IN THE COURT OF APPEAL OF THE COOK ISLANDS
HELD AT RAROTONGA **CA 3/2021**

BETWEEN **PAUL RAUI ALLSWORTH**

Applicant

AND **HENRY TUAKEU PUNA and MARK STEPHEN BROWN**

Respondents

Coram:	White P, Fisher JA, Asher JA
Hearing:	17 November 2021 (CIT) / 18 November 2021 (NZT)
Appearances:	N George for the Applicant K Raftery QC and B Marshall for the Respondent Henry Puna K Raftery QC and T Arnold for the Respondent Mark Brown A Maxwell-Scott and J Epati for the Crown
Judgment:	3 December 2021

JUDGMENT OF THE COURT OF APPEAL

A. The application for special leave to appeal to the Court of Appeal under Article 60(2) of the Cook Islands Constitution against the judgment of the Chief Justice delivered on 19 March 2021 acquitting the Respondents on all charges laid by the Applicant is declined.

B. The Applicant is to pay the Respondents costs in the sum of $1,500 with disbursements to be fixed by the Registrar.

Introduction

[1] The Applicant brought two sets of private prosecutions against the Respondents, who are respectively the former Prime Minister and the current Prime Minister of the Cook Islands, alleging offences of conspiracy under the Crimes Act 1989 and the Ministry of Finance and Economic Management Act 1995-96 following the 2018 Cook Islands General Election which had left neither of the two main political parties with a majority. In essence the informations laid against the Respondents alleged fraudulent use of public funds to fly two recently elected Members of Parliament from two outer islands to Rarotonga for the purpose of discussions around the formation of a Government.

[2] The informations went to trial before the Chief Justice Sir Hugh Williams sitting, by consent, as a judge alone in March 2021. After four days of evidence, the Applicant, as informant, formally closed his case and the Respondents applied for the informations to be dismissed on the ground the evidence disclosed no case to answer.

[3] After hearing submissions for the parties, the Chief Justice delivered an oral decision accepting the Respondents' application, dismissing all the informations and acquitting the respondents on all charges.[1]

[4] In July 2021 the Applicant applied out of time for leave to appeal to the Court of Appeal against the dismissal of his private prosecution. The application was heard in August 2021 and declined by the Chief Justice in a reserved decision delivered on 1 September 2021.[2] The Chief Justice decided there was no jurisdiction to grant leave to appeal following a no case to answer judgment and, if there had been jurisdiction, there was no basis for extending the time for the application for leave to appeal or for granting it.

[5] On 28 September 2021 the Applicant applied to the Court of Appeal under Article 60(2) of the Cook Islands Constitution for special leave to appeal against the judgment of the Chief Justice delivered on 19 March 2021 acquitting the

---

1 *Allsworth v Puna and Brown*, CKHC 19 March 2021, at [136]-[140].
2 *Allsworth v Puna and Brown*, CKHC 1 September 2021.

Respondents on all the charges laid by the Applicant. The application for special leave was opposed by the Respondents.

[6] Prior to the hearing of the application, the Court invited the Crown to provide assistance on the legal issues relating to the interpretation of Article 60(2) and the jurisdiction of the Court to hear an appeal against an acquittal in a private prosecution.[3] The Court was grateful to Ms Maxwell-Scott and Ms Epati for their helpful written and oral submissions.

[7] Following receipt of the written submissions for the Applicant and the Respondents, it appeared that the parties were under the misapprehension the Court would be addressing the merits of the proposed appeal when hearing and determining the application for special leave. The Court therefore sought further written submissions from the parties addressing the issues relating to the interpretation of Article 60(2) and the threshold question about prosecution appeals against acquittals and no case dismissals.[4] The Court was grateful to Counsel for the Respondents for their written and oral submissions on these issues.

