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

CA 508/2022

BETWEEN **THE KING**
Appellant

AND **ROMANI KATOA**
Respondent

Coram: White P, Fisher JA, Asher JA

Hearing: 31 October 2022

Counsel: J Crawford and L William for the Crown
M Short for the respondent

Judgment: 14 November 2022

JUDGMENT OF THE COURT

A. The appeal is dismissed.

B. The discharge without conviction on all charges is confirmed.

Introduction

[1] The respondent pleaded guilty to one charge of possessing an offensive weapon in public under s 94 of the Crimes Act 1969 and three of male assaults female under s 214(b). Following his payment of $1,500 to the Cook Islands Women's Counselling Centre, the Chief Justice discharged him without conviction. The Crown applies for special leave to appeal against that decision. The case raises important questions concerning the role of customary reconciliation before a guilty plea, the resolution of disputed facts for sentencing purposes and the principles on which a court should decide whether to grant a discharge without conviction.

Jurisdiction to appeal

[2] In the normal course the Solicitor General may appeal as of right against the adequacy of a sentence.[1] On appeal the Court can quash the sentence and substitute a more or less severe one or dismiss the appeal.[2] The position is different where the Crown appeals against a discharge without conviction. Such a discharge is not a "sentence" for appeal purposes. It follows that the discharge falls outside the Crown's statutory right of appeal. In such a case the Crown must resort to Art 60(2) of the Constitution which provides:

> Notwithstanding anything in subclause (I) 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] Article 60(2) allows the Court of Appeal to grant special leave to appeal where it thinks it appropriate to do so. Special leave to appeal is to be used sparingly. However it can provide the basis for an appeal in a case where it would be in the interests of justice and it is a matter of public importance.[3] Both counsel accepted that this was such a case. Special leave is granted accordingly.

The facts of the offences

[4] The facts for the purpose of this appeal are disputed. The prosecution summary of facts stated:

> On the night of Friday 15 August 2020, the defendant Romani KATOA was drinking at Trader Jacks Bar. At about 2.30am the following morning, he was standing outside the bar after it closed and noticed people fighting in the Vaka Shed near his canoes.
>
> The defendant approached the shed holding a machete and began chasing everyone out of the shed. He approached the victims, Lydia Brown, Leiana Unuia and Anne William and hit them on the buttocks and thigh area with the flat side of the machete. The victims received significant bruising in those areas.
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> When spoken to by Police, he denied having the machete and further stated that he only used a stick to protect himself from being attacked.

[5] The defence summary of facts stated:

> The defendant was outside of Trader Jacks standing by his truck waiting for his cousin so they could leave. He noticed a large crowd of people that involved young people were

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1 Judicature Amendment Act 2011, s 67(2).

2 Judicature Amendment Act, s 69(4).

3 *R v Brown* [2015] CKCA 5, at [6], and *Allsworth v Puma and Brown* [2021] 3 CKCA, at [32].

> fighting inside the canoe shed. The fight had originally started by the BBQ tables opposite the Empire Theatre before making its way across the bridge into the Vaka shed that holds the equipment for swimming and paddling for the Vaka association.
>
> The defendant grabbed two gardening tools from the back of his truck. He approached the crowd that was fighting with a shovel in one hand and a machete in the other then attempted to break up the fight and chase them out of the shed. It was pitch dark with no light in the shed and the defendant could only hear a huge commotion from the fighting that was going on. At first the defendant thought there were just a few people in the shed however it turned out to be a large gang of people fighting amongst themselves in the dark.
>
> The defendant saw someone trying to jump the fence on Trader Jacks side and was concerned about the canoes and property inside the shed. He had genuine concerns because the canoes were always getting damaged by juveniles congregating in the shed at night. The police disclosure shows that the defendant dropped the shovel then tried to shoo and scuttle the crowd using the flat side of the machete. In the process, the crowd turned on the defendant which he didn't expect. He was hit from behind on his head and fell to the ground.
>
> The defendant again used the flat side of the bush knife to chase people out of the shed. He did not use the machete is a chopping motion and used it to slap people on their backsides to leave the shed. He could not see who he was hitting or smacking as his actions were trying to disperse the crowd and chase them out of the shed.
>
> As it was completely dark, the defendant didn't see and wasn't aware of who he had been hitting. It was later found that he had assaulted Lydia Brown, Leiana Unuia and Anne William across the buttocks and thigh areas including his nephew Johnathon Bailey (the charge for assaulting Bailey was later withdrawn). There was some bruising on the female victims but no serious long term injuries. The defendant waited for the police to arrive then was taken to hospital. He received antibiotics and paracetamol from his injury when he was hit from behind.
>
> The defendant's cousin later noted that he had taken a shovel off some girls in the shed that were about to attack the defendant. The situation was chaotic and totally out of control.
>
> Unfortunately, this was a common occurrence every weekend because the Vaka shed was used as a venue to drink alcohol and smoke cannabis in the dark without getting caught.

