IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CRI-2014-404-000234
[2014] NZHC 3112

BETWEEN	NEW ZEALAND POLICE Appellant
AND	KOROTANGI PAKI Respondent

Hearing: 17 November 2014

Appearances: M Downs and K Cooper for the Appellant
P Wicks QC and K Van Houtte for the Respondent

Judgment: 5 December 2014

JUDGMENT OF WOOLFORD J

This judgment was delivered by me on Friday, 5 December 2014 at 3.30 pm pursuant to r 11.5 of the High Court Rules.

Registrar/Deputy Registrar

Solicitors: Crown Law (Wellington)

Counsel: P Wicks QC, City Chambers, Auckland
Chen Palmer, Auckland

Introduction

[1] The Crown appeals Judge Cunningham's decision to discharge the respondent, Korotangi Te Hokinga Mai Douglas Paki, without conviction, on one charge of driving with excess breath alcohol in October 2013, and two charges of burglary and one of theft in March 2014.[1]

[2] The Crown submits that Judge Cunningham erred in discharging Mr Paki on all four charges, and submits convictions should be entered against his name. No further penalty or sentence is sought. Counsel for Mr Paki, Mr Wicks QC, concedes that Judge Cunningham made the errors identified by the Crown, but notwithstanding those errors submits that on the correct approach the test for discharge without conviction is met.

[3] For the reasons that follow I allow the appeal in part. Mr Paki is to be convicted and discharged on the drink driving offence. He is discharged without conviction on the two charges of burglary and one of theft.

Background

[4] The charge of drink driving dates to the early morning of Sunday, 20 October 2013. At around 2:15 am Mr Paki was driving a motor vehicle on Childers Road, Gisborne. He was stopped by the Police on an unrelated traffic matter. When spoken to, he showed signs of recent alcohol intake. He was breath tested and the result returned was 761 micrograms of alcohol per litre of breath. The legal limit at the time was 400 micrograms of alcohol per litre of breath for adults and 150 micrograms for persons aged under 20 years, meaning Mr Paki, who was 18 years old at the time, was almost twice the legal limit for an adult and five times that for a youth. Due to the amount of alcohol involved, Mr Paki was charged as an adult.[2] At the hearing before me it became clear Mr Paki was released at large following the drink driving incident, and was not remanded on bail.

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1 *Police v Paki* DC Auckland CRI-2014-004-003495, 3 July 2014.
2 Land Transport Act 1998, s 56(1).

[5] Mr Paki pleaded guilty to the charge of drink driving on 6 December 2013, but was not convicted nor sentenced on that date. He was instead granted interim name suppression pending an application to be discharged without conviction. Name suppression was sought on the basis of the potential effect public disclosure of the charge would have on the health of Mr Paki's father, Te Arikinui King Tuheitia, the present Māori King, who is unwell, as well as the impact publicity would have on Mr Paki's prospects of becoming the next Māori King.

[6] Mr Paki was still awaiting sentence on the drink driving charge when he committed three further offences in March 2014. On Tuesday, 18 March 2014, Mr Paki was drinking with three friends of a similar age in Kaiti. At around 9:30pm they decided to obtain some surfboards. After parking outside a holiday park on Grey Street, Gisborne, one stood watch while the other three (including Mr Paki) entered the park and located two surfboards, tied down with bungee ropes to a trailer, that were the property of a visiting high school group. They cut the ropes, removed the surfboards and headed back to the car. As they walked back a member of the public challenged them and one surfboard was handed back. The other surfboard was placed in the car.

[7] Next the group went to Wainui Beach. All four walked up the driveway of a property on Wairere Road, opened the rear hatch of a car parked there, and removed three items: a fibreglass cattle prod, a Swazi oilskin jacket and an Akubra hat. Finally they went to an address further down the road. Once again one of the group stood watch while the other three (including Mr Paki) entered a garage on the property and removed a surfboard they found. All four were apprehended soon after by Police. The total value of the stolen property was $1600.

[8] Mr Paki's three co-offenders came up for sentence on 27 June 2014 in the Gisborne District Court. Judge Rea discharged each without conviction, but ordered them to pay $400 in costs.[3] The primary reason for their discharge was the extraordinary amount of work they had put in since their offending to make things right. Each of them had engaged in an extensive restorative mana tangata plan organised by the father of one of the co-offenders. The plan involved each of them

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3 *Police v Pugh* DC Gisborne CRI-2014-016-000553, 27 June 2014.

apologising to the victims and completing varied and substantial activities with local community groups that, in their totality, far exceeded the length of any sentence of community work that would have been imposed. It was clear that the offending was a foolish youthful escapade on the part of each of the co-offenders, one for which they had been reprimanded and for which they had taken responsibility. The Crown has not appealed their discharge, nor is there any suggestion of error by Judge Rea.

