IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA276/2022
[2023] NZCA 431

BETWEEN	DANIELLE HIRA TUMAHAI Appellant
AND	THE KING Respondent

Hearing: 29 August 2023

Court: Courtney, Whata and Downs JJ

Counsel: M J Taylor-Cyphers for Appellant
A M McClintock for Respondent

Judgment: 7 September 2023 at 11.30 am

JUDGMENT OF THE COURT

A The application to adduce fresh evidence is granted.

B The appeal is allowed and the convictions are set aside.

C The case is remitted to the District Court for redetermination.

D Any question of bail is remitted to the District Court.

REASONS OF THE COURT

(Given by Downs J)

Introduction

[1] Danielle Tumahai pleaded guilty to one charge of supplying a small amount of methamphetamine, and a second charge of offering to supply a similarly small amount

of that drug. She was convicted and sentenced to a term of 15 months' intensive supervision.[1] Ms Tumahai appeals on the basis that given the unusual circumstances of her case, she ought to have been discharged without conviction. A Court may discharge a defendant without conviction if, and only if, the "direct and indirect consequences of a conviction would be out of all proportion to the gravity of the offence".[2] Ms Tumahai does not challenge her sentence.

[2] In this brief judgment, we explain why the appeal is allowed and the case remitted to the District Court for redetermination.

Background

[3] Between 22 May and 9 June 2020, Ms Tumahai offered to supply at least 2.75 grams of methamphetamine. Between 27 and 29 May 2020, Ms Tumahai supplied at least 1 gram of the same drug.

[4] Ms Tumahai was charged on 29 October 2020. She pleaded guilty on 12 November 2021, following plea negotiations. Sentencing was scheduled for 4 March 2022. Ms Tumahai sought, and was granted, an adjournment until 9 May 2022 to facilitate her completion of a rehabilitative programme.

[5] On 9 May 2022, Ms Tumahai sought another adjournment on the basis her programme had not finished. The Crown offered no opposition to an adjournment. Judge A-M Skellern declined an adjournment and sentenced Ms Tumahai to a term of 15 months' intensive supervision.

[6] Ms Tumahai's lawyer had been given permission to appear by VMR at sentencing. However, that technology was not available in the courtroom. Consequently, her lawyer appeared by telephone albeit, we gather, over a very poor line, such that she found it difficult to follow what was happening.

[7] Ms Tumahai's lawyer had signalled an application would be made for a discharge without conviction under s 106 of the Sentencing Act 2002. However, no

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1 *R v Tumahai* [2022] NZDC 10741.
2 Sentencing Act 2002, s 107.

such application or supporting evidence was ever filed. So, while the Judge had what she described as a "very thorough" pre-sentence report,[3] the Judge did not have the benefit of any evidence about the offending, Ms Tumahai's background, or her rehabilitative progress to that point. Nor did the Judge have any evidence about the potential impact of a conviction on Ms Tumahai's employment prospects.

[8] The Judge was satisfied a community-based sentence was warranted because of Ms Tumahai's age (she was 30), otherwise good record, addiction to methamphetamine, and rehabilitative progress. The Judge, therefore, imposed intensive supervision. The Judge convicted Ms Tumahai of the offending absent an application for a discharge without conviction.

Fresh evidence

[9] Ms Tumahai seeks permission to offer fresh evidence: her own affidavit of June 2023.[4] On behalf of the respondent, Ms McClintock offers no opposition to reception of the evidence, acknowledging it is "sufficiently credible".

[10] We accept the evidence could, and should, have been placed before the District Court, but we also accept Ms Tumahai was not at fault in this respect. Like the respondent, we consider the evidence credible. We therefore receive it.

[11] Ms Tumahai says in 2015, she was in an abusive relationship and introduced to drugs. Her two children — who had been her world — were removed. Ms Tumahai's partner was then jailed for six and a half years. She turned from cannabis to methamphetamine. Ms Tumahai describes the offending and subsequent events this way:

> **Circumstances of the offending**
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> At the time of this offending, I was hanging out with a drug-dealer to support my habit.
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> I made a lot of "friends" – people used to come to me because they knew I had some, and I could make some extra money on my side, by giving some to them.

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3 *R v Tumahai*, above n 1, at [4].
4 The affidavit does not identify when in June it was sworn.

At the time I was arrested, I had been in a hotel room with some guys. The men I had come to the hotel room with had gone to do a drug deal, and left me in the hotel room.

The drug deal went wrong, and a murder was committed.

I was later a prosecution witness in the trial against Mr Filoa and Mr Davis, the men I went to the hotel with.

It was my understanding that if I gave evidence for the prosecution, I would receive a discharge without conviction on these charges.

Steps taken following my offending

I have attended quite a lot of rehabs. I am clean.

I first completed an 8-week programme called The Bridge. It is a residential rehabilitation programme.

