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

SC 32/2022
[2022] NZSC Trans 20

JASON BRENDON PHILIP

Appellant

v

THE QUEEN

Respondent

Hearing:	08 September 2022
Court:	Winkelmann CJ Glazebrook J O'Regan J Ellen France J Williams J
Counsel:	P V C Paino and E T Blincoe for the Appellant

G J Burston, J E Mildenhall and K L Kensington for the Respondent

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CRIMINAL APPEAL

MR PAINO:

Tēnā koutou e ngā Kaiwhakawā. Ko Paino, māua Blincoe, mō te kaipīra.

WINKELMANN CJ:

Tēnā korua.

MR BURSTON:

Tēnā koutou e ngā Kaiwhakawā. Ko Burston ahau, kei kōnei mātou ko Ms Mildenhall, ko Ms Kensington, mō te Karauna.

WINKELMANN CJ:

Tēnā koutou. Mr Paino? How long do you think you will be, and you may remove your mask while you make your submissions.

MR PAINO:

To the morning adjournment, perhaps earlier. I guess it depends to some extent on, and what I was going to say at the outset was there is a bit to cover, but I'm happy not to cover the parts or portions of it that you don't think are necessary. So I thought I would just do a brief outline of what I do intend to cover orally.

WINKELMANN CJ:

Yes, we've because we've read the materials so I think you can probably feel free to hit the high notes, and perhaps respond to the points of tension that really emerge between you and Mr Burston.

MR PAINO:

Yes, well in that event I think we'll be finished before the morning break.

WINKELMANN CJ:

Yes, my expectation is that you should be able to be finished by about 11.15.

MR PAINO:

Yes, that's sort of what I'm thinking as well. So a convenient starting point for me is to use my submissions as the base of my oral argument. So I'm going to refer to passages of the submissions, and then as your Honour indicated try and hit the high notes from those portions of it. I just want to start at the outset by outlining what I would intend to cover, but now I'm probably going to indicate that the portions of it which I am going to focus on are really the differences between the Court of Appeal's assessment of the facts, and the sentencing judge. I'm going to address you on role. I'm going to address you on addiction. On the principles of *Zhang v R* [2019] NZCA 507, [2019] 3 NZLR 648, in particular the role, and the way that Zhang should be treated for those cases that are, what I would suggest, around band 5, which should fall below it, and then I'm going to address you on the discount for children and then my learned friend Ms Blincoe is going to address you on the time in custody and it's relevance, what the final outcome should be, and any general assessments of a case that I don't cover.

So I thought I'd start by just trying to introduce briefly a human element to this, and I realise you've read all the documents, but I consider it my job and my role to focus on the fact that the impact of this decision, and certainly the motivation for counsel, is that whatever decision is made here affects people's lives, and others affected. Mr Philip now has the support of his partner, his partner's family, his father who was absent from his upbringing, and he now has two children and the aim of the appeal is to not have him return to custody.

If I could just refer in my submissions to the facts, which are referred to in paragraph 14 of my submissions, and I'll just cover what I say the brief facts are that are relevant. So the facts really are number 1, is that there were five shipments. Two, that the shipments were in concealed cars on four occasions. Three, that both Philip and his partner Hayman were involved in the driving on four occasions. That he made no profit, that he was addicted, and –

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WINKELMANN CJ:

He got an Audi car?

MR PAINO:

He got a 2006 Audio motor vehicle was registered in his name. That's all the summary of facts said. It didn't say he received it as a result of payment. It just said it was registered in his name, that's all. The summary didn't say that he got it as part payment or full payment for methamphetamine dealing, and my position is that that Audi car that he got was traded in for another car because the man was a car dealer, he was an importer of cars. So although he drove an Audi car, and although it was registered in his name, that's as far as it went. The Court of Appeal went further and said "inferentially", there was an inference to be drawn, which the Crown never referred to in its initial sentencing and which the Judge never referred to, but the Court of Appeal said that "inferentially" the Audi car was from drug dealing and that's not the case at all, and it was never alleged –

WILLIAM J:

Even if it's true it's a $4,000 car. Does it really matter in the overall scheme of things?

WINKELMANN CJ:

It's not a lot. Anyway, I think Justice France had a question for you, actually.

ELLEN FRANCE J:

No, no, I was just interested in why you say that inference couldn't be drawn.

MR PAINO:

Because –

ELLEN FRANCE J:

Because of factors like timing?

MR PAINO:

Well, let's take timing. This happened after the third offence, so it didn't happen at the start. I think, you know, the man being an importer of cars is relevant because, you know, if you were going to get a car off someone, who better than someone who you know imports cars. So the only person – the only inference drawing happened from the Court of Appeal.

WILLIAM J:

Isn't the inference available given that it was on the third exchange? Isn't the inference more available because of that, rather than less?

MR PAINO:

I don't think it is.

O'REGAN J:

I think we're getting lost in the detail.

WINKELMANN CJ:

Yes, we're getting lost in the detail. Okay, but can I just ask you a legal question? So it wasn't submitted by the Crown that this should be seen as payment at sentencing?

MR PAINO:

No.

WINKELMANN CJ:

But it was argued on appeal?

MR PAINO:

On appeal.

WINKELMANN CJ:

I would have.

MR PAINO:

I would have.

WINKELMANN CJ:

And did in appeal?

MR PAINO:

I would have, and of course the obligation is on the Crown, they carry the onus, not me.

WINKELMANN CJ:

Yes exactly, in terms of section 24, I suppose?

MR PAINO:

Yes. So could I ask the Court of Appeal decision, paragraph 39, be on the screen because I want to go through this issue, and I know it's the car but there are four other issues as well that I want to address.

WILLIAMS J:

Her name is Ms Hiha, Mr Paino, if you need to refer to her again.

MR PAINO:

No, I must have the wrong paragraph at the Court of Appeal decision. Paragraph 139, thank you. So 139 follows the paragraph where the Court says that Mr Burston made these submissions in the Court of Appeal. Now these submissions that Mr Burston made in the Court of Appeal to persuade the Court of Appeal that the sentencing judge had the wrong facts, these items I'm going to go through individually.

The first is: "These matters include Mr Philip and Ms Hayman were involved in eight purchases of methamphetamine from Mr James's Auckland premises rather than the five that they were charged with." Well there were five charges, and there were not eight purchases, and the defendant pleaded guilty to five charges. At the sentencing, the Crown said "at least five charges", but not eight, there was no reference to eight. The first time that eight charges somehow

became relevant in the sentencing process of the appellant was when Mr Burston made the submission in the Court of Appeal, and the Court of Appeal followed it, that's the first. The second is –

WINKELMANN CJ:

It's not in the agreed statement of facts, which is a very long prolix document, it's hard to keep clear in your mind what is in it.

MR PAINO:

Well, the problem with the summary of facts is that the summary of facts is that the summary of facts goes into all sorts of details about all sorts of defendant.

WINKELMANN CJ:

Yes, and it's not clear who the details are relating to.

MR PAINO:

No. So I wanted to say this about the summary of facts. There I was, there was trial coming along, the defendant wanted to plead guilty, he pleaded guilty, he accepted the summary of facts for the purposes of the sentence indication hearing, but there was quite a lot of information in the summary of facts that was referred to that not only referred to other offenders but referred to him. But he pleaded guilty, as did Ms Hayman, to four charges, and so – five charges, sorry, for methamphetamine. He didn't plead guilty to other charges, other incidents, that were mentioned, and he was never ever charged with those incidents, he was only ever charged with one extra charge – well, two extra, one was money laundering – but one other delivery which the Crown withdrew because they couldn't prove it. So I, as counsel I'm there, I've got a man who wants to plead guilty, I've got a summary of facts, I've got a trial about to start in two weeks, and I don't want to just say "I'll plead guilty" and then have a disputed facts hearing.

WINKELMANN CJ:

So can you just assist us with that? Are you saying that the reference to the other transactions appears in other, in the facts alleged against other people?

MR PAINO:

Well, the whole summary of facts is a joint summary of facts.

WINKELMANN CJ:

Yes, it is.

MR PAINO:

And it also –

ELLEN FRANCE J:

I thought on my count, Mr Paino, there were six occasions.

GLAZEBROOK J:

Yes, there was one that was withdrawn. Is that what you're saying?

MR PAINO:

I'm saying there were five charges, your Honour.

ELLEN FRANCE J:

Oh, yes – no, no, no. I'm just trying to get clear in my mind what one could draw from the summary of facts, and just doing a count-up on my notes I thought that would get you to six occasions, purchases, for want of a better word.

GLAZEBROOK J:

And does that include the one that was withdrawn? Actually maybe not.

MR PAINO:

Well, he was charged with five and one charge of money laundering. So the Crown withdrew one charge – no, he was charged with, sorry, with six, and the Crown withdrew one, which ended up five. So that's the four that, and then the one where they were stopped in Taihape. So the Crown are saying, so the Crown withdrew a charge, and they withdrew it, as far as I'm concerned, because they couldn't prove it, and he pleaded guilty to the other transactions, the five. And the Crown proceeded to the sentencing on the five, the Judge

only referred to the five, as your Honour did for the sentencing of Hayman as well, and then in the Court of Appeal the Crown, who appealed and want, you know, wanted the sentence increased, introduced either, and the Court of Appeal then agreed with it and said there were eight, involved in eight purchase, and my submission is that's clearly wrong.

The next aspect of 139, which does have some significance in my submission, your Honour, I am going to devote a little bit of time to 139, because this is where the Court of Appeal stated that the trial, that the sentencing judge erred and we're saying the Court of Appeal erred.

The next one is they completed one transaction for McMillan while he was in South America, and they were the only ones to engage with James. Well, first, McMillan went to South America and he had full access to the internet and full access to electronic means, and that's accepted, I mean it's in the sum. So the fact that they did one transaction in that period, that is they did one journey, return journey, doesn't mean anything because McMillan asked them to do it. So whether he asked them on a phone from Wellington or whether he asked them from somewhere in Chile, it doesn't matter in my submission, it's of no significance.

The third matter is, quote, from 139: "They were the only ones of Mr McMillan's associates to engage with Mr James." Completely incorrect, completely incorrect. The associates to engage with Mr James and Mr McMillan were Skinnon, who engaged via phone drops – sorry, via air drops – where James sent Skinnon to Wellington and Skinnon mixed with McMillan, so that's one.

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The other was Millar, M-I-L-L-A-R, and Millar did the same. He liaised with James and McMillan. So that is completely wrong. The third is they were, the next matter is they were trusted to carry substantial amounts of cash to pay for methamphetamine, well that's correct, but that was never anything that wasn't in the summary of facts. I mean that was clearly the case and it was never an item that was disputed. Then on the next matter, is the matter we referred to

earlier. On one trip to Mr James' Auckland premises they acquired an Audi motor vehicle. Now there's no mention in the summary of facts –

WINKELMANN CJ:

So in terms of trust to carry substantial sums of cash, Mr Burston is submitting to the Court of Appeal there, as I take it, that the sentencing judge didn't take that into account?

MR PAINO:

Well I don't think that's right at all. I mean it was always the Crown case, and the summary, that they drove methamphetamine from Auckland to Wellington and at some part of the next journey they took the cash with them. I mean in fact some of the cash was exposed by one of the co-defendants and photographed on his phone by him. So I mean it was never disputed that there was cash. Whether the cash was, exactly how much was there was unknown. I mean the photograph the Crown took was $180,000 which, according to the second to last page of the summary of facts, is one kilo.

ELLEN FRANCE J:

Well I assume from the Crown submissions that it's the trust aspect that seemed to potentially put Mr Philip in a different category or a different place in the band because you're very much, the person at the very bottom of the heap, presumably, isn't carrying around big amounts of cash for people.

MR PAINO:

Well what I, first of all –

ELLEN FRANCE J:

I suppose all I'm asking is what's your response in relation to the notion of trust, because I think that's what's being referred to there. Focused on.

MR PAINO:

Well trust applies to the delivery of drugs as much as it does to the delivery of cash. I mean it's, whenever anyone is a driver or a courier, or someone who's

transporting drugs from point A to point B, they're driving what effectively is cash because it's readily quantifiable. I mean it's readily exchanged. So trust always applies to a drug shipment, as far as cash goes. I mean this is Wellington to Auckland so it's not, you know, Miramar to the other side of town, and so –

O'REGAN J:

You need to stay a little bit closer to the microphone.

MR PAINO:

Sorry, thank you your Honour. As far as cash goes, it's Wellington to Auckland. The cash was, it appears, put in sealed compartments and they were airtight, just as you do when you buy, you know, your ham from Moore Wilsons, or whatever. They airtight it.

WINKELMANN CJ:

Vacuum packed.

MR PAINO:

Vacuum packed, sorry, thank you, and they had to fit in the small compartments in these cars which carry the methamphetamine. So the trust was, you know, there was trust, but there wasn't that much trust because they were vacuum packed.

WILLIAMS J:

Doesn't it get you to no more than he was a trusted courier in the exchange?

MR PAINO:

Yes, a trust courier both ways.

WILLIAMS J:

That's right, and that's pretty standard actually.

MR PAINO:

Yes, I mean if you're going to trust someone with drugs, what's the difference between trusting them with cash, would be my response.

O'REGAN J:

I think it's also indicative of having knew the quantities. I think the Crown are saying, well, that shows he wasn't ignorant of how much he was carrying.

MR PAINO:

Yes, I mean, apart from the first occasion where they talk about a transport of cartons, the other occasion was in the secret compartment, and they didn't know where the secret compartment was, and that was evidenced by the fact that when the car was seized and they got it back they didn't know where to look, and they were under surveillance, and they were all looking everywhere and so that was sort of indicative that they didn't know where they were. So that's the first thing. So they couldn't, they didn't have the weight of them even to know where they were, because what happened was –

WINKELMANN CJ:

They would have had an idea from the cash and from the first occasion, I think it was, where they actually saw the drugs, that they were involved in an operation of scale.

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MR PAINO:

Yes, I agree.

WINKELMANN CJ:

You'd accept that?

O'REGAN J:

That's all I'm saying.

MR PAINO:

I agree with that. Then the next point I think we've gone over a bit on, which is the Audi car, and when I first read all this I thought gosh, they've got this flash Audi, but then I realised it was just a, as Justice Williams says, $4,000 car and it's now off the road, and the police never seized it, didn't regard it as anything to do with it and not worthy of taking. So that's the next point, whereas as I say, the Court of Appeal said "inferentially" obtained from the sale of the drug, for the payment.

Then the next point is: "Mr Philip and Ms Hayman" both, the Court of Appeal say, "arranged for the involvement of others as drivers", plural, "in particular Mr Minns, and Mr Philip involved himself in the consequences of the…motor vehicle being impounded." Well, the involvement of Minns, I mean I don't – I mean Philip, he's not "trusted with the cash" because they're seal packed, he takes them from A to B, he had no – no one asked him to take Minns. Minns just accompanied him on one of the journeys. Minns went up to Auckland. Minns ended up driving back one of the cars.

WINKELMANN CJ:

Well the agreed statements of fact says "employed".

MR PAINO:

Yes, well, I mean, employed sort of – yes. I mean, he asked someone to drive instead of him. Now there's no evidence of what payment took place, there's no evidence of when this happened. He knew Minns. That's about as far as it can go, I think. In other words, on one occasion, Minns drove back down, went up and drove down. I don't regard that, with respect, as any indication that he had a greater role in this operation, when one looks at the operation from James at the top, McMillan in Wellington, people flying down with couriers, meeting McMillan.

WINKELMANN CJ:

Your simple submission is that it is to draw too long a bow to use this small fact to suggest that he's somehow in charge of part of the operation or directing people?

MR PAINO:

I do, I do. It's simply asking someone to drive on one occasion.

WILLIAMS J:

Minns drove a different car back, right?

MR PAINO:

Minns went up to Auckland. Minns drove a car back, Philip wasn't in the car, or Hayman. Minns was caught in Taupō.

WILLIAMS J:

Yes, and so on, right.

MR PAINO:

Which come to the next point in the Court of Appeal.

WILLIAMS J:

But does that –

MR PAINO:

Philip goes to Taupō, probably not surprising.

WILLIAMS J:

If he's coming back in a different car, does that suggest he was taken up to do that?

MR PAINO:

That he was on – sorry?

WILLIAMS J:

That he was driven up, or drove up, in order to do that? That it was a task?

MR PAINO:

He went up in his own car, Minns, but Philip and Hayman also went up in a car. They went up in the Audi, or another car.

WILLIAMS J:

Oh, right.

MR PAINO:

So Minns was in a separate car. Minns drove up there, the drugs were put in the car without him seeing them. Minns drove back. Philip and Hayman remained in Auckland and they were going to fly to Queenstown.

WILLIAMS J:

So it's not quite right that he said "come on, mate, let's go to Auckland for a drive" because he took up a separate car with the goods in it.

MR PAINO:

No, I think Minns knew what he was doing.

WILLIAMS J:

Yes.

MR PAINO:

Yes. I don't dispute that.

WILLIAMS J:

And he was asked by Philip to do that?

MR PAINO:

It looks as if he was. He got to Auckland and then Philip and Hayman booked a flight to go to Queenstown. In case you think it's an exotic holiday, if you have a look at his previous convictions he lived in Dunedin. He's got convictions in Gore, Dunedin and Invercargill and places, so he's familiar with the South Island and he lived there for five years, so he was going to the South Island, I think you can reasonably say, not for some expensive holiday, to see some people, and then Minns was taking the car back to Wellington to McMillan. Not to Philip. He wasn't sort of behind him in a car as some sort of heavy muscle.

WILLIAMS J:

No, but you have to accept that Philip organised this, or would you?
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MR PAINO:

Well it would have to be with McMillan's knowledge, because Minns is driving a car with drugs in it to McMillan, who's going to receive them.

WILLIAMS J:

The Crown says McMillan did not know Minns.

MR PAINO:

How can you say that.

WILLIAMS J:

I don't know, I'm asking you.

MR PAINO:

I'm sorry your Honour. Well I mean this wasn't really gone through at the sentencing, but the Crown – McMillan never said he didn't know Minns, and Minns never said he didn't McMillan.

WINKELMANN CJ:

Well, I mean, what we can say is that the agreed statement of facts says that Mr Philip was employed, "employed" is the word used, Minns to do this.

WILLIAMS J:

Actually it's a typo, it says "employee".

WINKELMANN CJ:

Well it uses the word "employed" a couple of times anyway, so that's the point, I suppose.

MR PAINO:

Yes, I'd probably prefer the word "engaged".

WINKELMANN CJ:

Yes.

MR PAINO:

Employed, whichever it is, begins with an E, and has the same meaning and, yes. But don't forget, your Honour, as I say, Minns had to drive back. McMillan must have –

WINKELMANN CJ:

You can't really take this submission beyond the one that you accepted was what you were saying, which is that it's too long a bow to draw to say that this involvement by him of Minns, because it is on the facts that he involved him, it's too long a bow to draw to say that this shows he was directing people or in charge of part of the operation.

MR PAINO:

That's true, that's correct.

WINKELMANN CJ:

One swallow does not a summer make.

MR PAINO:

That's correct, but I think I can also add that McMillan must have known about it because he was to receive the drugs, and there's no way in the world McMillan would have allowed someone he didn't know to deliver drugs to him.

So just if we go to the next paragraph, or the next portion, and then it says that, which is in the summary of facts, as the earlier one was in the summary of facts your Honour, the employed, he confronted James in Auckland. So obviously word got around, oh, Minns is caught, so we don't know what this confrontation was about. It could've been about whether he got some drugs from him, whether he, we don't know. But he'd been to see James, because James was the main man. He'd seen him on the occasions he'd driven the things down, the cars down, so he knew who James was, and he went to him and they had

an argument. Now we have no idea what that argument was about, and I think it's a long bow also to say that because he went to see James about the seizure in Taupō, that somehow it puts Philip up in the pecking order of this enterprise from James and McMillan.

