

**IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY**

**I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU ROHE**

**CRI-2018-004-1197
[2019] NZHC 2737**

THE QUEEN

v

BRIAN PAUL CUTLER

Hearing: 25 October 2019
Appearances: R McCoubrey for the Crown
R Mansfield for the Defendant
Sentencing: 25 October 2019

SENTENCE OF GAULT J

Solicitors / Counsel:
Mr R McCoubrey, Meredith Connell, Office of the Crown Solicitor, Auckland
Mr R Mansfield, Barrister, Auckland

[1] Mr Cutler appears for sentencing having pleaded guilty to five charges relating to possessing and supplying relatively large quantities of methamphetamine. They are:

- (a) four charges of possession for supply of a class A controlled drug, methamphetamine;¹ and
- (b) one charge of supplying the class A controlled drug methamphetamine.²

[2] This is, to the best of my knowledge, one of, if not, the first methamphetamine related sentencings following the release of the Court of Appeal's decision in *Zhang v R*, which sets new guidance on sentencing for methamphetamine dealing.³

Facts

[3] Mr Cutler is now 47 years' old. He arrived in New Zealand from Australia in September 2017. He became a person of interest to the National Organised Crime Group and the New Zealand Customs Service in November 2017.

[4] Throughout December 2017 and early January 2018, Customs examined a large number of courier consignments originating from Malaysia addressed to different business entities at 8D Southgate Place, Henderson, a factory unit Mr Cutler rented and resided in. A company, named North Island Equipment Services Ltd, had been incorporated, with the sole director and shareholder as Christopher Wilson and address at that factory unit. Each of these consignments contained identical cylinder or engine parts. None of them contained methamphetamine. The consignments were received and signed for by Mr Cutler.

[5] However, between 16 January and 3 February 2018, Customs intercepted and examined four very similar packages addressed to "North Island Quality Ltd", or some variant thereof, at Mr Cutler's address. Each of these four packages contained approximately 2.5 kgs of methamphetamine. All of the packages were subsequently

¹ Misuse of Drugs Act 1975, ss 6(1)(f) and 2(a). Maximum penalty life imprisonment.

² Sections 6(1)(c) and 2(a). Maximum penalty life imprisonment.

³ *Zhang v R* [2019] NZCA 507. The decision replaces the Court of Appeal's guideline decision in *R v Fatu* [2006] 2 NZLR 72 (CA).

delivered to and signed for by Mr Cutler at his address. A courier call was also intercepted where Mr Cutler identified himself as “Chris”.

[6] The total quantity of methamphetamine was 10.2 kgs.

[7] On 23 January 2018 Police and Customs executed a covert search warrant at a different storage unit in Henderson hired by Mr Cutler. They found the first consignment, which had not been opened, and seven empty cylinders or engine parts. Police installed a covert camera in the corridor of the storage facility. The camera had a good view of the unit, such that when the unit was accessed there was good imagery of items placed and removed from the unit.

[8] The camera observed Mr Cutler on various dates placing and removing packages from the unit, and removing suitcases containing empty cylinders.

[9] After midnight on 5 February 2018 Police also separately observed Mr Cutler removing packages believed to contain methamphetamine from the unit, and then driving to another address in Onehunga. He left that address a short time later. He visited that address again on 7 February 2018.

[10] On 8 February 2018 Police executed a further covert search warrant at the storage unit and discovered all four packages were missing. In their place were bags containing approximately \$1.15 million in cash.

[11] When spoken to by Police, Mr Cutler denied any knowledge of the methamphetamine, but acknowledged receiving a variety of packages at the address.

[12] Mr Cutler was otherwise unemployed and has no criminal convictions here or overseas.

Mr Cutler’s personal circumstances

[13] Mr Cutler was born in Australia, where he spent most of his life before moving to New Zealand in 2017. He described his upbringing to the pre-sentence report writer as “good”. He has four siblings and has a good relationship with his mother and

stepfather, whom he treats as his father. He spent the majority of his career working on oil rigs in Australia and New Zealand and earned good money.

[14] He unfortunately lost his job in 2015 after failing a drug test, and he reports going through a significant bout of depression, to the point he contemplated suicide.

