NOTE: ORDER UNDER S 205(1) OF THE CRIMINAL PROCEDURE ACT 2011 IN RELATION TO THE SENTENCE APPEAL.

IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA686/2022
[2024] NZCA 218

BETWEEN	SEIANA FAKAOSILEA Appellant
AND	THE KING Respondent

CA728/2022

BETWEEN	RICHARD PELIKANI Appellant
AND	THE KING Respondent

CA17/2023

BETWEEN	JIE HUANG Appellant
AND	THE KING Respondent

Hearing:	31 August 2023
Court:	Courtney, Whata and Downs JJ
Counsel:	J J Rhodes and K E Tuialii for Appellant in CA686/2022 S L McColgan for Appellant in CA728/2022 G J Newell and C G Farquhar for Appellant in CA17/2023 B J Thompson for Respondent
Judgment:	10 June 2024 at 11 am
Reasons:	11 June 2024

JUDGMENT OF THE COURT
[REDACTED]

A **Mr Huang's appeal against conviction is dismissed.**

B **Mr Fakaosilea's and Mr Pelikani's appeals against conviction are dismissed.**

C **Mr Fakaosilea's appeal against sentence is allowed. The sentence of 13 years and two months' imprisonment is set aside and substituted with a sentence of 10 years and eight months' imprisonment.**

D **Mr Pelikani's appeal against sentence is allowed. The sentence of four years and 11 months' imprisonment is set aside and substituted with a sentence of three years and ten months' imprisonment.**

REASONS OF THE COURT

(Given by Courtney J)

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INTRODUCTION

The convictions and grounds of appeal

[1] In 2020, the Police National Organised Crime Group began an investigation into the commercial supply of drugs in New Zealand. More than 50 charges were laid against a group of 14 people. Ultimately four, including the appellants, Seiana Fakaosilea, Richard Pelikani and Jie Huang, stood trial. Following a three-week jury trial during July and August 2022 before Campbell J in the High Court at Auckland, all three appellants were convicted of conspiring to import 600 kilograms of methamphetamine from South Africa.[1] Mr Fakaosilea and Mr Huang were also convicted of conspiring to import an unknown amount of methamphetamine from Fiji.[2]

[2] In addition: Mr Fakaosilea was found guilty of one charge of possessing methamphetamine for supply[3] and pleaded guilty to two charges of possession of a class A drug for supply[4] and four charges of supplying a class A drug;[5] Mr Pelikani pleaded guilty to one charge of possession of a class A drug for supply;[6] Mr Huang was found guilty of one charge of supplying methamphetamine[7] and pleaded guilty to one charge of unlawful possession of a firearm,[8] one charge of possession of cannabis for sale[9] and one charge of money laundering.[10]

[3] Mr Fakaosilea was sentenced to 13 years and two months' imprisonment.[11] Mr Pelikani was sentenced to four years and eight months' imprisonment.[12] Mr Huang was sentenced to six years and three months' imprisonment.[13]

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1 Misuse of Drugs Act 1975, s 6(1)(a) and (2A) — maximum penalty of 14 years' imprisonment.
2 Section 6(1)(a) and (2A) — maximum penalty of 14 years' imprisonment.
3 Section 6(1)(f) and (2)(a) — maximum penalty of life imprisonment.
4 Section 6(1)(f) and (2)(a) — maximum penalty of life imprisonment.
5 Section 6(1)(c) and (2)(a) — maximum penalty of life imprisonment.
6 Section 6(1)(f) and (2)(a) — maximum penalty of life imprisonment.
7 Section 6(1)(c) and (2)(a) — maximum penalty of life imprisonment. Mr Huang was acquitted on an unrelated charge of attempted aggravated robbery.
8 Arms Act 1983, s 45(1) — maximum penalty of four years' imprisonment and/or a fine of $5,000.
9 Misuse of Drugs Act, s 6(1)(f) and (2)(c) — maximum penalty of eight years' imprisonment.
10 Crimes Act 1961, s 243(2) — maximum penalty of seven years' imprisonment.
11 *R v Fakaosilea* [2022] NZHC 3207 [Fakaosilea and Pelikani sentencing notes] at [103].
12 At [104].
13 *R v Huang* [2022] NZHC 3323 at [41].

[4] All three appellants appeal against their convictions, asserting a miscarriage of justice.[14] This Court must allow the appeals if it is satisfied that a miscarriage of justice has occurred for any reason. A miscarriage of justice includes any error, irregularity, or occurrence, in or in relation to or affecting the trial that: created a real risk that the outcome of the trial was affected; or has resulted in an unfair trial or a trial that was a nullity.[15] As to whether there was a real risk that the outcome of the trial was affected, the Court must assess the potential risk of a different outcome resulting from the identified error, irregularity or occurrence.[16] The risk must be a real one, the question of which requires the Court to consider whether there is a reasonable possibility that another verdict would have been reached.[17]

[5] Mr Huang says that he suffered a miscarriage of justice because:[18]

(a) Trial counsel signed an admission of facts under s 9 of the Evidence Act 2006, which included a statement that Mr Fakaosilea had obtained "ten ounces ('occa's') from Mr Huang on at least three occasions prior to 9 March 2020". This evidence, although inadmissible against Mr Huang, was nevertheless relied on by the Crown in advancing its case against Mr Huang.

(b) Trial counsel did not object to evidence being adduced of a conversation between Mr Fakaosilea and Mr Pelikani (the Mango conversation), in which Mr Fakaosilea referred to "ripping" someone called "Mango" for "occa's" (ounces). The Crown asserted that Mr Huang was Mango. This conversation was accepted by the Crown as inadmissible against Mr Huang but was nevertheless used to his detriment.

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14 Criminal Procedure Act 2011, s 232(2)(c).
15 Section 232(4).
16 *Misa v R* [2019] NZSC 134, [2020] 1 NZLR 85 at [47], referring to *Wiley v R* [2016] NZCA 28, [2016] NZLR 1 at [29].
17 At [48].
18 The second and third grounds were raised for the first time in the written submissions filed for the appeal. There was no objection by the Crown to our considering them.

(c) The particulars of the charge of supplying methamphetamine (charge four) referred to Mr Huang supplying "occa's" (ounces) when that word had not been used in any admissible evidence against Mr Huang. It had only been used in an intercepted conversation that was inadmissible against him.

[6] Mr Fakaosilea and Mr Pelikani say that a miscarriage of justice occurred because the trial Judge refused to either declare a mistrial or adjourn the trial as a result of the police failing to disclose the raw data on which evidence obtained through tracking devices was based.

[7] In addition, Mr Fakaosilea and Mr Pelikani say that the jury's verdicts against them on the conspiracy charges were unreasonable.[19] A verdict will be unreasonable if, having regard to all the evidence, the jury could not reasonably have been satisfied to the required standard that the accused was guilty.[20]

[8] Mr Fakaosilea and Mr Pelikani also appeal their respective sentences of 13 years and two months' imprisonment and four years and eight months' imprisonment. They say that the starting points were too high and inadequate discounts were given for personal factors. Mr Fakaosilea complains further that his sentence should not have been uplifted for offending while on bail.

[9] We issued a results judgment prior to this judgment.[21]

The trial

A brief chronology

[10] One of the challenges for the appellants and their counsel was the rapidly changing landscape in the weeks preceding the trial. Resolution of charges were being reached progressively.[22] The charge list containing the charges on which the

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19 Criminal Procedure Act, s 232(2)(a)

20 *R v Owen* [2007] NZSC 102, [2008] 2 NZLR 37 at [5], discussing s 385(1)(a) of the Crimes Act 1961, the predecessor of s 232(2)(a) of the Criminal Procedure Act.

21 *Fakaosilea v R* [2024] NZCA 221.

22 The form of charges on which the appellants stood trial first appeared in an amended charge notice dated 23 June 2022. A later charge notice dated 17 July 2022 reflected the resolution of charges

appellants ultimately stood trial was produced on 17 July 2022, one day before the start of the trial. Counsel were still trying to resolve charges, address aspects of the evidence regarded as problematic and consider whether agreement could be reached on other evidence after the beginning of trial.

[11] The jury was empanelled on 18 July 2022 but immediately released to allow counsel to address a number of issues that had arisen. The trial resumed on 20 July 2022. That day, Mr Fakaosilea, Mr Pelikani and Mr Huang each entered guilty pleas on some of their charges. The Crown also filed a memorandum advising that agreement had been reached as to which convictions the Crown would adduce as evidence. These included Mr Fakaosilea's guilty plea to the possession for supply charge. A footnote to this memorandum recorded that the Crown would not suggest that this was evidence against Mr Huang. The s 9 statement of agreed facts was not filed until 26 July 2022.

[12] On 25 July 2022 the Judge made his opening remarks and Mr McCoubrey opened the Crown case.[23] Mr Rhodes made an opening statement on behalf of Mr Fakaosilea. The remaining opening statements were to be made the following day.

[13] On the morning of 26 July 2022, all counsel signed the s 9 statement. The statement was read to the jury that morning.[24] Admitted fact seven was that Mr Fakaosilea had pleaded guilty to a charge of possessing methamphetamine for the purposes of supply and included the particulars of that charge, namely that Mr Fakaosilea had obtained "ten ounces ('occa's') from Mr Huang on at least three occasions". The admission of the particulars is the subject of Mr Huang's first ground of appeal.

[14] Also on 26 July 2022, Mr Rhodes raised a concern over the accuracy of tracking data relied on by the Crown. The issue was still being addressed by police, so no immediate action was required. This is one of the issues raised by Mr Fakaosilea and Mr Pelikani in their appeals against conviction.

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against other defendants.

23 The Judge had adjourned the trial from 21 to 24 July 2022 as a result of one of the counsel being ill with COVID-19.

24 It is not clear whether the Judge was provided with a copy of the s 9 statement beforehand.

[15] The Crown evidence proceeded over the next several days. Then, on the morning of 1 August 2022, a voir dire was held to address the issue of the tracking data, which counsel had been unable to resolve. Following the voir dire, there were unsuccessful applications for a mistrial or, alternatively, an adjournment of the trial to allow counsel to consider how to deal with the tracking data evidence.[25]

[16] The Crown case concluded on the afternoon of 2 August 2022. The jury was released until 5 August 2022 to allow the Judge to deal with applications under s 147 of the Criminal Procedure Act 2011 (CPA) and a juror to attend a funeral.[26]

[17] The trial resumed on 5 August 2022. None of Mr Fakaosilea, Mr Pelikani nor Mr Huang elected to give evidence.

[18] The Crown gave its closing address. No matters were raised by defence counsel following the closing. Defence closing addresses were made on 8 August 2022. The Judge summed up on 9 August 2022. No issues were raised regarding the summing up. The jury retired to consider its verdict immediately after the Judge's summing up. The jury returned its verdicts on the afternoon of 11 August 2022.

The Crown case

The charges

[19] Charges one and two were recorded on the charge list as follows:

> **Charge 1**
>
> That SEIANA FAKAOSILEA, JIE HUANG and RICHARD PELIKANI between 9 March 2020 and 1 December 2020 at Auckland did conspire to import into New Zealand a class A controlled drug namely methamphetamine.
>
> **Particulars:** 600 kilograms from South Africa
>
> **Charge 2**

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25 *R v Fakaosilea* [2022] NZHC 1937 [adjournment judgment].

26 The applications made under s 147 of the Criminal Procedure Act resulted in one charge against Mr Fakaosilea (possession of methamphetamine), and two charges against the fourth defendant, Mr Mafileo, being dismissed. Otherwise, the applications were declined with reasons to follow.

That SEIANA FAKAOSILEA and JIE HUANG between 9 March 2020 and 1 December 2020 at Auckland did conspire to import into New Zealand a class A controlled drug namely methamphetamine.

Particulars: unknown amount from Fiji

[20] Charges three and four were companion charges: it was alleged that on or about 16 March 2020, Mr Fakaosilea possessed methamphetamine for supply (charge three) and Mr Huang had supplied the methamphetamine (charge four).[27] They were recorded on the charge list as follows:

Charge 3

That SEIANA FAKAOSILEA and TANIELA MAFILEO on or about 16 March 2020 at Auckland possessed the class A controlled drug namely methamphetamine for the purpose of supplying it to one or more other persons.

Particulars: Ten ounces ("occa's") from Huang

Charge 4

That JIE HUANG on or about 16 March 2020 at Auckland supplied the class A controlled drug namely methamphetamine to Seiana Fakaosilea.

Particulars: Ten ounces ("occa's") to Fakaosilea.

[21] The inclusion of the word "occa's" in the particulars of charge four is the subject of Mr Huang's third ground of appeal.

The evidence

[22] During the police operation, listening devices to intercept communications and tracking devices to capture vehicle movements were installed in a Toyota Corolla registration GTM677 and a Nissan Navara registration LRJ308. Both were used by Mr Fakaosilea during the relevant period. The tracking devices used GPS to determine the location of the vehicle and send that information to the police. The police used a software programme to compile the data sent by the tracking devices and produce reports from it.

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[27] Charge three was originally also laid against the fourth defendant, Mr Mafileo, but he successfully applied for this charge, among others, to be dismissed under s 147. See *R v Fakaosilea* [2022] NZHC 1912 [applications for dismissal oral judgment]; and *R v Fakaosilea* [2022] NZHC 2038 [applications for dismissal reasons judgment].

[23] The Crown case was that, when viewed against evidence about the relationship between the three defendants and the other circumstantial evidence, Mr Fakaosilea's and Mr Pelikani's movements and the intercepted conversations during March 2020 were sufficient to prove: that the three had reached an agreement to import 600 kilograms of methamphetamine from South Africa; that Mr Fakaosilea and Mr Huang had reached an agreement to import an unspecified amount of methamphetamine from Fiji; and that on 16 March 2020, Mr Huang had supplied Mr Fakaosilea with 10 ounces of methamphetamine.

The relationship and other circumstantial evidence

[24] There was evidence that Mr Pelikani was a close associate of, and frequently socialised with, Mr Fakaosilea, who was himself a patched, high-ranking member of the Comancheros Motorcycle Club.[28] From 2018 until early 2020, Mr Fakaosilea was the National Sergeant-at-Arms and at the time of the alleged offending, he was the acting National Commander.

