

IN THE MATTER of a Criminal Appeal

BETWEEN JONATHAN NUKI LUMMIS
JARDEN

Appellant

AND THE QUEEN

Respondent

Hearing 27 May 2008

Court Elias CJ
Blanchard J
Tipping J
McGrath J
Wilson J

Counsel R G Glover for Appellant
A Markham and M Ball for Crown

CRIMINAL APPEAL

2:15pm

Glover May it please the Court I appear for the appellant Mr Jarden.

Elias CJ Thank you Mr Glover.

Markham May it please the Court, Ms Markham together with Ms Ball for the respondent

Elias CJ Thank you.

Elias CJ Yes Mr Glover,.

Glover It think the first thing that I need to tell the court is that Mr Jarden is being released on parole tomorrow so I hope that doesn't turn this into a purely academic exercise. My understanding from him although I haven't been able to confirm this is that he is to be released without any particular parole conditions beyond the standard conditions. That means that his release has come just under one year from the date of sentencing which I think from memory was the 18 June last year.

Elias CJ Well it doesn't render the appeal moot because he is still subject to sentence if he is recalled.

Glover Indeed he is. Yes that's correct. But beyond that I think that there is probably not an awful lot I can add to the written submissions that I have placed before the Court. They detail, I hope in not unnecessary detail, progress of the thing through the High Court in terms of sentencing and the submissions that were made there and then the Court of Appeal. I am not sure whether this Court has granted leave to appeal on this occasion on the basis of the risk of miscarriage of justice or public interest, cause it could be either I think, given the nature of the decision that came from the Court of Appeal but I think what I could say is that this is effectively Mr Jarden's first opportunity to appeal because for what ever reasons the Court of Appeal decision clearly wasn't a satisfactory one. I think unless there are any specific matters Your Honours want me to raise I will confine myself if I may to just making a couple of.

Elias CJ I just have a factual query really or background query. There is a reference in one of the submissions, I am not sure whether it is yours, to the fact that the Judge didn't order forfeiture of the money found and I don't have that. We don't have that before us, that decision and I think I am right in saying that, I haven't seen it anyway, and there was some suggestion I think in the submission a faint suggestion that the Judge may have said more in dealing with that about his assessment of culpability or what had happened.

Glover My friend Ms Markham has just indicated to me that there should be something about that in the, page 493 of the Court of Appeal Case on Appeal.

Elias CJ We don't have that, I think the Registrar may well have that. Do you have it in Court Madam Registrar?

Glover Well I have a copy of it here.

Elias CJ If we have it I don't need to hold you up now.

Blanchard J We should have it, I asked for it to be available.

Glover I may well have a copy of it in my file in addition to.

Blanchard J Yes but I asked for a couple of copies at least of the whole Case on Appeal be available for us.

Glover There looks like there should be three volumes of that.

Elias CJ Alright, well could you just pass that over to me and I will just rifle through it. What page did you say Mr Glover.

Glover Page 493 in Volume 1 Your Honour, that sounds a bit illogical but they have been split in such a way that the decisions and the probation reports and so forth are at the back of Volume 1.

Elias CJ You carry on and I will have a look at it and pass it on.

Glover I can interpolate something on that point though. It is that Mr Jarden and there was evidence to this effect, his partner who subsequently committed suicide came into quite a lot of money which was held in a solicitors trust and she was able to access that as and when she wished. There was quite strong evidence that some of the money had recently come from her, the balance of it was a float that Mr Jarden was using to purchase cars which he was doing up in the warehouse that he was effectively living in as well and he had to have a float of cash so he could buy cars and sell cars and the Court ultimately accepted that the money was not proceeds from drug dealing, that summarises it.

Now what I was going to say was that unless Your Honours have anything specific you want me to address, I really want to confine myself to making a couple of comments about the Crown submissions.

Elias CJ Having just flipped through this decision, could you just confirm that I am right in thinking it doesn't bear on the question of culpability or the Judge's earlier assessment of the facts?

Glover No that would be entirely my view, it doesn't. It was adjourned, it should have been dealt with at sentencing and wasn't and was adjourned to a later date to be dealt with. The Crown was given the opportunity to make some submissions, they weren't accepted by Justice Fogarty and the net result was that the forfeiture was not ordered. And indeed, in addition to what I told you about his release tomorrow, he asked me to contact the police and they are actually going to release the \$7,800 odd dollars to him tomorrow when he is out of prison. So he is going to get his money back tomorrow.

Now returning to the Crown's submissions, by and large, apart from the length of the sentence which of course is why I am here, I don't have too many criticisms but there is one matter which is dealt with in para 32 of my friend's submissions which is essentially a suggestion that the levels in *Te Rure* would apply here. What has been overlooked in the Crown's submission is that although it is acknowledged on the face of it, I think the logic of has overlooked the fact that, here Mr Jarden is not charged with or convicted of conspiring to manufacture methamphetamine, he was only charged and has been convicted of conspiring to supply it and for that reason any arguments relating to the levels in *Fatu* which is essentially confined to manufacturing become I think really quite irrelevant to the present case and I have noted.

Elias CJ I understood *Fatu* was dealing with supply or sale.

Glover Well when one looks at the, I have a copy of the case here, if Your Honour looks at paragraph 24 you will see that the Court says that once the bands were defined the Court sets sentence levels for the sale and supply of methamphetamine and then uplifted (this is *Te Rure* I am looking at not *Fatu*) but quoting *Fatu*.

