime doesn't pay.

GLAZEBROOK J:

Which is why we have the proceeds of crime of course, legislation.

WILLIAM YOUNG J:

No, but I mean –

WINKELMANN CJ:

I mean, what does it mean?

WILLIAM YOUNG J:

I don't necessary mean in terms of money, that it's simply not worth doing the crime.

GLAZEBROOK J:

Well, that's likelihood of being caught as against punishment when you are, and likelihood of being caught I think is usually the most important.

WINKELMANN CJ:

I think, yes, I mean, perhaps if we just let Ms Blincoe move on to deterrence.

WILLIAM YOUNG J:

Right.

WINKELMANN CJ:

Because I think it's –

WILLIAMS J:

Well, it's not just deterrence though, because crime mustn't pay, otherwise everyone would do it, because it pays. But crime mustn't pay in a state response that is overall just. So there's more to sentencing than crime not

paying, even if crime not paying is at the centre of it. You can't, crime not pay can't walk you away from a just response, taking into account the background of the offender and so on and so forth, otherwise the state would be more oppressive than the criminal.

WINKELMANN CJ:
Well, we could spend all day discussing what it means that crime not pay, I mean…

WILLIAMS J:
Yes, it's fun, isn't it?

WINKELMANN CJ:
But I don't know that it's going to take us all that far, and perhaps we should return to the Sentencing Act.

MS BLINCOE:
Thank you.

So that does lead directly into my next point, which is about the empirical basis for deterrence. And deterrence as a sentencing goal is premised on this idea of rational choice theory, which is that people are constantly weighing up the costs and benefits of every potential decision and making decisions according to their rational assessment of those costs and benefits.

WILLIAM YOUNG J:
It goes beyond that, though. I mean, if you have consequences of a way of crime, a life of crime, being unpleasant, then it's not so much: "Oh, I'm going to commit a burglary on the spur of the moment," which is your rational offender thing, it's really: "Is it worth my while living this offending life?" And I suspect that the cumulative effect of the criminal penalties has an influence on desistance. Why do people who start off offending, perhaps quite prolifically, desist as they grow older? Now partly it's just getting older, partly it is:

"Well, actually this isn't really good way of life for me and there are better things to do."

WINKELMANN CJ:
Well, there's also a lot of different research which shows that people spending time in prison actually increases that likelihood of re-offending so – likelihood of offending. So perhaps we just let Ms Blincoe take us through this and then we can go on to…

WILLIAM YOUNG J:
Well, I'm just signalling you haven't got an entirely receptive audience, as you've probably gathered.

MS BLINCOE:
Understood, Sir.

So deterrence presumes that the prospect of a long sentence will be factored in to the costs side of the costs and benefits decision-making ledger and accordingly that longer sentences will result in less offending.

In *Zhang,* the Court of Appeal had for the first time the opportunity to consider whether this theory has any valid empirical basis. The evidence in that case was overwhelmingly, including from the Crown's expert, that sentence length does not have a deterrent effect, general or specific, in generally for any type of offending and particularly for drug offending.

WILLIAM YOUNG J:
The absolute proposition is – sort of it's pick up an oppositional streak in me – that there's a lot of literature on this, particularly that written by mathematically inclined economists, say that there is a deterrent effect can be discerned from three strike sentencing laws in America. Now there's a huge amount of background noise which you have to try and sort out because so much depends on prosecutor's practice, et cetera. But this absolute assertion that there is just no effect is one that I have difficulty with.

MS BLINCOE:

Understood, Sir. At the –

WILLIAM YOUNG J:

I agree that marginal deterrence…

MS BLINCOE:

The benefit of *Zhang* was that the Court of Appeal invited this evidence, and the evidence was from experts who were able, experts in their field, who were able to draw together –

WILLIAM YOUNG J:

They're mainly just literature surveys, aren't they?

MS BLINCOE:

They're – well, Professor Mackenzie is a criminologist, a professor in criminology, and Professor Berg is a professor in behavioural economics.

WILLIAM YOUNG J:

But aren't they basically literature surveys?

MS BLINCOE:

No, no, your Honour, they are drawing conclusions from that literature in a way that's –

WILLIAM YOUNG J:

Yes, I understand that. But the conclusions are based on literature.

MS BLINCOE:

Yes. And that's my point, that it's the benefit of, it's not just one random study, it's people who have, experts who have the benefit of drawing together all of the literature in their field and assessing it through a critical lens to come to a conclusion. And what's significant about Professor Mackenzie's evidence is that he was the expert for the Crown. So if a criminologist was going to find

that sentence length might have a deterrent effect, you would expect that a witness for the Crown might be able to do that.

So what Professor Mackenzie said was that the general existence of a criminal justice system does have a general deterrent effect, and also the perceived likelihood of apprehension, conviction and punishment does have a general deterrent effect, but sentence length does not, and particularly for drug users – sorry, particularly in drug offending cases. So to look at that more specifically, he separated drug users and enterprise offenders for the purposes of his analysis while of course noting the overlap in practice between those two groups of people. He said that drug users – and just to put this in context, this is after he has already outlined a number of studies about deterrence generally, not in the context of drug offending, and he's looked at different types of studies and said that none of them establish that deterrence, that sentence length has a deterrent effect. So then he's looking at the context of drug dealing and he says drug users are even less susceptible to deterrence than the general population for a number of reasons, including that they tend to prioritise short-term pleasure over long-terms adverse consequences, they're likely to already be stigmatised, meaning they don't have a stake in conformity which is under threat by the prospect of criminal sanction, the views of society in general may not be a relevant reference point for them, particularly if their drug use occurs in a group setting where the views of their peers are more influential, they may not care enough about adverse outcomes to factor those into their decision-making, particularly if they come from a deprived background they may have less to lose from the prospect of arrest and incarceration, and they may not think ahead to a consider adverse outcomes there their drug use has become habitual or relatively mindless. And then Professor Mackenzie tests the assumption that higher-level drug traffickers plan and think ahead more than others, which would, if correct, make them more susceptible to deterrence because they would be operating within that rational choice framework. And he said while is, can be, is often assumed, he says there's been very little explicit testing or analysis of that theory and that the available evidence supports the hypothesis that criminal justice sanctions do not have a strong deterrent effect on the

middle and upper echelons of international drug markets, and that's because although those people may be more likely to be exercising rational choice they're also far less likely to be caught and the general evidence is overwhelmingly that it is certainty of sanction rather than severity of sanction that has a deterrent effect.

Just briefly, Professor Berg's evidence was from a behavioural economics perspective and outlined flaws in rational choice theory both generally and in the specific context of drug dealing, same as Professor Mackenzie. The Crown in their submissions has to referred to a passage in *Zhang* where Professor Berg's evidence was quoted and the Crown has suggested that his comments only applied to low-level drug dealers. And while it's correct that that particular passage related to the specific deterrence of low-level dealers, his evidence overall was a far more general application. So for example on page 5 of the executive summary – and this is on the version that I've handed up today – he says: "The deterrent effect of sentencing guidelines for most drug offenders is so weak that reducing them would have no effect on the frequency of drug offences. The factors that strongly influence most drug sellers' decisions about offending simply do not include the duration of prison sentences."

WILLIAMS J:
Where in *Zhang* is this referred to?

MS BLINCOE:
It is paragraph 87 of *Zhang*, and it's referred to in the Crown's submissions at footnote 41.

WILLIAMS J:
Thank you.

WILLIAM YOUNG J:
I mean, that proposition, marginal changes in sentence length have very little deterrent effect, is pretty well established.

MS BLINCOE:

Sorry, your Honour, could you repeat that?

WILLIAM YOUNG J:

The idea that marginal changes in sentence length, lifting sentences by two years or reducing them by two years, have very little marginal deterrent effect, is well established.

MS BLINCOE:

I agree, Sir.

WILLIAM YOUNG J:

And that's – yes.

MS BLINCOE:

And that is the weight of the evidence.

WILLIAM YOUNG J:

Yes. But to say that deterrence, I mean, there's a – to say that deterrence doesn't work, it's quite a big extrapolation from that, particularly if you start from the proposition that you expect that a robust criminal justice system has a deterrent effect.

MS BLINCOE:

If I could perhaps refer the Court to the page 25, which is the last page of Professor Mackenzie's evidence, which is his conclusion, he says: "Some researchers have argued that given the weight of evidence against deterrence –

GLAZEBROOK J:

I'm sorry, where are we?

MS BLINCOE:

Sorry, it's page 25 of Professor Mackenzie's evidence in *Zhang*.

GLAZEBROOK J:

Oh, Mr Mackenzie, sorry, right, okay.

MS BLINCOE:

So it says “Conclusions”, that: “Some researchers have argued that, given the weight of evidence against deterrence, criminology should now accept the null hypothesis in relation to a link between sentence severity and deterrence – in other words, settle on the finding that no such link exists. Others are more cautious. To some extent that caution is built in to the social scientific endeavour. It is very hard to prove that something does not exist, and perhaps we should leave open the possibility that someone will find this deterrent effect in the end. It may be, for example, that sentence severity does not produce deterrent effects in the aggregate but that this aggregate finding subsumes one or more severable types of individual who in certain circumstances may be amenable to sentence-length related deterrence, or that previous studies of deterrence have just not yet found the level of sentence at which a deterrent effect would have manifested. If offenders have thresholds at which their perceptions of risk do begin to affect their criminal activity, perhaps those thresholds have not been reached in extant studies. These concerns seem esoteric at present for the judiciary and for criminal justice policy-makers: criminal justice systems cannot surely be designed on the basis of evidence that we do not currently have but hope someday will emerge. The weight of the best evidence currently is that deterrence is not a compelling reason to adjust sentencing tariffs for any type of offender and perhaps least of all for drug users whose capacity for the rational decision-making required to make deterrence work will be severely compromised.” So that perhaps addresses the point –

WILLIAM YOUNG J:

I don’t really disagree with that.

MS BLINCOE:

Thank you, Sir.

WILLIAM YOUNG J:

But I am starting from the, I do start from the proposition that there has to be a robust criminal justice system. Once you have that that, I agree that changes that are within the range of what's acceptable in a western country aren't going to make much difference.

MS BLINCOE:

And I think that the existence of a criminal justice system is justified partly for deterrence reasons, both theoretically and empirically, because it does have that effect. If we didn't have a system at all, we may end up with more people committing crimes. So in that sense the system does have that deterrence aspect. But in terms of how we sentence individuals, which is the concern in this case, in our submission deterrence should not be an overarching purpose that results in the exclusion of other factors. So in –

WINKELMANN CJ:

So your submission is in effect that it's too uncertain, if there is a deterrent effect it is not of significantly increasing length of sentence, it's not sufficiently supported by the evidence for us to subject people to very lengthy periods of prison and/or putting to one side all other considerations?

MS BLINCOE:

Yes.

GLAZEBROOK J:

Well, you say not only not sufficiently supported, but you would say from that passage there is no evidence at the moment, that it might be that there is some but there's absolutely none at the moment, is that the submission?

MS BLINCOE:

Exactly, exactly, and that's exactly what Professor Mackenzie says.

WILLIAMS J:
If the thing – at the risk of climbing on the pile – if there was such evidence, given 200 years of this type of sanction, and much of it much greater than what's done today, at least some of it much greater than is done today, if there was evidence you'd think we'd know about it.

MS BLINCOE:
Mmm, and a lot of have studied this and, you know, Professor Mackenzie's evidence is focused on people who have studied to try and show that it works.

WILLIAM YOUNG J:
And of course there's huge methodological difficulties with it…

MS BLINCOE:
Yes.

WILLIAM YOUNG J:
Because there are so many moving parts in the criminal justice system that just looking at before and after subjects don't help much, you have to, so increasing elaborate virtual experiments have been devised.

MS BLINCOE:
Exactly, Sir.

So in *Zhang* the Court of Appeal had the benefit of this evidence. But despite the broad and general nature of both the evidence of Professors Mackenzie and Berg, the approach in *Zhang* to personal circumstances and particularly addiction effectively assumes that defendants are exercising a rational choice to offend unless proven otherwise, and then proven otherwise is difficult, if not impossible, in cases where any profit has resulted because, the Court of Appeal says in *Zhang*: "Commercial dealing is likely to be inconsistent with the impairment of the ability to exercise rational choice."

ELLEN FRANCE J:

Aren't you mixing up two things there: one, deterrence, and the other the idea that criminal liability reflects free choice?

MS BLINCOE:

I think earlier in *Zhang* the Court of Appeal talks about the evidence about deterrence in a general sense and – sorry, I'll just find the passage so I can refer your Honour to it. So at paragraphs 86 and 87 the Court of Appeal sets out extracts of Professor Mackenzie and Professor Berg's evidence and then from paragraph 90 onwards they make some comments about the implications of that evidence. The first point they make, which I'll get to in a minute, is this idea that it's wrong to wholly detach deterrence from denunciation, accountability and community protection, but also in that paragraph, in the middle of that paragraph, which is paragraph 90, they say: "Deterrence is also put in issue where the offender is vulnerable, by reason (for instance) of addiction, mental health disability, economic deprivation, duress or undue influence. That consideration reduces the relevance of individual, rather than general, deterrence. It is not a consideration of general application, compelling moderation of sentencing in all cases."

So what the Court of Appeal has done is that they've taken the bits of this evidence that talk specifically about drug offenders and they've said that might reduce the need for specific deterrence in those specific cases where those specific personal circumstances exist and they've narrowed it to only have relevance at that stage, and they make a similar comment at paragraph 92 in relation to general deterrence and again, about half way through that paragraph, they say: "The principle of rational choice is less relevant, and general deterrence is less likely, where that rational choice is constrained by mental disorder (so that the choice may not be rational at all), addiction, poverty, duress or other supervening vulnerability."

WINKELMANN CJ:

Is part of your submission that they haven't addressed the general deterrence issue, they've simply gone straight to the personal, in light of the two?

MS BLINCOE:

They've made essentially the same comment about both general deterrence and specific deterrence but in both of those contexts they've said the – what they haven't said is that they're kind of assuming that it mostly works but within that, if you've got these very specific vulnerabilities and you can prove those to a sufficient extent and also you haven't made any commercial profit, then general deterrence and specific deterrence have less relevance.

WINKELMANN CJ:

So are you saying they are assuming that general deterrence works?

MS BLINCOE:

Yes. That's not stated but it must be implicit because they are carving out exceptions. They are saying that "rational choice is less relevant, and general deterrence is less likely, where that rational choice is constrained by mental disorder," addiction, poverty, et cetera. So that starts from the assumption that unless you've got one of those factors general deterrence is working.

WILLIAM YOUNG J:

But how do you distinguish between general deterrence and the general deterrent effect of a robust criminal justice system? Aren't they just the same thing?

MS BLINCOE:

No. So general deterrence is, in this context, looking at the sentence length for a particular type of offence.

WILLIAM YOUNG J:

Isn't that marginal deterrence?

MS BLINCOE:

It is marginal deterrence. So marginal deterrence is the idea that changes in sentence length can have a general deterrent effect. So the –

WILLIAM YOUNG J:

But what is the difference? Sorry. There is an issue whether tinkering with sentence lengths has a deterrent effect and the evidence suggests strongly that it doesn't, or doesn't much anyway. But there is a general deterrent effect in a robust criminal justice system. Why isn't that general deterrence?

MS BLINCOE:

Yes, so I think the distinction is general deterrence can operate at every level. There's the likelihood of – in terms of what the police are doing – the likelihood of apprehension. There's a likelihood of conviction. There's a likelihood of a prison sentence and then there's the length of the prison sentence.

WILLIAM YOUNG J:

So isn't it clear that that does have a deterrent effect?

MS BLINCOE:

It's the perceived certainty of apprehension, conviction and punishment have a general deterrent effect. The deterrence through sentencing, which is sometimes called marginal deterrence, is the part in that process that does not have.

WILLIAM YOUNG J:

Okay, but does the Court of Appeal talk about marginal deterrence or are they talking about general deterrence or are they just gliding over it?

MS BLINCOE:

They are talking about whether sentence length has a deterrent effect and that –

WINKELMANN CJ:

That's at 90?

MS BLINCOE:

In my submission, that is the same as marginal deterrence. Like, marginal deterrence is one term that's used for that. Deterrence through sentencing is another term that's used for that and then you've got general deterrence at other stages of the system. The Court of Appeal doesn't talk about that idea of general deterrence at other points of the system, I don't think.

WILLIAM YOUNG J:

But general deterrence, I mean we're probably going around talking about semantics, but an unpleasant sanction is part of the criminal justice system and does have a deterrent effect. I think you accept that.

MS BLINCOE:

In a very general sense?

WILLIAM YOUNG J:

Yes.

MS BLINCOE:

Yes, yes. So the fact that we have a system that can impose punishments generally and can incarcerate people and deprive them of their liberty is very well established and accepted to have a general deterrent effect. There are some people – some people don't commit offences because they believe that the offence is morally wrong or they believe in the legitimacy of the law but there are other people who may or may not commit those offences and are deterred by the general existence of sanction and punishment or –

GLAZEBROOK J:

But you'd say mostly on the evidence from the certainty of being apprehended rather than –

MS BLINCOE:

Yes.

GLAZEBROOK J:

– certainty or less certainty of being apprehended rather than the punishment?

MS BLINCOE:

Yes, yes, and that's –

GLAZEBROOK J:

As I understood you, sorry.

MS BLINCOE:

Yes, that's overwhelmingly the evidence is that that's where it operates.

WILLIAM YOUNG J:

Okay, but why would certainty of being caught, and of course there isn't any certainty, have any deterrent effect unless being caught has consequences?

MS BLINCOE:

I think that's true in a general sense of the potential consequence of incarceration but the length of that incarceration just doesn't – the evidence is that that aspect of it doesn't factor into decision-making.

WILLIAM YOUNG J:

But is there any evidence as to that apart from in relation to the marginal deterrence studies? I mean if the legislature said: "Look, we've been far too tough on burglars. The maximum fine for burglary is $50," well, it's highly likely that burglary would increase. So to say sentence has no impact is a difficult one to justify.

GLAZEBROOK J:

Well, if you lose all the profits then it's highly likely that you wouldn't, so that the certainty might be losing all the profits from burglary because burglary is essentially a profit aspect.

WILLIAM YOUNG J:

Well, that's another assumption.

GLAZEBROOK J:

So if you have 100% certainty of getting caught and you lose all your proceeds, it might actually have a deterrent effect.

WILLIAMS J:

The point is, isn't it, that the evidential failure of marginal deterrence brings front and centre the requirement in section 8 to consider the least restrictive intervention by the state given that marginal increases in that intervention are not having the result you want. You need to have a firm response but it needs to be the least possible firm response and that's it.

MS BLINCOE:

Yes, and that's – yes, I agree with that, your Honour. And that perhaps leads into my next point which is about accountability, denunciation and community protection because the Court in *Zhang* said that it is wrong to wholly detach those concepts, but what the Court in *Zhang* didn't do is explore what those sentencing purposes actually mean and how they are reflected in section 8 of the Sentencing Act.

So starting with accountability which is the first purpose listed in section 7, surprisingly, in my view, there's very little academic or judicial comment on what this purpose of accountability is supposed to mean in the Sentencing Act. So both *Halls' Sentencing* and *Adams on Criminal Law* equate it with the idea of just deserts or retribution-type purposes, that is that punishment is justified because the offender has done something to deserve it. At common law both retribution and denunciation always included an inherent requirement of proportionality. The Ministry of Justice said in its discussion paper in 1997: "The just deserts approach can cover both a retributive element, in that the sentence is deserved by virtue of the wrongdoing, and a denunciatory one whereby the sentence is deserved because the wrongdoing must be publicly condemned. Proportionality is

observed in both cases through the requirement that the sentence be just." As a result and, unlike deterrence, application of the purpose of accountability to the extent that it encompasses retribution, and also the purpose of denunciation, inherently requires that personal mitigating factors are weighed in the sentencing exercise. The Supreme Court of Canada said in *Ipeelee* at paragraph 37 of that decision: "The principle of proportionality ensures that a sentence does note exceed what is appropriate, given the moral blameworthiness of the offender."

WILLIAMS J:
Can you give me the paragraph again, please?

MS BLINCOE:
37. "In this sense the principle serves as a limiting or restraining function and ensures justice for the offender." Later on in that decision, referring to the constrained circumstances of many indigenous offenders, the Supreme Court of Canada said – and this is at paragraph 73 – "Failing to take these circumstances into account would violate the fundamental principle of sentencing – that the sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender." Unlike Canada, of course, New Zealand does not have a fundamental principle in our Sentencing Act. However, the purpose of accountability, again to the extent that it does encompass just deserts or retribution and also denunciation, are heavily reflected in section 8.

WINKELMANN CJ:
Well, you'd say that fundamental principle's expressed – it's not expressed, it's a fundamental principle – but it infuses the Sentencing Act's framework?

MS BLINCOE:
Yes. So many of the principles in section 8 reflect the proportionality exercise that is required when imposing a sentence for the purposes of accountability and denunciation. In my submission accountability has the potential to be broader than simply retribution, and I don't propose to go into that in detail.

But in our submission – not in this case but in other contexts – that purpose of accountability might be better achieved by someone being held accountable in the community by their community –

WINKELMANN CJ:
Well, that's the common sense meaning of accountability, isn't it, being held to account?

MS BLINCOE:
Yes. So it's fascinating that "accountability" was used in the Sentencing Act and I haven't found any explanation for it. There's this assumption that it means "retribution", but the plain meaning of it is completely different to retribution.

WILLIAM YOUNG J:
What is the plain meaning?

MS BLINCOE:
I've referred to some dictionary definitions –

WINKELMANN CJ:
Well, it's that you have to account for yourself and your wrongdoing, isn't it, and that's you normally do that in a, you'd normally do that if you – a child accounts for themselves to their parents –

MS BLINCOE:
Yes.

WINKELMANN CJ:
– and in a community situation you account for yourself to your community for what you've done?

WILLIAM YOUNG J:
But doesn't "accountability" sometimes mean "consequences"?

WINKELMANN CJ:

Yes.

MS BLINCOE:

I've referred to two dictionary definitions in the submissions and it's at footnote 157. One of those definitions is: "An obligation or willingness to accept responsibility or to account for one's actions," and another one is: "If you are accountable to someone for something that you do you are responsible for it and must be prepared to justify your actions to that person."

WILLIAM YOUNG J:

But, I mean, when you're dealing with an offender there can't be a justification for the actions, you know, by definition they've done something wrong so it can't mean that…

MS BLINCOE:

No, but there can be an explanation, which is obviously a different concept.

WILLIAM YOUNG J:

So, you say accountability doesn't include nasty consequences?

MS BLINCOE:

It *can* include nasty consequences. But do those consequences actually achieve this plain meaning of accountability?

WILLIAM YOUNG J:

Sorry, it probably doesn't matter much, but do you say that accountability for the purpose of the Sentencing Act does not include nasty consequences from the point of view of the offender?

MS BLINCOE:

So in my submission it does – it can. Where we got to in our submissions with this concept is it encompasses retribution and the idea of proportionality inherent in that, but it also has the potential to be broader because Parliament

has deliberately used the language of accountability rather than retribution, so –

WILLIAMS J:

Having thought about looking at these words, really having to think about them for the first time in some time, it may be that retribution gets a bad rap because it's just retribute, ie, to give back to, to tribute back that which you have taken, which seems to me is the same as accountability, it's just that we use retribution as if it's utu these days when in fact the etymology of that word is not that. Tribute is a gift.

MS BLINCOE:

I think that's correct. In New Zealand I think there's a kind of reaction to the idea of retribution because we equate it with vengeance or something like that in a very negative way, but what the Supreme Court of Canada said in *R v M (CA)* [1996] 1 SCR 500 is retribution is not the same as vengeance: "retribution incorporates a principle of restraint; retribution requires the imposition of a just and appropriate punishment, and nothing more".

WILLIAM YOUNG J:

That's just just deserts, isn't it?

WILLIAMS J:

Yes.

MS BLINCOE:

Yes. So the traditional framing of that is "just deserts" is the overarching concept and then the two aspects of that are retribution and denunciation.

WILLIAM YOUNG J:

And the problem is apples and oranges in spades because you've got the apple of culpability and the orange of what form of retribution should be or just deserts is, and they're not the same currency.

MS BLINCOE:

No, I agree, Sir, you can't – the task of, I suppose, the judiciary is to somehow weigh the offending against a punishment and somehow make those equal, and that's the task that we're engaged with in the courts, somehow making that sentence be proportionate.

WILLIAMS J:

Well, if we were going through that exercise as economists, I think the Ministry of Justice's prerogative of mercy unit attaches $100,000 to a year in jail, and if that's the case I'm not sure how much Mr Berkland made but I don't think it was $100,000, in which case he'd get a year. Well, I don't think that's very sensible but this whole equation is problematic.

MS BLINCOE:

It's another way of – so I simply just wanted to flag that and in our submission accountability does encompass retribution but there is potential for that purpose to be applied in a much broader way that's more consistent with its plain meaning and that recognises the reality that often imprisonment does not actually hold someone accountable in any meaningful sense whereas a community-based sentence, where the person is reconnected with their community and having to explain themselves to that community and make up for their offending somehow in an ongoing way, could achieve the plain meaning of accountability far better than prison ever could.

So I just wanted to say that while we're thinking about these purposes that they might have a broader meaning beyond how they play out in this case, but obviously when we're considering a sentence of imprisonment the way that accountability is engaged requires that proportionality exercise which is inherent in accountability and denunciation and obviously not at all relevant if you're sentencing for a deterrent purpose.

Finally, community protection. Again entirely different to deterrence with entirely different conceptual foundations. Usually community protection is equated with incapacitation, that is the idea that while the offender is in prison

they are not committing offences in the community, and on that basis obviously prospects of rehabilitation will reduce the need for community protection because it reduces the likelihood of the person re-offending. So if a sentence is being imposed for that purpose then the defendant's prospects of rehabilitation in particular must be closely considered. And again, Parliament has chosen to use the language of "community protection" rather than "incapacitation", which was the traditional common law label, and again in my submission that enables a broader approach, and in some cases the community will be better protected by sentencing someone to a rehabilitative community-based sentence which can achieve that rehabilitation and community protection in the long term than sending someone to prison where they may or may not rehabilitate and they may or may not go on to rehabilitate and they may or may not go on to re-offending.

Lastly, in terms of this broad argument about deterrence, I just wanted to touch on the fourth part of my submissions, which is about change social values. So the Select Committee, as I've noted, anticipated that the shifting perceptions of society may alter the weight to be given to the different purposes of sentencing, in section 7, and similarly to the extent that sentencing remains a partly common law methodology it must be responsive to changing social needs, values and perceptions. Public opinion is clearly shifting from a focus on punishment to a focus on rehabilitation, and there are examples of a number of surveys of that public opinion in the written submissions at paragraph 130 onwards. And, just briefly, the District Court is responding to these calls for change with its new Te Ao Mārama model, which looks at the underlying reasons for the offending and seeks to address those underlying reasons, and in my submission that is the approach required by the Sentencing Act and it is the approach that should occur at all levels.

So turning to the next point, which is this specific issue of personal mitigating factors, starting with addiction. So in this case there was clear evidence of addiction in the PAC report and in the alcohol and drug report, both of which the sentencing Judge had. The alcohol and drug report recorded that Mr Berkland started smoking cigarettes at the age of nine, using cannabis at

the age of nine, sniffing glue at intermediate school, using alcohol at the age 14 and using methamphetamine when he was in his thirties, with his use becoming excessive following the death of his older brother in around 2016. The alcohol and drug report concluded that his pattern of substance abuse history was consistent with substance dependency as defined in the DSM-IV. The report recorded that Mr Berkland was very aware that his methamphetamine use had become the main contributing reason leading to his current circumstances. The PAC report similarly recorded that Mr Berkland turned to drug use to deal with his emotions regarding his brother and his childhood, he had a good experience with methamphetamine, which led him to continue using it to cope with his feelings. He said this led to a downward spiral and to his offending.

This description by Mr Berkland recorded in the PAC report aligns with Professor's Berg's behavioural heuristics approach to explaining human behaviour as opposed to rational choice theory. Professor Berg says that rather than rationally weighing the costs and benefits of every decision, people to imitate those in one's social environment and stick with whatever worked well enough in the immediate past. Mr Berkland's methamphetamine use and –

WILLIAMS J:
I'm sorry, what was his – he had a one-liner for that.

MS BLINCOE:
Sorry?

WILLIAMS J:
Professor Berg had a one-liner that that. What did he call it?

MS BLINCOE:
"Behavioural heuristics".

