IN THE DISTRICT COURT
AT PUKEKOHE

I TE KŌTI-Ā-ROHE
KI PUKEKOHE

CRI-2021-092-008359
JUDGE VIA AVL
[2022] NZDC 13307

NEW ZEALAND POLICE
Prosecutor

v

UMAR ABDUL KUDDUS
Defendant

Date of Ruling: 15 July 2022

Appearances: T Simmons for the Prosecutor
R Nand for the Defendant

Judgment: 15 July 2022

SENTENCING OF JUDGE D J McDONALD
[ON S 106 APPLICATION]

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[1] Mr Kuddus, on 14 April 2022, you pled guilty to a charge of intentionally failing to comply with an order made under s 11 of the COVID-19 Public Health Response Act 2020 by travelling to Hamilton. I must accept as proved all facts expressed or implied that are essential to your plea of guilty. That is contained in s 24(1)(b) of the Sentencing Act 2002. That is important in your case.

[2] In your two affidavits and in the submissions by your learned counsel today, you have in effect said you thought that you could travel through the COVID boundary for court purposes. By your plea, I must accept, contrary to your assertions, that you

intentionally failed to comply. "Intentionally" means that you knew that you were not allowed to travel across the boundary from Alert Level 4 to Alert Level 2 but did so anyway. Because that issue was raised again this morning and following discussions with your counsel and with counsel for the police, I gave you time which you took to give further instructions to your lawyer.

[3] When everyone returned to court, you indicated through your lawyer that you wished to proceed with sentencing. I propose to do so. I have an agreed summary of facts with one agreed amendment today.

[4] You seek a discharge without conviction under s 106 of the Sentencing Act. The police oppose your application. Section 106 gives the Court a discretion to discharge an offender without conviction. That discretion is subject to the test laid down in section 107 of the Act being satisfied.

[5] Section 107 states:

> **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.

[6] The law in this area is well settled. In *Taulapapa v R* the Court at paras [22] and [23] said this:[1]

> It is settled law that a court considering a discharge should examine the gravity of the particular offence taking into account all aggravating and mitigating factors of the offending and the offender, identify the direct and indirect consequences of conviction and consider whether those consequences are out of all proportion to the gravity of the offence. Only then does it move to consider the residual discretion under s 106. There must be a real and appreciable risk that any given consequence will happen. This standard recognises that the Court is assessing the likelihood of something that may happen in the future. The offender should ordinarily put information before the Court to provide a factual basis for a decision that the test has been satisfied. There is no legal onus on an offender to do so, however, and the standard of proof in s 107 is simply that the judge be satisfied that the requirements of the section are met.

[7] That requires me to take a three step approach which is:

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[1] *Taulapapa v R* [2018] NZCA 414.

(a) to determine the gravity of the offence having regard to both the aggravating and mitigating factors of the offending and the offender;

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

(c) determine whether those consequences are out of all proportion to the gravity of the offence.

[8] Only if the threshold is met under s 107 can the Court move to consider the residual discretion under s 106, there must be a real and appreciable risk that any given consequence will happen. This standard recognises that the Court is assessing the likelihood of something that may happen in the future. Once the s 107 test is satisfied, this will normally result in a discharge.

[9] I deal first with the gravity of the offending, taking in the offending and personal matters related to you.

[10] On 17 August 2021, the New Zealand Government announced an outbreak of Delta Variant of COVID-19 within the community in New Zealand. The emergence of the Delta Variant of COVID-19 globally was not an unexpected shift in the viral evolution; however, it did pose a higher risk to New Zealand illustrated by outbreaks of this variant in Australia. Emerging science around the Delta Variant showed that there was a higher viral load earlier on in the infection and that it is generally more transmissible than the original Alpha Variant virus and other variants of concern.

[11] On 31 August 2021 at 11.59 pm, all areas south of Auckland transitioned to Alert Level 3 with Auckland and Northland Region remaining in Alert Level 4. The COVID-19 Public Health Response Order was announced at 4.15 pm on Monday 6 September 2021 and came into force at 11.59 pm on Tuesday 7 September 2021.

[12] Pursuant to that order, on 7 September 2021 at 11.59 pm all areas outside of Auckland transitioned to Alert Level 2 with Auckland remaining at Alert Level 4. The order remained in force until 11.59 pm on 21 September 2021. Clause 17 of the order outlined the restrictions on travel into, out of or through alert levels applicable for the

period that was in force. Travel between alert levels was only permitted for the purposes set out in cl 18 and only if that person was to travel direct without stopping while in the other alert level area.