[25] Further, there was evidence that Mr Fakaosilea and Mr Pelikani were involved in dealing in methamphetamine. Mr Fakaosilea and others had pleaded guilty to the supply of a commercial quantity of methamphetamine between 15 and 16 March and on 5 August 2020 at Christchurch. Mr Fakaosilea and Mr Pelikani both pleaded guilty to charges that on or about 11 March 2020 they possessed commercial quantities of class A drugs for the purpose of supply.[29]

[26] The Crown said that there was also a broader relationship between Mr Huang, Mr Fakaosilea and Mr Pelikani. The three men had met on several occasions during 2020 and there was evidence of an attempted aggravated robbery in August 2020 by Mr Huang and other Comancheros members in a taxing exercise.[30]

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28 These facts were part of the s 9 statement.

29 Mr Fakaosilea and Mr Pelikani maintained that the drug was cocaine, not methamphetamine. The Crown relied on intercepted, coded conversations to assert that the drug was methamphetamine and some of the coded statements could be linked to a package found at Mr Huang's address on termination of the operation. Determination of that question was left for a disputed facts hearing.

30 Mr Huang was acquitted of the charge laid in respect of this incident.

[27] When the police searched the men's homes, each was found to have Ciphr phones, which provided end-to-end encryption. There was evidence that these phones are reasonably difficult and expensive to obtain and are commonly used for drug dealing.

[28] The Crown said, further, that the relationship between Mr Fakaosilea and Mr Huang was based on Mr Huang supplying Mr Fakaosilea with methamphetamine. It said that Mr Huang was the person referred to as Mango in conversations during which Mr Fakaosilea talked about having obtained methamphetamine from Mango and "ripping" Mango off for methamphetamine. To show Mr Huang was Mango, the Crown pointed to photographs found on a mobile phone at Mr Huang's house showing encrypted Ciphr conversations with a user "Mango Yum" and the visits by Mr Fakaosilea to Mr Huang's house shortly after having referred to going to see Mango.

[29] In addition to relying on Mr Huang's identity as Mango to show that he was involved in dealing methamphetamine, the Crown relied on items found during the search of Mr Huang's house, namely: electronic scales with traces of methamphetamine and other drugs on them; a video on Mr Huang's phone showing clear plastic bags of white powder, including one on electronic scales showing the weight as one ounce; a money counter, snap-lock bags and cash; and plastic bags (later found to contain sugar) marked "K1", which, according to expert evidence, was a marking that had been found in previous police operations relating to methamphetamine offending.

[30] Further, after a drug deal in Christchurch on 5 August 2020 — in respect of which Mr Fakaosilea pleaded guilty to suppling methamphetamine — went wrong, Mr Fakaosilea turned to Mr Huang for help in arranging a passport so he could leave the country.[31] The phone belonging to Mr Huang's partner, Ms Tong, was found to contain messages from Mr Fakaosilea to Mr Huang the day after Mr Fakaosilea's arrest for this offending asking for Mr Huang's help in getting a passport to leave the country.

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[31] Mr Fakaosilea ultimately pleaded guilty to supplying a commercial quantity of methamphetamine in Christchurch.

[31] Finally, there was evidence of notes made on a mobile phone attributed to Ms Tong, dated 6 March 2022, with instructions about the process involved in an illegal importation:

> The person sending the container (from where ever) must be a business owner.
>
> Make sure the paperwork matches.
>
> Receiver must also be a business owner.
> Businessman's = untouchable
>
> Address must not be in our area (we from 275 but shipment goes to Papatoetoe)
>
> Problem with allot of the containers is because of the paperwork being filled in wrong.
>
> Paper work must make sense with what's inside the container
>
> Do not send through sub contractors (small timers)
>
> Straight to the main source
>
> preachers brother is the person that gives authority weather to search this or search that.
>
> So basically he has the ability to just make it pass without being check cause how a 'business' sent it.
>
> So if we want this to go smoothly, we just need to have that container be masked with whatever relates to the company that's sending it, & to be picked up by a company.

The "conspiracy conversation" between Mr Fakaosilea and Mr Huang on 9 March at 1.16 pm

[32] At the heart of the Crown case on the conspiracy charges against Mr Huang and Mr Fakaosilea was an intercepted conversation between them on 9 March 2020 (the conspiracy conversation). The Crown alleged that during the conversation, Mr Fakaosilea and Mr Huang discussed an existing plan to import methamphetamine from Fiji and a new proposal to import methamphetamine from South Africa.

[33] On 9 March 2020, at 1.16 pm, the listening device in the Toyota recorded the following conversation between Mr Fakaosilea and Mr Huang:

HUANG	Yeah um, oh wait um. Remember um, when, when, when you sort out that um, you know the Fi- Fiji, Fiji that um my friend told me he knows, if they can. If you guys got anyone can help to bring into New Zealand. And also um the South Africa, there's six hundred keys. And we don't need pay first.
FAKAOSILEA	South Africa.
HUANG	Huh. South Africa.
FAKAOSILEA	Oh yeah. But how would they have. Is it good?
HUANG	What do you mean it's good. Six hundred Key and then um. Cos he ask for lie six, he asked for um hundred, hundred k each. Pay back after sold but like. He's my friend's friend, so I try to rip him, ah rip him. Too much.
FAKAOSILEA	Let's rip him.
HUANG	Yeah.
FAKAOSILEA	We rip him.
HUANG	Yeah that's good. Yeah I can. I mean ah, um, the best way is um cos ah he's my friend's friend and ah, he don't know me but he wanna use our door. So we can, we can, we can let him use, use it. And then um once arrives you just rip, rip um rip off from my friends. Ah he's like and then can we do. And … kill (phonetic spelling), kill my friend. Ah it's not my friend's but he's one of my Wickr.
FAKAOSILEA	Um, what do you call it, um. (Pause) ah the Fiji one, I go, I go, I go see my friend now.
HUANG	Ah no, no good for um, um, he only want to go through ah boats.
FAKAOSILEA	Yeah. Who? Which one?
HUANG	Yeah this week. The Fiji one. But um.
FAKAOSILEA	Yeah that's the only way.
HUANG	And, and if … can um, this guy um, those people can do a- any, anything like … with him. Anything with um, easy for us. Like um, once arrives make sure … kill, kill one of my, kill my worker so like nothing …

FAKAOSILEA	(Cut over) Oh we come see you bro. We come see you.
HUANG	Yeah, yeah, yeah we talk, talk um face face.

[34] The Crown invited the jury to conclude that the reference to "600 keys" was a reference to 600 kilograms and that the price discussed, "hundred k each", was $100,000 per kilogram. Expert evidence was given by a police officer as to the price range for kilograms of methamphetamine.

[35] The Crown also invited the jury to find that the reference to "our door" meant a way of getting drugs into the country and Mr Fakaosilea and Mr Huang had access to that method. The reference to boats was said to be a suggestion about the way the importation from Fiji could be achieved.

The "Mango conversation" between Mr Fakaosilea and Mr Collins-Haskins on 9 March 2020 at 7.21 pm

[36] At about 7.21 pm, Mr Fakaosilea was observed arriving at the address of an associate, Brodie Collins-Haskins. The following intercepted conversation is the "Mango" conversation. It appeared that Mr Fakaosilea showed Mr Collins-Haskins something on his phone, Mr Collins-Haskins commented "[t]hat's a big one" and Mr Fakaosilea responded "I told you, you didn't want me back in game brother. Oh everyone would a been happy but you know". Then a little later Mr Fakaosilea said:

> … he doesn't know I wanna rip him as well … So I'm gonna rip the Fiji one and then I will rip the South Africa one … and then … I'm done …

[37] Shortly afterwards was the following exchange:

FAKAOSILEA	I'm going out South side.
HASKINS	… oh yeah.
FAKAOSILEA	And then gonna go see Mango.
HASKINS	Oh saw Mango.
FAKAOSILEA	I've been fucking ripping him.
HASKINS	Oh it's Mango.
…	

HASKINS	Have you been bullying the cunt?
FAKAOSILEA	Nah just been ripping him like this month …
HASKINS	How?
FAKAOSILEA	For occa's. Just been getting for occa's.
HASKINS	How?
FAKAOSILEA	Tea bag. Just been getting for ten, ten occa's at a time, that's how I've been getting by now.
HASKINS	(Laughs).
FAKAOSILEA	And then give him back ten, um twenny k, and be like aw he's coming back, get another ten give him back twenny k, oh he's coming back. (Laughs) He goes bro, this the third time you take something you not come back nothing (Laughs) … I don't give a fuck … later bo

[38] The Crown asserted that this conversation, coupled with a later conversation between Mr Fakaosilea and Mr Pelikani and the movements of the Toyota, supported the inference that Mr Huang was Mango. The reference to "ten occa's" was said to be a reference to 10 ounces of methamphetamine. On the Crown's view of the evidence, the reference by Mr Fakaosilea to going "out South side" and to see Mango meant him going to see Mr Pelikani, who lived in Mangere, and then to see Mr Huang. The Crown also relied on Mr Fakaosilea's admission that he had obtained 10 ounces of methamphetamine from Mr Huang on at least three prior occasions.[32]

[39] This conversation formed the basis for the change of possession for supply to which Mr Fakaosilea pleaded guilty and was the subject of admitted fact seven.

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[32] Proving that Mr Huang was Mango was also relevant to the charge against Mr Huang of supplying methamphetamine on 16 March 2020 (charge four). We return to this aspect later, in relation to Mr Huang's appeal.

Mr Fakaosilea's and Mr Pelikani's movements and conversation on 9 March 2020

[40] The tracking device showed the Toyota stopped at Mr Pelikani's house for 12 minutes at 9.06 pm on 9 March 2020. At 9.19 pm, the listening device captured the following:

FAKAOSILEA	I don't wanna go. I just wanna go hard and fast.
PELIKANI	Where?
FAKAOSILEA	… with the thing.
PELIKANI	Yeah, aye.
FAKAOSILEA	I be just be like oh bro wanna do … we've just gotta sort out …
PELIKANI	Yeah, yeah, yeah. (Pause) Do you wanna gonna go see Mango or
FAKAOSILEA	… Mango … yeah.

Mr Fakaosilea's and Mr Pelikani's movements and conversation on 10 March 2020

[41] At 8.44 pm on 10 March 2020, the Toyota stopped outside Mr Pelikani's house for one minute. The listening device recorded Mr Pelikani asking Mr Fakaosilea "[i]s Mango already there?" and Mr Fakaosilea replying "[y]eah".

[42] The Toyota was then driven to Mr Huang's house. During the trip Mr Fakaosilea and Mr Pelikani continued to talk, with Mr Pelikani saying "remember my tama's (man's) the matapa (door) for the main tama (man)". On the Crown case, Mr Pelikani's reference to a contact who acted as a "door" was reference back to the conversation between Mr Fakaosilea and Mr Huang about using a "door" for the importation.

[43] The Toyota stopped outside Mr Huang's house at 9.11 pm and remained there for 40 minutes. There is no direct evidence that a discussion with Mr Huang occurred during that time. The Crown invited the jury to infer there must have been a discussion about the importations.

[44] At 9.54 pm, the listening device picked up another conversation between Mr Fakaosilea and Mr Pelikani including the following:

FAKAOSILEA	… No one wants to do anything when they come out but you know us, as soon as we got out okay fuck straight back to it aye.
PELIKANI	Straight back to it cuz.
FAKAOSILEA	I didn't even wait aye.
PELIKANI	Nah.
FAKAOSILEA	I fucken didn't even wait aye. Nah you just done your … thingy aye.
PELIKANI	Yeah.
FAKAOSILEA	Your …
PELIKANI	So I got out today. Had dinner with my family and that. Fuck. Heard all the problems. And then fuck yeah. Got the work the next day. Yea less go. Didn't even know what the fuck I was doing bro … Coz you know you haven't played around with those numbers (fikas) aye. I just know like if it's the same method but it's just on a different scale you know what I mean. So I just … bro the rest is history g.

The "hongfulu" (ten) and other conversations, and Mr Fakaosilea's movements on 16 March 2020

[45] On 16 March 2020 at 11.03 am, the police intercepted a conversation between Mr Fakaosilea and another man in the Toyota, during which Mr Fakaosilea said:[33]

> … I think we grab like hongfulu (ten) today anyways.

[46] At 1.18 pm the police intercepted a phone call between Mr Fakaosilea and Mr Huang in which Mr Fakaosilea asked Mr Huang if he was home. The tracking device showed the Toyota stopped outside Mr Huang's house for 17 minutes from 1.34 pm.

[47] The listening device recorded Mr Fakaosilea and the other man getting back into the car at 1.50 pm and having a conversation about Mr Huang, including

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[33] The "hongfulu" conversation, which was hearsay vis-à-vis Mr Huang, was ruled to be admissible against him under s 22A of the Evidence Act: *R v Huang* [2022] NZHC 1740.

Mr Huang's recent divorce and payment to his ex-wife. Then Mr Fakaosilea talked about how he "rips" Mr Huang and said:

FAKAOSILEA	I always rip this cunt
UKM2	Uh?
FAKAOSILEA	I've been ripping him for ages.
UKM2	Aye?
…	
FAKAOSILEA	We're gonna rip him.
UKM2	What?
FAKAOSILEA	We're ripping him. (Pause)
UKM2	You were.
FAKAOSILEA	Nah for that six hundred. Me and the cuz … Cos we're his main boys.
UKM2	Oh true.

[48] The Crown relied on these conversations and tracking data to Mr Huang, to show that on 16 March 2020 Mr Fakaosilea had obtained methamphetamine from Mr Huang. This conversation is the only evidence (aside from circumstantial evidence about the relationship between Mr Fakaosilea and Mr Huang) to support charge four.

Mr Huang's defence

[49] Mr Huang's defence at trial was that, while he was a cannabis dealer, he was not involved in dealing methamphetamine and nor was he the person referred to as Mango in the intercepted conversations. Although Mr Huang did not give evidence, he had given a DVD interview to this effect, which was played to the jury. In his interview, Mr Huang explained the conspiracy conversation as a joke that did not go anywhere.

MR HUANG'S CONVICTION APPEAL

[50] As noted, Mr Huang asserts three instances of error by trial counsel, Ms Kincade KC, which he says led to inadmissible and unfairly prejudicial evidence

being used against him, resulting in a miscarriage of justice. Mr Huang and his partner, Ms Tong, gave evidence before us, as did Ms Kincade.

