

**IN THE HIGH COURT OF NEW ZEALAND  
TAURANGA REGISTRY**

**I TE KŌTI MATUA O AOTEAROA  
TAURANGA MOANA ROHE**

**CRI-2021-070-1570  
[2023] NZHC 680**

**THE KING**

v

**RYAN DUKE PARAONE WALSH**

Hearing: 30 March 2023

Appearances: D P Coulson for the Crown  
A G Speed for the Defendant

Date: 30 March 2023

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**ORAL JUDGMENT OF PALMER J**

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[1] Mr Ryan Walsh, now aged 28, has been found guilty by a jury of the offence of conspiring to import cocaine, which carries a maximum penalty of 14 years' imprisonment.<sup>1</sup> Today I decide whether he should be discharged without conviction or, if convicted, what his sentence should be.

**What happened?**

[2] In 2021, when he was 26, Mr Walsh was living with his partner across the road from his partner's mother's house where his partner's brother, Mr Tama Waitai, was staying on parole. Mr Waitai had been released from prison at the end of 2020 after serving a lengthy sentence.

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<sup>1</sup> Misuse of Drugs Act 1975, s 6(2A).

[3] Mr Waitai, and his associate Mr Tangaroa Demant, had agreed with a Mexican-based organised criminal group to import a large quantity of cocaine into New Zealand. The plan was that, when a ship docked at the port of Tauranga, they would remove from it a shipping container that would contain cocaine, before any customs inspection. They had a man working on the Mt Maunganui side of the port to help with that, Mr Maurice Swinton. But they needed a man working on the Tauranga side, in case the ship berthed there. Mr Waitai, Mr Demant, and Mr Swinton all pleaded guilty to conspiring to import cocaine, on the basis that the quantity would be around 200 kilograms.

[4] Mr Walsh did not know Mr Waitai until Mr Waitai got out of prison. The jury heard three intercepted phone conversations between Mr Demant and Mr Waitai, which also involved Mr Walsh, on 31 January 2021, 7 February 2021, and 12 February 2021. Mr Walsh was not involved in the whole of these conversations. And it is not clear from those conversations exactly what he knew about their plans. But he did agree to help them find someone to help them with whatever they were planning. He mentioned an uncle and then a workmate or a workmate's friend at the port.

[5] Mr Walsh's evidence at trial was that he was trying to impress his partner's brother. He felt pressured and a bit intimidated. He was trying to get onside with his partner's family, and was just making it up to fit in. His evidence was that he did not know anyone who could help them, there was no uncle at the port, he never intended to find anyone to help them, he never made any inquiries, and he had no knowledge of any drugs.

[6] Indeed, there is no evidence Mr Walsh ever did find anyone to help the other conspirators. And the plan never proceeded. No substantive steps appear to have been undertaken. No drugs were imported. Rather, there is evidence that Mr Walsh asked for his partner's help to get her brother off his case, and she did so. She confirmed that in evidence and said Mr Walsh was quite naïve with the situation.

[7] The jury unanimously found Mr Walsh guilty of conspiring to import cocaine. That means the jury was sure that Mr Walsh agreed with Mr Demant and Mr Waitai to find a person at the Tauranga port to help grab a shipping container from a ship, was

sure that Mr Walsh did intend to find that person, and was sure that Mr Walsh knew the container was intended to contain a controlled drug. I did not enter a conviction after the jury's verdict, with the consent of the Crown.

### **Law of discharge without conviction**

[8] Section 11(1)(a) of the Sentencing Act 2002 requires me to consider, before entering a conviction, whether Mr Walsh might be more appropriately dealt with by way of a discharge without conviction. That is what Mr Walsh applies for. The Crown opposes the application.

