

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

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

**CRI 2018-404-0032
[2018] NZHC 1383**

BETWEEN

MARK OTIS
Appellant

AND

NEW ZEALAND POLICE
Respondent

Hearing: 12 June 2018

Appearances: S M Buckley for Appellant
R J Warren for Respondent

Judgment: 12 June 2018

ORAL JUDGMENT OF JAGOSE J

Counsel/Solicitors:
S M Buckley, Barrister, Auckland
Kayes Fletcher Walker Limited, Auckland

[1] Marko Otis appeals against the District Court’s refusal to grant him a discharge without conviction.¹

[2] On 16 January 2018, Mr Otis was convicted by Judge McGuire on charges of possessing methamphetamine,² and possessing utensils.³ He was sentenced that same day to pay a fine of \$500 and to pay costs of \$260.⁴

[3] Mr Otis’ application for a discharge without conviction under s 106 of the Sentencing Act 2002 (the “**Act**”) was refused. Mr Otis now appeals that refusal on grounds the Judge erred by:

- (a) assessing the offending as being moderate instead of at the low range; and
- (b) finding there was nothing unusual with the consequences faced by Mr Otis.

[4] Mr Otis adduces new evidence on appeal, providing more details of Mr Otis’ personal and employment situation. The police accept the new evidence is “necessary or expedient in the interests of justice”, and at an appeal call-over on 23 March 2018, Lang J directed the evidence be accepted for consideration on appeal.⁵ The new evidence includes affidavits from Mr Otis, his wife, his sister, a report from specialist grief counsellor, Sarah Penwarden, and two letters of reference.

Approach on appeal

[5] Section 106 of the Sentencing Act 2002 gives a Court the discretion to discharge an offender without conviction. Section 107 provides that this discretion cannot be exercised unless the direct and indirect consequences of a conviction would be out of all proportion to the gravity of the offence.

¹ *Police v Otis* [2018] NZDC 587 at [21] [“District Court decision”].

² Misuse of Drugs Act 1975, ss 7(1)(a) and 2. Maximum penalty is six months’ imprisonment, or a fine not exceeding \$1,000, or both.

³ Section 13(1)(a) and (3). Maximum penalty is one year’s imprisonment, or a fine not exceeding \$5,000, or both.

⁴ The wording of the penalty is somewhat ambiguous. Judge McGuire held at [21] of the District Court decision “I was proposing a fine of \$250 and Court costs in each case”. The particulars of conviction record this penalty as a fine of \$500 and Court costs of \$260.

⁵ Criminal Procedure Act 2011, s 335.

[6] Section 107 requires the Court to undertake a three-step analysis and consider:⁶

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

If the offender meets the s 107 threshold, then the Court may go on to consider whether to exercise the residual discretion under s 106.⁷

[7] That proportionality test under s 107 is a question of fact requiring judicial assessment. It is subject to the *Austin, Nichols* approach, so that if the appellant can show that the first instance decision was wrong, I undertake the evaluation of the s 107 factors afresh.⁸

[8] In approaching this appeal, I consider first the gravity of Mr Otis' offending; next, the consequences of his conviction; and, last, conclude with my finding on whether the Judge erred in assessing those consequences as not out of all proportion to the gravity of the offending.

Gravity of offending

—*the offending*

[9] The offending occurred on 19 May 2017. Mr Otis was a passenger in a vehicle driven by his associate. The vehicle was stopped while they were driving down Lambie Drive, Manukau.

[10] The police searched the car under the Search and Surveillance Act 2012, and discovered in Mr Otis' pocket a glass pipe and a cut yellow straw. Mr Otis unsuccessfully attempted to hide a small snaplock plastic bag in his hand as he was turning out his pockets. The bag contained half a gram of methamphetamine. On further search of the car, two additional bags were found, each containing approximately half a gram of methamphetamine.

⁶ *Z (CA447/12) v R* [2012] NZCA 599, [2013] NZAR 142 at [8].

⁷ At [9].

⁸ The Court of Appeal recently confirmed in *Jackson v R* (2016) 28 CRNZ 144, [2016] NZCA 627 an appeal against a refusal to grant a discharge is an appeal against conviction and sentence.

[11] Mr Otis told the police only one of the plastic bags was his, he admitted it contained methamphetamine, and the glass pipe was used to smoke it.

[12] The summary of facts is ambiguous as to whether the charge of possession of methamphetamine related to the two packages in the car; the charging document does not clarify the point. A disputed fact hearing would have been required to settle the matter. In any case, if it was the prosecution's intention to proceed to trial based on a charge of possession of 1½ grams, Judge McGuire sentenced Mr Otis only on the basis of half a gram of methamphetamine. The police do not contest that position; I proceed similarly.

—*District Court judgment*

[13] In assessing the gravity of the offending, Judge McGuire remarked:⁹

... [the] simple possession of methamphetamine is properly regarded as not of the most serious kind but, likewise, not of the least serious kind.

