NOTE: PUBLICATION OF NAME, ADDRESS, OCCUPATION OR IDENTIFYING PARTICULARS OF COMPLAINANT PROHIBITED BY S 203 OF THE CRIMINAL PROCEDURE ACT 2011.

IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA541/2023
[2024] NZCA 395

BETWEEN	KAMALJEET SINGH Appellant
AND	NEW ZEALAND POLICE Respondent

Hearing: 7 March 2024 (further submissions received 15 July 2024)

Court: Thomas, Whata and Cooke JJ

Counsel: S J Shamy for Appellant
B Hawes for Respondent

Judgment: 22 August 2024 at 10.30 am

JUDGMENT OF THE COURT

A The application for leave to bring a second appeal against conviction is granted.

B The appeal is allowed.

C The conviction and sentence are quashed.

D The matter is remitted back to the District Court for reconsideration of whether the appellant should be discharged without conviction.

E Any question of bail is to be dealt with by the District Court.

REASONS OF THE COURT

(Given by Whata J)

[1] Mr Singh pleaded guilty to one charge of indecent assault.[1] He sought discharge without conviction, identifying deportation as a likely consequence of such conviction. This was declined.[2] Instead, he was sentenced to nine months' home detention.[3] He appealed his conviction to the High Court, claiming that he entered his guilty plea based on flawed legal advice, including advice about obtaining a discharge. This appeal was dismissed.[4] He now seeks leave to appeal to this Court and, if leave is granted, he seeks to have his conviction quashed. We are satisfied that the appeal raises legitimate miscarriage of justice considerations, so leave to appeal is granted.[5]

Threshold for vacating plea

[2] As stated in *R v Merrilees*:[6]

> If a plea of guilty is made freely, after careful and proper advice from experienced counsel, where an offender knows what he or she is doing and of the likely consequences, and of the legal significance of the facts alleged by the Crown, later retraction will only be permitted in very rare circumstances.

[3] Two categories of qualifying circumstances for vacation of a guilty plea are in focus in this appeal:

(a) where counsel wrongly induces a decision to plead guilty under the mistaken belief or assumption that no tenable defence existed or could be achieved;[7] and

(b) where counsel wrongly induces a guilty plea because of erroneous advice as to sentence.[8]

[4] An appeal based on counsel error as to sentence must show:[9]

(a) first, the advice given was erroneous;

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1 Crimes Act 1961, s 135.
2 *Police v Singh* [2022] NZDC 21766 [District Court judgment] at [30].
3 At [31].
4 *Singh v Police* [2023] NZHC 1838 [High Court judgment] at [89]–[91].
5 Pursuant to Criminal Procedure Act 2011, ss 237 and 238(b).
6 *R v Merrilees* [2009] NZCA 59 at [35].
7 At [34].
8 *Whichman v R* [2018] NZCA 519 at [37]; and *Su'a v R* [2017] NZCA 439 at [11].
9 *Whichman,* above n 8, at [41].

(b) secondly, there is or was a genuine prospect of acquittal at trial had the plea not been entered; and

(c) thirdly, there is credible evidence that, but for the erroneous advice, the guilty plea would not have been entered.

Background

The alleged offending

[5] The facts on which Mr Singh pleaded guilty can be stated briefly. On the evening of 4 December 2021, Mr Singh went to a party. He left around midnight. The complainant was at the party too. She went to bed about 3.30 am. The next morning Mr Singh returned to the party address at about 9.00 am. He entered the complainant's room and got into her bed. He started kissing her right cheek and placed his arm around her stomach. The complainant woke up. He touched her breast. The complainant told him to get out of her bed. He left.

The advice

[6] One charge of indecent assault was laid. Mr Singh initially entered a not guilty plea but changed that to a guilty plea and sought discharge without conviction following receipt of advice from Mr Fletcher.

[7] This advice includes an email of 8 June 2022. Mr Fletcher records in that email that Mr Singh said the events did not happen, that he was in the complainant's room looking for reflux medication, and that the complainant "may be after 'money'". In the same email, Mr Fletcher advised:

(a) Mr Singh had three options:

(i) plead guilty;

(ii) continue to defend the charges by judge-alone trial; or

(iii) endeavour to alter his election to trial by jury.

