IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA357/2023
[2024] NZCA 57

BETWEEN	NASHYN WILLIAMS Appellant
AND	THE KING Respondent

Hearing:	13 February 2024
Court:	Collins, Woolford and Mander JJ
Counsel:	E P Priest for Appellant M J Mortimer-Wang and C P Paterson for Respondent
Judgment:	13 March 2024 at 10.30 am

JUDGMENT OF THE COURT

A The application to adduce fresh evidence is granted.

B The appeal against conviction and sentence is dismissed.

REASONS OF THE COURT

(Given by Woolford J)

Introduction

[1] On 26 February 2021, Nashyn Williams drove his co-offender, Mr Kaos Williams, to a park in Northcote, Auckland. A crowd of young people had gathered there. There were on-going tensions between various young persons and a fight between two of the young people had been arranged. On arrival at the park, Mr Williams slowed his vehicle. Mr Kaos Williams, who was seated in the front

passenger seat, then proceeded to fire a shot from a sawn-off double-barrelled shotgun in the direction of the crowd. Mr Williams then drove away with his co-offender and disposed of the vehicle. The shot fired by Mr Kaos Williams resulted in the victim being shot in the face, causing him to lose his left eye, substantial vision in his right eye and sustain serious facial injuries.

[2] Initially, Mr Williams (then aged 18) and his co-offender (then aged 16), were jointly charged with wounding with intent to cause grievous bodily harm.[1] The Crown later filed an amended charge notice for both offenders. Mr Kaos Williams was charged with wounding with reckless disregard,[2] while Mr Williams was charged with being an accessory after the fact to the wounding.[3]

[3] Mr Williams then pleaded guilty to the lesser charge. On sentencing, Judge B A Gibson declined his application for discharge without conviction.[4] Instead, the Judge convicted Mr Williams and sentenced him to six months' supervision and three months' community detention.[5] Mr Williams now appeals the Judge's refusal to grant a discharge without conviction and, should this ground of appeal fail, against the sentence given.

Discharge without conviction

[4] Section 106(1) of the Sentencing Act 2002 (the Act) provides that a Court may discharge an offender without conviction following a plea or finding of guilt. In order to grant a discharge without conviction, the Judge must be satisfied that "the direct and indirect consequences of a conviction would be out of all proportion to the gravity of the offence".[6]

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1 Crimes Act 1961, s 188(1). Maximum sentence: 14 years' imprisonment.
2 Crimes Act, s 188(2). Maximum sentence: seven years' imprisonment.
3 Crimes Act, ss 71 and 312. Maximum penalty: three years, six months' imprisonment.
4 *R v Williams* [2023] NZDC 11576 [Sentencing notes] at [22].
5 At [22].
6 Sentencing Act 2002, s 107.

[5] This proportionality assessment is to be made in accordance with the three-step approach set out by this Court in *Z (CA447/2012) v R*.[7] A Court must assess:[8]

(a) the gravity of the offending, taking into account all aggravating and mitigating factors of the offending and the offender;

(b) the direct and indirect consequences of a conviction for the offender; and

(c) whether those consequences are "out of all proportion" to the gravity of the offending.

[6] Even if a Court determines that the consequences are out of all proportion, it must still consider whether it should exercise its residual discretion to grant a discharge (although it would be rare for the Court to refuse a discharge in such circumstances).[9]

Approach on appeal

[7] An appeal against a refusal to discharge without conviction is an appeal against both conviction and sentence.[10] To the extent this appeal relates to the Court's weighing of consequences against gravity, it proceeds by way of rehearing whereby the appellate court makes its own assessment of whether the criteria for discharge without conviction are met.[11]

[8] This Court must dismiss the appeal unless it is satisfied that a miscarriage of justice has occurred.[12] In the context of a discharge without conviction, a miscarriage of justice means a "material error" or that the Judge "erred in applying the principles for discharging an offender without conviction".[13]

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7 *R v Hughes* [2008] NZCA 546, [2009] 3 NZLR 222 at [16] and [22]–[23], affirmed in *Blythe v R* [2011] NZCA 190, [2011] 2 NZLR 620 and *Z (CA447/2012) v R* [2012] NZCA 599, [2013] NZAR 142.

