

**IN THE HIGH COURT OF NEW ZEALAND
REGISTRY**

**I TE KŌTI MATUA O AOTEAROA
TE ROTORUA-NUI-A-KAHUMATAMOMOE ROHE**

**CRI-2023-463-000100
[2024] NZHC 387**

BETWEEN JOSHUA GREEN (aka TURNER)
Appellant
AND NEW ZEALAND POLICE
Respondent

Hearing: 15 February 2024
Further submissions: 19 February 2024

Appearances: G C Gotlieb for Appellant
G Banuloes for Respondent

Judgment: 29 February 2024

JUDGMENT OF ANDREW J

This judgment was delivered by Justice Andrew
on 29 February 2024 at 3.00 pm
pursuant to r 11.5 of the High Court Rules 2016

Registrar / Deputy Registrar

Date.....

Introduction

[1] Mr Joshua Green, also known as Joshua Turner, was found guilty following a judge-alone trial on one charge of obstructing a constable in the execution of his duty.¹ Judge Hollister-Jones declined Mr Green’s application to be discharged without conviction and convicted and fined him \$500.²

[2] Mr Green appeals against conviction and sentence on the following grounds:

- (a) The Judge erred in finding that he had obstructed Senior Constable Stringfellow on three occasions on the morning of 30 August 2022;
- (b) the Judge erred in finding that the effect on mana is an ordinary consequence of conviction and that the disproportionality test had not been made out; and
- (c) the Judge erred in deciding that the other consequences raised by Mr Green did not have bearing as direct or indirect consequences of conviction.

[3] The Police oppose the appeal.

Background and District Court decisions

[4] Mr Green is the director of a logging company. On the morning of 30 August 2022, one of the company’s logging trucks was involved in a crash with a utility vehicle on the Napier/Taupō section of State Highway 5. Senior Constable Stringfellow was the first police officer in attendance and arrived at the crash scene at about 6.15 am. At some point between 6.45 am and 7.15 am, Mr Green drove into the centre of the crash scene, parking directly behind a fire truck. Judge Hollister-Jones, held that Mr Green “inserted himself” into the crash scene at an early stage.

¹ Summary Offences Act 1981, s 23(a). Maximum penalty three months’ imprisonment or a fine not exceeding \$2000; *Police v Green* [2023] NZDC 12041.

² *Police v Green* [2023] NZDC 18982.

[5] Shortly after he arrived at the scene, Mr Green saw that his logging truck, driven by a company employee, Mr Murray, was overturned. Mr Green has a very significant personal connection with Mr Murray – Mr Murray’s parents were good friends of Mr Green’s and they tragically died in a similar road accident.³ After Mr Green parked his utility vehicle, he got out of it and went looking for Mr Murray. Early on, he spoke to Senior Constable Stringfellow.⁴ Mr Green subsequently began taking photos of the crashed utility vehicle and the surrounding crash scene.

[6] The Judge held that Mr Green’s actions in taking photographs were directly contrary to a direction he had received from Senior Constable Stringfellow. That was a matter of obvious concern to the Senior Constable. The Judge noted that it was “completely unsatisfactory” for Mr Green to be wandering around a crash scene, being in the vicinity of debris from the crash, going up to the crashed utility vehicle and taking photographs of it.⁵ That was especially the case as one of its occupants was on a stretcher nearby, being attended to by paramedics.

[7] The Judge concluded that Mr Green’s actions in going over to take photographs of the crashed utility vehicle were contrary to a direction to stay where he was. In acting contrary to that direction, he made the Senior Constable’s job at the crash scene more difficult and “thereby obstructed him”.⁶

[8] Judge Hollister-Jones identified the critical issue as being whether Mr Green intended to obstruct Senior Constable Stringfellow. He concluded that:

[42] The critical issue is whether the defendant intended to obstruct Senior Constable Stringfellow. The defendant said he was not there to obstruct anyone. All his actions there were part of his manaakitanga for his staff, his duty of care as a company director, and he wanted to ensure photographs were taken for insurance purposes. It is clear to me that the defendant was so single-minded about his own purposes that he was not concerned about disobeying instructions from the police. He did so on three occasions that morning. The defendant was not concerned about whether his actions hindered the police in doing their job, as long as he could do what he felt he needed to do.