(b) He did not "think there is a realistic chance of a successful defence".

(c) Should Mr Singh defend the charges a dangerous narrative would be created, he would lose the discount for guilty plea and he "[would] be convicted".

(d) The case against Mr Singh was strong and a vague suggestion that the complainant is doing this for money was "simply unlikely to be accepted".

(e) There was "[slight] risk that if the trial [went] ahead evidence could come out of some form of penetration that could lead to much more serious charges".

[8] In another email dated 26 June 2022 Mr Fletcher advised:

> The evidence is clear, in my view that while intoxicated, you jumped into bed with a lady you barely knew. This is a serious matter and you must do all you can to make it right. If your finger, say, had penetrated her vagina, you would be looking at jail.

[9] Mr Singh gave evidence that Mr Fletcher said he was a "guru" at obtaining discharges without conviction and that seeking such a discharge without conviction was the best thing to do. Mr Singh also claims that Mr Fletcher told him he was assured of getting a discharge. This is disputed by Mr Fletcher.

[10] In any event, Mr Singh applied for a discharge without conviction. Mr Singh's affidavit filed in support of this application included an unequivocal apology for the offending. His application was dismissed by Judge Couch.[10] He was convicted and sentenced to nine months' home detention.[11]

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10 District Court judgment, above n 2.
11 At [30]–[31].

The High Court appeal

[11] Mr Singh appealed the conviction. The High Court judgment records that the main issues on appeal were: [12]

> (a) whether the advice given to Mr Singh was erroneous because he was led to believe a discharge without conviction would be the assured outcome following his guilty plea;
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> (b) whether it may be inferred that Mr Singh's English comprehension impacted on his understanding of the advice given to him;
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> (c) whether Mr Singh was advised about the prospect of requesting a sentence indication; and
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> (d) whether Mr Singh has a tenable defence.

[12] The following evidence was filed in connection with the High Court appeal:

(a) Evidence of Mr Singh — Mr Singh provides evidence of a reflux condition and says that he woke up the morning after the party suffering from this condition. He returned to the party address and went into the room where the complainant was sleeping as he assumed he might have dropped his medicine there. He also gives evidence setting out his recollection of the advice given by Mr Fletcher. He said he was told that if the complainant cried in front of the Judge, the Judge would trust her and he understood from Mr Fletcher that he could not successfully defend the charge. Mr Fletcher told him he was a "discharge without conviction section 106 guru" and that if he pleaded guilty he would be discharged without conviction. Because of this advice he changed his plea to guilty. He also felt under extreme pressure. He said Mr Fletcher drafted an affidavit for him but did not send it to him. He signed it because he thought he would be discharged without conviction. Mr Singh also gave evidence that he is a modest user of English.

(b) Evidence of Mr Fletcher — Mr Fletcher responds to Mr Singh's account, attaching copies of his written advice. He confirms that he

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[12] High Court judgment, above n 4, at [2].

told Mr Singh that he did not have a realistic prospect of success, that he could rule this out as a case of mistaken identity, and that Mr Singh's explanation for the complaint — making things up for "money" — was unlikely to be accepted. He accepts that he is likely to have said that if the complainant cries it will add to her credibility. He denies saying that discharge was certain and does not accept that Mr Singh was under extreme pressure. He says that he sent a copy of the affidavit by email, a copy of which was attached.

(c) Evidence and statement of ML — in her evidence, ML says she went to the party with Mr Singh and, like him, returned the following morning. She needed to use the bathroom and was directed to the ensuite bathroom in the bedroom where the complainant was sleeping. Mr Singh arrived shortly afterwards and he asked her where the bathroom was and she pointed to the same ensuite. He went in and did not remain long in the room. She remained seated outside, did not hear anything and when Mr Singh came out he seemed fine. In her statement, she describes how Mr Singh went into each room to check something and about 10 minutes later he came back. They also grabbed their friend India's cell phone that was on the table.

(d) Evidence of IL — a former partner of Mr Singh. Mr Singh treated her with respect and they remain good friends.

(e) Statement of FR – she lived at the address of the party. She recalls seeing Mr Singh coming into her room on the morning of the alleged offending. Her door was wide open and he was "lurking around in her room". As soon as he saw her awake he left the room.

