

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

**I TE KŌTI MATUA O AOTEAROA  
ŌTAUTAHI ROHE**

**CRI-2021-009-8205  
[2024] NZHC 1817**

**THE KING**

v

**FELIPE MONTOYA OSPINA**

Hearing: 4 July 2024

Appearances: B Hawes and A M Harvey for Crown  
P H B Hall KC and E Huda for Defendant

Judgment: 4 July 2024

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**SENTENCING REMARKS OF MANDER J**

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**Introduction**

[1] Felipe Montoya Ospina, you are for sentence having pleaded guilty to representative charges of importing the Class A drug cocaine,<sup>1</sup> attempting to import cocaine<sup>2</sup> and supplying the Class A drug cocaine.<sup>3</sup> You have also pleaded guilty to charges of offering to supply that drug<sup>4</sup> and participating in an organised criminal group.<sup>5</sup>

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<sup>1</sup> Misuse of Drugs Act 1975, s 6(1)(a) — maximum penalty life imprisonment.

<sup>2</sup> Section 6(1)(a); and Crimes Act 1961, ss 66, 72 and 311 — maximum penalty 10 years' imprisonment.

<sup>3</sup> Misuse of Drugs Act, s 6(1)(c) and (2) — maximum penalty life imprisonment.

<sup>4</sup> Section 6(1)(c) and (2) — maximum penalty life imprisonment.

<sup>5</sup> Crimes Act, s 98A — maximum penalty 10 years' imprisonment.

## **The offending**

[2] You are 37 years old. You grew up in Colombia but say you came to New Zealand to experience the lifestyle of being outdoors, rather than what you described as the “city life” of Colombia. You arrived in New Zealand from Sydney in June 2016. You were initially issued a visitor visa, later a working visa and undertook agricultural work in rural Canterbury. Finding that work isolating, you reached out to a Latina community group to establish some connections. You say that, through that pathway, you became acquainted with members of the drug syndicate.

[3] Your offending arises out of a significant police investigation into the importation of cocaine into this country from South America. It involved international co-operation with Colombian and Spanish Police, and American drug enforcement authorities. The drug syndicate operated from at least January 2018 to December 2021 and used farm workers, such as yourself, as “cover”. It is estimated 42.5 kilograms of cocaine with a street price of over \$19,000,000 was imported into New Zealand. A further 59.1 kilograms of cocaine with a street value of more than \$26,000,000 was also intercepted.

[4] One of your co-defendants has been identified as leading this operation. He had contacts within an overseas drug cartel and you have been identified as one of this person’s close associates. You are described as a senior member of the syndicate. You were involved in the importation and attempted importation of cocaine into New Zealand and personally supplied cocaine to other members of the organised criminal group based in Auckland. Your home address included an area specifically for deconstructing packaged items in which cocaine was imported. You were a trusted member of the syndicate who received packages of cocaine and was in charge of the deconstruction of those packages. However, you had limited, if any, contact with the overseas suppliers.

[5] Your offending occurred between 1 January 2018 and December 2021. In that period, you successfully imported seven packages of cocaine into New Zealand that weighed some 11.4 kilograms. You attempted to import a further five packages of cocaine that amounted to 28.87 kilograms.

[6] The representative charge of supplying cocaine arose from two discrete transactions.

[7] On 24 April 2021, you travelled by bus from Christchurch to Auckland, arriving in the early morning of the next day. You carried cocaine with you. You met with one of your co-defendants at a hotel in central Auckland. This person had flown to Auckland that morning from Christchurch. Later that morning, you retrieved the cocaine from a luggage store area and travelled with your associate to a meeting place where you rendezvoused with and supplied the cocaine to another person.

[8] The second supply of cocaine was on 11 July of the same year. As with the first trip, you travelled from Christchurch to Auckland by bus. You met with the same person and provided him with a package containing cocaine before immediately flying back to Christchurch. Later that month, your associate travelled to Auckland and retrieved \$100,000 cash for the cocaine from the person you had earlier supplied.

