IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA167/2019
[2020] NZCA 296

	BETWEEN	VALENTINE ATIRIANA MOSES Appellant
	AND	THE QUEEN Respondent

Hearing:	30 April 2020
Court:	Kós P, Miller and Collins JJ
Counsel:	V L Thorpe and A W Clarke for Appellant M J Lillico and ZWQ Andrew for Respondent E A Hall and L Scott for Criminal Bar Association of New Zealand as Intervener
Judgment:	15 July 2020 at 11.00 am

JUDGMENT OF THE COURT

A The application to adduce a s 27 report on appeal is granted.

B The appeal is allowed.

C We quash the sentence passed below and substitute a sentence of seven years, five months imprisonment.

REASONS OF THE COURT

(Given by Miller J)

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[1] In this judgment we revisit the Court's 2009 judgment in *Hessell v R*, which adopted a three-step methodology for sentencings affected by a guilty plea.[1] We alter that methodology to require a two-step approach in which any discount for a guilty plea is fixed at the second step.

[2] Ms Moses is one of several dealers in methamphetamine who were sentenced under the former guideline judgment, *R v Fatu*,[2] and whose appeals were adjourned pending delivery of the Court's current guideline judgment in *Zhang v R*.[3] We also consider, by reference to the *Zhang* guidelines, whether her sentence was manifestly excessive.[4]

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1 *Hessell v R* [2009] NZCA 450, [2010] 2 NZLR 298 [*Hessell* (CA)]. The three-step methodology survived the Supreme Court judgment: *Hessell v R* [2010] NZSC 135, [2011] 1 NZLR 607 [*Hessell* (SC)] at [73].

2 *R v Fatu* [2006] 2 NZLR 72 (CA).

3 *Zhang v R* [2019] NZCA 507, [2019] 3 NZLR 648.

4 As with other appeals brought before *Zhang v R* was delivered, we approach the appeal not as a search for error in the court below but by assessing the sentence against the *Zhang* guidelines.

[3] We address the methodological issue before turning to the circumstances of Ms Moses's appeal.

The three-step methodology

The Sentencing Act framework for sentence calculation

[4] The Sentencing Act 2002 establishes the framework within which this Court has developed sentencing methodology. The Act records purposes for which offenders may be sentenced and lists principles and aggravating and mitigating factors that courts must consider in sentencing.[5] It does not rank sentencing purposes or principles or prescribe that any given aggravating or mitigating factor must be given more or less weight than another.[6] Its list of aggravating and mitigating factors is not exhaustive.[7] Nor does it adopt any particular methodology. But it does invite a structured approach in which the sentencer evaluates the seriousness of the harm done, the culpability of the offender's conduct, the interests of the victim, and the personal circumstances of the offender. Guideline judgments build on the Act, seeking to further its purposes by promoting transparency of analysis, which facilitates comparison and appellate review, and principled consistency of outcome.

The starting point: R v Taueki

[5] An account of sentencing methodology under the Act begins with *R v Taueki*, a 2005 decision in which this Court reviewed longstanding guidelines for grievous bodily harm offences and set increased starting points for serious offences.[8] The former guidelines had established an array of sentences without making it clear whether they incorporated aggravating and mitigating circumstances referable to the offender.[9]

[6] In *Taueki* the Court accordingly established a two-step methodology founded on the idea of a starting point. At the first step the sentencing judge establishes a

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5 Sentencing Act 2002, ss 7, 8 and 9.
6 *Hessell* (SC), above n 1, at [37].
7 Section 9(4).
8 *R v Taueki* [2005] 3 NZLR 372 (CA).
9 At [8] citing *R v Hereora* [1986] 2 NZLR 164 (CA).

provisional sentence or starting point based on the circumstances of the offending.[10] The Court defined the starting point as the sentence considered appropriate for the particular offending by an adult offender after a defended trial.[11] We use the term "adjusted starting point" to signify that it incorporates all aggravating and mitigating features of the offending.[12] At the second step the judge tailors the adjusted starting point to the offender, incorporating their personal aggravating and mitigating circumstances to reach the appropriate end sentence.[13] By separating the circumstances of the offence from those of the offender the methodology permits comparison among starting points for similar offending.[14]

[7] The Court has since used adjusted starting points to demarcate sentencing bands in other guideline judgments. Apart from *Taueki*, it has done so in *R v AM* (sexual violation) and *Zhang v R* (methamphetamine).[15] It has also delivered judgments providing guidance about some, but by no means all, of the mitigating factors recognised in the Act.[16]

Uplifts and discounts must maintain proportionality

[8] The Act does not treat proportionality as a dominant sentencing principle, but its purposes, principles, and aggravating and mitigating factors emphasise harm and culpability and by requiring that the sentencer consider these matters the Act does anticipate that the sentence should be commensurate.[17] By way of illustration, s 8(a) requires that the sentencer take into account gravity of the offending, while ss 8(b)–

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10 *R v Taueki*, above n 8, at [28]–[30].

11 At [8] following *R v Mako* [2000] 2 NZLR 170 (CA) at [34].

12 By way of illustration, for the grievous bodily harm offending addressed in *R v Taueki* mitigating features of the offence included provocation and excessive self-defence: at [32].

13 At [44].

14 At [43]; and *Zhang v R*, above n 3, at [134].

15 *R v AM (CA27/2009)* [2010] NZCA 114, [2010] 2 NZLR 750; and *Zhang v R*, above n 3.