WILLIAMS J:

No, he…

MS BLINCOE:

Oh, do you mean the line that I just read?

WILLIAMS J:

No. He called it “win…

MS BLINCOE:

Oh, “win” – let me just check that.

WILLIAMS J:

It doesn’t matter, I’ll find it.

MS BLINCOE:

It was something like “win –

WILLIAMS J:

That was him, was it?

MS BLINCOE:

Yes, “win…

WILLIAMS J:

“Win repeat lose change”, something like that.

MS BLINCOE:

Yes. “Win stay lose shift”.

WILLIAMS J:

Ah, right.

GLAZEBROOK J:

Have we got a page number for that?

MS BLINCOE:

Yes, so it's page 67.

GLAZEBROOK J:

Yes, I've got it.

MS BLINCOE:

This is of the version that I've handed up.

GLAZEBROOK J:

Yes, I was trying to find that, thank you.

MS BLINCOE:

So Mr Berkland's methamphetamine use and consequently his addiction, sorry, and by implication his addiction, is also referred to in the summary of facts which Ms Ord has outlined. From the material available to the sentencing Judge and from the summary of facts it is apparent that Mr Berkland's motivations for his offending were threefold: one, to feed his own addiction; two, to provide for his children; and, three, what we have called broader financial motivations.

The sentencing Judge appears to have accepted that Mr Berkland's addiction contributed in some way to his offending. The Judge referred to the alcohol and drug report and said that the diagnosis of dependency was "consistent with your statements about your motives for the offending," and that's at paragraph 34 of the High Court sentencing decision. The sentencing Judge was, however, constrained by *Fatu* and by *Jarden* and allowed a discount of only six months or 2.8%.

The Court of Appeal did not allow a greater discount for addiction. This was due to a blunt application of the presumption in *Zhang* that causation will not be established in cases of serious commercial dealing. The Court of Appeal declined the discount by reference to matters that had already been taken into account elsewhere in the sentencing exercise. The four things they referred

to were the scale of the offending, presumably a reference to quantity, obviously already taken into account and set in the starting point; its commerciality, in our submission arguably inherent in quantities of this scale but, in any event, one of the indicia of significant role which was expressly taken into account in setting the starting point; his dealing in more than one drug, which had been taken into account in combination with the firearms offending by a one-year uplift; and his income beyond a subsistence level, again a matter expressly taken into account in assessing role.

WINKELMANN CJ:

Well, that doesn't mean anything though. They're not double counting because they're not uplifting if they're simply saying that tends to negate this particular mitigating factor which is a rather mainstream methodology. I'm not suggesting there's no value in your submission. I'm just saying there's nothing I think in the double-counting point, the fact they've already taken it into account somewhere else.

MS BLINCOE:

I suppose in our submission it's – the reasoning in *Zhang* is a presumption or a predetermination that where commerciality or profit is present it will be difficult, if not impossible, to establish –

WINKELMANN CJ:

So your point is not that they've already taken into account, your point is that it's a false premise that you can't have addiction as an operating or contributing factor where there's a commercial element?

MS BLINCOE:

Mmm, so it's not – this whole causation thing in *Zhang* in our submission isn't really about causation. It's not applying any kind of orthodox test for causation such as the "but for" test which we would say but for his addiction would Mr Berkland have ever got involved with Mr Blance, and the answer is absolutely not. That was the reason why he got involved in the first place. *Zhang* doesn't even set out a test for causation. It just sets out a requirement

for causation and then a presumption that it won't be established. So in our submission that's not really about causation. It's about giving effect to this Court's comments in *Jarden* that personal mitigating factors will have little weight because of the crucial importance of deterrence in drug dealing cases.

WILLIAMS J:

Isn't the – I mean there's something instinctively okay with the idea that vast income or vast scale shades out addiction. It's not necessarily a bad idea I guess if it's borne out. There might be a problem with making that the default position, given that those two things usually occur together.

MS BLINCOE:

I think in our submission there will obviously be cases where there is huge profit and the person is not addicted, and there will be cases where there's profit and addiction that co-exist, and in every case what the Sentencing Act requires is that the Judge looks at the particular facts of the case and says: "Was addiction one of the contributing factors to this offending?"

WINKELMANN CJ:

It has to turn on role in that circumstance because if you were a lead, a controlling character, person who set up the whole thing, sophisticated it for massive profit, well, then, the fact you were an addict but somehow managed to be a high-functioning drug manufacturer or importer, I think the addiction just phases into insignificance, doesn't it, because there's nothing about your addiction which is compelling you to construct an enormous commercial enterprise?

MS BLINCOE:

I think in general a proper factual analysis might lead to that conclusion but it's not helpful to have a presumption that that will be the conclusion before looking at the facts of the particular case. It might be –

WINKELMANN CJ:

It's a good indicator, though.

MS BLINCOE:

Potentially or potentially not. We just – it – there are a lot of cases, putting aside the person who's leading, there's a lot of cases involving significant role where this blanket approach has been applied to deny discounts without looking at the facts, and so I think for any level of role this is a separate exercise at stage 2 of *Taueki* where the Court is required by section 8 to look at the evidence of the factual circumstances before them. It may be that the Court disbelieves that the person is addicted if they say "I'm addicted" but there's a whole lot of other indicators that they weren't. The Court might find that the person is addicted but it didn't contribute in any way to the offending. But the Court can't predetermine that by having this blanket presumption.

WINKELMANN CJ:

No. It's simply the case, however, that as a matter of fact it's very unlikely to be a situation where someone is both an addict and also a mastermind of a large commercial operation. You know, the addiction will just not be any kind of a significant explanation of it and it's also a factually unlikely scenario, of course.

GLAZEBROOK J:

There's a lot of high-functioning alcoholics, however –

WILLIAMS J:

I wonder whether that's – exactly.

GLAZEBROOK J:

– who manage to function in what one might think of as sophisticated circumstances.

WINKELMANN CJ:

Well, I've yet to see an addict who's a head of a large commercial organisation.

GLAZEBROOK J:

Well, methamphetamine probably you're right but I'm not sure about some other addictions.

WINKELMANN CJ:

But in any case the point is that if you set up a large –

WILLIAMS J:

Yes, what about the famous 1973 schnapps election, for example?

WINKELMANN CJ:

It wasn't 1973. It was…

WILLIAMS J:

'84, sorry. Wrong decade.

WINKELMANN CJ:

If you set up a large enterprise, commercial enterprise, then addiction would have to be seen as being a very poor balance for that or would it be diminished in significance, and I think that you could say the Court of Appeal is signalling that in *Zhang*.

WILLIAMS J:

I guess that isn't the argument that this is a public law point that personal background is a mandatory relevant consideration and you can't by judicial fiat exclude it even as a default? You have to take it into account. There's no choice.

MS BLINCOE:

Yes.

WINKELMANN CJ:

But the Court of Appeal hasn't done that?

WILLIAMS J:

Well, it has actually.

MS BLINCOE:

There's several ways you can interpret that but the way that it's been applied in this case is a blanket presumption, and there's other cases –

WINKELMANN CJ:

Well, it's a presumption which is not an exclusion, but you're saying it shouldn't even be a presumption?

MS BLINCOE:

Mmm. It's a factual matter in every case that section 8 requires the Court to look at the facts before it to make factual findings if it needs to and to apply the Sentencing Act properly.

WINKELMANN CJ:

I must say I think it's rather a conventional thing for a court to do to say that the fact there is a large profit in an enterprise is quite a good indicator that addiction is not likely to be a significant contributor to this.

MS BLINCOE:

Again that's a specific factual matter to be determined in each case and the blanket presumption doesn't help. So –

WILLIAM YOUNG J:

Just so I'm right, what subsection of section 8 are you referring to?

MS BLINCOE:

Particularly (g), "must impose the least restrictive outcome"…

WILLIAM YOUNG J:

Okay, so, yes, but…

WILLIAMS J:

It's (i) really, isn't it, personal background?

WILLIAM YOUNG J:

But that's – yes. That says – what does "with a partly or wholly rehabilitative purpose"? That's presumably "or other means of dealing", yes?

MS BLINCOE:

Well, I think I, what my submission earlier today was, I, may have been originally intended primarily at community-based sentences. But most sentences should include a rehabilitative aspect, so subsection (i) is always going to have some relevance in terms of taking into –

WILLIAM YOUNG J:

Would you say that that includes prison sentences or…

MS BLINCOE:

I think prison – so section 16 of the Sentencing Act says you can sentence someone to prison for, there's a list of purposes and rehabilitation isn't one of them. But the way that that section is framed is that it just needs to be at least one of the other purposes and it doesn't exclude the possibility that prison can also have a rehabilitative effect. Of course in my submission prison is not at all effective rehabilitation and where possible people should be sentenced to community-based sentences, but that doesn't mean that if someone's sentenced to prison the Court should give up any hope that rehabilitation might occur, and obviously in every case the Court should be bearing in mind rehabilitative potential in sentencing.

WILLIAM YOUNG J:

But I guess the sentencing practice has been along the lines that the more serious the offending the less significance should be attached to, the less the significance that she be attached to personal factors.

MS BLINCOE:

In my submission that view, which I accept has been a prevailing view for a long time, is largely based on deterrence.

WINKELMANN CJ:

Or just deserts.

WILLIAM YOUNG J:

Or just deserts.

MS BLINCOE:

Possibly, although just deserts in my submission, a proper interpretation of just deserts, because it requires you to look at culpability and the proportionality between culpability and the sentence, that culpability assessment has to include underlying factors that contributed to the offending.

WINKELMANN CJ:

All right, so, I mean, I think we've taken it as far as we can. I mean – yes, right.

MS BLINCOE:

So just specifically in terms of this issue of causation versus contribution, there's nothing in the Sentencing Act that requires causation, but the Sentencing Act does of course require consideration of culpability, consistent treatment of similar offenders and the imposition of the least restrictive sentence. A requirement for contribution rather than causation reflects the Sentencing Act, is clear, is capable of consistent application, and removes the difficulties that have arisen in the interpretation of the causation standard post-*Zhang*, which I'll talk about specifically in a minute

In this case there is clear and compelling evidence that addiction was one of the contributing factors for this offending because one of Mr Berkland's motivations was of course to feed his own addiction. Even if this Court was applying a causation standard, this requirement is satisfied because it was

Mr Berkland's addiction that got him into this offending in the first place or, alternatively, it is satisfied for the same reasons as in the Court of Appeal's decision in *Clark v R* [2020] NZCA 641, where the Court of Appeal acknowledged, even applying *Zhang,* that addiction could be a partial cause that could co-exist with profit as a motivation.

So just turning some of those other post-Zhang appeals and the difficulty that the Court of Appeal has had in applying this causation requirement, in Appendix 1 of our submissions we've set out what we say are the five different approaches that the Court of Appeal has used in applying the causation requirement in Zhang, and these are all cases where the Court has accepted that the appellant is addicted and where there is also some actual commercial profit or expectation of commercial profit.

So some of these cases, *Whiteford v R* [2020] NZCA 130, *Wellington v R* [2020] NZCA 277 and *Su v R* [2020] NZCA 128, have received no discount on the basis that the fact of their profit is inconsistent with addiction being a cause of the offending. In other cases, and they are listed in appendix 1, discounts were granted but expressly limited in their extent by the scale of the offending. Thirdly, in a number of other cases, the Court of Appeal found that the addiction did not cause the offending and declined a discount on that basis but instead allowed a discount for rehabilitative prospects. The fourth group of cases, discounts have been granted for addiction and/or rehabilitation with no reference to the concept of causation at all. And finally, as I mentioned, there's been one case, *Clark v R*, where the Court of Appeal has recognised the reality that addiction and commercial profit can co-exist as contribution factors, and what the Court said was for some the choice to offend may be overwhelmingly influenced by their addiction. For others, addiction will be a partial influence, and for the remainder it may have no role at all in their decision-making. The Court in that case found that Mr Clark fell into the middle category because he acted partly to feed his addiction and partly in the hope of financial gain and allowed a 15% discount for addiction as well as 5% for remorse and 12% for rehabilitation.

So the Crown has submitted in this case that these different outcomes are unsurprising and are a function of the variety of circumstances that inevitably come before the Courts. However, in our submission the Crown's submission fails to differentiate between disparity which is justified by materially different circumstances and disparity which is arbitrary and therefore unjustified. The Crown has not suggested which circumstances exactly in these cases justify the different outcomes and, moreover, these cases involve not only different outcomes but entirely different processes by which those outcomes were reached. In our submission, comparison between these cases is possible precisely because they all involve appellants with materially the same circumstances.

WINKELMANN CJ:
And the Court of Appeal in different context in *Carr v R* [2020] NZCA 357 has obviously taken quite a different approach, hasn't it?

MS BLINCOE:
Yes.

WINKELMANN CJ:
Outside drug offending.

MS BLINCOE:
Yes.

WINKELMANN CJ:
And there's no reason, is there, why there should be different approaches to this between drug offending and other areas in terms of the notion of causation and contribution?

MS BLINCOE:
I agree. Absolutely. So the Court of Appeal's inconsistent treatment of this combination of factors is a direct product in our submission of the expression of the causation requirement in *Zhang* and the proposition from *Jarden* that in

commercial drug sentencing personal circumstances count for little. The result has been different treatment of similar offenders contrary to the consistency requirement in section 8(e) of the Sentencing Act.

WILLIAMS J:

I wonder whether – you suggest a contribution as opposed to causation. How about something like was a material factor in the offending?

MS BLINCOE:

I think language can be – the point isn't necessarily the words used, it's the outcome, so…

WILLIAMS J:

Sure. But the words do matter because causation, you say, has been the cause of this variance.

MS BLINCOE:

And causation's not –

GLAZEBROOK J:

The trouble with "material" is that it often has a worse effect than "causation" because it actually –

WINKELMANN CJ:

More inconsistency.

GLAZEBROOK J:

– because "material" can mean "a factor" but it can also mean "a really important factor" and the trouble with "material" it's usually used in that latter sense.

WILLIAMS J:

Take "material" out then. A factor.

GLAZEBROOK J:
Yes.

WINKELMANN CJ:
Which is contribution, yes.

MS BLINCOE:
I think whatever language is adopted it would be helpful if this Court is clear about what that language is supposed to mean because –

WILLIAM YOUNG J:
But might it not have to take into account how significant that contribution was, as a really minor factor might warrant little or no allowance –

MS BLINCOE:
Yes.

WILLIAM YOUNG J:
– a big factor a different allowance, and then aren't you back to contribution, or degrees of contribution or degrees of causation?

MS BLINCOE:
Of course. So, and I think that's what *Clark* acknowledges, that it could be –

WINKELMANN CJ:
But to search for scientific contribution, proof of scientific causation, the problem with the word "causation" is that it encourages a lawyer to search for…

GLAZEBROOK J:
Tortious.

WINKELMANN CJ:
Yes, causation…

WILLIAM YOUNG J:
(inaudible 13:00:27).

WINKELMANN CJ:
Yes. And your point is that that is to be avoided. And I notice that *Carr* seems to avoid any kind of language whatsoever, doesn't it, it just – how does it approach it? Simply "impaired choice and diminished moral culpability", so, and in *Carr* the Court was talking about life choices, life choice, that effectively there was a path the person was taken down through life.

MS BLINCOE:
I agree. And also in our submission – because causation is not necessarily inherently problematic but it's become problematic because it is so capable of different interpretations, and because the Court in *Zhang* has not clarified what they mean in setting that test, they've just stated what we say is a presumption against it being satisfied.

So in our submission "contribution" is clear, it's clear that it's a relatively low standard, that there can be multiple contributing factors, there can be different degrees of contribution, but it doesn't impose a higher standard that it's the primary cause or the only cause or anything like that. And, interestingly, in *Jarden* and – definitely in *Jarden* – this Court actually used "causation" and "contribution" fairly interchangeably. In one place the Court says "contribution", in one place the Court says "causation", and it seems to me that at that time those concepts were equated, and it was the same in *E v R* in relation to mental health, those terms seems to be used fairly interchangeably. But what's happened in *Zhang*, and not necessarily whether or not, I don't know whether or not this was intended in *Zhang* but how it's been applied, is that "causation" implies a much higher hurdle then "contribution" does. So it would assist to clarify that it's that lower level of "contribution" that's required rather than a "causation", which can be interpreted as a much higher standard.

WILLIAMS J:

It seems that the problem is that “causation” gets tougher the further up the commercial scale and role spectrum the offender is. At the lower level it’s easy, it probably is “contribution” and that’s some sort of blameworthiness assessment, I suspect, that we undertake instinctively and perhaps even unconsciously.

MS BLINCOE:

I agree, and that’s been the effect of *Zhang,* is that offenders at the lower end are getting generous discounts for addiction and they’re getting sentences of home detention, which never would have been possible under the previous approach. So *Zhang* has really shifted in a very positive way the approach at the lower end. But our submission is that’s stage two of the sentencing exercise. You can have offenders like Mr Berkland, who are involved with a large quantity of methamphetamine, but who also have these factors which constrain his, limit his choices, constrain his culpability, and that can happen as a factual matter even if you're looking at relatively large amounts of methamphetamine dealing.

So our submission is simply that that's stage two and, as a matter of practice, it may well be more likely that it’s the lower end offenders whose addition contributes to the offending, but it’s a factual analysis that has to occur.

WINKELMANN CJ:

So his life circumstances and his addiction created all the conditions for him to travel this particular path.

MS BLINCOE:

Yes.

WINKELMANN CJ:

To be contrasted with the life circumstances of someone who grew up in a stable household where his father wasn’t a violent alcoholic and he didn’t have an addition, so.

MS BLINCOE:

And that leads into my next point. So addiction is the –

WINKELMANN CJ:

You have another point? I thought you'd finished. Because it's 1 o'clock. How much longer will you be?

MS BLINCOE:

Probably only 10 or 15 minutes.

WINKELMANN CJ:

So, yes, timing. We've been quite a long time with your submissions. So what more do you have to cover, what other points do you have to cover?

MS BLINCOE:

Just deprivation as a separate specific thing.

WINKELMANN CJ:

All right.

MS BLINCOE:

And then rehabilitation.

WINKELMANN CJ:

And Ms Ord will be very brief, I should think, on MPI, I should think very brief? All right, okay. So we'll take the adjournment now. We'll come back at two.

COURT ADJOURNS: 1.05 PM

COURT RESUMES: 2.03 PM

WINKELMANN CJ:

Ms Blincoe.

MS BLINCOE:

So just very briefly in relation to deprivation as the basis for a separate discount, there was a latter from Mr Berkland's former partner which is included in the materials in the Court of Appeal additional materials 2.

WINKELMANN CJ:

So Justice Collins does refer to a letter from his partner but that's not his former partner. So both his partner and his former partner wrote.

MS BLINCOE:

Initially when we read Justice Collins' decision we assumed that was a mistaken reference to the letter from his former partner because we had the letter from his former partner and we didn't have any letter from his current partner. It subsequently transpired that Justice Collins never received that letter or –

WINKELMANN CJ:

From his former partner?

MS BLINCOE:

From his former partner – or a number of the other materials. It seems there may also have been a letter from his current partner but we have never seen that letter. It wasn't in the High Court file. It wasn't in Mr Stevenson's file. So we don't know. That reference to the letter from his partner –

WILLIAM YOUNG J:

How do you know he didn't have the former partner's letter?

MS BLINCOE:

Because it wasn't on the High Court file that got sent up to the Court of Appeal and we made enquiries with the High Court and they weren't able to find any of those materials, and the Court of Appeal –

WINKELMANN CJ:

And is there an indication that he did have a letter from his existing partner?

MS BLINCOE:

We asked his existing partner and she says she does recall writing a letter but we can't say what happened to that, but it may have existed but we've never seen it. But the important letter is the one from his former partner which the sentencing Judge didn't have. The Court of Appeal did have it and they outlined our submissions about it but then didn't come back to the issue of whether it warranted a separate discount.

WINKELMANN CJ:

Well, not the letter but the circumstance.

MS BLINCOE:

Exactly, the circumstances. And those circumstances include his childhood background in terms of physical abuse and violence and sexual abuse and other issues in his childhood and then her description of his life as an adult, including particularly the death of his older brother and the fact that Mr Berkland had resented his older brother for not protecting him from their father's violence. The older brother apologised on his death-bed and Mr Berkland visited him on a daily basis for the last couple of months before he died. So what Mr Berkland's former partner sets out is that that event triggered all of this unresolved childhood trauma and led to a spiral into methamphetamine use and addiction and depression which was the context of this offending and she describes –

WILLIAM YOUNG J:

Sorry, just pause there. It's just a query really. Does the Court have to accept as a matter of fact that it is established as a matter of fact everything that's said in the letter?

MS BLINCOE:

Sorry, Sir?

WILLIAM YOUNG J:

Does the Court have to accept as established as a matter of fact what is asserted in the letter?

MS BLINCOE:

The Crown has never challenged what's in the letter and –

WILLIAM YOUNG J:

No, I understand that, but normally letters like this aren't challenged.

MS BLINCOE:

No, and it's…

WILLIAM YOUNG J:

And it's quite a good letter. I mean I agree it's a very insightful letter but it's just a matter of I suppose process. You were saying essentially everything she said should have been accepted as true and the Judge or the Court of Appeal should have sentenced on the basis of that analysis of the facts.

MS BLINCOE:

And I think it's open to the Court to assess the credibility and reliability of letters like that in a general way.

WINKELMANN CJ:

Well, isn't it consistent with what's in the pre-sentence report which is not necessarily factually verified either but the Courts do tend to proceed upon the basis of – sorry, PAC report it's now called.

MS BLINCOE:

Yes.

WILLIAM YOUNG J:

What's the abbreviation? What does the acronym stand for?

MS BLINCOE:

Provision of Advice to Courts.

GLAZEBROOK J:

Okay, so that's why it's PAC.

MS BLINCOE:

But yes, I think in some cases materials in letters might be entirely uncorroborated but in this case it's corroborated by the PAC report, the alcohol and drug report and Mr Berkland's own letter to the Court. So there are a number of different sources of this material and in –

WINKELMANN CJ:

Well, there's consistency at least.

MS BLINCOE:

Yes.

WINKELMANN CJ:

There's consistency of account.

MS BLINCOE:

Yes.

WINKELMANN CJ:

It's not really corroborated because it tends to be self-corroborating. Mr Berkland's told this account to many people.

MS BLINCOE:

Yes, although Mr Berkland had been separated from his former partner for quite a few years at this stage. So obviously the early childhood is what he's told her but the more recent stuff is her observations of what had occurred, and also she is a registered social worker and so she's got that lens as well. So that perhaps could be relevant to the assessment of her – not that she's giving evidence as an expert but that she's got that context.

WINKELMANN CJ:

But I suppose the question that Justice Young has asked you is is it material – well, obviously it's a material question because he asked it – but material when we are moving into a different phase of sentencing as you would say it which is where we give a greater level of discount for a variety of factors on your account? If we're going to be doing that and differentiating defendants on that basis, the Court could be led into quite an invidious position if it's just relying on own, you know, on accounts. It could motivate people to concoct disadvantage that doesn't exist.

MS BLINCOE:

It could, and I think…

WINKELMANN CJ:

I think it probably would if they knew that they could get a 20% discount for having a hard childhood, you know.

MS BLINCOE:

Well, I think the reality is that a lot of defendants in the criminal courts do have a hard childhood and that exists and –

WINKELMANN CJ:

Yes, but that doesn't answer the point though, does it?

MS BLINCOE:

Well, mitigating material at sentencing has often been by way of letters in support and the courts always had a role in weighing those. But unless –

WINKELMANN CJ:

Well, I suppose the difficulty we have, isn't it, is that Corrections are quite divorced from the communities that they're speaking about, so they don't speak with knowledge of the defendant other than that which the defendant gives them.

GLAZEBROOK J:
They do interview families.

WINKELMANN CJ:
Sometimes they do, hardly ever.

GLAZEBROOK J:
Well, they should interview families.

WINKELMANN CJ:
Right, okay.

GLAZEBROOK J:
They used to.

WINKELMANN CJ:
You may have no answer to those questions, they're quite tricky ones.

MS BLINCOE:
I think if it's not challenged and there's no external reason to disbelieve it, and when the same material comes from multiple sources, that all adds weight to the credibility of the material.

ELLEN FRANCE J:
Well, in some cases there'd be no basis on which the Crown could challenge it, would there? So I don't know that the absence of challenges is any particular pointer. I mean, if you're talking about what happened in someone's childhood and there's never been any formal charges laid against anyone, for example for an assault.

WINKELMANN CJ:
Right.

MS BLINCOE:

Another point that Ms Ord has just raised is that he is illiterate, which is a fact that's been, that's not something that can be challenged because it's established and that's something that adds –

WINKELMANN CJ:

I'm not really challenging this account, I'm just asking because just looking at the whole, you're asking us to think about a different methodology of sentencing. So I'm not challenging Mr Berkland's account, I'm just thinking at a more abstracted level.

MS BLINCOE:

My point was simply that that's something that's referred to in that letter and so that, as an established fact, helps to corroborate the account in the letter more generally.

WINKELMANN CJ:

Yes.

WILLIAMS J:

There are some ways in which these things are mediated or filtered, for example if a psychologist undertakes and interview and concludes that the story is untruthful for some reason or that the symptoms don't reflect the trauma that's being discussed, then that's one way of doing it. But this discussion becomes relevant because the discounts count now, that's the point, they didn't used to count so much so the letters, no one particularly worried about them, maybe we just have to wait to see how this works out over time.

GLAZEBROOK J:

One suspects also that a lot of these people will have had dealings with various Government agencies and so, in fact there could well be reports that could be achieved and an ability for the Crown if it does consider the matters

to be truthful, at least to say: “Well, they were never brought to the attention of any of the authorities,” for example, or were.

WINKELMANN CJ:
Yes, because optimally the community would know about this person, which I think Mr Snelgar will tell us about, because some communities do know about people, which really makes a case for the community providing information about people and not Corrections.

MS BLINCOE:
And I think another point is that often in the PAC report the PAC report writers will comment on whether the person appears genuine, whether their account is consistent with other materials, things like that. So that aspect of it is certainly mediated through someone independent, and so in our submission it’s significant that the PAC report is consistent with the letter.

Another thing is sometimes if the defendant has given an explanation to the police that can be compared to what they say or what someone says about them subsequently. Or in other cases their criminal history might provide some indication, for example if they have lots of drug possession charges that can corroborate the history of addiction. So there’s lots of different ways that these materials can be looked at in context.

The other point I just wanted to make very quickly is Professor Nutt’s evidence is relevant to this issue because he talks about the way that early life trauma and abuse or neglect can predispose a person to addiction in two ways: use of drugs to suppress memories of trauma; and trauma leading to a failure of optimal brain growth meaning a person is less able to control their behaviour. So in terms of how we understand this in a psychological sense, that evidence is particularly relevant.

So simply our submission is that both his childhood background and his immediate circumstances of his downward spiral following his brother’s death

are relevant, they reduce his culpability in this case and that those matters warrant a discount.

And just very briefly in terms of rehabilitation, the PAC report talks in detail about his willingness to undergo rehabilitation. That was available to the sentencing Judge, and then subsequent to sentencing he completed the drug treatment unit in prison and was also a mentor for that unit, and in the Court of Appeal we applied to adduce evidence from the drug treatment unit, and that is in the materials. I think it's the Supreme Court additional materials. The Court of Appeal didn't comment on that. They didn't grant or decline that application to adduce that new evidence but in our submission there's been a number of post-*Zhang* appeals where, despite the usual rule or position that post-sentencing materials won't be considered, there's been a number of post-*Zhang* appeals where that type of evidence has been admitted and it has been relevant.

WILLIAM YOUNG J:
So what's the basis for it because isn't the focus on a sentence appeal whether the sentence at the time it was passed was correct?

MS BLINCOE:
Yes. So two things. One, it corroborates what the PAC report said prior to sentencing which is that he was very willing to engage in rehabilitation.

WILLIAM YOUNG J:
Well, that's fair enough. So if it bears on the situation as it was at the time of sentence then there can't be an objection.

MS BLINCOE:
In our submission the PAC report on its own is enough to warrant a discount regardless of whether the drug treatment unit stuff is taken into account. But the impact of *Zhang* is that you can get discounts for rehabilitative prospects or for actual rehabilitation. So people who are appealing their sentence following *Zhang* haven't had the opportunity to have your sentencing

adjourned so that they can undergo rehabilitation which is something that's happening a lot more now, and I think it's for that reason that the Court of Appeal in these post-*Zhang* appeals has been a lot more willing to look at that type of evidence. But regardless, in our submission, that was all there in the PAC report. There was prospects of rehabilitation. They've been confirmed post-sentencing and that warrants a discount in itself of, we say, at least 10%.