8 *Z (CA447/2012) v R,* above n 7, at [27].

9 At [27] citing *Blythe v R,* above n 7, at [13].

10 *Jackson v R* [2016] NZCA 627, (2016) 28 CRNZ 144; and *Ovtcharenko v Police* [2017] NZCA 65 at [5].

11 *H (CA680/2011) v R* [2012] NZCA 198 at [30]–[35] referring to the standard of review prescribed in *Austin, Nichols & Co Inc v Stitching Lodestar* [2007] NZSC 103, [2008] 2 NZLR 141.

12 Criminal Procedure Act 2011, s 232.

13 *Jackson v R*, above n 10, at [12].

District Court decision

[9] The Judge set out the three steps he was required to consider when dealing with an application for discharge without conviction under s 106 of the Act, as above.[14]

[10] As to the gravity of the offending, the Judge noted that the discharge of the firearm resulted in an impairment which would impact the victim for life. The Judge further stated that, although not in the summary of facts, the appellant likely knew his co-offender had a firearm and this was relevant to consider when assessing the gravity of the offending. The Judge accepted that had the lesser charge been heard in the Youth Court, it would likely have resulted in a discharge, but he had to deal with the charge as he found it in the District Court. The Judge found that the gravity of the offending was in the mid to high range, but not at the very highest end, because of the appellant's personal circumstances.[15]

[11] The Judge noted that, prior to the offending, the appellant had been a person of known good character. He had also not reoffended during two years on bail. Within the last six months, he had gained full time employment and was well-regarded by his employer. He had also completed 80 hours of voluntary community work.

[12] The Judge then turned to the consequences of a conviction. The appellant said he wished to travel in the future, and he was concerned that a conviction would make this impossible. However, the Judge was not convinced that a conviction would prevent the appellant's travel plans. Further, the Judge noted that overseas authorities also routinely request information regarding a discharge without conviction.[16]

[13] The Judge assessed the main issue to be the appellant's employment. The appellant was a highly regarded scaffolder employed by a scaffolding company. The Judge referred to the affidavit of the company's operations manager, which placed the appellant as one of his "top three" scaffolders in the company. However, the company's clients — such as schools and hospitals — required disclosure of criminal conviction records. If the appellant had a criminal conviction, the operations manager

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14 Sentencing notes, above n 4, at [4].
15 At [5]–[15].
16 At [15]–[16].

said that the appellant would be fired as a conviction would poorly reflect on the company's reputation. However, the Judge could not definitively find that he would not have work available upon conviction. Further, the Department of Corrections Employment and Training Consultant team confirmed there were scaffolding jobs available for individuals with a criminal conviction.[17]

[14] In conclusion, the Judge determined that the consequences of the conviction would not be out of proportion to the gravity of the offending. The Judge then convicted the appellant and sentenced him to six months' supervision and three months' community detention.[18]

Appellant submissions

[15] The appellant appeals against the refusal of a discharge without conviction on the basis that:

(a) the Judge placed excessive weight on the gravity of the offending and gave insufficient weight to relevant mitigating factors in assessing the gravity of the offending; and

(b) the Judge did not account for relevant factors regarding the consequences of a conviction.

[16] If the appeal against refusal of a discharge without conviction was to fail, the appellant appeals against the sentence on the basis of incorrect sentencing methodology.

Gravity of the offending

[17] Counsel submits that the Judge overstated the gravity of the appellant's offending and failed to properly take into account relevant mitigating factors of the offender at the first stage.

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17 At [17]–[21].
18 At [22].

