

**IN THE DISTRICT COURT
AT CHRISTCHURCH**

**I TE KŌTI-Ā-ROHE
KI ŌTAUTAHI**

**CRI-2023-009-008952
[2024] NZDC 20622**

MINISTRY OF HEALTH
Prosecutor

v

XIAOMING HE
Defendant

Hearing: 27 August 2024
Appearances: K Courteney for the Prosecutor
No appearance by or for the Defendant
Judgment: 27 August 2024

ORAL JUDGMENT OF JUDGE A A COUCH

[1] The defendant, Mr He, is charged with 12 offences relating to the sale of vapes and cigarettes. These comprise three charges under ss 40(1) and 40(2) of the Smokefree Environments and Regulated Products Act 1990 of selling vaping products to persons under 18 years of age, five charges under ss 65(2) and 65(6) of that Act of selling vaping products containing a flavour not permitted under the Act, one charge under s 50(1)(a) and s 51 of the Act of selling a cigarette with writing on it, one charge under s 50(1)(b) and s 51 of the Act of selling a single cigarette contrary to the requirements of the Act that cigarettes may only be sold in packages of 20 or 25, and two charges under s 50(2) and s 51 of the Act of selling cigarettes in a package not displaying the required warnings, photographs or pictures.

[2] The charges were laid on 12 December last year and the defendant first appeared in court on 30 January this year. He appeared again on 28 February but has since failed to appear. Counsel appointed to represent the defendant was granted leave to withdraw on 17 April. The Court was advised then that the defendant had left New Zealand on 20 March on a one-way ticket to China. The matter has since proceeded by way of formal proof.

[3] The Court was provided with extensive evidence to establish the formal proof. This consisted of two affidavits and 13 formal written statements. I have read all of these. I have also been provided with detailed and very helpful submissions by Ms Courteney in which she identifies the parts of the evidence offered to prove each element of each charge. I have compared that analysis with the evidence, and I am satisfied that Ms Courteney's analysis is accurate. On this basis I find all of the charges proved beyond reasonable doubt and the defendant is convicted of all charges.

[4] In the event I reach this conclusion, Ms Courteney has also provided helpful submissions on sentence. I accept her submission that, in the present circumstances, that is where the defendant has left the jurisdiction apparently permanently, there is no impediment to proceeding immediately to sentencing.

[5] The maximum penalty provided for each of these offences is a fine, but it is at two levels. The sale of vaping products to persons under 18 has a maximum penalty of a \$5,000 fine. The three other offences – that is selling non-compliant vaping products and selling cigarettes in non-compliant packaging – have a maximum penalty of \$50,000.

[6] The purposes of sentencing which come to the fore in this case are denunciation, deterrence and protection of the community. I agree with Ms Courteney that the lead offending in this case is the sale of vapes to young persons and the sale of non-compliant vaping products. It is well known that nicotine is a highly addictive substance and the age restriction on sales has been enacted by Parliament in an effort to minimise harm to young people.

[7] The statutory requirements in relation to sales of cigarettes also have a public health objective. The requirement that cigarettes be sold only in packages displaying explicit health warnings is intended to constantly remind smokers of the harm they do to themselves by smoking and, indirectly, the harm they do to the community. The requirement that cigarettes only be sold in packages of 20 or 25 raises the barrier to experimenting with smoking.

[8] There are several aggravating factors of the offending. The offending, both in relation to vaping products and cigarettes, was highly premeditated. The defendant bought and held stocks of the products which he sold or allowed to be sold on his behalf to numerous people over an extended period of time. The evidence shows he was given repeated verbal and written warnings about illegal trading and acknowledged to the investigators that he was well aware of the age restriction in particular.

[9] Comments on a public website revealed the defendant's state of mind. In response to a post reading: "Terrible. Sells single cigarettes and vapes to children!" the defendant responded: "Yes. We are the best place for everyone's drug habit needs". Another post was: "Sells vapes to children. Should be taken to court!!!!" The defendant responded: "We don't care. Have been caught three times before and only 500\$ fines so ur children can still come get their addictions fixed".

[10] What is apparent from these statements by the defendant, and from his prolonged pattern of illegal trading, is that he regarded earlier infringement notices and fines as a "cost of business," and factored that into his continued trading in breach of the law.

[11] It is also apparent from these statements and from the scale of illegal trading undertaken by the defendant that he was motivated by personal financial gain. By selling to young people the defendant sought to expand his clientele. It is apparent from evidence of one witness that he succeeded in his shop becoming the point of sale for school students from across the city.

[12] The offending involved in this case undoubtedly caused significant social harm by providing a means for young people who should be protected from vapes to readily have access to them. Illegally selling flavoured vaping products encouraged recreational use of vaping as opposed to smoking cessation. Selling cigarettes singly also reduced the cost of experimenting with smoking to a level which young people could afford.

[13] There are no mitigating factors of the offending in this case. Sales of vapes were made to buyers as young as 13 and the evidence is that in none of the cases giving rise to the specific charges was the buyer asked his or her age or required to provide proof of age.

[14] The one personal aggravating factor in this case is that the defendant was previously issued with three infringement notices for similar offending.

[15] Having regard to all aspects of the matter, the defendant will be fined a total of \$36,000 in respect of the vaping charges. That will comprise a fine of \$2,000 on each charge of selling vaping products to persons under 18 and \$6,000 on each charge of unlawfully selling flavoured vaping products.

[16] On the cigarette charges the defendant will be fined \$20,000, being \$5,000 on each charge.

[17] There will also be an order that the defendant is to pay a contribution of \$500 to the costs of prosecution.

Judge AA Couch

District Court Judge | Kaiwhakawā o te Kōti ā-Rohe

Date of authentication | Rā motuhēhēnga: 29/08/2024