So that was all I proposed to address your Honours on unless there's any other questions.

WINKELMANN CJ:
Thank you, Ms Blincoe.

MS ORD:
I'm now going to address the issue of the minimum period of imprisonment that was imposed and it's our submission that this was unnecessary in the circumstances. The Court of Appeal decision deals with the imposition of the minimum period of imprisonment in paragraphs 81 through to 85. At the conclusion of that appeal Mr Berkland had a sentence imposed of 12 years nine months' imprisonment. No MPI had been imposed. He would be eligible for parole at four and a quarter years. He's in fact been in prison since April 2017. He's coming up to the four-year mark now.

The imposition of the MPI means that he's not eligible to apply for parole until he's served six years three months. So effectively before he's able to go before the Parole Board he has to serve another further two years of imprisonment. That's just a stark measure of the effect of the imposition of the MPI in this case. Essentially, our submission –

WINKELMANN CJ:
And does that mean that he's not getting any rehabilitation at the moment?

MS ORD:
Any rehabilitation?

WINKELMANN CJ:

Yes.

MS ORD:

That's not –

WINKELMANN CJ:

He is, isn't he…

MS ORD:

That's not quite correct. In prison he's undertaken that drug treatment programme and he became a mentor in relation to that course. The prison has also assisted with his literacy and he advised us on Friday he can now read small, three-letter words and once a week someone comes in to help him break down larger words into smaller words once a week to help him with his literacy, and he's undertaken other courses as well. So he's availed himself of everything that's there in the prison and he also works and is in charge of the gang that controls the gardens at Rimutaka Prison at the moment.

WINKELMANN CJ:

The garden gang?

MS ORD:

The garden gang. So that's where he is currently. So we have to look at the provisions of section 86, and it might assist if the Court was just aware of a quick background in relation to section 86. That section was imported into the Sentencing Act at the time of the second reading by way of a supplementary order paper, and it was there to address concerns that persons who were violent offenders would be eligible for parole at a third and families might have to repeatedly come back before the Parole Board. So essentially I think Mr Phil Gough in the Hansard commented that: "It was inserted at this stage to mean that in some circumstances serious violent offenders and sexual offenders weren't to be eligible for parole automatically at a third."

After the decision in *Brown v R* [2011] NZCA 95, which the Court of Appeal indicated that concepts of accountability, denunciation, deterrence and community protection they rejected as a feature should really be the focus, there was an amendment to section 86 and essentially those concepts of denunciation, accountability and deterrence and community protection were imported into section 86 and the original requirement that it had to be a case that was special in some way that allowed section 86, the MPIs to be imposed, that that first hurdle was removed, and in *Brown* for the first time the Court of Appeal commented that it could and should be used in commercial drug-dealing cases. But that wasn't the original intention of section 86 when –

WINKELMANN CJ:
So are you saying that the amendment was a response to *Brown*?

MS ORD:
That's correct. In part –

WINKELMANN CJ:
So it was incorporating what *Brown* had said, it wasn't –

MS ORD:
Yes, but it added a factor that *Brown* had rejected, which was community protection. They said: "That's a matter for the Parole Board. The new parole legislation gets them to the Parole Board's focus is on risk to the community and you have to be low-risk to be released and eligible to be released at a third," so the amendment notwithstanding, the comments in *Brown* did incorporate that concept of community protection.

WILLIAM YOUNG J:
So what does the original purpose of a section matter now?

MS ORD:
So the original reading of the section which I just –

WILLIAM YOUNG J:

But why are we worried about that? Why don't we just look at the current section?

MS ORD:

That's correct. But it is, it's important to realise that originally section 86 was to be used sparingly, it's now –

WILLIAM YOUNG J:

But why, why?

MS ORD:

Because it was there to address the issue –

WILLIAM YOUNG J:

Yes, I know. But why are we interested in what the statute used to say?

MS ORD:

Because these concepts that are now included in section 86, such as denunciation and accountability, as opposed to deterrence, require that proportionality framework that Ms Blincoe has addressed the Court about. So –

WILLIAM YOUNG J:

But doesn't that address, aren't really addressed to what, how they would work against a release at, say, one-third?

MS ORD:

I'm not sure that that is the case.

WILLIAM YOUNG J:

Well, I think it is.

MS ORD:

Generally the issue is if community protection was an issue in a particular case which it wasn't here because the Court of Appeal said it wasn't and they accepted because of Mr Berkland's previous circumstances the lack of his any real criminal history, his periods of stability and his engagement in rehabilitation. The Court of Appeal in this case has said, well, look community protection is not an issue and not a reason that the MPI would be imposed, and the Court of Appeal also said that it wasn't a case where there was individual deterrence was necessary for Mr Berkland. They were essentially saying it's the idea of general deterrence and the overall seriousness of the offending.

WILLIAM YOUNG J:

Sorry, but I don't think you're really listening to my point. Isn't it sufficient to impose an MPI if they are satisfied that release at say one-third, or whatever point is chosen that's beneath the MPI fixed, would be inadequate in relation to the four matters of which here it's (a) and (b) and perhaps (c)?

MS ORD:

That's correct.

WILLIAM YOUNG J:

So you look at what would a four-year sentence look like in terms of – or release after four years – look like in terms of these criteria?

MS ORD:

That's correct, but in terms of section 86, again the Courts have never undertaken any real analysis of what these concepts were, meant, such as denunciation and accountability, and that's why the submissions segue into matters that Ms Blincoe has addressed.

WILLIAM YOUNG J:

There's also *Williams* isn't there?

MS ORD:

Sorry?

WILLIAM YOUNG J:

Williams, the case out of the Wairarapa. The little girl was killed or…

MS ORD:

I know the case of –

WILLIAM YOUNG J:

Sorry, that may be section 104.

MS ORD:

I know the case of Steven Williams because Mr Nisbet of my office acted for Mr Williams at the time. The High Court imposed a sentence below 17 years. I think it was 14. So it's not –

WINKELMANN CJ:

No, it's not relevant.

WILLIAM YOUNG J:

It's a section 104 case.

WINKELMANN CJ:

There are cases that do discuss, and they're pre-*Zhang* but not all pre-*Zhang* cases are irrelevant, that do discuss how someone with very good prospects of rehabilitation, how rehabilitation factors into this, and I think there are Court of Appeal authorities which say that the Court may legitimately take into account the impact of an MPI on the prospects of rehabilitation.

MS ORD:

That's correct. There's a decision of *Shaw v R* [2016] NZCA 110 which is pre-*Zhang* which again emanated from my office. I was involved in that case although Mr Nisbet argued it in the Court of Appeal, where that was the case where the Court agreed in those circumstances that an MPI didn't need to be

imposed. It was slightly – I think his original starting point was around the six years' imprisonment but for reasons including lack of previous convictions, willingness to engage in rehabilitation, outside community and family support, it was unnecessary for the MPI to be imposed in those circumstances. So there has been in the last few years a recognition by the Court of Appeal that MPIs don't have to be imposed in all commercial drug dealing cases and it is a scrutiny of the individual personal circumstances that relate to the offender and it's through that lens there needs to be a consideration of whether or not an MPI is necessary as well as, of course, looking at the offence itself.

So what I'm saying here is that if we look at these concepts of accountability and denunciation through the lens suggested by Ms Blincoe, one then gets an overall assessment of Mr Berkland's culpability in relation to the offence and, of course, his personal circumstances, and if one looks at all those factors this wasn't a case where the imposition of an MPI was necessary. He had insight into the causes of his offending. He was willing to address his methamphetamine addiction. In fact, even before his sentencing he'd had confirmation in letters from a rehabilitation programme that he could be admitted to attend there, obviously a sentence of imprisonment intruded upon that prospect, and he indicated to the PAC report writer that he was willing to undertake rehabilitation. So we know of course subsequently he's completed quite successfully the drug treatment unit programme in prison, as I've said, he's had length periods of offence-free living, he had a commitment to his children and his current partner, who's even in court today, he has that support of family, including his former partner, and we know from the Correction offer's letters that he's been an exemplary prisoner.

In this case, the Court of Appeal, as I've said, appear to accept that individual deterrence wasn't relevant here and protection of the community is not a factor in the imposition of an MPI for Mr Berkland. It seems that they've drawn the conclusion that the need perhaps for some sort of general deterrence together with the fact that they may have viewed the concepts of denunciation and accountability as being more punitive than needing to be

viewed within that sort of proportionality context, have led them to the view that an MPI needed to be imposed in this case.

WINKELMANN CJ:
Well, haven't they just decided that his conduct needs to be denounced but, more particularly, that there has to be deterrence, general deterrence, community deterrence?

MS ORD:
That's right. So, I mean, in a way this is an unusual case because all of those factors that need to be considered might be triggered, particular individual deterrence if someone's got previous convictions for similar offending, but this case is unusual in my submission because the Court accept that two important factors aren't really present in his case. So in my submission the Court has just viewed the substantial commercial scale of the offending with the serious social consequences as justifying and meeting the requirements of section 86. And what we are saying is that given Mr Berkland's circumstances it was unnecessary and unwarranted in this case –

WINKELMANN CJ:
Right, I think we have that submission.

MS ORD:
– notwithstanding his actual role in the commercial-scale drug offending. So that's really it in a nutshell.

WINKELMANN CJ:
Thank you, Ms Ord. Ms Park.

MS PARK:
Good afternoon, your Honours. The appellant, Mr Brownie Harding, has been granted leave to appeal on the question of whether the Court of Appeal was correct to dismiss his appeal against sentence and the appellant submits that the Court of Appeal was not correct for three reasons.

Firstly, the Court erred in its approach to setting a starting point. Despite accepting that there should be no distinction between supply, importation and manufacture of methamphetamine for the purposes of sentencing, the Court appears to have considered the appellant's case only in relation to other manufacturing cases. That had an impact on the Court's finding that, because the appellant had a leading role in what was the largest manufacturing operation in New Zealand to date, his was therefore one of the most serious of cases and the maximum penalty needed to be considered.

In my submission that is inconsistent with the new approach to methamphetamine sentencing set out in the guideline decision of *Zhang.* The appellant submits that, having regard to the quantum involved in other cases which are now sentenced under the same band, the appellant's offending is far from the most serious of cases so the starting point should not be near the maximum.

Secondly, the Court erred in not considering the appellant's relevant personal circumstances, and counsel accepts that there was only limited evidence as to the appellant's personal circumstances before the Court of Appeal, and the appellant has subsequently applied to have a cultural report that was recently obtained, admitted, to rectify that position, and I will be making submissions on the admissibility of that report.

However, even if the cultural report is not admitted, in my submission there were other factors relevant to the appellant's personal circumstances that should have been taken into account in assessing his culpability and in considering whether the end sentence was disproportionately severe, and those factors are poverty and life expectancy.

Thirdly, the appellant submits that the Court erred in upholding the end sentence of 28 and a half years' imprisonment on the grounds that it is manifestly excessive when compared to other similar cases and the length of the sentence does not contribute to the purposes and goals of sentencing,

and I am grateful to counsel for Mr Berkland for setting some of the groundwork in those submissions.

So turning to the first ground, the starting point, when the appellant was initially sentenced in the High Court the guideline decision in *Fatu* applied. Under *Fatu*, manufacturers of methamphetamine were considered to be more culpable than importers or suppliers because of the dangers associated with the manufacturing process. Manufacturing methamphetamine was also considered to involve a significant commercial element. Consequently, the starting point sentencing bands for primary offenders in manufacturing operations represented a 10 to 20% uplift from those for methamphetamine importers.

When sentencing the appellant, the sentencing Judge started by considering whether the maximum penalty for his offending, which is life imprisonment, should be imposed. This suggests that the Judge considered the appellant's offending to be within the most serious of cases for which the maximum penalty needed to be considered under section 8(c) of the Sentencing Act and, indeed, under *Fatu*, which differentiated between typed of methamphetamine offending, supply, importation and manufacture, the appellant's case could be considered within that group of cases. The appellant's offending involved 6.5 kilos of methamphetamine. It was the largest manufacture in New Zealand to date.

WINKELMANN CJ:
Detected.

MS PARK:
Yes.

WINKELMANN CJ:
It's hard to detect it, of course.

MS PARK:

That's right, your Honour. However, when the appellant's appeal was heard by the Court of Appeal, the guidelines had changed. In *Zhang* the Court of Appeal introduced new guidelines to apply to sentencing for methamphetamine offending which the appellant submits change how the Court should approach his sentencing. The Court acknowledged that the new guidelines were in response to concerns that *Fatu* resulted in disproportionately severe sentences and that certain assumptions made by the Court in 2005 no longer held true. The Court also acknowledged that the guidelines made significant amendments to the regime that had been developed under *Fatu*. Importantly for the appellant, one of those amendments was to do away with the sentencing distinction between supply, importation and manufacture.

At paragraph 122 of *Zhang* the Court of Appeal stated that the distinction was no longer needed because the relevant offending was punished identically by section 62 of the Misuse of Drugs Act 1975 regardless of the method of offending, and the safety concerns relating to manufacture, which previously had justified a higher starting point under *Fatu*, were less distinct than they had been 15 years prior.

ELLEN FRANCE J:

Ms Park, do you agree with that change in approach, that is, the removal of the distinction between the three?

MS PARK:

Yes. Yes, your Honour, and in fact for my client's case that is crucial that there has been a change in the – there has been a removal of the distinction between the different types of offending.

ELLEN FRANCE J:

Yes. No, I can see that in terms of his case. I suppose I was thinking about it in terms of, for example, those involved in supply because on one view of it that potentially changes things in a different way for them.

WINKELMANN CJ:

Upwards?

ELLEN FRANCE J:

Upwards.

MS PARK:

That's right. Potentially it does put them in a pot with arguably more serious offending. However, I think what the Court intended to do in *Zhang* was to rectify that by including role and making there be some assessment of role, perhaps the function or the practical differences in role between someone who is manufacturing and someone who's merely supplying it at the other end.

ELLEN FRANCE J:

Well, that makes role do quite a lot of work, doesn't it? I mean it does assume, I suspect, that the harm is the same, the harm caused is the same.

MS PARK:

That would be my submission. So in terms of the harm to the community, I think the Court said in *Zhang* that quantum was the proxy for harm to the community and then in terms of the distinction, the practical differences between the types of offending, really it was over to the role of the person involved, the offender. What was their role in getting the methamphetamine out into the community? And I think that was the Court's intention, to perhaps make up the difference between, functionally, between the different types of offending by focusing on role.

WILLIAMS J:

One of the dangers is that if the charge is supply alone it may drag the sentence up. If there is – if there's no source in the matrix of offending. See the issue there? I know it's not relevant to your client who's charged with manufacturing but nonetheless it's potential risk, because manufacturing and importation add product to the market. Supply doesn't.

MS PARK:

I do see that, your Honour, and I do think that the Court of Appeal went to great pains in the *Zhang* case to make it fair and the Court made some comments too about offenders at the lower end, that there was some scope not only to move down the band but also to move, you know, within bands and I think it was the Court's intention to use that to address some of those distinctions.

WILLIAM YOUNG J:

So how does the approach in *Zhang* sit with the requirement of the Sentencing Act to effectively steer by the maximum? I mean if this is amongst the most serious or the most serious case of methamphetamine manufacture, why does it matter that there are other similar offences which have involved bigger amounts? The statutory direction is reasonably clear, isn't it?

MS PARK:

In my submission, in determining a sentence, the stage 1 part of finding the starting point requires two aspects to it. The first one is to look at quantum and then the second part of that is to look at role. So in terms of quantum, there are – the Court sets out bands which have a penalty attached to the band depending on the quantum and so for my client if manufacturing is considered in itself then he accepts that 6.5 kilos puts him in the upper band under both *Fatu* and in *Zhang*, and so if he's in that band by himself and if he's the – if this is the biggest case of manufacture New Zealand has ever known, then the entrance point of two kilos is here and 6.5 kilos is here and he's at the end of the band. However, if under *Zhang* all of the offending effectively is considered in the same pot then two kilos is down here, and recently we've had cases that have involved 500 kilos of –

WILLIAM YOUNG J:

I understand all that. I'm just looking at section 8(d). "Must impose the maximum penalty prescribed for the offence if the offending is within the most serious cases for which that penalty is prescribed." Now I suppose *Zhang* might say, well, that penalty is prescribed for lots of things, including

manslaughter, and then closer to the point importing and selling methamphetamine, but if you just look at it the offence is manufacturing methamphetamine, this offending is within the most cases of manufacturing methamphetamine.

MS PARK:

That's right, your Honour, but my point is that the offending is no longer purely manufacturing offending. The type of offending includes both manufacturing, supply and importation.

WILLIAM YOUNG J:

I'm just signalling that I don't necessarily agree with the logic of *Zhang.*

MS PARK:

So in those terms, back to the scale, so if we are now in a band where there are 500 kilo importations at one end, then certainly my client's offending is down this end, and that's…

ELLEN FRANCE J:

Do you accept that they're, along your idea of your spectrum of your band, that at some point you get to a point where the amounts involved are such that you no longer need to, or there's no, you no longer need to make those comparisons. So I suppose what I'm thinking is you could always point to a worst example of, say, importing, because, you know, you can get up to such huge amounts, but that at some point the person involved in manufacturing is manufacturing such a large amount that that comparison no longer bears weight, do you agree with that?

MS PARK:

I think potentially, your Honour, and I would expect if that were to happen that there would be perhaps an upper limit, an upper, you know, a hundred kilos of more, regardless of how much that more is?

WINKELMANN CJ:

Although that could produce bad incentives, if you do accept that the sentencing link exists, you know, hung for a sheep as a lamb.

ELLEN FRANCE J:

Yes.

WINKELMANN CJ:

Is there a response to, *might* you make the response to Justice Young in relation to his concern that there isn't a logicality in the equating of manufacturing or the importation for these purposes, that there is a policy reason to respond at the weight level because it's how much weight comes into the system by virtue of the wrong or criminal act? So that if you do accept, if you're sentencing, giving long sentences for deterrent effect, then the logic is to deter the greatest weight most strongly. So the more methamphetamine the more deterrent should be directed at it, assuming, you know, that deterrence is in fact a legitimate consideration, which I think we have to since it's in the legislation.

MS PARK:

I do go later in my submissions to talk a little bit about deterrence. I am in agreeance with the submissions that were made earlier. But I think the additional point that I had to make is that even in terms of long sentences there does come to a point where the difference between 20 years and 28 and a half year is, there is no…

WINKELMANN CJ:

Yes, that's not really what I'm asking about. I suppose I could formulate it another way to get around the issue of deterrence. In terms of just deserts, is more just deserts directed at someone who produces in, introduces into the New Zealand market a hundred kgs than there is someone who introduces into the New Zealand market six kgs?

MS PARK:

Yes. And I suppose to an extent that is my point, is that in terms of the 6.5 kilos that my client is, that the appellant is responsible for, his responsibility should be less than other cases where it's a hundred kilos or 500 kilos that's been introduced or imported into the New Zealand market.

WINKELMANN CJ:

Okay.

WILLIAMS J:

Well, I guess you can say that section 6 of the Misuse of Drugs Act doesn't distinguish between them, it refers to a single offence of importation, manufacture or supply.

WILLIAM YOUNG J:

That's three offences.

WILLIAMS J:

Well, it says every person who contravenes one commits an offence.

MS PARK:

Yes.

WINKELMANN CJ:

I think if it's one offence or three it just raises…

MS PARK:

So an example of where the Court of Appeal has acknowledged the changes made in *Zhang* but has failed to follow them is at paragraph 45 of the Court of Appeal decision for Mr Harding. So there the Court acknowledges that the guideline band should no longer be subdivided between supply, importation and manufacture because the offences are punished identically and the harm caused is identical regardless of method. However, when deciding whether

section 8(c) was engaged the Court considers only whether the appellant's offending is within the most serious of manufacturing cases.

WILLIAM YOUNG J:

Well, do you say they are wrong? Leaving aside *Zhang* for a moment, do you say that that's not consistent with the statute, with section 8 –

MS PARK:

Sorry, what was that, Sir?

WILLIAM YOUNG J:

Well, this is the point I put to you earlier. They've construed section 8(c) in a particular way. They've said the offence is manufacturing methamphetamine, this is about as serious a case as there has been, or is the most serious case, therefore life imprisonment is the indicated sentence. Now what's legally wrong with that?

MS PARK:

Well, firstly, it's not the effect of *Zhang*.

WILLIAM YOUNG J:

Zhang, yes. So I'm troubled whether *Zhang* is right.

MS PARK:

But to put that aside, the wording of section 8(c) of the Sentencing Act itself says that the Court must impose the maximum penalty prescribed for the offence if the offending is within the most serious of cases for which that penalty is prescribed, and I suppose my response to that is if the same penalty is prescribed for all the offences within a group regardless –

WINKELMANN CJ:

No, you're saying it's one offence, aren't you?

MS PARK:

What's that, sorry?

WINKELMANN CJ:

Aren't you saying it's one offence?

MS PARK:

It is one offence but if the same penalty is prescribed for all the types of offences within a group regardless of the particular offence then assessing whether a particular offence within that group of offences, whether that's within the most serious of cases, must require a comparison with all the other cases within that group for which the same penalty is prescribed. So my response would be –

WILLIAM YOUNG J:

But in the importation cases the overseas Mr Big or Mrs Big is not normally prosecuted which is the point the Court of Appeal was making in or around that paragraph. So that's not a complete answer, is it?

GLAZEBROOK J:

No, but you're talking about – I think your question, wasn't it, what's legally wrong with that rather than factually? The answer was what's legally wrong is that the section talks about maximum penalty and I think the answer was you look at all of – well, you can correct me if I'm wrong – you look at all of the offences within a particular group, which would be in this case importation, manufacture and supply, with that maximum penalty and then you work out whether it's the most serious in that group of offences, not just manufacturing. Have I understood that point correctly?

MS PARK:

Yes, your Honour.

GLAZEBROOK J:

And then there's the factual issue.

WILLIAM YOUNG J:

How do you get there on a text?

MS PARK:

What's that, sorry?

WILLIAM YOUNG J:

How do you get there from the text of a statute?

MS PARK:

Sorry, Sir?

WILLIAM YOUNG J:

How do you get to "group of offences" as opposed to "the offence"?

GLAZEBROOK J:

For which that penalty is prescribed, I think, so it's actually on the wording of 8(c) as I understand the submission.

WILLIAM YOUNG J:

It is for that penalties prescribed but I mean I would have thought, for instance, life sentence is prescribed also for terrorism, manslaughter, it's not the – you don't have to have the most serious offence for which a life sentence is the prescribed maximum.

MS PARK:

I suppose my response is that it is that particular penalty as well as the effect now of *Zhang* that that essentially groups all of those types of offences into the same pot, as it were, so that the same penalty applies regardless of the method.

GLAZEBROOK J:

One of the difficulties with life imprisonment is that it does come for a variety of offences that don't have much to do with each other whereas most of the other ones that 8(c) will apply to, it will be a maximum penalty of, say, 20 years or seven years and you'll easily be able to work out, even across

offences, what the most serious – what's at the edge of the most serious, I would have thought.

WILLIAM YOUNG J:
It might be an awkward comparison to say sexual violation with drug dealing.

GLAZEBROOK J:
Well, I think that's why Ms Park is suggesting you group them in some way to make sense of the way it works. Is that…

MS PARK:
Yes, your Honour.

GLAZEBROOK J:
I'm not putting words in your mouth.

MS PARK:
Yes, thank you. So when viewed in that context, and the context of these other types of offences my submission is that 6.5 kilos is by no means at the serious end of the scale, particularly if quantity is a proxy for harm to the community and an important factor in assessing culpability. The Crown is referred to the cases of *Shailer v R* [2017] NZCA 38, [2017] 2 NZLR 629 and *Chen v R* [2009] NZCA 445, [2010] 2 NZLR 158 as support for the proposition that it is always possible to envisage more serious cases, and that the maximum penalty has never been reserved for the worse case imaginable. That is not what the appellant is asking the Court to do. The appellant is not asking the Court to imagine or come up with a more serious case. These are actual cases which fixed amounts being sentenced under the same provision, and in light of the Court's guideline judgment so the appellant is only asking that his offending be seen in the context of other similar cases in the usual way.

In relation to setting a starting point for the appellant's offending, the appellant submits that the Court should have made an assessment of where within the

band his offending fell, based on quantum alone, before making an adjustment for his role in the offending. Quantity is the first step in assessing culpability, and in my written submissions I have referred to a number of factors suggesting why this is necessary, including the wide range within each band, there being no upper limit in particular for band 5, and the need for consistency with other sentences. The appellant submits that in his case both the sentencing judge and Court of Appeal focused on his role almost to the exclusion of quantum. Quantum simply identified the relevant band his offending fell within and his role sent him to the upper end. The appellant accepts that role must be considered in setting a starting point and agrees that a more significant role and degree of culpability will attract a higher sentence starting a point across the range indicated. However, the appellant disagrees that a higher role should in itself shift the sentence to the end of the scale. Role must be considered together with quantum, and only the most serious of cases, having regard to both factors, should be liable for penalties near the maximum.

The appellant has disputed his role in the manufacturing operation throughout these proceedings. He accepts that he was aware of the operation and a –

WILLIAM YOUNG J:
Isn't it a bit late for that though?

WINKELMANN CJ:
I mean we have findings that he's bound by the in the High Court.

MS PARK:
Yes, that's right your Honour.

WINKELMANN CJ:
So why are we dealing with it?

MS PARK:

I suppose my point is that in any case he submits that a leading role shouldn't move a sentence up to the top of the band if, having regard to quantum, the case is not one of the most serious of cases.

WILLIAM YOUNG J:

If you look at page 21 of the case of, volume 1, it's para 27 of the Court of Appeal judgment, it's that little table.

MS PARK:

Which case Sir?

WILLIAM YOUNG J:

It's page 21 of volume 1.

WINKELMANN CJ:

This case, your case.

MS PARK:

My case, yes.

WINKELMANN CJ:

It's the graph is it?

WILLIAM YOUNG J:

It's the graph with the spots.

GLAZEBROOK J:

Can you just give me moment because I'm having trouble with my index.

WILLIAM YOUNG J:

This is not entirely familiar country for me. Is that accepted as being a fair range of sentences? In other words a sort of as setting a range for appropriate starting point sentences?

MS PARK:

As far as I'm aware, Sir, that is right.

WILLIAM YOUNG J:

So on that basis your client would be a candidate for at least a 20 year starting point?

MS PARK:

Yes, that's right your Honour, and my submission is around the 18 to 20 year starting point would be more appropriate then.

WILLIAM YOUNG J:

But wouldn't you have to then allow for the fact that I assume that the person around six kilos was an importer or a seller. There's a person, the third from the right.

MS PARK:

Yes.

WILLIAM YOUNG J:

Okay, there's someone with a 20 year starting point for what looks like six kilos. Now if that was, say, an importer, someone down the ladder a bit from the key person, or a seller, then wouldn't there have to be an uplift on that to represent the fact that your client was the ringleader, the organiser, the Mr Big of this operation?

WINKELMANN CJ:

How do we know that?

WILLIAM YOUNG J:

Well, because aren't they the findings of fact?

WINKELMANN CJ:

No, but how do we know the person who's –

MS PARK:

On the –

WILLIAM YOUNG J:

No, we don't. We don't. I'm making that assumption because it won't be a manufacturing case.

WINKELMANN CJ:

No, but…

WILLIAM YOUNG J:

So it would either be an importer which is almost always –

WILLIAMS J:

Yes, so there'll be a New Zealand ringleader for an import.

WINKELMANN CJ:

It might be a New Zealand ringleader.

WILLIAMS J:

The question is whether culpability for your client would be the same as a New Zealand ringleader for the same amount importing. I presume you'd say yes.

MS PARK:

Yes. So based on the removal of the distinction in *Zhang* the answer definitely would be yes. So all other factors the same, so role the same.

WILLIAM YOUNG J:

Your answer would be…

WINKELMANN CJ:

In her submission.

MS PARK:

In my submission, Sir.

WILLIAM YOUNG J:

I understand that. Okay, but it'd be quite interesting to know what that 20 – if we can identify that…

WINKELMANN CJ:

The Crown may know.

WILLIAM YOUNG J:

We probably can from *Zhang*, I guess.

WILLIAMS J:

There might be an argument that given you have to collect in equipment, run a crew that's bigger than a supply crew, get the ingredients, all of that sort of thing, that there's more to it in manufacturing than importation. Might there be?