[6] The difference between the two accounts was not expressly resolved in the Court below. Before turning to the appeal proper we will address this as a preliminary issue in the hope that similar problems can be avoided in the future. It involves both the proper role of customary reconciliation before a guilty plea and the procedure by which disputed facts should be resolved for sentencing purposes.

The chronological sequence

[7] Although the facts of the offences themselves are in dispute, the chronological sequence over the two years that followed is not. The sequence can be summarised as follows:

(a) On 15 August 2020 the respondent was involved in an altercation which resulted in allegations against him by three young women and a young man named Bailey. It was alleged that the respondent wielded a machete in a way that cause a laceration to Mr Bailey's hand and bruising to the buttocks and thighs of the three young women.

(b) The Police laid charges accusing the respondent of wounding with intent to injure Mr Bailey (maximum sentence 7 years imprisonment) and three charges of male assaults female (maximum 2 years' imprisonment).

(c) At the request of the respondent's family, the head of his community held a series of meetings with the four complainants. The community head told the complainants the respondent apologised and offered to pay compensation.

(d) The complainants accepted the respondent's apology and offer of compensation. The respondent paid $500 to each of the four.

(e) The complainants sent letters to the police saying they were satisfied with the process that had been followed and wished to withdraw the charges. On the most serious charge, Mr Bailey said that he alone was responsible for the laceration to his hand. He said it happened when he grasped the blade of the respondent's machete.

(f) Inconclusive discussions followed between counsel for the Crown and defence. Among other things the defence wanted to ensure that facts explaining the background and aspects of the violence that followed were brought to the attention of the Court.

(g) The Crown agreed to withdraw the wounding with intent to injure charge in return for the respondent's agreement to plead guilty to assaults on the three females and a new charge of carrying an offensive weapon in public (maximum 1 year's imprisonment).

(h) In court on 25 February 2022 the respondent agreed to the prosecution summary of facts which we set out earlier. That summary did not include either the background or the aspects surrounding the violence which had been the subject of earlier discussion between counsel. The respondent pleaded guilty to the three male assaults female charges and the new charge of carrying an offensive weapon in public. The prosecution withdrew the wounding with intent charge.

(i) The Crown filed its summary of facts and written sentencing submissions.

(j) When the respondent came before the Court for sentence on 20 April 2022 his counsel handed written sentencing submissions to the Court and counsel for the Crown. These included the defence summary of facts we have set out above. The defence submissions also relied on the satisfactory outcome of meetings with the complainants which counsel described as "restorative justice". The sentencing was adjourned to 22 April 2022 to allow the Crown to respond.

(k) The Crown filed further sentencing submissions. The submissions denied that this was a legitimate example of restorative justice, categorized the defence conduct as "witness interference" and "potentially perverting the course of justice", said that the prosecution summary of facts had been agreed to by the defence, and rejected the facts alleged in the defence summary.

(l) In his sentencing remarks the Chief Justice did not directly address the fact dispute but appeared to broadly accept the defence summary. He strongly criticised the defence's interactions with the complainants after charges had been laid and before any plea of guilty.[4]

[8] The two preliminary issues are the role of customary reconciliation in criminal proceedings and the procedure by which disputed facts should be resolved for sentencing purposes.

