

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

CRI-2006-004-21727

THE QUEEN
Plaintiff

v

**DANIEL CRICHTON
HUNG TRUNG KHA**

Hearing: 18 December 2009

Appearances: Ms R Reed for Crown
Mr S Lance for Crichton
Ms M Dyhrberg for Kha

Judgment: 18 December 2009

SENTENCING REMARKS OF LANG J:

Solicitors:
Crown Solicitor, Auckland
Counsel:
Mr S Lance, Auckland
Ms M Dyhrberg, Auckland

[1] Mr Crichton and Mr Kha, the Crown laid an indictment against you containing several charges under the provisions of the Misuse of Drugs Act 1975. At the beginning of a trial on 5 October 2009, Mr Kha, pleaded guilty to being in possession of 29.5 grams of methamphetamine and being in possession of a methamphetamine pipe. At the conclusion of the trial the jury found you guilty on a charge of being in possession of 81.2 grams of methamphetamine for supply and a representative charge of supplying methamphetamine.

[2] Mr Crichton, the jury acquitted you on the two charges on which they found Mr Kha guilty, but it convicted you on a charge of being in possession of 6.1 grams of methamphetamine for the purposes of supply. The jury acquitted Mr Kha on that charge.

[3] All of those charges arose out of a single incident that occurred in the early hours of 19 October 2006.

[4] Mr Kha, you also pleaded guilty to six further charges of supplying methamphetamine shortly after another trial on those charges was due to begin.

[5] As you both know, the maximum sentence on the charges of being in possession of methamphetamine for supply and supplying methamphetamine is one of life imprisonment.

[6] As I have advised counsel, I am dividing this hearing into two parts. In the first part I propose to deal with the charges that arose out of the incident on 19 October 2006. I will complete my sentencing so far as you are concerned, Mr Crichton, during this part of the hearing. The remaining charges to which Mr Kha pleaded guilty arise from offending that is not directly related to the incident on 19 October 2006.

[7] So far as you are concerned, Mr Kha, I will do no more during the first part of the hearing than fix the starting point that is appropriate in respect of your offending on 19 October 2006. I will then review that starting point for totality

purposes in the second part of the hearing, when I will consider the sentence to be imposed in respect of the remaining charges to which you have pleaded guilty.

The offending on 19 October 2006: Facts

[8] At about 4 am on 19 October 2006 a police patrol vehicle observed a vehicle turn left onto Remuera Road from Broadway in Newmarket. The police officers in the vehicle then stopped that vehicle in order to carry out a routine check. They found that you, Mr Kha, were driving that vehicle and that you, Mr Crichton, were sitting in the front passenger seat of the vehicle. The police officers asked you, Mr Kha, for your details, and you gave them false details. When they discovered this they arrested you and proceeded to search you and your vehicle. At that point they found a bag with what later transpired to be 29.1 grams of methamphetamine secreted on your person. They also found a methamphetamine pipe. You pleaded guilty at the beginning of your trial on 5 October 2009 to the charges arising from these discoveries.

[9] When the police searched your vehicle they found several items. In the footwell of the front passenger seat in which Mr Crichton was sitting the police found a sunglasses case. Inside this case was a container with 6.1 grams of a substance inside. This substance was later found to contain methamphetamine. The jury ultimately found you guilty on that charge, Mr Crichton, but acquitted Mr Kha on that charge.

[10] In the back seat of the vehicle the police found a bag. Inside the bag they found a bag with 81.2 grams of methamphetamine inside it. They found also cash totalling \$96,250 in various denominations. Inside the bag the police also found various items of drug dealing paraphernalia

[11] You were convicted, Mr Kha, of being in possession of that methamphetamine. The jury also found you guilty of supplying methamphetamine. The Crown based its case so far as this case is concerned on the cash that was found in the bag. It contended that that represented the proceeds of the sale of methamphetamine over the past few days.

Sentencing Act 2002

[12] The Court in sentencing you must have regard to the purposes and principles of sentencing in the Sentencing Act 2002. In any case involving dealing in methamphetamine a deterrent sentence is called for. As you must know, methamphetamine is one of the prime drivers of crime in our society. It destroys families, wrecks homes and causes people to commit serious crimes to finance their habits. The higher up the chain a drug dealer is, the more severe the sentence is. That is the only way in which the courts can play any part in stemming the tide of methamphetamine that is such a significant problem now in our society. Issues of deterrence and denunciation are therefore to the forefront.

[13] Importantly, also, however, is the need to select a sentence that is broadly consistent with sentences imposed in other cases. The only way in way a criminal justice system can operate in a way that retains the confidence of all those who come into contact with it is to ensure that it is applied in an even-handed and consistent manner.

