

**IN THE COURT OF APPEAL OF NEW ZEALAND**

**I TE KŌTI PĪRA O AOTEAROA**

**CA544/2023**  
**[2024] NZCA 144**

BETWEEN

**PETER AH TONG**  
Appellant

AND

**THE KING**  
Respondent

Hearing: 6 March 2024

Court: Thomas, Whata and Cooke JJ

Counsel: K J Beaton KC and A J Greaves for Appellant  
S J Mallett and B W D Alexander for Respondent

Judgment: 3 May 2024 at 10.30 am

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**JUDGMENT OF THE COURT**

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- A The appeal is allowed.**
- B The sentence of seven years' imprisonment is quashed and substituted with a sentence of six years' imprisonment.**

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**REASONS OF THE COURT**

(Given by Cooke J)

[1] Mr Peter Ah Tong pleaded guilty to, and was convicted of, importing methamphetamine,<sup>1</sup> possession of MDMA for supply,<sup>2</sup> and possession of

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<sup>1</sup> Misuse of Drugs Act 1975, s 6(1)(a). Maximum penalty of life imprisonment: s 6(2)(a).

<sup>2</sup> Section 6(1)(f). Maximum penalty of 14 years' imprisonment: s 6(2)(b).

dimethylpentylylone.<sup>3</sup> He was sentenced to seven years' imprisonment by Judge T J Gilbert, in the District Court at Christchurch.<sup>4</sup> Mr Ah Tong appeals against his sentence.

### **Relevant facts**

[2] Mr Ah Tong lived in a flat in Christchurch. Between 9 May and 15 June 2022, he imported four packages containing a total of 2.092 kilograms of methamphetamine. Three of these packages were intercepted by New Zealand Customs Service | Te Mana Ārai o Aotearoa and one of these packages successfully arrived at Mr Ah Tong's partner's flat, an address Mr Ah Tong regularly frequented. All of the packages were addressed to fictitious people. On 13 May 2022, Mr Ah Tong had also discussed in his text messages a "kilo" arriving from London, that he had "a massive amount of customers", and that he had already sold everything.

[3] On 14 June 2022, search warrants were executed at Mr Ah Tong's flat and his partner's flat. At this time, Mr Ah Tong was temporarily living at his partner's flat. Police found 79.2 grams of MDMA (ecstasy), 15 pink pills containing the ecstasy analogue dimethylpentylylone (a class C controlled drug), digital scales, small plastic bags, and \$5,140 in cash.

### **Decision under appeal**

[4] It was accepted by both counsel that in applying the bands in *Zhang v R*, the importation of just under 2.1 kilograms of methamphetamine placed Mr Ah Tong's offending at the bottom of band five.<sup>5</sup> The Judge determined the importation was pre-meditated but not sophisticated offending.<sup>6</sup> The Judge adopted a starting point of 11 years' imprisonment for that offending.<sup>7</sup> He considered this reflected the scale of the offending and that Mr Ah Tong's role was in the "significant" category.<sup>8</sup> In relation

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<sup>3</sup> Section 7(1)(a). Maximum penalty of three months' imprisonment and/or a \$500 fine: s 7(2)(b).

<sup>4</sup> *R v Ah Tong* [2023] NZDC 19252 [judgment under appeal].

<sup>5</sup> At [21] and [26], citing *Zhang v R* [2019] NZCA 507, [2019] 3 NZLR 648.

<sup>6</sup> Judgment under appeal, above n 4, at [30].

<sup>7</sup> At [33].