(f) Statement of the complainant — she describes meeting Mr Singh for the first time at the party. She went to bed at 3.30 am, having consumed three quarters of a crate since 11.00 am the day prior. She woke at 9.00 am to someone cuddling her from behind and kissing her. She describes the alleged offending. She turns around and sees

Mr Singh lying in bed next to her and confronts him. She tells him to "[g]et the fuck out" and he leaves. She then got up and spoke to FR, who could not speak then but later in the day relayed to the complainant that she had seen Mr Singh in her room and that he said he was looking for a phone.

(g) Statement of IM — she says Mr Singh was her flatmate and she travelled to the party with him. She left the party with other friends and did not link up with Mr Singh until the following morning. She recalls receiving a message from the complainant at about 3.59 pm saying that Mr Singh had indecently assaulted her.

[13] Harland J did not consider Mr Singh's claim that he thought a discharge without conviction was guaranteed to be credible.[13] The Judge was satisfied that Mr Singh understood the advice given and the contents of the affidavit he signed.[14] The Judge accepted that Mr Singh was not advised about the option of seeking a sentencing indication, but did not consider Mr Fletcher's advice to be inadequate.[15] She found that Mr Singh had a tenable defence because:[16]

(a) the evidence from [FR] that when Mr Singh entered her room, the door was left open. Mr Shamy submitted someone wanting to commit a sexual offence would not leave the door open;

(b) there were other people in the house, including [FR], and [ML] being right outside the door of the room the complainant was in;

(c) there was no indication of any sexualised activity or attempts at such when Mr Singh entered [FR's] room;

(d) [ML], who was seated right outside the door, heard nothing being said from inside the room;

(e) the complainant says that [FR] told her that, when Mr Singh was in her bedroom, he said he was looking for a phone but in [FR's] statement she says Mr Singh said nothing; and

(f) everyone had been drinking heavily which may have affected the complainant's memory.

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13 At [67] and [90].
14 At [74]–[75].
15 At [76]–[78].
16 At [85]–[86].

[14] But the Judge did not consider there to be any miscarriage of justice having particular regard to the fact that Mr Singh had admitted to the offending in his affidavit in support of his application for discharge, as well as her findings that Mr Fletcher's advice was adequate and Mr Singh understood the advice given.[17]

Issues on appeal (as originally pleaded)

[15] The central issues on appeal are:

(a) whether Mr Fletcher's advice to Mr Singh about his prospects of success, the risk of an allegation of digital penetration and about sentencing options was erroneous; and if so

(b) whether Mr Singh had a genuine prospect of acquittal if the plea had not been entered; and

(c) whether there is credible evidence Mr Singh would have pleaded not guilty had he known the correct position.

Wrong advice?

No realistic chance of a successful defence

[16] As we understand Mr Shamy's submissions for Mr Singh, Mr Singh's defence (at the time of the advice) could have been based on lack of confession, lack of eyewitnesses, lack of forensic evidence, probable intoxication, half-awake state of the complainant, lack of unusual behaviours afterwards by Mr Singh and Mr Singh's previous good character. Mr Shamy says that Mr Fletcher's focus on lack of motive to lie subverted the onus of proof. Finally, Mr Shamy contends that the High Court was correct to find that there was a tenable defence, and as such Mr Fletcher's advice was plainly wrong.

[17] Mr Hawes, for the Police, submits there was no tenable defence. He maintains that Mr Fletcher gave clear robust advice as to the prospects of success and that the

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17 At [87]–[88].

case for the Crown was strong. He also says that the issue as to motive was a valid matter to be weighed in the assessment. Overall, therefore, he submits that Mr Fletcher's advice about the merits was not wrong.

[18] We largely agree with Mr Hawes. Mr Fletcher provided robust advice about the prospects of successfully defending the charge. The Crown case was very strong. There was the complainant's evidence identifying Mr Singh at very close range as the offender. There was flatmate evidence of Mr Singh "lurking around" and there was ML's evidence placing Mr Singh in the complainant's room at the time of the alleged offending. There was also no obvious evidential basis for claiming that the complainant lacked credibility. Mr Singh's suggestion that she was wanting money is fanciful. While Mr Singh does not have to prove a motive to lie, any attack on her credibility appears challenging. Conversely, there was evidence that Mr Singh asked a friend, when talking about the incident, if someone was drunk could they be criminally responsible or words to that effect. This was not referred to by the High Court Judge and it is unclear if this evidence was before her.