[43] I am satisfied that whilst the defendant’s main purpose was not to hinder Senior Constable Stringfellow, he embarked on a course of conduct that

³ *Police v Green*, above n 1, at [33] and [34].

⁴ *Police v Green*, above n 1, at [37].

⁵ *Police v Green*, above n 1, at [39].

⁶ *Police v Green*, above n 1, at [41].

involved him hindering police in carrying out their function which was a collateral consequence of him achieving his own purpose. When the defendant went back over to the black ute to take photographs after being told to stay where he was, he believed that what he wanted to do was more important than obeying the instruction from Senior Constable Stringfellow.

[44] Having reflected on that purpose, the defendant's pattern of behaviour in disobeying the police instructions that morning, I infer that the defendant formed an intention to obstruct Senior Constable Stringfellow in performing his duties at the crash scene.

[9] Mr Green put forward three grounds in his application for discharge without conviction.⁷ First, he raised concern about the effect of a conviction on his ability to hold a firearms licence. Second, he detailed personal difficulties regarding the health of his infant son. Third, he expressed concern about the effect of a conviction on his standing in the community; that is, the effect on his mana.

[10] Judge Hollister-Jones noted that Mr Green's firearms licence had been revoked as Police no longer considered him to be a fit and proper person. It is unclear whether the revocation of his licence was a direct consequence of the incident in August 2022, but Mr Green expressed concern that a conviction would inhibit his ability to appeal the revocation. However, Judge Hollister-Jones accepted the Police argument that Mr Green's obstruction would be taken into consideration in a firearms appeal regardless of conviction.⁸

[11] Judge Hollister-Jones found no relevance of Mr Green's personal circumstances regarding his infant son's health to the circumstances of August 2022, nor to any effect of a conviction.⁹

[12] The Judge considered that, given the nature of the conviction in question, it would have no material effect on Mr Green's business or community endeavours. He accepted that the "real consequence" of a conviction would be on Mr Green's mana and how he perceived himself.¹⁰ However, he concluded that the effect on mana of a conviction would be "the ordinary consequence of a conviction".¹¹ There was

⁷ *Police v Green*, above n 2, at [20].

⁸ *Police v Green*, above n 2, at [21]–[24].

⁹ *Police v Green*, above n 2, at [25].

¹⁰ *Police v Green*, above n 2, at [34] and [38].

¹¹ *Police v Green*, above n 2, at [35].

therefore no basis to conclude that the consequences of the conviction would be out of all proportion to the gravity of the offending. Accordingly, the Judge declined Mr Green’s application for a discharge without conviction.

[13] Subsequently, Mr Green was successful with his appeal to the District Court against the revocation of his firearms licence.¹²

Legal Principles

Appeals against conviction

[14] Appeals against conviction following a judge-alone trial must be allowed if the judge has erred in their assessment of the evidence to such an extent that a miscarriage of justice has occurred,¹³ or if a miscarriage of justice has occurred for any other reason.¹⁴

[15] The onus is on the appellant to show that an error has been made. In assessing whether there has been an error, an appellate court must take into account any advantages a trial judge may have had.¹⁵ Because of this, where the challenge is to credibility findings based on contested oral evidence, an appellate court will exercise “‘customary’ caution”.¹⁶ However, the appellate court must form and act on its own assessment of the evidence and if it comes to a different view, the trial judge necessarily will have erred.¹⁷

[16] If it is shown that an error has been made, it must also be shown that this error has created a real risk that the outcome of the trial was affected or has resulted in an unfair trial or a trial that was a nullity, such that a miscarriage of justice has occurred.¹⁸ A “real risk” that the outcome was affected exists when “there is a reasonable

¹² *Green v Commissioner of Police* [2023] NZDC 19899.

¹³ Criminal Procedure Act 2011, s 232(2)(b).

¹⁴ Criminal Procedure Act 2011, s 232(2)(c).

¹⁵ *Sena v Police* [2019] NZSC 55, [2019] 1 NZLR 575 at [38].

¹⁶ *Sena v Police*, above n 15, at [38].

¹⁷ *Austin, Nichols & Co Inc v Stichting Lodestar* [2007] NZSC 103, [2008] 2 NZLR 141.