MS PARK:

I think that is correct, Sir. However –

WILLIAMS J:

That would suggest a higher starting point.

WINKELMANN CJ:

Or not, because in fact importation is more easily scalable than manufacturing because manufacturing is such a hard way to make methamphetamine.

WILLIAMS J:

But if you start from the proposition that the harder you have to work at your crime the more culpable you are then that might count against you.

MS PARK:

Yes, and I think that is part of the assessment of a person's role. I do believe that's what the Court of Appeal's intention was is to wrap all of the functional differences between the types of offending within that assessment of what is this person's role, how hard have they had to work, how many other people have they had to –

WILLIAMS J:

So the facts, the facts, the facts, you say?

MS PARK:

Yes.

WINKELMANN CJ:

It's not so much how hard they've had to work surely? It's premeditation and planning, that kind of thing. So it's the amount of – it's culpability.

MS PARK:

Yes, your Honour. Like the involvement of how many other people have been involved or what exactly has their role been.

WINKELMANN CJ:

And your client has some problems with that, doesn't he?

MS PARK:

In terms of his role?

WINKELMANN CJ:

Him pulling other people into his conduct.

MS PARK:

That's right, it has been a finding of fact that he involved his sons, his ex-partners, and his father was involved in the operation itself, yes.

So in terms of the appellant's role, there is some acceptance that that must mean that there's an uplift after having a look at quantum, but our submission is that quantity always needs to be looked at first and if you're now in this one pot with all of these other importation supply and manufacturing cases then where my client is on the scale is down this end of the scale rather than at the other end of the scale with the 500 kilo importation cases.

WINKELMANN CJ:
Well, not down one end but he's not quite up the top.

MS PARK:
That's right. So he's not at the entrance point which is two kilos but he's not down the other end, in my submission, and he's not in one of the most serious of cases because of the removal of that distinction.

So those are my submissions in relation to starting point.

ELLEN FRANCE J:
Could I just – sorry. You go.

WINKELMANN CJ:
I was just going to ask, that chart at 37 is pre-*Zhang*, isn't it?

ELLEN FRANCE J:
Yes, it's…

MS PARK:
That's the *Fatu* chart, yes.

WINKELMANN CJ:
Yes. So it's pre the impact of *Zhang*?

MS PARK:
Yes.

ELLEN FRANCE J:

I just wanted to check one factual question. The sentencing Judge accepted there may have been others in Auckland to whom Mr Harding was required to account, is how the Judge put it, but the operation at the property was headed by him alone. Do you seek to make anything of, you know, how his role is assessed because of the involvement of other people?

MS PARK:

Of other people down in Auckland?

ELLEN FRANCE J:

Yes.

MS PARK:

Only in terms of his personal circumstances and in particular in relation to his involvement in the gang and what those associations meant for his behaviour and the decisions that he made.

WINKELMANN CJ:

Because what Justice France is asking you is if there's someone up the tree from him in terms of who he has to account to for his offending, it suggests he's not the Mr Big, he may be a significant figure but *the…*

WILLIAMS J:

Well, he's certainly not the funding syndicate, because he was complaining about losing 200k as a result of leaks from the par bomb.

MS PARK:

Yes.

WILLIAMS J:

So if someone else is funding this, not him, but he's running it.

MS PARK:

Yes, that's right. And it think it is because of, and I think it is perhaps because of his involvement in the gang and what that means, what that meant for him, in terms of his accountability to other people.

WINKELMANN CJ:

No, that's a different – yes – that's a different point. The point – well, it might be some point. The point is that on that account he's not *the* top player. You might uplift because he's corrupting other people and playing a really critical role, but you don't uplift right up to the top, he's not the equivalent of the overseas person who has, in charge of the whole importation programme.

MS PARK:

That right, your Honour. My submission is that he's still part of a bigger chain, so he's not at the top of the chain, and that's because of his contacts, because of the supply chain within the gang itself.

WINKELMANN CJ:

Right. Have we finished with his role or are we still on his role?

MS PARK:

I've finished my submissions on his role, unless there are any further questions?

So the second point is in relation to his personal circumstances, and the submission is that the Court of Appeal erred in not taking into account relevant person circumstances or giving them sufficient weight, and I do realise that and accept that there was only limited material available at the time before the Court, and the appellant has subsequently provided or subsequently obtained a section 27 cultural report which we've made an application to have adduced.

So in relation to the admissibility of the cultural report, my submission is that the test for admitting new evidence was set out by the Privy Council in *Lundy v R* [213] UKPC 28, [2014] 2 NZLR 273 by reference to a sequential series of

tests. So the first test is is the evidence credible? If it is not credible, it should not be admitted. If the evidence is credible, the next question is is it fresh? If the evidence is both credible and fresh, it should be admitted unless it would have had no effect on the safety of the conviction. If the evidence is credible but not fresh, the Court needs to assess its strength and its potential impact on the safety of the conviction or, in this case, the sentence. If there is a risk that there is a miscarriage of justice if the evidence is excluded, it should be admitted, notwithstanding that the evidence is not fresh.

In *Ieremia v R* [2020] NZSC 143 this Court stated that a miscarriage of justice means any error, irregularity or occurrence that has created a real risk that the outcome of the trial was affected. That required consideration of whether there was a reasonable possibility that another verdict would have been reached had the evidence been before the jury. Applying that test to the facts of this case, my submission is that the evidence in the cultural report is credible, it was written by suitably qualified writers, and I note that section 27 does not require any specific qualifications for a report writer or person speaking on the offender's behalf.

WILLIAMS J:
What do you say to the Crown's arguments about some of the inferences and conclusions on the report, in the report, such as Mr Harding's health status?

MS PARK:
In terms of that, I suppose it's one of those things where the Court would have to make a decision about whether the report writer really had the qualifications to make those sorts of statements.

WILLIAMS J:
Well, I think the answer is obvious to that, isn't it? She's not a doctor or a medical professional. But the Crown says, well, that undermines credibility and cogency. What do you say?

MS PARK:

To an extent I accept that, but by the same token a cultural report writer is often going to include throwaway statements or just observations or comments about things that the Court or the reader of those writers needs to make assessments themselves.

I notice that one of the things the Crown has picked up on in terms of that is that the psychiatrist suggested that his blood condition could be treated with aspirin. That's not entirely what the psychiatrist says in their report. They just make a list of the medications that he is taking with that condition next to it, and that is not really an assessment that that is the best or the only way to treat it. It is just, again, an observation in the psychiatrist's report that that is the medication that he was taking in relation.

WILLIAMS J:

We would probably hear about it though if he was having to change his blood every three months.

MS PARK:

That's right.

WILLIAMS J:

So I Googled it and it did say aspirin. Aspirin is a…

MS PARK:

It's a blood thinner.

WILLIAMS J:

Is a treatment, yes, so that maybe that that is just one of those things that we don't rely on.

MS PARK:

Yes.

WILLIAMS J:
But I guess your argument is, there is other material in the report that can be relied on.

MS PARK:
Yes your Honour, and certainly when you look at the writer's qualifications and some of the other research that they have referred to. The fact that they've made a comment about his medical condition in my view shouldn't really overshadow, you know, some of the other comments that, the conclusions that they've been able to make, which are clearly within their field of expertise and knowledge, but again it's one of those things that the reader of the report writer will have to take themselves and say, is this just a throwaway comment or what is this.

So in my submission the report is credible. It is written by suitably qualified writers. It is comprehensive and addresses in detail the matters set out in section 27 and also includes research and other material to support some of the findings that they've made.

I accept, though, that the report is not fresh. A cultural report could have been obtained at any time prior to sentencing. Therefore, the Court must consider whether there is a risk of a miscarriage of justice if the evidence is not admitted. Specifically, whether there is a reasonable possibility that another verdict, or another outcome, would have been reached if the evidence had been before the Court.

Specifically in relation to cultural reports, the Courts have accepted on a number of occasions that cultural reports are relevant to sentencing and should properly be taken into account in determining an offender's sentence. But only where there is a linkage between the offender's background and the offending. There are examples of that in *Carr* and *Zhang* and in the Court of Appeal decision for the appellant's case, that the Court has said there needs to be a necessary link between the appellant's circumstances and the offending. My submission is that in this case the cultural report does provide

that necessary link between the appellant's personal circumstances and his offending, and in cases where that is the case then a cultural report is something that should be taken into account, and should be considered by the Court in sentencing. That being said, my submission is that, therefore, there would have been a difference in the outcome for the sentence had the cultural report been before the judge in the Court of Appeal.

In the appellant's case the only evidence that was before the Court of Appeal was a PAC report and a psychiatrist report. The PAC reports refers to aspects of the appellant's background including his gang affiliation and medical history, but only in a brief way. There is no analysis of the effect of that background on the offender, or how it may have contributed to his offending. In fact in the High Court Justice Moore states that the PAC report sheds incomplete light on how the appellant came to be where he was, and the psychiatrist report is the same. Consequently the Court of Appeal concluded that there was no evidence establishing the necessary link between any mental health issues or the appellant's alcohol and gambling addictions, and his offending to suggest it might have impaired his ability to exercise rational choice. The appellant submits that if the cultural report was before the Court there would be evidence upon which to establish the necessary link between the appellant's background and his offending and a discount would likely have been given. Consequently it is my submission that the cultural report should be admitted before this court.

In terms of the issue of causation, I am aware that we have an intervener that is going to make submissions on the requirement for a causal link and I have had the opportunity to read those submissions and I support those, and I agree with the conclusions reached that the test should be perhaps, as counsel for Mr Berkland also said, more of a causative contribution to offending as described in *Carr* rather than a causative link.

WILLIAMS J:
You mean a contributive?

MS PARK:

A contribution, that's right.

WILLIAMS J:

Yes.

MS PARK:

Contribution rather than a causative link. So in *Zhang* the Court of Appeal stated that the – and talking about deterrence – the Court looked at certain factors and said that where those factors were present they needed to be taken into account in sentencing and one of those factors referred to was poverty. The Court noted that while commercial dealing is likely to be inconsistent with the impairment of the ability to exercise rational choice which is what diminishes culpability and justifies discounting the sentence, the Court would not exclude the possibility of a case in which that impairment co-exists with more substantial offending. In this case, the appellant submits that his ability to make rational choices was diminished by his poverty. So prior to his incarceration the appellant was unemployed and receiving a benefit from Work and Income. He has no formal qualifications and only minimal work experience in labouring type jobs. The appellant has no assets and little prospect of being able to accumulate wealth in a conventional way given his lack of skills and experience and extensive criminal history. He also had a drinking and gambling problem.

The Court considered that the appellant's offending was motivated by profit. The appellant says that it was driven by poverty. He became involved in the offending as a means of providing financially for his whānau. Consequently, the appellant submits that there was a link with his offending because one prompted the other. The appellant saw the offending as the only option available to him of getting ahead.

So the other element that's perhaps been raised briefly in the cultural report is this idea of life expectancy. So in its decision the Court of Appeal raised the issue of whether a sentence of 28 and a half years' imprisonment imposed on

a Māori male in his early forties was tantamount to a life sentence given the lower life expectancies for Māori. The Court noted that if personal circumstances render a life sentence inappropriate under section 8(c), they also arguably render inappropriate a finite sentence that is tantamount to a life sentence for that particular offender. Statistical data available publicly suggests that the life expectancy for a 40 year Māori male born in 1976 is between 73 and a half and 75 years. The appellant acknowledges that life expectancy is not static and a number of factors contribute to the calculation of life expectancy, including deprivation, health and lifestyle. The Crown has referred to some cases where the sentence imposed exceeds life expectancy and it appears that in those cases the Court is more likely to reduce sentence on compassionate grounds. This is not one of those cases. Provided Mr Harding stays healthy, he will be released some nine years before the expected end of his sentence. That's not taking into account any effect from his blood disorder and any effect that might have on his life expectancy.

However, I suppose the only point I wish to make in this regard is just that if life imprisonment is inappropriate then surely anything tantamount to life imprisonment is also inappropriate and in relation Mr Harding's, well, in relation to the reduced life expectancy for Māori males in particular that is simply one of the factors that the Court needs to take into account in determining sentence.

So the third area where, in my submission, the Court of appeal made an error is in relation to it upholding the end sentence of 28 and a half years, and the two reasons that are proposed that it made an error is, firstly, that the sentence is manifestly excessive having regard to other comparable cases and, secondly, that such a lengthy sentence does not contribute to the purposes and goals of sentencing.

So I understand that there are always factual differences but given that the key factors for sentencing and in particular for setting a starting point are quantum and role then those are the factors that we have concentrated on in looking at other cases, and in my submissions I've set out a number of cases

and some of the details of those cases. In my submission the cases most comparable to those of the appellant are Mr Thompson's case, and Mr Thompson was sentenced within *Zhang* itself, and also *Campbell v R* [2020] NZCA 631.

So in terms of Mr Thompson, his offending involved 6.8 kilos of methamphetamine. Mr Thompson was considered to be the most comprehensive methamphetamine dealer Hawke's Bay has ever seen. So there are some similarities in terms of both quantity and role. He was considered to be the principal offender. Mr Thompson received a starting point of 18 years' imprisonment and his end sentence after a number of discounts was 13 years.

ELLEN FRANCE J:
The analogy with Thompson depends on adopting the approach where you treat supply similarly to the other two categories. So if that isn't accepted then you'd accept Mr Thompson's in a different category?

MS PARK:
Yes, your Honour. Accepting that there is no longer a distinction between those, you know, the three types of offences is key to the appellant's case.

GLAZEBROOK J:
And if there should be a distinction what do you then say that distinction should be, in the sense of when you're comparing with Mr Thompson with similar amounts, and a similar ongoing, from the sound of it, because that's one of the submissions is that this was an ongoing, and if it hadn't been stopped it would have carried on. It sounds like Mr Thompson was an ongoing supplier.

MS PARK:
Yes, and perhaps it does come down to some of those factual similarities. In terms of it being ongoing, I know that that's one of the things that the Crown has raised that manufacture is a little bit different to importation because of

the ongoing nature. But for the intervention of the police this would've kept going. In my submission, it's arguable that the same would be for importation as well.

GLAZEBROOK J:
I don't have a difficulty with that as a concept and that's why I was making the point with supply. You don't expect it's – it was clear in Mr Thompson's case that it wasn't a one-off, if you want to put it that way. It was an enterprise.

MS PARK:
Yes, yes, and perhaps it would require, if there is no distinction, looking for these other factors that are similar and making those analogies.

So in my submission those are the cases that are most similar to Mr Harding's, given the quantity, over six kilos, and the leading or principal role of those offenders, and in both cases the starting point is 18 years, and in my submission that is where Mr Harding's – if we were to – and we have given a proposed sentence – that is roughly where the starting point should be.

Before I go on to summarising the proposed sentence, just one other point I do wish to make is that the sentencing Judge assessed the appellant's culpability based on the sentences given to his co-offenders. While the appellant agrees that there must be parity and consistency, there are material differences between them that warrant different sentences, the main one being that the appellant's co-offenders were all sentenced under the *Fatu* guidelines. They did not appeal their sentences despite it being open to them to do so, and I suppose the key difference in this case is the difference in the guidelines between *Fatu* and *Zhang* and in particular the removal of the distinction between the types of offences.

I did say too that I would talk about how the sentence does not support the purposes and goals of sentencing.

WINKELMANN CJ:
Is that really covered by the material about deterrence?

MS PARK:
Yes, that's right, so I support the submissions that were made earlier.

So finally, in conclusion, my submission is that the proposed sentence for Mr Harding should start with a starting point of 18 years. So based on quantum alone an appropriate preliminary sentence would be 15 years then perhaps an uplift to recognise the role that he had, giving a starting sentence of 18 years. That is the same starting sentence given to Mr Thompson and Mr Campbell whose offending as stated previously is considered to be similar to Mr Harding's. From a starting point of 18 years, the appellant suggests that a discount of 10 to 15% could be given to take into account the appellant's personal circumstances, with a further 5% previously given for his guilty plea. That takes the end sentence to approximately 14 years and five months which, in my submission, would be consistent also with the sentences given to Mr Thompson and Mr Campbell.

So unless your Honours have any further questions, those are my submissions.

WILLIAMS J:
Ms Park, I just type really slowly, I'm sorry, but you said 10 and 5%, you gave 10 and 5% figures?

MS PARK:
10 to 15% for his personal circumstances, and I do note that that is considerably less than some discounts that have been given for personal circumstances, upwards of 30%. So 10 to 15% for his personal –

WILLIAMS J:
Just that? Right, good.

WINKELMANN CJ:

Where does that end us up, because I think you need to address the minimum period of imprisonment too, don't you, since it's 10 years, isn't it?

MS PARK:

Yes, that's right. Mr Harding has never challenged the minimum period of imprisonment.

WINKELMANN CJ:

But you need to have it adjusted down or else your sentencing appeal would be all for – and also it will exceed the – isn't there a –

MS PARK:

The required –

WINKELMANN CJ:

Is there a limit? I've now forgotten. I thought there was some percentage limit that you couldn't go beyond.

GLAZEBROOK J:

Yes, yes, there is. Two-thirds, I think. Or there used to be, actually.

WILLIAM YOUNG J:

10 years, whichever is the maximum.

WINKELMANN CJ:

Yes.

MS PARK:

So if the minimum period of imprisonment currently is 10 years and it needs to be adjusted to two-thirds of…

WINKELMANN CJ:

Well, it wouldn't be much of an adjustment, would it, because what's happened here is the Judge has maxed out at the 10 years.

WILLIAMS J:

What was the MPI? Ten years of 28?

MS PARK:

Of 28 and a half.

WILLIAMS J:

So a bit more, bit more than a third.

MS PARK:

Yes.

WINKELMANN CJ:

The Judge has imposed the maximum minimum he could impose?

MS PARK:

Yes.

WILLIAMS J:

The maximum minimum?

WINKELMANN CJ:

The maximum minimum, yes.

WILLIAMS J:

The biggest minimum.

WINKELMANN CJ:

And what's your position on the MPI, should we be persuaded?

MS PARK:

Well, that it would need to be reduced in line with the maximum minimum.

ELLEN FRANCE J:

But maintaining the same percentage of the – is that what you're saying? Maintain the same percentage of the end point?

MS PARK:

Yes, yes.

WILLIAMS J:

That might be – because the maximum minimum is – it's got a false ceiling on it which, if you took it down to a third of whatever your end point was, I haven't done the maths yet, but –

MS PARK:

Just below 15.

WILLIAMS J:

15, just under 15?

MS PARK:

Mhm.

WILLIAMS J:

Then you'd basically be pretty close to standard parole.

MS PARK:

Yes.

WILLIAMS J:

And that's not – are you suggesting that?

GLAZEBROOK J:

No, I think you were accepting it could be two-thirds, weren't you?

MS PARK:

Two-thirds, yes.

GLAZEBROOK J:

But it had to go down to two-thirds, yes.

WILLIAMS J:

I see. Right, sorry. I misunderstood.

WINKELMANN CJ:

Which would be 10. Yes.

MS PARK:

Yes.

WINKELMANN CJ:

You wouldn't want it to be 10 years.

MS PARK:

We're – yes, which is where it is. There are some issues for my client in terms of parole.

WINKELMANN CJ:

Well, you don't want to accept – I'm sure there's no point in bringing a sentencing appeal if you're going to accept a minimum period of imprisonment which is just the same. Aren't you arguing for a lesser minimum period of imprisonment because that's where the work is done on a sentence really?

WILLIAMS J:

You are now.

MS PARK:

I am now, your Honour. I would have to work out what that would be.

GLAZEBROOK J:

No, I think you were just saying you didn't challenge there should be a minimum period of imprisonment.

MS PARK:

That's right, he's never challenged.

GLAZEBROOK J:

Yes, of some sort, whether it's half or…

MS PARK:

Whatever the figure is.

GLAZEBROOK J:

Whatever the appropriate minimum period of imprisonment with the reduced, with your submission, if we accept that submission, with the reduced sentence.

MS PARK:

Yes.

WINKELMANN CJ:

All right, thank you. Thank you, Ms Park.

So, Mr Snelgar, are you in a position now to address?

MR SNELGAR:

"Tangohia te taura i taku kakī kia waiata au i taku waiata," were the words uttered by my ancestor, Mokomoko, on the day that he was hung at Mount Eden Prison, 17th of May 1866. This whakatauākī from Mokomoko or his ohākī, his dying declaration, is a metaphor that I would like to call on in my this afternoon, your Honours.

Mokomoko was put to death for a crime that he didn't commit, he was pardoned some years later, and his death followed the land confiscation within the rohe of Opotiki, the mass confiscation of land. And before you stands a descendent of Mokomoko, and I thought in some ways it's not a good thing to draw on that in terms of the argument about linkages and causation, that I

myself have had quite a lucky and blessed life, but that is not the same for many of my relatives, and that is a point that we are here to talk about on behalf of Te Hunga Rōia Māori is that not all Māori have the same opportunities but we have the same background in terms of the colonial legacy.

So there will be two broad submissions that I will make before this Court. The first is about the opportunities that the Court has through section 27 of the Sentencing Act to broaden the participation of Māori within the sentencing framework. The second is that this is an opportunity for the Court to encourage a greater emphasis on the sentencing framework itself, which can itself by focusing on that framework help to address the issue of Māori mass incarceration.

So at the start of the submissions the Court will see that we've set out some of the statistics which paint the picture of the sheer scale of Māori people who come before the courts. Some 23,000 Māori entered the court in the year 2019 to 2020, so in terms of numbers there are many different opportunities for the Court to engage with Māori culture, and those figures which follow, your Honours, also highlight that there are many Māori offenders who commit relatively low-level crimes and, indeed, 4.5% of those total convictions relate to methamphetamine. So although we are here today, and I know in terms of linkages there aren't many major linkages between my submissions and the heart of the matters before the Court, but hopefully that these can provide, these submissions provide some guidance on some of the bigger picture issues facing the criminal justice system.

So turning to those figures your Honours will see that's set out at paragraph 8 that highlights many of the lower-level crimes that Māori are sentenced on, and I'll come to address why that is relevant in the context of section 16 of the Sentencing Act.

WINKELMANN CJ:

Is there any information about what that category, offences against justice procedures, Government security and Government operations captures?

MR SNELGAR:

No, your Honour, although those types of crimes I imagine will cover things like failing to appear…

WINKELMANN CJ:

Bail breach.

MR SNELGAR:

Bail breaches.

WINKELMANN CJ:

So this is just a partial snapshot, it's not all offences, it's not a full accounting of the offences, it's simply a snapshot.

WILLIAMS J:

No.

MR SNELGAR:

No, but I can provide that full – and that is online but I can provide a hard copy to the Court if that would be of assistance. It was really to highlight the point that although there are many serious crimes there are a number of relatively minor crimes which Māori are incarcerated for –

WINKELMANN CJ:

Yes.

MR SNELGAR:

– which would engage that section 16 point.

WILLIAMS J:

So, 1,917 Māori males – it's there – are in jail for what you might call relatively minor offences?

MR SNELGAR:

That's correct.

WILLIAMS J:

And I did the maths on the other number, 3,156, which suggests that the number isn't 48%, it's a good deal higher than that.

MR SNELGAR:

Yes, and that might not be my strong point. I have to credit Mr Merrick for these.

WILLIAMS J:

Mine either.

MR SNELGAR:

But certainly the projection –

WILLIAMS J:

But you're talking about 60%?

MR SNELGAR:

Yes, your Honour. And those that are convicted and there is a higher percentage of those that end up in prison versus those that are actually convicted for Māori. So the picture is bleak, as the Court is well aware, and I will talk more about the Te Ao Mārama model, which is soon to be introduced in the District Court, and that this court has an opportunity to provide some guidance for that Te Ao Mārama model in my submission.

GLAZEBROOK J:

I was just saying I think that's the total crimes at the bottom, not the minor crimes.

WILLIAMS J:

Yes, but they're all minor, isn't that your point?

GLAZEBROOK J:

No, I think the figure at the bottom is the total number in prison, isn't it?

WINKELMANN CJ:

No.

GLAZEBROOK J:

For all crimes, or is that…

MR SNELGAR:

The 1917 number?

GLAZEBROOK J:

No, no, the 48% and the 60%.

MR SNELGAR:

Oh, yes, yes.

WILLIAMS J:

Oh, so those numbers along the bottom have no relationship to the numbers above them?

MR SNELGAR:

No, no.

WILLIAMS J:

Right.

MR SNELGAR:

No, because the number of those Māori in prison is –

WILLIAMS J:
Is higher than that number.

MR SNELGAR:
Is higher than that your Honour.

WILLIAMS J:
Yes, I see.

MR SNELGAR:
In terms of just turning briefly to section 27 and the legislative history of section 27, the Court would be aware, and just turning to *Solicitor-General v Heta* [2018] NZHC 2453, [2019] 2 NZLR 241, paragraph 35, which is at page 75 of my bundle of authorities. At paragraph 35 Justice Whata sets out the background of section 27 which, as the Court is aware, has been in a form before the Sentencing Act in terms of section 16 of the Criminal Justice Act, and its purpose was, as the footnote says, it's footnote 14, Michael Cullen at the time talked about it being a conscious attempt to recognise the importance of trying to meet the needs of Māori offenders. And as the Court knows that now that section 27 has certainly, there has been life breathed into that section in perhaps the last five to six years in terms of its application.

So at paragraph 11 onwards I've highlighted some of the various parts of the Sentencing Act, which may be of assistance when considering Māori culture in particular. We've discussed the purposes and principles already, and I just highlight again that 8(i) is a mandatory consideration, that it must take into account those background factors, and I support the submissions of the appellant in Berkland about the ineffectiveness of deterrence, and that indeed, in my submission, that there are not many rational actors who make those, weigh those benefits and consequences in terms of the impact of a sentence before committing a crime.

In addition to 8(i) is 8(h), which I will talk more about later in terms of the disproportionately severe impact of sentences of imprisonment on Māori based on the statistics that demonstrate there is differential treatment.

Finally, one that I didn't mention in the submissions is 9(2)(f) of the Act, which talks about offers to make amends, which in my submission can also include offers by whānau to make amends for the harm caused.

In terms of that point about rational act as it's helpful, and this is a report I don't have in front of me but Sir Peter Gluckman, the chief advisor to the Prime Minister in 2018, in his report commented that up to 90% of those in prison have a diagnosable mental health problem, or an addiction issue, so in terms of that question about rational actors, that statistic is certainly something that is important.

GLAZEBROOK J:
I think the head injury issue, and foetal alcohol syndrome, also feature relatively heavily in the prison population.

MR SNELGAR:
Yes, absolutely. That's my experience in the Youth Court particularly your Honour. I'm aware of the time but unless there is anything further I'll just turn to address the causal link.

WINKELMANN CJ:
Don't rush. Just proceed at an appropriate pace.

ELLEN FRANCE J:
Could I just check, in terms of the section 27 reports, are there practical issues in terms of impact of or ability? I don't mean – I mean once the Court has said one should be obtained, is that then causing difficulties in terms of timing of sentencing, for example?

MR SNELGAR:

Yes, there are a number of difficulties, including potential delays. Another issue is the legal aid scheme which sometimes prevents reports being obtained. Another issue is the ability of counsel to engage with Māori culture because, as we know, there are very few Māori lawyers that practise at the Bar or in the defence practice. So that might limit their ability to make enquiries of whānau in terms of that cultural information. Further is the limited pool of cultural report writers and the quality does differ significantly in terms of report to report.

Further, there is a danger that I will discuss later about reports becoming the main source of information rather than whānau and in my submission family are a more effective means of producing this type of evidence than a professional report writer and indeed it is the family who is the place that the offender will return to usually after the crime or the sentencing.

WILLIAMS J:

So how would you fix the implementation of section 27?

MR SNELGAR:

Your Honour, I would encourage this Court to highlight that beyond reports there are many other ways that cultural evidence can be relevant to the sentencing process. The first point would be that the causation test shouldn't be strict. In my submission there could be wording along the lines of there is some connection, some relevance of that information to the sentencing process because that is, of course, the gateway in which cultural evidence can become relevant in sentencing. So that would be the first issue is –

WILLIAMS J:

You said some connection, some relevance?

MR SNELGAR:

Yes, rather than that there is a linkage or a causal link between the deprivation and the offending. Once that bar is lowered, the next point would

be to expand and encourage counsel to obtain cultural evidence not only from professional Court writers but from whānau and other kaumātua from that person's hapū and iwi, and indeed that is part of section 27. There is that provision, 27(5) of section 27 which says the Court can request cultural information, and I don't have the statistics on how often cultural information is provided to judges but if we go on the basis that there are 20,000 Māori before the Courts, I wouldn't –

WILLIAMS J:
Is that in any 12-month period?