WINKELMANN CJ:

So this notion that he – you dispute that he confronted Mr James, you're saying it's building a lot on something that we'll see.

MR PAINO:

Well we don't know what the confrontation was about. I mean I've seen the CCTV footage. It's two people having an argument with no audio, and it's brief, it's seconds. So I don't know what it's about, and how could anyone say what it's about, bearing in –

WILLIAMS J:

Well you can infer it's about business.

MR PAINO:

You can infer it's about what happened, you know, the seizure of the car, but just what they said is, and what you draw from that is not able to be, when the Crown still carry the onus of proof.

WINKELMANN CJ:

Well I mean it might be, in fact, that Mr James confronted Mr Philip, mightn't it? Because to suggest that Mr Philip confronted Mr James to give Mr Philip agency and power in that context, isn't it?

MR PAINO:

It is. I mean I suppose it takes two to have an argument, but we don't know who started it.

GLAZEBROOK J:

Well you've got to infer that Mr James mightn't have been very pleased.

WINKELMANN CJ:

You're right.

GLAZEBROOK J:

With what Philip had allowed to happen.

MR PAINO:

Well especially if Mr James had an insight into how it happened.

GLAZEBROOK J:

Exactly.

MR PAINO:

Because it was a pretty amateurish thing to happen. Minns gets told by a police officer he'd give him so many hours to get back to Taupō, and he didn't, and then he gets stopped.

WINKELMANN CJ:

So your submission there would be that actually if you were to draw inferences from what occurred it was more likely that it was Mr James confronting Mr Philip, being angry about what had occurred, than it was Mr Philip confronting Mr James?

MR PAINO:

All I say is that is an available inference, but who knows. I really can't take it any further than that. I'd say James would have been angrier than Philip. James had more to lose than Philip. On my argument of the case Philip was just getting drugs and James lost, it appears, two kilos, so he would've been angry. But –

WILLIAMS J:

Where was the money?

MR PAINO:

There was no money I don't think, it was just drugs.

WILLIAMS J:

No money had been handed over?

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MR PAINO:

We don't know, no one knows what money paid for what drugs.

WILLIAMS J:

I thought the procedure was go to Auckland, hand over the dough, pick up the drugs, come back?

MR PAINO:

Yes, well…

WILLIAMS J:

Since he was on his way back, doesn't it suggest that Philip's going to be the grumpy one, not James? James has got his money.

MR PAINO:

Well, was it for that shipment or the one before?

WILLIAMS J:

I don't know.

MR PAINO:

No. I mean, all we do know is that – what we do know, when the cash was eventually discovered, as I indicated earlier, it was 180,000, which the summary of facts says is one kilo…

WILLIAMS J:

Yes.

MR PAINO:

Of meth. So we know that 180,000 was in the photograph, estimated, that represents one kilo. So was that a part-payment for two kilos or was it a full payment for one kilo? We don't know, I'm sorry.

WILLIAMS J:

Right.

MR PAINO:

I mean, I think drugs is one of those things where, you know, often you get paid, paid in arrears, you know, you supply the drugs and then you go next time and you get the money. I don't know, I don't know what the credit is like for these participants.

So then, paragraph 140, this is the Court of Appeal saying these points tend to corroborate the nature of his involvement as portrayed interview he summary of facts: "They could not justify a categorisation any lower than the cusp between lesser and significant." But the point really is the preceding paragraph at 138 to 139, states at the last, end of the paragraph: "Mr Burston submitted that if balanced regard was had to evidence at McMillan's trial, then other evidence supported a higher level of involvement by Philip," and then it outlines these. Well, I'm saying that what in 139, which the Court of Appeal basically says is not in the summary of facts or didn't have any attention at sentencing, all of it's in the summary of facts and the Judge did rely upon the summary of facts, and some of these matters are either so minor that they're not relevant to the assessment of the role or they're incorrect, such at the five to eight, such as the Audi and others.

So that probably conveniently takes us on to role, which I'm going to address you on, which is paragraph 75 of my submissions. So just before I get to role, which is actually 76, 75, I make the point it's ironic the Court of Appeal criticised Justice Gwyn for departing from the summary of facts without giving warning to the Crown but then proceeded to accept and take into account factual matters that were not contained in the summary, and then it's contrary to the burden of proof. So that's the point I really made earlier orally.

So when we get to role the – won't keep you a moment…

WILLIAMS J:

Can you tell me what do you say about the inclusion in the Court that the Crown hadn't been given fair warning, do you accept that or…

MR PAINO:

No, I don't accept that at all. I think –

WINKELMANN CJ:

I think we indicated we weren't really interested in that argument.

WILLIAMS J:

Oh, did we?

WINKELMANN CJ:

Yes.

MR PAINO:

Not interested, did your Honour say?

WINKELMANN CJ:

We're not interested in that argument, I think that's correct isn't it?

WILLIAMS J:

Oh, really? When I read the material I got quite interested in it.

MR PAINO:

Yes.

O'REGAN J:

Yes. No, we said in the leave judgment we weren't going to address it.

WILLIAMS J:

Okay.

MR PAINO:

Yes.

WILLIAMS J:

Well, move on then.

MR PAINO:

My answer is simply I don't accept it and that's all. Yes, so role. So obviously role's important because we've got was it *Zhang* at band 5, and it seems that a number of cases involving quantities where people might, defendants, might end up below the band. There seems to be a reasonably inflexible attitude in the sentencing courts that in circumstances where your role is lesser, that band 5 seems to almost be a point at which you cannot cross, and the Court here, the Court of Appeal here, looking at the role of the appellant, essentially said, well, they would have started at nine, which is one below the band 5. So what I submit is that the pretty inflexible approach of sentencing courts to the band 5 and not going below it is causing sentences that are higher than they need or should be.

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WINKELMANN CJ:

So you say, do you, that *Zhang* is being read as trapping people within the band?

MR PAINO:

Yes, because *Zhang* clearly says, and I've got the extracts at page 13 of my submissions and I don't know that I need to repeat them here, I think we all know what *Zhang* says, but just to go over it briefly. At page 13, paragraph 54 of my submissions it refers to *Hessell v R* [2010] NZSC 135, [2011] 1 NZLR 607, essentially saying sentencing "must involve a full evaluation of the circumstances to achieve justice in the individual case". Next paragraph: "In particular, we confirm that the role played by the offender is an important

consideration in fixing culpability and thus the stage one sentence starting point", but the Judge has to "assess the serious of the conduct and the criminality". Then over the page at paragraph 58 from my submissions, quoting *Zhang* at 104: "Quantity is valuable in assessing culpability as this court observed in *R v Fatu* [2006] 2 NZLR 72 (CA), but it alone cannot determine culpability."

So *Zhang* was never a case where if you had 250 grams or above the start point was 10 years. That was, if you like, an indicative start point. It was an important matter to take in account, but all the other circumstances should be taken into account as well and seen alongside that, and one of the most important ones is the role which in my submission the Judge got correct.

At page 180 of the casebook, I think it is the Court of Appeal casebook, the Judge referred to the indicia in *Zhang* and finding Mr Philip had a "lesser role". In particular the Judge accepted he "performed a limited function under direction", motivated primarily by his own addiction, "received limited or no financial gain; were paid in drugs to feed your own addition", and that should also say, by the way, his partner's addiction, "or cash significantly disproportionate to the quantity of drugs…involved; and had no influence on those above you in the chain". So the Judge then placed him in the lesser role.

WINKELMANN CJ:
That's quite an important point, isn't it, the disproportion between the rewards and the risk that the Judge makes.

MR PAINO:
Yes, I mean –

WINKELMANN CJ:
No relation, no…

MR PAINO:

Well if you assess the risk, if you take *Zhang* and believe that if you carry more than 250 grams you're going to go to jail for 10 years, to do it to feed the habit, and that of your partner, and receive very little, if any, cash, that is a massive risk. It's completely disproportionate, unlike other cases where I've read in the casebook where some of the offenders were getting, you know, reasonably substantial amounts of cash for doing jobs. Here the evidence is clear that they fed their addiction, they got drugs. The only proof of any cash was a $50 payment when Mr Philip was leaving with one of the cars and he turned around to Mr James, and Mr James gave him $50.

WINKELMANN CJ:

I imagine that might have been for gas.

MR PAINO:

Or lunch; Auckland.

WINKELMANN CJ:

You need more than that, yes.

MR PAINO:

I don't know what it was. I don't know what it was. It could have been – it really did put into perspective just what rewards he was getting if he has to basically almost plead for cash and receive $50.

WINKELMANN CJ:

So your simple point on role is that *Zhang* doesn't trap people within the band and role is critically important and can move people bands or move…

MR PAINO:

Not only move within bands but move under the band.

WILLIAMS J:

The Crown says you can only do that if you're at the, if your role is lesser, and that *Zhang* says that. I know you're arguing that this man's role was lesser, but do you accept that?

MR PAINO:

In other words, if he had a substantial role could you go below band 5?

WILLIAMS J:

Well, I wouldn't use "substantial", because it's not one of the indicators, but…

MR PAINO:

"Significant", sorry, significant.

WILLIAMS J:

Yes. If, for example, and it's open to inference, that his role was operational. I mean, he was driving a car up and down between Wellington and Auckland carrying a lot of methamphetamine and transporting a bunch of cash. You might say that was operational.

WINKELMANN CJ:

What does "operational" mean? Every role's operational.

WILLIAMS J:

Well, quite, but that's what *Zhang* says. So if that's the case, what do you say about movement between if you're at the bottom of significant?

MR PAINO:

Well, I think "operational" is just a word, I think it's better to look at what happened rather than just use the word. It does –

WILLIAMS J:

Well, the thing is that it's a word in the definition of the significant role.

MR PAINO:

Yes, but it –

WILLIAMS J:

Yes, we've got to grapple with it.

MR PAINO:

Yes, well, it says "operational or management function in own operation or within a chain".

WILLIAMS J:

Yes.

MR PAINO:

So I don't, I submit that just driving cash to and from, not in sealed envelopes, just driving them, is not operational. I mean, it's just driving from Auckland to Wellington, whether it was Auckland to Wellington or whether it was, as I say, from one suburb across the town to another.

WILLIAMS J:

Perhaps it might be better to argue that there are some operational roles that are in fact lesser.

WINKELMANN CJ:

Such as a courier, which case is always recognised.

MR PAINO:

Yes.

GLAZEBROOK J:

Well, are you – is there…

MR PAINO:

Well, I just…

GLAZEBROOK J:

I was just saying there's another way of putting it, that there's a range of things you can be doing operationally, some of which might even put you into a less

role but certainly at the bottom of significant, and those sorts of roles could mean that you could still shift bands.

MR PAINO:

Yes.

WINKELMANN CJ:

It's really –

GLAZEBROOK J:

I suppose you won't shift bands if it's a hundred kilos but you'll shift within the band. But if it's at the cusp of two bands then you may well shift under.

MR PAINO:

Yes. I mean, I suppose I struggle to decide it with the word "operational", but if it is an operation the whole thing, the whole thing is an operation, from wherever it came internationally to ending up with the drug dealer and the drug addict in Wellington.

WINKELMANN CJ:

So your point is he can't apply it in a tick-box way, you have to try and understand what the Court is getting at there, and what it's really looking at is people who are kind of using their brains and shaping the operation in some way. So if your operational involvement was, say, that you were in charge of the importation mechanism, so that you were designing how they got the things into a containers in a concealed way and bill of lading, well, you're doing something purely operational. But it's a long way removed from being asked to drive, to act as a courier.

MR PAINO:

Yes, correct. I just, with Justice Williams I just thought "operational" sounded more serious and that's why I suggested that you actually have to look at what happened, what he did, rather than using the word "operational". But if I look

at the thing from the perspective of the whole thing's an operation and his is a minor component of it, then –

WILLIAMS J:

Well, I think – I mean, this guy is transport infrastructure for this Wellington operation, there's no doubt about that.

MR PAINO:

Well, he's only one of a number.

WILLIAMS J:

Of course. But, you know, the operator of, a truck-driving contractor in a retail business is still operational.

MR PAINO:

Yes.

WILLIAMS J:

So we've got a – the issue is really to look at the culpability associated with it, is I guess the point I'm making, rather than the word, because "operational" is a very big word and it's in the significant role description in *Zhang.*

MR PAINO:

Yes. I think "driver" or "mule" is a better word.

WILLIAMS J:

In this case, yes.

MR PAINO:

Yes. Because what he did was he never chose the car, he didn't load it into the car, except for allegedly that one occasion with a cardboard box, he never saw it, he drove it –

WILLIAMS J:

Yes.

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MR PAINO:

– someone else accessed it, the cash back, except for one occasion someone photographed the cash. He just did what he was told essentially. He had no autonomy within this operation, and it says all management function. Well he certainly had no management function, and as I say in my table in my submissions at paragraph 76 on page 19 of my submissions, when I look at the word "significant", number 1 operational. I say: "No operation or management function." Page 19 at paragraph 76. "No operation or management function. Only drivers. Not in own operation or in a chain of operation or management." I suppose all I'm really saying there is driver.

Over the page on the significant criteria: "Involves and/or directs others." "No, did not involve or direct others. The only other participant was Minns. He travelled to Auckland separately." Then I've outlined that in earlier submissions. "There was no evidence that Philip or Hayman received anything in relation to the offending."

Next: "3. motivated solely or principally by financial or other advantage, whether or not operating alone." I said: "The only advantage was to receive methamphetamine." And I say that, there's two of them, not one of them, and that's because of their relationship, and so, and I mention the 2006 Audi. So under 3, the answer I say is no. And: "4. actual or expected commercial profit. No." Commercial I think is sort of profit making, that's how I look at commercial. Someone's making profit somewhere. He only got methamphetamine.

"Some awareness and understanding of sale of operation'". Answer: "Yes." He had some awareness but, you know, there was a large scale operation going on here. Mr James was operating in Auckland with all sorts of other drug dealers and middlemen, and other senior men in the operation at large. There were other couriers that Philip had not contact with, going from Wellington – from Auckland to Wellington, and I mentioned two of those earlier,

Skinnon and Millar and his role was just the driver to and from Wellington each way. So what we say is that Justice Gwyn's reasons for finding a lesser role are correct. Just down the page on the screen. "In a similar vein the Court of Appeal erred by not considering the indicia of 'lesser role' or the Judge's reasons for adopting that categorisation." So there was no analysis in the Court of Appeal about Justice Gwyn's analysis of the role which I referred to earlier.

So once the Judge found that he had a lesser role, performing a limited function under direction, and was motivated by addiction, I do want to address the Court on addiction here, and it's relevant to *Zhang* and in this case, what the addiction evidence was. So addiction is relevant, I say, to both stages of the sentencing.

WINKELMANN CJ:

Can I ask you a question about the facts about addiction. Mr Burston says that Mr Philip should have filed an affidavit. Would it not be the case – did the Crown take that point at sentencing?

MR PAINO:

No, no, never.

WINKELMANN CJ:

Okay.

MR PAINO:

Never took the point at sentencing and didn't dispute that he was addicted. The only dispute that he was addicted was when we get into the appeal courts.

WILLIAMS J:

The evidence on that is a bit blurry, though, isn't it? It's not a point run from the outset. It develops. And his own self-reports have a certain ambiguity about them, don't they?

MR PAINO:

Well, I'll tell you how it developed. It developed because the then defendant was going to trial. The issue of addiction didn't come up in his arrest, although when he was arrested he and his partner were found with a small quantity of methamphetamine, which the police officer asked: "Whose is that?" And he said: "It's mine." So he had that on him. They were staying at their parents' place when the police searched their property. Their parents are, you know, decent folk in Taihape, they're not druggies, they don't have criminal convictions.

WILLIAMS J:

Her parents or his father's?

MR PAINO:

Her parents, sorry, her parents. So it's unlikely they're going to be bringing in P pipes and paraphernalia, so the fact that no pipe was found when the police went there is not at all suggestive that they weren't using methamphetamine. In fact, they had methamphetamine on them and the defendant admitted that the methamphetamine was his. That's point number 1.

Point number 2 is that when you're going to a criminal trial and you – the issue of his addiction is not really at the forefront of your mind, and when I went to the sentence indication with Justice Gwyn, I am counsel who believes that if you are going to make a point like significant discounts for addiction, you need the facts in front of you. You need them. So I can't advance addiction as an issue. I told Justice Gwyn, and her Honour recorded it in her decision, that the start point of eight years and the discounts were on the basis of information that had been provided to date, which was the summary of facts and that was all. There was nothing else except the summary of facts, and of course the summary of facts is not going to say that the defendant is addicted.

So to then proceed from a sentence indication stage, to the final sentencing stage, counsel gets reports. So you don't typically get a section 27 report on the cultural report when you're going to trial, only normally when you've been convicted, you know, because if we're really only at that stage, you don't really

want your client telling all these report writers everything about themselves before there's a conviction. I mean, that's pretty bad practice. I know there are some counsel who do that but I don't agree with it.

So once he was convicted the Court then got an AOD report from an experienced AOD clinician, John Duncan, who's been round the tracks in the Wellington courts for years. I got a report from Hard2Reach, Mr Tam, so that was a section 27 report, and then he went to rehabilitation, and then there was reports there. Now the Crown, Justice Winkelmann said that, in their submission, that affidavits should have been filed by Mr Philip, so I'll address that and then I'll address the point Justice Williams made.

An affidavit from a defendant in prison; so let's just think of this, practically speaking. So the defendant says either, look, I was addicted all my life and, you know, this is my upbringing, or he or she says, look, I've read all the reports and I believe that all the information that the report writers have provided that they say I gave was true and correct, or they say something along those lines.

Now does it really, in my submission, add anything to the case? I mean, does it really – a criminal defendant often with a long list of convictions facing lengthy terms of imprisonment files an affidavit. Nowadays, it's hard to get an affidavit even sworn in a prison, so often frequently what happens is they just put it in an affidavit, a statement, comes to court as a statement and they worry about getting it on oath later. It doesn't add anything that it's an affidavit. These report writers are experienced. Mr Duncan is very experienced and he stated that he believed the defendant was honest when he was speaking to him, that's what he said in his report. So they make their assessment. If they thought that –

WINKELMANN CJ:

The critical point though is surely that it wasn't put on – the Crown didn't say "we want this substantiated, we want to cross-examine him", and they could have under section 24, couldn't they?

MR PAINO:

It is a critical point. I'm trying to expand on it, just to try to give a practical side to it, but the Crown never doubted that the defendant was addicted at the sentencing in front of Justice Gwyn. The only time the Crown tried to undermine that, really, is in this court where the Crown say in the submissions in this court, the word "now" appears. Yes, paragraph 57 of the Crown submissions, page 19, to this court: "It is now submitted on appeal that the motivation for the offending was almost exclusively the addiction to methamphetamine of himself and his partner."

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Now I just cannot understand that submission, "it is now submitted on appeal", I take that to mean the appellant is now submitting to this Court that the offending was almost exclusively the addiction of methamphetamine of himself and his partner. Well, it was always an issue, that's why Justice Gwyn found he had a lesser role, because of his addiction.

WINKELMANN CJ:

Your point is that it was submitted at the most obvious first occasion that it could be submitted, which was at the sentencing hearing?

