

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

**CRI 2009-092-004184**

**QUEEN**

v

**CHUN LOK FUNG**

Hearing: 10 July 2009

Appearances: S McColgan for the Crown  
G J Newell for the Prisoner

Judgment: 10 July 2009

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**SENTENCING NOTES OF WYLIE J**

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Solicitors:  
Crown Solicitor, P O Box 2213, Auckland  
G J Newell, P O Box 105 444, Auckland 1143

[1] Mr Fung, you appear before the Court today having pleaded guilty to one count of importing into this country the Class C controlled drug pseudo-ephedrine. This is an offence under ss 6(1)(a) and 6(2)(c) of the Misuse of Drugs Act 1975. It attracts a maximum penalty of 8 years' imprisonment.

[2] You pleaded guilty at an early stage. The offending occurred on 14 March 2009. The charge was laid on 16 March 2009, and you entered your guilty plea on 23 March 2009.

[3] You appeared before the Manukau District Court on 1 May 2009. It declined jurisdiction to sentence you, and transferred the matter to this Court for sentencing.

#### **Relevant facts**

[4] You fully accept the Police summary of facts.

[5] On 13 March 2009 you left Hong Kong on Cathay Pacific flight CX107. You had in your checked luggage a number of packets containing what purported to be vacuum sealed tea.

[6] At about 1.15pm on Saturday 14 March 2009 you arrived at Auckland International Airport. Your ticket showed that you intended to stay in New Zealand until 21 March 2009, and thereafter to return to Hong Kong.

[7] Your baggage was searched by New Zealand Customs Officers. Two of the vacuum sealed packets were found to contain ContacNT which is a medicine containing pseudo-ephedrine. The total weight of the pseudo-ephedrine found in your possession was approximately 4.5 kgs.

[8] Pseudo-ephedrine is an essential element required for the manufacture of methamphetamine. The amount of pseudo-ephedrine found in your possession would have yielded somewhere between 900 grams and 1.3 kgs of

methamphetamine with a potential street value of between \$900,000 and \$1.3 million.

[9] You were also in possession of a mobile phone. When spoken to by the Police you stated that once in New Zealand, you were to be contacted from Hong Kong by the person who had provided the drug to you. You also explained that you had received the ContacNT in Hong Kong from a man called Billy, and that you were to hand it over in New Zealand in exchange for HK\$8,000. You told the Police that you knew that the drug was prohibited in New Zealand, that that was why you had put it in the tea packets, and that you had vacuum sealed the packets yourself.

### **Pre-sentence report**

[10] I have received a full pre-sentence report.

[11] You are a 20 year old male. You are a single man, with no dependants.

[12] You are an only child who was born and raised in Hong Kong. You told the Probation Officer that your father is a real estate manager, and your mother a marketing manager. You advised that your parents provided you with a good upbringing in a comparatively affluent environment; you could recall no incidents of note in your formative years. You attended school until you were 16 years old, leaving with a good standard of literacy, but with no formal qualifications. Having left school, you worked as a waiter initially, and then in a supermarket. Thereafter the Probation Officer says that you were unemployed, and were supported by your parents. Your counsel has submitted that this is wrong and he has produced references from your employers. I refer to those references shortly.

[13] I am advised that once you have been sentenced, you will be served with a removal order, and that you will be deported to Hong Kong once you have served your sentence.

[14] You advised the Probation Officer that you do not use drugs, and that you very rarely drink alcohol. You enjoy good health, and have no mental health problems.

[15] You have no previous criminal convictions.

[16] In discussions with the Probation Officer, you advised that you disputed certain aspects of the summary of facts. You advised that you had been supplied with the two vacuum sealed packets by people who you had known for some six months, and that you did not know they were involved in criminal activities. You said that they provided you with the flight tickets when you arrived at the airport, and that you were lead to believe that the packages contained Chinese medicine, and did not know that they contained pseudo-ephedrine.

[17] The Probation Officer noted that you expressed no remorse to him for your actions and reported no specific needs that might have lead to the offending apart from being involved with people engaged in criminal activity. Your stance was said to be that those people had mislead you, and that you would not have got involved if you knew what the packages really contained.

[18] These statements to the Probation Officer are in large part inconsistent with statements you made to the Police when you were interviewed by them. They are also at odds with the submission made on your behalf today and I have given little weight to the version of events you communicated to the Probation Officer.

[19] The Probation Officer recommended a sentence of imprisonment.

### **Submissions received**

[20] I have received helpful submissions from Mr McColgan on behalf of the Crown, and from Mr Newell on your behalf.