[8] At the hearing of the application for special leave, it appeared that Mr Norman George, Counsel for the Applicant, had not received the Court's request for these further submissions or copies of the further submissions provided by the Respondents and the Crown. We therefore ensured he was given sufficient time during the hearing to respond to them. The Court was grateful to Mr George for his submissions on all the relevant issues.

[9] As the application for special leave was heard during the Covid-19 pandemic, the Judges were unable to travel to Rarotonga and the application was heard by Zoom with White P in Wellington, Fisher and Asher JJA in Auckland, Mr Raftery QC in Auckland, and other Counsel, the Registrar and members of the public in the courtroom in Rarotonga.[5] We thank Counsel and the Court staff for their co-operation.

---

3 Minute of White P dated 18 October 2021.
4 Minute of White P dated 15 November 2021.
5 By s 53(3) of the Judicature Act 1980-81 as inserted by s 2 of the Judicature Amendment Act 2011 and rule 40 of the Court of Appeal Rules 2012.

[10] The judgment proceeds under the following headings:

(a) The jurisdiction of the Court of Appeal.

(b) No right of appeal under Article 60(1).

(c) No question of law reserved.

(d) The test under Article 60(2).

(e) The rule against double jeopardy.

(f) No special category for private prosecutors.

(g) The interests of justice in this case.

(h) Costs.

(a) The jurisdiction of the Court of Appeal.

[11] The jurisdiction of the Court of Appeal to hear and determine appeals is governed by Article 60 of the Cook Islands Constitution as amended in 2009 which provides:

> "**Jurisdiction of Court of Appeal**
> 60 (1) Subject to the provisions of this Constitution, and as may be prescribed by Act, the Court of Appeal shall have jurisdiction to hear and determine -
> (a) Any appeal from a judgment of the High Court; and
> (b) Any cause or matter removed by the High Court to the Court of Appeal.
> (2) Notwithstanding anything in subclause (1) of this Article, and any limitations as may be prescribed by Act, the Court of Appeal may in any case in which it thinks fit and at any time, grant special leave to appeal to that Court from any judgment of the High Court, subject to such conditions as to security for costs and otherwise as the Court of Appeal thinks fit.
> (3) In this Article the term "judgment" includes any judgment, decree, order, writ, declaration, conviction, sentence, or other determination."

[12] Article 60(1) provides a right of appeal from the High Court to the Court of Appeal subject to the provisions of the Constitution and "as may be prescribed by any Act". An Act may "prescribe" an appeal either by providing for it or by precluding or limiting it.

[13] Examples of statutory provisions providing for appeals are ss 58 and 67 of the Judicature Amendment Act 2011. The former provides a right to appeal in civil cases which meet prescribed criteria. The latter provides for appeals in criminal cases: appeals as of right against any conviction in the High Court and by the Solicitor-General against sentence, and appeals with leave following conviction in certain prescribed circumstances.

[14] Examples of such statutory provisions precluding or limiting appeals are ss 479(3) and 390A(2) of the Cook Islands Act 1915, which provide that certain judgments of the High Court in land cases are final, ss 58 and 59 of the Judicature Amendment Act, which contain prescribed criteria for appeals, and s 58(5) of the Judicature Amendment Act, which precludes appeals against a range of High Court interlocutory judgments in civil cases.

[15] Article 60(1) also recognises that the Court of Appeal has jurisdiction to hear and determine appeals from judgments of the High Court when that Court itself has granted leave to appeal: in civil cases under s 58(3) of the Judicature Amendment Act and in criminal cases under s 68 of that Act. The criteria for the High Court to grant leave in civil cases under s 58(3) include the "general or public importance" of the question involved, "the magnitude of the interest affected", and "where the justice of the case so requires". The criteria for the grant of leave in criminal cases under s 68(1) relate to the level of the sentence imposed.

