ORDER PROHIBITING PUBLICATION OF THE NAMES, ADDRESSES, OCCUPATIONS OR IDENTIFYING PARTICULARS OF THE RESPONDENTS PURSUANT TO S 200 OF THE CRIMINAL PROCEDURE ACT 2011.

NOTE: PUBLICATION OF THE NAME, ADDRESS, OCCUPATION OR IDENTIFYING PARTICULARS OF THE COMPLAINANT PROHIBITED BY S 204 OF THE CRIMINAL PROCEDURE ACT 2011.

IN THE COURT OF APPEAL OF NEW ZEALAND

CA111/2017
[2017] NZCA 483

BETWEEN	THE QUEEN Appellant
AND	M (CA111/2017) Respondent

CA303/2017

BETWEEN	THE QUEEN Appellant
AND	C (CA303/2017) Respondent

Hearing:	2 October 2017
Court:	Harrison, Brown and Collins JJ
Counsel:	M J Lillico for Appellant M A Edgar for Respondent (CA111/2017) M B Meyrick for Respondent (CA303/2017)
Judgment:	26 October 2017 at 2.30 pm

JUDGMENT OF THE COURT

A The Solicitor-General's appeal against sentence in CA111/2017 is allowed.

B **The concurrent sentences of seven years' imprisonment on the charges of manufacturing methamphetamine are quashed and concurrent sentences of nine years' imprisonment imposed, cumulative upon the sentence for the Auckland charges. A minimum period of imprisonment of four years and six months is imposed.**

C **The Solicitor-General's application for an extension of time in CA303/2017 is granted.**

D **The Solicitor-General's appeal against sentence in CA303/2017 is allowed.**

E **The sentence of six months' imprisonment on the charge of conspiracy to manufacture methamphetamine is quashed and a sentence of two years' imprisonment imposed, cumulative on the sentence for the Auckland charges.**

F **Order prohibiting publication of the names, addresses, occupations or identifying particulars of the respondents pursuant to s 200 of the Criminal Procedure Act 2011.**

REASONS OF THE COURT

(Given by Brown J)

Introduction

[1] Following sentencing indications given on the first day of trial, M and C pleaded guilty to methamphetamine-related offending in the District Court at Tauranga (the Tauranga charges). On 1 February 2017 both were convicted and sentenced by Judge Ingram, M to seven years' imprisonment and C to six months' imprisonment.[1] These sentences were ordered to be served cumulatively upon existing sentences imposed on M and C in June 2016 in the District Court at Auckland for related drug offending.[2]

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1 *R v [C]* [2017] NZDC 2170.
2 *R v [M]* [2016] NZDC 11802; and *R v [C]* [2016] NZDC 11214.

[2] The Solicitor-General appeals the sentences imposed on the Tauranga charges by Judge Ingram, contending that the Judge erred:

(a) in respect of M, in adopting an inadequate starting point and in failing to impose a minimum period of imprisonment;

(b) in the case of C, in having inadequate regard to the totality of her offending; and

(c) in respect of them both, in failing to uplift the sentences for the charge of ill-treatment of a child.

[3] The Solicitor-General's notice of appeal against C's sentence was filed out of time and consequently requires an extension. This was because the right of appeal against that sentence is to the High Court rather than this Court,[3] and the Solicitor-General filed the notice of appeal in that Court instead. As matters transpired, it became apparent that it would be appropriate to hear the appeal against C's sentence in this Court as a related right of appeal.[4] Because the delay is adequately justified, we grant the Solicitor-General an extension of time to file the notice of appeal in this Court.

[4] Although this is a Solicitor-General appeal against sentence following a sentencing indication, neither respondent attested to reliance upon the sentence indication in entering guilty pleas or stated an intention to seek to have the convictions quashed if the Court considered the sentence should be increased.[5]

Factual background

[5] Police surveillance on a person in Auckland suspected of being involved in drug offending disclosed the involvement of M and C. This led to their being

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3 Criminal Procedure Act 2011, s 247(c).

4 Initially, C appealed against her conviction to this Court. This gave rise to a related right of appeal under s 320(1)(b) of the Criminal Procedure Act and the Solicitor-General filed the notice of appeal in this Court on that basis. C has since abandoned that appeal against conviction, but we consider that we have jurisdiction to hear the appeal as a related right of appeal to the appeal against M's sentence per s 320(1)(c)(ii) of the Criminal Procedure Act.