[9] Mr Paki came up for sentence one week later, on 3 July 2014, at the Auckland District Court. His sentencing hearing was held separately because in addition to the two charges of burglary and one charge of theft, he had the one outstanding charge of driving with excess breath alcohol. Other than that additional charge, there is no material difference in circumstance between Mr Paki and his co-offenders. Given the publicity surrounding this case, it is necessary to emphasise the importance of this fact, as it puts Judge Cunningham's decision in context. Judge Rea's sentencing notes are attached as an appendix to this judgment.

[10] Given that there is now no suppression of Mr Paki's name, the core of the present appeal is the impact of conviction(s) will have Mr Paki's prospects of becoming the next Māori King. Mr Paki is the second son of Te Arikinui King Tuheitia, the present Māori King. He has one older brother, Whatumoana, who is the current acting king (Te Whirinaki A Te Kingi) due to King Tuheitia's ill health. Whatumoana is also at present heir to the throne (Ariki Tamaroa). There is also a sister, Ngawai Hono I Te Po. King Tuheitia is the seventh Māori King in a lineage that dates back to Pōtatau Te Wherowhero's inauguration in 1858.

[11] The Kīngitanga or Māori King movement is one of the most enduring Māori institutions and has a proud history of protecting the interests of the Māori people alongside a commitment to peace and reconciliation. Just before his death, Pōtatau Te Wherowhero advised his followers:

> I muri, kia mau ki te whakapono, kia mau ki te aroha, ki te ture. Hei aha te aha, hei aha te aha.
>
> (After I am gone, hold fast to faith; hold fast to love; hold fast to law. Nothing else matters now – nothing).

[12] Although there is no formal process, all successions to the Te Wherowhero throne have been hereditary with all, except for Mr Paki's grandmother, Dame Te Atairangikaahu, being one of the sons of the preceding King. King Tuheitia hopes one of his sons will eventually succeed to the throne, but has not chosen which he will nominate for the role. As one of his sons, Mr Paki is one of two persons in New Zealand most likely to be nominated to be the next Māori King.

District Court decision

[13] The District Court Judge canvassed the above facts. She had regard to the decision of Judge Rea and considered that for the burglary and theft charges Mr Paki should be dealt with in exactly the same way as his co-offenders.[4] There was no distinction drawn between Mr Paki and his co-offenders in the efforts they had made towards rehabilitation, but the distinguishing factor of Mr Paki awaiting sentence on the drink driving charge at the time of the offending was not specifically considered by the Judge.

[14] The Judge went on to consider the charge of drink driving. She noted the reading of 761 micrograms of alcohol per litre of breath was a moderately serious level for an adult and a serious level for a youth. However, there was no suggestion that Mr Paki had engaged in dangerous driving, and no overtly dangerous behaviour had brought him to the attention of police. She correctly identified the common thread between the two sets of offending as the consumption of alcohol.[5]

[15] She then had regard to the evidence put forward about the direct and indirect consequences to Mr Paki of having convictions entered for all of the charges. She concluded that it was extremely likely King Tuheitia would nominate one of his two sons as his successor, and if Mr Paki was to receive a conviction for his drink-driving offence he would not be considered for the role. She accepted the evidence put forward from the bar that there was no difference between convictions for burglary, theft, or drink driving, as the Chiefs of the Tribes who formally elect the new Māori King would require Mr Paki to be "whiter than the dove" and have an unblemished past record before he would be seriously considered as a suitable

4 *Police v Paki*, above n 1, at [13].
5 At [14].

candidate for the role. The Judge accordingly considered the consequences of a drink driving conviction to be out of all proportion to the offence. Mr Paki was discharged without conviction on all four charges.

[16] The discharge on the drink driving charge was conditional, however, on receipt of a report from a qualified clinician stating that Mr Paki did not have an alcohol disorder that required treatment, and if he did have one, a report from a qualified clinician that Mr Paki had undertaken suitable treatment to address it. At this time the clinician's report is unavailable. Despite discharging him Judge Cunningham considered it appropriate to disqualify Mr Paki from holding or obtaining a driver's licence for eight months.

Leave to appeal

[17] The appeal is by way of a question of law brought under s 296 of the Criminal Procedure Act 2011. Leave is required under that section. No criteria for the grant of leave are specified in s 296, nor has any definitive test emerged as yet in the case law. At a minimum, there must be a properly identified and arguable question of law.[6] Given Mr Wick's concession of error on the part of the District Court Judge I grant leave to the Crown to bring the appeal.

