IN THE HIGH COURT OF THE COOK ISLANDS **JP APPEAL 4/17**
HELD AT RAROTONGA
(CRIMINAL DIVISION)

POLICE

v

TAMATI MAHIA

Hearing Date: 18 September 2017

Counsel: Mr D James, Solicitor General, for the Police
Mr N George for the Defendant

Judgment: 18 September 2017

JUDGMENT OF THE HONOURABLE JUSTICE PATRICK KEANE

[12:12:47]

[1] On 10 August 2017 Justice of the Peace Manarangi discharged without conviction the defendant, Tamati Mahia, on a charge of assault on 19 July 2017 at Tupapa to which he had pleaded guilty that day. She did so on an application by Mr Mahia after his plea was entered and the statement of facts on which the prosecution relied had been read.

[2] Counsel said that Mr Mahia denied assaulting the victim identified as primarily alleged, by three punches. He admitted tackling the victim identified but did so in self-defence. Counsel also contended that a conviction would be disproportionate. Mr Mahia was aged 20. He had no previous convictions. He was about to move to Western Australia where his family were. A conviction could stand in the way of him gaining employment.

[3] In her decision the Justice identified the second of those grounds without commenting on the first. She entered the discharge under Section 112 of the Criminal Procedure Act 1980-81.

[4] On this appeal the Solicitor General contends that faced as she was with a conflict of material fact on the guilty plea, the Justice was obliged to determine or to provide reasons that disclosed on what facts she was making her decision. She failed to give any reasons. The second ground was that she ought to have recused herself. This was a case in which she had a conflict of interest.

[5] At the beginning of this hearing I said that the second ground lay beyond the ordinary scope of this form of appeal and that the first ground constituted the substantive issue (but as I shall say, only partly).

[6] On a guilty plea, and faced with an application for a discharge without conviction, a Justice must, under Section 112 of the Criminal Procedure Act 1980-81, "make an enquiry into the circumstances of the case." That duty is abstractly expressed and does not capture the extent of the duty at common law, and the statute law of New Zealand to which recourse must be had where it is more particular, as long as that is consistent with the defendant's constitutional rights.[1]

[7] Section 24 of the Sentencing Act 2002 (NZ) sets out a code, which governs proof of facts on sentence, and is largely expressive of the common law.

[8] The starting point is that, when a plea of guilty is entered, the defendant admits all facts express or implied that are essential to the plea. That being so a Justice must accept as proved those core facts for the purpose of sentence, or when faced with an application for discharge without conviction.

[9] There can be, by contrast, a contest about facts contextual to the offence. Sometimes these may be the proper subject of submission only. Sometimes however, they are more critical and section 24 requires a disputed facts hearing to occur.

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[1] Criminal Procedure Act 1980-81, Section 3(2): Constitution of the Cook Islands, Articles 64-65.

[10] Then the prosecution must prove beyond reasonable doubt any aggravating fact, and negate to the balance of probabilities any mitigating fact "that is not wholly implausible or manifestly false." Conversely the defence must establish any mitigating fact to the civil standard. But, tellingly, the defence may not advance as mitigating any fact "that is related to the nature of the offence or to the offender's part in the offence."

[11] In this case the assault Mr Mahia was charged with was an assault by punching three times. That is what is set out in the statement of facts. When, therefore, on the application for discharge defence counsel said that Mr Mahia denied the punches and would have entered a not guilty plea but for the fact that he was moving to Western Australia, the Justice was confronted with a submission inconsistent with the guilty plea entered.

[12] Defence counsel submits today that this was not so. By admitting that he tackled the victim identified Mr Mahia admitted an assault, and that sufficed for the application. It was then open to him to submit that although the assault was admitted it was excused by self-defence. That was mitigating and, equally, a proper basis for the application.

[13] I do not accept that submission. The reality is that Mr Mahia was charged with assault by punching, not by tackling. That being so, the Justice was obliged to vacate the guilty plea and to substitute a not guilty plea even though Mr Mahia wished to be dealt with immediately.

[14] In other respects the Justice did exercise her discretion conventionally, when assessing whether a conviction might be disproportionate. She was clearly influenced by Mr Mahia's age, and the concern that a conviction might make it difficult for him to obtain work in Australia. But because a discharge without conviction was not then open in law, the Justice was not entitled to take account of these factors.

[15] I quash the Justice's decision and I remit the charge to the Justices of the Peace Court to be called before another Justice. There is a practical difficulty. Mr Mahia is not in the Cook Islands. That is an issue for the Justices to resolve procedurally after hearing from the police and the defence counsel. I make no comment about it.

[16] I need only say that, if and when Mr Mahia does appear, he is to be deemed not to have entered any plea, and is to enter a plea in the usual way.

Patrick Keane, J