

IN THE COURT OF APPEAL OF NEW ZEALAND

CA739/2009
[2011] NZCA 90

BETWEEN SHANE ANDREW ELLIS
Appellant

AND THE QUEEN
Respondent

Hearing: 8 February 2011

Court: Glazebrook, Arnold and Randerson JJ

Counsel: T Ellis and G Edgeler for Appellant
G J Burston, M F Laracy and S K Barr for Respondent

Judgment: 23 March 2011 at 3 p.m.

JUDGMENT OF THE COURT

The appeal against conviction and sentence is dismissed.

REASONS OF THE COURT

(Given by Randerson J)

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Introduction

[1] Following a jury trial in the High Court at Wellington before Mallon J, the appellant was convicted of three counts of importing methamphetamine. He was sentenced on 30 October 2009 to nine years imprisonment with a minimum term of four and a half years.¹ He now appeals against both conviction and sentence.

[2] The appeal against conviction is advanced on two principal grounds:

- (a) The trial was unfair because it was conducted contrary to certain Imperial statutes and s 25 of the New Zealand Bill of Rights Act 1990 in that the appellant was tried in the High Court in Wellington by a jury unrepresentative of the population and by a jury not of his peers.
- (b) The verdicts were unreasonable or cannot be supported by the evidence in that there was insufficient evidence to identify the appellant as the person seen by an accomplice in the Woolworths carpark at Tawa.

[3] In respect of the appeal against sentence, it was submitted that a lower starting point should have been adopted to more fairly reflect the appellant's lesser culpability than others involved in the importation.

Background facts

[4] The appellant was one of a number of persons convicted as part of a common enterprise orchestrated from within Rimutaka Prison to import methamphetamine from Thailand. The Crown case was that the drug was concealed within cosmetic

¹ *Ellis v R* HC Wellington CRI-2007-085-6245, 30 October 2009.

containers and posted to a variety of addresses in New Zealand. Orders and payments were arranged with persons in Thailand and funds transferred from New Zealand to Thailand to effect the purchases. Over several months in 2007, eleven packages containing approximately 980 grams of methamphetamine were received by various recipients in the Wellington, Auckland and Whanganui regions. The importations were not detected until mid-2007 when New Zealand Customs and the police intercepted a package which was made the subject of a controlled delivery.

[5] According to the evidence, the common enterprise involved three syndicates connected through Rimutaka prisoner Mr Sungsuwan and his former partner Ms Paetmuangjan (referred to at trial as “Joy”). A total of nine people were charged as a result of the police investigation although Mr Sungsuwan escaped prosecution as he had been deported before the offending was detected.

[6] The appellant was said to be involved in a syndicate known as the “New Client Syndicate”. He faced three charges as a party to the importation of methamphetamine by a Mr Nuku. Each charge related to separate importations in April and May 2007. A Mr Doar was also charged as part of this syndicate. Prior to the appellant’s trial, four co-offenders had pleaded guilty including Joy, Mr Nuku and Mr Doar.

[7] The New Client Syndicate involved Mr Nuku ordering methamphetamine from Joy by cellphone. She would forward the orders to the Thai suppliers who posted packages to nominated post office boxes in New Zealand. A cash deposit was paid by Joy prior to despatch of the packages from Thailand and she made final cash payments for them after each was received. The Crown case was that the appellant helped and encouraged Mr Nuku to import three of the packages, by passing funds to Joy to pay for them and by providing the post office box to which one of the packages was sent.

[8] At trial, Joy gave evidence that she had met the appellant seven to nine times between October/November 2006 and April 2007 at various locations around Tawa (including at the Woolworths supermarket carpark). At trial, the person Joy met was

referred to as “the Woolworths man”. On these occasions, her evidence was that she received the cash deposits or final payments for Mr Nuku’s importations.

[9] The essence of the second ground of appeal is that the Woolworths man Joy first met in October or November 2006 could not have been the appellant because he was on home detention at the time and was being closely monitored. If Joy was mistaken as to the identity of the man she met on the first occasion, then it is said this would cast doubt on her identification of the appellant on the subsequent occasions.

The conviction appeal

First ground – was the trial unfair?

[10] As already noted, the essence of the first ground of appeal is that the appellant did not receive a fair trial because he was tried in the High Court in Wellington by a jury which is said to be unrepresentative of the population and by a jury not of his peers. It was submitted that the geographical constraint placed on jury districts by s 5(3) of the Juries Act 1981 means that more than half of the population otherwise eligible for jury duty is incapable of being selected for a High Court jury. In addition, given the high percentage of members of the jury panel who are excused from jury service and the significant number of persons summoned who fail to attend, the effective jury pool is less than ten per cent of the possible pool of eligible jurors. As well, it is said that in the appellant’s case, his trial in the Wellington High Court meant that a significant sector of the population (namely the rural community) was excluded from jury service and that this was a further ground leading to an unfair trial.

[11] It was submitted on behalf of the appellant that, in consequence, the appellant did not receive a fair and public hearing by an independent and impartial court in terms of s 25(a) of the New Zealand Bill of Rights Act 1990. It was also submitted that the trial was conducted in a manner which was contrary to certain Imperial statutes which continue to have operation in New Zealand under the Imperial Laws Application Act 1988. These will be discussed further below.

Facts relevant to the first ground of appeal

[12] At the time of his arrest, the appellant was residing in Featherston. He was arrested on 14 November 2007 upon three informations laid indictably in the Masterton District Court. The informations were laid in that Court on the footing that it was the nearest by the most practicable route to the place where the informant believed the appellant might be found.² The informations alleged that the offences were committed in Wellington.

[13] The appellant appeared in the Masterton District Court on the day of his arrest. Various remands followed and on 26 March 2008 a District Court Judge remanded the appellant to the Wellington District Court for the hearing of depositions. Under the legislation then in force, a preliminary hearing for the purpose of depositions was ordinarily held at the court in which the relevant informations were filed,³ but the court could order that the preliminary hearing take place in some other court.⁴ The prosecutor had discussed the making of the order for depositions to be heard in Wellington with the appellant's then trial counsel (not present counsel). There was no opposition to the order being made.

[14] The preliminary hearing took place in the Wellington District Court between June and November 2008 resulting in the appellant being committed to the Wellington High Court for trial on 28 November 2008. We note that the statutory provisions then in force required that the appellant be committed for trial in the High Court at the place nearest to the committing court which, in this case, was the High Court in Wellington.⁵

Disposition of first ground of appeal

[15] The first ground of appeal can be disposed of in short order. The jury system for criminal trials in New Zealand is prescribed by the Juries Act 1981 and rules made thereunder.⁶ Jury districts are prescribed by geographical limits and a jury

² One of two options available under s 18(1) of the Summary Proceedings Act 1957.

³ Summary Proceedings Act 1957, s 155(1) (now s 167(1)).

⁴ Summary Proceedings Act 1957, s 155(2) (now s 167(2)).

