IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA45/2024
[2024] NZCA 467

BETWEEN	JOEL MORRISON TILLER Applicant
AND	THE KING Respondent

Court: Thomas, Whata and Grice JJ

Counsel: Applicant in person
I A A Mara for Respondent

Judgment: 20 September 2024 at 10.30 am
(On the papers)

JUDGMENT OF THE COURT

The application for leave to bring a second appeal against conviction and sentence is declined.

REASONS OF THE COURT

(Given by Grice J)

Background

[1] Mr Tiller was convicted after pleading guilty to two charges of contravening a protection order, one of them representative,[1] and one charge of resisting arrest.[2]

[1] Family Violence Act 2018, ss 90(a), 9, and 112(1)(a) — maximum penalty three years' imprisonment.

[2] Summary Offences Act 1981, s 23(a) — maximum penalty three months' imprisonment or $2,000 fine.

He was sentenced to 12 months' supervision in the District Court.[3] The decision was upheld on appeal to the High Court.[4] Mr Tiller now seeks leave to bring a second appeal against the refusal to grant his application for a discharge without conviction, on the basis that the appeal is in the public interest.

[2] Mr Tiller is subject to two protection orders, one each in respect of two different complainants, both of whom he has had previous relationships with. Mr Tiller and the second complainant have a child together. He breached those orders through text messages and phone calls to the complainants in January, July and August of 2021. The resisting arrest charge relates to events which occurred in March 2022. Mr Tiller drove away after being pulled over by police and informed that he was under arrest for breach of bail conditions, which were in place in connection with offending unrelated to the matters under appeal. Following a police car chase, Mr Tiller was stopped outside his residential address and physically resisted arrest.

Legal principles

[3] An appeal against a refusal to grant a discharge without conviction under s 106 of the Sentencing Act 2002 is an appeal against conviction.[5] Leave to bring a second appeal therefore must not be granted unless this Court is satisfied that the appeal involves a matter of general or public importance, or that a miscarriage of justice may have occurred or may occur unless the appeal is heard.[6] A matter of general or public importance typically raises a question of law that has "broad application beyond the circumstances of the particular case".[7] For the miscarriage of justice limb to be made out, the court will generally require a "reasonably available" argument that the lower court is in error.[8]

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3 *R v Tiller* [2023] NZDC 19823 [District Court decision].
4 *Tiller v R* [2023] NZHC 1050 [High Court decision].
5 *Jackson v R* [2016] NZCA 627, (2016) 28 CRNZ 144 at [6]–[9].
6 Criminal Procedure Act 2011, s 237.
7 *McAllister v R* [2014] NZCA 175, [2014] 2 NZLR 764 at [36].
8 At [37].

[4] The three-step process for determining whether an application for a discharge without conviction should be granted is prescribed by s 107 of the Sentencing Act, and has been articulated by this Court on numerous occasions.[9] The court must consider:

(a) the gravity of the offending;

(b) the direct and indirect consequences of a conviction on the applicant; and

(c) whether those consequences would be out of all proportion to the gravity of the offending.

District Court decision

[5] In the District Court, Judge Lummis considered each of the three criteria for a discharge without conviction as they applied to the offending. She noted in relation to the gravity of the offending that the psychological harm to the complainants due to the breach of their respective protection orders must be taken seriously.[10] While the offending did not involve physical violence, Mr Tiller had sent three text messages without identifying himself, which were of a personal character and included comments of a sexual nature, to the first complainant in January 2021. In addition, in August 2021, the appellant made a veiled threat in a telephone call about breaching his protection order if the first complainant did not agree to drop the order. Mr Tiller phoned the first complainant again some two weeks later, but she did not take the call. The second complainant received a call from Mr Tiller in July 2021. He warned her not to speak to his daughter, presumably referring to their daughter, and ended the call.

[6] The Judge noted that the complainants had reported experiencing significant stress and were living in a state of constant fear as a result of Mr Tiller's actions.[11] The Judge also referred to the frequency and repetition of the offending.[12] After considering the aggravating and mitigating features of the offending, the Judge

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9 See *Z (CA447/2012) v The Queen* [2012] NZCA 599, [2013] NZAR 142 at [8]; *R v Hughes* [2008] NZCA 546, [2009] 3 NZLR 222; and *Blythe v R* [2011] NZCA 190, [2011] 2 NZLR 620.