<sup>8</sup> The role profiles were articulated by the Supreme Court in *Berkland v R* [2022] NZSC 143, [2022] 1 NZLR 509 at [71].

to the remaining offences, the Judge uplifted the starting point by one year. This resulted in a starting point of 12 years' imprisonment.<sup>9</sup>

[5] The Judge determined that only a 20 per cent discount would be applied for Mr Ah Tong's guilty plea as the plea was not at the earliest opportunity warranting a full 25 per cent discount.<sup>10</sup> The guilty plea followed multiple appearances, an unsuccessful electronically-monitored bail application and a sentencing indication that Mr Ah Tong declined. The Judge then allowed a further 20 per cent discount for personal mitigating factors, including deprivation in Mr Ah Tong's upbringing which led to addiction, and his remorse.<sup>11</sup> The Judge considered that the discount for personal factors needed to be assessed in the context of the commercial underpinnings of his operation, the scale of those operations, and the harm caused.<sup>12</sup> After some "favourable rounding" an end sentence of seven years' imprisonment was imposed.<sup>13</sup>

### **Approach to appeal**

[6] Sentence appeals are governed by s 250 of the Criminal Procedure Act 2011. A first appeal court must allow the appeal if satisfied that:

- (a) for any reason, there is an error in the sentence imposed on conviction; and
- (b) a different sentence should be imposed.

[7] When considering whether a different sentence should be imposed, the court will have regard to the ultimate end sentence, rather than the process by which it was reached. The court will allow the appeal where the sentence being appealed is manifestly excessive and is not justified by the relevant sentencing principles.<sup>14</sup>

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<sup>9</sup> Judgment under appeal, above n 4, at [34].

<sup>10</sup> At [35].

<sup>11</sup> At [17]–[18] and [36]–[39].

<sup>12</sup> At [39].

<sup>13</sup> At [40].

<sup>14</sup> *Tutakangahau v R* [2014] NZCA 279, [2014] 3 NZLR 482 at [32]–[36].

## Arguments on appeal

[8] Mr Ah Tong contends that the sentence arrived at by the District Court was manifestly excessive for three interrelated reasons. First, it is argued that the Court's starting point was too high because Mr Ah Tong was essentially operating on his own in an unsophisticated way. The starting point should not have been of a kind appropriate for a significant drug dealing operation. Second, it is argued that the 20 per cent discount for personal background, addiction, rehabilitative potential and remorse was insufficient in the circumstances of the case, and warranted a further 25 per cent discount on top of the 20 per cent discount for the guilty plea. Finally, the appellant argues that, in accordance with the Supreme Court's decision in *Philip v R* and this Court's decision in *Sweeney v R*, a further discrete discount should have been granted for the impact Mr Ah Tong's incarceration will have on his 11 year old daughter.<sup>15</sup>

## Assessment

[9] In advancing oral submissions, Ms Beaton KC, for Mr Ah Tong, did not pursue the argument that the Judge's starting point was too high. We consider that she was right not to do so. The amounts of methamphetamine involved were squarely within band five of *Zhang*, albeit at the bottom end of that range.<sup>16</sup> The fact that there was no evidence that Mr Ah Tong had others above or below him in the operation, and that he operated in the nature of a sole trader does not mean that his role was not significant in terms of the role profiles identified by the Supreme Court in *Berkland v R*.<sup>17</sup> As Mr Mallett, for the respondent, submitted, this Court has said in *Tule v R* that when someone operates as a sole trader "it is not sensible to ask if [he] had a lesser role".<sup>18</sup> The sole trader's role can be both significant and leading. The significance of the operation was reflected not just in the quantities but also in the messages on Mr Ah Tong's cell phone that he had "a massive amount of customers". The fact that most of the methamphetamine was intercepted, and the appellant did not take effective

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<sup>15</sup> *Philip v R* [2022] NZSC 149, [2022] 1 NZLR 571 at [50]–[52]; and *Sweeney v R* [2023] NZCA 417 at [27].

<sup>16</sup> *Zhang v R*, above n 5, at [125].

<sup>17</sup> *Berkland v R*, above n 8, at [71].

<sup>18</sup> *Tule v R* [2023] NZCA 543 at [17].

steps to conceal his offending, does not mean that his role was not significant or that the quantities involved should be discounted.

