**NEW ZEALAND LAWYERS AND CONVEYANCERS DISCIPLINARY TRIBUNAL**

[2014] NZLCDT 88
LCDT 012/14

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| **IN THE MATTER** | of the Lawyers and Conveyancers Act 2006 |
| **BETWEEN** | **AUCKLAND STANDARDS COMMITTEE No. 1**<br>Applicant |
| **AND** | **DAVINA VALERIE MURRAY**<br>of Auckland, former Lawyer |

**CHAIR**
Judge D F Clarkson

**MEMBERS OF TRIBUNAL**
Ms S Hughes QC
Ms C Rowe
Ms M Scholtens QC
Mr W Smith

**HELD** at Auckland District Court

**DATE** 16 December 2014

**APPEARANCES**
Mr P Collins for the Standards Committee
Mr W Pyke for Ms Murray

## REASONS FOR DECISION OF NEW ZEALAND LAWYERS AND CONVEYANCERS DISCIPLINARY TRIBUNAL

[1] On 7 October 2011 Davina Murray concealed and smuggled into Mt Eden Prison an iPhone, a packet of cigarettes and a lighter ("the items"). She gave these items to Liam Reid, a prisoner serving a lengthy term of imprisonment for murder and rape. Ms Murray was frequently visiting Mr Reid as a lawyer, and had been a regular visitor (a number of times a week) during 2011.

[2] Mr Reid had been transferred to Mt Eden Prison in late August 2011 following a request by Ms Murray. Ms Murray had persuaded the prison authorities that preparation of Mr Reid's appeal, which required multiple consultations, could be better facilitated by transfer from the more distant Paremoremo Prison. Following Ms Murray's visit on 7 October, the items were found on Mr Reid and this discovery ultimately led to Ms Murray being charged with an offence under the Corrections Act.

[3] Ms Murray denied the charge and, in the course of a seven-day hearing, during which she represented herself, conducted her defence on the basis that two Corrections Officers had planted the items on Mr Reid. Mr Reid was called by her and gave evidence to that effect.[1]

[4] That defence was decisively rejected by the District Court Judge who found the evidence overwhelming against Ms Murray.

[5] Ms Murray then sought a discharge without conviction, so the Judge deferred entering a conviction pending sentencing. That took place on 1 October 2013. His Honour Judge R Collins declined Ms Murray's application for a discharge without conviction and sentenced her to 50 hours community work.

[6] Ms Murray appealed the conviction and sentence. In February 2014 His Honour Venning J dismissed both appeals. In the course of his decision His Honour confirmed that the case against Ms Murray had been overwhelming.

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[1] Mr Reid's evidence was actually led by amicus curiae, Mr Hirschfeld.

[7] Ms Murray completed her community work sentence.

[8] The charge to be considered by this Tribunal is that:

> Auckland Standards Committee 1 charges the respondent, pursuant to s.241 of the Lawyers and Conveyancers Act 2006 ("the Act"):
>
> 1. Under s.241(d) having been convicted of an offence punishable by imprisonment and the conviction reflects on her fitness to practise, or tends to bring her profession into disrepute; and
>
> 2. (withdrawn).
>
> …
>
> The particulars of the charge are that:
>
> (a) On 1 August 2013, in the District Court at Auckland, in the matter *New Zealand Police v D V Murray,* CRI-2013-004-003095, the respondent was convicted of a charge under s.141(1)(c) of the Corrections Act 2004; that on 7 October 2011 she delivered things, namely an Apple i-Phone 4 serial number …, a pack of Marlborough (sic) cigarettes, and a BIC lighter, to Liam Reid, a prisoner inside the Mt Eden Correctional Facility;
>
> (b) Any person convicted of an offence under s.141(1)(c) of the Corrections Act 2004 is liable to a term of imprisonment not exceeding three months or to a fine not exceeding $5,000, or both;
>
> (c) The offending was perpetrated by the respondent in her capacity as a lawyer and in reliance on her privileged status as a lawyer having access to her prisoner client;
>
> (d) The conviction reflects adversely on the respondent's fitness to practise; and
>
> (e) The conviction brought the legal profession into disrepute because it reflected adversely on the profession and because it damaged the relationship of mutual trust and respect between the legal profession and this country's prison authorities."