[15] He said to the report writer that he accepts the summary of facts is accurate, and said that on arriving in the country he was approached by unspecified people in New Zealand who told him “he had to do this”. He thought he had little choice as he feared reprisal for his family still living in Australia. He said to the report writer that he did not know what was in the packages as he had never opened them, and for all he knew they could have contained rice. But he did suspect, given the circumstances, that it was more than just rice.

[16] Mr Cutler self-identified as a “functioning drug user”. He says he started using at the age of 14 and has tried everything except heroin. He has never been to any form of rehabilitation and says he has simply stopped when he needs to. The report writer assesses Mr Cutler as having a high risk of continuing substance abuse.

[17] The report writer identified the key contributing factors to Mr Cutler’s offending as being self-entitlement, those he associates with, poor problem solving skills and substance use. Considering these factors, the report writer assesses him as being at medium risk of offending in the same manner, and that he poses a high risk of harm to others. I do not take this to mean there is a risk of violence, as there is no indication this has been a problem for Mr Cutler in the past.

[18] I also have before me several character references from people aware of Mr Cutler’s offending.

[19] First, I have two references from Mr Cutler’s mother and sister. Both write that Mr Cutler is committed to his family, and had to shoulder many burdens growing up, as his stepfather left after another of Mr Cutler’s sisters was born with severe disabilities. She is now 37 and requires constant care, which Mr Cutler’s mother provides full time. Mr Cutler would support her in this, and the long-term plan was

for Mr Cutler to take over this care. Both write that Mr Cutler has their full support and love, and that he is remorseful for his actions. They ask I consider this and the effect on his family as I sentence him today.

[20] I also have several references from officers in Mount Eden Correctional Facility, who are familiar with Mr Cutler's work in the prison as a cleaner and painter. It seems Mr Cutler has worked in various units around the prison, and all of the referees speak highly of him. They say that Mr Cutler has a good attitude, high work ethic, and is very respectful and reliable. He has been placed in positions of high trust in the team and is a positive role model to other prisoners. They comment that he understands what he has done and is remorseful. I note that such references from Corrections staff are relatively rare in my experience, and I commend Mr Cutler for his positive behaviour.

[21] Finally, I have a letter from Mr Cutler. He writes that he had an addiction problem since the age of 15, which only stopped because he had a heart attack. He writes that he takes full responsibility for his offending. He is truly ashamed of the effect his offending has on the many he doesn't know and on his loved ones. He writes that he is trying to use his time in prison positively through contributing to the community by being a model prisoner to show other prisoners that a life involved with drugs is no life at all, and that it will lead only to hurt and loss. He says he realises that drugs will take everything from you in the end, and he is thankful that he has only lost his freedom and not his life.

[22] I thank Mr Cutler and his supporters for their letters and I can only accept he is genuinely remorseful for his offending.

Approach to sentencing

[23] I must have regard to the purposes and principles of sentencing as set out in the Sentencing Act 2002.⁴ In serious drug offending such as this, as noted by the Court of Appeal in *Zhang v R*, the purposes include to hold Mr Cutler accountable for the harm done to the community, to promote in him a sense of responsibility for that harm,

⁴ Sentencing Act 2002, ss 7-8.

to denounce his conduct, to deter others from committing the same or a similar offence, protection of the community, and to assist in Mr Cutler's rehabilitation and reintegration. The principles include the requirement to impose a penalty near to the maximum if the offending is near to the most serious of cases for which that penalty is prescribed, but also the need to impose the least restrictive outcome appropriate in the circumstances.⁵

[24] I will follow the normal sentencing process.⁶ First, I will set a starting point, based on the characteristics of the offending applying the guideline decision in *Zhang*. Secondly, I will consider whether any of Mr Cutler's personal circumstances justify an adjustment to that starting point, up or down. Thirdly, I consider whether Mr Cutler should receive a discount for his guilty plea.

Starting point

[25] The Court of Appeal in *Zhang* identified five bands of culpability for supplying methamphetamine, which are defined by reference to the quantity of methamphetamine the defendant dealt in.⁷ The Court held it is no longer necessary to distinguish between supply, importation and manufacturing.⁸ The new bands are as follows:

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

[26] Quantity is an important measure of culpability, because it is an indicator of the harm or potential harm to the community, and greater quantities may indicate commerciality, which attracts greater denunciation.⁹ As the Court said in *Zhang*,¹⁰ the Ministry of Health has attempted to quantify the social harm associated with

⁵ *Zhang v R* [2019] NZCA 507 at [58].