Starting point

[14] The leading case, as all counsel recognise, in methamphetamine offending is the decision of the Court of Appeal in *R v Fatu* [2006] 2 NZLR 72. In that case the Court identified various bands within which offending of this type may come. Those who are involved in the supply, possession for supply or manufacture of up to five grams of methamphetamine face a starting point of two to four years imprisonment. Those who have between five and 250 grams of methamphetamine will have a starting point within the range of three and nine years imprisonment.

Mr Crichton

[15] In the present case, Mr Crichton, you clearly fall within the twilight zone between the first and second bands. Your counsel points out that the Crown has never analysed the methamphetamine to identify the purity of it. He therefore

submits that you may well fall into the top end of the first band rather than the bottom of the second.

[16] This is an issue that does not really affect the approach that the Court takes. The precise quantity of methamphetamine is only one of the issues that the Court must look at. What the Court is really concerned to do is to identify the overall culpability of the offender. The amount of methamphetamine that an offender may have dealt in or been in possession of is a very important factor, but it by no means the only factor.

[17] In the present case you were clearly a dealer at the lower end of the chain. There was no drug-related paraphernalia such as point bags or scales found in your possession. You were simply found with a bag containing a substance that weighed more than 6.1 grams and that contained methamphetamine.

[18] I consider that an appropriate starting point in that context is one of three years imprisonment.

Mr Kha

[19] Mr Kha, your offending falls into a very different category. The methamphetamine in the bag on the back seat of the vehicle weighed 81.2 grams. That alone put it well into the second band identified in *Fatu*. The fact that you had more than \$90,000 in cash means that you must also have sold a significant amount of methamphetamine over the past few days. The Crown puts it at around 100 grams. It is difficult to be precise but I consider that around 100 grams is an appropriate figure. This means that you had either dealt in or were found in possession of around 200 grams of methamphetamine.

[20] This puts you towards the top end of the second band. I accept the Crown's submission that it attracts a starting point of eight years imprisonment having regard to all factors. Your counsel does not greatly demur with that assessment. You were clearly a busy dealer. You had all the trappings of a dealer selling methamphetamine

at the retail level and the amount of cash involved speaks volumes, as does the quantity of methamphetamine that was found in your possession.

Mr Crichton - Aggravating factors

[21] Mr Crichton, I now need to consider whether the starting point that I have selected should be increased to reflect aggravating factors personal to you. In this context the Crown refers to the fact that you have a number of previous convictions for drug-related offences. These commenced some time ago with a cannabis related offence. I put that to one side for present purposes.

[22] More importantly, however, is the fact that between October 2004 and September 2006 you were convicted on several occasions of methamphetamine-related charges. I accept that these may not have been particularly serious, because they were dealt with either by way of fine or a sentence of community work.

[23] The present case clearly represents a significant shift in direction for you. None of your previous offending had an element of drug dealing about it. Rather, it appears to have been simple possession of methamphetamine or utensils and not possession for supply. Clearly, however, you have been warned by your earlier sentences that the Court took a dim view of people who involve themselves in methamphetamine. I consider the fact that virtually immediately after most of the offending on which you had been sentenced in 2006, you became involved in this offending is a significant factor. It actually makes this offending more serious because of the fact that it means that you have ignored previous sentences of the Court. For that reason I propose to increase the starting point that I have selected by four months to represent that fact.

[24] I now need to consider whether I should reduce the end starting point that I have selected to reflect factors personal to you. Obviously I cannot give a credit for a guilty plea because you did not plead guilty to the charge on which you were ultimately found guilty. Having said that I have some sympathy with the submission of your counsel who points out that that charge was not individually identified in the indictment until the Crown made an application to add it at the commencement of

the trial. For that reason it can hardly be said that you ought to have pleaded guilty to it much earlier.

[25] Having said that, you did have the opportunity to plead guilty to it once it had been added to the indictment. Had you done that, I would have been able to give you a very significant discount based on the authority of the recent decision of the Court of Appeal in *R v Hessel* CA 170/2009 2 October 2009. It is a pity that you did not take that opportunity, Mr Crichton, because the end result may well have been significantly different.

[26] There is a real dispute between your counsel and counsel for the Crown regarding the issue of mitigation. You seek to receive credit for the role that you played in returning the medals that were stolen in the well-publicised burglary of the Army Museum in Waiouru. There is no real dispute that you assisted in the return in the set of medals known as “the Hudson Medals”. You make it clear, and I accept, that you never had anything whatsoever to do with the theft of the medals. That fact must be obvious from the fact that you were in prison at the time that the burglary occurred.

