

**IN THE DISTRICT COURT
AT DUNEDIN**

**I TE KŌTI-Ā-ROHE
KI ŌTEPOTI**

**CRI-2019-012-000034
[2020] NZDC 2383**

THE QUEEN

v

NICOLE ASHLEY TYLER

Hearing: 11 February 2020

Appearances: R D Smith for the Crown
M Scally for the Defendant

Judgment: 11 February 2020

NOTES OF JUDGE M A CROSBIE ON SENTENCING

[1] Ms Tyler, you are for sentence today on a number of charges of: supplying methamphetamine jointly with Eli Christie between 14 November 2018 and 4 February 2019; offering to supply Class A cocaine jointly with Mr Christie on 29 January 2019; offering to supply Class B Ritalin on 14 November 2018 to 20 November 2018; and selling cannabis between 22 December 2018 and 31 January 2018.

[2] On the first two charges, the maximum penalty is life imprisonment. On the third charge, 14 years' imprisonment. On the fourth charge, eight years' imprisonment.

[3] The quantity involved was: 31 grams of methamphetamine; offering to supply 14 grams of cocaine; supplying 60 Ritalin pills; and selling 112 bags of cannabis.

[4] The remaining charges are: unlawful possession of a firearm, maximum penalty four years that happened in January 2019 while you were on bail for the first lot of offences; presenting a firearm, maximum penalty three months' imprisonment; threaten to kill, maximum penalty seven years' imprisonment; two charges of possessing a needle for drugs, maximum penalty one month; and possession of Class C drugs, maximum penalty three months' imprisonment.

[5] 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 years and nine months, with an overall adjustment for totality, bringing me to eight years. I stated that you are entitled to a 25 discount for plea, although I thought that might have been a little on the high side. I am going to stick with that today. That took me to six years. I noted that there may be other mitigating features which would come off the starting point. I indicated a sentence of no more than six and no less than five years; imprisonment, somewhere in between taking into account whatever the personal mitigating features might be.

[6] Since then, and while on remand awaiting sentence, you have pleaded guilty to a charge of injuring with intent, carrying a maximum penalty of five years' imprisonment. That occurred within the prison environment. The facts of that matter are that on 3 November 2019, you and others were in a small recreation yard and, after pacing around, you approached the victim who was seated, grabbed her by the hair and hit her twice to the head. You then delivered a further 11 uppercut punches to the head followed by two more knees to the head and three body kicks. Other prisoners intervened and the victim managed to retreat to the door to wait for staff assistance. She received a fractured nose deviated to the right which later required straightening under sedation, and her upper right tooth was loosened along with minor cuts to her lips.

[7] Now since the indication you have also attended a restorative justice conference with the victims of the firearms and threatening to kill offences. I have

taken the reports into account they are positive do indicate that you are remorseful. That you apologised several times and your apologies were accepted. Although it is separate offending, your behaviour is indicative of someone who was in the throws of a significant drug addiction and I will factor that in, in a moment.

[8] Since the sentencing indication, the Court of Appeal has released its decision in *Zhang v R*.¹ That case is a very detailed, instructive, guideline decision which examines many of the features that can be regarded as mitigating for methamphetamine offenders. More importantly than that, and I am not going to go into the case in great detail, but it is a significant decision which not only recalibrates the bands of offending for Class A offending (by reference to quantity adjusting those bands downward from a previous decision in *R v Fatu*) but it looks at the nature of drug offending in our country. Who it affects, and importantly, how it ought to be dealt with by the Court in a modern environment with due regard to issues such as drug addiction and other personal factors.² As a result of that decision it is necessary for me to recalibrate your starting point, discounts and end sentence.

[9] Nothing takes away from what you did and the seriousness of your offending which, of course, was versatile in terms of the types of drugs involved. Nothing takes away from the insidious nature of supply. As I said to the previous defendant, Ms McCarthy, nothing takes away from the havoc that this type of offending causes to the young, the vulnerable and already addicted. It is not lost on me that it causes havoc on those around you who have to cope with and often compensate for the lifestyle of an addict.

[10] I am told that you are motivated to do something about your drug use. One thing I sometimes observe when people come to be sentenced and they have been on remand is that they seem to look better. Life is a little clearer because you do not have the same exposure to drugs on the inside. I hope that is the case for you. I hope that clarity has you thinking about whose hands this stuff might end up in because you lose control the moment it leaves your hands. As I have said to Ms McCarthy, you might think you know who you are providing it to but you do not know what happens from

¹ *Zhang v R* [2019] NZCA 507.

