

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

CRI-2009-004-013501

THE QUEEN

v

XIANG XIAO

Hearing: 21 July 2009

Appearances: Ms Marshall for the Crown
S M Cheng for the prisoner

Judgment: 21 July 2009

SENTENCING NOTES OF STEVENS J

Solicitors/Counsel:
Crown Solicitor, PO Box 2213, Shortland Street, Auckland 1140
S M Cheng, PO Box 1103, Shortland Street, Auckland 1140

Introduction

[1] Xiang Xiao, you appear for sentence today having pleaded guilty to one charge under the Misuse of Drugs Act 1975 of importing the Class C controlled drug pseudoephedrine, for which the maximum penalty is eight years' imprisonment. You also appear on one charge under the Misuse of Drugs Act of possession of the Class C controlled drug pseudoephedrine for supply, for which the maximum penalty for this offence is also eight years' imprisonment.

[2] For the purposes of your sentencing I have been assisted today by helpful written submissions, both for the Crown and from your counsel Mr Cheng. I have also been assisted by the oral submissions presented in Court this afternoon, particularly by Mr Cheng who provided me with more information about you and the circumstances of this case. I have also received a pre-sentence report from the Department of Corrections together with a personal letter from you to the Court, which I have read.

Factual background

[3] On 13 July 2008, a Customs Officer examined a package which had been imported into New Zealand from China via the courier company TNT Express Worldwide (New Zealand) Ltd. The package was opened and inside were a number of boxes which had a photograph of a baby on the front and the image of a magnetic drawing board. Sixteen of the boxes contained a drawing board as declared, but the remaining 14 boxes contained a large quantity of blister packs labelled Contac NT.

[4] On 15 July 2008, the package was examined by a Customs Drug Investigator and 14 boxes with the blister packs of Contac NT in them were found. Each blister pack had ten Contac NT tablets, each capsule containing 90 micrograms of pseudoephedrine. In total some 9,900 Contac NT capsules were located, which was sufficient to make approximately 450-630 grams of methamphetamine. The capsules were tested and found to contain pseudoephedrine.

[5] A controlled delivery was carried out by a Customs Officer acting as a courier delivery agent. The Customs Officer telephoned through to a contact number listed on the package and advised that the package would be delivered on 18 July 2008. You asked that the package be redirected to room 152 at the Sky City Hotel, where you were living with an associate. At 10am, the Customs Officer delivered the package to room 152 where you accepted the package, signed for it and thanked the officer for the prompt delivery. A search warrant was executed at room 152 and you stated that you were expecting a parcel to be delivered to you from your friend in China and that you thought that it was a water heater.

Personal circumstances and pre-sentence report

[6] You are 25 years of age and of Chinese nationality. You have been an illegal overstayer in New Zealand since 2003. You grew up in mainland China with your parents. In 2002, at the age of 19 years, your parents sent you to study at Rosehill College in New Zealand. Initially, you stayed with a local homestay family and attended secondary school for approximately four months. After that you enrolled in a computer programme for six months.

[7] In 2003, your student visa expired and you became an illegal overstayer. The report suggests you have survived through casual employment in the hospitality industry. The report says that you do not have any problems with drug and alcohol abuse, and no harmful pattern of use is established. You indicated that you have never gambled and have no association with any gangs in New Zealand.

[8] In the explanation for the offending, you stated that your father had lost his job and that you did not have a job in New Zealand. You said that a friend in China contacted you through the internet and asked you to retrieve some parcels and pass them on to contacts in New Zealand. You said that you felt that you could not say no and explained that you were to receive between \$10-\$20 per packet for your trouble. You now realise that this whole exercise was not worthwhile and you have expressed remorse for your offending. You have no previous convictions in New Zealand.

Crown submissions

[9] The Crown submits that the offending was aggravated by a considerable level of premeditation. The offending in this case involved packaging the pseudoephedrine to avoid detection and the hiring of premises for the delivery of the drugs into New Zealand. The Crown submits that you played a significant role in offending which was well planned and showed a degree of sophistication.

[10] The Crown submits that your offending falls within category 2 of *R v Ho* HC AK CRI 2005-092-000567 12 April 2005 which calls for a starting point of between three and five years' imprisonment. Finally, the Crown submits that you are entitled to credit for your guilty pleas and that a reduction of around 25 percent would be appropriate.

