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

IN THE DISTRICT COURT
AT WELLINGTON

CRI-2016-085-000534
[2018] NZDC 7424

THE QUEEN

v

LINESH ALFRED DAHYA

Hearing: 13 April 2018

Appearances: C Hislop for the Crown
Defendant appears in Person

Judgment: 13 April 2018

NOTES OF JUDGE I G MILL ON SENTENCING

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[1] Linesh Dahya, has appeared today for sentencing on three charges he was found guilty of by a jury.

(a) The first of those charges being a charge of possession of methamphetamine, a Class A drug for the purposes of supply.

(b) The second charge, a charge of possession of GBL, a Class B drug for the purposes of supply.

(c) Lastly, possession of an offensive weapon, namely a police baton.

[2] At the beginning of sentencing today, Mr Antunovic appeared, but only appeared to ask for leave to withdraw as his services had been terminated by Mr Dahya. The reasons for this were explained further by Mr Dahya after Mr Antunovic was given leave to withdraw.

[3] There has been quite a discussion with Mr Dahya today about the issues that he wishes to raise and having discussed those at some length he has agreed that sentencing should proceed today, and has made one or two submissions about sentencing also.

[4] Just to put the matter in context, it appears that Mr Dahya wishes to file an appeal against the finding of guilt and in doing so, he has been critical of the actions of his lawyer and also the actions and evidence of the police, particularly the two police officers who were involved in the search at the [Service Station] in [location deleted] and his arrest.

[5] These issues clearly relate to issues that must be advanced on appeal, if they are to be advanced, and are issues that relate to whether he was in fact guilty and whether the evidence against him was not challenged in the appropriate way.

[6] There are two main factual matters that he challenges.

(a) The first is, the location of his car when it was searched. Whether that was at the [Service Station] or later at his apartment?

(b) Secondly, whether all the drug and paraphernalia, he was found in possession of, was in the computer bag on the front passenger seat or was distributed between the computer bag and a tool bag in the boot of the car.

[7] The evidence at trial was, from the police officers who gave evidence, that it was distributed between the two different sites. Mr Dahya's evidence was that it was in the computer bag. The relevance of this evidence was, that he claimed he was on the way to the landfill to dispose of all of the drugs and that they were in the computer bag with other paraphernalia and this fitted better with his explanation that they were in the same location in the bag on the passenger seat, he having, in fact, stopped just prior to the [Service Station] to check that they were there.

[8] It is reasonable to assume, in the circumstances, that the jury could have considered the evidence of the police to be preferred as to where the search took place and where the drugs were found.

[9] Mr Dahya wishes to raise issues over the conduct of his case in respect of the challenges or lack of in respect of that evidence. Those are matters, however, that cannot affect the sentence in this case from my stand point as I am bound by the findings of the jury, and that their findings of guilt were made on the evidence, in fact, called at the trial, the evidence being that the drugs were dispersed in two different places and the search, or at least the substantial part of the search took place at the apartment.

[10] I now must turn to the facts of the case as they were given at the trial. The brief facts, and these are indeed brief facts, are, that [in February] 2016, the defendant was at the [Service Station] in [location deleted]. The police arrived and had a search warrant for his vehicle and pursuant to that they later located a bag in the front seat of the car; it had 131.7 grams of GBL Class B drug in it, two plastic dropper bottles, a scoop, straws and syringe. It was then found, in the boot of the car, a deodorant container where two bags of crystalline substance were found containing seven and 13.7 grams of methamphetamine respectively. Inside of the bag, in the boot of the car, were a set of scales that contained traces of methamphetamine, empty plastic bags, a dropper bottle, an unused methamphetamine pipe and plastic syringes. The baton was also located in the boot of the vehicle. On the defendant, himself, $734 in cash was located, and on the search of his apartment, a further $2000 was found in a safe.

