

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

**I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKĀURAU ROHE**

**CRI-2022-404-0004198
[2023] NZHC 1660**

BETWEEN	CASSIDY ELLEN JOHNSTONE Appellant
AND	NEW ZEALAND POLICE Respondent

Hearing:	13 June 2023
Counsel:	J A Kincade KC and A Shendi for Appellant M Djurich for Respondent
Judgment:	30 June 2023

JUDGMENT OF HINTON J

*This judgment was delivered by me on 30 June 2023 at 3.00 pm,
pursuant to Rule 11.5 of the High Court Rules.*

Registrar/Deputy Registrar

Date:

Solicitors: Meredith Connell, Auckland

[1] On 18 January 2020, the appellant was involved in a high-speed police chase which ended when her vehicle veered off a motorway off-ramp. She was heavily under the influence of alcohol and the Class B controlled drug methylenedioxymethamphetamine (MDMA). Two of her three passengers suffered serious injuries which required hospitalisation and surgery and they suffered long-lasting consequences. The appellant was also injured.

[2] Following a sentence indication given by Judge Fitzgibbon,¹ the appellant pleaded guilty to two charges of causing injury while under the influence of drink and/or a drug to such an extent as to be incapable of having proper control of a vehicle,² and one charge of reckless driving.³

[3] On 6 September 2022, the appellant was convicted and sentenced to six months' community detention and 12 months' supervision with conditions.⁴ She was also ordered to pay a total of \$22,500 to the victims by way of emotional harm reparation, and was disqualified from holding or obtaining a driver's licence for one year and two months on each charge, to be served concurrently.

[4] The appellant appeals her conviction on two grounds:

- (a) the Judge erred by failing to consider under s 11 of the Sentencing Act 2002 (the Act) whether the appellant ought to have been more appropriately dealt with by way of a discharge without conviction under s 106 of the Act; and
- (b) a miscarriage of justice has occurred because her trial counsel failed to provide her with advice regarding the availability of a discharge without conviction.

¹ *Police v Johnstone* DC North Shore CRI-2020-044-001454, 22 February 2022.

² Land Transport Act 1998, s 61(2)(a): maximum penalty of 5 years' imprisonment or a fine not exceeding \$20,000; and disqualification from holding or obtaining a driver's licence for one year or more.

³ Section 35(1)(a): maximum penalty of 3 months' imprisonment or a fine not exceeding \$4,500; and disqualification from holding or obtaining a driver's licence for 6 months or more.

⁴ *Police v Johnstone* [2022] NZDC 22785.

[5] The respondent says there was no error:

- (a) Although the Judge did not expressly address the appropriateness of a discharge without conviction, she was clearly alive to and articulated the factors relevant to such a sentencing outcome. This consideration was also implicit in the Judge's conclusion that an electronically-monitored sentence was the most appropriate outcome having considered a range of mitigating factors.
- (b) Trial counsel reasonably exercised his judgment in advising the appellant of the available sentencing options. Having regard to the seriousness of her offending, his previous resolution discussions with police, and the Judge's sentencing indication, it was reasonable for counsel to conclude that a discharge without conviction was not a realistic possibility. Accordingly, no error was made in the provision of advice.

[6] I consider the Judge made no error for the reasons stated at [5(a)] above. I consider trial counsel also made no error. However, rather than addressing these matters separately, I turn to consider whether, in any event, a miscarriage of justice has occurred, that is, whether a discharge without conviction would be appropriate. To reach a conclusion on counsel error, I consider I have to address the ultimate issue anyway.

Background

Offending

[7] I take the record below largely from the respondent's submissions.

[8] At about 5.00 am on 18 January 2020, the appellant was driving her BMW vehicle northbound on State Highway 1 towards the Victoria Park Tunnel. The speed limit in the area is 80 km/h. There were three male passengers in the car — Mr de Wit and Mr Wilson in the back seat and a third male in the front passenger seat.

[9] The appellant's vehicle changed lanes and was recorded travelling 133 km/h into the tunnel. A police patrol vehicle followed. On approach to the Harbour Bridge, the appellant was recorded as travelling at about 100 km/h.

[10] The patrol vehicle activated its flashing lights and sirens. The appellant slowed down and appeared to stop before accelerating rapidly. She continued to travel towards the Harbour Bridge at approximately 130 km/h. This speed increased to 175 to 180 km/h over the Harbour Bridge. It was accompanied by dangerous manoeuvres around vehicles travelling at or around the speed limit, and rapid lane changing.