⁵ Summary Proceedings Act 1957, s 168A(1)(b), (now s 184N(1)).

⁶ Jury Rules 1990.

panel is drawn on a randomly selected basis from eligible members of the electoral roll. A jury is then selected by a process of random balloting. There is no suggestion that there has been any departure from the Juries Act or relevant rules in the selection of the jury for the appellant's trial, nor that there is any ambiguity in the legislation. Secondly, it is not suggested that the jurors chosen for the appellant's trial were, as a matter of fact, anything other than objective and impartial.

[16] In these circumstances, it must be accepted that the appellant's trial, as regards the composition of the jury, has been conducted in accordance with law as prescribed by Parliament. It follows that we have no option but to dismiss this ground of appeal.

[17] Nevertheless, out of deference to the extensive argument presented on the appellant's behalf, we go on to respond to it.

What are the desirable characteristics of the modern jury?

[18] In its preliminary paper on juries issued in 1998,⁷ the Law Commission identified four goals of the jury selection process gleaned from the juries legislation in New Zealand and from the right guaranteed by s 25(a) of the New Zealand Bill of Rights Act to a fair and public hearing by an independent and impartial court. The four objectives identified were to obtain a jury which is competent, independent, impartial and representative of the community.⁸ In the present case, there is no challenge to the competence, independence or impartiality of the members of the jury who tried the appellant's case. The challenge is confined to a submission that the jury panel was not representative of the community.

[19] As the Law Commission observed, random selection operates at various points in the jury selection process and does not guarantee that any particular community will be represented on the chosen jury.⁹ In particular, random selection occurs both when the jury list is prepared and by the later balloting of jurors for each particular jury trial. In general, however, we accept the broad proposition that

⁷ Law Commission *Juries in Criminal Trials: Part One* (NZLC PP32, 1998).

⁸ At [232].

⁹ At [246].

representativeness is likely to be enhanced by a system which draws upon the widest practicable jury pool. We also accept the propositions advanced by the Law Commission that:¹⁰

... the diversity of perspectives of a jury drawn from representative sources is likely to enhance the competence of the jury as fact-finder, as well as its ability to bring its common sense judgment to bear on the case.

...

Secondly, regardless of the nature of the impact of different groups in the community participating in jury trials, representation further legitimises the jury system and the wider criminal justice system. The legitimacy of the jury system rests on concepts akin to those of democratic government. Public confidence in the fairness of the jury system may rest on all groups in the community participating in that system.

The Juries Act 1981

[20] Under the Juries Act, a jury list must be prepared for each jury district containing a random selection of the names of people who, according to the electoral roll, reside in the jury district and are registered as electors.¹¹ Counsel for the appellant produced data from Statistics New Zealand (without dispute from the Crown) which showed that, for the High Court jury districts current at the time of trial, 53 per cent of people aged 18 years and over on the electoral roll resided outside the jury district areas and were therefore ineligible for selection on the jury lists. On the basis of the recent extension of jury districts to 45 kilometres by the most practicable route from the relevant courthouse, this percentage has reduced slightly to 49 per cent. It should be noted that these statistics reflect the numbers rendered ineligible across the whole of New Zealand and are not necessarily reflective of the numbers who are ineligible in any particular High Court jury district. It is reasonable to infer that a larger proportion of those on the Electoral Roll would be eligible for jury service in the major cities and provincial centres where jury districts are more heavily populated and a larger part of the urban community would be contained within the boundaries of the jury district.

¹⁰ At [249]–[252].

¹¹ Juries Act 1981, s 9(3).

[21] Although the principal focus of the appellant's submissions was on the 53 per cent excluded from eligibility for jury service, counsel also drew attention to statistics showing that, of the remaining 47 per cent, 66 per cent are excused under s 15 of the Juries Act and a further 15 per cent do not answer the summons. The final result is that around eight to nine per cent of the population eligible for jury service become available at the courthouse for selection for any particular jury. The exact provenance of these statistics was not identified but we accept they came from official sources and may be taken as broadly accurate for present purposes. We understand that these statistics reflect the picture nationwide and include both High Court and District Court jury districts. For that reason, they are not necessarily reflective of the position in any particular jury district.

[22] Other statistics put before us demonstrated that, in 1999, some 91 per cent of eligible voters were enrolled on the electoral roll, although this percentage is also subject to local variation.¹²

Brief history of jury composition in New Zealand and the setting of jury districts

[23] In its 1998 preliminary paper, the Law Commission provided a brief overview of the history of New Zealand's jury composition.¹³

It is only relatively recently that the "juror franchise" has become more inclusive of all people in our community. In New Zealand in the 1840s, jurors were limited to male British subjects (excluding Māori) who were property owners of "good name and character". Women were first permitted to serve on juries in 1942 but only after notifying the registrar that they wished to do so. The Juries Amendment Act 1963 removed this disqualification, but until the Juries Amendment Act 1976 women could be excused solely on the ground of their sex. Māori were excluded from the ordinary jury system until 1962. Before then there was limited provision for all-Māori juries under the Juries Act 1908 ss 4 and 141 – 151 (repealed by the Juries Amendment Act 1962). Since the enactment of the Juries Act 1981, clergy, teachers, doctors, dentists, pharmacists, soldiers, sailors, and fire officers, among others, are no longer exempt from jury service (see the now repealed s 6 of the Juries Act 1908).

[24] More recently, the upper and lower age limits for eligibility for jury service have been changed. Any person over the age of 18 (not otherwise excluded by s 8 of

¹² Law Commission *Juries in Criminal Trials* (NZLC R69, 2001) at [138].

¹³ At [316].

the Juries Act) is eligible if registered on the electoral roll. The former upper limit of 65 years of age has now been removed, although any such person may apply to the Registrar to be excused.¹⁴

[25] The present appeal does not take issue with the representativeness of the jury list in terms of race or gender, but rather with geographical representativeness. Since the first Juries Ordinance of 1841, the jury system in New Zealand has always operated on the basis of jury districts defined by a specified distance from the place where the trial is to be held. The Juries Ordinance 1841 provided that “no man shall be summoned whose place of abode shall be distant more than 20 miles from the place at which the Court shall be holden”.¹⁵ The 20 mile limit persisted in successive legislation¹⁶ until an amendment in 1898 which reduced the distance to ten miles.¹⁷ The Juries Act 1908 continued the ten mile limit¹⁸ and it was not until amending legislation in 1951¹⁹ that the limit was increased to 15 miles or 25.35 kilometres. Even then, this applied only to Auckland, Wellington, Christchurch and Dunedin. The 15 mile/25.35 kilometre limit was extended to all jury districts in 1957²⁰ with a further increase to 30 kilometres in 1976.²¹

[26] As already noted, the 30 kilometre limit remained²² until a recent amendment which increased the distance to 45 kilometres with effect from 4 October 2010.²³

[27] Some indication of what Parliament considered to be relevant considerations in establishing jury districts may be gained from s 5(5) of the Juries Act. This provision applies if the application of the 30 kilometre boundary would mean that any place fell within two or more District Court jury districts. If this occurs, the Minister of Justice must fix the boundaries.²⁴ Section 5(5) sets out the matters to

¹⁴ Juries Act 1981, s 15(2)(aa) inserted with effect from 30 July 2000.