[9] You also offered to supply cocaine to two unknown persons via a messaging app on your cell phone on six occasions between 3 August 2021 and 10 September 2021. That period overlapped with or comes shortly after the drug syndicate successfully imported four packages in July and August of that year.

[10] Five of those offers appear to have been to the same person, who used the same messaging handle. The details of those offers are as follows:

- (a) Between 3 and 6 August 2021, half an ounce (14 grams) was offered for \$3,920. You arranged to meet at the Merivale Mall car park and the pair of you messaged each other once you had arrived at that location.
- (b) Between 31 August and 2 September 2021, two ounces (56 grams) were offered for \$8,400 per ounce. The person wanted half an ounce for \$4,200. You arranged to meet at a local car park for the handover.
- (c) Between 2 and 3 September 2021, two ounces of cocaine were offered. The person asked for three quarters of an ounce and you said you could do that for \$6,300.

- (d) Between 4 and 6 September 2021, half an ounce was offered which was accepted. Texting continued until the exchange was made.
- (e) Between 9 and 10 September 2021, this same buyer asked to buy half an ounce from you, but you only had a quarter. You indicated you would sell the quarter for \$2,000. You again arranged to meet and continued texting until the exchange was complete.
- (f) The sixth occasion you offered to supply cocaine was on 9 September 2021, this time to a different person. You offered one ounce for \$8,120 and arranged to meet this person. You were asked again to supply cocaine after 10 September, but you said you could not source the drug. This is consistent with a number of the syndicate's imports being intercepted at the border around this time.

[11] On 10 November 2021, the police terminated its investigation. A search of your address in Hororata located numerous items consistent with commercial scale drug offending. Items included 10 cell phones; \$30,000 in cash; various tools, including a drill bit used to extract cocaine from imported receptacles, snap lock bags, scales, a bottle of acetone; and various items, all of which matched the consignee description of seven successful imports.

[12] You initially denied any involvement but pleaded guilty in March this year.

### **Approach to sentencing**

[13] The Sentencing Act 2002 sets out the purposes and principles of sentencing that I am required to take into account in sentencing you today. Relevant purposes include accountability, denunciation, deterrence and rehabilitation. I need to consider the gravity of your offending, the degree of your culpability, the seriousness of the offending and the general desirability of consistency in imposing sentences for like offending. I am required to impose the least restrictive outcome that is appropriate in the circumstances.

[14] In passing sentence, I must fix a period of imprisonment that is commensurate with the seriousness of your offending, in accordance with sentencing guidelines for Class A drug offending that have been provided by the appellate courts.<sup>6</sup> Broadly, your culpability is to be assessed by the quantity of the drug involved and the role you played in the offending.<sup>7</sup> I must then consider matters personal to you which may be of aggravating or mitigating effect to arrive at an appropriate end sentence.

### **Effects of offending**

[15] In sentencing you today, it is important to recognise the harm caused by serious drug offending, particularly that of Class A drugs. Your offending does not have a direct victim. But the distribution of cocaine, like other hard drugs, has countless victims within the community, people who often experience the very worst outcomes. These include adverse mental health, criminal offending to fund addiction, the breakdown of personal and employment relationships, and social deprivation.<sup>8</sup> Society as a whole is harmed by such drug activities.

### **Starting point**

[16] The Crown submits this case is significant and without obvious comparison to other Class A drug offending involving as it does close to or more than 100 kilograms of cocaine. Your offending involves both a large quantity of this Class A controlled drug, but is also marked by multiple importations or attempted importations over a lengthy period.

[17] The Crown submits the approach to be taken to the setting of an appropriate sentence should, firstly, involve an assessment of a starting point for the successful importations and, secondly, an increase to reflect the unsuccessful importations. This is consistent with the approach that has been adopted in sentencing your co-defendants. It reflects the lower maximum penalty of 10 years' imprisonment for attempted importation in comparison to life imprisonment for a successful importation. I adopt this two-stage approach.

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<sup>6</sup> *Berkland v R* [2022] NZSC 143, [2022] 1 NZLR 509; *Zhang v R* [2019] NZCA 507, [2019] 3 NZLR 648; and *Cavallo v R* [2022] NZCA 276, (2022) 30 CRNZ 726.