The role of customary reconciliation

[9] There were important dealings between a representative of the respondent and the complainants before the respondent entered pleas of guilty. We agree with the Chief Justice that these dealings are a matter for concern. At the heart of the concern is the respondent's

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4 Sentencing Notes [4] to [6].

payment of a substantial sum to each of the four complainants followed by their retraction of allegations against him. The inference that the retractions were the result of the payments is irresistible. The Chief Justice commented that this was "almost certainly an attempt to pervert the course of justice – possibly a perversion of the course of justice".[5] We are not called upon to decide whether a crime was committed but the dangers of episodes of this kind are obvious. Ms Crawford informed us that they are a frequent problem in this jurisdiction.

[10] On the other hand Mr Short advanced a powerful response based on Cook Islands custom. He said:

> Cook Islands custom is simply a reference to families, tribes or members of the community making amends. Often this is done immediately and can take the form of appointing a paster or person holding a traditional title in the community to speak on behalf of the person who has committed the wrong. If the apology is accepted, this becomes the start of a move towards reconciliation. This is sometimes followed by gifts, repairs or the purchase of a new motorcycle that was either damaged or stolen to restore the victim back to the position that they were in previously before the incident took place. The intention and objective for this process is to achieve a result that assures the community that a problem has been fixed and this allows for both parties involved in the incident to move forward. This is what the respondent did. He did not approach the victims personally, and it was his family that asked the head of the community to visit and speak to the victims to relay the respondents remorse and to offer compensation for lost wages if any or to cover medical bills.

[11] Ms Crawford and the Chief Justice emphasised that it was a matter of timing. There could be no objection to interactions of this kind *after* a defendant has pleaded guilty to the charges in question. But as to that Mr Short said:

> Although the Crown's submissions in entering a plea first before reconciliation takes place has merit, it isn't realistic for Cook Islanders because the shame and sense of facing your victim during this interim time of 2-3 months would make it extremely uncomfortable for both families because of the small community where everyone knows everyone and are likely to meet each other at church, school, netball or rugby game etc.

[12] This is one of those sensitive areas where an important Cook Islands custom must be reconciled with the integrity of a modern judicial system. A possible compromise might be that expressions of regret and apology before a guilty plea are to be encouraged while offers of tangible compensation to victims must be deferred until after a guilty plea has been entered. But on the limited material before us it would be wrong to comment further. As Ms Crawford rightly pointed out, any definitive decision should follow widespread consultation. Ideally the

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5 Same at [15].

issue would be dealt with in legislation. If it is returned to the Courts to decide, it would need to be preceded by notice to all interested parties. Expert assistance would also be needed concerning customs and the way in which they should intersect with court procedures.

[13] In the present case it has not been shown that the respondent and his family were acting in bad faith or that they knew that they were acting contrary to the law as it is presently understood in the Cook Islands. In those circumstances we will disregard the interactions with the complainants for the purposes of this appeal.

Establishing the facts for sentencing purposes

[14] The other preliminary issue concerns the way in which competing factual accounts should be resolved where a defendant intends to plead guilty. It is not possible to carry out a sentencing, or hear an appeal against a sentence or discharge without conviction, without a clear view as to the facts of the offence. In the present case the Chief Justice was confronted with two different versions. There was no process for resolving them by discussion, negotiation or, if necessary, a disputed facts hearing. The court made no express finding as to what facts were accepted. In this court each party maintained its own version. Indeed one of the Crown's principal grounds of appeal was that the Chief Justice had accepted and acted upon the defence summary of facts. Differences over facts for sentencing purposes are not uncommon.