[9] The history of the criminal process has been recorded here because six days before the hearing of this charge, Ms Murray filed an amended response to the charge - the first limb of which she had previously admitted. Her amended response denied the first limb of the charge and the submission was made on her behalf that there was "… an absence of proof of any conviction".

[10] Ms Murray also withdrew her opposition to the second alternate limbs of the charge, conceding that if a conviction existed then it did reflect on fitness to practise and/or tended to bring the profession into disrepute. Ms Murray preserved her position on current fitness to practise in relation to any subsequent penalty hearing.

**Issue**

[11] Thus, the issue for this Tribunal to determine was whether the Standards Committee had established, on the balance of probabilities, the existence of the conviction pleaded.

[12] We found that it had, and, subsequently after further submissions, determined the disciplinary charge itself to have been proven.

[13] We reserved our reasons which are now stated:

***Evidence in Support of a Conviction***

[14] (a) The decision of Judge R Collins of 1 August 2013[2], following a seven-day defended hearing:

> [14] "… I am satisfied beyond reasonable doubt that those three items were introduced into MECF on that day by the defendant Davina Valerie Murray."
>
> And at paragraph [78]:
>
> "For the reasons given above the charge is proved beyond reasonable doubt."

(b) The sentencing notes of Judge R Collins of 1 October 2013[3] in which His Honour dismissed the practitioner's application for a discharge without conviction[4]

> "In my assessment, the consequences of a conviction are not out of all proportion to the gravity of the offending. In those circumstances, I am not able to grant a discharge."

[2] *New Zealand Police v Davina Murray* CRI-2013-004-003095, AK DC, Collins J,1 August 2013.
[3] *New Zealand Police v Davina Murray* CRI-2013-004-003095, AK DC, Collins J,1 October 2013.
[4] Sought under s 106 Sentencing Act 2002 at paragraph [38].

His Honour went on to set out the relevant principles of sentencing and to fix as sentence:

"… A modest amount of community work is the appropriate outcome."[5]

At paragraph [42] His Honour pronounced sentence:

"So, therefore, you are sentenced to 50 hours community work."

Such a sentence is not available in the absence of a conviction.

(c) The judgment of Venning J of 28 February 2014 recorded:[6]

> "On 1 October Judge R Collins dismissed Ms Murray's application for a discharge without conviction, convicted her and sentenced her to 50 hours community work.
>
> [3] Ms Murray appeals against the refusal to discharge her without conviction. Formally the appeal is against conviction and sentence."

And at paragraph [49] His Honour said:

> "For the above reasons I am satisfied that when the gravity of the offending is weighed against the consequences of a conviction it cannot be said that, in terms of the test under s 106, a conviction would be wholly out of proportion to the gravity of the offending.
>
> **Result**
>
> [50] For those reasons the appeal is dismissed."

(d) Following the practitioner's change of stance, in which she denied the conviction, the Standards Committee provided further evidence in the form of a certificate which was provided to the Tribunal pursuant to s 139 of the Evidence Act, namely a certificate copy of entry of criminal record. The certificate records under the heading "Decision": convicted and sentenced to community work … 50 hours". It was certified by a Deputy Registrar of the District Court. This certificate was challenged because it purported to be prepared pursuant to the Summary Proceedings Act 1957, which has now been repealed.[7] A further challenge was made to the certificate in that it was complained that the word "convicted" was not

[5] At paragraph [40].
[6] *Davina Murray v New Zealand Police* [2014] NZHC 337, at paragraph [2].
[7] That was the Act in force when the practitioner was dealt with. We shall deal with this challenge in due course.

uttered by His Honour Judge Collins and therefore the Certificate was not a true record of the outcome.

(e) Ms Murray clearly considered herself to be convicted because she both appealed that conviction and, when unsuccessful, completed her sentence of community work although the Defence maintained that these actions were born from a mistaken view taken by Ms Murray that she had been convicted and were in no way determinative of the issue.