MR PAINO:

Yes. And it was never disputed and no one asked the defendant to undergo any – I mean, if it had been put in dispute the Crown could have said what they're saying now: "Look, it's all self-reporting," as Justice Williams indicated, a suspicion, raised a suspicion, "it's all self-reporting", how do we know he had an addiction at all? The Crown could have said: "We've got all this evidence to show he didn't take drugs," or "he wasn't involved" or whatever, but it was always in issue. And I just look with disbelief at paragraph 57 when it said "it's now submitted on appeal" that that was his motivation.

WINKELMANN CJ:

Well, were those reports filed in advance of the hearing?

MR PAINO:

Yes, they were all filed. So we had a sentencing hearing, the date was put off, I applied to have the defendant – then the defendant went on electronically monitored bail…

WINKELMANN CJ:

So, Mr Paino, the reports were filed before the adjournment application, so they were the basis of it, were they, for him to get rehabilitated?

MR PAINO:

Partly, and then the final report. So what happened was AOD report was filed, after he was convicted, the sentencing was adjourned to enable him to attend the Kahukura programme at the marae. That came about because Mr Tam recommended in the section 27 report that he attend that marae, that was funded by the proceeds of crime. I just want to add just a little inflexion on this that the Crown opposed this and said that the drugs, the rehabilitation places are being taken over by gangs, produced previous convictions of the people that ran it and so on. But the Judge saw through all that. He ended up going to this programme, came back, there was a report which is in the materials, a positive report, and only after that report was received and the psychological report about the child, the Judge then sentenced him to home detention, and those reports all stated that he was addicted, he said various things that, you know, if the Crown wanted to put under the spotlight might have been able to say: "Well, that's slightly inconsistent," but never did, never did, only here in this Court.

WINKELMANN CJ:

So the critical point is they weren't surprised by the submission that he was addicted at sentencing?

MR PAINO:

Sorry, I missed that.

WINKELMANN CJ:

They were not surprised by the submission that he was addicted at sentencing.

MR PAINO:

No, no. Well, it was just the theme of the reports, and they agreed that his addiction was a factor to be taken to account but didn't move him from, you know, into the lesser category. So it was only, as I say, in this Court that it's disputed that he was addicted.

Now, Justice Williams, have I answered your question about, you know, the mixed information you, sort of, about his addiction?

WILLIAMS J:

Well, it's just the report of the psychologist – Mr Thomson, wasn't it? Dr Thomson – in which the self-report has Mr Philip said he'd used methamphetamine periodically throughout his life, noted he'd been abstinent from the drug after meeting Ms Hayman from 2015 to '17, but resumed when he started driving supplies of methamphetamine to Auckland and it became easy to access.

MR PAINO:

Yes. So I think he, what he was saying there, the way I see it, is that he was addicted, that he gave up, and then he met her and then they both were there together taking methamphetamine, which is pretty –

WILLIAMS J:

Well, no, they were abstinent, it looks like.

MR PAINO:

Well, they may have been abstinent for a while but then got back on again, I mean…

WILLIAMS J:

So the point is perhaps a subtle point and perhaps doesn't matter so much, but the point is that the addiction comes from participating in the operation because he home detention been abstinent before that.

MR PAINO:

Well, he never said he'd been abstinent until the beginning of 2019, I mean that's –

WILLIAMS J:

No, until 2017, returned when he started driving supplies of meth.

MR PAINO:

Well, the operation commenced in 2019, so – I just think there's a – I wouldn't read too much, with respect, into that.

WINKELMANN CJ:

Your point is that there's a lot being built on under someone's note of what he said.

O'REGAN J:

There's also –

WILLIAMS J:

Well either way we're building a lot on a note someone took, either way.

MR PAINO:

Yes. The way I see it is what he said is he'd had periods of his life when he was abstinent but he got hooked on the meth again when he met his partner. They may have had a period where they didn't have it. Then they both got into it and that drove them to the – the addiction took them to be the drivers. based on their addiction, rather than let's drive and while we're driving we might as well have a bit, and then get addicted again.

WILLIAMS J:

Okay, so that's a wrong report, you would say?

MR PAINO:

I just think there is some confusion there. I think –

WINKELMANN CJ:

Internally inconsistent because he says 2017, but he didn't start driving until 2019.

MR PAINO:

Yes, no –

O'REGAN J:

Can I just ask you about that? In the Crown submission which you were referring to before just over the page on 59(b) they refer to the cultural report where he said that "he and his partner were 'persuaded into making quick money'" by being drug couriers, and then in (c), they refer to the PAC report where he said he agreed to do it for "cash and drugs".

MR PAINO:

Yes.

O'REGAN J:

Which I think the Crown ask us to infer from that that it wasn't just addiction, it was also for cash.

MR PAINO:

Yes, well, a fair point, with respect. So what I would argue to that is one, that that wasn't anywhere near the focus. The Crown didn't mention that in their submissions at the first instance.

GLAZEBROOK J:

At sentencing, you mean?

MR PAINO:

At sentencing, sorry. Second is quick money. Well, I've given you the example of the $50, the petrol. I mean, I don't know, there's no evidence of quick money, it only came from him, and quick money is what? I don't know what quick money is. I mean is methamphetamine – it's a tradable commodity.

WILLIAMS J:

Can't we infer from the general circumstances of this case that there was some monetary motivation, as there almost always is in these sorts of situations, it's not rocket science. But on the evidence it wasn't very much because the evidence of accumulation of assets, and sort of big money lifestyle, was completely absent. Isn't that all we can say and all we need to say?

MR PAINO:

Yes, I still like the $50 petrol money one.

WILLIAMS J:

Well it's wonderful flourish but I'm interested in the broader context.

MR PAINO:

Yes, in the broader context, that's right. So I don't think affidavits are needed in these contexts unless the Crown put it in issue, and didn't.

WINKELMANN CJ:

Okay, I think we've got that submission.

MR PAINO:

Do you want to hear anything about parity? Because you've got other offenders and –

WINKELMANN CJ:

I think your submissions cover that.

MR PAINO:

Yes, and in every case Justice Gwyn mentioned, for every sentencing Justice Gwyn mentioned what others had been sentenced to.

WINKELMANN CJ:

She had quite close regard to parity.

MR PAINO:

Yes, within the (inaudible 11:09:10).

WILLIAMS J:

Isn't your best argument the Crown argued for parity?

O'REGAN J:

With Ms Hayman you mean?

WILLIAMS J:

With Ms Hayman.

MR PAINO:

Yes, well, I mean – just remind me, sorry your Honour. The Crown's argument for parity –

WILLIAMS J:

The Crown argued that the starting points for Hayman and Philip should be the same.

MR PAINO:

Yes, and what they called "almost identical offending", and so all the way along, the Crown had said that the starting points for Philip and Hayman should be the same. Higher, but the same, and it's only when Hayman got sentenced with a start point of six years and then when Philip got sentenced, the Crown said – well, it was at Philip's sentence indication, or was it I can't quite recall, but the argument then changed, once Hayman got sentenced, and as we know her sentence wasn't appealed, and so…

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As I said in paragraph 95 of my submissions: "There could not be a more compelling example of parity being required than two defendants who acted together and are alleged to have offended identically." Acknowledged by the Crown, and living together and being together the whole time. So on a parity basis Philip deserved the same point as the co-offender.

WINKELMANN CJ:

And we've got your submissions on parity.

MR PAINO:

I have finished on parity, yes, sorry. So I realise I've got five minutes from my estimate but there is the issue of discounts, and I don't know that I need to address the Court on the discounts, other than the child discount, because the Crown really acknowledged that 30% – the Court of Appeal, sorry, said 30% was high end, inarguably generous, and I would take issue with the word "inarguably" but I'm not going to say much about that.

As far as the other discounts were concerned, the Crown, it was agreed that the guilty plea discount should remain at 20%, and I just want to say something about that. This is the worst time you could imagine, I would say, to have discounts for guilty pleas removed or reduced, with the backlog of cases caused by COVID. The Court should be encouraging guilty pleas and providing tangible discounts for guilty pleas, even if they come late, because some of these people have been in custody for ages and, but there was no argument about the 20% guilty plea, so I'm not dealing with that.

Then we have the young child, the discount for the young child, which the Court of Appeal removed. So the 20% discount was given to Ms Hayman, and I think what's relevant here is that we had two offenders. Mother and father, both living together, both involved equally in the offending. The offending wasn't violent or domestic violent related. The mother attended the residential rehabilitation. She was healthy, as is the child. They had housing and accommodation. They've got support from their extended family providing house and living around the corner. The father's in the same situation. He spent six months in custody away from his partner and he'd been to residential rehabilitation and follow-up. He is largely healthy and now illegal drug free with the specialist providing him with medicinal cannabis. There are now two children, not one. At the time of sentencing there was one, at the time of the Court of Appeal the other child was –

WINKELMANN CJ:

So is your point that there's no reason why only the mother should be entitled to any sort of consideration for the fact of her parenting responsibilities when it comes to sentence?

MR PAINO:

Yes, and it's rare you'd get a case like this, this is not going to open the floodgates where every father who comes along and says "I've got a child". I mean this man spent every day with his child on home detention, so it's verifiable. Every evening he spent with his child and it's clear, professionally assessed by someone like Dr Thomson who provided the information about the bond in the relationship. It's not just an affidavit with something self-serving, and, you know, he got half what she got. It referred in his report to her being the primary carer, that's pretty, a bit controversial nowadays, especially in the Care of Children Act 2004, referring to parenting orders and custody and access going, but the Judge recognised that – and gave her 20% and gave him half, and to me, the way I see it is it links in very closely to the section 8(i) of the Sentencing Act which states that the Court "must take into account the offender's personal, family, whanau, community, and cultural background in imposing a sentence or", otherwise "dealing with the offender with a partly or wholly rehabilitative purpose". So to reduce someone's sentence because they have a loving and good relationship with a child in a settled environment for the reasons put forward by Dr Thomson and which will be known to all about separating children and the incarceration of offenders, then that discount was warranted.

WINKELMANN CJ:

Well just before you sit down I think it's fair to ask you this, because that links through to the fact that, you know, we look at sentencing sometimes quite mathematically, and section 8(i) and other considerations, such as rehabilitation, suggested to the sentencing judge in this case that a home detention sentence was far better for the purposes of sentencing than putting this man in prison. I wanted to know if you had turned your mind to the approach in appeal, in the Solicitor-General's appeal, to that sort of, an

assessment by the Judge. Because her assessment was that the rehabilitative, and I suppose merciful sentence, was home detention not imprisonment, and what do you say about the approach of the Solicitor-General's appeal to that kind of an assessment by the Judge in exercising her sentencing discretion?

MR PAINO:
I'm not passing the buck, but Ms Blincoe was going to address you on a similar point.

WINKELMANN CJ:
Oh excellent, good, good.

MR PAINO:
So could I respectfully ask her to add to that and also the issue of the six months he spent in custody and how that affects this appeal?

WINKELMANN CJ:
Yes, thank you.

MR PAINO:
Thank you, your Honour.

MS BLINCOE:
So as Mr Paino has indicated I will be addressing the Court on two points, firstly that issue of time in custody and secondly that overall question about whether home detention was the correct end sentence, and I think I can address your Honour's question in the course of talking about that.

So in terms of the issue of time in custody, Mr Philip of course spent six months in prison when originally arrested before he was granted bail. The issue of whether that should be taken into account was raised in the High Court but didn't need to be addressed by Justice Gwyn because the Judge easily reached a two year sentence which could be commuted to home detention on the basis of the six year starting point and the discounts that her Honour allowed. In the

Court of Appeal it was submitted that on behalf of Mr Philip that if the Court was minded to increase the starting point or reduce the discounts then the time in custody should be taken into account in order to reach that two year threshold where home detention could be considered, because the six months that Mr Philip spent in custody was the most punitive and deterrent aspect of the sentence. Similarly, in this court, this issue potentially arises if the Court is persuaded to uphold, for example, the starting point of eight years rather than six years. Obviously if this court agrees completely with Justice Gwyn, then this issue won't need to be addressed.

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The Court of Appeal in this case dismissed this argument, stating that it is not a consideration on re-sentencing because the period in custody is taken into account in calculating a prisoner's entitlement to release and referring to section 82 of the Sentencing Act. These kinds of arguments are often dismissed to reference to section 82 of the Sentencing Act but, in our submission, that reasoning is incorrect and should be revisited by this Court, again, if the issue arises.

So section 82 states that in determining the length of any sentence of imprisonment to be imposed, the Court must not take into account any part of the period during which the offender was on pre-sentence detention. In our submission the section is simply telling judges that when they sentence someone to imprisonment they don't need to deduct time in custody because that is accounted for by Corrections when they calculate parole eligibility and release dates. It has nothing to do with the methodology for determining the type of sentence to be imposed and it does not, in our submission, prevent a sentencing judge from taking into account time in custody when considering sentence type, whether that's home detention, community detention, community work, supervision, or any other sentence. In the –

WINKELMANN CJ:

And as a matter of fact Corrections undertake that calculation, so they take into account.

MS BLINCOE:

Only when it's a prison sentence.

WINKELMANN CJ:

Yes, when it's a prison sentence.

MS BLINCOE:

Yes, yes.

ELLEN FRANCE J:

That's not – oh. I was thinking it's, I was thinking at the other end. Because the range of things that count as pre-sentence detention have been expanded, haven't they? As I understand it, from the changes to the Parole Act there are now a broader range of things prior to sentence that will count as pre-sentence detention for these purposes.

MS BLINCOE:

I'm not entirely sure I understand the question.

WINKELMANN CJ:

Well, section 91(2) has been amended –

MS BLINCOE:

Yes.

WINKELMANN CJ:

– and other types of restriction that count for pre-sentence detention that the Parole Board can – that can be taken into account in calculating sentence.

ELLEN FRANCE J:

So, for example, if you are in a hospital or a secure facility under CP(MIP), that will count as well.

MS BLINCOE:

Right, okay, thank you. I wasn't aware of that amendment but…

WINKELMANN CJ:

Yes. Oranga Tamariki, that was added in 2017, so yes.

MS BLINCOE:

Can't imagine that those issues would arise on these facts where it's simply time in prison on the same charges.

WINKELMANN CJ:

Well, your submission is that the Judge was entitled to take that into account, if she had, which she didn't. For instance, when she's considering the deterrent and accountability, the purposes of sentencing.

MS BLINCOE:

Exactly. So the Crown has quoted a case, *Chong v* R [2022] NZHC 869, and I just wanted to draw the Court's attention to paragraph 36 of that case and the passage immediately before the passage that the Crown has quoted…

O'REGAN J:

Well, let's just get it up on the screen. Is it in the authorities?

MS BLINCOE:

It's in the Crown's authorities. So the judge in that case said: "I do not discount the potential for a sentencing court to take into account the impact of pre-sentence detention on an individual offender in exercising the sentencing discretion to arrive at what it considers to be an appropriate sentence. The Court of Appeal – sorry.

GLAZEBROOK J:

I'm just trying to find – okay, fine, thank you.

MS BLINCOE:

The Court of Appeal has accepted that section 82 does not necessarily preclude a court from considering the effect of pre-sentence detention in assessing

appropriate sentencing outcomes in the particular case. And then, as you can see, the Court in that case suggests limitations around that.

In that passage the High Court cites two Court of Appeal decisions: *Ropiha v R* [2013] NZCA 60 and *Te Aho v R* [2013] NZCA 47. Those decisions aren't before this Court, but I just wanted to note in *Ropiha* the Court of Appeal said: "Section 82 has as its purpose reinforcing that the calculation for credit for remand is an administrative function that is not for the Court. That does not necessarily preclude consideration at sentencing of the effects that remand may have had in a particular case."

So in *Chong* the passage that the Crown quotes, just on the next page, says that the Judge doesn't accept that this can be done as a matter of course. But our submission is not that it should be done as a matter of course, but simply that it is open to the Court to do so as a matter of discretion, if it is necessary in order to achieve the least restrictive sentence. Ultimately *Chong* refers to a number of Court of Appeal cases suggesting that this can be done, and a number of High Court cases suggesting that it can't, but in our submission there is nothing in the words of section 82 that compels the interpretation that time in custody can't be taken into account in determining sentence type, and it would be helpful, in our submission, if it arises in this case for this Court to clarify the law on this point.

WINKELMANN CJ:

So it's really just a – your submission is it's a mathematical thing. It makes sure, it's not, the Court isn't trying to do the calculation when it, and make sure, it makes clear who's to do the calculation, and it's not for the Court.

MS BLINCOE:

Exactly. Exactly. The other provision is section 15A of the Sentencing Act, which provides that home detention can only be imposed if, among other matters, the Court would otherwise sentence the offender to a short term sentence of imprisonment. So in our submission this provision is slightly more problematic for us than section 82. However, our submission is that the

reference to sentencing the offender to a short-term sentence of imprisonment, which of course is a reference to two years or less, that that phrase can be interpreted in a broad and principled way in light of the purpose and context of that section, so that it is read as referring to a notional end sentence of two years or less, rather than that literally being the sentence that the Court would actually impose. That is, that time in custody can be deducted from a sentence of imprisonment, a notional sentence of imprisonment, for the purposes of reaching a sentence below two years.

So in terms of the purpose of that section, and I apologise this is not in our written submissions, but I think it's important. Section 15A was introduced by the Sentencing Amendment Act 2007, which started off as part of the Criminal Justice Reform Bill 2006, and the explanatory note to that Bill says: "The purpose of this Bill is to introduce a range of measures to arrest the sharp increase in the prison population in recent years. This increase is no longer sustainable neither financially nor socially." That Bill, of course, introduced other aspects that didn't end up coming into force, for example the sentencing council, but what it did do to the Sentencing Act was to establish home detention as a stand-alone sentence instead of a way of serving imprisonment, and it added that hierarchy of sentences in section 10A, as well as making a number of changes to the other community-based sentences.

So in our submission given that explanatory note, which is very clear, a broad interpretation of section 15A, which allows time in custody to be taken into account, is consistent with that statutory purpose of reducing imprisonment rates.

WINKELMANN CJ:

Well that's if you take the time in custody into account in a mathematical calculation but you could also take time in custody into account simply in terms of the purposes and principles of sentencing, well, purposes of sentencing, couldn't you?

MS BLINCOE:

I agree completely, and in our submission it doesn't need to be mathematical, it's discretionary, and the point really is that that time in custody has achieved many of the sentencing purposes, meaning that there's less that has to be done at sentencing. So absolutely, it's not mathematical, it's about standing back and looking at what has actually happened here.

That ties into my next point, I suppose, which is that the section also has to be read in the context of the other provisions in the Act. So of course the hierarchy of sentences in section 10A. The requirement in section 16 that prison cannot be imposed unless it's for a number of listed purposes, and that those purposes can't be achieved other than by a sentence of imprisonment. So that ties into that point. The requirement in section 8(g) to impose the least restrictive outcome, and the requirement in section 8(h) to take into account particular circumstances that would mean a sentence that would otherwise be appropriate, would be disproportionally severe because in our submission having spent time in custody is a personal circumstance that affects that overall sentencing exercise, and as I've already mentioned those purposes in section 7, which have already been achieved. So again –

WINKELMANN CJ:

How do they relate to section 6(4) of the Misuse of Drugs Act 1975 though?

MS BLINCOE:

So in our submission that presumption is – it is a presumption but it is a presumption that can be very easily rebutted because the wording of that section is simply that imprisonment has to be imposed: "… unless, having regard to the particular circumstances of the offence or the offender," including age if that's relevant, "…the Judge or court is of the opinion that the offender should not be so sentenced." So that language is very broad. It's not manifest injustice. It's not exceptional circumstances. It's not special reasons. Nothing along any of those lines. It's simply that the Judge has to look at all the circumstances and decide whether they're of the opinion that the offender shouldn't be, shouldn't have imprisonment imposed. So it is a presumption and

it's there and it's a consideration that has to be gone through, but in our submission it's not a high bar to get past that presumption.