MR SNELGAR:
Yes. I'm not sure that there would be 20,000 reports being produced every year. So it may be that there are missed opportunities for the Judges to be informed about culture and I would encourage that the Court say 27(5) means the Judge should be active in its enquiries into asking counsel.

WINKELMANN CJ:
These are all imperfect mechanisms in the present case though at the present time, aren't they, because of the lack of connection?

MR SNELGAR:
Yes, yes.

WINKELMANN CJ:
Counsel to whom might help them.

MR SNELGAR:
That's right.

WINKELMANN CJ:
And the Courts to whom might help them.

MR SNELGAR:

That's correct, and indeed if we look at the case of Mr Harding today, having read his cultural report, seeing names like Graham Latimer who is an extremely well-respected kaumātua from the north, mention of the Leaf whānau which I know have suffered immensely through colonisation, and I'm not sure if there is a connection there to Harding Leaf who was one of the Māori Battalion's leaders.

WILLIAMS J:

He was a warrant officer, wasn't he?

MR SNELGAR:

Yes, yes. So there is a very deep pool of knowledge that only perhaps not enough people are able to access and that's not through the fault of the offender, not through the fault of counsel either or the Judge, but simply what the Court can do is encourage those enquiries be made prior to sentencing because in my submission that cultural information will be important to understanding more about the person but also there may be some benefits in terms of how the whānau could support the actual sentence.

WINKELMANN CJ:

And do iwi have a role in perhaps assisting with the creation of mechanisms for this to occur?

MR SNELGAR:

Yes, yes, absolutely. And we know in the context of Oranga Tamariki that it's a different framework, 7AA says "mana tamaiti" and there is a role for iwi in that process. That is not as direct here, but there is of course section 8(i), which refers to whānau and community, so that wording is certainly not an opportunity for the Court to encourage those types of participance. In my experience I haven't seen an iwi or a hapū or a marae attend sentencing before.

WILLIAMS J:

Interestingly in the case of Mr Harding's, I was going to call him Mr Leaf, Mr Harding's report, for example, they refer to his grandfather's hapū, Te Paatu, hapū of Ngāti Kahu, and to Harding Leaf's hapū, north Ngāti Whātua and Te Roroa and maybe the Leafs in south Hokianga.

MR SNELGAR:

Yes.

WILLIAMS J:

But there's a whole lot of connections there that don't appear to be being made, given that I'm aware that those Ngāti Whātua, Ngāpuhi and Ngāti Kahu are all busy in this area…

MR SNELGAR:

Yes.

WILLIAMS J:

And might all have been able to say: "We know this guy, we can help maybe, maybe not," but there doesn't seem to, the plumbing doesn't seem to be there to ensure that this information has got to the Court.

MR SNELGAR:

Not yet, but certainly if this Court was to say that that type of information or that type of participation by those groups would be of assistance, then certainly the wero goes on to them to step up in terms of answering that call, and certainly I would imagine those iwi would want to participate, given the impact that prison has on their whānau and future generations.

WILLIAMS J:

Yes, well, they are participating already, just probably imperfectly. Because we want to avoid a situation that's happened in Canada where there's a profession of Gladue report writers and no change to incarceration rates because connection to community, the connection to community in place,

which is the most important beneficial effect of this process, is never seen as being the point. Do you agree with that thinking?

MR SNELGAR:
Absolutely, Sir, and that's certainly the risk that is present today with professionalisation of reports, and certainly the Te Ao Mārama framework should hopefully address that very issue and ensure that there are more participants than just the professional report writer.

One example that I could quickly mention is from my chambers friend, Mr Merrick, who facilitated a whānau hui, that was part of his role, he took instructions from his client and facilitated a hui, the hui came together, talked about the impact that this had had on this whānau member, and produced a report to the Court making suggestions on how this person should be sentenced as well as their background. That wouldn't have happened without Mr Merrick, without someone who could engage the whānau at that level.

GLAZEBROOK J:
One of the issues too of course through is, I don't know, consultation fatigue, I guess, and putting those stresses on already overburdened people who are dealing with other matters in the iwi. So there's probably some – it's difficult for us to be prescriptive about that in the sense that there could then be an expectation that people have to step up and, gratuitously effectively, because there's probably not a payment schedule.

MR SNELGAR:
Yes, nor is there a payment schedule for –

GLAZEBROOK J:
No, no, exactly. But that's not something that we can set up or set up by edict from here.

WINKELMANN CJ:

Just further to what Justice Williams said, you could say that that's actually, the notion of reconnection, of the importance of the whānau connection, is embedded in that statutory framework that was created, and I think Michael Cullen actually talked about grade of participation in that sense when he was talking about the provision.

MR SNELGAR:

Correct, yes.

WILLIAMS J:

It is striking that he identifies the chief of Ngāti Kahu as his grandfather…

MR SNELGAR:

Yes.

WILLIAMS J:

And we're not, the system seems unable to reach out for assistance to that network, which is operating and strong.

MR SNELGAR:

Yes. And I won't mention that's my partner's whānau, but the Latimer whānau, as you know, carry a lot of mana and procedure about those connections we've made.

But indeed, your Honour Justice Glazebrook, as you said, that maybe it's not the place of the Court to prescribe but maybe to encourage participation because the alternative is that the status quo remains, Māori remain disproportionately represented and things do not change. I suspect the Te Ao Marama model will mean that iwi and hapū participate more. So if there was a decision on which counsel such as myself could wave before the Court to say let us look at other participants from the highest Court and that would certainly be beneficial in the Manukau District Court.

I don't intend to go through any more about the causal test other than to highlight that those same struggles have been happening in Australia and Canada, as his Honour, Justice Williams, will be well aware of, in terms of the impact of deprivation on culpability and Māori criminality. There's many cases that I've cited that highlight that issue but really, as I've said, the main point is that the causation test should be low and the reason why is to encourage greater participation by the Māori community who indeed have had a chequered past with the Courts of New Zealand, and if the test remains low that means the Court is able to access a greater range of information and ensure that that offender's background is part of the sentencing process.

So I've talked about that whānau hui and the need for an active judiciary but I just want to highlight one other point which is at paragraph 28 of my submissions which are the four different ways that cultural evidence can assist the Court. As I've said, it's about assessing culpability; explaining behaviours, perhaps if there's been exposure to violence or drug and alcohol issues in the past; may relate to an offender's rehabilitative prospects – if this is an offender who has a whānau that are very engaged in the process, that may provide confidence to the Court, and certainly if the threshold is lower then that will encourage more participation; and lastly the type of sentence, and we may get to a point where iwi and hapū come to courts and ask for their people in the sense that let us take our mokopuna and let us keep them in our community and sentence them accordingly with some judicial oversight.

So cultural evidence is, as I've said, relevant beyond just reports. It's a way to ensure that iwi and hapū are engaged if this Court was to provide guidance on it because the alternative, as I said, is that the intergenerational harm continues and that prisons become marae for many generations of Māori, and that is certainly the reality, in my experience, from intergenerational trauma, from children from CYFS care, from social welfare, whose parents and grandparents have also been through that process, there is significant intergenerational harm.

Turning to the second point which is about disproportionately severe outcomes for Māori, this is really encouraging the Court to look at the broader legislative framework and the different parts that could be called on to address how the Court may itself have played a role in terms of Māori, the situation that we have today in terms of high rates of incarceration. The statistics show that Māori do receive different treatment than non-Māori in terms of the different stages in the justice system and I know that there is a difficulty in terms of equality, equal treatment, but in my submission that perception must be coloured by te Tiriti o Waitangi, by the active protection of Māori, of taonga, that exists, and as well as the United Nations Declaration on the Rights of Indigenous Peoples, but more so that the Court should focus more on individual justice in each case. And that might mean different outcomes, but that may be all that's necessary to achieve justice for that individual, and that is certainly an issue. The Court may not agree with me, but in terms of the place of guideline decisions, that sometimes that a guideline decision may be the starting point for the sentencing process to the detriment of those important provisions in section 8 and in sections 16 and 27, because it is quite easy to fall into a mechanic or scientific process where one simply starts, the starting point is prescribed as a superette robbery and that is what is adopted, but indeed that may have the net effect of actually perpetuating disproportionate outcomes for Māori.

WINKELMANN CJ:

Are you going to address us on the impact of imprisonment on Māori society generally? Because there is also, I suppose, the issue that there is this intergenerational harm caused by imprisonment itself and how we should think about that in the sentencing process, which you might say that that's already in the Sentencing Act. There is that understanding of imprisonment as a, causes a burden on society generally, and therefore there is that principle that you prefer the least restrictive outcome.

MR SNELGAR:

That's right, and in terms of the health statistics I think I did mention the health report and the wider impacts of what a sentence has on that individual and

their whānau. Certainly from a Māori perspective it is not the individual alone who does carry that sentence, that it is something carried by the whānau and in the case of Mokomoko, for example, several generations later that same sentence is carried in a spiritual sense.

WINKELMANN CJ:
And the children of those in prison are seven more times likely than their cohort who don't have a parent in prison to end up serving time in prison?

MR SNELGAR:
Correct. The statistics are extremely alarming and the key point for Te Hunga Rōia Māori is to encourage the Court to grapple with these issues in the way that a framework – that primarily focuses on those section 8(i) considerations, section 8(h) in terms of sentencing, having a disproportionately more severe outcome if you are Māori because you are more likely to be denied parole, you are more likely to go to jail, and the flow-on effects of that in terms of the impacts on whānau, loss of culture.

And as section 16 mandates the Court, and in my experience this is something that isn't regularly mentioned in decisions, as it clearly states, section 16 means basically that the Court must not impose imprisonment unless it is satisfied that a sentence for any of the purposes set out in section 7, a sentence cannot meet those – is being imposed for those purposes and those purposes cannot be achieved by any other sentence other than imprisonment. So basically that there is guidance to suggest that let's look at everything else other than imprisonment before we look at that in terms of the law, and section 7 is discretionary in terms of those categories whereas section 8, as we've discussed, are mandatory considerations. Section 16 becomes very important if there are cases that, in a guideline-type situation, that may well be close to that two-year threshold for home detention. So if a guideline is preventing that defendant from getting close to that two years, in my submission section 16 would justifiably allow the Court to prioritise perhaps rehabilitation, the disproportionately severe outcome of prison because that person is Māori, and impose a sentence that is home

detention or something else, and when you look at the statistics as I've highlighted about many Māori facing quite low-level crimes, this is a relevant provision.

So just in conclusion, what the Te Hunga Rōia Māori is asking is certainly just for guidance from this Court that there are ways to engage Māori more effectively beyond reports and, secondly, that there is a framework for the Court to consciously engage with those big questions about imprisonment rather than what in my submission is a primacy emphasis on guideline decisions on the basis of consistency which the outcome of that maybe that the Court continues to contribute to disproportionate outcomes for Māori and a way to rectify that would be through section 16 and section 8(i) and (h).

So unless there are any questions those would be my submissions.

WILLIAMS J:
You mentioned active protection and equality as Treaty principles, understandably. I wonder whether mana and rangatiratanga don't also apply, particularly powerful, because that's what you're talking about, you're talking about getting the community involved in the sentencing process, which is a reflection of that article 2 rangatiratanga idea, isn't it?

MR SNELGAR:
Yes. And I did grapple a little bit with the idea of tino rangatiratanga being participating in a court, whether that would mean tino rangatiratanga, but certainly that would be consistent as providing that space for Māori to participate in the ways that they see fit. That might be in tauparapara, that might be in haka and waiata, and that would be encouraging tino rangatiratanga. Certainly that where –

WILLIAMS J:
Well, to engage in being the solution.

MR SNELGAR:

Yes.

WINKELMANN CJ:

It's your latter, it's your fourth category, isn't it?

MR SNELGAR:

Yes. So not only participation but involvement in the sentencing framework itself, and that would be consistent with section 8(i) as well.

GLAZEBROOK J:

Just going to the guideline decisions, many of those are for the more serious crimes, and some of the other aspects that you mentioned in terms of those not so serious crimes where Māori land in prison where in other circumstances in fact if they weren't Māori they wouldn't land in prison, one, because they wouldn't be policed in the first place because there's differential policing in different areas, et cetera, and then different charging and then more difficulties as you go up. So I'm not so sure that the issue is the guideline judgments, because certainly not at that lower lever because, one there aren't the guideline judgments there and, two, in fact the likelihood is that there's a disproportionate effect because of the disproportionate policing, et cetera, charging decisions, that go right through the system.

MR SNELGAR:

That's right. Although as the Judge can play a circuit-breaker in some ways in that trajectory and –

GLAZEBROOK J:

Oh, certainly, absolutely, and I'm not suggesting anything different. It was really just at the guideline judgment level often they are the more serious crimes and for whatever reason there's been a decision that prison is the best means of dealing with those, one might challenge that in the first place as an assumption.

MR SNELGAR:

Yes. And two examples of those guidelines, being *R v Mako* [2000] 2 NZLR 170 (CA) and *R v Terewi* [1999] 3 NZLR 62 (CA), are over 20 years old now.

GLAZEBROOK J:

Yes.

MR SNELGAR:

But there is quite a rigid adherence to those decisions but of course we know that within *Mako* there is provisions around departing from the guidelines, but certainly it's incumbent on counsel to encourage judges to not – sorry – to encourage judges to not rigidly apply those. But it is difficult when courts are busy and when there hasn't been guidance from High Courts perhaps on section 16 in sense that that should be a starting point before guideline decisions, so…

WILLIAMS J:

I suspect the difficulty is overstated a little. The problem is there isn't the infrastructure. So you've got a mandatory requirement to pay close attention to a person's background but no infrastructure by which you could determine that except a PAC report that's a 20-minute phone conversation with a Corrections official.

MR SNELGAR:

Yes.

WILLIAMS J:

And while that is the infrastructure, section 8(i) is never going to speak very loud. So that's key issue, it seems to me, and once the infrastructure is in place it can be as efficient as any other system.

MR SNELGAR:

Pono mārika, absolutely. And hopefully Chief Judge Heemi Taumaunu is able to solve all those big problems.

WILLIAMS J:

Yes.

MR SNELGAR:

Unless there are any questions, those would be my submissions, and those would be the submissions for Te Hunga Rōia Māori.

WILLIAMS J:

Tēnā koe.

WINKELMANN CJ:

Tēnā koe, Mr Snelgar.

WILLIAMS J:

And Ms Spelman.

WINKELMANN CJ:

And Ms Spelman. Well, thank you, counsel, for your excellent submissions today. We have round two tomorrow morning. So, Mr Barr, we're looking okay for the times from the Crown's point of view?

MR BARR:

Yes.

WINKELMANN CJ:

How long would you be expecting to be?

MR BARR:

Well, I would expect that we would take up the entire morning. Presumably there may be some reply included in that.

WINKELMANN CJ:

All right, okay, that's fine.

GLAZEBROOK J:

That's two hours, isn't it?

WINKELMANN CJ:

So, no, you're thinking that with the reply it will be two hours?

MR BARR:

Yes.

WINKELMANN CJ:

So you'll probably be about one hour 45ish, with a short reply.

MR BARR:

Yes, and I think to achieve that I might need to focus things a little overnight. But I think 12 o'clock is realistic still.

WINKELMANN CJ:

All right. Well, don't – yes. Make sure you don't focus to the point of not covering the material you want to cover.

GLAZEBROOK J:

Start a bit earlier?

WINKELMANN CJ:

Yes, we could start a bit earlier. Shall we start at 9.30?

MR BARR:

That would be helpful, thank you.

WINKELMANN CJ:

Right, we'll retire now.

COURT ADJOURNS: 4.06 PM

COURT RESUMES ON WEDNESDAY 24 MARCH 2021 AT 9.34 AM

WINKELMANN CJ:
Mōrena, Mr Barr.

MR BARR:
Mōrena, good morning. Our submissions have three parts. The first is a framework under which each of the general questions posed by the Court in *Berkland* will be addressed, the framework of the sentencing process, secondly, respond to and address some of the factual issues that have arisen and, thirdly, conclusions or a tying of the threads together, apart.

We propose with the Court's leave that I deal with the framework which I suspect will take up the lion's share of our submission time. Ms Ewing would deal with the factual issues or factual responses and –

WINKELMANN CJ:
On both appeals?

MR BARR:
Yes, and then if need be that I return to tie together any of the outstanding issues, tie together the framework with the facts. It may be by that stage all the points are clear anyway but…

WINKELMANN CJ:
Well, just an indication to counsel, we thought that we would break at 10.45 for a short time for morning tea since we're starting at 9.30, and actually I should have started by – I wanted to raise one point with Ms Parks, I'm sorry, Mr Barr, in relation to the minimum period of imprisonment. I just wanted to clarify because we weren't sure as to what your submission was on the minimum period of imprisonment. Having looked at Justice Moore's sentencing notes, he said that his intention was to impose a 50% MPI but then that – but the statutory maximum cut in to make it 10 years, and we're just not

clear what your submission is and we did wonder if you needed to take instructions on that.

MS PARK:
I do need to take instructions, your Honour. I've had no instructions at all in relation to the minimum period of imprisonment.

WINKELMANN CJ:
Well, that might be something we will need to allow you leave to file submissions on and have the Crown come back on.

MS PARK:
Thank you, your Honour.

WINKELMANN CJ:
Thank you, Mr Barr.

MR BARR:
So to give a slightly more detailed overview of what I intend to talk about, first of all I'd like to give a sketch of how the Crown proposes that the Sentencing Act be approached in cases such as the present. Secondly, to speak to the gravity issues, the section 8 gravity issues which encompasses first of all the starting point for offending in the most serious category issue, that's Mr Harding's issue, and secondly how to address the differentiation between leading and significant offenders, Mr Berkland's issue. The third heading is personal culpability and personal mitigating features, and that topic will cover the impact of addiction and deprivation on personal culpability which is relevant to both appellants, the addiction issue as it relates to rehabilitation prospects for Mr Berkland and very briefly the age issue that was raised by Mr Harding although mainly in his written submissions. The final topic is minimum periods of imprisonment.

So before I turn to the first heading, the sketch, I wanted to make three observations following on from yesterday's oral submissions. The first is that

the Crown proposes a somewhat different model to that advanced by the appellants and the main difference really is that it's perhaps less tangled up with the purposes aspect of sentencing and focuses more on the mechanics of section 8 and section 9. That's in relation to determining sentence length, but I'll come back to that shortly.

WINKELMANN CJ:
So it focuses more on?

MR BARR:
The mechanics of determining sentence length under sections 8 and 9.

WINKELMANN CJ:
Are you saying they can be divorced?

MR BARR:
No. There is – purposes play particular roles under the Sentencing Act and the model I'm proposing, that when it comes to sentence length, the critical sections that do the heavy lifting in determining sentence length are not the purposes of deterrence and so forth but rather section 8 and 9.

The second general observation is that in relation to those mechanics under section 8 and 9 for determining starting points at least, the differences between the Crown and the appellants is perhaps more difference in degree than kind despite the fact that the Crown submissions on starting point end up with quite a different outcome than the appellants, but the fundamental points being advanced by the appellants and the Crown really is the difference of emphasis.

WINKELMANN CJ:
So can you tell us what you agree with then?

MR BARR:

So first of all for the maximum penalty – sorry – the most serious category of cases point. This is for Mr Harding. He says that the comparison needs to be not only for other methamphetamine manufacturing cases but wider other Class A or importation or supplying cases, and the Crown accepts that those comparators are available. It's just that the best comparator will be the closest type of offending and in this case the best comparator is other manufacturing cases. So the point is I agree that the Courts can look beyond just manufacturing, other manufacturing cases, when considering what is the most serious category but my emphasis is that the best comparators will be those ones closest to the offenders.

And in respect of determining the differentiation between lead offenders and significant offenders, I clearly accept that there needs to be a differentiation and I sense that both the Crown and the appellants agree that a rigid approach is not appropriate in the New Zealand context. That was my impression and that's a submission that I'll be advancing too. So there doesn't seem to be a huge gulf between us on that point.

WILLIAMS J:

A rigid approach to role, are you saying?

MR BARR:

Sorry. A rigid approach to – I'm referring there to the UK guidelines which it's been discussed that there's, for example, the 30% drop from "leading" to "significant" and whilst that is a – it's going to be an available point of reference, my impression is that everyone agrees that that type of – perhaps "rigid" is unfair to the UK guidelines because it's not fixed but that type of specific percentage is not one that would be applied.

WINKELMANN CJ:

And do you also agree that a rigid approach should not be taken to role because there is a question of, I suppose, is that – that might be the same

point, isn't it, that there is, or no, perhaps it's not, that there is a need to be nuanced not just as to the differential but also as to the nature of the role?

MR BARR:
Yes.

WINKELMANN CJ:
So it's not just a three-point difference, as Ms Ord suggested, that you need to have a far more sophisticated approach to it than that?

MR BARR:
Yes, I agree with that. I agree with your Honour's point and that's the approach that's been articulated, I'd suggest, in *Zhang*.

WILLIAMS J:
So the appellants here say the gap just isn't big enough?

MR BARR:
Yes.

WILLIAMS J:
And what do you say to that?

MR BARR:
Well, I say there's two fundamental answers to that. First of all, when working out what the actual gap is, it's not a straightforward exercise here because we're not just comparing the main offending with the main offending. Mr Berkland has other drug dealing that went into the mix. So that's the first point, that comparison is fraught, but the second and perhaps more important point is that on a comparison between Mr Blance and Mr Berkland, if *Zhang* was applied to both of them, Mr Blance would inevitably have got a considerably higher sentence and whatever way, if the Court accepts that, whatever way you look at the differentiation it is more than enough. It even approaches that which the UK Courts have suggested of 30%.

WILLIAMS J:

Right, so you're comfortable with a 30% gap, it's just that this would have pushed Blance up, not down, not Berkland down?

MR BARR:

What I'm saying is that the Court of Appeal here said that the gap might have been only two years, so that would be less than 30%, and so I'm not disputing the Court of Appeal's assessment of that, what would have been an appropriate gap. I'm saying it's very much a factual or a nuanced assessment. But equally I'm not saying that there is any specific percentage that needs to be applied. It needs to be looked at on a case-by-case basis, but whatever way one looks at this case there is no – it can't be said that a miscarriage has occurred because if you carry out that exercise and put Blance where he should have been, the gap would be substantial between his notional sentence and Mr Berkland's.

WILLIAMS J:

So the Court of Appeal's reasoning is sound on that front, you say?

MR BARR:

Yes. I'm sure different courts would – of placement.

GLAZEBROOK J:

Somewhat difficult, I don't know, but the Courts have always looked at differentiation on the basis that the other sentence should have been higher. Sometimes they make those comments but there also is fairness in individual cases when you do have a bad disparity, and usually someone tries to explain it when there's an appeal to say, well, it was personal circumstances that brought the other one down or…

MR BARR:

And this is quite an extraordinary situation because with *Zhang*, if we put *Zhang*, it was all under *Fatu* and the appeals are both under *Fatu*.

GLAZEBROOK J:

No, I understand. I absolutely understand how this has occurred but…

MR BARR:

Yes. So it's somewhat – it's not unique but it's unusual and perhaps that's why these contortions of trying to compare notional endpoints for Mr Blance might be getting myself into some difficulty, and I'm not saying that's the only test. What I will be submitting is it's a useful touchstone for sentencing Judges to look at what, when sentencing a significant offender, to look at what the lead offender either has got or, as is often the case because they've not apprehended the lead offender, what they might have got.

GLAZEBROOK J:

Yes, I understand.

MR BARR:

But beyond it being a touchstone, it probably gets a little bit difficult.

GLAZEBROOK J:

While you're there, you're perhaps going to explain but I thought that you said you weren't concentrating on purposes but on sections 8 and 9 and that that was different from the approach that was suggested. But I thought that we were addressed at length on section 8 yesterday.

MR BARR:

Yes. It's this idea that deterrence is performing a significant role in our criminal justice system by pushing up sentences. That's the first part of the argument, and the second part is deterrence is an invalid concept. That's the second part of what might be seen, and that's not doing justice to the way it was put but as a general proposition the first part of the appellant's submissions, deterrence does significant things, in determining sentence length there's no basis for it, therefore the system is broken. What I'm suggesting is that that's in effect a straw man type argument, although certainly it's not deliberately put in in that way. The deterrence doesn't, under

the Sentencing Act, perform that function in determining sentence length, so the argument about or the critiques of the deterrent principle somewhat fall away when we look carefully at the way sentence length is determined.

GLAZEBROOK J:
All right, so you'd accept then, when you say you had the same approach to section 8 and 9, you just get a different result, you were actually accepting the analysis of section 8 that was done for us yesterday in the most part. Is that what I understand?

MR BARR:
I think that's right although I'll go through it in a little bit more detail but as a general proposition.

GLAZEBROOK J:
No, no, no, I understand there were differences but it's just I wanted to make sure that I'd understood the central submission.

MR BARR:
Yes, yes.

WINKELMANN CJ:
Well, I find that strange because the analysis of those sections yesterday was to the effect that they had embedded within them the purposes so that those provisions such as maximum sentence, longer sentence for the worst offence, were argued to be substantially qualified by the broader purposes of the Sentencing Act.

MR BARR:
My point – and it might be helpful if I go to that heading…

WINKELMANN CJ:
Yes, perhaps you should just get into your…

MR BARR:

Because otherwise I might get myself in something of a tangle. I suppose just the third and final overview point is in relation to how to factor in deprivation, addiction and, for that matter, mental health histories, and my observation there, which I will turn to, is that there is no doubt differences in terminology that's been advanced by the appellant and the Crown in the Court of Appeal, and terminology or words are important. But what lies beyond that terminology is what is really important, and the focus of a sentencing judge, I submit, is going to be as to what inferences the Judge should draw from the available material and whether that inference can be that the person making the decision to offend did so in a constrained or impaired manner, and that is at –

GLAZEBROOK J:

Sorry, decision to offend…

MR BARR:

And whether that decision to offend was constrained or impaired. So that's the critical evaluation that's going on that underlies all this terminology, I say, and I'll return to that a little bit later.

WILLIAMS J:

I don't think you get any argument from the appellants on that point.

MR BARR:

No, I don't think so.

WILLIAMS J:

The question, the challenge is underlying that, which is when can you make the inferential leap and how, in circumstances where you're sometimes talking about deprivation three generations ago or four generations ago, or you're talking about, I mean, you know, an addiction issue that may well be wrapped or buried underneath greed, what do you do with that? Does sentencing law require goodies and baddies, or is the Judge's job more nuanced than that?

MR BARR:

Well, I'd certainly accept the second point, that…

WILLIAMS J:

You see, it does seem to me that the flow of the cases is one set says there's a binary and the other set says it's more complicated. The binary ones almost always say commerciality or other factors, you know, "Your badness outweighs your addiction, your greed outweighs your addiction," or whatever. The others say while greed was powerful, addiction was also relevant. Which do you say is the correct approach, if I've articulated that properly?

MR BARR:

The essential answer to that is that, I say that the, I suppose the inconsistency which my learned friends say exists in the Court of Appeal isn't an inconsistency but is in fact a function of the courts making evaluative decisions in each one of those cases. So –

WILLIAMS J:

Yes, well, that's true in both of those scenarios that I gave you, those were evaluative decisions.

MR BARR:

Yes.

WILLIAMS J:

The question is which one is correct?

MR BARR:

Well, because it's, what I'm suggesting is that – I can't speak for, if all those Court of Appeal decisions have been correctly decided. But what I can say is that the approach to them, I say, is one of looking at the history which is before the Court, asking whether the Court should draw an inference as to what the offender's decision-making was at the time that they make the decision to offend, and when that process is carried out very much at an

evaluative – and, look, taking into account it's factual analysis as well, then those courts are well placed to decide was the offender's decision constrained or impaired? That goes beyond was the offender's, did the range of choices that the offender had available to them, were they narrow through their life history, because almost certainly in the cases that you are talking about the offenders' range of choices has narrowed, sometimes narrowed quite substantially. So I'm saying that that's not enough for a section 8 discount, that in itself doesn't reduce personal culpability, it has to go further than that and have constrained the choice that the offender has had before them and that –

WILLIAMS J:
So if you're poor that's not enough to count?

MR BARR:
Well, it may be because that's all history and it's the inference that can be drawn from that at the present moment when the offending takes place. So –

WILLIAMS J:
How do you apply that? Why does one Judge say: "You're poor but I'm sorry, your greed was bigger," and another Judge says: "You're poor and while you were greedy your poverty is contributing so I'm going to give you a discount for that"? How do you distinguish between those? Is it just the luck of the draw?

