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

CA 1802/23

BETWEEN **JOSHUA NGA UTANGA**

Appellant

AND **THE CROWN**

Respondent

Coram: White P, Fisher JA, Asher JA

Hearing: 29 August 2024 (CIT) / 30 August 2024 (NZT)

Counsel: Mr T Clee (by Zoom) for the Appellant
Ms C Evans and Mr T White for the Respondent

Judgment 16 September 2024

JUDGMENT OF THE COURT OF APPEAL

A. The appeals against conviction and the dismissal of the application for a discharge without conviction are dismissed.

B. The sentence of 12 months' probation subject to conditions as to travel and counselling is confirmed.

Introduction

[1] In accordance with a direction given by the President under s 53(3) of the Judicature Act 1980-81 as inserted by s 2 of the Judicature Amendment Act 2011, this appeal was heard in Rarotonga with the Judges appearing by video link from the High Court in Auckland, Mr Clee appearing by Zoom from Spain, and other Counsel, the Registrar and members of the public in the courtroom in Rarotonga. We thank the President of the New Zealand Court of Appeal and the staff of both Courts for their assistance in making the necessary arrangements.

[2] On 27 July 2023 a jury found the Appellant guilty on two of five charges of assault on a female under s 214(b) of the Crimes Act 1969. He was convicted on the two charges and sentenced to 12 months' probation with conditions as to travel and counselling.

[3] An application by the Appellant to be discharged without conviction was dismissed by Justice Potter on 24 October 2023.[1]

[4] In this Court the Appellant appeals against his conviction and the dismissal of his application to be discharged without conviction. In the event his appeal against the dismissal of his application to be discharged without conviction is dismissed, he does not challenge the sentence imposed in the High Court.

[5] As noted in Minute No 2 of the President dated 25 March 2024, the appeal has had the effect of staying the sentence of probation: s 72(5) of the Judicature Act 1980-81 as inserted by s 2 of the Judicature Amendment Act 2011.

[6] We have read all the relevant pre-trial and trial documents as well as the written submissions for the parties, and the written memoranda provided by Counsel on various issues as requested by the Court before and after the hearing of the appeal. We have also been particularly assisted by the oral submissions from Counsel which have resulted in the refinement of the issues raised on appeal.

Factual background

[7] The Appellant and the Complainant had been in a relationship for 2 1⁄2 years and had an eight month old daughter. The relationship had become fraught, ultimately leading to the five charges against the Appellant of assaulting the Complainant. The facts relating to the two charges on which he was found guilty by the jury were essentially admitted in his written statement to the Police, which he challenged unsuccessfully, and are conveniently summarised by Justice Potter in her sentencing decision.[2]

[8] On Sunday 10 July 2022, Mr Utanga and the Complainant were at home when they began to argue about the house being untidy. The Complainant was 6 weeks pregnant at the

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1 *R v Utanga* [2023] CKHC 11.
2 *R v Utanga* above n 1 at [4]-[6].

time. The Complainant was breast feeding their daughter, when Mr Utanga approached the Complainant and hit her in the face with an open palm. The Complainant's nose began to bleed.

[9] The jury returned a unanimous guilty verdict in relation to this assault.

[10] The following day, Monday 11 July 2022, the Appellant and the Complainant were driving home after work. They began to argue and Mr Utanga told the Complainant to get out of the car, stopping on three occasions. On the third occasion he stopped the car, climbed over the front seat into the back where the Complainant was, and pushed her out of the vehicle. They both fell out of the vehicle onto the ground. She received bruising to her arm from the incident and was picked up by a passing motorist. The Complainant called the Police later that day and gave a statement.

[11] The jury returned a majority guilty verdict in relation to this assault.

[12] The Appellant was found not guilty on the remaining three male assaults female charges.

[13] The Appellant's written statement given to the Police and signed on 12 July 2022 included the following admissions –

(a) on Sunday 10 July 2022, "I use one hand twice and two hands once to push her with open palm, she fell on the couch"; and

(b) on Monday 11 July 2022, "I jump from the driver seat to the back seat I use the car seat to use my body to push her out of the van", but "I didn't touch her" and "at the same time she was holding on to me, so we both fell on the ground."

