IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

I TE KŌTI MATUA O AOTEAROA
TE WHANGANUI-A-TARA ROHE

CRI-2024-485-082
[2025] NZHC 708

BETWEEN	MANA BROWN Appellant
AND	NEW ZEALAND POLICE Respondent

Hearing: 4 March 2025

Appearances: C J Nicholls for Appellant
G P Fitzgerald and F J Beaton for Respondent

Judgment: 31 March 2025

JUDGMENT OF GRICE J
(Appeal against refusal to grant a discharge without conviction)

Introduction

[1] Mana Brown pleaded guilty to one charge of displaying prohibited gang insignia in a public place in breach of the Gangs Act 2024 (the Act).[1] On 12 December 2024 the Hutt Valley District Court declined Mr Brown's application for a discharge without conviction under s 106 of the Sentencing Act 2002.[2] Mr Brown now appeals against that decision.

Background

[2] The Act came into force on 21 November 2024.[3] The stated purpose of the Act is to reduce the ability of gangs to operate and cause fear, intimidation, and disruption

1 Gangs Act 2024, s 7 — maximum penalty 6 months' imprisonment or $5,000 fine.
2 *New Zealand Police v Brown* [2024] NZDC 30570 [judgment under appeal].
3 Section 2.

to the public.[4] It introduces a new offence of knowingly, and without reasonable excuse, displaying gang insignia at any time in a public place.[5]

[3] Mr Brown is 19 years old. He is a patched member of a chapter of the New Zealand Nomad gang, a specified gang under sch 2 of the Act.[6]

[4] At 3.00 pm on Saturday 7 December 2024, Mr Brown was in a public place, on the footpath outside a restaurant in Naenae, Lower Hutt. He was wearing a black cap displaying the wording "YG EASTY MAD B.C NOMAD" in red writing with a yellow border. This constituted prohibited gang insignia under the Act, as red writing with a yellow border and the word Nomad are commonly used to refer to the New Zealand Nomad gang.[7]

[5] Mr Brown was observed wearing the gang insignia in a review of CCTV footage captured on Hutt City Council cameras. The observation was reported to the police.

[6] In explanation, Mr Brown said the hat displayed his uncle's name in the gang's writing and colour.

The District Court decision

[7] Mr Brown pleaded guilty at his first appearance on 12 December 2024. At that hearing, his counsel also made an oral application for a discharge without conviction, on the basis that the consequences of a conviction would be significant for Mr Brown personally, particularly if he were later convicted on a similar charge.

[8] Judge Mika observed that the Act "has caused much discussion and division in our community".[8] He accepted that the gravity of Mr Brown's offending was low. However, the Judge noted that the Police were correct to bring the prosecution, and Mr Brown had accepted that he had offended against the Act. Furthermore, the Judge

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4 Section 3.
5 Section 7. There are certain exceptions to this prohibition specified under s 8.
6 See also s 4 definition of "gang".
7 See s 4 definition of "gang insignia"; and sch 2 item 24.
8 Judgment under appeal, above n 2, at [3].

found that the consequences of a conviction in terms of potential future offending were speculative, and noted that "in real terms" it was up to Mr Brown "whether that becomes an issue".[9]

[9] The Judge was not satisfied that the consequences of a conviction outweighed the gravity of the offending, and therefore declined the application for discharge without conviction.[10]

[10] The Judge ordered forfeiture of the cap, which had been seized by police, and convicted and discharged Mr Brown on the charge.[11] In reaching that decision, the Judge noted Mr Brown's youth and the fact that he was successfully serving his current sentence of intensive supervision.

Fresh evidence on appeal

[11] In the course of oral argument, counsel for Mr Brown made an application to adduce fresh evidence on appeal. The fresh evidence filed is an affidavit of Mr Brown, describing his upbringing as part of the gang, the events that took place on the day of the offending, and what he believes would be the consequences for him of a conviction.

[12] The test for determining whether fresh evidence may be adduced on appeal is well-settled. The court must be satisfied that the evidence is sufficiently fresh (in that it could not with reasonable diligence have been called at sentencing), sufficiently credible, and cogent in the sense that it might reasonably have led to a different outcome.[12]

[13] The Police do not oppose the fresh evidence being adduced. They accept that it would not have been practicable for the affidavit to have been filed at sentencing, and that the Court is likely to consider the material of assistance in determining the appeal.