10 District Court decision, above n 3, at [19].

11 At [15] and [16].

12 At [19].

concluded that the gravity of the offending was properly characterised as "being somewhere in the lower end of moderate".[13]

[7] As to the second step of assessing the direct and indirect consequences of a conviction, the Judge noted that the key consequence for Mr Tiller was in regard to his occupation.[14] However, while Mr Tiller reported experiencing difficulties in obtaining employment and suggested his career prospects had been effectively destroyed, the Judge considered there was insufficient evidence to persuade her that a conviction would have significant consequences in terms of his occupation.[15] Mr Tiller also raised concern about the impact on his potential future travel prospects. The Judge considered the suggested consequences were largely speculative, but accepted that convictions, in general, make travel more difficult.[16]

[8] Finally, turning to the question of proportionality, the Judge found that the consequences of convictions for Mr Tiller did not outweigh the gravity of his offending.[17] Therefore a discharge without conviction was not appropriate in the circumstances.

[9] Both parties had agreed that the punitive aspect of Mr Tiller's sentence had already been met, as he had spent 86 days in custody and 237 days on electronically monitored bail, with a 24 hour curfew.[18] The Judge considered that to be a significant penalty for the type of charges faced by Mr Tiller, and that therefore the only need in terms of sentencing was supervision.[19] An order for 12 months' supervision was imposed with the conditions recommended in the pre-sentence report.[20]

High Court decision

[10] On appeal, O'Gorman J found there was no error in the District Court Judge's approach in determining that a discharge without conviction should not be granted.

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13 At [35].
14 At [37].
15 At [40] and [44].
16 At [43].
17 At [45].
18 At [48].
19 At [48] and [49].
20 At [51].

She rejected Mr Tiller's argument that the offending was not serious because it did not involve physical violence or explicit threats, repeating Judge Lummis' observation that, as has been emphasised by this Court, psychological harm caused to complainants through breach of protection orders "should not be understated".[21] The Judge considered that Mr Tiller had failed to appreciate the true gravity of his offending. She described the offending as "moderately serious", noting that it involved threats, sexual and demeaning comments, and insults to the complainant on a number of different occasions.[22] The fact that the offending occurred while Mr Tiller was on bail was an additional aggravating factor. The charge of resisting arrest was also characterised as moderately serious.

[11] The Judge noted that Mr Tiller's main concern was in relation to his employability.[23] The Judge acknowledged that the convictions might make gaining employment more difficult, but considered there was insufficient evidence to substantiate that he could not gain employment because of the convictions.[24] Similarly, while accepting that it might be more difficult for Mr Tiller to travel overseas, the Judge found the evidential requirements of the impact of the convictions in this regard were not made out.[25] Even taking account of the real risk of those consequences, the Judge determined that the consequences of the offending did not outweigh the gravity of the offending.[26]

The application for leave to bring a second appeal

Matter of general or public importance

[12] Mr Tiller submits that this is a matter of public interest because of the "significant inconsistencies" that have arisen across District Court decisions in relation to discharges with conviction. He refers to three cases released this year in which discharges with conviction were granted, noting that those respective judges chose "to make very compassionate and kind decisions". Mr Tiller submits that his offending is

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21 High Court decision, above n 4, at [14], citing *Weidemann v R* [2018] NZCA 381, [2018] NZFLR 707 at [43].
22 At [16].
23 At [17].
24 At [23(b)].
25 At [20]–[21] and [23(b)].
26 At [23(c)].

considerably less severe than in the cases he cites. He contends that a discharge without conviction would have significant benefits in terms of his career prospects, quality of life, and future wellbeing. Mr Tiller notes that he is very remorseful, has already experienced significant punishment in advance of sentencing, and is highly motivated to never reoffend. He makes reference to his time spent on bail, lack of prior convictions, willingness to participate in restorative justice, and completion of a men's non-violence programme.

[13] Mr Tiller referred to three cases reported in newspaper articles. We have located the judgments for what appear to be those cases. All of the decisions involve very different circumstances to Mr Tiller's offending.

