IN THE HIGH COURT OF THE COOK ISLANDS
HELD AT RAROTONGA
(CRIMINAL DIVISION)

CR NO. 188/25

POLICE

v

POKOTEA AKAVA
(AKA ANA TANGIIA)

Hearing: 6 February 2025

Appearances: Snr Sgt P Tararo for Prosecution
Ms J Crawford for Defendant

Judgment: 10 April 2025

JUDGMENT OF KEANE CJ

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[1] The defendant, who is charged with common assault, has completed Police diversion; but in the Justices' Court there is an unresolved question as to what the outcome should be and as to how that is to be decided.[1]

[2] Once diversion is complete, and the Police apply for leave to withdraw the charges, or seek the discharge of the defendant without conviction, is completion of diversion decisive in itself or just one factor for the Court to consider?

[3] This question has not, as it appears, been the subject of any considered ruling of this Court, though in one case the withdrawal of a careless driving causing injury

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[1] This question of law has been remitted to me, I understand, under s106, Criminal Procedure Act 1980-81.

charge, after the entry of a guilty plea and, once diversion was complete, was accepted in principle.[2]

[4] In this judgment I confine myself to the question itself. I do not have anything setting out the CI Police Diversion Scheme, which I assume to be closely aligned with the NZ Police Scheme, and to meet the NZ Solicitor-General's standards applying to such schemes there.[3] Nor do I, nor should I, have anything about the case itself, beyond the question raised.

[5] Neither scheme has a statutory foundation. That foundation lies instead in the Prosecutor's independent discretion at common law whether to lay charges in the first place, and what they should be, and whether to pursue any charges once laid.[4]

[6] The Criminal Procedure Act 1980-81 does not contemplate a Diversion Scheme as such, but does provide the underpinning essential.[5] In that it is like the NZ Police Diversion Scheme, which is underpinned by the Criminal Procedure Act 2011 (NZ), but goes further. It does give diversion specific effect.[6]

[7] To answer the question posed, I first outline the distinct roles of the Police and the Court in the diversion process. I then, after referring to a New Zealand case, identify two critical points at which those distinct roles may appear in tension, and could result in diversion miscarrying. I end with my summary answer.

Prosecutorial discretion

[8] The prosecutorial discretion is the explicit foundation for the NZ Police Diversion Scheme. As the NZ Police guidelines say, diversion is:

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2 *Police v Laudala* [2019] CKHC 6, Potter J.

3 NZ Police 'Police Adult Diversion Scheme Guidelines'; 'Solicitor-General's Guidelines for Diversion Schemes', Crown Law Office [NZ], 6 August 2021.

4 *Thompson v Attorney-General* HC Christchurch, CP51/00, Panckhurst J, [24]-[28].

5 Criminal Procedure Act 1980-81, ss 46 'Withdrawal of information by informant', 68 'Withdrawal of guilty plea'.

6 Criminal Procedure Act 2011 [NZ], ss 115 'Plea of guilty may be withdrawn be leave of Court', 146 'Withdrawal of charge generally', 147 'Dismissal of charge generally'; 148 'Prosecutor must notify Court if defendant completes diversion'.

> … a post-charge pathway to avoiding a criminal conviction, in cases where it has been determined that the public interest requires charges to be laid and a prosecution initiated, but where an alternative to full prosecution may be a suitable way to resolve the matter.

[9] This principled policy choice, which our Diversion Scheme must share, reconciles and balances the two dimensions at common law to the prosecutor's discretion whether to lay and pursue charges.

[10] In deciding whether to charge, a prosecutor must first be satisfied that 'there is sufficient admissible evidence to warrant laying charges'; in other words, 'reasonable prospects of conviction'; not just 'a bare prima facie case', but one where 'a conviction is either likely, or at least so close to being likely, as to make it appropriate to proceed'.[7]

[11] More relevantly, and crucially, a prosecutor must also be satisfied, secondly, that 'a prosecution is justified in the public interest'; and this may involve 'a host of complex factors', some general and some 'subjective and peculiar to the person suspected of having committed an offence'.[8]

[12] Where diversion is offered, as the NZ Police guidelines say, it is proper evidentially to charge, and equally proper in the public interest not to pursue any charge once diversion is complete. Then, particularly, the Court becomes engaged.

