

EDITORIAL NOTE: CHANGES MADE TO THIS JUDGMENT APPEAR IN [SQUARE BRACKETS].

**ORDER PROHIBITING PUBLICATION OF NAME(S), ADDRESS(ES),
OCCUPATION(S) OR IDENTIFYING PARTICULARS OF
APPELLANT(S)/RESPONDENT(S)/ACCUSED/DEFENDANT(S) PURSUANT
TO S 200 CRIMINAL PROCEDURE ACT 2011. SEE
<http://www.legislation.govt.nz/act/public/2011/0081/latest/DLM3360346.html>**

**IN THE DISTRICT COURT
AT AUCKLAND**

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

**CRI-2020-019-004005
[2020] NZDC 17370**

NEW ZEALAND POLICE
Prosecutor

v

[SAGE LOWERY]
Defendant

Date of Ruling: 27 August 2020
Appearances: T Veikune for the Prosecutor
M Talbot for the Defendant
Judgment: 27 August 2020

**RULING OF JUDGE N J SAINSBURY
[ON S 106 APPLICATION]**

[1] [Sage Lowery], you are for sentence on one charge of failing to comply with an order that had been made under the COVID-19 legislation. The circumstances of the offending is that you arrived from Australia on 20 July 2020. You came with other family, because of the death of your father. He had died somewhat unexpectedly after suffering a stroke a day or so earlier.

[2] Because of the quarantine provisions that were in place, you and the other family members had to remain in managed isolation. On the face of it, that meant you would miss your father's tangi. Requests were made for compassionate leave to attend the funeral. Further requests were made following that application being denied. By way of an alternative, it was hoped that his body may be brought to Hamilton where you were in quarantine and an arrangement could be made for you to see the body so as to pay your respects and say goodbye. However, no decision had been made on that by the evening of 24 July. In the absence of permission, you and other family members left the quarantine facility. You were apprehended quite soon afterwards. The result is this charge.

[3] You are seeking a discharge without conviction. In order to determine that application, I need to consider first the gravity of the offending. I then need to consider the direct and indirect consequences of a conviction and having established those, determine whether those consequences are out of all proportion to the gravity of the offending. If that is resolved in your favour, I then need to exercise my discretion as to whether it is appropriate to grant the application.

[4] I turn first to the gravity of the offending. The maximum penalty for offending of this nature is six months' imprisonment. There is a range of culpability that can apply in these circumstances. At one end of the spectrum would be offending where someone who knows that they are positive for COVID breaches quarantine and goes into the community. In other words, deliberately and knowingly putting the community at risk. That would, I consider, place that offender towards the upper end of the available sentencing range.

[5] There is then more graduated levels of culpability. In terms of where you sit, there are a number of factors that I consider are relevant. First, you were complying with quarantine and had been tested and tested negative. I accept that that may have given you the mistaken belief that it was therefore unlikely that you had COVID and would not be a risk to anyone. I emphasise *mistaken* because there is a reason why the quarantine is for 14 days and there is a reason why there is further testing. But that distinguishes you from the situation where someone might deliberately take on a risk.

[6] I accept that this, from your perspective, was an impulsive decision. You are 18, you were there with family including your mother. In terms of the decision for the family to leave, I consider that ordinary family dynamic means that this is a decision where you are very much led by your mother. I would find it very unlikely for instance that you would have left the facility on your own. So to that extent, you are not the person whose idea it was, you went along with it. I take into account the family dynamic, it puts considerable pressure on someone in your position. It is difficult to stand against what the others are doing.

[7] This was also a situation of very real grief. As I have already noted, your father had died suddenly and unexpectedly. I accept from the information in your affidavit that you had a particularly close relationship with him. Notwithstanding that you had relatively recently moved to Australia, you had maintained that close relationship. I consider that the wish to see your father and say goodbye before his burial had an impact on overriding what might have been the sensible decision.

[8] Finally, you are young. You are 18. That partly reinforces some of those other factors, the influence of other family, the grief of losing a father who was so close to you. Also, youth in and of itself is seen as being an important factor in sentencing. Often decisions can be made impulsively by younger people that would not be done by someone who is older. The Court needs to be careful not to apply a standard of judgement that is unduly harsh, given where a young person stands.