[9] Sections 106 and 107 of the Criminal Procedure Act 2011 provide that I may grant a discharge without conviction if I am satisfied that the direct and indirect consequences of a conviction are out of all proportion to the gravity of the offending. I must take into account the aggravating and mitigating aspects of the offending and the offender.<sup>2</sup> There is no onus of proof. But the applicant must demonstrate there is a real and appreciable risk any identified consequences will occur.<sup>3</sup> The Court is either satisfied that the consequences are out of proportion or it is not.<sup>4</sup> If satisfied, the Court may consider exercising the discretion to discharge without conviction.

[10] Serious drug offending provides relatively few occasions for a Court to discharge an offender without conviction. But it does happen:

- (a) In 2003, in *R v Hemard*, a 25-year-old tourist received a parcel containing 0.7 of a gram of cocaine similar to possession for personal use.<sup>5</sup> Panckhurst J said the level of criminality was low and the level of stupidity was extremely high.<sup>6</sup> Entry of a conviction would, on account of the offender's particular personal circumstances of working in corporate leisure, have had dire consequences. He was discharged without conviction.

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<sup>2</sup> *R v Hughes* [2008] NZCA 546, [2009] 3 NZLR 222 at [22]; *Z (CA447/2012) v R* [2012] NZCA 599, [2013] NZAR 142 at [8].

<sup>3</sup> *DC (CA47/2013) v R* [2013] NZCA 255 at [43].

<sup>4</sup> *H (CA680/2011) v R* [2012] NZCA 198 at [30].

<sup>5</sup> *R v Hemard* HC Christchurch T 30/03, 11 April 2003.

<sup>6</sup> At [9].

- (b) In 2012, in *Bullock v New Zealand Police*, a 17-year-old school boy admitted intending to sell some of his 16 ecstasy and 40 other class C drug tablets.<sup>7</sup> Woodhouse J considered the District Court had placed undue emphasis on the general nature of the offending rather than the culpability of the particular offender.<sup>8</sup> The evidence indicated the risk of reoffending was low and the offender's experience of the criminal justice system would have had a substantial impact. The employment and other life consequences of a conviction were held to be disproportionate to the gravity of the particular offending. A discharge was granted.
- (c) In 2014, in *R v Rakich*, the offender sold 200 class C pills over three separate occasions and conspired to sell at least 2,600 class C pills over seven occasions.<sup>9</sup> Duffy J considered that his age of 20, his previous good character, his remorse, and the fact he had turned his life around since the offending reduced the gravity of offending to low. The consequences of conviction included impacting on his ability to travel to the United States for a successful business he had started. The Judge considered the consequences of conviction would undermine the strong rehabilitative steps he had taken to date and would be out of proportion given that he had clearly learnt his lesson and was very unlikely to offend again.<sup>10</sup> He was discharged without conviction.
- (d) Also in 2014, in *Rodrigo v New Zealand Police*, a 22-year-old university student supplied Ritalin, a class B drug he had been prescribed, to three people without profit.<sup>11</sup> The gravity of the offending was reduced by his age, being a first offender, admitting his offending, his remorse, his undiagnosed ADHD, his family support, and his low likelihood of reoffending.<sup>12</sup> A conviction would have impacted

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<sup>7</sup> *Bullock v New Zealand Police* [2012] NZHC 1374.

<sup>8</sup> At [5].

<sup>9</sup> *R v Rakich* [2014] NZHC 3287.

<sup>10</sup> At [163]–[164].

<sup>11</sup> *Rodrigo v New Zealand Police* [2014] NZCA 68.

<sup>12</sup> At [11].

on his ability to travel to his family in North America and his employment prospects, and would have been out of all proportion to the low level of offending. He was discharged without conviction.