16 Apart from *Hessell*, the Court has addressed youth (*Churchward v R* [2011] NZCA 531, (2011) 25 CRNZ 446), mental capacity (*E (CA689/10) v R* [2011] NZCA 13, (2011) 25 CRNZ 411; and *Shailer v R* [2017] NZCA 38, [2017] 2 NZLR 629), addiction and mental health (*Zhang v R*, above n 3), and ill-health (*R v Verschaffelt* [2002] 3 NZLR 772 (CA)).

17 See Mirko Bagaric "Injecting Content into the Mirage that is Proportionality in Sentencing" (2013) 25 NZULR 411 at 416–417; Richard G Fox "The Meaning of Proportionality in Sentencing" (1994) 19 Melb UL Rev 489 at 492–493; and Andrew Ashworth "Re-evaluating the Justifications for Aggravation and Mitigation at Sentencing" in Julian V Roberts (ed) *Mitigation and Aggravation at Sentencing* (Cambridge University Press, Cambridge, 2011) 21 at 25.

(d) require that the offending be gauged against maximum penalties,[18] and s 8(g) requires that the sentence be the least restrictive that is appropriate in the circumstances. Some sentencing purposes, principles and factors do not rest on proportionality — the leading examples are public protection and rehabilitation — but it is always an important sentencing principle. It is underscored by s 9 of the New Zealand Bill of Rights Act 1990, which protects the right not to be subjected to disproportionately severe punishment.

[9] The authorities recognise that uplifts and discounts for personal circumstances should also be proportional. This principle is seen most clearly in cases about uplifts for previous convictions, but it also applies to discounts.[19] So, for example, in *Taylor v R* this Court held that an uplift "must bear some reasonable relationship or proportionality to the starting point".[20] This ensures that end sentences retain an appropriate degree of proportionality, in the offender's circumstances, to the harm done and the culpability of the offending.

[10] To say that uplifts or discounts at the second step must bear an appropriate proportion to the adjusted starting point is not to insist that they be calculated as a percentage.[21] Judges commonly fix some discounts as a number of months or years. But it is usual to fix larger discounts, including those for youth, mental illness and guilty pleas, as a percentage, which aids calculation and facilitates comparison among cases.[22]

What the Act says about a guilty plea discount

[11] Section 9(2) of the Act provides that a sentencing court must consider mitigating factors listed there, to the extent they apply to the case. One of these is

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18 See Andrew von Hirsch "Proportionate Sentences: A Desert Perspective" in Andrew von Hirsch, Andrew Ashworth and Julian Roberts (eds) *Principled Sentencing: Readings on Theory and Policy* (3rd ed, Hart Publishing, Oxford, 2009) 115 at 118.

19 *R v Fahey* CA184/00, 2 November 2000 at [33]; and *Orchard v R* [2019] NZCA 529 at [41].

20 *Taylor v R* [2012] NZCA 332 at [46]. See also *Tiplady-Koroheke v R* [2012] NZCA 477 at [24]; *Blackmore v R* [2014] NZCA 109 at [13]; and *Hodgkinson v R* [2012] NZCA 478 at [21].

21 *Blackmore v R*, above n 20, at [13] n 18.

22 See for example *Whittaker v R* [2020] NZCA 241 at [49].

"whether and when the offender pleaded guilty".[23] The statutory language says nothing about the rationale for a guilty plea discount, or its amount.

The rationale and three-step methodology: Hessell v R

[12] Until 2009, when this Court's judgment in *Hessell* was delivered, the leading authority on guilty plea discounts was *R v Mako*, a 2000 decision in which the Court resisted laying down any specific amount or proportion because of the widely varying circumstances in which a plea might be entered.[24] Following the Sentencing Act 2002 a practice had nonetheless developed of applying a sliding scale based on the plea's timeliness. In *Hessell* the Court abandoned the *Mako* approach and established a set of guidelines designed to deliver a consistent approach to guilty plea discounts.[25]

[13] The decision resulted in a three-step methodology for sentences affected by a guilty plea. As explained above, at the first step the court fixes an adjusted starting point based on the circumstances of the offence, and at the second step it incorporates any aggravating and mitigating circumstances of the offender. *Hessell* added the third step, which provides for the guilty plea.[26] The Court established a sliding scale which permitted a discount of 33 per cent for a plea entered at first reasonable opportunity, reducing to 10 per cent for a plea entered three weeks before trial.[27] It recorded that its approach was based on its then-current practice.[28]

[14] The Court adopted the three-step methodology because it identified a strong public interest in guilty plea discounts being predictable. It cited guidelines prepared by the English Sentencing Guidelines Council and a draft guideline prepared by the New Zealand Law Commission in the expectation that a sentencing council would be established in New Zealand. These guidelines justified a guilty plea discount because it avoids a trial, with associated benefits for victims and witnesses and efficiency gains

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23 Section 9(2)(b).
24 *R v Mako*, above n 11, at [14].
25 *Hessell* (CA), above n 1, at [6].
26 At [14].
27 At [15].
28 At [14]. See *R v Hannaghan* CA396/04, 9 June 2005 at [25]–[26]; *R v Growden* CA67/05, 25 October 2005 at [50]; *R v Fonotia* [2007] NZCA 188, [2007] 3 NZLR 338 at [50]; *R v Andersen* [2007] NZCA 288 at [35]; and *R v Proctor* [2007] NZCA 289 at [27].

for the State; for that reason, it was distinguished from personal mitigation.[29] The English guideline accordingly recommended that "the sentencer should address separately the issue of remorse, together with any other mitigating features, before calculating the reduction for the guilty plea".[30] The discount should be a proportion of the total sentence imposed, calculated according to "the circumstances in which the guilty plea was indicated".[31] Under the Court of Appeal's approach the amount of the discount did not depend on the strength of the prosecution case. The underlying justification is that a guilty plea is an autonomous decision to surrender the right to proof.[32] Under this approach the discount should not be reduced because the offender is thought to have had little chance of acquittal on the facts that he or she has admitted with the plea.

