# CASE NOTE: *ZHANG V R* [2019] NZCA 507 – INDIVIDUALISED SENTENCING AND A NEW GUIDELINE JUDGEMENT FOR METHAMPHETAMINE-RELATED OFFENDING

OLIVER FREDRICKSON*

## I. INTRODUCTION

In *Zhang v R*, a Full Bench of the Court of Appeal revised the sentencing guidelines for methamphetamine-related offending, while also making number of comments about sentencing more generally.[1] Having identified problems with aspects of *R v Fatu*, the previous guideline judgment for methamphetamine-relating offending, the Court selected six appeals which raised issues that the Court wished to address.[2] The judgment, spanning 328 paragraphs, has many different threads, which are best identified at the outset:

1. The problem with *Fatu* sentencing guidelines
2. The new *Zhang* sentencing guidelines
3. Relevance of personal mitigating factors at sentencing
    a. Addiction
    b. Mental health
    c. Duress or undue influence
    d. Social, cultural, and economic factors
4. Other sentencing considerations
    a. Minimum periods of imprisonment for drug offending
    b. Use of s 25 of the Sentencing Act 2002 to adjourn sentencing.

While providing authoritative guidance to future sentencing courts, the Court of Appeal paused to emphasise that guideline judgments should not be applied in a mechanistic manner.[3] Instead, "sentencing must achieve justice in individual cases".[4] This served as a guiding principle for the Court and was quickly reinforced in its subsequent decision in *Orchard v R* where the Court of Appeal stated that "consistency is not an absolute end; sentencing remains an evaluative exercise and guideline judgments must not be applied in a mechanistic way".[5] This is equally relevant at both the first and second stages of sentencing.

## II. THE PROBLEM WITH THE *FATU* GUIDELINES

Since 2005, sentencing for methamphetamine-related offending had been based on the guideline judgment in *R v Fatu*.[6] In *Fatu*, the Court of Appeal promulgated

* LLB (Hons)(1st Class), Victoria University. The views in this note are entirely the author's.

[1] *Zhang v R* [2019] NZCA 507, [2019] 3 NZLR 648.

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

[3] *Zhang v R*, above n 1, at [48].

[4] At [10(a)].

[5] *Orchard v R* [2019] NZCA 529, [2020] 2 NZLR 37 at [28].

[6] *R v Fatu*, above n 2.

sentencing guidelines in the form of four sentencing bands.[7] The bands were specific to the type of offence.

| | **Supply** | **Importation** | **Manufacture** |
|---|---|---|---|
| **Band one** – (less than 5 grams) | 2–4 years' imprisonment | 2.5–4.5 years' imprisonment | N/A – manufacture will almost always involve significant commerciality |
| **Band two** – (5 grams to 250 grams) | 3–9 years' imprisonment | 3.5–10 years' imprisonment | 4–11 years' imprisonment |
| **Band three** – (250 grams to 500 grams) | 8–11 years' imprisonment | 9–13 years' imprisonment | 10–15 years' imprisonment |
| **Band four** – (500 grams or more) | 10 years to life imprisonment | 12 years to life imprisonment | 13 years to life imprisonment |

In devising these bands, the Court stated that "all other things being equal, a manufacturer is more culpable than an importer and an importer is more culpable than a supplier".[8] This was because manufacturers are responsible for bringing the drugs into circulation,[9] they are usually at the top of the supply chain,[10] and they create the dangers associated with the manufacturing process.[11] Primary offenders received starting sentences towards the higher end of the relevant band whereas the opposite applied to those whose role was less significant.

In December 2018, the Court of Appeal signalled its intention to reconsider aspects of *Fatu.*[12] To assist the Court, submissions were sought and received by numerous intervenors.[13] The appellants and the interveners were "united in their criticisms" of *Fatu* and the restrictive way it had been applied by sentencing judges.[14] After much consideration, the Court identified three major concerns.

