IN THE HIGH COURT OF THE COOK ISLANDS **JP APPEAL NO. 3/18**
HELD AT RAROTONGA
(CRIMINAL DIVISION)

MATAHARIKI TAIME

v

POLICE

Hearing Date: 31 July 2018

Counsel: Mr W Rasmussen for the Appellant
Ms A Herman for the Crown

Judgment: 31 July 2018

JUDGMENT OF THE HONOURABLE JUSTICE COLIN DOHERTY

[2:11:47]

[1] This is an appeal against the refusal to exercise a discretion to discharge the Appellant without conviction.

[2] On 15 March 2018, the Appellant pleaded guilty to a charge of driving with excess breath alcohol. She had been apprehended driving with a breath alcohol reading of 530 micrograms of alcohol per litre of breath. Her counsel sought a discharge without conviction.

[3] Submissions were made and ultimately the Justice entered a conviction and fined the Appellant $100, ordered her to pay Court costs of $50 dollars and imposed the mandatory minimum period of disqualification for 12 months.

[4] She appealed pursuant to s 76 of the Judicature Act. That provision provides under subsection (1): "Except as expressively provided in any enactment, where on the determination of any proceedings civil or criminal by a Justice sitting alone or by Justices

sitting together, any party thereto is not satisfied with the decision therein, he may appeal from that decision to a Judge."

[5] Section 80 of the Judicature Act provides the powers of a Judge sitting on appeal from Justices. In effect that provision allows the Judge hearing the appeal to affirm reverse or vary a judgment and quash a conviction and substitute, a conviction for any other offence or where an appeal is to sentence if the Judge thinks that a different sentence should have been passed, either quash the sentence passed and pass another effectively as the Judge thinks is appropriate.

[6] In effect, the Justice was exercising a discretion pursuant to s 112 of the Criminal Procedure Act 1980-81 which provides under subsection (1): "The Court after inquiry into the circumstances of the case may in its discretion discharge the defendant without convicting him unless by any enactment applicable to the offence, a minimum penalty is expressly provided for".

[7] In this case the Appellant submits that the inquiry conducted by the Justice was not full enough. Unfortunately, this Court on appeal has only the decision of the Justice and does not have copies of or transcripts of what transpired between counsel in terms of submission. This is not a case where evidence was taken, as a plea of guilty was entered into and only submissions were made.

[8] One can only assume that full submissions in support of the application pursuant to s 112 of the Criminal Procedure Act were proffered to the Justice and the Police had an opportunity to oppose. In submissions today ,neither counsel demurred from that proposition. The Appellant's position really is that not sufficient inquiry was made and not sufficient weight was given to the submissions put forward on behalf of the Appellant.

[9] It is clear from the decision that there was inquiry made by the Justice. It is clear also that the Justice had heed to the submissions made. For example, paragraph 3 of her decision says: "That to be convicted would impact adversely on the livelihood of the family and the defendant is at present the sole driver of [sic] and living with them at the Penryhn Hostel and the handicrafts they sell, she is also self-employed."

[10] She went further in paragraph 4 to talk about the circumstances of the driving incident: "Also taking into consideration is [sic] submission that after a night out at the Rehab Club the defendant went to sleep and was woken earlier the next morning to assist a relative and was of course subsequently breathalysed and found to be over the limit at the time".

[11] The next paragraph refers obviously to a submission made by counsel to: "The fact that she slept showed some level of responsibility and that she had been cooperative throughout this with regards to the charges laid".

[12] The Justice also had or took cognizance of submissions of the Crown because there was highlighted the fact that at 530mg of alcohol per litre of breath that was more than a little over the legal limit.

[13] Later at paragraph 9 of her judgment, the Justice came back to the effects of a conviction on the Appellant: "Unfortunately an adverse effect on [sic] livelihood of a person and how they get on to or from work or carrying out their duties as drivers, taxi drivers, bus drivers, affect many that come before this Court on EBAs. It is not an out of the ordinary situation".

[14] It is true also that the decision refers to the exercise of a discretion in another case, and that took some focus in submissions from the Appellant in this appeal. Ultimately in weighing it up the Justice came to the conclusion that there ought to be a conviction and she convicted and fined the Appellant as I have already described.

[15] Section 112 of the Criminal Procedure Act is wide in its discretion and does not fetter how a Court might make an enquiry into the circumstances of the case. Counsel for the respondent has referred to a decision of the New Zealand Court of Appeal in *Fisheries Inspector v Turner*[1] which gave advice in relation to the exercise of a similar discretion which was then available under the New Zealand law and applying that, the Court is required to balance all relevant public interest considerations as they apply in a particular case.

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[1] *Fisheries Inspector v Turner* [1978] 2 NZLR 233

[16] The New Zealand Law has subsequently changed and under s 107 of the Sentencing Act 2002 there is another test which now is that the Court is enjoined not to discharge an offender without conviction unless the Court is satisfied that "the direct and indirect consequences of a conviction will be out of all proportion to the gravity of the offence."

