

**IN THE DISTRICT COURT  
AT MANUKAU**

**CRI-2017-092-003769  
[2018] NZDC 430**

**THE QUEEN**

v

**MARCUS PEHITAHİ ORCHARD**

Hearing: 12 January 2018  
Appearances: Z Hamill for the Crown  
T Darby for the Defendant  
Judgment: 12 January 2018

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**NOTES OF JUDGE R J EARWAKER ON SENTENCING**

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[1] Mr Orchard, you pleaded guilty following a sentence indication to a charge of possession of methamphetamine for supply, possession of cannabis and possession of a Class C drug for supply.

[2] The brief facts are that on Friday 31 March of last year you were the front passenger in a vehicle stopped in Manurewa by the police. As they were speaking to the driver they observed you place an object in the glove box. When questioned about that you opened the glove box and stated you had put money in it. The police officer at that stage invoked a warrantless search because of what he saw in the glove box. Located was a black zip-up container in the front passenger footwell which contained two further containers holding methamphetamine. There was also a large zip lock bag containing cannabis, money, and also in the front passenger area another cellphone, so there were two cellphones, and further cash.

[3] The police also located a black back-pack which had your details in it. Located in that was a black pouch containing a number of unused zip lock bags. Located also were zip lock bags containing what was thought initially to be LSD and a small metal canister containing cannabis. Subsequent testing showed that there was a total of 72.8 grams of methamphetamine and a total of 15.7 grams of cannabis. What had appeared to be LSD was in fact a controlled drug analogue 2C-I which is a Class C controlled drug and there was a total of 140 squares of that. The police also seized a total of \$1440 in cash.

[4] The matter was dealt with by me at a sentence indication shortly before you were due to stand trial and that was in December of last year. I indicated at that point that for the methamphetamine charge in accordance with the decision of *R v Fatu*<sup>1</sup> it would fall within band 2 for the methamphetamine and a starting point of five years would be appropriate. Now what was complicating the sentencing was that you were already a sentenced prisoner having been sentenced by Judge Ingram on 30 November 2017 in respect of drug charges which post-dated the ones which I am due to sentence you on today. I indicated that there would need to be an adjustment for totality but any sentence I imposed in respect of these current charges would be cumulative. That sentence indication was accepted and you pleaded guilty on that basis.

[5] So in sentencing you I am required to take into account the purposes and principles of sentencing. I need to take into account the harm which drugs do to the community, you were clearly dealing in methamphetamine, that is obvious from not only the objects that were found, the amount of cannabis, the money but also your plea. So, I do need to denounce your conduct and deter you and others from committing the same or similar offences. It is well-known that drugs, particularly methamphetamine, are a real and constant problem in our community.

[6] I also need to take into account the gravity of the offending, the seriousness of this type of offence, the general desirability of consistency with appropriate sentencing levels but also impose the least restrictive outcome.

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<sup>1</sup> *R v Fatu* [2006] 2 NZLR 72 (CA)

[7] So really, having already set out what the starting point would be for the lead offence of possession of methamphetamine for supply the real issue is whether there is required to be an uplift for the other offences and then what is the appropriate adjustment given the sentence that was imposed upon you by Judge Ingram in the Tauranga District Court.

[8] As indicated, this offending in my view falls within band 2 of *R v Fatu* and that is obviously the tariff case for the Court of Appeal which would have been explained to you by your counsel. Band 2 is supplying commercial quantities between five grams and 250 grams carrying a range of three years' imprisonment to nine years' imprisonment. As I indicated, a starting point of five years in my view is appropriate.

[9] The Crown also indicate that there should be an uplift for the additional charges which is not supported by your counsel Mr Darby who urges upon me to treat the other two charges of possession of cannabis and possession of the Class C drug for sale as part of the totality of this offending.