5 By filing an affidavit of the nature specified in *R v Edwards* [2006] NZSC 52, [2006] 3 NZLR 349n at [8].

charged with and pleading guilty to charges of possession of methamphetamine and ephedrine for supply (the Auckland charges).[6] M was sentenced by Judge Sharp to four years' imprisonment and C was sentenced by Judge Ryan to four years, four months and two weeks' imprisonment.

[6] Contemporaneously, police in the Bay of Plenty were also investigating M and C's suspected drug-related activity. On 4 June 2015 members of the armed offenders squad executed a search warrant at a Katikati property, where M had been under observation for more than three hours, and located a significant quantity of precursor substances, material and equipment used in the manufacture of methamphetamine. The size and quantity of the material revealed that large scale manufacture of methamphetamine was possible. Various items of equipment were still warm, indicating they had recently been used. M's fingerprints were located on items of interest at the property.

[7] Later that same day, police executed a search warrant at the home address of M and C at Omokoroa where M was located in the basement of that property in the process of what was later shown to be the final stages of methamphetamine manufacture. ESR continued the evaporation process and determined that M had been in the process of producing 347.7 grams of methamphetamine hydrochloride. A search of the house revealed a total of $111,545 in cash in various locations.

[8] At the time of entry C was in the upstairs master bedroom with the couple's infant daughter. Samples from various sites throughout the premises were determined to be above the Ministry of Health Guidelines 2010 for the Remediation of Clandestine Methamphetamine Laboratory sites. In particular the level of methamphetamine around the baby's bassinet was over 75 times higher than the levels prescribed by the Ministry of Health guidelines.

[9] The police investigation revealed that the role of C was primarily as an organiser, manager and coordinator of the manufacture of methamphetamine by M,

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6 M pleaded guilty to one charge of possession of methamphetamine for supply and one charge of possession of ephedrine for supply; C pleaded guilty to five charges of possession of ephedrine for supply.

including dealing with the acquisition of money and purchasing of the precursor substance ephedrine.

[10] M pleaded guilty to:

(a) two charges of manufacturing methamphetamine;

(b) two charges of conspiring to manufacture methamphetamine;

(c) two charges of possessing equipment;

(d) one charge of possessing a precursor; and

(e) one charge of ill-treatment of a child.

[11] C pleaded guilty to one charge of conspiring to manufacture methamphetamine and one charge of ill-treatment of a child.

The sentencing decision

[12] Judge Ingram considered that some of the materials which M and C sourced in Auckland (the subject of the Auckland charges) were for use in the manufacture and conspiracy to manufacture offences the subject of the Tauranga charges.[7] It was his clear view that the Auckland and Tauranga offending should be regarded as one set of offences and that, in addressing matters on a totality basis, credit should be given for the sentences imposed on the Auckland charges.

[13] In line with his sentencing indication, the Judge identified a starting point of 12 years' imprisonment for M. He considered the quantity of methamphetamine manufactured by M to be in the order of around 400 grams, thereby falling within the middle of band 3 of *R v Fatu*.[8] He uplifted the starting point by one year for offending while on bail. The Judge declined to uplift sentence to reflect the charge of ill-treatment of a child, despite initially indicating he would do so in his

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[7] *R v [C]*, above n 1, at [8].
[8] *R v Fatu* [2006] 2 NZLR 72 (CA) at [43].

sentencing indication, having been influenced by counsel's submissions and his own research on the effects of methamphetamine exposure on children. He then applied a 15 per cent discount for M's guilty pleas, resulting in an end sentence of 11 years. Taking into account the four year sentence imposed in Auckland, the Judge sentenced M to a final sentence of seven years' imprisonment, imposed cumulatively on the sentence for the Auckland charges. The Judge declined the Crown's request for a minimum period of imprisonment.

[14] Judge Ingram sentenced C to concurrent sentences of six months' imprisonment on both charges, to be served cumulatively upon her sentence for the Auckland charges. As in M's case, the Judge declined to impose any uplift or cumulative sentence to reflect the charge of ill-treatment of a child.

The Solicitor-General's appeal against M's sentence

Starting point

[15] Judge Ingram's selection of the starting point was substantially influenced by his assessment of the amount of methamphetamine he considered was proved to have been manufactured by M. The Judge said:[9]

> [23] Accordingly whilst I accept that my view of 12 years as the starting point for [M] might be regarded as somewhat lenient having regard to the totality of his involvement in the drug scene and his record, nevertheless in order to impose a sentence towards the top end of band 3 and moving into band 4, in my view, would require a [sic] further and more persuasive evidence of the quantities, the amounts and the proceeds of the manufacturing process before I could be persuaded to increase the 12 year point which I have selected as being appropriate.

