

**IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY**

CRI-2008-035-1764

THE QUEEN

v

NATHAN PIERRE MATIAHA-SMITH

Hearing: 27 March 2009
Counsel: J M Webber for Crown
C L Elder for Prisoner
Sentence: 27 March 2009

SENTENCING NOTES OF DOBSON J

[1] Mr Matiaha-Smith, you appear this morning for sentencing on three convictions. Obviously the most serious of them is that of possession of methamphetamine for the purposes of supply, which carries the maximum penalty of life imprisonment. You are also for sentence on convictions for possessing utensils for the use of methamphetamine, which carries a maximum penalty of one year's imprisonment and/or a \$500 fine, and for possession of a class C controlled drug namely cannabis, which has a maximum penalty of three months' imprisonment and/or a \$500 fine.

[2] As to the circumstances of your offending, in September 2008 the Police executed a search warrant at the address you were then living at in Masterton. You

were found in possession of approximately half a gram of methamphetamine, a glass pipe used for smoking methamphetamine, a set of digital scales, some \$1,800 in cash, a butane burner such as is commonly used in heating methamphetamine, four empty point bags of the type used in small-scale dealing in methamphetamine, and other utensils commonly used to divide, and assist in the consumption of, methamphetamine.

[3] At the same time, the Police found a snaplock bag containing approximately 200 cannabis seeds. You admitted all the items were yours and told the Police that you were one of three people who got together to buy three grams of methamphetamine for \$1,100 a gram and then divided that three ways. You broke your one gram down into point bag amounts using the digital scales with the intention of selling them for between \$80 and \$100 per point. You told the Police that you were only intending to supply methamphetamine to a small number of persons, most of whom would be known to you.

[4] There has been an exchange between counsel as to the circumstances of your pleading guilty at the time of the scheduled depositions hearing. I accept Ms Elder's submission on your behalf that in line with the full and frank admissions you made when first apprehended, it was always your intention to plead guilty to these charges. I will later in my evaluation be giving you full credit for that.

[5] You should know how seriously Parliament and New Zealand society treat any offending involving methamphetamine. It is currently the most serious scourge in New Zealand society, causing very extensive grief and tragedy to many of its users and, more sadly, to the families and friends affected by their drug use, and the victims of the substantial amount of crime associated with the use of P as it is commonly called.

[6] For those reasons, I have to approach your sentencing in a way that marks the seriousness of any such offending, acts as a deterrent both for you in the future and for others who might get involved in supplying methamphetamine, as well as having an eye for your ultimate rehabilitation. A lot of the time taken this morning has focused on that concern.

[7] You have heard reference to the case of *R v Fatu* [2006] 2 NZLR 72. That is a Court of Appeal decision setting out sentencing guidelines for the sentences to be imposed for various levels of supply of methamphetamine. It is agreed that your offending is towards the bottom end of band 1 as provided for in *Fatu*. That relates to low-level supply of amounts involving less than five grams, which the Court of Appeal suggests attracts prison sentences between two and four years.

[8] It is sad that there is no shortage of other cases in similar circumstances that I can draw on to provide further guidance on where the starting point in terms of the length of a prison sentence should be in your case.

[9] In *R v Hughes* [2007] NZCA 73, the Court of Appeal reconsidered a sentence of two and a half years imposed for one conviction of possessing .5 of a gram of methamphetamine, the same amount as you had. That was arrived at by a starting point of three years' imprisonment, reduced by a third for a guilty plea but then increased by six months because of Mr Hughes' previous involvement in methamphetamine and his criminal history. You have heard Mr Webber for the Crown this morning say that the Crown treats your case as the same as *Hughes*. Ms Elder is inclined to say that the previous convictions Mr Hughes had for methamphetamine make it a more serious case than yours. And there is some shading and I am inclined to agree with Ms Elder yours is not quite so serious.

[10] In another case, a starting point of three years was set for possession of four point bags, which can be assumed to be around .4 of a gram, discounted by six months for a guilty plea, leaving a final sentence of two and a half years. That was also considered appropriate by the Court of Appeal – see *R v Conway* CA275/04 23 March 2005. I recognise that that comparator is before *Fatu*, but is nonetheless helpful.