[15] Similar problems were common in New Zealand before the procedure for summaries of fact was codified in s 24 of the Sentencing Act 2002 and R 5A.1 of the Criminal Procedure Rules 2012. They relevantly provide:

> **24 Proof of facts**
> (1) In determining a sentence or other disposition of the case, a court-
> (a) may accept as proved any fact that was disclosed by evidence at the trial and any facts agreed on by the prosecutor and the offender; and
> (b) must accept as proved all facts, express or implied, that are essential to a plea of guilty or a finding of guilt.
> (2) If a fact that is relevant to the determination of a sentence or other disposition of the case is asserted by one party and disputed by the other, -
> (a) the court must indicate to the parties the weight that it would be likely to attach to the disputed fact if it were found to exist, and its significance to the sentence or other disposition of the case;
> (b) if a party wishes the court to rely on that fact, the parties may adduce evidence as to its existence unless the court is satisfied that sufficient evidence was adduced at the trial;

(c) the prosecutor must prove beyond a reasonable doubt the existence of any disputed aggravating fact, and must negate beyond a reasonable doubt any disputed mitigating fact raised by the defence (other than a mitigating fact referred to in paragraph (d)) that is not wholly implausible or manifestly false;
(d) the offender must prove on the balance of probabilities the existence of any disputed mitigating fact that is not related to the nature of the offence or to the offender's part in the offence;
(e) either party may cross-examine any witness called by the other party.

(3) For the purposes of this section, -

aggravating fact means any fact that-

(a) the prosecutor asserts as a fact that justifies a greater penalty or other outcome than might otherwise be appropriate for the offence; and
(b) the court accepts is a fact that may, if established, have that effect on the sentence or other disposition of the case

mitigating fact means any fact that-

(a) the offender asserts as a fact that justifies a lesser penalty or other outcome than might otherwise be appropriate for the offence; and
(b) the court accepts is a fact that may, if established, have that effect on the sentence or other disposition of the case.

5A.1 Summary of facts

(1) At the time that a defendant pleads guilty, -
(a) the prosecutor must provide to the court and the defendant a summary of facts about the offence and the facts alleged against the defendant; and
(b) the defendant must advise the court whether the summary of facts is accepted.
(2) If the defendant does not accept the summary of facts, -
(a) the defendant must identify the facts disputed; and
(b) the defendant and the prosecutor must try to resolve the dispute.
(3) If the dispute is resolved, the prosecutor must advise the court of the resolution and of any agreed amendment to the summary of facts as soon as practicable.
(4) If the dispute is not resolved within 10 working days after the guilty plea is entered, the prosecutor and the defendant must notify the court of that fact and seek and indication in accordance with section 24(2) of the Sentencing Act 2002.

[16] The New Zealand process is elaborate and prescriptive. A simplified version, modified for use elsewhere, might be as follows:

(a) At or before the entry of a plea of guilty the prosecutor provides the defendant with a summary of facts.

(b) As soon as possible the defendant either advises the prosecutor that the summary is accepted or specifies any facts that are disputed or to be added. The defendant may not propose facts that would be inconsistent with a plea of guilty.

(c) The prosecutor and defendant try to resolve any disputes and, if successful, advise the Court of the agreed result.

(d) If there is no agreement, the Court is invited to give an indication as to the sentencing significance (if any) of the facts in dispute. If the parties are still unable to agree, either party may request a disputed facts hearing.

(e) At the disputed facts hearing the prosecutor must prove aggravating facts, and negate mitigating facts, beyond reasonable doubt except that the defendant must prove mitigating facts unrelated to the offending on the balance of probabilities.

(f) Following the disputed facts hearing the Court determines what the facts are for sentencing purposes.

[17] At least in this decision we will not attempt to prescribe the procedure to be followed in the Cook Islands in mandatory terms. However we commend to counsel and sentencing courts the simplified steps just outlined as non-binding guidelines for the future. Had that procedure been followed in the present case the current problems would not have arisen.

The sentencing in the High Court

[18] At the sentencing the Chief Justice pointed out that the respondent did not need to enter the shed with a machete. He should have gone a few metres down the road and called on the police to resolve the situation. The respondent recognised that that is what he should have done.