<sup>7</sup> *Zhang v R*, above n 6, at [104], [106]-[117] and [126]-[127].

<sup>8</sup> *Zhang v R*, above n 6, at [78]-[79].

[18] The Crown correctly identifies that your successful importation of 11.4 kilograms of cocaine places you in band five of the case called *Zhang*, which indicates a starting point range of 10 years to life imprisonment.<sup>9</sup> The Crown submits you fit “squarely” in the significant category in terms of your role and contends a starting point of at least 18 to 19 years’ imprisonment is appropriate.

[19] Mr Huda, on your behalf, argues a 20-year starting point would be manifestly excessive and that, taking all charges together, warrants a starting point of 16 years’ imprisonment. In doing so, he submits you fall at the lower end of the significant category in terms of role.

[20] It is to that issue — your role in the offending — that I now turn. The Crown submits you were a senior member of the syndicate, trusted to receive and deconstruct packages. Your offending involved organised crime for the express purpose of turning a profit, and, although you had limited overseas contacts, you were a willing receiver of packages. The Crown accepts however that you often acted at the direction of other more senior members of the syndicate.

[21] In contrast, Mr Huda argues you did not come to New Zealand for the purpose of committing serious cocaine offending, that you acted at the direction of others and allowed your home to be used to deconstruct packages. He maintains that, while you did assist others in that task, you did so under supervision, and you did not make any profit from the syndicate’s drug proceeds. He argues the motivation for your offending was drug addiction.

[22] I assess you as being in the middle of the significant category, for the following reasons:

- (a) Firstly, you played a role at each stage of the operation, including the importation, the extraction of cocaine, and its eventual supply. Your home address was used for deconstruction of the cocaine packages, and you participated in this activity. I accept you acted under the direction of others.

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<sup>9</sup> At [125].

- (b) Secondly, you were motivated solely or primarily by financial advantage. You contest the Crown's submission that the driver of your offending was profit. You report drug addiction as being the reason you became involved in the syndicate and that you were paid in amounts of cocaine. I do not accept this. You were involved at every stage of the operation. You were trusted with large quantities of cocaine and the deconstruction took place at your home address. I find it difficult to believe you would have been involved and trusted by more senior members to the extent you were, if you were so addicted and under the influence of drugs at that time. Some of your co-defendants' offending was primarily motivated by addiction and they were paid in small amounts of cocaine. However, they performed much lesser roles. I note the final offer to supply cocaine between 9 and 10 September 2021 was of the last quarter ounce you had to supply and, despite this being during a period when you could not source anymore of the drug due to border intercepts, you offered to sell it for \$2,000. In my view, that is inconsistent with your claim of being a heavy addict. I accept your self-reporting that you used drugs over the period of your offending, but I consider this was a secondary motivation. Rather, your primary motivation was financial gain. I do not consider the circumstances of your offending bear any other reasonable inference.
- (c) Thirdly, you report you would sometimes be paid \$1,000 in cash for your services, as well as payments of \$5,000 for the trips to Auckland. It can be inferred that, in a commercial sized operation such as this, you were receiving payment for your ongoing services over the offending period. While this may not have been commensurate to the risk assumed, such is commonplace for those not at the "leading" end of the hierarchy in a syndicate such as this. Having regard to the indicated extent of your involvement, I consider it likely the financial rewards you received over the period of your offending were not insignificant.
- (d) Finally, your awareness of the scale of the operation. As already noted, you were involved at each stage of the operation. The quantity involved

is significant and you knew the syndicate had international links because you were willing to receive packages from contacts overseas. Yours is not a case of discrete instances of import or supply of small amounts, rather, you knowingly participated in an ongoing commercial drug importation operation.

[23] Both counsel have referred to what are submitted, from their perspectives, as being comparable cases.

