IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU ROHE

CRI-2024-404-686
[2025] NZHC 160

BETWEEN	ELIZABETH JANE COONEY Appellant
AND	NEW ZEALAND POLICE Respondent

Hearing: 4 February 2025

Appearances: M I Hague for Appellant
J E Bragg and K A Venter for Respondent

Judgment: 13 February 2025

JUDGMENT OF PETERS J

This judgment was delivered by Justice Peters
on 13 February 2025 at 2.30 pm

Registrar/Deputy Registrar

Date: .....

Solicitors: Frontline Law Ltd, Wellington
Kayes Fletcher Walker Ltd, Crown Solicitor, Manukau

Introduction

[1] Following a Judge-alone trial before Judge Forrest, the appellant was found guilty of common assault under s 9 of the Summary Offences Act 1981.[1]

[2] The Judge did not immediately enter a conviction on the assault charge and Ms Gunn subsequently applied for a discharge without conviction.[2] The Judge declined this application as she was not satisfied the consequences of conviction were out of all proportion to the gravity of the offending.[3] Rather, the Judge convicted and discharged Ms Gunn. The Judge subsequently dismissed Ms Gunn's application for costs under s 5 of the Costs in Criminal Cases Act 1967.

[3] Ms Gunn appeals against her conviction. I must allow the appeal if satisfied the Judge erred in her assessment of the evidence to such an extent that a miscarriage of justice has occurred.[4]

[4] Absent success on her appeal against conviction, Ms Gunn appeals against the Judge's refusal to discharge her without conviction.

Facts

[5] On 25 February 2023, Ms Gunn was in the arrivals hall at Auckland International Airport, awaiting the arrival of friends. Ms Gunn was accompanied by a Mr Clark. Mr Clark was holding a large camera, of the type used by TV cameramen. Ms Gunn was holding a microphone.

[6] The events relevant to this appeal were recorded on the airport's CCTV system. That footage was subsequently "synced" with audio recorded by Ms Gunn or Mr Clark. Like the Judge, I have had the benefit of watching and hearing what transpired.

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1 As the appellant prefers, I shall refer to her as Ms Gunn.
2 Sentencing Act 2002, s 106.
3 Sections 106 and 107.
4 Criminal Procedure Act 2011, s 232(2)(b).

[7] The complainant on the charge of assault, to whom I shall refer as C, is employed at the airport. She approached Ms Gunn, and asked whether Ms Gunn and Mr Clark had permission to film at the airport, and whether she and Mr Clark were doing so for a business purpose.

[8] Ms Gunn replied that they were not filming for a business purpose; that they were present to film people they had helped "get off an island"; they wished to get high quality footage; and that no money was being made. As it happens, the airport's policy or bylaw regarding filming only requires permission if the filming is for a commercial purpose.

[9] Whilst Ms Gunn was talking to her, C turned to talk to Mr Clark who was on C's right. C asked Mr Clark to stop filming. At that point Ms Gunn, on C's left, asked C to identify the legal basis for the request. To gain or regain C's attention, Ms Gunn said "Excuse me", and then reached out and touched C's upper arm.

[10] This touch constituted the actus reus of the assault charge. It was common ground at trial that Ms Gunn's touch was light, fleeting, and for the purpose of getting C's attention. C did then return her attention to Ms Gunn and told Ms Gunn not to touch her.

[11] At some point after this, the police were called. It is unnecessary to say in detail what occurred thereafter. However, Ms Gunn and Mr Clark were each charged with trespass and with resisting a police officer. The Judge dismissed the charges of trespass because there was no evidence Ms Gunn and Mr Clark had been asked to leave the airport. The Judge also acquitted both on the resisting charge as she was not satisfied there was sufficient evidence of any intention to resist the police.

[12] However, the Judge did find Ms Gunn guilty of the charge of assault. Ms Gunn appeals against that finding on several grounds. It is unnecessary for me to address all of them as I am satisfied the appeal succeeds on the submissions made as to consent. I add that Mr Hague, counsel for Ms Gunn in the District Court and on appeal, also asked that, if I allowed this appeal, I remit the matter back to the Judge for

reconsideration of her decision as to costs. However, as no appeal against that decision has been filed, I have no jurisdiction to remit the matter back as sought.