[14] The offending would have been less, he went on "... if there had been just one point bag of methamphetamine, one dose, if you like, or smoke". One of the factors His Honour stressed in arriving at his 'moderate' assessment was the amount of methamphetamine, half a gram, which the Judge noted was "enough for five smokes".¹⁰

[15] In mitigation, however, the Judge said:¹¹

Mr Otis presents as a very pro-social member of society. He has worked hard. He has had financial challenges in his life which he has managed to rise above. He has a daughter at university and he and his wife are supporting her financially and he is to be commended for that. Since this offending he has done two further things that are to his credit. He has enrolled in a CADS course. He presently has three classes to go with this to get beyond his drug use.

The Judge remarked Mr Otis has started a rigorous exercise regime,¹² was passionately regretful about his offending, and "has done everything realistically within his power to correct" it.¹³

⁹ District Court decision at [7].

¹⁰ At [8] and [14].

¹¹ At [10]

¹² At [11]

¹³ At [14].

—analysis

[16] Counsel for Mr Otis, Siobhan Buckley, submits the Judge erred by placing too much weight on the amount of methamphetamine found in his car. She says Mr Otis’s criminality should not alter greatly depending on whether he was found with 0.1 or 0.5 grams of methamphetamine for personal use.

[17] In his sentencing notes, the Judge observed the factual circumstances suggested the methamphetamine was recently purchased.¹⁴ If so, says Ms Buckley, Mr Otis should not be penalised much more severely for being apprehended soon after several points of methamphetamine were purchased, distinctly from being found with one point of methamphetamine in his possession a few days later.

[18] These submissions are a little strained. The amount of methamphetamine found clearly does matter a good deal. I do not accept the law should sympathise with Mr Otis’ ‘bad luck’ in being caught soon after his purchase (if that is indeed what happened); he ran that risk when he purchased the drugs.

[19] Both Ms Buckley,¹⁵ and counsel for the police, Rosslyn Warren,¹⁶ devoted considerable attention to discussing caselaw applicable to the assessment of Mr Otis’ culpability. I do not traverse this material in any real depth. Cases of this kind are highly fact specific. In any case, the key point Mr Otis wishes to make is not controversial: the quantity of methamphetamine is only one factor to be considered amongst many. I do not think the Judge placed excessive weight on that factor, to the detriment of a balanced assessment of the entire factual matrix. The judge recognised the gravity of the offending was accentuated by its involvement with a class A drug,¹⁷ and inferred involvement with a dealer, if not in dealing.¹⁸ Class A drugs are “drugs that pose a very high risk of harm” to individuals and to society by their misuse,¹⁹ so related offending is difficult to categorise as ‘low’.

¹⁴ District Court decision at [9].

¹⁵ *Cropper v Police* [2016] NZHC 2779; *Jefferies v Police* [2015] NZHC 3153; *Hopkins v Police* [2017] NZHC 2250.

¹⁶ *Hopkins v Police* [2017] NZHC 2250; and *Andrews v Police* [2015] NZHC 3212.

¹⁷ District Court decision at [6].

¹⁸ At [9].

¹⁹ Misuse of Drugs Act 1975, s3A

[20] As to the mitigating factors – which should be weighed as part of the gravity of the offending, this first stage of the s 107 test²⁰– Ms Warren properly acknowledges the Judge did not have the benefit of the new evidence before me now. This new evidence is:

- (a) an affidavit from Mr Otis describing the background to his offending, and his subsequent efforts to address its causes. Mr Otis spent much of his life caring for his mother, who suffered severely from paranoid schizophrenia. After his mother killed herself in 1995, Mr Otis experienced deep grief and self-blame that continued to affect him years later. He ceased working in December 2016, and has struggled to find alternative employment. He seems to have turned to methamphetamine as a coping mechanism;
- (b) an affidavit from his wife, Tina Alach, affirms this narrative, but also stresses how Mr Otis nonetheless showed great character after his mother’s passing. He worked hard to obtain two qualifications, and continues to be a great father to their daughter who is currently studying at university. Ms Alach remarks his arrest was “a huge wake-up call” for Mr Otis, leading him to finally address issues from his past that have long affected him;
- (c) an affidavit from his sister, Natasha Hrstich, focusing on the siblings’ shared experience of caring for their sick mother, and the tragic impact of her suicide on them;
- (d) a letter from Mr Otis’ counsellor, Ms Penwarden, a grief expert who Mr Otis started seeing following his arrest. She writes how Mr Otis has engaged positively in his six sessions so far, and is motivated to continue working with her to address his underlying grief. In further correspondence provided to me today, Ms Penwarden confirms Mr Otis has continued to engage in grief counselling, and is continuing to make progress; and

²⁰ Z (CA447/12) v R [2012] NZCA 599, [2013] NZAR 142 at [27].