[15] Although the Court followed the English methodology by separating the guilty plea from other mitigating factors, it departed when setting the maximum amount of the discount and in its treatment of remorse. Under the English approach a guilty plea earns a maximum discount of one-third or 33 per cent and remorse is assessed separately, at the second step. There is no guideline, but a genuinely remorseful defendant who pleads guilty at the earliest opportunity may receive a material discount in addition to the one-third available for the guilty plea.[33] In *Hessell* this Court held that the maximum discount of 33 per cent included remorse, for which an additional allowance might be made only in exceptional cases where it had been demonstrated in a practical and material way.[34] The Court justified bundling the guilty plea with non-exceptional remorse on four grounds: a guilty plea is the best evidence of remorse; an allowance for remorse is "automatically built in" to the guilty plea discount;

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29 United Kingdom Sentencing Guidelines Council *Reduction in Sentence for a Guilty Plea: Definitive Guideline, Revised 2007* (23 July 2007); and New Zealand Law Commission *Sentencing Establishment Unit Draft Sentencing Guidelines on Discount for Guilty Plea* (July 2008) at [4].

30 *Definitive Guideline Revised 2007*, above n 29, at [2.4]. Any allowance for assistance to the authorities was to be calculated separately in the same way.

31 [At 4.1]. The current (2017) English guidelines continue to adopt this approach: United Kingdom Sentencing Council *Reduction in Sentence for a Guilty plea: Definitive Guideline* (1 June 2017) at 5.

32 The literature is discussed by Richard Nobles and David Schiff in "Criminal Justice Unhinged: the Challenge of Guilty Pleas" (2019) 39 Oxford J Legal Stud 100. The 2007 United Kingdom Guidelines, above n 29, allowed the strength of the prosecution case to be taken into account in exceptional circumstances. The 2017 version, above n 31, specifies that the benefits of a guilty plea apply regardless of the strength of the evidence against the offender.

33 See by way of example *R v Pitts* [2014] EWCA Crim 1615 at [63]–[65].

34 *Hessell* (CA), above n 1, at [28].

remorse is easily claimed but not easily gainsaid; and the guilty plea discount would be more predictable if it incorporated remorse.[35]

[16] *Hessell* went on appeal to the Supreme Court, which substantially modified this Court's approach, beginning with the rationales for a guilty plea discount. The Supreme Court observed that the Act treats a guilty plea as a mitigating factor and indicates that an earlier plea should generally carry more weight than a later one, but otherwise indicates no policy governing the approach sentencing judges should take.[36] The Court accordingly turned to sentencing law developed by the courts, noting that much of it had found its way into the Act's purposes, principles and factors.[37] The Court cited *R v Strickland*, a 1989 judgment in which this Court identified three policy rationales for a guilty plea discount:[38]

> … it spares the victim the ordeal of giving evidence; it saves the State the time and expense of a defended hearing; and it may be evidence of the offender's acceptance of responsibility for wrongdoing and contrition.

[17] The Supreme Court confirmed that benefits to the criminal justice system, and to participants in it, supply the "core justification" for guilty plea discounts.[39] Apart from cost savings for the State and reduced trial backlogs, there are social benefits; witnesses and especially victims are spared the burden of giving evidence, and a guilty plea "often also assists victims and their families through its acknowledgement of responsibility for the offending".[40] We observe that this last rationale values contrition, manifested through the guilty plea, not for itself but because, and to the extent that, atonement benefits the victim.

[18] The Supreme Court held that this Court had erred by bundling the guilty plea discount with remorse, which must be treated as a discrete mitigating factor,[41] and placing too much importance on consistency of outcomes. Addressing this Court's concern about proof of remorse, the Supreme Court observed that the Act envisages it must be "shown", meaning that sentencing judges need not take unsubstantiated

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35 At [24]–[28].
36 *Hessell* (SC), above n 1, at [50].
37 At [39]–[42].
38 At [28] citing *R v Strickland* [1989] 3 NZLR 47 (CA) at 51.
39 At [46].
40 At [45].
41 At [64].

claims at face value.[42] A guilty plea may show only that the defendant knows the prosecution case is strong.[43]

[19] For these reasons the Supreme Court rejected this Court's scaled discount approach, holding rather that a guilty plea discount requires an evaluative assessment reflecting all the circumstances of the case, including the strength of the prosecution case and the point at which the defendant had the opportunity to be informed of all implications of the plea.[44] It follows that an early plea need not earn a full discount.

[20] The Supreme Court capped the guilty plea discount at 25 per cent.[45] Although it expressed concern that this Court's prescriptive approach, narrowly focused on timing of the plea, might induce the innocent to plead guilty, the Court also noted there was no evidence that New Zealand courts' traditionally flexible approach, under which discounts of up to one-third were given for an early plea, had led to perverse outcomes.[46] This is not the occasion to revisit policies underpinning the upper limit to a guilty plea discount. That exercise would call for information about the systemic benefits of a guilty plea, which may vary with circumstances affecting the court system, analysis of the risk that too large a discount may create too powerful an incentive to plead guilty, and review of processes that sentencing courts might employ to manage that risk.