[16] Article 60(2) then confers jurisdiction on the Court of Appeal to grant "special leave" to appeal "in any case" if the Court "thinks fit". As the opening words of Article 60(2) make clear, the jurisdiction exists notwithstanding anything in Article 60(1) or "any limitations as may be prescribed by Act". In other words, none of the statutory provisions precluding or limiting appeals prevent the Court of Appeal from exercising its "special leave" jurisdiction. In the case of the limitations under s 58 of the Judicature Amendment Act, this is expressly confirmed by s 58(7).

[17] Article 60(2) is to be contrasted with its predecessor (Article 60(3)) which was "subject to such limitations as may be prescribed by Act."[6] As the explanatory note to the 2009 Constitution Amendment Act states, the deletion of this restriction

---

6 Compare *Drollet v Police* [2003] CKCA 2 at [7] and [9].

on the Court's "special leave" jurisdiction was intended. The new Article 60(2) was intended to entrench "a wide discretion in the Court of Appeal to grant special leave against a decision of the High Court".

[18] The expression "special leave" for leave granted by the Court of Appeal is used to distinguish the nature of this leave from the ordinary leave to appeal granted by the High Court under ss 58(3) and 68 of the Judicature Act. Leave to appeal granted by the Court of Appeal is "special" because it is granted by the Court of Appeal in cases when there is no right of appeal or when the High Court has declined to grant ordinary leave.

[19] We discuss the approach which the Court should take in exercising its "wide discretion" under Article 60(2) below.[7]

(b) No right of appeal under Article 60(1).

[20] There is no dispute there is no statutory right of appeal to the Court of Appeal by a prosecutor, whether the Crown or a private person, against an acquittal following the dismissal of a criminal charge and the discharge of a defendant.[8]

[21] Criminal appeals as of right to the Court of Appeal relate to convictions not acquittals.[9]

[22] Apart from s 76 of the Judicature Act 1980-81, there is no Cook Islands statute which provides expressly for a right of appeal by a prosecutor against an acquittal. This means there is no provision "prescribing" an appeal of this nature in terms of Article 60(1) of the Constitution. The exception under s 76 of the Judicature Act relates solely to acquittals in summary trials presided over by Justices of the Peace. While s 76 has no application in this case, we note the decision of the Chief Justice in *Solicitor-General v Boaza*[10] where he suggested the Crown should exercise constraint before bringing appeals against acquittals in the context of that provision.

---

7 At [25]-[35].
8 Criminal Procedure Act 1980-81, ss 111(2) and (3).
9 Judicature Amendment Act 2011, s 67.
10 [2011] CKHC 46 at [47]-[49].

[23] There is also no dispute that a prosecutor, whether the Crown or a private person, has no right to apply to the High Court for ordinary leave to appeal against an acquittal. The right to apply for leave in criminal cases relates only to convictions not acquittals.[11]

(c) No question of law reserved.

[24] There is no dispute the Chief Justice might have reserved a question of law at the trial for the opinion of the Court of Appeal,[12] including any question of law raised by the Applicant as the private prosecutor in this case, but no request was made and no question of law was reserved.[13]

(d) The test under Article 60(2).

[25] Mr George submitted that "special leave" required "extraordinary circumstances" outside the realm of the ordinary with the case raising issues of public interest and importance and the question of overall justice.

[26] Both Mr Raftery QC for the Respondents and Ms Maxwell-Scott for the Crown noted the provisions of Article 60(2) before its amendment in 2009, the explanatory note to the amendment and relevant authorities. Both submitted the Court's discretion was not unfettered, but required the Court to be satisfied the case was of "special public importance" before granting special leave. They cited decisions of this Court which they submitted were to this effect.[14]

[27] We do not agree that these authorities go so far as to suggest "special public importance" is an absolute requirement for the Court in exercising its "special leave" jurisdiction. In *Tuakeu v Tangata* the Court said that had there not been jurisdiction to appeal under s 58(5) of the Judicature Amendment Act the "safety-net" was that it could, and would, have given leave to appeal under Article 60(2) as a case of "public importance".[15] As the case concerned an election petition, it clearly was a case of

---

11 Judicature Amendment Act 2011, s 68.
12 Judicature Amendment Act 2011, s 75D.
13 Judgment declining leave, above note 2 at [22].
14 *Tuakeu v Tangata* [2014] CKCA 1 at [8] and *Johnstone v Police Department* [2015] CKCA 3 at [3].
15 *Tuakeu v Tangata*, above note 14 at [8].

public importance. But the Court did not purport to lay down an exhaustive test for all types of case.