Proceedings in the High Court

[14] Prior to the start of the trial, the Appellant applied under s 19 of the Evidence Act 1968 for the evidence in his written statement, which he gave to the Police on 12 July 2022, and the Police summary of facts to be ruled inadmissible. After taking evidence from the Appellant and the Police Constable who had taken his statement, and after hearing from Counsel, Justice Potter in a short oral ruling delivered on 24 July 2023 dismissed the application in respect of the Appellant's statement of evidence.[3] In essence, the Judge decided that the Appellant had

[3] *R v Utanga* CKHC CR Nos 65, 68/2003, 24 July 2023.

been properly cautioned by the Constable and properly informed of his right to consult a lawyer, and the statement had not been given under threat and duress as claimed by the Appellant.

[15] As the Crown had confirmed the Police summary of facts would not be used at the trial, the Appellant's application in respect of that summary was withdrawn.

[16] Following the Appellant's pleas of not guilty to the five charges, a defended jury trial ran from 24 to 27 July 2023.

[17] The Crown's case was based on –

(a) the evidence of the Complainant;

(b) the unchallenged evidence of the doctor who had examined her injuries (minor bruising) on 11 July 2024;

(c) the independent evidence of Samuel Vaile who saw the Complainant on Monday 11 July 2024 in a distressed state on the side of the road and gave her a lift to a neighbour's place and not to the police station as he had offered;

(d) the independent evidence of Shirley Hill, the neighbour who on 11 July 2024 saw the Complainant with her baby in a distressed state: she was very upset, but no injuries were seen; and

(e) the evidence of the Police Constable who had interviewed the Appellant and had taken his statement and who also produced the Crown's booklet of documents. The Constable gave evidence that he saw no injuries to either the Complainant or the Appellant. In response to questions from Justice Potter, he confirmed his evidence at the pre-trial hearing about the circumstances surrounding the taking of the Appellant's statement.

[18] The evidence of the Police Constable who had taken statements from the Complainant and other witnesses, which had been disclosed to defence Counsel, and who was overseas at the time of the trial was, with the agreement of defence Counsel and the trial Judge, not called to give evidence at the trial.

[19] During the trial on 25 July 2023, in the course of the cross-examination of the Complainant by defence Counsel for the Appellant to the effect that the Complainant had no supporting evidence, she referred to text messages which she said she had received from the Appellant and which she claimed supported her evidence. Following the completion of the Complainant's cross-examination, the issue of the admissibility of the text messages was raised by defence Counsel in chambers before Justice Potter. Crown Counsel, who had been unaware of the existence of the texts, submitted the Crown should be allowed to adduce them in evidence in response to the challenge to the Complainant's credibility.

[20] Defence Counsel for the Appellant submitted that the texts were "totally irrelevant" and the Crown would have the opportunity to clarify the matter when cross-examining the Appellant.

[21] After hearing from Counsel, Justice Potter declined to make a ruling because, "at this point there is no purpose in those texts being produced through this witness". At the same time she recognised that the issue might arise again in the context of the examination of the Appellant.

[22] The next day, 26 July 2023, the issue was raised again before Justice Potter in chambers, with Crown Counsel submitting the Crown should be entitled to put the texts to the Appellant in cross-examination because they had been used to discredit the Complainant. As Counsel for the Appellant had no objection, Justice Potter ruled that the Crown could do so.

[23] At trial the Appellant's case which put the Crown to proof was based on challenging the credibility of the Complainant and –

(a) his own evidence: he denied all the alleged assaults and referred to the injuries the Complainant had inflicted on him (bitten finger and scratched neck) and claimed that he had "used reasonable force to remove her from the vehicle" when she had punched him and pulled him out. evidence from his parents; and

(b) evidence from Michael Chase (counsellor), Charlotte Piho (his new partner), and Louise Christie (café owner) who had seen scratches on the Appellant's neck.

