

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

CRI-2007-004-018646

THE QUEEN

v

ROBERT BENJAMIN HAARHAUS

Hearing: 24 July 2009

Counsel: W Cathcart for the Crown
C Wilkinson-Smith for the prisoner

Judgment: 24 July 2009

SENTENCING NOTES OF STEVENS J

Solicitors/Counsel:
Crown Solicitor, PO Box 2213, Shortland Street, Auckland 1140
C Wilkinson-Smith, PO Box 276 167, Manukau City 2241

Introduction

[1] Robert Benjamin Haarhaus, you appear for sentencing today having pleaded guilty to 12 charges under the Misuse of Drugs Act 1975: see appendix attached. Four of the charges relate to the Class A controlled drug methamphetamine, four relate to the Class B controlled drug MDMA and four relate to the Class B controlled drug GHB.

[2] For the purposes of your sentencing today, I have been assisted by the following materials: written and oral submissions from Mr Cathcart for the Crown and written and oral submissions from your counsel Mr Wilkinson-Smith. I have received a pre-sentence report from the Department of Corrections and a number of letters of reference or testimonial from friends and family in your support. I note that a number of your family and friends are present today and some of those have indeed authored the materials, which I have read and acknowledge.

Factual background

[3] In 2007, the Auckland Metro Drug Squad began an investigation into your drug dealing activities from an address at 352A Kohimarama Road in Auckland. The operation was code-named, Operation Texas. The investigation centred on the sale and distribution of the Class A controlled drug, methamphetamine, the Class B controlled drug MDMA, commonly known as ecstasy, and the Class B controlled drug gamma-hydroxybutyrate, commonly known as GHB. Operation Texas included an electronic surveillance phase at your address between 30 July 2007 and 28 August 2007. Visual surveillance was also conducted at the address. Interception warrants were granted by the High Court in respect of various telephones and landlines attributed to you.

[4] The operation terminated when drug squad officers searched your address and arrested you on 28 August 2007. Several associates had already been arrested and charged with drug dealing offences and other associates were arrested later. On 6 May 2009, you pleaded guilty to representative charges of supplying, offering to

supply, possession for supply and conspiracy to supply the three categories of controlled drugs, to which I have already referred.

[5] You disputed some of the aggravating features of the offending as set out in the Crown summary of facts. As a result, a three day disputed facts hearing was heard before me in May 2009. I resolved the various factual disputes relating to the quantities involved and your particular role in this wholesale drug supermarket operation: see *R v Haarhaus* HC AK CRI 2007-004-18646 4 June 2009.

[6] In summary, I held that during the relevant period, you acquired at least 700 grams or 25 ounces of methamphetamine. I also held that you dealt in lots of multiple thousands of MDMA tablets and on a wholesale level in relation to GHB. In relation to one particular transaction, you acquired some 20 litres of GHB and when the operation terminated a 20 litre container was found to be near empty. I considered that you were a key figure in this drug dealing operation, as you were responsible for the on-supply and distribution of the three classes of drugs on a major scale.

Personal circumstances and pre-sentence report

[7] You are 45 years of age. Prior to your remand in custody, you lived at 352A Kohimarama Road. You state that you built the house in 2005, but there is a legal dispute relating to ownership of the house. You say that you have a close relationship with your parents and former girlfriend, Gemma Walton, and I note that some of the letters in support came from these people.

[8] You were born in Amsterdam, Holland. You moved to New Zealand in 1980, at the age of 14. You state that you had a happy childhood. Your mother worked full time as a model and your stepfather had a successful business importing leather boots and shoes.

[9] You left school at the age of 17, having achieved fifth and sixth form certificate. You then commenced employment as a registered motor vehicle

salesperson for Cooper-Henderson Car Sales Limited in Manukau City. You were awarded top salesperson of the year three years in a row.

[10] You then set up Papakura Motors with your stepfather. This business was sold for a profit in 1996. You were able to buy an apartment at 217 Tamaki Drive, Mission Bay. You then set up another business, Aston Motors Limited in Mt Wellington. Around the same time, you also set up a night club in Parnell, called "Sweet 285". The night club failed financially and in 2002 you were made bankrupt.