[19] The Chief Justice considered that the use of a weapon in the dark, when the respondent had been drinking, and when there were crowds of people around was the lead offence and that the assaults were consequential on that. In his view these were serious offences committed in a situation where the respondent was fortunate he did not face much more serious charges. There was the use of a weapon in darkened circumstances where the chances of much greater injury were present. He accepted that imprisonment was a reasonable starting point although he considered 18 months to two years a little high.

[20] The Chief Justice weighed those factors against the respondent's contributions to the Cook Islands community. He noted that:[6]

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6 Sentencing Notes at [8] and [9].

> [O]ver the years you have built a reputation for yourself in the Cook Islands, having led multi-disciplinary teams in private and public sectors, that you have taken projects from conception through to full implementation in some of the most isolated and challenging communities in the Cook Islands and the Pacific.
> You have also been involved in a lot of development projects around the Cook Islands, e.g. managing the Arutanga Harbour development programme in Aitutaki and the Cook Islands renewable development programme. It is of note that you are an avid member of the Cook Islands Sports Association, being re-elected as the Cook Islands F.I.N.A Bureau Member from 2021 to 2025, and holding various positions in different sports codes in the Cook Islands.

[21] He went on to note:[7]

> [The respondent's] very impressive record, both in sports and in business and there are a number of testimonials before me, including one from the Attorney-General, which are very laudatory about your contribution to the Cook Islands. That is a matter which stands you in good stead today.

[22] In addition there were the guilty pleas and the fact that it was the respondent's first offence.

[23] The Chief Justice adjourned the sentencing for a week to allow the respondent to pay $1,500 to a charity with the principal aim of combating violence in the community, particularly against women. The respondent had made the payment by the time the case was called a week later. The Chief Justice then discharged him on all charges without conviction.

The appeal

[24] In this Court the Crown submitted that the proper sentence was probation with community service. The essential grounds can be summarised as the criticisms that:

(a) The Chief Justice acted on the defence summary of facts.
(b) He did not quantify the sentencing starting point and discounts for mitigation.
(c) He did not apply the proper test for discharges without conviction.

(a) Acting on the defence summary of facts

[25] The effect of Ms Crawford's submission was that as the prosecution summary of facts was accepted by the respondent when he pleaded guilty, he was irrevocably bound by it. Once that occurred he was not free to add to, or question, its contents.

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7 Sentencing Notes at [10].

[26] We do not accept that submission. It is true that as a matter of practice one would expect that once a defendant had accepted a prosecution summary of facts he or she would give adequate notice before seeking to add to, or question, the summary later. A defendant who failed to do so might well be reprimanded by the Court for needlessly causing the case to be stood down or adjourned. But no legislation or decision has been cited to suggest that a defendant is legally barred from challenging a previously accepted prosecution summary. There is no statutory bar or estoppel. The overriding requirement is to achieve justice.

[27] In the present case the Crown knew that the respondent wanted to ensure that facts explaining the background, and aspects of the violence that followed, were put before the Court. That was explained in discussions between the parties before the respondent pleaded guilty. It was repeated in the defence summary provided two days before the substantive sentencing. There was nothing to prevent the Chief Justice from acting upon the defence summary. The fact that he did so does not undermine his decision.

[28] Further, the Crown could have objected specifically to all or parts of the defence summary for the purpose of the sentencing but did not do so. When this Court put to the Crown the additional material in the defence summary sentence by sentence during the appeal hearing, most of the additional facts were not in dispute, and could be seen as helpful additional information. The Police summary had been very brief. We have no doubt that the Chief Justice would have appreciated having more material on which to assess the aggravating and mitigating factors of the offending.

[29] This ground of appeal fails.

(b) Failure to quantify the starting point and discounts for mitigation

[30] The Chief Justice did touch on quantification in his description of the Crown's starting point of 1½ to 2 years imprisonment as "perhaps a little too high … [but] not greatly too high" and the Crown suggestion of a reduction of a third for the plea of guilty as "a little generous". We accept that he did not finalise a starting point and reduction after mitigation at that stage in his reasoning.