[17] In *Z v R*[2] the New Zealand Court of Appeal gave a guideline in respect of the application of section 107 New Zealand Sentencing Act. A similar guideline might well be appropriate for the exercise of the discretion under s112 of the Criminal Procedure Act.

[18] First, to identify the gravity of the offending. By that I mean the aggravating and mitigating factors of the offending itself rather than the offender.

[19] Secondly, to identify the consequences of a conviction for an offender, both direct or indirect.

[20] Thirdly, to determine whether the consequences of a conviction would be out of all proportion to the gravity of the offending and in that exercise to consider the aggravating and mitigating factors relating to the offender rather than the offence.

[21] The fourth step is to step back and regardless of the outcome of the first three steps to consider whether there should be an exercise of the residual discretion that resides in the Court to discharge.

[22] I posit that as a guideline rather than saying that it is the effect of s 112 of the Criminal Procedure Act. It seems to me however that that type of structure would not offend the wide discretion.

[23] How does that apply to this case? I intend to put myself in the shoes of the Justice and assess the information that was available to her which has been available to me both through the submissions of counsel today, my reading of the file and my reading of the judgment of the Justice.

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[2] [2012] NZCA 599

[24] If I were to apply the staged test that I have just set out, in relation to the gravity of the offending itself, one of the aggravating features is inherent in the level of the reading. It was 130mg of alcohol per litre of breath higher than the maximum allowed. It was somewhere between a third and fifty percent higher than that which is allowed.

[25] Secondly, the Appellant need not have driven at all. Her driving was as a response to a call from a family member who had been stopped at a checkpoint as a pillion passenger on a motorbike without a helmet. This occurred very close to where she was resident. The Good Samaritan act by the Appellant was just that. This young person could have walked home very easily, it was 9am on a Sunday morning, it was light and there would have been little difficulty in her walking back to where she and the Appellant were residing.

[26] In her favour, the Appellant had gone to sleep for some time after imbibing alcohol. She might well have been entitled to think that after a period of sleep which on the record seems to be some seven hours maximum that she would have been fine to drive. With an alcohol level of the reading that is was, her alcohol reading must have been very high when she went to sleep.

[27] Secondly, there was no overt driving offence here, it was not as though there was an accident or her driving was deemed to be bad. Thirdly, she was called by a relative for help.

[28] So where does that put the gravity of the offending? It must be remembered that drink driving is viewed, not just in the Cook Islands Jurisdiction but further afield, as a rather insidious crime and has rather insidious effects on the social fabric. I would have thought that the gravity of this offending, however, in the round could be no more than moderate.

[29] Taking the second step to assess the direct or indirect consequences of a conviction, counsel has submitted that the Appellant had a particular position within her family and whanau network. She is a resident of one of the Northern Group, from Penryhn, many of whom reside at a local hostel. I infer from submissions from counsel, that their cultural and social circumstances, vary from local ones. They rely on a network of family. They are not used to the infrastructure fabric of Rarotonga. They are not use to using buses, nor are they use to using taxis. It is certainly not common for them to use them and they are costly.

[30] The submission is that the consequences were not really direct consequences for the Appellant herself, but more for the consequences of those with whom she cohabited and who relied upon her. In many respects, this is not much different from an employer relying on an employee to have a driver's licence. However, there are not the usual consequences of that relationship where failure to have a licence can mean failure to have a job. I can deduce no indirect consequences of a conviction to her.

[31] Are then the consequences of a conviction out of all proportion to the gravity of the offending? And in that in must consider the aggravating and mitigating circumstances going to the offender herself. In her favour she has no previous convictions. She was cooperative, she was helping her family. On the other side of it, the hardship is to others rather than to herself and she is able to apply for a licence I understand it within a month or two of now. As I understand the law she could apply for a limited licence six months after, or certainly some leeway for driving six months after, the imposition of the conviction and disqualification.

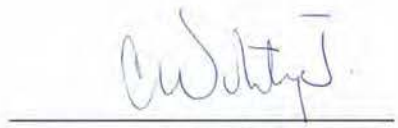
[32] I think when I weigh it up that I must agree with the Justice, albeit put in terms other than those she expressed. I cannot find that the consequences of a conviction would be out of proportion to even the moderate gravity that I have assessed her offending at.

[33] Should then I step back exercise my residue discretion, that looking at matters in the round I should grant an application to discharge?

[34] In view of the nature of the offending and the law as it is in this country relating to drink driving, I think that there are no other extenuating circumstances to enable me to properly exercise that discretion. What this judgment means is that on two counts: my assessment afresh of the situation and the fact that it looks to me that in the exercise of the conduct of the inquiry undertaken by the Justice, she and I have come to the same conclusion.

[35] I hope that this judgment might be an indicator for Justices to take a more structured approach to the exercise s of 112. A more eloquently discussion the issues will be of assistance to those who use our Courts.

[36] The upshot of this is that the appeal is dismissed and the original sentence is confirmed.



Colin Doherty, J