NOTE: PUBLICATION OF NAME, ADDRESS, OCCUPATION OR IDENTIFYING PARTICULARS OF COMPLAINANT PROHIBITED BY S 203 OF THE CRIMINAL PROCEDURE ACT 2011. SEE http://www.legislation.govt.nz/act/public/2011/0081/latest/DLM3360350.html

IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

CRI 2006-085-3351
CRI 2016-085-3357
[2018] NZHC 1015

THE QUEEN

v

DANIEL CLINTON FITZGERALD

Hearing: 10 May 2018

Counsel: A R Winsley and H E Savage for Crown
K Preston and A C R M Jeffares for Defendant

Sentence: 10 May 2018

RULING AND SENTENCE OF SIMON FRANCE J

Introduction

[1] Mr Fitzgerald appears for sentence on charges of indecent assault, common assault and breach of supervision order (alcohol and drug condition).[1] He was found guilty following a judge-alone trial before me.[2]

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1 Crimes Act 1961, ss 135 and 196; and Parole Act 2002, s 107T.
2 *R v Fitzgerald* [2018] NZHC 465.

[2] The circumstances were that Mr Fitzgerald accosted two women walking towards him on a Wellington footpath. He veered towards one, grabbed her and attempted to kiss her on the mouth. The woman averted her face and the kiss landed on her cheek. The second woman intervened. Mr Fitzgerald grabbed her arms and frog marched her backwards until she was up against a shop window. The struggle continued until Mr Fitzgerald desisted and walked off. Mr Fitzgerald was convicted of indecent assault and assault. He was also in breach of a no drug condition imposed as part of a supervision order to which he was subject.

[3] Mr Fitzgerald has previous convictions for similar conduct that have resulted in him previously receiving both a first and second strike warning under the Sentencing Act 2002. These convictions would be his third strike. Following verdict, I deferred the entering of convictions to enable an application for a discharge without conviction. I address that first.

Ruling – is a discharge without conviction available?

[4] A preliminary issue arises before sentencing can proceed. Is a discharge without conviction under s 106 of the Sentencing Act available where a person is found guilty of a third strike offence?[3]

[5] The two key provisions in the Sentencing Act are the third strike provision, and the discharge without conviction provision. To these the Crown would add a "governing provision" section. Section 86D provides:

> **86D Stage-3 offences other than murder: offender sentenced to maximum term of imprisonment**
>
> (1) Despite any other enactment,—
>
> (a) a proceeding against a defendant charged with a stage-3 offence must be transferred to the High Court when the proceeding is adjourned for trial or trial callover under section 57 of the Criminal Procedure Act 2011 or, as the case may be, in accordance with section 36 of that Act, and the

[3] There had been a sentencing indication in this matter: *R v Fitzgerald* [2017] NZHC 2206. Dobson J concluded that a discharge without conviction was not available but allowed the matter to be revisited at any future sentencing: *R v Fitzgerald* HC Wellington CRI-2016-085-3351, 12 September 2017 (Minute of Dobson J) at [3].

proceeding from that point, including the trial, must be in the High Court; and

(b) no court other than the High Court, or the Court of Appeal or the Supreme Court on an appeal, may sentence an offender for a stage-3 offence.

(2) Despite any other enactment, if, on any occasion, an offender is convicted of 1 or more stage-3 offences other than murder, the High Court must sentence the offender to the maximum term of imprisonment prescribed for each offence.

(3) When the Court sentences the offender under subsection (2), the Court must order that the offender serve the sentence without parole unless the Court is satisfied that, given the circumstances of the offence and the offender, it would be manifestly unjust to make the order.

(4) Despite subsection (3), if the Court sentences the offender for manslaughter, the Court must order that the offender serve a minimum period of imprisonment of not less than 20 years unless the Court considers that, given the circumstances of the offence and the offender, a minimum period of that duration would be manifestly unjust, in which case the Court must order that the offender serve a minimum period of imprisonment of not less than 10 years.

(5) If the Court does not make an order under subsection (3) or, where subsection (4) applies, does not order a minimum period of not less than 20 years under subsection (4), the Court must give written reasons for not doing so.

(6) If the Court imposes a sentence under subsection (2), any other sentence of imprisonment imposed on the same occasion (whether for a stage-3 offence or for any other kind of offence) must be imposed concurrently.

(7) Despite subsection (2), this section does not preclude the Court from imposing, under section 87, a sentence of preventive detention on the offender, and if the Court imposes such a sentence on the offender,—

(a) subsections (2) to (5) do not apply; and

(b) the minimum period of imprisonment that the Court imposes on the offender under section 89(1) must not be less than the term of imprisonment that the Court would have imposed under subsection (2), unless the Court is satisfied that, given the circumstances of the offence and the offender, the imposition of that minimum period would be manifestly unjust.