¹⁵ Section 7.

¹⁶ Juries Act 1868, s 7; Juries Act 1880, s 13.

¹⁷ Juries Act Amendment Act 1898, s 9.

¹⁸ Section 12.

¹⁹ Juries Amendment Act 1951, s 3.

²⁰ Juries Amendment Act 1957, s 2.

²¹ Juries Amendment Act 1976, s 3.

²² For completeness, it is noted that s 3(2) of the Juries Amendment Act 2001 provided for a 45 km jury district for the Kaikohe District Court.

²³ Juries Amendment Act 2008, s 4.

²⁴ Juries Act 1981, s 5(4).

which the Minister must have regard when fixing the boundaries. The Minister shall have regard to:

...

- (a) The convenience of the residents in getting to and from a Court for jury service; and
- (b) The principle in criminal cases that, so far as practicable, the jury should be drawn from the community in which the alleged offence occurred; and
- (c) The desirability of ensuring that, so far as practicable, the number of persons on the respective jury lists for different districts is roughly equal.

[28] Three points are evident from this provision. First, Parliament considered that residents should not be inconvenienced by having to travel substantial distances in order to be available for jury service. Secondly, the Minister is required to have regard to the principle that the jury should be drawn from the community in which the alleged offence occurred, not the place where the accused resides. As we later note, this principle is consistent with the drift of the Imperial statutes we later discuss. Thirdly, the principle that the jury should be drawn from the community in which the alleged offence occurred is only to be applied “so far as practicable”.

The Law Commission’s review of jury district boundaries

[29] The Law Commission’s preliminary paper discussed (amongst other things) the possibility of extending jury district boundaries. The report noted that rural populations were excluded from jury service because of the way in which jury districts were defined. The report also noted a suggestion that extending the jury district boundaries would increase the proportion of Māori eligible for jury service.²⁵

[30] In relation to these two issues, the paper stated:²⁶

There are two possible options which may meet this point: increasing the size of jury districts, or creating alternative jury districts in more rural areas. But the advantage of the present definition of jury districts is that there is likely to be a greater population to draw upon than in rural areas. Defining a new jury district would still, to some extent, be arbitrary. Whether jury district boundaries are extended or new ones created, greater cost and effort

²⁵ At [288].

²⁶ At [289].

will be required of those who live in the outer edges of jury districts or in sparsely populated rural areas.

[31] In 2001, the Law Commission delivered its final recommendations on this issue.²⁷ In discussing the issue of jury district boundaries, the Law Commission noted that the boundaries had not been altered since 1976 despite the very considerable improvement in roading and increase in car ownership. As it had done in 1998, the Law Commission emphasised that increasing the boundaries would not materially increase Māori representation. Whether extended boundaries would improve the representation of rural people was not directly discussed. Based largely on pragmatic considerations, the Law Commission concluded:²⁸

... we consider that it is reasonable to expect people to travel further now than in 1976, especially if it helps to spread the burden of jury service among more people. The exact extent of the boundary must necessarily be arbitrary, but we suggest 45 kilometres as being a reasonable distance to travel.

[32] It is evident that the Law Commission did not have any major concerns about the representativeness of jury lists in New Zealand. Although it recommended a 50 per cent increase in the geographical boundaries, it did not consider any further extension was needed. Practical considerations such as convenient travelling distances were taken into account. The Law and Order Select Committee considering the Criminal Procedure Bill 2004 (from which the boundary extension to jury districts emanated) did not discuss the rationale for the extension of jury district boundaries in its report.

The meaning of the expression “trial by one’s peers”

[33] Counsel for the appellant relied on various Imperial statutes in submitting that it was a basic principle of law that a person facing criminal charges was entitled to a trial by his or her peers.²⁹ While these statutes refer to due process according to law, only two of them make any direct or indirect reference to trial by one’s peers. Chapter 29 of the Magna Carta provides:

²⁷ Law Commission *Juries in Criminal Trials* (NZLC R69, 2001).

²⁸ At [151].

²⁹ Statute of Westminster the First 1275, chapter 1; Magna Carta 1297, chapter 29; Criminal and Civil Justice Act 1351, chapter 4; Civil and Criminal Justice Statute 1354, chapter 3; and the Due Process of Law statute 1368, chapter 3, all of which apply in New Zealand by virtue of s 3 of the Imperial Laws Application Act 1988.

No freeman shall be taken or imprisoned or disseised of his freehold, or liberties, or free customs, or be outlawed, or exiled, or any other wise destroyed; nor will we not pass upon him, nor condemn him, but by *lawful judgment of his peers*, or by the law of the land

(Emphasis added.)

[34] We agree with the observations made by the Law Commission in its preliminary paper that the term “peers” was used in the Magna Carta in a general sense of a trial by one’s social equals.³⁰ As the Law Commission noted, at the time the Magna Carta was signed, jurors were more akin to witnesses than triers of fact and so were required to have personal knowledge of the alleged crime. Necessarily, members of the jury in earlier times were drawn from the place where the crime was committed. But, in no sense could juries at that time be considered impartial and independent, requirements which are of the essence of the modern jury.

[35] Perhaps of greater significance, however, is the concept of trial by persons of the same neighbourhood where the crime has been committed. This principle is reflected in Chapter 4 of the Criminal and Civil Justice Act 1351 which speaks of trial “by indictment or presentment of good and lawful people of the same neighbourhood where such deeds be done ...”. As far as we have been able to ascertain, the 1351 Act deals with the equivalent of a grand jury rather than a petit jury but the concept of trial by persons from the place where the crime was committed developed in respect of petit juries as well.

[36] In its preliminary paper, the Law Commission outlined the modern rationale for that principle:³¹

The use of local jury districts, centred upon a jury court, has parallels with the boundaries of electoral districts and the election of constituency members of Parliament to represent local interests. A similar principle is in operation: people have a strong interest in the administration of criminal justice in their own local community, and their interests and sense of community values should be represented on local juries.

[37] The principle was recently restated by this Court in *R v Foreman* in the context of an application for change of venue:³²

³⁰ At [265].

³¹ At [268].

³² *R v Foreman* [2008] NZCA 55.

[10] The starting point is that s 5(5) of the Juries Act 1981 recognises the principle that “so far as practicable” a jury should be drawn from the community in which the alleged offence occurred. The reason for this fundamental principle is the longstanding notion that one should be tried by a jury of one’s “peers”. It also better enables persons from the particular area to attend and hear for themselves a case in which they may have a particular interest.