WINKELMANN CJ:

I think we better take the morning adjournment and then we'll hear you quickly when we return on this issue of the Solicitor-General's appeal.

COURT ADJOURNS: 11.32 AM

COURT RESUMES: 11.51 AM

MS BLINCOE:

So to answer your Honour's question from earlier there's, I suppose, two parts to the answer. The first part is that in our submission the sentence was the right sentence when sections 7, 8, 25 and 27 of the Sentencing Act are considered, which I will get to in a moment, and it's not necessarily merciful in the sense of a higher sentence should have been imposed. But even if it was merciful in that sense, and this often happens in the Court of Appeal, in our submission if that was the Court of Appeal's view, what the Court of Appeal often does is say, well we think the sentence should have been this, but given that it's a Solicitor-General appeal, and the additional harshness of sending someone to prison when they've been on home detention, often the Court of Appeal won't interfere with the sentence. The submission along those lines was made in the Court of Appeal and it's at 155 of the Court of Appeal decision, where Mr Paino said: "That on any reconsideration of the sentence, the Court should recognise that incarcerating an offender who had adjusted to, and served, part of a non-custodial sentence was unduly harsh and inhumane." That it was "especially so for Mr Philip where has pursued rehabilitative steps and continues to play a major in parenting his infant (soon to be two). Regrettably," the Court says, "they cannot rely on that aspect to diverge from what is otherwise the appropriate response to a successful challenge".

In our submission it is always open to the Court of Appeal to consider the additional harshness of increasing a sentence on appeal and to use that as a

reason not to allow the appeal, and it's always open to them to make some general comments about what the sentence should have been, but in these circumstances, not to overturn the sentence.

WINKELMANN CJ:

Yes, so just a couple of things about that. You say it's not merciful. It is a perfectly legitimate sentencing approach to take a merciful approach, as *Hessell* makes clear. There are some circumstances in which a merciful approach is appropriate.

MS BLINCOE:

Yes, I agree with that.

WINKELMANN CJ:

So I just – in case there's an implication in your submission that there's something wrong because the sentence is merciful, mercy is a recognised approach on sentencing if the circumstances are made out for the application in a discretion that way. Did you look at any of the authorities in relation to the Solicitor-General's appeal?

MS BLINCOE:

No, I didn't have the opportunity to do that. From my general impression, my understanding is often they will say, well the sentence should have been this but we're not going to interfere. Sometimes they do but they don't always, so it's certainly open to the Court of Appeal to not, to –

WINKELMANN CJ:

Wouldn't it also be incumbent on the Court of Appeal to have regard itself to the principles and purposes of sentencing?

MS BLINCOE:

Exactly, so that's why in our submission it was a legit sentence in terms of sections 7 and 8. It wasn't – I appreciate your Honour's point about merciful

sentences being legitimate and I agree with that, and perhaps the label of whether it's merciful or not is not helpful, but –

WINKELMANN CJ:

But here it's certainly a rehabilitative sentence, that's the purpose of the sentence.

MS BLINCOE:

Exactly. So the point I wanted to make really about why home detention is the right sentence here, we've said in our written submissions that this sentencing is section 27 in operation, which it is. But it's also section 27 working together with the other provisions in the Sentencing Act, particularly at section 7 of the Sentencing Act. And what's important about section 7 is that it gives the Judge a choice of sentencing purposes. There's no hierarchy, there's no mandatory purposes, unlike section 8, which is expressed in mandatory terms. So it's entirely open to the sentencing judge to decide which purpose or purposes of sentencing are the most important and what purpose is trying to be achieved by the sentence. And it's clear in our submission –

WINKELMANN CJ:

Are the most important?

MS BLINCOE:

Yes. It's clear from the Judge's sentencing notes that she was imposing the sentence primarily for a rehabilitative purpose, and in our submission it is totally legitimate and consistent with section 7 for a sentencing judge to do that, especially in a case like this where the other sentencing purposes have already been achieve prior to sentencing. So the time in custody fulfils, for example, denunciation, maybe deterrence, the time he's spent in residential rehabilitation has achieved maybe holding the defendant accountable, promoting a sense of responsibility, community protection in the sense that of course a rehabilitated defendant is far less likely to re-offend than someone who hasn't undergone rehabilitation. So in our submission with the increased use of section 25 to adjourn sentencing to allow rehabilitation, sentencing is not just a single event,

it is actually process, and if those purposes have already been achieved they don't need to be then part of the sentence that's ultimately imposed. And that, of course is the approach already of, for example, the alcohol and drug courts, the other specialist courts and, hopefully, more and more courts with the roll-out of Te Ao Mārama.

WILLIAMS J:

It's not just if they've been achieved but if, through the section 25 adjournment process, one purpose starts to stand out, ie through doing rehab, then it's legitimate to give extra weight to that, that's the whole point in section 25, right?

MS BLINCOE:

I agree, yes. So section 16, which I've already referred to, says that prison can only be imposed for certain purposes, and those purposes do not include rehabilitation. So if we accept that the Judge made a decision, this sentence is going to be for a rehabilitative purpose, she was actually precluded from imposing imprisonment for that purpose. If the purpose of sentencing is the start of your analysis and rehabilitation is the purpose, then prison can't be imposed according to section 16. So this is how these provisions have always been intended to all work together to achieve the least restrictive outcome, which of course is mandated by section 8(g).

WINKELMANN CJ:

So is it submission, is there implicit in what you've just said the submission that it's more than pure maths?

MS BLINCOE:

Absolutely, yes. And I think a mathematical approach can sometimes distract from standing back and looking at what is the right sentence here, and of course nothing in the Sentencing Act mandates a mathematical approach. The most important principle in the Sentencing Act in my submission is the requirement to impose the least restrictive sentence, and a mathematical approach can be a tool and it can be a very useful tool for judges to weigh up the wide range of things that have to be taken into account at sentencing and that's a legitimate

way to do that, but ultimately the sentencing judge always has to stand back and has to apply section 7 and 8 of the Sentencing Act.

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WINKELMANN CJ:

So on your submission the Judge looked at section 6(4) of the Misuse of Drugs Act and decided that there were circumstances in this case which suggested that a sentence other than imprisonment was appropriate –

MS BLINCOE:

Yes, I mean it's not expressly –

WINKELMANN CJ:

– and she decided that that was because, quite apart from the mathematical assessment she did, she decided that was because the predominant sentencing purpose here was rehabilitation.

MS BLINCOE:

I mean none of that's explicit in the decision, but –

WINKELMANN CJ:

No, it is – I mean, I must say I don't think it's hard to infer that from the decision. When the Court of Appeal came to do it, did they explicitly address what the purpose of the sentence they were imposing was? Did they explicitly say "rehabilitation is no longer the predominant purpose" et cetera?

MS BLINCOE:

I don't believe they did. I don't think they looked at it through that lens at all except to dismiss the argument about it being unduly harsh to overturn the sentence on appeal.

WILLIAMS J:

I wonder if, you know, maybe it is maths but it's maths in the service of the purposes and principles of sentencing, not the other way around. That might

be the way to put it, because a judge who wishes to focus on rehabilitation or wishes to be merciful still has to justify it in terms of the facts, the concessions and the statue, and the maths ensures they do that, and the Judge in this case got to 67%, which is a whopper, but she carefully worked through that process and whether she was right or wrong is a matter for debate but that's the point, isn't it?

MS BLINCOE:

The maths is, I suppose, one mechanism to do that.

WINKELMANN CJ:

Maths assists with the consistency in sentencing, doesn't it?

MS BLINCOE:

Yes, although – yes. There's an interesting point about consistency which is raised by Kris Gledhill in his chapter on sentencing in the *Challenge and Change* book that came out recently and he makes the point that the way that that provision is phrased is that the Court only has to take into account the general desirability of consistency, which actually is not very strongly worded, and suggests that that is the least mandatory of all the principles in section 8 and is not an overarching requirement of sentencing. So, yes, consistency is important to an extent, but against that there are all these other principles in section 8 including, of course, the requirement to not just consider but actually impose the least restrictive sentence, so –

WILLIAMS J:

But it is a deep value in the law that like cases will receive like treatment, not just in sentencing but across the entire system of law, and you wouldn't want it to be otherwise really, would you?

MS BLINCOE:

No, I mean you wouldn't want it to be completely random, but –

WILLIAMS J:

Well there are some cases where that is the case.

MS BLINCOE:

The issue is the way that this concept of consistency is used, particularly by the Court of Appeal, in the way that it limits the discretion of sentencing judges to impose more lenient or merciful sentences, however you want to phrase that, so –

WILLIAMS J:

Doesn't that get you to what you take into account when you develop your consistency framework? Because some consistency can be very nuanced and sophisticated, and some consistency measures can be blunt and superficial.

MS BLINCOE:

So, yes, and I mean starting points, obviously, try and achieve consistency. There is an argument which could be made that a quantity-based approach to starting points may be a bit arbitrary and not that consistent, but that's what we've got.

WINKELMANN CJ:

It's not a quantity-based approach, it's a quantity and role approach.

MS BLINCOE:

Quantity and role. It depends how *Zhang* is interpreted, which I won't get into, but the consistency has to look at all the factors that go into the mix rather than prioritising certain ones.

WINKELMANN CJ:

Well, as is made clear in the Sentencing Act, it's similar offenders committing similar offences in similar circumstances.

MS BLINCOE:

Exactly, and that was the argument in *Berkland v R* [2020] NZSC 125 that it's not just starting points, it's also discounts that have to be approached in a

consistent way. But in my submission there are certain types of discounts which are the ones that relate directly to culpability, like addiction being a contributing factor to offending or deprivation being a contributing factor to offending. Those should be consistent as far as possible, keeping in mind obviously that people have very different circumstances. But then there are other types of discounts which are far more discretionary and the discount for the young child is a classic example of that in this case, and this Court in *Jarden v R* [2008] NZSC 69, [2008] 3 NZLR 612, I think referred to purely compassionate grounds for a discount, and there's always been examples of discounts that –

WINKELMANN CJ:

Which is mercy, it's mercy.

MS BLINCOE:

Yes, mercy essentially, for factors that don't contribute to the offending but are somehow relevant to sentencing and that are necessary to achieve the purposes and principles of sentencing, and in my submission there's far more discretion there for a sentencing judge to allow those kinds of discounts to get to the right sentence.

WILLIAMS J:

Doesn't – I mean, I don't think that's necessarily the intention with consistency at all, because you've identified a factor that takes it out of the ordinary run so you are, if you're right, inherently being consistent when you decide that mercy should be the more important thing here, it would be inconsistent to ignore it. Isn't that the way you think that through?

MS BLINCOE:

Yes. I mean there's – yes, I would agree with that. But then again if, for example, someone in identical circumstances to Mr Philip had those circumstances ignored, that doesn't mean that Mr Philip should be sentenced in a way that's consistent with another judge choosing to not take those factors into account. So –

WILLIAMS J:

Right. Well, there's always the human element in this.

O'REGAN J:

Yes, exactly…

GLAZEBROOK J:

Well, isn't your argument they should be taken into account if they're…

WINKELMANN CJ:

Yes.

MS BLINCOE:

Yes.

GLAZEBROOK J:

I mean, the argument should be they should be taken into account if you have somebody in similar circumstances to Mr Philip's.

MS BLINCOE:

But –

WINKELMANN CJ:

I think you're submitting essentially that consistency cannot be applied to defeat the purposes and principles of the Sentencing Act.

MS BLINCOE:

Yes, I think that's a fair summary, that's it's not – it's only one principle in the mix, certainly.

O'REGAN J:

But it's also important at both ends, isn't it? Because it's not whether you've got a discretion to go too low, it's also whether you've got a discretion to go too high. So consistency is important at the high end as well.

MS BLINCOE:

Yes. I think there's more scope for discretion to go lower than there is to go higher because of how section 8 is phrased. There's a lot of matters in there that could result in discounts or merciful sentences but there aren't necessarily justification for imposing a sentence that's much higher.

WINKELMANN CJ:

Yes. I think Justice O'Regan's point was that it's protective not only against sentences that are too low but also against those that are too punitive.

MS BLINCOE:

Oh, certainly, yes. So that – yes, I agree with that. So I think that's really all I intended to say on that.

WINKELMANN CJ:

That point.

MS BLINCOE:

On anything, unless your Honours have any further questions?

WINKELMANN CJ:

Thank you. Mr Paino?

MR PAINO:

Thank you, as your Honour pleases.

WINKELMANN CJ:

Mr Burston.

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MR BURSTON:

May it please the Court, counsel have been asked to focus on the approach taken by the Court of Appeal in this case to the guideline judgment, *Zhang*. The Court of Appeal records at paragraph 137 of its judgement that it had undertaken its "own sentencing analysis". That was part of its function on

appeal in considering the first and second grounds of appeal before it, namely that the sentencing judge erred by taking a starting point that was manifestly too low and by imposing a manifestly inadequate end sentence. The Crown's submission is that the Court of Appeal's sentencing analysis contains no error of principle and did not result in a manifestly excessive sentence.

In the respondent's oral submissions, I will support the approach taken by the Court of Appeal to the guideline judgment in the stage 1 analysis in considering the factors relevant to setting the starting point of eight years' imprisonment. Ms Mildenhall will support the Court of Appeal's approach to the stage 2 analysis, taking personal mitigating circumstances into account, to arrive at an end-point sentence of two years, 11 months' imprisonment.

At paragraph 6 to 17 of the Crown written submissions we set out the factual background from the agreed summary of facts. The Crown position is that this is essentially the most important aspect of this sentencing analysis to determine what the appropriate categorisation of role culpability is because it must come from the factual basis for sentencing; what Mr Philip accepted he did through his pleas of guilty and an agreeing on a summary of facts with the prosecution. To that end, I refer to page 212 of the Supreme Court case on appeal where –

WILLIAMS J:
Is this the summary of facts?

MR BURSTON:
This is the Crown sentencing submissions from 8 April.

O'REGAN J:
It's a minute of – oh, 213 I think it is.

MR BURSTON:
I'm sorry, I've given it a wrong reference.

O'REGAN J:

It's 213 I think, Mr Burston, rather than 212.

MR BURSTON:

It is, and the part that I'm referring to it's 215 at paragraph 10. So this is the Crown's sentencing memorandum dated 9 April 2021, and it refers to a collated summary of –

GLAZEBROOK J:

Do you want to look at the screen and see whether what you're referring to is up there or whether you want something else?

MR BURSTON:

Paragraph 10, thank you, your Honour: "A collated summary of facts is attached. Counsel for the defendant has agreed via email on 27 January 2021 that this can be filed to provide the Court with the facts on which the indication is to be given." So this was the record of the agreed facts on which the indication was given and on which the sentencing subsequently proceeded when the indication was accepted.

I want, at the outset of my submissions now, to go through the agreed summary of facts to identify the parts and facts that the Crown submits are critical to a fair assessment of Mr Philip's role in his offending. At paragraph 138 of the decision under appeal, the Court of Appeal stated in the middle of that paragraph: "The agreed summary of facts reflected participation at least on the cusp between lesser and significant categories of involvement." So that is an important statement in the Court of Appeal's judgment based on their reading of the agreed summary of facts. To assess whether that is –

WINKELMANN CJ:

What paragraph is that in their judgment? I just didn't note.

MR BURSTON:

138.

WINKELMANN CJ:

138, thank you.

MR BURSTON:

The part that I'm referring to is highlighted. To assess whether that is correct, a close reading the summary of facts is essential and as the Court has observed it's a prolix document and even on a couple of readings it can be hard to follow which are the particularly pertinent bits, so –

WINKELMANN CJ:

Especially since the charges don't associate with people when they're in the typed form, do they?

MR BURSTON:

The charge documents?

WINKELMANN CJ:

Well, they just have a charge number but they don't say who the charge relates to in the document, which is quite confusing.

MR BURSTON:

Correct, but I think they all relate to Mr Philip because this is a summary of facts. So up the top there…

WINKELMANN CJ:

And yet it has a lot of irrelevant details in it.

MR BURSTON:

I does, and that's a result of it being –

WINKELMANN CJ:

Cut down.

MR BURSTON:

Well, cut down…

WINKELMANN CJ:

Extracted.

MR BURSTON:

More of a putting together of the Operation Maddale summary which came from the Auckland operation, and the Operation Superdry summary, which focused on Mr McMillan's dealing in Wellington from a Gilmer Terrace carpark and the Tiida trip that was intercepted in Taupō, and there are headings that relate to the different operations. But for our purposes it starts at page 43 and records that Mr Philip is 49, he's in a relationship with Ms Hayman, who was nearly half his age at 27. Mr Philip was the father of Mr McMillan's long-term ex-partner, Mr Philip and Ms Hayman became trusted associates of Mr McMillan's and assisted him by regularly travelling to Auckland to uplift methamphetamine and to deliver cash on his behalf. "On occasion Philip and Hayman would employ the services of their own associate, Steven Minns, to assist in the drug runs," and you'll see from Mr Minns' age at 47 that he, I think it was acknowledged that he would be an associate of Mr Philip.

The Operation Superdry introduction is at 44 and at the bottom of the page: "McMillan employed Philip and Hayman as couriers to complete delivery of money to Auckland and to transport the methamphetamine back to Wellington for distribution." So they're not drug mules in the classic sense where they're given a suitcase or a container and the direction is to take that from point X to point Y. There's a payment function here which is important, an important component of the round trips. "Philip and Hayman later engaged the services of Minns to act as a driver on their behalf in the transportation of methamphetamine."

Now that's, you know, that's clear. *They* engaged him on *their* behalf. "In order to avoid law enforcement, McMillan and his associates would use encrypted telecommunications that were unable to be intercepted by police to manage his lucrative drug dealing business." At the end of the summary we see that they had a BlackBerry phone in the Audi car in Taihape. "McMillan and his associate were very disciplined in their use of telecommunications that could be

intercepted. They would not talk on their phone other than for routine calls and, when required, would direct other parties to download –

WINKELMANN CJ:

Mr Burston, it's not necessary to read us through the whole thing. You can highlight particular ones. We have read it all.

MR BURSTON:

Okay. So Signal was used indicating the degree of sophistication, Hayman and –

GLAZEBROOK J:

It's not very sophisticated to actually download the Signal app and then invite your friends to joint. I just happens to be like WhatsApp encrypted in a different way from ordinary email, but it's hardly sophisticated to download an app and just start putting messages up.

1220

MR BURSTON:

Mr James had a network of Ciphr phones and Mr McMillan had one of those. Mr McMillan had a collection of BlackBerrys and he used those to communicate with his associates. So there was –

WINKELMANN CJ:

Yes but we're not dealing with them, we're dealing with Mr Philip, so if we can just focus on him.

MR BURSTON:

Mr Philip was one of the people with a BlackBerry.

WINKELMANN CJ:

Okay, so he was given a BlackBerry as part of this whole scheme, probably.

MR BURSTON:

To be able –

GLAZEBROOK J:

So again, you'd had burner phones. That's hardly – you could read any detective novel to know that you get burner phones rather than using your own cellphone, wouldn't you?

MR BURSTON:

It's not a burner phone, it's a –

GLAZEBROOK J:

Well I know BlackBerrys are different, but really…

MR BURSTON:

So we start with Operation Maddale on 47: "McMillan's associates were regularly travelling from Wellington to Auckland to deliver large quantities of money and uplift methamphetamine on McMillan's behalf." Those associates are Mr Philip and Ms Hayman. There were no other associates of Mr McMillan. As we'll see shortly, Mr Skinnon and Mr Millar were Mr James' associates, and they didn't take methamphetamine, they went to Wellington to collect cash from Mr McMillan, so James' associates, not McMillan's.

