

IN THE COURT OF APPEAL OF THE COOK ISLANDS
HELD AT RAROTONGA

CA No. 16/14 & PC 2/15

BETWEEN

ELIESA SIVARO
Applicant

AND

THE CROWN
Respondent

Coram: Williams P, Barker JA, Paterson JA

Counsel: Mr. N George for Applicant
The Solicitor-General, Mrs. C McCarthy, for Respondent

Dates of Submissions: 10 July 2015, 22 September 2015, 1 October 2015

Date of Judgment: 12 October 2015

JUDGMENT OF THE COURT OF APPEAL

Background

- [1] The Court heard argument from counsel on 11 June 2015 and announced its decision, which was to dismiss the appeals against conviction and sentence, the following day.
- [2] The Applicant now seeks leave to appeal the judgment of the Court to Her Majesty the Queen in Council. In considering the Applicant's application, the Court has carefully reviewed the following submissions of the parties:
- i. Application for Leave to Appeal to Her Majesty the Queen in Council dated 10 July 2015 (the "**Application**");
 - ii. Memorandum of Counsel for the Applicant dated 22 September 2015 ("**Memorandum in Support**"); and
 - iii. Notice of Opposition to Motion to Apply for Leave to Appeal to Her Majesty in Council dated 1 October 2015 ("**Notice of Opposition**").

- [3] The grounds for appeal are said to be:
- i. That the Court erred in law; and
 - ii. That Article 59(2) of the Cook Islands Constitution and Rule 2(c) as set out in Section 3 of the Privy Council (Judicial Committee) Act 1984 (“**Rule 2(c)**”) permits such an application.
- [4] Article 59(2) of the Cook Islands Constitution simply provides that there shall be a right of appeal to Her Majesty in Council, with the leave of the Court of Appeal, from judgments of the Court of Appeal “in such cases and subject to such conditions as are prescribed by Act”.
- [5] The relevant statute is the Privy Council (Judicial Committee) Act 1984. Rule 2(c) of that Act provides that an appeal lies to the Privy Council where, in the opinion of the Cook Islands Court of Appeal (i.e. this Court), the question involved is “one which, by reason of its great general or public importance or otherwise, ought to be submitted to Her Majesty in Council for decision” (emphasis added).
- [6] Thus the test to be satisfied in determining whether it is appropriate to grant leave is whether the case involves a question of “great general or public importance” such that it ought to be submitted to the Privy Council by way of appeal.

The parties’ submissions

- [7] One issue for consideration before the Court of Appeal was the impact, if any, of a letter to the editor published in the COOK ISLANDS NEWS on 19 September 2015, the morning after the jury had been sent out deliberate. The Applicant’s concern was that the letter might have influenced the jury, who ultimately returned their verdicts at 2pm on 19 September, five hours after the letter had been published and after a total of eleven hours’ deliberations. The jury found the Applicant guilty of two charges of rape alleged to have occurred at Arorangi, and acquitted the Applicant on two further charges of rape alleged to have occurred at Matavera. As indicated earlier, this Court dismissed the appeals against conviction and sentence by its oral judgment on 12 June 2015. The Court’s reasons for its decision were announced in its Reasons for Judgment dated 6 August 2015 (“**the Judgment**”).
- [8] In his Application for leave to appeal, counsel for the Applicant, Mr Norman George, submitted that the publication of the letter prejudiced the Applicant’s right to a fair trial and that the Judgment does not “go far enough in addressing the abrogation of [the Applicant’s] right to a fair trial by an impartial and independent tribunal”. Mr George submitted further that the Applicant “has spent a considerable amount of time in custody despite these concerns of lack of a fair trial”.
- [9] Counsel for the Respondent, Ms Cheryl McCarthy, opposed the Application on the ground that the Court assessed the Applicant’s fair trial rights at paragraphs 18–25 of its Judgment and properly dismissed the appeal. Ms McCarthy accordingly submitted that there were no questions to be addressed which may be considered of great general or public importance such that the Judgment should be reviewed by the Privy Council.

Court’s decision

- [10] Having considered the Application, it is the opinion of the Court that the question of the Applicant’s right to a fair trial has been properly assessed against settled principles of law and that there are accordingly no remaining questions of great general or public importance to be canvassed.

- [11] The Judgment of the Court addressed the matter of the Applicant's right to a fair trial at paragraphs 18–25. The Court referred to two cases, *R v Kittelty* and *R v Down*, in reaching its decision. Of particular note is the judgment in *R v Down*, in which the court held at paragraph 27 that if counsel fail to bring an offending publication to the attention of the trial judge when counsel could have done so, that is the end of any meaningful ground of complaint. The court found that “It is almost always too late to raise a matter of this kind on appeal if no complaint or request for action has been registered at the trial”.
- [12] In this case, Mr George has acknowledged to the Chief Justice that he had been aware of the letter when it was published but did not draw it to the Court's attention despite the fact that the jury was still deliberating. As noted at paragraph 24 of the Judgment, had Mr George done so, the Chief Justice would no doubt have given strong directions about the treatment of the letter to the jury. In view of Mr George's failure to advise the Chief Justice of the publication of the letter 2015 at the appropriate juncture, and following *R v Down*, this Court held in its Judgment that the appeal against conviction and against the Chief Justice's refusal to grant a retrial should be dismissed.
- [13] For the foregoing reasons, the Court considers that the Applicant has failed to identify any error of law which is of such great general or public importance that it ought to be submitted to Her Majesty in Council for decision. The Court therefore **declines** the Applicant's application for leave to appeal to Her Majesty the Queen in Council.
- [14] Whether the Applicant should elect to apply directly to the Judicial Committee for leave to appeal under the appropriate rules is obviously not a matter for this Court.



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Sir Ian Barker JA



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BJ Paterson JA



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DAR Williams P
President