Blanchard J But I thought *Fatu* did deal with dealing as well as manufacturing. I haven't got a copy of it here either but I did look at it a week or two ago and I thought in the earlier part of the judgment it was concerned with dealing.

Glover Yes I think that's right but I am not saying it didn't do that what I am saying is that the application of the band and particularly in band 1 particularly in relation to low level offending can only really have applicability to manufacture.

Elias CJ But that's not what *Fatu* is saying because at paragraph 34 of *Fatu* it adopts the following sentencing bands in cases involving the sale or supply of methamphetamine.

Glover Well could I refer Your Honours to paragraph 24 of *Te Rure*. You will see there it has been set out in tabular form and it reiterates the quantities that were the basis of *Fatu*. And it says that band 1 low level offending is not appropriate for charges of manufacturing as they would almost always involve commercial quantities and that really goes to the heart of the issue here because it's a very moot point, what Mr Jarden may or may not have done, by anybody's standards I think, and I don't think my friend will really disagree with this, he and about three or four other accused were essentially bottom feeders, they were really at the very end of the chain and they were purchasing their drugs if they were in fact doing that, from

Deborah Gordon Smith, who is one of the principal offenders and was a long time personal friend of Mr Jardens, a family friend, the relationship went back well before any involvement with drugs as I understand it. And there was no actual evidence of Mr Jarden supplying anybody with the drug. It was simply an inference that the Crown asked the Court to draw in that the Court did draw.

Elias CJ Well it's an inference that the Judge was prepared to draw.

Glover Yes it was an inference.

Elias CJ On two occasions and perhaps a third, but two anyway.

Glover Yes and I never really understood his reasoning there because there was no actual evidence of any supply, nothing that anyone could point to. The key to this whole case was a very large volume of text messages essentially, accompanied by phone intercepts, and there was nowhere in any of those intercepts of texts or phone calls where you could say on a confident basis.

Elias CJ But, aren't we dealing with this on the basis that the finding that the Judge made which was, he was entitled to make a finding, he had to make a finding, that that has to be accepted.

Glover Well yes I have to accept that indeed.

Elias CJ So we don't need to go back into that, he said "at the bottom end on two occasions" and I am not able to say how much.

Glover Yes, nor was he able to point to any commercial gain, which is why I am trying to take

Elias CJ Well he says commercial.

Glover He does but then he seems to muddle it up with what was I think standard ground throughout the trial that Jarden was dealing in cannabis and there was ample evidence.

Elias CJ Well I will need to be convinced that he did muddle it up, because I think his reasons hang together Mr Glover, so you will need to take me to.

Tipping J It's paragraph 3 of the sentencing remarks that seem to me to be fairly crucial Mr Glover where the Judge says "that he is satisfied that the Crown has proved beyond reasonable doubt that you were buying methamphetamine more than once and more than just as a user", so that's the first step. The second step is that he couldn't say beyond more than

buying for supply on two occasions. So he has found as a fact beyond reasonable doubt that he was buying for supply and did supply on two occasion.

Glover Yes Sir he has.

Tipping J Now whatever his reasoning process was, and I agree, it's not very patent, that is what he's found for sentencing purposes, and I don't see how we can go behind that.

Glover Well he goes behind it himself to some degree in the next paragraph. Paragraph 4, he goes on to say there is pretty strong evidence that you brought on three occasions but to a degree I think some caution has to be exercised in your way, by which I think he means in your favour, I am also of the view that it is very difficult and dangerous to try and fit this case into the *Fatu* bands because of real doubts as to the issues of quantity, and I had raised that in my initial submissions which are covered in my submissions to this Court and I think I was the only counsel to take *Fatu* on squarely and say it doesn't apply here, at least not to the extent that the Crown would like to make it apply, and His Honour carried on by saying "but it can be fitted into a commercial drug dealing setting, you were a commercial drug dealer at the very least in cannabis and to some degree in respect of methamphetamine". Which to my way of thinking at least is quite an equivocal statement.

Elias CJ Well we know it's a finding that there was dealing for commercial purposes in respect of methamphetamine. He just isn't able to say to what extent.

Tipping J These are sentencing remarks they are perhaps not as cogently ordered if you like, as one might wish as a perfectionist, but they are sentencing remarks. With respect I think a fairly clear picture emerges that the Judge was uncertain to what amounts and to what extent beyond to actual supplies. That's what I read out of it.

Glover Well I agree with that Sir, except he does go on to say as I have just indicated to some degree in respect of methamphetamine and he adds.

Tipping J He hasn't put it very well Mr Glover but I mean it's pretty clear what he's talking about.

Glover Well it is, but I mean that's the basis of the sentence that we are here to deal with today.

McGrath J He goes on to say doesn't he to say that, "while it's commercial dealing in respect of methamphetamine, it's quite minor commercial dealing in

respect that some of the purchases were as a user. But I don't myself read any qualification to his basic finding that the methamphetamine incidents were commercial incidents.

Glover Well I can't take issue with that, I mean that is his finding as the Chief Justice has clearly indicated, and I can't argue that.

Elias CJ Isn't the real issue whether he was wrong to invoke effectively the first band in *Fatu* because that's adopting the most favourable approach for your client that it's under 5 grams.

Glover Well it must have been under 5 grams I think.

Tipping J That's what he means when he said in para 6 that he's been on the cautious side, he says he can understand the Crown because he's got a fair suspicion that it was more. But he's not going to sentence on that basis.

