

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

CRI-2009-057-1622

THE QUEEN

v

CORY JAMES NICHOLLS

Hearing: 15 December 2009

Appearances: Ms J Jelas for Crown
Mr S Cassidy for Prisoner

Sentence: 15 December 2009

SENTENCING REMARKS OF LANG J

Solicitors:
Crown Solicitor, Auckland
Counsel:
Mr S Cassidy, Auckland

[1] Mr Nicholls, you appear for sentence having pleaded guilty in this Court to one charge of being in possession of methamphetamine for supply and one charge of supplying methamphetamine. Both of those charges are laid as representative charges, which mean that they cover a range of offending rather than a single act. The maximum penalty for both of those charges, as I am sure you know, is one of life imprisonment.

[2] You have also pleaded guilty in this Court to one charge of being in possession of drug-related utensils. The maximum penalty for that offence is one year's imprisonment.

[3] Finally, you pleaded guilty in the District Court to one charge of burglary for which the maximum penalty is ten years' imprisonment and one charge of being in possession of cannabis. The maximum penalty for the cannabis charge is three months imprisonment.

[4] The Judge in the District Court declined jurisdiction and remanded you to this Court for sentence on those charges so that you could be sentenced on all charges together.

[5] In sentencing you, I propose to deal first with the charges to which you pleaded guilty in this Court. Having recited the facts in relation to those charges I will move to select a starting point in respect of those charges. This means the sentence that would ordinarily be imposed after a defended hearing and before taking into account any factors that are personal to you.

The facts

[6] The facts that underline the charges are contained in two summaries. You agree with those summaries and there is no dispute about any of the material facts in them.

[7] The charges to which you pleaded guilty in this Court follow a long-running police operation targeting the supply of methamphetamine in the South Auckland

area. During that operation you were identified as being involved in the street level sale and purchase of methamphetamine.

[8] During the operation the police obtained an interception warrant and began intercepting phone calls and text messages. As a result of this they found that you were using a particular cellphone number to conduct negotiations relating to the sale and purchase of methamphetamine. You were obtaining point bags of methamphetamine from a dealer higher up the chain. You were then selling those point bags at street level.

[9] It is clear from the summary that you were dealing regularly. Although you only received a point or two on any given occasion, you regularly obtained more than one replenishment of your supplies per day. Quite clearly you were dealing at street level on a very regular basis. On occasions you were also paying for methamphetamine by providing the person from whom you were acquiring it with cannabis.

[10] In all, the Crown contends, and you accept, that you purchased between 24 and 26 grams. The approximate purchase price of half a gram of methamphetamine during this period was about \$400. That half gram could be on-sold for up to \$500. The Crown estimates that the total value of the methamphetamine that you purchased was approximately \$19-\$20,000, with the potential on-sale value being in the vicinity of \$24-\$26,000. You would supply the methamphetamine to friends in return for cash and also the ability to share in the drugs that you were providing them.

[11] When the police terminated the operation they searched your home address. There they found empty snaplock point bags together with two pipes that could be used for the consumption of methamphetamine. They also found the cellphone that you had been using during the course of your drug dealing activities.

Sentencing Act 2002

[12] As I am sure you are now aware, the courts view dealing in methamphetamine very seriously. They really have no choice about that, because Parliament has declared that drug dealing activities in this area are to carry a maximum sentence of life imprisonment. You must be aware of the tragedies that the use of methamphetamine brings about. It breaks up families and relationships. It causes people to commit serious crimes and has a devastating effect for a vast number of people in this country.

[13] Given that that is the case, the only way in which the courts can deal with cases such as this is to impose deterrent sentences. The object of those is to ensure that people who deal in methamphetamine know that if they are caught they will be going to jail for a considerable period. You realistically accept that that will be the case.

[14] At the same time, however, it is important that I impose a sentence that is broadly consistent with those imposed in other cases. It is difficult to compare other cases on any precise or exact basis because no two cases are ever exactly the same. Nevertheless, counsel for the Crown has provided me with some authorities that assist me in determining where the starting point in relation to your offending lies.

