IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU ROHE

CRI-2019-404-000416
[2020] NZHC 368

BETWEEN	MANINDER SINGH
	Appellant
AND	NEW ZEALAND POLICE
	Respondent

Hearing:	3 February 2020
Counsel:	M J Mellin for appellant C D Piho for respondent
Judgment:	3 March 2020

JUDGMENT OF KATZ J
[Conviction and sentence appeal]

This judgment was delivered by me on 3 March 2020 at 3:30pm

Registrar/Deputy Registrar

Solicitors:	Kayes Fletcher Walker Ltd, Office of the Crown Solicitor, Manukau
Counsel:	M J Mellin, Barrister, Manukau

Introduction

[1] Mr Singh appeals his conviction and sentence on a charge of driving with excess breath alcohol.[1] He was found guilty by Judge David J Harvey in the District Court at Manukau, following which he was disqualified from driving for six months and fined $1,030.[2]

[2] The key issues raised by Mr Singh's appeal are:

(a) whether the Judge erred in finding that the police officer was justified in administering a breath alcohol test;[3] and

(b) (if the conviction is not set aside on the basis of this alleged error) whether the Judge erred in not discharging Mr Singh without conviction.[4]

[3] Mr Singh seeks leave to file an updating affidavit for the purposes of the appeal. The Crown did not oppose admission of that evidence. I am satisfied that it is credible, fresh, and relevant to the safety of the convictions and should therefore be admitted.[5]

[4] Mr Singh seeks an extension of time for the appeal to be brought. The extension of time is sought on the basis that Mr Singh has limited financial resources and had to focus on his immigration appeal first. Given the importance of this appeal to Mr Singh, and his reasons for delay in filing, I am satisfied that it is in the interests of justice that an extension of time be granted.

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1 Land Transport Act 1998, s 56(1). Maximum penalty three months' imprisonment and a fine not exceeding $4,500.

2 *New Zealand Police v Singh* DC Manukau CRI-2018-092-009594, 7 March 2019; *New Zealand Police v Singh* [2019] NZDC 10147, the conviction and sentencing respectively.

3 Obviously, if he was not, the results of the test would likely be inadmissible.

4 Sentencing Act 2002, s 107.

5 *Lundy v R* [2013] UKPC 28, [2014] 2 NZLR 273 at [120].

Background

[5] Mr Singh is an Indian national. He arrived in New Zealand in 2014. He is currently in New Zealand on a work visa valid until 10 April 2020. He would like to renew his visa and, in the longer term, seek permanent residence in New Zealand.

[6] The facts of Mr Singh's offending are as follows. Around 11.50 pm on 7 August 2018, a police constable came upon a van that was unusually positioned on the side of a road in South Auckland. It was parked half on the road and half on the verge, on yellow lines. The constable gave evidence that the left indicator was flashing, the headlights were on, the key was in the ignition, and the engine was running. In the driver's seat was Mr Singh. He appeared to be asleep. The constable opened the van door, showed his ID, and removed the key from the ignition. He spoke to Mr Singh and took his particulars. He noted that there was a smell of alcohol. Mr Singh had glazed eyes, slurred speech and seemed to be falling in and out of sleep. The constable conducted a breath test, which indicated a breath alcohol of more than 400mcg of alcohol per litre of breath. The constable then took Mr Singh to Manukau Police Station for an evidential breath test, which showed a result of 986mcg/L.

[7] Mr Singh did not give evidence at trial. Subsequently, however, he deposed in an affidavit provided for sentencing purposes that he had been drinking at a friend's house. He said that he argued with his friend and made the poor decision to drive away in his company van. He says he only drove for a short time, then found a safe place to park.

[8] The company van Mr Singh was driving included a sophisticated satellite tracking system. That system recorded not only the vehicle's position, but also its speed, travel time, and when the ignition was turned on or off. These records revealed that the van was turned on at 8.36 pm, when it left Mr Singh's friend's address. Four minutes later the vehicle stopped at the location where the constable found Mr Singh. The vehicle remained stationary at that location, with the ignition on, for approximately three hours. This corroborates Mr Singh's account that he only drove for a short time.