First ground of appeal: the s 9 statement

The issue

[51] It will be recalled that charge three against Mr Fakaosilea and charge four against Mr Huang involved the same supply of methamphetamine on 16 March 2020. Part of the Crown case in relation to charge three was propensity evidence of Mr Fakaosilea's pleading guilty to possession of methamphetamine for supply on three previous occasions. Mr Fakaosilea had been charged with that offending on the basis of the Mango conversation. The particulars of the charge referred to him having obtained the methamphetamine from Mr Huang.

[52] The fact of Mr Fakaosilea's guilty plea and the particulars of the charge were adduced by way of admitted fact seven in the s 9 statement in the following form:

> Mr Fakaosilea has pleaded guilty that between 1 January 2019 and 9 March 2020, at Auckland, he possessed thirty ounces of methamphetamine for the purpose of supply. The particulars of the charge are "ten ounces ("occa's") from Mr Huang on at least three occasions prior to 9 March 2020".

[53] As noted, the Mango conversation was not admissible against Mr Huang. Therefore, the particulars, which were based on the Mango conversation, were not admissible against Mr Huang either.

[54] Mr Huang's complaint is that trial counsel agreed to the s 9 statement, in the form that included the reference to Mr Fakaosilea having obtained the methamphetamine from Mr Huang, without Mr Huang's instructions and this was prejudicial to his defence that he was not involved in dealing methamphetamine. Mr Newell, for Mr Huang, also argued that the prosecutor had erred in the use made of the particulars to admitted fact seven and the trial Judge had failed to effectively address the issue in summing up. As to the last, Mr Newell also submitted that, in fact, there was no direction that could have adequately addressed the prejudice caused by the inclusion of the particulars.

[55] Mr Newell submitted that the admission operated as propensity evidence "through the back door" in relation to charge four. It implicated Mr Huang in offending for which he was not charged and for a much greater amount than he was charged with under charge four — 30 ounces as opposed to 10 ounces. Given he was not charged with the supply, he could not offer a defence to the allegation. Because the statement regarding the source of the methamphetamine was effectively a hearsay statement by Mr Fakaosilea that Mr Huang was the supplier, Mr Huang could not challenge it unless Mr Fakaosilea were to give evidence, which he did not.

[56] The circumstances in which the s 9 statement came to be agreed by Mr Huang's trial counsel was the subject of extensive cross-examination and submission by Mr Newell. However, even where trial counsel conduct is in issue, the ultimate question is whether justice has miscarried.[34] Because Mr Huang's complaint of miscarriage of justice rests on prosecutorial conduct and the Judge's summing, up as well as trial counsel error — and with no disrespect to counsel's careful analysis — we find the more pertinent enquiry to be the consequences of the admission. The prosecutor, of course, had obligations regarding the evidence put before the jury and the trial Judge had oversight of the s 9 agreement.[35]

[57] The Crown was alive to the fact that admitted fact seven of the s 9 statement was not admissible against Mr Huang and had acknowledged this in its memorandum to the Court on 20 July 2020. However, Mr Thompson, for the Crown, maintained that, while there might have been more work involved in drawing the threads of the evidence together if admitted fact seven had not included the particulars, that evidence would nevertheless have been adduced in some form.[36]

[58] Mr Newell did not accept this assertion. His point was that because proof of a particular is not required unless it forms an element of the offence, and the source of the methamphetamine was not an element of the offence, the Crown had not had to prove that Mr Fakaosilea obtained the methamphetamine from Mr Huang.[37] For the

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34 *R v Sungsuwan* [2005] NZSC 57, [2006] 1 NZLR 730 at [70] per Gault, Keith and Blanchard JJ.
35 *Wallace v R* [2023] NZCA 6 at [47].
36 This was also the view expressed by trial counsel in her evidence.
37 *R v Mead* [2002] 1 NZLR 594 (CA) at [105] per Anderson J; as discussed in *Carlos v R* [2010] NZCA 248 at [13]–[14].

same reason, a guilty plea does not represent an admission of particulars.[38] Therefore, if the evidence had been adduced in the form of a certificate of conviction, it would not have included the particulars complained of.

[59] While we agree that a certificate of conviction would not have included the particulars, that does not address the point being made by the Crown. In relation to charge three, the Crown was seeking to establish that Mr Fakaosilea's visit to Mr Huang on 16 March 2020 was to obtain methamphetamine. A history of Mr Fakaosilea sourcing methamphetamine from Mr Huang would clearly have had greater value as propensity evidence than the mere fact that he had been in possession of methamphetamine for supply on some previous occasion. The Crown maintains that it could readily have adduced that evidence otherwise than by way of a certificate of conviction or by the s 9 statement in the form it was agreed. Specifically, it could have been introduced by a s 9 admission from Mr Fakaosilea alone. Alternatively, the Crown could have invited the inference from the "hongfulu" conversation coupled with the tracking data.

[60] Whether the evidence contained in the particulars might have been admitted other than by way of a certificate of conviction or the s 9 statement in the form agreed depended on whether it was properly admissible in terms of the ss 7 and 8 gateway provisions in the Evidence Act. For the reasons just outlined, we accept that the evidence was relevant and of moderate probative value to the case against Mr Fakaosilea. We do not believe that the evidence would properly have been excluded as having an unfairly prejudicial effect on the proceedings because, in our view, the risk was one that could be managed adequately through Crown counsel's address and the Judge's summing up.

[61] We see the real issue in this ground of appeal as whether the prejudice arising from admitted fact seven was adequately managed in the trial, given that it was contrary to Mr Huang's expressly stated defence and that he had no means of challenging the statement.

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[38] *Matthews v Department of Labour* [1984] 2 NZLR 400 (CA) at 407.

The prosecutor's use of the propensity evidence

[62] In closing, the prosecutor began by referring to charges three and four together. But rather than starting with the evidence from 16 March 2020 — the intercepted conversations and tracking data — he invited the jury to look at the s 9 statement on the basis that it was relevant to both charges:

> Now I want to turn then to charges 3 and 4 and this is the first bit of evidence I'm going to look at with you. And the very first bit of evidence I'm going to look at with you is a good place to start, I suggest, and that's what is agreed; the admitted facts. Can I ask you to have a look please at the document "Admissions of Fact — Association and Convictions".
>
> … most relevant to charges 3 and 4 is number 7, over the page. I'm going to read it in full and then say some things about it. Mr Fakaosilea has pleaded guilty that between 1 January 2019 and 9 March 2020 at Auckland, he possessed 30 ounces of methamphetamine for the purpose of supply. The particulars … are 10 ounces or ockers from Mr Huang on at least three occasions prior to 9 March 2020. So it is an admitted fact that Mr Fakaosilea, on at least three occasions, got 10 ounces of methamphetamine from Mr Huang.

[63] Only at that point did the prosecutor signal that admitted fact seven was not to be used against Mr Huang:

> We're just going to pause there and ask you to be careful, we've got rules of evidence, what you're allowed to take into account against various defendants, that there, number 7, is only evidence against Mr Fakaosilea at this stage and that won't change. As against Mr Fakaosilea is an admitted fact, everybody agrees this to be the case that he has on, at least three occasions, got 10 ounces of methamphetamine from Mr Huang.

[64] The prosecutor then continued to discuss charge three at some length but, in doing so, mentioned Mr Huang more than five times and without any further caution that the evidence had no relevance to charge four against Mr Huang:[39]

> What's charge 3, charge 3 is getting 10 ounces of methamphetamine from Mr Huang, now, that's a great example, I'm going to suggest to you where if you just looked at the conversation you might think yep, it does look like he's off to get ockers, something from Mr Huang … but maybe that's not enough, maybe it is, I don't know, but the point is you don't just look at that conversation because you also go into that deliberation, you go into thinking about that charge thinking well, if I look at admitted fact number 7, Mr Fakaosilea admits that on three occasions, he has got 10 ounces off

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[39] The prosecutor's quotes of evidence as recorded in the transcript are slightly different from the exhibits but are provided here as recorded in the transcript.

> Mr Huang and that obviously adds to the case against him and means I suggest that you can come quite quickly sure on this occasion, he did too.
>
> … Now admitted fact number 7 comes, basically, I say basically from pages 20 and 21 of exhibit 1 and I'm going to go out south–side to Mr Pelikani's house and then I'm going to go and [see] Mango, who as you know, the Crown says is Mr Huang and Mr Fakaosilea then talks about Mr Huang, talks about Mango, … then Mr Fakaosilea starts: "ripping him" starts talking about ripping him and then on page 21: "I'm just for ockers, I've just been getting ockers," "how", "teabag, just been getting for 10 ockers at a time, that's how I've been getting by now."
>
> So it's that 10 ockers at a time that gave rise to that charge that Mr Fakaosilea accepts that he got 10 ockers at a time from Mr Huang and its evidence in the case that you're entitled to take into account as well that at least as far [as] they're concerned, they're talking about Mango, so any suggestion Mango isn't Mr Huang, which the Crown says it plainly is, would have to deal with this conversation and explain how that's not a reference to Mr Huang. So as he says, he's been getting 10 ockers at a time from Mr Huang and what is it the Crown says happens in charge 3.

[65] Shortly afterwards, the prosecutor moved to refer to the fourth defendant (Mr Mafileo) and to Mr Huang. When he talked about Mr Huang, he noted Mr Huang's position that that he was a cannabis dealer and that he did not deal methamphetamine but also referred to photographs taken from Mr Huang's phone of what appeared to be bagged up methamphetamine. Then he returned to discussing charges three and four together:

> So if we then go to the conversation after — back in exhibit 1 now … that deal took place, again, its page 128, Mr Fakaosilea returns to his theme of ripping Mr Huang. He's the guy: "we're going to rip him. We are ripping him." Just as told his friend earlier that he was ripping him, I took you to that conversation earlier on. So what that demonstrates, those charges 3 and 4, putting it all together, I suggest, there's a really clear picture [that] emerges of Mr Fakaosilea sourcing 10 ounces of methamphetamine from Mr Huang.

[66] The prosecutor concluded by signalling his intention to rely on the evidence later in relation to the conspiracy charges:

> And that's really all I need to say about charges 3 and 4 except to make this point. Of course you don't then put that to one side and say: "All right we'll forget about that for now," because you keep it in your mind: "Well if that's right, if the Crown's right about that then what does it say about the relationship between Mr Fakaosilea and Mr Huang?" It says their shared interest is methamphetamine. They have a shared interest in methamphetamine as is demonstrated by this deal. So when I come later on to talk about some other things where the Crown says its methamphetamine, you're perfectly entitled to take into account: "Well yes, that does appear to be something that the two of them are both interested in."

[67] The last sentence is notable in light of counsel's later submissions in relation to the conspiracy charges. When beginning his submissions on those charges, the prosecutor said:

> … And before I go directly to those charges and the evidence in support of them, again I just want to talk about some background information and again talk a little bit about the relationships between the defendants. I have already touched on Mr Huang and Mr Fakaosilea …

[68] He then went on to talk about the relationship between Mr Fakaosilea and Mr Pelikani before turning to the circumstantial evidence in support of the conspiracy charges that we traversed earlier.

The Judge's summing-up

[69] The Judge commented on admitted fact seven twice in his summing-up. When he explained the Crown's reliance on guilty pleas generally, he referred to the Crown's reliance on admitted fact seven in relation to charge three and how that evidence could be used:

> [57] The Crown also relies on one particular guilty plea by Mr Fakaosilea to say that it shows a pattern of behaviour on Mr Fakaosilea's part. You may remember that Mr Fakaosilea pleaded guilty to a charge of possessing methamphetamine, being ten ounces from Mr Huang on at least three occasions prior to 9 March 2020. This evidence may be used by you in relation to charge 3, that's the charge against Mr Fakaosilea of possession of methamphetamine for supply. The earlier guilty plea can be used in relation to that charge if you are satisfied the guilty plea on the earlier charges demonstrates a pattern of behaviour on the part of Mr Fakaosilea, and if that pattern is similar to the alleged offending of Mr Fakaosilea in charge 3. If so, it is open to you to conclude that his alleged offending is more likely to have occurred, and hence you can use it as one of the pieces of evidence relevant to that charge.

[70] The Judge then explained how propensity evidence could be used against Mr Fakaosilea and added:

> [60] Finally, these guilty pleas of Mr Fakaosilea may be used only against Mr Fakaosilea. They cannot be used against Mr Huang.

[71] Much later the Judge dealt specifically with charges three and four. In relation to charge three, he said:

> [98] The Crown's case starts with Mr Fakaosilea having pleaded guilty to obtaining ten ounces or occas or methamphetamine from Mr Huang on at least three occasions prior to 9 March 2020. The Crown then relies on an intercepted conversation on 16 March 2020, in which Mr Fakaosilea says "I think we grab like ten today" … The Crown says that when you understand the background including what the Crown says is Mr Fakaosilea's pattern of similar offending, and you will remember what I said about that a few minutes ago, the Crown says that when you take into account the background, in the 16 March 2020 conversation Mr Fakaosilea is saying that he is going to grab ten ounces of methamphetamine. The Crown then points to the evidence that Mr Fakaosilea then called Mr Huang and soon after went to Mr [Huang's] address. The Crown says you can be sure that Mr Fakaosilea obtained ten ounces of methamphetamine from Mr Huang at that meeting on 16 March.

[72] In relation to charge four, the Judge said:

> [101] … There is only one question for you: are you sure that on about [16 March 2020] Mr Huang supplied Mr Fakaosilea with methamphetamine?
>
> [102] The Crown's case on this charge was largely the same as its case on charge 3, and I do not need to repeat it. But there is one difference though. As Mr McCoubrey acknowledged, and [as] I said earlier when giving you general directions about the evidence, Mr Fakaosilea's guilty plea to the other charges of previously obtaining ten ounces at a time from Mr Huang is admissible only against Mr Fakaosilea. It is not admissible against Mr Huang on this charge. You must put it out of your minds when considering charge 4 against Mr Huang. Just imagine that this charge is in a trial of its own and consider only the other evidence that relates to this charge.
>
> [103] You can, however, take into account the intercepted conversation in which Mr Fakaosilea says he will "grab like ten today".
>
> [104] Ms Kincade said that on this charge, that apart from Mr Fakaosilea's statement that he would grab like ten today, there was no other evidence supporting the charge that Mr Huang supplied methamphetamine to Mr Fakaosilea on 16 March. There was no methamphetamine found at Mr Huang's house. With this lack of evidence she said it was pure speculation to suppose that Mr Huang had supplied methamphetamine to Mr Fakaosilea on that day.