Defence submissions

[11] On your behalf, Mr Cheng submitted a slightly lower starting point was appropriate. However, when questioned he accepted that a starting point of four years would not be inappropriate, given the extent of your involvement and the nature of the planning that went into this offending. Mr Cheng accepted that two factors drive the starting point in this case, namely, the quantity of pseudoephedrine and your role.

[12] Mr Cheng also accepted that a discount of approximately 15 months' imprisonment would be appropriate to reflect the guilty pleas and other relevant mitigating factors.

Relevant purposes and principles of sentencing

[13] The Sentencing Act 2002 requires that I keep a number of purposes and principles in mind when deciding on an appropriate sentence. In your case, I have specific regard to the following purposes of sentencing as set out in s 7 of the Act: the need to hold you accountable for the harm done to the community; the need to

promote in you a sense of responsibility for, and an acknowledgement of, that harm; the need to denounce your conduct; the need to deter you and others like you from committing the same or a similar offence; and the need to assist in your rehabilitation and reintegration.

[14] In sentencing you, I also take into account the principles of sentencing according to s 8 of the Sentencing Act, including: the need to take into account the gravity of your offending, including the degree of your culpability; the need to take into account the seriousness of this type of offence in comparison with other types of offences; the need to consider the general desirability of consistency with appropriate sentencing levels and with similar offenders; the need to take into account particular circumstances of the offender that would mean an ordinarily appropriate sentence would be disproportionately severe; and the need to impose the least restrictive outcome that is appropriate in your circumstances.

Features of the offending

[15] The Court of Appeal in *R v Taueki* [2005] 3 NZLR 372 sets out the orthodox approach to sentencing. Accordingly, I will first set a starting point based on the features of the offending and then adjust the starting point according to any mitigating and aggravating features relating to you the offender.

[16] With respect to aggravating factors, which I must take into account under s 9 of the Sentencing Act, I take into account the damage caused to the New Zealand public from methamphetamine offending generally. I also take into account that there was a degree of planning and premeditation involved in this offending.

[17] In terms of mitigation, in your case I do not consider that there were any mitigating features of the offending.

[18] In terms of you as the offender, there are no particular aggravating factors applicable.

[19] In terms of mitigating factors, however, there are your guilty pleas, your relative youth and your previous good record, which you are entitled to call upon.

Relevant case law

[20] I have had regard to the case of *R v Ho* which sets out two categories of offending of this type. The circumstances of your case point to category 2, whereby a starting point of between three and five years' imprisonment is appropriate. I accept that you were not the mastermind but you played an important role in ensuring that these Class C controlled drugs were received into New Zealand and delivered into the hands of those who were expecting them.

[21] I have had regard to three similar cases: *R v Yu* HC AK CRI 2007-004-15768 27 August 2007, *R v Zhao* HC AK CRI 2006-004-2922 27 June 2006 and *R v Wu* HC AK CRI 2005-092-6711 27 September 2005, all of which involved importation of pseudoephedrine into New Zealand.

Analysis

[22] There is no doubt that an appropriate starting point in your case is four years' imprisonment. That is consistent on a comparative basis with the various cases to which I have already referred. In this case, there was more planning and sophistication involved than in at least two of the other cases. To reflect the role that you played and the degree of culpability concerned, I adopt a starting point of four years' imprisonment.

[23] In terms of adjusting that starting point, I have already indicated that there are no aggravating personal circumstances. You are entitled to a discount to take into account the guilty pleas, your comparative youth, your remorse and lack of previous convictions. I will therefore allow a discount on the lead charge of 15 months' imprisonment.

Sentence of the Court

[24] On the charge of importing the Class C controlled drug pseudoephedrine into New Zealand, you are sentenced to two years and nine months' imprisonment. On the charge of possessing the Class C controlled drug pseudoephedrine for supply, you are sentenced to two years' imprisonment. Both of those sentences are to be served concurrently.

[25] That concludes my sentencing remarks and I understand as soon as your sentence of imprisonment is served to the satisfaction of the Department of Corrections you will be deported from New Zealand. When you return to your native China I hope that you will tell those who contacted you about importing drugs into New Zealand, that New Zealand is not a country which welcomes any form of controlled drugs.

[26] You may stand down.

Stevens J