Approach on appeal

[9] Section 229(1) of the Criminal Procedure Act 2011 allows a person to appeal against their conviction to the High Court.[6] Section 232 of the Act provides that an appeal against conviction must be allowed if, in the case of a Judge-alone trial, the Judge erred in his or her assessment of the evidence to such an extent that a miscarriage of justice has occurred, or if a miscarriage of justice has occurred for any other reason. In any other case the appeal will be dismissed.

[10] Section 250(2) provides that the Court must allow an appeal against sentence if satisfied that for any reason, there is an error in the sentence imposed on conviction, and a different sentence should be imposed. In any other case, the Court must dismiss the appeal.[7] The sentence must be "manifestly excessive";[8] the High Court will not intervene where the sentence is within the range that can properly be justified by accepted sentencing principles. Whether a sentence is manifestly excessive is to be examined in terms of the sentence given, rather than the process by which the sentence is reached.

Appeal against conviction on substantive grounds

[11] Mr Mellin, counsel for Mr Singh, submitted that the constable did not have proper grounds to administer a breath screening test. If so, Mr Singh's subsequent breath alcohol test results are inadmissible.

[12] Section 68 of the Land Transport Act 1998 relevantly provides that an officer may require either of the following persons to undergo a breath screening test without delay:

(a) a driver of, or a person attempting to drive, a motor vehicle on a road (s 68(1)(a)); or

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6 Criminal Procedure Act 2011, s 230(b).
7 Section 250(3).
8 *Tutakangahau v R* [2014] NZCA 279, [2014] 3 NZLR 482 at [26]–[27].

(b) a person whom the officer has good cause to suspect has recently committed an offence against the Land Transport Act that involves the driving of a motor vehicle (s 68(1)(b)).

[13] The trial judge found that both conditions were satisfied. Mr Mellin submitted that neither is. I will consider both limbs. Although Judge Harvey focused his reasoning on s 68(1)(a), I will consider s 68(1)(b) first as, in my view, the facts of this case clearly fall within that limb.

[14] First, however, I address Mr Singh's challenge to the Judge's finding that the car headlights were on and the indicator was flashing.

Findings relating to headlights being on, indicator lights flashing

[15] In finding that Mr Singh was the driver within the meaning of s 68(1)(a), despite the vehicle having been stationary for a period of time, the Judge had regard to the fact that he was "in control" of the motor vehicle. In particular:[9]

> He had left the engine running, the lights were on, the indicator was on which would seem to suggest that at some stage within a relatively recent time he had tripped the indicator stalk. The key was in the ignition. He was behind the steering wheel in a position where he could exercise control of the motor vehicle.

[16] Mr Mellin submitted that it was inappropriate for the Judge to make and rely on a factual finding that the car's headlights being on and the indicator lights flashing in circumstances where he had prevented trial counsel from fully exploring that issue in cross-examination.

[17] I have reviewed the notes of evidence. There appears to be strong evidence to support the Judge's finding that the car's headlights and indicator were on. Indeed, that appears to have been what first attracted police attention. Defence counsel challenged this evidence, however, and questioned the constable about the fact that the photograph of the vehicle (taken from behind) does not appear to show that the lights or indicator were on. The officer's answers were along the general lines that he may

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9 *New Zealand Police v Singh* DC Manukau CRI-2018-092-009594, 7 March 2019 at [15].

have turned the lights off prior to taking the photograph and, further, that the photograph could have been taken during the "off" blink of the indicator light. It appears that defence counsel wished to pursue this line of cross-examination further, but the Judge did not believe such questioning would be fruitful and suggested that counsel move on.

[18] I share the Judge's doubts that further questioning would have assisted the defence. However, given the (fairly remote) possibility that further cross-examination may have been productive, I propose to put this particular aspect of the evidence to one side when considering this appeal.

Section 68(1)(b): did the officer have good cause to suspect that Mr Singh had committed an offence against the Land Transport Act that involved the driving of a motor vehicle?