[38] Section 5(5)(b) of the Juries Act reflects this principle. It did not appear in the preceding legislation but has clearly been an accepted principle of New Zealand law for some time.³³

[39] While acknowledging the longstanding principle of trial in or near to the place where the crime was committed, this general principle is heavily qualified and affected by essentially practical considerations. These include:

- (a) The availability of courtrooms equipped with jury trial facilities.
- (b) The difficulty which can sometimes arise in establishing any one place where the crime was committed (a matter we discuss further below).
- (c) The need to accommodate the different circumstances which may apply to other accused in a multi-accused trial.
- (d) The possibility that an informant could exercise the option under s 18(1) of the Summary Proceedings Act to lay the information in the court nearest to the place the informant believes the defendant may be found.
- (e) The possibility that the preliminary hearing or place of committal may be moved to another court under s 167 of the Summary Proceedings Act.
- (f) The possibility of a change of venue being ordered under s 322 of the Crimes Act 1961 in order to secure a fair trial. (In this respect it is often argued on behalf of an accused that local publicity might be so adverse that a fair trial cannot be held in the area where the crime has been committed.)

[40] Just as significantly, there is no necessary connection between the principle that the trial should ordinarily take place near to where the crime was committed and an accused receiving a fair trial by an independent and impartial jury. In *R v Cornelius*³⁴ this Court dealt with a submission that a jury’s verdict could not be relied upon when, in error, the jury list was drawn from only part of the relevant jury

³³ See for example *R v Leggatt* (1901) 19 NZLR 317 (SC); *Re Maxwell* [1933] NZLR 110 (SC).

³⁴ *R v Cornelius* [1994] 2 NZLR 74.

district. The district included Whangarei and three more rural electorates, one of which included the town of Kerikeri where the crime had been committed. With reference to arguments based on Magna Carta, the New Zealand Bill of Rights Act, s 5(5)(b) of the Juries Act and other enactments, Cooke P observed:³⁵

Important though these certainly are – and in our opinion their practical recognition is among the most important judicial duties – they do not seem to us to have much bearing on the present case. The accused was tried by a qualified and apparently impartial jury of his peers (ie equals); they were all drawn by chance and at random from a quite closely populated area within the defined jury district; he had his ordinary rights of challenge, with and without cause, of individuals called as jurors; and it would have been unlawful and impracticable to draw the jury from the community of the alleged crime in Kerikeri, which is about 100 km from Whangarei. The case has to be seen in perspective without the distortion of emotive arguments.

[41] The Court went on to conclude that s 33 of the Juries Act could be called in aid and that the verdict had not been affected by the error. This provision is not relied upon in the present case. We observe, however, that if a failure to follow the procedures set out in the Act does not necessarily render a verdict unsafe, it is difficult to see how following them could do so.

Representativeness – the overseas authorities

[42] There is little New Zealand authority on the representativeness of jury panels but counsel referred to a number of authorities in the United States, the United Kingdom and Commonwealth countries. In the United States, there is a substantial body of jurisprudence supporting the proposition that the selection of a petit jury from a fair cross-section of the community is an essential component of the Sixth Amendment right “... to a public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law ...”.³⁶

[43] It is sufficient if we refer to three of these authorities. In *Taylor v Louisiana*, the Supreme Court of the United States considered a statute which provided that no woman was to be selected for jury service unless she had previously filed a written

³⁵ At 82.

³⁶ *Smith v Texas* 311 US 128 (1940); *Thiel v Southern Pacific* 328 US 217 (1946); *Taylor v Louisiana* 419 US 522 (1975); *People v Wheeler* 583 P 2d 748 (Cal 1978); *Duren v Missouri* 49 US 357 (1979).

declaration conveying her wish to be included in the jury pool. The Supreme Court found that although the jury selection system did not disqualify women from jury service, the systematic impact was that only a very few women, grossly disproportionate to the number of eligible women in the community, were called for jury service. In the case at hand, no women were on the “venire” from which the petit jury was drawn. The Court found that the statute was in violation of the Sixth Amendment. In a much cited passage, the Supreme Court said:³⁷

The purpose of a jury is to guard against the exercise of arbitrary power – to make available the commonsense judgment of the community as a hedge against the overzealous or mistaken prosecutor and in preference to the professional or perhaps over conditioned or biased response of a judge. *Duncan v Louisiana*, 391 U.S., at 155-156, 88 S.Ct., at 1450-1451. *This prophylactic vehicle is not provided if the jury pool is made up of only special segments of the populace or if large, distinctive groups are excluded from the pool.* Community participation in the administration of the criminal law, moreover, is not only consistent with our democratic heritage but is also critical to public confidence in the fairness of the criminal justice system. Restricting jury service to only special groups or excluding identifiable segments playing major roles in the community cannot be squared with the constitutional concept of jury trial. “Trial by jury presupposes a jury drawn from a pool broadly representative of the community as well as impartial in a specific case. ... [T]he broad representative character of the jury should be maintained, partly as assurance of a diffused impartiality and partly because sharing in the administration of justice is a phase of civic responsibility.” *Thiel v. Southern Pacific Co.*, 328 U.S. 217, 227, 66 S.Ct. 984, 90 L.Ed. 1181 (1946) (Frankfurter, J., dissenting).

(Emphasis added.)

[44] The Supreme Court went on to accept that states were free to grant exemptions from jury service to individuals in the case of hardship, incapacity or those engaged in particular operations without posing any substantial threat to the remaining pool of jurors being representative of the community.³⁸

[45] In *Duren v Missouri*, the Supreme Court gave further guidance as to the circumstances in which there will be a prima facie violation of the fair cross-section requirement. It was said that the defendant must show:³⁹

...(1) That the group alleged to be excluded is a “distinctive” group in the community; (2) that the representation of this group in venires from which

³⁷ At 530.

³⁸ At 534.

³⁹ At 365.

juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due to systematic exclusion of the group in the jury-selection process.

[46] The Supreme Court in the subsequent case of *Lockhart v McCree*⁴⁰ emphasised the restricted scope of the fair cross-section requirement. First the Court confirmed that the fair cross-section principle had never been invoked to invalidate the use of challenges to prospective jurors (whether for cause or on a peremptory basis) or to require that petit juries, as opposed to jury panels, reflect the composition of the community at large. The Court acknowledged that the limited scope of the fair cross-section requirement was a “direct and inevitable consequence of the practical impossibility of providing every criminal defendant with a truly representative petit jury”.⁴¹

[47] The Supreme Court clarified that the cases where a violation of the Constitution had been made out on the basis of the fair cross-section principle had been restricted to the exclusion from jury service of large groups of individuals on the basis of some “immutable characteristic such as race, gender, or ethnic background, undeniably [giving] rise to an appearance of unfairness”.⁴²

[48] Finally, the Supreme Court in *Lockhart* explained the relationship between the fair cross-section principle and jury impartiality in these terms:⁴³

In our view, it is simply not possible to define jury impartiality, for constitutional purposes, by reference to some hypothetical mix of individual viewpoints. Prospective jurors come from many different backgrounds, and have many different attitudes and predispositions. But the Constitution presupposes that a jury selected from a fair cross section of the community is impartial, regardless of the mix of individual viewpoints actually represented on the jury, so long as the jurors can conscientiously and properly carry out their sworn duty to apply the law to the facts of the particular case. ...