***Evidence against Conviction***

[15] Produced by consent was a copy of the Information Sheet which is the handwritten record of the Judge in the criminal proceedings. Beside the date 1/10/13, that is the sentencing date, His Honour has recorded "*50 hours community work - recommendation for community placement*". In other words, while firmly and clearly rejecting a discharge without conviction, His Honour has omitted to write the word "*convicted*" before noting the sentence on the record.

[16] Mr Pyke submits on behalf of Ms Murray, that *"an inference from the imposition of a sentence of community work may be argued by the Committee to prove a conviction; ….it is submitted that, as a matter of law, an inference is not enough when it comes to a record of a conviction."*

[17] Mr Pyke further submits that a conviction cannot be inferred from the sentencing notes of 1 October 2013 (despite the clear rejection of a discharge without conviction).

***Relevant Statutory Provisions***

[18] As to the certified copy of entry of criminal record, s 139 of the Evidence Act 2006 applies:

> **139 Evidence of convictions, acquittals, and other judicial proceedings**
>
> (1) Evidence of the following facts, if admissible, may be given by a certificate purporting to be signed by a Judge, a registrar, or other officer having custody of the relevant court records:
>
> (a) the conviction or acquittal of a person charged with an offence and the particulars of the offence charged and of the person (including the name and date of birth of the person if the person is an

> individual, and the name and date and place of incorporation of the person if the person is a body corporate):
>
> (b) the sentencing by a court of a person to any penalty or other disposition of the case following a plea or finding of guilt, and the particulars of the offence for which that person was sentenced or otherwise dealt with and of the person (including the name and date of birth of the person if the person is an individual, and the name and date and place of incorporation of the person if the person is a body corporate):
>
> …
>
> (2) A certificate under this section is sufficient evidence of the facts stated in it without proof of the signature or office of the person appearing to have signed the certificate.
>
> …"

[19] This section was discussed in the *Okeby*[8] decision which is referred to below.

[20] If it is considered that there is an error on the record, then s 204 of the Summary Proceedings Act applies:

> "**204 Proceedings not to be questioned for want of form**
> No summons, sentence, order, bond, warrant, or other document under this Act, and no process or proceeding under this Act shall be quashed, set aside, or held invalid by any District Court or by any other Court by reason only of any defect, irregularity, omission, or want of form unless the Court is satisfied that there has been a miscarriage of justice."

***Relevant Case Law***

[21] The cases which have attempted to challenge certificates provided as proof of conviction have generally been concerned with identity of the named defendant. Such was the case in the *Okeby.*[9] However in that case[10] it was said:

> "There may be cases where a defendant wishes to challenge a s.139 certificate on the grounds other than identity. That might occur, for example, if there were a clerical error in the records and it could be demonstrated that the defendant had not been acquitted or had been convicted of some other offence not relevant to the case at hand."

[22] The Court then discussed the expression "sufficient evidence" in s 139(2):

> "[23] We conclude that the expressions "sufficient evidence" in s 139(2) means that the Crown **need not call any evidence beyond the certificate to prove the facts stated therein, but an accused person is not precluded from calling evidence to the contrary.**" (emphasis added)

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[8] *S R Okeby v R* [2010] NZCA 5129.
[9] See footnote 8.
[10] At paragraph [18].

[23] The Tribunal notes that apart from the production of the criminal record sheet signed by the Judge, which was produced by consent, no further evidence was called and the parties were content to deal with the matter by submissions.

[24] We were also referred to the decision of *R v Baker:*[11]

> "With the benefit of legal advice the accused confessed his guilt to that charge. Notwithstanding the absence from the criminal record sheet of any record of conviction, I am sure that the accused is to be regarded as having been convicted at that point."

And:[12]

> "It is, I think, the acceptance of a plea of guilty which determines the matter. The entry of the word "conviction" in the criminal record sheet may, in certain circumstances be little more than a formality."