Court's role

[13] At that point the Court is invited to endorse and give effect to a Police exercise of the prosecutor's discretion whether to lay and pursue charges; and has no right to revisit that decision.

[14] The governing principle is that 'ordinarily, courts have no role to play' in the exercise of the prosecutor's discretion because 'these are matters for the executive through the prosecutorial arm'.[9] And a diversion decision, 'effectively a decision to prosecute or, more accurately, a decision to review a pending prosecution,' is 'an

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7 'Judicial Oversight of Prosecutorial Discretion: A Line in the Sand?' Hon Justice Weinberg. Paper, Criminal Law Conference, 26 October 2015, Hong Kong.

8 Weinberg, supra.

9 Weinberg, supra.

intimate expression of the prosecutorial discretion' in which 'the courts should not be involved'.[10]

[15] In short, as was said in the most recent apposite case, to which I come shortly to illustrate how diversion can miscarry, *Whyte v New Zealand Police*[11]:

> It is for the police and the police alone to administer the Diversion Scheme. Decisions made by the police are final. There is no right of appeal or review.

[16] That is correct, but also incomplete. Once diversion is completed, the Police cannot end the prosecution. Only the Court is able to do that by exercising one of its statutory powers of decision. As Panckhurst J said in *Thompson*, speaking illustratively of an application to withdraw a charge:[12]

> … there is no statutory power of decision exercised by the police. There is an administrative decision taken to seek leave to withdraw the information. But the 'rights' and 'liabilities' of the suspect which are affected … flow from the judicial decision itself, albeit that the police action in seeking leave is an essential precursor. In short, the circumstance that the Judge has the last say is decisive.

[17] At this point, the Court does have a statutory power of decision to exercise, but not a free hand. It must exercise its discretion consistently with its correlative duty not to second guess – review or sit in appeal on – the Police decision to offer diversion and end the prosecution once diversion is complete. It must give those decisions effect.

[18] In our jurisdiction it seems, and perhaps in this case, the Court may be invited to grant leave under s 46(1) CPA for any charges to be withdrawn.[13] But s 46(3) allows the Police to relay a charge. A fully definitive result is preferable, as in New Zealand where, once diversion is complete, any charge must be dismissed and that is deemed an acquittal.[14]

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10 *Thompson v Attorney-General* [24]-[28].
11 *Whyte v New Zealand Police* [2024] NZHC 3712, Eaton J [42].
12 *Thompson v Attorney-General* [20]
13 *Police v Laudala,* supra.
14 Criminal Procedure Act 2011 [NZ], s 148.

[19] A discharge without conviction is able to given under s 112(1) CPA; and is deemed under subs (2) to be an acquittal. Section 112 does not impose a duty to discharge. The Court retains a discretion, 'after inquiry into the circumstances of the case … unless … a minimum penalty is expressly provided for'. But it must be exercised to accomplish diversion completely in law.

[20] If, instead, the Court deems completed diversion to be just one discretionary factor, and not decisive in itself, the diversion process, and justice itself, can miscarry as the *Whyte* case illustrates.

Whyte v NZ Police

[21] In that case the defendant, who denied assault with a weapon, but admitted wilful damage, and had nearly completed diversion, suffered from two counsel errors, the second compounding the first.

[22] Her trial counsel entered guilty pleas on her behalf, unconscious seemingly that they barred her from having the charges summarily dismissed once she completed diversion. And, later, a second counsel, the first's agent, applied instead to have her discharged without conviction on the basis that convictions would be totally disproportionate.[15]

[23] In declining that application and in convicting the defendant of both offences, and ordering reparation, the District Court Judge held that the defendant did not meet the statutory test for such a discharge:

> Ms Whyte, I am not unsympathetic … but I am not persuaded that the consequences of a conviction would be out of all proportion to the gravity of the offending.