[31] However the Chief Justice did return to sentencing levels later when reviewing the result of all aggravating and mitigating circumstances. In that context he said that before turning to the jurisdiction to discharge without conviction, a sentence short of imprisonment,

such as coming up for sentence if called upon, would have been appropriate.[8] In our view that conclusion overtakes any further need to examine starting points and reductions for mitigating factors.

[32] This ground of appeal fails.

(c) Failure to apply proper test for discharges without conviction

[33] Ms Crawford submitted that the Chief Justice failed to apply the proper test for discharges without conviction. Section 112 of the Criminal Procedure Act 1980 (the "CPA") provides:

> **112. Power to discharge defendant without conviction or sentence**
> (1) The Court, after inquiry into the circumstances of the case, may in its discretion discharge the defendant without convicting him, unless by any enactment applicable to the offence a minimum penalty is expressly provided for.
> (2) A discharge under this section shall be deemed to be an acquittal.
> (3) Where the Court discharges any person under this section, it may, if it is satisfied that the charge is proved against him, make an order for the payment of costs, damages, or compensation, or for the restitution of any property, that it could have made under any enactment applicable to the offence with which he is charged if it had convicted and sentenced him, and the provisions of any such enactment shall apply accordingly.

[34] As the Chief Justice pointed out, there are no statutory guidelines in the Cook Islands as to the manner in which the discretion under s 112 is to be exercised. He described the New Zealand legislation as a useful guide but did not carry out the steps it implies in any organised way. Given that there have been no mandatory preconditions to the exercise of the discretion in the Cook Islands it would be difficult to criticise his approach on that ground. But we accept Ms Crawford's submission that the time has come to elevate s 112 reasoning to a more principled level. Mr Short did not suggest otherwise.

[35] In New Zealand the jurisdiction to discharge without conviction is not materially different from the Cook Islands one:[9]

> **106. Discharge without conviction**
> (1) If a person who is charged with an offence is found guilty or pleads guilty, the court may discharge the offender without conviction, unless by any enactment applicable to the offence the court is required to impose a minimum sentence.
> (2) A discharge under this section shall be deemed to be an acquittal.
> (3) A court discharging an offender under this section may—

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8 Sentencing Notes at [25].
9 Sentencing Act (NZ), s 106.

(a) make an order for payment of costs or the restitution of any property;
or
(b) make any order for the payment of any sum that the court thinks fair and reasonable to compensate any person who, through, or by means of, the offence, has suffered -
(i) loss of, or damage to, property: or
(ii) emotional harm; or
(iii) loss or damage consequential on any emotional or physical harm or loss of, or damage to, property:
(c) make any order that the court is required to make on conviction.

[36] However the New Zealand Act goes on to impose a precondition before that power can be exercised:

> **107. Guidance for a discharge without conviction**
> The court must not discharge an offender without conviction unless the court is satisfied that the direct and indirect consequences of a conviction would be out of all proportion to the gravity of the offence.

[37] The test posed by s 107 is conveniently referred to as "the proportionality test". Although described in the section heading as "guidance", the test is in fact mandatory.[10] A court "must not" grant a discharge without conviction unless the consequences of a conviction would be out of all proportion to the gravity of the offence. Even where the offender satisfies the requirements of s 107, there remains an overriding discretion whether to grant the discharge under s 106.[11] It follows that when a New Zealand Court is considering a discharge without conviction it must work through four steps:[12]

(a) Identify the gravity of the offending including aggravating and mitigating factors relating to both the offence and the offender.
(b) Identify the direct and indirect consequences of a conviction.
(c) Determine whether those consequences would be out of all proportion to the gravity of the offending.
(d) Decide whether the overriding discretion conferred by s 106 should be exercised.

[38] Not all sentencing principles are to be found in a statute. They are commonly developed by the Courts themselves working within the jurisdiction provided by Parliament. The Cook

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10 *R v Hughes* [2009] 3 NZLR 222 (CA).
11 *Z v R* [2012] NZCA 599, at [27] and [28].
12 *A(CA 747/2010 v R* [2011] NZCA 328, at [25]; *Z v R*, above, at [27] and [28]; contra *Blythe v R* [2011] NZCA 190, [2011] 2 NZLR 620.