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9 At [4].
10 At [5].
11 At [6].
12 *R v Lundy* [2013] UKPC 28, [2014] 2 NZLR 273.

[14] Mr Brown's sentencing took place at his first court appearance, which was only two days after his arrest. At that hearing both the guilty plea was entered and the oral application for discharge without conviction was made. With that in mind, I consider the evidence is sufficiently fresh, credible, and cogent to meet the test for adducing fresh evidence on appeal, and leave should be granted.

Approach on appeal

[15] The appeal against the refusal to grant a discharge without conviction is an appeal against conviction.[13] Therefore, s 232 of the Criminal Procedure Act 2011 applies, and this Court must allow the appeal only if it is satisfied that a miscarriage of justice has occurred, on the basis of an error in the Judge's assessment of the evidence or for any other reason.[14] A miscarriage of justice is defined as follows:[15]

> (4) … miscarriage of justice means any error, irregularity, or occurrence in or in relation to or affecting the trial that—
>
> (a) has created a real risk that the outcome of the trial was affected; or
>
> (b) has resulted in an unfair trial or a trial that was a nullity.
>
> (5) In subsection (4), trial includes a proceeding in which the appellant pleaded guilty.

The test for a discharge without conviction

[16] Under s 106 of the Sentencing Act, a sentencing judge has the discretion to grant a discharge with a conviction. That section relevantly provides:

> **106 Discharge without conviction**
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> (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.

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13 *Jackson v R* [2016] NZCA 627 at [6]–[9]. While an appeal against a refusal to grant a discharge without conviction is often characterised as an appeal against both conviction and sentence, in this case Mr Brown's sentence is not challenged beyond the refusal to grant the discharge without conviction. Therefore, the appeal is against conviction alone.

14 Criminal Procedure Act 2011, s 232(2)(b) and (c).

15 Section 232(4) and (5).

…

[17] Section 107 provides that a court must not grant a discharge without conviction unless it is satisfied that the direct and indirect consequences of a conviction would be out of all proportion to the gravity of the offence.[16] There must be a "real and appreciable" risk that any given consequence will occur.[17]

[18] There is a well-established three-step process to determining whether a discharge without conviction should be granted. The judge must assess:[18]

> (a) the gravity of the offending, taking into account all aggravating and mitigating factors of the offending and the offender;
>
> (b) the direct and indirect consequences of a conviction; and
>
> (c) whether the direct and indirect consequences of a conviction would be out of all proportion to the gravity of the offending.

[19] The Court of Appeal has described the discretion under s 106(1) as "residual", because while "it will be a rare case where an offender has passed through the s 107 'gateway', but is then not discharged under s 106(1)", there may be some circumstances in which that is appropriate.[19]

Summary of the parties' positions

[20] Mr Nicholls, for Mr Brown, submits that the gravity of the offending was not merely low, but "zero". Furthermore, he contends that Mr Brown's youth means the consequences of a conviction will be inherently more severe than for the average person, and that those consequences are out of all proportion to the gravity of his offending. Mr Nicholls also makes a number of submissions in relation to the wider context of the Act, which he says is relevant to whether the Court should exercise its discretion to grant a discharge without conviction. In particular, he submits that the legislation imposes an unjustified limitation on the right to freedom of expression affirmed under s 14 of the New Zealand Bill of Rights Act 1990

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16 Sentencing Act 2002, s 107; and *R v Hughes* [2008] NZCA 546, [2009] 3 NZLR 222 at [8].
17 *R v Taulapapa* [2018] NZCA 414 at [22].
18 *Blythe v R* [2011] NZCA 190, [2011] 2 NZLR 620 at [7]–[14]; *R v Hughes*, above n 16; *Z v R* [2012] NZCA 599, [2013] NZAR 142 at [28]; and *R v Taulapapa*, above n 17, at [22].
19 *Blythe v R*, above n 18, at [13].

(the NZ Bill of Rights Act), and is potentially discriminatory. He compares it with other well-known repressive regimes.