Following that, I completed 10 weeks at another facility called Higher Ground. This gave me the skills to then leave independently. It is at Higher Ground that things really changed for me.

I then went on to live with Wings Trust, which is a supported living arrangement.

I now live on my own, in Ōrākei. I am stable, safe, and clean.

Consequences of a conviction

The day before I was sentenced, on 08 May 2022, I had reached the interview stage for a job as a flight attendant, as cabin crew with Air New Zealand.

The next step in the process was police vetting.

I was shocked my sentencing went ahead the following day, without my lawyer there and without being able to ask for a discharge without conviction, and complete my rehabilitative work.

I was then sentenced, and I knew that my convictions for supplying methamphetamine and offering to supply methamphetamine would show up on police vetting.

I withdrew my application.

I would very much like to re-apply, but I know that I will never be able to get the job, because the convictions will mean I am unable to get a visa to fly internationally to any other country.

The charges both carry a maximum penalty of life imprisonment, and that is all people will see when they receive the police vetting results – that is what I am scared of.

I have applied for a lot of other jobs in the last year.

> If I am unable to work as cabin crew, I would like to do work that uses my experience but does not let it define me.
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> So I have applied for jobs with the Ministry of Social Development, St Johns, and as a Police Communicator with New Zealand Police.
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> I have withdrawn these applications at the police vetting stage, because I do not want people to have that information about me.
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> I believe that once this information is revealed, I would instantly be rejected for these roles.
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> I have applied for Air Chathams also as cabin crew, as they only fly domestic. This too required police vetting.

[12] With our permission, Ms Tumahai gave supplementary evidence, and was briefly cross-examined. Ms Tumahai said, among other things, that her children had been returned. We found her testimony helpful.

The appeal

[13] Ms Taylor-Cyphers, who did not act for Ms Tumahai in the District Court, contends the sentencing process miscarried for two reasons. First, no application for a discharge without conviction was ever filed, even though Ms Tumahai wanted to be discharged without conviction. Second, because of the combination of events described at [5]–[8], Ms Tumahai had no effective representation at sentencing.

[14] Ms Taylor-Cyphers acknowledges the charges are inherently serious, and discharges without conviction for dealings in controlled drugs are rare. However, she notes that such an outcome is possible, citing the observations of Palmer J in *Walsh v R*:[5]

> [10] Serious drug offending provides relatively few occasions for a Court to discharge an offender without conviction. But it does happen:
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> (a) In 2003, in *R v Hemard*, a 25-year-old tourist received a parcel containing 0.7 of a gram of cocaine similar to possession for personal use.[6] Panckhurst J said the level of criminality was low and the level of stupidity was extremely high.[7] Entry of a conviction would, on account of the offender's particular personal circumstances of working in corporate leisure, have had dire consequences. He was discharged without conviction.

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5 *R v Walsh* [2023] NZHC 680.
6 *R v Hemard* HC Christchurch T 30/03, 11 April 2003.
7 At [9].

(b) In 2012, in *Bullock v New Zealand Police*, a 17-year-old school boy admitted intending to sell some of his 16 ecstasy and 40 other class C drug tablets.[8] Woodhouse J considered the District Court had placed undue emphasis on the general nature of the offending rather than the culpability of the particular offender.[9] The evidence indicated the risk of reoffending was low and the offender's experience of the criminal justice system would have had a substantial impact. The employment and other life consequences of a conviction were held to be disproportionate to the gravity of the particular offending. A discharge was granted.

(c) In 2014, in *R v Rakich*, the offender sold 200 class C pills over three separate occasions and conspired to sell at least 2,600 class C pills over seven occasions.[10] Duffy J considered that his age of 20, his previous good character, his remorse, and the fact he had turned his life around since the offending reduced the gravity of offending to low. The consequences of conviction included impacting on his ability to travel to the United States for a successful business he had started. The Judge considered the consequences of conviction would undermine the strong rehabilitative steps he had taken to date and would be out of proportion given that he had clearly learnt his lesson and was very unlikely to offend again.[11] He was discharged without conviction.

(d) Also in 2014, in *Rodrigo v New Zealand Police*, a 22-year-old university student supplied Ritalin, a class B drug he had been prescribed, to three people without profit.[12] The gravity of the offending was reduced by his age, being a first offender, admitting his offending, his remorse, his undiagnosed ADHD, his family support, and his low likelihood of reoffending.[13] A conviction would have impacted on his ability to travel to his family in North America and his employment prospects, and would have been out of all proportion to the low level of offending. He was discharged without conviction.

