

**IN THE DISTRICT COURT  
AT AUCKLAND**

**I TE KŌTI-Ā-ROHE  
KI TĀMAKI MAKĀURAU**

**CRI-2018-004-001145  
[2019] NZDC 1215**

**THE QUEEN**

**v**

**YEW WAI CHAI**

Hearing: 16 January 2019

Appearances: E Mok and F Culliney for the Crown  
P Tomlinson for the Defendant

Judgment: 16 January 2019

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

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[1] Mr Chai, you are for sentence today on one charge of importing the Class A controlled drug methamphetamine and 11 charges of importing the Class B controlled drug ephedrine. Charge 2 and the first of the ephedrine charges is a representative charge and refers to offending occurring from 28 August through to 24 November 2017.

[2] In terms of the ephedrine offending, amounts have only been specified where the importation or the consignment was seized by the New Zealand Customs Service and the actual amount of the ephedrine has been established so there is a part of charge 2 and there are four other charges where the amount of ephedrine imported is unknown. You are to be sentenced on the basis that there was at least 60 kilos of ephedrine imported by you.

[3] With respect to the importation of two kilos of methamphetamine on 10 January 2018, Mr Tomlinson has always advocated strenuously on your behalf that you believed that what you were receiving on that occasion was ephedrine and not methamphetamine and there has been a significant amount of today devoted to his submissions in that regard and the Crown responds and I will come back to that in the course of these sentencing comments.

[4] You were a part of what is described as a criminal group. Various names are sometimes given for such but, in any event, those with whom you operated were involved in sending significant amounts of illegal drugs from either Malaysia or other parts of Asia into New Zealand. But for the one occasion on 10 January, all we know is that all other known importations were of ephedrine and not the finished product of methamphetamine.

[5] But ephedrine in these circumstances has but one purpose and that is the ultimate production of methamphetamine and it is not being emotive, nor is it being dramatic, to say that methamphetamine is a scourge in this country. It does a lot of harm, it drives a lot of violent offending and it drives a lot of property offending, as well as being destructive of the lives of those who become very quickly and easily addicted to it.

[6] The frequency with which the sentencing Courts and the appellate Courts have to deal with methamphetamine sentencing should not numb us to its harm and lessen the Court's approach or response to quite frankly what is the evil of this particular drug.

[7] You arrived in New Zealand on 27 July 2017 and your role was to be what has colloquially become known as a catcher, that is you were to be in New Zealand organising addresses where consignments of illegal drugs could be sent and your task would be to secure the consignment and then obviously arrange for its forward distribution to others in the drug dealing trade.

[8] You were responsible for obtaining a significant number of addresses. Those known to the authorities and set out in the summary of facts include [six addresses

deleted] but I accept that sometimes there may not in fact be a duplication and may be talking about one and the same address. So either alone or later in this operation you were involved with those addresses as well as [four addresses deleted]. In addition, the methamphetamine was sent to [address deleted].

[9] So this was not the situation of a young person being sent from Asia to establish one address and receive one package in New Zealand. You operated here for many months, you operated multiple addresses and you received a multiple number of consignments.

[10] The amount of ephedrine comprised in charge 2 is 34.84 kilograms, charge 4 4.194 kilograms, charge 6 four kilograms, charge 7 10 kilograms, charge 8 4.5 kilograms, charge 10 2.5 kilograms and charge 12 three kilograms, and what distinguishes your situation from Ms Aloysius, who is described as a co-defendant, is that while she cumulatively acted as a catcher for something over 150 kilograms of ephedrine, she did so only on two occasions and in many respects she is not a true co-defendant with you.

[11] On 10 January when the methamphetamine was about to be delivered to [address deleted], you arrived behind the courier driver and you attempted to take delivery of the package that you obviously knew he was about to deliver. Because you could not satisfy the courier driver of your identification and your entitlement to receive the package, he refused to deliver it to you.

[12] You followed him through West Auckland and onto Lincoln Road where he had pulled into the carpark of Burger King. You pulled in behind him effectively blocking the van. You again approached the courier driver and demanded the package be handed to you. To his absolute credit he refused to do that and told you you would need to collect it from the depot and he also photographed your vehicle to obtain the registration plate.

[13] Reporting that interaction to his superiors brought about referral back to Customs about your actions. At that point a number of the consignments of ephedrine had already been seized.

[14] You have no known conviction history and clearly there will be no uplift of the appropriate starting point for that. However, I am not prepared simply because there is just inadequate information available to me to suggest that you are entitled to any credit for a previously blameless life or what might be described as good character.