[10] In my view a small uplift is required to reflect the different nature of the cannabis and also the analogue drug. It would not be appropriate to simply treat it all as a concurrent. In my view, an uplift is required and I do accept that eight months is an appropriate for the additional charges, so that brings me to a sentence of five years and eight months' imprisonment.

[11] What I do need to do is adjust the sentencing in accordance with s 85(2) Sentencing Act 2002 which provides that:

If cumulative sentences of imprisonment are imposed, whether individually or in combination with concurrent sentences, they must not result in a total period of imprisonment wholly out of proportion to the gravity of the overall offending.

[12] What is important there is the fact that you were sentenced, as I say, by Judge Ingram on 30 November 2017 for charges of possession of methamphetamine, possession of cannabis for sale, possession of an amphetamine analogue and also possession of a sawn-off .22. There was also a charge of receiving. The offending I am dealing with today pre-dated that offending by one month, so it was close in time,

and so really I need to put myself in the position of the Judge at that time to determine what sentence I would have given had they all been dealt with together. You received an end sentence from Judge Ingram of two and a half years' imprisonment. I do accept the Crown submission that, having regard to the circumstances of both the instances of offending, an appropriate adjustment is in the vicinity of two years to reflect the totality principle. That means that the sentence adjusted for totality would be three years and eight months' imprisonment.

[13] From there I need to look at appropriate discounts for your plea for any other matters placed before me. Mr Darby in his submissions urged upon me to take into account some personal circumstances particularly relating to your children. [Details deleted]. I am told prior to you being incarcerated you were a solo parent, with help, in raising the children by your parents, so their grandparents. I am advised by Mr Darby that the grandparents are now the sole carers of your children but there are some health issues, particularly with your mother, which may impact on that. The difficulty I have with that submission Mr Orchard is that I have no confirmation of your parents' health issues or indeed the circumstances relating to your children. Also, the Court of Appeal have, on a number of occasions, indicated that where drug dealing is involved personal circumstances carry little weight. So, dealing with those two factors, there is very little I can take into account regarding your children.

[14] However, what I can take into account is that you have, it seems, addressed the issue of your drug offending. I have a letter here of remorse which I do accept is genuine for a number of reasons. Firstly, it seems that you have, whilst incarcerated for nine months, really endeavoured to get on top of your drug problems that have presented you before the Courts on numerous occasions. I also take into account the comments of Judge Ingram in his sentencing notes of 30 November where he does positively comment on your remorse and your willingness to deal with your drug problems. So, that is a factor that I am able to take into account and I do consider that your remorse and your willingness to rehabilitate yourself is genuine. So taking all that into account having adjusted for totality prior to any discounts the sentence would be three years and eight months' imprisonment.

[15] I consider that I can give a discount of two months for the factors that I have addressed, being your remorse, and although I said that I do not take into account your personal circumstances it is, as I say, the efforts you have made at rehabilitation that do impact on me so that takes it down to three years and six months. From there it is a question of the discount that is appropriate for your plea. The Crown urge upon me the maximum discount, given the lateness of your plea, to be 15 percent. Mr Darby draws a number of other factors to my attention and urges upon me a higher discount. In my view a discount of six months is appropriate for your plea which gets me to an end sentence of three years' imprisonment.

[16] That sentence will be in respect of the charge of possession of methamphetamine and the charge of possession of the Class C controlled drug for sale. Those sentences will be concurrent with each other but will be cumulative on the sentence that was imposed by Judge Ingram.

[17] In terms of the other charge of possession of cannabis, there will be a sentence of one month concurrent imprisonment for that charge.

[18] So, the total sentence will be three years' imprisonment and that will be cumulative on the sentence of two and a half years imposed by Judge Ingram.

[19] Also, there is the question of forfeiture of the money, which is not opposed by you or Mr Darby. I order forfeiture of the \$1440 in cash and destruction of the restricted weapon that was found, together with the drugs seized at the time of your arrest.

R J Earwaker  
District Court Judge