[21] The Police oppose the appeal. Mr Fitzgerald for the Police submits that the Judge correctly applied the prescribed test, and it would not be appropriate for the Court to effectively nullify Parliament's legislative intent by refusing to convict an offender on the basis that a conviction under the Act infringes upon his right to freedom of expression.

Analysis

Gravity of the offending

[22] The gravity of the offending for the purposes of s 107 relates to the applicant's culpability, which is determined on an assessment of the facts, rather than based on the nature of the charge.[20] The concern is thus with the gravity of the particular offence committed, not the type of offence.[21]

[23] Mr Nicholls submits that the gravity of the offending is "zero". He refers to the purpose of the Act, and notes that there is no evidence the gang was "operating" while Mr Brown was wearing his cap, nor that the cap caused fear, intimidation, or disruption to the public. Mr Brown was merely in Naenae on a day when the community was celebrating the opening of the public swimming pool, which had been closed for repairs for some years. He was enjoying the festive atmosphere and had no intention to cause any disruption. In addition, the area is home to many gang members and they are an integral part of the community. Further, Mr Nicholls says, most members of the public would be unlikely to even recognise that the letters on Mr Brown's cap referred to the Nomad gang, and therefore no harm could arise from it, as opposed to a gang patch.

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20 *J (CA32/2021) v R* [2021] NZCA 690 at [36].
21 *Babich v R* [2018] NZHC 2324 at [7], citing *Taylor v R* [2018] NZHC 688 at [46].

[24] The Police accept that the gravity of the offending is low. However, Mr Fitzgerald submits that the gravity of the offending could not conceivably be categorised as "zero".

[25] That must necessarily be the case. It is inherent in the fact that Parliament has criminalised Mr Brown's conduct through s 7 of the Act that there must be some gravity to his offending. Mr Brown pleaded guilty to the offence, thus acknowledging his culpability for it. While the purpose of the Act is to prevent fear, intimidation, and disruption to the public caused by gangs, the fact that such fear, intimidation, or disruption occurred is not an element of the offence. All that is required is that Mr Brown wore the gang insignia in public, knowingly and without reasonable excuse.

[26] Nevertheless, I accept that the gravity of Mr Brown's offending was appropriately classified by the Judge as at the lowest level. Mr Brown did not behave in an intimidatory manner while wearing the cap, he was not with a large group of gang members also wearing gang insignia, nor did his actions attract any public complaint. The offending was identified by Council personnel while reviewing CCTV footage in the area. Mr Nicholls criticised the use of this surveillance to identify the offending to police. However, the manner of reporting was not legally challenged.

[27] In the circumstances, the Judge was correct to characterise the gravity of the offending as low.

Direct and indirect consequences of a conviction

[28] In his affidavit, Mr Brown says that having convictions will make his life harder, particularly in relation to his ability to get a job, travel, and "get finance, insurance or start a business in future". He notes that he is at the start of his adult life and he does not want to be consigned to "society's scrapheap".

[29] Mr Nicholls submits that while it is undeniable that all criminal convictions have negative consequences for a person, those consequences will be more severe given that Mr Brown is a young person who has not yet established himself in life. It is accepted by both counsel that Mr Brown's youth is a relevant factor to be considered in assessing the consequences of a conviction. This Court has recognised that the

consequences of a conviction for a young offender who does not yet have a "foothold in a career" are potentially greater than for an average person, and there is a risk that a conviction in that context "may be permanently damaging".[22]

[30] At the same time, as the Police submit, there is no evidence provided to demonstrate *a real and appreciable risk* of any specific negative consequences that may arise for Mr Brown as a result of a conviction, besides the assertions in his affidavit. There is nothing to suggest that there will be any particularly significant impacts for Mr Brown, beyond those which are considered natural and ordinary consequences for a young person convicted of this offending.

[31] Furthermore, the Police submit that a conviction for the present charge is unlikely to have a particular impact on Mr Brown's future job prospects, given his previous convictions are for more serious offending. However, Mr Nicholls contends that the consequences of a conviction will be significant, notwithstanding those convictions.

[32] Mr Brown has three previous convictions — two for common assault,[23] and one for aggravated burglary.[24] While I accept that an additional conviction is not a positive step in terms of his employment prospects, the impact of the present conviction is likely to be minimal in light of his pre-existing convictions for violent offending. Furthermore, as Mr Brown notes in his affidavit, he considers his membership in the gang to be a large part of his identity, and has a number of gang facial tattoos. His involvement in the gang is likely to be apparent to any prospective employer regardless of the conviction.