So McMillan acquired what we call the mule cars which were used by Mr Philip and Ms Hayman to transport the meth in the hidden compartments.

WINKELMANN CJ:

Well look, Mr Burston, we've got all the narrative but can you isolate the things you say show that this is not just a courier who's taking part in a broader operation, this is someone who's more towards a significant player side of things.

MR BURSTON:

On that page, just to reply to Mr Paino's point, James was assisted by his associates, Millar and Skinnon included.

WINKELMANN CJ:

Yes, so Mr Paino's point was that the Court of Appeal was wrong so that Mr Philip was the only person who had an association with Mr James, isn't it?

MR BURSTON:

One of Mr McMillan's associates to have an association with Mr James.

WINKELMANN CJ:

Okay, all right.

MR BURSTON:

He said Millar and Skinnon did as well, but they weren't McMillan's associates, they were James'.

WINKELMANN CJ:

Well why is that significant, that it was in –

MR BURSTON:

Well I'm replying to the point that Mr Paino –

WINKELMANN CJ:

I know, but you submitted in the Court of Appeal it was significant so I'm just trying to understand why it is significant that Mr McMillan's – he was the only one of Mr McMillan's associates to have an association with Mr James.

MR BURSTON:

Well Mr James was a drug kingpin who was delivering kilograms of meth not just to Mr McMillan but throughout the country, and the fact that Mr Philip was trusted to meet and deal with him is an indication that Mr McMillan reposed in him, in my submission.

So page 48, beginning 12 December and through the months following, Philip and Hayman "regular visitors to Bentinck Street…travelling…on six identified occasions. In each occasion they collected in the vicinity of two kilograms of meth for transportation to McMillan and on occasion paid cash for the

methamphetamine supplied." So although the sentencing was on the basis of six kilograms, the summary referred to in the vicinity of two, so the amount on which the sentencing proceeded was conservative.

The 12 December charge on page 49 refers to the contact that Philip and Hayman had at Bentinck Street where they "each removed a cardboard box containing an unknown amount of methamphetamine" and put it in the mule car, so they're actually collecting the meth on that occasion. James received cash, being –

WINKELMANN CJ:

Look Mr Burston, I do repeat, you don't need to take us through every single detail because we've read it. You can just highlight the things you say show that upper level of involvement.

MR BURSTON:

Okay. On – the second charge is the bottom of page 50, 19 December. 5 January, McMillan was out of the country during the period of the third charge being collected and transported from Bentinck Street, the delivery on the 16th of January, which was the third charge. The 24th of January charge is the fourth one that they were convicted of, that's at page 53. On the 30th of January, page 54, the Audi is collected and it was registered into Mr Philip's name that day. Now on that the evidence given by Detective Buckley at Mr McMillan's trial was that the Audi was valued at approximately between 10 and $12,000 when located by the police in Taihape on 10 May 2021. Now I simply put that in in response to Mr Paino's submission that it's now worth $4,000. There was actual evidence of the value at the trial and –

WINKELMANN CJ:

Which trial?

MR BURSTON:

McMillan's trial.

WINKELMANN CJ:

Well, how are we to take that into account?

MR BURSTON:

Well, if the Court accepts that it's worth $4,000 now from Mr Paino's submission, I ask the Court to accept from me that it was valued at 10 to $12,000 but –

WINKELMANN CJ:

Okay, so we would just not take into account anybody's submissions on that point, wouldn't we? We'd just look at the date of the Audi, which was two thousand and what?

MR BURSTON:

2006.

WINKELMANN CJ:

Yes. Because we couldn't really take either of those into account, could we, is your point?

WILLIAMS J:

What page are you on with the reference evaluations?

MR BURSTON:

50 – it's not…

O'REGAN J:

It's not referred to, it was just in the trial.

WILLIAMS J:

Oh.

MR BURSTON:

It's not – it's in the summary of facts.

WILLIAMS J:

So was there a motor vehicle valuer giving evidence?

MR BURSTON:

The detective from the Asset Recovery Unit gave evidence at McMillan's trial…

WILLIAMS J:

Oh, okay.

MR BURSTON:

And that was the value that was put on it by the Asset Recovery Unit, they –

WINKELMANN CJ:

I could just about give evidence on this because I owned a 2006 Audi.

MR BURSTON:

Judicial notice, your Honour.

WILLIAMS J:

What they say about old German cars is if you want to buy a second-hand German car you'd better be able to afford a new one.

MR BURSTON:

Page 55, so there's a trip on the 20th of February –

GLAZEBROOK J:

The internet is not particularly favourable to your submission, Mr Burston, on a quick look.

WILLIAMS J:

Now you've opened a Pandora's box, Mr Burston.

MR BURSTON:

I'm sorry?

WINKELMANN CJ:

Nothing.

GLAZEBROOK J:

I said the internet is not particularly favourable to your submission as to value, on a quick look.

WINKELMANN CJ:

We're not going – so, as you say, we can't take any of that into account, because that was your submission in the Court of Appeal, wasn't it, that the Judge couldn't take into account, the sentencing Judge couldn't take into account evidence she heard in the disputed fact hearing, just so we can't take into account evidence from trial or whatnot.

MR BURSTON:

No, my submission was that the Judge, if she was going to take into account evidence from the trial, then in fairness she had to also have regard to the evidence at the trial that supported the significant categorisation indicators.

WINKELMANN CJ:

All right, okay.

MR BURSTON:

So, 20 February, page 55, Mr Philip and Ms Hayman leave Wellington in the Audi, later that day they're closely followed into a service station in Tūrangi with the Nissan Tiida, the second mule car, driven by Mr Philip's son, shortly after both are heading north. Why it's put this way is that the information on Maddale for these trips came from a fixed camera at the front of Bentinck Street, so you'd see Mr Philip and Ms Hayman arriving and dealing there, and then also a significant source was the, or are service station CCTV cameras which pick up the registration number of vehicles, and the two vehicles, the Audi and the mule car, driven by Mr Philip's son, are seen there on the 20th of February. Ms Hayman returned to Wellington on the 24th of February with approximately two kilograms of methamphetamine, relevance that, it would appear, that

Mr Philip has involved his son to drive the mule car on that occasion on which a further two kilograms of methamphetamine is driven back to Wellington from Bentinck Street.

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The two kilograms of meth charge, which is in the Crown charge notice rather than one of the Crown charging documents, starts Sunday the 10th of March, page 57 of the summary of facts. So at 3 o'clock in the afternoon Hayman and Philip go to Palmerston in the Audi and the Tiida, driving in tandem. Ms Hayman's messaging Minns: "Get up, we are off, I'm leaving Wellington now, be ready to go to Auckland." So they're directing *him* to drive. In Palmerston Minns is given the Nissan and they travel in convey. The only reason inference from this is that they're distancing the driver of the car further from Mr McMillan and they're distancing themselves from the Nissan Tiida which is going to be the drug – which is going to come back with the methamphetamine in it. That's the only reasonable explanation for getting Mr Minns involved in the way that he was. The purpose of the trip: to collect a large amount of methamphetamine from James for subsequent supply to McMillan. When they get there the meth is put in and Minns stupidly drives outside the grace period he was given so the vehicle's suspended. They then make a booking to fly to Queenstown, after the time when the car's suspended, indicating that they had sufficient funds to make a quick booking for an air flight from Auckland for two people to Queenstown. Now it's at this point that this photograph comes into the summary but –

WINKELMANN CJ:

Yes, well, we've got that. That's the Mongrel Mob patch photograph with the 160,000 or 180,000.

MR BURSTON:

Yes. It's accepted fact that it's Mr Philip's patch.

WINKELMANN CJ:

Yes.

MR BURSTON:

And it was 160 not 180.

WINKELMANN CJ:

160,000 cash, yes, I said 60 or 80.

MR BURSTON:

Yes. But that's all out on the bed next to the patch, so the inference is that Mr Philip must be aware that on that one trip to Auckland that he's going up with Mr Minns, he's taking a very large amount of cash to pay for the methamphetamine that he's going top bring back. So that is very clear evidence that he's aware of the scale, in combination with the other evidence that he provided bags of cash to James.

GLAZEBROOK J:

But that's been conceded, is my understanding.

MR BURSTON:

Yes, but it's there in the summary of facts and has to be taken into account in determining whether –

GLAZEBROOK J:

No, I understand that. But you don't need to go over it because it's been conceded.

MR BURSTON:

Thank you. Page 61. After the vehicle is impounded, they drove to Palmerston, meet with the daughter, Juanita, Mr McMillan's previous partner. They then go back to Taupō, they travel back to Palmerston, they go to a meeting with Mr McMillan in Wellington, they go to Taupō where there's another meeting where they're discussing drones for the obvious thing of trying to locate where the seized car is. So that point about that is that they're not just couriers. Take this from X to Y, that's your job, that's all your involvement is. They are

heavily involved with McMillan, who's the leader of the group, in meetings following the –

WINKELMANN CJ:

Do you say these meetings are about anything other than the courier work and how it had gone wrong?

MR BURSTON:

They were about how to get the car back that they knew –

WINKELMANN CJ:

Okay, so they're talking about their function as couriers and they're trying to get the car back?

MR BURSTON:

They're supporting Mr McMillan to get to two kilograms of meth out of police custody before it's – out of custody before it's found, and they're doing that working as a group so that they are all protecting themselves from the serious criminal consequences of what they're doing. So it goes to awareness and…

WINKELMANN CJ:

Well, this is all conceded, Mr Burston, it's all conceded that they were couriering, that they had some sense of the scale of the operation.

MR BURSTON:

It's –

WINKELMANN CJ:

But this is…

MR BURSTON:

It's not –

WINKELMANN CJ:

But what you're submitting to us is that it's more than the courier role, it's somehow more, what?

MR BURSTON:

Part of a group of people working together to facilitate Mr McMillan being supplied with large amounts of methamphetamine to undertake his commercial drug dealing operation in Wellington.

WINKELMANN CJ:

Which is another way of saying that they were helping him with the drug operation but couriering the drugs.

MR BUSTON:

And then trying to help him get the –

WINKELMANN CJ:

The drugs delivered as they had agreed to do.

MR BURSTON:

Well, back from police surveillance and impoundment.

WINKELMANN CJ:

Right.

WILLIAMS J:

Your best point is that he enlists Minns and the son, isn't it? Apart from that this is –

WINKELMANN CJ:

It's bog standard.

WILLIAMS J:

– pretty standard already car-based courier operation and as far as the appellants say, and you may have a view on it, the fact that he didn't have

access to the concealed compartments or even perhaps, it's said, know where they were, suggests a relative absence of trust.

MR BURSTON:

He's trusted with $160,000. There's a high level of trust, and why is the trust there? He's not engaged because of a drug dealing relationship, he's not the user who's succumbing to the pressure of being asked into it by his drug supplier. It's because he's a father-in-law role to the principal offender and hence someone he can trust, not –

WILLIAMS J:

Well why doesn't he trust him with the – why isn't he the guy putting the material in the compartments and then extracting them at the end? Why is that not part of his job if he's that close and a father-in-law in a kind of mob operation?

MR BURSTON:

Well we don't know. For a start, James is in south –

WILLIAMS J:

Well you've got to be able to draw some inferences.

MR BURSTON:

Not James, McMillan's in South America when one of the deliveries happens and that's brought back down to Wellington by Philip and Hayman, so we don't know. Did they store the vehicle or did they retrieve the methamphetamine and do something with it? We simply don't know.

WILLIAMS J:

We don't know what, sorry? You don't know whether they did or didn't know about where it was?

MR BURSTON:

Whether or not they retrieved it from the secret compartment.

WILLIAMS J:

I thought the evidence was they didn't know where the secret compartment was?

MR BURSTON:

Well that's an inference that can be drawn.

WILLIAMS J:

Well though, with this game, it's all about drawing inferences, Mr Burston, and so we have to do this very carefully given what's at stake. Well, sorry, the sentencing judge does. They did not seem to know where those compartments were. The photo of the $160,000 cash next to the patch seems to suggest that this is a signal event in the operation. Sophisticated associates don't take photos of the ill-gotten gains and, you know, it's sometimes seen put up on Facebook.

MR BURSTON:

He's taken bags of cash to Mr James before.

WILLIAMS J:

Doesn't this suggest, all of this context suggests he is a bottom end operator, doesn't it? It seems reasonably straightforward to me that that's the position. He's a bottom player being used by McMillan. Remember, this is a pretty standard operation, as you'll know much better than me.

MR BURSTON:

Well he's not the bottom because he himself is employing Mr Minns to distance himself from the car when it's most vulnerable to the police.

WILLIAMS J:

Well, and that's why I said your best argument is the use of Minns and Philip, not all of these I think, what I might respectfully suggest are inferences running against other stronger inferences.

MR BURSTON:

Well it's the knowledge plus the involvement of others plus an operational role in the –

WILLIAMS J:

Right, so the question becomes whether the involvement of Minns and the son turn this guy, who on other indicators appears to be a bottom operator, into the transport manager of this operation. Now, on any analysis that's a jump. Might be right but it's a jump.

WINKELMANN CJ:

So that probably fairly summarises where you've got to, Mr Burston. So is there anything you want to say in response to Justice Williams, or anything additional to the facts that you've already taken us to in terms of placing him on the cusp between lesser and significant?

1240

GLAZEBROOK J:

Can I just check, you're really arguing the operation role can be inferred from the fact of operating while Mr McMillan was away, is that right?

MR BURSTON:

That's part of it, but it's not –

GLAZEBROOK J:

Well, what's the rest of it then, if that's only part?

MR BURSTON:

Well, he's engaged someone else at management function.

GLAZEBROOK J:

No, no, I understand – no, sorry. I think what I've written down in terms of what Justice Williams said was: "Not bottom, as employing Mr Minns and perhaps his son. Knowledge of the scale of the operation plus the involvement of others, being Mr Minns and his son, and an operational role." So the operational role,

is that inferred only from that shipment while Mr McMillan was away or is there something else?

MR BURSTON:

Well, he runs transport, so his job is to take cash from Wellington to James, the high-level supplier. He hands over the cash and delivers the car to Auckland where it can be loaded and then he argues for someone else, on two occasions at least, to then drive the vehicle back. He's not in it, he's arranging for another driver to –

GLAZEBROOK J:

Well, that's just the same way as saying he's employing two other people, isn't it?

MR BURSTON:

Yes, but it's –

WINKELMANN CJ:

I think it is, Mr Burston. Well, I think we've got –

MR BURSTON:

He's not simply a courier.

ELLEN FRANCE J:

It is only two occasions, isn't it?

MR BURSTON:

Two with Minns and one with the son.

WINKELMANN CJ:

Is that the three occasions or are two of those coterminous, one of those coterminous? Like, is there three separate deliveries that there are other people involved in or are there two deliveries?

MR BURSTON:

There's at least three.

WINKELMANN CJ:

Three deliveries…

ELLEN FRANCE J:

Well, this summary of facts only talks about three.

MR BURSTON:

Correct. The Judge found at the disputed facts hearing for Mr McMillan that there were seven trips that Philip and Hayman were involved in, with Mr Minns being involved in four trips in February. But we're not here to talk about that trial.

GLAZEBROOK J:

Well, we can't work on that, can we, because Mr Philip had no opportunity to counter that?

MR BURSTON:

Yes, accepted.

WINKELMANN CJ:

Right, so, Mr Burston…

MR BURSTON:

So the final bit on the summary is the quantities that are at 68 and 69, between six to 10 kilos of meth, the search warrant in Taihape on 70, the police radio scanner located in the bag, are just another example of planning to avoid detection. There was, as Mr Paino has submitted this morning, .25 of a gram of methamphetamine found in the pocket of a jacket in the bedroom occupied by them in Taihape. Mr Philip wasn't asked about that package, he was asked about another package, which turned out to be 28 grams of cannabis that was in Mr Haywood's bag and he acknowledged that it was theirs. There were no indicia of methamphetamine use located in the house or in their car.

So that is the summary, and the Crown's submission is that the Court of Appeal was entitled to make the statement and the finding that the indicia of significant participation was such that it couldn't be said to be below the level of at least the cusp of significant and lesser. Based on that summary of facts –

WILLIAMS J:

Do you say the lack of the wealth one would have expected of a significant player, particularly a transport operations manager, is irrelevant?

MR BURSTON:

Can I take the Court to the relevant passages of the various reports? There's nine passages that I can quickly go to.

WINKELMANN CJ:

Well, can you just tell us what the relevance of taking us to them is first and then we'll go to them?

MR BURSTON:

The alcohol and drug report shows that he has a serious gambling addiction so relies on other to provide money to relieve desperate financial situations caused by gambling. Now the payments are going to be in cash. They're not going to be put into a bank account, and so just because the police don't find cash doesn't mean that there is cash.

WINKELMANN CJ:

Isn't cash?

MR BURSTON:

That there isn't cash. I mean the other way that you can look at it, though –

GLAZEBROOK J:

Would it be legitimate to infer from a gambling addiction that, in fact, the Crown has shown that there were large payments of cash?

MR BURSTON:

He was on a benefit. He's got a major gambling problem: "Needing to gamble with increasing amounts of money in order to achieve the desired excitement… repeated unsuccessful efforts to control…". So where does he get the money from? An explanation for the source of the money would be the cash payments for the role that he's undertaken.

GLAZEBROOK J:

Well he's only had that for a short amount of time, he's had the gambling addiction for a lot longer, so you've got to ask where he got the money earlier as well presumably?

MR BURSTON:

Yes you could.

WILLIAMS J:

Mr Burston, this is pokies. Come on. They're $2 slot machines.

WINKELMANN CJ:

Anyway. I think we've got your submission on that point Mr Burston.

MR BURSTON:

All right.

WILLIAMS J:

You can compare this with, say, *Smith* and *Berkland*. Or, you know, in the *Berkland* cluster of offending and he owned a courier. This guy seems to have nothing except a 2006 Audi.

MR BURSTON:

He's 49 years of age, he's been asked to take this role on by his son-in-law, and it's risky, and he knows it's risky, because he's getting someone else to do the bulk of the driving.

WILLIAMS J:

Absolutely, you'd be an idiot if you didn't know that.

MR BURSTON:

Yes, but you'd also be an idiot not to get proportionately rewarded for it.

WILLIAMS J:

Well there, that's exactly the point.

MR BURSTON:

A car, cash, methamphetamine, you're going to be rewarded for it, and there's a difference in this case form –

WINKELMANN CJ:

In your written submissions you say, you refer us to Court of Appeal authority which says that it's for the defendant to show they didn't make money, there's an inference you make money when you deal with large amounts of methamphetamine, don't you?

MR BURSTON:

There's an inference that he would've been paid a proportionate amount of money for the risk he was taking. He wasn't actually dealing the meth so it wouldn't be a slice, a share of the profits because it was Mr McMillan's business, but it would have been a proper fee for taking the risk involved in driving up to Auckland to get a large amount of methamphetamine and to drive it back to Mr McMillan. That is, in terms of *Zhang*, an aggravating factor in terms of the motivated solely or primarily by financial or other advantage.

WINKELMANN CJ:

Well there you would have to prove an aggravating factor beyond reasonable doubt for a sentencing judge, wouldn't you?

MR BURSTON:

Correct, and paragraph 127 of *Zhang* says: "In practice the facts necessary to establish guilt often justify inferences about role, knowledge and gain."

WINKELMANN CJ:

Beyond reasonable doubt.