[21] However, the cap does make it necessary to decide which circumstances may contribute to the guilty plea discount and which may justify an additional discount for remorse. The Supreme Court did not focus on that question. Its judgment is open to the interpretation that remorse may contribute substantially to the guilty plea discount,[47] and if that is so, there may be little room for an additional remorse discount. This Court subsequently interpreted *Hessell* in that way, holding in *R v Clifford* that only remorse that can be characterised as "extraordinary" warrants an additional

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42 At [64].
43 At [62].
44 At [57], [65] and [74]–[77].
45 At [75].
46 See [71]–[72]; *R v Walker* [2009] NZCA 56 at [19]; and cases cited at n 28 above. We observe that the Law Commission had proposed a 33 per cent cap.
47 When rejecting this Court's view that strength of the prosecution case is irrelevant, the Supreme Court stated (at [60]) that acceptance of responsibility is an important factor.

discount.[48] We prefer the view that, when its judgment is read as a whole, the Supreme Court did not mean to go so far. We make four points.

[22] First, benefits to the judicial system and participants in it supply the principal justification for a guilty plea discount. To this extent New Zealand practice is consistent with the rationale for guilty plea discounts adopted in sentencing guidelines proposed by the Law Commission and adopted in English law. In addition, atonement experienced by the victim following the offender's remorse may now justify a discount, though we observe that such cases may be uncommon in practice. The sentencing judge must decide which of these rationales applies and what weight will be given to them.

[23] Second, fixing the amount of the discount requires an evaluative judgment, but the relevant circumstances of the case must be those that engage any applicable rationales for the discount. The rationales established by the Supreme Court suggest that, among other things, the scale and complexity of the trial, the proximity of the plea to first appearance or to trial,[49] the justification for any delay, the inevitability or otherwise of conviction, the benefits of not giving evidence for victims and witnesses, and the victim's experience of atonement following the offender's acceptance of responsibility may affect the amount of the discount, which may range from 25 per cent to nothing.

[24] Third, remorse is a personal mitigating factor that may justify a discount separately from any guilty plea discount. Remorse is a question of fact and judgement. The defendant bears the onus of showing that it is genuine, meaning that it qualifies as remorse and he or she actually experiences it.[50] Remorse need not be extraordinary to earn a discount, but it does require something more than the bare acceptance of

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48 *R v Clifford* [2011] NZCA 360, [2012] 1 NZLR 23 at [60].

49 The earliest reasonable opportunity is a function of procedures for charging, appearances and disclosure. In *Hessell* (CA), above n 1, which was decided before the Criminal Procedure Act 2011 was enacted, this Court considered that a plea at second appearance would generally be considered early: at [29]. The Supreme Court referred more generally to the point at which the defendant had the opportunity to be informed of all implications of the plea: *Hessell* (SC), above n 1, at [75].

50 Sentencing Act, s 24(2)(d).

responsibility inherent in the plea. Courts look for tangible evidence, such as engagement in restorative justice processes.

[25] Fourth, a guilty plea is not synonymous with remorse but may evidence it. The plea is an act of confession to a wrong done, and it is commonly associated with contrition and a desire for expiation.[51] It follows that guilty plea and remorse discounts may be paired, and very often are: a defendant who pleads guilty at the earliest reasonable opportunity may also earn a remorse discount, while another who delays the plea until arraignment at trial may be denied both discounts.

[26] We observe that, following *Hessell*, remorse may both justify its own discount and underpin a guilty plea discount where the latter is based on victims' experience of atonement. In addition, s 10 of the Sentencing Act requires that a sentencing court take into account an offer of amends, considering whether the offer is genuine and whether the victim has accepted it as expiating or mitigating the wrong. It follows that in those cases where victim atonement is a factor, and especially where a guilty plea is accompanied by an offer of amends, it may sometimes be necessary to ensure the sentencing analysis does not result in remorse receiving too much or too little credit in the end sentence.

Calculating the guilty plea discount

[27] That brings us to how the discount works. In *Hessell* this Court held that it should be calculated as a percentage of the sentence that would otherwise have been passed; that is, after making allowances for aggravating and mitigating factors relating to the offender:

> [14] … we recommend to trial judges, as a general practice, that they recognise the guilty plea by giving a discrete reduction to what the sentence would otherwise have been, such reduction to be calculated as a proportion of the total sentence that would otherwise be imposed. The extent of the reduction should depend on the stage in the proceedings at which a guilty plea is entered or at which the offender expresses a willingness to enter a guilty plea to the offence for which he or she is later convicted. *The reduction should be made as the final step in the sentencing process; that is, after the appropriate sentence has been determined with reference to aggravating and*

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[51] Brendon Murphy "The Technology of Guilt" (2019) 44 Australasian Journal of Legal Philosophy 64 at 88–89.

> *mitigating factors relating to the offence and aggravating and all other mitigating factors relating to the offender.* (Emphasis added)

[28] The Supreme Court was at pains to emphasise that sentencing is an evaluative exercise, but it chose not to adopt the Australian "instinctive synthesis" approach. Instead it adhered to what it described as the flexible New Zealand practice of addressing "gravity and culpability of offending" as "separate matters".[52] The Court cautiously went on to accept the three-step methodology:

> [73] There is no objection in principle to the application of a reduction in a sentence for a guilty plea once all other relevant matters have been evaluated and a provisional sentence reflecting them has been decided on. Indeed, there are advantages in addressing the guilty plea at this stage of the process (along with any special assistance given by the defendant to the authorities). It will be clear that the defendant is getting credit for the plea and what that credit is. This transparency validates the honesty of the system and provides a degree of predictability which will assist counsel in advising persons charged who have in mind pleading guilty.