Approach to appeal

[18] Section 300 of the Criminal Procedure Act 2011 provides:

> **300 First appeal court to determine appeal**
> (1) A first appeal court must determine a first appeal under this subpart by—
> (a) confirming the ruling appealed against; or
> (b) doing any of the following if the court considers the ruling is erroneous and, in the case of the person's conviction or acquittal or of a direction by a court to stay the prosecution or to dismiss the charge under section 147, also resulted in a miscarriage of justice:
> (i) setting aside the conviction and entering an acquittal, if the person has been convicted; or
> (ii) directing a new trial, in any case; or
> (c) varying or substituting the sentence or remitting the sentence to the sentencing court with directions, if the decision relates to sentence and the court thinks the decision is erroneous; or

6 *Clarke v Ministry of Social Development* [2014] NZHC 1830.

(d) remitting the matter to the trial court in accordance with the opinion of the appeal court; or
(e) making any other order that the court considers justice requires.

…

(4) The first appeal court may give separate directions concerning each charge to which the appeal relates.

[19] If any error of law is identified, this Court may either confirm the District Court's result and discharge Mr Paki without conviction under s 300(1)(e) or allow the appeal and order conviction(s) to be entered against his name. Since the errors of law are accepted, both parties agreed at the hearing that this Court should consider the matter afresh.

Errors of law

[20] The Crown submits the Judge erred by failing to consider the gravity of the totality of the offending; by failing to consider the fact of offending while on bail; in treating, absent any evidence, conviction as an absolute bar to Mr Paki's ascension to the Te Wherowhero throne; and by failing to consider a relevant consideration – namely, the impact of Mr Paki's admitted conduct (as distinct from convictions) on his succession prospects.

[21] Save the clarification that the property offending occurred while Mr Paki was released at large whilst awaiting sentence for the drink driving charge, and not on bail, the errors are conceded by Mr Wicks. In determining the matter afresh I will consider the relevance of each error in turn.

Discharge without conviction

[22] A sentencing Judge has the discretion to discharge without conviction a person who is found guilty or has pleaded guilty to an offence.[7] That discretion must not be exercised unless the court is satisfied that, as a matter of fact,[8] the direct and

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7 Sentencing Act 2002, s 106.
8 *R v Hughes* [2008] NZCA 546, [2009] 3 NZLR 222 at [11].

indirect consequences of a conviction would be out of all proportion to the gravity of the offence.[9] The inquiry is two staged:[10]

> At the first stage it is necessary to consider the gravity of the offence, the direct and indirect consequences of a conviction, and whether those consequences are out of all proportion to the gravity of the offence. In a composite way, this is a jurisdictional test. The second stage of exercising what is a residual discretion is only engaged if that jurisdiction is established.

[23] As a sentencing exercise the principles and purposes of sentencing contained in the Sentencing Act 2002 (the Act) are relevant.[11] So too are the aggravating and mitigating factors relating to the offence and the offender set out in s 9. There is no onus or burden of proof on the applicant: the court is to assess all relevant material before it and decide whether it is satisfied the disproportionality test is made out.[12] Although the statutory test is expressed in the singular, there is no statutory bar to discharging a person for multiple offences, nor to discharging a person on one or more offences but not another.[13] Ultimately it is a question of whether the consequences of conviction are out of all proportion to the gravity of the offending.

(a) Gravity of offending

[24] The error identified by the Crown is that Judge Cunningham considered Mr Paki's property offending and drink drive offending discretely and in isolation from each other. It is correct in principle that the totality of the offending must be considered, but the weight to be given to totality will depend on the circumstances of the case.

[25] In *Kropelnicki v Police* the applicant for discharge without conviction stole a defibrillator from the Ministry of Foreign Affairs building in Wellington. Five months later he was found without reasonable excuse in a Wellington storage facility. Gendall J had regard to totality in the following way:[14]

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9 Sentencing Act 2002, s 107.
10 *DC (CA47/2013) v R* [2013] NZCA 255 at [31] (citations omitted).
11 Sentencing Act 2002, ss 7 and 8.
12 *R v Hughes*, above n 8, at [49], [53].
13 The same approach applies on appeal: Criminal Procedure Act 2011, s 300(4).
14 *Kropelnicki v Police* HC Wellington CRI-2007-485-63, 17 March 2008.

> [49] It cannot be overlooked that, in this case, there were two offences; discretely separate in time, place and circumstance. Both involved elements of dishonesty because the circumstances surrounding the offence against s 29 Summary Offences Act 1981, were that the appellant unlawfully went to the storage building to remove his belongings without paying the storage fees that he knew had to be paid before removal was allowed. He was avoiding payment. In assessing overall culpability the Court cannot ignore the fact that a second offence occurred. Weight to be given to it, depends on an overall assessment of all the circumstances. But the appellant was on bail for an offence of dishonesty when he committed the further offence of being found in a building without reasonable excuse. It may have been an act of stupidity, but equally it was not spur of the moment or impulsive. It was another dishonesty act, designed to avoid financial liability, at a time when the appellant was on bail. It reflects upon his overall culpability. Under normal sentencing principles, it could have warranted a cumulative sentence.

