

**IN THE DISTRICT COURT
AT INVERCARGILL**

**I TE KŌTI-Ā-ROHE
KI WAIHŌPAI**

**CRI-2019-025-002078
[2020] NZDC 9234**

NEW ZEALAND POLICE
Prosecutor

V

BROOK O'KANE
Defendant

Hearing: 25 May 2020
Appearances: Sergeant P Stratford for the Prosecutor
J U Mooney for the Defendant
Judgment: 25 May 2020

**RULING OF JUDGE B A FARNAN
[ON S 106 APPLICATION]**

[1] Brook O'Kane, you are before me today, represented by Mr Mooney.

Charges

[2] You have pleaded guilty to one charge of assault on a family member, namely your mother. That charge carries with it a maximum penalty of two years' imprisonment. You admitted that offending on 5 February 2020.

[3] You are also facing a charge under the Health Act 1956, which you have today pleaded guilty to. That offending came about on 21 April 2020, when you had been

given a number of warnings by a medical officer but you continued to breach the COVID-19 Level 4 lockdown requirements.

Current application

[4] You have applied to be discharged without conviction pursuant to s 106 Sentencing Act 2002. Section 11 of that Act requires the Court to consider a discharge without conviction for all offenders.

[5] The police oppose your application, but might have been neutral had you taken steps to prevent further offending.

[6] I have considered the written submissions prepared by both the police and your counsel, and also the affidavit that you have sworn and filed in support of your application.

[7] I have also considered the second charge, which was offending while on bail, for the family violence assault charge.

Allegations of fact

[8] I deal firstly with the family violence matter. The relevant facts of your offending are that about 7.30 pm on Saturday 30 November 2019, you were at your home address in Invercargill. Also present was your mother, who is your victim, and her eight-year-old son.

[9] An argument ensued in relation to your mother asking you to move out. You rushed at her when she was in the lounge, and hit her head with a closed fist. Your victim fell to the floor with you on top of her. You grabbed her by the hair and pulled out a clump of her hair. Believing she was going to pass out, your victim yelled for her son to go to the neighbour's for help. You eventually climbed off your mother and left the address.

[10] As a result of the assault, your mother received a cut to her left eyebrow and delayed bruising. I have seen photographs of her injuries.

[11] When spoken to by the police, you stated you were angry because your mother had called you a druggie and other names. At the time of this offending, you were aged 19.

[12] Further, on 25 March 2020 the New Zealand Government declared a state of emergency and placed all citizens on COVID-19 restrictions. There was extensive publicity around the measures that the Government was taking. Pursuant to s 71A Health Act, the New Zealand Police are legally authorised to assist a medical officer of health to ensure compliance with the Ministry of Health directives.

[13] The police had adopted what they refer to as an engage, communicate, educate and encourage approach, to ensure compliance with the Health Department measures, with enforcement only being pursued when absolutely necessary.

[14] Ms O’Kane, you had previously been warned by the police for breaches of the Department of Health Guidelines. Specifically, at 9.40 pm on 26 March 2020 you were spoken to by the police and given education in response to the COVID-19 and lockdown rules. At 10.30 pm on 5 April 2020, you were spoken to by the police on the phone. You stated you were not aware of the rules and being educated. You were given a verbal warning.

[15] A few days later, on 11 April 2020, you were again spoken to by the police. You stated that you were staying at a friend’s place. You were not cooperative. You again stated you were not aware of the lockdown rules. You were given a verbal warning. On 12 April 2020, the next day, you were the driver of a motor vehicle in Invercargill. This time when you were stopped, you were given a written warning.

[16] On 21 April 2020, you were again in breach of the Ministry of Health directives to stay at home unless for essential travel, when you were driving a motor vehicle at 2.50 am in the morning on Dee Street in Invercargill. You were spoken to by the police and found to have no valid reason for leaving your address. You were not displaying signs of COVID-19 at the time. It took four warnings before the police laid any charges against you, Ms O’Kane, in relation to this offending.

[17] When you were arrested for breaching the Health Act, you explained to the police that the reason for the trip was to go and see a friend, otherwise you would sit at home and eat food and be bored.

Three step process

[18] In considering your application for a discharge without conviction, the Court is required to consider the three-step process set out in the Court of Appeal decision *Z (CA447/12) v R*¹.

- The Court must first consider the gravity of your offending, including all of the aggravating and mitigating factors relating to the offending and the offender.
- Second, the Court must then identify the direct and indirect consequences of conviction for the particular offender.
- Finally, the Court must consider whether those consequences are out of all proportion to the gravity of the offending. If the Court determines the consequences are out of all proportion to the gravity of the offending, it must still consider whether it should exercise its residual discretion.

[19] Turning now to an assessment of the gravity of your offending, Ms O’Kane, the aggravating and mitigating factors relating to you and your offending are that you were aged 19 at the time of your assault offending. At that time, you were a first offender. Your mother suffered injuries, bruising and cuts. She also had a clump of her hair pulled out by you. Additionally, this incident occurred in your mother’s home and your eight-year-old stepbrother was present.

[20] Due to your age, I accept that you might have prospects of rehabilitation, although that might be hard to accept in the context of you continuing to offend while on bail.

¹ *Z (CA447/12) v R* [2012] NZCA 599, [2013] NZAR 142.

[21] Taking all of those matters into account, I assess the gravity of your offending, in terms of the assault charge, as low to moderate, category for offending of that particular type.

[22] However, in respect of the Health Act offending, I consider that to be more serious in the sense that you had been given a significant number of warnings for offending in the way in which you had. You were given plenty of opportunities to avoid offending.

[23] In relation to the direct and indirect consequences of a conviction for you, I have considered the general stigma of a conviction, particularly for family violence. A conviction at your age could impede your future prospects when you are not yet determined on a career.

[24] The defendant has just advised the Court that she has no longer has her employment that Mr Mooney, her counsel, referred to in his submissions. She hopes to study nursing at the Southern Institute of Technology, although there is nothing before me in writing.

[25] While I accept that the Court does not need to be satisfied that the consequences will inevitably or probably occur as promoted on behalf of a particular defendant, in your case, Ms O’Kane, you not only re-offended while you were on bail, but you breached your bail. Additionally, you also, on another occasion, failed to appear in Court.

[26] In your affidavit before the Court you said that you were going to take steps to prevent further offending, but you have not done so. This lead offending occurred in November 2019, some six months or so ago, and you have not taken any steps to address the cause of your offending.

[27] You also, as I have mentioned, failed to appear in Court. That was on 4 February 2020 and a warrant had to be issued for your arrest.

[28] There is nothing before me that would specifically indicate that a conviction would jeopardise your future.

[29] Therefore, considering all of those matters, I am not satisfied that the direct and indirect consequences of a conviction are out of all proportion to the gravity of your offending, particularly now that it is not just the assault offending but there is further offending under the Health Act.

[30] Therefore, I cannot be satisfied that the direct and indirect consequences of a conviction would be out of all proportion to the gravity of your offending.

Result

[31] Your application is declined.

Judge BA Farnan
District Court Judge

Date of authentication: 27/05/2020
In an electronic form, authenticated pursuant to Rule 2.2(2)(b) Criminal Procedure Rules 2012.