First, *Fatu* was based on the flawed premise that lengthy prison sentences are effective as a general and specific deterrent.[15] Second, the bands were based only quantity.[16] The role of the offender was only relevant to their placement *within* a band; it could not take them outside of a band. Third, under the *Fatu* bands, sentencing courts frequently imposed minimum periods of imprisonment in a routine and mechanistic way.[17]

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[7] *Zhang v R*, above n 1, at [19].
[8] *R v Fatu*, above n 2, at [22].
[9] At [22] citing *R v Aramah* (1982) 4 Cr App R(S) 407.
[10] At [22] citing *Cabassi v R* [2002] WASCA 305 at [10].
[11] At [23].
[12] *Zhang v R*, above n 1, at [2].
[13] These were: Criminal Bar Association of New Zealand, New Zealand Law Society, New Zealand Bar Association, Auckland District Law Society, Public Defence Service, Human Rights Commission, New Zealand Police, New Zealand Drug Foundation, Te Ohu Rata o Aotearoa (Māori Medical Practitioners Association) and Te Hunga Rōia Māori o Aotearoa — the Māori Law Society.
[14] At [21].
[15] At [23].
[16] At [26].
[17] At [28].

These concerns were accompanied by growing community acceptance that drug addiction is a health issue and should be treated as such.[18] Against this backdrop, the Court in *Zhang* pronounced the new sentencing approach for methamphetamine-related offending.

## III. NEW *ZHANG* GUIDELINES

The Court began by confirming that quantity remains a reasonable proxy for the social harm caused by the drug.[19] To this extent, it is valuable in assessing culpability. However, there are other considerations that flow into this assessment. As the Court stressed throughout the judgment, sentencing must involve a "full evaluation of the circumstances to achieve justice in the individual case".[20]

Notably, the Court emphasised that the role played by the offender will be an important consideration in fixing culpability as it allows sentencing judges to holistically assess the seriousness of the conduct and the criminality involved.[21] Importantly, the Court held that the offender's role may move them not only within a band but also *between* bands.

In England and Wales, sentencing courts follow a two-factor process which assesses both quantity and role.[22] For each drug offence, there is a table with quantity on one axis and role on the other. The "two grid matrix" then computes a starting point based on both factors. The Court of Appeal declined to adopt this approach as it would likely encourage a "tick box" approach to sentencing, thus "replacing one form of undue rigidity with another". [23] However, the Court did suggest that sentencing courts refer to the Sentencing Council's indicia of role were still helpful. Modified slightly to reflect New Zealand circumstances, the indicia include:[24]

| **Role** | | |
|---|---|---|
| **Lesser** | **Significant** | **Leading** |
| 1. performs a limited function under direction;<br>2. engaged by pressure, coercion, intimidation;<br>3. involvement through naivety or exploitation;<br>4. motivated solely or primarily by own addiction;<br>5. little or no actual or expected financial gain;<br>6. paid in drugs to feed own addiction or cash | 1. operational or management function in own operation or within a chain;<br>2. involves and/or directs others in the operation whether by pressure, influence, intimidation or reward;<br>3. motivated solely or primarily by financial or | 1. directing or organising buying and selling on a commercial scale;<br>2. substantial links to, and influence on, others in a chain;<br>3. close links to original source;<br>4. expectation of substantial financial gain;<br>5. uses business as cover; and/or |

[18] At [31].
[19] At [103].
[20] At [104] citing *Hessell v R* [2010] NZSC 135, [2011] 1 NZLR 607 at [38].
[21] At [118].
[22] At [114]–[117]: Sentencing Council (UK) *Drug Offences: Definitive Guideline* (2012).
[23] At [118].
[24] At [126]. The Court noted: "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".

| | | |
|---|---|---|
| significantly disproportionate to quantity of drugs or risk involved;<br>7. no influence on those above in a chain;<br>8. little, if any, awareness or understanding of the scale of operation; and/or<br>9. if own operation, solely or primarily for own or joint use on non-commercial basis. | other advantage, whether or not operating alone;<br>4. actual or expected commercial profit; and/or<br>5. some awareness and understanding of scale of operation. | 6. abuses a position of trust and responsibility. |

After "extensive consideration and debate", the Court decided to retain the quantity bands outlined in *Fatu*, but with some significant modifications.[25] The new sentencing bands are:[26]

| | **Former:** *Fatu* | **New:** *Zhang* |
|---|---|---|
| Band one: <5 grams | 2–4.5 years | **Community to 4 years** |
| Band two: < 250 grams | 3–11 years | **2–9 years** |
| Band three: < 500 grams | 8–15 years | **6–12 years** |
| Band four: < 2 kilograms | 10 years to life | **8–16 years** |
| Band five: > 2 kilograms | 10 years to life | **10 years to life** |

An obvious modification is that the new bands are no longer functionally subdivided between supply, importation, and manufacturing. This is because the "harm caused is identical regardless of method".[27] Further, the Court introduced a fifth band as the band four was "simply too broad", previously including anything in excess of 500g.[28]

## IV. PERSONAL MITIGATING FACTORS AT SENTENCING

The Court also took the opportunity to make a number of general comments about the following mitigating factors:[29]

a. addiction;
b. mental health;
c. duress or undue influence; and
d. social, cultural, and economic deprivation.