¹⁸ Criminal Procedure Act, s 232(4).

possibility that a not guilty (or more favourable) verdict might have been delivered if nothing had gone wrong”.¹⁹

Discharge without conviction

[17] An appeal against refusal to discharge without conviction is a composite appeal against conviction and sentence.²⁰

[18] Sections 106 and 107 of the Sentencing Act 2002 set out the statutory criteria for discharges without conviction. The test in s 107 is as follows:

107 Guidance for discharge without conviction

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.

[19] In *Z (CA447/12) v R*, the Court of Appeal set out a three-stage test to be applied by the court when considering applications for a discharge without conviction.²¹ First, when considering the gravity of the offence, the court should consider all aggravating and mitigating factors relating to the offence and the offender. The court should then consider the direct and indirect consequences of conviction and consider whether those consequences are out of all proportion to the gravity of the offence. Finally, if the court determines that the consequences are out of all proportion, it must still consider whether it should exercise its residual discretion to grant a discharge, noting that it will be rare for the court to refuse a discharge in such circumstances.

Analysis and decision

Issue (a) – Obstruction charges proven?

[20] Mr Green contends that, on the available evidence, the District Court Judge erred in finding that he in fact obstructed Senior Constable Stringfellow in the execution of his duty and that he intended to do so.

¹⁹ *R v Sungsuwan* [2005] NZSC 57, [2006] 1 NZLR 730 at [110].

²⁰ *Jackson v R* [2016] NZCA 627; *Gasu v New Zealand Police* [2021] NZHC 2948.

²¹ *Z (CA447/12) v R* [2012] NZCA 599, [2013] NZAR 142 at [27].

[21] Mr Green accepts that he breached a Police roadblock in order to reach the crash scene. However, he says that Senior Constable Stringfellow allowed him to remain at the crash scene once he had arrived. As such, he claims that he had permission to be at the crash scene and, in the absence of a direction not to take photographs, it was reasonable for him to be there to take photographs in his capacity as the owner of Green Transport.

[22] I accept and agree with the submission that, at least to the point of being instructed to stay where he was, Mr Green was not obstructing Senior Constable Stringfellow. However, that does not affect the appeal in any tangible way; the real issue is acting contrary to that instruction.

[23] I find that there is no merit to this ground of appeal. The Judge, who had the benefit of seeing and hearing all of the witnesses, including Mr Green, carefully evaluated all of the evidence and concluded, as he was entitled to, that he preferred the evidence of Senior Constable Stringfellow and Constable Lilly regarding the order of events.²² His Honour concluded that Mr Green was told by Senior Constable Stringfellow to stay where he was but, contrary to those directions, Mr Green took photos, starting with photographs of crash debris near to the site. It was Mr Green's actions that resulted in a confrontation between Senior Constable Stringfellow and Mr Green.

[24] There is no basis for this Court to disturb those findings. That includes the finding that it was "completely unsatisfactory" for Mr Green to be wandering around the crash scene in the manner that he did. By failing to follow the Police's instruction and moving away to take photographs, Mr Green plainly obstructed Senior Constable Stringfellow in the execution of his duties.

[25] The findings of Judge Hollister-Jones appear to have been accepted by Mr Green. In the affidavit that he filed for the discharge without conviction he noted:²³

I had believed that things had occurred in a different order to what Senior Constable Stringfellow had set out in his brief and his evidence in court.

²² At [36].

²³ At [5].

Having been through the trial process and seeing the details of the day played out step by step, I now accept the Judge's findings completely.

[26] The ground of appeal challenging conviction therefore appears to be at odds with Mr Green's own sworn statement that he filed for the purposes of sentencing.

[27] I further find that the learned District Court Judge correctly identified an intention to obstruct as being a key issue. In doing so, he carefully applied the relevant principles, including those contained in the leading decision of *Mackley v Police*.²⁴ He correctly noted that "there must be an intention that what the [Senior Constable] was trying to do should be hindered or made more difficult".²⁵ Furthermore, he noted that an intention to obstruct may be an unavoidable inference, even if it was not the defendant's dominant intention.²⁶

[28] Having reflected on Mr Green's purpose and his "pattern of behaviour" in disobeying the Police's instructions, the Judge ultimately concluded that Mr Green had formed an intention to obstruct Senior Constable Stringfellow in performing his duties at the crash scene.

[29] In my view, there was a proper evidential foundation for that determination and Mr Green has failed to establish any miscarriage of justice. The first ground of appeal is rejected.

