

**IN THE DISTRICT COURT
AT AUCKLAND**

**I TE KŌTI-Ā-ROHE
KI TĀMAKI MAKĀURAU**

**CRI-2018-004-004070
[2018] NZDC 22323**

NEW ZEALAND POLICE
Prosecutor

v

JAMES LAWRENCE GILLILAND
Defendant

Hearing: 17 October 2018

Appearances: R Coubray for the Prosecutor
M Dyhrberg QC for the Defendant

Judgment: 31 October 2018

**RESERVED JUDGMENT OF JUDGE J JELAS
(Application under s 106 of the Crimes Act 1961)**

[1] Mr Gilliland has accepted responsibility for his first criminal offence and has pleaded guilty to injuring the victim while having reckless disregard for the victim's safety.¹ The maximum penalty of this offence is five years' imprisonment.

[2] Mr Gilliland applies to the Court for no conviction to be entered against his name in respect of this admitted offence.² He submits that the consequences of a conviction, both direct and indirect, are disproportionate to the gravity of the offending.³

¹ Crimes Act 1961, s 189(2).

² Sentencing Act 2002, s 106.

³ Section 107.

[3] The application is opposed by the police.

[4] A 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.⁴ This requires a three step process: first, identify the gravity of the offence, second, identify the direct and indirect consequences of a conviction; and, third, determine whether the consequences of a conviction are out of all proportion to the gravity of the offence.⁵ This proportionality test is not a matter of discretion, but rather of judicial assessment.⁶ The Court may decide whether to exercise its discretion under s 106 only if the s 107 test is met. It remains open to the Court to decline to exercise its discretion to grant a discharge.

Gravity of the offending

[5] At approximately 8.30 am on 9 May 2018 the victim was driving her car. She was stopped at a controlled intersection waiting to turn left onto a busy intercity road. Her vehicle was the first vehicle in a line of traffic, waiting for a green light. When the light turned green, enabling the victim to drive forward, she was unable to do so due to pedestrians crossing the street on her left-hand side. She was required to give way to pedestrians before turning left. To allow the vehicles queued behind her to drive on, she drove her vehicle slightly forward enabling those vehicles to get past her car.⁷

[6] Mr Gilliland was standing on the street corner closest to the victim's vehicle. He took exception to the victim driving her vehicle slightly forward to enable those vehicles queued behind to pass by. Mr Gilliland kicked the passenger door of the victim's car. The victim wound down her window seeking an explanation from the defendant. He replied, "there are pedestrians crossing".

⁴ *Jackson v R* [2016] NZCA 627, (2016) 28 CRNZ 144 at [12]. See also *Gaunt v Police* [2017] NZCA 590 at [9]-[10].

⁵ *R v Hughes* [2008] NZCA 546, [2009] 3 NZLR 222 at [16] – [17].

⁶ *H (CA680/11) v R* [2012] NZCA 198 at [30].

⁷ Some of those vehicles were waiting to drive straight ahead, across the intersection, or to turn right.

[7] There is no suggestion in the summary that, at any stage, the victim drove her vehicle in a manner that breached any road rule. Neither is there a suggestion that any pedestrian was in danger or that any pedestrian was concerned by the victim's acts.

[8] Once the pedestrians had crossed, the victim drove forward onto the main road, turning left. She stopped and parked her vehicle close to the intersection. She then got out of her vehicle to inspect it for possible damage.

[9] A moment later, the victim and the defendant came to be face-to-face.⁸ Mr Gilliland then placed both his hands on the victim's shoulders and pushed her over. Due to the force of the push, the victim fell backwards onto the concrete footpath. She placed her hand out behind her to break her fall, resulting in her wrist breaking.

[10] After pushing the victim, Mr Gilliland fled along Ponsonby Road. He did not get far, being stopped by a member of the public who pursued and restrained him.

[11] It is Mr Gilliland's act of pushing the victim, causing her to fall backward and break her wrist, that is the basis for the offence that Mr Gilliland has admitted he committed.