[28] In the second case cited, *Johnstone v Police Department*, the Court was careful to avoid confining the grant of leave under Article 60(2) to cases of special public importance, saying:[16]

> "Although special leave under that provision is normally reserved for cases of special public importance, the power of the Court is sufficiently flexible to accommodate unusual situations in order to make a person's right to appeal meaningful."

This presupposes that, however unusual, there could be cases in which special leave to appeal would be justified even though lacking special public importance.

[29] *Johnstone* involved an appeal to the High Court following conviction for a drink driving offence by a Justice of the Peace before sentence had been imposed. The Court of Appeal granted special leave to appeal under Article 60(2) because the irregularities were not the fault of the parties.

[30] In our view, as the decision in *Johnstone* illustrates, it would not be appropriate to adopt a test for the exercise of the Court's discretion under Article 60(2) which might be said to prevent a grant of leave in a case when the Court thought "fit" in the wider interests of justice leave should be granted. The Court has a wide discretion which should not be unduly fettered in that way.

[31] Bearing in mind the range of both civil and criminal High Court judgments which might give rise to an application for special leave under Article 60(2) and the need to ensure the "safety-net", as the Court put it in *Tuakeu v Tangata*,[17] remains available, it would be unwise to adopt a test which set the bar for the exercise of the Court's discretion too high. At the same time, the overall interests of justice test would avoid the risk of opening the floodgates for special leave applications.[18]

[32] An applicant for special leave will need to demonstrate some special feature or features particular to the case that lead to the conclusion that, in all the

---

16 *Johnstone v Police Department*, above note 14 at [3].
17 Above note 14.

circumstances, justice requires leave to be given.[19] Amongst the considerations which will be relevant in that overall assessment will be the need for finality in litigation, statutory limitations on appeal, Cook Islands Constitutional and common law principles, the strength of the proposed appeal, the practical utility of the remedy sought, the extent of the impact on others similarly affected, the avoidance of a miscarriage of justice, the administration of justice, and the absence of prejudice to the Crown.

[33] It is also important to recognise in this context that the Cook Islands Court of Appeal is an intermediate appellate court with the Privy Council being the ultimate appellate court in the Cook Islands judicial hierarchy. Unlike appeals to ultimate appellate courts which may be brought only with leave,[20] appeals may also be brought as of right to the Cook Islands Court of Appeal, as well as with ordinary leave from the High Court.[21] This means that Article 60(2), which stands in juxtaposition to Article 60(1), should be interpreted in the context of the Cook Islands Constitution's specific appeal provisions. While the tests for granting leave by ultimate appellate courts requiring "a matter of general or public importance" or "a substantial miscarriage of justice",[22] "violation of the principles of natural justice" or "substantial and grave injustice",[23] or "'gravity involving matters of public interest or some important question of law, or affecting property of considerable amount, or …. otherwise of some public importance or of a very substantial character"[24] provide guidance, they should not be used to constrain the discretion of the Cook Islands Court of Appeal to grant special leave under Article 60(2) in the overall interests of justice taking into account the circumstances of the particular case and the relevant considerations, including those which we have mentioned.

[34] For these reasons we agree with Mr George that the test for the exercise of the discretion should be the overall interests of justice in the circumstances of the particular case. We agree with the Court in *Johnstone* that "special public importance" is not necessarily an essential prerequisite. Similarly, while

---

18 Compare *R v Knight* [1998] 1 NZLR 583 (CA) at 589.
19 Compare *R v Knight*, above note 18.
20 Privy Council, New Zealand Supreme Court, High Court of Australia and Supreme Court of Canada.
21 Above at [12]-[15].
22 Senior Courts Act 2016 (New Zealand), s 74.
23 Privy Council test for leave in criminal proceedings.
24 Privy Council test for leave in civil proceedings.