[10] We also do not accept Ms Beaton's submission that the Court did not give sufficient discount for personal mitigating circumstances. We do not consider that remorse was a factor that could justify a discount. We accept, however, that there were important mitigating circumstances in two respects. First, although Mr Ah Tong has only turned to methamphetamine in more recent times, it is apparent that he has had a lifelong difficulty with addiction which has involved alcohol and other drugs before he escalated to methamphetamine offending. Second, Mr Ah Tong's personal background involved deprivation and an abusive upbringing of a kind that warranted a discount given there is a causative connection between that background and his offending. Those two factors are interrelated as we accept that Mr Ah Tong's addiction issues are causatively connected with his difficult upbringing. We also consider that there is a relevant prospect of rehabilitation which is associated with the relationship Mr Ah Tong has with his youngest daughter in particular — a matter we return to below. But notwithstanding the significance of those factors in combination, we consider that the Judge appropriately addressed them in allowing for a further 20 per cent overall discount over and above that allowed for the guilty plea. That discount cannot be criticised and was within range.

[11] But we do accept the submissions advanced by Ms Beaton and Mr Greaves that the Judge erred in failing to address the implications of imprisonment for Mr Ah Tong's dependent daughter, and that a further discount was appropriate because of those implications. In *Philip v R*, the Supreme Court reinstated a discount that had been applied by the High Court because of the implications of imprisonment on the offender's young child.<sup>19</sup> This Court had held that this could not justify a discrete discount given other personal mitigating discounts that had been applied.<sup>20</sup> In

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<sup>19</sup> *Philip v R*, above n 15.

<sup>20</sup> *McMillian v R* [2022] NZCA 128 at [152].

restoring the discount, the Supreme Court said a discrete discount was appropriate given the impact on the child.<sup>21</sup> The Court explained:<sup>22</sup>

[52] The provision for such discounts reflects both s 8(h) and (i) of the Sentencing Act. Section 8(h) requires the court to take into account circumstances of the offender that would mean an otherwise appropriate sentence “would, in the particular instance, be disproportionately severe”. Section 8(i) directs the court to consider various personal circumstances, namely, “the offender’s personal, family, whanau, community, and cultural background in imposing a sentence … with a partly or wholly rehabilitative purpose”. A sentencing approach which recognises the importance to a child of the familial relationship is also supported by the United Nations Convention on the Rights of the Child (Children’s Convention). The Children’s Convention emphasises the importance for children of growing up in a family environment and imposes an obligation on courts to treat the best interests of the child as a “primary consideration”.

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[56] The respondent relies on *Fukofuka v R* for the proposition that such discounts will be rare. The Court’s view of the seriousness of the offending was among the points that appear to have influenced the Court of Appeal in declining to allow any credit for the impact on the offender’s family in *Fukofuka*. We do not find it helpful to characterise such discounts as “rare” or to emphasise, to the exclusion of other factors, whether the defendant is the primary caregiver or the seriousness of the offending. What is required is a consideration of all of the relevant circumstances which must include the child’s interests. Those interests include, as our reference to the Children’s Convention indicates, the importance for children of growing up in a familial environment. We accept that there may be other factors in this consideration which take primacy including, by way of example, issues of inter-familial violence; an absence of remorse and/or lack of any rehabilitative steps, but those factors are not relevant here.

[12] This Court then applied this approach in *Sweeney v R*.<sup>23</sup> In that case, Mr Sweeney had assumed full-time responsibility for his four and six-year-old children from 2019. The Court found that it did not require an expert report to come to a conclusion that the interests of the children warranted a 10 per cent discount.<sup>24</sup>

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<sup>21</sup> *Phillip v R*, above n 15, at [53].