[12] The victim's injury was serious. Her right wrist was broken in four places. Her wrist was in a cast for just over four weeks and had various splints of one form or another for another four weeks. The victim is right-handed and was unable to attend to everyday personal tasks and activities and was significantly hampered at work. Considerable burden resulted for those who support the victim in her work. The breaks have now healed but she still suffers a level of discomfort from time to time and is unlikely to regain full strength and mobility in her wrist. The offending has affected her greatly.

[13] The defendant submits the catalyst for the events was the defendant's genuine concern for the pedestrians crossing the main road resulting from his heightened sensitivity to breaches of road rules. It is further submitted that he had no intention

⁸ The summary of facts is silent as to how the victim and the defendant came to be standing face-to-face. All counsel agreed that how that occurred is not relevant to the assessment of the gravity of the offence.

to hurt the victim and that there is a disproportionality between the force applied to the victim and the seriousness of the injury the victim suffered.

[14] The defendant suffered a significant accident while riding his bicycle in 2016. He states that since that incident, he has been sensitive to driver errors and traffic offences. The defendant's sensitivity to traffic rule breaking is recorded in the report of Dr Joseph of the Bexley Clinic.⁹ Mr Gilliland met with Dr Joseph a few weeks after the offence. Dr Joseph describes Mr Gilliland as being easily annoyed by people who commit traffic mistakes. Mr Gilliland informed Dr Joseph that he has taken to recording bad driving examples; he has honked at traffic offenders and, on a few prior occasions, got into confrontations with drivers.

[15] I do not consider Mr Gilliland's heightened sensitivity to driver errors to be of any significant relevance to the gravity assessment. Several factors have led me to this determination.

[16] The starting point is the fact the victim made no driver error. The victim drove her car forward to allow those behind her to pass while she was waiting for the pedestrians to clear. That is not a driver error. Drivers commonly drive their vehicle forwards while waiting for pedestrians to cross without endangering pedestrians. There is no suggestion this was done in an aggressive or some other manner that might have caused the crossing pedestrians concern. Mr Gilliland himself describes the victim's vehicle as "creeping forward", which would suggest a very slow pace.¹⁰ Mr Gilliland's explanation is premised upon a complete misjudgement of the situation. In my view, Mr Gilliland's misjudgement is not a factor warranting some form of credit.

[17] Mr Gilliland's heightened sensitivity to driver errors is described in the supporting submission to his s 106 application as a *condition*.¹¹ Mr Gilliland's heightened sensitivity is not a medical condition and is not described in such terms by

⁹ Applicant's submissions tab 4.

¹⁰ Affidavit of J Gilliland at [2.2].

¹¹ Applicant's submissions at [2.5(iii)]. This paragraph cites s 9(2)(e) of the Sentencing Act which enables mitigation for an offender's diminished intellectual capacity or understanding at the time of the offence.

Dr Joseph. Dr Joseph's report clearly states that no specific psychiatric or psychological therapy is recommended. General counselling was recommended to assist Mr Gilliland with the stresses of the prosecution process.

[18] Dr Joseph does not identify any singular cause for Mr Gilliland's offending. While Mr Gilliland's heightened sensitivity to driver error is noted, other financial and relationship stresses were also listed in the report. From my reading of Dr Joseph's report, it was not Dr Joseph's intention to suggest the cause of the offending was due to Mr Gilliland's perception of driver error. Dr Joseph had merely recorded in his report the explanation Mr Gilliland provided to him.

[19] A final factor which I have considered is the fact that the more likely explanation for the offending was Mr Gilliland's aggressive demeanour at the time. Mr Gilliland acknowledges in his affidavit that events the day prior had "added to [his] aggravated disposition".¹² Immediately prior to the offence, he chose to kick the victim's car door to bring to the victim's attention the crossing pedestrians. There are multiple ways a pedestrian might alert a driver to a perceived danger; kicking the car door would be one of the more extreme and aggressive ways. When the victim informed Mr Gilliland she had driven forward due to cars behind her wanting to get past her vehicle, Mr Gilliland states he was further angered.¹³ His response to a reasonable explanation further evidences his demeanour at the time. Finally, when Mr Gilliland found himself face-to-face with the victim, his immediate response was to push her forcefully. These factors all point to Mr Gilliland's aggressive mood that morning. There may have been multiple factors contributing to Mr Gilliland's demeanour that day, including the negative effects of the other stresses in his life relating to general finances and relationships that Dr Joseph reported.