[49] In the United Kingdom, the leading authority is the decision of the Privy Council in *Rojas v Berllaque*.⁴⁴ At issue was whether fair trial rights guaranteed by the Constitution of Gibraltar were infringed by legislation under which jury service

⁴⁰ *Lockhart v McCree* 476 US 162 (1986).

⁴¹ At 174.

⁴² At 175.

⁴³ At 183.

⁴⁴ *Rojas v Berllaque* [2003] UKPC 76, [2004] 1 WLR 201.

was compulsory for men but voluntary for women. A majority⁴⁵ of the Privy Council allowed the appeal by the female plaintiff in a false imprisonment case and adopted the authorities in the United States on the fair cross-section principle. In consequence, the appellant's fair trial rights had been infringed. By virtue of a provision in the Constitution of Gibraltar, the Privy Council ordered that the offending legislation was to be construed in a constitutionally consistent manner such that jury service was to be compulsory for both men and women. A remedy of that type is not of course available in this country.

[50] The majority in *Rojas* disagreed with the approach adopted in one of the Privy Council's earlier decisions⁴⁶ and found that a non-discriminatory method of compiling jury lists was an essential ingredient of a fair trial by jury. In a key passage, the majority said:⁴⁷

It seems that in the *Poongavanam* case the appellant sought to equate a discriminatory jury list with a lack of impartiality in the selected jury. A similar approach was adopted on behalf of Ms Rojas in the present case. This approach, concentrating on the requirement of impartiality, all too easily distracts attention from another, fundamental requirement of jury trial. This requirement is an essential feature upon which jury trial depends for its very validity. Since juries are chosen at random from jury lists, a non-discriminatory method of compilation of the jury lists is an essential ingredient of a fair trial by jury. This is inherent in the concept of a fair trial by an impartial jury. Fairness is achieved in the composition of a jury by random selection from a list which is itself fairly constituted. This is the "fair cross-section" principle underlying the American jurisprudence. It is a principle equally applicable to article 6(I) of the Convention of the Protection of Human Rights and Fundamental Freedoms and to corresponding constitutional guarantees, of which section 8 of the Constitution of Gibraltar is an instance. A jury list compiled on a basis which, without any objective justification, excludes from jury service virtually one half of the otherwise eligible population is a jury list compiled on a discriminatory basis. A jury list compiled on this basis is the antithesis of a fairly constituted jury list. Trial by a jury derived from such a list does not satisfy the constitutional requirement of a fair trial by an independent and impartial court.

[51] The minority⁴⁸ of the Board of the Privy Council declined to follow the United States jurisprudence on this topic and considered there was no violation of fair trial rights unless it could be demonstrated that the chosen jury was not

⁴⁵ Lords Nicholls, Millet and Walker.

⁴⁶ *Poongavanam v R* (unreported) Privy Council Appeal No 27 of 1989, 6 April 1992.

⁴⁷ At [14].

⁴⁸ Lords Hobhouse and Rodger.

impartial. There being no objective basis for fearing that the all-male jury would not be impartial, the appellant had failed to establish any infringement of her fair trial rights.

[52] For present purposes, there are two points of significance to be drawn from the majority judgment in *Rojas*. The first is that the relevant statutory provision was found to have unfairly discriminated against women. As such, it was obvious that a clearly identified and major societal group had been excluded. Secondly, the majority made it clear that the discrimination had taken place without any objective justification. As we later find, the geographical constraints in the present case do not clearly discriminate against any identified group in the community and also have an objective justification.

[53] In Canada, the courts have recognised the contribution which a representative jury panel makes to the selection of a competent and impartial jury and in helping to ensure confidence in the jury's verdict. But the Canadian courts have also recognised the practical limits to representativeness. The purpose of jury trials is discussed in a general sense in the Supreme Court's decision in *R v Sherratt*.⁴⁹ However, of more relevance for present purposes are two later decisions. In *R v Church of Scientology of Toronto*⁵⁰ the Ontario Court of Appeal considered a contention that the relevant juries legislation excluded non-citizens. The judgment of the Court was delivered by Rosenberg JA. In concluding that the fair trial rights guaranteed by the Canadian Charter were not violated, the Court emphasised that the right to a representative jury roll is not absolute in the sense that an accused is entitled to a roll representative of all the many groups that make up Canadian society. Rather, the right to a representative panel was said to be inherently qualified.

[54] The Court noted that the roll was selected from a discrete geographical district which itself may or may not be representative of broader Canadian society. The Court said:⁵¹

⁴⁹ *R v Sherratt* [1991] 1 SCR 509 at [30]–[35].

⁵⁰ *R v Church of Scientology of Toronto* (1997) 116 CCC (3d).

⁵¹ At [155].

What is required is a process that provides a platform for the selection of a competent and impartial petit jury, ensures confidence in the jury's verdict and contributes to the community's support for the criminal justice system.

[55] The Court also considered the United States jurisprudence on what constituted a “distinctive group”. Rosenberg JA hesitated to articulate a test of distinctiveness based on “some immutable characteristic” and preferred to deal with each case having regard to the purposes of the requirement of representativeness as identified by L’Heureux-Dubé J in *Sherratt*. As Rosenberg JA put it:⁵²

The essential quality that the representativeness requirement brings to the jury function is the possibility of different perspectives from a diverse group of persons. The representativeness requirement seeks to avoid the risk that persons with these different perspectives, and who are otherwise available, will be systematically excluded from the jury roll.

[56] The Court went on to find that:⁵³

The deliberate exclusion of distinctive groups based on characteristics such as race, sex, colour, religion or national origin might well infringe the requirement of a jury selected from a fair cross-section of the community. Exclusion of certain persons based upon their immigration status is simply not of that quality.

[57] More recently, the Supreme Court of Canada has again emphasised in *R v Find*⁵⁴ the practical limits of the justice system in furnishing a representative jury pool in a case dealing with allegations of bias against sex offenders. The judgment of the Court was delivered by McLachlin CJ. The Chief Justice described the two stages of the jury selection process adopted in Canada involving, first, the selection of a panel of prospective jurors and, secondly, the “in-court” process involving the selection of a trial jury from the previously prepared panel. These procedures, the Chief Justice said, were designed to furnish, so far as possible, a representative jury pool.⁵⁵

[58] The Chief Justice went on to say:⁵⁶

⁵² At [158].

⁵³ At [162].

⁵⁴ *R v Find* [2001] 1 SCR 863.

⁵⁵ At [19]–[20].

⁵⁶ At [28].

The ultimate requirement of a system of jury selection is that it results in a fair trial. A fair trial, however, should not be confused with a perfect trial, or the most advantageous trial possible from the accused's perspective. As I stated in *R v O'Connor*, [1995] 4 S.C.R. 411, 103 C.C.C. (3d) 1, 130 D.L.R. (4th) 235, at para 193, “[w]hat constitutes a fair trial takes into account not only the perspective of the accused, but the practical limits of the system of justice and the lawful interests of others involved in the process ... What the law demands is not perfect justice, but fundamentally fair justice.”