[9] On the basis of those factors, I accept that they help reduce the gravity of the offending. While the importance of compliance with quarantine in the crisis that we are facing cannot be understated, I do assess the gravity of this offending in the circumstances as low.

[10] I then turn to the consequences. Your counsel has referred to a number of particular consequences or potential consequences. I do not need to find that these consequences will happen but there needs to be a real and appreciable risk that they will occur.

[11] One of the issues raised is a concern as to what consequence a conviction might have for you remaining in Australia. Where there are issues raised as to whether someone might be allowed to travel to another country or whether they might be removed, there needs to be an evidential basis before I can take that into account. That is made clear in a number of cases and was reconfirmed by the High Court in *Shi v Police*.¹ Normally, there would be affidavit evidence from an immigration specialist or a specialist in Australian law to set out what the risk factors are. Without that sort of information, I do not give great weight to that as a consequence.

[12] There is then referred to as employment consequence. You have indicated in your affidavit a wish to study to be a nurse. There is a concern raised that a conviction may be a block to that. I need to be clear to you that even were you to be granted a discharge without conviction, that will not necessarily be something that the authorities in Australia cannot take into account.

[13] For a lot of occupations, and it may well include nursing in Australia, there is what is called a fit and proper person test. Even where someone has been discharged without conviction, they are still obliged to tell the registration authority that they have had this court appearance so it is still a matter to be taken into account. Similarly, the fact that you have name suppression does not mean that this can be hidden in all circumstances. Indeed, there is an obligation to advise certain organisations that overrides the name suppression.

[14] So even if I were to grant a discharge without conviction, these may still be matters that you will need to disclose in due course. However, it is considered relevant when a registration authority such as a nursing organisation considers someone as a fit and proper person to know that a judge looking at their case considered that it was not necessary in the public interest for a conviction to be entered. That can work in your favour.

[15] So, what I want to make clear is that to grant a discharge without conviction should not hide the fact that this happened from the nursing authorities. You may still need to front that. However, there can be situations where the very fact of a conviction

¹ *Shi v Police* [2020] NZHC 59.

itself becomes a bar to certain occupations. The question I need to ask is whether these circumstances are such that you should be burdened with that for the foreseeable future.

[16] In addition to the specific matters raised, Mr Talbot refers to more general consequences. The courts and the High Court in particular in a number of cases have emphasised that the fact of a conviction in and of itself can be a consequence which goes into the mix on this sort of application. In the case of *Nash v Police*, Mallon J made the point that there are general consequences that follow from a conviction.² What she said was this:

In a variety of ways (eg. employment, insurance, immigration) people are asked to disclose whether they have criminal convictions. For those that are remorseful there can be a loss of pride and self-esteem or at least embarrassment in having to answer that question honestly. It may also materially disadvantage him – as his counsel says it may count against him when he is competing for a position against someone who does not have a conviction.

[17] In other words, what her Honour was making the point, particularly for a young person, a conviction can be a considerable burden. The Court needs to be careful in deciding whether that is required. To put it another way, is there a public interest in imposing a conviction on an 18 year old for one-off offending in these unique circumstances.

[18] Finally, in the mix is the issue of parity with your younger siblings. [Details deleted] One answer to that is you are simply older and you now have the adult responsibility and you should have made the correct adult decision. But I think there is some argument to be made in terms of that parity.

[19] Considering those matters, what is significant to me is that what led to this offending were the particular circumstances, your youth and that you were following the lead of an older person. In those circumstances, I do consider that a conviction would be out of all proportion to the gravity of the offending. Your position is exacerbated because back in Australia, the suppression orders in this country may not

² *Nash v Police* HC Wellington CRI-2009-485-07, 18 May 2009.

necessarily be respected and you will be facing the potential of publicity there, rightly or wrongly. That is going to make your situation more difficult.

[20] What that means, [Sage Lowery], is that I am satisfied that the test is met and in the circumstances, I am satisfied that you should be discharged without conviction.

[21] I re-emphasise that the name suppression put in place by Judge Cocurullo remains in place.

Judge NJ Sainsbury
District Court Judge

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