[20] The Court cannot lose sight of the fact that at the time of the offence, the victim was *not* driving her car, there had been no driver error, she had provided a reasonable explanation to Mr Gilliland for why she had driven her vehicle forward and Mr Gilliland's response was to push the victim to the ground. His actions were entirely unprovoked.

¹² Affidavit of at [2.1].

¹³ Affidavit of at [2.4].

[21] I also do not find Mr Gilliland's submission that it was not his intention to hurt the victim to be relevant. The gravity assessment requires an assessment of the circumstance of the offence upon which the charge is based. The lack of an intention to harm is not an element of this offence and not a relevant factor in the present assessment process. The charge of reckless disregard implies that Mr Gilliland was aware of the potential consequences of his actions and nonetheless continued with his act. In any event, the charge of injuring with intent carries the same maximum penalty of five years imprisonment.¹⁴ Parliament has not drawn a distinction between intentional acts and reckless acts that both result in injury.

[22] Finally, I do not accept Mr Gilliland's submission that the consequential harm to the victim was disproportionate to the force applied. The summary clearly states that it was the force of the push that caused the victim to fall backwards onto the concrete footpath. Mr Gilliland is 29 years old. The victim is a female and almost twice his age. He pushed her forcefully enough to cause her to fall back onto the solid surface. I cannot find that the resulting harm was not a reasonably foreseeable consequence; the consequences are inherent in the charge. This Court is all too familiar with single applications of force that have caused significant harm to victims, particularly where they fall into hard surfaces.

[23] The assessment of gravity requires consideration of other factors beyond the direct circumstances of the offence itself. Mr Gilliland is 29 years of age and, as noted, is appearing in the criminal court for the first time. He accepted responsibility early for this offence and is remorseful for his act. His remorse is expressed in his letter dated 17 May 2018. His remorse has been apparent to others and is described as genuine by those closest to him.¹⁵ Mr Gilliland was prepared to meet with the victim if a restorative justice conference had been convened.

[24] Mr Gilliland has the support of his family, friends and employer who think highly of him. He is described in a variety of positive terms by those supporting him

¹⁴ Crimes Act 1961, s 189(2).

¹⁵ See for example, report by Dr Joseph tab 4, reference by H Bladdock (tab D) and letter by D Frazer (tab D).

in their letters of reference, although none would appear to have been aware of Mr Gilliland's sensitivity to perceived traffic violations.

[25] The defendant is entitled to be considered a first offender who, with the exception of this incident, has to date demonstrated good character.

[26] The defendant has been proactive with responding with this incident. He has engaged with counsellors to identify factors contributing to the offending and learn strategies to cope with future stressors in his life. Those are all positive steps.

[27] Ms Dyhrberg submits that the gravity of the offending, considering the offence in isolation, is "mid-range", not "minor". Ms Dyhrberg further submits, that once all factors are considered, the gravity of the offending can be described as low-level.¹⁶

[28] I have concluded the gravity of the offending is moderately serious, having regard to all factors discussed in the paragraphs above. This was an unprovoked aggressive response resulting in a serious injury to the victim. While the defendant has taken full responsibility for his actions, is in the process of examining contributing factors to the offending and is deeply remorseful for his acts, that does not, in my view, reduce the offending to such a level that it can be described as "low-level".

[29] Neither counsel was in a position to address the starting range of sentence if the present application was declined. I note, in the case of *R v Scott*, a starting point of 12 months' imprisonment was noted for the same offence on comparable facts where a male pushed his partner causing her to fall backward and break her ankle.¹⁷ A starting point sentence in the range of 12 months' imprisonment is consistent with my assessment of the gravity of the offence.