[33] Mr Nicholls also raised in the District Court the potentially greater consequences if Mr Brown were to obtain any further convictions. Presumably he was

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22 *Walker v Police* [2016] NZHC 1450 at [22].

23 Crimes Act 1961, s 196 — maximum penalty one year's imprisonment. The first of these offences occurred on 25 September 2022, for which Mr Brown was convicted and discharged. The second offence occurred on 13 August 2024, for which Mr Brown was sentenced to 50 hours' community work.

24 Crimes Act, s 232 — maximum penalty 14 years' imprisonment. This offence was committed on 30 December 2022. Mr Brown was sentenced to three months' intensive supervision and one year of special conditions.

referring to the mandatory gang insignia prohibition order (GIPO) regime for repeat offences set out under s 9 of the Act, which provides:

> **9 Mandatory gang insignia prohibition order for repeat offences**
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> (1) A court must make a gang insignia prohibition order if—
>
> (a) the court convicts the person of an offence against section 7; and
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> (b) the person has been convicted of 2 or more previous offences against section 7 within 5 years of the date of the conviction referred to in paragraph (a).
>
> (2) An order made under subsection (1) prohibits—
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> (a) the person from possessing gang insignia; and
>
> (b) the person from controlling gang insignia; and
>
> (c) gang insignia being present at the person's usual place of residence.
>
> (3) A gang insignia prohibition order takes effect when it is made and continues in effect for 5 years.
>
> (4) If a court must make an order under subsection (1) but the person is already subject to an order made under that subsection, the court must amend that order to provide that it continues in effect for 5 years from the date of the amendment.
>
> (5) A person commits an offence if the person—
>
> (a) is subject to a gang insignia prohibition order; and
>
> (b) intentionally breaches all or any part of the order.
>
> (6) A person who commits an offence against subsection (5) is liable on conviction to a term of imprisonment not exceeding 1 year.

[34] However, the Judge was correct to find that any future offending by Mr Brown and his resulting potential liability to a GIPO is not a consequence of his conviction for this offence but will only be relevant if he offends further. This is his first conviction under the Act, and the requirement to impose a GIPO does not arise until a person's third such conviction. While the entry of a conviction may take Mr Brown a step closer to facing a GIPO, it does not in itself have that consequence. It would be more appropriate to take this prospect into account if he faces further convictions. As the Judge said, whether this arises in the future is in Mr Brown's hands.

[35] Other matters raised by Mr Brown were that the police were monitoring CCTV footage to provide them with an opportunity to arrest him. That is not borne out by the fact that the police had the footage brought to their attention by Council staff or volunteers monitoring the footage. Furthermore, his being held in custody for one hour was not a consequence of the conviction but of his arrest.[25]

Proportionality assessment

[36] Given Mr Nicholls's submission that the gravity of the offending was zero, he says it is not difficult to meet the proportionality test in this case.

[37] Mr Fitzgerald submits that as the gravity of the offending is low and the direct and indirect consequences of a conviction are minimal, it cannot be demonstrated that the consequences are out of all proportion to the gravity of the offending. He notes that this is a higher standard than merely finding the consequences do not "outweigh" the gravity of the offending, as the Judge concluded. He further contends that Mr Brown has not established that a miscarriage of justice has occurred, particularly in light of the fact that he received the least restrictive outcome available as a sentencing option.

[38] I agree that the direct and indirect consequences of a conviction for Mr Brown are not out of all proportion to the gravity of his offending. Although the gravity of his offending is very low, the consequences he will face as a result of his conviction are also relatively minimal. Furthermore, while the sentence imposed is not directly relevant to the conviction appeal at hand, the fact of the conviction and discharge, with the only penalty being forfeiture of the cap, supports the position that the consequences of a conviction are not out of all proportion to the gravity of the offending. Mr Brown did not receive any substantial penalty for the offence.