[19] The evidence going to the complainant's reliability was also weak. Contrary to Mr Shamy's submissions, in reality, opportunity and identity were not seriously arguable. Mr Singh was seen going into the complainant's room uninvited at about the time the complainant says the offending occurred. It is inherently implausible that another man, bearing Mr Singh's description, entered the room and indecently assaulted her shortly before or after the time Mr Singh was in her room. In addition, there can be no claim to recent invention. The complainant referred to the incident in a message to IM, identifying Mr Singh, later the same day.

[20] It follows that we have come to a different conclusion than the High Court Judge as to whether there was a tenable defence on the available information.[18] The matters identified by the High Court and Mr Shamy point to lack of corroborative evidence of the alleged offending, circumstantial evidence that is not consistent with the offending, and a plausible (if weak) narrative that Mr Singh was searching for his reflux medication. But these matters are makeweight at best in the face of direct

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[18] *Hussein v R* [2011] NZCA 58 at [22].

evidence from the complainant and other witnesses placing Mr Singh in the complainant's room at the time of the alleged offending, and then the direct evidence from the complainant identifying Mr Singh as the offender.

[21] Accordingly, we do not find that Mr Fletcher's advice about the chance of success was wrong.

Digital penetration

[22] We accept Mr Fletcher's advice that Mr Singh might face an allegation of digital penetration was speculative and wrong. We return to the significance of this below.

Sentencing options

[23] Two errors are alleged regarding Mr Fletcher's sentencing advice:

(a) Mr Singh would likely be discharged without conviction; and

(b) Mr Singh was not advised about the option of obtaining a sentencing indication.

[24] Mr Fletcher conceded under cross-examination that he may have referred to himself as "a discharge without conviction guru". He also accepted that he recommended applying for a discharge because there was a reasonably good possibility of success. He was however adamant that he did not say it was very likely Mr Singh would obtain a discharge without conviction. We have no reason to doubt Mr Fletcher's credibility on this and, like the High Court, we think it is not at all credible that Mr Singh thought he was guaranteed a discharge without conviction.[19]

[25] Furthermore, we consider that it was open to Mr Fletcher to advise that there was a reasonably good possibility of a discharge without conviction even on the state of the authorities that existed at the time of the advice. In this regard, Mr Singh's early

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[19] High Court judgment, above n 4, at [67].

guilty plea, largely unblemished record,[20] and the consequences of conviction for him (including deportation) provided an arguable basis for discharge.[21]

[26] For completeness, we see nothing in the point made by Mr Shamy that Mr Fletcher did not pass on opinion advice from a clerk that discharge was very unlikely. Whether to accept and or pass on such an opinion is a matter properly within the remit of experienced trial counsel.

[27] Turning then to the failure to advise Mr Singh about a sentencing indication, Mr Shamy submitted in this Court that the failure to advise Mr Singh about the option of obtaining a sentencing indication was plainly wrong and prejudicial. We accept that a sentencing indication may have better enabled Mr Singh to make a fully informed decision about how to proceed. However, as demonstrated by this Court's decision in *T (CA662/2012) v R*, the failure to seek a sentencing indication will not qualify by itself as giving rise to a miscarriage of justice.[22] In *T (CA662/2012),* the combination of this failure and erroneous advice that the Crown would not oppose the defendant's application for discharge without conviction led to a finding of miscarriage "at the margin".[23]

[28] In the present case, there is no combination of errors of this kind. Moreover, given the inherent complexity involved in a discharge assessment under s 106 of the Sentencing Act 2002, we very much doubt that the Court would have been inclined to provide any sort of firm indication that a discharge would be forthcoming or not. As we have said, there was an arguable basis for a discharge, but little more could be usefully said without undertaking the full s 106 assessment.

[29] Accordingly, while we accept that it was an error not to raise the sentencing indication option, we do not consider this error materially affected the assessment Mr Singh needed to, and did, make.

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20 He has one previous conviction for a traffic matter.