[11] Now because of the weight of the drugs in this case, a legal presumption arose and at trial Mr Dahya had to prove, on the balance of probabilities, that he was not in possession of either of the drugs, at least in whole or in part, for the purpose of supply. In this respect, he gave evidence of his purpose in having the drugs. His explanation was that he found the drugs hidden in property of a deceased man and this property he had been requested to dispose of or examine given his interest and expertise in computers and IT. Approximately, he said, a month prior to this incident he had found these items and his evidence was that he was on the way to the [landfill], or thereabouts, to dispose of these and that was disposing of the drugs together with the

related paraphernalia, including the small spoons and scoops that I have mentioned which could have, of course, been used for the dispensing of methamphetamine, syringes that could be used to dispense GBL which comes in a liquid form; the form that was found in this case and there were plastic bags. So, his evidence was he was coincidentally and unfortunately subject of a search by the police on the very occasion when he was going to dispose of the drugs. His evidence was that he had decided to keep the electronic scales that were found as he could use these to weigh precious metals retrieved from electronic equipment, and the baton was to be used, he said, as a tool in his work; and he described it could be used as a crowbar or hammer in his work.

[12] Well on the basis of the evidence that the jury heard, and also the evidence of Mr Dahya, it is not altogether surprising to me that the jury were unconvinced about his evidence and explanation, and may have seen this as a desperate attempt to explain away what seemed, on the surface, to be obvious, that he was in possession of these drugs for the purpose of supply, particularly given all the paraphernalia and equipment that was found in the car.

[13] In addition to this, there was other evidence that he was living in a flat where there was an electronic surveillance system, that he relied on encrypted messaging apps and at times directed others to use these apps, that he had three working cellphones, he was carrying $734 in cash when he was apprehended by the police, and he had a further $2000 cash in his safe at home. His evidence was, the $2000 was from savings; it appeared he did not wish to have it in a bank account and he said that he had privacy reasons for that, and the $734 in cash, he said would be used for cash purchases because often you get a better cash deal if you have the cash available as opposed to credit. Again, it was open to the jury to find these explanations implausible and to find the additional evidence, I have mentioned, to be such that the finding of guilt was appropriate.

[14] It seems to me, on the basis of the evidence that I heard, and the jury heard, there was a strong case against the defendant of being in possession of the drugs for supply, whether the presumption applied or not.

[15] So, as far as sentences concerned the Crown point out, correctly, that there is a presumption in the Misuse of Drugs Act 1975, that imprisonment should be imposed for Class A drug dealing offending.

[16] I am also drawn to *R v Fatu*[1]. Which is the leading Court of Appeal case on sentencing involving methamphetamine dealing. It is clear that under Band 2 in that particular decision, that the guideline is that supplying commercial quantities of methamphetamine, which is five grams to 250 grams of methamphetamine, a starting point of three to nine years' imprisonment is appropriate.

[17] In this case, Mr Dahya, was found in possession of around 20 grams of methamphetamine.

[18] The Crown have referred me to several cases in which they say similar circumstances exist. The case of *Williams v R*[2]. where a starting point of three years and six months was upheld in respect of 15 grams of methamphetamine and some cannabis and some GBL.

[19] I am also directed to the case of *R v McGrath*[3]. where there was just under 20 grams and more cash in that case and other drug dealing equipment, and a starting point of four and a half years' imprisonment could have been appropriate but four years was the starting point.

[20] As far as the Class B offending is concerned, that is in relation to the GBL, it is not easy to find a starting point there. There is a case of *R v Wallace and Christie.*[4] Which says that smaller operations representing commercial dealing starting points of up to five years are appropriate. And in that case the Crown has said there should be an uplift in relation to that particular dealing.

[21] So, the Crown submit on the basis of the evidence that we heard and the findings which the jury must have made, that this amount of methamphetamine which

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[1] *R v* Fatu [2006] 2 NZLR 72 (CA)
[2] *Williams v R* [2017] NZHC 1859
[3] *R v McGrath* HC Wellington CRI-2007-078-000793, 7 November 2008
[4] *R v Wallace and Christie* [1999] 3 NZLR 159

was worth anything up to $9000 if sold, together with the GBL which could have delivered 24 to 60 doses of the drug, would first of all result in a sentence, so far as the methamphetamine is concerned with a starting point of four years with an uplift of 12 months for the GBL offending. When one looks at the totality of the case, a starting point of four and a half years is suggested in this case.

