NOTE: PUBLICATION OF NAME, ADDRESS, OCCUPATION OR IDENTIFYING PARTICULARS OF COMPLAINANT PROHIBITED BY S 204 OF THE CRIMINAL PROCEDURE ACT 2011.

IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA210/2020
[2020] NZCA 443

BETWEEN	C (CA210/2020) Appellant
AND	THE QUEEN Respondent

Hearing:	23 July 2020
Court:	Clifford, Woolford and Dunningham JJ
Counsel:	S D Withers and V I Tava for the Appellant B D Tantrum and L N Wilson for the Respondent
Judgment:	22 September 2020 at 10.30 am

JUDGMENT OF THE COURT

The appeal is dismissed.

REASONS OF THE COURT

(Given by Woolford J)

[1] Following a five-day trial in the Auckland District Court on 2–6 December 2019, a jury found C guilty of three charges of assaulting her daughter.[1] She had earlier pleaded guilty to a fourth charge of assault.[2]

[2] On 18 March 2020, Judge Collins declined C's application for a discharge without conviction.[3] Instead, he sentenced her to 12 months' supervision. C now appeals against the Judge's refusal to grant her a discharge without conviction.

Factual background

[3] C faced a number of charges brought by the Crown. The complainant in each charge was her daughter. The dates specified ranged from 25 November 2011 to 1 May 2018, when her daughter was aged between three and nine years old. On 8 October 2018, C pleaded guilty to Charge 8, which alleged an assault on her daughter on 19 April 2018 by slapping her twice. That assault had been recorded by C's estranged partner without her knowledge and the Judge noted that the physical violence had been "accompanied with some very unacceptable language".[4]

[4] The jury subsequently found C guilty of a further three charges — Charges 6, 11 and 12. Charge 6 alleged that on a specific occasion when her daughter was nine, C dragged her by her hair, shook her head and punched her legs, shoulders and head. Charges 11 and 12 were representative charges and alleged that, on at least one occasion, when her daughter was between three and nine, C had hit, punched and slapped her (Charge 11) and pulled her by the hair and shook her head (Charge 12). The Judge proceeded with sentencing on the basis that the force used by C in Charge 11 was that of slapping.[5] He also found that the assaults alleged in Charges 11 and 12 were not one-off, but happened on a number of occasions, but for the purpose of sentencing, no more than six occasions.[6]

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1 C does not have name suppression. Notwithstanding, we have anonymised this judgment, following the approach in *H v R* [2019] NZSC 69, [2019] 1 NZLR 675 at [54]–[58], to enable it to be republished online without identifying C's daughter.
2 Crimes Act 1961, s 194(a). Maximum penalty of two years' imprisonment.
3 *R v [C]* [2020] NZDC 9249.
4 At [6]
5 At [4].
6 At [10].

[5] The pre-sentence report dated 17 January 2020 noted that C had supervised contact with her daughter at that time. C is recorded as expressing remorse for the offending and reporting that she had attended and completed parenting programmes with Lifewise and family one-on-one counselling with SHINE. She was assessed as motivated and willing to engage in any programme to address her offending behaviour.

[6] It was noted that she had migrated from Fiji to New Zealand in 2007 and was in full-time employment as a healthcare assistant at a retirement village in Auckland. However, she hoped to be registered as a social worker and had completed four years of study towards a Bachelor of Social Practice degree.

District Court decision

[7] In his decision of 18 March 2020, the Judge outlined the three-step analysis for s 106 applications: first, to assess the gravity of the offending; secondly, to assess the consequences of a conviction; and thirdly, to assess whether the consequences are out of all proportion to the gravity of the offending.[7]

[8] First, as to the gravity of the offending, the Judge observed that the offending was "at least moderately serious for offending of its type".[8] The fact that the victim was C's young daughter was an aggravating factor as it was a breach of trust. Further, the unacceptable language that accompanied Charge 8, to which C pleaded guilty, also aggravated the offending. The Judge also accepted the Crown's submission that the physical force used in relation to the daughter was over a lengthy period of time, and that the offending had a significant impact (both direct and indirect) on the daughter. The offending could not be characterised as one-off or out of character.