Wilson J And just on that point Mr Glover do you accept what the Crown say at paragraph 11 of their submissions.

Glover No I don't, I don't accept, if Your Honours referring to quarter-back position.

Wilson J That whole paragraph I am referring to.

Glover Well it's problematical because the whole jury trial, at least as far as Jarden was concerned, but I think for a number of the other accused too, was run on the basis that the telephone calls and texts messages were on many occasions quite equivocal as to what interpretation ought to be placed on them, and it was certainly never accepted by I think virtually anybody on the defence side of the case that quarter-back position meant what the police were contending for, and that was elaborately challenged by a number of other counsel. In Jarden's case I didn't make too much of an issue of it because there is no suggestion that Jarden brought 7 grams of methamphetamine on even one occasion, my whole point in approaching the sentencing was that nobody could say what the quantities were and that's why the application of *Fatu* was a risky exercise and to some degree Justice Fogarty agreed with that.

Tipping J But if there are two sales under in total 5 grams, I entirely understand the point about the Court of Appeal going off on this cannabis frolic, but I can't quite follow why it is said that the starting point of three years is so horribly wrong. Even if the *Fatu* bands don't strictly apply but working from them, if you like, at least by analogy with them, I would have thought, the Judge thought he was being cautious, and I don't think he's been, you have to say don't you that this is manifestly excessive this, I

don't see whether an error of principal comes in, accept when the Court of Appeal.

Elias CJ I suppose you could say that there is no explanation of how he gets to the middle of the first band.

Glover No, none at all, unless I am mistaken he might have said somewhere or perhaps it was the Crown that he was near the top of the first band.

Elias CJ Does he.

Tipping J He doesn't say that.

Glover No that may be the Crown.

Tipping J But the *Fatu* band is 2-5 isn't it? The relevant *Fatu* band.

Glover Yes it is.

Tipping J So he's taken 3. Well.

Glover Well I suppose my argument really is that he needed to signpost his arrival at that starting point far better than he has, because we do not know how much, even if we accept His Honours finding of fact, as we are obliged to for this purpose, we do not know how much he said to have supplied, we do not know whether he said to have given it to somebody, or sold it.

Elias CJ Well he says commercial.

Glover Yes but he so entangles that with the cannabis issue that we come out in the paragraph that Justice Tipping was referring to before and Justice McGrath, the end of paragraph 4, it may well be that in respect of methamphetamine it was quite minor in as much as a lot of the purchasers may be for your use as a user.

Elias CJ But it is minor, he accepts that.

McGrath J Minor commercial offending.

Elias CJ Minor commercial offending, but I am just hung on I suppose on this, how he moves it up, and of course there is supply and sale within this band, and it moves perhaps because of the commercial element. I mean he is clearly in six accepting that there are purchasers, so it's not a question of giving somebody some methamphetamine which would also be within that first band in *Fatu*. And on that basis there is a reason for not being at the very bottom of the band.

Glover Well for myself I would have preferred to see the reasons spelt out better. I mean I can accept the logic of what Your Honours saying and I can't really fault it.

Elias CJ It wasn't a merciful sentence.

Glover It wasn't no, it wasn't, although I think His Honour probably thought it was, but it wasn't, it was quite a harsh sentence in my submission and.

Tipping J I would have thought with respect that the range you were looking at here was from two – three years. Now the Judge has gone to the top of the range. What I need to be persuaded of that that was outside an available sentence.

Glover Well I think three years was.

Tipping J Say two and a half would have been the absolute maximum do you?

Glover To start, and I have also taken issue, I took issue in the Court of Appeal, with very little success and I hope to have more success here. I have taken issue with the fact that the traditional view that personal circumstances can have no bearing should not be applied here, at least rigorously, because there were personal circumstances in Jarden's case which put him out of the ordinary in my submission. The Crown also has referred to him having previous drug dealing offences. That's incorrect. He had a charge of cultivating of cannabis, and there was no suggestion that that was for commercial reasons, and when one looks at the sentence that he received for that, I think one would be entitled to infer that the Court accepted that that wasn't the case and probably the police as well.

Tipping J At what stage in the sequence of events was the suicide of the partner.

Glover She was only a matter of, I can't remember exactly now, I think it was a matter of weeks or at the most months before trial.

Elias CJ Yes it was after the offending. So it didn't bear on the offending.

Tipping J So that the personal circumstances directly related to the offending are the anxiety and depression aspect.

Glover Yes

Tipping J Caused by what? By the partners difficulties.

Glover Caused by her very lengthy psychiatric illness and she was seven months pregnant. This was not her first suicide attempt, unfortunately this time she succeeded. But he had been under extreme pressure, that is related in the Probation Report it's clearly reflected there.

Tipping J Yes I have read the report.

Glover And there was also a letter from his mother who, you probably haven't got that, and I haven't got a copy of it now either.

Tipping J No I have read it, it's there.

Elias CJ Yes we have the mother, father, sister and aunt I think.

Glover And really given what Jonathan Jarden had been through and given the stresses that his partner Penny's circumstances had placed on him, and given the fact that he came really effectively to the Court as almost a first offender, and found himself in, way out of his depth. Deborah Gordon-Smith was a very busy young woman indeed, and she had the contacts with the Asians from Auckland, she was bringing large quantities of methamphetamine into Christchurch and distributing them through other networks, Jarden was not part of any of that.

Elias CJ Well he's part of that conspiracy though isn't he, cause wasn't she the person he was said to have been conspiring with.