[27] Secondly, your counsel makes it clear that you have never sought monetary reward for your actions. I accept that also. You say that you were motivated solely by your desire to return to this nation items of very valuable cultural and heritage significance.

[28] The Crown takes the view that you are not entitled to any further credit for this because you have already received credit in another form for it. It says that because the police consented to you being released on bail after this Court and the Court of Appeal had ruled that you were not entitled to have bail. The Crown says that this was sufficient reward for your actions and that this Court should not give you any further credit.

[29] Your counsel maintains that the police had their own reasons for wanting you to be released. He says that they wanted you to be released so that you could assist

them to recover the remainder of the medals following your release. I have to say that that is an interpretation that is open on the material before me.

[30] I take the view that some credit must be given for this factor over and above the fact that you received bail. Bail is not a form of credit in itself. It merely means that a person has the ability to spend the time waiting for trial in the community albeit, in your case, subject to strict conditions. It does not in any way represent a credit to be given towards the final sentence that the Court must impose.

[31] I accept that you became involved in the endeavour to have the medals returned out of your own wish to ensure that that occurred and not for any monetary or other reward. I accept also that the role that you have played has brought you into a degree of prominence, and that misunderstanding may have occurred within the prison environment in which you were living at the time that this occurred and also after your remand in custody following the jury's verdict.

[32] I also bear in mind the fact that you are now 40 years of age. Clearly you have very strong family support. Many members of your whanau are here today. You have three young children whom you obviously care very much for and a partner who is very supportive. I have read letters from you and your family expressing in heartfelt terms your good qualities as a family man.

[33] You also point out that, over the 18 months that you have been on bail, you have not committed any further offending and that this is a marked departure from your earlier life in which you accumulated convictions at an extraordinarily rapid rate.

[34] In the end, the attitude taken by the Crown in relation to the remainder of the medals really precludes me from giving you credit for that because, although you assert that you had an active involvement in that and the thief himself has written a letter saying that your actions were certainly instrumental at the beginning, I cannot reach any definite conclusion on that. Nevertheless, on the material that I have seen I accept that you are entitled to a reduction of the starting point that I have selected and I propose to reduce your sentence by nine months to reflect that fact.

Sentence – Mr Crichton

[35] On the charge of being in possession of methamphetamine for supply, you are sentenced to two years seven months imprisonment.

Facts: Operation Washington charges

[36] Mr Kha, I now turn to the offending that arose out of the police operation known as Operation Washington. This took place between 11 May 2007 and 28 June 2007. During that period the police intercepted communications between yourself and three other people. By this stage you were in custody on remand following your arrest on the Newmarket charges. Notwithstanding that fact, you were able to play a full part in the operations of the group through use of a cellphone that you had illicitly obtained and kept within the prison. The four of you dealt in ounce amounts of methamphetamine. Your part in the syndicate was as the go-between. You organised the supply of methamphetamine from one person to another and your then partner, Ms Nguyen, was the person on the outside who physically organised delivery: *R v Nguyen* HC AK CRI 2008-092-2364 1 December 2009 Allan J.

[37] You accept that during the course of the operation, through your involvement, six discrete supplies of methamphetamine occurred to a third party. These resulted in methamphetamine to a total weight of 1.1 kilograms being supplied. Both counsel accept that this puts you well into the fourth band identified in *Fatu*.

[38] Ms Nguyen has now pleaded guilty and been sentenced. She had dealt in nearly 1.4 kilograms of methamphetamine because she was involved in some supplies in which you did not participate. The Judge who sentenced her selected a starting point of 13 years imprisonment.

[39] The Crown acknowledges that, in terms of weight, your offending was less culpable. It submits, however, that you were fully involved generally in the

activities of the syndicate and that the Court should not draw any real distinction between yourself and Ms Nguyen.

[40] I have also been assisted by the fact that counsel have provided me with the sentencing notes of other persons who dealt in methamphetamine further down the chain, albeit in large quantities. In particular, I have been assisted by the sentencing notes in respect of Mohammed Khan and Rajneel Diran.

[41] In *R v Khan & Ors* HC AK CRI-2008-0920002364 15 October 2009 Williams J, Mohammed Khan pleaded guilty to supplying around two kilograms of methamphetamine. He had obtained that from the person to whom you supplied methamphetamine. The Judge in that case took a starting point of 16 years imprisonment. Rajneel Diran pleaded guilty to supplying 800 grams of methamphetamine, and the Judge selected a starting point of 12 years imprisonment.

[42] I have also been assisted by the sentencing notes in *R v Li* HC AK CRI-2006-091-008458 25 August 2009 Asher J, which was a sentencing that occurred in another police operation. Mr Li had been found guilty of supplying 1000 grams of methamphetamine in the role of a middleman. The Judge in that case had taken a starting point of 12 ½ years.