[29] Mr Lillico argued that in this passage the Supreme Court endorsed the practice of fixing the guilty plea discount as a percentage of the notional sentence calculated at step 2. We do not agree. The Court held only that there is no objection in principle to a three-step approach in which the guilty plea discount is deducted as the last step. It approved the use of a percentage discount but it did not say that the three-step approach is mandatory. It did not consider whether the multiplicand (the figure to which the percentage is applied) ought to be the product of step 1 or step 2. As Mr Lillico accepted, there is no reason to think the issue now before us was drawn to the Supreme Court's attention. On *Hessell*'s facts it did not matter whether the discount was taken as a percentage of the sentence provisionally assessed at step 1 or step 2.[53]

Other mitigating factors reduce the guilty plea deduction

[30] Under the three-step methodology uplifts or discounts for personal circumstances at step 2 affect the amount of the guilty plea deduction. The greater the

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52 *Hessell* (SC), above n 1, at [55]. The Court had earlier spoken approvingly, at [26] and [31], of the practice of issuing guideline judgments. See also *R v Clifford*, above n 48, at [51].

53 The sentencing Judge had adopted an orthodox starting point based on the offence and added one month for personal aggravating factors before allowing a guilty plea deduction "in the region of 10 per cent": *Hessell* (CA), above n 1, at [89]. The guilty plea was the only mitigating factor, and the amount of the discount evidently was not affected by the small uplift at the second step.

step 2 discounts for personal mitigating factors the lower the resulting multiplicand and the fewer units of time deducted for the same percentage guilty plea discount, as the table below illustrates. We have assumed a 10-year adjusted starting point, a 15 per cent discount for personal mitigating factors and a full guilty plea discount in this hypothetical case:

	Three-step methodology	**Two-step methodology**
Step 1	*Begin with adjusted starting point* 120 months (10 years)	*Begin with adjusted starting point* 120 months (10 years)
Step 2	*Discount for personal mitigating factors* (15%) 120 – 120 x 15% = 120 – 18 = 102	*Discount for SUM of personal mitigating factors* (15%) *and guilty plea discount* (25%) 120 – 120 x (15% + 25%) = 120 – (18 + **30***) = 120 – 48 = 72
Step 3	*Discount for guilty plea* (25%) 102 – 102 x 25% = 102 – **25.5*** = 76.5	
End sentence	6 years, 4 ½ months	6 years

* The bolded figures show the number of months being deducted for the 25 per cent guilty plea discount.

[31] The Crown has not suggested any justification for reducing a guilty plea deduction — the units of time credited — when the plea is accompanied by personal mitigating factors. A guilty plea discount in New Zealand now rests principally on the systemic and social rationales we have discussed above — savings to the State, relief for victims and witnesses from the burden of giving evidence, and victims' experience of atonement following the offender's contrition. These rationales are likely to justify altering the amount of the discount according to the timing of the plea. But none of them justifies systematically reducing the deduction merely because an offender's sentence is also to be discounted for other mitigating factors.

[32] Mr Lillico argued rather that the three-step methodology makes no difference in the end. To begin with, uplifts for previous convictions and the like are usually modest, and in many cases the guilty plea supplies the only significant mitigating factor. In such cases it is usually immaterial whether a guilty plea discount is applied before or after allowing for personal circumstances. We accept that submission holds true in many cases.

[33] Mr Lillico next argued under either approach the effective sentence will still fall comfortably within a range appropriate to the offence and the offender. He submitted that in such cases an appellate court is unlikely to find the sentence manifestly excessive. We accept that submission as a general proposition, but of course we are concerned here with a question of methodology which is of general application to sentences affected by a guilty plea.

[34] Finally, Mr Lillico argued that in practice judges use their discretion to ensure the end sentence is just. We accept that submission for several reasons. First, we have explained that the Sentencing Act catalogues purposes, principles and factors without ranking or weighting them and, as the Supreme Court emphasised in *Hessell*, sentencing is an evaluative exercise. Guideline judgments structure the exercise of discretion but do not eliminate it; every guideline judgment recognises that judges must apply the Act and may depart from the guidelines where appropriate.[54] This Court's judgment in *Hessell* similarly recorded that the guidelines established there did not override the discretion of sentencing judges.[55] The only concrete limit is that established by the cap of 25 per cent on the guilty plea discount.

[35] Second, those guideline judgments which establish sentencing bands usually do so by reference to multiple considerations and leave it to the sentencing judge to establish their respective relevance and weight in any given case. In *R v AM*, for example, the Court listed 13 culpability factors for sexual violation offences without prioritising among them.[56] Further, offenders are frequently sentenced for more than

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54 See *R v Fatu*, above n 2, at [32]–[36] in which this Court recognised that offending could fall outside of the prescribed bands. See also *R v Taueki*, above n 8, at [10]; *R v AM*, above n 15, at [36], [79] and [83]–[84]; and *Zhang v R*, above n 3, at [48] and [120].

55 *Hessell* (CA), above n 1, at [6].

56 *R v AM*, above n 15, at [37]–[64].

one offence and that introduces the totality principle, for which there is no guideline judgment.

[36] Third, there is no guideline for many aggravating or mitigating factors, and sentencing judges are left to gauge their relevance and weight in any given case.[57]

[37] Finally, guideline judgments emphasise that the sentencing judge should stand back and inquire whether the final sentence is correct in all the circumstances. In *Hessell* the Supreme Court affirmed this point:

> [77] All these considerations call for evaluation by the sentencing judge who, in the end, must stand back and decide whether the outcome of the process followed is the right sentence.

We observe that this Court, and the High Court, have often emphasised this approach to sentencing after considering the effect of the methodology on the guilty plea discount.[58]

[38] All of that said, the three-step methodology is logically capable of affecting outcomes in practice, as we have recognised in the table above. The examples to which we next turn suggest that it has had that effect in some cases where the starting point was set under a guideline judgment.