[24] The cross-examination of the Appellant was extensive and covered –

(a) The admissions in his statement to the Police;

(b) the texts which he admitted sending to the Complainant, but which he said were an incomplete record because they did not include the texts she had sent him;

(c) the van incident; and

(d) photos, including his own arrest photo which he claimed would show scratching on his neck.

[25] The Appellant referred to the incomplete nature of the text messages both under cross-examination and when re-examined.

[26] The Crown also called rebuttal evidence from Ngapoho Jane Archer who, on Monday 11 July 2022, had been working for Charlotte Piho and had seen the Complainant very upset and said she herself had been pushed by the Appellant.

[27] After the closing addresses of Counsel were delivered, Justice Potter summed up to the jury on the basis that the jury would need to be sure, that in respect of each of the five charges, the Appellant had applied force to the person of the Complainant and that the force was deliberate. These two requirements were included in a questionnaire which was given to the jury to complete in respect of each of the five charges.

[28] Both Counsel in their addresses, and Justice Potter in her summing up, made it clear that the principal issue in respect of the two requirements for each of the five charges was credibility and it was for the jury to decide whether they believed the Complainant or the Appellant, while emphasising that the decision on proof without reasonable doubt had to be reached by an examination of all the evidence.

[29] Both Counsel and Justice Potter also referred to the text messages:

(a) The Crown referred to them in detail to answer the suggestion the Appellant was "cool, calm and collected", but did not refer to their incomplete nature;

(b) The Defence referred to the unavailability of the Complainant's texts as an attempt by her "to conceal her real self"; and

(c) The Judge referred to what both the Crown and the Defence had said.

[30] Following the jury's two guilty verdicts on 27 July 2023, Justice Potter entered convictions on those two charges, and then on 24 October 2023 heard and determined the Appellant's application for a discharge without conviction under s 112 of the Criminal Procedure Act 1980-81. Following the decision of this Court in *R v Katoa*,[4] Justice Potter applied the four-step process for determining such applications and dismissed it.[5]

[31] Having dismissed that application, Justice Potter then sentenced the Appellant to 12 months' probation subject to travel and counselling conditions.

Post-trial development

[32] Following the trial, the Police disclosed to the Appellant's father a photo of the Appellant taken at the time of his arrest showing the scratching to his neck, which had not been produced by the Crown at the trial.

The Appeal

[33] In this Court the Appellant has raised two principal issues, namely –

(a) a miscarriage of justice under s 69(1)(c) of the Judicature Act 1980-1981, as inserted by s 2 of the Judicature Amendment Act 2011, arising from the admission of the text messages which were incomplete and prejudicial to the Appellant, and the non-disclosure of the photo of the Appellant showing the scratches to his neck which, if disclosed, would have led to the inadmissibility of the Appellant's written statement to the Police; and

(b) a challenge to the decision of this Court in *R v Katoa*, which decision was followed by Justice Potter in dismissing the Appellant's application for a

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4 *R v Katoa* [2022] CKCA 3 at [33]-[38].
5 *R v Utanga* above n 1 at [8]-[29].

discharge without conviction, on the ground the decision was wrong in law and should be overruled or not followed.

[34] The Appellant also raised a subsidiary issue relating to the Crown's decision not to call the Police Officer who took the Complainant's statement, and who filed no formal written statement.

[35] We propose to address these issues in the sequence the submissions were advanced by Mr Clee at the hearing of the appeal.

The inadmissibility of the incomplete text messages

[36] There was no dispute that prior to the events leading to the charges the Appellant had sent the Complainant a series of text messages which used obscene language and were abusive, threatening and aggressive towards her. There was also no dispute the Complainant had sent the Appellant texts, but hers were not available and were not included in the screen shots of the Appellant's texts, which were put in evidence during his cross-examination, with him claiming hers were similarly abusive and obscene.