(8) If, in reliance on subsection (7)(b), the Court imposes a minimum period of imprisonment that is less than the term of imprisonment that the Court would have imposed under subsection (2), the Court must give written reasons for doing so.

[6] The governing provision relied on by the Crown is s 86I:

> **86I Sections 86B to 86E prevail over inconsistent provisions**
>
> A provision contained in sections 86B to 86E that is inconsistent with another provision of this Act or the Parole Act 2002 prevails over the other provision, to the extent of the inconsistency.

[7] Finally, s 106(1) provides:[4]

> **106 Discharge without conviction**
>
> (1) If a person who is charged with an offence is found guilty or pleads guilty, the court may discharge the offender without conviction, *unless by any enactment applicable to the offence the court is required to impose a minimum sentence*.

[8] The first argument advanced by Mr Preston is that s 86D(2) applies only once an offender is convicted of a stage-3 offence. Because it operates after the imposition of a conviction, it says nothing about the prior step of whether a conviction is entered at all, which is what s 106 is about.

[9] I agree. The analysis is consistent with the emphasis on sequence identified by the Court of Appeal in *Barnes v R*.[5] It was there emphasised that the provision in s 86C(4), which requires all of a stage-2 sentence to be served without parole, applies to a sentence that has otherwise been arrived at in accordance with normal sentencing principles. So too here, s 86D(2) applies only once there is a conviction.

[10] It is for this reason, also explained in *Barnes*, that s 86I is of no import.[6] There is no inconsistency within the Act because s 86D(2) only applies when there is a conviction. Section 106 addresses the prior step of whether there should be a conviction entered notwithstanding a plea or guilty verdict.

[11] That, however, is not the complete answer because within s 106 itself there is an impediment. The power to discharge without conviction is not available if:

> by any enactment applicable to the offence the court is required to impose a minimum sentence.

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4 Emphasis added.
5 *Barnes v R* [2018] NZCA 42, at [50] and [60]–[64].
6 At [60]–[62].

The parties disagree as to whether s 86D(2) constitutes a minimum sentence.

[12] Mr Preston submits that "any enactment applicable to the offence" means the specific provision concerning which Mr Fitzgerald is charged; here, s 135 of the Crimes Act 1961. There is nothing in the penalty provision of s 135 requiring a minimum sentence. Relying on *Police v Stewart*, Mr Preston further submits the limitation in s 106 does not apply to any orders that must be made upon conviction, only to the sentence.[7] It is submitted that s 86D involves an order. Finally, it is submitted, relying on *Barnes*, that the use of conviction in s 86D(2) is a deliberate choice which is designed to enable s 106 to apply. This supports the proposition that s 86D(2) is not a minimum sentence within the meaning of s 106.

[13] I am of the opposite view, and cannot regard s 86D(2) as doing anything other than stipulating a minimum sentence. It may appear simplistic, but the proposition can be tested by the question – can the court here, if it wishes, impose a sentence less than seven years? The answer is no, and completely so in the sense there is no discretion at all. The manifest injustice exception applies to the parole implications, but not to the length of the sentence.[8] It is irrelevant that the quantum of the sentence is the maximum penalty available; that is the mechanism for determining the minimum length, but it is a mandatory minimum sentence.

[14] Further, s 86D(2) is an enactment applicable to the offence because it concerns serious violence offences as defined by the Act, and s 135 of the Crimes Act is one of those offences. The opening words of s 86D(1) make clear what offences and situations it applies to. Mr Fitzgerald's case is one such situation. Finally, in terms of *Police v Stewart* and the distinction between sentence and order, s 86D(2) relates to a sentence. It is the term of imprisonment imposed consequent upon Mr Fitzgerald being convicted of the offence. It may be that any consequent directions concerning parole periods are orders, but the term of imprisonment itself is a sentence. This is reflected in the language of s 86D(2) – "must sentence".

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7 *Police v Stewart* (2004) 22 CRNZ 35 (HC) at [34].

8 Sentencing Act 2002, s 86D(3).

[15] *Barnes* does not assist here. As the Crown submits, it is very relevant to the issue of whether it would be manifestly unjust to make an order that the defendant serve the whole of the sentence,[9] but not to the length of sentence which is fixed by statutory mandate, and concerning which there is no scope to apply ordinary Sentencing Act principles.

[16] For these reasons, like Dobson J, I consider that the application for Mr Fitzgerald to be discharged without conviction fails for jurisdiction reasons.

Sentence – term of imprisonment

[17] Section 86D requires the Court to impose the maximum sentence, which in this case is seven years' imprisonment. That is the sentence.