⁶ *R v Taueki* [2005] 3 NZLR 372 (CA); and *Hessel v R* [2010] NZSC 135, [2011] 1 NZLR 607.

⁷ *Zhang v R* [2019] NZCA 507 at [125]. This is in contrast to the four bands in *Fatu* [2006] 2 NZLR 72 (CA) at [43].

⁸ At [122].

⁹ At [104].

¹⁰ At [80].

methamphetamine using a tool called the “Drug Harm Index”. The Ministry calculated the total social costs associated with methamphetamine in 2016 as \$1,239,000 per kilogram.¹¹ This case involves 10.2 kgs, so the social harm on that basis would be the frightening amount of approximately \$12.6 million.

[27] Quantity alone, however, cannot determine culpability.¹² The Court of Appeal stated that the defendant’s role in the criminal enterprise has a fundamental effect on culpability, which can be recognised not just by moving within the bands, but also by moving below the starting point for a band where culpability, other than quantity, is low.¹³ The Court emphasised, however, that access to lower starting points may only be expected when a defendant’s role is lesser in degree, and where quantities are at the lower end of the relevant band.¹⁴

[28] The Court of Appeal stated that, in assessing role, Judges may be assisted by reference to the following descriptions, based on those developed by the United Kingdom Sentencing Council, to distinguish between “lesser”, “significant” and “leading” roles:¹⁵

Lesser	Significant	Leading
1. performs a limited function under direction;	1. operational or management function in own operation or within a chain;	1. directing or organising buying and selling on a commercial scale;
2. engaged by pressure, coercion, intimidation;	2. involves and/or directs others in the operation whether by pressure, influence, intimidation or reward;	2. substantial links to, and influence on, others in a chain;
3. involvement through naivety or exploitation;	3. motivated solely or primarily by financial or other advantage, whether or not operating alone;	3. close links to original source;
4. motivated solely or primarily by own addiction;	4. actual or expected commercial profit; and/or	4. expectation of substantial financial gain;

¹¹ *Zhang v R* [2019] NZCA 507 at [80].

¹² At [104].

¹³ At [110] and [123].

¹⁴ At [123].

¹⁵ At [126].

- | | | |
|---|---|--|
| <p>5. little or no actual or expected financial gain;</p> <p>6. paid in drugs to feed own addiction or cash significantly disproportionate to quantity of drugs or risks involved;</p> <p>7. no influence on those above in a chain;</p> <p>8. little, if any, awareness or understanding of the scale of operation; and/or</p> <p>9. if own operation, solely or primarily for own or joint use on non-commercial basis.</p> | <p>5. some awareness and understanding of scale of operation.</p> | <p>5. uses business as cover; and/or</p> <p>6. abuses a position of trust or responsibility.</p> |
|---|---|--|

[29] The Court also noted that the defendant will, of course, likely know more about his or her own role than the Crown. The Court emphasised that the Crown has the burden of proving aggravating facts and disproving mitigating facts in dispute.¹⁶ But, in practice, as noted by the Court, the facts necessary to establish guilt will justify inferences about the role, knowledge and gain. Where these inferences are sufficient to prove an aggravating fact, an evidential burden moves to the defendant to displace the inference.¹⁷

[30] Turning to this case, the quantity of methamphetamine at issue, being 10.2 kgs, puts Mr Cutler clearly within band 5. The relevant range is, therefore, 10 years to life imprisonment.

[31] There is a wide divergence between the Crown and defence on the appropriate starting point. The critical point of difference between them is how to characterise Mr Cutler's role.

¹⁶ *Zhang v R* [2019] NZCA 507 at [127]; see s 24(2)(c) of the Sentencing Act 2002.

¹⁷ At [127].