[59] We were not referred to any relevant authorities in Australia on this topic other than the general endorsement by the High Court of Australia in *Cheatle v R*⁵⁷ that the jury as a body of persons representative of the wider community was an essential feature or requirement of the jury system. In some Australian states, jury districts are not defined by a radius from the courthouse but people who reside at a place greater than defined distances from the Court may seek excusal.⁵⁸ In other states, the jury districts are defined by distance from the courthouse.⁵⁹

[60] It is interesting to note that in its 2007 report, the New South Wales Law Reform Commission recommended the establishment of jury districts defined by a radius from the court and gave, as possible examples, distances of 40 kilometres for metropolitan areas and 100 kilometres for regional courts.⁶⁰

Discussion of the representativeness issue

[61] We accept that a randomly selected and representative jury list is an important feature of the jury selection process in New Zealand. We are attracted to the description of the role of jury lists adopted by the Ontario Court of Appeal in the *Church of Scientology* case, namely that the jury list provides the platform for the selection of a competent and impartial trial jury. In particular, the goal of securing the benefit of a diversity of views in the trial jury is best served by a jury list which, as far as practicable, is representative of the community as a whole. We accept too

⁵⁷ *Cheatle v R* [1993] HCA 44, (1993) 177 CLR 541 at 560.

⁵⁸ South Australia (persons living more than 150 km from the Court); New South Wales (persons living more than 56 km away); Victoria (persons living more than 50 km outside Melbourne or 60 km from any other Court, may apply for excusal).

⁵⁹ In Western Australia the distances from the courthouse vary between 50 and 80 km (the latter for the more sparsely populated areas); in Queensland jury districts are generally set at about 20 km from the relevant court except in larger cities.

⁶⁰ New South Wales Law Reform Commission *Jury Selection* (Report 117, 2007) at [8.45] – [8.47].

that another purpose of a randomly selected and representative jury list is to assist in ensuring public confidence in jury verdicts and the criminal justice system generally.

[62] It follows that, in the words of the majority of the Privy Council in *Rojas*, if a significant proportion or segment of the population is excluded from eligibility for jury service on a discriminatory basis and without objective justification, the representativeness of the jury list may be diminished with the potential to compromise the desired aims of the jury system.

[63] This potential might arise where, for example, identified groups in the community were systematically excluded from jury service by reason of one of the established grounds of discrimination such as gender, ethnicity, or religious or ethical belief. The authorities in the United States and the United Kingdom have recognised the difficulties that may arise in cases of that character.

[64] But no authority has been cited for the proposition that geographical limitations on the boundaries of jury districts may compromise the representativeness of juries to such an extent as to give rise to a real risk of an unfair trial. Our own research has not revealed any case to support this proposition, but has brought to light one case where an argument based on geographical limitation of a jury district failed. The Court of Appeal of California concluded in *People v McDowell*⁶¹ that the exclusion by geographical limit of large rural areas in the San Bernadino County did not raise constitutional issues unless the limit resulted in discrimination against a particular racial, social or economic class.⁶² As here, no evidence was offered to demonstrate that jurors drawn from rural districts might react differently from urban dwellers.

[65] The overseas jurisprudence recognises that it is impossible to achieve complete representation of all sectors of the community⁶³ and that practical considerations must play their part in the selection of jury panels.⁶⁴ In common with

⁶¹ *People v McDowell* 27 Cal App 3d 864 (1972).

⁶² At 875.

⁶³ See, for example, *Thiel v Southern Pacific Co* 328 US 217 (1946).

⁶⁴ As reflected, for example, in *R v Church of Scientology* and *R v Find*.

other jurisdictions,⁶⁵ New Zealand has adopted a system of jury districts defined by geographical limits. This system has been in place from the outset of criminal jury trials in 1841. There are sound practical reasons for the adoption of such a system in a country of limited population with large rural areas which are relatively sparsely populated. The inconvenience for jurors of travelling large distances to the nearest courthouse has always been regarded as an important consideration for entirely understandable reasons.

[66] It is proper to assume that, in adopting geographical limits for jury districts, successive New Zealand Parliaments have been satisfied that jury lists randomly selected from persons registered on the Electoral Roll will be sufficiently representative of the community at large having regard to the practicalities of jury service in the New Zealand context. The recent extension of jury districts to a 45 kilometre radius from a courthouse by the nearest practicable route reflects Parliament's present view on this issue, reached after a thorough analysis by the Law Commission.

[67] The proposition advanced by the appellant's counsel in the present case demonstrates the lack of reality in his argument. When questioned about what it would mean for the conduct of jury trials in the High Court, counsel's answer was that jury trials could not take place anywhere in New Zealand until Parliament had adopted a system of defining jury districts which did not exclude rural areas. While asserting that it was not for counsel to devise an alternative, counsel offered the suggestion that there should be no geographical limits on jury districts. Anyone concerned about the cost or inconvenience of excessive travelling distances should be entitled to be excused on that ground. These are essentially law reform issues upon which it is not appropriate for us to comment. It is sufficient to note that the ultimate consequence of counsel's argument would be that High Court jury trials could not proceed anywhere in the country even though there is no evidence that the jury in the appellant's trial was anything other than impartial or independent.

⁶⁵ For Australia (see above n 58), in England and Wales each Crown Court has a catchment area for jurors that is defined by reference to postcode districts: for discussion see United Kingdom Ministry of Justice *Diversity and Fairness in the Jury System* (2007).

[68] In the appellant's case, counsel's proposition was that trial in the Wellington High Court (some 64 kilometres by road from the appellant's residence in Featherston) meant that he was not tried by his peers and that his trial was unfair by excluding persons from rural areas from eligibility on the jury list. This argument was advanced without recognition of several important facts:

- (a) The absence of any courthouse equipped for High Court jury trials in the locality of Featherston or Masterton.
- (b) The acquiescence of appellant's counsel in moving the preliminary hearing to the District Court in Wellington (with the necessary statutory consequence of a committal to the High Court in Wellington).
- (c) The absence of any evidence that jurors drawn from rural areas would be likely to have different views from those of city dwellers in relation to the importation of class A drugs.
- (d) The absence of any suggestion that the trial jury actually chosen lacked impartiality or independence.

[69] The proposition that those living in the rural community constitute an identifiable and homogeneous group likely to hold a generally consistent perspective in relation to criminal offending or a viewpoint different from that of city dwellers is not sustainable. The reality is that members of the rural and urban communities are each likely to hold a range of views on this topic and there is no evidence to suggest that juries drawn from rural areas are any less likely to be impartial than those drawn from urban areas.