[43] You say that you were being used by Ms Nguyen. The Crown does not accept that that is the case. I consider, however, that given the fact that she dealt physically with more methamphetamine I should distinguish between you to some extent. I therefore select a starting point of 12 ½ years on the charges arising out of Operation Washington.

Totality

[44] This means that I have starting points of 12 ½ years and 8 years in relation to the Operation Washington and Newmarket offending. Obviously a sentence of 20 years six months is out of the question, because the end result of your drug dealing was that you ultimately handled a little bit less than did Ms Nguyen. For that reason it is necessary for me to have regard to issues of totality. When I do this, I consider

that a reduction of seven years is warranted. This means that I have selected an end starting point of 13 ½ years imprisonment.

Aggravating Factors

[45] I now need to consider whether I increase that starting point to reflect aggravating factors. Here, in my view, there are two.

[46] The first is the fact that you have reasonably extensive convictions in Australia, albeit during the 1990's, on drug related charges. You have served terms of imprisonment in Australia for that. Of even greater importance, however, is the fact that you were prepared to offend whilst in custody on remand on serious drugs charges. I consider that this is a gravely aggravating matter and warrants an uplift of one year. I add a further six months to take into account the fact that you have previous convictions. This means that I am left with an end starting point of 15 years imprisonment.

Mitigating factors

[47] I now need to consider the extent to which that starting point should be reduced to reflect mitigating factors.

[48] There is nothing in your personal circumstances, other than your guilty pleas, to warrant any reduction. You appear for sentence at the age of 38 years. Your criminal record shows that you have been involved in drug dealing in both New Zealand and Australia for a considerable period. Indeed, it seems to have formed the basis of your work life. You also have issues with gambling, and that is not surprising in this context. Having said that, I accept that you do not overtly display any of the trappings of the money that you may have made selling drugs. Your significant drug habit means probably that your profits have been eaten away by the drugs that you have consumed over the years.

[49] The only matter for which I can give you any significant discount is your guilty pleas. They came, in both cases, very shortly before trial. In terms of the

decision of the Court of Appeal in *R v Hessel*, you would probably only be entitled to a discount of around ten per cent. Significantly, however, another Judge had earlier indicated to those accused of offending arising out of Operation Washington, that pleas before trial would attract a discount of around 15 per cent. Other offenders have received the benefit of that indication, notwithstanding late pleas of guilty. I think that it would be wrong to adopt a different approach in your case. For that reason I propose to adopt a factor of 15 per cent to reflect your guilty pleas.

[50] This means that your sentence is reduced by two years three months to reflect your guilty pleas.

[51] This leaves an end result of 12 years nine months imprisonment.

Minimum term

[52] I also need to consider whether or not to sentence you to a minimum term of imprisonment. I have that power under s 86 of the Sentencing Act 2002 because I have sentenced you to a sentence of more than two years imprisonment. I can only do that, however, if I am satisfied that that is necessary for any or all of the purposes set out in s 86(2) of the Act and I will list those. They are:

- 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.

[53] In the *Khan* case the offenders were ordered to serve minimum terms of one-half of their sentence. In the case of Mr Li, he was ordered to serve a minimum term of five years imprisonment from an end sentence of 11 years nine months. No

minimum term was imposed in the case of Ms Nguyen, although it is not difficult from reading the Judge's sentencing remarks in that case to work out why that was.

[54] I consider that the circumstances of your offending meet all of the criteria in s 86(2). In particular, I consider that the fact that you were prepared to continue to engage in very serious drug-related activity whilst in custody on remand is a factor that the Court simply cannot ignore. For that reason I propose to make an order that you serve one-half of the end sentence that I have imposed.

Sentence

[55] I deal first with the Newmarket offending. On the charge of supplying methamphetamine and being in possession of methamphetamine for supply, you are sentenced to eight years imprisonment. Those sentences are to be served concurrently with all other sentences.

[56] On the charge of being in possession of a pipe, you are convicted and discharged.

[57] So far as the Operation Washington sentences are concerned, on each of the charges of supplying methamphetamine you are sentenced to 12 years nine months imprisonment. All of those sentences are to be served concurrently with each other and with the other sentences that I have imposed.

[58] I direct in relation to the Operation Washington sentences that you are to serve a minimum term of six years four months imprisonment before being eligible to apply for parole.

Orders for destruction and forfeiture

[59] I make an order for the destruction of any drugs and drug-related paraphernalia that the police discovered when they searched you, your vehicle or your premises.

[60] I also direct that the cash that was found in your possession at the time of the Newmarket offending be forfeit.

Lang J