[32] The Crown says Mr Cutler's role is between significant and leading, by reference to the role descriptions. The Crown says the following are the characteristics of Mr Cutler's role:

- (a) The enterprise was plainly commercial and large scale.
- (b) Mr Cutler took a direct and principal role in the distribution of the drugs. That is evident from his organisation of storage units, his hands-on approach, and the fact that the cash was located in one of his storage units.
- (c) Accordingly, Mr Cutler's role ought to be viewed as the leading, if not the sole, offender in the New Zealand end of the enterprise.

[33] In written submissions the Crown submitted this justified a starting point of between 18 to 20 years' imprisonment. But Mr McCoubrey acknowledged today that that was too high and proposed a starting point of between 16 and 18 years' imprisonment.

[34] Mr Mansfield, for Mr Cutler, submits Mr Cutler's role should fall in between lesser and significant. Mr Mansfield characterises Mr Cutler's role as a "catcher", being purely logistical in nature – although he acknowledged orally that Mr Cutler was more than simply a "catcher", submitting he was nevertheless an intermediary operating under instruction. Mr Mansfield submits that Mr Cutler was responsible for the receipt and distribution of the packages, but he acted solely on the instructions of those higher in the organisation and did not have influence over them. He submits Mr Cutler received a fixed fee for his services, and did not take a portion of the profit, he was put in a position where he could easily be apprehended and was thus expendable.

[35] Mr Mansfield submitted the starting point should be between 10 and 11 years' imprisonment.

[36] There has been no disputed facts hearing. I can only sentence Mr Cutler based on the guilty pleas and summary of facts, which is vague as to exactly Mr Cutler's role. The summary was agreed by the parties following lengthy negotiations, and I suspect is intentionally vague in some respects. I note this only to explain the lack of detail, and it does not affect my decision in any other way.

[37] I am therefore left to draw inferences from the summary of facts to determine Mr Cutler's role. I note that Mr Mansfield submits three factors which are not in the summary of facts, namely: that Mr Cutler did not receive a cut of the profits but instead received a fixed fee; he did not have influence over those higher up in the enterprise; and he was instructed where to deliver the packages, so did not have a management role. Mr Cutler said these same things to the pre-sentence report writer.

[38] I must be careful to distinguish between the presence or absence of aggravating factors and of mitigating factors. I consider those three identified by Mr Mansfield are best characterised as the absence of aggravating factors. For example, if Mr Cutler did have influence over those higher in the organisation, and took an active role in managing the enterprise, that would be an aggravating feature of the offending. The Crown has not proved this is the case. Therefore, by default, I assume that Mr Cutler did not have influence over those above him. That is what I mean when I say absence of an aggravating factor.

[39] Therefore, unless I can infer otherwise from the summary of facts, the Crown has the burden of proof to show Mr Cutler had a greater role than that identified by Mr Mansfield in relation to the factors referred to.

[40] I consider the following are the characteristics of Mr Cutler's role:

- (a) He performed something more than a limited role, in that he was not merely a courier or mule. I draw this from the fact he seemingly had a fair degree of autonomy as to how he performed his tasks. But I do not consider the summary of facts establishes that he performed more than a logistical function, that is, receiving the packages, storing them, distributing them to others, then storing cash, all on the direction of

others. I am not prepared to infer he had a management role or determined where to distribute the packages.

- (b) I am not prepared to infer he had a leading role in the operation, or that he had influence over people higher in the enterprise. I accept Mr Mansfield's submission that Mr Cutler was in something of an expendable position, given the packages were signed for by him, meaning if the operation was discovered Mr Cutler would go down. This indicates Mr Cutler was not overly important to those higher up.
- (c) I accept there may have been an element of pressure, based only on Mr Cutler's comments to the report writer, but I do not place much weight on this in the absence of supporting evidence.
- (d) I cannot infer that Mr Cutler was receiving the cash for himself and that it was his own operation, nor that he received a cut of the profits. There was a financial motive, but the quantum of his fee is unknown.
- (e) I accept Mr McCoubrey's submission that there was an element of the use of a business to cover the enterprise.
- (f) While Mr Cutler said he has been a drug user, there is no evidence that that played a significant role in this offending. I note the Court of Appeal's direction that there should be persuasive evidence of addiction and its connection to offending if it is to be considered a mitigating factor, which I take to apply equally to whether it is considered a feature of the offending or of the offender, as it could conceivably come in at each stage. That has not been suggested here.
- (g) I consider Mr Cutler must have had some awareness of the scale of the operation, although Mr Mansfield says he did not. Mr Cutler handled a significant amount of cash, which must have given him some clue as to the value of his activities. One does not secrete rice in cylinders or engine parts, nor receive \$1.15 million for this quantity of rice.