[24] In *Agwu v R*, the appellant played a leading role as the head of an operation importing and supplying 4.5 kilograms of cocaine.<sup>10</sup> A starting point of 18 years' imprisonment was adopted and upheld on appeal.<sup>11</sup> In *R v Cook*, 35 kilograms of cocaine was imported into Auckland from Mexico inside a statue.<sup>12</sup> The less culpable offender was still described as a "key player" and received a 19-year starting point. On appeal, that offender was assessed as having a mid to low-level significant role and the starting point was adjusted to 17 years' imprisonment.<sup>13</sup>

[25] Your offending in terms of quantum is more serious than in *Agwu*, but you played a lesser role, although I note Mr Agwu's offending was only over a five-month period. The quantity in *Cook* was much higher than what your offending involved, but that concerned one discrete importation rather than numerous importations over an extended period, and your role falls squarely within the significant category.

[26] The Court of Appeal decision in *Cavallo v R* concerned a group of foreign nationals who were part of an international organised criminal group importing cocaine from South America over a three-month period in 2017.<sup>14</sup> One of the offenders, Mr Cavallo, assisted the leader of the organisation to import a third shipment of 46 kilograms of cocaine. The Court of Appeal upheld the finding that he had a high-level significant role. He was described as not fitting into the leading category because he did not "undertake the same range of tasks and responsibilities

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<sup>10</sup> *Agwu v R* [2015] NZCA 619.

<sup>11</sup> At [8].

<sup>12</sup> *R v Cook* [2017] NZHC 2034.

<sup>13</sup> *Cook v R* [2020] NZCA 469 at [42]-[43].

<sup>14</sup> *Cavallo v R*, above n 6.



that characterised two other offenders' involvement".<sup>15</sup> The Court approved a starting point for him Cavallo of 20 years and 10 months' imprisonment.

[27] Your offending is less serious than Mr Cavallo's in terms of quantum and you played a more subordinate role, you being in the middle of the significant category rather than at the higher end. However, the offending in that case involved only the one discrete transaction.

[28] From all this analysis, I consider a **starting point of 18 years' imprisonment** is appropriate, keeping in mind this also captures the charge of participation in an organised criminal group that involved an extensive cocaine importation enterprise that continued over a number of years, and includes your detected internal or local trafficking in cocaine over a two-month period shortly before the termination of the police operation. That starting point needs to be uplifted for the attempted importation of 28.87 kilograms of cocaine. In doing so, I take into account the quantity of the drug, your level of ongoing assistance and that it extended over a lengthy period of time. For that offending, after having regard to totality, I **adjust the starting point by 18 months**.

[29] This brings the end starting point to **19 years and six months' imprisonment**.

[30] Neither the Crown nor your counsel have suggested a separate uplift for the charges of supplying and offering to supply cocaine to be necessary. As I have already noted, that offending should be viewed as having been taken into account in fixing the starting point for the importation charges.

[31] This results in an end starting point, as I have said, of **19 years and six months' imprisonment**.

### **Personal mitigating features**

[32] Your counsel submits there are a number of mitigating features personal to you that should reduce your sentence. These include your guilty pleas, your imprisonment

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<sup>15</sup> At [68] and [74].

as a foreign national and your rehabilitative potential. A s 27 report has been filed which canvasses your background.

### *Guilty plea*

[33] You pleaded guilty in March 2024. The prosecution case against you was strong and your pleas can only be assessed as belated. You were charged in November 2021 and pleaded guilty on 1 March 2024. I apply the same **10 per cent discount** as I have afforded other offenders who pleaded guilty within the same timeframe.

### *Foreign imprisonment*

[34] You are from Colombia. You arrived in New Zealand in 2016. It has been recognised that the isolation and denial of family support experienced by foreign nationals imprisoned in New Zealand for drug offending, may be treated as a mitigating factor where it makes the sentence harder than usual to bear.<sup>16</sup>

[35] You report to having a strong support network in Colombia that includes your parents and two siblings. Since your arrest, your parents' health has declined. You have only one support person here in New Zealand, who visits once a month. I accept your relative isolation from your home country may make your sentence harder to bear and that you struggle to understand English. However, you came to this country and decided to commit serious crime. You knew the consequences. One of your co-offenders was granted a five per cent discount on account of the disproportionate impact imprisonment in New Zealand would have upon him.<sup>17</sup> I consider I am obliged to adopt a similar course and apply the same **discount of five per cent** for you.

