

2013 he was sentenced by Judge Nicola Mathers to 10 months' supervision (with special conditions) and ordered to complete 175 hours' community work.¹ He has appealed against conviction and sentence.

[2] Mr Byrt's appeal against conviction was on the ground that the jury could not reasonably have convicted him. In his appeal against sentence he contended that the Judge wrongly refused to discharge him without conviction.

Conviction appeal

[3] The two complainants (secondary school girls) gave evidence at Mr Byrt's trial that they were walking home one afternoon from school in September 2010. Both said that as they were walking, a car went past them, stopped, then reversed so that it was close to them. They saw that the male driver of the car, whom they could see through the open front passenger side window, had opened his trousers and was masturbating. After a short time, the man drove off. One of the complainants recorded the car's licence plate on her cellphone. Both complainants said that as the man drove off, he was grinning and laughing. They said the whole incident lasted about 10 to 15 seconds.

[4] One of the complainants telephoned the police when she got to her house. Mr Byrt was subsequently identified as the driver of the car. He gave evidence at his trial. He said he was driving with a drink bottle held between his legs, and moved one hand to take the cap off, while keeping the other hand on the steering wheel. He said that as he did this, he went to grab the cigarette he had in his mouth. The cigarette fell out of his mouth, towards his crotch area. He braked suddenly and came to a quick stop. He then grabbed the bottle and tried to use it to stub out the cigarette.

[5] Mr Byrt said he then noticed a girl in a school uniform standing on the footpath, looking shocked and scared, with her mouth open. There was also a second girl. He said he did not recognise either of them. He gave the girl in uniform a wave and a smile, to reassure her, then drove away. He denied he had been

¹ *R v Byrt* DC Auckland CRI-2010-044-6772, 6 November 2013.

masturbating, and gave evidence of suffering from a condition that resulted in (among other things) a lack of sexual drive.

[6] The complainants and Mr Byrt were extensively cross-examined.

[7] Mr Darby submitted for Mr Byrt that the jury could not have reasonably found Mr Byrt guilty on the evidence if they had properly applied the onus and burden of proof. He submitted that the complainants gave significantly different descriptions of the offender, neither of which matched Mr Byrt. He suggested that the complainants could have been mistaken in saying that the car stopped then reversed, as a result of being shocked by what they thought they had seen.² He further submitted that the circumstances of the alleged offending have an aura of unreality, and the jury should have been left with a reasonable doubt, because of the unusual nature of the alleged offending.

[8] The appeal against conviction may be dealt with quite shortly. The test is whether the jury's decision was supportable on the evidence.³ In this case the evidence of both complainants was clear as to the offending. Both were firm in their evidence that the car passed them, stopped, then reversed, and stopped beside them. Both said that they saw, through the open window, the driver masturbating. Both were cross-examined on their evidence, with Mr Byrt's evidence put to them.

[9] We are not persuaded that the jury's verdict was unsupportable. On the contrary, it was clearly supportable on the complainants' evidence. The appeal against conviction is therefore dismissed.

Sentence appeal

[10] Although framed in the notice of appeal as an appeal against sentence, Mr Darby's submissions focussed on the Judge's refusal to discharge him without conviction. As such, the appeal is an appeal against conviction. It was not

² At the appeal hearing Mr Darby, on instructions, submitted that the complainants had given malicious evidence. He accepted that this had not been put to either of the complainants at trial.

³ See Crimes Act 1961, s 385(1)(a) and *R v Owen* [2007] NZSC 102, [2008] 2 NZLR 37 at [12] and [17].

contended that the Judge should have imposed a lesser sentence. However, we have considered Mr Darby's submissions as to discharge without conviction on the merits.