[15] Your offending here was sophisticated. It was for reward. You advised the probation officer that you knew exactly what you were doing, what the arrangement was and that you were doing what you did for payment between 2000 and \$3000 per package. There was, therefore, a high level of premeditation. There were multiple offences over a materially lengthy period of time.

[16] The probation report in other respects is unsurprisingly brief and also unsurprisingly recommends imprisonment because there is no other alternative today.

[17] This matter has been the subject of a sentencing indication hearing. At that I indicated a starting point for charge 1 of 15 years, an uplift for the balance of the offending, that is the ephedrine importations, of three years, would bring matters to an overall starting point of 18 years. Your plea came early. The evaluation of the worth of the plea was such that you are entitled to 25 percent for that.

[18] At the sentencing indication hearing I left open the question of a minimum period of imprisonment and any other matters in mitigation were left open for Mr Tomlinson to advance today at sentencing.

[19] I turn then to the question of starting point and Mr Tomlinson argues that the 15 years that I adopted should be reduced because you believed that you were receiving ephedrine and not methamphetamine and, therefore, your culpability is reduced.

[20] Despite the sentencing methodology that we adopt in this country which operates to achieve consistency as far as defendants are concerned, the offending has to be viewed in context so as to invest the process of sentencing with an air of reality. Now it is vital in that that there be no double counting and that is the approach that I have been careful to adopt today.

[21] I am not prepared to reduce the overall sentence that I indicated because of a belief on your part that you were receiving ephedrine as opposed to methamphetamine and the reasons that I am not prepared to do that are to be given just in a moment.

[22] This is not a situation where you were reckless as to whether or not you were receiving illegal drugs. You knew you were receiving illegal drugs. It is not a situation where you could argue that you had been told that you were to receive some legitimate product but appreciated there is a risk that it might in fact be drugs and you went ahead and ran that risk anyway. You knew that you were in New Zealand to receive illegal drugs and you were being paid for that.

[23] The drugs that you believed you were receiving and did in fact receive on at least 11 occasions, if not more, bearing in mind that charge 2 is a representative charge, was a drug which has the sole purpose of creating methamphetamine. So you were a part of a process which had as its ultimate objective the sale and distribution of methamphetamine into the New Zealand community. On 10 January you went to some determined lengths to ensure that you could get possession of that package.

[24] And, finally, the indication that I gave on 9 November last year involved at the end of the process an assessment of what is known as totality and I will come to that in a moment. What that means is that if I had, and if I am wrong not to have lowered the methamphetamine starting point, then I would not have reduced the uplift for the 11 charges involving the importation of ephedrine by the extent that I did.

[25] Now I record that in setting the starting point for the importation of methamphetamine I had regard to the cases referred to me by both the Crown and Mr Tomlinson. They were *Man v R*, *R v Nguyen*, *R v Yung* and *Landrian v R* and my assessment of those cases led me to accept that the Crown submission of a 15 year starting point was appropriate.<sup>1</sup>

[26] Mr Tomlinson argued for a lesser starting point primarily in reliance on his argument that your recklessness entitled you to a lower starting point.

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<sup>1</sup> *Man v R* [2017] NZCA 525; *R v Nguyen* [2009] NZCA 239; *R v Yung*; and

[27] It may well be that where somebody is reckless as to whether the product is a drug or not may warrant some reduction but my view is that all the circumstances here, given that you were on a frequent basis involved as a catcher for a Class B controlled drug which had as its ultimate object the production of methamphetamine, does not warrant any reduction of that starting point here.

[28] I turn then to the question of the uplift. Mr Tomlinson submitted that the sentencing indication that a three year uplift was appropriate and the Crown submitted for between three years and four years and I adopted three years, that has possibly only been influenced today in terms of reconsideration by His Honour Judge Glubb's sentencing of Ms Aloysius. I do not see her offending as having direct comparative assistance even though she could be said to have received a greater volume of ephedrine. I have already noted the occasions on which she was involved with importations were only two.

[29] In addition, while His Honour's decision is one that I have to have regard to, far more determinative of my assessment is the decision of the Court of Appeal in the case of *Yuen v R* where a starting point of 13 years adopted by the sentencing Judge was upheld by the Court of Appeal, where the Court observed:<sup>2</sup>

That where the offending involves multiple instances of commercial importation of methamphetamine precursor substances, of this sort of volume, involving significant premeditation and organisation by an offender with a significant role, a starting point close to the statutory maximum of 14 years is entirely appropriate and should be expected.