[11] More recently in the High Court, in *R v Vinod* HC AK CRI-2007-004-010097 3 June 2008 Priestley J, the offender was found in possession of .5 of a gram of methamphetamine plus utensils for measuring and dealing in methamphetamine. The High Court took two years and three months as the starting point, with previous convictions and the lesser charge of possession of utensils being treated as a slightly

aggravating feature. Again, there was a one third reduction for the offender's guilty plea and with recognition of his remorse and steps taken to address his drug habit, he was finally sentenced to nine months' home detention and 100 hours' community work.

[12] Having regard to all these comparators and the approach to sentencing directed in *Fatu*, I consider the appropriate starting point here is two years and six months' imprisonment. That reflects largely the amount of methamphetamine, but the starting point must be higher because your explanation plus the cash found and the utensils all indicate a degree of low-level dealing.

[13] I then have to consider the aggravating and mitigating factors. Your history of previous convictions does show a worrying pattern of re-offending, but for the most part it is minor assaults, driving offences and trespass. You do have convictions involving cannabis for offences in April and then in September 2004, but no more serious drug offending. I am mindful that convictions on which you are being sentenced today do include involvement in cannabis again, and you have stepped up your criminality significantly by your preparedness to deal in methamphetamine. In fairness the Crown says that these previous convictions do not qualify as an aggravating factor and obviously Ms Elder would second that. I am afraid I do see it as a slight aggravating factor. You are on a path and my sentencing today has to reflect where that path might lead you. Your prior history is a minor aggravating factor, but not justifying an addition of any than one month, which takes the starting point to two years and seven months.

[14] As to the mitigating factors, your guilty plea is one form of recognition of your wrong-doing. Ms Elder has placed a lot of emphasis on the fact that there was an extraordinarily full and frank admission right at the very outset and you are to be given credit for that. An early guilty plea also relieves the prosecution and the Court of the need to commit the resources that would be involved in a trial, so usually significant credit is given on account of a guilty plea. Mr Webber suggests that 25 percent would be appropriate, there is a tariff of up to a third and I am comfortable giving you credit of one third for your guilty plea which would reduce two years and seven months down to one year and nine months' imprisonment.

[15] As to the sentences on the lesser charges, I consider concurrent sentences (that is, served at the same time) are appropriate. I would impose three months' imprisonment on the conviction for possession of the methamphetamine pipe and other utensils and one month's imprisonment for the possession of cannabis seeds.

[16] Your counsel has raised the prospect of substituting a home detention sentence for the prison sentence. A first difficulty with this is that the Misuse of Drugs Act 1975, in s 6(4), imposes a presumption for Judges in favour of imprisonment on convictions such as this. However, the approach to that presumption has been addressed by the Court of Appeal in *R v Hill* [2008] 2 NZLR 381. In effect, the Court of Appeal has said that even though there is that presumption in s 6(4), if the end sentence on a methamphetamine conviction would come within the definition of a "short term sentence" (which is what is necessary to consider substitution of prison with a term of home detention), then that less restrictive sentence may be imposed if the sentencing Judge considers that the enhanced prospects of rehabilitation in a particular case justify doing that. In *Hill*, the offender had taken really positive steps to recognise his drug addiction, and to turn his life around. That was critical in persuading the Court of Appeal to substitute the term of two years and three months' imprisonment for possession of some six grams of methamphetamine, with a sentence of 12 months' home detention plus 200 hours' community work.

[17] The approach in *Hill* has now been adopted in numerous sentencings involving conviction for lower-level methamphetamine since it was delivered. What is critical is the offender's willingness and commitment to rehabilitate. It does not appear that you have thus far made that commitment in the extremely positive way that was present in *Hill*. I note that the Probation Officer's report observes:

Mr Matiaha-Smith's motivation to lead an offence free lifestyle has been assessed as moderate. He has indicated that his focus for the future is to remain alcohol and drug free and to dissociate himself from the people he was involved with during this time.

[18] The very recent drug and alcohol assessment of you by Te Hauora paints a somewhat different picture. There are understandable circumstances in inadequate and apparently abusive parenting that led to early experimentation with alcohol and

cannabis, leading on to a measure of dependence or addiction. More recently there has been a serious level of dabbling with methamphetamine. That apparently stopped with your arrest, and although that is what should happen, some small credit is due to you on that account. Te Hauora recognises a need to deal with your addictive behaviour, and recommends that a residential setting would be most appropriate for dealing with that. You will have heard the discussion I have had with Ms Elder and Mr Webber about the tensions in pursuing that if there is a sentence of home detention.

