EDITORIAL NOTE: CHANGES MADE TO THIS JUDGMENT APPEAR IN [SQUARE BRACKETS]

IN THE DISTRICT COURT
AT TAURANGA

I TE KŌTI-Ā-ROHE
KI TAURANGA MOANA

CRI-2016-012-002334
[2018] NZDC 22050

THE QUEEN

v

JAY TARAHINA KIWI

Hearing: 19 October 2018

Appearances: O Salt for the Crown
P Kaye for the Defendant

Judgment: 19 October 2018

NOTES OF JUDGE T R INGRAM ON SENTENCING

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[1] Mr Kiwi, you are for sentence today on a number of serious drug charges. I went through this with you at the time of the trial, but in deference to the arguments that had been addressed to me and the large representation from your family that are here today I propose to review them.

[2] You pleaded guilty on the third day of trial to a single charge of threatening to do grievous bodily harm to [the victim]. You yourself heard that recording played and I watched you as that recording was played. It was crystal clear to me that you were a whole lot less than proud of what you had done there. That was no way to be behaving. It was a serious threat. It was repeated over a period of time and as I indicated at that time had that charge stood by itself on that day I would have been looking at a starting point of 18 months' imprisonment for the threat alone.

[3] Then there was a charge of conspiracy to supply methamphetamine by itself, charge 3. Charge 5 was amended to become a representative conspiracy to supply and it related to what was going to occur in Dunedin. Charge 3 did not relate to Dunedin, but was simply a discussion about sourcing some methamphetamine for someone. Charge 8 is a charge of possession of methamphetamine for supply and involved a substantial quantity of methamphetamine, over 500 grams, found in your Suzuki Swift. Finally, there was charge 9 and that involved the methamphetamine for supply that was taken to Dunedin by you and Mr Wiki in respect of which you were apprehended by the police at Dunedin Airport.

[4] The Crown summation of the quantities involved are on charge 3 were 28.3 grams, charge 5 was simply unknown, charge 8 was 459.5 grams and charge 9 was 81.8 grams, a total of 569 grams.

[5] We had a discussion in the course of the trial as to whether or not you wished to continue, having regard to the evidence which had been played for the jury to that point and after considering the matter you elected to change your plea. I gave you an indication at the time that I would give you a credit for not putting members of your family through the ordeal of giving evidence in the case. There were several members of your immediate family who were about to be called by the Crown to give evidence establishing different aspects of the Crown case and their evidence was necessary for the Crown to succeed in some respects in relation to some of the charges that you faced at that time.

[6] I have a straightforward and long-standing view as a trial Judge that those who co-operate with the authorities to the point where family members and victims are not required to give evidence in Court and face the ordeal of cross-examination, and people who instruct counsel and conduct a trial on the basis that they do not require such witnesses to attend, should be given some credit. It is in the public interest that the ordeal for witnesses in trials, particularly in trials involving significant quantities of drugs where the penalties are likely to be substantial, I consider that the public interest is best served by encouraging pleas on charges to avoid the necessity for people to face the ordeal that I have mentioned. I intend to give you a discrete credit in relation to that aspect of matters.

[7] As far as the circumstances of your offending are concerned, you have been involved for some time in endeavouring to set up a distribution network and set yourself up in business as a significant dealer in methamphetamine. The evidence at trial left me persuaded beyond reasonable doubt that you made considerable efforts to set up a network involving distribution of drugs in the South Island. There was some evidence in the course of the trial which indicated that you had certainly been to the South Island and you may have been involved in the supply of drugs there, but there were no charges relating to anything other than the Dunedin incident.

[8] In relation to that you went together with an associate, Mr Wiki, who is a patched member of the Black Power gang and who was obviously providing security for you to Dunedin. There you were caught at Dunedin Airport by the police and a bag of methamphetamine, carried by Mr Wiki, was found to contain some 99 grams of the Class A controlled drug methamphetamine. There was a total of 104 grams, some of which may well have been for personal use. There was a substantial amount of money, over $5000, located. The police were able to locate your car, the Suzuki Swift, and that had some 506 grams bagged up for sale.

[9] The picture I was left with at the conclusion of the trial, Mr Kiwi, is that you were in the business of dealing drugs and you were an ambitious young man setting out to create a dealer network. You were, however, spectacularly unsuccessful, at least in relation to the charges that you have pleaded guilty to.

[10] I have received a probation report on you which, whilst is not entirely glowing, it certainly has its good aspects and both counsel have provided me with detailed written submissions, which I do not propose to cover in detail. The critical issue in this case is what the proper starting point should be.

[11] That, of course, is not free from Higher Courts rulings. The leading cases are the well-known *R v Fatu*.[1] I accept unreservedly that this case falls into band 4 of *R v Fatu* because it was an attempt, at least, to supply substantial commercial quantities. You had possession of well over 500 grams of methamphetamine and the

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1 *R v Fatu* [2006] 2 NZLR 72 (CA).

Court of Appeal there indicated that a sentence of 10 years to life imprisonment is appropriate for such cases.

[12] Subsequent to *R v Fatu* the Courts have been faced with a rising tide of methamphetamine dealing and in recent times there had been a number of cases. In particular, I refer to the judgment of Palmer J in *R v Wellington* where the Courts have had to reassess the incidence of penalties involving quantities of methamphetamine which at the time *R v Fatu* was decided would have been regarded as very, very large quantities, but today simply have to be recognised as being only a fraction of the quantities that are sometimes located and brought before the Courts for sentence.[2]

[13] I accept and adopt the reasoning of Palmer J in *R v Wellington*. He there, by reference to other cases decided by other High Court Judges in connection with the same distribution network, concluded that a sentence of 10 years and eight months was appropriate for two separate actual supplies of 280 grams and 700 grams in late 2016. He accepted and adopted the sentencing starting points arrived at by two other High Court Judges. I consider that the High Court's recent assessment of appropriate penalties should be adopted in sentencing involving the kind of quantities of methamphetamine that I see in this particular case.

