

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

CRI 2008-004-025021

THE QUEEN

v

MINGREN HE

Appearances: R McCoubrey for the Crown
M Dyhrberg for Mr He

Judgment: 11 December 2009

SENTENCE OF WOODHOUSE J

Solicitors:
Mr R McCoubrey, Meredith Connell, Office of the Crown Solicitor, Auckland
Ms M Dyhrberg Barrister, Auckland

[1] Mr He, you may remain seated while I explain the sentence I am going to impose on you. I will ask you to stand at the end when I formally impose the sentence.

[2] I need to explain this sentence not just to you – but I must explain it, of course, to you – but also to your family and beyond them and others in this courtroom, to the entire community, because what you have done are crimes against the whole community. You understand that? And you have indicated to me, by nodding your head, that you do understand. The point is that you have committed serious crimes, and I believe you recognise that there must be a period of imprisonment. What I have to determine is the length of that imprisonment.

[3] You appear for sentence having pleaded guilty to a number of charges involving methamphetamine and pseudoephedrine.

[4] There are two groups of offences. The first occurred between March 2008 and February 2009. So it was offending over an extended period. You imported 660 grams of methamphetamine on one occasion and a minimum of 21 kilograms of ContacNT capsules containing pseudoephedrine on 13 separate occasions. And you sold pseudoephedrine.

[5] The second group of offences occurred between 15 July 2009 and 14 August 2009, while you were on bail charged with the offences just referred to. And that is an aggravating fact. You imported more pseudoephedrine contained in a minimum of 7 kilograms of ContacNT capsules. You were arrested in August 2009 and pleaded guilty in October 2009 to a further charge of importing this pseudoephedrine and to possession of it for supply.

[6] The maximum penalty for importing methamphetamine is life imprisonment. And that emphasises the seriousness of that offending. The maximum penalty for the other offences is 8 years imprisonment for each offence, and 8 years imprisonment is a long sentence in itself.

[7] Your counsel, Ms Dyhrberg, does not appear to take significant issue with the Crown's concise summary of the way you generally operated, and it was as follows:

Typically, Mr He would arrange for another individual to provide an address to which packages could be sent. Mr He would then visit these "catchers" and uplift the packages. When analysed, the packages typically contained 2.2 kilograms of ContacNT. On the occasions referred to in count 2, Mr He sold the ContacNT to another individual.

The catchers were typically paid an amount in the region of \$150-\$200 for agreeing to receive the packages. On the occasion referred to in count 4 (that is the importation of methamphetamine) the catcher (a co-accused of Mr He by the name of Xing Yao Loh) was paid \$3,000 for receiving the methamphetamine.

[8] In respect of the importation of methamphetamine, Ms Dyhrberg has said that you claim not to have known that it was methamphetamine. This makes no difference to your guilt, as you have acknowledged by pleading guilty. Ms Dyhrberg also points out that although you paid \$3,000 to the so-called catcher for the methamphetamine importation, which was much higher than the normal payment for pseudoephedrine, some pseudoephedrine payments had been up to \$1000. Mr He, I will give you the benefit of the doubt. Apart from the higher payment to the recipient of this package the inference that may be drawn from the fact that there were 13 consignments of pseudoephedrine is that you may have thought that this also was pseudoephedrine. I am prepared to accept that for the purposes of sentencing. It is accepted that you were not controlling the exports of the consignments from China, or from wherever else they may have come.

[9] Ms Dyhrberg acknowledged that you played a significant role in the importation – that you were a crucial player – in her words. But she submitted, using her words again, that you were "simply acting as a "middle man" receiving the pseudoephedrine and then almost immediately on-selling it to, or through, an older person more integrally involved in the operation".

[10] I will proceed on the basis of the broad description of your role by Ms Dyhrberg. The Crown does not contend that you were one of the controlling criminals. It does appear that Police accept that the controller of the operation you were involved in was in China. But you played an important role in receiving the

pseudoephedrine and methamphetamine into New Zealand and then in distributing it to others.

Personal circumstances

[11] You are now 21 years old. You were aged between 19 and 20 when you committed these offences.

[12] You were born in China and came to New Zealand when you were 6 years old. You have said that you regret what you have done and that you are extremely ashamed of your actions. I accept that, and I hope I am right in accepting that. This can be taken into account by the credit that you are entitled to for your guilty pleas. I have had regard to the other personal matters referred to in Ms Dyhrberg's submissions on your behalf, including the level of support you have from family and friends. This is reflected in the letters of support I have received and read. This includes one from your aunt who has come from Canada for your sentencing. You are lucky Mr He to have the support of your family which is demonstrated by their presence in Court today. And I hope what I am told is correct, that you will never let them down again – but I must add, and that you will never let the whole community down again.

[13] I also take account of relevant matters referred to in the pre-sentence report, your educational prospects, and the other matters which the Crown accepts do stand to your credit – and I have not referred to all of these matters expressly. And I have, of course, read the pre-sentence report and take account of the matters referred to there to the extent that I can when dealing with offences of this nature.

Sentence

[14] I need to fix a sentence starting point. This is based on the nature of your offending without reference to personal factors, which I come to later. I will fix the starting point by reference first to the most serious offence which is the importation of methamphetamine. The general starting point for importing more than 500 grams

of methamphetamine, based on a Court of Appeal case called *Fatu*¹, is between 12 years imprisonment and life imprisonment.