[37] In these circumstances, Mr Clee submitted the screenshots should not have been admitted in evidence by the trial Judge because they were incomplete and unfairly prejudicial to the Appellant. There was no opportunity for the Complainant to be questioned about the reasons for her texts not being available and yet they were used to discredit the Appellant whose credibility was put in issue on the basis of them, especially by Crown Counsel in her closing address to the jury. The admission of the screenshots in this way was unfair and led to a serious miscarriage of justice.

[38] As Mr Clee acknowledged in response to questions from members of the Court during the hearing of the appeal, however, there are a number of difficulties with these submissions.

[39] First and foremost, it is hard to see how the unavailable text messages sent by the Complainant to the Appellant could have affected the relevant factual issues at the trial, namely whether the Appellant had applied force to the Complainant on the five occasions the subject of the charges and, if so, whether he had done so deliberately. While the credibility of both the Complainant and the Appellant was relevant in the context of the evidence relating to these

factual issues, there was nothing relevant in the deleted messages themselves affecting the credibility of the Complainant in relation to those factual issues, especially when the admissions in the Appellant's statement to the Police were taken into account.[6]

[40] Mr Clee argued that the unavailable texts could have been relevant to the issue of the credibility of the Complainant, in relation to the charge involving the assault in the van on Monday 11 July 2022, because it could have provided support for his version of that event, which was that she was the aggressor and her interference with his driving justified his actions in stopping the van on three occasions as a matter of safety, and her then falling out. In light of the Appellant's admissions and in the absence of self-defence being raised by the Appellant at the trial, however, we do not consider the credibility of the Complainant was in issue in respect of the van assault.

[41] Second, in assessing whether the admission of the text messages prejudiced the jury unfairly against the Appellant, it is important to recognise how the trial was run by defence Counsel. The starting point is to recall that it was the challenge to the credibility of the Complainant by defence Counsel in his cross-examination of her that led her to mention the existence of the texts, which it was accepted were not known to the Crown, and the initial unsuccessful application by Crown Counsel for their production. The next point to recall is that the second application for their production before the Crown cross-examination of the Appellant, was granted without objection by the Appellant's defence Counsel.

[42] Mr Clee, in his initial written submissions, accepted that trial Counsel's action in not objecting to the admission of the text messages was "not helpful". In his later written submissions he went further and submitted this was "an error by trial counsel". During the hearing of the appeal, however, Mr Clee acknowledged that if this submission were to be pursued the well-established procedure for raising trial counsel error would need to have been followed, and he did not intend that this should occur.[7] Instead, he relied on trial counsel error as a background observation to his criticism of the trial Judge's ruling.

[43] Third, we do not accept that the admission of the incomplete text messages was unfair and led to a substantial miscarriage of justice in terms of the proviso to s 69(1)(c) of the

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6 See [50]-[54] below on the challenge to the admissibility of that statement.
7 Cf *Hall v R* [2015] NZCA 403, [2018] 2 NZLR 26.

Judicature Act. As Mr Clee accepted, the law relating to miscarriage of justice is conveniently summarised in the Crown's supplementary memorandum dated 28 August 2024, provided to the Court before the hearing of the appeal. Of particular assistance are the recent decisions of the New Zealand Supreme Court in *Lundy v R*[8] and *Misa v R*[9].

[44] In *Lundy* the Supreme Court considered the application of the equivalent New Zealand proviso in respect of the wrongful admission of evidence which amounts to incurable error stating:[10]

> "When called upon to consider whether wrongly admitted evidence has resulted in an incurable error the appellate court considers the evidence overall, but not for the objective of deciding whether the admissible evidence established the defendant's guilt. It is concerned rather to gauge the impact of the inadmissible evidence upon the trial. As the Privy Council explained in *Barlow v R*:
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> ... it is certainly not the case that a trial is rendered unfair simply because some potentially misleading evidence has been admitted. The fairness of the trial has to be judged in the light of the proceedings as a whole."