The three-step methodology in practice

[39] We begin with *Reweti v R*,[59] an appeal from a sentence of two years and nine months imprisonment for aggravated robbery, for which the guideline judgment is *R v Mako*.[60] Simon France J remarked that the starting point of four years had been uncontroversial at first instance because the circumstances largely reflected one of the examples given in *Mako*. The appellant was 18, and although he had some criminal

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57 But see cases listed above at n 16.

58 The two-step approach was adopted in *Reweti v R* [2018] NZHC 809; *R v Kokiri* [2019] NZHC 501; *Barlow v R* [2019] NZHC 725; and *Royal v R* [2020] NZCA 129. Its availability was also commented on in *R (CA217/2018) v R* [2018] NZCA 582; *Peke-Meihana v R* [2019] NZHC 642; *Houkamau v Police* [2019] NZHC 2743; *Jones v R* [2019] NZHC 1816; *Solicitor-General v Kaokao* [2019] NZHC 2352; *Harris v Police* [2019] NZHC 2846; and *Edmonds v Police* [2019] NZHC 3038.

59 *Reweti v R*, above n 58.

60 *R v Mako*, above n 11.

history he was an excellent candidate for rehabilitation. He also experienced ill-health. The Judge decided on a discount of 30 per cent for these mitigating factors and 25 per cent for his early plea. Under the three-step methodology the end sentence was 25 months, three months higher than it would have been if the guilty plea discount was applied to the adjusted starting point. To achieve what he found to be the right result, Simon France J took the latter approach, resulting in a sentence that could be, and was, converted to home detention.[61]

[40] In *Peke-Meihana v R*, also an aggravated robbery appeal, Mallon J similarly reached an end sentence of home detention although she did so by adjusting the starting point rather than altering the guilty plea discount.[62] Had she retained the original starting point the alternative two-step methodology would have resulted in a difference of 10 months in the end sentence.[63] The case demonstrates that the methodology can make a significant difference to the end sentence when other mitigating factors are very substantial.

[41] We observe that the outcomes in these cases were available under *Hessell*. The Court of Appeal recommended its methodology to trial judges as a general practice and observed that the methodology did not readily accommodate alternative sentences:

> [52] Sometimes it may be appropriate to recognise a guilty plea by imposing one type of sentence rather than another. For example, if an offence otherwise warrants a short term of imprisonment, it may be appropriate to reduce the sentence below the imprisonment threshold to a sentence of home detention or community detention in order to give the guilty plea appropriate recognition. It may also be appropriate to impose a single sentence instead of a combination of sentences (for example, supervision instead of supervision and community work). In cases such as this, a percentage reduction is not possible. The type and length of sentence that gives appropriate effect to the sliding scale set out above is a matter of judgement.

Consistent with that observation, though usually without citing it, judges have suggested that the two-step approach taken in *Reweti* is confined to cases that are on the cusp of home detention and plainly call for a merciful approach.[64]

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61 *Reweti v R*, above n 58, at [24]–[25].
62 *Peke-Meihana v R*, above n 58.
63 At [28].
64 *R (CA217/2018) v R*, above n 58, at [26]–[28]; *Houkamau v Police*, above n 58, at [43];

[42] However, the three-step methodology can reduce guilty plea discounts in more serious cases. This is such a case, as we explain at [57] below, though the effect is minor. Ms Hall, for the intervenor, cited *R v R*, a sexual violation case in which the sentencing judge adopted a starting point of 12 years then deducted 25 per cent (36 months) for youth and a year for mental health issues and rehabilitative potential, followed by the guilty plea deduction of 25 per cent.[65] The resulting sentence was six years imprisonment. The two-step methodology would have produced a sentence that was shorter by 12 months. On appeal, this Court declined to apply the two-step methodology and held that six years was the right sentence in the circumstances.[66]

[43] The cases accordingly confirm that the three-step methodology can reduce the size of guilty plea discounts for offenders with significant personal mitigating features. Judges have sometimes, but not always, identified the issue and made compensatory adjustments to the sentence calculation, but that merely confirms the methodology itself needs adjusting.

Should the Court depart from *Hessell*?

[44] Mr Lillico reminded us that this Court ordinarily considers itself bound by its own decisions and will depart from them only in limited circumstances.[67] He pointed out that *Hessell* was a Full Court decision. But the issue before us concerns this Court's supervisory jurisdiction over criminal practice, which by design leads to the Court dealing with many appeals and invites an evolutionary approach. The Court made a similar point in *R v Chilton*, recognising that a more flexible approach may be warranted when dealing with "litigation practice", a field in which an intermediate appellate court is likely to know how a given legal doctrine is working in practice.[68] The Court also noted that a more flexible approach may be necessary in criminal proceedings.[69] The methodological issue was not addressed in *Hessell*. Finally, the

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Peke-Meihana, above n 58, at [28]; *Jones v R*, above n 58, at [22]; and *Solicitor-General v Kaokao*, above n 58, at [32]–[34].

65 *R v [R]* [2018] NZDC 4473.

66 *R (CA217/2018) v R*, above n 58.

67 *R v Chilton* [2006] 2 NZLR 341 (CA) at [83].

68 At [96].

69 At [103].

case for altering the methodology is clear. For these reasons we think there is sufficient cause to depart from this Court's decision in *Hessell*.