Glover Well she is the only one he could have conspired with because she is the only one that he had any contact with at all over the whole thing. Not even with his fellow conspirators on the bottom level. There was nothing going between Jarden and them, it was all between Jarden and Gordon-Smith, back and forth. And a lot of the conversations had arguably had nothing to do with drug-dealing. A number of them had to do with, in fact, a very large number of them had to do with cannabis. Some of them had to do with nitric oxide although I had difficulty getting the Crown to accept that, I don't know what the jury thought of it, but it was quite clear that nitric-oxide was also involved and I think that was before it was illegal.

Elias CJ But at the end of the day the question we have to decide is whether the uplift from 2-3 in circumstances where the Judge said this was commercial was not open to him.

Glover I think the only way I can answer that Ma'am is to say that if it was open to him he needed to spell it out more clearly. My submission essentially is that unless this Court takes contrary position to that of the trial Judge, Mr

Jarden is going to spend the rest of his life wondering why he got such a lengthy prison sentence.

Elias CJ Well he got it because he supplied methamphetamine a Class A drug to some unknown purchasers on at least two occasion for commercial advantage. That's the reason.

Glover That's the reason but I think.

Elias CJ You have to convince us that it's not sufficient reason.

Glover Well in my submission it isn't absent some kind of quantification of culpability. The question that Your Honours observation really, I think, causes to be asked is what do you have to do to get three years imprisonment for supplying methamphetamine on or be it a minor commercial basis to another person.

Blanchard J Not a lot because it's a very dangerous drug. So the penalties are going to be severe even for dealing in small quantities.

Glover Yes Sir I accept that, but is the person who on the street or in a night-club supplies 2 point bags of one-tenth of a gram each to two separate people in the night-club going to attract three years. In my submission unlikely if the persons got Jarden's background.

Blanchard J It's pretty clear, although the Judge doesn't spell it out, but he thought it was on a greater level than that.

Glover Well that's my point Sir, he has to say why he thought that and he doesn't. Which brings me back to my point about how Jarden is going to wonder for the rest of his life why he is the only one who knows what he really did and he's going to wonder for the rest of his life why he got that sentence without an explanation of it beyond, I mean no disrespect to Justice Fogarty, but vague generalities.

Elias CJ Well you see I don't accept that the Judge, I accept what the Judge says, that he thinks that not proper to make an assessment which puts your client in a higher band than band one. So you are in that range of two to five years and you are not giving it away. It's very hard to say that it's not an available sentence unless you want to say that the bands are wrong.

Tipping J This is inherent, often in charges of conspiracy, as opposed to actual consummated offences and conspiracies are notoriously difficult thing to sentence for, cause it can vary how much am I or the Court entitled to take into account Mr Glover that the Judge heard all the evidence. I agree that it has got to be an analytical exercise to a degree, but on the other hand we

often hear, don't we, the Judge heard all the evidence, and he's drawn this conclusion from it, he hasn't expressed himself with total precision, maybe that's the evidence didn't allow that, but he's got the flavour of the case.

Glover Well I am sure he did but the key evidence in this case was the schedule of phone calls and text messages to what extent His Honour went through and analysed those before he reached the possession.

Tipping J Well he was sitting there – he's listening to it all as it unfolded.

Glover There was an ancillary issue in this case and that was about the use that the Crown made of the spread sheet it had and that was involved in an appeal against conviction which is not part of the consideration for this Court but suffice it to say that the vast preponderance of the evidence was in the form of text messages or telephone intercepts and yes His Honour heard all the tapes being played in Court and yes he had a copy of the schedule of text messages, and it also included some observations by police who were watching people moving around but that was to a rather smaller percentage of the material contained in the spread sheet, so to that extent I mean yes of course he heard all the evidence but I wonder how much he chose to analyse the content in the spread sheet, he doesn't say, if he had gone through and said I believe that on this date and this date these were your commercial supplies, then I probably wouldn't be here. But he didn't do that, he plucked out of the air, again I mean no disrespect to him, but he plucked out of the air his point that there were at least two commercial supplies, but there really was a need to point to which two and why he thought that in my submission, and he didn't do that. Now I can't stand here and say that something in the band 1 *Fatu* range was completely unavailable to him, obviously I can't say that, but what I think I can say is that in the circumstances of this case it may have been that he shouldn't have felt himself as indeed to some extent he accepted that he didn't to be too constrained by *Fatu* and the subsequent developments and it has to be born in mind that this sentencing took place before *Te Rure* where the Court of Appeal said that *Fatu* has to be dealt with on a more restrained basis when it comes to conspiracy and the Court of Appeal actually quantified some discounts that should be given.

Tipping J But this is not conspiracy inchoate this is conspiracy manifested in two actual supplies, I can't quite follow the logic of this Mr Glover.

Wilson J On that point too Mr Glover as a member of the Court of Appeal which decided *Te Rure* and the author of the judgment, I clear a recollection that was an appeal that was seen as requiring the application of well established principles rather than creating any new principles.

Glover Well yes Sir I am sure that's correct, the principles for discounting were obviously well established and *Fatu* was I suppose in need of that qualification although perhaps it should have been inferred but *Te Rure* obviously made that express and to that extent it's a very useful case. But it also made express discounts that could be given, now I appreciate that I am up against Justice Tipping's comments about, this was a completed conspiracy an inchoate conspiracy in terms of these two supplies and I am driven back as I am repeatedly going to be to the point that we need to know exactly what the culpability of those two supplies was.