The effect of admitted fact seven

[73] We accept that the particulars included in admitted fact seven prejudiced Mr Huang, for the reasons Mr Newell advanced. Even though the evidence was not admissible against him, Mr Fakaosilea's admission that he had obtained "ten ounces ('occa's') from Mr Huang" implicated Mr Huang in offending for which he was not actually charged and which he had no effective means of challenging. It would, unless clearly excluded by the prosecutor's address and the Judge's summing up, add weight to the Crown case that Mr Huang was involved in methamphetamine dealing. We do not accept Mr Thompson's argument that under the s 9 statement, Mr Huang was simply accepting the fact that Mr Fakaosilea had pleaded guilty to the charge, rather than admitting that Mr Fakaosilea had, in fact, obtained methamphetamine from him. A jury would be unlikely to grasp that distinction without very specific direction.

[74] In our view, the prosecutor's address did not adequately explain the evidence could not be used against Mr Huang in relation to charge four — the single, brief, caution given about the use of the s 9 admission in relation to charge four was not adequate to off-set the subsequent references to the evidence that appeared to relate to both charges three and four. Further, the address created uncertainty as to whether it could be used in relation to the conspiracy charges. When the prosecutor came to discuss those charges, there was no reminder that the evidence could only be used against Mr Fakaosilea. To the contrary, the prosecutor suggested that admitted fact seven was relevant to the broader issue of the relationship between Mr Fakaosilea and Mr Huang in relation to the conspiracy charges.

[75] We consider that the position could have managed by clear directions during the Judge's summing up and, in so far as charge four is concerned, the Judge's direction was adequate to ensure that the jury understood that admitted fact seven could not be taken into account in relation to that charge. We do not, however, consider that it was sufficient to address the prejudicial effect of the admission in relation to the conspiracy charges. The direction was very specifically aimed at charge four— twice the Judge said that the evidence could not be used in relation to charge four. But no mention was made of how the jury should treat the evidence when it came to consider the conspiracy charges. In our view, it was quite possible for the jury to be left with

the impression that it could use Mr Huang's admission when considering the conspiracy charge to determine whether the relationship between Mr Fakaosilea and Mr Huang was based on methamphetamine.

[76] Moreover, the jury was not given any guidance on what to make of the evidence when considering Mr Huang's defence that he dealt only in cannabis. Ms Kincade had closed to the jury on the basis that Mr Huang admitted that he dealt in cannabis and that the amount of cannabis found in his house "explain[ed]…everything about this case". Because the direction regarding charge four was so clear, we do not consider that the jury could have been in any doubt that it was to consider the defence without reference to admitted fact seven.

[77] However, the lack of any guidance in relation to the conspiracy charges was likely to have caused confusion. In directing on charge one against Mr Huang, the Judge referred to Ms Kincade's argument that there was no evidence at Mr Huang's home of methamphetamine dealing, as opposed to cannabis dealing. But the Judge made no mention of how that position could be reconciled with admitted fact seven. In our view, there was a risk that the jury was left unsure of how to deal with admitted fact seven in terms of assessing Mr Huang's defence in relation to the conspiracy charges.

[78] These conclusions require us to consider whether there was a real possibility that another verdict would have been reached. However, we think it better to decide this question later, taking into account our conclusions on Mr Huang's other grounds of appeal.

Second ground of appeal: the Mango conversation

The issue

[79] This ground of appeal concerns the intercepted conversation on the evening of 9 March 2020 between Mr Fakaosilea and Mr Collins-Haskins, known as the Mango conversation. It will be recalled that the Mango conversation had led to Mr Fakaosilea's guilty plea on a charge of possession for supply which formed the basis for admitted fact seven.

[80] Proving that Mr Huang was Mango was important to the Crown case against Mr Huang. Trial counsel recognised this; notes taken by trial counsel's junior in preparation for trial recorded that "[if Mr Huang] admits that he is [M]ango he is essentially pleading guilty to the supply charge." However, although the Mango conversation obviously implicated Mr Huang in relation to the identity of Mango and it was common ground that the conversation was inadmissible against Mr Huang, the issue of how it should be dealt with was not raised with the trial Judge. In evidence before us, trial counsel said that she viewed the Mango conversation as connected with the conspiracy charges and did not consider objecting to it.

[81] Mr Newell submitted that: the prosecutor made statements in closing which suggested, incorrectly, that the jury could use the Mango conversation to find that Mr Huang was Mango; trial counsel should have objected to admission of the Mango conversation altogether; and the trial Judge should have addressed the issue during the course of the trial and in summing up.

Was there error by trial counsel, the prosecutor and/or the trial Judge in relation to the Mango conversation?

[82] In his opening address in relation to charge three, the prosecutor referred to the fact, albeit obliquely, that the Mango conversation was inadmissible against Mr Huang:

> Now it is really important at this stage, to point out that's only evidence against Mr Fakaosilea and I will repeat that later, but it is a very clear statement by him, a very unguarded statement that what he has been doing, he's been getting 10 ockers at a time, 10 ounces of methamphetamine at a time, just as the Crown says happens in charge 3 in the Crown charge list.

[83] However, when the prosecutor closed on charge three, he did not repeat the caution that the conversation was inadmissible against Mr Huang. Instead, he made the submissions that we have already set out, but repeat here for convenience:

> … Now admitted fact number 7 comes, basically, I say basically from pages 20 and 21 of exhibit 1 and I'm going out south-side to Mr Pelikani's house and then I'm going to go and [see] Mango, who as you know, the Crown says is Mr Huang and Mr Fakaosilea then talks about Mr Huang, talks about Mango … then Mr Fakaosilea starts: "ripping him" starts talking about ripping him and then on page 21: "I'm just for ockers, I've just been getting

> ockers", "how", "teabag, just been getting for 10 ockers at a time, that's how I've been getting by now."
>
> So it's that 10 ockers at a time that gave rise to that charge that Mr Fakaosilea accepts that he got 10 ockers at a time from Mr Huang and it's evidence in the case that you're entitled to take into account as well that at least as far [as] they're concerned, they're talking about Mango, so any suggestion that Mango isn't Mr Huang, which the Crown plainly says it is, would have to deal with this conversation and explain how that's not a reference to Mr Huang. So as he says, he's been getting 10 ockers at a time from Mr Huang and what is it the Crown says happens in charge 3.

[84] Mr Newell submitted that the suggestion that someone — presumably Mr Huang's trial counsel since Mr Huang was the one implicated — would need to prove that Mr Huang was not Mango undermined any other caution that the conversation was not admissible against Mr Huang. In fact, however, no such caution was made.

[85] In closing, in relation to the conspiracy charges, Ms Kincade addressed the evidence on the phone of the "Mango Yum" message and said to the jury that "for the Crown's case they want Mr Huang to be Mango". However, her submissions to rebut that possibility were directed to the lack of any evidence found on the phones belonging to Mr Huang that the police had seized and the fact that there was no intercepted conversation in which Mr Huang was addressed directly as Mango. Nothing was said about the Mango conversation, either at that stage or later, in relation to charge four.

[86] The Judge did not refer to Mango at all in his summing up.

[87] We agree that the prosecutor's treatment of the Mango conversation would have left the jury with the impression that it was entitled to use the evidence to decide whether Mr Huang was Mango and, furthermore, that it was for Mr Huang to rebut that inference. The issue ought not to have been approached in this way, and it ought to have been challenged by trial counsel and addressed by the Judge in summing up. But because the issue was not taken up by either trial counsel in closing or by the Judge in summing up, that impression was not corrected.

[88] Whether these errors led to a miscarriage of justice will be considered later, along with the issues arising from Mr Huang's other grounds of appeal.

Third ground of appeal: reference to "occa's" in the particulars of charge four

[89] It will be recalled that charge four, which alleged that Mr Huang had supplied Mr Fakaosilea with methamphetamine on 16 March 2020, included the following particulars:

> **Particulars**: Ten ounces ("occa's") to Fakaosilea

[90] Mr Newell submitted that the reference to "occa's" in the particulars for charge four should not have been included, that trial counsel should have challenged the framing of the charge in that way and that the trial Judge should also have addressed the matter. These submissions rest on the assertion that the reference to "occa's" allowed the Crown to encourage the jury to use impermissible propensity reasoning to link the Mango conversation, in which the word had been used but which was inadmissible against Mr Huang, to charge four.

[91] Mr Thompson accepted that the Crown could have framed charge four without reference to "occa's" and instead referred only to ounces. However, he contended that it was appropriate to have included the particulars, because charge three against Mr Fakaosilea had been drafted in that way, using the same formulation of particulars to signal to the jury that the charges related to the same alleged incident. Mr Thompson also submitted that "occa's" was used throughout the trial as slang for ounces. Finally, he said that the jury was unlikely to read anything into the use of the word because the focus for its consideration in relation to charge four was on Mr Fakaosilea referring to grabbing "hongfulu".

[92] We do not accept these submissions. First, a review of the notes of evidence and the exhibits shows that "occa's" was not, in fact, used as slang throughout the trial. The only time the word appeared in evidence was in the transcripts of conversations that were not admissible against Mr Huang and in Mr Huang's police interview, when it was put to him that Mr Fakaosilea had said that he (Mr Fakaosilea) had obtained 10 "occa's" of methamphetamine from Mr Huang, which Mr Huang denied.

[93] Expert evidence was led from Detective Sergeant Howard regarding the use of "teabag" in the context of methamphetamine dealing — a word that Mr Fakaosilea

had also used in his conversations — but he was not asked about "occa's". Otherwise, the use of the word appeared only in counsel's submissions.

[94] We accept that the use of the word "occa's" in the particulars to charge four was unfair, because it conveyed an evidential link between charges three and four, which did not exist. The result was a risk that the jury would treat the use of the word as one that could be ascribed to Mr Huang, which it could not. The risk could have been managed by a direction from the Judge, but no direction was given.

Was there a miscarriage of justice?

[95] We have concluded that errors were made in this trial:

(a) In relation to admitted fact seven, the particulars should not have been included in the agreed form and the prosecutor should not have referred so extensively to the evidence without repeating the caution regarding its use, both in relation to charge four and the conspiracy charges.

(b) The prosecutor's use of the Mango conversation would have left the jury with the impression that the evidence could be used to decide whether Mr Huang was Mango. The lack of any direction by the Judge meant that this impression was not corrected.

(c) The use of "occa's" in the particulars of charge four was not appropriate and risked the jury attributing that word to Mr Huang, even though there was no evidence that he had used it.

[96] The effect of these errors was that the Crown case was improved in terms of proving that Mr Huang was involved in methamphetamine dealing and had a relationship with Mr Fakaosilea based on methamphetamine. However, we are not persuaded that there is a reasonable possibility that the verdicts on the charges against Mr Huang would have been different.

[97] In relation to charge four, the Judge's direction regarding admitted fact seven was very clear and we are satisfied that it was sufficient to ensure that the jury would

not take that evidence into account in determining charge four. Nor do we see the use of "occa's" in the particulars of charge four as having affected the outcome. While it did create a link back to the particulars in charge three, the word was not, in fact, used much in the course of the trial and the jury was not directed in terms of it. The jury had, in fact, been told in response to its question in relation to charge three that particulars did not have to be proved.

[98] The risk regarding the conspiracy charges was of the jury impermissibly reasoning, from admitted fact seven and the Mango conversation, that Mr Huang had a history of dealing in methamphetamine with Mr Fakaosilea. In considering this, we step back from the close focus on admitted fact seven and the Mango conversation and look at the Crown case as a whole.

[99] Admitted fact seven and the Mango conversation would, at most, have added to the Crown's assertion that Mr Huang was Mango and that he had previously been involved in supplying Mr Fakaosilea with methamphetamine. However, those assertions could readily be proved by other evidence. The Crown was entitled to invite the inference that Mr Huang was Mango from the conversations and movements of Mr Fakaosilea and Mr Pelikani on 9 and 10 March 2020. The reference in their conversation on 9 March 2020 to seeing Mango, coupled with the conversation the following day about whether Mango was "already there" and the visit to Mr Huang immediately afterwards was compelling evidence that Mr Huang was Mango. In our view, the Mango conversation did not add a great deal to the basis on which the inference as to Mango's identity could be drawn.

[100] Likewise, the circumstantial evidence provided strong support for the Crown's assertion that Mr Huang was involved in methamphetamine dealing and had supplied Mr Fakaosilea with methamphetamine. Mr Huang, by his own admission, dealt in drugs. While he said he only dealt in cannabis, there were traces of methamphetamine found on scales in his house, images of what appeared to be methamphetamine on his phone and packets of sugar marked in a way known to be used in relation to methamphetamine. Mr Fakaosilea had turned to him for help when a methamphetamine deal went wrong. Moreover — and although this point was not advanced by the Crown — the jury would have been entitled to consider the

conspiracy charges on the basis that charge four was proved and that Mr Huang had supplied methamphetamine to Mr Fakaosilea on 16 March 2020.

[101] Looking at the conspiracy conversation against the circumstantial evidence, we are satisfied that there was no real possibility of a different verdict on those charges. That conversation, even in isolation, presented compelling evidence of a plan between Mr Fakaosilea and Mr Huang to import drugs. The reference to the importation from Fiji and South Africa coupled with the reference to "600 keys" (kilograms, a typical larger unit in methamphetamine dealing) indicated that methamphetamine, not cannabis, was the subject of the proposed importation. The later conversation between Mr Fakaosilea and Mr Pelikani, on their way to visit Mr Huang on the evening of 10 March 2020, included the question by Mr Pelikani whether "Mango [was] already there" and a discussion that included reference by Mr Pelikani to his "tama" (man) being the "matapa" (door). The tracking device on GTM677 then shows a 40-minute visit to Mr Huang's house.