[13] Over August and September 2021, a number of statements were issued to all legal practitioners in New Zealand and other organisations by the Chief Justice, these statements outlining the applicable rules governing the operation of the New Zealand courts during the different levels. It is to my knowledge that they were not the first and only statements issued by the Chief Justice during this long pandemic period we have been in.

[14] Those statements from the Chief Justice made it clear that no lawyer was required or expected to cross Alert Level 4 boundaries to travel out of or into the Auckland Region to attend court.

[15] It was further made clear that if any lawyer identified the need to cross the Alert Level 4 boundary to attend court, this should be raised in advance with the presiding judge.

[16] You say you were unaware of that. I have some doubts about that statement of yours. As a litigator, as you say in your affidavits, appearing regularly in court, I suggest that at best you would have some suspicion that you would need permission to travel over the boundary.

[17] You at the current time were employed as a senior solicitor in an Auckland law firm. On 15 September 2021, you emailed the registrar of the Hamilton District Court advising that you were counsel acting for a party in a financial assessment hearing scheduled for 10 am on 17 September. In the same email, you noted that you were not able to travel from Auckland to attend the hearing in person and you requested the hearing be conducted by telephone. The same day, the Hamilton District Court registry responded by email to you acknowledging your email and confirming that the assessment hearing on 17 September would be conducted by telephone.

[18] The financial assessment hearing that you were to appear on was for a finance company, Club Finance Limited. They had obtained a civil judgment against an individual for a modest sum of money. A financial assessment hearing is held before a registrar, not a District Court judge. The debtor appears as does either someone from the finance company, because normally these are finance company applications, and the debtor sets out income and expenditure to see if there are any funds left over to pay the judgment debt. While such hearings may be of vital importance to a finance company like Club Finance Limited, in the order of importance of matters that come before the Court this would be at the lowest level. If you had sought to travel to such a hearing, it is almost certain that the registrar would have referred it to a civil designated judge in Hamilton and it would have been refused. I say that, because I am a civil designated Judge.

[19] Despite arranging to do it by telephone, you at about 8 o'clock in the morning on 17 September 2021, whilst Auckland was still in Lockdown Level 4, decided to travel by private motor vehicle down to Hamilton. I accept you went to a testing station and did a test prior to doing that but you did not receive a result until your return. But you, yourself, considered you were not symptomatic, that you had not been contact with anybody you knew who had COVID. That you drove down by yourself. That when you stopped at the Z Service Station in Anglesea Street, Hamilton to purchase some items, you wore your mask and, indeed, when you went into the Court in Hamilton you wore your mask.

[20] The fact is, Mr Kuddus, when you crossed the border of the boundary, you did not have a work exemption, nor did you have a personal exemption to cross the boundary.

[21] After stopping at the petrol station in Anglesea Street, you went to the Hamilton District Court for the assessment hearing before the registrar. The other party, the debtor, did not appear at the time designated and you left court in Hamilton at around 10.30 am. Around 11 o'clock that morning, as you were driving back to Auckland, the Court registrar telephoned you. The debtor must have turned up and the hearing is conducted, as you had originally envisaged, over the telephone.

[22] You recorded various portions of your trip from Auckland to Hamilton and back, it would appear, on your mobile phone which you then posted on your social media platforms, including Facebook and Instagram. Because of that and what someone obviously saw, the police were notified. You were charged.

[23] I take into account the purposes and principles of sentencing which are well known. I need to hold you accountable. Despite what your learned counsel says, that is an important purpose. That is to personally hold you accountable, to denounce your conduct and to deter others.

[24] The whole regime of alert levels were put in place to protect the entire population, to protect us all. As a result, self-interest had to be put to one side. The needs of the community came first. If the needs of the community were not put first, all others would be at risk. You, by your plea, knew that you could not travel to Hamilton. As you said in your first affidavit, you decided to travel because you had been in lockdown for so long and you were feeling trapped. You said:

> I had initially intended to carry out the financial assessment hearing by telephone conference, as I had previously on occasions done; however, given that we had been in lockdown for so long, I was feeling trapped being at home and felt depressed not being able to do what I love which is being a lawyer and attending to litigation matters.

[25] Many others in our community, Mr Kuddus, by obeying the levels, missed out on far more important life events than having a meeting with a registrar to see whether a debtor could pay any money to Club Finance. People who obeyed the rules could not attend funerals and tangi, go to weddings, see people who were gravely ill, be at or see babies shortly after their birth. I am sure all of us, to one degree or another, at times felt that we were being trapped but, thankfully, the vast majority of New Zealanders abided by the rules.