[9] The Judge then noted that the fact that C did not plead guilty to some charges was not considered an aggravating factor, but rather the lack of a mitigating factor.[9] He said that C's position was somewhat understandable given that, in his view, the

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7 At [5].
8 At [11].
9 At [9].

interview with the daughter contained some exaggerations. The Judge observed that the courses and counselling that C completed were mitigating factors.[10]

[10] Secondly, as to the consequences of a conviction, the Judge noted that there were three. There was the real and appreciable risk that a conviction would affect C's ability to (i) work as a social worker, (ii) obtain registration from the Social Workers Registration Board and (iii) regain custody of her daughter, the victim.[11]

[11] Thirdly, the Judge then turned to balance the gravity of the offending against the consequences of a conviction. As to the mitigating factor of the rehabilitative courses, the Judge noted that C would, in any event, have had to have undertaken those courses in order to advance her application for custody of her daughter in the Family Court. The Judge also noted that the Family Court, in making a decision around custody of the daughter, would be concerned with the actual conduct rather than the mere fact of a conviction itself. Further, it was relevant that the Family Court would, in any event, have access to the file.[12]

[12] As to C's prospects of obtaining registration and working as a social worker, the Judge observed that the courts have expressed the view that, generally, it is for specialist registration boards to make the decision about whether a person is a fit and proper person. It is not for the Court to usurp that role. That is not an inflexible rule. However, the Judge held that, given the direct nexus between the offending and the nature of social work, it is preferable for the Social Workers Registration Board, not the Court, to decide whether C is fit and proper to be registered as a social worker.[13]

[13] Accordingly, C's application for a discharge without conviction was declined. Instead, the Judge sentenced C to 12 months' supervision on the special condition that she attend and complete appropriate programmes to the satisfaction of the probation officer.

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10 At [10].
11 At [12].
12 At [13]–[14].
13 At [13].

Approach to appeal against refusal to grant discharge without conviction

[14] An appeal against a refusal to grant a discharge without conviction is an appeal against both conviction and sentence.[14] Therefore, such an appeal will succeed where there has been a miscarriage of justice for any reason.[15]

[15] Section 107 of the Sentencing Act 2002 provides that the Court must not discharge an offender without conviction unless it is satisfied that the direct and indirect consequences of a conviction would be out of all proportion to the gravity of the offence. This assessment requires a three-step analysis (as recognised and applied by the Judge).[16] For the Court to be so satisfied, there only needs to be a "real and appreciable" risk that such consequences will occur.[17]

Discussion

[16] C submits that the Judge erred in two respects. First, she says the Judge erred in his assessment of the overall gravity of the offending. Secondly, she says the Judge erred in failing to consider the impact of a conviction on her ability to obtain work in her profession as a social worker.

Appeal ground 1: Rehabilitative efforts and gravity of the offending

[17] As to the first ground of appeal, C submits that the Judge did not give sufficient weight to the rehabilitative courses that she had completed. Accordingly, the Judge erred in his assessment of the overall gravity of the offending as "at least" moderately serious for offending of its type — C submits that the offending is just moderately serious. C completed a number of courses, all of which related to family matters, prior to the District Court decision. She says that while the Judge mentioned these courses, there is no evidence that the courses were counted in assessing the gravity of the offending.

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14 *Jackson v R* [2016] NZCA 627, (2016) 28 CRNZ 144 at [6]–[16].
15 Criminal Procedure Act 2011, ss 232(2)(c) and 250(2).
16 See *Z (CA447/12) v R* [2012] NZCA 599, [2013] NZAR 142 at [8]–[9].
17 *DC (CA47/2013) v R* [2013] NZCA 255 at [43].

[18] However, the Judge clearly considered that the courses were a mitigating factor — he noted that "[t]he matters which lessen the gravity for you are the rehabilitation courses that you have done".[18] He returned to consider those courses in more detail in the third step of the analysis. There, the Judge observed that C would have had to complete those courses in any event to advance her case in the Family Court.[19] That was relevant to the Judge's assessment of whether the gravity of the offending and the consequences of conviction were out of all proportion. The Judge did not dismiss the courses as being merely prerequisites to the Family Court proceeding; he considered the courses completed mitigated the seriousness of the offending, but he took a realistic assessment of the courses in balancing the gravity of the offending and the consequences of conviction. The context is relevant in assessing how much emphasis should be placed on the completion of the courses for the purposes of a s 106 application.