[70] We are not persuaded that there was any unfairness in the appellant's trial, or that there was any breach of the Imperial statutes relied upon. Although these statutes remain in force, they are best viewed as informing the construction to be given to modern statutes, the latter generally being accorded precedence.⁶⁶

[71] As noted, the principle that persons should generally be tried in the area in which the crime was committed is subject to a number of qualifications. In any event, there is little to support the appellant's contention that the crime was committed in Featherston. The heart of the offending lay with Mr Nuku's activities

⁶⁶ *Drelizis v Wellington District Court* [1994] 2 NZLR 198 (HC); *R v Cornelius* [1994] 2 NZLR 74 (CA); *Cooper v Attorney-General* [1996] 3 NZLR 480 (HC); *Shaw v Commissioner of Inland Revenue* [1999] 3 NZLR 154 (CA); *Prothonotary v Wilson* [1998] NSWSC 26; *Carnes v Essenberg* [1999] QCA 339.

at the Rimutaka Prison in Wellington. Arguably the crimes were committed when the drugs arrived in New Zealand or, at the latest, when the drugs were uplifted from post office boxes in Johnsonville, Ava (Lower Hutt), and Whanganui. The appellant's principal role was to act as a go-between in passing money over to Joy in the Tawa area. Against this, all that was advanced in favour of the crime having been committed in Featherston was that the appellant had made a number of telephone calls from there. We are satisfied there is no substantial foundation for the suggestion that the crime was committed in Featherston.

[72] As to the high levels of excusals from jury service in New Zealand, we note that Parliament has recently attempted to address this issue by providing that jurors may apply to defer their jury service where, by reason of specified matters, undue hardship or serious inconvenience would result.⁶⁷ It remains to be seen whether this will have the effect of reducing the excusal rate and whether it will lead to some reduction in the numbers of people who do not answer their summons for jury service.

[73] Finally, we note that nothing we have said in this judgment should be construed as suggesting that grounds of appeal may not arise where there is a proper evidential basis to support it. Where there is evidence that any member of a jury is not impartial giving rise to a real risk of a miscarriage of justice, the court will, of course, intervene. No miscarriage of justice is established in the present case.

Second ground – the identification issue

[74] It will be recalled that the challenge to the identification evidence focused on the reliability of the evidence of the co-offender, Joy, that it was the appellant whom she met on the first occasion in the Woolworths carpark at Tawa in October/November 2006 and on a number of subsequent occasions. A challenge was made pre-trial to the identification evidence but the evidence was ruled admissible by Simon France J.⁶⁸ Both the appellant and Mr Nuku had been together in Rimutaka Prison until the appellant was released in August 2006. Defence counsel

⁶⁷ Juries Act 1981, s 14B. This came into force on 4 October 2010 pursuant to cl 2 of the Juries Amendment Act 2008 Commencement Order 2010

⁶⁸ *R v Ellis* HC Wellington CRI-2007-085-6245, 10 July 2009.

led evidence at trial from a police officer that the appellant was on home detention at his residence in Featherston between 1 August 2006 and 13 November 2006. The purpose of this evidence was to establish that the appellant could not have met Joy at the Woolworths carpark during that period as she stated.

[75] As a result of this evidence the Crown was granted leave to call rebuttal evidence from the probation officer responsible for the appellant during the period of his home detention. She did not have available to her all the relevant records but was able to confirm that the appellant was entitled to leave his Featherston property on pre-approved absences. Based on her case notes, she said the appellant was granted an absence on 26 October 2006 to undertake painting work at an address in Porirua. This was the only recorded absence in October or November 2006 for any extended period during the day. While the appellant was undertaking this work, he was subject to electronic monitoring with Chubb Security driving past the property several times during the day to monitor compliance. Random monitoring of the workplace occurred on that day between 1 pm and 4.40 pm.

[76] The appellant was required to be at his home address in Featherston by 7 pm. The probation officer thought this would have required him to leave Tawa for Featherston by 6 pm, allowing for travel time of one hour. It was the Crown case that there was sufficient time for the appellant to have met Joy in the carpark at Tawa that evening sometime between 4.40 pm and 6 pm and to return to Featherston by 7 pm.

[77] On behalf of the appellant, counsel referred us to evidence from Joy that the meetings she had with the Woolworths man normally took place between 6 and 7 pm. Allowing up to one and a half hours to travel from Tawa to Featherston (which counsel submitted was more realistic depending on traffic conditions), then it was impossible for the appellant to have met Joy sometime between 6 and 7 pm at Tawa and to have returned home by 7 pm.

[78] In response, Mr Burston submitted on behalf of the Crown that Joy did not state the time of the first meeting but said it was still light. Her evidence about the usual timing of the meetings with the Woolworths man she identified as the appellant

was general in nature. The first meeting was very brief. There was, Mr Burston submitted, sufficient time between 4.40 pm on the day in question and 7 pm for the appellant to have travelled to Tawa, met Joy sometime around 6 pm and been home in time for the 7 pm curfew.

[79] After the trial, the probation officer who had given evidence about the appellant's approved absence while on home detention located the file which had previously been missing. The appellant sought leave to have this evidence before this Court. While satisfied this further material is "fresh" in terms of the relevant authorities,⁶⁹ it does not contain any new material of relevance to the appeal. We decline the application for leave accordingly.

[80] We are not persuaded by the submission made on behalf of the appellant on the identification point. Joy was not pinned down to a specific time and her evidence as to timing was general in nature. Unless the witness had some particular reason to note the time more precisely, some flexibility in timing could reasonably have been allowed for. All of the material on this issue was before the jury and, whether one hour or an hour and a half is regarded as the appropriate travelling time, it was open for the jury to accept Joy's evidence identifying the appellant as the Woolworths man.

[81] Counsel for the appellant mentioned in passing, but did not develop, some concern that Joy had said, after viewing photo montages, that she was only 90 per cent certain that the appellant was the Woolworths man. These concerns were canvassed before Simon France J and were taken into account in his pre-trial ruling. We agree with the conclusions reached by him for the reasons he gave.

[82] Importantly, we accept the Crown's submission that the evidence relating to the meeting on 26 October 2006 is not to be treated in isolation from the substantial body of supporting evidence the Crown relied upon to identify the appellant as a party to the offending.

⁶⁹ *R v Bain* [2004] 1 NZLR 638 (CA).

[83] The Crown relied upon three main strands of evidence to prove its case against the appellant:

- (a) The contact between the appellant and Joy.
- (b) The contact between the appellant and Mr Nuku.
- (c) The association between the appellant and two of the post office boxes to which New Client Syndicate packages were sent.

[84] In respect of the first category, the Crown did not rely solely on Joy's visual identification of the appellant as being the Woolworths man. She described the Woolworths man as driving a purple Legnum motor vehicle. A vehicle of that description was found at the appellant's address when it was searched in November 2007. In addition, Joy described telephone contact between herself and the Woolworths man to arrange the meetings. During the search of the appellant's address in November 2007, the police found a piece of paper on which was written one of Joy's telephone numbers. The paper had the appellant's fingerprints on it.