Impact of the NZ Bill of Rights Act

[39] Mr Nicholls submits that the Act imposes an unjustified limitation on the right to freedom of expression affirmed under s 14 of the NZ Bill of Rights Act, and is in

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[25] Authorised under the Crimes Act, s 315(2).

breach of New Zealand's international obligations under art 19 of the International Covenant on Civil and Political Rights. He says the Act is a "powerful mechanism" by which police can arrest and charge New Zealanders who express their association with a gang through their clothing, even though they may not be causing any harm. He further submits that the prosecution under this law "amounts to an attack by Parliament on a critical feature of the appellant's expression of his identity". Mr Nicholls also contends that the legislation is potentially discriminatory towards Māori, given their overrepresentation in gang populations. He submits that this is an example of legislative overreach infringing upon fundamental human rights and refers to several examples of repressive laws and regimes both overseas and in New Zealand's own history, which he says are comparable. He contends that if Mr Brown's conviction is upheld it will establish "a disturbing precedent".

[40] Mr Fitzgerald submits that it is not appropriate to take into account the matters raised by Mr Nicholls in assessing whether a discharge without conviction ought to have been granted. He notes that the explanatory note to the Bill highlights that the legislation was designed to "reduce the harmful behaviours engaged in by gangs" and to "disincentivise gang membership".[26] Thus, Mr Fitzgerald submits that the Act has a dual purpose of reducing gang operations in their entirety, as well as reducing the fear, intimidation, and disruption caused by gangs to the public, based on the policy position that display of gang insignia as a status symbol may assist gangs in marketing themselves.

[41] Furthermore, a s 7 report was presented to the House of Representatives alongside the Bill, which concluded that the prohibition on the display of gang insignia in public places is inconsistent with the right to freedom of expression.[27] However, the report also found that such expression was of "low value".[28] Mr Fitzgerald therefore submits that Parliament has intentionally legislated inconsistently with the right to freedom of expression under the NZ Bill of Rights Act, by specifically criminalising this form of expression. On that basis, he says it would not be

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26 Gangs Legislation Amendment Bill (23-1) (explanatory note).

27 Judith Collins *Report of the Attorney-General under the New Zealand Bill of Rights Act 1990 on the Gangs Legislation Amendment Bill* (26 February 2024).

28 At [25].

appropriate for the Court to effectively disapply the legislation by refusing to convict an offender because of the associated infringement on rights.

[42] While acknowledging the concerns raised by Mr Nicholls regarding the impact of the legislation on freedom of expression, his submissions misconstrue the role of the NZ Bill of Rights Act in this context. He contends that the impact on rights is relevant to the exercise of the Court's discretion as to whether to grant a discharge without conviction. However, that step does not arise unless an applicant can pass through the "gateway" of s 107 by demonstrating that the consequences of a conviction would be out of all proportion to the gravity of their offending. Furthermore, if that test is passed, it will be a rare occasion that a court will not exercise its discretion to grant a discharge without conviction. The impact of the NZ Bill of Rights Act is unlikely to be of much assistance to the applicant if it is not considered until that stage.

[43] Mr Nicholls's submissions largely relate to issues of public policy surrounding the Act, which are of limited relevance to the present appeal. Mr Brown has pleaded guilty to an offence under s 7 of the Act and was represented at all stages by counsel. Therefore, in considering whether a discharge without conviction should be granted, the assessment for the court is whether the s 107 test is met. That test is mandated by Parliament and does not involve considering whether the offence itself is rights-consistent.

[44] Furthermore, s 4 of the NZ Bill of Rights Act specifically prohibits a court from declining to apply any provision of an enactment or holding it to be in any way invalid or ineffective by reason of its inconsistency with any provision of the NZ Bill of Rights Act. It would therefore be inappropriate for the Court to in essence override the effect of the Act through a "backdoor" method, by granting a discharge without conviction when the statutory test for doing so under s 107 has not been made out. This appeal is not the appropriate manner of addressing concerns about the rights-implications of

the Act. In appropriate cases, it is open to parties to address those issues by seeking a declaration of inconsistency.

Conclusion

[45] No miscarriage of justice arises. The Judge made no error in refusing to grant a discharge without conviction. The appeal is dismissed.

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Grice J

Solicitors:
Chris Nicholls, Lower Hutt for Appellant
Luke, Cunningham & Clere, Wellington for Respondent