Appeal against conviction

Section 9 Summary Offences Act 1981

[13] Section 9 of the Summary Offences Act 1981 ("Act") provides:

> **9 Common assault**
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> Every person is liable to imprisonment for a term not exceeding 6 months or a fine not exceeding $4,000 who assaults any other person.

[14] Assault is defined in s 2 of the Act:

> **assault** means the act of intentionally applying or attempting to apply force to the person of another, directly or indirectly, or threatening by any act or gesture to apply such force to the person of another, if the person making the threat has, or causes the other person to believe on reasonable grounds that he has, present ability to effect his purpose;

Elements of the offence

[15] As the Judge said:[5]

> [15] In relation to the charge of assault the prosecution must prove beyond a reasonable doubt that:
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> (a) Ms Gunn applied force (or attempted or threatened to apply force) to [C]; and,
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> (b) That the application of force was deliberate; and,
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> (c) That [C] did not consent to the application of force and Ms Gunn did not believe there was consent.

[16] "Force" may include a touch. There is no dispute that Ms Gunn touched C, and that she did so deliberately, or intentionally in the words of s 2. Given that, the Judge's (a) and (b) were satisfied.

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5 *Police v Cooney* [2024] NZDC 10363.

[17] The issues which arose were as to (c). The defence having put consent and/or belief in consent in issue, it was for the prosecution to disprove both.[6]

Discussion

[18] What follows incorporates counsel's oral and written submissions on appeal (considerably more comprehensive than those made to Judge Forrest I might add).

[19] Both counsel on appeal referred me to *Collins v Wilcock* as a case relevant to the issues in this case.[7] In *Collins*, a police officer had detained a woman she wished to question, and she had done so by taking hold of the woman's arm. It was common ground that, at the time she did so, the police officer did not have a right to arrest the woman. The woman retaliated to being held in this way, following which she was charged with and convicted of assaulting a police officer in the execution of her duty.

[20] On appeal, the woman contended that the officer's detention of her, i.e. by holding her arm, was unlawful and constituted an assault.

[21] In addressing that point, the Court discussed the circumstances in which physical contact is generally acceptable in the ordinary conduct of daily life, and not unlawful, that is does not constitute an assault:[8]

> Generally speaking, consent is a defence to [assault]; and most of the physical contacts of ordinary life are not actionable because they are impliedly consented to by all who move in society and so expose themselves to the risk of bodily contact. So nobody can complain of the jostling which is inevitable from his presence in, for example, a supermarket, an underground station or a busy street; nor can a person who attends a party complain if his hand is seized in friendship, or even if his back is, within reason, slapped ... Although such cases are regarded as examples of implied consent, it is more common nowadays to treat them as falling within a general exception embracing all physical contact which is generally acceptable in the ordinary conduct of daily life.
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> ...
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> **Among such forms of conduct, long held to be acceptable, is touching a person for the purpose of engaging his attention, though of course using**

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6 *R v Bannin* [1991] 2 NZLR 237 (HC) at 245.

7 *Collins v Wilcock* [1984] 1 WLR 1172, [1984] 3 All ER 374. This case has been cited with approval in New Zealand. See for instance *Thompson v Police* [2012] NZHC 1500.

8 At 1177–1178 (emphasis added).

> **no greater degree of physical contact than is reasonably necessary in the circumstances for that purpose**. So, for example ... a touch by a constable's staff on the shoulder of a man who had climbed on a gentleman's railing to gain a better view of a mad ox, the touch being only to engage the man's attention, did not amount to a battery ... But a distinction is drawn between a touch to draw a man's attention, which is generally acceptable, and a physical restraint, which is not. So we find Parke B. observing in *Rawlings v. Till* (1837) 3 M. & W. 28, 29, with reference to *Wiffin v. Kincard*, that "There the touch was merely to engage [a man's] attention, not to put a restraint upon his person." Furthermore, persistent touching to gain attention in the face of obvious disregard may transcend the norms of acceptable behaviour, and so be outside the exception ... In each case, the test must be whether the physical contact so persisted in has in the circumstances gone beyond generally acceptable standards of conduct; and the answer to that question will depend upon the facts of the particular case.

[22] The Court then went on to discuss the rights of a police officer, both in that capacity and as a citizen. As to the latter, the Court said:[9]

> A police officer may wish to engage a man's attention, for example if he wishes to question him. If he [the officer] lays his hand on the man's sleeve or taps his shoulder for that purpose, he commits no wrong.