Elias CJ Well it may not help you. I mean he's assumed the least culpable that it's less than 5 grams.

Glover Well yes.

Elias CJ So don't you really have to attack *Fatu* and the first band to make any headway with this submission.

Glover Well I suppose I do and I am quite comfortable with doing that in the sense that in the general sense at least that I don't feel embarrassed about making a submission that sometimes dividing things into bands in the way which *Fatu* does can lead to an artificial result, and the first band in *Fatu* takes as it's lowest starting point two years, that may be a starting point which should not always be applied, and instead of considering in Jarden's case whether His Honour should have said well look *Fatu* says two to five, but while I think.

Elias CJ Isn't rather your point that the band is wrong because there is such a huge difference between point 1 of a gram and 5 grams.

Glover Yes there is a huge difference. It's an arithmetical progression if my mathematics come back to me correctly. It is a huge difference by a factor of many hundreds and the problem is that unless we know what he did, is it fair to say that he should be stamped with being.

Elias CJ That's true if, I am sorry I shouldn't have interrupted, but that is true if you put it all on quantity, but if you are looking in terms of culpability the preparedness to sell this drug for gain is very significant.

Glover Of course it is and that's why I think that the Courts will deal severely with people who supply methamphetamine at any level whether it's giving it to a friend or whether it's selling it at point 1 of a gram for only a few dollars or whether it's supplying 5 grams or a kilogram. Obviously the severity of the sentence will vary according to the quantity. But where the quantity is not known and where a person is accepted by the Judge as dealing only at a minor commercial level and where he is effectively a first

offender in drug dealing, then to take a starting point of three years and to decline to give him any discount would seem both to be harsh, I am not sure if I can quite go as far as I think Justice Tipping wants me to go, and say that it is so harsh that it's not available.

Tipping J I am not really wanting you to do anything other than what is in your clients best interest, but unless you can go that far you are not going to succeed.

Glover I know what Your Honour is saying. Is it manifestly excessive, well in my submission it is unless it can be justified. And it would seem to me, and I don't want to waste juris prudential here, but it would seem to me that it ought to be a fundamental principle of the law in this land that anybody who is sentenced understands the exact basis of the sentence that they receive. And it is incumbent upon a Judge in any case, but I think, particularly in serious cases like this, for the Court to spell out, you are getting what you got because of what you did, and this is what the Court thinks you did. Now whether the Courts findings of fact are accepted by the accused person or not is another matter, but the accused person is entitled to an exegesis of the Courts findings of fact in a form which is readily understandable and referable, and that's what Jarden didn't get.

Tipping J Am I right in inferring from the way you are presenting this Mr Glover that you are inviting us to reduce it to two years.

Glover I am inviting you to reduce it to two years Sir. And that would be on the basis not only of what I have just said, it would be on a basis where I am not in fact challenging band 1 in *Fatu* because two years would still fit, but it would be on a basis of saying that without the precision that I have just been referring to it would be unfair not to give him the benefit of the doubt if he wasn't going to get that it should have been spelled out why, and also on the basis that in Jarden's case exceptionally and the Court could very well, if my submission were exceeded to, the Court could very well spell this out so it wouldn't necessarily become a precedent, but that in Jarden's case at least, personal circumstances were not irrelevant and the Judge should not have ignored them.

Tipping J I just need a little bit more help about the weight of the personal circumstances. It's generally put isn't it that in Class A drug dealing offences, if not all, but certainly Class A, personal circumstances cannot have the weight that they might otherwise have in sentencing generally. Now what is it in particular that this man had a difficult relationship with his partner because of her psychological health and that was no doubt stressful and so on, but there are almost always stresses of some kind in the lives of people who find themselves in this sort of situation. I am

having some difficulty marking this out as particularly compelling Mr Glover, that's where you need to help me.

Glover Well Sir if I could refer you to paragraph 16 of my submissions, this is where I set them up for the benefit of this Court, and I repeated that I had submitted to the Court of Appeal that the personal factors which were reflected in the Probation Report and in particular the suicide of the applicant's seven month pregnant partner, after years of schizophrenia and psychosis, were matters which the Judge was not entitled to dismiss. The applicant was almost a first offender, never having been sentenced to anything more severe than a fine, was clear from the Probation Report that he had been suffering from anxiety and depression for three years, largely because of his partners mental illness. He was described as having strong family support and expressed a willingness to undertake therapy. He was assessed at being at low risk of reoffending and as being "a person who is likely to be willing and able to comply with orders of a Court".

Tipping J Yes well the suicide of the partner is tragic but it occurred after the offending, I am not saying it's wholly irrelevant, but the three years of suffering from anxiety and depression on account of her mental difficulties, that's the high water mark I suppose is it.

Glover I think it really is Sir.

Blanchard J What I think you are really saying is that three years is a starting point you would argue was very much on the high side and I think you would say that it was too high, but put it at very much on the high side. So you are starting on the high side, there are these factors that you have just drawn attention to and the Judge swept those aside as well.

Glover Yes. I mean I think the Judge could have said, two years or at a pinch two and a half years, and I note your tragic personal circumstances but I think all in all this is what the offending merits.