MR BARR:
Because the history isn't the determinator. That's the foundation for drawing the inference, so –

WILLIAMS J:
I'm just looking for a rational reason for choosing one or the other so that we don't get defendants whose sentence is a lottery depending on what the attitude of the Judge is. That's very dangerous.

MR BARR:

I agree, but what I'm suggesting is that it's not just going to be that history that plays into the Judge's assessment. That's why it's intensely factually specific. So there'll be the history which leads up to the decision-making. Then the Judge will look at the facts available when that decision is made. So, for example, if an offender had a deprived background, has had their choices over life narrowed, but at the time of the offending they are able to make autonomous decisions to advance their own position, such as being in a…

WILLIAMS J:

But that's always going to be the case. Every sentencing will involve someone making a decision otherwise, you know, it's not an offence.

MR BARR:

No, I agree. I'm not suggesting – it's not just the ability to make a decision because if they've got no choice then that's not an offence.

WILLIAMS J:

Exactly.

MR BARR:

But equally along that continuum of having no choice, having an endless array of choices, we also have a narrowing of choices and I'm saying that that's not enough and that explains some of the outcomes in this case where – in these previous cases, I should say.

WINKELMANN CJ:

Well, why is it – can I just ask?

WILLIAMS J:

What I'm asking you is when is it not enough because sometimes it is enough and sometimes it's not. That's what the cases say.

MR BARR:

Yes.

WILLIAMS J:

Where's your line?

MR BARR:

My line is where the point that the Judge can decide that the offender's choice to offend in this case was constrained. In other words, they were –

WILLIAMS J:

But you just said the choices are narrowed.

MR BARR:

I was describing a continuum from the far, far end being no choice, so there's no liability, and at the other end of the continuum a wide range of choices.

WINKELMANN CJ:

Doesn't that have the problem that it's setting up a sort of false dichotomy because the evidence, all of the social and sociological evidence, is that poor starts in life and poverty actually are constraining of choices and they do operate all the time so why would you be looking for something above and beyond that because by looking for something above and beyond that you're creating a kind of a lottery? It's an artificial construct.

MR BARR:

The first point is if a person is constrained then that will be enough. The –

WINKELMANN CJ:

But what is constraint is my point because what I'm putting to you is that – I mean there is an enormous body of literature based on lifetime studies of people, et cetera, that there are a recognised range of factors that operate to constrain people, and so some people may go through life in those circumstances and not offend, and some people go through life in those

circumstances and do offend, and the law says, well, you don't get a free pass because you've had a hard life. We assume you have a free will and therefore you must pay a price in the criminal context. But what the appellant's are saying, well, yes, you don't get a free pass but what we do take into to mitigate your culpability is that you're not really an equal player with someone – you're not really equally culpable with someone who's had all the privileges that life can confer upon them. You've really had a life path that has reduced your ability to control yourself, in difficult situations, has placed you in positions where your only peer group is going to be a peer group who have got similar problems. So it's saying we just recognise that it reduces your culpability when we compare you to the person who's had a perfect life. So what is wrong with that model?

MR BARR:

So that would just simply be choosing a different test, a different terminology for the test. The constrain impairment is one that the Canadian courts have adopted and has been brought into New Zealand context. What your Honour is proposing there is a test of, I suppose, a narrowing of opportunities, and that is a – again, that's in this spectrum. The question for the Court, I guess, is where the line is drawn and because it's a question of – and I emphasise I'm talking here about section 8(a) culpability assessment. I'm not talking about necessarily other types of discounts that are available – but determining under section 8(a) culpability, my submission is that the appropriate test is constraint and impairment rather than a narrowing of opportunities. And to use Mr Harding as an example, at a very high level example without getting into the details, no doubt Mr Harding is able to explain how he has had a difficult background at some point or other. He's ended up in the gangs and in doing so each of these decisions along the line have narrowed his life choices. He's ended up as being effectively in a position though of, at the point of offending, in a position of control, control over those who are around him. There's a description of how he controlled his family members. He's in control of the scale of the operation that he's chosen to carry out. So I say that that's an example of somebody whose life choices have narrowed by

comparison to mine, hugely more narrow, but in determining culpability under section 8 that's not enough.

WILLIAMS J:

Well, I wonder whether a kind of rational way of dealing with this is that if there are constraining choices in a person's background, there might be some debate about whether Mr Harding's background was such a background but let's not talk about Mr Harding, if there is constrained choice, logically that constraint will apply to all choices unless there's something in the factual background to suggest it didn't apply. Right? So you would say in Mr Harding's case this guy's demonstrating uber-agency. So whatever the constraints were, they weren't applying. I can at least see the logic in that argument. But you've got to start from the proposition that genuinely established constrained choice impairs all important life choices after that unless there's something on the facts to suggest otherwise. In other words, it's the flip side of what was said by the Courts earlier which is in the Professor Berg thing and has said by the Courts for generations now, that you assume rational choice unless you can prove otherwise. In fact, in constrained choice circumstances you assume the reverse unless you can prove otherwise.

WILLIAM YOUNG J:

Aren't you assuming rational choices but against a different set of advantage and disadvantages?

WILLIAMS J:

Well, reduced rational choices.

WILLIAM YOUNG J:

No, no, it's a rational choice but it's just that the options are different.

WILLIAMS J:
Well, the options aren't different. They're fewer. So that must apply to this decision-making logically unless there's something to suggest it didn't. Isn't that the conceptual approach that makes sense?

MR BARR:
Well, that probably ties in with the Canadian approach and something that the Canadian courts have been grappling with, and it started with Gladue and the comment that has been often repeated and discussed that generally the more violent and serious the offence, the more likely it is, as a practical reality, that the terms of imprisonment for aboriginals and non-aboriginals will be close to each other or the same, even taking into account their different concepts of sentencing. So that's what *Gladue* said back in 1999.

WILLIAMS J:
Yes, I think *Ipeelee* walked away from that, a bit.

MR BARR:
Yes. So then that obviously resulted in that phrase being repeatedly cited, and the concern of the Supreme Court of Canada in *Ipeelee* was that that had been turned into a cast iron rule, that if it's serious offending –

WILLIAMS J:
No difference.

MR BARR:
No difference. And so what the, amongst other comments – I'm referring here, I should have said, to the *Ipeelee* in the, I think it might be the Berkland Crown bundle, at page – sorry, the Harding Crown bundle – at 755.

So what the Court said in *Ipeelee* was: "Numerous courts have erroneously interpreted this this generalisation as an indication that the Gladue principles do not apply to serious offences." Now, two points there. My learned friend made the point yesterday that in all cases it's important to consider the

potential impact of deprivation, even in serious cases, and that's a point that the Supreme Court has made in *Ipeelee*. The additional point I would add though is that *Ipeelee* didn't retract what Gladue had said, it's just that the Gladue principle had been misinterpreted as cast iron rule – that's probably over-stating it – but as an inflexible rule. But the general principle that more serious offending is likely to result in similar outcomes, even when deprivation arises, remains a general observation and is not retracted by *Ipeelee*, it's just that *Ipeelee* is making the very valid point that that's not a, you can't apply that as a rule that fetters judges' decision-making. And it's important, when the facts arise, to look at deprivation even in serious cases.

WILLIAMS J:
All right. So my question was if the evidence establishes impairment of choice for whatever reason, then you logically apply that thesis to the choice to offend unless there's something in the fact to suggest that there was complete agency?

MR BARR:
I'm not sure – the general proposition I'm not taking issue with. I would take –

WILLIAMS J:
So you agree?

MR BARR:
Well, what I –

GLAZEBROOK J:
He'd put it the other way round, I'm sure.

WILLIAMS J:
I know, I just – I just want you to bit the bullet, please, yes or no?

MR BARR:
Oh, well, I'd say I disagree, and I've explained why…

WILLIAMS J:
Good, yes.

MR BARR:
Because it seemed to me that there was a presumption built into that proposition, and what I'm suggesting is this is very much an evaluative exercise where those presumptions can't apply. The Judge undoubtedly –

WILLIAMS J:
Then what do you do with the background?

MR BARR:
Well, the background, for example in the numerous cases the *Zhang* talked about and the ones that have been cited here, the Judge will consider background and deprivation informs the Judge amongst the other informations available about the offender's decision-making.

WILLIAMS J:
Yes. What I'm looking for though is the disciplining of that intellectual process the Judge goes through so it stops being a lottery.

MR BARR:
Yes, I…

WINKELMANN CJ:
Can I ask a question, coming from a different perspective, possibly the same? One way of framing this is whether the courts are entitled to accept basically generalised evidence about the impact of disadvantage or whether in the way that it's being construed, what the Court of Appeal has said in *Zhang*, is to require proof that it's individually operative. So population information,, particularly in New Zealand, we can say in the New Zealand context, the information we have is that disadvantage and the intergenerational impact, colonisation, does have a constraining impact on choice and does as a driver crime, can a court take that into account when deciding section 8 culpability or

at a later point – so we'll leave those two at the moment – so that's another way of framing Justice Williams' question, I think.

MR BARR:
Yes.

WINKELMANN CJ:
Because I think you are saying that you need something more for the individual, it's not just a population analysis.

MR BARR:
No, and in fact there were three answers, three points I think to that. One, there is a wealth of material now available in the public arena. What hasn't happened to date is any mechanism to put that material in such a way that the courts can, the lower courts, can use that without having to draw on individual reports in each case. So there's no, as far as I understand it, there's no single body of information which a District Court judge can draw on, and by and large the judges are drawing on their experiences or their own information or, when a section 27 report is available from those, or from some of the helpful accounts that your Honours' decision, *R v Rakuraku* [2014] NZHC 3270, the *Heta,* and those other decisions in the High Court.

WILLIAMS J:
There is actually a body produced by this little outfit called Waitangi Tribunal that deals with that historical, that writes up that historical narrative district by district, it's just that it hasn't made the crossover, even though the superior courts have said that these reports are properly taken into account even if they're not binding on the mainstream courts, they just haven't crossed over into the perception of the criminal justice system yet and they probably should.

WINKELMANN CJ:
Okay, so that's your first – you said you had three points, I think?

MR BARR:

Yes. The second is the, two points relating to the Canadian approach. First of all –

WINKELMANN CJ:

Well, can I just, before we move on to that can I ask you what do you say about the ability of the courts to use that material if it was available – and Justice Williams informed us that actually it is available – what about the ability of them to use it, or are you going to come back onto that in a later point?

MR BARR:

Well, I suppose my point was that there isn't a single judicial document that –

WILLIAMS J:

No.

MR BARR:

There's the go-to document, it's the point I was really to make, rather than saying it's not available. There's plenty of information out there but there's probably no single go-to document.

WILLIAMS J:

No. Well, there's no single go-to story, you see, that's the point.

GLAZEBROOK J:

Yes, I was going to say how…

WINKELMANN CJ:

So no single –

GLAZEBROOK J:

It would have to be at least an individualised, to that extent, in terms of whakapapa…

MR BARR:

Yes. So, as it currently stands, the information that's been put before District Courts is varied. The second point is –

WINKELMANN CJ:

It's varied?

MR BARR:

Varied. I would have –

GLAZEBROOK J:

But that's not right, is it?

WINKELMANN CJ:

Well, you mean it's varied between section 27 reports? I mean, it's notoriously varied in quality and…

MR BARR:

Different sources, is what I mean.

GLAZEBROOK J:

But it's not theory that says, when deprivation…

WINKELMANN CJ:

Varied.

GLAZEBROOK J:

Oh, varied.

MR BARR:

Oh, I'm sorry, varied, yes.

GLAZEBROOK J:

I misheard, sorry.

MR BARR:

The second point is the Canadian Supreme Court has taken judicial notice in *Gladue* and the other of these factors. Now again that might present difficulties, how does a court articulate it in the broad term. But I suppose I need to raise there that it's not all straightforward in Canada either, because that judicial notice comes off the back of section 618(2)(a) of the Canadian Criminal Code, which gives particular emphasis to sentencing for aboriginal Canadians.

WINKELMANN CJ:

The fundamental principle.

MR BARR:

Yes. And subsequent Canadian decisions have grappled with whether those principles, including judicial notice, can be applied to other ethnicities, and that's an unresolved decision in Canada. But where this – and I raise that because there's where there's not the statutory basis of it – and there's a range of lower court decisions which are going through, as I understand it, the appeal courts at the moment, including *R v Morris* 2018 ONSC 5186 and I think *Morris* is the one that's been appealed to the Ontario Court of Appeal and seems to have been subject to appeal for the last two years but hasn't been decided yet so far as I can find, and that's one where an African Canadian sought to rely on the same *Gladue* principles as an aboriginal Canadian and –

WINKELMANN CJ:

Yes, it's a different paradigm.

MR BARR:

It is a different paradigm and one of the issues that was being grappling with was, well, can we do that without that judicial foundation, and different lower court decisions have reached different conclusions and that's yet to be resolved in the Canadian context.

WILLIAMS J:

Can we – really, that someone's – this is a question about whether someone's background of deprivation is relevant to sentencing. How could that be?

MR BARR:

No, sorry, I meant this was the – whether the Courts could take judicial notice of the effects of not colonial impact on aboriginals but rather the judicial notice of the effects of the life experiences, deprivation on African-Canadians and that's an unresolved issue. I simply raise that because one of the topics that's inevitably come up in that conversation is, well, is judicial notice appropriate without legislative authority?

WINKELMANN CJ:

Well, there's no legislative authority in the fundamental principle of criminal justice, is there, for taking judicial notice? It's rather a…

GLAZEBROOK J:

Evidential point?

WINKELMANN CJ:

It's outcome focused, doesn't – what is the – I'm just trying to recollect it. The fundamental principle of criminal justice which Gladue is based upon.

WILLIAMS J:

But anyway, section 618 doesn't say: "And you must take judicial notice of deprivation."

MR BARR:

It does not.

WINKELMANN CJ:

No, there's no point.

WILLIAMS J:

It's just that it stares you in the face every day.

MR BARR:

That's right. I simply raise that that – I suppose responding to your Honour's point how does that material – how does a Judge deal with that material? It's not straightforward.

WILLIAMS J:

Yes, that's right.

WINKELMANN CJ:

Although there is a body of now published figures, et cetera, which is so overwhelming that that is the sort of thing that courts have traditionally taken judicial notice of. Of course,. The point is how far it takes you. You may take judicial notice of that but how far it takes you in an individualistic justice system.

MR BARR:

Yes, which brings round to my third point and that is the Canadian Courts, despite certainly in section 618(2)(a) –

WILLIAMS J:

(2)(e).

MR BARR:

– (2)(e), sorry – despite taking into – taking judicial notice, nonetheless individualised information is still important because their phrasing is the background must still bear on the decision-making in determining whether there's constrained or impaired choice. So individualised information is still critical and certainly to the way I'm submitting a Judge should determine these cases. That's important not just to get that individualised information about someone's past but how it has impacted on the offending decision which will include individual information about the offence itself.

WINKELMANN CJ:

So can I just put your propositions back to you and see if you accept what I'm saying, and tell me if you don't. So you are generally accepting then though that if there is a reliable body of information which suggests on a population basis that deprivation is causing over-representation in the criminal justice system, so causing a greater propensity to offend, I suppose – not quite sure if that's how I'd put it – but that is something that the Courts could take into account?

MR BARR:

On ordinary principles, yes.

WINKELMANN CJ:

But that does not remove the need for an individualised assessment as to whether those are operative in the individual case.

MR BARR:

Yes.

WILLIAM YOUNG J:

But how does it take it into account? I mean there are two views on this. One is that – I mean there are a variety of views on it. One is the issue that a Bill should start upstream, which is a long-term approach to project.

MR BARR:

I'm sorry, I missed it.

WILLIAM YOUNG J:

The process should start upstream which is, of course, a very long-term process, but if there is a higher propensity to offend in a certain area does that mean that penalties for people in that area should be less or more? Depends on whether you're a retributionist or a deterrent person or a sort of have a different more socially justice orientated view.

MR BARR:

Well I think it is probably genuinely accepted that information such as this background, doesn't just go one way. It can highlight situations where the offender can present as a more dangerous; information might emerge that would suggest that the offender is more dangerous to the community and so forth. Absolutely, information can lead to sentences being increased or decreased and that is all part of the evaluation.

WILLIAM YOUNG J:

Well the offender is particularly prone to offend because of a personality disorder that is unlikely to be dealt with a rehabilitative or prison environment then that may point upwards, in terms of sentence length.

MR BARR:

Indeed it could. In *Ipeelee,* this was a type of situation that the Court is confronted with there and both of the offenders were on effectively extended supervision orders and they breached the extended supervision orders and the lower Courts considered that was serious offending and indicated that community protection was critical because this demonstrated that they showed an ongoing risk and an increased risk to the community. The Court, in the end, said well that may well be the case but a second aspect of the processes, the rehabilitative focus and the Court dealt with that by effectively imposing a year imprisonment for, interestingly enough, and I will get on to this, for rehabilitative purposes, so the two individuals could dry out. And saw that that sentence served overall rehabilitative purposes. Now I just use that as an example because it is an individualised assessment of those very types of considerations. Sometimes they point upwards and sometimes they point downwards.

WILLIAM YOUNG J:

If preventive decision is an issue, I think, and I may be wrong, the overwhelming consideration is protection of the public rather than why does this offender pose a threat to the public.

MR BARR:

Yes.

WILLIAM YOUNG J:

So community protection; it may be a trump.

MR BARR:

Certainly preventive detention, absolutely.

WILLIAMS J:

What the Court said in *Ipeelee*, at paragraph 69 was the courts are not the ones most empowered to make the changes. The changes that need to occur are upstream changes but we have to play our part. In the criminal justice system we cannot abandon our responsibility because this is really about poverty, lack of education and substance abuse. We have got to play our part too which this seemed to me to be impeccable logic.

MR BARR:

So I use that as an example of the Court there looking carefully at the way in which the background makes an offender more dangerous or can be rehabilitated. Equally there is some examples I think we have cited in our submissions from Australia where the Courts there have said, well look this particular feature demonstrates that this offender poses a particular risk and we need an uplift to reflect that particular aspect. So this all comes back to my central thesis that the Courts should look at these factors, they can go both ways and it is, I suppose the burden that is placed on judges, to carry out these very difficult evaluative circumstances. Now I appreciate the point that your Honour made earlier that there is always a risk when commentators, some judges, even the legislature sometimes has concerns about judges having too much individual discretion and the risks that that can pose. For example if unstated prejudices are built into that decision making and the Court would be conscious of that. By the same token the approach of the New Zealand Courts, perhaps, and a good example is *Hessell v R* [2010] NZSC 40 and this Court's decision of *Hessell* really emphasising the

importance in this jurisdiction of courts being able to take a relatively flexible approach within guidelines. So *Hessell* is clearly a completely different topic but the point made by *Hessell* perhaps has some resonance here that it is important that individual judges have individual scope to make individualised decisions.

WILLIAMS J:
Whatever guidance we might provide, it has got to be guidance which neutralises unconscious bias as best we can.

MR BARR:
Yes.

WINKELMANN CJ:
May I ask a related but related different topic. I mentioned yesterday to Mr Snelgar the information that is available about the intergenerational impacts of imprisonment itself and I am just interested in where you see any scope for the Court in the Sentencing Act 2002 context to think about the broader impacts of sentencing decisions, for individual sentencing decisions. Because Canada section 618(2)(e) was really a Parliamentary indication that societal impacts of all of this is in the mix for sentencing. More difficult to fit into the Sentencing Act paradigm, that kind of analysis that non-custodial sentences should be preferred because of the broader societal impacts, other than I suppose, the very important direction in section 16, that to the extent possible, non-custodial sentences should be preferred.

MR BARR:
That is actually a perfect segue into my first heading which is the sketch. We actually covered a lot of the points I wanted to cover a little bit later on, but the sketch of how I say the process should work which is as I say, slightly different to my learned friend.

GLAZEBROOK J:

Just on that point that has just been made by the Chief Justice, there, are of course, very strong cases especially in the Constitutional Court of South Africa about sentences that affect families, not in a generic sense, but specific sentences and taking into account child responsibilities and the family. So there is certainly precedent that one tries as hard as possible not to send people who have custody of children, to prison, in an individual sense.

MR BARR:

I am not aware, I don't know the South African cases but that certainly fits with, I suppose, what I imagined would be practised, yes.

WILLIAM YOUNG J:

It would fit with current sentencing practice wouldn't it.

WINKELMANN CJ:

Well perhaps not, given the figures we see about the rising number of wāhine.

MR BARR:

Sorry I don't know. So where, then, does section 7 fit in with all of this because I am going to suggest it has got three key roles. First of all it performs an educative role and by that I mean it reminds judges as to why they and the participants are there. It informs the public as to why the legislature has set up the Sentencing Act in the way that it has and that is clear from section 3 of the Act which talks about promoting those purposes. So that is a general reason why section 7 is there. The second reason and this is what I would suggest that the real hard work that the purposes does, once a judge has evaluated the seriousness of the sentence and the circumstances of the offender, that is under 8 and 9, then the judge needs to select the appropriate sentence type from the hierarchy of sentences and the judge's evaluation of the offender and the offence, will inform the types of purposes that are engaged and that in turn will influence the sentence type that is selected. And the final major way in which purposes works is for the likes of the MPIs where – and for that matter preventive detention – where

some jurisdictional, it provides a jurisdictional threshold for the provision of those types of orders.

So importantly, from what I've just said, those sentencing purposes don't do a great deal for determining sentence length, and the obvious or the simple reason why I say that at the start is because section 7 simply offers little guidance in that in determining precise lengths of sentences. It involves high-level goals and for that matter often competing goals. So to illustrate that point I thought I'd step through what I'd say might be the sort of processes that might apply for Mr Harding, Mr Berkland and maybe for some other cases as well.

The first step is stage 1, assessing the offence and the offender under section 8 and 9, and, in particular, the key provisions under section 8 at this point, I say are sections 8(a) through to (f). Now if your Honours don't have a copy in front of you of the sentencing Act, it is at the start of the appellant Harding's bundle of materials.

WINKELMANN CJ:
It's also in the materials that Ms Blincoe handed up to us yesterday today too…

MR BARR:
Yes, it is. So section 8(a) through to (f), that's the gravity, the culpability, the maximum most serious types of offences, so those types of assessments for sentence length, as adjusted by the section 9 aggravating and mitigating features, and of course, as we've already talked about, in amongst this assessment, deprivation and addiction, mental health, those all go into the factoring. Now once the Judge has completed that task, then section 8(g) tells the Judge that they must select an offence from one of those listed in 10A. So that's the hierarchy from discharges through to imprisonment, six or seven sentencing types. And it must be an appropriate outcome and it must be the least restrictive.

Now to come back to your Honour's question earlier, what statutory mechanisms are available for selecting sentence type and taking into account background features, this, in my submission, is one of the key provisions because it's at the point of selecting sentence type and then under the Sentencing Act each of the sentences has guidance as to – and that guidance often includes purposes. So, for example, community work, one of the purposes underlying community work is accountability to the community. That was a topic that was talked about yesterday. Well, what's accountability been? In that context it's returning to the community, or trying to pick some of that arm. So another one, supervision, clearly the guidance given in the Act is that's a rehabilitative purpose underlying that one.

WINKELMANN CJ:

But my question was slightly different which is can we legitimately take into account or can we say that Parliament has had this in its mind when it's set out the statutory framework about the negative impacts on the broader society, so whānau and hapū, other community groups, of imprisonment? So could you say that section 8(g) and section 16 are to be interpreted in that way?

MR BARR:

And yes, 16 is the key one there. So the Court first of all was given a direction, look for the least restrictive, then go to section 16 and it reinforces that message straight away because it says, 16(1): "Have regard to the desirability of keeping offenders in the community". So I suppose that, if anything, is the provision that most closely captures the point that your Honour is raising.

I just note there that again section 16 is about selecting section type and we know that because section 16(1) talks about keeping offenders in the community. So at this stage, in section 8(g), the Judge is trying to determine what's the appropriate sentence type, looking at the hierarchy, looking at section 16, those types of guidance, or working their way down the various options.

Now eventually the Judge will come up with the sentence type and the next question under section 8(h) is is that appropriate? Even though the Judge has now selected an appropriate sentence type, so let's say it's home detention, is that going to be disproportionately severe? So even an appropriate sentence can be adjusted under section 8(h).

8(i), the Court is directed, and particularly in the scenario where the Court is looking at a sentence with a wholly or partial rehabilitative purpose, must take into account the background information. Now that's not to say elsewhere under the Act the Court doesn't take into account background information because, of course, it does, but here it's for a particular reason. It's urging the Court, when it's going through that hierarchy of sentence types, and on the table is one with a wholly or partial rehabilitative type, that information goes in to feed that decision.

Now I mentioned before to Justice Williams when we were talking about *Ipeelee* that that was a case where the Court imposed imprisonment for a rehabilitative purpose or at least that played a part in it. Now as a general rule my submission is imprisonment is not imposed for rehabilitative purposes. They can have that outcome because, of course, there's lots of programmes that are available, but the purpose for which a sentence of imprisonment is imposed is not rehabilitative and we know that because section 16 lists the purposes for which imprisonment is imposed and they don't include rehabilitative or reparation purposes.

So section 8(i), we're still at the stage –

WILLIAMS J:
Do you think – I wonder whether that's true. Of course, it does say that imprisonment is about protection of the community and the purposes in 7(1)(a) to (c) and so on, but is your argument that section 16 actually precludes prison having a coincidental rehabilitative effect, consciously, not just…

MR BARR:

No, I don't.

WILLIAMS J:

Then what's the point in the submission?

MR BARR:

The point in the submission is that the work is trying to do – the primary function, I suppose it would be best to say, of (i) is when the Court is looking at that, when the District Court is dealing with those many cases which are on the cusp of prison or home detention or community detention, looking at that background for that specific purpose, what's the rehabilitative, and I –

WILLIAMS J:

So are you saying (i) doesn't speak to sentences of imprisonment at all?

MR BARR:

Well, I raised *Ipeelee* because there is an example that…

WILLIAMS J:

Where it does?

MR BARR:

Where it does.

WILLIAMS J:

Where it could if it were here, yes.

MR BARR:

But I also raise it because it really highlights the very specific purpose the Court there had in mind which was the one-year imprisonment was imposed for a drying-out period, and that puts – it's a somewhat unusual scenario and…

WILLIAMS J:

Well, look at Mr Berkland, for example, in the drug treatment unit. That's rehabilitative, isn't it?

MR BARR:

And that's really where I'm going. Section 8(i) is not the provision that is relevant to Mr Berkland. There's other provisions. But in terms of his rehabilitative purpose the sentence, when we're talking about a long term of imprisonment, it's not been imposed for rehabilitative purposes. That has been determined. The length has been determined in 8 and 9 and it's whatever it may be. It's whatever the Court decides is the appropriate length, but 12 and three-quarter years. So when we're talking about a 12 and three-quarter year sentence is imposed, the purposes for which it is imposed under section 16 are those four purposes, one or all or other of them. It is stretching the language to breaking point to suggest that that length of sentence is imposed for a wholly or even a partial rehabilitative purpose. But that's not to say –

WILLIAMS J:

How can that be? I really don't follow the logic of that at all, because look at the sophisticated array of programmes exactly for prisoners like Mr Berkland and the success in his case. I mean is this all an optional extra?

MR BARR:

No, it's – I'm really talking about the way that the Sentencing Act is designed and that's why this wording is phrased as it is.

WILLIAMS J:

But the Sentencing Act governs that too, doesn't it? These programmes are provided pursuant to the Sentencing Act, aren't they?

WILLIAM YOUNG J:

Or the Corrections Act, aren't they?

MR BARR:

Yes, Correction Act. Look, I'm not for one moment trying to undermine any suggestion that a lot of good work happens in the prison but from a statutory purpose what I'm trying to explain is why that is phrased as it is and how that fits in with this overall scheme of what's going on, and I'm not at all trying to suggest that the factors under 8(i) are not to be considered elsewhere in the sentencing process. What I'm trying to submit is to understand what role purposes have in the Sentencing Act, that they don't drive sentence length. If one stands back and looks at the way it's structured, what the Sentencing Act is trying to get judges to do is consider what's the seriousness of the offence and the offender under 8 and 9 and then go through this process of 8(h) onwards?

WINKELMANN CJ:

Can I just say, I'm having difficulty accepting this basic fundamental model that you're offering?

MR BARR:

I'm sorry?