"extraordinary circumstances" may well warrant a grant of leave, their existence is also not a necessary prerequisite. Mr George went too far in making this suggestion.

[35] Accordingly, the issue in the present case is whether the Court is satisfied it is in the overall interests of justice that the Applicant, a private prosecutor, should be granted special leave to appeal in the face of the common law rule reflected in the Cook Islands legislation precluding an appeal by a prosecutor against an acquittal.

(e) The rule against double jeopardy.

[36] All Counsel recognised a serious impediment to the grant of special leave in this case was the common law rule that appeals by prosecutors against acquittals are not normally permitted because they are contrary to the fundamental rule against double jeopardy which forbids a second trial for the same offence. There is little doubt this rule is well-established throughout the common law world.[25]

[37] Mr George submitted, however, that the common law rule did not apply to private prosecutors and could be "overruled" by Article 60(2), and there were in any event exceptional or extraordinary circumstances justifying the grant of special leave in this case in the interests of justice.

(f) No special category for private prosecutors.

[38] Mr George sought to distinguish the authorities relating to the rule against double jeopardy on the ground that they were based on the existence of well-resourced Crown or state prosecutors with statutory powers which created an inequality of arms whereas a private prosecutor was in a separate special category. A private prosecutor such as the Applicant in this case was not well-resourced and was disadvantaged in not having access to the statutory powers of the Police in relation to the gathering and production of evidence.

---

[25] See, for instance, *Green v United States* 355 US 184 (1957) at 187-188, *Davern v Messel* (1983) 155 CLR 21 at [4], "Acquittal Following Perversion of the Course of Justice" NZLC R70 (March 2001) at [12], and the Chief Justice's leave judgment, above note 2 at [32].

[39] While we accept a private prosecutor is not in the same position as a Crown or state prosecutor, the rule against double jeopardy is not based solely on the existence of a well-resourced prosecutor with statutory powers. As the authorities make clear, there is a second reason for the rule, namely that a person who has been acquitted should not be subjected again to embarrassment, expense, continuing anxiety and insecurity, and the possibility that, even though innocent, that person may be found guilty. A fundamental purpose of the rule is to prevent the unwarranted harassment of an accused by repeated prosecution for the same matter, thereby protecting the administration of justice by preventing harassment and inconsistent results, and promoting confidence in court proceedings and the finality of verdicts.[26] This reasoning applies equally in the case of a private prosecution.

[40] We would also be reluctant to create a special category for private prosecutors in this context, especially when they are not under the same constraints as Crown and state prosecutors who are required to comply with prosecutorial codes or guidelines when considering whether an appeal or application for leave to appeal is appropriate in a particular case.

[41] We therefore do not accept Mr George's submission that the common law rule does not apply to private prosecutors or that it has been "overruled" by Article 60(2). As Ms Maxwell-Scott also pointed out, there is no express statutory provision in the Cook Islands similar to the provisions in England and Wales,[27] New Zealand,[28] Canada,[29] and Australia[30] permitting the prosecution to appeal a legal ruling (often specifically including a submission of no case to answer) providing a clear statutory exception to the bar on appealing an acquittal.

[42] The absence of any express provision of this nature in the Cook Islands makes it very unlikely it was intended Article 60(2) should be used to fill the gap in these circumstances. This conclusion is reinforced by the existence of a range of express provisions prescribing rights of appeal and avenues for leave to appeal in

---

26 NZLC R70, at [12] and [14].

27 Criminal Justice Act 2003, s 58, which was enacted following a report by the Law Commission of England and Wales Double Jeopardy and Prosecution Appeals (Law Com No.267) in March 2001.

