14/10

LOW PRIORITY

AP 149/94

IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

1554

BETWEEN K
Appellant

AND NEW ZEALAND POLICE
Respondent

Hearing: 28 September 1994

Counsel: T.G. Stapleton for the Appellant
M.T. Lennard for the Respondent

Judgment: 28 September 1994

ORAL JUDGMENT OF HERON J

This is an appeal against a conviction for assault on a female entered in the District Court on 6 May 1994. The appellant is a police officer aged 26 years. The relevant facts were included in the Judge's reserved decision and they are common ground. They are as follows:

> "At approximately midnight on 22 October 1993, the complainant, Mauger, and a group of her friends went to an inner city licensed premises. She was there with at least six friends.
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> Prior to that they had been in the Police Club in the Wellington Central Police Station, over several hours, each one consuming various amounts of alcohol.
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> In May 1993 the complainant had formed a relationship with the defendant, K . The complainant had travelled from New Plymouth to spend the weekend with the defendant.
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> Whilst at the police station with the complainant, the defendant had indicated that he was going to his home address because he was extremely tired.

The complainant and her friends went to the licensed premises. As she was entering the premises, she encountered the defendant coming downstairs.

At this stage neither the defendant nor the complainant spoke to each other.

The complainant spoke briefly with a female friend and they visited the ladies toilets situated to one side of the bar.

As the complainant and her friend were about to enter the toilets they were approached by the defendant who grabbed the complainant's arm and spun her round. A discussion then took place.

The complainant then walked into the toilet area.

A short time later the complainant heard toilet doors banging behind her and heard a person entering the toilet area in which she was situated. She turned around and saw the defendant facing her approximately 0.5 metres away.

The complainant asked the defendant what he was doing in the ladies toilet. The defendant adopted a boxing stance with both of his fists clenched.

The defendant was angry. He punched the complainant above her left eye with his right fist. The punch was delivered with considerable force and left the complainant shaken and initially in pain. She commenced sobbing because of this pain.

The complainant walked from the toilet area and spoke briefly to her friends who returned her to the Wellington Central Police Station.

The complainant was examined at Wellington Hospital by a house surgeon who determined that her injury was consistent with having been struck above the left eye. On examination it was found that she was suffering from a haematoma approximately 1.5 cm above her left eye and under and around her left eyebrow, laterally. An X-ray was also performed, but there was no fracture evident.

The defendant was spoken to at the Wellington Police Station later that night after the incident. He was crying and shaking his head from side to side. He was extremely

> intoxicated. He admitted punching the complainant.
>
> The defendant is a single man aged 25 years, he lives locally and is currently employed as a constable by the New Zealand Police. He has not previously appeared before the Court."

The appellant pleaded guilty, but in doing so indicated to the Court that he would call evidence on the question of the application of the diversion scheme, as it is commonly known, in the particular circumstances of his case. Counsel at that time, who is counsel today, wrote saying that he would attempt to show that the charge in these proceedings was not properly considered for diversion and that if it had been so considered then it would have been diverted. He said the consequences arising from Constable Kenyon's conviction on the charge are such (he will lose his job), and a conviction in all the circumstances would be wholly disproportionate to the seriousness of the matter.

Consequently the hearing involved those matters. The appellant called Mr J.R. McDonough, who was a retired police officer, but who had a great deal to do with the introduction and overall administration of the police diversion scheme. He produced the policy document relating to the scheme, together with draft criteria which he said continued in force to the present time. In the course of that evidence it became plain that at an early stage in the proceedings counsel for the appellant attempted to persuade the police to divert the appellant and it seems, on becoming aware of those circumstances, the District Commander at Wellington, Superintendent Cunneen, wrote to the officer in charge of prosecutions instructing that diversion would not be considered in respect of this serious assault and the criminal process will take its

course. Mr McDonough was critical of what he regarded as that interference in the process. Despite subsequent representations by the solicitors concerned there was no change in that policy towards the appellant although it was maintained by the superintendent that the question of diversion had been given careful consideration. The solicitors responded by saying that in effect the decision to divert or not to divert had been pre-empted and that they continued to maintain the position that he was eligible for diversion and that course should have been followed. In the Court below the matter was raised as it is raised here, as an abuse of process and that having regard to established criteria the diversion scheme ought to have been fairly applied to the appellant and the appropriate decision made by the officer in charge of prosecutions.

In this case Mr Stapleton puts the circumstances surrounding diversion on a two prong basis. The first is that he continues his submission that what occurred is an abuse of process, that the diversion scheme is so closely connected to the criminal justice system, including the fact that it comes into operation only after an information has been put before the Court, that this Court should make a finding that in fact there had been an abuse of process and that the Judge in the Court below ought likewise to have found that to be the case. I have expressed reservations about any finding of abuse of process of the kind that has been considered in a number of cases, Watson v Clarke [1988] 1 NZLR 715.