Starting point

[15] Both counsel agree that the sentence to be imposed on you falls to be determined in accordance with the principles enunciated by the Court of Appeal in a case called *R v Fatu* [2006] 2 NZLR 72. In that case the Court of Appeal identified different bands of offending in relation to methamphetamine. Where persons are supplying or manufacturing between five and 250 grams of methamphetamine, they are liable to a sentence of imprisonment of between three and nine years. You clearly fall within that band because of the quantity of methamphetamine that you purchased and sold during the four month period that the police operation had you in its sights.

[16] Your counsel submits that a starting point of four years imprisonment would be appropriate. Counsel for the Crown says that the starting point should be somewhere between four years and four years six months.

[17] Counsel for the Crown has also provided me with several authorities that demonstrate that other persons who have been found who have been found in possession of between 20 and 35 grams of methamphetamine have had starting points of around the four to six year mark: *R v Allen* HC AK CRI 2005-004-023236 17 November 2006 Keane J; *R v Andersen* HC AK CRI 2006-092-001569 16 October 2007 Winkelmann J; *R v O'Connor* HC WHG CRI 2007-088-4852 22 October 2008 Dobson J and *R v McGrath* HC WN CRI 2007-078-793 7 November 2008 France J.

[18] I consider that some help is also to be gained in the present case from the starting point selected for two other persons who were arrested in the same police operation as that which led to your arrest. One of those, Ms Witeri, pleaded guilty to having been in possession of 64 grams of methamphetamine of which she had on-sold 32 grams. It seems that she was a methamphetamine addict and may well have consumed the balance. In her case the sentencing Judge adopted a starting point of five years imprisonment. (*R v Witeri* HC AK CRI-2009-057-1471 30 October 2009 Courtney J). Obviously her case was more serious than yours because of the sheer volume of methamphetamine involved in her case.

[19] Another person caught in the operation was Girlie Purua. She was found to have been in possession of 12.6 grams of methamphetamine. In her case the sentencing Judge adopted a starting point of three years six months imprisonment. (*R v Purua* HC AK CRI-2009-057-1493 30 October 2009 Courtney J). Quite clearly your offending is more serious than Ms Purua's, again because of the fact that you bought and sold significantly more methamphetamine than she did.

[20] Viewing those matters overall I have concluded that a starting point of four years two months imprisonment is appropriate on the methamphetamine charges.

Aggravating factors

[21] I do not propose to increase that sentence in any way to reflect aggravating factors personal to you. You have a large number of previous convictions but only one of those is drug-related. It relates to procuring or being in possession of cannabis and you were sentenced on that charge to 150 hours community work on 24 November 2008. Your present offending occurred whilst you were subject to that sentence and that would be a factor that would entitle the Court to increase the starting point because it is clearly an aggravating feature. I am satisfied, however, that your current offending was entirely different albeit increased in scale.

[22] I do not therefore propose to apply an uplift to recognise your earlier convictions but you need to know, Mr Nicholls, that from now on if you ever appear for sentence again on methamphetamine related charges, you will inevitably receive an increase in your sentence because further offending will reflect the fact that you will not have learnt your lesson as a result of the sentence that I am imposing today.

Mitigating factors

[23] I need now to determine the amount by which I should reduce the starting point to reflect any mitigating factors personal to you. Your counsel submits that a reduction of one-third or 33 per cent is justified to reflect your guilty pleas and previous good character. Unfortunately, however, I see nothing in your past to suggest that you have good character that can be relied on to reduce your sentence here.

[24] So far as your guilty pleas are concerned, I am bound by the decision of the Court of Appeal in *R v Hessel* CA 170/2009 2 October 2009. In that case the Court said that where an offender pleads guilty at first callover in the trial Court, a reduction of 20 per cent is to be applied. That is the factor that I propose to apply to you given the fact that you pleaded guilty very shortly after the first callover in this Court. I therefore propose to reduce your sentence by ten months to reflect that fact. This leaves me with an end sentence in relation to the methamphetamine charges of three years and four months.

