IN THE DISTRICT COURT
AT AUCKLAND

CRN 05004024420

THE POLICE

v

H
Applicant

Hearing: 8, 9 August 2005

Appearances: F Pilditch for the Informant
P Dale for the Applicant

Judgment: 16 August 2005

RESERVED DECISION OF JUDGE S G LOCKHART QC
[In the matter of an application for discharge without conviction under s.106 of the Sentencing Act 2002]

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[1] In the Auckland District Court on 1 August 2005, H (hereinafter called "the applicant") pleaded guilty to a charge under s.7(1)(a) of the Misuse of Drugs Act 1975 in that he:

> "did attempt to procure a Class A controlled drug namely cocaine."

[2] To this charge the applicant pleaded guilty. Having pleaded guilty, an application was then made on behalf of the applicant that he be discharged without conviction pursuant to s.106 of the Sentencing Act 2002. The hearing of that application was adjourned to 8 August in order that affidavits in support of the application could be filed by the applicant. The hearing continued for a full day on 9 August.

Factual background

[3] On 19 June 2005 the Auckland Police Drug Squad commenced an electronic investigation into the suspected activities of a known drug provider. During the course of the police investigations the police became aware on 27 June 2005 that the applicant had contacted the drug provider on his cellular telephone and that he had made an enquiry from that person regarding obtaining cocaine which is a Class A controlled drug.

[4] The individual contacted by the applicant advised the applicant that some cocaine would be available in approximately three and a half weeks to which comment the applicant apparently jokingly replied that they "should go to Colombia themselves to get it".

[5] The applicant requested that when the cocaine did arrive in New Zealand to put "ten" aside for him. It is not disputed on behalf of the applicant that that conversation was a reference to ten grams of cocaine although in an attempt to disguise the reference to cocaine, the applicant referred to the cocaine as "vintage bottles of wine".

[6] On 11 July 2005 the applicant again made contact with the proposed supplier on his cellular telephone and inquired about the availability of cocaine. In reply the applicant was informed by his contact that he was out of Auckland and would not be back until later in the week. The applicant was further advised he would be contacted by the prospective supplier on his return to Auckland if any cocaine was available.

[7] On 1 August 2005, almost three weeks later, the applicant was interviewed by the police. He admitted he had made contact with the possible supplier in an attempt to obtain a Class A controlled drug cocaine. In explanation for his offending the applicant stated that he had made the request to be supplied with cocaine because he had found that taking cocaine in the evening suppressed his appetite which assisted him to lose weight.

Grounds for a discharge pursuant to s.106

[8] The applicant has pleaded guilty to a charge laid under s.7(1)(a) of the Misuse of Drugs Act 1975 and having regard to the provisions contained in s.311 of the Crimes Act 1961 (which the prosecution accepted was applicable to offences committed under the Misuse of Drugs Act 1975), the maximum penalty that can be imposed upon conviction is three months imprisonment and a fine of $500.00.

[9] The applicant has applied to be discharged without conviction pursuant to s.107 of the Sentencing Act 2002 on the grounds that such a conviction may:

(a) impact on the applicant's ability to travel overseas particularly to the United States, Australia and China being countries in which the applicant has business interests and indeed any other country to which the applicant wishes to travel and;

(b) that if the applicant is convicted that conviction creates a possible risk of an impact on the financial status of the business interests of the applicant not only in New Zealand but also in particular Australia and the United States.

The law

[10] Section 106 of the Sentencing Act provides as follows:

> **"106 Discharged without conviction**
>
> (1) If a person who is charged with an offence is found guilty or pleads guilty, the court may discharge the offender without conviction, unless by any enactment applicable to the offence the court is required to impose a minimum sentence.
>
> (2) A discharge under this section is deemed to be an acquittal.
>
> ..."

[11] Section 107 applies to all applications made under s.106 and states:

> **"107 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." [underlining added]

[12] Thus the Court cannot make an order discharging a defendant without conviction under s.106 unless the Court is satisfied that the conditions contained in s.107 have been established to the required standard of probabilities (see ***McDowell v Police***, (Christchurch HC, A 133/02, 11 March 2003, Hansen J)).

[13] Applications pursuant to s.106 are made and considered more frequently in the District Court as opposed to the High Court, the reason being that the District Court is required to sentence not only a larger number of individuals who are prosecuted but also the District Court's jurisdiction applies to a greater range of offences having a lower scale of culpability. The majority of the decisions emanating from the High Court generally arise from appeals from a District Court decision in exercising a discretion, declining to grant a defendant a discharge without conviction pursuant to s.106.

[14] The grant of a discharge without conviction is discretionary, a discretion however which must be decided in accordance with principles enunciated by both the High Court and the Court of Appeal. During the course of hearing this present application the Court was referred to in excess of twenty reported or unreported decisions from all jurisdictions. A close perusal of all those decisions establishes that where the applicant applying for a discharge without conviction is a person of youthful years, who is undertaking a course of academic study, who has no previous convictions and is generally of good character, he or she comes within the category of defendants who are more likely to receive the benefit of a s.106 discharge. However each individual application must be considered on its own merits from which no particular category of individuals can be excluded.