It is said that the diversion scheme has been considered by the Court of Appeal in Police v Roberts [1991] 1 NZLR 205 and was taken into

account on the very question that is before this Court, as to whether there ought to have been a discharge without conviction. There the Court referred to the matter in passing, saying that it was unfortunate that the scheme was not operative in the particular district where the appellant in that case was situated, otherwise she might have availed herself of it. The second aspect to the diversion consideration is the part that it should play in the exercise of the discretion which Judges have when considering s.19 of the Criminal Justice Act 1985, which reads:

> **"19. Discharge without conviction** - (1) Where 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 a minimum penalty is expressly provided for.
> (2) A discharge under this section shall be deemed to be an acquittal.
> (3) A court discharging an offender under this section may make any order for payment of costs or for the restitution of any property that it could have made under any enactment applicable to the offence with which the offender was charged if it had convicted and sentenced the offender, and the provisions of every such enactment shall apply accordingly."

I am not prepared to go to the stage of finding that what was done in this case amounted to an abuse of the legal process. It would generally be a matter fully argued in an administrative law sense. I am not sure all the information is before the Court as to the interface between this scheme and the normal chain of command requirements of the police and the entitlement, if there is such an entitlement, of a senior officer to give the sort of direction Mr Cunneen gave. That, it seems to me, will have to await further consideration. It seems common ground that the scheme is available to police officers. There is no exclusion in the

documents I have referred to and furthermore this was the sort of case that might have led to a decision being made to divert. We do not have the benefit of the decision of the officer in charge of prosecutions, but I am satisfied that the appellant must have been a candidate for diversion and in the particular circumstances of the case might well have won that indulgence.

Of importance, and I think central to this appeal, is the finding of the District Court Judge on that question. Relying on the dictum of Robertson J in Fisher v Police AP 147/90 Auckland Registry 4/9/90, she held that the issue of diversion is a matter for the police, not for the Court, and the essential test she set in accordance with the decision of the Court of Appeal on s.19 is whether or not a conviction in all the circumstances would be wholly disproportionate to the seriousness of the matter. In that respect I think the learned Judge has shut out from consideration what I regard as a relevant consideration, namely the treatment of others in circumstances of a similar kind to those involved in this case. If for matters of all round policy a policeman would not be considered as eligible for a police diversion scheme, but other persons might be so, it seems to me that can hardly then exclude from proper consideration that question on the exercise of the s.19 discretion. As is the case here, the appellant is of good character. He had an impressive array of testimonials as one might expect from a police officer who had distinguished himself already in an albeit short career. The incident was of a domestic kind. The woman concerned (a policewoman) had had an ongoing friendship with the appellant. There had been far too much drinking during the evening and it seems that the appellant was

overcome by jealousy or some such like emotion which caused him to act in the way he did.

The Judge, in exercising her discretion, also had regard to s.5 of the Criminal Justice Act 1985 and in so doing considered that this was a crime of serious violence and accordingly in entering any conviction she was required to find special circumstances if a term of imprisonment was to be avoided. There is no contest that those special circumstances existed and so her finding of serious violence is not really in issue in this case. Whilst it is the unenviable task of Judges to have to make differentiations in the scale of acts of violence the legislature nevertheless requires it. Cases cited to me suggest that more violence than was involved in the present case have been held not to be serious violence. R v B.T. Morris CA 89/94 25/5/94, Chappell v Police AP 134/94 Christchurch Registry, 9/6/94. This was a punch to the eye region. It undoubtedly gave the complainant a black eye in the end, but it must be regarded as at the lower end of the range of violence, particularly because that definition includes acts of gross violence, including the use of a weapon and so on. Violence is defined as "physical violence so as to inflict injury on persons" and clearly the punch would be just that. "Serious" involves elements such as grave, wide, considerable, important (Shorter Oxford), and whilst it is not necessary to finally determine that in this case, the view that I take is that in all the circumstances, having considered the outcome for this woman of this blow, this act was not an act of serious violence as defined.

I think a finding of serious violence may also have had some bearing on the exercise of the discretion

by the Judge in the Court below. She then had to look again to see whether there were special circumstances, and finally was being asked to take those circumstances once more into account in discharging under s.19. I have the feeling that if she had not included this act within the definition of s.5 she might more readily have looked at the question of s.19 in a more favourable light so far as the appellant was concerned. So in that respect there are really two factors which in my view have borne upon the discretion that she exercised in a way which I think entitled me to review it and to consider whether it is appropriate to discharge the appellant without conviction.

