EDITORIAL NOTE: NO SUPPRESSION APPLIED.

IN THE DISTRICT COURT
AT DUNEDIN

CRI-2015-012-000764
[2016] NZDC 17718

THE QUEEN

v

NIKOLAS JAMES POSA DELEGAT

Hearing: 12 September 2016

Appearances: R Bates for the Crown
M Ryan for the Defendant

Judgment: 12 September 2016

RULING OF JUDGE K J PHILLIPS
[ON S 106 APPLICATION]

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[1] Nikolas James Posa Delegat is facing charges which he pleaded guilty to on 26 July this year relating to an incident in Dunedin on 26 March last year. The charges for which he is before me relate to a charge under s 192(2) Crimes Act 1961 that he with intent to avoid the arrest of himself assaulted a police officer with intent to obstruct her in the execution of her duty. The maximum penalty on that charge is one of three years. He is charged with a Crimes Act assault on a Mr David Ogilvie; with intentional damage of a window of a bar; and resisting a Constable Early. Constable Early was a police officer that did participate in a restorative justice conference as did the manager of the Starters Bar.

[2] Mr Delegat seeks, through his counsel Mr Ryan, a discharge without conviction under s 106 Sentencing Act 2002. I must deal with the application in the

terms of s 107 which gives me guidance as to how and on what basis a discharge under s 106 can be granted. Section 107 provides that:

> 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.

[3] Section 107 requires a balancing exercise when considering whether or not to exercise the discretion under s 106. Quite clearly, and a number of decisions have mentioned it, s 107 considerations are a prerequisite or a "gateway" to deciding whether or not to discharge any person under s 106.

[4] The submission that is made on behalf of Mr Delegat is that a discharge should be granted due to the consequences of a conviction and difficulties that he could have in the future in his employment. Some issues in relation to his ability to travel are also raised.

[5] Mr Bates appears for the Crown to oppose the application. He has made submissions, as has Mr Ryan the defendant's counsel, both in writing and also today orally. They have been in considerable detail. I have read those submissions as I have read a detailed affidavit filed by the defendant.

[6] I must say at the outset that issues that arose from the affidavit of the defendant where he was saying he could not either recall "exactly what occurred" or that he was "not aware that the person he struck at the time of the incident was a police officer" was in direct variance with what was detailed in the summary of facts. The application hearing was stood down whilst Mr Ryan consulted with the defendant. It was made very clear when the hearing resumed that the summary of facts was accepted as it was written and that there was no issue taken by the defendant in that regard.

[7] The facts in reality seem to me to be abundantly clear. Here the defendant was highly intoxicated. He was, and Mr Ryan has emphasised to me today, a person who was meant to be taking medication (it appears that he did not do so) and a person who also needs to be careful in relation to mixing the issues that he has with mental health and his medication with alcohol. Here, however, he not only

consumed alcohol, at 18 years of age, but he was not taking his antidepressant medication. He apparently, in a bar, became enraged. That appears to have been over some comment made by a person in relation to his girlfriend. As a result of that occurring he punched a hole in a security window. That led to a heated argument with this female associate to the degree where a member of the public became concerned with the defendant's vehemence and approached the campus watch officer who was in and around the bar where he was, which is in the student area of Dunedin.

[8] The first victim (Mr Ogilvie) became involved. He intervened in what was happening between the defendant and the female friend. He stood in between them. He had to, in fact to get the defendant to do anything, push him away from the girl. The immediate response of the defendant was to try and punch the victim in the head. The victim evaded the punch and attempted then to grab the defendant to stop further punches but he slipped to his knees. While he was on his knees the defendant kneed him in the face. Hence the Crimes Act assault. In my view, a serious one of its kind with a knee in the face.

[9] It appears then that the defendant was taken to the ground. It appears that police officers arrived. The defendant was being restrained. He was struggling vigorously. He punched the police constable in the face. She was attempting to control his arms at the time. He said, "Get off me cop," so he clearly knew it was a police officer. It is accepted by the Crown that he did not know it was a female police officer. But he then punched the police woman three to four times in the face with his closed fist. He was handcuffed, but he was not done. He violently struggled, attempted to head butt the officers and kicked out at the police officers.

