

**IN THE DISTRICT COURT
AT DUNEDIN**

**I TE KŌTI-Ā-ROHE
KI ŌTEPOTI**

**CRI-2019-012-000719
[2020] NZDC 2307**

THE QUEEN

v

GAYLENE LILLIAN McCARTHY

Hearing: 11 February 2020
Appearances: R Smith for the Crown
S Saunderson-Warner for the Defendant
Judgment: 11 February 2020

NOTES OF JUDGE M A CROSBIE ON SENTENCING

[1] Ms McCarthy, you are for sentence today on four charges of:

- (a) possession of methamphetamine for supply, the quantity involved 9.3 grams;
- (b) supplying methamphetamine jointly with Eli Christie, quantity 21 grams;
- (c) supply of methamphetamine jointly with Eli Christie, quantity 255 grams; and
- (d) possession of a firearm in contravention of ss 21 and 23 Arms Act 1983.

[2] With respect to the first three offences, the maximum penalty is life imprisonment and, with respect to the fourth, three months' imprisonment.

[3] On 6 September 2019 I provided you with a sentencing indication on all of these matters and you subsequently accepted that indication. I fixed a starting point in the range of eight to eight and a half years. I also indicated that there were a number of matters that I would be prepared to take into account, such as your addiction, your rehabilitation, remorse and matters such as an abusive and controlling relationship. I was unable to quantify what those discounts would be as I had insufficient personal information before me. But I also factored in that you would be entitled to about 25 percent for guilty plea.

[4] I indicated that if you were to plead shortly thereafter, a starting point of no worse than eight and a half years before the 25 percent discount, no lower than six and a half years before the 25 discount and then taking into account the matters that I have just referred to.

[5] Since then, the Court of Appeal has released its decision in *Zhang v R*.¹ This is a comprehensive and instructive guideline decision which examines the history of sentencing in relation to particularly Class A drug offending. It examines in great detail the sentencing framework and scheme set up in the Sentencing Act 2002 and it sets out a nuanced, and arguably more flexible, sentencing approach, not just restricted to drug offending. *Zhang*, as many Judges and lawyers anticipated, examined many of the mitigating features that I identified as relevant to you at your indication hearing.

[6] Prior to doing that, however, the Court recalibrated the bands of offending by reference to quantity. As a result of that recalibration, together with the articulation by the Court of discounts that might be provided with respect to issues such as drug addiction, it is necessary today for this Court to recalibrate your starting points, discounts and end sentence. No objection is taken to that course and a further sentencing indication was not sought.

¹ *Zhang v R* [2019] NZCA 507.

[7] Nothing takes away from the seriousness of your offending and the insidious nature of supplying methamphetamine. Nothing takes away from the havoc that this drug causes to the young, the vulnerable and those who are already addicted and, of course, you are in the last category. I am not going to repeat what was set out in the sentencing indication remarks. The facts are set out in those remarks and a copy of that will be provided to the press.

[8] In very simple terms, while there are those who think that older, educated, adults can make informed and rational decisions about whether they want to buy and use drugs from sellers, like you, there remains a significant category of people who the community and Judges fear for. They are those categories that I have referred to. The young. The vulnerable. The already addicted.

[9] What that means for you in simple terms is that the moment you part with those drugs, you lose control. Even though you think you might know who they are going to, you do not know what they are going to do with them or who they are going to sell them to. If you do involve yourself in the type of programme that is offered in the Dependency Treatment Units within the women's prison, you will learn very quickly just who the victims of this type of offending are.

[10] What the Court of appeal did in *Zhang* is, in a considered way, work through the purposes and principles of the Sentencing Act including, in my assessment, a greater focus on personal circumstances, addiction and treatment. The Court proposed to retain the *R v Fatu* quantity bands but with some significant modifications.² The Court stated at para [118] that “the role played by the offender is an important consideration in fixing culpability and thus the stage 1 sentencing point”.