[21] The Crown urged me to adopt the approach to sentencing discussed by the Court of Appeal in *R v Taueki* [2005] 2 NZLR 372. Mr McColgan referred me to the

purposes and principles of sentencing, and emphasised s 7(1)(a), (b) and (g) of the Sentencing Act 2002. Reference was also made to s 8(a), (b), (e) and (g). He noted that there were no tariff decisions in regard to the importation of pseudo-ephedrine. He referred me to the decision of the Court of Appeal in *R v Xie* [2007] 2 NZLR 240, where the Court suggested that reference to the guideline decision for sentencing in methamphetamine cases – *R v Fatu* [2006] 2 NZLR 72 – adjusted to reflect the lesser maximum penalty, may be of assistance to sentencing Judges in pseudo-ephedrine importation cases. Mr McColgan emphasised that in importation cases it is important to consider the role played by the person being sentenced, and that sentences imposed depend on the degree and level of involvement. He referred me to a number of cases dealing with the importation of pseudo-ephedrine. He then submitted that there were various aggravating features to your offending. In particular he referred to the damage and harm that could have resulted from the offending. He referred to the premeditation on your part, and submitted that it was greater than that inherent in the offence itself. He noted that you had arranged to be contacted by the person who gave the drugs to you in Hong Kong, and that you were then to hand the drugs over in New Zealand in exchange for money. He noted your recognition to the Police that the drug was prohibited in New Zealand, and your acknowledgement that you placed the drug in the tea packets and vacuum sealed those packets yourself. He submitted that this demonstrated a degree of sophistication and forward planning, which aggravated the offending. He also referred to the amount of the pseudo-ephedrine – 4.5 kgs – and to the yield of methamphetamine it could have produced, and the value of that yield.

[22] Mr McColgan submitted that a starting point should be in the vicinity of 4 to 5 years' imprisonment.

[23] He accepted that you had not previously appeared before the Court, and that you were entitled to a credit for this, and to a credit on account of your early guilty plea. He also accepted this morning that you had demonstrated remorse.

[24] Mr Newell on your behalf confirmed that you fully accept the Police summary of facts. He also referred to the purposes and principles of sentencing. He referred me in particular to s 8(h) of the Sentencing Act 2002, which requires me to

take into account any circumstances particular to you which would make the appropriate sentence disproportionately severe. In this regard, he noted that you have limited English, and that you will be without family support while serving your sentence in this country. He also referred to s 7(1)(h) of the Act which requires me to provide for your reintegration and rehabilitation insofar as possible. He also submitted that I should impose a sentence which, while consistent with others for offending of this type, is the least restrictive outcome available.

[25] He accepted that you had imported approximately 4.5 kgs of ContacNT granules, and that that was a sizeable quantity of the drug pseudo-ephedrine. He submitted that nevertheless your involvement was highly relevant, and that you fell within what is known as Category 2 identified in the decision *R v Ho* HC AK CRI 2005-092-00567, 12 April 2009 – namely you were not a mastermind or an instigator, and your role was that of a courier or mule. He submitted that you were acting under the direction of older and more sophisticated offenders, and that your agreement to carry the drugs was indicative of your naïve and immature decision making rather than any criminal propensity. He submitted this was a one-off transaction, and that there was no evidence of ongoing conduct. In support of this submission, he noted that the amount to be paid to you - HK\$8,000, was relatively modest – being equivalent of approximately NZ\$2,000 or a little less.

[26] He emphasised the fact that you gave a full and frank statement to the Police on your arrest.

[27] Mr Newell also noted that there are no tariff decisions as such for the importation of pseudo-ephedrine. He also referred me to a number of authorities, and in particular to the decision of Winkelmann J in *R v Ho*. He submitted that a starting point of between 3 to 4 years' imprisonment is appropriate. He then submitted that you were entitled to a credit for your early guilty plea, and for your youth. He asserted that you had expressed deep remorse for your offending, and regretted the effect that it would have on your own family and on the wider New Zealand community. He referred me to a letter which has been written to the Court by your parents. He also submitted that you are intrinsically a person of good character. He referred me to a letter from one of your previous employers, to a letter

from the principal at your high school, to a letter from the pastor at the Hong Kong Baptist Church which I understand you attended, and to a letter from a Ms Wai Yuk Chuang, who described herself as an older sister to you. He also referred me to a letter from a Mr Lau Ma Cheung, who is a close family friend. I have read all of those letters. There is a common theme that you are naïve, and of a generous nature. Mr Newell submitted that those personality traits go some way in explaining why you became involved in this offending.

[28] Mr Newell referred to the pre-sentence report and suggested that it contained inaccuracies. He submitted this was because you were interviewed using a Mandarin rather than a Cantonese interpreter, and that you have limited Mandarin. He referred to the various inconsistencies. With one exception, I do not need to itemise the same. I have taken into account Mr Newell's submissions. I will deal with the one exception shortly.

[29] In summary, Mr Newell submitted that I should adopt a starting point of between 3 to 4 years' imprisonment, and that you are entitled to a significant discount to reflect your very early guilty plea, remorse and previous good character.

### **Approach to sentencing**

[30] I have considered the principles set out in ss 7 and 8 of the Sentencing Act 2002. I have had particular regard to the need to hold you accountable for the potential harm that you could have done to the community here in New Zealand by your offending, the need to promote in you a sense of responsibility for, and acknowledgement of that harm, and the need to denounce the conduct in which you were involved. I am also mindful of the need to deter others from committing the same or similar offences. I have taken into account the gravity of your offending, including your degree of culpability. I have considered the seriousness of this type of offence, and the general desirability of consistency with appropriate sentencing levels with similar offenders committing similar offences. I am mindful that I must impose the least restrictive outcome that is appropriate in the circumstances.