28 Criminal Procedure Act 2011, s 296.

29 Criminal Code, s 676(1).

30 Federal Court of Australia Act 1976, s 30AA.

criminal cases following convictions[31] and by the provisions of the Cook Islands Constitution designed to protect the interests of defendants following acquittals, including acquittals based on no case to answer dismissals.[32]

(g) The interests of justice.

[43] Mr George submitted, however, there were exceptional or extraordinary circumstances in this case which justified the grant of special leave in the interests of justice, namely:

(a) The trial Judge's errors of statutory interpretation in respect of the Electoral Act 2004, the Civil List Act 2004, the Civil List Order 2009/04 and the Remuneration Tribunal (Queen's Representative and Members of Parliament Salaries and Allowances) Order 2009/04.

(b) The trial Judge's excessive control of the hearing and restrictions on the evidence produced by the prosecution.

(c) The trial Judge's refusal to hear evidence of actual readouts of critical text messages.

(d) The rushed nature of the hearing and the lack of "much sympathy" from the trial Judge.

(e) The vulnerability of the Cook Islands to electoral fraud and corruption because of its small size.

(f) The difficulties faced by the Applicant in gathering evidence for the private prosecution when the small size of the population of the Cook Islands meant the public service was inevitably intimidated by senior politicians.

(g) The overall unfairness of the acquittals.

---

31 See summary of these provisions at [12]-[15] above.
32 Constitution Articles 64(1)(b) and 65(d).

[44] At the same time Mr George acknowledged he was not challenging the integrity, impartiality or independence of the Cook Islands judiciary in respect of electoral fraud or corruption issues which reached the courts. In particular, he acknowledged that such issues were dealt with appropriately by the courts.[33] Nor was he challenging the integrity, impartiality or independence of the Chief Justice in his conduct of the trial in this case. He acknowledged there were no allegations of perjury or witness intimidation which might have tainted the trial as occurred in *R v Moore*.[34] Apart from the charges in this case, no other allegations of electoral fraud or corruption were before the Court.

[45] In addition Mr George acknowledged there were no charges laid against the Respondents alleging intimidation of any nature and consequently no evidence at the trial relating to such allegations. He also acknowledged he was not challenging the integrity, impartiality or independence of the Crown Law Office which had in fact provided some assistance to the prosecution in this case.

[46] In our view none of the other matters identified by Mr George in his submissions was established or would meet the test for granting special leave.

[47] The Applicant could have asked the trial Judge to reserve the questions of statutory interpretation for the opinion of the Court of Appeal under s 75D of the Judicature Amendment Act 2011, but he did not do so.

[48] The allegation of excessive control of the hearing and restrictions on the evidence produced by the prosecution was based on the Judge's decision to exclude from the witness statement of a former Member of Parliament, Mr James Beer, clearly irrelevant or inadmissible opinion evidence.

[49] The trial Judge's refusal to hear evidence of actual readouts of critical text messages was perfectly appropriate in the context of a judge alone trial. The critical text messages were all produced as exhibits and available for the Judge to read and to be referred to by Mr George in his submissions at the trial.

---

33 For example, *Browne v Hagai* [2018] CKCA 4.

34 *R v Moore* [1999] 3 NZLR 385 (HC and CA) and unreported CA 399/99 (23 November 1999), and "Acquittal Following Perversion of the Course of Justice: A Response to *R v Moore* NZLC PP42.

[50] The allegations about the "rushed nature" of the trial and the lack of "much sympathy" from the Judge appeared to be the subjective impressions of Counsel for the Applicant not supported by the fact the hearing took four days and was the subject of a comprehensive and balanced oral judgment.[35]

[51] The Applicant was no doubt disappointed when the Judge found there was no case to answer, but that does not of itself mean the consequential acquittals were unfair. In our view there is no reason to find the trial was tainted or contaminated in any way.

[52] For these reasons therefore we are not satisfied there are any special features particular to this case where the overall interests of justice require the grant of special leave to appeal and the application is accordingly declined.

