IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA101/2018
[2018] NZCA 486

BETWEEN	SHREESH BASNYAT Applicant
AND	NEW ZEALAND POLICE Respondent

Hearing: 9 May 2018

Court: French, Cooper and Williams JJ

Counsel: C Mitchell for Applicant
J E L Carruthers for Respondent

Judgment: 8 November 2018 at 11.00 am

JUDGMENT OF THE COURT

A The application to adduce further evidence is declined.

B The application for leave to appeal is declined.

REASONS OF THE COURT

(Given by Williams J)

Introduction

[1] The District Court refused Mr Basnyat's application for a discharge without conviction under s 106 of the Sentencing Act 2002, following a guilty plea for drink

driving.[1] The High Court dismissed Mr Basnyat's subsequent appeal.[2] Leave is now sought to bring a second appeal. The issue raised is whether the Courts below properly applied the test for discharge without conviction in s 107 of the Sentencing Act or were distracted into error by relying on flawed case law.

Factual and Procedural Background

[2] The facts of the offending were succinctly set out by Brewer J:[3]

> [2] On the evening of 26 October 2016 Mr Basnyat was driving in Avondale when he turned into a schoolyard immediately prior to a police alcohol checkpoint. He was stopped by a mobile patrol. When spoken to by police, Mr Basnyat exhibited signs of recent alcohol intake. He underwent a breath test and gave a blood sample — the latter generated a blood alcohol reading of 84 milligrams of alcohol per 100 millilitres of blood. When spoken to by police Mr Basnyat said he had consumed three bottles of beer prior to driving.

[3] On 13 March 2017 Mr Basnyat pleaded guilty to a charge of driving with excess blood alcohol.[4]

[4] Mr Basnyat is a 31-year-old civil engineer. He is employed as headworks engineer at Watercare Ltd in Auckland. This involves ensuring that the company's water storage and wastewater assets meet regulatory, operational, financial and water quality requirements. It is a position of considerable responsibility and some seniority. His supervisor Mr Chaloner-Warman provided an affidavit to the District Court indicating that, but for the convictions which could well have a negative impact on his career, Mr Basnyat had the potential to reach "the very highest levels in the organisation".

[5] An affidavit from a practising chartered accountant adduced in the High Court, but not (as far as we can tell) in the District Court, attested to the proposition that in the deponent's experience as a professional and an employer, a drink driving

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1 *Police v Basnyat* [2017] NZDC 21099.
2 *Basnyat v Police* [2018] NZHC 51.
3 *Basnyat v Police*, above n 2.
4 Land Transport Act 1998, s 56. The maximum penalty is three months' imprisonment or a fine not exceeding $4,500.

conviction is likely to significantly impact on Mr Basnyat's future employment prospects.

[6] Mr Basnyat sought leave in this Court to produce further evidence in the form of an affidavit of his father, Shreedhar Man Singh Basnyat. Mr Basnyat senior deposed that his son is a fine and upstanding member of the local Nepalese community; that he is a role model for his community; that he is an active contributor to the cultural and sporting life of that community; and that as the eldest son he has significant responsibilities to care for the family. The suggestion was that these responsibilities and Mr Basnyat's contribution to his community could well be negatively affected as a result of a conviction. The respondent opposed admission of this evidence. We will address the merits of this application below.

[7] On 18 September 2017, Judge Ellis in the District Court at Auckland declined Mr Basnyat's application for a discharge without conviction, convicted him and fined him $800 plus court costs and medical fees. Further, Mr Basnyat was disqualified from driving for six months.[5]

[8] Mr Basnyat appealed to the High Court. Brewer J dismissed the appeal.

[9] The matter comes before this Court by way of application for leave to bring a second appeal. Miller J directed that the leave application and the substantive appeal be argued together before the Permanent Court in light of the questions of principle sought to be raised.

[10] We consider that the requirements for leave are not met in this case. In particular, no matter of general or public importance arises and there is no risk of a miscarriage of justice.[6] For completeness, however, we also address the substantive merits of the appeal.

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5 *Police v Basnyat,* above n 1, at [14].
6 Criminal Procedure Act 2011, s 237(2)(a) and (b).