[22] Mr Antunovic, before he was given leave to withdraw, had filed a memorandum acknowledging that although a prison sentence was inevitable, the starting point identified by the Crown was too high. In his submission, a starting point, so far as the methamphetamine is concerned, should be three years' imprisonment given the amount involved, and that the overall starting point should be one of three and a half years when I add in the Class B controlled drug.

[23] So, what do I make of that, I have a probation report. I do not need to refer very much to that report. I also have several testimonials, attesting the good character of the defendant, apart from of course the present offending. The probation officer's report recommends home detention, but as I have already indicated to Mr Dahya the sentence would not fall within a range where that would be appropriate.

[24] Mr Dahya has no relevant previous convictions. In my view, the sentence falls within Band 2 in the case of *R v Fatu.*[5] So far as the methamphetamine is concerned. Although it is near the lower level of that band, I do not accept that it is right at the lower level given the amount of the drug, and the other evidence that supports the conclusion that this was a small scale commercial operation.

[25] In respect of the methamphetamine offending, which is the most serious charge, a starting point of three and a half years' imprisonment is my starting point.

[26] As far as the GBL, or the Class B drug is concerned, prison again is the appropriate response in respect of that offending and while a sentence of 12 months or more may be appropriate, when I look at the totality of the offending, I add six months on to that starting point making four years' imprisonment.

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[5] *R v Fatu*

[27] I do not add anything so far as the possession of the baton is concerned. I will simply imprison the defendant on that charge for a very short time to be served at the same time.

[28] There can be no discount for remorse because of course the defendant does not accept that he is guilty. And it is a question of what I do concerning, first of all, the references that I have received as to his good character, and secondly, whether I grant a forfeiture order in respect of the cash that was found.

[29] Now it has been said many times by the Higher Courts that good character or previous good behaviour is of little consequence so far as drug dealing offences are concerned. In this case I now have four testimonials about Mr Dahya and his character and his good works and support that he has given to other people.

[30] So, notwithstanding what the Higher Courts have said about this, I am going to allow a small deduction for his previous good character and reduce the sentence to one of three years and 10 months.

[31] So, I will pass the sentence of imprisonment first and then deal with the question of forfeiture. So, the decision now is on sentencing:

(a) On charge 1, being possession of methamphetamine for supply, Mr Dahya, you are convicted and sentenced to imprisonment for three years and 10 months.

(b) On the charge of possession of GBL for the purpose of supply, you are convicted and imprisoned for a period of six months to be served at the same time.

(c) On the charge of possession of the baton, you are convicted and imprisoned for a period of one month.

[32] So, all those sentences are served together. The sentence is one of three years and 10 months.

[33] Now, in respect of forfeiture, it is provided under the Misuse of Drugs Act, that on a conviction of any person for an offence against s 6 of the Act, which is the case here, if I am satisfied that the money found in possession of that person is received by that person in the course of, or consequence upon the commission of that offence, or is in possession of that person for the purpose of facilitating the commission of an offence against the section, in addition to any other penalty imposed, order that the money be forfeited to the Crown. So, the test is whether I am satisfied about that, so there is some Authority as to what that means. There is no definition of what, "Satisfied" is, but in some cases and these are cases dealt with in the Higher Courts, the Court has said that this is to be judged on the balance of probabilities, the civil standard.

[34] Now it has also been said in the Supreme Court, which is of course the Highest Court in the country, what is required is an assessment of the applicant's purpose in holding the money at the time of seizure, rather than the accurate prediction of how the money would be used in the future.

[35] Looking at all the evidence that was given in the case before me, and I know that Mr Dahya does not agree with all of that evidence, but looking at the evidence that I, and the jury saw, I find it is more probable than not, that the money was received in the course of obtaining the drugs or having the drugs there for supply, or was a kitty for facilitating such offending, and on that basis $2734 is forfeited to the Crown, pursuant to s 32 subs (3) Misuse of Drugs Act 1975.

[36] Mr Dahya, that is my decision, at least you can now think about your appeal.

I G Mill
District Court Judge