Prior to *Zhang*, appellate authority suggested that methamphetamine offending was so serious that less weight should be given to personal circumstances at the second

[25] At [118].
[26] At [125].
[27] At [122].
[28] At [121].
[29] At [137].

stage of the sentencing process.[30] However, the Court in *Zhang* did not take these comments to imply exclusion of personal mitigating factors. Rather, the Court held that such factors are "to be weighed in the balance with the needs of deterrence, denunciation, accountability and public protection".[31] The Court also thought that considerable caution must be exercised in the expression of broad principles which may diminish the inherently discretionary weighting of aggravating and mitigating factors in stage two of the sentencing exercise.[32]

Ultimately, personal mitigating factors relating to the offender are applicable at stage two of sentencing for all instances of Class A drug offending, as in any other offending.[33] Although the Court selected mitigating factors that are "particularly germane" to methamphetamine offending, these comments have already proven to have general application, beyond simply methamphetamine offending.[34]

*A. Addiction*

Addiction may be a relevant mitigating factor at sentencing where it is causative of the offending or it will make a sentence of imprisonment more punitive.[35] In appropriate cases, addiction may warrant a discount of "up to 30 per cent", but this is not an absolute limit.[36]

The Court acknowledged the expert evidence that addiction may raise a number of mitigating considerations.[37] First, an offender's otherwise strong pro-social tendencies may be overwhelmed by dependence and addiction, even if they have ceased using methamphetamine. Second, offenders may be unwilling to seek treatment because of both social stigma and threat of punishment. Third, there is some evidence that offenders use methamphetamine as a coping mechanism for childhood trauma and in response to developmental difficulties.[38] Each of these call into question the effectiveness of deterrence.[39]

The Court confirmed that any discount to recognise addiction should be based on persuasive evidence, as opposed to mere self-reporting.[40] An offender must therefore show the extent and effect of the addiction on the balance of probabilities.[41] The cases since *Zhang* have not provided strict guidance on what constitutes "persuasive evidence".[42] However, this is not necessarily a bad thing, especially given the Court's

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[30] For example: *R v Jarden* [2008] NZSC 69, [2008] 3 NZLR 612; *Chen v R* [2009] NZCA 445, [2010] 2 NZLR 158 at [174].
[31] *Zhang v R*, above n 1, at [133] citing the Sentencing Act 2002, s 7.
[32] At [134].
[33] At [136].
[34] See *Orchard v R*, above n 5.
[35] *Zhang v* R, above n 1, at [147].
[36] At [149].
[37] At [145].
[38] At [145].
[39] At [146].
[40] At [148].
[41] At [148].
[42] See *R v Govender* [2019] NZHC 3212; *R v Roberts* [2019] NZHC 3319.

emphasis on flexibility and discretion at sentencing. To impose strict evidential requirements could effectively shut out offenders who have failed to obtain a clinical assessment. Such judicial discretion is preferable to enable sentencing judges to holistically evaluate whether the offender has provided "persuasive evidence" of addiction.

Having provided persuasive evidence of addiction, the offender must then show a causative link between the addiction and the offending.[43] For example, in *Crighton v R*, one of the six appeals heard in *Zhang v R*, Ms Crighton supplied a total of 3.75 grams to "pay for her own drug use and to supply her partner with methamphetamine, at least in part to prevent any violence".[44] As a result, a discount of 30 per cent (together with mental health) was appropriate.[45]

The Court in *Zhang* stated that commercial and substantial dealing is prima facie inconsistent with addiction being causative of the offending.[46] Where the dealing or manufacturing goes beyond a level that is self-sufficient, it is likely that the offender was instead exercising rational choice. The Court of Appeal reinforced this focus on rational choice in *Royal v R*, saying that:[47]

> [I]t may well be ... that addiction contributed to this offending, but more is required. The question is whether addiction impaired Mr Royal's capacity to make the commercial decisions he made.