- (e) In 2018, in *Taylor v R*, Ms Taylor pleaded guilty to charges of possession of methamphetamine for supply and conspiracy to supply methamphetamine.<sup>13</sup> Ms Taylor’s part in the conspiracy was minimal and the gravity of the offending was very much at the lower end of the scale. She acted as a result of her partner’s domination of her, which she had a severely compromised ability to resist due to her long history of abuse. Convictions for methamphetamine offending would preclude Ms Taylor from entering the teaching profession and turn her life around, which would be out of all proportion to the gravity of her offending. Thomas J stated this was “a rare case” where an offender in respect of a class A controlled drug would be discharged without conviction.
- (f) Finally, last week in *R v H*, an 18-year-old who had been selling ecstasy through the Mongrel Mob turned his life around and pleaded guilty to aggravated burglary.<sup>14</sup> Cooke J discharged him without conviction, observing:

[32] It is unusual for a person to have got himself involved in drug dealing, and then participated in this serious offending, to receive a discharge without conviction. But you are a person without previous convictions, you are young, and there is a real prospect that you can now start your new life with the love and guidance of those who are seeking to support you both [in] Australia and New Zealand. The criminal justice system needs to address cases like this with the sensitivity they deserve. There is a public benefit in taking steps to prevent people like you from entering the criminal justice system and prison systems. That is particularly so for young people. Once those systems are entered it becomes hard to stop a decline into a criminal lifestyle, highly influenced by gang culture. Whilst this is serious offending, it can be said that this is the very kind of case that a discharge without conviction provision is most effectively directed to.

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<sup>13</sup> *Taylor v R* [2018] NZHC 688.

<sup>14</sup> *R v H* [2023] NZHC 626.

### **The gravity of the offending**

[11] Mr Walsh, I have already described your offending. There is no doubt the offence itself is serious. Commercial drug offending results in inherent social harm. Mr Demant, Mr Waitai, and Mr Swinton proposed to import a very large amount of cocaine. This was as the Crown says, was a large-scale operation. The Crown submits your offending was of moderate gravity. The role was crucial though Mr Coulson accepts your part in it was not. Mr Swinton's starting point for sentencing was four years and three months' imprisonment. The Crown accepts yours would be lower than that but submits a two and a half year starting point could still be justified. The jury found you intended to help and knew the container was intended to contain a controlled drug.

[12] But there are significant mitigating aspects of your offending and culpability:

- (a) First, when you were involved, the conspiracy was in its early planning stages.
- (b) Second, it never came to fruition. There is no evidence cocaine was dispatched. None was imported.
- (c) Third, there is no evidence you knew how much cocaine was proposed to be imported, that there was any Mexican connection, or even that it was cocaine.
- (d) Fourth, I accept your intended assistance was minimal. You were to find someone the other conspirators could work with. But you did not. There is no evidence you were to participate in the physical offending yourself or were to receive any benefit for your assistance, which distinguishes your offending from Mr Swinton's. As Mr Speed submits, there were three conversations that went nowhere.

- (e) Fifth, I accept you were simultaneously intimidated by, and trying to impress, your partner's brother. You appear to have tried to negotiate your way through the conversations. Perhaps that was influenced by how you handled similar situations in your past. You say the situation triggered your anxiety and Post Traumatic Stress Disorder from your childhood. That would be understandable, given your childhood. In any case, your behaviour does not appear to have been motivated by malign intent or self-interest.
- (f) Sixth, importantly, you got yourself out of the conspiracy before it came for you to actually do anything. Or rather, you asked your partner to get you out of it. And she did.

[13] So, I consider the gravity of your offending was low though, as the judge said in *R v Hemard*, the level of your stupidity was extremely high. You acknowledge that. I'm sure your partner, who gave evidence and is an impressively strong young woman, has told you so. Listen to her.

[14] You tell me you only have yourself to blame and you have let down your partner, your Nan, your mum, your sisters, your daughters, your employer and your work mates. I accept you are genuine when you say in your affidavit:<sup>15</sup>

I am deeply remorseful for the situation which I found myself in. It was a lapse of judgment which I bitterly regret. To be involved with drugs is not something I wish ever to be involved with having seen the harm and damage it caused to my family and my mother. With the benefit of hindsight, I cannot believe how stupid I was to even engage in the conversations I did and say the things I said even though I had absolutely no intention of following through on what was said.