[15] Section 11 of the Sentencing Act 2002 contains a mandatory statutory direction that where a person is found guilty or has pleaded guilty to a charge, the Court must consider whether the offender could be more appropriately dealt with by:

(a) discharging the offender without conviction under s.106 or;

(b) convicting and discharging the offender under s.108 or;

(c) convicting the offender and ordering that the offender come up for sentence if called on under s.110.

[16] However, as stated in ***Cook v Police*** (Auckland HC, A 01/03, 28 February 2003, Harrison J):

> "Section 107 recognises the overriding consideration for a discharge is formulated in ***Police v Roberts*** [1991] 1 NZLR 205 (CA), p.210."

[17] The Court of Appeal in ***R v Sean Edward Reid*** (CA 322/04, 16 December 2004) confirmed that the correct approach was still as stated in ***Police v Roberts*** (supra) being:

> "... in the final analysis, after considering all the relevant circumstances, it is a proper exercise of the Court's discretion 'if the direct and indirect consequences of the conviction are, in the Court's judgment, out of all proportion to the gravity of the offence'. That must be the overriding consideration. The words, 'out of all proportion' point to an extreme situation which speaks for itself."

Consequently that is the test that has to be applied in the present case after having due regard to the factual situation as presented to this Court and the grounds that were submitted as being relied upon by the applicant to be discharged pursuant to s.106.

Overseas travel

Australia

[18] The Australian Department of Immigration and Multicultural and Indigenous Affairs have published for guidance a Fact Sheet containing information relating to the character requirements for non-Australian citizens seeking to enter Australia. In accordance with the terms of the character test an individual will fail that test where they have a substantial criminal record. To come within the ambit of "a substantial criminal record" an individual has to be sentenced to a term of imprisonment of 12 months or more.

[19] If a conviction in respect of the present charge is entered against the applicant it can hardly be alleged that he has a "substantial criminal record" as it would be his first conviction and being a person otherwise of good character and repute he could

not be declined a visa to enter Australia on any other grounds. From the information available regarding the issue of visas to enter Australia, the applicant should have no difficulty in retaining his current visa to enter Australia or to have that visa renewed in the future.

[20] In fairness to the applicant it should be observed that it was acknowledged by counsel that it was unlikely that the applicant would face any difficulty in the future in travelling to and entering Australia.

United States

[21] An individual requiring a Non-Immigrant Visa application to enter the United States is obliged as required by s.38 on the application form to answer the following question:

> "Have you ever been arrested or convicted for any offence or crime, even though subject of a pardon, amnesty or other similar legal action?"

The first point to note is that there is an obligation on the individual completing that form to disclose whether they have been "arrested" for any offence. Clearly the applicant has been arrested and even if the applicant was discharged without conviction the applicant would still have to acknowledge on the application form that he had been the subject of "an arrest".

[22] The application form to be completed by a potential visitor to the United States provides that if that person is obliged to disclose that they have been either arrested and/or convicted, it does not automatically signify "ineligibility for a visa"

but such an applicant may be required to personally appear before a consular officer before their visa can be granted.

[23] Consequently there is no evidence before this Court that the imposition of a conviction on the charge which the applicant has pleaded guilty would automatically result in the applicant being refused a non-immigration visa to the United States. The applicant may be required to personally appear before a consular officer in New Zealand who would no doubt take into consideration the otherwise good character of the applicant in making a decision as to whether or not to grant a visa.

[24] In the opinion of the Court, having regard to the wide discretion that exists in the granting of a non-immigrant visa application to enter the United States, it is unlikely that the applicant's ability to enter the United States will be curtailed.

China

[25] In support of the present application, an affidavit has been filed annexing documentation relative to the obtaining of an entry visa to China. Included in that documentation is a document obtained from the Embassy of the People's Republic of China situated in Auckland which purports to state the Law of the People's Republic of China relative to the Control of the Entry and Exit of Aliens. That document provides rules for the implementation of visas which prevents entries of individuals who:

> "are considered prone, after entering the country, to smuggling, prostitution or drug trafficking;"

[26] Again an examination of the documents supplied by the Embassy of the People's Republic of China in New Zealand clearly indicates that if the applicant

was convicted of the current offence to which he has pleaded guilty, such a conviction will not preclude the applicant from travelling to and entering China.

Impact of conviction on travel visa eligibility

[27] It was submitted on behalf of the applicant, in respect of specific reference of travel to Australia, United States and China, that the entry of a conviction would debar the applicant from travelling to those countries. On the evidence produced at the present hearing it is not established on the balance of probabilities that the applicant, if convicted, would be declined a visitor's visa to those countries.

[28] As Mr Dale acknowledges in his written submissions on this topic (para 29), a conviction will not necessarily impede the applicant's ability to travel. There is only a risk that a conviction might do so. A careful perusal of the relevant documents produced on behalf of the applicant indicates that that risk is unlikely to eventuate.

Risk of conviction impact on business

[29] In respect of this issue, an affidavit was filed on behalf of the applicant by Christopher Gerard Aiken the Chief Executive of the Kitchener Group, of which the Court was advised that the applicant is the sole shareholder and Director.