A modified methodology for calculating guilty plea discounts

[45] The following sentencing methodology replaces the three-step methodology established in this Court's judgment in *Hessell* at [14].[70] It also replaces the Court's subsequent restatement in *R v Clifford* at [60].[71]

[46] A two-step methodology should be used:

(a) the first step, following *Taueki*, calculates the adjusted starting point, incorporating aggravating and mitigating features of the offence;

(b) the second step incorporates all aggravating and mitigating factors personal to the offender, together with any guilty plea discount, which should be calculated as a percentage of the adjusted starting point.[72]

[47] Because the court fixes all second-step uplifts and discounts by reference to the adjusted starting point under this methodology, it makes no difference to sentence length if the guilty plea discount is the last step in the sentence calculation. However, the sentencing judge should still quantify a guilty plea discount, for several reasons: the discount is justified in substantial part by systemic and social considerations distinct from the offender's personal circumstances; the discount must be transparent, which aids predictability; and the calculation allows others, including the offender and the victim, to identify the sentence that would have been imposed but for the plea.[73] It should be apparent that the discount does not exceed the maximum of 25 per cent of the adjusted starting point.

[48] This methodology does not preclude credit for some mitigating factors being assessed by reference to what would otherwise be the end sentence (that is, the product

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70 *Hessell* (CA), above n 1.
71 *R v Clifford*, above n 48.
72 We apply the methodology to this appeal at [71] below.
73 See *Hessell* (SC), above n 1, at [73].

of step 2), where that is appropriate. For example, credit for time spent on electronically monitored bail is commonly calculated in that way.

[49] As explained at [4] above, guideline judgments such as this one promote transparency of analysis and principled consistency of outcome, so furthering objectives of the Sentencing Act. We repeat that the ultimate question, however, is not whether an applicable guideline judgment is followed but whether the sentence is a just one in all the circumstances. When answering it the sentencer should stand back and consider the circumstances of offence and offender against the applicable sentencing purposes, principles and factors.

Ms Moses's sentence appeal

The facts

[50] The police apprehended Ms Moses following a 2017 operation targeting methamphetamine dealing in Gisborne. Intercepted communications established that between May and December 2017 she received 965g of methamphetamine for on-supply, in a total of 169 transactions.

[51] Her practice through most of this period was to receive payment from her own customers then place an order with the principal offender, Lucky Campbell. A table incorporated in the summary of facts records that until October 2017 she usually received supplies of between one and five grams, with a small number of larger transactions.

[52] The quantities received from Mr Campbell increased in October 2017. Between 13 October and 27 November there were eight transactions in each of which she received 28g or one ounce. Thereafter there were three transactions between 30 November and 7 December in each of which she received 56g or two ounces. This reflected what the summary described as a move to a sales target arrangement in which Mr Campbell supplied her with ounce amounts and resupplied her once she had met her target. The frequency of the transactions — three of 56g apiece during one week — indicates that she was selling significantly more than she had done previously and invites the inference that she was supplying other dealers rather than end users.

[53] When arrested on 31 January 2018 Ms Moses was found to be in possession of 10.8g of methamphetamine and $10,280 in cash. In interview she admitted selling the drug to pay her bills.

The sentencing

[54] Ms Moses faced one representative charge of possessing methamphetamine for supply. Judge Cathcart recorded that the quantity placed her in *Fatu* band four and observed that deterrence and denunciation were of primary importance but did not preclude an allowance for personal circumstances.[74] By reference to similar cases he adopted a starting point of 11 and a half years imprisonment.[75] He appeared to accept that she was addicted, although that claim depended on self-report and her claimed usage was modest, but he made no allowance for addiction when setting the starting point. Rather, he characterised the offending as commercially motivated.

[55] The Judge recognised that at the age of 43, Ms Moses had no relevant prior convictions, and he was prepared to acknowledge her willingness to undertake treatment for addiction. He declined an adjournment for a s 27 cultural report, reasoning that it could not make a material difference to sentence given that, following *Jarden v R*,[76] personal circumstances must be subordinated to denunciation and deterrence.[77] Taking all mitigating factors into account he allowed a discount of 13 months or nine per cent.[78]

[56] The guilty plea discount allowed was 20 per cent.[79] The Crown accepted that family dynamics may have delayed the plea, which also contributed to resolution of what was to have been a lengthy multi-party trial.

[57] The sentence calculation followed the three-step methodology. From the starting point of 11 and a half years (138 months) the Judge deducted 13 months for personal mitigating factors, resulting in a provisional sentence of 125 months.

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74 *R v Moses* [2019] NZDC 5170 at [2] and [9].
75 At [17].
76 *Jarden v R* [2008] NZSC 69, [2008] 3 NZLR 612.
77 *R v Moses*, above n 74, at [28].
78 At [29].
79 At [31].

From that figure he deducted 20 per cent or 25 months for the guilty plea. The calculation resulted in an end sentence of 100 months or 8 years 4 months imprisonment, with no minimum period.[80] Had the two-step methodology been used the end sentence would have been 97.4 months or, when rounded down to the nearest month, 8 years 1 month imprisonment: a reduction of three months.

[58] We observe that this three-month difference does not in itself warrant interfering with a sentence of more than eight years imprisonment. It is a small difference in a long sentence, and it is unlike a calculation error, which may result in this Court adjusting the sentence to achieve what the sentencing judge evidently intended even if the adjustment is a small one.[81] If the Judge applied *Hessell* correctly the end sentence was what he considered appropriate after standing back and inquiring what was the right outcome. As will be seen, however, we propose to adjust the sentence for other reasons and when doing so we will use the two-step methodology.

The appeal

[59] For Ms Moses, Ms Thorpe argued that when considered against the *Zhang* guidelines the starting point was too high, and the Judge also erred by refusing an adjournment for a s 27 report and consequentially giving insufficient weight to personal circumstances. We have already dealt with the appeal so far as it also addressed the three-step methodology.