Blanchard J Or could have said three years, but I note

Glover But I appreciate the personal circumstances which brings it back to two and a half or two or whatever. So it's really a by-pass approach from me the first part being, without proper precision it's somewhat arbitrary simply to go to the three mark and adopt it without some kind of more detailed explanation and then once you have done that or once you haven't done it in this case it is not right simply to sweep aside the personal circumstances where they are of a nature like the one found here without a bit more than saying what the Judge did say.

McGrath J Mr Glover the impression I get from paragraph 7 of the Judge's sentencing remarks is that the question of the partner's illness and subsequent suicide was a subsidiary factor in mitigating circumstances, you said that it would seem the way he's dealt with the matter that more emphasis was being placed on the emphasis of Deborah Gordon-Smith. And that so far as the partner was concerned it was really only her suicide that was being put forward. I just really wonder is the state of her health and the affects of that prior to the suicide a factor that's assuming growing importance in this Court more than it was put to Justice Fogarty.

Glover No I don't think so Sir and I think it's reflected in the Probation Report. I think the Probation Officer actually commented on.

McGrath J Well the report does pick it up yes.

Glover Yes, and certainly it was emphasised by me in the High Court.

Tipping J You were also prepared to have said that he had been dealing in ecstasy not that I am influenced by that in the slightest, but it seemed a rather strange thing to be preparing,

Glover Well indeed, but um it's very clear that he was a confused and misguided young man in circumstances where things were not entirely within his control, he offended, he offended stupidly.

Tipping J I am not being critical, how did that come into it Mr Glover. I mean it's just possible the Judge might have been unconsciously influenced by that, I don't know, but I was startled when I read that in paragraph 1.

Glover Well I don't know Sir really.

Tipping J I don't know, well perhaps we will leave it alone if you like.

Glover No I do know no I can answer that I'm sorry. I do know that I know the answer to that exactly. There was substantial evidence that Deborah Gordon-Smith was dealing in ecstasy and dealing in ecstasy in large quantities. Indeed it was the submission of her counsel to the jury that what the Crown said was methamphetamine was not in fact methamphetamine at all, it was ecstasy and so my argument taking up on that to the jury was you have got be sure that the substance that the Crown says was methamphetamine wasn't in fact the Class B controlled drug ecstasy.

Tipping J Oh I see.

Glover That's where that came from. It does seem a little odd doesn't it.

Tipping J It just seemed to leapt off the page.

Glover Yes it sort of pops out for no apparent reason, but that is the reason.

Tipping J I understand, thank you.

Wilson J Mr Glover are you suggesting any cause or link between your clients anxiety and depression and the offending of which he was convicted?

Glover I don't know that I can answer that Sir, that would require a psychologist or psychiatrist to address it.

Wilson J And there is no evidence to support that thesis.

Glover Not that I am aware of. My own personal instinct is that I think there is a causal link but I can't express that with any degree of objectivity.

Elias CJ On the other hand I suppose it is indicative of the difficulties that he was under at the time of the offending and so feeds into your submission that the personal circumstances should have been looked at a bit more closely.

Glover Yes I think so Your Honour. I want to be careful about how far I go here because my recall is not perfect, but I think that he had actually rescued his partner from suicide on more than one occasion, he had found her before it was too late, and that would have been over a longer period than the period that the offending took place because this offending was within a relatively discrete timeframe.

Elias CJ Well I don't know that you need to go into all of that because the pre-sentence report indicates anxiety and depression for about three years and that he had been on medication and that he had been on a sickness benefit for that time.

Glover I don't think unless there is anything else I can add much to what I have said.

Elias CJ Thank you Mr Glover.

Glover May it please the Court.

Elias CJ Yes Ms Markham

Markham Thank you Ma'am may it please the Court. Like my friend I don't have that much really to add to the written submissions filed on behalf of the Crown. The Crown accepts that there was an error of principle on the part

of the Permanent Court in applying *Te Rure* but the Crown submission is that applying the correct approach which we say is *Fatu* in light of *Te Rure* that the sentence was within range for this offending.

Elias CJ Ms Markham I just wondered whether accepting it wasn't very perhaps as well expressed as it might have been, whether the Court of Appeal wasn't really looking at *Te Rure* as a cross-reference rather than, because it seems such an extraordinary blunder to sentence as if for cannabis offending when it's quite clear that the Judge in his sentencing remarks wasn't. And it's just a cross check against the suitability of the sentence.

Markham Yes Ma'am I would agree with that, there are two interpretations I suppose of the Courts remarks and the one and the sort of least favourable interpretation is the one that my friend has taken and that is to say that this man has been sentenced for offending that he hasn't been convicted of. The other interpretation is the one that I would submit as more likely and that is simply that *Te Rure* was being used as a yard stick against which this mans culpability was being measured.

Tipping J The difficulty about that is they say Mr Jarden was a small scale cannabis dealer.

Markham Yes.

Blanchard J Do they mean like a small

Tipping J Like as if he were or by analogy with, it's a most clumsy piece of work.

Markham Well I can't defend it Your Honour, all that I can say is that a more favourable interpretation of the Court's reasoning would be that it was a yard stick.

Tipping J I am a bit interested in this *Te Rure* business because isn't it getting a little simplistic to say that there should always be a discount for conspiracy, it depends what the conspiracy evidence proves surely. I would have thought *Te Rure*, with respect, if not read carefully and with that in mind, is apt possibly to give too absolute an impression.

Markham Well my reading of *Te Rure* was exactly that Sir that in cases where the conspiracy goes beyond a theoretical agreement and there is actual supply, or actual manufacture as it was in that case, then the discount can be very small.