WINKELMANN CJ:

I'm finding it hard to accept this model that you were suggesting because it entails depowering the purposes provision of the statute which to me seems an unusual method of statutory interpretation in any situation. It just seems to me overly – it's an artificial constraint to say that you put purpose to one side and go to section 8 and 9 because sections 8 and 9 have the purposes embedded into them. They are an expression. They are an expression of statutory purpose but in conventional statutory interpretation terms when you're looking at how you apply them you bear in mind the overall statutory purpose as set out in section 7. So it just seems to me unnecessarily sort of rigid the way you're approaching this.

WILLIAMS J:

Well, it also suggests that *Jarden* is completely wrong when it says deterrence is the primary basis for sentence length and you can't discount personal factors. *Jarden* may well be wrong on that but it's clear that the Courts have traditionally applied deterrence purposes as a reason for sentence length.

MR BARR:

And I suppose where I'm getting to, leading up to, is *Jarden*. How does the Court interpret *Jarden* and apply it? One way of approaching it is to say, well, purposes do determine sentence length as a rule. That's one approach, so…

WILLIAMS J:

I thought that was what you were…

MR BARR:

No, no, sorry.

WILLIAMS J:

Keep going, keep going.

MR BARR:

So one approach is to say purposes determine sentence length. So we're putting aside the cases where we're determining sentence type which is, you know, on the cusp of imprisonment or home detention and clearly purposes are critical to that decision-making. But we've got to the point where I say under 8 and 9, we are looking at a long sentence, whatever it may be for, for Mr Harding and Mr Berkland, it is a long sentence.

To what extent do purposes drive those sentences. So in other words, let's say Mr Harding where there is some statutory. I will use Mr Berkland rather. His sentence is worked out by comparison with other comparable decisions, the guidance in 8 and 9, the mitigating features and the aggravating features and the Court reaches what it thinks to be an appropriate outcome, 12 and three quarter years. Can the Court then say, well look I am going to take this

appropriate sentence and then uplift it by five years because deterrence is a driving factor. Sometimes the way sentences are phrased almost by shorthand, that is almost the impression one might get from time to time, but what I am saying under this approach is what is happening is the Court is determining the appropriate sentence length and then it will serve whatever purpose it will serve because the Court has already worked out the outcome.

WILLIAM YOUNG J:

Just pause there. It will normally determine length by reference to comparable cases and that the implicit assumption is that the pattern of sentences for particular offences, reflects an appropriate balancing of Sentencing Act considerations. I do not think many judges accept in particular cases, and I will come to really say, well this is what deterrence requires. Where it did sometimes raise its head was in relation to home detention which I think has been excluded now but it does arise in relation to section 86.

MR BARR:

Yes absolutely.

WINKELMANN CJ:

I think in the District Council they are doing this all the time. They are spending a lot of time on section 7 and I think that is what the statute anticipates and it seems to me you are setting up a false dichotomy between section 8 and 9 and section 7 because section 8 and 9 are a statutory expression of section 7 and so in order to understand and apply them, one needs to think about section 7 purposes.

MR BARR:

I don't doubt that for a minute that they must be firmly in the judge's mind, but the question is, how can those purposes help. What content is in section 7 to help a judge determine a sentence length. Now at one extreme, one can say if I select deterrence as my purpose, I can take an otherwise appropriate term and I could uplift that.

WILLIAMS J:

That is not really what they are saying. They are saying the starting point is deterrence loaded and the cases have said that forever, so deterrence is my primary purpose, therefore my starting point is this and given that deterrence is my primary purpose, I will not discount for addiction or background. That used to be the approach pre-*Zhang* and you are saying that was inherently wrong.

MR BARR:

I suppose what I am trying to do is unpack – because that is not inherently wrong at all. It is just that it has not been unpacked. When a Judge says a 12 and three quarter year sentence is a deterrent sentence, that is a description of what it is doing.

WILLIAMS J:

Yes, a description of the reason for the sentence.

WINKELMANN CJ:

I think we might adjourn and come back to that point. The last question is description of the reason for the sentence.

WILLIAMS J:

That was more a statement than a question.

COURT ADJOURNS: 11.00 AM

COURT RESUMES: 11.04 AM

MR BARR:

Right, turning to my next heading which is gravity and in particular the two topics which are live. How to determine Mr Harding's starting point and how to determine Mr Berkland's starting point. So starting with Mr Harding as we have already touched upon this morning. A comparator used here was for determining the most serious of cases was other manufacturing cases and the

Crown submits that was not highly appropriate because that is the closest of a range of offences that could be selected from other manufacturing cases right through to other, as your Honour said yesterday, manslaughter cases or terrorism cases. So there is a range of cases; the best ones are going to be the closest ones. That is not to say that other cases cannot be used as comparators too and so it would also be entirely acceptable for the Judge to have compared importation cases or supply cases to determine what is the most serious of its kind or most serious category but once one moves away from the most closely comparable cases, inevitably difficulties arise.

The first is the nature of the offending and the topic that came up a few times yesterday, was, is there now under *Zhang* a difference between manufacturing supply and importation or are they just all one, to be treated as the same. And the Crown submission is that *Zhang* very much intended that they could still be treated differently but it would depend on an individual analysis of each case. And I say that because first of all in *Zhang* at 97, the Court of Appeal considered the previous differences in sentences; up to 100% it noted between different cases of similar quantities and one of the reasons why the Court observed that that happened was because some of them were supply, some were manufacturing, some were importation. So that was one reason they had noted pre-*Zhang* a differentiation and then at 122 of the decision, the Court effectively decided that all these issues could be grouped together under the headings of role and quantity and in particular I say the question of supply, manufacturing and importation are now dealt with under role and I say that because role descriptors which the Court used; one of them under leading is close links to the original source. Now, of course, all things being equal, the manufacturer is the closest to the source, so the manufacturer introduces the product to the world, the importer introduces it to the country and in doing so reaches our borders and the supply introduces it to the local community. Whilst the Court felt that those differences, in role, including the closeness to the source could all be dealt with under the same levels of sentencing in the bands, there is no need to distinguish the band ranges, nonetheless that remained a relevant factor.

So if a Court wants to look beyond manufacturing cases for the comparative for the most serious types, then yes it is of course acceptable to look to important in supply cases, but the Court must bear in mind that there is a difference because the person who is closest to the source will be the manufacturer.

WINKELMANN CJ:
Can I just ask you what the paragraph reference is for the closeness to the source.

MR BARR:
It is paragraph 126 and that is the table of roles.

GLAZEBROOK J:
It is certainly closest to the source of it arriving in New Zealand aren't you, with an importation. I mean you might not be closest to the source of manufacturing but you are certainly close to it arriving in New Zealand and responsible for it arriving in New Zealand in large quantities in some cases.

MR BARR:
That seems to be the approach that is taken. The importation has often been seen on the parallel with manufacturing, for that very reason.

WILLIAM YOUNG J:
As the role though? I mean because this is I suppose quite a significant issue. The person who is the importer in New Zealand of the drugs is not the originating source of them – presumably someone in China.

MR BARR:
Yes.

WILLIAM YOUNG J:
And is that the point the Court of Appeal was making or is it a different point?

MR BARR:

I'm saying that the person who is closest to the source is the manufacturer. That is the source.

WINKELMANN CJ:

Well, what I was going to say, you could say that someone who takes the step of importing the drugs into New Zealand is also equally close to the source because they're the source of it being originated into the market, leaving to one side the issue of role in that. So if they were the person who is responsible for importing the whole whoa-to-go, they would be no less culpable than a manufacturer would be based on the closest to the source.

WILLIAM YOUNG J:

Well, it depends on what you mean by "source".

WINKELMANN CJ:

Exactly.

MR BARR:

Yes, I can't really disagree with that proposition but I suppose just as a matter of logic the source is the manufacturer. Often that individual is overseas and New Zealand doesn't punish that person. Sometimes the manufacturer might also be the importer, probably in a transnational organised criminal group, but effectively what that point is making, in my submission, is just that one of the factors to be taken into account is the closest to the source is an indicator or closeness to the source is an indicator of a leading role. It's doesn't necessarily say that all manufacturing cases are more serious than, say, importation cases of even supply cases because that will depend on looking at all the different aspects under the role. A small manufacturer, for example, will be the source. A large supplier will be some distance from the source but might be culpable, that type of point.

ELLEN FRANCE J:

I'm not sure – on your approach, though, won't – unless the importer is the actual, the person from whatever overseas country also is the one who comes here, won't that always be less serious then on that analysis?

MR BARR:

Well, on that just one factor I agree but there's different factors that go into importation, for example. A large element of the culpability arises from breaching our borders which doesn't exist with a manufacturer. But on that one particular point, closeness to the source, it seems as a matter of logic that the closest person will be the originator of the product.

ELLEN FRANCE J:

Where does breaching the border come into it in this analysis?

MR BARR:

Well, I'd say that's not as a function of an aggravating feature but inherent in the offence itself, an element of the offence itself of importing.

WINKELMANN CJ:

It used to be something that was said in sentencing decisions about importation but I haven't seen it for a while.

MR BARR:

I guess importation is certainly often seen as a very, well, comparable to manufacturing. I'm not trying to put any of them on a hierarchy. I'm just saying that there is different elements that make individual cases more or less serious, and one of those elements for manufacturing is that they are the originator of the product for importation. Breaching the borders is part of it. But there will be a whole lot of factors that go to drive why any one case is more serious than another, not just the volume. So volume –

WILLIAMS J:

But volume is the – drug offending is about social harm.

MR BARR:

Yes.

WILLIAMS J:

That's what we're trying to prevent when we punish drug offenders. Logically then the introduction of additional volume into New Zealand consumption is the worst kind of offending. Doesn't really matter how. With importation you see the result of probably several months production. With manufacturing, generally speaking, you'll only see the result of a few weeks manufacturing if there are intercepts and so on but the police won't wait until you get to 100 kilos before they swoop in. But other than, what's the difference?

MR BARR:

The major difference going beyond – well, three differences. First of all, this point about closest to the source, give or take, depending on what the Court thinks of that particular point.

WILLIAMS J:

Can you just apply my frame and tell me whether there's any difference at all in manufacturing and importation in terms of the harm that this offending is designed to protect us against?

MR BARR:

Yes, and that is the, depending on the case, that the organised criminal effort, for want of a better phrase, that might have to go into a particular type of offence, and Mr Harding's is a good example of that. Now that –

WILLIAMS J:

Sure. But you see, you'll get the same with importation. It's just that it's on the other side of the border and it'll be several months work of either a gang, you know, a group that – a crew that big or a much bigger crew working more quickly with better industrialisation. But really, apart from that…

MR BARR:

Well, that's important because let's say that overseas offender who was responsible for that organised criminal effort overseas could be captured and punished for that effort, then of course you would expect them to – that would increase their culpability. The reality is that the overseas manufacturer typically has not been apprehended or even come into the country. So in terms of the activity that's punishable in New Zealand, yes, pound for pound a gram of – pound for pound – methamphetamine imported has the same effect on the end user as that which is manufactured in New Zealand. There's no question about that. They're the same, essentially the same product or they can't be distinguished.

WINKELMANN CJ:

All right, we – carry on.

MR BARR:

But that's not the sole element that's to be punished. I say a critical element, particularly when we're getting up in the level of manufacturing, is looking at the organised criminal effort that's going in which increases culpability and a major part of that is because the impact on the wider community that that effort causes. Now that may sometimes be the case with importations, and the example I gave in the written submissions – this is based solely on my reading of the Court of Appeal's decision in *Fangupo v R* [2020] NZCA 484 – but my impression at least from those facts was there's a case of importation of, I think from memory, something like 15 kilograms or 19 kilograms of methamphetamine, and the offender there, Mr Fangupo, his role largely involved flying to America once, arranging contacts and so forth. Yes, the quantity was actually a great deal larger so the harm to end New Zealanders is potentially higher but the amount of effort and thus culpability or impact on the wider community for that criminal, organised criminal effort, is less in Mr Fangupo's situation.

WINKELMANN CJ:

Hard to see that when he's introduced about three times the quantity of methamphetamine into the market.

MR BARR:

Yes, so I'm not disputing that the harm from that end product is higher.

WINKELMANN CJ:

All right. You're saying from his personal efforts he's been less corrupting of others around him? That's your point?

MR BARR:

Yes. So I'm saying that the harm that's caused by – not all manufacturings, of course, because it's case by case – but manufacturing on this industrial scale has wider implications than simply the – I shouldn't say "simply" – than the harm to the or potential harm to the end user.

WINKELMANN CJ:

All right, okay, so moving on from that point.

MR BARR:

Now I don't think there's been – well, the next point I was going to cover was the selection by the Judge of the 30-year starting point. It's not an issue that I think was developed a lot yesterday, but I suppose all I had to say about that was one the Judge had placed it in the top bracket and had stepped away from life imprisonment then logically the Judge would have been looking for a sentence near to life imprisonment. Obviously a difficult task to do given the indeterminate nature of a life sentence but the 30 years I say is appropriate because the main difference between a 30 sentence with a 10 year – sorry, in the end it is a 28 and a half year sentence but the 30 year starting point, the main difference would be that the 30 year term is determinant and an automatic MPI under the Parole Act 2002 would be 10 years, as compared to a life imprisonment term where the sentence never expires and similarly the MPI would be 10 years. So that selection of 30 years as the starting point can

be seen as one step down from life imprisonment and given that the Judge had just decided it was only just below life imprisonment, that was an appropriate starting point to select.

There is the passage in the Court of Appeal's judgment which deals with the question as to whether 30 years as opposed to say 20 years was necessary to serve the purposes and principles of sentencing. I don't know if your Honours want me to address that particular point.

WINKELMANN CJ:
Well, yes I think so, yes.

MR BARR:
My response to that is again rather brief. Having calculated the appropriate sentence under section 8 to be 30 years, minus the 5% discount for guilty plea, 28 and a half years, then that sentence, the Judge needed to check that on section 16 and ask whether that sentence served one or other the list of purposes under section 7 and the short point is that the sentence of that length was always going to serve the purposes of denunciation and I say the other purposes as well. The question is not whether a lesser sentence would have served those purposes; that is not the question that section 16 asks. The sentence length is determined under section 8. The only question for the Judge then is whether it does serve one or more of those purposes and of that, my submission, is there cannot be a great deal of doubt.

My next topic is Mr Berkland and the differentiation in his starting point or a selection of his starting point and Ms Ewing will speak more to the facts of Mr Berkland's case shortly but the essential point here is that Mr Berkland what was on any account falling within the significant band and given that he was in the significant band, it follows that his starting point needed to be adjusted below that of the leading offender or the notional leading offender and the Crown says that the approach to be adopted there is one of flexibility, bearing in mind the principles that the *Zhang* case has set out. In other

words, that a strict approach was considered by the Court of Appeal and rejected and that is consistent with the New Zealand sentencing approach.

One of the points I have made in my submissions is that Mr Blance could have well received under *Zhang* a significantly higher sentence and to some extent that is always going to involve an element of speculation but given the quantity that he was overseeing and some of the aggravating features there, one might expect the starting point in the order of 23 to 25 years. If that was the case, then Mr Berkland's overall starting point of 17 and a half years would be something like 15% or 30% less than Mr Blance's notional starting point which would be at least enough to reflect the difference. But in any event, the important point is the Crown says that under *Zhang* Mr Berkland's starting point was not objectionable and that touchstone by referring to Mr Blance's starting point confirms that, or, sorry, touchstone referring to Mr Blance's notional starting point confirms that.

WINKELMANN CJ:
So you are saying that's simply a cross-check?

MR BARR:
Yes, it's a cross-check, yes. Turning then to my next topic which is personal culpability and personal mitigating features, and the first question is that of in which circumstances can deprivation, addiction and, for that matter, mental health be taken into account and this question of causation.

So the Crown says that the causation test is appropriate and that the test properly applied does not give rise to some of the concerns that have been voiced. The causation test under criminal law as an understood concept, a substantial or inoperative cause, it doesn't have to be the only cause. The Court of Appeal has commented that a proximity test such as might be applied more rigidly in a tort setting is not to be applied here which would cause difficulties with considering historic and sometimes intergenerational deprivations.

But underlying the test the Crown says the critical question is what the Judge is actually asking himself or herself and this was the point that we discussed earlier this morning. My submission is that the Judge is asking themselves: "Can I draw an inference from this material that a constrained or impaired choice is – played on the offender's decision-making for this offending?"

Unless the Court has further questions on that, it's probably a topic that was covered this morning.

So the next question is, well, is the discount for deprivation or addiction limited to section 8(a), and, of course, it's not. As *Zhang* pointed out, there's other mechanisms under the Act and here Mr Berkland received a 12-month discount for his prospects for rehabilitation. The Crown submission is that that reduction is unremarkable and the mechanism by which that discount is made fits logically under section 9 and, for that matter, section 10 as well which allows a court to take into account an offender's response to an offence and any proposed remedial action. Section 10 is by and large, well, often used in the context of restorative steps or steps to repay stolen money or steps of that manner, but it does appear to be broad enough also to capture responses by offenders, including proposed remedial action. In any event, the 12 months was allowed and the Crown says that that was sufficient.

The next topic relates to Mr Harding and it wasn't one that occupied a great deal of time yesterday and that's the question of Mr Harding's age and his age that he will be when his sentence expires. So he'll be 66 when his sentence expires and the material from Statistics New Zealand has gone through the life expectancy. Not for Mr Harding, but for that particular group, of which he is a member. It is male Māori aged 40 at the time his sentence was imposed. The essential Crown submission is that there is little room in Mr Harding's case for a discount to be applied on the orthodox principles that have been adopted by the Court today.

So unless the Court has any questions on that, I am going to turn to my last topic and that is minimum periods of imprisonment. This is clearly one where

the principles and purposes of sentencing are engaged. The purposes provide the jurisdictional threshold for an MPI to be imposed and the question for the Court is relatively straightforward although obviously difficult in individual cases to apply. The key point here is it was not simply a mechanical application in Mr Berkland's case of saying that one of these purposes is in play and therefore an MPI was appropriate or even saying this is a serious case and therefore MPI was appropriate. The difficulty for Mr Berkland was that the Court had found that his personal culpability had not been reduced, so he was an offender who could not call on that invite the Court to take a different view of those purposes. There is a multitude of other reasons why an MPI might not be imposed; assistance to the authorities is sometimes taken into account. Clearly that was not in play here either.

WINKELMANN CJ:
Well what about rehabilitation?

MR BARR:
So rehabilitation was in play because Mr Berkland had the 12 months taken off.

WINKELMANN CJ:
Because here there was evidence his prospects of rehabilitation were good.

MR BARR:
Yes and I accept that that will be taken into account in weighing those other purposes. The Court of Appeal here did not ignore that factor, that there had been prospects of rehabilitation but it is not wrong for the Court then to have decided that the other purposes weren't still nonetheless properly in play and it was still open to the Court to impose an MPI notwithstanding those rehabilitative prospects.

The only final comment I would probably make on MPIs is that there isn't any particular statutory guidance as to the length of MPI that should be imposed, other than, of course, the range that is between –

WILLIAM YOUNG J:
Between the third and two-thirds.

MR BARR:
Yes, so that somewhat suggests that where an MPI, in this case essentially 50% is imposed, that ordinarily that 50% would be justified because the Court has already gone over the jurisdictional threshold and decided that an MPI was appropriate. It follows that little more would be required to set the MPI at half way.

So those are the points I wanted to raise. Does your Honours have any questions at this stage on that framework?

ELLEN FRANCE J:
So could I just check one thing. In terms of Mr Harding, why do you say that *Thompson* is not an appropriate comparator?

MR BARR:
So Mr Thompson got the 18 year starting point for 15 kilograms.

ELLEN FRANCE J:
Yes, supply.

MR BARR:
So – sorry, for six kilograms, I beg your pardon. The reasons are, one, that Mr Harding was close to the source.

GLAZEBROOK J:
Harding was what, sorry?

MR BARR:
Close to the source, the part of the role. Two, he was responsible for the organised criminal effort that his particular manufacture involved. That was, at

least in New Zealand's context, extraordinary. And it's really those, it's the combination of those two factors that make the comparison fraught. So it's certainly available as a touchstone but it's very difficult to – it's not as though it's comparing like with like.

GLAZEBROOK J:
So what comparator would you use?

WILLIAM YOUNG J:
Rhodes.

MR BARR:
Yes, well, *Rhodes* is the only direct comparator and I say it's the appropriate comparator to use because it's on all fours.

WINKELMANN CJ:
Although that was before *Zhang*, so before the distinction was removed between manufacturing and importation.

MR BARR:
Yes, although my submission is very much that that distinction hasn't been removed.

WINKELMANN CJ:
And if you look at some of the lesser offenders in *Rhodes* they should get quite considerably lower sentences even though they are also themselves critical figures, significant figures in terms of that graph.

MR BARR:
Yes, part of the unusual aspect of unusual aspect of Mr Harding's case is that he is very much at the – he is the pinnacle of a large, and in this case a much larger, operation than *Rhodes*.

WINKELMANN CJ:
Well, not that much larger.

MR BARR:

Larger, I should probably say. So the very fact that – yes, it's not common to say the least for kingpins, if that term can be used, for industrial-sized manufacturing cases to come before the Courts.

Just returning to your Honour's question about the difference and this idea of organised criminal effort, there was a question I think yesterday about my reference to the Court of Appeal of England and Wales in *R v Wiseman* [2013] EWCA Crim 2492, [2014] 2 Cr. App. R. (S.) 23 and the notion there that it's difficult to compare, in that case I think it was cannabis production on a large scale, with importation or supply, and they made the point that it's difficult in particular when there's an ongoing operation. Now I do accept the proposition that suppliers can be ongoing operations or indeed in some cases importations can be ongoing operations as well, but I sense there was more in that point than simply whether it was ongoing. The manufacturing operation I this case stands out because the complex is already in place, the hard work to get it up and running, the premises, the materials, the supply chains for precursors, the cooks, the security, all those things go in to make a manufacturing operation of this size quite extraordinary. Part of the idea of that being in place and being able to continue to produce methamphetamine is not to say to punish what is going to be produced in the future, but it is to make the point that this was an operation that required a great deal of investment, organised criminal effort to get up and running.

WINKELMANN CJ:

Well can I just ask you to step back from this. If we step back from this case. If one was to design a sentencing system which responded to the need to deter and control this drug, one would probably think that the most important thing to control is importation, not manufacturing, because manufacturing is so effortful that, in fact, quantities that are introduced into the marketplace through manufacturing is small, whereas the importation methodology is sophisticated and immensely scalable which is what we see through the very large quantities that are coming in. So if one has not taken that kind of bottom up defending particular case approach, the irrational response is not to amp

up how seriously you view manufacturing because it is so down and duty for the offender, but rather to reflect the fact that importation is scalable and has been scalable.

MR BARR:

Yes I do take your Honour's point. I think it is dangerous to assume that manufacturing is not contributing in a material –

WINKELMANN CJ:

I am not saying that.

MR BARR:

– way to the local methamphetamine market because what we do know is that detection of local methamphetamine manufacturing is very difficult and we also know that the importation of ephedrine and pseudoephedrine comes into New Zealand in very high quantities. So those quantities of precursors are going somewhere but what the difficulty is, is detecting – well there is two possibilities. The ephedrine has been lost or it has been converted into methamphetamine and we are not detecting it. What is being detected, of course, is these very large importations so they are clearly a concern for the police.

WINKELMANN CJ:

We do not know what percentage of importation is not being detected, just like we do not know what percentage of manufacturing is not.

MR BARR:

No I think that is right. I guess I am cautioning the Court against developing, from a policy point of view, that importation necessarily has to be focussed upon because it poses a bigger threat.

WINKELMANN CJ:

Yes I suppose I am not really saying that that is a legitimate way of sentencing but I am just testing the raw proposition that manufacturing has to be more focussed upon because that is really what is implicit in yours.

MR BARR:

No I don't want to be taken to saying that. I am just saying under that particular heading of *Zhang;* that one factor and I emphasise it is only one of many, that manufacturing is closest to the source. So I am not saying manufacturing will sit higher in the schedule always, but in an individual case it can well do and it is the combination here of being closer to the source.

WINKELMANN CJ:

It's role. It is the role of the person.

MR BARR:

Yes role, but the term role under *Zhang* captures a large number of concepts.

WILLIAMS J:

You are just saying, don't let quantity blind you to the culpability of the infrastructure that has gone into getting to this quantity.

MR BARR:

Yes. Thank you.

WINKELMANN CJ:

Thank you Mr Barr.

MS EWING:

I'm conscious of the time so I'll be as brief as I can. I've got two topics to cover. The response to Mr Berkland's submissions about the facts of his offending, and the Crown position about the admissibility of Mr Harding's cultural report.

So beginning with Mr Berkland. The starting point has to be that the summary of facts described his role as Mr Blance's right-hand man. That's what he admitted in general terms, and he was the right-hand man in a six-month 15 kilogram bulk supply operation, at time the largest that had been seen in the Wellington area. The Crown submission is that the facts of his involvement, the details given in the summary of facts, entirely bear that description out, and a summary of Mr Berkland's role is provided in appendix 2 to the Crown submissions, but today, given limited time, I just want to focus on three topics: first, his role in bulk supplies on behalf of the operation, secondly, his relationship with Mr Blance, and, third, the degree of profit that he derived.

So starting with his role in bulk supplies, and it may be helpful, your Honours, to have the summary of facts to hand in case we need to refer to particular transactions. So the base of the operation was clearly Mr Blance's address and it's also clear that he led the supplies but for the most part with Mr Berkland taking care of other aspects of the operation. But when customers couldn't find Mr Blance, when he didn't answer his door, they sought out Mr Berkland. He was an alternative contact point for the supply of methamphetamine, and that's paragraph 38 of the summary of facts where that part of his role is described in general terms. When they did so, Mr Berkland knew how much meth was available and he knew on what terms it was available. He knew the price, he knew, for example, that for a half-ounce you had to provide cash up front. So while he might not have had the drugs in his own possession, he was the 2IC of the supply operation. He was an alternative contact point for methamphetamine, and that part of his role is particularly significant when we consider the bulk supplies that he himself made, obtaining the drugs from Mr Blance but dealing with the customers himself.

So on the 28th of February, this is paragraph 173 of the summary of facts, an undercover officer asks Mr Berkland for a quarter of an ounce, seven grams of methamphetamine. He goes to Mr Blance, obtains it and provides it. He does so, he – on the 15th of March, this is paragraphs 230 to 231, he makes clear

that he can obtain very large quantities on request. He offers the undercover officer an ounce of methamphetamine and comments: "If you've got 14 grand on you I'll go and get it now." The officer enquires about larger quantities and Mr Berkland advises: "I can get up to five ounces but for that amount you'd need to give us an hour because we don't have that sort of quantity just lying around," and he explains that a $500 discount is available if five ounces are purchased. On the 27th –

GLAZEBROOK J:
Did you give us that paragraph number for that or was that 230 as well?

MS EWING:
230 to 231, yes, that's all the same conversation on the 15th of March.

ELLEN FRANCE J:
233, I think, for the discount.

MS EWING:
Yes, thank you, your Honour. On the 27th of March, paragraph 237, the officer asks him for half an ounce. Mr Berkland explains it will take him five minutes to go and get it from Mr Blance's house, and at that point the negotiation breaks down because the undercover officer refuses to supply the cash up front. But the transaction proceeds on the 2nd of April, paragraph 262, with the summary of facts. Again 14 grams of methamphetamine, undercover officer goes to Mr Berkland for that amount. Mr Berkland goes to Mr Blance, secures it and receives the cash which he returns to the operations base.

On 4 April Mr Berkland is chatting with some undercover officers in a bar and again he makes clear just how much he can supply on behalf of the operation. This is paragraph 291 of the summary of facts. Three or four ounces would take him 10 minutes to obtain. That is between 80 and 120 grams of methamphetamine. So those transactions, the Crown says, provide a snapshot of why this supply operation was attributed to both Mr Blance and

Mr Berkland, because although Mr Blance was the person at the front of the shop, Mr Berkland was also facilitating large scale supplies.

WINKELMANN CJ:
And so Ms Ord makes the point, that the only evidence he was facilitating large scale supplies was in response to the undercover operation.

MS EWING:
Yes but of course the undercovers were deployed. The fact that he made those supplies to one customer, who was an undercover officer, doesn't tell us much about how other supplies would have proceeded. It is obvious from the way the operation unfolded that customers were coming directly to their house for drugs, so they are not necessarily providing a trace of those transactions and phone records and notably there was no interception device in Mr Berkland's house as there was in Mr Blance's, so that is why the police can quantify 700 visitors to the address, supplies made et cetera. So my learned friend Ms Ord also submitted yesterday that Mr Berkland only supplied small quantities himself and I will come on to describe some other transactions where the Crown says he supplies very large or similar quantities, out of his own supply, when he has the methamphetamine available, but I will deal with that point under the topic of profit. So that is my first point, his role in bulk supplies. Unless there are any questions about that, I will move on to his relationship with Mr Blance.