[11] Due to these high speeds, the patrol vehicle abandoned the pursuit, turned off its flashing lights and continued travelling at the speed limit. The appellant continued driving at 175 to 180 km/h and engaged in further dangerous manoeuvres such as rapidly driving up to other vehicles and crossing all lanes without reducing her speed.

[12] The appellant continued driving at an extremely high speed as she approached the Onewa Road off-ramp. As she entered the off-ramp, she veered completely off the shoulder and crashed into a tall light pole, knocking it off its base. Her vehicle continued in a straight line into a steep bush area where it crashed into a bush and was spun around at high speed. The vehicle came to a rest approximately 5 to 10 metres up the bushy hillside with the driver's door jammed against a tree.

[13] Mr Wilson was briefly knocked unconscious and was thrown onto Mr de Wit. The man in the front passenger seat was uninjured. He immediately exited the vehicle and started running down the off-ramp towards Onewa Road where he was stopped by police. Mr de Wit, who had a badly injured elbow, also got out of the vehicle and walked down the hillside to where police units were arriving.

[14] The appellant was found in the front passenger seat. She smelt strongly of alcohol. She denied that she was the driver and stated that she had injured her back.

[15] The appellant and Mr de Wit were both transported to North Shore Hospital by ambulance. Mr Wilson sought medical treatment later. The appellant suffered a fracture to a vertebra in her lower spine. A blood sample was taken and was found to

contain 182 (+/-9) mg of alcohol per 100 ml of blood (the limit being 80 mg per 100 ml of blood). The blood sample also contained the Class B controlled drug MDMA (or ecstasy).

[16] Mr de Wit suffered a dislocated left elbow, a compound fracture to his left arm, one ruptured ligament and one torn ligament in his left arm. His left arm required surgery to remove scar tissue and repair the damaged ligaments. He was hospitalised for a day, but as a result of his injuries he was unable to work and lost his building apprenticeship. He consequently had to move back home with his parents in order to financially support himself.

[17] Mr Wilson suffered a burst fracture to his L2 vertebra, classed as a traumatic spinal injury, which required surgery. He was hospitalised for ten days but also suffered ongoing consequences such as pain and restricted movement. Mr Wilson's parents have had to take time off from their work to assist with his recovery. He has been told that because of his injuries, he may never be able to return to the manual labour workforce.

Procedural history

[18] The appellant eventually gave a statement to police accepting that she may well have been the driver. This was supported by other evidence: statements of her passengers, and forensic and scene evidence. The cumulative effect made the likelihood of conviction high. The appellant's counsel, Mr Foley, deposed for purposes of this appeal that he considered the strength of the evidence, coupled with the seriousness of the alleged offending, rendered imprisonment a real possibility. He recommended to the appellant that he should try to negotiate more favourable charges and a more favourable summary of facts.

[19] Mr Foley achieved both goals. For example, the appellant initially also faced an additional charge — failing to stop for blue and red flashing lights (aggravated). The police agreed to withdraw this charge for the purposes of resolution. Further, the police agreed to various amendments to the summary of facts which were favourable to the appellant such as the removal of any mention of the appellant purposefully moving seats following the crash, as well as her exact blood alcohol level. Mr Foley

also obtained confirmation that, in the event the appellant accepted the amended summary of facts, the police would not seek a prison sentence.

[20] On Mr Foley's advice, the appellant sought a sentence indication on the amended summary of facts (to which she later pleaded guilty).

Sentence indication

[21] Before the Judge, Mr Foley submitted an appropriate starting point was between 20 and 26 months' imprisonment and an appropriate end sentence was home or community detention together with a period of disqualification and an order for emotional harm reparation. The police supported the suggested end sentence.

[22] Mr Foley raised the following mitigating factors personal to the appellant:

- (a) a letter of reflection, apology and remorse plus willingness to engage in restorative justice and pay emotional harm reparation;
- (b) confirmation of the appellant's attendance at 29 counselling sessions and her voluntary engagement with Community Alcohol and Drug Services (CADS), as well as her attempt to engage with the Right Track programme directed at young and at-risk drivers;
- (c) the appellant's previous good character evidenced by an absence of previous convictions and a number of letters of support;
- (d) the appellant's youth, being 21 at the time of the alleged offending; and
- (e) the availability of a discount for guilty plea, in the event she accepted the sentence indication.

[23] Judge Fitzgibbon said she "[had] a fulsome understanding of the way in which [the appellant] feels about what has happened and what her friends and those close to her think about her as a person".⁵

⁵ *Police v Johnstone*, above n 1, at [9].