[41] Overall, I find Mr Cutler was likely an important distributor of a significant quantity of methamphetamine but was a lower level member of the enterprise whose responsibilities were operational only. As Mr Mansfield submitted, he was an intermediately operating under instruction. He operated with some autonomy, but he did not have influence over the operation as a whole, or over those higher up in the organisation. I would place him at the lower end of the “significant” category identified by the Court of Appeal.

[42] In terms of band 5, I am satisfied this is not a case where it is appropriate to go below the minimum starting point of 10 years, given the quantity of methamphetamine and that Mr Cutler’s role was not a minimal one. The question then becomes how to fit this role into band 5.

[43] I am assisted by the specific cases the Court of Appeal considered in *Zhang* when giving its tariff guidance.

[44] The first is the appeal regarding Mr Zhang himself.¹⁸ Mr Zhang is a Canadian national, who arrived in New Zealand in January 2018. On 20 February 2018 a consignment arrived from the United States addressed to Mr Zhang, marked “toner”. It was held up by Customs because it lacked an importer code, which Mr Zhang then obtained. The consignment was inspected by Customs and they found approximately 17.9 kgs of methamphetamine. It was replaced by a placebo and then delivered to Mr Zhang, who was then arrested when it came into his possession. Although Mr Zhang only appealed his minimum period of imprisonment, the Court of Appeal proceeded to analyse the whole sentence.

[45] The offending was clearly band 5. The Court found Mr Zhang’s role was “significant”, but at the lower end. He served an operational function, having come to New Zealand to meet the consignment and make sure it cleared Customs, and make it ready for sale. But there was no evidence demonstrating he was to take an active role in the supply stage of the operation. He only received a limited amount of money for his role. The Court stated that a starting point of 15 years would be appropriate,

¹⁸ *Zhang v R* [2019] NZCA 507 at [246]-[264].

balancing Mr Zhang's more limited role with the significant quantity of methamphetamine.

[46] Another appeal related to Mr Thompson.¹⁹ He was convicted of supplying 4.2 kgs of methamphetamine and possessing for supply another 2.6 kgs. The trial judge described Mr Thompson as running a sophisticated and complex methamphetamine business and was the most compressive dealer the Hawke's Bay had ever seen. The Court of Appeal found Mr Thompson was at the top end of the "leading" role.²⁰ The Court of Appeal approved a starting point of 16 years on the supply charge, with an uplift of two years for the possession for supply charge.

[47] Mr Mansfield also referred me to Gordon J's decision in *R v H*.²¹ This was pre-*Zhang*, but is somewhat similar to the current offending. I note the Court of Appeal's comment in *Zhang* to the effect that their judgment would not have overly much effect on defendants charged with commercial level dealing in methamphetamine, which is the case here.²² This means pre-*Zhang* cases may still be relevant to offending at the upper end of the spectrum. Mr H was convicted of several charges, among them 11 charges of supplying methamphetamine. The lead charge involved 9 kgs. Mr H's role in this transaction was to transport the methamphetamine to a location at which it would be picked up by a person unknown. Another person, Ms F, was the instigator of this offending, but Mr H played an important part in it. Mr H was effectively the second in command to the mastermind of the operation. Gordon J took a starting point of 12 years and six months on that lead charge.

[48] I draw assistance from all of these cases. Mr Cutler's role culpability is broadly comparable to Mr Zhang's. However, the quantity in *Zhang* was significantly greater. The quantity here is more than in *Thompson*, but Mr Thompson had a leading role. This case is perhaps closest to *R v H* in terms of quantity, but Mr H's role was arguably greater. Considering the new guideline judgment and these examples, I adopt a starting point of 12 years' imprisonment. I consider this best balances the significant quantity of methamphetamine and Mr Cutler's role.

¹⁹ At [265]-[281].