[26] Although Judge Cunningham should have had due regard to totality, I have some sympathy for the approach she took. Mr Paki's two sets of offending were discrete and separate in time, place and circumstance. Moreover, they are different in kind. As it has transpired, Mr Paki was not on bail at the time of the property offending, and so the only tenable link between the two sets of offending was that Mr Paki awaited sentence for the drink driving charge at the time of the property offending and, as Judge Cunningham correctly identified, the influence of alcohol in both. The way in which Judge Rea had dealt with Mr Paki's co-offenders one week earlier to Mr Paki's hearing, and how Mr Paki presented as on an equal footing to them but for the drink driving charge, would have made it highly attractive to consider each set of offending discretely.

[27] In assessing the gravity of the offending on a totality basis all relevant aggravating and mitigating factors relating to the offending and the offender come into play.[15] The Courts take a dim view of intentional acts of dishonesty, such as the property offending in this case, as well as drink driving offending. Burglary attracts a maximum penalty of 10 years imprisonment, and the consequences of drink driving are well known. The offending in this case is aggravated because of the high level of breath alcohol involved, the number of charges of burglary and theft, and the fact the property offending occurred while Mr Paki was awaiting sentence for the drink driving charge. Mr Wicks accepts the offending was moderately serious.

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15 *DC (CA47/2013) v R*, above n 10, at [35].

[28] The offending, however, must be put in context. In this case there are numerous and significant mitigating factors that, in their totality, noticeably reduce the gravity of Mr Paki's offending. As to the drink driving charge, the following mitigating factors are identified by Mr Wicks:

(a) The drink-driving offending arose through a routine traffic stop rather than any bad driving.[16]

(b) He successfully completed the Right Track – Te Ara Tutuki Pai – Driver Offender Rehabilitation Programme in March 2014.

[29] Mr Wicks has provided the Court with an evaluation report about the Right Track programme. It is a community based initiative that aims to reduce driving offending and increase road safety by promoting good choices by participants when it comes to alcohol and driving. The programme runs for 40 hours and focuses on the consequences of drink driving and the importance of choices in preventing those consequences. Course results suggest the programme is very effective in preventing further offending by participants and, in addition, has a positive impact on the wider community.

[30] As to the property offending, Mr Paki engaged on a voluntary basis in an extensive restorative mana tangata programme, involving a range of restorative steps developed from a tikanga perspective to put right the offending. These steps included:

(a) Apologising to the victims. For one victim there was a restorative justice meeting in which Mr Paki made a direct apology. A letter of apology, which I take as genuine, was sent to another victim. Later these victims received carved or painted artwork from the co-offenders. In addition Mr Paki and his co-offenders travelled to the

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[16] There is a suggestion in the affidavit evidence that Mr Paki was pulled over by Police in response to him failing to stop at a stop sign. This detail was not included in the summary of facts to which Mr Paki pleaded guilty. For present purposes, therefore, this detail is to be put to one side.

high school whose surfboards were stolen. They apologised in person, and each presented a piece of art to the school.

(b) Completing activities with local community groups. There are too many to detail. They include volunteer work relating to their school's kapa haka group, teacher aide work at a local school, refereeing a ripper rugby competition, the establishment of a support group, and agreeing to mentoring with a community leader.

(c) Genuine remorse. From the material on file I am satisfied that Mr Paki's expressions of guilt are authentic and heartfelt. He clearly has suffered the wrath of his father and whānau, and his remorse is evident from his actions in trying to right the wrong done to those from whom he stole.

[31] When it comes to the property offending, I agree with Judge Rea's assessment:[17]

> [2] But everything since [the offending] has been utterly positive. When I first saw this file, I could not believe the amount of work that your families have put in to try and get you guys sorted out. And now I read the restorative justice report where you have done absolutely everything you possibly could to put things right. I think [counsel] said that you guys are future leaders. I hope that is right. And I hope you do not let this interfere with that because I just do not know why young guys from the backgrounds you come from – with all the people down the back – get yourself into this situation. How embarrassing do you think it is for your whānau to have to sit there and watch you guys in the dock?

[32] A similar comment could be made as to the drink driving charge. Although Mr Paki's steps towards making right his drink driving offending could be seen as less extensive, they show a degree of initiative and a willingness to accept responsibility. There were, thankfully, no victims to whom he could possibly make a meaningful apology. That reflects the nature of the crime committed, being an offence against the public welfare.

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17 *Police v Pugh*, above n 3.