[24] The Judge adopted a starting point of 26 months' imprisonment, having regard to the high speeds, the high level of intoxication (by both alcohol and illicit drugs) as well as the injuries suffered by two of the passengers.⁶

[25] The Judge indicated the appellant would be afforded discounts amounting to 50 per cent (the maximum of the range submitted on her behalf) for the matters in mitigation put forward by Mr Foley and, subject to there being a positive pre-sentence report, that an end sentence of home or community detention would be appropriate.⁷ The Judge further said she favoured community detention to allow the appellant to complete her studies.⁸

[26] On Mr Foley's advice, the appellant accepted the sentence indication on 10 March 2022.

Sentencing

[27] The appellant was sentenced on 6 September 2022. In the meantime, she had completed the Right Track programme. The Judge did not have sufficient information to impose reparation for the victims so she made orders for emotional harm payments instead.

[28] The Judge then sentenced the appellant as recorded above at [3].

Legal principles

Approach on appeal

[29] An appeal against conviction may only be allowed if a miscarriage of justice has occurred for any reason, and must otherwise be dismissed.⁹ A miscarriage of justice means any error, irregularity, or occurrence in or in relation to a trial that has

⁶ *Police v Johnstone*, above n 1 at [8] and [10].

⁷ At [10].

⁸ At [10].

⁹ Criminal Procedure Act 2011, s 232(2)(c).

created a real risk that the outcome was affected or is unfair.¹⁰ This includes a proceeding in which the appellant has pleaded guilty.¹¹

Discharge without conviction

[30] As stated above, leaving to one side the question of trial counsel or judicial error, and in the interests of pragmatism, I directly address the ultimate question of whether an application for discharge would have succeeded had the appellant been advised to seek one and accepted that advice. Unless that is the case, there has been no miscarriage of justice.

[31] Discharges without conviction are governed by ss 106 and 107 of the Act. Section 107 is a precondition to the discretion under s 106.¹²

[32] Section 107 requires consideration of three factors:¹³

- (a) the gravity of the offending;
- (b) the direct and indirect consequences of a conviction; and
- (c) whether those consequences are out of all proportion to the gravity of the offending.

[33] If the answer to (c) is positive, the Court has a discretion as to whether to grant a discharge.

Would a discharge without conviction have been available?

Gravity of offending

[34] There is no dispute that the gravity of the appellant's offending before considering any personal mitigating factors is high. She had consumed over twice the legal blood alcohol limit, as well as the Class B controlled drug MDMA or ecstasy.

¹⁰ Section 232(4)

¹¹ Section 232(5).

¹² *R v Hughes* [2008] NZCA 546, [2009] 3 NZLR 222 at [8].

¹³ At [8]; see also *Z v R* [2012] NZCA 599, [2013] NZAR 142, at [8].

Her driving was both dangerous and at extremely high speeds. She failed to stop when police followed her over the Harbour Bridge with flashing lights and sirens. Her speeding and dangerous driving was the direct result of her attempt to evade police, which I agree with the respondent, is a significant aggravating factor. Finally, the extent of injury caused was severe. The two passengers' victim impact statements record that they suffer ongoing consequences.

[35] Both the appellant and the respondent acknowledge that the personal mitigating factors set out at [22] above, reduce the gravity to no less than moderate. I concur but would emphasise "no less than".

Consequences of conviction

[36] The appellant submits that the following consequences flow from her convictions and these consequences are out of all proportion to the moderate gravity of her offending:

- (a) *Employment prospects:* the appellant fears she will not be able to get a job within the cybersecurity industry. She further fears that a recent rejection of a studentship may be linked to her convictions because she was required to disclose them during the application process and she could see no other reason why she would be rejected.
- (b) *Future travel:* the appellant also fears that she will not be able to obtain visas to travel to, and work in, places such as Australia, Canada and the United Kingdom if her convictions stand.

[37] The Court must be satisfied there is a "real and appreciable risk" that the identified consequences will arise.¹⁴ The nature, seriousness and degree of likelihood of the consequences occurring will be material.

¹⁴ *R v Taulapapa* [2018] NZCA 414 at [22].