[19] When the officer arrived on the scene, Mr Singh was in a vehicle pulled over awkwardly on yellow lines and partially parked on the berm/road side. The engine was running. Mr Singh had glazed eyes and slurred speech and was sitting behind the driver's wheel seeming to drift in and out of consciousness. On their face, such circumstances clearly constitute good cause to suspect that Mr Singh had been driving under the influence of alcohol, an offence under the Land Transport Act that involved the driving of a motor vehicle.

[20] Mr Mellin submitted, however, that when assessing whether the officer had "good cause to suspect" this Court should also have regard to information that came to light later, namely the GPS data that showed Mr Singh had actually been stationary in the same place for three hours.

[21] I reject that submission. Whether the officer had the necessary "good cause to suspect" must be assessed immediately prior to him requesting Mr Singh to undergo a breath screening test. At that stage he did not know that the vehicle had been parked with its engine running for some three hours. On the information available to the officer at the time there were clear grounds to suspect that Mr Singh had committed a relevant offence against the Land Transport Act. He was therefore entitled to require Mr Singh to undergo a breath screening test.

[22] For completeness, I note that it is my view that even if the officer had been aware that the vehicle had been stationary for three hours, he would still have had good cause to suspect that Mr Singh had been driving under the influence of alcohol.

Section 68(1)(a): did the Judge err in finding that Mr Singh was either a driver of, or a person attempting to drive, a motor vehicle on the road?

[23] Judge Harvey found that Mr Singh was either a driver of, or a person attempting to drive, a motor vehicle on the road. He considered three cases to be particularly relevant: *Wynn-Williams v Police, Mehrtens v Police,* and *Danaher v Police*.[10] The first decision relevantly found that there must be some proximate connection to actual driving to be a driver; intervention of time, circumstance, or conduct can separate the person from their status as a driver.[11] *Mehrtens* clarified that mere lapse of time will not be decisive; other circumstances must be considered.[12] *Danaher* found a person to be a driver when they were found behind the wheel of a car in a ditch at 4.00 am, with the keys in the ignition and the headlights on.[13] This was despite the fact that, similarly to the present case, evidence suggested the car had not moved for some time.[14]

[24] Mr Mellin submitted that because the vehicle had not moved for some time, Mr Singh cannot fairly be described as the driver. He had, counsel submits, deliberately gone to sleep. He could just as easily have gone to sleep in the back seat, where he would clearly not have been driving the car.

[25] In my view it is at least arguable that Mr Singh was not driving the vehicle or attempting to drive it at the relevant time. It is not necessary to reach a concluded view on the topic, however, because Mr Singh clearly falls within s 68(1)(b).

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10 *Wynn-Williams v Police* CA400/03, 15 June 2004; *Mehrtens v Police* [2005] DCR 587 (HC); *Danaher v Police* HC Auckland CRI-2007-404-93, 3 September 2007.
11 *Wynn-Williams v Police* CA400/03, 15 June 2004 at [28].
12 *Mehrtens v Police* [2005] DCR 587 (HC) at [14].
13 *Danaher v Police* HC Auckland CRI-2007-404-93, 3 September 2007 at [14].
14 *Danaher v Police* HC Auckland CRI-2007-404-93, 3 September 2007 at [14].

Conclusion

[26] The appeal against conviction fails. The officer had good cause to suspect that Mr Singh had committed an offence against the Land Transport Act that involved the driving of a motor vehicle. He was therefore entitled to require Mr Singh to undergo a breath test. The breath test was therefore admissible, and the ensuing conviction was sound.