21 For examples of cases where discharge has occurred in the context of an indecent assault see *Rahim v R* [2018] NZCA 182; *Marshall v Police* [2014] NZHC 2681; *B v Police* [2016] NZHC 1118; and *R v Lang* [2020] NZDC 16389, [2020] DCR 435.

22 *T (CA662/2012) v R* [2013] NZCA 550 at [37]–[39].

23 At [37].

A genuine prospect of acquittal?

[30] We turn then to assess whether there was a genuine prospect of acquittal. As explained in *Whichman v R*, when making this assessment, the Court does not overanalyse the merits of available defences:[24]

> … we do not think an appellate court should overanalyse the merits of available defences. To do so risks eroding the essential responsibility of the first appeal court under s 232(4) [of the Criminal Procedure Act 2011] to concern itself with whether the error "created a real risk that the outcome of the trial was affected". What matters is whether a genuine prospect of acquittal has been lost as the result of a process failure in the criminal justice system. As *T (CA662/2012) v R* demonstrates, it is very much a matter of impression as to whether justice has or has not been done in the particular case.

[31] We have already found that, based on available information, Mr Singh did not have a realistic prospect of successfully defending the charge. While, for the reasons set out in *Whichman,* it is necessary to be circumspect in our assessment of the merits, we consider that at most there was a theoretical prospect only of an acquittal. Accordingly, we find that a genuine prospect of acquittal was not lost.

[32] For completeness we observe that in reaching this view we have not placed weight on Mr Singh's subsequent admission. We consider there is force in the proposition that Mr Singh was so concerned to maximise the prospects of discharge that he offered a false admission. Notably, this Court in *Whichman* set aside a subsequent admission of guilt because it would not have been available to the Crown at trial, being devised later in an effort to gain sentence credit.[25] Similarly, at the time Mr Singh made his decision to plead guilty, the Crown would not have had his admission of guilt for the purposes of trial. We therefore put aside the admission for the purpose of this assessment.

[33] In any event, we are not satisfied that there is or was a genuine prospect of acquittal.

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24 *Whichman*, above n 8, at [41] (footnote omitted).
25 At [50].

Credible evidence that a guilty plea would not have been entered?

[34] Given where we have got to, it is not strictly necessary to make a finding on the last threshold issue. But we think it important to complete the analysis given we are dealing with the potential for miscarriage.

[35] Mr Hawes submits that Mr Singh always wanted to avoid conviction and that it was always likely he would have pleaded guilty. We agree. Mr Singh was very clearly motivated to adopt a course that might avoid conviction given his concerns about the effect of a conviction on his immigration status. We do not consider that correct advice about the risk of an allegation of digital penetration (or the absence thereof), or the availability of a sentencing indication, would have caused him to maintain a not guilty plea given that his best prospects of avoiding conviction always lay with an application for discharge.

Miscarriage on the pleaded grounds?

[36] Mr Singh was wrongly advised that he might face a more serious allegation of digital penetration and he was not told about the option of a sentencing indication. We therefore accept that he proceeded on the basis that a not guilty plea might lead to more serious allegations and he did not have a full appreciation of the likely sentencing outcomes. But we do not consider that, alone or in combination, these errors meant that there has been a miscarriage of justice. It is plain to us that Mr Singh would have acted on advice about what course of action was needed to give him the best prospects of avoiding conviction. In the context of a very strong Crown case, he was correctly advised that his best prospects of avoiding conviction was an early guilty plea and an application to be discharged without conviction. Mr Singh understood and followed that advice.

A fresh ground of appeal

[37] After the hearing of this appeal, the Supreme Court in *Bolea v R* clarified that risk of deportation must be taken into account when assessing whether conviction was out of all proportion to the offending pursuant to ss 106 and 107 of the

Sentencing Act.[26] This decision is relevant to the consideration of the decision to refuse to grant a discharge without conviction to Mr Singh given that deportation is a likely consequence of his conviction.

[38] An appeal against a refusal to grant a discharge without conviction is treated as a composite appeal against both conviction and sentence.[27] An issue therefore arises as to whether this Court can consider the refusal to discharge without conviction given Mr Singh's appeals to both the High Court and this Court were in respect to his conviction only. Mr Singh's sentence appeal comes to us for the first time; however, the High Court is the first appeal court.[28]

[39] We are satisfied we have jurisdiction in the circumstances. An appeal against a refusal to grant a discharge without conviction is unique in that it is treated as a composite appeal against both conviction and sentence, and the conviction appeal is properly before us. In light of this conclusion, we sought further submissions from counsel as to merits of the refusal.