(h) Costs

[53] At the conclusion of the hearing, Mr Raftery QC indicated that, if the Respondents were successful, they sought costs of $20,000 essentially because costs should follow the event and the prosecution was without merit. Mr George responded that an order of that magnitude would be strongly opposed. Ms Maxwell-Scott advised the Court that the Crown would not be seeking costs.

[54] In response to the Court's request, further memoranda have been filed for the Respondents and the Applicant. The memorandum for the Respondents provided information indicating that their actual solicitor-client costs exceeded $20,000 by a significant margin, but did not address further the factors which the Court should take into account in determining the issue in the circumstances of this case.

[55] Mr George in his memorandum for the Applicant provided information about the impecuniosity of the parties behind the prosecution and advised the Court that he and his assistants had worked throughout on a pro bono basis. The Applicant, if successful, did not seek costs, but left the issue entirely to the discretion of the Court. Mr George recommended the parties should meet their own costs, noting that under

---

[35] For completeness we note there is no dispute that the judgment was wrong to state all Members of Parliament were sworn in on 5 July 2018 when in fact only the new Cabinet was sworn in then. Members of Parliament were sworn in on 19 September 2018. We agree with the Counsel for the Respondents this was an immaterial mistake.

s 71(6) of the Judicature Amendment Act 2011 no security for costs is payable by any applicant for leave to appeal in criminal proceedings in the Court of Appeal.

[56] We agree with Mr George that the prohibition in s 76(1) is significant. It indicates that in the context of criminal proceedings an applicant for leave to appeal, who will usually be a convicted defendant, should not be unduly deterred from pursing an application by a requirement to pay security for costs. While an unsuccessful private prosecutor will not be in the same position as a convicted defendant, he or she will also be entitled to the benefit of the prohibition.

[57] The prohibition on the payment of security for costs in this context reflects the fact that applications for leave to appeal in criminal proceedings will normally be able to be dealt with in a relatively expeditious and straightforward manner and often following the hearing of the substantive appeal itself. It also reflects the fact that orders for costs in criminal appeals are rare.

[58] The application for special leave to appeal in the present case was in a different category because clearly there was a threshold issue to be determined before the appeal was heard on the merits, namely whether leave should be granted at all under Article 60(2) of the Constitution and in the face of the common law rule that appeals by prosecutors against acquittals are not normally permitted. This issue was a novel one involving consideration of the scope of Article 60(2), the scheme of the relevant statutory provisions, the application of the common law rule to a private prosecution and the reasons for the rule against double jeopardy.

[59] In our view the public interest in the resolution of this novel threshold issue militates against an award of indemnity costs as sought by the Respondents. The application for special leave has been unsuccessful, but it would not be correct to describe it as hopeless or totally without merit. It involved novel legal questions requiring careful analysis. Nor would it be reasonable for the Respondents to recover costs incurred in preparation for a hearing of the appeal itself when there was a clearly identified threshold issue.

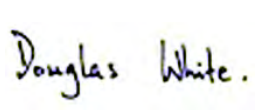
[60] At the same time we do not give weight to the impecuniosity of the parties behind the prosecution. This is normally an irrelevant factor when determining costs.

[61] Exercising our discretion to award costs in the circumstances of this case, we therefore consider that while costs should follow the event the award should be for a relatively modest sum in Cook Islands terms. The Applicant is to pay the Respondents costs in the sum of $1,500 with disbursements to be fixed by the Registrar.

Result

[62] The application for special leave to appeal to the Court of Appeal under Article 60(2) of the Cook Islands Constitution against the judgment of the Chief Justice delivered on 19 March 2021 acquitting the Respondents on all charges laid by the Applicant is declined.

[63] The Applicant is to pay the Respondents costs in the sum of $1,500 with disbursements to be fixed by the Registrar.



Douglas White, P **Robert Fisher, JA** **Raynor Asher, JA**