[102] We are satisfied that the evidence provided a strong basis for inferring that there was a discussion at Mr Huang's house about the importation that he and Mr Fakaosilea had discussed by phone the day before. We are therefore not persuaded that a real risk existed that the trial would have had a different outcome for Mr Huang.

[103] The appeal against conviction is dismissed.

MR FAKAOSILEA'S AND MR PELIKANI'S CONVICTION APPEALS

First ground of appeal: disclosure of the tracking data

How this issue arose

[104] This ground of appeal rested on the general complaint that the police had disclosed only part of the data captured through the tracking devices and that both the raw data from the tracking devices and the software needed to generate reports from it should have been disclosed. Further, the appellants submitted that the Judge had erred in refusing to either declare a mistrial or to adjourn the trial to allow counsel to properly consider the issues arising from the tracking data earlier.

[105] On 12 July 2022, one of the prosecutors, Mr Kirkpatrick, provided a report to defence counsel by way of disclosure. It was described as "Document 2867 … Other – GTM677 – Tracking data associated to the tracking device in GTM677 – Recorded 'stops'". The police had produced a report from data captured by the tracking device. It showed the times the Toyota was stopped for longer than two minutes, with arrival and departure times, and the locations of each stop.

[106] Mr Rhodes, counsel for Mr Fakaosilea, queried why the report did not show the Toyota stopping at Mr Pelikani's house at 8.44 pm on 10 March 2020, as the Crown had alleged. The police produced a new report which showed stops of 30 seconds or more on the relevant days, including the brief stop at Mr Pelikani's house on 10 March 2020. In addition, the report contained the longitudinal and latitudinal coordinates for each stop and an "address" column, which showed either a street address, a range of addresses or the name of a business. Mr Kirkpatrick sent this report onto Mr Rhodes, adding that "Detective Hicks will also provide a copy of the generated data relevant to each day which you should receive shortly."

[107] However, Detective Hicks emailed all counsel advising that, while he could collate "more minute details", trying to produce information in greater detail such as updates of the locations every 10 seconds whether moving or not "would be thousands of pages, and quite frankly every time I try to generate such a report the system crashes". He offered to provide this level of detail in relation to specific dates, but it appears that no specific requests were made.

[108] On 26 July 2022, the first day of evidence, Mr Rhodes contacted the prosecutors with an urgent query. He had noticed an apparent error in the report relating to the other tracked vehicle — LRJ308 — which showed the vehicle moving from an address in Papatoetoe to "Kwikimart Northcross", a distance of some 37 kilometres, in two minutes and back to Papatoetoe two minutes later. This was accepted to be an error. Detective Scott Foster checked the GPS coordinates against the locations for seven of the days shown on the disclosure report. He identified three in which the coordinates did not correlate with the address shown.

[109] Mr McCoubrey, the senior prosecutor, advised Mr Rhodes that, based on his enquiries, the latitude and longitude coordinates were correct and that the error in the address column appeared to be associated with "reverse geocode" software provided by a third party, though the reason for the error was not known. Mr Rhodes was not satisfied with this explanation and declined to accept the GPS data as accurate. These were the circumstances that led to the voir dire.

The voir dire and the Judge's ruling refusing applications for a mistrial or adjournment.

[110] The Court heard from two officers. Detective Foster had carried out the checks of the coordinates against the addresses.[40] Detective Senior Sergeant David Nimmo, was responsible for management of the technical surveillance capability for the upper North Island. Detective Nimmo explained that the tracking device operates by emitting a signal that is picked up by the global navigation satellite system and, in that way, indicates a location. On installation, the device is tested by checking that the laptop software and the device are showing the same location. It did not appear that testing was undertaken while the tracking device was being deployed. Neither of the witnesses had the expertise to give evidence about the system used to ensure that the tracking devices were operating correctly.

[111] Detective Nimmo was able to say that the tracking device came fitted with software that provided a link to proprietary software that could be used to assist investigators to determine the location of motor vehicles (as opposed to latitude and longitudinal coordinates). It was this proprietary secondary software that was believed to have produced the errors in location.

[112] At the conclusion of the voir dire, Mr Fakaosilia and Mr Pelikani both applied for the trial to be aborted. Mr Pelikani also applied, as an alternative, for the trial to be adjourned for two to three weeks. This was on the basis that the "raw data" captured by the tracking devices should have been disclosed in its entirety, together with the software needed to interrogate the data. Mr Pelikani also applied for a ruling that the

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[40] Under cross-examination, Detective Foster agreed that the Crown had an obligation to disclose all material which may be relevant to a trial or the charges that police have laid.

presumption of reliability under s 137 of the Evidence Act did not apply to the evidence produced from the raw data.

[113] As noted, the Judge refused the applications. He gave written reasons for his decision on 8 August 2022.[41] The Judge considered that the raw tracking data was not "relevant information" for the purposes of s 13 of the Criminal Disclosure Act 2008 (CDA) and therefore the Crown had no obligation to disclose it:

> [19] The defendants' applications assume that the entirety of the raw tracking data is "relevant information". I do not accept that. For each vehicle, the raw tracking data will be able to show the location of the vehicle at any particular time over a period of many months. It is inconceivable that every such location, second-by-second over many months, could be relevant.

[114] The Judge relied on the decision of this Court in *Singh v R*, which concerned disclosure of data taken from a mobile phone in the context of a case involving an alleged sexual assault.[42] The police had extracted all the data from the complainant's mobile phone and searched it so as to identify messages just between the complainant and the defendant and produced a report on that basis, which was provided to the defendant in accordance with s 13 of the CDA.[43] In the District Court, the Judge refused the defendant's request for disclosure of the entire contents of the phone on the basis that the defendant ought to be required to identify particular information considered to be relevant and formulate search terms accordingly. His reasoning was:[44]

> [37] Quite clearly the Police are able to target specific information from the Complainant's cellphone because they have already done so in identifying the text messages that have been produced … If the Defendant wants further disclosure from the Prosecutor it will be necessary to particularise what it is he wants to be searched for and to advise the Crown to enable such a search to be undertaken. If the Defendant is not prepared to do so then there will be no obligation on the Crown to do anything further in relation to the material downloaded from the Complainant's phone.

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41 Adjournment judgment, above n 25. Detective Foster confirmed under cross-examination that all the audio recordings and the associated software had been provided to the defence. Mr McColgan put to Detective Foster that the same approach should have been taken to the tracking data, and the Detective responded that that was fair: see [13]. However, that concession has no significance in terms whether the police are required to provide disclosure of the kind sought.

42 *Singh v R* [2020] NZCA 629.

43 At [2].

44 *R v Singh* [2020] NZDC 17349, referred to in *Singh v R*, above n 42, at [26].

[115] Dismissing the appeal from the decision, this Court confirmed that it was incumbent on a defendant making a request for further disclosure under s 14 of the CDA to particularise the information sought so that it can be identified and disclosed, provided it meets the definition of relevant in s 8.[45] This Court expressly endorsed the reasoning of the District Court Judge.[46]

[116] Returning to the present case, the Judge added that the defendants could have requested further information under s 14 of the CDA, such as locations of a vehicle on a particular day, which would, because of the degree of particularity, have been treated as relevant information, but they had not done so (except in relation to the 30 second stop locations, which had been provided).[47]

[117] The Judge also rejected the argument that the presumption under s 137 of the Evidence Act did not apply.[48] Section 137 provides that if a party offers evidence that is produced partly or wholly by a device or technical process, and the device or technical process is of a kind that ordinarily does what a party asserts it to have done, it is presumed that the device or technical process did what the party asserts it to have done, in the absence of evidence to the contrary. The Judge considered that the tracking device and associated software were of a kind that ordinarily produced accurate coordinates.[49] Any error had arisen from the use of third-party software and there was nothing to suggest that the underlying coordinates produced by the tracking devices were inaccurate.[50]

Appeal

[118] Under s 13(2) of the CDA, the Crown is required to disclose any "relevant information". For that purpose, "relevant" is defined as:[51]

> …in relation to information or an exhibit … information or an exhibit, as the case may be, that tends to support or rebut, or has a material bearing on, the case against the defendant.

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45 *Singh v R*, above n 42, at [26].
46 At [26] and [28].
47 Adjournment judgment, above n 25, at [20].
48 At [29].
49 At [27].
50 At [29].
51 Criminal Disclosure Act 2008, s 8.

[119] Under s 14 of the CDA, at any time after the duty to make full disclosure has arisen under s 13, a defendant may request disclosure of particular information, which must be identified by the defendant with as much particularity as possible.

[120] Mr Rhodes, counsel for Mr Fakaosilea, argued that the undisclosed data was relevant because the defendants' movements generally were relevant. He gave as an example, the possibility that the routes taken could provide context to the defendants' conversations but were not shown in the data disclosed because the Crown case did not depend on the route taken on any given day, only the location of the stops made — particularly those at Mr Pelikani's and Mr Huang's houses.

[121] Mr Rhodes submitted that it should not be left to the Crown to choose which information it deemed relevant and only disclose the portion relied on. He pointed out that the police and the Crown are not necessarily in a position to know what information or specific data the defendants might wish to rely on. He characterised the approach taken in this case as the prosecution cherry picking and sought to draw an analogy with other forms of information obtained through surveillance devices, such as intercepted communications captured by listening devices; while most of the communications intercepted are not likely to be relevant at trial they are nevertheless disclosed.

[122] Mr Rhodes sought to distinguish the decision in *Singh* on the basis that, in a sexual case, there were good privacy reasons to withhold information beyond that which had been disclosed by the police.[52] He suggested a more comparable situation would have been if the prosecution in *Singh* had only disclosed a curated selection of text messages between the complainant and defendant.

[123] Mr McColgan, for Mr Pelikani, supported Mr Rhodes' submission, and also submitted that without knowing that the GPS data was completely reliable, it was not possible to properly advise Mr Pelikani as to the strength of the Crown's allegation that he and Mr Fakaosilea were at Mr Huang's house on 10 March 2022. He said that, until the errors regarding the addresses were identified, counsel had been content to accept the GPS data as disclosed by the police but afterwards considered that there

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52 *Singh v R*, above n 42.

ought to be an opportunity to satisfy themselves of the accuracy of the GPS data. By then, however, the police responded that the information was not required to be disclosed.

[124] We begin with the question of relevance under s 13 of the CDA. It is clear that the Crown's obligation under s 13 is to disclose relevant material, which is material that will support or rebut or otherwise have a material bearing on the case against the defendant. The nature of the case does not alter this obligation and we do not accept Mr Rhodes' argument that this case should be distinguished from *Singh* by reference to the nature of the alleged offences.

[125] In terms of data captured by the tracking device, the Crown case turned on the location of the vehicles on particular days. The disclosure obligation under s 13 of the CDA was to provide data that related to that aspect. If some other aspect of the data captured by the tracking device was identified by the defendants as relevant, then they could make a request under s 14 for additional disclosure. However, as was emphasised in *Singh*, there must be some specificity to the request for further information. A general request for all raw data, on the basis that something might turn out to have relevance to the defence case is not sufficient.[53]

[126] Nor do we accept Mr McColgan's argument that the raw data, and associated software, should be disclosed solely because counsel cannot be sure the GPS data is reliable. There was no evidence to suggest that the GPS data sent from the tracking devices was incorrect — as noted, only three errors were identified in the police reports and they related to the information in the address column of the reports which had been provided by the third-party software. The Judge was right to treat s 137 of the Evidence Act as applying to the GPS data.

[127] We note, finally, the criticism made of the police for signalling that, if the raw data were found to be liable to be disclosed, the Crown would nevertheless be entitled to withhold it under s 16(1)(a) of the CDA on the ground that disclosure is likely to prejudice the maintenance of the law, including the prevention, investigation and detection of offences. Mr Thompson submitted that to disclose the raw data in its

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[53] *R v Singh*, above n 44, at [43]; aff'd *Singh v R*, above n 42, at [28].

entirety and the associated software would enable criminals to fully understand the capabilities of those systems and the nature of the devices, whereas the information that is relevant to a case is the data that is produced from the devices. Neither Mr Rhodes nor Mr McColgan addressed this particular submission.

[128] In our view, the information before the Judge, and before this Court, satisfies us that full disclosure of the entire data set and associated software was not required by s 13, that no specific request for particular information was made under s 14 (and if it was it would not require disclosure of the entire data set and associated software) and that withholding the information would likely be justified under s 16(1)(a).

Second ground of appeal: unreasonable verdicts

The correct approach to this issue

[129] Mr Fakaosilea and Mr Pelikani say that the jury could not reasonably have been satisfied that charges of conspiracy were proved beyond reasonable doubt.

[130] We noted at the outset that a verdict will be unreasonable if, having regard to all the evidence, the jury could not reasonably be satisfied to the required standard that the defendant is guilty.[54] On appellate review, the following are to be borne in mind:[55]

> (a) The appellate court is performing a review function, not one of substituting its own view of the evidence.
>
> (b) Appellate review of the evidence must give appropriate weight to such advantages as the jury may have had over the appellate court. Assessment of honesty and reliability of witnesses is a classic example.
>
> (c) The weight to be given to individual pieces of evidence is essentially a jury function.
>
> (d) Reasonable minds may disagree on matters of fact.
>
> (e) Under our judicial system the body charged with finding the facts is the jury. Appellate courts should not lightly interfere in this area.
>
> (f) … the appellate court is not conducting a retrial on the written record. The appellant must articulate clearly and precisely in what respect or respects the verdict is said to be unreasonable and why, after making

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54 *R v Owen*, above n 20, at [5].
55 At [13], endorsing *R v Munro* [2007] NZCA 510, [2008] 2 NZLR 87.

> proper allowance for the points made above, the verdict should nevertheless be set aside.

The s 147 application

[131] In relation to the South African importation conspiracy, with which Mr Fakaosilea, Mr Pelikani and Mr Huang were charged, the Crown needed to prove in respect of each, that he agreed with at least one of the other defendants to import methamphetamine from South Africa and intended the agreement to be carried out. In relation to the Fiji importation, with which only Mr Fakaosilea and Mr Huang were charged, the Crown had to prove that Mr Fakaosilea agreed with Mr Huang to import methamphetamine from Fiji and that each intended the agreement to be carried out.[56]

[132] At the conclusion of the Crown case, the Judge heard applications under s 147 of the CPA by all three charged with conspiracy.[57] The Judge considered that there was an evidential foundation on which a jury could reasonably convict.[58] He held that that the conspiracy conversation coupled with the circumstantial evidence was sufficient for a properly directed jury to convict.[59] As this Court has recognised, the test under s 147 overlaps with the test for whether a verdict is unreasonable in the context of an appeal against conviction.[60] For the same reasons as given by the Judge, we consider that the verdict was not unreasonable.