[85] Telephone data also established contact between cellphone numbers used by Joy and two cellphone numbers associated with the appellant. The telephone contact was consistent with meetings being arranged between the appellant and Joy between February and April 2007. Telephone data was not available prior to February 2007.

[86] The Crown case against the appellant was further strengthened by evidence in the second category of contact between himself and the co-offender Mr Nuku. Apart from the fact that the two of them had been imprisoned together for a period up until August 2006, the Crown evidence included receipts for two payments made from the appellant to Mr Nuku's prison trust account along with telephone data showing a connection between telephone numbers associated with the appellant and Mr Nuku respectively. Although there was little evidence available of the content of text messages, there were text messages from one of the numbers associated with the appellant tending to suggest that the appellant was confirming to Mr Nuku that he had paid Joy a sum of money on 19 March 2007. That coincided with other evidence suggesting a meeting that day between the appellant and Joy.

[87] As to the third category, the Crown had evidence from one of his associates (a Mr Walters) that the appellant had asked him to open the post office box to which one of the packages of drugs was sent. In addition, the appellant's daughter gave evidence that he had asked her to open a post office box in his name to which two earlier packages had been sent. These were not the subject of charges.

[88] All of this evidence provided strong circumstantial support for the Crown's case against the appellant.

[89] We conclude that the verdict was not unreasonable and that no miscarriage of justice has resulted. The appeal against conviction is dismissed.

Sentence appeal

[90] In submitting that the sentence imposed was manifestly excessive, counsel for the appellant focused on the difference in relative culpability between the appellant and Mr Nuku. Given that the Judge did not entirely accept that the appellant was "a high ranking trusted lieutenant" and considered he had not made any real profit from the operation, it was submitted that the Judge should have allowed a greater reduction from Mr Nuku's starting point for sentencing purposes.

[91] The Judge noted that the three packages relating to the appellant's convictions contained a total of 260 to 280 grams of methamphetamine with a value of approximately \$260,000 to \$280,000. She said the evidence established that the appellant had handed over cash to the Thai woman (Joy) on four occasions. The amounts involved totalled some \$40,000. The Judge found that the appellant knew how much money he was handing over.

[92] The sentencing Judge further found that, in relation to one of the three packages involved, the appellant arranged for his friend Mr Walters to open the post office box to which the package was sent; advised Mr Nuku by text of the box number; and collected the package (or arranged for it to be collected). The Judge regarded the appellant's possession of a Thai magazine dated April 2007 as too coincidental for any innocent explanation to be reasonably possible. Although not

charged for two other packages sent to the post office box opened by the appellant's daughter, the Judge considered that this evidence indicated his role in respect of the packages for which he was actually charged and convicted and in respect of which he was to be sentenced.

[93] She concluded that, although perhaps not the high ranking trusted lieutenant referred to by the Crown, and despite the absence of any real profit obtained by the appellant, he was nevertheless entrusted with and played a key role in Mr Nuku's operation.

[94] The Judge noted that the starting point for Mr Nuku for his role in the importation of the same three packages was eleven years imprisonment before any uplift for significant aggravating features relating to him. The same starting point was applied to another offender (a Ms Klokstad). Her sentence was ultimately upheld by this Court.⁷⁰

[95] The Judge adopted an eight year starting point which represented a reduction of approximately 25 per cent from Mr Nuku's starting point. Her reasoning is described in the sentencing notes:

[19] I set my starting point by comparing your culpability with that of Mr Nuku. I do so by working from the overall starting point for Mr Nuku rather than by dividing up its component parts. I do so because I consider the Crown's 10 year starting point, although supported by the component parts of the starting point for Mr Nuku, would place you at too similar a level of culpability of Mr Nuku, when it is clear that you had a supporting role to him, and that it was Mr Nuku that had the leading role in the syndicate.

[20] Although your support role was central to the operation I would not categorise you as a high ranking lieutenant in the same way as the offender in *R v Murphy* [CA198/05 23 November 2005 at [22]] which the Crown referred to in their submissions. That offender, amongst other things, had a trusted relationship with the overseas-based supplier and was involved in the planning of the importation. You were trusted by Mr Nuku with the money arrangements, but you acted at his direction and without any relationship with the Thai supplier or even necessarily the Thai inmate beyond knowing who he was. Although comparisons of culpability with other cases [are] difficult because the facts are always different, in *R v Cristia* [[2008] NZCA 19], in respect of the offender who played more of a supporting role, the Court of Appeal considered that a reduction of at least 20% as against the

⁷⁰ *R v Klokstad* [2009] NZCA 503.

principal offenders was warranted. Applying for reduction of about 20% to the starting point for Mr Nuku would give you a starting point of eight years and 10 months, whereas applying a 30% reduction would give a starting point of seven years and eight months' imprisonment.

[21] I will take a starting point of somewhere between that. I consider that in the round an eight year starting point is a fair reflection of your lesser culpability than Mr Nuku. Although that puts you just below what is called band 3 in the Court of Appeal's guideline decision in *R v Fatu* [[2006] 2 NZLR 72] I consider that to be appropriate in light of your lesser role.

[96] From the starting point of eight years, the Judge added one year for aggravating factors, namely the fact that the appellant was assisting in importations which were being orchestrated from within the prison; the offending had occurred within a year of the appellant being released from prison and while he was still subject to a sentence for conspiring to deal in methamphetamine; and because the appellant had some previous drug convictions. We do not understand the uplift for one year to be challenged on appeal. The Judge found there were no mitigating factors and none were advanced before us. The resulting sentence imposed was nine years imprisonment.

[97] The Judge also imposed a minimum term of imprisonment of four and a half years representing 50 per cent of the finite sentence. She said that the seriousness of the offending meant that denunciation and deterrence would not adequately be served if the appellant became eligible for parole after the normal one-third of his sentence had been served. In adopting the minimum term of 50 per cent, the Judge noted that this reflected the appellant's limited role compared with that of Mr Nuku. The latter had received an end sentence of 12 years with a minimum period of imprisonment of seven years.

[98] We are satisfied that the sentence was well within the range available to the sentencing Judge and cannot be described as manifestly excessive. We accept the Crown's submission that the starting point of eight years imprisonment fell below the lowest end of the range of nine to thirteen years indicated in *R v Fatu*⁷¹ for band 3 offending (250 to 500 grams). Had there been evidence that the appellant had made some real profit from the operation, the starting point would have been significantly higher. Although the Judge accepted that the appellant was not a high

⁷¹ *R v Fatu* [2006] 2 NZLR 72 (CA).

ranking lieutenant, she was entitled to reach the conclusion that the appellant nevertheless played a key role in the syndicate. The Judge carefully and properly differentiated between the culpability attaching to Mr Nuku and the appellant. No separate submissions were advanced in relation to the minimum period of imprisonment except to say that it ought to have been at a lower level. We are satisfied it was appropriate in the circumstances for the reasons the Judge gave.

[99] For these reasons, the sentence appeal is dismissed.

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