Employment

[38] The appellant relies on evidence from Mr Francis, a friend who works in the cybersecurity sector. He is 25 years of age and has five years' experience including as a summer intern at Xero, his current employer. Mr Francis says the appellant will "likely struggle" to find employment with her convictions. He bases this on the following factors:

- (a) First, security checks in the cybersecurity field are routine. Mr Francis himself has been asked in previous applications whether he has convictions.
- (b) Mr Francis was asked to vet graduate applicants for a summer internship programme at Xero and, in his experience, "those with convictions were not favoured and unlikely to be considered for a role as the work includes aspects such as handling private and sensitive information".
- (c) It is sometimes necessary to undergo further vetting where a person is required to work on a Government contract.
- (d) Failing a security clearance could mean alienation from certain types of work (for example, Government-contract work).
- (e) The cybersecurity industry in New Zealand is small and if a person is prevented from working on certain projects, "it becomes well known to all those working in this field".

[39] I do not consider the evidence establishes a real and appreciable risk of unemployability in the cybersecurity industry as a whole or elsewhere.

[40] With great respect to Mr Francis who clearly has a promising career, he does not yet have the experience or standing the Court requires for evidence on an application such as this. Mr Francis' comments are based on his own personal and limited work experience in one particular segment of the cybersecurity sector. He has

a limited employment history and has only been involved in the vetting process for graduate student internships with one firm, Xero. He is not an employer in the industry. Even in the limited context in which he assisted in screening graduate candidates, Mr Francis provides no information as to how often he came across candidates with convictions, or what other attributes these candidates had that may have impacted their employability. The fact that some candidates with convictions did not obtain internships does not amount to evidence that convictions are, in and of themselves, a barrier to employment. Accordingly, Mr Francis' personal employment experience and views as to the weight employers may place on convictions cannot be relied on as being indicative of industry practice.

[41] Further, I do not accept the proposition that any conviction whatsoever would render the appellant "untrustworthy" in the industry. As the respondent says, Mr Francis assumes all convictions would be seen as the same by all employers in that industry. I consider it unlikely that driving-related convictions would preclude the appellant from all types of work within the industry. That is more likely to be the case with a dishonesty conviction or, for example, the charge Mr Foley arranged to be dropped, which showed serious non-compliance with the law. I have not seen it suggested previously that traffic offending, even serious traffic offending such as the appellant's, is a particular employment impediment, except where the job is driving-related in its broadest sense.

[42] There is insufficient evidence that the appellant would be faced with significant or insurmountable barriers to employment within the cybersecurity industry. It is clear from Mr Francis' affidavit that there are various types of cybersecurity work. This presumably covers both private and public sectors. It seems unlikely that the appellant would be excluded from all forms of this work.

[43] It seems that following graduation, the appellant will hold a Bachelor of Computer and Information Sciences, with strong academic results. She is likely to be sought after, whether within her current chosen field, or similar or other fields. As the respondent submits, it seems likely that this degree has a large number of career paths. There is no evidence before the Court to suggest there is a real and appreciable risk that the appellant will generally be unable to find employment following her studies.

I note also that she has strong character support, evident from the letters filed for the purpose of her sentence indication. It would seem she also has an employment referee, at least in Mr Francis. I would assess it as likely that the appellant will overcome any or most employment impediments she may have from her convictions.

[44] Finally, there is no evidence to suggest that the appellant's unsuccessful studentship application, notwithstanding her good academic results, was due to weight placed on her convictions. There may be any number of factors which resulted in her unsuccessful application. The criteria were not in evidence, but I doubt the scholarships were granted solely to top students, as the appellant assumes.

[45] Overall, the potential impact of a conviction on the appellant's employment prospects is speculative. Any potential impact is insufficiently real or appreciable to justify a conclusion that her convictions would preclude her from employment, whether in the cybersecurity industry, in related fields, or more generally.

Travel

[46] The appellant has expressed "aspirations of working remotely all over the world". In particular, "the countries [she] would mostly like to work in [are] Canada, United Kingdom and Australia". While the appellant has no actual travel plans, she fears she would not be able to get a visa to these countries if her convictions stand.

[47] The appellant relies on the affidavit of immigration specialist, Carina Ford, to support her submission that a conviction would have an impact on her ability to travel and work in Australia, in particular. No evidence has been provided in respect of any other country.

[48] Ms Ford helpfully sets out a number of Australian visa pathways available to the appellant and how these may be affected by her convictions, should they remain. The respondent says that none of the pathways suggest there is a real and appreciable risk that the appellant will not be able to travel to Australia.