[11] Mr Darby submitted that the Judge failed to give sufficient emphasis to the stigma attached to conviction for doing an indecent act in public, as conviction for such offending carries real opprobrium. He referred to *Bullock v Police*, in which Woodhouse J considered the stigma attaching to a conviction for possessing a class C controlled drug for supply as a relevant factor when allowing an appeal against the Judge's refusal to discharge the appellant without conviction.⁴

[12] In relation to this submission, Mr Darby also sought to produce a volume of medical material. Having heard counsel, we received a medical report dated 11 February 2015, which records that Mr Byrt has suffered from chronic depression since 2006, and experiences symptoms of lack of motivation, hopelessness, irritability and reduced libido. Mr Darby submitted that in this case, the opprobrium that would result to Mr Byrt from a conviction would be out of all proportion to the gravity of the offending, and should have led to his being discharged without conviction.

[13] Mr Darby went on to submit that in refusing to discharge Mr Byrt without conviction the Judge failed to apply s 8(g) of the Sentencing Act 2002 (pursuant to which a sentencing Judge "must impose the least restrictive outcome that is appropriate in the circumstances") and s 8(h) (which provides that the Judge "must take into account any particular circumstances of the offender that mean that a sentence or other means of dealing with the offender that would otherwise be appropriate would, in the particular instance, be disproportionately severe"). He submitted that discharge without conviction was the least restrictive outcome that was appropriate, and that a conviction was disproportionately severe.

[14] Mr Darby's second submission was misconceived. The jurisdiction to discharge an offender without conviction is expressly provided for in s 106 of the Sentencing Act. Section 11(1) of the Act provides that if a person is found guilty, or pleads guilty to an offence, the court must, before entering a conviction and

⁴ *Bullock v Police* [2012] NZHC 1374 at [12]–[13].

imposing sentence, consider whether the offender would be more appropriately dealt with by a discharge without conviction under s 106; a conviction and discharge under s 108; or a conviction and order to come up for sentence under s 110.

[15] If the Judge does not discharge an offender, and a conviction is entered, then s 8 is engaged. However, s 8 is not engaged if there is no conviction, and Mr Darby's submission for Mr Byrt was that he should not have been convicted. We reject Mr Darby's submission that s 8(g) and (h) provide an alternative route to a discharge without conviction.

[16] Nor are we persuaded that the Judge was wrong to reject the submission that Mr Byrt should be discharged without conviction. We accept Mr Ebersohn's submission that, while it was not at the highest level of sexual offending, Mr Byrt's offending must be viewed as moderately serious. Sexual offending of this nature, targeting comparatively young women, must be met with serious consequences.

[17] We also accept Mr Ebersohn's submission that the Judge did not err in her assessment that a conviction would have little impact on Mr Byrt's future employment, as he was not employed at the time of the offending, and had no particular prospects of being employed. Further, we accept that the Judge gave consideration to the possible stigma attaching to a conviction, and did not err in concluding that Mr Byrt's circumstances were such that he should accept any such stigma. The circumstances which led Woodhouse J to find in *Bullock* that the stigma of a conviction should be taken into account are not present in this case. There, the appellant was a very young man (he was still at school at the time of the offending), and was described as an impressionable youth thrown into a difficult environment with which he was not equipped to deal.⁵

[18] As to the possible impact of a conviction on Mr Byrt's mental health, we note that the medical report produced at the appeal hearing records that his mental state has stabilised with ongoing medication and psychotherapy, and does not set out or quantify any particular implication that a conviction or sentence may have.

⁵ *Bullock v Police*, above n 4, at [7].

[19] We are not persuaded that the Judge erred in concluding that the consequences of a conviction were in proportion to the gravity of Mr Byrt's offending. Nor are we persuaded that the Judge erred in declining to exercise her discretion in favour of a discharge without conviction.

[20] As we have noted above, it was not submitted that the Judge should have imposed a lesser sentence. Accordingly, as we have found that the Judge did not err in refusing to discharge Mr Byrt without conviction, the appeal against sentence must be dismissed.

Result

[21] The appeals against conviction and sentence are dismissed. Mr Byrt is to report to the North Shore Community Probation Service within 48 hours of the delivery of this judgment, to begin his sentence of supervision and community work.

Solicitors:
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