²⁰ *Zhang v R* [2019] NZCA 507 at [272].

²¹ *R v H* [2018] NZHC 1760.

²² *Zhang v R* [2019] NZCA 507 at [11].

Features personal to Mr Cutler

[49] I now turn to whether any factors personal to Mr Cutler justify an adjustment to that starting point.

[50] I note that it is sometimes said that personal factors in serious methamphetamine cases should be subordinated to the importance of deterrence.²³ The Court in *Zhang* stated that the need for deterrence is taken into account when setting the starting point, and the segregated nature of the sentencing process adequately balances the need to consider personal circumstances with the need for deterrence.²⁴ So this does not mean personal mitigating circumstances are less applicable in offending of this kind.²⁵

[51] Mr Mansfield points to the fact Mr Cutler has no previous convictions, and, as evidenced by the references from Corrections staff, has behaved admirably in prison. He says this evidences good character and prospects of rehabilitation.

[52] I give less weight to previous good character, given the nature of the offending. However, I do consider Mr Cutler's lack of a criminal history and behaviour in prison, together with the support of Mr Cutler's family, increase the prospects Mr Cutler may be able to turn a corner and become a productive member of society again. I consider such positive prospects of rehabilitation is a strong mitigating factor.

[53] Mr Mansfield also points to the fact that Mr Cutler will have to serve a lengthy custodial sentence in a country foreign to him, where his family will not be able to visit him, or at least not regularly. The Court in *Zhang* noted this has often legitimately been treated as a mitigating factor, as prison for such a person will be harder than normal to bear.²⁶ This factor will perhaps be more strongly engaged where a person also does not speak English, but I still give credit for this.

²³ See *R v Jarden* [2008] NZSC 69, [2008] 3 NZLR 612 at [12]; and *Zhang v R* [2019] 507 at [130].

²⁴ *Zhang v R* [2019] NZCA 507 at [134].

²⁵ At [136].

²⁶ At [163]. See also: *R v Yung* [2017] NZHC 895 at [6]; *R v Yuen* [2016] NZHC 571 at [15]; *R v Nevarez* [2012] NZHC 156 at [25]; and *R v Roest* [2012] NZHC 1086 at [68].

[54] Finally, Mr Mansfield points to Mr Cutler's remorse. I accept Mr Cutler is genuinely remorseful, based on his letter, the comments of his referees, and the pre-sentence report. Mr Cutler has made a grave error of judgment, and he must deal with the consequences of that, but genuine remorse increases the likelihood he will not reoffend.

[55] Mr Mansfield does not suggest addiction played any significant part in Mr Cutler's offending.

[56] The Crown did not make submissions on what discounts are appropriate for personal mitigating factors. I consider a discount of 20 per cent is appropriate to account for all of these factors.

Guilty plea

[57] Finally, I consider what discount is appropriate to reflect that Mr Cutler pleaded guilty.

[58] Mr Mansfield submits that although the plea did not come at the first opportunity, the parties were in discussion since July 2018, and the basis for a resolution was formalised in November 2018, when the summary of facts was significantly amended. The Crown accepts the plea came after detailed discussions about an appropriate resolution. The Crown accepts a discount of 20–25 per cent is appropriate.

[59] Considering the plea came after a substantial amendment to the summary of facts, and there was no need for a trial, I consider the maximum 25 per cent discount is appropriate.²⁷

[60] From a starting point of 12 years' imprisonment, I deduct 20 per cent, or two years and five months, for mitigating factors, bringing the sentence to nine years and seven months. I then deduct 25 per cent, being a further two years and five months, to come to a final sentence of seven years and two months' imprisonment.

²⁷ *Hessel v R* [2010] NZSC 135, [2011] 1 NZLR 607 at [75].

[61] The Crown does not seek a minimum period of imprisonment, and I do not consider one is appropriate in this case.

Formal sentence

[62] Mr Cutler, please stand.

[63] On the four charges of possession for supply of a class A controlled drug, methamphetamine, I sentence you to seven years and two months' imprisonment, to be served concurrently.

[64] On the single charge of supplying the class A controlled drug methamphetamine, I sentence you to seven years and two months' imprisonment, to be served concurrently.

[65] Please stand down.

Gault J