[45] After referring to three cases reflecting that the standard for incurable or fundamental error is high, the Court held:[11]

> "The authorities establish that when considering the significance of inadmissible evidence in the context of the trial, an appellate court may inquire into whether the evidence went to an issue on which the verdict turned, how strong was the Crown case otherwise, how cogent or prejudicial was the evidence and whether it was met by defence evidence, what impact the inadmissible evidence had on the conduct of the defence case, how counsel handled the evidence, and whether the trial judge's directions mitigated or cured the irregularity. As explained above, it may be possible to take into account what the actual jury did with the evidence, if that is ascertainable."

[46] In *Misa* the Supreme Court commented that the focus is on "realistic rather than theoretical possibilities".[12] The Court summarised the test as follows:[13]

> "... the question is whether the error, irregularity, or occurrence in or in relation to or affecting this trial has created a real risk the outcome was affected. That, in turn, requires consideration of whether there is a reasonable possibility another verdict would have been reached."

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8 *Lundy v R* [2019] NZSC 152, [2020] 1 NZLR 1.
9 *Misa v R* [2019] NZSC 134, [2020] 1 NZLR 85.
10 *Lundy v R* above n 8 at [38], footnotes omitted.
11 *Lundy v R* above n 8 at [42], footnotes omitted.
12 *Misa v R* above n 9 at [46].
13 *Misa v R* above n 9 at [48].

[47] Adopting a realistic approach in gauging the impact of the alleged inadmissible text messages on the trial in this case, we consider that by the end of the trial the jury were aware that while the Complainant's texts had existed but were not available, both the Appellant and Complainant had sent similarly abusive texts to each other, the Appellant's texts provided an answer to the defence attack on her character and showed him to be capable of being threatening and aggressive towards her, and, most importantly, none of the texts undermined the Appellant's admissions in his statement to the Police. In these circumstances there was no real risk that the outcome of the trial was affected. The admission of the incomplete texts did not therefore result in an unfair trial or a substantial miscarriage of justice.

The impact of the non-disclosure of the arrest photo of the Appellant

[48] There was no dispute that the photo of the Appellant taken by the Police at the time of his arrest in July 2022 showed an injury, namely scratch marks to his neck, which had been inflicted by the Complainant, and that the photo had not been disclosed in advance of the trial. As Crown Counsel was not aware of its existence, the Appellant accepted there should be no criticism of Crown Counsel in this respect.

[49] While the photo itself was not produced in evidence during the trial and no request for its production was made by the defence during the trial, there was no dispute that by the end of the trial the jury was aware of its existence. The Appellant himself had referred to its existence in his evidence under cross-examination. The jury was also aware that the Complainant had accepted under cross-examination that she may have scratched him in the altercation in the van and the evidence about the scratch marks from the independent defence witness Louise Christie was unchallenged. In addition, in the Crown's closing submissions, Counsel referred specifically to the Complainant's evidence that she might have scratched the Appellant in the van.

[50] Mr Clee submitted, however, that the non-disclosure of the arrest photo had prejudicially affected the Appellant's pre-trial challenge to the admissibility of his statement to the Police based on duress because it had deprived Appellant's trial Counsel of the opportunity to undermine the credibility of the Police Constable, who had taken the statement, from cross-examining him about the injury shown in the photo. This submission was based on the later evidence of the Constable at the trial in July 2023 when under cross-examination he

denied the Appellant had shown him his injury when he was being interviewed. The Constable also admitted he did not ask to see the injury because it was not shown to him and he was not interested in it. Mr Clee submitted that if the photo had been disclosed before the trial the Constable's memory and veracity would have been challenged and the Court would have been able to accept that the Appellant's statement was made under duress and was therefore inadmissible.

[51] Once again, as Mr Clee acknowledged in response to questions from members of the Court during the hearing of the appeal, there are a number of difficulties with these submissions.

[52] First, no evidence was given at the pre-trial hearing about the scratch marks to the Appellant's neck or the arrest photo showing them. In particular the Police Constable was not cross-examined on this issue. There was no basis for questioning the credibility of the Constable on this ground. This was therefore not a reason for undermining the Judge's finding that duress had not been established and for ruling the Appellant's statement was admissible.