MR BURSTON:

Yes: "Where these inferences are sufficient to prove an aggravating fact," in my submission it is. What he's done is sufficient to prove the aggravating fact that he has, there's some advantage to him in terms of indicia 3 of significant in being involved in this. "Where the inferences are sufficient to prove an aggravating fact, an evidential burden will move to the offender to displace the inference."

WINKELMANN CJ:

Well I mean they have to be complying with the Sentencing Act. So it would have to be that there are inferences available beyond reasonable doubt and then the offender is under a duty to displace it. There's not some new approach on this basis that *Zhang* can introduce overriding the Sentencing Act.

MR BURSTON:

Of course. The Court is referring to section 24, the disputed facts provision. 1250

WINKELMANN CJ:

So all you need to say on your submission is that there is an inference available here that he was motivated by profit, and the Court of Appeal…

MR BURSTON:

Putting it too high. Simply motivated solely or primarily by advantage, financial or other advantage. We're not suggesting and don't need to suggest that he was going to get a commercial profit from it, which was –

WILLIAMS J:

I thought you were suggesting that.

GLAZEBROOK J:

Yes, that's what I thought too.

WINKELMANN CJ:

I mean, I must say that is exactly what you have been submitted to us for about the last 10 minutes, Mr Burston.

MR BURSTON:

Number 4 is "actual or expected commercial profit", number –

WINKELMANN CJ:

But are you now submitting that it's an aggravating factor that he was motivated solely or primarily by a design to get methamphetamine? Because it's either methamphetamine and addiction or profit.

MR BURSTON:

Well, profit is in this context, it's about drug dealing, would be that you buy a drug for X and you sell it for Y and you make the profit, that's what McMillan was doing, and it's either commercial profit or, in leading, substantial financial gain selling on a commercial scale. So it's large commercial profits for leading, it's any commercial profits is one of the indicia for significant. But that's separate for –

WINKELMANN CJ:

So you are saying commercial profit.

MR BURSTON:

Well, I'm saying I don't need to tick that indicia or get to that indicia and I didn't –

WINKELMANN CJ:

But can you say what you are saying then, Mr Burston?

MR BURSTON:

Well, he's motivated primarily by financial or other advantage.

WINKELMANN CJ:

That's not really good enough, if you're asking us to be satisfied that this advantage was proved beyond reasonable doubt by way of inference. What is the advantage?

MR BURSTON:

The proposition is he wouldn't have done it unless he got an advantage out of it. He hasn't said the police weren't intercepting phone calls from him, they were using encrypted apps, we don't know what he got. But it's a safe inference, it's the only reasonable inference in my submission, that he was getting some form of advantage from his involvement in the scheme.

WINKELMANN CJ:

Yes.

GLAZEBROOK J:

Well, some form of advantage isn't really good enough, is it?

MR BURSTON:

Well…

GLAZEBROOK J:

Because earlier you were saying the inference is that he's being paid commensurate with risk and that therefore that was proved beyond reasonable doubt and could be used as an aggravating factor or at least to put someone in the role.

MR BURSTON:

That's correct. The only difference, it's not profit unless you say that it's his services that he's laying out and he's getting paid so that's the profit that he's making from it. I'm just –

GLAZEBROOK J:

Well, the Judge's finding was that he was motivated, and Ms Hayman, by methamphetamine addiction.

MR BURSTON:

Yes.

WILLIAMS J:

So I think the hurdle you have to overcome is this. Your pitch is that he is the operations transport manager.

MR BURSTON:

Yes.

WILLIAMS J:

You therefore are bound to be able to establish beyond reasonable doubt that the surrounding circumstances support that finding. Among those will be financial advantage. Because he's not a low-level operator, he's the transport manager.

MR BURSTON:

Correct.

WILLIAMS J:

Now you say you can just assume that because there's so much methamphetamine involved, and perhaps you could –

MR BURSTON:

Not just assume, but you can make that proper inference from his knowledge of the amount of cash that Mr McMillan is obtaining.

WILLIAMS J:

Correct, yes, all of that. What runs against you on that is the absence of wealth, you have to grapple with that. It's not enough to say: "Well, he's got a pokies problem."

MR BURSTON:

It's not enough in itself, but he's on a Jobseeker's benefit, he has an Audi motor vehicle, he is –

WILLIAMS J:

Yes, I mean, sure, he's – I think it must follow that he's getting some money.

MR BURSTON:

He's got money to gamble.

WILLIAMS J:

Sure.

MR BURSTON:

Yes.

WILLIAMS J:

But you've got him pitched as the operations manager, not as just a courier, and those indicators get you to the courier, he's going to get some money, but they're not going to get you to the guy who runs the transport infrastructure for the operation.

MR BURSTON:

Well, Mr McMillan didn't.

WILLIAMS J:

Because Smith, look at Smith, look what he owned.

MR BURSTON:

Mr McMillan didn't. I mean, the person who was running the transport operation was Mr Philip, we know that from what he did, he –

WILLIAMS J:

Right, so, but in order to get that, to get the inferences available from low-level courier that drags along Minns and so on, to your characterisation as transport operations manager, it does seem to me that you have to explain the absence of the launch, the classic cars, blah blah blah, and the access to cash in relatively large sums because that's what you'd expect of someone operating at that level with, what, two kilos, what was it, every couple of weeks?

MR BURSTON:

Well that's what he's delivering but he's not selling it.

WILLIAMS J:

No, I know, but you have him pitched high up.

MR BURSTON:

If there's an expectation of substantial financial gain, that's indicia 4 for leading.

WILLIAMS J:

Yes, but your –

MR BURSTON:

It's just financial gain. That puts you in as significant.

WILLIAMS J:

Well it's not that – well, perhaps so, but you've got him as operations manager and not courier, and I just want you to establish why it is that you can ignore the absence of wealth given that you say he's the operations manager.

MR BURSTON:

Well it's the question of labelling getting in the way. He's got an operational function within a chain. That's indicia 1.

WILLIAMS J:

So has a courier, just a plain courier. That's why it's important to get to the nuances here and not let the labels divert us from properly assessing culpability.

MR BURSTON:

Okay so nature of the couriering, he has taken up $100,000 plus to pay for it.

WILLIAMS J:

Sure.

MR BURSTON:

He's dealt with the kingpin. He's brought six kilograms of methamphetamine down into Wellington. That makes him not just a courier, it makes him a substantial vital part of Mr McMillan's drug dealing business before Mr McMillan's previously been imprisoned for drugs and he can't be linked to the transport operation.

WILLIAMS J:

I see. So you say those other factors mean you can ignore the apparent absence of wealth?

MR BURSTON:

The apparent – yes, I do.

WILLIAMS J:

Okay, thank you.

MR BURSTON:

Because it's not necessary to include that. It's just one of the indicia, and –

WINKELMANN CJ:

So we've heard quite a lot from you on role, I think we've got your position pretty clear and it's 12.57, Mr Burston. How are we going with what you're covering? You've dealt with role. So you were going to look at the stage 1 analysis?

MR BURSTON:

One more point. When one reads the reports it's very clear to a number of the report writers he's saying: "I decided to get involved, I chose to get involved." There's inconsistencies about whether he was an addict at the time or whether he became an addict as a result of the large quantities of methamphetamine that became available to him, but –

WINKELMANN CJ:

Well can I just say on this, Mr Burston, and I think I should tell you out of fairness to you, there was a factual finding that his addiction was linked to his offending.

Did the Crown dispute the account given on behalf of Mr Philip that he was addicted?

MR BURSTON:

Which account? Because –

WINKELMANN CJ:

The claim at sentencing which was part of the sentencing argument and that he should be given credit because his offending was linked to addiction. Because that's a mitigating factor and in terms of the Sentencing Act, if you dispute it you should put the parties on notice that it's disputed. It's not a sort of free-flowing thing where you can decide to dispute it at one point or the other. You actually have to dispute it at that point so that Mr Philip could then have provided his affidavit and you could have cross-examined, or whoever it was could have cross-examined and then the judge could have made a finding, as opposed to a sort of, another approach.

MR BURSTON:

I didn't appear at the sentencing.

WINKELMANN CJ:

No, I appreciate that.

MR BURSTON:

The defence sentencing submissions where they say this was all addiction-driven, no financial gain, came in close to sentencing. It had already been delayed for months. So my –

WINKELMANN CJ:

No, but Mr Burston, that doesn't relieve the Crown of the obligation to give notice as has always been done, that they dispute that if they do in fact dispute it.

GLAZEBROOK J:

So as I understand, the alcohol and drug report came before the adjournment?

MR BURSTON:

Yes it did, it came early but from the reports – my submission is, and my submission is a fair one, that there is a level of inconsistency in the various reports that Mr –

GLAZEBROOK J:

Well there might be, but the point I think the Chief Justice is asking you was, was that contested at the sentencing by the Crown, as it would have to if it wanted to contest that?

1300

MR BURSTON:

No.

GLAZEBROOK J:

Well, why can you now, do you say, contest it on appeal?

MR BURSTON:

I'm not. The submission that I was making was that based on paragraph 127 of *Zhang,* the Crown was entitled to rely on the justified inferences as to gain available from the agreed summary of facts and that there was no evidential burden discharged to rebut those facts because there was no evidence, reports are not evidence. However, it's – and I'm sorry that the discussion's taken too much time – because it's not necessary to decide that for the appeal and it's accepted that the Crown didn't challenge it and that the sentencing proceeded on the basis that Mr Philip did have, that the offending was motivated/driven by his addiction. However the Court of Appeal acknowledged that and the most important point is that, at paragraphs 142 and 144 of the judgment under appeal…

WINKELMANN CJ:

Is it 122 and 144?

MR BURSTON:

142 and 144. "The new factor was that reports subsequently provided satisfied the Judge that Mr Philip's offending was driven by his addiction to methamphetamine. Given the other features of his offending, that could not justify a starting point 40 per cent lower than the bottom of band 5." Paragraph 144: "…giving credit for each of the factors relied on by the Judge to characterise Mr Philip's involvement in the lesser category and in particular the Judge's view of it being addiction-driven offending, it could not be put any less than on the cusp between lesser and significant involvement." So –

WINKELMANN CJ:

Okay. So is it the case then that the Court of Appeal also accepted that his offending was driven by addiction?

MR BURSTON:

Yes. But because of the other indicia of, that put him fairly in the significant category on the cusp.

WINKELMANN CJ:

Okay. But that means that all of the submission about wealth and what we can infer is reasonably irrelevant because we can't re-visit on this level and find…

MR BURSTON:

I've acknowledged that.

WINKELMANN CJ:

All right. Well, I think we'll take the luncheon adjournment now. So what timing…

MR BURSTON:

Can I make the submission, though, that from the Crown's point of view when in *Zhang* the Court of Appeal acknowledges that it's difficult for the Crown to prove guilt, and we rely on an agreed summary of facts where an indication is given or guilty pleas are entered as the factual basis for sentencing, then to get

a submission relatively late in the piece that: “Oh, this was all addiction-driven offending and there was no profit,” makes it difficult, it’s difficult to contend with because then, as your Honour observes, the onus is on the Crown to dispute it, which is going to delay the sentencing. So my submission is that why I’ve been raising this point is if it was possible to get some guidance as to the appropriate procedure where the defence are going to be asserting the mitigate fact –

GLAZEBROOK J:

Well, you're not going to assert it at the time of the summary of facts because you can’t imagine saying: “Will you please put in the summary of facts that I’m motivated by addiction,” because, as has rightly been pointed out, that has to be on the – well, not has to be, but would normally be on the basis of reports.

MR BURSTON:

Well, it’s an asserted mitigating fact and –

GLAZEBROOK J:

Which has nothing to do with the first stage of sentencing, which is subject to the issue of role here.

WINKELMANN CJ:

So your point is that you actually, although addiction was floating around in the ether, the submissions, defence submissions which crystallise it in the point that addiction was a driving force of this offending, came quite late?

MR BURSTON:

Relatively new, Rule 5A, Criminal Procedure Act Rules, the summary of facts has got to be sorted out within a short timeframe after the entry of the guilty plea and, if the mitigating fact relating to culpability role, addiction, is going to be relied on, it should happen much closer to the entry of the guilty plea than in the week or so before sentencing for all the obvious reasons. But – and I’m sorry to go into the lunch hour – the point is the Court of Appeal accepted it here so it’s not, it doesn’t drive the appeal.

WILLIAMS J:

Are you saying that addiction has to be in the summary of facts?

WINKELMANN CJ:

No, he's not, he's not saying that.

GLAZEBROOK J:

It can't possibly say that.

MR BURSTON:

No, but I would say –

WINKELMANN CJ:

I think we've got it clearly. Right, we'll just take the lunch –

MR BURSTON:

– there should be an affidavit so then the Judge can give an indication of what weight would be placed on it and the Crown can decide whether it's going to be challenged and whether a disputed facts hearing is necessary at that stage, because we shouldn't be getting to sentencing until a factual basis for sentencing is sought.

WINKELMANN CJ:

Okay, thank you, Mr Burston, we'll take the luncheon adjournment.

COURT ADJOURNS: 1.06 PM

COURT RESUMES: 2.17 PM

WINKELMANN CJ:

Mr Burston.

MR BURSTON:

Quantity, where it sits, are the two other topics that I will address as briefly as I can. So it remains true that quantity is the first determinative sentencing under

the *Zhang* guideline, paragraph 103, and this guides the stage 1 analysis. The applicable band and position within band is assessed first based on quantity and then movement within band or below band depending on an overall assessment of the second factor role.

Principles of denunciation, deterrence, accountability all strongly attach at this quantity analysis stage. Where there are large quantities of methamphetamine involved it is highly relevant to culpability because it is indicative of harm and/or potential harm to the community and it's also an indicia of commerciality, which deserves greater denunciation because of large potential for achievement of – large quantities involve a potential for or achievement of large illicit profits by offenders selling a dangerous, illegal drug. So those are the two reasons why the Court of Appeal in *Zhang* said that quantity was an important determination to adjust the starting point at initially.

The Crown submission is that this first culpability factor quantity does not depend on personal profits to the offender being sentenced. That comes at the role analysis stage and is only one of the considerations in role analysis. Here, the quantity is six kilograms, so it's in the top band, with a starting point range of 10 years up to life imprisonment. The quantity is three times more than the entry point quantity of the band, so the starting point based on quantity alone is, as the Court of Appeal held, well within band 5.

The potential for social harm caused by the six kilos of meth, partly paid for and collected by Mr Philip and then delivered or attempted to be delivered by him, was very high in this case, so over $7 million of social harm calculated using the Ministry of Health Drug Harm Index, referred to at paragraph 80 of the *Zhang* decision.

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In Mr Philip's involvement in transporting six kilograms of meth, the person, as it was put before lunch, who ran the transport infrastructure for Mr McMillan's Wellington based operation, his role was important in allowing Mr McMillan to make his large profits from large scale commercial drug dealing, which activity

requires denunciation. So at the quantity stage, one looks at what is it that this offender, by engaging with the dealing in this large amount of drug, it's not only the social harm, it's the fact that you're lending support to high-level commercial sale of a dangerous pernicious drug.

WINKELMANN CJ:

You can assume that we know all this stuff, Mr Burston, because we do know this stuff. We've read *Zhang*, we understand the points.

MR BURSTON:

Right, so we're well into band 5.

WINKELMANN CJ:

That's your submission, fine.

MR BURSTON:

The next stage, we've looked at quantity, we've looked at role, assessment of the starting place within the band. Paragraph 123 is the most important paragraph of *Zhang*, in my submission, on going below band. So the bottom half of this where, over the page: "Access to the lower sentence starting points may be expected only by those whose role is found to be lesser in degree, and where quantities are at the lower end of the relevant range." Not the case here.

We record that although the new entry points are intended to encompass most cases of low culpability in setting a starting point, we don't exclude the possibility of a case involving minimal participation, which might fall below even those entry points. Two such cases historically; the *R v Phillips* [2018] NZHC 2119 appeal before us raises this very issue. Other cases in future when necessary to do justice in a particular case. Now going to *Phillips* in *Zhang*, which is at –

WINKELMANN CJ:

So is your point that the Court of Appeal in *Zhang* was saying that even low people will normally stick inside the band? Like, low-level involvement, people will still stick inside the band they start off in?

MR BURSTON:

The new entry points are "intended to encompass most cases of low culpability" in setting a starting point, and the lower ends of the band are only going to be available to those in a lesser role. So yes, that's what they're saying.

GLAZEBROOK J:

Actually, that's not really how I understand that sentence or that paragraph.

WINKELMANN CJ:

It's hard to understand, possibly.

GLAZEBROOK J:

Because it can't possibly be saying if the leader is at the bottom end of the band everybody has to be at the bottom end of the band because you can only – unless they have a minimal participation and that doesn't make any sense. The way I understand it is you can actually go lower and lower into another band if you like, if your role is lesser in degree, and – because if you're way at the top of the band with quantity then obviously you're going to get in the band below unless you've got minimal participation. But if you're at the lower end of the band then of course you can go below with lower participation, because otherwise it doesn't make any sense to have a role differential.

WINKELMANN CJ:

Exactly. Well if it doesn't make any sense if the band's based on weight, and suddenly you're actually acting as if it's based on role.

MR BURSTON:

Well my submission is that looking at this case where three times the entry point and where at the cusp of significant lesser, I accept that's a question that the Court will be looking closely at but that's where the Court of Appeal got to,

even accepting that the offending was driven by methamphetamine addiction. So we're not at the lower end of the band, and this paragraph says that access to lower entry points is going to be "expected by those whose role is found to be lesser in degree". And the important in my submission is that the reference to cases involving minimal participation which might fall even below those entry points is important, because that's what the Court of Appeal was contemplating, and expressly by reference to *Phillips*, and *Phillips* –

WINKELMANN CJ:

Well, can just test this just quickly? Just so I can understand what you're saying. So say in relation to somebody they land up just on quantity but they're also a leader at 10 years. What are you saying happens to the people who are down below them in the chain?

MR BURSTON:

How much – well, to be in band 5 the quantity has to be at least two kilos, and if you're a leader in that you're not going to be at the bottom of, you're not going to be at 10 years. If you've got two kilos and you're a leader then you're going to go up to the top. Remember, band 4 finishes –

GLAZEBROOK J:

So, sorry, so where do – so you're saying two kilos is just quantity and then you go up and down from the bottom of the band depending upon whether you're a leader?

MR BURSTON:

Two kilos is the bottom quantity, it's the entry point quantity.

GLAZEBROOK J:

Well, no, I understand that. But what – so you're just – well, so you're a leader and you're two kilos. Do you say you don't go to the bottom of that band, you go somewhere further higher up?

MR BURSTON:

Yes.

GLAZEBROOK J:

all right.

MR BURSTON:

Because if it was –

GLAZEBROOK J:

And where does that come out in *Zhang*?

MR BURSTON:

Excuse me. If it was 1.99…

GLAZEBROOK J:

Where does that come in *Zhang*?

MR BURSTON:

If you're a leader in band 4, 1.99, then the top of the scale is 16 years.

WINKELMANN CJ:

Yes, Mr Burston. What Justice Glazebrook is saying is that when you look at *Zhang* on its own terms it's talking about weight. So where does it come that, say if you're at the bottom of the band in terms of weight, where in *Zhang* does the Court say that you should lift up nevertheless if you're a leader? So say you've got two kgs, where's it say you go up from that stop 10 years because you're a leader? I'm not – this is not a trick question, because I mean I think *Zhang* is quite difficult on this point.