[49] Ms Ford is of the view that the appellant's current convictions "would not make her ineligible" for a subclass 444 visa, unless her community detention is considered

a period of imprisonment and it is for a period of 12 months or more. I note that the appellant was sentenced to a period of only six months' community detention. Further, under s 5 of the Migration Act 1958 (Cth), it appears unlikely that the appellant's sentence of community detention would be considered a "period of imprisonment". Consequently, the appellant would not automatically be refused entry into Australia if her convictions are upheld. She would, however, be subject to a character test (discussed below). If the appellant enters Australia on a subclass 444 visa from 1 July 2023, assuming she does not reoffend, she may be eligible for citizenship after four years of residency and subject to meeting other criteria.

[50] Australian permanent or skilled visas are also subject to the character test. As Ms Ford deposes, a person will not be considered to pass the character test if they have a substantial criminal record (which the appellant clearly does not) or their "past and present criminal or general conduct indicates they are not of good character". Whether a person passes this second limb is clearly a matter of discretion for immigration officials. In any case, it is Ms Ford's view that there is only a low risk that the appellant would not pass this test. Regardless, refusal of a permanent visa does not preclude the appellant from an alternative pathway such as a temporary visa or residency.

[51] Ms Ford's evidence on the character test applied by Australian immigration officials is instructive. It indicates that while the appellant would be required to meet the character test if her convictions stand, those convictions do not, in and of themselves, mean that she would automatically fail that test. On the contrary, it is Ms Ford's opinion that there is only a low risk that this would be the case based on the appellant's past and present criminal or general conduct. This risk is clearly of a low magnitude.

[52] There is no evidence at all that the appellant would be precluded from travelling to Canada or the United Kingdom, being the other countries to which she has expressed a desire to travel and work.

[53] There is also no evidence that the appellant has immediate travel plans, nor a specific need to travel to Australia (or elsewhere) in the near future for employment purposes or otherwise. In contrast, in the three cases cited by the appellant — *Vela v*

R,¹⁵ *Rodrigo v Police*,¹⁶ and *Police v Suturin*¹⁷ — the defendants had specific travel needs of more significance. In *Vela v R*, the Court regarded the inability of the defendant to travel to America and live with his father as a “heavy burden”.¹⁸ The defendant had also provided evidence confirming that he would be ineligible to enter America at all while he had the conviction.¹⁹ In *Rodrigo v Police*, the Court considered the defendant’s career and travel aspirations would be more affected than some others who appear before the courts because the defendant’s relatives were all overseas.²⁰ In *Police v Suturin*, the Court considered that the consequences of conviction on future travel were relatively minor where the defendant’s job required him to travel internationally.²¹

[54] The consequences of conviction on the defendants’ ability to travel in the above three cases are not present in this case. There is no evidence to suggest that the appellant’s desire to travel to Australia, Canada or the United Kingdom for employment is based on particular ties to those countries or any specific need, either now or in the near future. Rather, it is based on a general desire to travel and work abroad at some later stage and to be untrammelled by her convictions.

[55] For the above reasons, I do not consider there is a real and appreciable risk that the identified consequences will arise and in any event I consider that the consequences are low.

Proportionality

[56] The appellant’s offending is of at least a moderate degree of seriousness for offending of its kind after taking into account all mitigating factors personal to her. In contrast, the direct and indirect consequences of conviction are low. Their submitted impact on the appellant is speculative. In any event, I do not consider they pose insurmountable or even significant barriers for her. They are not “out of all proportion” to the gravity of her offending.

¹⁵ *Vela v R* [2010] NZCA 440.

¹⁶ *Rodrigo v Police* [2014] NZCA 68.

¹⁷ *Police v Suturin* [2021] NZDC 2001.

¹⁸ *Vela v R*, above n 15, at [19].

¹⁹ At [16].

²⁰ *Rodrigo v Police*, above n 16, at [17].

²¹ *Police v Suturin*, above n 17, at [12].

[57] The appellant would therefore not have been eligible for a discharge without conviction.

Conclusion

[58] For the foregoing reasons, I find that neither Judge Fitzgibbon nor Mr Foley erred in their respective roles. I note that I consider the Judge was as generous to the appellant as possible. In terms of Mr Foley's advice, while I agree a prison sentence was possible, I think it was unlikely in all the circumstances. But I consider overall that Mr Foley's advice was not only correct, the appellant was materially advantaged by it both as a result of the negotiated outcome and the ultimate sentence.

[59] Even if the Judge and/or Mr Foley did err, there is no risk that any error affected the outcome, given the appellant's ineligibility for a discharge under s 106 of the Act. There was no miscarriage of justice.

[60] The appeal is therefore dismissed.

Hinton J