[10] The facts summary that I read describes the campus watch officer as having swelling and bruising to his left eye and a cut to an elbow. Mr Ogilvie, in a victim impact statement dated 2 September, says that he does not know the defendant. He got a sore knee when he fell to the ground and redness and tenderness as a result of the assault but no bruising and no financial costs. He says he has not sustained any emotional harm and has no ill feelings towards the defendant. He thought the

defendant had 'lost the plot'. That was constant with what he had said originally to the police.

[11] The second victim (the one who was struck in the head with one blow and three to four further blows) is a 32-year-old female. As a result of being on duty and attempting to restrain the defendant she was knocked out. She does not know him. It was, as she put it in her victim impact statement, "an unprovoked assault." She describes it as being sustained. She says in her victim impact statement that the defendant knew she was a police officer, she was in full uniform. She says that she does not remember anything after the first punch in the head which basically knocked her out. She had to be taken to hospital. She spent some 15 odd hours in the Emergency Department at Dunedin. She was released from hospital but had to return because then she felt numbness in her arms and had to be referred to a neurologist. She sustained swelling, bruising and tenderness to her left eye, concussion and continuing headaches. She was stood down from police duties for two months due to ongoing concussion symptoms, unable to drive for that period of time and then had to be slowly worked back into her role as a policewoman. Eighteen months later she has reoccurring headaches. She has been told quite simply if she has another brain trauma like she had that night, her health would be seriously compromised. She just sees herself as "extremely lucky". The overall concussion has had far-reaching impacts upon her – reoccurring headaches, not able to return to full work for three months. She considers the defendant has shown her no remorse for his actions. Mr Ryan would take argument with that. The defendant has attached to his affidavit a letter apparently an apology he had written which never got to the police officer. She says that it was only recently, when he pleaded guilty, was there an approach for a restorative justice conference. She says that he had 18 months to do something about it and did nothing. That is her view of the situation.

[12] Mr Ryan, for the defendant, has gone through in detail a restorative justice conference report attended by the police officer (Constable Early) who was the person that the defendant resisted. It appears that the defendant Mr Delegat took full responsibility and apologised. The apologies were accepted. But I note that Constable Early describes the second assault on his partner as he saw him

"absolutely smashing it." The defendant said he is getting help with his alcoholism. All those matters were accepted at the conference. I take the detailed restorative justice report into account.

[13] I have gone through all that in detail because as a matter of law the Court of Appeal has made very clear (without the necessity to refer to lower Court decisions) the way in which these applications are to be dealt with. It is as follows (*R v Hughes,*[1] *R v Blythe*[2] and *Z v R*[3]). All cases upheld a three step approach when considering the disproportionality test in s 107. I quote from *Z v R* at para [27]. There the Court was considering a case from England in the Divisional Court in *A*.

> When considering the gravity of the offence, the court should consider all the aggravating and mitigating factors relating to the offending and the offender; the court should then identify the direct and indirect consequences of conviction for the offender and consider whether those consequences are out of all proportion to the gravity of the offence; if the court determines that they are out of all proportion, it must still consider whether it should exercise its residual discretion to grant a discharge (although, as this Court said in *Blythe*, it will be a rare case where a court will refuse to grant a discharge in such circumstances).

[14] So the first step is identifying the gravity of the offending. *Z v R*, and ss 9 and 9A of the Sentencing Act, are obviously relevant to the gravity of the offence as are ss 7, 8 and 9. I must take into account guilty pleas, expressions of remorse, the victims' perspective, the Court's assessment of how likely it is the defendant would re-offend and consider the overall gravity. I must take into account the nature of the offence, the circumstances relating to the commission of the offence, the aggravating and mitigating factors of the offender and the offence and matters occurring after the offence.

[15] I have before me a man of 18 years of age who committed serious violent attacks in a bar against a police officer. He has no prior convictions at the age of 18. He is a young man who I am told by the reports that I have read, has mental health issues (and that is backed up by submissions from Mr Ryan), who takes anti-depression medication, and has a history of such issues confronting his day-to-day life. I understand that he has, since this offending occurred, taken steps

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1 *R v Hughes* [2008] NZCA 546
2 *R v Blythe* [2011] NZCA 190
3 *Z (CA447/12) v R* [2012] NZCA 599

in relation to issues involving mental health and alcohol. It is clear that he has alcohol issues. They were known to him prior to the arrival at the bar on the day in question.