*Mr Walsh*

[15] Your own background context is important to assessing the consequences of conviction. Under s 27 of the Sentencing Act, I have had the benefit of receiving a report from Ms Natalie Ridler about your background. I have seen a letter from your

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<sup>15</sup> Affidavit of Ryan Walsh, 21 March 2023, at [18].

mother and from your nan and from your partner. I have also seen an affidavit from you and a letter.

[16] In brief, your early childhood was defined by substance abuse. Your mother was a methamphetamine addict since before you were born. She was often the victim of violence. So were you. You grew up around alcohol, drugs, and gangs. You used to have to steal shoes and went without food. Your father grew cannabis and sold it. You have described him having shoot-outs with those who came to steal it. He died in a car crash driving to pick you up when you were eight years old, having just finished his marine studies.

[17] I have received a letter from your mother explaining the trauma in her life and that she now works for Manaaki ora Trust, helping people to recover from alcohol and other drug addictions and mental health issues. She tells me you have been somewhat of a mentor and positive role model for your sisters, daughters, cousins and other children and young men. Though she does note that the comments she received from others about what a good boy you were when you were growing up made her often think they had the wrong child. Many mothers think that. Your grandmother says you have been a wonderfully helpful family member and a great benefit to her especially as a pensioner with a fairly severe disability. Your partner tells me both she and you lost your fathers at a young age which has had an impact on you both. The majority of the older males in her family have been to prison. She fears the impact on her children, younger brother and nephew of their one male role model going to prison. They may think that's just part of life.

[18] Indeed, the sort of background you grew up in usually leads to a cycle of poverty, offending, and often gang life. To your credit, you avoided that. You stayed at school until Year 13, even if only because school was better than home. You have only ever had two convictions, for driving offences when you were a teenager, in 2012 and 2013. You had a close relationship with your grandfather. You would come back to your whānau to look after your mum and your sisters. You have been with your own partner now for five years and you have a young baby together.



[19] You followed your father into marine studies and started a Diploma. After a year, you decided that wasn't for you. But, after a stint as a scaffolder and a rigger in Australia, you came back to New Zealand and enrolled in a diving course. You were head of your dive group of 17 people. You still have a considerable student loan which you are paying off. You have worked as a self-employed commercial marine diver for eight years. You work in custom-controlled areas, ports, and government facilities. Mr Tom Ward, a diving supervisor who has known you for six years through your diving career, gave evidence in support of your character at trial and in relation to discharge and sentence. He emphasises the skill and training required of your role, which involves considerable responsibility. You take others' lives in your hands and, by all accounts, you do it well.

[20] Your evidence is that you have been planning to obtain your in-shore diver's supervisor certificate in June this year and to contract yourself out as an in-shore supervisor, with greater responsibility and higher income. Your longer-term goal is to become a saturation diver, with higher income overseas in the oil and gas industry.

#### *Consequences of conviction*

[21] You have provided evidence that the consequences of a conviction will have a significant long-term effect on your career, your ability to earn income to support your young family, and to travel overseas for work and further training. You would not be able to work on any port and would be prohibited from entering Government-run bases, particularly naval bases. These are the kinds of places you might otherwise be employed to work in from time to time.

[22] Mr Ward confirms that "it would be difficult for [you], if not impossible, to obtain work in high security areas where a conviction would prohibit entry".<sup>16</sup> He states "[t]his would be a massive hindrance to Ryan's further development in his chosen career and obviously his income" and "would make it virtually impossible for him to work and train overseas as he plans to do".<sup>17</sup> The Crown accepts a conviction will likely prevent you from undertaking work at ports and government facilities.

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<sup>16</sup> Affidavit of Tom Ward, 21 March 2023, at [3].

<sup>17</sup> At [4].

[23] I accept these consequences of conviction for you are moderately to highly serious. They would also impact significantly on your whānau, including your young child and younger relatives – which is a relevant consideration.<sup>18</sup> The consequences of conviction would significantly set back your admirable efforts to rise out of your difficult childhood context to become a respected commercial diver and father. It might even tempt you into aspects of the cycle you broke away from in your previous life. There is benefit to you and your family but also a public benefit in preventing that.