[33] Finally, consideration must be had to Mr Paki's age, early guilty pleas and clean record. He is a young man. At the time of the offending he was 18 years old. Youth has long been recognised as a mitigating factor by the Courts, and due regard to the neurological differences between adolescents and adults puts this spate of offending in context.[18]

[34] Having regard to these factors in their totality, I assess Mr Paki's offending to be low to moderate in gravity. The most serious and striking aspect, and the one that poses the most difficulty, is the level of breath alcohol. It is very high for a person of his age. Mr Paki's rehabilitative efforts have done much to minimise it, but the level cannot be ignored.

(b) Consequences of conviction

[35] Although the gravity of the offending must be considered in its totality, it was accepted at the hearing that the consequences of conviction may differ between offences. A conviction is always a stain on a person's record, but the impact of that stain on a person's future depends on the type of offence involved.

[36] Without minimising the seriousness of drink driving offending, it is clear that convictions for burglary and theft would have a greater impact on Mr Paki. Dishonesty convictions of this nature can have serious and permanent consequences on a person's potential and future career, especially when accrued at a young age. That real and appreciable risk does not follow as a matter of course for a conviction of drink driving. I am satisfied that, considered alone, a conviction for drink driving is a black mark but one that cannot be realistically compared to multiple dishonesty convictions for offences as serious as burglary.

[37] The issue here is what consequence a conviction of drink driving, alone or in combination with burglary and theft convictions, will have on Mr Paki's chances of succeeding to the Te Wherowhero throne. The test is whether there is a real and appreciable risk that the consequence will occur. The Court does not need to be

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[18] *Churchward v R* [2011] NZCA 531, (2011) 25 CRNZ 446 at [77].

satisfied that the consequence will inevitably or probably occur.[19] As conceded by the Crown, I am satisfied that, at the very least, there is a real risk a conviction will decrease Mr Paki's chances of succession. The question is by how much Mr Paki's chances will decrease, and what proportion of that decrease would be the consequence of his conviction, rather than a consequence of his admitted conduct.

[38] Before I begin that assessment, it is appropriate to note the justification for a discharge without conviction, and therefore the relevance of the consequences of a conviction, such as the impact on Mr Paki's succession prospects, to a person's sentence. Every person in New Zealand who has pleaded guilty or is found guilty to an offence has the right to make an application to be discharged without conviction. The test in s 107 of the Act – whether the consequences of conviction are out of all proportion to the gravity of the offence – is a question of fact. It reflects the unsurprising fact that personal circumstances differ between individuals and that there are innumerable factors affecting the gravity of a particular offence, the culpability of a particular offender, and any impact a conviction might have. Parliament has granted a wide discretion to a sentencing Judge to allow an application for discharge, having regard to all the circumstances of the case, because it is impossible at a legislative level to adequately provide for the infinite variety of circumstances that may arise.[20] Disproportionality is the key factor in determining whether to discharge an applicant. Before disproportionality is considered, however, it is necessary to determine what the gravity of the offence is and what the consequences of conviction will be.

[39] The Crown has identified two errors made by the District Court Judge. First, the Judge concluded that any conviction would be an absolute bar to Mr Paki's succession to the Te Wherowhero throne, and second, the Judge failed to consider the impact of Mr Paki's admitted conduct (as distinct from convictions) on his succession prospects. Notwithstanding those errors, Mr Wicks argues that convictions being entered will almost certainly result in Mr Paki being unable to succeed his father, and that there is a distinction between being before the Court for

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19 *DC (CA47/2013) v R*, above n 10, at [43].

20 *Fisheries Inspector v Turner* [1978] 2 NZLR 233 (CA) at 237 (per Richardson J).

admitted conduct compared with having that conduct marked by a criminal conviction.

[40] At the District Court hearing and in this Court affidavit evidence was filed in relation to the procedure and practice employed in the appointment of the next Māori King. There are affidavits from Mr Paki's father, King Tuheitia, and Te Rangihiroa Whakaruru, the Principal Private Secretary to King Tuheitia and the Secretary to the Kīngitanga movement.

[41] The affidavits inform that there is no formal process that dictates the process for succession, but there are a number of well-established steps and rituals that are unique to the Kīngitanga movement. Typically the outgoing monarch issues a set of succession orders that stipulate the King's preference for a successor, their suitability, and whether or not the preferred successor is supported by the will of the Kīngitanga movement's Chiefs of the Tribes. These orders are considered by the Chiefs of the Tribes when they meet in conclave at Turongo House in Ngāruawāhia following the burial of the King. At conclave a vote is held to determine the successor. After a decision is made a pronouncement is issued which initiates the coronation of the new Māori monarch.