[24] On her appeal against conviction the Crown conceded there had been a miscarriage of justice; and in granting her appeal Eaton J agreed. As he said:[16]

> Playing what I would describe as little more than a bystander role, Ms Whyte now stands convicted of both offences, assault with a weapon, a charge she has always denied, and a much less intentional damage charge that she did not

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15 An application for discharge without conviction, Sentencing Act 2002 [NZ], s 106, 107.
16 *Whyte v New Zealand Police* [42].

> deny, in circumstances where the prosecution had agreed a process whereby she should not be convicted of either charge. Plainly something has gone amiss.

[25] Eaton J set aside her convictions, vacated her guilty pleas and remitted her to the District Court for the charges to be summarily dismissed once she had completed reparation.

[26] On the appeal, it was not contended the Judge under appeal had made any error. But it is arguable he did. In holding that the conviction consequences were not wholly out of proportion to the offending's gravity, though the defendant had nearly completed diversion, and the Police did not oppose a discharge, he negated the prosecutor's diversionary decision. He could instead have acted as Eaton J did on the appeal.

[27] The Judge's decision to confine himself to, and decline, the discharge application before him may, however, perhaps be attributable to one or both of the reservations I now come to.

Qualifying offences

[28] One reason a Court may hesitate before giving leave for charges to be withdrawn, or the defendant discharged, may be that the offending appears too serious for diversion.

[29] One answer is that, under the NZ scheme at any rate, the range of charged offences for which diversion may be offered appears largely unprescribed. The 'paradigm case' for diversion may be where the offences charged are of 'relatively low seriousness'. And some offences may 'generally not be seen as suitable for diversion (e.g. sexual offences, serious drug offences and offences involving breach of a Court order such as a protection order).' But what may be finally decisive is 'the seriousness of the criminal conduct', which may not as serious as a charge may suggest.[17]

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[17] Finn & Wilson 'Sentencing Law In New Zealand', 5.3.1

[30] The second and complete answer is, as I have said, that the Court may not, in exercise of its statutory powers of decision, second guess Police decisions to lay charges and then, once diversion is complete, seek their withdrawal or the defendant's discharge. That can result in a miscarriage of justice.[18]

Responsibility and guilt

[31] A second reason why a Court may hesitate before exercising its statutory powers to end a prosecution, once diversion is complete, is that the defendant has accepted responsibility, and may indeed have pleaded guilty.

[32] To qualify for diversion a defendant must accept responsibility, and cannot be offered diversion after a not guilty plea. But accepting responsibility is not a guilty plea. Nor is a guilty plea required:[19]

> The process of diversion encourages defendants to accept responsibility for their conduct and to agree to make good harm that has been caused. That is commonly in the form of an apology, the payment of moneys, participation in some form of rehabilitative scheme or community work. But that process does not require a defendant to admit the elements of the offending with which that defendant is charged. A defendant may well admit responsibility for conduct that has given rise to offending whilst having a legal defence to the particular charges preferred by the police. As the guidelines recognise, a guilty plea is not a prerequisite for eligibility for diversion.

[33] The desirable, if not always normal, practice ought to be that on the first call of the case, or the next, when the Police prosecutor advises the Court the defendant qualifies for diversion there should be a remand without plea until diversion is complete, or to some intermediate date.

[34] Where a defendant happens to have pleaded guilty before the Court is advised he or she qualifies for diversion, it is also desirable that any such plea be withdrawn by leave of the Court.

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18 *Whyte v New Zealand Police* [40], [75].
19 *Whyte v New Zealand Police* [43].

Essential decisions

[35] Our Police Diversion Scheme, like any other, requires our Police and the Court to play distinct but complementary roles. The Police, in their prosecutorial discretion, offer diversion. The Court makes complementary orders ending the prosecution.

[36] Each serves the same purpose: to ensure that a defendant, who completes diversion after having been charged with an offence, receives under the law a clean slate, untainted by any guilty plea or finding of guilt. In law, an acquittal.

[37] The Court's role is, therefore, to make the orders required: to give leave to the defendant, under s 68 CPA, to withdraw any guilty plea before diversion was offered; and to discharge the defendant without conviction under s 112(1), once diversion is complete.

P J Keane, CJ