Tipping J Well why should there be any discount at all if the evidence actually, although charged as a conspiracy, satisfies the sentencing Judge that there was a certain or more actual supply of x amount of whatever it is.

Markham I suppose the answer

Elias CJ There is a different maximum.

Markham Exactly, the answer is that the maximum penalty is only 14 for the conspiracy.

Elias CJ So should you pro rata the whole exercise.

Markham Well the Court in *Te Rure* suggested a discount in the vicinity I think of 5 to 10% in cases where the conspiracy went beyond, in their agreement, and that is the approach that the Court took there. And in fact *Te Rure* was a case where there was no specified amount. It was a manufacturing operation where it was impossible to say how much methamphetamine had been manufactured but the Court

Elias CJ Although the Court said the fact that it was a manufacturing operation meant that it wasn't going to be an inconsequential amount.

Markham No but the Court went further in fact and suggested that not only was it band 2 but it was at the middle towards the upper end of band 2, having regard to the other indicia of commerciality that there were in that case. In terms of *Fatu*, just to clear up I think, I am not sure whether your Honours have a copy of the judgment in front of you, but it is para [34] that sets out the relevant bands for the sale or supply of methamphetamine and band 1 is described as low level supply, that is less than 5 grams and the range is in fact 2 to 4 years imprisonment as the starting point. Then you get into the overtly commercial band, which is band 2, and that is described as supplying commercial quantities, 5 grams or more. And that is 3 to 9 years imprisonment.

Elias CJ Yes well that really does, I hadn't thought about looking at band 2 but that really does support Mr Glover's submissions doesn't it, because this, the starting point and ending point adopted by the Judge here puts it into band 2.

Markham The starting point and the end point is also squarely within band 1.

Elias CJ It is the middle of band 1.

Markham There is an overlap and

Tipping J Where did I get the 2 to 5 from? Is that a mental aberration or is that something else?

Markham I wouldn't like to comment Sir.

Tipping J Don't hesitate to, [laughter],

Markham That may be the manufacturing.

Tipping J Probably a mental aberration.

Markham That may have something to do with the manufacturing of bands.

Tipping J Well anyway that's fine, you have clarified it thank you.

Markham Yes so my submission is that the Judge was required to fix

Elias CJ I mean this didn't overlap with supplying commercial quantities of 5 to 250 grams. One would expect the overlap, accepting that there is an overlap, this wasn't within the area of overlap.

Markham This wasn't in terms of quantity because the Judge couldn't be specific but in terms of commerciality the Judge made that clear finding that there was, to an extent, commercial dealing in methamphetamine.

Elias CJ But it is commercial quantities which are identified as 5 to 250 grams.

Markham Well I accept that there is no black and white distinction between bands 1 and 2 in terms of band 2 being purely commercial, band 1 not. There is an overlap but my submission would be that in terms of where you pitch the starting point, if you are looking at band 1 the fact that the offending is commercial and has been found to be commercial, would place that or would tend to place that towards the upper end of that band. Having regard also to any other indicia that you might have.

Elias CJ Doesn't this undermine the Judge's, doesn't this undermine though the Judge's professed approach that because he didn't know the quantities the most favourable interpretation on the evidence in terms of quantity would have to be permitted.

Markham I think *Fatu*, although it uses quantity as the objective measure of commerciality, it is also about more than that. I mean the broader picture is that *Fatu* was concerned with levels of commerciality, however measured. And my submission would be that simply because it is not possible to fix a specific quantity, and that is the case in lots of sentencing exercises, not just conspiracies, it doesn't mean that *Fatu* goes out the window and you are forced to the lowest end of the possible range. The Judge can still make an assessment of the level of commerciality involved, based on all of the circumstances in the case, not simply quantity.

Elias CJ	But he hasn't here.
Tipping J	How is the first band described again, could you
Wilson J	Low level offending.
Markham	Low level supply.
Tipping J	Low level supply.
Markham	Less than 5 grams.
Tipping J	Less than 5 grams.
Markham	2 to 4 years. So there is no specific mention of commerciality, at least at that stage. Now I am not suggesting that commerciality precluded from band 1, but the real focus in terms of commercial offending is band 2.
Tipping J	So very minor commerciality, if you like, would be at around 3 years, the very bottom of band 2 and the middle of band 1, so to speak.
Markham	That would be my submission.
Blanchard J	What does band 2 actually say.
Markham	Band 2 says supplying commercial quantities, 5 grams
Elias CJ	And it is commercial quantities, it is not commercial supply, it is supplying commercial quantities which are defined as 5 to 250 grams.
Markham	Well I accept that it is commercial quantities but my submission would be that the quantities are merely an indication of the level of commerciality involved, and there may be other features that enable a sentencing Judge to draw conclusions about the level of commerciality without knowing a specified quantity. And in this case of course we have the volume of communications, the timing compared with the known deliveries of methamphetamine to Ms Gordon-Smith and so on. So it was a case where the finding of commerciality was very much open to the Judge and I don't understand my friend to necessarily suggest otherwise.
Elias CJ	No.
Blanchard J	But it is on two occasions for what appear to be small amounts. The impression I have is that the Judge must have thought, giving Mr Jarden

the benefit of the doubt, that the two occasions probably involved less than 5 grams.

Markham Well that is, I guess the two occasions combined would have to involve less than 5 grams on the Judge's analysis, otherwise we would be in band 2.