[42] Since the Chiefs of the Tribes retain the ultimate discretion and must vote to formally approve a successor, it is common practice for the outgoing monarch to try to obtain their agreement before issuing succession orders. The will of the Chiefs of the Tribes is therefore an important factor in determining the next King. In reviewing suitability the Chiefs of the Tribes will consider all relevant factors, including achievements, past conduct, reputation within the Kīngitanga movement, marital status, whether the proposed successor has children capable of succeeding to the throne, and whether it is the wish of the outgoing monarch.

[43] The Crown is correct that none of the evidence suggests that a conviction or convictions would be an absolute bar to Mr Paki's succession to the Te Wherowhero throne. There is no formal rule that states as much. The Judge in her sentencing notes stated the following:[21]

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[21] *Police v Paki*, above n 1, at [16].

> … Both deponents have told me that if Mr Paki has any criminal convictions at all, that will mean that he could not be a successor to his father. I specifically asked Mr Wicks to take instructions about whether the property offending, which clearly is dishonesty offending, would be viewed any differently than a drink-driving charge, and I have been told quite firmly that it would make no difference. Mr Wicks put it like this, that, the chiefs of the tribes would require the new Māori King to be "whiter than the dove." That means that the person must have an unblemished record.

[44] It is clear the Judge erred to the extent she treated a clean record as an absolute requirement for succession. The statement that the new Māori King must be whiter than the dove came from the bar, and was not in affidavit evidence before the Court. At the hearing in this Court the statement was not repeated, and Mr Wicks conceded that it would be speculation to consider what the Chiefs of the Tribes would make of any conviction. The statement is, however, supported by the third affidavit of Mr Whakaruru, dated 13 November 2014 and prepared for the purpose of this hearing. In it he states:

> 6 The Tikanga framed by the elder people of the Kiingitanga Movement require that the Ariki and/or successor to the throne should not have any criminal conviction. That is something not written into the law anywhere but is simply a requirement by way of a tribal protocol/practice.
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> 7 It is from the internal protocol/practice that the statement "whiter than the dove" comes, …

[45] Before this most recent statement there was no suggestion in the prior affidavits of the existence of this protocol. For example, in Mr Whakaruru's first affidavit, dated 10 December 2014, he only goes as far to state that if a potential successor is known to have any criminal conviction, then the Chiefs will be "unlikely" to approve the succession. That statement does not refer to an absolute requirement that the successor to the throne should not have any criminal conviction. No further evidence is provided in respect to this requirement, such as an example in the past when an otherwise suitable candidate was declined because of a criminal conviction.

[46] Mr Whakaruru also deposed in his second affidavit, dated 23 January 2014, and affirmed in his third affidavit, that if a Māori monarch had a criminal conviction, then they will be disqualified from holding one of the custodial positions or any other trustee position associated with the Te Wherowhero title. This disqualification

would count against a person's succession prospects. The Crown points out that there is no formal rule that if Mr Paki was barred from trusteeship he would be ineligible to succeed his father, nor is there any applicable statutory disqualification from trusteeship in the Te Ture Whenua Māori Act 1993 and the Waikato Raupatu Claims Settlement Act 1995.[22] However, if convicted of dishonesty offending he would be disqualified from being an elected member of Waikato-Tainui Te Kauhanganui Incorporated, the trustee of the Waikato Raupatu Lands Trust.[23] That disqualification does not apply to a conviction for drink driving. Once again in his third affidavit Mr Whakaruru emphasised that any disqualification would be due to the internal requirement or custom that a custodial trustee not have any criminal record, rather than any legal requirement.

[47] I am satisfied that if Mr Paki is convicted of either or both sets of offending, it is highly unlikely that he would be nominated by his father and confirmed by the Chiefs of the Tribes to be the next Māori King. However, although it is ultimately a question for the King and the Chiefs of the Tribes, I am equally satisfied that it is likely the same consequence would occur whether or not a conviction is entered against Mr Paki's name. In other words, I agree with counsel for the Crown's suggestion that the horse has well and truly bolted by the publication of this offending and the consequences that publication has had on Mr Paki's chances of succession.

[48] The District Court Judge did not make reference to the consequences of Mr Paki's admitted conduct on his succession prospects, as distinct from a conviction itself. That is understandable, given that Mr Paki had name suppression until the date of the hearing, although the numerous media applications should have forewarned the possibility of coverage. In December 2013, after the drink driving offending, King Tuheitia deposed the following in support of Mr Paki's application for name suppression:

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[22] Section 272(2)(c) of the Te Ture Whenua Maori Act 1993 states that no person shall be appointed who is a person convicted of any offence punishable by imprisonment for a term of 6 months or more, unless that person has served the sentence or otherwise suffered the penalty imposed upon that person. It is unclear whether that requirement applies to the Waikato-Tainui holding trust (Waikato Raupatu Claims Settlement Act 1995, s 22), but even if it did, Mr Paki would not be disqualified because no sentence is sought by the Crown beyond a conviction and discharge.