Refusal to discharge without conviction

[40] The appeal should be allowed if there has been a miscarriage of justice.[29] It is sufficient for this purpose if there has been a material error by the sentencing judge in entering conviction or if the judge has erred in applying the principles for discharging an offender without conviction found in s 107 of the Sentencing Act.[30]

[41] Mr Shamy submitted that the Judge failed to properly treat the likelihood of deportation as a consequence of conviction, as now required by *Bolea*.[31] That being the case we were invited by him to undertake the s 106 evaluation afresh. In this regard, he submitted there is no tariff case for the offence of indecent assault, and that it is instead "an evaluative exercise that is heavily fact-dependent".[32] Mr Shamy contended further that the gravity of the offending is lessened because it was not

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26 *Bolea v R* [2024] NZSC 46 at [56].
27 *Jackson v R* [2016] NZCA 627, (2016) 28 CRNZ 144 at [7]–[9] and [16].
28 Criminal Procedure Act, s 247(1)(b)(ii).
29 Pursuant to Criminal Procedure Act 2011, s 232.
30 *Jackson v R*, above n 27, at [12].
31 *Bolea v R*, above n 26, at [41] and [56].
32 *Rahim v R*, above n 21, at [16].

premeditated, the offending was very brief, there was no touching near the genitalia, and Mr Singh stopped as soon as lack of consent was voiced. The gravity is also lessened due to Mr Singh's lack of criminal history, his relatively young age (26 years) and his prospects of rehabilitation.

[42] As regards the consequences of the conviction, Mr Shamy submits that there is unchallenged evidence that the issue of a deportation liability notice is highly likely to occur. Both the liability for deportation and the risk of actual deportation should be treated as a consequence of a conviction under s 107.[33] Mr Shamy contends that Mr Singh's likely deportation is out of all proportion to the low to moderate gravity of his offending, and accordingly he should be discharged without conviction.

[43] Mr Hawes submits that the Judge in essence applied the approach laid down in *Bolea,* noting in particular that the Judge found it was highly likely Mr Singh would be deported and that the consequences of conviction were clearly very serious for Mr Singh. He therefore submitted that the Judge correctly proceeded on the basis that the entry of conviction as opposed to the offending itself would trigger immigration consequences, including deportation, and that the consequence was likely to follow.

Our assessment

[44] In *Bolea* the Supreme Court said:

> [41] Our view is that where, as here, there is unchallenged evidence that the issue of a deportation liability notice will "almost certainly" occur, then (in the absence of other evidence) both the liability for deportation and the risk of actual deportation should be treated as consequences of conviction under s 107. It follows that we do not agree that, for persons in Ms Bolea's position, the process followed by the immigration authorities means that the "usual" position is that the prospect of deportation will be a consequence of the offending rather than the conviction.

[45] It then laid down a four-step process for the position in relation to s 107:[34]

> (a) What is required is an individual assessment of the particular circumstances of the defendant as is apparent from both ss 11(1) and 107 of the Sentencing Act.

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33 *Bolea v R*, above n 26, at [41] and [56].
34 At [56].

(b) If there is credible evidence based on past practice that, in the ordinary course, a deportation liability notice will be issued then, unless there is case specific evidence to the contrary both the liability to deportation and the risk of actual deportation should be treated as consequences of the conviction under s 107. The same approach applies where it is plain immigration authorities will not go beyond consideration of the conviction.

(c) The position may be different if it is clear a conviction does not add anything … .

(d) Once the court determines the exposure to deportation is a consequence of the conviction, the court must be satisfied there is a real and appreciable risk of that consequence occurring. This consideration is undertaken as part of the proportionality exercise required by s 107.

