IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

M.1485/84

BETWEEN COLIN ALOYSIUS McDONALD

Appellant

AND POLICE

Respondent

Hearing: 13 December 1984

Counsel: Haig for Appellant
Jones for Respondent

Judgment: 13 December 1984

(ORAL) JUDGMENT OF PRICHARD, J.

The Appellant, who is an experienced police officer, was convicted in the District Court at Auckland on 5 September this year of the offence of assaulting one Owen Phillip Ross in an interview room at the Mt. Eden Prison. The Appellant had gone to the prison to interview Ross in connection with enquiries he was making into a burglary. At one point, the Appellant left the room to telephone Police Head Quarters. He says that when he returned, Ross was sitting down and that as he went to go past him, Ross made a sudden movement which he thought was the prelude to an assault. The Appellant says that he instinctively made a sudden movement with his hand and struck the

complainant with the back of his hand. It seems that the Appellant sustained what is generally called a black eye.

There is no doubt that the Appellant has an impeccable record in the police force, in which he has served for 11 years, 7 of those as a detective, and that his conduct on this occasion can fairly be said to be quite out of character. There is evidence that at the time he was under considerable nervous and emotional strain because of a domestic situation.

Mr Haig submitted in the District Court that this is an appropriate case for a discharge under s.42 of the Criminal Justice Act, having regard to the drastic effects which the entry of a conviction is likely to have on the career of the Appellant and the circumstances of the offence. In this Court Mr Haig submits that the learned District Court Judge was in error when he rejected the plea for a s.42 discharge on the assumption that it was a likelihood but by no means a near certainty that the entry of a conviction would mean that the Appellant would be dismissed from the force. He submitted also that the Judge failed to appreciate the effect a discharge under s.42 would have on the chances of the Appellant not being so dismissed.

While this may be valid criticism as far as it goes, (as to this I express no opinion) it does not necessarily follow that I should interfere with the exercise of the Judge's discretion and, in particular, that I would, if I were hearing this case at first instance, discharge the Appellant under s.42.

These cases, (and they are rare cases) when police officers are guilty of a momentary lapse from the high standard of conduct demanded by their calling, are hard cases. But the integrity of the Police has to be unquestionable and the standing of the Police in the eyes of the public must be jealously protected. Those are the overriding considerations which persuade me that I cannot allow this appeal.

Mr Haig referred me to a judgment of Barker, J. in Fanene v. Police where an appeal by a police officer was allowed and a s.42 discharge substituted for the penalty imposed in the District Court. That was a case where a police officer was convicted of an assault. But it was a different case. It was not, as here, an assault by a police officer on a person in custody.

For what it may be worth, in case my brief judgment in this matter ever comes to be considered by a disciplinary Board, I would add that in my view, there are many circumstances in this case which would justify the Board in treating this as a special and exceptional

case. There is no doubt that the officer concerned was in a state of emotional tension, that he had some reason to think that the complainant might resort to violence and that he may well have reacted instinctively to an unexpected movement by the complainant. The Appellant's record in the police force will, of course, be well known to the authority dealing with the matter. For my part I would think it a tragedy if this officer were to be dismissed from the Force in consequence of this incident.

Edward T.