Sentencing judges have continued to apply this guidance in a number of cases post-*Zhang*.[48] In *R v Pomale*, Mr Pomale supplied at least 721 grams of methamphetamine over a three-month period and in return received $117,370. Justice Venning labelled Mr Pomale a "major commercial dealer", stating that "[he] may also be afflicted by an addiction to methamphetamine but that is not the reason that [he] engaged in this offending".[49] As such, no causative link existed, and no discount was awarded.

### *B. Mental Health*

In a similar vein, the Court in *Zhang* affirmed that mental impairment short of insanity is a mitigating consideration.[50] Where there is an evidential basis to suggest that mental health issues have contributed to offending, a discount is available. Non-contributory mental health issues, however, will be of little mitigatory relevance.[51]

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[43] A discount may also be appropriate if the offender can show that their addiction will render a term of imprisonment disproportionately severe. This received very little discussion and has not been applied in subsequent cases.
[44] *Zhang v R*, above n 1, at [198]. See also *Roberts v R*, above n 42, at [36]; *R v Carnachan* [2019] NZHC 3025.
[45] At [201].
[46] At [147].
[47] *Royal v R* [2020] NZCA 129 at [24].
[48] See *Hall v R* [2020] NZCA 183; *Berkland v R* [2020] NZCA 150; *R v Pomale* [2019] NZHC 2798.
[49] *R v Pomale*, above n 48, at [25].
[50] *Zhang v R*, above n 1, at [151].
[51] At [147].

The precise degree of discount will depend on the severity of the mental health condition and the strength of the causative link between that condition and the offending. The Court decided against reviewing the discount levels for contributing mental health, instead noting that the Court of Appeal in *E(CA689/10) v R* discerned a range of 12 to 30 per cent.[52]

The Court noted, however, that mental health and addiction will often operate in combination. Where this is the case, it may be appropriate to grant a combined discount to avoid doubling counting.[53]

*C. Duress and Undue Influence*

A sentencing discount may also apply where an offender has acted under duress, short of a full defence, or under undue influence of a person upon whom the offender is dependent. Offending in these circumstances, usually involving gang-related or intra-family offending, diminishes the personal responsibility and moral culpability of the offender.[54]

*D. Social, Cultural and Economic Factors*

The Court then addressed social, cultural, and economic factors; again making a number of general comments. Most importantly, the Court pronounced that:[55]

> ingrained, systemic poverty 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.

Where these constraints are shown to contribute causatively to the offending (whether associated to addiction or not) they will require consideration in sentencing. Social, cultural, and economic deprivation that has a demonstrative nexus with the offending will be a relevant mitigating factor at sentencing, regardless of the specific ethnicity of the offender.[56]

The Court of Appeal recently confirmed this approach in *Carr v R*, stating that:[57]

> [W]here a cultural report provided under s 27 of the Sentencing Act contains a credible account of social and cultural dislocation, poverty, alcohol and drug abuse including by whānau members, unemployment, educational underachievement and violence as features of the offender's upbringing such matters ought to be taken into account in sentencing.

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[52] At [153], citing *E(CA689/10) v R* [2011] NZCA 13, (2011) 25 CRNZ 411 at [71]–[83].
[53] At [152].
[54] At [154], citing *R v McCarthy* (1996) 13 CRNZ 578 (CA); and *R v Cullen* HC Tauranga CRI-2008-070-2188, 23 April 2008.
[55] At [159].
[56] At [162].
[57] *Carr v R* [2020] NZCA 357 at [60].

These comments reflect the increased willingness on the part of sentencing judges to critically engage with cultural reports and draw the necessary links to find that an offender's systemic deprivation had a "causative link" to the offending.[58]

## V. OTHER SENTENCING CONSIDERATIONS

### *A. Section 25 of the Sentencing Act 2002*

Section 25 of the Sentencing Act 2002 allows a sentencing judge to adjourn proceedings before sentencing to enable the offender to, among other things, enter a rehabilitation programme. The Court took the opportunity to "encourage counsel and sentencing judges to make greater use of s 25 in appropriate cases where possible".[59]

An "appropriate case" is one where:[60]

> independent evidence suggests the offending was caused by the factor(s) which the proposed programme or course of action is designed to target. In this context, self-reporting as to the causes of the offending will generally not be sufficient.