***Discussion***

[25] We note by analogy there was a clear finding of guilt in the present case so that, similarly, we could accept, even if we had to go behind the certificate produced under s 139 that the entering of the word "convicted" would also be "little more than a formality".

[26] Also relevant, by analogy, is s 204 of the Summary Proceedings Act referred to above. There is clearly no miscarriage of justice suffered by the practitioner in reading into the record the word "convicted" before the sentence imposed.

[27] She had been found guilty to the criminal standard of proof, her application for a discharge without conviction had been clearly rejected and such rejection upheld on appeal. There is simply no issue of miscarriage of justice arising from the omission of this one word.

[28] We accept the submission made by Mr Collins that "the evidence of conviction is overwhelming".

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[11] [1975] 1 NZLR 247, at 252, line 20.
[12] At line 30.

**Approach taken**

[29] Mr Collins went on to submit that the practitioner's approach was the sort of "battle of tactics" that lawyers facing disciplinary charge have been warned against in a number of cases dating right back to *Re C,*[13] *Leary*[14] and *Re Veron*[15] where it was said:

> "From the earliest times and as far back and the recollection of the individual Judges of this Court goes, disciplinary proceedings in this jurisdiction … have always been concluded upon affidavit evidence and not otherwise. They are not conducted as if the Law Society … was a prosecutor in a criminal cause or as if we were engaged upon a trial of civil issues at nisi prius. The jurisdiction is a special one and it is not open to the respondent when called upon to show cause, as an officer of the Court, to lie by and engage in a battle of tactics, as was the case here, and endeavour to meet the charges by mere argument."

[30] We accept that submission and note that it may be relevant in assessment of the practitioner's overall conduct of the proceedings at penalty stage.

[31] We note that this technical attack of the first limb of s 241(d) is mitigated, to some extent, by Ms Murray's reversal of her approach to the second limb which was conceded by her as having been made out. Thus it is common ground that a conviction of this nature not only reflects on her fitness to practice but also tends to bring her profession into disrepute.

**Seriousness of Conduct**

[32] While recognising the concession and indeed admission of this limb we do consider it necessary to make a finding at this stage about the level of seriousness of this charge in order to provide some guidance to the parties for the purposes of the penalty hearing. Furthermore Mr Collins submits that the Tribunal is "obliged to enquire into the seriousness of the conduct which led to the conviction", having regard to *dicta* such as in *Ziems*[16] where it was held:

> "It has been said before, and in this case the Chief Justice of the Supreme Court has said again, that the Bar is no ordinary profession or occupation. These are not empty words, nor is it their purpose to express or encourage professional pretensions. They should be understood as a reminder that a

[13] *Re C* (A Solicitor) [1963] NZLR 259.
[14] *Auckland District Law Society v Leary* [unreported M1471/84 High Court, Auckland Registry, Hardie Boys J, 12 November 1985).
[15] *B Veron* ex parte Law Society of NSW [1966] 1 NSWLR 511, 515.
[16] *Ziems v Prothonotary of the Supreme Court of NSW* (1957) 97 CLR 279, 298.

> barrister is more than his client's confidant, adviser and advocate, and must therefore possess more than honesty, learning and forensic ability. He is, by virtue of a long tradition, in a relationship of intimate collaboration with the judges, as well as with his fellow-members of the Bar, in the high task of endeavouring to make successful the service of the law to the community. That is a delicate relationship, and it carries exceptional privileges and exceptional obligations. If a barrister is found to be, for any reason, an unsuitable person to share in the enjoyment of those privileges and in the effective discharge of those responsibilities, he is not a fit and proper person to remain at the Bar.
>
> Yet it cannot be that every proof which he may give of human frailty so disqualifies him. The ends which he has to serve are lofty indeed, but it is with men and not with paragons that he is required to pursue them. It is not difficult to see in some forms of conduct, or in convictions of some kinds of offences, instant demonstration of unfitness for the Bar. Conduct may show a defect of character incompatible with membership of a self-respecting profession; or, short of that, it may show unfitness to be joined with the Bench and the Bar in the daily co-operation which the satisfactory working of the courts demands. A conviction may of its own force carry such a stigma that judges and members of the profession may be expected to find it too much for their self-respect to share with the person convicted the kind and degree of association which membership of the Bar entails. But it will be generally agreed that there are many kinds of conduct deserving of disapproval, and many kinds of convictions of breaches of the law, which do not spell unfitness for the Bar; and to draw the dividing line is by no means always an easy task."