[53] Second, the evidence the Police Constable gave under cross-examination at the July 2023 trial about not being shown the scratch marks on the Appellant's neck at the time of his arrest in July 2022 relates to his lack of memory rather than to his credibility. No issue of credibility was raised on this evidence because the Constable did not deny the Appellant had in fact been scratched, only that he had not been shown the scratch marks. If the issue of admissibility of the Appellant's statement to the Police had been raised again at the trial, all the trial evidence relating to the scratch marks and the arrest photo would have been relevant to establish that this was a non-issue. It would have provided no basis for revisiting the Judge's rejection of the allegation of duress and admissibility ruling.

[54] Third, as Mr Clee acknowledged, it would therefore have been a "leap" to jump from the Constable's trial evidence in order to impeach the Constable's pre-trial evidence. We are therefore satisfied there was no basis for concluding that the Appellant's statement to the Police was not correctly ruled admissible by Justice Potter.

The "missing" Police witness who took the Complainant's statement

[55] The Police Constable who took statements from the Complainant and other Crown witnesses was not called to give evidence at the trial because she was overseas and unavailable. Given the limited scope of this Constable's evidence, the Crown decided she was not required as a witness. This decision was confirmed with the trial Judge and defence trial Counsel. No request was made by trial Counsel for her to be made available.

[56] At the hearing of the appeal, Mr Clee submitted the Police Constable should have been called so she could have been cross-examined about the Police "no-drop" policy which arose in the context of a request made at one stage by the Complainant that the charges against the Appellant should be dropped.

[57] In our view, as Justice Potter indicated in the course of the trial, the Police "no drop" policy had no relevance to the issues in the trial. The Crown was entitled to proceed with the five charges against the Appellant on the basis of the evidence from the Complainant and the other witness who were called at the trial.

[58] We agree with the Crown that in the circumstances of this case the Crown was under no obligation to call the Constable who had taken the Complainant's statement,[14] especially when both the Appellant's defence Counsel and the trial Judge had agreed that it was not necessary to do so.

The challenge to *R v Katoa*

[59] The Appellant accepts that Justice Potter, when considering whether to discharge the Appellant without conviction under s 112(1) of the Criminal Procedure Act 1980-1981 (the CPA), was bound by the rules of precedent to follow and apply the decision of this Court in *R v Katoa* where we held that a Cook Islands Court considering a discharge without conviction "ought to work through the four steps" adopted in New Zealand as "a rational way of exercising the discretion already conferred under s 112."[15]

[60] The Appellant submits, however, that the decision in *R v Katoa* was wrong in law and

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14 *R v Fuller* [1966] NZLR 865 (CA), *R v Bishop* [1996] 3 NZLR 399 (CA).

15 *R v Katoa* above n 4 at [38].

should be overruled for the following reasons –

(a) The power of the High Court in the Cook Islands to discharge a defendant without a conviction under s 112(1) involves the exercise of an unfettered discretion.

(b) The four step process in New Zealand is mandated by s 107 of the New Zealand Sentencing Act 2002 which replaced a similar unfettered discretionary provision and now requires the Court to be satisfied that the direct and indirect consequences of a conviction would be "out of all proportion to the gravity of the offence" before discharging an offender without conviction.

(c) The Cook Islands Parliament would need to enact legislation amending s 112(1) of the CPA to fetter the exercise of the discretion in a similar way which has led to the New Zealand four step process, but has not done so, even though it has had the opportunity to do so for 22 years.

(d) As this has not occurred, the Court had no authority or power to do so. In particular, it is precluded from doing so by Article 46 of the Constitution of the Cook Islands, the supreme law, which provides that no provision of any Act of the Parliament of New Zealand passed after the commencement of that Article (5 August 1965) shall extend or be deemed to extend to the Cook Islands as part of the law of the Cook Islands.

