IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CRI 2007-092-018306

THE QUEEN

v

STEPHEN PAUL KISSLING

Hearing: 8 December 2009

Appearances: J Jelas for the Crown
S Ellis for Mr Kissling

Judgment: 8 December 2009

SENTENCE OF WOODHOUSE J

Solicitors:
Ms J Jelas, Meredith Connell, Office of the Crown Solicitor, Auckland
Mr S Ellis, Barrister, Auckland

[1] Mr Kissling, you may remain seated while I explain the sentence that I intend to impose. As I have already made clear, and I am not dissuaded by Mr Ellis, I consider there is need for some additional sentence on top of the 20 years, but it cannot possibly be what it would otherwise be if I were sentencing you for these offences alone. And the question really is what should be the increase.

[2] You appear for sentence for manufacturing methamphetamine and for possession of precursor substances, equipment and materials used in the manufacture of methamphetamine.

Facts

[3] A brief outline of the facts is as follows.

[4] On 31 August 2007 Police searched your home. You were the only occupant. Police found a number of items, substances and materials used in methamphetamine manufacture. Swabs were taken. From analysis of these swabs there were a number of positive readings for methamphetamine, ephedrine, and pseudoephedrine. This established the manufacture of methamphetamine – and you have of course acknowledged this by pleading guilty to that charge.

[5] There were also four surveillance cameras in operation viewing the area surrounding your home. These cameras were linked to a television which was on at the time of the Police search. Almost $14,000 in cash was found. And those matters are reasonably significant in relation to commerciality as opposed to manufacturing purely for your own use.

[6] When your home was searched on 31 August 2007 – the matter I have just referred to – you were on bail pending trial on a number of charges under the Misuse of Drugs Act and, in particular, charges of manufacture and distribution of methamphetamine on a very large scale. These charges followed your arrest in November 2006 – that is to say 9 months earlier. On those charges you were found guilty on five charges of manufacture of methamphetamine, eight charges of

supplying methamphetamine, and numbers of other charges. The effective sentence imposed on you – as you of course well know – was 20 years' imprisonment with a minimum non-parole period of 9 years.

Personal circumstances

[7] You are 40 years of age. Regrettably Mr Kissling, there is little in your personal circumstances which I need to refer to as justifying any reduction of the sentence that would otherwise be imposed. The principal matter is that you did plead guilty to these charges and I will come back to that.

[8] I have mentioned your addiction and I do not ignore that. And there is also some indication of a degree of remorse on your part, and I do not ignore that.

[9] You do have previous convictions, in addition to the drug offending which led to your sentence of 20 years' imprisonment, but I do not intend to take those into account by increasing the sentence.

Starting point

[10] I need to fix the starting point for your sentence. This is to be assessed having regard to the circumstances of the offences before taking account of the personal factors. The starting point should be fixed for the offence of manufacturing methamphetamine with an increase for the other offending, if appropriate.

[11] The Court of Appeal decision of *Fatu*[1] says that the starting point for the lowest level of manufacture, up to a production of 250 grams, should be between 4 years to 11 years imprisonment. I accept Mr Ellis' submission that these guidelines are not absolutely rigid; that the sentencing Court is not locked into some sort of arithmetical exercise. But they are very firm indications. Mr Ellis in his written submissions submitted that the starting point should in fact be lower than the 4 years, and central to that submission is that you are an addict. From this Mr Ellis submitted

[1] *R v Fatu* [2006] 2 NZLR 72

that the Court "can safely assume that an addict would not cook just for commercial gain and that some of the methamphetamine would be used to satisfy your addiction". You are entitled to the benefit of the doubt in that regard but the important consideration, Mr Kissling, is that plainly you had manufactured for commercial purposes, and that in fact is implicit in the submission Mr Ellis made. What is more, you were obviously intending to continue to manufacture. And I cannot ignore the extent of your involvement in the offending which led to the sentence of 20 years' imprisonment when I come to assess the level of your criminality in the current offending.