[26] You say that the constable that you spoke to at the boundary, in effect should have stopped you. The first answer to that is that you knew you should not turn up at the boundary. You got your test done and got your certificate before going to the boundary. You showed you were a lawyer, you showed that you had a hearing. What

you did not tell him, that you in effect were not allowed to travel. So, he or she would have accepted that you, as a lawyer, were telling the truth.

[27] There are no mitigating factors in relation to the offending.

[28] Mr Simmons for the police said a starting point of a short term of imprisonment is appropriate. With the greatest respect to him, I would say that is too far up the sentencing ladder.

[29] I, of course, must look at personal matters at this stage relating to you. You have pleaded guilty and did so at the first available opportunity, you will be given the full 25 per cent credit. You are otherwise of good character. You have no previous convictions. You tell me and as does your counsel that you are genuinely remorseful and apologetic. My view is that you are remorseful and apologetic for being caught, rather than for any other reason. It is advanced that you made voluntary donations to various charities through 2022, but most after you were caught.

[30] However, those personal factors in your favour bring the seriousness and gravity of the offending down. It is still, in my view, low to moderate offending.

[31] I now look at the consequences that you put forward of a conviction:

(a) **Employment**. You are employed as a senior solicitor. Your firm knows of the charge, indeed it is your principal who appears for you today. There is nothing in your affidavit that you will lose your job if you are convicted. Of course, you will lose your job if the Law Society takes steps to revoke your practicing certificate; you cannot then practice. You were concerned that you will be investigated by the New Zealand Law Society. That is the responsible body that is charged with making sure that lawyers are fit and proper persons. It is for them to issue or refuse to issue you with a practicing certificate. It is for them to commence proceedings to strike you off. To refuse to renew a practising certificate, the provisions of s 55 of the Lawyers and Conveyors Act 2006 must be met. It is highly, highly unlikely that any

proceedings would be taken as a result of this charge that you be struck off. The Society knows of the charge. You have put forward nothing from the Law Society, for example, that you are at a risk of losing your practising certificate if you are convicted. No evidence is given to me from the New South Wales Law Society as to what it might do. As has been said, the courts should leave it to appropriate institutions to make decisions as to whether an individual is fit to practice and I refer to *Maraj v Police* and *Lang v Police* in the High Court Wellington in 2003.[2] If you seek employment outside of your current firm, you say you will be disadvantaged by a conviction. I take into account what was said in *Walker v Police*, but that is a normal consequence of a conviction.[3] You are considering a move to Dubai to practice law there. That is speculative. No information has been put before me except to say "it might be in the near future", no information about the efforts you have made to secure employment there. An extract from the *Gulf News* dated 9 January 2018 as well as a screenshot is insufficient to show that you would be barred from working in Dubai. There is no bar to travel to that country.

(b) **Mental health**. You say that a conviction would adversely impact upon your mental health, primarily due to shame and humiliation. That is an ordinary consequence of a conviction. You do not provide any evidence as to how your mental health has been impacted beyond what is ordinary.

(c) **Future travel**. Your future travel plans are quite speculative. You tell me you are planning to go for Hajj in 2023 and would be required to transit through Australia. You annex Australian Immigration advice but there is no information that even if you apply for a waiver that you will be automatically refused. From the number of applications which claim future travel as a consequence, I am well aware that the Australians normally require some term of imprisonment before they will refuse

[2] *Maraj v Police* [2016] NZCA 279.
[3] *Walker v Police* [2016] NZHC 1450 at 25.

entry. It does not say that with a conviction you will be barred from travelling.

(d) **Trust**. You would have to resign as a trustee. Again, that is a natural consequence. I do not know how big the trust is, who it helps or what it does.

[32] I now move to step three, it is to determine whether the consequences advanced by you are out of all proportion to the gravity of the offending. I repeat, this application is opposed by the police.

[33] It is at this point, I must undertake a weighing process. The gravity of the offending is low to moderate, looking at all the matters that I must. There are no real or appreciable risks of identified consequences occurring except the resignation from the Muslim Trust. The consequences in relation to employment, overseas travel, your mental health, are not out of all proportion to the gravity of your offending. I have been referred to a number of other cases, including a case of a lawyer who was granted a s 106 application; however, such applications are quite fact specific.

[34] In my view, you have not met the test in s 107. Your application to be discharged without conviction is refused.

[35] You will be convicted, you will be fined $900 and $130 costs.

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Judge DJ McDonald
District Court Judge | Kaiwhakawā o te Kōti ā-Rohe
Date of authentication | Rā motuhēhēnga: 29/07/2022