Such a course has been followed in at least two recent cases, Walker v Police AP 25/93 Rotorua Registry, 19/4/93, a decision of Henry J, and in a decision of Holland J, Chappell v Police (supra), both involving police officers where there have been similar backgrounds to the situation here. As Henry J said in Walker v Police (supra):

> "It is not a question of treating a police officer differently from other persons - it is a question of giving due and proper weight to all the circumstances of the case, of which status as a police officer is only one. That status cannot of itself prohibit the operation of the section."

Whilst the Judge had regard to that passage in this case, she refers to it directly, it underlines in my view the appropriate approach to the exercise of s.19. That view is confirmed in the leading case on the exercise of the discretion in s.19, namely Fisheries Inspector v Turner [1978] 2 NZLR 233.

It is a question in the end of whether the penalty of a conviction is disproportionate to the offence charged. In that regard there was some debate as

to what the consequences were for this appellant. Throughout the whole inquiry there has been a promotion that a conviction will lead to dismissal. The appellant is suspended at the present time. It is uncertain what his future will be in the event that no conviction is entered, but undoubtedly the incident itself will be relevant to his continued employment with the police and will impact, if that employment continues, on matters of presumption and the like. That in my view is the appropriate impact that this incident overall should have, rather than leading as it seems it will, to automatic termination of employment.

I am attracted to the approach that was taken in a case with very much the same facts. Chappell v Police (supra). It might be said that the assault in this case was slightly worse, but there it involved an assault on a female by a police officer on a social occasion. Whilst the assaults, for there were more than one, were lesser in terms of violence, there was in fact bruising to the ribs and the eye and other general assaults on the complainant. The Judge found, as I have, that the case was a case of violence but not serious violence. He also referred to R v Morris (supra) and the dicta there as to the proper application of those words. Holland J said in R v Chappell (supra):

> "The appropriate principles for the application of s.19 have been stated in a number of cases, the earlier of which may be the decision of the Court of Appeal in Fisheries Inspector v Turner [1978] 2 NZLR 233 and in particular the judgment of Richardson J on p.241, summarised in the sentence:
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> > "If the direct and indirect consequences of a conviction are, in the Court's judgment, out of all proportion to the gravity of the offence, it is proper for

> a discharge to be given under s.42 (s.19)."

> Should this man lose his employment because of this incident on this night? I was originally concerned that he may have suffered because he was a Police officer. It is well known that until recently the Police have exercised a discretion over domestic assaults not always resulting in prosecutions. I am told that it is the present policy of the Police when called to an assault of this nature now to commence criminal proceedings."

He then discusses the diversion scheme and considered that the Judge in the Court below had acted wrongly in the exercise of discretion, particularly in regard to the view that was taken as to whether this constituted serious violence. He concluded by saying:

> "I am satisfied that the discretion should be exercised in the appellant's favour."

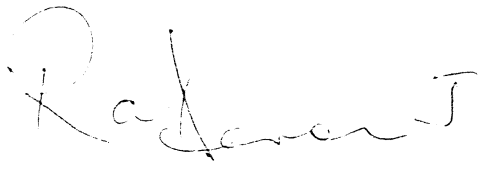
Police v Chappell (supra) and Walker v Police (supra) are to be contrasted with Stanley v Police AP 145/90 Christchurch Registry, 25/7/90, and McDonald v Police M.1485/84 Auckland Registry 13/12/84 Prichard J. There is an immediate distinction to be made in the latter cases. The policeman guilty of assault was on duty and none of the other circumstances relating to individuals concerned as apply here had any application in that case. I think that is a reasonable distinction to be drawn, but as with all these matters they will depend very much on the impact and impression that the Judge has of the case.

The clear impression that I have of this case is that the discretion should be exercised in favour of the appellant. He has not attempted at any time to hide his identity. It has been a matter of public knowledge. It is not a question of attempting to shelter behind an order for non

publication and then ask the Court to exercise the further indulgence of granting a discharge. It is in the public arena now that this man was unable to handle this particular domestic situation, which resulted in an attack on his girlfriend. That in itself casts a penalty upon him, not only from the public at large, but to those persons who work with him and from time to time are required to rely on his support and judgment. I think that will be penalty enough.

The District Court Judge, in addition to the conviction, fined him $1,000, with $750 to be paid to the complainant, and ordered Court costs. It would be open to me to increase that fine in the light of the fact that he is now receiving the benefit of a s.19 discharge. I do not think that is in all the circumstances appropriate. The fine is pitched in my view at the appropriate level, but it will of course be a term of the discharge that he has to pay the sum of $1,095, of which $750 is to go to the complainant and the balance to be by way of order for costs. Accordingly I set aside the conviction, quash the fine and the order for costs and enter a discharge in terms of s.19, with the other monetary orders I have made.

I have not directed my attention to all the points made on both sides, but I am grateful for the care that has been taken by both the Crown and the appellant in putting all the relevant authorities before me in this way.



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