Tipping J There seems to have been quite a lot, I know we don't have all the evidence in front of us, but from the flavour of the sentencing remarks somewhat elusive as they are in places, there seems to have been quite a lot of dialogue between this man and the Gordon-Smith woman, apropos of methamphetamine transactions.

Markham Yes.

Elias CJ All sorts of transactions.

Tipping J Well all sorts of it but concentrating on methamphetamine for the moment. Would not the Judge have been entitled to get some sort of, the anxiety I have in this case is to how precise are we going to require sentencing Judges to be, both in their own minds and in their articulations, when they have sat there for weeks or however long it was listening to all the evidence. Now there are conflicting desiderata here.

Markham Well again this was a sentencing following a lengthy trial, and it is not uncommon in my submission for Judges in that situation not to rehearse the facts in any detail necessarily, provided that they have made sufficient findings of culpability. That, in my submission, is sufficient. So here the Judge has made a finding that this was low level commercial dealing. That, in my submission, is sufficient.

Tipping J Well you see this is part of the trouble with guidelines in that, as the Chief Justice has pointed out, apparently the actual phraseology of the guideline is low level dealing in commercial quantities. We don't, I have always had a bit of an anxiety about these guidelines being construed like a will. Somehow or other we have got to both give guidance in the guidelines and leave some room for flexibility, for individual application. That is what worries me a bit about Mr Glover's submission, that to have to articulate with the sort of precision that would be ideal just strikes me as being a little unreal in a lot of these cases.

Markham Well yes especially where you have someone who is dealing in drugs and using drugs. It is never going to be possible to fix with mathematical certainty what the quantity of drugs is that was intended for supply, and what the quantity was intended for personal use, and it is, in my submission, a matter for the overall assessment of the sentencing Judge,

and I think *Fatu* recognises that implicitly because it has the overlap between the bands. It enables flexibility, it refers to the fact that the appropriate sentence will reflect not only the quantity but also the particular role played by the offender and the chain and so on. So there is that flexibility there and in fact I think para [32] of *Fatu* indicates that where there are people who simply give small amounts of drugs to friends for their personal consumption and a complete absence of commerciality, then you can look at sentencing outside the band. So there is that built in, in my submission, and here really unless the trial Judge can be shown to have been wrong in what he did, the sentence and the sentence consequently manifestly excessive the Crown would submit to the contrary, this was within the available range and within band 1.

Tipping J What do you say about the personal circumstances dimension. Let's say that 3 years was a fair starting point, let's assume that for the moment. Was it a bit tough not to give some credit for

Markham Well this was a submission advanced in the Court of Appeal, and the Court of Appeal didn't accept that and basically applied the standard line that personal circumstances count for little and deterrence predominates and so on. In my submission that wasn't an error, a demonstrable error, on the Court of Appeal's part. I would also submit that, as I think has been noted already, the suicide of the partner occurred afterwards so it is not something that bears directly on the culpability of the appellant at the time of the offending and there were previous convictions and it doesn't seem the Judge was aware that those drug offences, and I accept there is a reference to dealing in the Crown's submissions which is an error

Tipping J Pretty trivial in this context though.

Markham Well trivial except for the fact that they occurred on bail while for this offending.

Tipping J Oh really.

Markham It was in 2006 that those offences were committed, whereas this offending was in I think 2005. The Judge doesn't seem to have been aware of that point but the Crown would submit that it would have been open to the Judge to make some allowance for that in terms of uplift and that may bear upon this question of, well essentially the Judge took the view that the personal circumstances and the convictions balanced each other out. And my submission would be that that was open to him.

And for completeness your Honours I should accept also that there was some reference to para [11] in the Crown submission and that was the comment about the quarter-back position referring to half an ounce. I

think the Crown at trial accepted that it could have referred to quarter of a gram, rather than quarter of an ounce, which is obviously significantly less.

Unless the Court has any questions, those are the Crown's submissions.

Elias CJ Ms Markham you mentioned, and I should have picked up that too, I think your reference was to what was said at the end of para [34] in *Fatu* that supply in small quantities where there is no commerciality and no other aggravating circumstances may call for starting points less than those indicated as appropriate for band 1. So the commercial element is really what is reflected in band 1.

Markham Yes and no, depending on what other aggravating features there may be.

Elias CJ Yes yes acknowledging that.

Markham It is not purely commercial but it

Elias CJ No. Thank you Ms Markham.

Mr Glover do you want to be heard in reply.

Glover Only very briefly your Honour. There is just one point that occurred to me while we were listening to Ms Markham, and that is that band 1 in *Fatu* is to some extent unsatisfactory because it says up to 5 grams and I note the comments about commerciality or lack of it, and I take those on board and I really incorporate those into what I am about to say. But 5 grams is a relatively large quantity of methamphetamine, that the drug is sold on the street in .1 of a gram point bags, that is what they are called point bags because they contain point one of a gram. As I indicated earlier .1 of a gram at wholesale prices attracts about \$35 wholesale street value, perhaps a bit more, if you are an end of the line dealer on the street, you might sell it for a bit more than that. 5 grams at wholesale rates is about \$1750. And again more if you break it down and sell it commercially. So to go from zero to 5 grams or from .1 to 5 grams, is a leap from \$35 to \$1750 and that really does I think involve quite a different consideration of the degree of commerciality involved and that is the only point I wanted to make.

Elias CJ We will adjourn briefly to consider where we are going to from here and we may simply send a message back that we will reserve our decision.

Court adjourns 3:20 pm