[16] It is also clear from what he says in his affidavit that he does not "independently" recall what actually took place. (I am told by Mr Bates there is another report which would indicate that he does recall a good deal more than what he says). But, as I have said, Mr Ryan emphasises the restorative justice conference. He submits that the views of the principal victim would have been different if she had received the apology letter that had been written, that I should take into account that the Crown has seen fit to reduce the charge markedly from a charge carrying a maximum sentence of seven years' imprisonment to one carrying a maximum of three years. Mr Ryan says that this young man has done everything an 18-year-old could to rehabilitate himself; has expressed remorse; has repaid the damage occasioned to the Starters Bar by him smashing the window; that it is a "one-off incident" occurring when he was intoxicated; he has entered into Capri Hospital; and it was completely out of character. It was when he was alerted to what he had done he entered the hospital. He has and would like to be involved in voluntary community work, speaking and working with the police with people who have alcohol issues because of what Mr Ryan (an Auckland barrister) describes is "the Dunedin drinking culture." It appears that the position of the defendant is to mitigate the matters as much as he can and that he has done everything he possibly could to rehabilitate himself and make good what he did.

[17] Mr Ryan's submissions as to consequences are in relation to the consequences that he would have difficulty in obtaining a licence under the Financial Management Act.[4] Direct and indirect consequences do not necessarily have to occur. It is sufficient to be satisfied that there is a "real and appreciable risk" that consequences would occur. He quotes to me *Harcourt v Police,*[5] which is a decision made well before the current Act was amended and s 107 came "into play". I take note however that with direct consequences and indirect consequences, there is no onus or responsibility on a person to establish that they would in fact occur.

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4 Financial Advisers Act 2008

5 *Harcourt v Police* HC Hamilton AP42/90, 14 May 1990

[18] The other consequence is that he would have difficulties in not being to race yachts in and around the American coastline. In the end what Mr Ryan is saying to me, "Yes, these are the facts of the matter, which are not debated by the defendant but that the circumstances are that he was in a bar highly intoxicated and totally lost control of his anger. They are the aggravating factors. The mitigating factors are his age and his good character." Mr Ryan also points out to the issues that neurologists talk about. The formation of a young person's frontal lobe (particularly in males) in not being fully formed until they are about 25 years of age. Mr Ryan puts it that this young man has made a mistake; he has tried to remedy it; and that he should be granted a discharge accordingly.

[19] I note that the gravity of the offence is clear in my view. He really without any degree of warning or real provocation from the first victim punched him because that first person was attempting to interfere with what the defendant was saying or doing with his girlfriend. As a result of what then occurred he intentionally kneed that man when he was on the ground, in the head. When taken to the ground and struggling violently, he, knowing there was a police officer attempting to restrain him, punched that officer in the face on one occasion hard enough to render the police officer into a state of unconsciousness, or near unconsciousness, and that he followed that by another three or four blows after telling the person in no uncertain terms as to being a police officer "to get off him", punching another three to four times. All aimed at the head.

[20] In relation to then assessing the seriousness, I take into account what the female police officer has said and the impact upon her which could only be described as serious. I take into account what happened at the restorative justice conference on the other hand. I also must take into account his age. I take into account his good character and matters that relate to issues of mental health. I counter that by saying that he was well aware of the difficulties that he had. He was well aware of the requirement to take his medication. He was well aware of the difficulties he has when he is drinking. He did both. But I take those other factors into account when assessing the overall gravity of the offence and decreasing the gravity.

[21] In that line I then consider the aggravating factors relating to the offender. I do not think there are any. The mitigating factors, as I have already said, his age and good character. I assess all of those matters as I am required to. In my view, after having given that consideration, I do not accept what Mr Ryan's written submissions say as to the level of gravity. I consider the gravity here, after taking all ss 7, 8 and 9 matters into account, as I am required to do, and all matters of mitigation that I consider the gravity to be above moderate.

[22] Consequences. As I have already said, it is not necessary the identified consequences would inevitably or probably occur. Is there a real and appreciable risk that such consequences would occur? I note that Mr Bates mentions to me an authority approved by the Court of Appeal in *Maraj v Police*.[6] Wylie J in *Cook v Police*[7] said at para [26]:

> The words "is satisfied" in s 107 mean that the Court is required to make up its mind on reasonable grounds. It does not require proof beyond reasonable doubt. Further, the Court does not need to be satisfied that "the identified directions and consequences would inevitably or probably occur". It is sufficient if the Court is satisfied that there is "real and appreciable risk that such consequences will occur".