[11] Due regard is to be had to enable sentencing Judges to properly assess the seriousness of the conduct and the criminality involved and thereby the culpability inherent in the offending and in the holistic manner required by other guideline decisions of *R v Taueki* and *Hessell v R*.³ The Court said:

² *R v Fatu* [2006] 2 NZLR 72 (CA).

³ *R v Taueki* [2005] 3 NZLR 372 (CA); *Hessell v R* [2010] NZSC 135, [2011] 1 NZLR 606.

That means that a more limited measure of engagement in criminal dealing deserves a less severe sentence than a significant or leading role. The role may result in an offending in fact, moving not only within a band but also between bands.

[12] The Court of Appeal repeated the Supreme Court's fundamental observation in *Hessell* "that sentencing must involve a full evaluation of circumstances to achieve justice in the individual case" and that injunction, as the Court of Appeal framed it, "calls for flexibility and discretion in setting sentence".

[13] You have heard the conversation in Court that I have had with Ms Saunderson-Warner and Mr Smith about the description of your role, its relevance and how it is to be taken into account. The Court of Appeal in its decision set out a table of three roles, describing them as "lesser, significant and leading roles". The Court said:

We observe that indicia 2, 3 and 4, for lesser role categorisation are descriptive of conduct. Any discount for associated, mitigating personal considerations, is a matter for the second sentencing stage.

[14] In my view, this observation deals with the issue of double-counting, discussed in Court with counsel previously today. Ms Saunderson-Warner identified those elements of your offending categorised as a lesser role. Counsel both accept your offending falls within band 3 in *Zhang*, quantities of less than 500 grams, within a band of six to 12 years.

[15] The Crown submits that your involvement in the supply of a total of 285 grams of methamphetamine would place the offending at the lower end of band 3, although not the very bottom. Noting and accepting that you were involved in an abusive relationship and sat at the bottom end of the chain of supply, the Crown accepts your offending was primarily motivated by your need to feed your addiction and that you made little financial gain from the offending.

[16] As a result of your role being seen as a lesser one, the starting point was submitted by the Crown to be in the range of five to six years. Ms Saunderson-Warner takes a slightly different approach. While agreeing which band the offending sits in, Ms Saunderson-Warner notes that the total quantity is not much beyond the lower band

and submits that an initial assessment based on quantity would see a starting point reduced to six years and six months.

[17] Dealing with your lesser role, counsel took me to personal circumstances such as the nature of an abusive relationship and your own addiction, submitting a starting point of five years and submits that would be principled and appropriate.

[18] In my assessment, the observation by the Court of Appeal that I have referred to about indicia 2, 3 and 4 for lesser roles, is a charge to take a nuanced approach and overall starting point. It does not factor in matters of discount to a degree that is taken into account at the second stage and which might otherwise amount to double-counting or in some cases lead to almost no sentence at all.

[19] Taking into account where all of this sits in terms of quantity, in my view, it is at six years and six months' imprisonment starting point. A nuanced approach, taking into account lesser role factors as descriptive of conduct, sees an overall starting point of six years. Your addiction is not in dispute. It is evidenced by professional information and was a principal driver of the offending. A violent and abusive relationship is also not in dispute and is confirmed by Police in correspondence with counsel. However, there came a point at which the relationship ended but your offending continued. Clearly the addiction was still relevant; although I am unsure which of the two was the greater driver.

[20] Taking into account that I have factored into the starting point already the lesser factors, I fix the discount to be provided for the effect and relevance of your addiction to this offending and a commitment to rehabilitation, at 25 percent. I fix the nature of the relationship, noting that it has already been factored in to an extent, but also the subsequent continuation of your offending after it ended at five percent, totalling 30 percent. From that six years, that brings me to a discount of 22 months, rounded off 72 months, which is 50 months. In addition, you are entitled to the discount initially accepted of 25 percent which, off 50 months, comes to 12 and a half months. I will be imposing an end sentence rounded to three years and one month's imprisonment.

[21] It is my hope that you take advantage of the Dependency Treatment Unit if that is offered to you and make the best of what you can. It will follow from that sentence that you will be scheduled to see the Parole Board in a matter of months I would think.

M A Crosbie
District Court Judge