The Court then provided the following guidance on the use of s 25 adjournments:[61]

> (a) Section 25 is not limited to cases where successful treatment could mean the difference between a custodial sentence or community-based sentence. Even if a custodial sentence is inevitable, the successful completion of a programme may warrant a sentencing discount.[62]
> (b) Counsel should present the court with a plan with written confirmation that the offender has enrolled in the programme or has a start date. In an addiction case, counsel should provide information from a recognised drug rehabilitation centre regarding the available programmes and an objective assessment of the offender's willingness to participate and a prognosis of whether the treatment is likely to be successful.[63]
> (c) A s 27 cultural report may be necessary to provide information about the available support from the offender's whānau and community.[64]
> (d) If the offender has previously participated in a treatment programme but failed or been excluded from it, that may tell against granting an adjournment.[65]
> (e) The Court may consider the offender's bail history and compliance with court orders, as well as any risk factors and issues of victim safety.[66]
> (f) Even if an offender does not complete the programme, valuable progress may still have been made and such progress should be carefully considered and acknowledged as is appropriate.[67]

### *B. Minimum Periods of Imprisonment*

In a minute issued prior to oral argument, the Court flagged its intention to confirm the correct approach to be taken when imposing minimum periods of imprisonment.

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[58] See *R v Karaitiana* [2020] NZHC 91; *R v Te Poono* [2020] NZHC 1188.
[59] *Carr v R*, above n 57, at [179].
[60] At [180].
[61] At [175]–[186].
[62] At [184]
[63] At [181].
[64] At [182].
[65] At [182].
[66] At [183].
[67] At [185].

First, the Court emphasised, as it had in previous decisions, that minimum periods of imprisonment must not be imposed as a matter of routine or in a mechanistic way.[68] Going further, the Court stated:[69]

> It is not sufficient for a judge simply to recite s 86 without more. A reasoned analysis is required, both as regards the imposition of a minimum period of imprisonment and its length. In a number of recent appeals, this Court having undertaken that analysis has concluded that either the sentencing judge was wrong to impose a minimum period of imprisonment or that its length was excessive and not justified.

For drug dealing offences, the Court made two further points. First, in such cases, it is deterrence, denunciation and accountability that are likely to be at the forefront of decisions involving the imposition of a minimum period of imprisonment.[70] Second, the Court cautioned that "if a practice has developed that an end sentence of nine years' imprisonment automatically triggers a minimum period of imprisonment, then such a practice must cease".[71] The Court confirmed that "there are no presumptions, no rules of thumb".[72]

## VI. CONCLUSION

The new sentencing guidelines for methamphetamine-related offending aim to increase judicial discretion by requiring judges to undertake a full evaluation of the circumstances to achieve justice in the individual case.[73] Indeed, in *Moses v R*, the Court of Appeal later commented that, when applying guideline judgments:[74]

> The ultimate question… is not whether an applicable guideline judgment is followed but whether the sentence is a just one in all the circumstances. When answering it the sentencer should stand back and consider the circumstances of offence and offender against the applicable sentencing purposes, principles and factors.

This focus on individualised sentencing is equally relevant when assessing aggravating and mitigating factors. At stage two, the court should utilise the tools available, such as ss 25 and 27 of the Sentencing Act 2002, to obtain the best available information about the offender. This information, whether it be about addiction, mental health, duress, or socio-economic factors, should form part of the overall assessment of the offender's culpability and, therefore, the appropriate sentence in all of the circumstances.

## VII. AFTERNOTE

In November 2020, the Supreme Court granted leave to appeal two methamphetamine sentencing decisions in which *Zhang* was applied: *Berkland v R*

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[68] At [169].
[69] At [169].
[70] At [171].
[71] At [172].
[72] At [174].
[73] At [104].
[74] *Moses v R* [2020] NZCA 296, [2020] 3 NZLR 583 at [49].

and *Harding v R*.[75] The Court noted that it was "particularly interested" in the following issues:[76]

> (a) whether, given the more limited role attributed to Mr Berkland by the Court of Appeal (compared to that of his co-offender), sufficient weight was placed on that factor in setting the starting point;
> (b) whether the Court of Appeal applied the correct approach to personal mitigating circumstances in relation to Mr Berkland, and in particular in requiring a causal link between his addiction or history of deprivation and the offending; and
> (c) whether the Court of Appeal was correct to uphold the imposition of a minimum period of imprisonment.

While these appeals are not a "wholesale re-litigation" of *Zhang*, the Supreme Court's comments on the proper application of *Zhang* will certainly be relevant. Oral argument took place on 23-24 March 2021 and the final decision is forthcoming.

[75] *Berkland v R* [2020] NZSC 125; *Harding v R* [2020] NZSC 127.
[76] *Berkland v R*, above n 75, at [1].