[11] You state that around this time, you attended a party and met a person involved in the business of selling party pills. You then began working with that person. You state that you went into business with this person selling legal party pills that looked like the illegal drug ecstasy. However, in 2006 when your relationship with your partner broke up, you started using methamphetamine on a regular basis. You then began to sell drugs, initially to pay for your own drug habit and then to make a financial profit.

[12] You state that you are extremely remorseful for using and selling illegal drugs. You state that you have completed a drug rehabilitation programme in prison and that you will never use drugs again. It is commendable that you have undertaken the drug rehabilitation programme, however, I am bound to observe that your remorse expressed to the probation officer is probably more at your concern at getting caught than for your recognition as to the dreadful implications of the offending in which you were involved over a sustained period.

[13] To your credit, the probation officer assesses you as having a low risk of re-offending. I am not so sure.

Previous convictions

[14] You have only one conviction for careless driving, and I put that entirely to one side.

Crown submissions

[15] The Crown submits that an aggravating feature of the offending is that it involved a significant element of planning and premeditation. The Crown acknowledges that your conviction for careless driving has no relevance. The Crown submits that a discount of around 15 percent is appropriate for the guilty pleas, as they were entered three weeks before trial. The Crown notes that the disputed facts hearing was largely without merit and submitted that the discount otherwise available should be reduced for that factor.

[16] The Crown submits correctly that the lead offence should be the count of supplying the Class A controlled drug, methamphetamine. The Crown also submits that this case should be approached on a totality basis to reflect your role and the extent of the offending. The Crown submits that the offending falls within band four of *R v Fatu* [2006] 2 NZLR 72.

[17] Mr Cathcart submitted that a starting point in the vicinity of 14 years' imprisonment is appropriate. The Crown also submitted that an uplift of two years is required to reflect the totality of the offending, including the fact that three classes of drugs were involved.

[18] Finally, the Crown submitted that a minimum non-parole period of 50 percent of the final sentence should be imposed.

Defence submissions

[19] Defence counsel submitted that I should adopt a lower starting point in the range of nine to ten years' imprisonment on the basis of the cases referred to in Mr Wilkinson-Smith's submissions: see *R v Walker* [2009] NZCA 56 and *R v Northwood* HC AK CRI 2006-090-000692 20 November 2007. Mr Wilkinson-Smith accepted that an uplift in the vicinity of two years was appropriate to reflect the totality of the offending.

[20] Counsel also accepted that there were three classes of drugs involved, that this offending was at a wholesale level, and that in relation to the methamphetamine offending, there was a combination of imported (pure) methamphetamine and local. Indeed, having listened to all of the intercepted telephone communications relating to your dealings, I record that you were in the initial stages of the investigation, dealing in imported methamphetamine and it was only towards the latter part of the investigation when the imported methamphetamine ran out, that you resorted to dealing in local methamphetamine.

[21] Defence counsel submitted that a reduction is warranted for your guilty pleas, time spent on electronic bail, remorse, lack of previous convictions, low risk of re-offending and family support. To that I should also add your initial attempts at rehabilitation.

[22] On a totality basis, the defence submits that there should be a discount for the guilty pleas in the vicinity of 20-25 percent, and further discount for the other factors referred to including the time spent on electronic bail, which was 13 months on restrictive bail conditions. Finally, defence counsel submitted that a minimum term of imprisonment was not required as the final sentence would be a sufficient deterrent in and of itself.

Relevant purposes and principles of sentencing

[23] The Sentencing Act 2002 (the Act) requires that I keep in mind a number of purposes and principles 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 similar offences; and finally I do have regard to the need to assist in your rehabilitation and reintegration. At the end of the day, I need to be careful to ensure that any sentence imposed is not crushing.

[24] In sentencing you, I also take into account the principles of sentencing according to s 8 of the 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 offending in comparison with other types of offences; the need to consider the general desirability of consistency with appropriate sentencing levels with similar offenders; the need to take into account the particular circumstances of you 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 to your circumstances.

Features of the offending

[25] The Court of Appeal in *R v Taueki* [2005] 3 NZLR 372 set 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.

Offending

Aggravating Factors

[26] Section 9 of the Act sets out the factors that are considered aggravating. In this case, the following aggravating factors apply – the extent of loss, damage or harm to the community (s 9(d)). I take this factor into account in that you were dealing in Class A and Class B controlled drugs, and the scourge that they represent, particularly methamphetamine, on our society. Methamphetamine has devastating consequences for those who get caught up in this nefarious business, and that is why it is an aggravating factor.