[61] In considering these submissions, the starting point is to set out in full the relevant paragraphs from our decision in *R v Katoa* which include the relevant Cook Islands and New Zealand statutory provisions and our reasoning (but omitting the footnotes) –

> "[33] Ms Crawford [Crown Counsel] 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:
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> **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 [defence Counsel] did not suggest otherwise.

[35] In New Zealand the jurisdiction [under s 106 of the Sentencing act 2002] to discharge without conviction is not materially different from the Cook Islands one:

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—

(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**
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> 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. 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. It follows that when a New Zealand Court is considering a discharge without conviction it must work through four steps:

> (a) Identify the gravity of the offending including aggravating and mitigating factors relating to both the offence and the offender.
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> (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 s106 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 Islands Courts have already used a proportionality approach in a number of cases. 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."

[62] At the hearing of the present appeal Mr Clee emphasised the distinction to be drawn between the proportionality approaches adopted in New Zealand under ss 106 and 107 of the Sentencing Act 2002 and in the Cook Islands under s 112 of the CPA. In particular, he contrasted the requirement of s 107 of the New Zealand Sentencing Act that the consequences of a conviction "be out of **all** proportion" to the gravity of the offence with the lesser requirement adopted in Cook Islands cases under the unfettered discretion in s 112 of the CPA that the conviction simply be "disproportionate" to the offences.

[63] Mr Clee pointed out, correctly, that the "proportionality test" adopted by the Cook Islands High Court decisions referred to in our decision in *Katoa* was not the New Zealand

"out of **all** proportion" test but the less restricted "out of proportion" or "disproportionate" test.[16] In Mr Clee's submission the decision in *Katoa* by adopting the New Zealand "out of **all** proportion" approach has therefore wrongly contracted or narrowed the wide scope of the unfettered discretion in the Cook Island's provision. Other High Court decisions relied on by the Crown in which the "out of **all** proportion" test appears to have been applied were similarly wrong.[17]

[64] There is no dispute this Court as a Court of Appeal may acknowledge and correct its own earlier decisions on issues of statutory interpretation when satisfied a statute has been clearly misconstrued.[18] And, if a finely balanced point of construction is involved, there must be a cogent reason for departure from the earlier decision.[19]

[65] For the following reasons, however, we are not persuaded we erred in our decision in *Katoa* in interpreting and applying s 112 of the CPA and in adopting as guidelines for the Cook Islands the New Zealand four step approach with its requirement that the court determine whether the consequences of a conviction would be "out of **all** proportion" to the gravity of the offending.

[66] First, as Mr Clee accepted, no question of lack of jurisdiction arises. As we recognised in *Katoa*,[20] sentencing principles are commonly and indeed constantly developed by the Courts themselves, particularly appellate courts, working within the jurisdiction provided by Parliament.[21] In this case the sentencing jurisdiction to discharge without conviction is conferred by s 112 of the CPA.

[67] Second, as Mr Clee accepted, no statute is required to enable the Court of Appeal to lay down a set of guidelines for courts exercising the discretion to discharge without conviction under the s 112 jurisdiction in a rational way. There are numerous examples of the Cook Islands Courts, including the Court of Appeal, adopting and applying New Zealand sentencing

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16 *R v Katoa* above n 4 at [38] footnote 13 – *Police v Anguna* [2013] CKCH 41, Weston CJ at [27]; *Police v Potoru* [2020] CKHC 8, Williams CJ at [27]; *Police v Rakacikaci* [2020] CKHC 18, Keane J at [15]-[16].

17 *Taime v Police* [2018] CKHC 45, Doherty J at [20], but cf [32]; *Police v Leawere* [2022] CKHC 15, Grice J at [19].

18 *Boaza v Brown* [2022] CKCA 4, at [23]-[27].

19 *Dahya v Dahya* [1991] 2 NZLR 150 (CA) at 155-156.

20 *R v Katoa* above n 4 at [38].