[19] As the Crown submits, given the duration of the offending and the Family Court context in which the rehabilitative courses were completed, the Judge was entitled to find that C's rehabilitative efforts did not substantially lessen the seriousness of the offending. Accordingly, there was no error on this ground.

Appeal ground 2: Impact of conviction on job prospects

[20] As to the second ground of appeal, C submits that the Judge erred in failing to properly consider the impact a conviction would have on her ability to obtain work in her desired profession as a social worker.

[21] Where a conviction would have a real and appreciable risk of stopping an employer from considering an employment application, a discharge without conviction may be justified.[20] C submits that, in her field of work (that is, social work), employers are unlikely to look beyond the mere fact of a conviction, particularly where the convictions are for offending against a child.

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18 *R v [C]*, above n 3, at [10].
19 At [13].
20 See *DC (CA47/2013) v R*, above n 17, at [44]–[45]; and *Brown v R* [2012] NZCA 197 at [31].

[22] C provides, in support of her appeal, a rejection letter she received in response to the enquiry made by her in relation to a placement for her Bachelor of Social Practice degree with an Auckland organisation, which states "I can say we don't take people with convictions against children".

[23] C also referred to s 28 of the Children's Act 2014, which provides that a core worker convicted of a specified offence must not be employed or engaged by a specified organisation unless he or she is granted an exemption under s 35.[21] Assaulting a child under s 194(a) of the Crimes Act 1961 is a specified offence.[22] Section 35 provides that the chief executive of any key agency may grant an exemption to a person who has been convicted of a specified offence, but only if the chief executive is satisfied that the person would not pose an undue risk to the safety of children if employed or engaged as a core worker.

[24] C has applied for an exemption. On 12 May 2020, the Chief Executive of Oranga Tamariki informed C of their preliminary decision to decline her application. The following reasons were given:

> - [C] is currently serving a sentence of 12 months supervision for offences against children. This sentence does not end until March 2021.
>
> - Lack of evidence outlining effectiveness of the rehabilitation completed (by both the providers and [C]).
>
> - Lack of personal endorsement in references and evidence of the effectiveness of the rehabilitation and lack of ownership of offending and need for change means there is little to no evidence to indicate that [C] would not pose a risk to the safety of children.
>
> I would like to give you the opportunity to respond to this preliminary decision before the decision is finalised. You can do this by providing additional information to support your application. It will assist if you can focus your response on the areas of concern that are outlined above.

[25] The statutory scheme appears to be contrary to C's claim that employers are unlikely to look beyond the mere fact of a conviction. Indeed, there is an express statutory exemption that C can apply for (and has already done so). Evidently, there is sufficient scope to look beyond the mere fact of a conviction and engage in a robust

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21 "Core worker" and "specified organisation" are defined in Children's Act 2014, ss 23 and 24, respectively.

22 Children's Act, sch 2, cl 1(31).

examination of C's offending and later rehabilitative efforts. The Chief Executive's preliminary decision, for example, provided specific reasons and gave C the opportunity to respond. Furthermore, it is also relevant that s 38 provides that a person whose application for an exemption has been declined may appeal to the High Court against the decision not to grant the application.

[26] In the circumstances, it cannot be said that the consequences of conviction (particularly on the prospects of a job in the social work field) are out of all proportion to the gravity of the offending. C remains in full-time employment, but not in social work. As the Judge observed, the offending had occurred over a lengthy period of time, was not a one-off or out of character incident and involved a breach of trust between parent and child. Moreover, a conviction will not necessarily bar C from working in her desired profession, although it may be a substantial barrier. Ultimately, however, given the direct nexus between the offending and the nature of the job applied for, it is more appropriate for the relevant employer and/or the Social Workers Registration Board, not the Court, to assess C's conduct and her fitness for the role/registration. Accordingly, this ground is also dismissed.

Result

[27] For the above reasons, the appeal is dismissed.

Solicitors:
Crown Solicitor, Auckland for Respondent