[23] He went on to make certain findings. But in another case of *Barker v R*[8] Wylie J then said that "real" and "appreciable" denotes something of substance and not something fanciful or something which may never happen. I take those comments into account.

[24] What is submitted to me is that in relation to the defendant's career and his future prospects, that he would not be able (and that is the submission made "not be able") to obtain the financial licence that he would require; and he would not be able to enter the United States of America. That the steps taken to rehabilitate himself after a one-off lapse of judgement and these "real" and "appreciable" risks are such that the consequences would outweigh the gravity of the offending.

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6 *Maraj v Police* [2016] NZCA 279
7 *Cook v Police* [2014] NZHC 282
8 *Barker v R* [2014] NZHC 435

[25] Mr Bates, on behalf of the Crown, submits however that the position is somewhat different as to consequences from what Mr Ryan argues. The first point that should be noted is in regards to Mr Bates again mentioning the authority that I spoke about (*A v R*[9]) which is mentioned in *Z v R* and the personal aggravating and mitigating factors in *Z v R* to be taken into account. The consequences of a conviction Mr Bates debates at para 39 onwards (in page 11) of his submissions. When one has a look at the Security Commission guidelines these are somewhat different from what the defence submission is. The defendant, in his affidavit, talks about the Authority considering the conviction and reflecting adversely on his ability to act as an Authorised Financial Adviser. He was aware as he said (at paragraph 4.1.12 of his affidavit) when I quote (emphasis mine):

> I am aware that a conviction **may not have such a profound effect** here in New Zealand as it **would have overseas on my chosen career path**.

[26] Mr Bates at para 41 of his submissions refers to the guidance notes provided by the Securities Commission. What in fact is said is that there is a discretion given to the Commission to consider every application by having regard to the circumstances of the applicant and the offence; and when assessing fitness the Commission will consider whether an adviser will probably discharge his or her duties; and whether he or she is fit for the role as a financial adviser. Further, such applications are considered on a "case-by-case approach".

[27] When I have regard to those matters and the authority of *Maraj v Police* it is very clear that where a statutory body is given the task of screening or selecting applicants for admission to a profession, they should exercise the discretion. That it is inappropriate for the Court in all but the most exceptional cases to substitute its discretion.

[28] In *Roberts v Police*[10] Wylie J commented it was not going too far to say (as quoted from Mr Bates' submission) that to do so (grant a discharge) the Court would be actively concealing from a statutory body information which ought properly to come before that body.

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9 *A (CA747/10) v R* [2011] NZCA 328

10 *Roberts v Police* (1989) 5 CRNZ 34 (HC)

[29] On the basis of all that, and on the basis of the defendant's own affidavit, I do not accept that the direct and indirect consequences are of a kind or to a level that would enable those consequences to outweigh the moderate and above gravity of the defendant's offending. I go back and say that in relation to travel, for example, whether or not as part of his recreational pursuits he sails off the coast of America or off the coast of New Zealand, is not a matter of consequence that in my view too much weight can be placed on either.

[30] The direct and indirect consequences. The conviction might be perhaps a matter that the AFA has to consider when (or if) the defendant gets to the stage of applying for a licence. It is a matter that they decide upon. They should have all the circumstances available to them. I compare those consequences with the gravity that I have also found. I am not entitled to grant a discharge, despite the eloquent plea put by Mr Ryan on the basis here we have a young man, no prior convictions, one mistake and he has got a conviction. I am afraid that that eloquence does not suffice to fulfil the test that I have got to apply. I have to be satisfied that those direct and indirect consequences of a conviction would be out of '**all**' proportion to the gravity of the offence.

[31] The defendant does not have the responsibility to prove it. I have to exercise judgement. I have to take into account all relevant information in the written and oral submissions of both the prosecution and defence. Having done that, the consequences that are put before me do not outweigh the gravity of the offending.

[32] I consider that in relation to the matter, the defendant cannot pass through the gateway of s 107. The application for a discharge must be refused.

K J Phillips
District Court Judge