## Discussion

[31] In recent years there has been a significant increase in the manufacture, availability and use of the Class A controlled drug methamphetamine in New Zealand. The drug is having a very real impact on New Zealand society. It is responsible for much harm. It can have appalling effects on those who use it. It is responsible for considerable violence and criminal offending in our community. There is a particular need to denounce and deter those involved in its manufacture, and those who import the substances which are used in its manufacture.

[32] Pseudo-ephedrine was commonly obtained from packets of medication purchased from chemist shops in this country. Increased controls at the point of sale have been put in place. They were designed to prevent bulk shopping for such medication. As a result many of those involved in the manufacture of methamphetamine now seek to source pseudo-ephedrine from overseas. Parliament has moved to try and deal with this. In 2004 pseudo-ephedrine was reclassified as a Class C controlled drug and the maximum sentence for its importation was increased to 8 years' imprisonment.

[33] In determining the appropriate starting point for your sentence, I have had regard to a number of authorities including those referred to me by counsel. First I considered the level of your involvement in the importation that occurred. I have had particular regard to the decision of the High Court in *R v Ho*. In that case, Winkelmann J referred to another decision of this Court – *R v Wickremasinghe* HC AK T0013408, 28 March 2003 – where the Court discussed the two categories of persons involved in the importation of drugs. The first category are those included at the top level – the instigators, masterminds, prime movers and controllers. The second category are those people who are still crucial players, but are not the prime movers and controllers. In *R v Ho*, Winkelmann J was dealing with a courier. Her Honour was satisfied that a courier's role could properly be described as coming within the second category. She noted that while the courier has a key role in the enterprise, he or she is not a mastermind or instigator. Her Honour adopted a starting point for Category 2 offending of between 3 and 5 years' imprisonment in respect of the importation of a Class C controlled drug.



[34] I accept the submissions made on your behalf that you were a courier, and as such, should be treated as a Category 2 offender. However I note your acceptance of the summary of facts. You knew you were importing pseudo-ephedrine into this country; you concealed the pseudo-ephedrine. There was clearly significant premeditation on your behalf. The quantity of pseudo-ephedrine imported by you was substantial. It could have produced a significant amount of methamphetamine.

[35] Having considered the various authorities referred to me by counsel, and in particular the decisions in *R v Qui* CA 202/06, 17 October 2006; *R v Jiang* HC AK CRI 2006-004-004381, 16 March 2007; *R v Zhang* HC AK CRI 2005-004-008357, 15 September 2006, and *R v Yu* HC AK CRI 2005-004-010703, 15 December 2006, I am satisfied that a starting point of 4 years and 6 months' imprisonment is appropriate in your case.

#### **Personal aggravating/mitigating features**

[36] I am not aware of any personal aggravating features.

[37] I now turn to the mitigating features. I note that you have not previously appeared before this Court, or it seems the Courts in your own country. That is to your credit.

[38] I accept that you are entitled to a substantial discount on account of your very early guilty plea. In that regard I refer to the decision of the Court of Appeal in *R v Walker* CA 435/08, 6 March 2009 at [19] where the Court observed that an accused person can expect a discount of 30% to 33% for a guilty plea entered at the earliest opportunity.

[39] Mr Newell suggested that you have expressed remorse. Mr McCoglan's accepted that you have done so and so do I notwithstanding what appears in the Probation Officer's report. This morning you have expressed remorse directly to me and indicated to me that you will never do this again and that you will never put your family through this process in the future. I am told that you have expressed remorse

direct to your parents. In that regard, I note that your mother is here this morning having travelled from Hong Kong. That says much for your family support.

[40] Mr Newell referred me to the decision of the Court of Appeal in *R v Wong* CA 378/02, 25 March 2003, and submitted that it is appropriate to have regard to the fact that incarceration in this country will be difficult for you. I have contrasted the Court of Appeal's remarks in *R v Wong* to the remarks, also of the Court of Appeal, in *R v Oga* CA 180/06, 6 March 2007. In the latter case, the Court noted that an offender who is a foreign national, who does not reside in New Zealand, and who is not a native English speaker, will not normally receive a greater discount than that which would otherwise apply. The Court noted that incarceration in a foreign country, with all that entails, is a risk those involved in the illicit international drug trade face. I accept that you will be serving your sentence away from your home, and your family, but in my view circumstances of that kind have little or no relevance.

[41] I have considered other factors personal to you. I do not propose to traverse those factors in detail, but I conclude from them that it is appropriate that I should reduce your sentence to a greater extent than would generally be the case for somebody in your position.

[42] As a result, I have discounted the term of imprisonment I would otherwise have sentenced you to by 50%.

### **Sentence**

[43] Mr Fung, you are sentenced to a term of imprisonment 2 years and 3 months.

[44] You may stand down.

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Wylie J