² *R v Fatu* [2006] 2 NZLR 72 (CA).

that point. The fear that we have is that it ends up in hands of the young who become addicts. No one wants that.

[11] What the Court of Appeal did in *Zhang* in a considered way, is to work through the purposes and principles of the Sentencing Act 2002 which includes in my assessment a greater focus on personal circumstances, addiction and treatment. The *R v Fatu* quantity bands were retained but, as I have said, with some significant modifications. The Court said that:³

The role played by the offender is an important consideration in fixing culpability and thus the stage 1 sentencing point, and Judges are unable to properly assess the seriousness of the conduct and the criminality involved and thereby the culpability inherent in the offending in the holistic manner required by other guideline decisions in *R v Taueki* and that of the Supreme Court and *Hessell v R* [2010] NZSC 135, [2011] 1 NZLR 607.⁴

[12] This 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 offender moving not only within a band but between them. The Court of Appeal repeated the Supreme Court's fundamental observation in *Hessell v R* that:⁵

Sentencing must involve a full evaluation of the circumstances to achieve justice in the individual case, and that injunction calls for flexibility and discretion in setting sentences.

[13] You have had heard the conversation I had in Court with Ms Scally and Mr Smith about your role, and the Court of Appeal set out a table of lesser significant and leading roles and said:⁶

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] As I said to Ms McCarthy, in my view this observation deals with any issue of double counting previous discussed today.

³ *Zhang v R*, above n 1, at [118].

⁴ *R v Taueki* [2005] 3 NZLR 372 (CA); *Hessell v R* [2010] NZSC 135; [2011] 1 NZLR 607.

⁵ *Hessell v R* [2010] NZSC 135, [2011] 1 NZLR 607 at [25], citing *R v Cargill* [1990] 2 NZLR 138 (CA) at 141 per Cooke P.

⁶ *Zhang v R*, above n 1, at [126].

[15] Counsel accept that your offending falls within band 2 in *Zhang v R* (quantities of less than 250 grams with a band of six to 12 years). The Crown accepts that it was at the lower end of band 2. The Crown submits that your involvement and threatening to kill is separate offending. I heard Ms Scally's characterisation of where that offending also sits within your addition.

[16] Ms Scally submits in relation to the methamphetamine offending that a starting point of around three years and six months would be appropriate and does not appear to challenge an uplift of two years to reflect the substantial dealing in Class B and C controlled drugs, a total of some five years and six months' imprisonment in total.

[17] The Crown accepts, notwithstanding the scale of the offending, that you are at the lower end of any supply chain and that your drug offending appeared motivated primarily by the need to feed a longstanding addiction to methamphetamine.

[18] The firearms and threatening to kill charges saw me separately indicate an uplift of two years and then a further three months for offending while on bail. The nuanced approach that I have referred to from *Zhang v R* sees me recalibrate that back somewhat slightly to two years and a total starting point on top of the five years and six months of seven years and six months, some 90 months' imprisonment.

[19] Your addiction is not in dispute. It is evidenced by professional information that I have and it was a principal driver of the offending. From that, I propose to allow you the 25 discount for your addiction as sought and I round the starting point down to 67 months' imprisonment.

[20] The violence in prison is quite significant. There are a number of aggravating features. It featured blows to the head and it occurred within a prison environment and affected the good order of the prison environment. There seems to me to be a good deal of violence coming before the Court from prison environments, happily not so often from women's prisons. The number of blows to the head, the uppercuts and the length of the beating, leads me to a starting point of 18 months' imprisonment. I am going to take into account of what we call the totality principle and come back to 12 months on that, which brings me to a total of 77 months' imprisonment.

[21] I am going to give you credit of 25 percent for your pleas across the board, that is of some 20 months. I am going to adjust that downwards slightly for your participation in restorative justice and bring your sentence down in total to 54 months, which is four years and six months' imprisonment which will be applied on each of the Class A, Class B offences. Two years on the selling cannabis. 18 months on the unlawful possession of firearm. Two months on the presenting. One year on the threatening to kill. Three months on each of the possession of needles. One month on the Class C and one year on the injury with intent to injure.

[22] That is significantly lower than where we were in September 2019. When you leave prison is very much going to be dictated by what you do when you are in prison. The Board will be interested when you see them (which I imagine will be not too far away) whether you are motivated to attend the Dependent Treatment Programme or if you have done that. I am told that you are partly along the way. My advice to you as someone who sits on the Parole Board, not usually at Christchurch Women's, is to avail yourself with any opportunity you have inside to deal with that drug problem so that you are a better person for yourself and your family when you come out the other end.

M A Crosbie
District Court Judge