Issue (b) – Discharge without conviction

[30] The critical issue to address is whether the Judge was in error and a miscarriage of justice occurred because he found that the effect on Mr Green's mana was simply "an ordinary consequence" of conviction. It was, of course, on that basis that the Judge concluded that the disproportionality test under s 107 had not been made out.

[31] The learned District Court Judge correctly identified the three-stage test for a discharge without conviction. In assessing, at step one, the gravity of the offence, he

²⁴ *Mackley v Police* HC Christchurch AP13/94, 4 May 1994.

²⁵ *Police v Green*, above n 1, at [8].

²⁶ *Police v Green*, above n 1, at [9]; *Minto v Police* [2013] NZHC 253 at [18].

concluded that the gravity of the offending was at the low end.²⁷ I agree with that conclusion. The Police do not argue otherwise.

[32] There were no aggravating features of this offending, but several significant mitigating factors. These include the finding by the Judge that Mr Green's dominant purpose was not to hinder Senior Constable Stringfellow, albeit there was the necessary intention to obstruct. In the subsequent firearms appeal decision of Judge Kelly,²⁸ the Judge, referring to the decision under appeal, noted that the obstruction was of a low level and was not Mr Green's main purpose – rather, it was a collateral consequence of him seeking to achieve his own purpose. I agree with that assessment.

[33] In discussing the low-level nature of this offending, it is important to also acknowledge that Mr Green had a legitimate interest, both professional and personal, in what was going on at the crash scene. This does not justify his actions but is a mitigating factor of the offending. I also note the findings of the Independent Police Conduct Authority (IPCA) who dealt with the complaint by Mr Green against the Senior Constable. The IPCA's decision of 30 September 2022 records the Senior Constable's acknowledgment that he told Mr Green at the scene that his company has "a bad reputation in Taupō". In part, that might explain what Judge Hollister-Jones described as Mr Green's loss of self-control at the time. The Senior Constable has confirmed that he will not say things like that again.

[34] I am satisfied that Mr Green has demonstrated genuine remorse for his offending, which is a significant mitigating factor. He has apologised to the Senior Constable in a letter and sought to apologise in person. Furthermore, his affidavit clearly indicates his regret for the offending and his willingness to take responsibility. Combined with the other mitigating factors, I am satisfied that Mr Green's offending is of a very low gravity.

[35] The next issue to address is, of course, the direct and indirect consequences of convictions.

²⁷ *Police v Green*, above n 2, at [18].

²⁸ *Green v Commissioner of Police*, above n 12, at [93].

[36] In his submissions, Mr Gotlieb, for the appellant, places great emphasis and weight on the impact of a conviction on the appellant's mana. Mr Green is a kaumatua and leader within Ngāti Tūwharetoa.²⁹ In an affidavit from Mr John Bishara, the Board Chair of the Tūwharetoa Māori Trust Board and Chief Executive Officer of the Lake Taupō Forest Trust, Mr Green is described as a “great leader in our community”. The cultural report, and other information before the Court, notes that he has been an elected trustee for many Māori land trusts over the years.³⁰ His company, Green Transport Ltd, is very competitive within the forestry world and may be the largest Māori owned trucking company in the New Zealand logging industry. The company is a strong supporter of local community sports clubs, including Taupō United Rugby Seniors, Tongariro Rugby United Seniors, and others. The cultural report further records that he is the holder of significant whakapapa knowledge for his whānau, hapū and iwi. He is also the current director of the Central North Island Wood Council.

[37] Mr Gotlieb has referred to the recent Supreme Court decision *Ellis v R*,³¹ where the Chief Justice summarised the fundamental principle of mana as follows:³²

Mana conveys concepts of power, presence, authority, prestige, reputation, influence and control. While mana is one of the most valuable and important things a person can have, an allegation of a hara [the commission of a wrong, the violation of tikanga resulting in imbalance] alone may result in a corresponding loss of mana. It applies at both an individual level, so that hara does not occur against the individual only but can impact the whānau, hapu or iwi. There are two relevant types of mana here:

- (i) Mana tuku iho – mana inherited from ancestors; and
- (ii) Mana tangata – mana derived from actions or ability.