[14] The Sentencing Act 2002 requires me to hold you accountable for what you have done and promote a sense of responsibility in you. I am satisfied, Mr Kiwi, that having heard what you heard during the course of the trial, you came to the realisation of exactly what you had got yourself into and the trouble you had caused so many other members of your family, many of whom are here today. I accept that you do indeed have a sense of responsibility for what you have done. You know very well that the effect on your family will be considerable. You have children and they will be deprived of their father's presence for a significant portion of their childhood as a result of what you have done. That is evident in the letter that you have written me. It is evident in the probation report and I consider that you have belatedly reached a proper sense of responsibility.

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2 *R v Wellington* [2018] NZHC 2196.

[15] Turning to the violence. You heard the violence in your voice when you were making the threats that were the subject of the charge, and I could see that you were embarrassed about it. I have no doubt from the many cases that I have heard involving methamphetamine and hearing the kinds of conversations that we heard in Court during the course of your trial that you, like many, were then severely affected by methamphetamine to the point where a good deal of the time you were well and truly out of control. You did not realise it until you sat there in the cold light of day in the courtroom listening to yourself speaking in a way that nobody should speak to anybody, particularly not to [relationship details deleted].

[16] I need to denounce your conduct and deter you and other people with the sentence I impose. You need rehabilitation and the Parole Board will doubtless be discussing that aspect of matters with you.

[17] This is serious offending. Of its kind it fits, in my view, well within the top band of *R v Fatu*. I need to be consistent with sentences imposed on others and I must impose the least restrictive outcome that is appropriate in the circumstances in accordance with the hierarchy of sentences.

[18] The aggravating features obviously involved the serious nature of the threats and the extent of the harm that resulted. It was, of course, premeditated behaviour and you have a pretty unenviable record. I accept that the record does not have anything to do with methamphetamine in any practical sense, but you do have a previous conviction of possession of cannabis for supply back in 2001. Because of its age and the different nature of the drug I do not consider that particular conviction would justify an uplift and nor would the remainder of your record.

[19] You are a relatively young man and you are, in my view, entitled to credit for your guilty plea. I accept that you are remorseful. I also take account of something that Palmer J identified also in *R v Wellington*, and that is that the effect on your family is not to be ignored. There are two parts to that. Here you spent nearly 12 months in custody in Dunedin and you were separated from your family for a long time before the matter was moved to Tauranga for trial. Then there is the simple ongoing effect of

your incarceration on your children, and Palmer J indicated in *R v Wellington* that credit for that can be given in some circumstances.

[20] I am satisfied on the basis of the authorities and statutory factors that I have mentioned that in these circumstances a sentence of imprisonment is required and no other sentence could conceivably be appropriate. By comparison to *R v Wellington* where a start point of 10 years and eight months was adopted for the actual supply of 980 grams I consider that the quantity here would justify a 10 year starting point if it had been actually supplied. But I consider that possession for supply by itself is not as serious as actual supply, particularly with these kinds of quantities.

[21] I also acknowledge the parity issue that arises in relation to Mr Wiki's sentence. I accept the Crown's submission that Mr Wiki's part in it was less than yours, and I was left with the clear impression from the trial that you were the kingpin and Mr Wiki was the security. Be all that as it may, it seems to me that with an appropriate account for the difference in roles I must nevertheless have at least some regard to the sentence that was imposed on Mr Wiki.

[22] I consider that you were engaged in endeavouring to build up a drug supply business, but had not actually succeeded in developing the Dunedin market as you intended, being caught on your initial sales trip.

[23] Taking into account the difference between actual supply and possession for supply, I consider that an appropriate starting point would be a sentence of nine years and six months.

[24] The serious verbal assault on [the victim] would justify, in my view, having regard to the starting point already indicated, an increase of six months. It is different in nature to the drug charges and an uplift is required. That would take me to 10 years.

[25] I am prepared to allow six months for your guilty plea to cover the fact that family members and others were spared the ordeal of giving evidence at your trial and being cross-examined. I allow a further six months to cover your remorse and the effect on your family, which I accept would be considerable on the same basis as

Palmer J indicated in *R v Wellington*. That would lead me to a sentence of nine years' imprisonment in relation to charge 8. You are, accordingly, convicted and sentenced to imprisonment for a period of nine years on that charge.

[26] In relation to charge 1, you will be convicted and sentenced to imprisonment for a period of six months, to be served concurrently as that has been taken into account.

[27] In relation to charge 3, which is a conspiracy charge, you will be convicted and sentenced to imprisonment for a period of three years.

[28] On charge 5, which was a representative charge, you will be convicted and sentenced to imprisonment for a period of five years.

[29] In relation to charge 9, which is the Dunedin possession for supply charge, you will be convicted and sentenced to imprisonment for a period of seven and a half years. All those are to be served concurrently.

[30] The Crown has suggested that this is a case where a minimum period of imprisonment would be appropriate. I accept the defence submission that is not necessary in this case. Although the quantities were over half a kilogram, the reality is there was no charge of actual supply involving you and, in my view, it falls into a different category to cases involving actual supply. For those reasons I make no order for a minimum period of imprisonment.

[31] In relation to the Crown's applications there will be orders for destruction, as the Crown have suggested.

[32] The net result for you is a sentence of nine years' imprisonment, Mr Kiwi.

Judge TR Ingram
District Court Judge

Date of authentication: 29/10/2018
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