Were the verdicts on the conspiracy charges against Mr Fakaosilea unreasonable?

[133] Mr Rhodes submitted that the evidence fell short of being sufficient to prove either of the two essential elements. Specifically, the evidence was said to show no more than an initial discussion or negotiation — there was no evidence of any actual agreement or consensus nor of any evidence of an intention that an agreement be carried out.[61] At its height, the evidence showed only initial discussions or negotiations.

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56 *R v Gemmell* [1985] 2 NZLR 740 at 743 (CA); and *R v Morris (Lee)* [2001] 3 NZLR 759 (CA) at [15].

57 The Judge determined the applications in an oral judgment: applications for dismissal oral judgment, above n 27. The Judge's reasons were delivered later: applications for dismissal reasons judgment, above n 27.

58 Applications for dismissal oral judgment, above n 27, at [42

59 Applications for dismissal reasons judgment, above n 27, at [42] and [44].

60 *Kuru v R* [2023] NZCA 150 at [41] per Collins and Muir JJ.

61 Nor was there any evidence that either of the importations actually occurred.

[134] Mr Rhodes pointed out that Mr Fakaosilea was under surveillance for nine months and that over that entire period, no other intercepted communications referred to the importation of methamphetamine from South Africa or Fiji. Moreover, there was only a handful of meetings between Mr Fakaosilea and Mr Huang, and even those were explicable by other business; such a low level of interaction was inconsistent with a conspiracy to import large quantities of methamphetamine.

[135] Finally, Mr Rhodes submitted that even on the basis of the conspiracy conversation on 9 March 2020, it was obvious that any talk of importation from South Africa or Fiji was fanciful; for example, the suggestion by Mr Huang that they would not need to pay for 600 kilograms of methamphetamine in advance.

[136] We start by noting that the evidence of intercepted conversations and vehicle movements is to be viewed against the circumstantial evidence about Mr Fakaosilea's background and the items seized by the police from the homes of Mr Fakaosilea and Mr Huang. We have already set out the evidence relied on by the Crown and therefore confine ourselves to a brief summary of the evidence against Mr Fakaosilea, which we consider provided a sufficient evidential basis for the jury to convict.

[137] The circumstantial evidence, against which the intercepted conversations and tracking data were to be considered, included:

(a) Evidence of an ongoing relationship between Mr Fakaosilea, Mr Pelikani and Mr Huang and their prior dealing in methamphetamine on a commercial scale, including with Mr Huang (on Mr Fakaosilea's admission) supplying Mr Fakaosilea.

(b) Ciphr phones belonging to Mr Fakaosilea, Mr Pelikani and Mr Huang.

(c) Evidence in Mr Huang's house consistent with drug dealing, including in methamphetamine.

(d) Photographs of encrypted Ciphr conversations involving a user "Mango Yum", found at Mr Huang's house.

[138] The conspiracy conversation could reasonably be construed as referring to a previous discussion between Mr Fakaosilea and Mr Huang about an importation from Fiji, with Mr Huang directing Mr Fakaosilea to "[r]emember … when you sort out … the Fiji … [i]f you guys got anyone can help to bring into New Zealand." The exchange later in the conversation about "the Fiji one" being "this week" and boats being "the only way" makes it clear that there was an existing plan.

[139] The reference to an earlier dealing regarding Fiji effectively addresses the argument that the lack of other intercepted conversations should be taken as indicating that none took place. It is obvious from the use of coded language by both and the obvious reluctance of Mr Huang to talk on the telephone that there was a level of caution about being overheard. Given that all the defendants had Ciphr phones, the lack of evidence about other conversations does not support the submission that there were no other conversations.

[140] We accept the Crown's submission that this conversation provided a sufficient evidential basis, combined with the circumstantial evidence, to have enabled the jury to conclude that there was a concluded, or continuing, agreement to import methamphetamine from Fiji. The later conversations support that conclusion.

[141] In the Mango conversation later the same day, Mr Fakaosilea talked to Mr Collins-Haskins about being "back in the game" and about "ripping" somebody in relation to "the Fiji one" and the "South Africa one" before saying that after those deals, he would be "done" and going on to refer to seeing Mango and the fact that he had been "ripping" Mango.

[142] During the journey to visit Mango, Mr Fakaosilea and Mr Pelikani talked about using Mr Pelikani's "tama" (man) as the "matapa" (door). Then, on 16 March 2020, Mr Fakaosilea was captured telling an unidentified associate about "ripping" Mr Huang (whom he has just visited) in relation to "that six hundred".

[143] We agree with the Judge's assessment that these conversations did provide sufficient evidence on which the jury, properly directed, could reasonably convict Mr Fakaosilea in respect of both the South Africa and Fiji charges. As the trial Judge

recognised, it was also open to the jury to draw a different inference or to not be satisfied that any inference could be drawn. That possibility does not, however, impugn the verdicts that were open to the jury to reach. This ground of appeal therefore fails.

Was the verdict on the conspiracy charge against Mr Pelikani unreasonable?

[144] We have found that the jury's verdicts in relation to Mr Fakaosilea were not unreasonable. There was, however, less evidence against Mr Pelikani than against Mr Fakaosilea. Mr Pelikani was not party to the conspiracy conversation between Mr Fakaosilea and Mr Huang on 9 March 2020. The only direct evidence against him was: the 10 March 2020 conversations in which Mr Pelikani talked about his "tama" (man) being the "matapa" (door); and, later, after visiting Mr Huang with Mr Fakaosilea, the comment that it was "the same method" but "on a different scale".

[145] Mr McColgan submitted that the conspiracy conversation on 9 March 2020 was inadmissible against Mr Pelikani. Since he was not party to it, the conversation was hearsay vis-à-vis Mr Pelikani. For the Crown to rely on it in relation to Mr Pelikani, it needed to have served notice under s 22 of the Evidence Act indicating that the prerequisites of s 22A were satisfied, namely that there was reasonable evidence of a conspiracy, reasonable evidence that Mr Pelikani was a member of the conspiracy and that the hearsay statement was made in furtherance of the conspiracy. Mr McColgan submitted that the conversation could not have satisfied these prerequisites and the Judge erred in failing to direct the jury to disregard it when it came to consider Mr Pelikani's position, resulting in a miscarriage of justice.

[146] We agree that the Crown was required to serve a notice under s 22 of its intention to rely on the conspiracy conversation in relation to Mr Pelikani. It is common ground that notice was not given. There was no explanation for this omission. However, we accept Mr Thompson's submission that the prerequisites required by s 22A would have been satisfied so that this omission had no effect on the outcome of the trial.

[147] Section 22A preserves the common law exception to the hearsay rule known as the co-conspirator's rule;[62] provided there is reasonable evidence of a conspiracy or joint enterprise, a statement made in furtherance of the conspiracy or joint enterprise is admissible against a defendant in respect of whom the statement is hearsay. When the statement predates the defendant's joinder of the conspiracy, it may nevertheless be admitted, but only for the limited purpose of proving the "origin, character and object of the conspiracy".[63]

[148] Mr McColgan did not accept that the conspiracy conversation on 9 March 2020 was capable of being found by the jury to prove the existence of a conspiracy between Mr Fakaosilea and Mr Huang. It is apparent from what we have said so far that we do not accept that. We are satisfied that the jury could reasonably have found that the conversation evidenced an agreement between Mr Fakaosilea and Mr Huang to import methamphetamine. The admissibility of the statement against Mr Pelikani is a matter that ought to have been raised and determined pre-trial but we are satisfied that its inclusion did not create any risk that the outcome of the trial was affected.

[149] We note that in closing, Mr McColgan stated three times that the statement was not admissible against Mr Pelikani. The Judge addressed the point as follows:

> [89] Mr Pelikani of course was not a party to the 9 March call between Mr Fakaosilea and Mr Huang. That does not mean that you ignore that call when considering the charge against Mr Pelikani. The call is evidence that you can take into account in considering what Mr Pelikani might have discussed with Mr Fakaosilea and Mr Huang at the meeting the next day on 10 March.
>
> [90] Nonetheless, because Mr Pelikani was not a party to that call, the Crown's case against him is different to the case against Mr Fakaosilea and Mr Huang. The Crown asks you to infer, from the relationship between Mr Pelikani and Mr Fakaosilea — what the Crown says is their shared interest in possessing commercial amounts of class A drugs, in particular methamphetamine — and from the content of their intercepted calls before and after the meeting with Mr Huang, that Mr Pelikani joined the agreement and intended to carry it into effect. In particular, you may remember that the Crown relies on Mr Pelikani's comments about his man being the door for the main man and his comment about something being the same method but on a different scale.

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62 *Adams on Criminal Law — Evidence* (online ed, Thomson Reuters) at [EA22A.01].

63 *R v Messenger* [2008] NZCA 13, [2011] 3 NZLR 779 at [21], quoted in *R v Winter* [2019] NZSC 98, [2019] 1 NZLR 710 at [36].

[150] We accept that this aspect of the Judge's summing up could have been a little clearer. However, we consider that the intercepted conversation was admissible as against Mr Pelikani on the basis that it constituted reasonable evidence of a conspiracy (at that point comprising Mr Fakaosilea and Mr Huang but not Mr Pelikani).

[151] Mr McColgan submitted that, in any event, the 10 March 2020 statement could not reasonably be found to have been made in furtherance of the conspiracy and the suggestion that the visit to Mr Huang that evening was to discuss the importations was nothing more than speculation. He pointed out that there was nothing in the language following that visit to suggest that Mr Fakaosilea and Mr Pelikani had just agreed to be involved in a significant importation that was expected to be very profitable.

[152] The Crown accepted that the high point of the case against Mr Pelikani was his statement during the 10 March 2020 about his "tama" (man) being the "matapa" (door) which was made during the journey to Mr Huang's house. However, Mr Thompson pointed out that this statement was to be considered against the fact that Mr Pelikani had an existing relationship with Mr Fakaosilea based on both a personal connection and on methamphetamine dealing. Further, Mr Pelikani's reference to his man being the door reflected the language used by Mr Huang and Mr Fakaosilea in relation to the South Africa importation. The purpose of the visit to Mr Huang could be inferred from the discussions that preceded and followed it. The restraint in the language was not remarkable — it was evident that the parties had shown a reluctance to talk openly.

[153] In our view, the evidence, taken as a whole, did provide a sufficient basis on which the jury could have found that Mr Pelikani had joined the conspiracy that was established by the conspiracy conversation. This ground of appeal therefore fails.

[154] Mr Fakaosilea's and Mr Pelikani's appeals against conviction are dismissed.

THE SENTENCE APPEALS

[155] Mr Fakaosilea was sentenced to a total of 13 years and two months' imprisonment for three charges of possession of a class A drug for supply, four of supplying a class A controlled drug and two of conspiring to import methamphetamine.

[156] Mr Pelikani was sentenced to a total of four years and 11 months' imprisonment on one charge of conspiracy to import methamphetamine and one of possession of a class A controlled drug for supply.

[157] Mr Fakaosilea and Mr Pelikani both appeal their sentences on the ground that they were manifestly excessive as a result of the Judge taking starting points that were too high and failing to adequately recognise personal mitigating factors. In addition, Mr Fakaosilea contends that the Judge should not have imposed an uplift for his offending while on bail.

Disputed facts

[158] In respect of the charges of possession of a class A drug for supply on 11 March 2020 and between 15 and 16 March 2020, and the supply of methamphetamine on 5 August 2020, Mr Fakaosilea and Mr Pelikani had entered guilty pleas on the basis of disputed facts. These were determined at a disputed facts hearing, the findings of which formed the basis for the sentencing on those charges.[64]

[159] At the disputed facts hearing, the Judge found that:

(a) in respect of the possession for supply charge on 11 March 2020, Mr Fakaosilea and Mr Pelikani had possession of five ounces of cocaine (not, as the Crown alleged, five kilograms of methamphetamine);[65]

(b) the quantity of methamphetamine supplied on the trip to Christchurch between 15 and 16 March 2020 was an unknown commercial quantity of methamphetamine (not, as the Crown alleged, five kilograms of methamphetamine);[66] and

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64 *R v Fakaosilea* [2022] NZHC 2984 [disputed facts judgment].
65 At [40].
66 At [53].

(c) the quantity of methamphetamine supplied on the trip to Christchurch on 5 August 2020 was at least 500 grams (not, as the Crown alleged, at least one kilogram).[67]

Mr Fakaosilea

The sentence

[160] The Judge took the proven methamphetamine charges as the lead offending and proceeded on the basis that it involved at least 1.633 kilograms of methamphetamine.[68] This brought the offending within band 4 of *Zhang v R* and indicated a starting point of between eight and 16 years' imprisonment.[69] The Judge considered that Mr Fakaosilea occupied a leading role, which warranted a starting point at the top of band 4.[70] On this basis, the Judge's provisional starting point for the methamphetamine offending was 14 years' imprisonment.[71]

[161] The Judge uplifted the provisional starting point by four years to reflect the two conspiracy charges,[72] and a further six months to reflect the charge of possessing cocaine for supply.[73] The adjusted starting point was therefore 18 years and six months' imprisonment.[74] A further five percent uplift (11.1 months) was added to reflect the fact that the offending occurred while Mr Fakaosilea was on bail.[75]

[162] The Judge allowed the following discounts:

(a) from the 14-year starting point for the charges to which Mr Fakaosilea had pleaded guilty, 15 percent (coming to 25 months) for the guilty pleas;[76]

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67 At [63].
68 Fakaosilea and Pelikani sentencing notes, above n 11, at [26].
69 At [26]; and *Zhang v R* [2019] NZCA 507, [2019] 3 NZLR 648 at [125].
70 Fakaosilea and Pelikani sentencing notes, above n 11, at [28]–[30].
71 At [30].
72 At [33].
73 At [35].
74 At [36].
75 At [57]–[58].
76 At [88].