[11] We also dismiss Mr Basnyat's application to admit the further evidence of his father. While credible, it is plainly not fresh and for the reasons which follow below, it could not, in any event, affect the outcome of this application.[7]

District Court Decision

[12] Judge Ellis considered the facts in this case to be "quite unremarkable".[8] The Judge was not persuaded that, in terms of s 107, the consequences pointed to in Mr Basnyat's case were "out of all proportion" to the seriousness of the offending.[9] Drink driving was, the Judge considered, "serious anti-social behaviour".[10] Against that, there was no indication of a likelihood of loss of Mr Basnyat's current employment.[11] In addition, the Judge considered, while a conviction may affect any applications for jobs elsewhere, this is to be expected as a predictable consequence of the offence.[12]

High Court Decision

[13] In the High Court Brewer J agreed with that assessment. He considered the potential employment and travel impacts of the conviction.[13] In making his proportionality assessment, he applied the decision in *Linterman v Police*.[14] There Miller J considered a discharge without conviction for drink driving ought to be exceptional and that an applicant "must identify some extraordinary consequences of conviction" in order for such applications to be granted.[15] Since, in Brewer J's view, there was no risk to Mr Basnyat's current employment, it could not be said that the employment consequences of a conviction were out of all proportion to the gravity of the offending.[16] Concerns with respect to travel were noted but dismissed as unsubstantiated.[17] Mr Basnyat had no immediate travel plans.[18]

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7 *Bain v R* [2007] UKPC 33, (2007) 23 CRNZ 71 at [34].
8 At [8].
9 At [12].
10 At [8].
11 At [9].
12 At [10].
13 At [20]–[25].
14 *Linterman v Police* [2013] NZHC 891.
15 At [9].
16 At [35].
17 At [32].
18 At [32].

Analysis

[14] The regime in ss 106 and 107 has been the focus of a number of decisions of this Court.[19] No purpose would be served in undertaking yet another survey of the background to what is now a well-settled approach to the exercise of the discretion in s 106. A brief summary is all that is required. Section 107 provides the threshold test for discharges without conviction:

> **107 Guidance for discharge without conviction**
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> The court must not discharge an offender without conviction unless the court is satisfied that the direct and indirect consequences of a conviction would be out of all proportion to the gravity of the offence.

[15] There is then a residual discretion under s 106 which uses the word "may", although once the threshold is met, a discharge will usually follow.[20] The correct approach to the s 107 test was set out by this Court in *Z (CA447/2012) v R* where Arnold J described a four-stage analysis for sentencing courts: [21]

(a) consider all aggravating and mitigating factors of the offence and offender to establish the gravity of the offence;

(b) identify the direct and indirect consequences of conviction for the offender;

(c) consider whether those consequences are out of all proportion to the gravity of the offence; and

(d) consider whether, in exercise of the residual discretion in s 106, a discharge should nonetheless be declined.

[16] The focus in this application is on whether, despite that settled approach in general offending, the courts have come to develop a different test in respect of drink

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19 See *R v Hughes* [2008] NZCA 546, [2009] 3 NZLR 222; *Blythe v R* [2011] NZCA 190, [2011] 2 NZLR 620; and *Z (CA447/2012) v R* [2012] NZCA 599, [2013] NZAR 142.

20 *R v Hughes*, above n 19.

21 *Z (CA447/2012) v R*, above n 19, at [27].

driving. The fault lies, it is said, with the High Court decision in *Linterman*.[22] In *Linterman* the appellant was a law student whose plans to undertake specialist postgraduate study in Vancouver would likely have been significantly disrupted if she were convicted.[23] She was a top honours student and a good sportswoman.[24] In a passage often quoted by courts applying s 106, Miller J articulated his approach in these terms:

> [9] I agree that discharges ought to be exceptional for this offence. It is illuminating to reflect on the several reasons why that might be so. First, in the hands of a drunk a car is a dangerous thing. Second, good character and extenuating personal circumstances normally count for little. Drink-driving is a pervasive social problem which has brought many good citizens into the dock and caused the legislature to respond with a sentencing policy that emphasises personal and general deterrence. Notably, the court may relieve an offender of the minimum disqualification period only for special reasons relating to the offence. Special reasons relating to the offender will not do. Nor is ignorance of one's alcohol level a defence; a driver who chooses to drink at all takes the risk that for whatever physiological or other reason her level will prove higher than she thought. Third, an applicant must identify some extraordinary consequence of conviction, which is difficult when the ordinary consequences are unpleasant. A drink-driving conviction always carries a social stigma and the offender must normally disclose it to a prospective employer, who may wonder whether it evidences poor judgement or undue fondness for drink, and to immigration authorities, who may categorise it as evidence of antisocial tendencies.
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> [10] That said, a discharge is available in law for the offence, so the legislature must be taken to have recognised that some cases may merit one. When granting a discharge a court may make any order that it would be required to make on conviction, so the policy of the legislation can be respected by imposing a period of disqualification. And under settled principles the offender's explanation and good character may be considered when assessing the gravity of the offence and exercising the discretion under s 106 of the Sentencing Act [2002], although the weight accorded these things must be affected by the legislative policy that I have just discussed. Further, the cases indicate that disruption to travel or study plans may justify a discharge if sufficiently proved, although counsel could draw my attention to no judgment of this Court in which one has been granted or upheld on such grounds for drink-driving.
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> (Footnotes omitted.)