The appeal against the Judge's decision not to discharge Mr Singh without conviction

Relevant legal principles

[27] The Judge declined to discharge Mr Sing without conviction. Mr Singh now appeals that decision. An appeal against a refusal to grant a discharge is an appeal against conviction and sentence.[15] It is a general appeal.[16]

[28] Section 106 of the Sentencing Act 2002 provides that the Court may discharge an offender without conviction following a plea or finding of guilt. Under s 107, the discretion is to be exercised only if "the court is satisfied that the direct and indirect consequences of a conviction would be out of all proportion to the gravity of the offending". The disproportionality assessment is to be made according to the three-step approach set out by the Court of Appeal in *Z (CA447/12) v R*:[17]

(a) the Judge must identify the gravity of the offending, including the aggravating and mitigating factors of the offending and the offender;

(b) the Judge must identify the direct and indirect consequences for the offender; and

(c) the Judge must consider whether those consequences are out of all proportion to the gravity of the offending.

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15 *Jackson v R* [2016] NZCA 627, (2016) 28 CRNZ 144 at [8]-[9] and [16].

16 *Maraj v Police* [2016] NZCA 279 at [11]; and *Austin, Nichols & Co v Stichting Lodestar* [2007] NZSC 103, [2008] 2 NZLR 141 at [16].

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

[29] In considering whether a claimed consequence is out of all proportion to the offending, it is not necessary for the Court to be satisfied that the consequence is inevitable.[18] Instead, there must be a real and appreciable risk of the consequences occurring. The nature and seriousness of the consequences and that degree of likelihood of their occurring will be material to the Court's assessment of whether those consequences would be out of all proportion to the gravity of the offence. In other words, the higher the likelihood and the more serious the consequences the more likely it is that the statutory test can be satisfied.[19]

Did the Judge overestimate the gravity of offending?

[30] The Judge noted that the offence of driving under the influence of alcohol is of significant public concern and there are significant road safety elements associated with the detection, prosecution and punishment of those who are committing such offences. He assessed Mr Singh's offending as being "of moderate gravity" and described it as being in the vicinity of 5 or 5.5 on a scale of 1 to 10.

[31] Mr Mellin submitted that, if the headlights and indicators were off (as he submitted) then the gravity of the offending must be assessed as being lower.

[32] I reject that submission. If anything, other road users were at increased risk if Mr Singh's lights were off, as contended by Mr Singh on appeal. Further (and importantly) the key danger posed to other road users was that Mr Singh drove when he was so drunk that, when he was tested three and a half hours later, he was still nearly four times above the legal limit.

Does the likely deportation of Mr Singh mean that the consequences of his offending are out of all proportion to its gravity?

[33] At the time of the hearing before Judge Harvey it was, obviously, not known whether a conviction would definitely result in deportation, although the Judge recognised that as a possible (but not inevitable) outcome.

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[18] *Iosefa v Police* HC Christchurch CIV-2004-409-64, 21 April 2005 at [34]; and *Alshamsi v Police* HC Auckland CRI 2007-404-62, 15 June 2007 at [20].

[19] *Iosefa v Police* HC Christchurch CIV-2004-409-64, 21 April 2005 at [35].

[34] Since his conviction, Mr Singh has been issued with a deportation liability notice. The grounds for deportation are that he is the holder of a temporary entry class visa and that there is sufficient reason to deport him because he was charged, convicted and sentenced for driving with excess breath alcohol. Mr Singh appealed to the Immigration and Protection Tribunal ("the IPT") on the grounds that there were exceptional circumstances of a humanitarian nature that would make it unjust or unduly harsh for him to be deported from New Zealand. His appeal was unsuccessful. The IPT noted that although Mr Singh has friends and connections in New Zealand, he does not have any close family in New Zealand and his primary family and social nexus is to India where he was born and grew up, and where his parents continue to live.

[35] Mr Mellin submitted that it is now virtually inevitable that Mr Singh will be deported and that such a consequence of conviction is out of all proportion to the gravity of his offending.

Relevance of deportation as a consequence of offending when assessing disproportionate hardship

[36] In *Zhang v Ministry of Economic Development* Asher J cautioned against courts usurping the role of immigration officials and suggested that, when considering applications for discharge without conviction, courts should generally be reluctant to consider consequences that may be imposed by other authorities as a result of conviction:[20]

> …it is appropriate for the consequences of conviction to be resolved by the appropriate authorities, rather than the Court attempting to pre-empt that decision-making process by a decision to discharge without conviction […] There is nothing that requires the courts to intervene to try and impose their perception of what the right immigration consequences should be. That is best left to the immigration authorities... And there will always be occasions where in a finely balanced case a discharge may be warranted on these types of grounds. The case for discharge may not be so strong where the details of the offending will be known and closely examined by the relevant authority in any event, than where the query will be only as to prior convictions, for instance in an application for professional certification.