[14] The first is *R v [L]*, which involved a charge of careless driving causing death, following a tragic incident in which five-year-old boy was accidentally killed after falling off the back of his father's vehicle.[27] The Judge found that the consequences of a conviction would be out of proportion to the defendant's culpability,[28] as every time that conviction had to be analysed it would be a triggering event for him.[29]

[15] The second case referenced is *Police v Adesanya*.[30] In that case, Ultimate Fighting Championship fighter Israel Adesanya was discharged without conviction for driving with excess blood alcohol. The Judge noted that Mr Adesanya had plans for international travel in relation to his career, and that there was a "virtual certainty" that he would lose his endorsements if convicted.[31] The Judge therefore considered that the consequences of a conviction would have a real and appreciable impact on Mr Adesanya's employment and travel opportunities. He concluded that the gravity of the offending, which was assessed at a moderate to low level, was outweighed by the consequences of a conviction in the circumstances.[32]

[16] The final case referred to by Mr Tiller, *Police v [MG]*, concerned a young man who punched a 71-year-old woman three times in the head, while partaking in a protest

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27 *R v [L]* [2024] NZDC 11239.
28 At [20].
29 At [16].
30 *Police v Adesanya* [2024] NZDC 3033.
31 At [15] and [16].
32 At [17].

against the speaker Posie Parker at an event in Auckland.[33] The Judge took into account the fact that the defendant had pleaded guilty at the earliest opportunity, his expressions of remorse, and his youth, given that he was 20 years of age.[34] In addition, he noted that the defendant had undertaken a number of counselling and rehabilitative measures to address the offending, and faced additional challenges due to his neurodiversity.[35] The Judge was satisfied "by a reasonably clear margin" that a conviction would be out of all proportion to the gravity of the offence.[36]

[17] We set out the factors involved in the District Court decisions only to illustrate that the considerations in each case must be evaluated by reference to the relevant circumstances. It goes without saying that the approach prescribed by s 107 (as set out above) applies, and each assessment of an application for discharge without conviction will be dependent on its own facts and whether the criteria are met in those particular circumstances. The proposed appeal does not raise a matter of general or public importance merely because discharges without conviction were granted in the above three cases. The High Court and District Court in this case properly applied the established principles.

Miscarriage of justice

[18] Mr Tiller further contends that the Judge erred in finding that the consequences of his convictions for breach of protection orders were not out of proportion with the seriousness of the offending. He suggests that the categorisation as "family violence" convictions carries significant connotations of physical violence towards family members, which are misleading in the circumstances and likely to be highly detrimental to his employment prospects. He notes that he has been unable to gain employment in his chosen field since resigning from his last job in January 2022, having been rejected for over thirty job opportunities. Mr Tiller says the disadvantage this has caused him will "at least halve" his earning capacity going forward.

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33 *Police v [MG]* [2024] NZDC 4551.
34 At [8]–[10].
35 At [11]–[13].
36 At [20].

[19] In any event, even if Mr Tiller obtained leave to file further evidence on appeal, his reliance on assertions and screenshots indicating he was unsuccessful in a number of job applications is unpersuasive. There is no clear link to demonstrate that the lack of success is related to the entry of convictions against him. We note that difficulties in securing employments are an ordinary consequence of a conviction, and in our view in this instance that consequence must "yield to the employer's right to know".[37]

[20] Mr Tiller is seeking to relitigate arguments already raised and considered in both the District Court and the High Court. He has not identified any error in either of the lower Courts' decisions. Mr Tiller's written submissions suggest a continued failure to take responsibility for the gravity of his offending. He again refers to the fact that he did not make "explicit" threats nor use physical violence to diminish the seriousness of the offending, a matter of concern noted in the High Court decision.[38] Both Judges made reference to this Court's decision in *Weidemann v R*, emphasising the seriousness of breaches of protection orders.[39] The impact on both complainants was significant.

[21] We conclude that there is no apparent error in the lower Courts' conclusions that the consequences of convictions in this instance are not out of proportion to the gravity of Mr Tiller's offending. It follows that we are not satisfied a miscarriage of justice may have occurred.

Result

[22] The application for leave to bring a second appeal against conviction and sentence is declined.

Solicitors:
Te Tari Ture o te Karauna | Crown Law Office, Wellington for Respondent

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37 *R v Taulapapa* [2018] NZCA 414 at [42(a)].
38 High Court decision, above n 4, at [16].
39 *Weidemann v R*, above n 21.