[23] The Court in *Collins* found that the actions of the police officer in holding on to the woman's arm went beyond laying a hand on a sleeve or tapping a shoulder and suchlike — went beyond what would generally be considered acceptable — and so was unlawful and did constitute an assault.

[24] The significance of *Collins* in this case is that certain forms of contact are considered generally acceptable, and one is touching a person to engage their attention, provided that no greater degree of physical contact is employed than is reasonably necessary in the circumstances.

[25] Ms Gunn's touch was fleeting and to gain C's attention. Ms Gunn used no greater degree of physical contact or force than was reasonably necessary for that purpose. Accordingly, on the face of *Collins*, what occurred in this instance was within the bounds of what is considered acceptable, i.e. was not unlawful.

[26] It is conceivable that what is considered acceptable might be negated by prevailing circumstances. Certainly, the Judge did not accept that Ms Gunn could have

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9 At 1178.

believed C consented to what occurred. That was because, in the Judge's view, by then the discussion between Ms Gunn and C had become "confrontational and hostile (on the part of Ms Gunn)", and that Ms Gunn had been "rude and inappropriate" in asking C where she was from.[10] (I need not get into the detail of why Ms Gunn asked C that.) However, having viewed/heard what occurred (several times) I do not share the Judge's view of the tenor of the discussion or of Ms Gunn's manner. My assessment is that Ms Gunn was polite, albeit assertive and wishing to communicate her view to C.

[27] It follows that I consider Ms Gunn's touch of C's arm was within the ambit of what the law considers generally acceptable physical contact occurring in everyday life, and so was not an assault in the sense of s 9 of the Act. I am satisfied the Judge erred, to such an extent that a miscarriage of justice has occurred. Given that, I am required to allow this appeal.

Appeal against refusal to discharge without conviction

[28] If I am wrong in this, I would have allowed Ms Gunn's appeal against the refusal to discharge her without conviction.

[29] What occurred between Ms Gunn and C was trivial. There was no dispute in the District Court, and there is none on appeal, that any offending was at the very lowest possible level.

[30] The issue which then arises is whether the consequences of conviction are out of all proportion to the gravity of the offending. The gist of the Judge's decision was that, to the extent Ms Gunn had established any such consequences, they did not outweigh the gravity of the offending.

Discussion

[31] It has long been accepted that any conviction carries consequences, often referred to as the "ordinary" or "general" consequences of conviction. These consequences include matters such as the following.

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[10] *Police v Cooney*, above n 5, at [20].

[32] First, a conviction for criminal offending carries a stigma. In this case, the conviction is for assault, being a crime against the person. Many in the community would not understand "assault" to include a fleeting touch, such as that which occurred in this case. Moreover, that stigma is particularly relevant in this instance because Ms Gunn, now in her 60s, has an otherwise unblemished record.

[33] Secondly, it is generally accepted that circumstances will arise in which it is necessary to disclose a conviction. This may be in connection with an application for employment or when travelling overseas. Ms Gunn's evidence was that she travels to Australia from time to time to visit family. She will be required to disclose the fact of the conviction when she does so. It is not necessary that the conviction be a complete bar to a proposed course of action for it to be a relevant consequence. In some circumstances, it is sufficient that it will, or is likely to, require explanation.

[34] The Court has often recognised that there will be occasions in which a defendant's offending is so trifling that consequences such as those to which I have just referred are themselves out of all proportion to the gravity of the offending.[11] This is such a case.

Result

[35] The appeal against conviction is allowed. The conviction for assault is set aside.

Peters J

[11] *Meijler v R* [2021] NZCA 472 at [17]–[22]; *J (CA32/2021) v R* [2021] NZCA 690 at [42]–[47]; *Albert v R* [2017] NZHC 102 at [24]–[28]; *Hamill v Police* [2015] NZHC 2878 at [11]–[13]; *Taavili v Police* [2012] NZHC 2323 at [30]–[31]; *Nash v Police* HC Wellington CRI-2009-485-000007, 22 May 2009 at [16]–[20]; *Tahere v Police* [2013] NZHC 3391 at [11]–[12]; and *Gaunt v Police* [2017] NZCA 590 at [14]. Again, the vast majority of these were not cited to Judge Forrest.