[19] In support of the enhanced prospects for rehabilitation if you remain in the community are the fact that you currently have employment, even if only on a casual basis, in a panel-beating and spray-painting firm, and that you appear to have a positive rapport with your grandmother, which is hopefully a source of support for you in keeping away from the lifestyle that led you to this offending, even though she has given up the fight in the Wairarapa and is moving away to Taranaki. In addition, you have previously served a sentence of home detention, which you apparently completed without any problems. Generally, sentences of home detention, and particularly longer ones towards the upper limit of 12 months, are becoming appreciated as not the soft option that some suggest that it is.

[20] The Crown has argued against home detention because they reflect on your recent circumstances as demonstrating an instability that is inappropriate with the trust shown by giving you home detention. I accept what Ms Elder says that the vast majority of that instability is caused by matters beyond your control and I am prepared to give you credit for the submission she makes that finding a flat on your own, away from those who influenced your involvement in drug dealing, is a fresh start and a commitment to try and be stable.

[21] You are assessed as being suitable for a sentence of community detention or home detention by the Probation Service and you have very recently proposed a further residential address at 188B Chapel Street in Masterton. It is proposed you would live there on your own. The Probation report suggests you would occasionally have custody of your younger son, but I note that Te Hauora reports you do not have contact with either of your sons at the moment and Ms Elder

explains that this depends rather on your relationship with that younger child's mother. The Chapel Street address is assessed by the Department of Corrections as suitable for the purposes of an electronically monitored sentence. You have had a number of residential addresses in recent times, and you are on notice that you cannot so freely change address if you are indeed sentenced to home detention.

[22] Having regard to the matters raised by Ms Elder on your behalf, I am prepared to see the prospects of rehabilitation as sufficient to warrant the substitution of home detention. You get across that line, Mr Matiaha-Smith, by just a small fraction, and you are being given a chance. You should appreciate that this is an option that would not be given again should you not strictly comply with the terms of the home detention sentence, or indeed if you are foolish enough to re-offend. However, employment, a settled address and a commitment to lead a lifestyle avoiding drugs is to be encouraged and hopefully sets you on a path that will see you not offending again.

[23] Accordingly, I sentence you to 11 months' home detention, in substitution for the prison sentences that would otherwise be imposed on the most important conviction. On the others, I impose a sentence of two months home detention on the possession of utensils and one month on the possession of cannabis seeds. All of those home detention sentences are to be served at the same so the total is 11 months.

[24] I am going to impose the special conditions in the terms recommended by the Probation report, and they are:

- a) You are to travel directly from here to 188B Chapel Street, Masterton and await the arrival of the Probation Officer and the monitoring company;
- b) You are to reside at this address at all times, unless an absence from the residence has been authorised by the Probation Officer (and you are going to have to work hard at tying together your employer's

commitment to have you and the Probation Service's ability to monitor you);

- c) You are to attend and complete a drug and alcohol assessment, and attend and complete any counselling as recommended in the assessment to the satisfaction of the service provider and the Probation Officer;
- d) You are to attend and complete any counselling, treatment or programme, as directed by the supervising Probation Officer.

[25] You have not opposed the Crown application for an order for destruction of the utensils and I make that order.

[26] The Crown also seeks forfeiture of the \$1,800. I consider that the low level of your dealing may not warrant forfeiture of all that amount and one feature of your rehabilitation that worries me is the extent of your outstanding fines. I am not absolutely clear I have jurisdiction to deal with it in this way, but you have given your counsel authority to indicate to the Court your consent to the Ministry of Justice applying any part of the money not forfeited to the Crown in reduction of your outstanding fines. My sentencing notes will record that and I am hopeful that that course can ensue so that I order forfeiture of \$900, on terms that this is sufficient direction for the balance to be paid to the Collections office in reduction of your fines. If there is a jurisdictional difficulty in doing that and there is something more that I could do to ensure it did happen, I am happy to re-open the matter. In the final event, if it is not possible by any means, then I would direct forfeiture of the whole amount.

[27] You may stand down.

Dobson J

Solicitors:
Crown Solicitor, Wellington for Crown