MR BURSTON:

Well, look, if you were less, so you're a couple of grams less and you're into band 4, then if you're a leader in band 4 with the top quantity, you're looking at, the range goes up to 16 years. I'm not saying you would get 16 years but it's well above, I think it starts at eight, doesn't it? So you are trying to make an assessment and my submission would be the bottom of the band, the 10-year

entry point, is for amounts over two kilograms, and if you've got a – the bottom of that band would be your bog-standard lesser role with your lesser amount…

WINKELMANN CJ:

So your point is that it's a necessary inference of the fact that there is an overlapping of the sentencing ranges between the bands, is it?

MR BURSTON:

Well, in response to Justice Glazebrook's point I don't accept that a leader with two kilograms of methamphetamine would have a starting point at 10 years, it would be higher than that, giving flexibility for those with significant or lesser roles to come in below that.

WINKELMANN CJ:

And the fact that there is this overlap between the sentencing ranges supports that argument, doesn't it, because of the fact you can get a higher sentence?

MR BURSTON:

Yes, it does.

WILLIAMS J:

Well, the point is the Court of Appeal in this case set it lower than 10 years.

MR BURSTON:

Yes, they did, they said that nine would have been generous and they only brought it down to eight because the indication had been accepted and it would be awfully complicated to impose a greater sentence, you'd have to re-visit the plea, et cetera. But –

WILLIAMS J:

Of course. But they did – I mean I think, although they were relatively firm about the categories, the Court of Appeal doesn't say these are three separate buckets. They're a spectrum on a continuum.

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MR BURSTON:

Yes, because there's got to be flexibility in sentencing, it's not a mechanistic exercise, et cetera.

WILLIAMS J:

Correct. So it take you back to the facts and careful analysis of the fact without box-ticking.

MR BURSTON:

Yes. And it comes back to a consideration of what the Court of Appeal intended in *Zhang* when they re-calibrated the bands, et cetera. And what they're saying is they don't exclude the possibility of a case involving minimal participation falling even below the entry points, notwithstanding that the bottom of the entry points is intended to cover most cases of lesser culpability for quantities in that band. And if we go to *Phillips* we see that it was characterised by the defence lawyer at 215, para 215: "…she did not own the drug and was merely acting as a driving companion for Mr Smith," "Her input in the offending was minimal," so that's the defence characterisation. And at 217: "As mentioned, the Judge accepted that Ms Phillips accompanied Mr Smith out of a sense of loyalty," so the starting point there, five years "was generous". The Judge, paragraph 218: "The Judge applied a starting point of five years' imprisonment, well below the entry point, because of his appreciation of the very limited role played by Ms Phillips in an operation essentially conducted by Mr Smith." So that's the minimal participation that was envisaged by the Court in *Zhang.*

WINKELMANN CJ:

Okay, all right, so I think we've got your submission. So you're saying that Mr Philip isn't of the kind of below the level of, bottom of band 5 –

MR BURSTON:

It's a long way from minimal participation.

WINKELMANN CJ:

Okay, so we've got that submission. So is there anything else you want to say, Mr Burston? Just mindful of the time.

MR BURSTON:

Yes, I understand.

So the Court of Appeal referred to the other cases to check their conclusion on a starting point, we discuss those at paragraph 67 of the written submissions. We address parity at 68 to 75 and our submissions are fully set out as the defence ones are. Ms Hayman's starting point was set because the Judge considered that her role was analogous to that of Ms Phillips, and plainly that isn't correct if the Court accepts my characterisation of Mr Philip's role as not being minimal participation or a very limited extend of participation.

WINKELMANN CJ:

So the Crown at sentence said that Mr Philip's partner's role, Mr Philip's partner and Mr Philip are absolutely the same in terms of culpability?

MR BURSTON:

Yes, and that the starting point for Ms Phillips – Ms Hayman – was too low, because it wasn't analogous to *Phillips.*

WINKELMANN CJ:

No, no, I'm say at the sentencing hearing. So you accept that still, you still say that they're the same? Because I imagine you wouldn't want to be changing the position from what you said at sentence, you still accept that she's –

MR BURSTON:

Of course not, we –

WINKELMANN CJ:

– as culpable as him?

MR BURSTON:

Yes, and the send was too low. Because it was set by reference to the *Phillips* case and it's not analogous to the *Phillips* case.

WINKELMANN CJ:

But the Court of Appeal didn't proceed on the basis they are equally culpable, did it?

MR BURSTON:

I believe it did, and just said that it's not appropriate to reduce one inadequate, manifestly inadequate sentence, to the level of another because the parity requires an assessment of public confidence in the outcome and to reduce another manifestly inadequate sentence, to reduce another sentence to a manifestly inadequate level is going to be contrary to that interest.

WINKELMANN CJ:

Okay.

GLAZEBROOK J:

Although the other point is that having to, having the Crown choose which one they're going to –

WINKELMANN CJ:

Appeal.

GLAZEBROOK J:

– appeal as against another one, might land up with a perception of unfairness on the part of the public.

MR BURSTON:

Well, that's not the way that the Court of Appeal looked at it. I accept that that's a way that has to be taken into account, but if the public – first of all the Hayman sentence was, I think, 26 March, Mr Philip's was in September. So there was quite a time gap between them, and the question of whether Ms Hayman's sentence should be appealed had to take into account that not only had she not

been to prison before, and the Crown is well aware, and she is, that the courts, it's almost an imperative not to put people in prison who haven't been in prison before because there's so much that can go wrong with that. Not only that, she didn't have any previous convictions at all and she was about to have a child, or had just had a child. So the considerations of the likelihood of success of appealing her sentence and bearing those considerations in mind are different in my respectful submission in relation to Mr Philip, who as the Court observed has had a number of prison sentences relatively recently.

ELLEN FRANCE J:

Do you say that the Court of Appeal found that the sentence imposed on Ms Hayman was manifestly inadequate?

MR BURSTON:

They didn't need to, but as I recall it, that's the language that they use when addressing the parity point.

ELLEN FRANCE J:

They do in terms of referring to your submission.

MR BURSTON:

Yes, well they certainly – I mean, my submission is it's a straightforward analysis. The Judge said that she considered the most analogous case was the *Phillips* case and applied a starting point slightly – six years instead of five, but it's not analogous to the *Phillips* case because that was truly the case of minimal involvement, very limited extent that the Court of Appeal's talking about in the passage that I've just referred to, and these repeated trips to Auckland, the carriage of cash, the knowledge of the scale of the operation et cetera, you can't make a very limited involvement conclusion about Ms Hayman's involvement once you accept that there's nothing to distinguish her from Mr Philip, apart from their age and life experience.

WINKELMANN CJ:

Okay, so what other submissions did you wish to make, Mr Burston?

MR BURSTON:

Only to conclude the Crown submission at 66 of the written submissions, expresses the Crown position that a starting point "one year below what he submitted was appropriate on his own behalf at the sentence indication", and 20% below the entry point for the band can be seen as generous.

WINKELMANN CJ:

Well I mean, his submissions at the sentence indication are completely irrelevant aren't they, Mr Burston, because that was before the counsel had received the reports? I don't think there's any kind of an estoppel operating against Mr Philip.

WILLIAMS J:

They were caveated on receipt of the reports, weren't they?

MR BURSTON:

The summary of facts was accepted, as I've shown. It was put before the Court on 27 January, this can be the basis on which the sentence indication is to proceed, that sentence indication was then accepted and that was the factual basis for sentencing. In characterising that in the written submissions for the sentencing indication, the defence said he had a significant role but it is submitted "towards the lower end of that classification". It's submitted he fits into the bottom part of the second category on the operation or management function of the chain referred to in paragraph 115 of *Zhang.*

There's no evidence of any sums of money that he was received: "Clearly he would have received something but it was never much more than a relatively modest amount." So I'm submitting that even notwithstanding the new information about offending driven by methamphetamine addiction there was still an acceptance of the significant indicia by experienced counsel, because, my submission, the Court of Appeal were right to come to the conclusion that it couldn't be less than the cusp between significant and lesser given what he did over an extended period and having regard to the quantities involved.

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WINKELMANN CJ:

So who is going to address us in relation to those points, that point that I raised with Mr Paino, which was in relation to the Solicitor-General's appeal?

MR BURSTON:

My learned friend will. Thank you your Honours.

WINKELMANN CJ:

Ms Mildenhall, feel free to take your mask off.

MS MILDENHALL:

Thank you your Honour. Tēnā koutou, may it please the Court. I will be briefly addressing your Honours on the issues of the discounts. I'll be relatively brief on that, given that there is the 30% discount is accepted generally. I'll also refer to the issue about the time on remand in custody, and then deal with the questions your Honours may have about Solicitor-General appeals.

So the Crown's written submissions in relation to the 30% discount for personal circumstances is at paragraphs 79 to 86, and in the case on appeal in this decision by the Court of Appeal, which is the Supreme Court case on appeal page 35 at 94, the Court said in relation to the co-offender Mr Taui's appeal, a statement of principle that I don't think there is any argument with either, that: "Assessments of discounts for personal circumstances are idiosyncratic, focusing individually on all the circumstances of every offender who offers such matters in mitigation. All of a range of matters are to be weighed against the circumstances of the individual's offending." And the Court here also noted that the higher the degree of commerciality involved in methamphetamine supply offending, the less matters of depravation and adverse upbringing can be weighed in favour of a discount for personal circumstances.

Now here, in the Crown submission, the Court of Appeal correctly identified that 30% is at the upper end of discounts generally given for personal factors such as those that were detailed in the reports that were before the Court. However, the Court of Appeal acknowledged, and this is at paragraph 149, page 51 of the

casebook that a meaningful discount was warranted here based on the section 27 report, together with the other materials that were before the Court, and that meaningful discount encompassed consideration of the issues of Mr Philip's difficult background, his cultural alienation, the issues of addiction, and the steps that he had taken and efforts that he had made towards rehabilitation.

Now it's very common for sentencing courts to take account of all materials put before the Court together, and assess them with a global discount in mind. It's often the most appropriate course to take because factors such as addiction, cultural alienation and systemic depravation can overlap and interconnect with factors such as efforts made to rehabilitate expressions of remorse and, in appropriate cases, any making of amends, and in the Crown submission this was one such case, where it was appropriate to look at all of those things in the round.

WINKELMANN CJ:

Can I just ask you about your proposition which I accept you were just picking up from the Court of Appeal judgment, but the more commerciality, the less mitigating factors can be weighed. But that can't be right, can it, for the truly minor. So if someone is involved in a large operation, that they are a vulnerable dupe doing some menial task, that doesn't meant that you can't, you can weigh their vulnerability and other mitigating factors less, because they're involved in a commercial task. It's much more sensitive than that, isn't it?

MS MILDENHALL:

That's absolutely right, and again it's a matter of looking at all of the factors that are impacting on the offending and weighing them in balance. Again, the Court of Appeal in *Zhang* recognised that mitigating factors all may need to be considered in combination and the Court did exactly that in relation to Ms Phillips' appeal, one of the *Zhang* appellants.

At paragraphs 223 to 224 of *Zhang*, the Court discusses the discount that it applies there. It reflected all of Ms Phillips' personal circumstances, which

relevantly were the significant trauma in her past, its contribution to her mental health and addiction issues, the contribution of those mental health and addiction issues in turn to her offending, the fact that her PTSD may mean imprisonment would be more severe for her and also the Court considered the progress she had made towards rehabilitation. So that 30% that the Court allowed as a discount for her personal circumstances were in totality.

However, essentially, I don't understand there to be a great deal of difference between my learned friend's position and the Crown's position on whether that discount should have been higher. The real point made by the appellant is that there was an extra 10% that the Court of Appeal determined was not justified for Mr Philip's children. The Court of Appeal in the Crown submission didn't err in concluding that that additional 10% discount was made without justification, and this is at the Crown written submissions at 87 to 92.

Discounts of this type are rare as the Court of Appeal emphasised in *Fukofuka v R* [2019] NZCA 290, which is in the Crown's bundle, page 308 to 309 is the point I'm referring to, 47 to 48 paragraphs: "Where the offending is serious and premeditated" or protracted, "the impact of the sentence on the family of the offender plays little" role. Further, such discounts usually are only given in circumstances where imprisonment is going to deprive a family of the primary caregiver. Mr Philip here is not the primary carer and there's not likely to be the kind of exceptional hardship that is normally required. Ms Hayman remains available as carer to the children and she has wider whānau support, and the report that is at the Court of Appeal case on appeal referred to the fact that it was likely that the "quality of care" for the children will continue even if Mr Philip is imprisoned. That was at page 141 of the case on appeal.

So in the Crown submission, the Court of Appeal properly recognised that the sentencing judge erred in allowing this additional discount, which attributed to the overall manifestly inadequate sentence.

Unless your Honours have any questions on those points?

GLAZEBROOK J:

Your submission is, yes, it can be available but it's only in very, very limited circumstances, so the bests interests of children doesn't impact at all – I mean, that's a very narrow – if you look at what was said there, it's incredibly narrow and not looking at the societal harm in terms of imprisonment, which is quite clearly caused by imprisonment of a parent. Shouldn't we be looking at something more modern that's actually trying to look at reducing the effects of imprisonment on families?

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MS MILDENHALL:

When there's a professional opinion saying that the quality of care is not going to be, is unlikely to be affected by imprisonment of one parent, then in my submission this doesn't justify that unusual step being taken.

WILLIAMS J:

It seems to me that the Judge sat back and looked at this in the round. It was a guy who was doing rehab, seemed to be doing rather well, closely bonded with his daughter, was it, first child, in a good space. In the context of what we know about the likelihood of future life course for a child raised in a family where a parent has been incarcerated, why shouldn't the Judge be able to take that prophylactic approach for the sake of 10%?

MS MILDENHALL:

Again, looking at this case in the round, it's because it stepped off on the wrong foot by the parity issues and the starting point that was 40% below the –

WILLIAMS J:

But that's not your argument, that's Mr Burston's argument. I'm just talking to you about the 10%.

MS MILDENHALL:

In another case that maybe.

WILLIAMS J:
Why another case and not this case?

MS MILDENHALL:
Because it was already manifestly inadequate.

WILLIAMS J:
You see it was already low, the Judge probably thought in order to get to that end point for a guy who was getting his act together, and a strong relationship, well supported by his parents-in-law, why put off to the next generation the cost of another imprisoned kid. It doesn't seem to make sense to me.

MS MILDENHALL:
Because it's illegitimate reasoning –

WILLIAMS J:
Is it?

WINKELMANN CJ:
Can I just ask you about your reasoning, because it seems to be –

WILLIAMS J:
Well I was looking for a thoughtful answer to my question.

WINKELMANN CJ:
Well, I don't know, you're looking for an argument.

WILLIAMS J:
Why is it illegitimate reasoning?

MS MILDENHALL:
Because it is tailoring a sentence with an unprincipled way of bringing it down to get within home detention range.

WILLIAMS J:

So those considerations are irrelevant in terms of the Sentencing Act, is that what you say?

MS MILDENHALL:

No, they're not, they're very relevant.

WILLIAMS J:

Well the Sentencing Act says so, doesn't it? So why are they unprincipled if you take them into account?

MS MILDENHALL:

Because it has to compete with all of the other factors at play.

WILLIAMS J:

That's for the Judge, isn't it? She saw the guy.

WINKELMANN CJ:

Well can I ask my question now. I just wanted to be clear what you are saying.

WILLIAMS J:

I didn't get an answer to that question.

WINKELMANN CJ:

Can I just ask you what you are saying because you seem to be saying two completely different things. You seem to be saying these discounts are only available in exceptional circumstances, and this isn't one of them, but you're also saying really the Judge was employing this as an illegitimate attempt to get the whole sentence down, and in this case it's not appropriate but it might be appropriate in other cases.

MS MILDENHALL:

Not to do it to get the sentence down, that tailoring deliberately to get within home detention range is the illegitimate reasoning, or one part of illegitimate reasoning –

WINKELMANN CJ:

Well maybe we ought to be rethinking that notion that somehow tailoring it to get it down to home detention is illegitimate reasoning because it comes back to this thing about whether we're just actually, judges are just mathematicians, or they're sentencing judges who are trying to achieve the purposes of the Sentencing Act, because this judge assessed this man, saw his family circumstances, saw he had real prospects of rehabilitation, made the assessment, why should I inflict this harm on this family in this circumstance, and decided that a sentence of home detention was the appropriate response.

MS MILDENHALL:

And that is clearly within the hands of this Court to do, but precedent requires, precedent demands that a tailored sentence to look at the end result you want and then sentence, you know, apply factors in sentencing to get to that end result, is an illegitimate way of doing it, and it also affects issues of consistency in sentencing and parity and…

GLAZEBROOK J:

Well, this depends on an argument, doesn't it, that it's illegitimate to take into account a child if in fact the child will be looked after adequately by a remaining parent or presumably by whānau in some way? So looking at a child more in the sense of material aspects of the child rather than the emotional aspects of the child and the issues of being brought up by other than your parents if they're available and willing to look after you properly.

MS MILDENHALL:

Well, the focus is on the care that can be given to the child.

GLAZEBROOK J:

So it's only in exceptional circumstances where that physical care isn't available that you could give any sort of discount for parental responsibility, that seems to be the submission and that would seem to be what was said in that case, and the Crown says that's right, is that right?

MS MILDENHALL:

Yes, and the same thing came up in *Campbell v R* [2020] NZCA 356 where the mother was left in charge of five children and the father was serving a long sentence of imprisonment, and they were all the same kind of considerations there.

GLAZEBROOK J:

Well, there may be case where you just couldn't get it down, whatever discount you gave, but you might be able to minimise the time the person was in prison and away from the family. But you're saying that's not legitimate because you can only that in exceptional circumstances?

MS MILDENHALL:

Well, in *Campbell* I believe there was a discount, a small discount applied, I think it was five% – yes, it's at paragraph 87 of the Crown submissions.

GLAZEBROOK J:

Sorry, I haven't read that. But what were the exceptional circumstances there?

MS MILDENHALL:

She was – it was serious drug offending, she was the primary caregiver for her children, a devoted mother and stable presence in their lives, and their father was in prison already, who had been involved in the same offending.

WINKELMANN CJ:

All right, I think we've got your submission on that. Thank you, Ms Mildenhall. Are you on to the last point – oh, no, you're on to the calculation point, yes, time spent in prison.

MS MILDENHALL:

Yes. I don't really have much to add to the Crown's written submissions on this point, which are at paragraphs 93 to 95.

WINKELMANN CJ:

So, Ms Blincoe ran a new argument that you hadn't seen in her written submission.

MS MILDENHALL:

Essentially the Crown's submission is that Justice Mander's decision in *Chong*, which is the last case in the Crown's bundle, that really this is just, that sort of consideration is precluded by the statutory requirements. At paragraphs 44 to 48 Justice Mander directly addressed the proposition that was put forward by the appellant in *Chong* that a judge could take that time served into account in order to reduce a sentence to two years or less. So first his Honour said it was, that proposition was based on an obiter comment by the Court of Appeal in *Kidman v R* [2011] NZCA 62, (2011) 25 CRNZ 258 and this was not the focus of that appeal, which was rather the approach that should be taken to deducting time spent on remand when a sentence of home detention is being imposed.

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Secondly, the Court talked about the issue having been considered previously in the High Court by Justice Clifford who found that the combination of section 15A(1)(b) and section 82 of the Sentencing Act precluded a sentencing judge from taking into account the time the appellant had spent on remand when determining a sentence of imprisonment. Thirdly, that such an approach would likely amount to artificially and illegitimately tailoring the length of an otherwise appropriate sentence to one of two years, and again that's the same point of tailoring expressly to get a sentence down to within range for home detention.