- (e) references from Des Bickerton, a previous employer between 2008 and 2012, who describes Mr Otis as a reliable employee, well respected by his team and customer base; and from a long-standing family friend, Tanya Unkovich, who speaks to her deep respect for Mr Otis' character.

[21] Ms Warren accepts it is open for me to conclude, in light of this new material, the offending should be considered low rather than moderate. With some disquiet – borne of the absence of any direct evidence identifying Mr Otis' offending to be sourced in that mitigating background, but not in, for example, his decision to leave the workforce, or his poor investment decision – I would allow that characterisation. But it does not necessarily follow the consequences of Mr Otis' conviction are out of all proportion to the gravity of the offending.

[22] I turn to those consequences now.

Consequences of conviction

—District Court judgment

[23] Judge McGuire discussed at length the consequences of a conviction on Mr Otis' employment prospects, particularly on his then-current employment with the temporary workforce resource, Drake. His Honour found:²¹

There is in this case some risk to [Mr Otis'] employment but I do not consider in the light of what I have articulated about what has occurred in this case that the risk of losing his job achieves the status of being something that could well happen in these circumstances.

In making this finding, the Judge had before him a letter from Drake which explicitly stated Mr Otis' role "could cease" if Mr Otis had a conviction, but the letter was nonetheless mindful of the obligations of his current employer to follow a fair process.

[24] The Court transcript also demonstrates the Judge was aware of the possible consequences of Mr Otis' future employment prospects. On my reading, the Judge was not particularly persuaded by counsel's submission Mr Otis' age (of 55 years) stands in his favour, given he has years left in the workforce. In oral submission today, Ms

²¹ District Court decision at [11]-[13].

Buckley tenders a report titled *Aging Workforce in the New Zealand Crown Entity Sector Survey Report 2014*,²² to establish that age discrimination is endemic and that Mr Otis will be sorely affected by it.

—*analysis*

[25] Ms Buckley submits the Judge was not aware – because no submission was made on the point – Mr Otis was not just seeking any kind of job. I now have evidence Mr Otis has tertiary qualifications (a NZQA certificate in civil engineering, and a diploma in business), and has spent the majority of his working life in managerial positions. His hope is to take up a managerial position again. Mr Otis deposes such a job is important mainly because of the higher income, necessary to support his family who are struggling after he made a bad business investment decision several years earlier.

[26] I accept conviction risks impeding Mr Otis’ job prospects. But that is the ordinary course of what generally follows from convictions on charges such as this. I lack evidence to take the submission much further. As the Court reminded in *Andrews*:²³

This Court has cautioned against granting a discharge when the impact of a conviction on employment is unclear and where there is insufficient evidence to support any assertion made as to the alleged consequences.

[27] There is no evidence as to Mr Otis’ financial position to bolster his claim a managerial position is necessary. There is striking silence in the evidence about his job prospects – whether from future prospective employers, or more generally – in the industries in which he might work. This stands in stark comparison to, for example, *Cropper*, where evidence came from specialist recruitment consultants, each saying conviction would represent an insurmountable obstacle to the offender obtaining employment in his chosen profession.²⁴

²² Lonergan Research *Aging Workforce in the New Zealand Crown Entity Sector: Survey Report 2014* (prepared for the New Zealand Human Rights Commission in partnership with The Office for Senior Citizens & OCG Consulting, 2014).

²³ *Andrews v Police* [2015] NZHC 3212 at [24].

²⁴ *Cropper v Police* [2016] NZHC 2779 at [41].

Proportionality analysis

[28] With these comments in mind, even if the Judge overstated the gravity of the offending, once the additional mitigating factors are taken into account, I do not consider he erred in declining a discharge without conviction.

[29] It is rare for the Court to grant a discharge without conviction to an offender under the Misuse of Drugs Act 1975.²⁵ It is telling, in all the cases initially advanced by Ms Buckley, the appeals were dismissed for the appellants' failure to overcome the proportionality hurdle. Of the cases later relied on – both involving student offenders and class C party drugs – one turned on comprehensive psychological evidence,²⁶ and the other on the established impact of travel restrictions,²⁷ for their particular assessments of the effects of conviction on the particular offender. There is nothing comparable here.

[30] It is apparent that this episode has been a huge wake-up call for Mr Otis, as recognised both by his wife and by the Judge. It has led him to make positive changes in his life, which is both impressive and laudable. I have no doubt the conviction is an added burden for Mr Otis, but it is no more than the natural consequence of the conviction, which follows on the gravity of the offending. It is not in any way disproportionate.

Result

[31] The appeal is dismissed.

—Jagose J

²⁵ *Trisciuzzi v Police* HC Invercargill CIV-2008-425-20, 5 August 2008 at [13].

²⁶ *Bullock v Police* [2012] NZHC 1374.

²⁷ *Bigy v Police* [2012] NZHC 2852.