[38] The affidavit from Mr Bishara provides powerful evidence that a conviction will have a significant effect on Mr Green's mana. Mr Bishara has referred to mana in the following terms:

8. In Māori society, a person's mana is earned through whakapapa (lineage), but mainly for what someone does i.e., leadership, responsibilities, expertise and experience, acts of courage, achievements, and particular skills.

²⁹ He is of Ngāti Tuwharetoa, Te Whānau ā Apanui, and Ngāti Maniapoto descent.

³⁰ He was an elected trustee for three Maraeroa trusts (A,B,C) and the elected chairperson for the Maraeroa C Trust for nine years, up until 2020.

³¹ *Ellis v R* [2022] NZSC 114.

³² *Ellis v R*, above 31, at [185](c).

9. Mana can be a source of personal and collective strength and is closely tied to a person's whakapapa (ancestry) and their connection to the land. Mana empowers individuals to have authority, make decisions, and to act.

[39] Mr Bishara further notes that, from a Māori perspective, whakamā (shame, embarrassment, and loss of mana) is a very real and deep burden and/or penalty for a Māori person to carry and is a very real consequences of a conviction. Mr Bishara has personally observed the deep burden and whakamā that Mr Green has experienced. He describes this as particularly concerning because Mr Green is “a great leader in the community”.

[40] In assessing the issue of direct and indirect consequences and, in particular, the impact on mana, I acknowledge that Mr Green has previous convictions. However, these are both historic and traffic-related. He is now nearly 50 years old and clearly holds positions of leadership. I also note that there are significant references and letters of support before the Court testifying to his significant roles within the community generally.

[41] In assessing all this material, I find that the consequences of a conviction on Mr Green and, in particular, the impact on his mana, would be significant. I also find that, in concluding that the consequences here are the “ordinary consequence of conviction”, the learned District Court Judge was in error. On the particular facts here, the consequences are not simply the “ordinary consequences” of a conviction. In coming to that conclusion I have, of course, had the advantage of having additional evidence before me which was not available to the Judge of first instance.³³

[42] In weighing those significant consequences against the low gravity of the offending, I conclude that, in terms of the test in s 107, a conviction in this case would be out of all proportion with the gravity of Mr Green's offending. I also find that as a matter of discretion a discharge without conviction should be granted.

[43] Mr Green's loss of his firearms licence, albeit that his appeal was successful, is also a factor of relevance. The circumstances of this offending lead to the Police

³³ I grant leave to file Mr Bishara's affidavit. I note there is no objection from the Police. Criminal Procedure Act 2011, s 334 and *Lundy v R* [2013] UKPC 28, [2014] 2 NZLR 273 at [120].

revoking his firearms licence and I accept his evidence that he has suffered significant stress and loss of mana as a result of that. As noted by Judge Kelly in his decision of 21 September 2023,³⁴ Mr Green has used his firearms for recreational hunting to provide meat for his whānau and others. Mr Green is obviously a skilled and very experienced hunter. In his affidavit before the District Court, he noted that hunting is not only “valuable mahikai”, but also important whānau bonding time. He is the Mahikai Kaiako (hunting teacher) for the whānau.

[44] Finally, I note that this is quite a different case from *Parata v Police*,³⁵ where this Court addressed the impact on Mr Parata’s mana and considered whether the consequences of a conviction would mean that he would not be able to become a kaumātua. In that case, the gravity of the offending was held to be “moderately serious domestic violence” and the Judge held that the issue of whether Mr Parata would be able to become a kaumātua was remote and a matter the Court could give little weight to.³⁶ Eaton J held that the gravity of the offending in that case should not be understated and, significantly, considered that, since Mr Parata’s offending had already been publicised, a discharge without conviction could not prevent the loss of mana ensuing from a conviction.³⁷ This is readily distinguishable from Mr Green’s case as his offending is of very low gravity and, thus far, his offending has not been publicised throughout his community. As such, unlike *Parata*, a discharge without conviction can serve to restore, or prevent the loss of, Mr Green’s mana.

Result

[45] The appeal is granted. Mr Green is discharged without conviction pursuant to ss 106 and 107 of the Sentencing Act 2002.

Andrew J

³⁴ *Green v Commissioner of Police*, above n 12, at [78].

³⁵ *Parata v Police* [2022] NZHC 2623.

³⁶ *Parata v Police*, above n 35, at [57].

³⁷ *Parata v Police*, above n 35, at [57].