[17] For Mr Basnyat, Mr Mitchell submitted that to the extent that *Linterman* is now routinely cited and followed by sentencing courts (as it was by Brewer J in this case) the courts are in error. Such reliance had caused them to bypass the four-stage

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22 *Linterman v Police*, above n 14.
23 At [4].
24 At [3].

proportionality assessment provided for in the legislation and explained in *Z (CA447/2012) v R*, and to substitute that with the superficial standards of "exceptional circumstances" and "significant hardship". The law had, it was argued, developed "a bifurcated standard for discharge applications that has no basis in the authorising statute".[25]

[18] We do not see the problem.

[19] Properly construed, *Linterman* is not a gloss on the statutory test, but rather a statement of the practical consequence of the application of the sections. Drink driving is a moderately serious offence when seen by reference to its potential consequences and to the pervasiveness of alcohol abuse in our society. That means the proportionality scales to be applied at stage three of *Z (CA447/2012) v R* are, to an extent, tipped by that level of seriousness. The consequences of a conviction must also therefore be relatively significant before they are "out of *all* proportion" to the moderate seriousness of the offence. It would be different if drink driving were a minor offence, but it is not.

[20] But judges must not treat *Linterman* as if it were a proxy for the statutory test, and they must not exercise their discretion as if the word "exceptional" is to be found in s 107. By and large they do not, as shown in the survey of 15 High Court decisions referred to in the article by Mr Conder which was cited by Mr Mitchell in argument. The learned author concluded as follows:[26]

> A close reading of these cases show[s] that exceptionality is not the key criterion. Rather it is the consequences themselves which must be clear. This is consistent with the language of s 107, which requires an explicit balancing act between a moderately serious offence like drink driving and the consequences which flow from a conviction. It is also consistent with the careful scrutiny encouraged by Heath J in the *Ovtcharenko* decision.

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25 See generally a discussion of the subject in Tim Conder "Exceptionally unexceptional" [2018] NZLJ 21 at 21.

26 At 25.

[21] Having surveyed these and other decisions for ourselves, we agree with that assessment.[27] But the cautionary language adopted by Heath J in *Ovtcharenko v Police* is nonetheless apt:[28]

> [20] I agree with Miller J, in *Linterman v Police*, that applications for discharges without conviction in alcohol related driving cases should be scrutinised with care. It may, with respect, go too far to say that they ought only to be granted in "exceptional" circumstances. As with any other offence, it is necessary to apply the statutory tests. In doing so, the nature of the social problem that the legislation is intended to address is something that goes to an assessment of the gravity of the offending.
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> (Footnotes omitted.)

[22] The legislative directive is that a proportionate response to driving with a blood alcohol level above 80 milligrams per 100 millilitres of blood will ordinarily be the entry of a conviction. All other things being equal that will be the inevitable result. It will therefore be necessary to identify factors either in the offending or the consequences of a conviction for the offender that show that result is wholly disproportionate. A blood alcohol reading that is only just over the limit will be relevant — placing the gravity of the offending at the low end of moderately serious as Brewer J indicated — but not enough on its own. There will also be factors personal to the offender, often related to the offending itself, which will go to gravity. These might include the use before deciding to drive of faulty personal breath alcohol checking devices or the need to drive to assist others in an emergency, and the like.[29] Youth will also be a relevant factor under this heading.

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27 Two further High Court decisions from 2017 are consistent with this assessment: *Howard v Police* [2017] NZHC 2779; and *Walford v Police* [2017] NZHC 2627.

28 *Ovtcharenko v Police* [2016] NZHC 2572.