[30] When giving evidence Mr Aiken referred to and produced various loan document forms which contained a proviso that the lender had the right to call up the loan if there "is a material adverse change in relation to a relevant party". It was submitted that the applicant was a "relevant party" because he had provided to

lenders not only additional personal securities but he was also a personal guarantor of the loans made to the Kitchener Group.

[31] A considerable portion of the evidence given by Mr Aiken was suppressed from publication not because it was irrelevant but because it was hearsay and also because, as Mr Aiken acknowledged, he had no authority to speak on behalf of any of the lending institutions. In addition, Mr Aiken's affidavit did contain certain highly sensitive commercial financial information relating to the Kitchener Group. In the final analysis the extent of Mr Aiken's evidence was to alert the Court to a possibility that some institutions who had advanced considerable sums to the Kitchener Group may if a conviction was entered to the charge to which the applicant had pleaded guilty have concerns regarding their financial involvement with him.

[32] Mr Pilditch, on behalf of the police, objected to what he described as a "substantial amount of hearsay" in both Mr Aiken's affidavit tendered in evidence and his viva voce evidence. To a certain extent that criticism was justified. However the Court allowed considerable latitude to the applicant's witness on the issue of hearsay, firstly because there would have been considerable reluctance on the part of banking officials to give categorical and binding decisions until the prosecution was finally concluded and secondly, that particularised evidence from top level banking officials could only have been given by overseas-based witnesses, whose availability created some difficulty.

[33] In the end result, all Mr Aiken could state was that the respective bankers to the Kitchener Group had available, if they wished to exercise them, considerable

rights to withdraw their loan facilities if they became concerned that the applicant's life style was posing a potential threat to the financial support already advanced and presumably subject to adequate securities.

[34] As opposed to Mr Aiken's evidence regarding the possible financial repercussions that may occur if the application was convicted, Mr Aiken confirmed that the applicant was a very successful businessman who was held in extremely high regard in the building development industry.

[35] Viewing the evidence of Mr Aiken in its totality, it is not a criticism of him to hold that his evidence could not establish any firm basis that a conviction for the nature of the offence to which the applicant has entered a guilty plea would seriously affect the financial standing of the Kitchener Group. Such a conviction may have a detrimental effect but should not be of a major concern, having regard to the applicant's apparent high standing and regard in the business and building development community.

Decision

[36] It is accepted that the applicant appears before the Court, aged 51, as a first offender. He has no previous convictions. The applicant has achieved outstanding success as a businessman and as a property developer and as a result he has been a financial contributor to charities and civic projects. If the applicant is convicted it is not established on the evidence currently before the Court that that conviction will affect his ability to travel overseas. Again, if he is convicted the effect of a conviction may have some impact upon his standing in the community but it is open to conjecture as to whether such a conviction will affect seriously the financial

position of the Kitchener Group which apparently has a high successful commercial reputation.

[37] The maximum penalty as decreed by the legislation on the charge to which the applicant has pleaded guilty and which can be imposed on the applicant is three months' imprisonment and a fine of $500.00. As he is a first offender the prosecution accepts that consideration of a term of imprisonment is totally inappropriate. He can only be fined but there do arise some issues of the offending that need to be stated.

[38] There is no evidence that the applicant has an addiction. Equally, there is no evidence that he was a part of what has been termed a celebrity group of offenders. Other individuals may be facing other more serious charges but there is no evidence before the Court linking him to any other individual who currently faces charges.

[39] However, the agreed summary of facts establishes that on two separate occasions , two weeks apart, the applicant made telephone contact with an individual making a request to obtain cocaine. The offending was not an isolated enquiry with an unknown person on a casual basis. The applicant's explanation to the police that he was desirous of obtaining cocaine to suppress his appetite is completely unsupported by any medical evidence (as opposed to ***R v Jackson***, (Christchurch HC, CRI 2003-009-010563, 11 December 2003, Panckhurst J).

[40] Taking all matters into consideration that have been advanced on behalf of the applicant, the Court is not satisfied on the balance of probabilities that the applicant has established that "the direct and indirect consequences of the conviction

are out of all proportion to the gravity of the offence" which results in the application to be discharged without conviction being declined.

[41] In addition, it is held that a consideration of the totality of the evidence leads to the inescapable conclusion that the applicant prior to making requests to obtain cocaine, had been previously a consumer of that drug and had sufficient personal knowledge of the identity of the proposed supplier to be able to contact that person by cellphone on two occasions, each time inquiring about the availability of cocaine.

[42] Being mindful that a discharge granted pursuant to s.106 is deemed to be an acquittal under s.106(2), and having regard to the applicant twice seeking to procure cocaine, then in exercising the discretion conferred on the Court, as contained in s.106, the application to be discharged without conviction would also be refused.

[43] The application by the defendant is to be discharged without conviction is dismissed and the defendant is convicted of attempting to procure a Class A controlled drug, namely cocaine.

S G Lockhart QC
District Court Judge

Signed at at on the day of 2005