[18] Counsel acknowledges that there is no tariff judgment for accessory after the fact offending but refers to *R v Tito* which sets out two relevant factors in assessing the gravity of offending:[19]

(a) the seriousness of the crime which the defendant has assisted; and

(b) the level of assistance provided.

[19] Counsel submits that the Judge wrongly took the appellant's supposed knowledge that his co-offender had a firearm and his subsequent intention to fire the gun into account as aggravating factors. It is submitted that the Judge did not have sufficient evidential foundation to do so. Counsel submits that the Judge was wrong to cite a comment in the pre-sentence report which stated that it was difficult to believe that the appellant did not know what his co-offender's intentions were, as he knew that his co-offender had a firearm.

[20] Counsel refers to three cases where the starting point for comparable accessory after the fact offending was set between 10 and 14 months' imprisonment.[20] Counsel submits that the appellant's offending was less serious and that a starting point of six to eight months' imprisonment would reflect his disposal of the vehicle. Counsel submits that the appellant's offending is moderate for offending of this nature, before taking into account personal mitigating factors.

[21] Counsel further submits that the Judge gave insufficient weight to the appellant's personal mitigating factors, namely, youth, previous good character, time spent on bail without any breaches, volunteer work, and the fact that the charge would likely have been dealt with in the District Court were it not for the procedural history. She submits that the appellant's culpability can be characterised as low due to these factors and, by failing to properly take them into account, the Judge mischaracterised the gravity of the offending as being at the mid-to-high range and that it is better characterised as being of low gravity.

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19 *R v Tito* [2015] NZHC 2969 at [20].

20 10 months was found to be the appropriate starting point in: *R v Rodgers* [2022] NZHC 1942 and *R v Younes* [2023] NZHC 744. In *R v Bracken* [2021] NZHC 2615, 14 months was the starting point.

Consequences of conviction

[22] Counsel submits that a relevant starting point in assessing the consequences of conviction is that they need not be proven, only that there is a real and appreciable risk of any identified consequence.[21]

[23] Counsel submits that the Judge improperly disregarded evidence that the appellant would lose his employment upon conviction and the real risk it posed to his employment prospects.

[24] Further, she submits that the Judge placed insufficient weight on the general consequences of conviction. In the appellant's case, this includes consequences such as restrictions on travel, difficulty to secure rental properties, and stigma and shame. Counsel also submits that it is relevant for the Court to consider the appellant's dependent family.[22]

[25] In conclusion, counsel submits that the consequences of a conviction would be out of all proportion to the gravity of the appellant's offending and a discharge without conviction is the appropriate outcome.

Other error in sentencing

[26] Counsel further submits that there were errors in the sentencing process, which the Court needs to consider only if the appeal against the refusal to grant a discharge without conviction is dismissed.

[27] These errors arose from the Judge's incorrect approach to the sentencing methodology in *R v Taueki*.[23] The Judge did not adopt an appropriate starting point and did not make any assessment of the *Taueki* factors.[24] The Judge did not provide any discounts for the appellant's guilty plea, youth, volunteer work, previous good character and time spent on bail.

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21 *DC (CA47/2013) v R* [2013] NZCA 255 at [43].
22 *Cook v Police* [2014] NZHC 282 at [28].
23 *R v Taueki* [2005] NZCA 174, [2005] 3 NZLR 372 at [44].
24 At [31]–[32].

[28] It is also noted that the end sentence reached for the appellant and co-offender was the same, despite the appellant's lesser charge. It is accepted that this is due to the statutory limits imposed upon sentencing in the Youth Court in that Mr Kaos Williams could not, as a matter of law, be sentenced to imprisonment or home detention because of his youth. Nonetheless, counsel submits that issues of parity arise.

Fresh evidence

[29] Subsequent to her written submissions dated 24 January 2024, counsel for the appellant made an application for fresh evidence to be admitted in the appeal, in the form of an affidavit by the appellant. The Crown does not object and it is admitted accordingly.