Consequences of a Conviction

[30] Mr Gilliland works as a software developer for [a large international IT company]. Mr Gilliland also subcontracts as a [technician for the second company]. He has worked for [the second company] for at least four years.

¹⁶ Applicant's submissions at [2.13].

¹⁷ *R v Scott* HC Hamilton CRI-2017-419-45, 18 September 2017.

[31] There is no suggestion that a conviction would result in Mr Gilliland losing his employment with either company.

[32] Mr Gilliland's supervisor at [the first company] has filed a letter of support.¹⁸ There is no immediate plans for Mr Gilliland to travel for work purposes with [his employer]. If a travel opportunity did arise in the next short while Mr Gilliland acknowledges another developer could be sent.

[33] Mr Gilliland did not specify any future travel arrangements for [the second company]. In the past he has travelled for the company to Dubai (in December 2014) and Melbourne and Sydney (in 2015). In an affirmation from the director of [the second company], it is stated that Mr Gilliland will be required to travel to Dubai in late November 2018 and to Qatar and India in April 2019.¹⁹ The difficulty of travel arrangements to these three countries if a conviction is entered is relied upon in support of the present application.

[34] Mr Gilliland submits he will be hampered in his advancement with [the first company], and his profession generally, if he is unable to travel overseas when opportunities arise. He cites an international project he is working on in Australia and the international nature of [his employer's] customer base. Mr Gilliland has been working for [his employer] for over two years. To date, he has not travelled overseas for company purposes. The likelihood of him being required to travel overseas for project based work with [his employer] is not readily apparent.

[35] In the future, Mr Gilliland aspires to apply for employment overseas. Countries of interest to him are USA, Canada, Germany or the Czechia. His supervisor at [the first company] describes the personal career benefits for software engineers working overseas. He states such persons "truly kickstart their career and worldly experience by taking on such opportunities". He goes on to describe the general benefits of overseas travel and work experience. Most of the general benefits touched upon apply to all persons who work and travel offshore for a period.

¹⁸ Applicant's submissions tab 11.

¹⁹ Applicant's submissions tab 12.

[36] Finally, Mr Gilliland submits a conviction will hamper his ability to undertake personal travel. He refers to the fact his sister has recently migrated to Spain and the desire to visit her. There are no personal overseas trips presently planned or being contemplated during the next while. Mr Gilliland states future travel will be subject to his financial situation.

[37] It is submitted, a conviction will generally require Mr Gilliland to apply for entry to other countries which is a time-consuming process with an unknown outcome.

[38] An affidavit of J Cottrell, a Wellington barrister and solicitor specialising in immigration law has been filed to address the effects of a conviction upon international travel.

[39] The Crown submits a conviction, if entered, will not bar Mr Gilliland's entry into other countries but will generally require him to engage in a more detailed immigration approval process. The Crown confirmed it is not the Crown's intention to seek a final sentence of imprisonment, if the present application was declined. Mr Gilliland would not be in the position of seeking travel approval after serving a prison sentence. The Crown submits that a combination of supportive references (like those supplied to the court in support of the present application) along with a court record recording all relevant positive factors²⁰ makes it unlikely, particularly as time passes by, that a foreign immigration service would deny entry to Mr Gilliland. Canada certainly appears to adopt this approach. Ms Cottrell states that Canada places emphasis on time passed since the incident and steps taken since the offence.

[40] The Crown noted that there are many countries that don't require a visa for short trips. The USA requires disclosure of an arrest and conviction meaning Mr Gilliland will still need to go through a visa approval process to gain entry to the USA irrespective of the outcome of the present application. Ms Dyhrberg accepted the enquiry process by US immigration officials would have been triggered by Mr Gilliland's arrest. She submits the outcome of that process is more likely to be positive for Mr Gilliland if no conviction were entered.

²⁰ Those factors are referred to in paragraphs [23]-[26] above.

[41] Finally, the Crown submits some of the travel referred to by Mr Gilliland is aspirational and dependent upon many factors that include his financial ability to travel. It is noted that Mr Gilliland is presently in a relationship with a supportive but dependant partner who is still recovering from a severe illness suffered two years ago. Whether Mr Gilliland will in fact travel in all the ways he has set out in his affidavit is largely unknown.