Islands Courts have already used a proportionality approach in a number of cases.[13] We agree with that practice. In our view when a Cook Islands Court is considering a discharge without conviction it ought to work through the four steps just outlined. No statute is required to sanction that approach. It is simply a rational way of exercising the discretion already conferred under s 112 of the Criminal Procedure Act. We now apply it in the present case.

Step one: gravity of the offence

[39] For the reasons outlined earlier, we accept the respondent's version of the facts where it differs from that of the Crown. Although there was no express finding to that effect, that also appears to have been the approach taken by the Chief Justice. We agree with his comment that the respondent should have called the police rather than entering the fray himself. We also agree that it was foolish to use a weapon in the dark where the chances of much greater injury were present. However the following conclusions can also be drawn taking into account the defence summary:

(a) The respondent felt a sense of personal responsibility for the protection of the canoes given vandalism to them in the past and his reliance on them for community activities in the future.
(b) Urgent action was needed to stop the fighting among the canoes that was already in progress.
(c) The respondent did not use the weapon until after he himself had been attacked, knocked to the ground, and injured.
(d) Using the flat of the machete, while unacceptably dangerous, was likely to produce bruises rather than lacerations.
(e) The respondent's motive of protecting community property was commendable, however reprehensible the means he chose to implement it.

[40] This was not the usual case of carrying an offensive weapon in public or male assaults female. It was not motivated by deliberate lawlessness, anger, animosity or personal gain. In our view a sentence well short of prison would have been appropriate even without taking into account mitigating factors. Taking into account the defence summary of facts this was not serious offending.

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13 *Police* v *Anguna* [2013] CKHC 41; *Police* v *Potoru* [2020] CKHC 8; *Police v Rakacikaci* [2020] CKHC 18.

[41] In mitigation were the respondent's exceptional contributions to the community, no less than 14 exemplary character references, an unblemished record and a plea of guilty. The respondent has also done all he could to remedy his offending by means of apologies and compensation.

[42] We agree with the Chief Justice that even before turning to the jurisdiction to discharge without conviction this was not a case that called for a sentence of imprisonment. The Crown did not contend otherwise. Nor did the case call for a substantial penalty. Coming up for sentence if called upon, or a conviction and discharge, would have been possible.

Step two: consequences of conviction

[43] The respondent is a senior member of the Executive Board of the Cook Islands Sports and National Olympic Committee, the current President of the Cook Islands Aquatics Federation, and the Oceania representative of the International Board of Aquatics. Those positions require him to travel overseas for conferences and workshops. He is also required to travel overseas as part of Team Cook Islands at various international Games and events. Such travel is of obvious benefit to the people of the Cook Islands as well as the respondent himself.

[44] In some countries convictions for violence and related offences can be a barrier to entry. The unlimited scope of the respondent's travels makes it impracticable to identify the rules governing each destination to which he might need to travel. If he were denied entry there would be detriment to members of the Cook Islands public as well as to himself. We accept that the consequences of conviction would be severe.

Step three: out of all proportion?

[45] In relation to the gravity of the offending, the charges are towards the lower end of the scale of seriousness, and there are the significant mitigating aspects of the offending. This must be contrasted with the serious consequences for the respondent and the community if a conviction is entered. We have concluded that in the particular circumstances of this case the consequences of conviction would be out of all proportion to the gravity of the offence.

Step four: exercise of the discretion

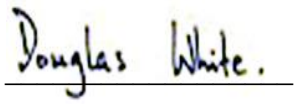
[46] Even where the first three steps are satisfied there remains an overriding discretion under s 112. There are no factors counting against the favourable exercise of the discretion at

this point. Actively in his favour are the two years of uncertainty and publicity since the event and his payment of $1500.00 to charity.

[47] We agree with the Chief Justice's view that the respondent should be discharged without conviction.

Result

[48] The appeal is dismissed. The discharge without conviction on all charges is confirmed.



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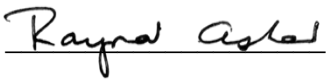
Robert Fisher, JA



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