[46] All of this is important because, in dismissing Mr Singh's application for discharge, Judge Couch said:[35]

> [20] This raises the issue of the extent to which the Court should take account of potential immigration consequences. … [W]here an offender's conduct may come to the attention of immigration authorities and be considered in any event, it was best that any immigration consequences be left to immigration authorities. … [T]here is nothing that requires the courts to intervene, to try and impose their perception of what the right immigration consequences should be.
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> [21] In *Sok* the Court of Appeal took a similar view saying that when offending could be taken into account by immigration authorities regardless of the outcome in court proceedings, immigration consequences where not a strong factor in an application for discharge. As the Court of Appeal put it: "The causation question can sometimes be brought into focus by asking whether a discharge will eliminate or mitigate a risk of deportation."
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> [22] What is apparent … is that the significance of conviction for immigration purposes will depend on whether immigration decisions would be made on the basis of the conviction or of the offending itself. To a large extent, this depends on the offender's immigration status at the time of sentence. In the cases I mentioned so far, the offenders have temporary entry class visas. The Immigration Act [2009] itself has distinct and different provisions relating to those who hold temporary class visas and those who hold resident class visas.

[47] And further:

> [25] Turning to this case, I proceed on the basis that it is highly likely that Immigration New Zealand would seek to deport you if you are convicted. That would be subject to an appeal on humanitarian ground but the prospects

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35 District Court judgment, above n 2 (footnote omitted), quoting *Sok v R* [2021] NZCA 252 at [52].

> of you succeeding in such an appeal would not be great and cannot be relied on.

[48] The Judge then found:

> [28] … The consequences of conviction are clearly very serious for you. You are likely to be deported from this country. It must be recognised, however, it is the intention of the Immigration Act that criminal offending should have a consequence. A visa holder who is convicted of a criminal offence, particularly a serious offence such the one you have committed, can properly be regarded as no longer of good character, which is an essential attribute for the grant of visas. While there will be many cases such as yours where the offending is minor or moderate and deportation will be properly seen as an excessively harsh consequence of conviction, in this case, the offending is serious and morally repugnant.
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> [29] I note that in s 161 of the Immigration Act, convictions are dealt with in three categories. The first category is where the maximum penalty is three months or more. … The middle category is where the maximum penalty is two years or more. The third and highest category is where the maximum penalty is five years more. Your case falls into that highest category.
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> [30] Having regard to all the circumstances, I am not satisfied that the consequences of conviction would be out of all proportion to the gravity of your offending. Thus, the test in s 107 of the Sentencing Act is not met and the application for discharge without conviction is declined. You will be convicted.

[49] While the Judge correctly refers to "the consequences of conviction", he effectively downplayed their significance because of the approach taken by Immigration New Zealand to the underlying offending, including by reference to its categorisation of particular types of offending. The Judge also appears to have placed considerable weight on the view of Immigration New Zealand as to the repugnancy of the offending. In so doing the Judge fell into error. As the Supreme Court has now made plain, once the court is satisfied that the issue of a deportation liability notice will "almost certainly" occur (as here) then both the liability for deportation and the risk of actual deportation should be treated as a consequence of the conviction and considered in the proportionality exercise envisaged by s 107 of the Sentencing Act.[36] It was then for the Judge to consider whether, on the facts of the case, deportation was out of all proportion to the offending, without undue deference to the views of Immigration New Zealand about the offending.[37] That did not happen here.

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[36] *Bolea v R*, above n 26, at [41].

[37] A similar issue recently arose in *Datt v R* [2024] NZCA 297 where that Court also found similar error of approach at [46].

[50] On that basis the appeal against conviction must be allowed.

[51] We have also considered whether we should assess the merits of the discharge application in this Court. But we have come to the view that the proper course is to remit the application for discharge back to the District Court for reconsideration as the first instance Court, as the Supreme Court did in *Bolea*.[38] In this regard, we think Mr Singh should be able to file any further evidence in relation to the discharge issue, and have the benefit of a fully considered first instance decision and any subsequent appeal rights should that prove necessary.

Result

[52] The application for leave to bring a second appeal against conviction is granted.

[53] The appeal is allowed.

[54] The conviction and sentence are quashed.

[55] The matter is remitted back to the District Court for reconsideration of whether the appellant should be discharged without conviction. Any question of bail is to be dealt with by the District Court.

Solicitors:
Addington Law Centre, Christchurch for Appellant
Crown Solicitor, Christchurch for Respondent

[38] *Bolea v R*, above n 26, at [58].