[30] In his affidavit sworn 1 February 2024, the appellant states that he is now unemployed. He states:

> 4. I resigned from my workplace. It was all too hard. I knew that I couldn't stay in my role. I resigned rather than be fired.

[31] He further states:

> 10. … I don't feel I could ever go back there now, even if I win the appeal. My key supporter there who took a chance on me has since left.

[32] The appellant says he has applied for some full-time jobs, but he has been "knocked back". He states:

> 9. … I am young. I don't have any qualification and I have this conviction which means I don't get interviews.

[33] Counsel submits that this confirms that the feared consequences of a conviction have occurred.

Respondent submissions

[34] Counsel submits that, notwithstanding a number of positive factors, the overall gravity of the offending remains moderate to high and so the consequences of conviction are not out of all proportion.

[35] Counsel submits that the gravity of the offending is informed by the seriousness of the primary offence, which resulted in substantial permanent loss of vision for the victim. In terms of the appellant's culpability, he witnessed his co-offender fire towards a group of young persons and then drove him away before disposing of the vehicle. The Crown accepts that it would be inappropriate to take into account the appellant's supposed knowledge of the firearm in the vehicle and any intention his co-offender may have had. Nonetheless, counsel submits that mere knowledge of the gun would not much impact the gravity of the appellant's offending. This is predicated on the appellant's choice to leave the scene with the principal offender and dispose of the vehicle, even accounting for personal mitigating factors.

[36] Counsel submits that the only material consequence concerns the appellant's employment. The Crown submits that, while a conviction may lead to the loss of the appellant's employment at the scaffolding company, this does not preclude him from securing employment elsewhere. This submission is supported by the PAC report, which stated that the Department of Corrections can assist the appellant in securing other scaffolding work even upon conviction.

[37] Regarding travel consequences, counsel refers to the Judge's finding that disclosure of a discharge without conviction would, in any event, likely be required. This suggests that any impediment to travel is a consequence of offending, rather than a consequence of conviction. Counsel refers to *Edwards v R* which set out the Court's approach to accounting for travel when considering the consequences of conviction.[25] Counsel submits that the requirements are not met here.

[38] Therefore, on balance, the consequences are not out of all proportion to the consequences of conviction. While it is acknowledged that there are factors to the appellant's credit, a conviction is necessary to mark his involvement in an incident that left a young man nearly blinded.

[39] Counsel's submissions also address the appellant's appeal of the end sentence. The Crown accepts that the *Taueki* methodology was not followed. Counsel submits that this is because the Judge had already considered the mitigating factors which

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[25] *Edwards v R* [2015] NZCA 583 at [25]–[27].

would be relevant in calculating the end sentence. Moreover, an error in process is only significant where it leads to an error in the end sentence. Counsel submits that the end sentence is within range. The appellant's end sentence is at the lower end and this could only be reached upon assessment of mitigating factors relevant to him.

[40] Regarding counsel's submission as to parity, Mr Kaos Williams received an end sentence of one year's intensive supervision and six months' community detention. This is a higher sentence in degree (intensive supervision as opposed to supervision) and length to reflect the more serious charge laid against Mr Kaos Williams.

Discussion

Discharge without conviction

[41] Notwithstanding the able submissions of counsel for the appellant, we cannot say that the Judge was in error in his consideration of the three-step process mandated in *Z (CA447/2012) v R*.[26]

[42] As to gravity of the offence, the appellant had just seen his co-offender discharge a sawn-off double barrel shotgun at a group of young persons gathered in a public park. He chose to take both immediate and longer-term action to assist his co-offender to evade apprehension and prosecution. He immediately sped away from the crime scene with Mr Kaos Williams, the principal offender, in the front passenger seat of the vehicle in order to enable him to avoid arrest. He later disposed of the vehicle, which has not been recovered by Police. The appellant obviously disposed of the vehicle to suppress evidence of the offending in order to enable both offenders to avoid conviction.