(b) from the adjusted starting point, 15 percent for personal factors and five per cent for youth;[77] and

(c) [redacted].[78]

[163] The end sentence was 13 years and two months' imprisonment.[79]

Starting point

[164] Mr Rhodes submitted that the Judge erred in selecting the starting point because he proceeded on the wrong quantity of drugs and treated Mr Fakaosilea's role as greater than it was.

The quantity of class A drugs

[165] The Judge sentenced Mr Fakaosilea on the basis that the three instances of possession of class A drugs for supply, on 11 March, between 15 and 16 March and on 5 August 2020, involved at least 1.633 kilograms of methamphetamine.[80] The Judge reasoned as follows.[81]

(a) Mr Fakaosilea had obtained at least 40 ounces of methamphetamine (approximately 1.133 kilograms) from Mr Huang by 16 March 2020.

(b) In that same month, Mr Fakaosilea had supplied unknown commercial quantities to Christchurch on two occasions.

(c) The Judge accepted that it was reasonably possible that those supplies had all come from the 40 ounces Mr Fakaosilea obtained from Mr Huang. However, the Judge did not accept that the 500 grams supplied in Christchurch on 5 August 2020 was part of the 40 ounces sourced from Mr Huang in March 2020 because of the five months that had elapsed since the 40 ounces was obtained.

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77 At [76] and [77].
78 [Redacted]
79 At [96].
80 At [26].
81 At [25].

[166] Mr Rhodes submitted that there was an insufficient evidential basis for this finding and the Judge should have accepted as reasonably possible that the source of the August 2020 supply was the original 40 ounces obtained in March 2020. Mr Rhodes argued that the Judge had failed to take into account the travel restrictions during COVID-19 lockdown periods (level 3 from 23 March 2020, level 4 from 25 March 2020 and level 3 from 27 April 2020 until 13 May 2020). These meant that Mr Fakaosilea was significantly constrained in terms of travel and supply of methamphetamine over that period. Secondly, there was no evidence, despite the monitoring of Mr Fakaosilea's movements and communications in 2020, that he had any other source of methamphetamine. Therefore, Mr Fakaosilea should have been sentenced on the basis that he had a total of 1.133 kg of class A drugs for supply.

[167] Mr Rhodes also submitted that the effect of sentencing Mr Fakaosilea on the basis of 1.633 kg rather than 1.133 kg was to incorrectly increase the starting point from between 11 and 12 years (the middle of band 4 of *Zhang*) to the upper quartile of band 4.

[168] Supporting the Judge's finding, Mr Thompson pointed to evidence that he said indicated Mr Fakaosilea was more likely to have on-sold all the methamphetamine obtained from Mr Huang in March 2020 reasonably quickly, rather than stockpiling the supplies. In an intercepted conversation with his Christchurch customer, Mr Mathers, on 11 March 2020, Mr Fakaosilea and Mr Mathers discussed the shortage of methamphetamine in both Auckland and Christchurch. A week later, on 15 March 2020, two of Mr Fakaosilea's associates, at his direction, flew to Christchurch to supply Mr Mathers with an unknown commercial quantity of methamphetamine. The following day, 16 March 2020, Mr Fakaosilea obtained 10 ounces of methamphetamine from Mr Huang (charge three) and in the "hongfulu" conversation, Mr Fakaosilea referred to giving Mr Mafileo two (ounces). Mr Thompson pointed out that this would have left Mr Fakaosilea with only eight ounces (227 grams) from that supply. And a week afterwards, on 21 March 2020, Mr Fakaosilea directed two associates to Christchurch with a further unknown commercial amount of methamphetamine to supply to Mr Mathers. Cumulatively, this evidence suggests that Mr Fakaosilea had disposed of all the 40 ounces he had obtained in March 2020 by the end of that month.

[169] Mr Thompson dismissed the submission that COVID-19 travel restrictions would have made much difference to Mr Fakaosilea's operations, given the nature of the operations and the fact that the monitoring of Mr Fakaosilea's movements and communications during that period was, in fact, quite limited. Mr Thompson also pointed out that the police executed a search warrant at Mr Fakaosilea's house on 16 June 2020 and no finding of methamphetamine was reported from that search.

[170] In our view, there was a sufficient evidential basis for the Judge to reach the conclusions he did regarding the quantum of class A drugs Mr Fakaosilea had in his possession. We agree with Mr Thompson that the evidence of Mr Fakaosilea's communications and the movements of his associates to and from Christchurch in March 2020 strongly suggests that all the methamphetamine he obtained from Mr Huang that month was promptly on-sold. On that basis, that travel restrictions during that time would have had little effect, even assuming that Mr Fakaosilea and his associates were observing them.

Mr Fakaosilea's role

[171] The Judge found that Mr Fakaosilea: was the wholesale supplier to the Christchurch customer, Mr Mathers; organised the buying and selling of methamphetamine on a commercial scale; obtained methamphetamine from Mr Huang on a number of occasions; and directed various subordinates in the drug syndicate. He said:

> [29] … It is an irresistible inference, from the duration and frequency of, and quantities involved in, the offending, that you expected to profit substantially from the drug enterprise. In my view, all these factors point to you having a leading role. However, I am not sure that you had close links to the original source of the methamphetamine that you possessed and supplied. You had a leadership role, but it was not quite the highest that the courts come across in dealing with commercial drug syndicates.

[172] Mr Rhodes submitted that, even if the quantum had been correctly calculated at 1.633 kilograms, the starting point was nevertheless excessive because the Judge assessed Mr Fakaosilea's role in the offending as being higher in the relevant band than the evidence warranted. He argued that Mr Fakaosilea's role should properly have been classified as being at the high end of significant, perhaps on the cusp of

leading but not truly in a leading role. Mr Fakaosilea was properly described as a middleman.

[173] Mr Rhodes pointed out that, while Mr Fakaosilea organised buying and selling on a commercial scale and did have substantial links to and influence on the others in the chain, other factors associated with a leading role were not present: he did not use business as a cover, did not abuse a position of trust and responsibility and did not have close links to the original source. Nor was there expectation of substantial financial gain, even though Mr Fakaosilea was offending for profit — in the context of the disputed facts hearing, Campbell J had referred to Mr Fakaosilea's statement to Mr Collins-Haskins that he was only making "five k" on what he was sending down to Christchurch.[82]

[174] We do not see any error in the Judge's assessment of Mr Fakaosilea's role. Mr Fakaosilea occupied a high position within the Comancheros and, on the evidence, was responsible for directing the wholesale supply of methamphetamine. This was the primary consideration in assessing his role. In any event, we do not accept that the amount of profit Mr Fakaosilea enjoyed from the role can be accurately gauged from a single comment by him to a customer. Having regard to other similar cases, we are not persuaded that the starting point was out of range.

[175] In *Wellington v R,* the quantity of methamphetamine involved was similar — 1.54 kilograms — but the role lesser.[83] Mr Wellington had played "a significant role" in the distribution of commercial quantities of methamphetamine and the offending was financially motivated in view of the significant profits.[84] Mr Wellington was not the ringleader and was not the principal organiser of the network. A starting point of 12 years' imprisonment was regarded as appropriate.[85]

[176] *Pomale v R* concerned the supply or conspiracy to supply approximately 2.1 kilograms of methamphetamine.[86] The offender was a middleman who acted as a

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82 Disputed facts judgment, above n 64, at [38(a)] and [49].
83 *Wellington v R* [2020] NZCA 277 at [4]–[6].
84 At [17].
85 At [18].
86 *Pomale v R* [2022] NZCA 343 at [8].

liaison between the upper end of the supply chain and the street level dealer.[87] The starting point of 13 and a half years' imprisonment was upheld on appeal.[88]

[177] In *Chai v R*, for charges involving two kilograms of methamphetamine where the role was described as organising, operational and significant, and the appellant was motivated solely by financial and other advantages, this Court considered the appropriate starting point was 13 years' imprisonment.[89]

[178] Mr Fakaosilea's offending was more serious than these cases, even allowing for the greater amount of methamphetamine involved in *Chai* and *Pomale*, because of the greater role he played.

[179] In *Malolo v R*, the offender held a leading role in the supply of at least 994 grams of methamphetamine and he offered to supply a further 500 grams.[90] So the offending was comparable to the present case. However, the starting point of 11 years' imprisonment, which was upheld on appeal, was described as lenient because it appeared that the Judge had not taken into account the further 500 grams when setting the starting point.[91] The case is therefore not of great assistance to Mr Fakaosilea.

[180] In comparison, Mr Fakaosilea's offending was not as serious as that in *Paora v R*, which involved a senior gang member who was deeply involved in a sophisticated enterprise to supply methamphetamine in the Bay of Plenty, with a leadership role which the Court likened to that of a chief executive, and who received most of the profits.[92] Mr Paora was convicted of, inter alia, possession for supply of a total of 2.691 kilograms of methamphetamine.[93] The global starting point taken by the sentencing Judge of 17 years' imprisonment was upheld on appeal.[94]

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87 At [4].
88 At [21].
89 *Chai v R* [2020] NZCA 202 at [17]–[21].
90 *Malolo v R* [2022] NZCA 399 at [10].
91 At [19].
92 *Paora v R* [2021] NZCA 559 at [1] and [3].
93 At [4].
94 At [30].

Uplift for the cocaine charge

[181] Mr Fakaosilea pleaded guilty to a charge of possession of cocaine for supply. The amount involved was 140 grams. The Judge applied an uplift of six months to reflect the additional offending.[95]

[182] Mr Rhodes submitted that this uplift is excessive. He argued that had the charge related to methamphetamine (which is what the Crown had originally alleged) an additional 140 grams of the drug would have been unlikely to have altered the starting point (a point the Judge had accepted at sentencing). Mr Rhodes suggested that the better approach would have been to assess the offending in totality at the outset and place it at an appropriate point in the band, bearing in mind that a portion of the drugs were cocaine, which would attract a slightly lower assessment in terms of *Zhang*.[96]

[183] Mr Rhodes also relied on *R v Uputaua*, in which the sentencing Judge, having taken a starting point of 15 years' imprisonment for methamphetamine offending involving 14.9 kilograms of the drug, imposed an uplift of one year to reflect charges of possessing a total of 2.21 kilograms of cocaine.[97] He submitted that the six-month uplift in the present case was excessive by comparison.

[184] We accept the Crown's submission that an uplift was appropriate to reflect the additional, and slightly different, criminality involved in the supply of cocaine. However, given that (as the Judge accepted) the starting point would not have been altered if the further 140 grams had been methamphetamine rather than cocaine, we agree that the uplift was excessive. An uplift of three months would have been sufficient to recognise the additional offending.

Uplift for the conspiracy charges

[185] The Judge sentenced on the basis that, although an agreement had been formed and the parties intended to carry it out, there was no evidence of any steps taken in

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95 Fakaosilea and Pelikani sentencing notes, above n 11, at [35].
96 *Cavallo v R* [2022] NZCA 276 at [63].
97 *R v Uputaua* [2017] NZHC 2320 at [3].

furtherance of it. He considered the starting point on a standalone basis would have been eight years' imprisonment and imposed an uplift of four years.[98]

[186] Mr Fakaosilea contends that the uplift was excessive because, not only was there no evidence of any steps having been taken in furtherance of the conspiracies, nor was there evidence to suggest that Mr Fakaosilea and Mr Huang had the ability to advance the "vague and fantastical" agreement.

[187] In *R v Te Rure*, this Court observed that it is "logical that, the closer a conspiracy comes to execution, the closer it becomes in seriousness to the actual illegal act being planned".[99] Mr Rhodes submitted that the converse must be true: the further a conspiracy is from execution, the further in seriousness it is compared to the actual illegal act being planned. He relied on *R v Naupoto*, in which Katz J had taken a starting point of four years' imprisonment for a conspiracy to import 400 kilograms of methamphetamine.[100]

[188] We accept that, in principle, this must be right. In *Gao v R*, this Court recognised that substantial discounts were properly afforded in cases where it was improbable that the importation would ever occur.[101] We do not accept, however that the plan was "vague and fantastical", as Mr Rhodes contended. The essential details of the plan were discussed, including the use of Mr Pelikani's contact as a door and the instructions recorded on Ms Tong's phone. It was a plan that was at an early stage. It might or might not have come to fruition, but there was sufficient evidence to show that the parties were prepared to engage in planning for what would have been very serious offending. On that basis, we turn to Mr Rhodes' submission that the starting point and uplift for the conspiracy charges were excessive.

[189] There are few cases with comparable features to the present case. In *Banaba v R,* three charges of conspiring to import more than 6.75 kilograms of methamphetamine, involving one actual importation and two intercepted

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98 Fakaosilea and Pelikani sentencing notes, above n 11, at [33].
99 *R v Te Rure* [2007] NZCA 305, [2008] 3 NZLR 627 at [25], quoted in *Banaba v R* [2016] NZCA 122 at [30].
100 *R v Naupoto* [2012] NZHC 3138 at [4] and [18].
101 *Gao v R* [2018] NZCA 69 at [14].

importations, drew a starting point of 13 years.[102] In *Gao*, this Court held that an effective starting point of 10 years and six months' imprisonment for conspiracy to import and supply very large commercial quantities of methamphetamine was within range.[103] The Court distinguished *Naupoto*, because it considered that the conspiracy in *Gao* involved a person of proven ability to import methamphetamine.[104]

[190] In the present case, the total amount involved in the proposed importations was unknown, because the importation from South Africa was said to be 600 kilograms but the importation from Fiji was of an unknown quantity. The facts are closest to *Gao*; an unspecified but clearly substantial commercial amount of methamphetamine, where the plan involved experienced dealers in methamphetamine and a claimed contact who could assist. We do not see any error by the Judge in fixing the starting point above *Naupoto* but below *Gao* and *Banaba.*

Uplift for offending on bail

[191] When Mr Fakaosilea committed the current offences, he was on bail for unrelated offending and was subsequently acquitted on those charges. Given that he was acquitted on the unrelated charges, Mr Rhodes submitted that the Judge erred in imposing a five per cent uplift for offending on bail.

