



COURT OF APPEAL OF NEW ZEALAND

TE KŌTI PĪRA O AOTEAROA

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JING YUAN ZHANG AND OTHERS v THE QUEEN [2019] NZCA 507

PRESS SUMMARY

This summary is provided to assist in the understanding of the Court’s judgment. It does not comprise part of the reasons for that judgment. The full judgment with reasons is the only authoritative document. The full text of the judgment and reasons can be found at www.courtsofnz.govt.nz.

1. The Court of Appeal today released a judgment introducing a new guideline for judges sentencing people convicted of offences related to the importation, manufacture and supply of methamphetamine.

Background

2. Methamphetamine is a Class A drug, meaning that methamphetamine-related offending has a maximum sentence of life imprisonment. This reflects the fact that methamphetamine offending is serious criminal conduct, which causes very serious physical, mental and economic harm to individual New Zealanders.
3. Sentencing for methamphetamine-related offending has been based on the guideline decision of this Court in *R v Fatu* [2006] 2 NZLR 72 (CA) since 2005. That decision created a series of sentencing bands based on the quantity of methamphetamine involved in the offending, and whether the offending related to supply, importation or manufacture. In December 2018, the Court signalled its intention to reconsider aspects of *Fatu*. It did

so in response to concerns that *Fatu* was resulting in disproportionately severe sentences and that certain assumptions made by the Court in 2005 no longer held true.

4. The Court identified three particular issues requiring consideration: (1) the weight that should be given to the role played by the offender when assessing culpability; (2) the relevance of an offender's personal circumstances, particularly addiction issues; and (3) the approach to be taken to imposing minimum periods of imprisonment for methamphetamine offending.
5. Six sentence appeals were selected for hearing together by a Full Court of five judges. In addition to seeking submissions from the parties to the appeals, submissions were received from the following interveners: the New Zealand Law Society, the New Zealand Bar Association, Criminal Bar Association of New Zealand, the Public Defence Service, the Auckland District Law Society, the Human Rights Commission, the New Zealand Drug Foundation and Te Hunga Rōia Māori o Aotearoa.

The Judgment

6. The judgment discusses factors relating to two stages of the sentencing process: the first stage, which requires judges to set a "starting point" reflecting the seriousness of the offending, and the second stage, wherein judges make adjustments to that starting point to reflect factors personal to the offender. It also discusses "minimum periods of imprisonment", where offenders are required to serve a minimum period of imprisonment greater than the standard non-parole period of one-third of the sentence.
7. The judgment holds as follows.
8. First, as to Issue 1 (the weight that should be given to the role played by the offender), sentencing must achieve justice in individual cases. That requires flexibility and discretion in setting a sentence notwithstanding the guidelines expressed in this and similar judgments.
9. Second, in sentencing methamphetamine offending, quantity remains a reasonable proxy both for the social harm done by the drug and the illicit gains made from making, importing and selling it. It is therefore an important consideration in fixing culpability and thus the stage one sentence starting point.

10. Third, the *Fatu* quantity bands are therefore retained, but with some significant modifications.
11. Fourth, and in particular, the role played by the defendant is also an important consideration in setting the sentence starting point. Due regard to role enables sentencing judges properly to assess the seriousness of the conduct and the criminality involved, and thereby the culpability inherent in the offending.
12. Fifth, a more limited measure of engagement in criminal dealing deserves a less severe sentence than a significant or leading role. Diminished role in drug-dealing offending may result in a defendant moving not only within a band — as currently happens or is supposed to happen under *Fatu* — but also between bands.
13. Sixth, although the Court did not adopt the two-grid matrix (involving quantity bands and role categories) devised by the United Kingdom Sentencing Council, in assessing role, sentencing judges may find it helpful to have regard to the Council’s categorisations of role (into leading, significant and lesser). In considering the individual appeals before it, the Court made use of those categorisations.
14. Seventh, the *Fatu* sentencing distinction between supply, importation and manufacture is removed. Evaluation of role will satisfactorily account for functional differentiation.
15. Eighth, the *Fatu* bands themselves are adjusted: there are now five bands (the fourth *Fatu* band being subdivided), and the sentencing start points for bands one to four are lowered from those previously applying.
16. Ninth, judges need to be willing to set starting points in sentences beneath the stated entry points where culpability is truly low; most likely where a defendant plays a lesser role in offending.
17. Tenth, as to Issue 2 (the relevance of an offender’s personal circumstances, particularly addiction issues), at stage two of the sentencing exercise, personal mitigating circumstances relating to the offender are applicable to all instances of Class A drug offending, including methamphetamine dealing, as in the case of any other offending.
18. Eleventh, addiction shown to be causative of the offending is a mitigating consideration. It may in its own terms justify a sentence discount of up to 30 per cent, although that is not

to be treated as an absolute limit. Addiction will often combine with mental health issues, and the two may need to be considered in combination, although without the doubling-up of an otherwise appropriate discount. Addiction also calls for consideration of a rehabilitative response as part of sentencing.

19. Twelfth, poverty and deprivation (potentially but not necessarily resulting from loss of land, language, culture, rangatiratanga, mana and dignity) are matters that may be regarded in a proper case to have impaired choice and diminished moral culpability. Such vulnerabilities (where established, and whether associated with addiction or not) require consideration in sentencing.
20. Thirteenth, counsel and sentencing judges are encouraged to make greater use of the power in s 25 of the Sentencing Act 2002 to adjourn sentencing to enable rehabilitation programmes to be undertaken. Use of that power is appropriate where independent evidence suggests the offending was caused by the factor(s) which the proposed programme is designed to target.
21. Fourteenth, as to Issue 3 (the approach to be taken to imposing minimum periods of imprisonment for methamphetamine offending), minimum periods of imprisonment must not be imposed as a matter of routine or in a mechanistic way. A reasoned analysis is required under s 86 of the Sentencing Act, both as regards the imposition of a minimum period of imprisonment and its length. If a practice has developed that an end sentence of nine years' imprisonment automatically triggers a minimum period of imprisonment, such a practice must cease.
22. Fifteenth, deterrence, denunciation and accountability are likely to be at the forefront of decisions in drug cases involving the imposition of a minimum period of imprisonment. As a general rule, therefore, lengthy minimum periods of imprisonment are properly reserved for cases involving significant commercial dealing.
23. Sixteenth, this judgment applies to all sentencings that take place after the issue of this judgment regardless of when the offending took place. It applies to sentences that have already been imposed, if and only if two conditions are satisfied: (1) an appeal against the sentence has been filed before the date the judgment is delivered and (2) the application of the judgment would result in a more favourable outcome to the appellant.

Result

24. Applying these principles, four sentence appeals (of the six) succeeded, and two were dismissed.

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