[30] My view based on *Yuen v R* and the other authorities dealing with substantial importation of ephedrine, had the ephedrine offending stood on its own a minimum starting point would have been one of 10 years' imprisonment and an uplift of three years on a totality basis in my view is extremely generous to you. It is such that had I adopted a lower starting point for charge 1 the reduction for totality here would not have been so great and would have still brought an effective overall starting point of 18 years.

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<sup>2</sup> *Yuen v R* [2015] NZCA 555.

[31] The one other matter other than plea which is argued for you should reduce your sentence and that is that you are remorseful. I have read the letter that you have written. Judges commonly receive such letters.

[32] Taking that letter into account but taking into account what the probation officer has had to say, I am not satisfied that there is objectively sufficient before me which would warrant a reduction for remorse. You took a calculated commercial risk and I am simply not satisfied that you are sorry for the harm that your offending would have caused as opposed to being sorry for the situation that you find yourself. Your letter in that regard is far more focused on your own predicament rather than the harm that your offending would cause to people in this country.

[33] I turn then to the question of a minimum period of imprisonment. Various authorities had been referred to me including the case of *Argu* today where on a Crown appeal the Court of Appeal refused to allow the appeal and set a minimum period of imprisonment.<sup>3</sup> However, I do not read *Argu* as suggesting that the previous approach of the Court of Appeal in cases such as *R v Anslow* and *Solicitor-General v Huang* was wrong, just simply on the facts in *Argu* the Court was not prepared to intervene and overturn the decision of the sentencing Judge.<sup>4</sup>

[34] Effectively, the line of authority represented by *R v Anslow* and *Solicitor-General v Huang* holds that where very serious drug offending is involved, and particularly where the sentences are in excess of nine years, that minimum periods of imprisonment are appropriately involved or engaged.

[35] In my view, the argument or at times the almost unspoken sentiment that because you will inevitably be the subject of deportation should not influence the decision as to whether a minimum period of imprisonment should be imposed. The Court of Appeal has on occasion observed that that is a false or a wrong approach.

[36] The s 86(2) purpose of deterrence must be at play here. It would be wrong for those such as yourself recruited in Asian or South-East Asian countries to come to

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<sup>4</sup> *R v Anslow*; and *Solicitor-General v Huang*.

New Zealand to act as a catcher to come on the instruction that if you get caught and the case against you is overwhelming, seek a sentencing indication, argue strongly for a sentence which does not involve a minimum period of imprisonment and you will be released and go back home at one-third of that sentence. Those who will arrange for people such as you to come to New Zealand to act in this role, they must act in the knowledge when they are conducting their recruitment processes that minimum periods of imprisonment in excess of one-third of the sentence will be imposed for offending on this scale.

[37] If I am to set a minimum period of imprisonment it has to be between 40 percent and two-thirds of the sentence but is not to exceed 10 years. Here on charge 1 there will be a minimum period of imprisonment imposed of 40 percent and that is for the reasons which I have just given.

[38] Finally, in terms of forfeiture of the relatively small amount of cash found on you, I am satisfied that that money was in your possession as a consequence of this offending and it does fall within the section and I believe even though that might deprive you of some funds in New Zealand while in prison, it would be wrong in principle to allow the retention of that money by you and there will be forfeiture pursuant to s 32(3) Misuse of Drugs Act 1975 of the \$NZ3255 and the \$AUD900 found in your possession.

[39] So Mr Chai, just before I conclude Mr Tomlinson has raised with me the issue that you are a foreign national and that serving a term of imprisonment here will be a harsher exercise for you than for somebody who may well be a New Zealand resident. While I had not expressed a view on that earlier it is something that I had certainly taken into account in preparation for today.

[40] In my view, that approach in your situation would be wrong. I am not saying that there are not occasions, particularly for very young offenders coming from overseas who had been manipulated and may be particularly vulnerable, for the Court to give some consideration to that but in your case you are a very mature man and there has been nothing put before me which would suggest that you were particularly vulnerable or in other ways had been manipulated or threatened or coerced to come to

New Zealand to carry out this role. In my view, it would be wrong in principle for people such as yourself to come to New Zealand to commit this offending and then say as a foreign national a sentence in New Zealand prison will be harsher for you than for someone else.

[41] So on charge 1, you are sentenced to a term of imprisonment of 13 years six months with a minimum period of imprisonment of five years and six months. On charges 2 to 12, the sentence is one of four years' imprisonment. All sentences of imprisonment are concurrent. The total is 13 years six months with a minimum period of five years six months to be served on charge 1.

R J Collins  
District Court Judge