[18] In relation to the other offences, the context of the assault is serious. It involves attacking a woman who was seeking to protect her friend. The physical acts are at the lower end of the scale, but it was a traumatic episode. Mr Fitzgerald has a poor criminal record. The sentence for the assault is three months' imprisonment. Section 86D(6) requires that sentence to be concurrent. In relation to the breach of supervision condition, no penalty is required. Mr Fitzgerald is convicted and discharged on that.

Sentence – no parole order

[19] Section 86D(3) requires the Court to order the sentence be served without parole unless, having regard to the circumstances of the offence and offender, it would be manifestly unjust to do so. Section 86D(5) requires a court to give written reasons if such an order is not made. These are my written reasons.[10]

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9 Under s 86C in relation to a stage-2 offence.

10 At the sentencing hearing I indicated that my written reasons would be fuller than the oral summary provided at the time. The oral summary was consistent with these written reasons but lacked some of the detail.

[20] In the present case, when delivering verdict, I indicated that the circumstances of the case made it likely a non-parole order would be manifestly unjust. The Crown has today indicated it agrees. Accordingly, the analysis will be more truncated than might often be the case.

[21] Concerning the offence itself, the nature of the indecent assault is at the bottom end of the range. The actual act was a kiss on the cheek; the attempted act an unwelcome and undoubtedly traumatic attempt to kiss a stranger on the mouth. Standing alone, and leaving aside aggravating features of the offender, it would not attract a jail term.[11]

[22] Concerning the circumstances of Mr Fitzgerald there are two aspects to highlight – his mental health situation,[12] and the past offending that led him to this stage-3 situation. Mr Fitzgerald is a schizophrenic who first presented to Psychiatric Services, in a grossly psychotic state, as a 15 year old. He is now 45 years old and in the intervening period has had numerous engagements with mental health providers. He has consistently been on medication with varying success. He requires constant mental health input. He has been receiving this as a remand prisoner since his arrest on this matter. His mental health issues are linked to his impulsive offending of this type, but not to an extent as to provide him with a defence.

[23] Concerning the offending which leads Mr Fitzgerald to this point, a previous propensity ruling provides a helpful summary:[13]

> The propensity evidence consists of previous indecent assault offending by Mr Fitzgerald. In 2008 Mr Fitzgerald accosted a woman along a footpath. He followed her and as she sought to walk off at pace, Mr Fitzgerald grabbed her buttock. In 2012 the offending was similar but more serious in that Mr Fitzgerald knocked the victim to the ground which caused her skirt to ride up. Mr Fitzgerald fell on top of her and then buried his face in her buttock area while putting his hands there as well. Finally, in 2015 Mr Fitzgerald in short succession slapped or grabbed three women on the buttocks as they walked past him.

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11 See, for example, *Stephenson v Police* [2015] NZHC 3101 where a sentence of nine months' supervision was imposed on appeal for one charge of indecent assault where the appellant followed a stranger on the street and then grabbed her buttocks.

12 In *R v Harrison* [2016] NZCA 381, [2016] 3 NZLR 602 at [148] the Court of Appeal commented mental health difficulties were specifically considered as a justification for introducing the manifestly unjust exception.

13 Fitzgerald, above n 1, at [13].

The 2012 and 2015 incidents generated the two previous strike warnings.

[24] Without minimising the conduct or the impact on the victims, it can be seen the offending which leads Mr Fitzgerald to this point has all been relatively less serious. The 2012 incident has aspects that are more serious and troubling, but the stage-2 and stage-3 offences are respectively briefly grabbing the buttocks of a passing woman, and attempting to kiss a passing woman.

[25] The 2012 offence received an 11 month' imprisonment term. The 2015 incident understandably received a shorter term of four months' imprisonment. The present offence is the least serious assault of the three. An order that Mr Fitzpatrick serve the whole of a seven year sentence in relation to it would be manifestly unjust.

[26] For the purposes of sentencing I have an updated mental health assessment which largely repeats the conclusion of numerous past reports. Mr Fitzgerald has significant mental health issues, and needs constant mental health care. He appears to be acquiring some insight into the "stupidity" (his word) of his offending and avows an intention to desist. It is appropriate to provide encouragement and incentive to maintain this insight. An order that the standard one-third parole rule apply will achieve that, whilst recognising Mr Fitzgerald is still liable to serve the whole period if not able to be released on parole.

[27] For reasons of the nature of the offence, the nature of the earlier stage one and two offences, and the contribution that Mr Fitzgerald's mental health issues make to the offending, I consider an order that he serve the whole of the sentence without parole would be manifestly unjust. The normal parole period should apply.

Outcome

[28] Mr Fitzgerald:

(a) on the offence of indecent assault, you are convicted and sentenced to seven years' imprisonment;

(b) on the offence of breaching a supervision order you are convicted and discharged.

[29] I make no minimum non-parole order, and specifically observe that no order is made under s 86D(3).

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Simon France J