29 See *Waight v Police* HC Auckland CRI-2006-404-465, 24 May 2007 at [30]; and *Police v Erwood* [2007] DCR 728. In *Waight v Police*, Winkelmann J records at [3]: " … The appellant was a newly qualified police officer, who had previously been employed as a technician with the navy. On the night in question he had been at a farewell with his old navy colleagues. He consumed alcohol at that function and, conscious of the law, he conducted two self-tests using the standard Alcotel R80A. Unfortunately the test kit was wrongly assembled, and two readings indicated that he had not breached the legal limit." The discharge was granted despite the appellant being nearly twice the limit when stopped. In *Police v Erwood*, an off-duty rural sole charge police officer had been golfing and drinking with friends. The local fire service siren sounded twice indicating there had been a serious motor accident in the area. The next nearest police station was an hour away in New Plymouth. Ambulance services were 25 minutes away. Since he was closer, he decided he should attend to help local volunteer fire fighters. He had medical emergency training and oxygen and a defibrillator in his car. He arrived at the scene and rendered assistance before the ambulance arrived. According to statements from those in attendance, there was no evidence that he was impaired in rendering such assistance. He was breathalysed at the scene by New Plymouth officers when they arrived later. He was discharged without conviction.

[23] Specific consequences are required and those have been identified in many cases. They include employment or travel limitations where the risk of impact is appreciable.[30] In short, some element of the offending or something in the circumstances of the offender are required to make the standard response wholly disproportionate.

[24] In this case, the argument is Mr Basnyat was only four milligrams over the limit; he is a capable young engineer working for a reputable infrastructure company; he is well regarded with a bright future and likely to require overseas travel as part of his current employment or in search of employment offshore given his transferable skill set; and he is an important contributor to the life of the Nepalese community in Auckland.

[25] There is nothing in particular about the offending that reduces its gravity below the low end of moderately serious. Mr Basnyat pulled into a schoolyard before being stopped so was plainly aware that he was at risk of being over the limit. While the degree of excess was small, that alone will not be sufficient to justify a discharge. More will be required. In this case Mr Basnyat is young, but at 31, not so young that it might be said the gravity of the offending is mitigated thereby, or that the consequences for him will be disproportionate. It is acknowledged that he is in a responsible position with a bright future, but that is not an uncommon circumstance, at least among those employed in responsible positions. As we have said, excess alcohol consumption is pervasive in New Zealand.

[26] In any event Mr Basnyat's job is not at risk. His supervisor suggests that a conviction may prejudice Mr Basnyat's prospects of promotion within Watercare Ltd, but no particular policy or practice of the company in relation to drink driving convictions was identified and the supervisor himself seemed very supportive of Mr Basnyat's future prospects. We would not, overall, attach significant weight to this particular risk.

[27] We accept that the risk of his conviction having an impact is greater if and when Mr Basnyat chooses to seek employment elsewhere. All other things being

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[30] *Alshamsi v Police* HC Auckland CRI-2007-404-62, 15 June 2007 at [20].

equal, similar candidates without convictions are likely to be preferred to those with convictions. But that is a relatively narrow set of circumstances. We do not know how common it is for candidates to be separable only by their criminal record. On the other hand, if Mr Basnyat is as valued by his current employer as his supervisor suggests, any such handicap could well be overcome by the sort of work or character references one would expect in that circumstance. Thus the potential impact can only be speculation at this point, or at least insufficiently real and appreciable to justify a conclusion that the impact of a conviction would indeed be out of all proportion.

[28] As for travel, Mr Mitchell's argument was unconvincing. He pointed to entry constraints in Canada where Mr Basnyat might wish to travel for business conferences or work. But a perusal of the Immigration Canada website, details of which were provided by Mr Mitchell, indicates that a person in Mr Basnyat's situation is very likely to be granted entry albeit not as of right. The inconvenience for him will be that he must apply for entry. This is hardly disproportionate to the moderate seriousness of this offending.

Result

[29] The application to adduce further evidence is declined.

[30] In light of our view of the effect of *Linterman*, no issue of general or public importance arises because neither Judge Ellis in the District Court, nor Brewer J in the High Court strayed from the terms of the statutory test. There is also no risk that a miscarriage of justice may have occurred, or may occur unless the appeal is heard, given our view of the merits. We accordingly decline to grant leave to appeal.

Solicitors:
Crown Law Office, Wellington for Respondent