(e) In 2018, in *Taylor v R*, Ms Taylor pleaded guilty to charges of possession of methamphetamine for supply and conspiracy to supply methamphetamine.[14] Ms Taylor's part in the conspiracy was minimal and the gravity of the offending was very much at the lower end of the scale. She acted as a result of her partner's domination of her, which she had a severely compromised ability to resist due to her long history of abuse. Convictions for methamphetamine offending would preclude Ms Taylor from entering the teaching profession and turn her life around, which would be out of all proportion to the gravity of her offending. Thomas J stated this was "a rare case" where an offender in

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8 *Bullock v Police* [2012] NZHC 1374.
9 At [5].
10 *R v Rakich* [2014] NZHC 3287.
11 At [163]–[164].
12 *Rodrigo v Police* [2014] NZCA 68.
13 At [11].
14 *Taylor v R* [2018] NZHC 688.

respect of a class A controlled drug would be discharged without conviction.

(f) Finally, … in *R v H*, an 18-year-old who had been selling ecstasy through the Mongrel Mob turned his life around and pleaded guilty to aggravated burglary.[15] Cooke J discharged him without conviction, observing:

> [32] It is unusual for a person to have got himself involved in drug dealing, and then participated in this serious offending, to receive a discharge without conviction. But you are a person without previous convictions, you are young, and there is a real prospect that you can now start your new life with the love and guidance of those who are seeking to support you both [in] Australia and New Zealand. The criminal justice system needs to address cases like this with the sensitivity they deserve. There is a public benefit in taking steps to prevent people like you from entering the criminal justice system and prison systems. That is particularly so for young people. Once those systems are entered it becomes hard to stop a decline into a criminal lifestyle, highly influenced by gang culture. Whilst this is serious offending, it can be said that this is the very kind of case that a discharge without conviction provision is most effectively directed to.

[15] Ms Taylor-Cyphers contends Ms Tumahai's circumstances are analogous to those of the cases discussed in *Walsh*, especially once Ms Tumahai's prosecution testimony in the murder case is taken into account, along with the apparent offer by Detective Wood or Detective Roberta to provide a letter of support to the sentencing Judge. Ms Taylor-Cyphers emphasises this is an unusual case, in which an appellant has broken the grip of an addiction and has much to offer society — provided the burden of an unwarranted criminal record is removed.

[16] For all of these reasons, Ms Taylor-Cyphers contends the consequences of conviction are out of all proportion to the gravity of the offending, and Ms Tumahai should be discharged without conviction.

[17] Ms McClintock responsibly acknowledges the sentencing process was imperfect. However, she contends it was not wrong for the Judge to decline an adjournment as the case had already been adjourned once and no application for a discharge without conviction was ever filed.

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15 *R v H* [2023] NZHC 626.

[18] Ms McClintock also contends the consequences of conviction are not out of all proportion to the gravity of the offending and the appeal should, therefore, be dismissed. Unsurprisingly, Ms McClintock emphasises the inherent seriousness of the offending. She says the circumstances of the cases identified in *Walsh* are distinguishable from those of Ms Tumahai; only one involved methamphetamine and in it, the defendant's ability to resist her partner's demands was severely compromised given her long history of abuse.[16]

Analysis

[19] We must allow the appeal if satisfied a miscarriage of justice has occurred.[17] That would be so if an error or irregularity in the sentencing process has created a real risk the outcome might have been different.[18]

[20] We are satisfied this test is met notwithstanding Ms McClintock's submissions. Ms Tumahai wanted to apply for a discharge without conviction, and through no fault of her own, that application was never advanced. Relatedly, no evidence was placed before the District Court to support such an application. Sentencing then proceeded even though Ms Tumahai anticipated an unopposed adjournment, absent effective representation because of the unavailability of VMR and an "appearance" by no more than a poor telephone line. Moreover, given the evidence now available, we are satisfied there is a real possibility the outcome might have been different had the process not miscarried.

[21] For completeness, none of this implies any criticism of the Judge. She, obviously, did not know what we now know.

[22] We have decided the best course is to remit the case to the District Court for redetermination. This will ensure that Court has all of the information it needs to make what will be, we accept, a difficult determination. With this in mind, we anticipate:

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16 *Taylor v R*, above n 14, at [49].
17 Criminal Procedure Act 2011, s 232(2)(c).
18 Criminal Procedure Act, s 232(4)(a); and *R v Gwaze* [2010] NZSC 52, [2010] 3 NZLR 734 at [61].

(a) Ms Tumahai will file and serve additional evidence outlining, in detail and with supporting information:

(i) Her attempts to gain employment.

(ii) Her rehabilitative efforts and progress.

(iii) Police representations of assistance in relation to her testimony as a prosecution witness.

(b) The Crown will inquire of the Police about [22(a)(iii)], file and serve evidence as appropriate, and identify the significance of Ms Tumahai's evidence to the prosecution case.

Result

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

[24] The appeal is allowed and the convictions are set aside.

[25] The case is remitted to the District Court for redetermination. Any question of bail is remitted to the District Court.

Solicitors:
Crown Solicitor, Auckland for Respondent