[192] Mr Rhodes relied on this Court's decision in *Fangupo v R*, in which the appellant had offended at the same time he was standing trial (and presumably on bail) on unrelated charges.[105] He was acquitted of the charges on which he was standing trial. In relation to the later sentence imposed for offending committed while he was on trial, this Court did not accept that the unproven charge should be held against him when considering whether he should not be entitled to a discount for previous good character.[106]

[193] The present case is different because the issue is whether the sentence should have been uplifted to recognise the fact that Mr Fakaosilea offended while on bail.

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102 *Banaba v R*, above n 99 at [23], [24], [31] and [38].
103 *Gao v R*, above n 101, at [17].
104 At [24].
105 *Fangupo v R* [2020] NZCA 484 at [57].
106 At [57].

Although the facts of *Fangupo* suggest that the same issue could have arisen there, it did not. Whether Mr Fakaosilea was ultimately acquitted of the charges in respect of which he had been bailed does not change the fact that he was subject to bail conditions at the time he committed the offending for which he was being sentenced. Offending while on bail is an aggravating factor that the sentencing Judge was required to take into account.[107] The Judge did not err.

Discounts for youth and prospects of rehabilitation

[194] At the time of the offending Mr Fakaosilea was 20 years old. He had lived in New Zealand since he was 16 and had a very limited criminal history in New Zealand (assault with a weapon, driving offences and obstructing police). He had not previously served any term of imprisonment, nor any sentence of community detention.

[195] The Judge described Mr Fakaosilea's childhood in Australia as seriously dysfunctional.[108] Effectively raised by his siblings, Mr Fakaosilea had come under the influence of his older brother from a young age. As a result, he became involved in drugs and gang life as a teenager and became a heavy drug user. When his brother was deported to New Zealand in 2016, Mr Fakaosilea, then aged 16 years, followed him and became involved in the Comancheros. These circumstances were reflected in the 15 per cent discount given for personal circumstances, which is not challenged.

[196] Under challenge is the Judge's allowance of five per cent for youth and no recognition for rehabilitative efforts.[109] The Judge explained this by the fact that the youth credit is generally justified by the impaired decision-making ability of young offenders and their better prospects for rehabilitation. The Judge considered that the 15 per cent credit, which had already been allowed for Mr Fakaosilea being influenced by his brother, recognised any impairment in decision-making abilities due to youth. He did not accept that Mr Fakaosilea had shown any concrete steps towards rehabilitation and so did not see any justification for a discrete discount for that.

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107 Sentencing Act 2002, s 9(1)(c).
108 Fakaosilea and Pelikani sentencing notes, above n 11, at [76].
109 At [77].

[197] Mr Rhodes submitted that the five per cent discount was inadequate, having regard to Mr Fakaosilea's age, limited criminal history and prospects of rehabilitation. As to the last, he pointed to the fact that Mr Fakaosilea had made efforts towards rehabilitation by applying for electronically monitored (EM) bail to a residential rehabilitation facility in both 2021 prior to the trial,[110] and at the conclusion of the trial in 2022. Both had been declined.[111] Mr Rhodes also pointed out that Mr Fakaosilea's co-offender, Mr Huang, received a 22.5 per cent discount for previous good character and a further 10 per cent for his rehabilitative prospects, even though he was significantly older.

[198] These submissions were met by the Crown with reference to the seriousness of the offending — Mr Fakaosilea occupied a position at the top of a drug syndicate and had subordinates under his control. Mr Thompson submitted that there was no impulsivity in play but rather sustained, sophisticated planning. He also noted that while he had applied for EM bail to residential facilities and expressed a willingness to rehabilitate, unlike Mr Huang, he had not actually completed any rehabilitation programmes prior to his sentencing.

[199] In our view, Mr Fakaosilea's situation did warrant somewhat greater recognition of his youth and prospects for rehabilitation than the Judge recognised. Impaired decision-making that is recognised by a discount for youth is not necessarily limited to the impulsivity that frequently accompanies youth offending, a point recently made by this Court: "[l]imited neurological development and immaturity can be implicated in a young person's offending even when their behaviour does not necessarily appear impulsive".[112] Such immaturity can be seen in the young person's ability to understand and assess the nature of the offending as well as the risks associated with it. For a 20-year-old to assume the responsibility of very serious drug offending in a gang context suggests a lack of comprehension as to the risks he was

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110 *Fakaosilea v R* [2021] NZHC 2171 [bail judgment]; and *Fakaosilea v R* [2021] NZCA 554 [bail appeal judgment].

111 *R v Fakaosilea* [2022] NZHC 2539 [abandoned bail application judgment]; and *R v Fakaosilea* [2022] NZHC 3135 [bail pending sentence judgment]. Mr Fakaosilea had also unsuccessfully applied for bail in the District Court in 2021, and his appeal was dismissed by Palmer J: *R v Fakaosilea* [2021] NZHC 2469; aff'd *Fakaosilea v Police* [2021] NZHC 248 [Powell J bail judgment].

112 *Uruamo v R* [2023] NZCA 356 at [31].

running. Mr Fakaosilea, some eight years younger than Mr Huang, and by his own account "a yes man", plainly lacked the maturity needed to make an independent decision about the nature of the offending in which he was becoming involved. We are mindful, too, of the crushing effect of a long sentence on a young person, also recognised as a justification for youth discounts.[113] This is especially relevant in this case because, as noted, Mr Fakaosilea had never served a sentence of imprisonment prior to these convictions.

[200] We also are of the view that Mr Fakaosilea's prospects for rehabilitation ought to have been positively recognised. As Mr Rhodes submitted, Mr Fakaosilea had applied repeatedly for EM bail in order to engage with residential rehabilitation programmes. He had been declined each time, mainly because of his risk profile.[114] Mr Fakaosilea's ongoing association with the Comancheros and his conduct in prison while on remand suggested that he would continue to associate with them and possibly reoffend. On the other hand, Mr Fakaosilea has provided an affidavit in support of his applications for EM bail pending sentence in which he speaks plainly about his past life and his strong wish to engage in rehabilitation. He also explains the difficulty of engaging with the rehabilitative services available to those in custody, given the dynamics of prison and also the fact that, during the period affected by COVID-19, staff shortages and the backlog of people wanting to attend treatment programmes meant availability has been very limited.

[201] We consider that a 10 per cent discount would have been appropriate to recognise Mr Fakaosilea's youth, the potentially crushing effect of a long sentence on a young man and his stated wish to engage in rehabilitation.

[Redacted]

[Redacted]

[202] [Redacted].

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113 *Churchward v R* [2011] NZCA 531, (2011) 25 CRNZ 446 at [77(b)], citing *R v Chankau* [2007] NZCA 587 at [26], and *R v Slade* [2005] 2 NZLR 526 (CA) at [45].

114 Bail judgment, above n 110, at [30], adopting Powell J's comments: see Powell J bail judgment, above n 111, at [19]. See also bail appeal judgment, above n 110, at [29] and [31]; abandoned bail application judgment, above n 111, at [46]; and bail pending sentence judgment, above n 111, at [15]–[17].

[203] [Redacted].

[204] [Redacted].

[205] [Redacted].

[206] [Redacted].

[207] [Redacted].

[Redacted]

[208] [Redacted].[115]

[209] [Redacted].[116] [Redacted].[117] [Redacted].[118] [Redacted].[119] [Redacted].[120]

[210] [Redacted].[121]

[211] [Redacted].[122] [Redacted].

[212] [Redacted].

Result

[213] Our conclusions mean that:

(a) the adjusted starting point is reduced by three months to 18 years and three months' imprisonment;

(b) the discount for youth and prospects of rehabilitation is increased from five to 10 per cent; and

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115 [Redacted].
116 [Redacted].
117 [Redacted].
118 [Redacted].
119 [Redacted].
120 [Redacted].
121 [Redacted].
122 [Redacted].

(c) [redacted].

[214] The uplift of five per cent for the offending occurring while Mr Fakaosilea was on bail remains. The discount of 15 per cent for personal factors remains. The discount of 15 per cent for guilty pleas in respect of the charges to which Mr Fakaosilea pleaded guilty remains, coming to a discount of 25 months.

[215] The result is a reduction in the end sentence to 10 years and eight months' imprisonment.

Mr Pelikani

[216] Mr Pelikani was sentenced on one charge of conspiracy to import methamphetamine and one of jointly possessing five ounces of cocaine for supply with Mr Fakaosilea. The Judge took the conspiracy charge as the lead offence and adopted a starting point of six years' imprisonment for that charge.[123] He uplifted the starting point by 18 months to recognise the cocaine charge.[124] This gave a starting point of seven years and six months' imprisonment.

[217] The Judge allowed discounts of: 20 per cent of the relevant starting point for Mr Pelikani's guilty plea on the charge of possession of class A drugs for supply (equating to ten months);[125] 10 per cent for Mr Pelikani's deprived and dysfunctional childhood;[126] and five per cent for rehabilitative prospects.[127] [Redacted].[128] Finally, the Judge allowed a five month credit for the time spent on EM bail.[129]

[218] The end sentence was four years and 11 months' imprisonment.[130]

[219] Mr McColgan submitted that the starting point was too high and the discounts for personal factors [redacted] too low.

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123 At [41].
124 At [43].
125 At [89].
126 At [78].
127 At [81].
128 [Redacted].
129 At [92].
130 At [97].

Starting point

[220] The starting point of six years was taken on the basis that Mr Pelikani was party to only one of the conspiracies and was brought into that conspiracy after it had already been formed by Mr Fakaosilea and Mr Huang.[131] The Judge therefore regarded Mr Pelikani's responsibility as slightly lower.

[221] Mr McColgan submitted, as Mr Rhodes had in relation to Mr Fakaosilea, that the Judge had erred by treating the conspiracy as having a greater degree of probability in terms of it being carried out than the evidence justified. In fact, Mr McColgan said, there was much to suggest that the plan was highly improbable: the likelihood of the conspirators finding $60 million to source the drugs was fanciful; the suggestion that the supplier would not require payment up front was again fanciful; and there was no evidence to suggest that Mr Pelikani had access to a "door" that would be able to assist in an importation by sea as opposed to contact at the mail centre. Moreover, apart from the very limited conversations that formed the basis for the conspiracy charges, there was no evidence of any steps having been taken towards implementing the plan. Mr McColgan also invited comparison with *R v Naupoto*, submitting that the Judge had wrongly distinguished *Naupoto* and placed insufficient weight on it.[132]

[222] For the reasons already discussed in relation to Mr Fakaosilea's appeal, while we accept that there is no evidence that steps were actually taken to advance the conspiracy, we do not accept that the plan could not have been advanced.

[223] The lower starting point fairly reflected the fact that Mr Pelikani was guilty of only one of the conspiracies. However, although the Judge had regarded him as being slightly less culpable than Mr Fakaosilea and Mr Huang because he was a latecomer to the plan, we do not think the starting point reflected that finding. In our view, the appropriate starting point required some further adjustment for that. A starting point of five years and nine months' imprisonment would have been appropriate. This starting point is uplifted by 18 months for the cocaine offending, as recognised by the

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131 At [41].

132 *R v Naupoto*, above n 100, as discussed by Campbell J at [31]–[32] of the Fakaosilea and Pelikani sentencing notes, above n 11.

Judge and not challenged in this appeal.[133] This leads to an adjusted starting point of 7 years and three months' imprisonment.

Discount for personal factors

[224] The Judge described Mr Pelikani's upbringing as seriously deprived and was satisfied that this contributed to the path and to the decisions that led to his offending.[134] He commented however that Mr Pelikani had had opportunities in the past to leave that path, and referred to Mr Pelikani's statement when he was sentenced at 21 years of age on other matters that he intended to "go straight". The Judge said:[135]

> You chose not to. I accept that with your upbringing going straight is easier said than done. But your moral culpability is, for this reason, not diminished by your upbringing as much as is Mr Fakaosilea's.

[225] The Judge allowed a 10 per cent credit. Mr McColgan submitted that greater recognition should have been made of Mr Pelikani's personal background and he should not have been penalised for not being able to persevere with intentions he stated as a 21-year-old. Further, some recognition should have been made for the fact that Mr Pelikani had a drug addiction.

[226] Although satisfied that Mr Pelikani had a drug addiction that may have diminished his capacity to make rational choices, the Judge was not satisfied that the drug addiction was causative of the offending given that it was commercial and was not committed for the promise of reward in drugs or for little other financial gain.[136] He therefore declined to allow a discrete discount for that factor. Nevertheless, he allowed a five per cent credit for Mr Pelikani's efforts at rehabilitation, noting that he had engaged in several intensive rehabilitation programmes since 2021.[137]

[227] We agree that a greater discount ought to have been allowed for Mr Pelikani's rehabilitative efforts. Counsel advised that Mr Pelikani had completed a five-month full-time residential programme and continued with rehabilitation as an out-patient

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133 Fakaosilea and Pelikani sentencing notes, above n 11, at [42] and [43].
134 At [78].
135 At [78].
136 At [79]–[80].
137 At [81].

until trial. Given Mr Pelikani's difficult upbringing, which contributed to his drug addiction, efforts of this kind should be encouraged and recognised. A discount of 10 per cent would have been appropriate.

[Redacted]

[228] [Redacted].[138] [Redacted].

Result

[229] Our conclusions mean that:

(a) the starting point for the lead offending is reduced by three months to five years and nine months' imprisonment; and

(b) the discount for prospects of rehabilitation is increased from five to 10 per cent; and

(c) [redacted].

[230] The discount for guilty pleas in respect of the charges to which Mr Pelikani pleaded guilty, which came to ten months, remains.[139] The discount of 10 per cent for personal factors remains. The five-month credit for time spent on EM bail remains.

[231] The result is a reduction in the end sentence to three years and ten months' imprisonment.

Result

[232] Mr Huang's appeal against conviction is dismissed.

[233] Mr Fakaosilea's and Mr Pelikani's appeals against conviction are dismissed.

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138 [Redacted].

139 Fakaosilea and Pelikani sentencing notes, above n 11, at [87] and [89] citing *Agar v R* [2021] NZCA 350 at [30]–[37].

[234] Mr Fakaosilea's appeal against sentence is allowed. The sentence of 13 years and two months' imprisonment is set aside and substituted with a sentence of 10 years and eight months' imprisonment.

[235] Mr Pelikani's appeal against sentence is allowed. The sentence of four years and 11 months' imprisonment is set aside and substituted with a sentence of three years and ten months' imprisonment.

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