[23] Rules of Waikato-Tainui Te Kauhanganui Incorporated, r 5.3.1(e).

> 20 It is my fear that if Korotangi's name is published in association with the [drink driving] charge, even if he is then successful in his application to a discharge without conviction, the damage will be done and he will be highly unlikely to be approved by the Chiefs for succession to the Te Wherowhero throne.

[49] Similarly Mr Whakaruru, in his first affidavit, stated that if there is public reporting of a potential successor being involved in a criminal prosecution, then the Chiefs of the Tribes will be unlikely to approve the succession. In his third affidavit he then stated:

> 10 Whilst the publicity around his admitted conduct will result him in being highly unlikely to be approved to ascend to the throne, the entry of a conviction against Mr Paki will be seen as an additional factor making the prospects of ascension even more highly unlikely.

[50] It appears, therefore, that King Tuheitia's fears have been realised. I do not see how a conviction entered for drink driving could appreciably decrease Mr Paki's chances beyond their current low standing. The possible requirement or internal protocol referenced by Mr Whakaruru, that a candidate for succession must be "whiter than the dove", may equally apply to admitted wrongful conduct. If a potential successor is discharged without conviction for the very reason of ensuring his chances of succession are preserved, rather than for some other independent reason, it is difficult to see how that discharge could absolve the candidate in the eyes of the Chiefs of the Tribes. Mr Paki will not be "whiter than the dove" by reason of that discharge alone. The position may be different for the dishonesty offences in this case, where a discharge may be justified for reasons independent of Mr Paki's chances of succession.

[51] Overall I am satisfied that the adverse consequences identified by Mr Wicks have already been substantially suffered by reason of the publication of his conduct. It can no longer be said that the decision over who is the preferred successor remains finely balanced, as deposed by Mr Whakaruru in his first and second affidavits. At the most there is a real risk a conviction or convictions will be a black mark which will form an additional hurdle to Mr Paki's succession, but it cannot be said this will meaningfully reduce his current diminished chance of being the next Māori King.

(c) Disproportionality

[52] There is no helpful gloss on what is required in the proportionality assessment beyond that stated by the test. Statements such as the discretion is to be exercised sparingly do not assist.[24] Everything depends on the particular circumstances of the case.

[53] I consider first the burglary and theft offending. In my judgment the consequences of conviction for this offending would be out of all proportion to its gravity, even when due regard is made to the fact it occurred while Mr Paki was awaiting sentence on the drink driving charge. Not much weight can be put on this fact: Mr Paki was not on bail, and the drink driving offending was distinct in time, place, circumstance and type. Except for the bare existence of two sets of offending and the shared influence of alcohol, there is no meaningful connection between the two events that significantly aggravates the latter on a totality basis.

[54] In coming to this conclusion I do not rely on the possible effect the convictions would have on Mr Paki's chance of being the next Māori King. Judge Rea's reasoning applies in his case, and is sufficient in of itself. Although the jurisdictional test in s 107 does not refer to parity between co-offenders, and is to be exercised on a case-by-case basis, I am satisfied that in this particular case the principle enshrined in s 8(e) of the Act applies. It is a significant supervisory function of an appellate court to ensure the even-handed administration of justice when required to ensure the justice system is not brought into disrepute.[25] Therefore Judge Rea's decision to discharge Mr Paki's co-offenders strongly weighs in favour of Mr Paki being treated in a similar manner. The principle of parity is important. It applies here.

[55] Putting aside Judge Rea's decision, I reach the same result. Given the extensive rehabilitative efforts taken by Mr Paki since his offending, he has done everything he possibly could to right his wrong.[26] In light of the low to moderate gravity of his offending, multiple convictions for burglary and theft at his age would

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24 *R v Hughes*, above n 8, at [23].
25 *R v Pawa* [1978] 2 NZLR 190 (CA) at 191.
26 Sentencing Act 2002, s 10.

be a disproportionate stain on his character, and one which would severely impact his future. The test in s 107 is made out.

[56] The same cannot be said for the drink driving conviction. Mr Paki's level of breath alcohol was high. The fact that the second set of offending involved alcohol is directly relevant to the offence. Against that is Mr Paki's successful completion of the Right Track programme, but as I have concluded that cannot completely minimise the level of alcohol involved. More significantly, I am not satisfied that a conviction for drink driving would meaningfully decrease his chances of becoming the next Māori King, or have any other consequence out of all proportion to the gravity of the offence. A drink driving conviction is a black mark, but not an irredeemable one.