[16] Mr Lillico for the Solicitor-General submitted that this starting point was too low, and pointed to several factors which undermined the Judge's assessment of the scale of M's offending:

(a) The manufacture interrupted by the police on 4 June 2015 produced, on its own, almost 400 grams of methamphetamine hydrochloride.

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[9] *R v [C]*, above n 1.

(b) M pleaded guilty to two separate charges of manufacturing methamphetamine.

(c) M had access to 2.8 kilograms of ephedrine, which is capable of producing 1.4 kilograms to 2.1 kilograms of methamphetamine.

(d) Equipment bearing M's fingerprints had been shown to have been used to manufacture methamphetamine found at another three locations in Tauranga. That equipment included sophisticated paraphernalia and large quantities of precursor substances supportive of large scale manufacture.

[17] Mr Edgar for M sought to support the Judge's conclusion as to starting point, contending that, while the quantities of precursor available may well have produced larger quantities, it was not established beyond reasonable doubt that M was personally involved in the manufacture of larger quantities than those contemplated by band 3.

[18] In the circumstances of this case, we consider that the Judge took too narrow a view. As this Court said in *R v Fatu:*[10]

> As a matter of principle, an offender should only be sentenced in relation to offending which he or she admits or which the Crown can prove. It is not right for an offender to be sentenced on the basis of offending that he or she would or could have committed had the police not intervened. On the other hand, the Courts must take a realistic view of the dynamics of this particular form of offending. Those who gear up to manufacture methamphetamine are not likely to be content with a single "cook". As was recognised in *Worth v R*, the "practical potential of the operation" must be a relevant consideration.

[19] We accept Mr Lillico's submission that, by focussing solely on the amount produced by M in a single cook, the Judge significantly understated M's overall offending. Mr Lillico submitted that a significant uplift from the starting point for the manufacturing charge to reflect the size and scale of the offending overall was warranted. He submitted an increase of between two or three years was consistent with other decisions of this Court.[11] We agree that an uplift was justified. In our

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10 *R v Fatu,* above n 8, at [40] (citations omitted).

11 *Crompton v R* [2015] NZCA 277; and *R v Collins* [2009] NZCA 388.

view, an overall starting point of not less than 13 and a half years' imprisonment was appropriate on the basis of the evidence as to the scope of M's offending.

Uplift for ill-treatment of a child?

[20] By accepting the guilty pleas and entering a conviction, Judge Ingram clearly recognised that the proximate manufacture of methamphetamine was likely to cause suffering, injury or adverse affects to a child's health, that being an element of the charge under s 195 of the Crimes Act 1961. However, notwithstanding that the Judge had contemplated an uplift of six months for that charge at the time of the sentencing indication, the Judge decided not to impose an uplift, stating:

> [16] Nothing that I have heard today or read subsequently has changed my view in relation to the uplift for the bail but the position in relation to the child which relates to [M] and [C] has changed. I have reviewed the authorities, I have researched the matter to the best of my ability and I have it pointed out to me by the defence counsel that there is a dearth of evidence to establish that there is likely to be any ongoing effect on the child because of the exposure to methamphetamine.
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> [17] Giving the matter the best possible consideration that I can, I have come to the view that the proposed uplift in the circumstances is not justified. I accept that a sentence of imprisonment is required in order that it be on the record but I have come to the view that as I am not satisfied beyond reasonable doubt that there must be further harm for this child in the future then it would not be appropriate for me to impose an uplift in those circumstances.

[21] However, it is not a requirement of the charge that the adverse affects on the child's health be ongoing. We accept Mr Lillico's submission that there was an error of law in the Judge's reasoning that he was required to be satisfied that there must be further harm for the child in the future in order to uplift the sentence. The fact that the Judge was not satisfied of ongoing harm amounts to no more than an acknowledgement of the absence of an aggravating feature in this case.

[22] The Judge did not identify his own research material and we are unaware of its context or scientific integrity. In the absence of authoritative advice to the contrary, and given the guilty pleas to the charge, we are prepared to infer that there are likely to be adverse effects to an infant's health by exposure to 75 times the officially recognised limit of methamphetamine. There is the added factor, to which

the Judge did not refer, of the child's exposure to the real and substantial risk of injury or death from an explosion during the manufacturing process.