[42] From that information supplied it does not appear that a conviction will prevent Mr Gilliland travelling for short periods of time to Qatar (stays of less than 30 days) and Ireland (stays of less than three months). Travel to India for stays up to 60 days does not require police certification. From the information filed, Mr Gilliland would be able to fulfil his travel obligations with [the second company]

[43] The consequences of a conviction being will result in Mr Gilliland undertaking the more time-consuming process of applying for permission to travel to those countries that do not allow short term visits without a visa. I accept that the outcome of that process will be unknown until the application is made and the result received. However, I do not accept that a conviction will mean that Mr Gilliland will be ineligible for a visa for all countries. Canada certainly looks promising, particularly as time goes by. As Ms Cottrell records, the general purpose of declaring criminal history is to identify individuals who pose a risk to the country and to ensure such persons are excluded. Mr Gilliland, on any measure, would be considered to be a low risk of any re-offending.

[44] I also accept that a consequence of a conviction will result in Mr Gilliland being disadvantaged when applying for future positions of employment. He will be competing against those applicants who have no convictions and as a result he may suffer a disadvantage. I do not accept that a conviction will be a bar to all future employment prospects. Mr Gilliland has the support of both his employers who are fully aware of the present offending. [His employer] is an international company that regularly sponsors its staff to take up positions in their other branch offices based around the world. Mr Fraser is supportive of Mr Gilliland taking up that opportunity in the future should Mr Gilliland so desire. This is clear evidence that promotion, within [the first company], will be available to Mr Gilliland. It would also appear that

Mr Gilliland will have the benefit of positive work references if he were to seek employment with another organisation.

[45] From the information filed, I conclude the consequences of a conviction for Mr Gilliland will be that, at some future date, he will need to seek a visa to travel and the outcome of that process will be unknown until the result is received. However, I do not anticipate Mr Gilliland will be barred from entry to all countries.

[46] Mr Gilliland may also be disadvantaged with future job applications but again I do not accept the opportunities for advancement will be prohibited by a conviction.

Proportionality

[47] Having considered the gravity of the offence and what the direct and indirect consequences would be if the conviction were to remain, I must then determine whether those consequences would be out of proportion to that gravity. As mentioned previously, the Court must not grant a discharge of conviction unless it is satisfied that the consequences will be out of proportion to the gravity of the offence.²¹

[48] In my view, the consequences of the offending are not disproportionate to the gravity of the offending. As mentioned earlier in this judgment, the victim's injury was serious. Mr Gilliland's actions were unprovoked and the harm caused by his actions was a reasonably foreseeable consequence. While Mr Gilliland is commended for his early acceptance of responsibility and willingness to participate in a restorative justice conference I have concluded the offending to be moderately serious.

[49] The likely consequences which could stem from this conviction will not prevent Mr Gilliland from continuing working in his present positions. Nor will convictions prevent him from undertaking present work commitments overseas, nor likely prevent him from any other future travel, whether it be for leisure or work. While the process of arranging travel will be more time-consuming, where a country requires a visa for entry, it cannot be concluded said one way or another, what the

²¹ Sentencing Act, above n 2, s 107.

likely consequence will be. I consider that a bar of entry is unlikely to result given the positive aspects of the case I have already touched upon.

[50] While there are consequences which will likely follow the conviction, I do not consider that those consequences are disproportionate to the gravity of the offending. I do not consider that the test set out in s 107 has been satisfied.

Conclusion

[51] There are no additional factors that, in my view, warrant an exercise of discretion in Mr Gilliland's favour and a granting of the application. I have considered the various cases that have been filed in support of the application. Each of those cases are highly fact dependent. While there are previous instances where the applications have been successful and no conviction entered, the outcome in those cases was warranted on the particular facts of those cases. The facts of this case differ.

[52] The application is declined.

Judge J Jelas
District Court Judge

Date of authentication: 30/10/2018
In an electronic form, authenticated pursuant to Rule 2.2(2)(b) Criminal Procedure Rules 2012.