Just another comment about the inter-relationships of sections 15A(1)(b) and 82. At paragraph 36 of *Chong* there was a comment about the section 82 not necessarily precluding a court from considering the effect of pre-sentence detention in assessing appropriate sentencing outcomes. It's not the length of pre-sentence detention that is relevant there. It's the effect of it. So the Judge commented about examples that would, first, need to be unexpected and unusual, but they would be things like where time spend on remand has a disproportionately severe effect on the offender for health reasons. So it's not

considering the length of pre-sentence detention, it's simply considering what that pre-sentence detention, what impact it's had on the offender.

So the Crown's position is that where the proposition is to reduce the term imprisonment that would otherwise have been imposed, solely in order to render a person eligible for a sentence of home detention, such a course of action isn't allowed by operation of the provisions of the Sentencing and Parole Acts, and to do that, my friend referred to interpreting a sentence of imprisonment insolvent section 82 as meaning a notional sentence of imprisonment, and in my submission that would require a legislative change, given that all of those terms are defined terms within the statute.

WILLIAMS J:

I guess it, to some extent, comes down to "what the Court would otherwise sentence the offender" means. Doesn't it? Because it is possible to read that as a more notional exercise. I'm not saying it's right but it doesn't say the Court would otherwise have.

MS MILDENHALL:

Again, if it requires clarification that is something that should be a legislative change, but on its face, given the two parts to it, the clearest interpretation, and in accordance with its accompanying provisions in the Parole Act, the interpretation that has been taken in *Chong* and in other cases, in my submission, is the correct one.

WINKELMANN CJ:

So the Solicitor-General's appeal point?

MS MILDENHALL:

Yes, now I'm not – in the luncheon adjournment I did manage to look up a few recent cases, appeals, Solicitor-General appeals, several in the High Court, a few in the Court of Appeal, where sentences of home detention were successfully appealed and a sentence of imprisonment imposed instead, but just to begin with, just to reiterate the principles on Solicitor-General appeals,

they are not for borderline cases, and they are not taken in borderline cases, and courts will not interfere with sentences, even if finding the original decision was wrong, if to do so would cause injustice. That is, that has been the case at least since the case of *R v Donaldson* (1997) 14 CRNZ 537 (CA) in 1997, and especially so, the Court said in that case, where it means that where an offender has been successfully abiding by conditions of a community sentence. In this case, as my friend has been discussing, there was the original sentencing decision for Ms Hayman which was referred to which wasn't appealed, and Mr Philip's sentence which was done on exactly the same starting point was.

We've already heard there were different factors relevant in terms of the individual; different age, different background in terms of convictions, no convictions –

WINKELMANN CJ:

We don't need to hear the whole argument over again, but in terms of the approach on the Solicitor-General's appeal, I mean, did the Court of Appeal turn their minds to the impact on the rehabilitative purpose of the High Court Judge's sentencing?

MS MILDENHALL:

Well the focus was on identification of an error which is, again, the appropriate focus to begin with.

WINKELMANN CJ:

Well not when re-sentencing though, is it? Once you decide there's been an error you still have to, even as an appellate court, turn your mind to the purposes and principles of sentencing? The Judge had decided, she didn't say expressly as much, but it's obviously plain in her mind, that the primary purpose in this case is rehabilitation, and I'm just wondering if you can point to anywhere in the appeal judgment where they do turn their minds to the purpose of what they're about when they're sentencing, or are they just dealing with it mathematically?

MS MILDENHALL:

Well it's bound up in the 30% discount and in the same way that the sentencing judge didn't expressly discuss taking a rehabilitative approach, the Court of Appeal considered that 30% was already generous and would have considered that considerations of rehabilitation were sufficiently credited within that 30% discount. I really can't take the submission about the Court of Appeal's approach any further than that.

At the end of the sentencing process for Mr Philip the Court said at paragraph 155 of its decision – referred to the submission for the appellant that: "Incarcerating an offender who had adjusted to, and served, part of a non-custodial sentence was unduly harsh and inhumane." The Court did take that into account but considered that it couldn't rely on that aspect to diverge from what was otherwise the appropriate response to a successful challenge to a sentence found to be manifestly inadequate.

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ELLEN FRANCE J:

On the Solicitor-General's appeal is that accurate? I mean couldn't the Court have said, well, we consider the appropriate sentence was the starting point they adopted, but given it's a Solicitor-General's appeal we're not going to impose that sentence, given the other factors?

MS MILDENHALL:

Yes it could, but again sentencing is an art not a science and there are sentencing always comes within a range. It would have been a different approach but it doesn't mean –

ELLEN FRANCE J:

It's just the Court, sorry.

MS MILDENHALL:

It doesn't mean the approach that the Court took in this case was wrong because of the magnitude of the inadequacy.

ELLEN FRANCE J:

Well it may be loose terminology it's just the cannot rely on that aspect when, in fact, it's don't think it's appropriate to rely.

MS MILDENHALL:

What it would have meant, in this case, was from a starting point of eight years applying discounts totalling 75% to bring it down to a home detention sentence. Which the Court didn't consider was appropriate or desirable, and the Court made the point that the appeal wasn't pursued solely to avoid the creation of a wrong precedent.

WINKELMANN CJ:

So why did it say it was pursued? If it wasn't pursued solely to avoid the creation of a wrong precedent? Why did it say it was pursued?

MS MILDENHALL:

Sorry.

WINKELMANN CJ:

That's all right, these masks make it very muffled.

MS MILDENHALL:

As I said, because it was manifestly inadequate, because there was no principled way for a starting point of eight years to result in this case in a sentence as low as home detention.

WINKELMANN CJ:

That's the trouble with this whole math, I have to say I'm becoming increasingly troubled with this whole mathematical approach to sentencing because sentencing judges are obliged to take into account the purposes and principles of sentencing but I'm not seeing that being engaged with by the Court of Appeal, and I understand the application of *Zhang*, but what do you say about that? I mean you can't allow a mathematical model that's adopted by judges to defeat the purposes of the requirements of the statute, can you?

MS MILDENHALL:

Well it's only a mathematical model once you've determined all the relevant facts. It is always based on the particular facts of any case. The mathematics –

WINKELMANN CJ:

Well you're feeding the facts of a case into a mathematical model. Really.

MS MILDENHALL:

Yes.

WINKELMANN CJ:

Which is not necessarily connected directly to a statutory scheme. It's in pursuit of one aspect of the statutory scheme, which is consistency.

MS MILDENHALL:

Feeding in all of those other aspects, yes.

WINKELMANN CJ:

Mmm.

MS MILDENHALL:

Which of course are relevant to different degrees, or not relevant at all in different cases. So again it comes back to the particular facts of each case.

WILLIAMS J:

That's the point, isn't it, that consistency depends on all relevant factors being taken into account, including those factors that take it out of the mainstream. Otherwise you're sentencing inconsistently.

MS MILDENHALL:

And also relevant factors being taken into account in the same way in similar cases.

WILLIAMS J:

Yes. But there's a problem with a rule that says "ignore", isn't there? Something that might otherwise be relevant and important, if it is a rule and not just a guide.

MS MILDENHALL:

I'm not quite sure what you mean by a rule that says "ignore".

WILLIAMS J:

Well…

MS MILDENHALL:

Or not to take into account something.

WILLIAMS J:

"Ignore" in Mr Philip's context, the needs of his child, vis-à-vis him, which seems to be what the Court of Appeal says.

MS MILDENHALL:

I would resist saying that they didn't, that they ignored that factor.

WILLIAMS J:

Well, they certainly wrote it down and they said: "We're not giving it any weight," is the bests way of putting it. Another way of putting it is: "We don't consider it to be relevant."

MS MILDENHALL:

Or finding that it was already part of the bundle of factors that were taken into account in the…

GLAZEBROOK J:

That wasn't their finding though, was it?

WILLIAMS J:

Yes, no, it definitely wasn't. They would have said that if they meant that. "Thirty per cent is enough, including for the child." They didn't say that.

MS MILDENHALL:

They said it was already inarguably generous and no more was…

WILLIAMS J:

Well, they said that was generous but they – yes, perhaps we're dancing on the head of a pin.

MS MILDENHALL:

No more could be justified.

WINKELMANN CJ:

Right, Ms Mildenhall, is those your submissions?

MS MILDENHALL:

Thank you, your Honour.

WINKELMANN CJ:

Thank you very much for your help on that. Mr Paino.

MR PAINO:

So I have three matters in reply. The third matter is an interesting matter, which is that if the appeal was successful how should the result be frame, and I might start with that because if the appeal is successful we've had a sentence of home detention that's been cancelled by the Court of Appeal, and it's cancelled anyway if you get sentenced to imprisonment –

WINKELMANN CJ:

How long was he in prison following the Court of Appeal hearing?

MR PAINO:

I think it's three months. Yes.

WINKELMANN CJ:

Okay.

MR PAINO:

And the sentence of home detention that would otherwise have been imposed –

WINKELMANN CJ:

I should just say, Mr Burston, we'll probably hear you on this point too, that Mr Paino is talking about now, about how…

MR PAINO:

Yes, I probably should have addressed it earlier but…

WINKELMANN CJ:

It's all right.

MR PAINO:

But the sentence of home detention which was imposed on the 13th of September 2021 finishes at midnight on the 12th, so that's Monday by my calculation. So if he was, if the sentence of home detention had of continued then it'd be finished on Monday, I think is.

WILLIAMS J:

The 12th anyway, you say?

MR PAINO:

That's the 12 months.

WILLIAMS J:

The 12th did you say?

MR PAINO:

I think it's the 12th, yes. I've always thought that if you get sentenced on the 13th one year is the 12th, midnight on the 12th, but it's – so now in the meantime he's been on, he's been in custody for I think three months and he's been on the same sort of conditions on EM bail that he would have been on on home detention, not much difference between the two sentences, except that on home detention they can require you to do programmes, which they can't do,

from memory, on EM bail, but that hasn't happened. So really they're the same sentence effectively.

GLAZEBROOK J:

How long?

WILLIAMS J:

How long has he been on EM bail?

WINKELMANN CJ:

About two months now.

MR PAINO:

Well, it will finish, if he was on it, it would finish on the 12th, the evening –

GLAZEBROOK J:

No, no, sorry, how long has he been on bail?

WILLIAMS J:

EM bail, yes.

O'REGAN J:

This Court gave bail, I think, on the 12th of July, is that right?

ELLEN FRANCE J:

No, we gave bail on the 29th of July.

O'REGAN J:

29th of July, right.

MR PAINO:

Yes. Oh, you mean since the bail on this sentence. Sorry.

O'REGAN J:

Yes.

MR PAINO:

29th of July to today. So part of that is three months in custody. So that's actually more "severe", in inverted commas, than it would be if he was just on home detention, because he's gone back to custody.

If this appeal is allowed, then I guess what could happen is the sentencing Judge's sentence could be reimposed but backdated to the commencement of it. The trouble is I don't know how Corrections would regard it. They might regard the period that wasn't served on home detention and when he was in custody as, you know, as not part of the home detention sentence. So just raise the point that in fact if the appeal is allowed my submission is that the shouldn't have to serve any other punishment. Which brings me to the next point –

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ELLEN FRANCE J:

So in that situation I can't now remember what the conditions were in relation to home detention, but would there be any, without any conditions attaching to that?

WILLIAMS J:

Where there post-release conditions?

ELLEN FRANCE J:

That's the point I'm grappling for.

MR PAINO:

You mean to the sentence of imprisonment?

WILLIAMS J:

The sentence of home detention.

ELLEN FRANCE J:

Sentence of home detention, no?

MR PAINO:

I don't think so. No, I don't think so. Ms Blincoe may check that on the sentencing notes while I'm considering this. I mean if the Court could impost post-detention conditions in the sentence if the appeal was allowed, I would have no strong objection to that, except of course that you have to remember that this is now a very long period of detention in the home, and certainly if the Court could provide a system with some rehabilitation, that would be okay. But I have to say, just excuse me, I have to say that frankly there's not much rehabilitation in Taihape going on. Apart from your own.

WILLIAMS J:

That's harsh.

MR PAINO:

Apart from the rehabilitation being served naturally with your own whānau. Which brings me onto the next point, which is the child discount, and I just want to make –

GLAZEBROOK J:

Can I, I mean one other possibility just to get, cut through all of that, would be to say time served I suppose?

MR PAINO:

Yes but time served is seven months, plus three months, which is 10 months.

GLAZEBROOK J:

Or to impose a sentence of time served.

WINKELMANN CJ:

Already served.

GLAZEBROOK J:

Already served.

MR PAINO:

Yes, so that would be double the sentence. So it would still be a sentence of imprisonment.

GLAZEBROOK J:

Well it means, yes, so, I mean the same effect happens, that you say it shouldn't have been a sentence of imprisonment.

MR PAINO:

Yes.

GLAZEBROOK J:

Right.

MR PAINO:

So I've got no problem with a sentence of this Court. Whatever it is, not adding any more to the sentence, so that has to be a sentence of imprisonment instead of a sentence of home detention, bearing in mind he spent just under six months in prison, and another three months, that's nine, so if it was 18 months then, I don't know, that might look inadequate, but I'm into the practicalities and have no –

GLAZEBROOK J:

No, that's why I was putting to you a possible practicality.

MR PAINO:

Yes, no objection in principle to it being another term of imprisonment. So the answer to –

WINKELMANN CJ:

Child discount.

MR PAINO:

The answer to the question about post-detention conditions that Ms Blincoe just found for me, is on page 191 of the Court of Appeal casebook. Standard post-conditions apply for a period of 12 months from the detention

end date. That is "to attend an assessment with the departmental psychologist… to attend and complete alcohol and drug counselling… to attend counselling." So there are post-release conditions.

WILLIAMS J:

This is following the High Court judge's…

MR PAINO:

Yes, this is the High Court judge's decision. They call them "standard" and standard is section –

ELLEN FRANCE J:

I was going to say they're the standard…

MR PAINO:

The reference to the Act is there so this Court can impose post-release conditions to a short term of imprisonment, a short term being under two years. The Court can still –

WINKELMANN CJ:

Well is the sensible thing to ask Mr Burston and you to shortly – well Mr Burston perhaps, to file a short memorandum, assuming we were to allow the appeal as to how it should be dealt with from a sentencing point of view, and then you to reply, because I'm just conscious that we didn't hear Mr Burston and he might want to pause and think about that.

MR PAINO:

Yes, which then brings me to the next point, which is relevant to this, and that is –

WINKELMANN CJ:

So Mr Burston to file within seven days and you to reply within a further seven days?

MR PAINO:

That's fine your Honour.

WILLIAMS J:

Or even better if you can agree on the assumption. Mr Burston smiles wryly.

MR PAINO:

No I'm more than happy to do that. If me agreeing on that is of any use.

WILLIAMS J:

There you go.

MR PAINO:

And disagreeing on a number as well. Just on the bail issue. So he's now on this restrictive bail, you know, he can't go out and work, and so I don't want to be at all critical of this Court, but if we waited as long as *Berkland* to get a decision then –

WILLIAMS J:

You're not being critical?

MR PAINO:

No, I'm just mentioning a fact. If we waited that long then he's on this bail, so that's a considerable period. So I have, I'm minded to file an application for variation of bail, you actually have to apply a fresh application for bail because there is authority to say you can't vary an EM bail to no EM because – but you have to file a fresh application. So I am minded to file a fresh application for bail asking for it to be straight bail rather than have the restrictive EM bail. Because if the appeal was allowed it's effectively he's served his sentence, and that really will be, the result of that application on your decision on that application may well informed by long you think it's going to take, and if it's going to take a long, long time, I think it's wrong that he's on EM bail for that long. I mean, if this man's appeal is likely to be allowed then he really needs to get out, he's served his time, needs to get out and get a job, which he wants to do and which is available to him, and, you know, he has been in that household

a long time, it has built up his relationship with his boys, boy, and now boys, so there has been a positive advantage to that.

Which does bring me on to my final point, and that is that when considering the discount for the child, or discounts as a whole, I think your Honour Justice Williams, your Honour indicated that it was a whopping, I think, discount of 67%. But actually it's not, because for personal circumstances it's 30%, for the guilty plea it's 20, so, I mean, in the round it's large, but the 10% for the child, but the rest of it's for being on EM bail and I don't really regard that as a personal circumstance discount. So the personal circumstance discount is the 30%, plus the 10% for the child. The 20% is for the guilty plea, I don't regard that as personal.

WINKELMANN CJ:
So hang on, the 30% includes the time on EM bail?

MR PAINO:
No.

WINKELMANN CJ:
No. What are you saying? I'm sorry, I'm finding it hard…

MR PAINO:
I'm saying that the only discount for personal circumstances was 30%, plus 10% for the child. Then there was 20% for the guilty plea and there was six months for being on EM bail, which I don't regard as a personal circumstance…

WINKELMANN CJ:
Right, got it.

MR PAINO:

Nor do I regard the guilty plea as a personal circumstance. The personal circumstance, the 30%, is what the Court of Appeal said was inarguably generous and it refused to allow any more discount for the child.

WINKELMANN CJ:

So 40% is really personal if you include the child, isn't it?

MR PAINO:

It is. But the child, the child discount is really also for the defendant's rehabilitation, because it's really important to him, as was evidence from Dr Thomson's report, from what he told the others, that his relationship with his child is something that changed his life, because he'd never – he had these other children, one of whom he was on bail with, but the relationship with his boy changed his life, and you can see how that could happen, if you're in a house and you can't leave it except for a few hours a few days a week, you could see how it could happen where forced to be with his child, and that really changed his life. So in my submission the 10% is part and parcel, is also under section 8(i), is a discount for him to be involved in his family for the purposes of his rehabilitation, as well as the point Justice Williams made, which is for the benefit of the child in stopping future generations from terms of imprisonment.

And there was one more point, I'm sorry, *R v Phillips.* Mrs Phillips, Ms Phillips, was sentenced and she wasn't just a passenger in a car, she had her own drug-dealing operation, she sold drugs, she went all round the country, according to the sentencing decision, to sell drugs, she had her own lot of customers, and she took numerous calls at all hours of the night selling drugs. So it's not just a passenger in a car. And on that note I will finish, and thank you for listening.

WINKELMANN CJ:

So, we need to continue bail, don't we, at this point?

MR PAINO:

Bail?

WINKELMANN CJ:

Because wasn't the bail expressed to expire as at the date of the hearing or…

ELLEN FRANCE J:

The bail pending the hearing of the appeal against sentence, so…

MR PAINO:

Not pending determination.

ELLEN FRANCE J:

No.

MR PAINO:

No.

ELLEN FRANCE J:

So on that basis I think it does need to – if…

WINKELMANN CJ:

So we will extend the bail on the existing condition but cognisant of your indication that you are filing a fresh application for bail.

MR PAINO:

Yes, and I intend to file that by, say, Monday. I do intend to have tomorrow off, if I can, and I don't know how much detail you want me to go into, but I think I'm going to just outline the circumstances like any bail application, and just to give you advance notice, I am going to ask that the EM bail aspect of it is…

WINKELMANN CJ:

Be discharged.

MR PAINO:

Is discharged to enable –

WINKELMANN CJ:

So you will discuss that with Mr Burston as you normally would, won't you?

MR PAINO:

Yes. And, I mean, as we did in the bail pending appeal, we did agree on the terms…

WINKELMANN CJ:

Yes.

MR PAINO:

Even though I was in an inaccessible place in Queensland, Australia, we still managed to agree.

WILLIAMS J:

It probably helped.

MR PAINO:

I think it did, yes, I do recommend it. Thank you.

WINKELMANN CJ:

Okay, thank you, Mr Paino. All right, we'll retire. We will take time to consider our decision and will retire.

COURT ADJOURNS: 3.30 PM