<sup>22</sup> Footnotes omitted. The Supreme Court refers to Convention on the Rights of the Child 1577 UNTS 3 (opened for signature 20 November 1989, entered into force 2 September 1990), in particular the preamble and art 3; *Fukofuka v R* [2019] NZCA 290, in particular at [47]–[48]; and *Mau v R* [2021] NZCA 106. See also Francesca Maslin and Shona Minson “What about the children? Sentencing defendants who are parents of dependent children” [2022] NZLJ 367; and the discussion in *Berkland*, above n 8, at [116], on the correlation between offending in later life and environmental factors affecting children such as the lack of prosocial familial support and connection, and having a caregiver who is, or has been, in prison.

<sup>23</sup> *Sweeney v R*, above n 15.

<sup>24</sup> At [27].

[13] In assessing the potential for a discount arising because of the effect on dependent children, the focus is on the interests of the children. How an offender's dependent children are impacted by sentencing is something that should be considered by counsel and brought to the attention of the court. Those circumstances may warrant a discrete reduction in the term of imprisonment because of the impacts on the child, even if the offender's own circumstances do not warrant any further discounts.

[14] Here the Judge assessed the implications on Mr Ah Tong's dependent daughter as part of Mr Ah Tong's personal circumstances, indicating that there was only so much weight he could give to such factors given the seriousness of the offending.<sup>25</sup> He then went on to elaborate that, whilst there were impacts for his family, there would be other parents and children whose lives had been ruined by methamphetamine offending of the kind Mr Ah Tong had engaged in.<sup>26</sup> We do not consider that approach to be consistent with that explained in *Philip and Sweeney*. There were factors that suggested that there were implications for Mr Ah Tong's daughter that the Court needed to address. In particular:

- (a) The daughter's mother was already imprisoned, and serving a lengthy sentence. Following her imprisonment in 2016, Mr Ah Tong had been his daughter's sole caregiver, and his own imprisonment accordingly had significant adverse implications for her.
- (b) The child was 11 years old, which we consider to be at an age at which parental support and guidance is of particular significance, arguably more so than for much younger children. In her statement provided to the Court, the daughter said she was not coping well at school and that she had started seeing a counsellor about her feelings concerning her father not being present to support her.
- (c) The daughter is now in the care of Mr Ah Tong's partner. While his daughter knew Mr Ah Tong's partner, we do not understand that they had lived in the same household other than temporarily. Mr Ah Tong's

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<sup>25</sup> Judgment under appeal, above n 4, at [36].

<sup>26</sup> At [37]–[39].

partner had also provided an affidavit at sentencing saying that her mental health had deteriorated significantly since Mr Ah Tong's imprisonment and that she had had to take over day-to-day care of Mr Ah Tong's daughter. It is apparent that this was effectively a forced foster parent arrangement that had significant implications.

[15] Against that background, we consider that this case is comparable to that of *Philip and Sweeney*. It was appropriate to recognise the significant adverse implications involved in the separation of an 11-year-old dependent child from her remaining parent. Whilst some separation is unavoidable given the nature of Mr Ah Tong's offending, it should be minimised given the implications for the child. We also consider that Mr Ah Tong's rehabilitation prospects are best enhanced by him sustaining his parental role to the extent practicable. We consider that the Judge ought to have allowed a further discrete discount of 10 per cent in those circumstances, and that the sentence is manifestly excessive without that discount. As in *Sweeney*, the inclusion of the further discount moves beyond tinkering as it materially effects both the end sentence and the period of time before Mr Ah Tong can be considered for parole.<sup>27</sup>

[16] In those circumstances, we consider that there ought to have been a 50 per cent rather than a 40 per cent discount for mitigating circumstances, and that the end sentence ought to have been six years' imprisonment rather than seven years' imprisonment.

## Outcome

[17] For these reasons the appeal is allowed.

[18] A sentence of six years' imprisonment is substituted for that of seven years' imprisonment.

Solicitor:  
Crown Solicitor, Christchurch for Respondent

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<sup>27</sup> *Sweeney v R*, above n 15, at [32].