[12] I am satisfied that the lowest starting point should be not less than the 4 years stipulated in *Fatu*. The real question is whether it should be higher. The Crown submits that the starting point should be around 5 years' imprisonment.

[13] I have had regard to some broadly comparable cases. I will simply mention their names: *Minton*[2]; *Hawkins*[3]; *Johnston and Stott*[4]; and *McDonald*[5]. The references for those cases will be in the transcript of what I am now saying. Taking account of those cases, the principles outlined in *Fatu* – and I emphasise the principles rather than rigid bands – and taking account of the facts of your offending, I consider that the starting point, with an uplift for the possession charges, should be 5 years' imprisonment. That is the sentence that I would impose, subject to a reduction for the guilty pleas, if those were the only offences that I was dealing with, or the only sentence I had to consider.

[14] That sentence should be increased by at least 6 months because this offending occurred while you were on bail on the other charges. That takes it to 5 ½ years. The only factor justifying a reduction – the only factor of consequence justifying a reduction – is the guilty pleas. The maximum reduction, Mr Kissling, based on the Court of Appeal decision in *Hessell*[6] would be 10%, reducing the sentence from 5 ½ years to 4 years and 11 months imprisonment. Now I emphasise, and it should be

[2] *R v Minton* CA684/07, 10 June 2008
[3] *R v Hawkins* (HC ROT, CRI 2006-063-1080, 28 November 2007, Rodney Hansen J)
[4] *R v Johnston and Stott* (HC AK, CRI 2005-044-5100, 11 April 2006, Asher J)
[5] *R v McDonald* (HC AK, CRI 2006-057-001431, 28 November 2006, Venning J)
[6] *R v Hessell* CA170/09, 2 October 2009

clear to you, that is the sentence that I would have imposed if I was dealing with these offences in isolation.

Cumulative or concurrent

[15] There is then the question whether the final sentence to be imposed on you should be concurrent with the existing sentence of 20 years' imprisonment, or cumulative on it. The Crown has submitted that a sentence cumulative on the sentence of 20 years' imprisonment should be imposed. The Crown also recognises that the result, when the two sentences are added, should not be wholly out of proportion to the gravity of all of the offending – that is to say, the offending on which you were sentenced to 20 years' imprisonment and the offending I am now dealing with.

[16] Mr Ellis submitted in his written submissions that the end sentence of imprisonment should be between 2 and 3 years and that this should be concurrent with the 20 year sentence. As to the end sentence of between 2 to 3 years, if that is considered solely in relation to this offending, I do not agree that the sentence should be as low as that. I have already explained why.

[17] I also disagree with Mr Ellis' submission that, whatever the actual sentence is, it should be concurrent with the 20 year sentence. As I have already indicated, Mr Kissling, in my discussion with Mr Ellis, if that were the result no effective penalty would be imposed on you for this further offending. This further offending occurred on bail over 9 months after you were arrested for the earlier offending, which was offending on a very large scale. If there is no effective sentence, people in your position, and with your attitude to the law, will carry on offending because they will calculate that, if they are detected, it will make no difference.

[18] I am satisfied that there must be a cumulative sentence. On the other hand, if the total of the two sentences was around 25 years, that would be out of proportion to the gravity of the overall offending. For this reason I consider that the appropriate sentence to impose on the charge of manufacturing methamphetamine is a sentence of 1 year's imprisonment cumulative on the existing effective sentence of 20 years'

imprisonment. That compares with the Crown submission of 1 to 2 years cumulative.

Formal sentence

[19] Would you please stand.

[20] On the charge of manufacturing methamphetamine you are sentenced to 1 year's imprisonment cumulative on the present sentence you are serving of 20 years' imprisonment.

[21] On each of the charges of possession of precursor substances, equipment and materials, you are sentenced to 6 months imprisonment. These sentences are concurrent with the sentence I have just imposed of 1 year's imprisonment.

[22] There will be an order for destruction of a crossbow that was found at the premises.

[23] By consent there will also be an order for forfeiture of the sum of $13,740 in cash seized by Police.

[24] If you would stand down Mr Kissling.

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Peter Woodhouse J