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[20] *Zhang v Ministry of Economic Development* HC Auckland CRI-2010-404-453, 17 March 2011 at [14].

[37] *Zhang* was subsequently confirmed by the Court of Appeal in *Ho v R*.[21] The general approach advocated in *Zhang* and clarified in subsequent cases is justified on grounds of institutional competence and comity. The immigration authorities are those with the institutional background and competence required to deal with immigration questions and have been empowered by Parliament to make that assessment. If the immigration authorities assess that a defendant's offending is serious enough to warrant deportation, then that is generally their assessment to make, and there are appeal/review rights available.

[38] However, in 2018, the Court of Appeal moderated the position somewhat in *Rahim* and granted a discharge without conviction where deportation would break up a family unit.[22] There have been a number of High Court decisions since then that have recognised that where deportation of an offender will cause serious harm to a defendant's family (usually in the form of a family unit being broken up) that may be sufficient to justify a discharge without conviction.[23] For example, in *R v Tang*, deportation of the defendant would have resulted in her losing all contact with her four year old son.[24]

[39] It is relatively rare, however, for deportation risk to be taken into account as a relevant consequence of offending in cases where deportation will not result in serious harm to the offender's family unit in New Zealand. Ultimately, however, each case must be assessed on its own merits.

Application of the relevant principles to Mr Singh's appeal

[40] Mr Singh is not a permanent resident of New Zealand, but rather the holder of a temporary entry class visa. He entered New Zealand in 2014 on a student visa. Since July 2014 he has been granted three student visas, one visitor visa and most recently two work visas.[25] Mr Singh's current two-year work visa expires on

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21 *Ho v R* [2016] NZCA 229.
22 *Rahim v R* [2018] NZCA 182.
23 For example, *Singh v Police* [2019] NZHC 417; *Kovalic v Police* [2019] NZHC 1214; *R v Tang* [2019] NZHC 2056; *Sunda v Police* [2019] NZHC 756; *Chand v Police* [2017] NZHC 1119.
24 *R v Tang* [2019] NZHC 2056.
25 Pursuant to Mr Singh's affidavit dated 26 April 2019 at [41].

10 April 2020. Mr Singh hopes to have this renewed and (all going well) eventually obtain permanent residence:

> While working towards fulfilling the Essential Skills Work Visa requirements that would be for a period of around one to three years. During this time, I will gain enough experience to have enough points required for meeting the New Zealand residency criteria.

[41] Obviously, whether or not Mr Singh will obtain enough points to meet New Zealand residency criteria in the future is speculative. It will depend on what experience he gains, and what the relevant immigration criteria are at the relevant time.

[42] In essence, the consequences of a conviction for Mr Singh, if a deportation order is now made, will be that he may lose whatever time he has remaining on his current visa (one month) and the *opportunity* to apply for a further temporary visa and, possibly, in the future, permanent residence. The loss of that opportunity is not permanent, but for a period of five years.

[43] Mr Singh is a single man. His offending is of moderate gravity. His deportation will not break up a family unit, as Mr Singh has no close family in New Zealand. Mr Singh's personal circumstances are not out of the ordinary. They do not warrant a departure from the general approach outlined in *Zhang*, as confirmed and clarified in subsequent cases. Mr Singh had a right of review (on humanitarian grounds) to the IPT, which he has exercised. It is not appropriate for this Court to now, in effect, seek to undermine the statutory process that has been followed. The appropriate course in this case is for the immigration consequences of Mr Singh's offending to be determined by the relevant immigration authorities.

Result

[44] The appeals against conviction and sentence are dismissed.

Katz J