[23] We accept Mr Lillico's submission that the offence itself still requires judicial recognition and, because it was the subject of a discrete charge, should have impacted upon the sentence. The seriousness with which such offending is treated by Parliament is shown by the increase in maximum penalty for offences under s 195 from five to 10 years in 2012[12] and the addition in 2008 of s 9A in the Sentencing Act 2002 to include further aggravating factors in cases of offending against children.[13]

[24] *R v Smith* dealt with a similar scenario where, along with charges arising from the manufacture of methamphetamine, the defendant was charged with ill-treatment of a child for exposing the child to the risk of physical injury through an explosion and through inhalation of toxic fumes.[14] Lang J increased the starting point for the drugs charges by one year to reflect the added aggravating factor of the presence of the defendant's daughter in the vicinity of a large scale methamphetamine manufacturing operation.

[25] We consider that an uplift of the same order is warranted in this case.

Overall result

[26] Proceeding from the starting point of 13 and a half years' imprisonment, we maintain Judge Ingram's uplift of one year to reflect the fact that a significant amount of M's offending occurred whilst on bail. We then add a further uplift of one year for the charge of ill-treating a child. That gives an overall starting point of 15 and a half years' imprisonment.

[27] The 15 per cent discount allowed by the Judge from that total produces a figure, rounded down, of 13 years' imprisonment. After allowing, as Judge Ingram did, a reduction of four years for the sentence on the Auckland charges, the final

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12 Crimes Amendment Act (No 3) 2011, s 7.
13 Sentencing (Offences Against Children) Amendment Act 2008, s 4.
14 *R v Smith* HC Auckland CRI-2010-057-1017, 22 February 2011.

sentence is one of nine years' imprisonment, cumulative upon the sentence for the Auckland charges.

Minimum period of imprisonment

[28] The Court may impose a minimum period of imprisonment longer than the automatically applicable parole period if satisfied that such period is insufficient for any or all of the purposes of accountability, denunciation, deterrence and protection of the community.[15] The Judge declined the Crown's request for a minimum period of imprisonment in respect of M because of a view which he held as to the utility of such sentences:[16]

> I have a straightforward view that minimum sentences of imprisonment are rarely appropriate or useful in cases involving drug addicts who are being sentenced to long sentences of imprisonment. That is primarily because it is my view that the Parole Board are best placed to manage your rehabilitation and recovery and I do not consider that the public interest is well served by the imposition of long sentences of imprisonment with restrictions on the Parole Board in terms of their ability to craft an appropriate parole regime, which may require several years to bear fruit, and I consider that in these circumstances a minimum sentence of imprisonment is not required, both because I do not consider, having regard to the length of these sentences, that the time which is required to be served at a minimum before you would be eligible for release is such that either the public or indeed any observer would regard the sentence as inadequate.

[29] Mr Lillico submitted that, while this Court has recognised that manufacturing driven by the offender's need to meet his or her own habit can lessen the need for denunciation and deterrence,[17] this falls short of a general principle precluding the imposition of a minimum term of imprisonment upon offenders suffering from drug addiction. Whether a minimum period of imprisonment is warranted requires a fact-specific analysis. Here, M's offending, although influenced by his addiction, was also substantial in scale, persistent and commercially motivated. It was very serious drug offending that inevitably caused harm to the community. These factors warranted the imposition of a minimum period of imprisonment.

[30] Mr Edgar submitted that in adopting such a view the Judge did not ignore the principles and purposes of sentencing, contending that the adoption of such an

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15 Sentencing Act 2002, s 86(2).
16 *R v [C]*, above n 1, at [49].
17 *Fleming v R* [2011] NZCA 646 at [20]–[23].

approach would provide the Parole Board with greater flexibility in order to craft a treatment regime with a view to ultimate release.

[31] While the Judge's own views on this subject are entitled to respect, we are satisfied that his approach erred in law. This Court has consistently confirmed that in cases of serious drug offending the requirements of deterrence and denunciation will almost inevitably prevail in satisfying the s 86 criteria.[18] We are satisfied that those factors are established here.

[32] While we consider that the minimum period of imprisonment proposed by the Crown of 50 per cent is generous, in the circumstances of a Solicitor-General's appeal and the fact that a minimum period was not imposed in the District Court, that is the order which we make. Accordingly, a minimum period of imprisonment of 50 per cent, or four years and six months' imprisonment, is imposed.