[33] Evidence was provided by the Manager of Auckland Prison on a number of matters relevant to the seriousness of Ms Murray's offences, as well as its consequences. Mr Sherlock set out in detail the risks posed by the items in question, not only the cigarettes and lighter, but in particular the use to which cell phones in prisons can be put. He provided a number of examples of the dangers posed and criminal activities enabled with the use of a sophisticated piece of equipment such as an iPhone.

[34] In addition Mr Sherlock gave evidence about the important relationship between prison officials and lawyers visiting prisoner clients. He acknowledged the importance of the ability of lawyers to have access to their clients more easily than a lay visitor. He deposed to the privileged position held by lawyers as a consequence and in particular the breach of trust involved in the abuse of the privileged position by Ms Murray. Unchallenged evidence was received from Mr Sherlock as follows:

> "Generous access within prisons to lawyers supports our justice system and I believe is of great value and to be respected. Ms Murray's conduct has caused significant erosion of this trust and confidence with prison authorities. I personally feel I can no longer simply rely on the integrity of the legal profession when making decisions in the best interests of the security of Auckland Prison, and ultimately the safety of the public."

[35] Ms Murray's actions caused a review of prison security and the imposition of a number of restrictions on visits between lawyers and prisoners.

[36] It is this aspect of Ms Murray's abuse of her privileges as a lawyer which was seen as the most aggravating feature of her offending by both the District Court Judge and the High Court Judge who considered this offending.

[37] The second aggravating feature in relation to the charge was submitted by Mr Collins to be the defence advanced by Ms Murray, that the items had been planted upon Mr Reid by two prison officers.

[38] Mr Pyke objected to this being considered as part of the assessment of seriousness of the offending leading to conviction or indeed as part of the second limb determination, whilst accepting it would be relevant at penalty phase. Part of Mr Pyke's objection resides in the fact that the specific manner of conduct of the defence was the subject of a second charge which was withdrawn prior to the hearing commencing. However, that charge was particularised not by the form her defence took but by the manner in which it was conducted, alleging disrespectful and inappropriate conduct. Those matters are an entirely different category and of course none of the evidence in relation to those matters has been considered or will be regarded by the Tribunal.

[39] It was not one of the particulars of that charge that Ms Murray put forward a false defence or allowed Mr Reid to be called on her behalf knowing that he would be lying to the Court in giving in his evidence.

[40] We consider we can take account of this much more serious aspect in the weighing of the present charge as well as at penalty stage.

[41] We note that although this was a Summary offence, carrying only a maximum of three months imprisonment, from a professional disciplinary point of view, it goes directly to the heart of the standing of the profession in the community. This was a view shared by the District Court Judge and the High Court Judge when reviewing penalty.

[42] The breach of trust and abuse of professional privilege most certainly reflect on fitness to practice.

[43] As to damage to the reputation of the profession, the tests posed in *Davidson*[17] and *W*[18] as to the view of the resonable person, informed of all the relevant circumstances, need hardly be asked. The publicity which has inevitably accompanied a lengthy contested hearing at which a notorious criminal gave evidence in support of a lawyer, falsely accusing two prison officers, has without doubt been enomously damaging to the criminal defence bar in particular and to the profession in general.

[44] For all of the above reasons we found the charge to be proved to the high standard required on the balance of probabilities, and fixed a Penalty date for 26 February 2015.

**DATED** at AUCKLAND this 24th day of December 2014

Judge D F Clarkson
Chair

[17] *Davidson v Auckland Standards Committee No. 3* [2012] NZLCDT 35 at [11].
[18] *W v Auckland Standards Committee No. 3* [2012] NZCA 401.