### *Proportionality*

[24] Mr Speed submits that the case law supports the availability of a discharge without conviction. In particular, in *R v Taylor*, the effect of Ms Taylor’s career and trying to turn her life around has broad similarities to your situation. Mr Coulson seeks to distinguish the case. Mr Speed submits it is extremely unlikely you would ever be involved in anything like this again. Having put aside your troubled background and made a great success of your life, he submits the consequences of conviction are clear and compelling and would be out of all proportion to your minor involvement in this scheme.

[25] Mr Coulson submits the consequences are the natural consequences of moderately serious offending and notes your employment helped enable your offending. He relies on the Court of Appeal’s decision in *R v Taulapapa* in submitting that potential employers or independent bodies assessing people’s character should know what offending a person has committed and decide its significance themselves.<sup>19</sup> You are allowed entry into controlled areas. Mr Coulson submits there is a strong public interest in maintaining tight border security and it would be wrong to hide your conviction from Customs and other government agencies. There is no specific evidence about travel consequences so they are speculative. Mr Coulson submits the consequences of the offending cannot be said to be out of all proportion to the gravity of the offending.

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<sup>18</sup> *Philip v R* [2022] NZSC 149 at [52]–[56]; and United Nations Convention on the Rights of the Child, art 3(1).

<sup>19</sup> *R v Taulapapa* [2018] NZCA 414 at [42(a)].

[26] But the Court of Appeal in *R v Taulapapa* described a number of different approaches the courts take when it comes to employers looking behind a conviction. It held that impacts on employment are a matter for judicial judgement and held there that it was likely future employers would not look behind Ms Taulapapa's conviction and consider the merits of her situation.<sup>20</sup> The evidence is that the same is true here. Your culpability is much lower than conviction for this offence would suggest.<sup>21</sup> And I consider the offence of conspiracy to import cocaine is a bad guide to your future behaviour. Everything I have seen suggests your experience of the criminal justice system in this case is highly likely to mean you will try to avoid any contact with the criminal justice system again in the future. As you should. I do not believe you will put New Zealand's border security at risk. I rely on you to prove me right.

[27] I have assessed the gravity of your offending as low and the consequences of conviction for you and your family as moderately to highly serious. Accordingly, I consider the consequences are out of proportion to the gravity of your offending.

#### *Exercise of discretion*

[28] I have had regard to the cases I mentioned earlier in deciding whether to exercise my discretion to discharge you without conviction. You are older than several of the offenders in those cases. And the quantity of drugs to be imported was much higher, though there is no evidence you knew about the quantity. But your offending only involved you saying you would do something, which you did not do. And you withdrew that offer, through your partner. You did nothing. Your role in the offending is less significant than the roles of the offenders in the other cases I have mentioned.

[29] Your risk of reoffending is low. The consequences of a conviction for you and your family are moderately to highly serious. The Department of Corrections pre-sentence report recommends a discharge without conviction. They highlight the impact even a sentence of home detention would have upon your employment. A discharge without conviction is consistent with the purposes and principles of sentencing, which must be a relevant consideration.

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<sup>20</sup> At [46] and [49].

<sup>21</sup> At [49].

[30] I consider you should be able to continue with your career as a commercial marine diver and to provide for your family in a way which was not able to be done for you growing up. You are a smart and responsible young man with your future ahead of you. You tell me you worked so hard to break the cycle of drug abuse and gang culture that you were brought up in and now you feel like a complete failure. You can make of your future life what you will. I urge you to go out of your way to proactively avoid getting involved in any offending again, for your sake and for the sake of your family, as well as society more generally. I am confident you can do that. Your counsel will tell you that you are relatively lucky to get this rare chance. You will not get a second one.

### **Result**

[31] Mr Walsh, could you please stand. I discharge you without conviction on the charge of conspiracy to import cocaine.

Palmer J

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