C's sentence

[33] Judge Ingram did not identify a specific starting point for the totality of C's offending but was apparently influenced to a significant degree by the sentencing remarks of Judge Ryan in the context of the Auckland charges.[19] C's role there was described as being at the lower end of the supply chain, albeit still an important cog in the network of purchase and distribution.[20] In respect of the Tauranga charges, however, in the statement of facts to which C pleaded guilty she was described as "an organiser and coordinator" involved in "managing the manufacture of methamphetamine by [M]".[21] We agree with the Solicitor-General that the fact of her substantially increased criminality warranted an uplift on her sentence for the Auckland charges significantly more than the six months imposed by the Judge. Her sentence on the Tauranga charges was therefore manifestly inadequate to reflect the totality of her offending.

[34] Because the standard sentencing approach was not followed, it is necessary to undertake the calculation of C's sentence afresh. While the quantity of

18 *R v Wong* [2009] NZCA 332 at [21].
19 *R v [C]*, above n 1, at [54].
20 *R v [C]*, above n 2, at [48].
21 See [9] above.

methamphetamine capable of manufacture was substantial, at sentencing the Crown submitted the offending fell at the upper end of band 2 of *Fatu* (four to 11 years' imprisonment) due to difficulties in establishing the amount involved in the conspiracy and how much of the ephedrine was in fact manufactured into methamphetamine.

[35] This Court in *R v Te Rure* established that, in relation to charges of conspiracy to manufacture methamphetamine, some downward adjustment from the identified *Fatu* band is required.[22] The amount of reduction required depends on how far the agreement to manufacture has progressed. Where it remains a theoretical plan, a substantial reduction from the *Fatu* sentencing levels is required; where the plan has been developed to a point of action including the possession of equipment and precursors, little reduction can be expected.[23]

[36] In Cs case, we are satisfied that such a reduction leads to a starting point of seven to eight years' imprisonment for the conspiracy to manufacture charge. Then, for the same reasons which led to our conclusion in respect of M, we consider that an uplift of one year is appropriate for the charge of ill-treatment of a child. This gives an overall starting point of eight to nine years' imprisonment. We will adopt the mid-point of eight and a half years.

[37] At the sentencing for the Auckland charge, Judge Ryan gave C a three month uplift for her previous convictions and a discount of 10 per cent for her personal circumstances, including her traumatic and tragic personal history.[24] Mr Lillico acknowledged that such adjustments should apply to the global starting point, resulting in a nominal sentence of 94 months before a consideration of guilty pleas.

[38] Applying a 15 per cent discount for her guilty pleas and deducting the 52.5 months for the sentence on the Auckland charges, a final figure is reached of approximately 27.5 months' imprisonment.

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22 *R v Te Rure* [2007] NZCA 305, [2008] 3 NZLR 627.
23 At [27].
24 *R v [C]*, above n 2, at [49] and [53].

[39] We acknowledge that this is higher than the sentence sought by the Solicitor-General of no less than 16 months' imprisonment imposed cumulatively upon C's sentence on the Auckland charges. However, that assessment assumed an uplift of only six months for the ill-treatment charge, whereas our view is that an uplift of one year is required on that account.

[40] Rounding the end sentence down, we therefore consider the appropriate end sentence to reflect the totality of C's offending is two years' imprisonment, cumulative upon the sentence for the Auckland charges.

Result

[41] The Solicitor-General's appeal against sentence in CA111/2017 is allowed.

[42] The concurrent sentences of seven years' imprisonment on the charges of manufacturing methamphetamine are quashed and concurrent sentences of nine years' imprisonment are imposed, cumulative upon the sentence for the Auckland charges. A minimum period of imprisonment of four years and six months is imposed.

[43] The Solicitor-General's application for an extension of time in CA303/2017 is granted.

[44] The Solicitor-General's appeal against sentence in CA303/2017 is allowed.

[45] The sentence of six months' imprisonment on the charge of conspiracy to manufacture methamphetamine is quashed and a sentence of two years' imprisonment is imposed, cumulative upon the sentence on the Auckland charges.

[46] In order to protect the identity of the respondents' child, we make an order prohibiting publication of the names, addresses, occupations and identifying particulars of the respondents pursuant to s 200 of the Criminal Procedure Act 2011.

Solicitors:
Crown Law Office, Wellington for Appellant