District Court charges

[25] I now turn to the charges to which you pleaded guilty in the District Court.

[26] The summary of facts in relation to those charges record that on the morning of 9 June 2009 you and another person went to a residential address in Tuakau. There you parked your vehicle in the driveway and walked to the rear of the address, where you removed two copper downpipes which ran down the side of the house from the roof spouting. No doubt you were going to take these away and sell them for scrap metal.

[27] After you had removed the pipes, you climbed onto the carport roof which joined onto the side of the house and then climbed onto the roof of the house itself. At this point you were observed by somebody in the vicinity, who telephoned the mother of the owner of the property to advise her what was going on. She then arrived at the address and you left the scene. I am advised that you left the downpipes at the scene and did not take them with you.

[28] When your case was first called this morning I asked counsel to explain to me how you could be charged with burglary when you had not actually entered any dwelling. After some discussion they agree that your liability in this context arises because the definition of burglary in s 231(2) of the Crimes Act 1961 includes being within any enclosed yard. The section of the property that you had entered on this day is, I am told, an enclosed yard, and you accept that you were guilty of the charge of burglary on that basis.

[29] The charge of being in possession of cannabis arises as a result of the fact that the police executed a search warrant on your property on the afternoon of 19 June 2009. Inside your bedroom the police found a black leather bag containing eight grams of cannabis plant material. You said that the cannabis was yours and you were in possession of it to give away to friends.

[30] You also frankly admitted your involvement in the incident relating to the removal of the copper downpipes. You said that you had climbed onto the roof to remove the copper spouting so that you could sell it for cash.

[31] Normally the burglary alone would probably attract a community based sentence. In your case, however, you have a previous notation in the Youth Court for a burglary that occurred in 1998. You also have numerous offences for dishonesty, including shoplifting, unlawfully interfering with motor vehicles and being unlawfully in a building. In addition, you have been convicted of being in possession of instruments for the purposes of car conversion. Quite clearly you are no stranger to this kind of offending and that puts the burglary charge in a slightly different category. There is also the fact that the only realistic sentence that can be imposed on you in relation to the burglary charge is one of imprisonment.

[32] On its own I would have adopted a starting point for the burglary charge of nine months imprisonment, although a starting point of 12 months could easily be justified.

[33] On its own the cannabis charge would not be serious either. The problem here is that you were on bail at the time of both the burglary and the cannabis charges. You were also still serving the previous sentence in relation to the other cannabis charge to which you pleaded guilty in November 2008. That really aggravates the seriousness of this new charge, because it shows that you decided to continue to be involved with cannabis even though you were still subject to a sentence of community work for a previous similar offence. That charge would therefore easily justify a further three months being added to the nine months on the burglary charge.

[34] A sentence of 12 months imprisonment on top of the sentence that I have selected for the methamphetamine charges would, however, result in a sentence that is too high having regard to issues of totality. I consider that the starting point in relation to the burglary and cannabis charges should be reduced to six months to reflect that fact.

[35] From that sentence I propose to deduct two months, or one-third, to reflect the fact that you pleaded guilty in the District Court. This leaves an end sentence in relation to those charges of four months imprisonment. I propose to add that sentence cumulatively to the sentence on the methamphetamine charges.

Sentence

[36] On the two methamphetamine charges, you are sentenced to three years four months imprisonment.

[37] On the charge of being in possession of the pipes, you are convicted and discharged.

[38] On the burglary charge, you are sentenced to four months imprisonment. That sentence is to be served cumulatively on the sentences that I have imposed on the methamphetamine charge.

[39] On the charge of being in possession of cannabis plant, you are sentenced to two months imprisonment. That sentence is to be served concurrently with all other sentences.

Order for destruction

[40] I make an order for the destruction of the pipes and the cannabis.