[15] Ms Dyhrberg has provided careful and helpful submissions leading to a primary submission that the starting point for the importation of methamphetamine should be 11 to 12 years imprisonment. In some cases the starting point can be below 12 years. Because I am proceeding on the basis that you did not realise that you were importing methamphetamine, and you thought it was another package of pseudoephedrine, the gravity of your offending is less and I will fix the starting point at 11 years being the lower figure submitted on your behalf by Ms Dyhrberg.

[16] In that regard I do note that the Crown, in written submissions, had submitted that the starting point should possibly be as high as 14 years. Mr McCoubrey, today, has acknowledged that in your case the starting point should be lower than the figure originally submitted.

[17] The 11 years for the methamphetamine offending needs to be increased for the other offences. If you were being sentenced solely for the importations of the 28 kilograms of ContacNT the starting point could be 6 years or more. The summary of facts and other information provided to me does not provide a calculation of the amount of methamphetamine that might have been produced from the 28 kilograms of ContacNT capsules. But other cases, with one exception on the high side, consistently record a calculation that the potential yield of methamphetamine is approximately 20% to 30% by weight of the total weight of capsules. That means that 28 kilograms of capsules could produce approximately 5.6 to 8.4 kilograms of methamphetamine. The quantity of methamphetamine is large and the potential value is high. This is what you were quite deliberately involved in – facilitating it in an indirect way – but of course you were not directly involved in manufacture of methamphetamine. What I am wishing to emphasise is that you were playing a part in facilitating that end objective.

¹ *R v Fatu* [2006] 2 NZLR 72

[18] Ms Dyhrberg has submitted that the starting point for the methamphetamine offence should be increased by 1 to 2 years for the pseudoephedrine offences, being the supply and possession of pseudoephedrine as well as the importation of it.

[19] The Crown has submitted that the starting point for the methamphetamine offence should be increased by around 3 years for the pseudoephedrine offences. That increase of 3 years was in light of a submission that the sentence for the pseudoephedrine offences, if dealt with in isolation, and having regard to the fact that there was significant offending while on bail, could be 8 years imprisonment. I agree that it could be. And I have already said, the starting point for the importation charges alone could be 6 years or more.

[20] Ms Dyhrberg and the Crown have referred me to a number of other cases by way of comparison. And I have considered a few more. Having regard to these other cases, including the Court of Appeal case of *Fatu* I referred to – using *Fatu* by broad analogy – and having regard to all the other matters I have considered up to this point in relation to the offending itself, I consider that the starting point should be increased by 2 years to 13 years imprisonment.

[21] This should be increased by a further year, to 14 years, for significant offending while on bail. If that might seem by some to be high, if viewed in isolation, I should say that I consider the increase of 2 years to take account of all the pseudoephedrine offending in my view is a lenient calculation. There are no other circumstances which would justify an increase.

Personal circumstances

[22] I come now to your personal circumstances. They do warrant some reduction. I take account of the submissions made on your behalf in relation to your personal circumstances. I give particular weight to the fact that you were reasonably young when you got involved in this with the lure of money. I also give some weight to what is said by you, and on your behalf, as to the prospects of rehabilitation. You have no previous convictions. There are the other matters put before me by counsel. All of these considerations in your special circumstances do

require a reasonably substantial reduction, notwithstanding the fact that personal circumstances will often not warrant particularly significant reductions.

[23] There is also the fact that you pleaded guilty to all of the charges. There is no particular issue between the Crown and you, through Ms Dyhrberg, as to the reduction that should be allowed for this. Generally, a reduction for guilty pleas should be dealt with as the final stage of the assessment of a sentence, but in this case an exception to the usual approach is justified by simply making an overall assessment.

[24] The reduction I consider you are entitled to for all matters is 50%. That is a substantial reduction Mr He. In some ways that is giving you a real chance, even though you will be remaining in prison. This means an end sentence on the lead charge of importation of methamphetamine of 7 years imprisonment.

Minimum period of imprisonment

[25] The remaining question is whether I should impose a minimum period of imprisonment before parole can be considered. The Crown has submitted that I should impose a minimum period beyond the statutory minimum of one-third before consideration of parole. Ms Dyhrberg, again with careful submissions, and in my view on solid grounds, has submitted that there should be no minimum period of imprisonment.

[26] I take account of the matters I am required to take account of under the Sentencing Act in dealing with minimum periods of imprisonment. I have considered the cases particularly referred to me by Mr McCoubrey, being *R v Zhou*² and *R v Wang*³. I recognise fully what is said there. My judgment, weighing all of the necessary matters, is that there should be no minimum period of imprisonment.

² *R v Zhou* [2009] NZCA 365

³ *R v Wang* [2009] NZCA 118

Formal sentence

[27] I will now impose the formal sentence, and you should stand.

[28] For the offence of importing methamphetamine you are sentenced to imprisonment for 7 years.

[29] For the four offences of importing pseudoephedrine you are sentenced to 4 years imprisonment on each charge.

[30] For the two offences of supplying pseudoephedrine and possession of pseudoephedrine for supply you are sentenced to imprisonment for 3 years.

[31] The sentences, Mr He, are to be served concurrently which means that the total is 7 years. You may not recognise this right at this moment, but you are really being given a chance. I hope you take it.

[32] The final matter is that there should be forfeiture of the sum of \$8,000. That order may be made by consent.

[33] You may stand down.

Peter Woodhouse J