[57] At this stage it is highly unlikely Mr Paki will be appointed King. Whether there is an established tikanga or not, I am satisfied that a discharge will not materially affect whether Mr Paki is viewed as "whiter than the dove". There is no suggestion that the Chiefs of the Tribes would focus on a conviction of this type without regard to the totality of Mr Paki's admitted conduct as well as the totality of his rehabilitative efforts. In fact, the affidavit evidence suggests the Chiefs of the Tribes will consider all relevant factors, including past conduct not marked with a conviction.

[58] Mr Paki's chances of succession may improve in the future after an appropriate period of atonement. However, I am not satisfied from the affidavit evidence that a conviction for drink driving will prevent him from forever succeeding if he is otherwise considered a suitable candidate for the role. Much depends in that circumstance on what weight the Chiefs of the Tribes would place on a historical drink driving conviction and, as conceded by Mr Wicks at the hearing, it would be speculation to consider what the Chiefs would make of such a conviction.

[59] I conclude that the marginal decrease in his chance of becoming the next Māori King that can realistically be considered a consequence of conviction is not out of all proportion to the gravity of the offence. Accordingly there is no jurisdiction under s 106 to discharge Mr Paki for the drink driving charge.

(d) Discretion

[60] As noted I am, however, satisfied that this is an appropriate case to exercise the discretion in s 106 in respect to the burglary and theft offences. It is a rare case where an offender satisfies the jurisdictional test in s 107 and is not then discharged.[27] Mr Paki has atoned for his crimes. He has borne the scrutiny of much public attention and has suffered the displeasure of his father, whānau, and community. He has brought his family into disrepute. I have no doubt the media attention has been a significant ordeal and one that has been most difficult for him and his family to endure. This constitutes a substantial penalty in of itself, and one that cannot be ignored.

Result

[61] The Crown's appeal against discharge without conviction is allowed in part. I order that a conviction be entered against Mr Paki's name for the drink driving offence committed on 20 October 2013 (CRN 13016003555). Mr Paki is to be convicted and discharged for that offence. The order made by Judge Cunningham disqualifying Mr Paki from holding or obtaining a driver's licence for eight months is confirmed. Mr Paki is, however, discharged without conviction on the two charges of burglary and one of theft.

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Woolford J

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[27] *DC (CA47/2013) v R*, above n 10 at [52].

IN THE DISTRICT COURT
AT GISBORNE

CRI-2014-016-000553

NEW ZEALAND POLICE
Informant

v

HEMUERA WIPOHA PUGH
RA NGARU SMITH
TEAHORANGI TOTOREWA
Defendants

Hearing: 27 June 2014

Appearances: Sergeant C Neustroski for the Informant
C Scott for the Defendant Pugh
A Bendall for the Defendant Smith
R W Donnelly for the Defendant Totorewa

Judgment: 27 June 2014

NOTES OF JUDGE G A REA ON SENTENCING

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[1] You guys sat around, had some drinks till the alcohol affected you, and then you went out on a mission to try and get a surfboard or surfboards. You went to a camp where there were some high school students from Whakatane, you then went out to Wainui and you helped yourself to some property out of a car, and then you went into a garage. When I say "you", I mean all of you, because you all agreed you all had different roles to play. That is the bad side of it.

[2] But everything since then has been utterly positive. When I first saw this file, I could not believe the amount of work that your families have put in to try and get you guys sorted out. And now I read the restorative justice report where you have done absolutely everything you possibly could to put things right. I think Ms Bendall said that you guys are future leaders. I hope that is right. And I hope

you do not let this interfere with that because I just do not know why young guys from the backgrounds that you come from – with all the people down the back – get yourself into this situation. How embarrassing do you think it is for your whānau to have to sit there and watch you guys in the dock?

[3] Well I will tell you what we are going to do – there will be no conviction. Each of you is going to be discharged without conviction on all charges.

[4] You are going to be ordered to pay $400 costs of the prosecution, each of you, and the reason I am doing that is because there is nothing the law can do that you have not already done yourselves. You have done your community work. You do not need supervision. The people down the back can supervise you. But this is a one-off, guys. If you think you have dodged a bullet, do not ever do it again, because you will never ever get this sort of outcome.

[5] I cannot ever recall giving somebody a discharge without conviction in the 19 years I have been doing this job, unless it has been asked for by the lawyers. The lawyers did not ask for it because they knew what was binding on me and they knew generally that I would not be able to do it. But I consider that this is a special case because I cannot ask you to do anymore than you have already done. But you have got to finish it through; you have got to keep at it. You have got to finish the programme that Mr Totorewa put together for you because that is all part of it.

[6] I was going to put the sentencing off to get you to do it, but you have been doing everything up till now and I have got no reason to believe that you will not continue.

[7] Burglary is not good; you know that. You have sat there and reflected on what you have done and you have stepped up. You are free to go.

G A Rea
District Court Judge