So again the starting point is the summary of facts which describes him as a right-hand man and notably these are both senior gang members. There is no obvious hierarchy between them, in that sense.

WINKELMANN CJ:
In what sense? In gang sense?

MS EWING:
In a gang context.

WINKELMANN CJ:

That was not at issue was it?

MS EWING:

So I am simply, I suppose, I am contrasting this situation to one such as Mr Harding's where it is plain that there is an element of exploitation by a more senior gang member of people who are subordinate to him in the gang hierarchy. And the Crown, of course, does not dispute Mr Blance as the leader of the operation, he is directing it and Mr Berkland's role is operational. But the Crown says it certainly doesn't approach a lesser or a minor role. And that is borne out by the trust that Mr Blance places in him. Mr Berkland is trusted to run the shop in Mr Blance's absence. He is also significantly trusted to go and purchase the methamphetamine that they are selling on his own so he goes to meet the manufacturer's courier on several occasions. He purchases three kilograms of methamphetamine on each of those occasions and he exchanges it for over a million dollars in cash. That is the degree of trust that Mr Blance places in Mr Berkland which in the Crown submission is completely inconsistent with him being a minor assistant.

WINKELMANN CJ:

I do not think it is said that he is a minor assistant.

MS EWING:

He says that his role approaches that of a lesser role.

WINKELMANN CJ:

Aspects of it.

MS EWING:

Yes but the Crown is, he is a lieutenant in the military sense. He steps in and plays the role that Mr Blance generally plays as leader. He is not approaching a lesser role.

WILLIAMS J:

I think you'd call him a lieutenant. He's more likely a senior NCO.

WILLIAM YOUNG J:

He's a placeholder which is holds the position which is the etymological meaning of "lieutenant".

MS EWING:

That's right.

WILLIAMS J:

Might be in the French army but not in the New Zealand one.

GLAZEBROOK J:

I hope we can avoid military comparators.

MS EWING:

Yes, perhaps the business analogy was the better one. I apologise for that. So the fact he's stepping into Mr Blance's shoes on occasion in the Crown's submission totally supports the view that he's the right-hand man or the deputy, and it also speaks to his complete knowledge of the operation. There is really no part of it of which he seems unaware. He knows when Mr Blance is going to reload. He knows when methamphetamine will next be available. He knows the pricing structure. He knows what they pay for it, and he goes to meet the manufacturer's courier himself, so he's personally quite close to the source.

And in the Crown's submission, although Mr Berkland had an addiction, this isn't a case where that's an indicium or a sign of a lesser role. Mr Blance was also an addict and was obviously able to run a well-organised methamphetamine operation. So this isn't a case where it appears that Mr Berkland's addiction has been exploited as in Mr Harding's case, for example.

WINKELMANN CJ:

Bit strange though Mr Blance was keen for him to get off his addiction which suggests Mr Blance or himself is more in control. Was that the evidence, that Mr Blance was holding it whilst he sorted himself out, holding his nest egg?

WILLIAM YOUNG J:

Holding, sorry, what?

WINKELMANN CJ:

Holding the nest egg. I thought there was a suggestion that Mr Blance wanted him, Mr Berkland, to sought himself out on the addiction front.

MS EWING:

It was until he stopped spending that the nest egg was being held. So I didn't read that part of the summary to say it was to do with his addiction. So that's Mr Berkland's relationship with Mr Blance and I'll move on then to profit which is a point that has been relied on in oral submissions yesterday.

The starting point here is that a leading role requires an expectation of significant profit. A significant role requires simply actual or expected commercial profit. So the significant role doesn't incorporate an idea that someone is profiting wildly. It means that they are motivated by profit in their involvement in the operation, and there were two limbs to Mr Berkland's reward. The first was the cash he received every week, one to two thousand dollars, over a six-month period. So that equates to 27 weeks. And just to put the lower end of that range, $1000 a week in context, the 2016 median for income for New Zealanders was $937, in 2016. That's according to the Statistics New Zealand website. So if he receives $1000 a week and that's it, he's earning more than half of New Zealanders at that point.

So another way of contextualising that $50,000 profit over a six-month period is to describe it as $100,000 salary, but, of course, it's tax free. So if significant profit were required, the Crown says it's been made here.

But there's a second limb to Mr Berkland's reward which is the drugs that he received. Half an ounce of methamphetamine a week initially, eventually by late March that's down to a quarter ounce which is worth – so seven grams – worth $3500. That's what Mr Berkland sells a quarter ounce for. And again, if we compare this situation with Mr Harding's cooks, they are addicts. They are paid only in drugs. They receive no money, but we would never suggest that the cook in a methamphetamine operation played less than a significant role. So the Crown says that Mr Berkland's – the reward that Mr Berkland is receiving is significant notwithstanding the presence of his addiction, and I just note that the quantum or the amount of drugs that he was taking per week or per day was never specified. In his alcohol and drug report he declined to comment on how much he was using. So there's no way for us to assess what proportion of that amount he received would have gone towards his own addiction. But what we do know is that despite his own use he had large amounts available for his own clients. So he had his own supply operation on the side and he is supplying quantities of a gram, two grams, and on one occasion to the undercover officer seven grams from his own stash. That's on the 15th of March and that date, 15 March, gives us a good snapshot of Mr Berkland's own supply operation which, as I say, is based just by people visiting his house.

GLAZEBROOK J:
Have you got a paragraph number for that as well?

MS EWING:
Yes, apologies. It's helpful to read the entire description of everything that happens that day just to contextualise it. So it starts at 202 and it runs through to 227. But I'll now speak to the particular sales that are made on that day.

The undercover's at his house for an hour and 20 minutes. He hasn't pre-arranged his visit. He just shows up and asks for a quarter ounce which Mr Berkland hands him from his satchel. Doesn't go to Mr Blance. He hands it over from his bag. But before he does so the officer notices that he has

another seven-gram bag sitting in his garage separate to the one that he then supplies the officer. While the officer is undertaking that transaction with him, three customers visit in the space of that one hour 20 minutes. The first buys two grams of methamphetamine. That's paragraphs 207 to 208. The second buys one gram of methamphetamine, paragraphs 215 to 216, and the last buys half a gram, paragraph 225. So in the space of one hour and 20 minutes Mr Berkland has a seven-gram bag that he sells to the undercover and he then sells a further three and a half grams to others. That's a snapshot of how much methamphetamine he has left after his own use has been supplied, and for that reason the Crown says there's no question that he was also profiting from the drugs he received, and he makes clear himself that he's doing so. He says to the officer that he's saved $10,000 over the space of two months, that's paragraph 197, and $10,000 is found in a safe at his mother's house, paragraph 334. There are other…

WILLIAMS J:
And what date? This is in April, is it?

MS EWING:
I believe it's 11 April when the operation is terminated. So those are the reasons the Crown says the detail in the summary of facts entirely supports the view that Mr Berkland was a right-hand man and was rewarded for his role, and I could take the Court to other transactions but unless there are any questions about that submission I'll leave it there, given the time.

WILLIAMS J:
You don't take any issue with the list of transactions referred to in the appellant's submissions, saying the transactions that are the transactions that applied?

MS EWING:
I believe the seven gram supply to the undercover officer that comes from Mr Berkland's own satchel is omitted from that list. I'm speaking from memory, but I think the appellant's position was that he just simply didn't

supply amounts of that quantum, you know, quantities that large himself. He had supplied the two grams, the one gram, the half a gram, and then he got everything else from Mr Blance. So I say that 15 March demonstrates he is willing to supply larger quantities as long as he's got the methamphetamine, and it's also important to keep in mind that he has another source of methamphetamine, not just Mr Blance. At one point he tells the undercover officer: "Mr Blance is out but I've got four grams," that he's bought from another source. So it's – the quantity in his own possession –

WINKELMANN CJ:
What paragraph is that?

MS EWING:
That paragraph is 157.

WILLIAMS J:
This is from his brother, is it?

MS EWING:
Yes.

WINKELMANN CJ:
Or brother-in-law.

WILLIAMS J:
Who charges too much, from memory.

MS EWING:
Yes. So moving on to the cultural report unless there are further questions about Mr Berkland's role.

The central Crown submission about the admissibility of the cultural report is cogency. It's accepted that that will be the central issue on appeal, and Mr Barr has already outlined for the Crown really why the Crown says any

connection between his difficult childhood and his later is broken. So his background, early exit from education –

GLAZEBROOK J:

Why do you say it's broken? I mean you're coming back to causation then, are you, or what – I must admit I can't quite understand the Crown's submission on this exactly, so maybe you can try again.

MS EWING:

So to the extent I use the language of causation that was regrettable because the Crown position is it has to contribute. So perhaps a better way of putting that is that the influence of that background can't really be seen at the point he makes his decision or decisions here to set up a profitable methamphetamine factory. So his early exit from education –

WILLIAMS J:

So you say influence or contribution is enough because I think Mr Barr said substantial and operative cause. It's a big difference.

MS EWING:

Sorry, I think perhaps I have – the words "constrained or impaired" I think encapsulate the Crown position on what has to be shown. So if the person's decisions were constrained or impaired by their background at the time they were made.

WILLIAMS J:

Ie, that they contribute to constraint or impairment or that they were a substantial and operative cause of constraint or impairment? That terminology is really important. Which one is it?

WINKELMANN CJ:

Well, is it fair to ask Ms Ewing that because we've covered this ground with Mr Barr and perhaps Mr Barr will…

WILLIAMS J:
I just want to make sure that I'm getting your case accurately because this is important.

MS EWING:
Mr Barr has invited me to park anything for the wrap up that I see as outside my remit and perhaps that's where we are.

WILLIAMS J:
Okay, right.

MS EWING:
But it's obvious that for someone who exits education early as he has who has an alcohol problem and whose whānau have association with gangs that there will be some explanatory force in that background when it comes to the early parts of Mr Harding's criminal history.

WINKELMANN CJ:
That's a nice expression. "Explanatory force" is a nice expression.

WILLIAM YOUNG J:
"Explanatory value", wasn't it?

MS EWING:
"Force" was what I said, yes.

But the influence of that background as a constraining force is no longer apparent 20 years later when he is a senior gang member using that influence to facilitate his offending. By that time the gang is a source of power for Mr Harding. It's he who directs others to offend. It's he who uses more vulnerable gang members at great risk to them and for very little reward, and to that extent –

WILLIAMS J:

So your submission is that attaining a senior position in a gang, wipes out any prior history of deprivation. I mean, where do you get that from?

MS EWING:

It doesn't wipe it out but the –

WINKELMANN CJ:

Well if you need to carry on with what you are saying, because I think you are only part-way through your submission, so yes.

WILLIAMS J:

Well this is important.

WINKELMANN CJ:

Yes I know but I do think Ms Ewing is part-way through her submission on this, because I think that is only one of the legs of it. So perhaps you just finish your submission.

WILLIAMS J:

Well it is just that that is either a psychological or a sociological assessment.

GLAZEBROOK J:

No I think it is actually part of the argument that at some stage the connection is broken, but that comes back to the more general submission, I think, rather than the specific submission.

WINKELMANN CJ:

Well perhaps you just finish your submission Ms Ewing, and then we will go back to Justice Williams' question.

MS EWING:

So by the time Mr Harding is deciding to set up his methamphetamine factory, as Justice Moore termed it, he is in a position to direct others to assist with

that project and he sets yields for the process, he holds his cooks to those targets. As Justice Moore said, he runs his operation through domination and through fear and he is using addicts, paying them in drugs and he is using his gang network to distribute the end product. By this point, the Crown says, his membership in the gang is no longer a force that is constraining his decisions about whether to take that opportunity to set up the methamphetamine factory. It has become the means by which he carries out his offending and in that sense his use of the gang and his use of subordinate gang members to participate in his manufacture operation, exemplifies the kind of organised criminal activity that aggravates rather than mitigating, so under section 9(1)(hb) the Crown says his exploitation of members of the organised criminal group, is something that aggravates his sentence. The gang is something that is empowering him, not constraining him.

WILLIAMS J:

So this sort of scenario is not uncommon. People who have potential of character, leadership qualities or intelligence, either get to go to law school or accounting school or gang school, depending on circumstance. So I suspect that Mr Harding, if he had gone to university, would have ended up in a leadership role in some other job, but he has ended up in this one due to those background factors. What is your basis for saying that because he became a gang boss, that background of deprivation is now irrelevant, at least as a mitigating issue? Because that would really exclude every person in a position of leadership in a gang.

MS EWING:

The Crown says that section 9(1)(hb) has to apply to this kind of offending at some point. At some point Parliament has said, it's more serious when you offend in a gang context, and that is difficult, obviously to square with the section 27 cases which treat becoming involved in a gang early on.

WILLIAMS J:

Sure but treats those two things as mutually exclusive, as if gang membership is aggravating and you ignore the causes of gang membership in sentencing, when the Act says you don't.

MS EWING:

The test that the Crown is applying here is simply whether his choice is constrained at that point by his background.

WILLIAMS J:

Yes but you see the analysis you apply is necessarily a sophisticated analysis. How do we know that whatever background Mr Harding had or anyone else in his position he's neutralised so that there is unimpaired choice at the point at which offending occurs given that neither you nor I have any expertise in making that assessment. We didn't do a course in that at law school, at least not in my time. Maybe they do now, but I doubt it. You see the burden we're placing on judges here to make those sort of sociological and psychoanalytical judgements without help?

MS EWING:

I accept it's a – I suppose –

WILLIAM YOUNG J:

A bigger question, do we have to assume unimpaired unconstrained choice as a fundamental of punishment? If we do, it's completely wrong because most people in prison have come from backgrounds with constrained choices. So having been involved in sentencing for more years than I can count although I can still remember them, I have never assumed that offenders have unconstrained choices.

MS EWING:

I suppose the purpose of the section 27 discount is to distinguish between the people that did have a far wider…

WILLIAM YOUNG J:
Is it a section 27 discount or is it information?

MS EWING:
My understanding of the purpose of Mr Harding's cultural report was that it was to furnish information under section 27 which could then explain, provide some explanation for the offending.

I accept it's a very difficult process to determine these kind of links but it doesn't appear that there was – it appears that Mr Harding's project was one of his own initiate and one that he then used the gang to –

WILLIAMS J:
I think you can certainly say that Mr Harding had greater agency than many of the foot soldiers in his organisation. You can certainly say that. It's obvious from the facts. But to then go on and say: "And therefore we can ignore the negative and constraining aspects of his background," seems to me to be a leap that none of us is qualified to make.

WINKELMANN CJ:
Although could you also say that nothing in his background could lead him to set up an operation which drives so much profit for him?

GLAZEBROOK J:
And which exploits the other people who are much more vulnerable than him. That's what…

WILLIAMS J:
But you see the point is with gang leaders everything in their background takes them there.

GLAZEBROOK J:
That's true but isn't your point is that you don't neutralise out the aggravating factor of gang membership by saying, well, the background led him there?

That's one of your points at least but also the other point is that at some stage you have to assume that they made a conscious choice to carry on.

MS EWING:

And to state the obvious, not everybody who joins a gang ends up in Mr Harding's position.

WINKELMANN CJ:

All right, I think we'd better move on.

MS EWING:

Those are the submissions that I have been tasked to make so unless there are any questions about that aspect I'll return the podium to Mr Barr.

WINKELMANN CJ:

Thank you, Ms Ewing.

MR BARR:

I think I perhaps needed to clarify the situation and what the Crown is proposing for the test for how deprivation and so forth is factored in. So the Crown is endorsing the approach by *Zhang* and the use of the phraseology which involves the word "causation", whether it be causal link or causal nexus. The second point is –

GLAZEBROOK J:

Sorry, can you just repeat that again? I didn't…

MR BARR:

The Crown is endorsing the approach adopted by the Court of Appeal in *Zhang*.

GLAZEBROOK J:

So you say it has to be causation, not contribution, is that the submission?

MR BARR:

Yes. Whether those – sorry, I'll come back to that in a moment. That phrase has readily understood meaning in the criminal context of a substantial and operative cause and I raise that to make the point that it doesn't have to be the only cause to meet the test.

WILLIAMS J:

It would be almost impossible to establish – there's a great deal of academic debate about this question – to establish that colonisation or slavery is a substantial and operative cause of offending six generations later, even though the correlation between those things is significant. The test you would impose would exclude that background effectively, if you are serious about substantial and operative cause.

MR BARR:

Well I have used that phrase, not because it is a term that *Zhang* has used but to put the usual context around the word but the main reason was to emphasise that we are not talking about the only cause. But to address your Honours' point, whatever term is used, and I appreciate in different context, in the Canadian Courts, the term is deliberately avoided, but whatever term is used, a link is involved and my submission is the critical point is what is underlying this test. What is the Judge to do with the requirement to see a link between a past and an offending and the mechanics I submit is the most important thing. Can a Judge, or should a Judge infer from that background and what they know about the offence and the offender, specifically, that that decision was constrained or impaired.

WINKELMANN CJ:

I rather like Ms Ewing's explanatory force expression which allows the nuance that you are suggesting.

GLAZEBROOK J:

I think the explanatory force was rather to say, well it is not an excuse wasn't it because that has been said on a number of occasions. It might explain the

offending but does not excuse it. I am sorry that term, explanatory force, I thought was being used by Ms Ewing in that context and in that sense.

WILLIAM YOUNG J:
And so it explains why it has happened.

WINKELMANN CJ:
Yes, the question for the Court is whether the circumstance, the background information, has an explanatory force and Ms Ewing said, when you looked at Mr Harding's information, it could not be said to have an explanatory force.

MR BARR:
I suppose where I have tied it to is the use of those phrases, both by the Court of Appeal here and in the Canadian Courts and indeed in some of the other Courts and comparable jurisdictions have focussed on these phrases. But the point I was probably inarticulately trying to explain earlier was if there is a range; if one looks at choice from range from no choice through to completely unconstrained choice, or totally free choice, no impediments. There is also quite a spectrum in between and it is where the line is drawn that the system says, that actually has reduced your personal culpability under section 8. Now that line has been drawn, not at a narrowing of someone's life choices, elsewhere, that is not being the test that is being adopted, but at the point further along that spectrum where someone choice is constrained and that is the reason why the Crown has opted for that as being the test to be applied. And this is importantly the mechanism by which a Court realistically grapples with the far more high level question. Did some event in the past, the historic past, possibly deeply historic past, cause an offence which I accept is a very difficult question to even conceptualise but breaking it down to whether the more mechanical question of, did that past, coupled with what we know about the present; can an inference be drawn that the decision-making about this particular offence was constrained or impaired.

WILLIAMS J:

For myself, I think probably contribute to, is not inconsistent with what you were just saying and probably sensibly so. Is there a nexus, is all it is.

MR BARR:

Yes and look those phrases are used. I think my learned friend said yesterday, those types of phrases are used interchangeably. I am supporting the position that the test that has been phrased in *Zhang* because I say it effectively does what it says on the tin. It is saying there must be more than a narrowing of life choices and it forces Judges, rightly or wrongly, to look to see whether those connections have flowed through to the offending.

WINKELMANN CJ:

The difficulty with it, however, is it is easy to get mixed up with notions of compulsion in relation to the particular offence.

MR BARR:

With the two constrained.

WINKELMANN CJ:

Yes choice constrained.

GLAZEBROOK J:

But is it better to really just meet it head on and say, which is possibly what some of the cases have been saying, there comes a point where you have such seriousness of offending that no matter whether you had narrow choices or not, it should not be a mitigating factor.

MR BARR:

That is one option, the other option.

GLAZEBROOK J:

That is not a blanket thing, because it could be a mitigating factor in some cases if there is true constraint, in the sense of some of Mr Harding's underlings.

WILLIAMS J:

Well that is the line that was picked up in *Gladue* and then retreated from in *Ipeelee* because of the effect it was having on indigenous people offending seriously, where background was clearly a contributing factor.

MR BARR:

Yes. What my answer is, yes that is an approach. It is a viable approach but what I am suggesting is a better way is say, yes there will be a correlation between seriousness of offending and an absence of mitigating circumstances.

GLAZEBROOK J:

Can I just be clear I was talking in this drug context, where when you are looking at seriousness of offending, you are actually looking at the size of the operation, the sophistication of the operation in the role. So I was not talking about the offending that is more violent offending and where you can see a particular correlation between the two. So there comes a point of sophistication, if it is a sophisticated fraud operation or a sophisticated drug operation, it might just be that that is a sensible line to draw.

MR BARR:

And it may well be. The point isn't that those mitigating features; there is two ways of looking at it. Serious offending means that any mitigating features are to be ignored and serious offending means in reality, those mitigating features are unlikely to exist and it is that point that I am making here, and the example being Mr Harding's serious offending and the mitigating feature of reduction of personal culpability.

WINKELMANN CJ:

They are less potent. The more serious it is, the less potent they are, is your point isn't it.

MR BARR:

Yes.

WILLIAMS J:

I think you are really saying that there is a difference between having reduced options and a reduced ability to choose between reduced options. You have got to get in at both layers, you say. I am not sure I agree with that, but that is your point.

MR BARR:

Yes.

WILLIAMS J:

That was essentially the point that Justice Downs made in *Carr* in the original sentencing, which was, I think, rejected by the Court of Appeal.

MR BARR:

Carr, I say is a good application of the principles that I am suggesting, that when one looks at the facts of *Carr* which was aggravated robbery by some relatively young men, who were in the gangs from very early on.

WINKELMANN CJ:

Mr Carr was in his 40s I think.

MR BARR:

I am sorry?

WINKELMANN CJ:

I think Mr Carr was in his 40s.

WILLIAMS J:
It was an old Carr.

MR BARR:
But the point is that the Court looked at the history, and applied to his decision-making and I say that that's an application of what I'm submitting is an appropriate approach. It's just it's led to a different outcome than occurred for Mr Harding but on a principle way.

WINKELMANN CJ:
Right, I think we've got that.

MR BARR:
So I think that was the only point that needed – well, probably not the only point but the only point that I wanted to re-address on. Do your Honours have any further questions?

WINKELMANN CJ:
Thank you. Ms Ord.

MS ORD:
Thank you, your Honours. The first point I want to make on behalf of Mr Berkland is to address this idea that has been advanced by the Crown in its submissions that Mr Blance's starting point could well have been considerably higher. They've cited no authority to support that proposition and they've cited no authority for this mythical 23 to 25 year starting point.

WINKELMANN CJ:
I think you dealt with that in your principal submissions, didn't you?

MS ORD:
That's correct but it's important in this case, and as part of the additional materials there are the sentencing notes of Justice Collins. He describes the difficulty he and counsel have had finding comparable cases which simply

involve supply at paragraph 19 of his decision and he cites those which involve smaller quantifies of methamphetamine, around eight and a half kilos and slightly less, and then he refers to the two cases where the quantifies are virtually the same, both 14.9 kilos. That's *R v Le'Ca* [2018] NZHC 274 and *R v Uputaua* [2017] NZHC 2320 and they're importation cases.

WINKELMANN CJ:
We can read all this. Your point is that Justice Collins in selecting a starting point went through the authorities carefully?

MS ORD:
That's correct and they were 18 and 15 year starting points and he's started Mr Blance at the 18 years for a similar quantity. So the Judge's starting point, in my submission, is unimpeachable and that's the first point I wanted to make about that.

There is the second point made by the Crown in the oral submissions today that Mr Berkland had other drug-dealing offences, so that equates for part of the 16 and a half year starting point. That's not correct. He was given a year uplift for that offending and the firearms and that's never been contested and, in any event, the sale of those quantities of drugs to the undercover officer would usually have not been met with a sentence of imprisonment but most likely a sentence of home detention.

The third point that I wanted to make was in relation to Ms Ewing's submission about profit. It's never been the appellant's position that there wasn't a profit in this for him. The point that was really being made was it was disproportionate to the value of the drugs and the risks involved which is one of the indicia in the lesser role that is cited by *Zhang*, and that helps the Court assess role when looking at what Mr Berkland was to receive, and Ms Ewing has referred to a couple of matters in the summary of facts but I would also like to refer to paragraph 267 where Mr Berkland told the undercover officer that it was Blance who's a millionaire, and clearly he wasn't, and had regularly conducted the methamphetamine deals worth millions of dollars.

So Mr Berkland's profit needs to be seen as quite a contrast to that being received by Mr Blance and that's the point being made about that.

There was just a more minor point by the Crown that it seemed that on the 15th of March that Mr Blance had available to him as part of his particular stash –

WINKELMANN CJ:
Mr Berkland?

MS ORD:
Sorry, Mr Berkland – the seven grams. I would just like to draw the Court's attention to paragraph 204 which says in fact Mr Berkland had to make his way across the road to the garage at 46 Roberts Street. This is one of those addresses that was used to store the cash and methamphetamine that was associated with Mr Berkland but clearly Mr Blance's methamphetamine and cash. So there's no suggestion in the summary that it was somehow his personal stash. It was simply part of the drugs and – sorry, the methamphetamine that was stored at those premises, and there's nothing in that part of the summary that's been referred to that has suggested that that was his individual stash. Of course, it is accepted that he was selling those small quantities of methamphetamine nonetheless.

Just going to two different points now that have been raised, probably in relation to areas that Ms Blincoe has addressed this Court on. The first was this idea that, the submission by Mr Barr, that if community protection is engaged or there's a public safety or danger, that if deprivation or, by analogy, mental health or youth, is such that it causes an increase to the public then the sentence could be uplifted for that reason. It's our submission that this is not part of the ordinary sentencing process. That's why we have sentences –

GLAZEBROOK J:
But he actually does say that. If you look in terms of mental health, it can increase the danger to the public and that can be taken into account.

MS ORD:

It does but I just want to say that where an increased danger is to the public, we have processes like preventive detention ESOs, so those directly reflect that. Also we have this tension because if someone is a danger they often have previous convictions so that's an aggravated feature that's taken into account of the section 9 consideration, and then we also have that tension with mitigating features at section 9(2) –

WINKELMANN CJ:

Well, sentencing is a lot about tensions. These issues don't arise with Mr Berkland in any case, do they?

MS ORD:

No, but my point simply is that the argument that we've made for addiction and deprivation is not one where we're inviting the Court to say and that the Courts are equally able to use those factors to increase sentences. The argument has always been in relation to discounts, and I just digress because the point I wanted to make about, for instance, diminished intellectual capacity which in theory could increase risk to the public in certain cases, that is specifically a mitigating feature. So we just need to be very careful here that we don't create another avenue where there are uplifts for people and defendants who are experiencing these privations in their lives.

WINKELMANN CJ:

Those issues aren't – they're not at issue here.

MS ORD:

Thank you. The final point I simply wanted to make was that – and that's drawing from the last submissions of my learned friend – is that our real point and the thrust of our submissions is that no matter how serious the offending on its face, mitigating factors always have to be considered and that process that's set out in sections 8 and 9 needs to be undertaken and there should never be some sort of blanket rule that mitigating factors don't need to be

considered in very serious cases, whatever they are, and that's just contrary to the whole thrust of our submissions.

WINKELMANN CJ:
We've got that, I think.

MS ORD:
Thank you.

WINKELMANN CJ:
Now Ms Park.

MS PARK:
Your Honours, I really don't have any further submissions other than the ones I made yesterday and to note that I will be filing some submissions on the minimum period of imprisonment.

WINKELMANN CJ:
And how long will you need for that, Ms Park?

MS PARK:
Perhaps by the end of next week. That will give me time to take instructions.

WINKELMANN CJ:
Because you have to take time to – all right, so that's Friday week.

MS PARK:
I don't have the date to hand but your submissions limited to the point of –

WILLIAM YOUNG J:
Friday.

WINKELMANN CJ:
Okay, so that'd be…

MS PARK:

Thursday.

WINKELMANN CJ:

Thursday week, and limited to five pages and to the point of minimum period of imprisonment.

MS PARK:

Yes.

WINKELMANN CJ:

And Mr Barr, your reply on that?

MR BARR:

I can't imagine – I'm trying to think of the days of the Easter break but a week later, well, say on the Friday, the following Friday.

MR BARR:

Five working days?

WINKELMANN CJ:

Also limited to five pages.

MS PARK:

Thank you, your Honour.

WINKELMANN CJ:

Thank you, Ms Park. So that concludes the hearing. Thank you, counsel, for your very helpful submissions. We've been much assisted, and we will take some time to consider our decision.

COURT ADJOURNS: 12.41 PM