21 *R v Taueki* [2005] 3 NZLR 372 (CA), *Nuku v R* [2012] NZCA 584, [2013] 2 NZLR 39, *R v Terewi* [1999] 3 NZLR 62 (CA) and *Moses v R* [2020] NZCA 296, [2020] 3 NZLR 583.

guideline judgments.[22] For this reason Mr Clee did not pursue his submissions that the Cook Islands needed to enact a statutory provision similar to s 107 of the New Zealand Sentencing Act or that Article 46 of the Cook Islands Constitution precluding the application of New Zealand law had any application in this context. Our decision in *Katoa* does not suggest we were applying s 107 of the New Zealand Sentencing Act or purporting to extend the application of that mandatory provision to the Cook Islands.

[68] Third, as Mr Clee accepted, in laying down the set of guidelines in *Katoa* it was open to the Court of Appeal to adopt the four step approach from New Zealand, including a proportionality test. Once it is accepted a proportionality approach may be adopted, we do not see why it could not be an "out of **all** proportion" test. There is nothing in s 112 of the CPA precluding the adoption of that test as opposed to a lesser simple disproportionate test. It is not a matter of narrowing or fettering the exercise of a discretion, but rather of adopting a rational approach to its exercise.

[69] Fourth, the adoption in previous Cook Islands High Court decisions of the lesser test, did not prevent the Court of Appeal from adopting the "out of **all** proportion" test. The distinction between the two tests does not seem to have been addressed in the High Court decisions which are in any event not binding on the Court of Appeal. Moreover, there are the two High Court decisions that do adopt an "out of **all** proportion test".[23] In *Taime v Police* the "out of **all** proportion" test and the "out of proportion" test are both mentioned without reference to any differentiation between them.[24]

[70] Finally, it is important to recognise the ultimate step in the Cook Islands guidelines, namely the requirement for the court to decide whether to exercise the "overriding" statutory discretion to discharge a defendant without conviction under s 112 of the CPA. This "overriding" or "residual" discretion may enable a Cook Islands court in a rare case to grant or refuse a discharge without conviction regardless of the outcome of the first three non-mandatory steps.[25] Contrary to Mr Clee's submission, it is therefore safe in the Cook Islands to

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22 *R v Virivirisai* [2019] CKCA 3 at [18], [22], [25], [30], [33]–[38], [42], [44] and [48]; *Goodwin v Crown* [2019] CKCA 1 at [20], [31]–[32], [37], [39], [40] and [51]; *R v Marsters and Tangaroa* [2012] CKCA 1 at [21], [23]–[27], [36] and [46]; and *Mata v Queen* [2000] CKCA 1 at [8]–[11].

23 See [63] above: *Taime v Police* above n 17, Doherty J at [20], but cf [32]; *Police v Leawere* above n 17, Grice J at [19].

24 *Taime v Police* above n 17 at [20] and [32].

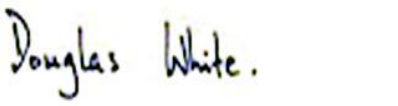
25 Cf *Z v R* [2012] NZCA 599, [2013] NZAR 142 at [27] and *Taime v Police* above n 17 at [21] and [33].

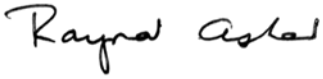
rely in an appropriate case on the ultimate step to correct a situation where the conviction would be disproportionate, but not necessarily out of **all** proportion.

[71] For these reasons we remain of the view that our decision in *Katoa* was correct and did not involve a misconstruction of s 112 of the CPA requiring us to overrule it. *Katoa* should continue to be followed and applied in the Cook Islands as Justice Potter did in this case. In particular, Justice Potter correctly considered and applied the overriding discretion as the ultimate step in the exercise of the discretion.[26] We agree with Justice Potter this was not an appropriate case for the discretion to be exercised to discharge the Appellant without conviction.

Result

[72] The appeals against conviction and the dismissal of the application for a discharge without conviction are dismissed. The sentence of 12 months' probation subject to conditions as to travel and counselling is confirmed.





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

[26] *R v Utanga* above n 1 at [28].