[43] The crime which the appellant assisted as an accessory after the fact was serious and the degree of assistance significant.

[44] The Judge said he took into account the appellant's acknowledgement in the pre-sentence report that he knew his co-offender had a firearm, notwithstanding that

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[26] *Z (CA447/2012) v R*, above n 7.

it was not specified in the summary of facts.[27] Although counsel for the appellant criticises the Judge for doing so and says it was a material error on his part, we consider the offence to be serious regardless of whether or not the appellant knew his co-offender had a firearm beforehand. The gravamen of the offence is to be judged by the appellant's actions after his co-offender had shot at the group of young persons and not beforehand, because the charge was formulated as accessory after the fact.

[45] In assessing the gravity of the offence, the Judge rightly took into account a number of personal mitigating factors — the appellant's previous good character, his employment as a scaffolder and his family circumstances. The Judge also had regard to the appellant's youth and the likely outcome if he had appeared in the Youth Court. Taking these factors into account, it was open to the Judge to assess the gravity of the offence as being in the mid-to-high range, but not at the very highest end, because of factors that went to the appellant's personal circumstances.

[46] As to the consequences of a conviction, counsel for the appellant acknowledges that an assertion that general future travel may be impeded is not likely to be sufficient, on a standalone basis, to grant a discharge without conviction. Counsel submits that travel barriers are something the Court may take judicial notice of. However, we think the approach taken by the Judge to the issue of overseas travel was perfectly proper. The Judge did not see a conviction as a bar to travel, but acknowledged it may be a hindrance.

[47] The major issue for the Judge as far as consequences of a conviction were concerned was the appellant's employment as a scaffolder. The Judge accepted that there was a risk that he would lose his employment through his conviction, but noted the availability of other scaffolding jobs and that a Department of Corrections Employment and Training Consultant could support him with obtaining employment. Subsequently, the appellant's employment was not terminated. Instead, he resigned in circumstances which are not well explained. He also says he would not go back even if his appeal was successful. There is also no suggestion that an Employment and

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[27] Sentencing notes, above n 4, at [9]–[10].

Training Consultant is no longer available to assist the appellant to obtain alternative employment.

[48] The other consequences referred to by counsel for the appellant such as stigma, shame and general consequences do not add anything of significance to the consequences of criminal checks conducted for overseas travel and for employment.

[49] We are of the view that the Judge did not fall into error in assessing the likelihood of the various consequences of a conviction.

[50] The balancing of the gravity of the offending with the consequences of a conviction was an assessment for the Court. Again, the Judge was not wrong to conclude that the consequences of a conviction were not out of all proportion to the gravity of the offending.

Errors in sentencing methodology

[51] As to the errors in sentencing, we accept that the Judge did not apply the two-step sentencing methodology set out in *R v Taueki* to reach the appellant's end sentence. The Judge did not adopt a starting point on the basis of comparative case law and did not discuss the mitigating factors submitted specifically with regard to the end sentence. However, we also accept that the Judge did discuss and weigh up the facts of the offending and the appellant's personal mitigating factors when assessing the gravity of the offence for the purposes of determining the appellant's application for a discharge without conviction.

[52] Nevertheless, where there has been an error of process, as is strictly the case here, an appeal will only be upheld if the error has a bearing on whether the sentence is manifestly excessive.[28] We are of the view that the sentence is not manifestly excessive. It is within range for similar offending. In fact, it may be seen as within the lower end of the range. It was reached by the Judge informed by the earlier discussion of the appellant's personal mitigating factors.

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[28] *Tutakangahau v R* [2014] NZCA 279, [2014] 3 NZLR 482 at [36].

Result

[53] The application to adduce fresh evidence is granted.

[54] The appeal against conviction and sentence is dismissed.

Solicitors:
Crown Solicitor, Auckland for Respondents