[27] Premeditation and planning (s 9(i)) – here you went to considerable length in your dealings, both with those from whom you were obtaining the drugs, and those to whom you were supplying them, to conceal your activities. That is evident from the intercepted telephone conversations and the coded language which you used,

both general and specific with various suppliers and purchasers over a lengthy period of time. This made the investigation of your offending quite difficult and it is only because of the electronic surveillance both of telephones and audio, and the surveillance that was placed around your residence that your activities were able to be detected.

[28] I would also comment that it was because of the use of codes that you were able to, through your counsel contend at the disputed facts hearing, that you were not dealing in ounces but rather in grams. As you will be aware from my findings, I found that you were dealing in the more significant amounts as set out in my disputed facts judgment. The reason I was able to make such findings was because of other evidence which was led by the prosecution which enabled the codes to be broken.

Mitigating Factors

[29] In respect of the offending, I consider that there are no applicable mitigating factors. This was very serious offending at a high level and no mitigating factors apply.

Offender

Aggravating Factors

[30] In this category previous convictions would normally be included. However, you have only one minor previous conviction. I do not consider this conviction relevant, so there are no aggravating factors relating to you personally.

Mitigating Factors

[31] In terms of s 9(2)(b) of the Act, the mitigating factors that apply to you are your guilty pleas, the time spent on electronic bail and some evidence of personal methamphetamine use. But I note from the intercepted telephone communications that you were often with your friends leading the high life and in your dealings, you

seemed to be able to manage to talk in codes with both your suppliers and those to whom you sold the three types of drugs. I note that you have taken some preliminary steps towards rehabilitation and that you have some level of family support as illustrated by the references and testimonials.

Imprisonment factor

[32] Section 16 of the Act establishes a general presumption against imprisonment. However, this is subject to the specific presumption in favour of imprisonment set out in s 6(4) of the Misuse of Drugs Act.

Methamphetamine offending

[33] The sentencing approach to Class A controlled drugs is set out in *Fatu*. There is no dispute that the offending in this case falls within band four where the starting point begins at ten years and goes up to life imprisonment.

[34] I have considered a number of cases, including those cited by your counsel. In addition, I have considered *R v McQuade* HC AK CRI 2006-019-8458 10 September 2008, *R v Ridout* HC WN CRI 2008-404-84 2 May 2008 and *R v C* HC AK CRI 2006-004-25638 17 August 2007.

MDMA and GHB offending

[35] For Class B controlled drugs I have considered the case of *R v Wallace* [1999] 3 NZLR 159. The Court of Appeal in *Fatu* confirmed that *Wallace* is to remain the authority for Class B controlled drug offending.

[36] With regard to the MDMA offending in particular, I refer to the case of *R v Catalogna* HC AK CRI 2007-004-18646 16 June 2009. The prisoner in that case was one of your suppliers and he was sentenced on the basis of a quantity accepted as being between 1000 – 2000 tablets. Ronald Young J adopted a starting point of five and a half years' imprisonment in that case.

Conspiracy offending

[37] I have had regard to the various cases involving conspiracy offending; *R v Savage* HC WHA CRI 2005-029-1267 21 July 2006, *R v Te Rure* [2008] 3 NZLR 627. I note that the usual approach is that the High Court will revise down the *Fatu* tariffs for supply by around 30 percent to reflect the approximate 30 percent difference in maximum penalty: see *R v Johnson* HC WHA CRI 2006-088-001233 27 September 2006. I have also considered the cases of *R v Williams* HC AK CRI-2007-404-6 6 December 2007 and *R v McGregor* HC AK CRI-2003-044-2778 4 February 2005.

Minimum period of imprisonment

[38] I have carefully considered s 86 of the Act which sets out the principles which I must apply. In particular, I have considered subs (2) which enables the Court to impose a minimum period of imprisonment that is longer than the period otherwise applicable under the Parole Act 2002, if satisfied that that period is insufficient for all or any of the following purposes:

- (a) holding the offender accountable for the harm done to the victim and the community by the offending;
- (b) denouncing the conduct in which the offender was involved;
- (c) deterring the offender or other persons from committing the same or a similar offence;
- (d) protecting the community from the offender.