The starting point

[60] The offending falls into *Zhang* band four: amounts between 501g and 2kg and a starting point between 8 and 16 years imprisonment.[82] Ms Thorpe focused on role, arguing that Ms Moses fell into the lower end of the "lesser" role category. Counsel characterised Ms Moses as a low-level street dealer who sold small amounts and depended on Mr Campbell to source the drug. She did not know the full extent of his operation and she had no influence upon him. He moved her onto the target system, with "unequivocal expectations that she would sell a global target within certain time

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80 At [32]–[33].
81 *Tutakangahau v R* [2014] NZCA 279, [2014] 3 NZLR 482.
82 *Zhang v R*, above n 3, at [125].

frames". She was not a user when she began but she soon became addicted. Counsel submitted that a starting point of eight and a half to nine years is appropriate.

[61] Mr Lillico responded that the starting point remains appropriate under *Zhang*. He submitted that Ms Moses had a significant role. She was a second-level supplier whose involvement escalated substantially over time. She was likely moving to a wholesaler role; it is unlikely that the large quantities she was handling by October 2017 were being sold to end users. She dealt almost every day, and sometimes several times a day. She admitted that her motivation was primarily financial. Given that the overall quantity was almost twice the amount needed for entry to band four, it cannot have been an error to take a starting point just below the mid-point.

[62] We are not persuaded that the starting point was wrong. The quantity places Ms Moses at the mid-point of band four and although she worked for Mr Campbell it is not accurate to characterise hers as a lesser role. We draw the inference that she had become more than a retail dealer by the time of her arrest. She was not involved through naivety, nor is there evidence that she was engaged through pressure or intimidation. We are prepared to accept that she was addicted, but that does not explain offending on this scale. Her motivation was financial. She may not have known the full scale of Mr Campbell's operation, but she was sentenced only for the methamphetamine she dealt herself.

Personal mitigating factors: the s 27 report

[63] As noted, the allowance for all mitigating factors was 13 months or nine per cent. When declining to adjourn for the s 27 report, the Judge made it clear that he appreciated the importance of such reports but he took the view that in this case a report would likely make no more than a marginal difference.[83]

[64] Ms Thorpe argued that this was an error. Ms Moses pleaded early, on 15 February 2018, and sentencing was scheduled for 20 March. She was entitled to present information under s 27. The report was in preparation. She argued that the since-completed report points to significant mitigating factors and a history of social,

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83 *R v Moses*, above n 74, at [28].

cultural and economic deprivation, all of which may be taken into account following *Zhang*.[84]

[65] Mr Lillico responded that the Judge appropriately considered personal circumstances, which were mentioned in the brief pre-sentence report, and the s 27 report contains little relevant information. The report does not identify a sufficient linkage between deprivation and the offending; rather, it details the effect of various government policies on the Gisborne region without linking them to Ms Moses in a way that demonstrates causation between deprivation and offending.

[66] We admit the report for purposes of the appeal. It was prepared by Matau Cultural Annotators. It is a thoughtful report. Ms Moses was not an entirely reliable narrator, which the report attributes to her methamphetamine use, but eventually she underwent extended interviews and disclosed her background. The report explains that her offending followed a bout of depression after the death of her mother and a sports injury that left her unable to maintain labouring work. It confirms that her motivation was financial and explains she was valuable to Mr Campbell because she had no prior drug convictions and could exploit her extensive whānau networks across competing gangs.

[67] The report reviews her life circumstances; she is one of a large reconstituted whānau and has four children of her own, some of whom have been raised by others in whāngai adoptions. Although she described her childhood as happy, she also disclosed that she was abused as a child within the wider whānau and was not protected by responsible adults, with consequences for both her whānau bonds and her adult relationships.

[68] The report recounts the Māori rural-to-urban diaspora of the 1960s and 1970s and the consequential loss of social structures, tikanga, culture and language. Existing deprivation was compounded by structural reforms of the 1980s, which "savaged" the Gisborne area and resulted in high unemployment, relative poverty, gang membership and substance abuse. In this setting, whānau are often unsafe, disorganised and ill-resourced. Ms Moses's reconstituted whānau exhibited these

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84 *Zhang v R*, above n 3, at [133]–[137].

features, and it was in this setting that she was introduced to methamphetamine following the death of her mother and her own inability to work and resulting depression. The report states that she has sought help for her drug use and notes that she is considered a low reoffending risk, although it gives us no cause for optimism about support from her whānau or community.

[69] We accept the report's account of Ms Moses's economically and socially deprived background. The strength of any causal connection to her offending is nonetheless difficult to gauge. She had a limited offending history until she began selling methamphetamine in her forties. She then dealt in substantial quantities to make money, not because she was addicted or under pressure from associates. It appears that two events led to her offending: the death of her mother, with whom she had a complex relationship, and her inability to work as a labourer following injury.

[70] We accept that these events point to a connection between her social and cultural background and her offending. It is sufficiently proximate to mitigate culpability to a degree. The report also points to prospects of rehabilitation which we think merit recognition. We will increase the discount to 15 per cent (21 months) for these matters. The guilty plea discount of 20 per cent (28 months) is not in dispute.

Sentence calculation

[71] The resulting sentence calculation begins with the adjusted starting point, 11 and a half years or 138 months. From that we deduct 21 months (15 per cent) for personal mitigating factors and 28 months (20 per cent) for the guilty plea. The total second step discount is therefore 49 months and the end sentence is 89 months or seven years, five months imprisonment. Expressed another way, the calculation is 138 – (21 + 28) = 89.

Result

[72] The appeal is allowed. We quash the sentence passed below and substitute a sentence of seven years, five months imprisonment.

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