### *Background matters and rehabilitative potential*

[36] Aside from the offending for which you appear today, you have no known criminal history. The pre-sentence report writer assesses you as at low risk of reoffending.

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<sup>16</sup> *Zhang v R*, above n 6, at [163].

<sup>17</sup> *R v J* [2024] NZHC 204, at [76].

[37] Your s 27 report details your background. You grew up in a close, stable and religious family. You did not lack anything as a child. After finishing school, you obtained a Bachelor's degree in Business Management and a Postgraduate Certificate in Quality Control Systems. When you moved to New Zealand, your difficulties in communicating in English constrained your social circle to other Spanish speakers and when you began working on a dairy farm, you became isolated, particularly after the COVID-19 lockdowns. This is said to have affected your mental health, as well as the fact your girlfriend's tourist visa to New Zealand was declined.

[38] As a result, you say you resorted to drugs that were provided by your co-defendants and developed a habit. Although you say this was your motivation behind your offending, for the reasons already canvassed, I do not consider that was the case. I accept it may have been a contributing factor but your motive was a commercial one.

[39] You said to the pre-sentence report writer you are deeply regretful for your offending and that since your arrest you have engaged in work, exercise, and returned to your religion. Upon your release, your family is prepared to pay for your return flight to Colombia and your uncle will employ you at his company. Your remorse and prospects indicate there are positive prospects for your rehabilitation.

[40] I consider a **discount of 10 per cent** is appropriate to mark these personal mitigatory considerations.

### **Summary**

[41] In summary, from a starting point of 19 years six months' imprisonment, I deduct 10 per cent for your guilty pleas, five per cent for the hardship of imprisonment in New Zealand and 10 per cent for your previous good background and rehabilitative potential. That amounts to a total discount of 25 per cent, and results in an **end sentence of 14 years and seven months' imprisonment**.

### **Minimum period of imprisonment**

[42] The Crown submits I should impose a minimum period of imprisonment (MPI). That is the period of imprisonment you must serve before you have any chance of being released on parole.

[43] An MPI, as it is called, is not imposed as a matter of routine or in a mechanistic way.<sup>18</sup> Under s 86 of the Sentencing Act 2002, I may impose an MPI if I consider it is necessary to hold you accountable for the harm done to the community by way of your offending, denounce your conduct, deter you or others from committing similar offences, or because there is some need to protect the community. When determining whether an MPI is required and, if so, the duration, the Court is required to take into account the purposes and principles of sentencing and the applicable aggravating and mitigating factors.<sup>19</sup>

[44] The Crown has submitted an MPI of 50 per cent is warranted on the basis you were involved in the organised importation of cocaine over an extended period of time, the fact your involvement was not borne from addiction and you were a visitor to New Zealand. Mr Huda argues an MPI is not warranted. He submits your role does not justify such a step.

[45] Your offending continued over a lengthy period of time. You participated at every stage of the operation and, as I have found, addiction was not at its root. To the contrary, you were commercially motivated, although I accept your drug habit may have been a contributing factor. There is a public interest in imposing stern sentences on foreign nations who import narcotics into New Zealand, but it has not been established you came to this country with that intention, and you did act under the direction of others. By a fine margin, I consider the end sentence I have reached adequately satisfies the purposes of sentencing.<sup>20</sup>

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<sup>18</sup> *Zhang v R*, above n 6, at [169].

<sup>19</sup> *R v Nguyen* [2009] NZCA 239 at [33]-[34].

<sup>20</sup> *R v Gordon* [2009] NZCA 145 at [46].

## **Sentence**

[46] Mr Montoya Ospina, would you please now stand.

[47] On the charges of participating in an organised criminal group, importing, attempting to import, supplying, and offering to supply the Class A drug cocaine, you are sentenced to **14 years and seven months' imprisonment.**

[48] There will be an order for forfeiture of the tools and other items relating to your offending that were located at your address at the time of the police search.

[49] You may stand down.

Solicitors:  
Crown Solicitors, Christchurch

Counsel:  
P H B Hall KC, Christchurch  
E Huda, Barrister, Christchurch