[39] The principles governing the imposition of a minimum term of imprisonment are discussed in *R v Brown* [2002] 3 NZLR 670. However, since that case s 86 has been amended and the approach to be taken now is set out in *Taueki* at [51] – [56].

[40] There are two stages of a test which I must apply and I have taken those aspects into account when considering the question of minimum period of imprisonment.

Discussion

[41] First I must set the starting point for this offending. I take as the lead offence the supply of the Class A controlled drug methamphetamine.

[42] I have already referred to the aggravating features and the significant harm posed to the community and the element of premeditation and planning. I also bear in mind that I am sentencing you on the basis of 700 grams of methamphetamine and that you were the key figure in a significant wholesale drug dealing supermarket operation. You were supplied with large quantities of a range of controlled drugs and you were then responsible for the on-supply and distribution of those drugs to other drug dealers so that these three types of drugs would get out into the community. Without you the distribution to a large number of people in society would not have been possible. As indicated in the disputed facts hearing judgment, you were operating at a significant wholesale commercial level of large amounts of methamphetamine, MDMA and GHB.

[43] On a comparative basis with the cases to which I have already referred, I propose to adopt a starting point of 13 years' imprisonment. There is no dispute between the Crown and your counsel that an uplift of two years is appropriate to reflect the totality of the offending. That would bring a starting point of 15 years' imprisonment.

Adjusting the starting point

[44] I put to one side your previous conviction. You are entitled to a discount for your guilty pleas. The pleas were entered into three weeks before trial. I agree with the Crown submission that the disputed facts hearing was largely without merit, particularly once you elected not to give evidence. But in the absence of guidance from the Court of Appeal on the point, I do not intend to impose a lesser discount because of the fact that you went to a disputed facts hearing that was largely without merit.

[45] I also take into account, to a limited extent, your remorse and personal circumstances including family support, early attempt at rehabilitation and the fact that you were a recreational user of methamphetamine. But I do note that the authorities are clear that personal circumstances are not to be taken into account to any significant degree when the Court is sentencing on drug dealing offences. Here, the offending was grave. However, in terms of mitigating I will allow a total discount of two and a half years for the factors which I have mentioned.

[46] In addition, I agree with the defence submission that you should be entitled to a discount for time spent on electronic bail. You were on relatively restrictive terms of bail for some 13 months. In *R v Aram* [2007] NZCA 328 the Court of Appeal upheld a discount for this factor where the prisoner had spent time on relatively strict electronic bail. I allow a further discount of six months. That brings the total discount to three years so that would mean a final sentence of 12 years' imprisonment.

Minimum period of imprisonment

[47] I have carefully considered the statutory requirements referred to above. I have considered the principle in *Brown* as elaborated upon in *Taueki*. I have also taken into account the principles in *R v Anslow* CA182/05 18 November 2005 and *R v Wang* [2009] NZCA 118. I take into account in particular the observations of the Court of Appeal in *Anslow* at [27] where it was stated that for sentences involving imprisonment for nine years or greater there was near uniformity in the approach of sentencing Judges that a minimum period of imprisonment would be imposed.

[48] In your case, I have had particular regard for the need to hold you accountable, to denounce your conduct and to deter you. There is also the need to protect the community. That is, those who might be attracted at retail or street level to get into using drugs that you were pedaling, basically for greed. I am satisfied that the one-third sentence under the Parole Act is insufficient to meet these purposes, in particular to hold you accountable for the harm done to the community by your offending: see *Taueki* at [51] – [53].

[49] Standing back and considering all of the principles and purposes of sentencing in ss 7, 8 and 9 of the Act, in relation to the question of imposition of the length of the minimum period of imprisonment, I consider that it is necessary in your case to impose a minimum period of imprisonment: see *Taueki* at [56]. I fix the figure at six years in this case.

Conclusion

[50] In conclusion, you will now be sentenced by this Court as follows:

- a) For supply of the Class A controlled drug methamphetamine, you are sentenced to 12 years' imprisonment;
- b) Offering to supply the Class A controlled drug methamphetamine, you are sentenced to ten years' imprisonment;
- c) Possession of the Class A controlled drug methamphetamine for supply, you are sentenced to 12 years' imprisonment;
- d) Conspiracy to supply the Class A controlled drug methamphetamine, you are sentenced to eight years' imprisonment;
- e) Supply of the Class B controlled drug MDMA, you are sentenced to five years' imprisonment;
- f) Offering to supply the Class B controlled drug MDMA, you are sentenced to three years' imprisonment;
- g) Possession of the Class B controlled drug MDMA, you are sentenced to five years' imprisonment;
- h) Conspiracy to supply the Class B controlled drug MDMA, you are sentenced to three years' imprisonment;

- i) Supply of the Class B controlled drug GHB, you are sentenced to five years' imprisonment;
- j) Offering to supply the Class B controlled drug GHB, you are sentenced to three years' imprisonment;
- k) Possession of the Class B controlled drug GHB, you are sentenced to five years' imprisonment; and
- l) Conspiracy to supply the Class B controlled drug GHB, you are sentenced to three years' imprisonment.

[51] All of those sentences are to be served concurrently. I confirm that in respect of the lead offence, a minimum period of imprisonment of six years' imprisonment shall apply.

[52] You may stand down.

Stevens J

Appendix

Charge	Date of charge	Section	Max penalty	Section
Supply of a Class A controlled drug, methamphetamine (Count 1)	Between 30 July 2007 and 28 August 2007	Section 6(1)(c) Misuse of Drugs Act 1975	Life imprisonment	Section 6(2)(a) Misuse of Drugs Act 1975
Offer to supply a Class A controlled drug, methamphetamine (Count 2)	Between 30 July 2007 and 28 August 2007	Section 6(1)(c) Misuse of Drugs Act 1975	Life imprisonment	Section 6(2)(a) Misuse of Drugs Act 1975
Possession of a Class A controlled drug, methamphetamine (Count 3)	Between 30 July 2007 and 28 August 2007	Section 6(1)(f) Misuse of Drugs Act 1975	Life imprisonment	Section 6(2)(a) Misuse of Drugs Act 1975
Conspiracy to supply the Class A controlled drug, methamphetamine (Count 10)	Between 30 July 2007 and 28 August 2007	Section 6(2A) Misuse of Drugs Act 1975	14 years' imprisonment	Section 6(2A)(a) Misuse of Drugs Act 1975
Supply of a Class B controlled drug, MDMA (Count 4)	Between 30 July 2007 and 28 August 2007	Section 6(1)(c) Misuse of Drugs Act 1975	14 years' imprisonment	Section 6(2)(b) Misuse of Drugs Act 1975
Supply of a Class B controlled drug, GHB (Count 7)	Between 30 July 2007 and 28 August 2007	Section 6(1)(c) Misuse of Drugs Act 1975	14 years' imprisonment	Section 6(2)(b) Misuse of Drugs Act 1975
Offer to supply a Class B controlled drug, MDMA (Count 5)	Between 30 July 2007 and 28 August 2007	Section 6(1)(c) Misuse of Drugs Act 1975	14 years' imprisonment	Section 6(2)(b) Misuse of Drugs Act 1975
Offer to supply a Class B controlled drug, GHB (Count 8)	Between 30 July 2007 and 28 August 2007	Section 6(1)(c) Misuse of Drugs Act 1975	14 years' imprisonment	Section 6(2)(b) Misuse of Drugs Act 1975

Possession of a Class B controlled drug, MDMA (Count 6)	Between 30 July 2007 and 28 August 2007	Section 6(1)(f) Misuse of Drugs Act 1975	14 years' imprisonment	Section 6(2)(b) Misuse of Drugs Act 1975
Possession of a Class B controlled drug, GHB (Count 9)	Between 30 July 2007 and 28 August 2007	Section 6(1)(f) Misuse of Drugs Act 1975	14 years' imprisonment	Section 6(2)(b) Misuse of Drugs Act 1975
Conspiracy to supply a Class B controlled drug, MDMA (Count 11)	Between 30 July 2007 and 28 August 2007	Section 6(2A) Misuse of Drugs Act 1975	10 years' imprisonment	Section 6(2A)(b) Misuse of Drugs Act 1975
Conspiracy to supply a Class B controlled drug, GHB (Count 12)	Between 30 July 2007 and 28 August 2007	Section 6(2A) Misuse of Drugs Act 1975	10 years' imprisonment	Section 6(2A)(b) Misuse of Drugs Act 1975