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, Asher JA, Arnold JA

Hearing: 22 May 2025 (CIT) / 23 May 2025 (NZT)

Counsel: Mr T Clee and Mrs I Jayanandan for Appellant
Mr T White and Ms T Scott for Respondent

Judgment: 24 June 2025 (CIT) / 25 June 2025 (NZT)

JUDGMENT OF THE COURT OF APPEAL

Introduction

[1] In accordance with a direction given by the President of the Court under s 53(3) of the Judicature Act 1980-81 (as inserted by s 2 of the Judicature Act 2011) and reflecting Article 59(1) of the Constitution of the Cook Islands, this appeal was heard in Rarotonga, with the Judges appearing by video link from a courtroom in the New Zealand Court of Appeal in Wellington, and 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 of Appeal for their assistance in making the necessary arrangements.

Background

[2] At a trial before Potter J and a jury on five charges of male assaults female,[1] the Applicant was found guilty on two charges and acquitted on the remaining three. The Complainant was the Applicant's (now former) partner.

[3] The Applicant applied to be discharged without conviction under s 112 of the Criminal Procedure Act 1980-81. Potter J rejected that application and sentenced the Applicant to 12 months' probation with conditions as to travel and counselling.[2] The Applicant then appealed to this Court against his convictions and the dismissal of his application to be discharged without conviction.[3] This Court dismissed the Applicant's appeal against conviction and the refusal of a discharge without conviction, confirming the sentence imposed by Potter J.

[4] The Applicant now applies to this Court for leave to appeal to the Judicial Committee of the Privy Council (the Privy Council). The Applicant identified two grounds in his notice of motion seeking conditional leave to appeal. The first concerned the approach the courts should take to applications for discharges without conviction under s 112 of the Criminal Procedure Act; the second concerned the admissibility of certain text messages under s 22(1) of the Evidence Act 1968. Counsel for the Applicant, Mr Clee, abandoned the second ground in the course of the hearing, so we say no more about it. We will focus on the first ground.

[5] We must, however, address a preliminary issue first, namely whether this Court has jurisdiction to grant leave to appeal to the Privy Council in a criminal case. The Crown argues that this Court has no such jurisdiction. It contends that under the legislation in force in the Cook Islands, a person seeking to appeal in a criminal matter must apply directly to the Privy Council for special leave to appeal.

Jurisdiction

(i) Some background

[6] The enactment of the Statute of Westminster 1931 (UK) made it possible for

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1 Contrary to s 214(b) of the Crimes Act 1969.
2 *R v Utanga* [2023] CKHC 11.
3 *Utanga v R* [2024] CKCA 1.

self-governing dominions such as New Zealand, Australia and Canada to take steps to regulate appeals to the Privy Council, by, for example, either abolishing or extending the right of appeal.[4] So, in principle, the Cook Islands legislature could enact legislation authorising the Court of Appeal to grant leave to appeal to the Privy Council in criminal matters. The question is: has it done so?

[7] Articles 56 to 61 of the Constitution of the Cook Islands deal with the Court of Appeal. Article 59(3) provides for a right of appeal with leave from the Court of Appeal to the Privy Council. It reads:[5]

> There shall be a right of appeal to Her Majesty the Queen in Council, with the leave of the Court of Appeal, or, if such leave is refused, with the leave of Her Majesty the Queen in Council, from judgments of the Court of Appeal *in such cases and subject to such conditions as are prescribed by Act*.
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> (Emphasis added.)

[8] The word "Act" is defined in Art 1(1) of the Constitution to mean "an Act of the Parliament of the Cook Islands". The relevant Cook Islands Act is the Privy Council (Judicial Committee) Act 1984 (the 1984 Act). The purpose of the 1984 Act was to extend an Order in Council dated 10 January 1910 (as set out in the First Schedule to New Zealand's Privy Council (Judicial Committee) Rules Notice 1973) to the Cook Islands as part of Cook Islands' law. The 1910 Order in Council regulated appeals to the Privy Council from the New Zealand Court of Appeal and the Supreme (now High) Court.

[9] The 1984 Act made some modifications to the 1910 Order. First, the meaning of the words "Court of Appeal" and "Court" were amended to refer to the Cook Islands Court

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[4] See Lord Mance and Jacob Turner *Privy Council Practice* (OUP, Oxford, 2017), at paras [1.21]−[1.28], [2.13] and [2.30]. Certain provisions of the Statute of Westminster did not take effect until adopted by the relevant Dominion: see s 10 of the Statute. In New Zealand's case, the necessary legislation was not enacted until 1947: see the Statute of Westminster Act 1947.

[5] Article 2 of the Constitution provides that "Her Majesty the Queen in right of New Zealand shall be the Head of State of the Cook Islands". Article 59(3) refers to "Her Majesty the Queen in Council", ie the Privy Council. In New Zealand, the consequences of the Sovereign's death are addressed in s 5 of the Constitution Act 1986. It provides that on the Sovereign's death, the Sovereign's successor takes over all the Sovereign's functions, powers, duties etc. There does not appear to be a similar provision in the Cook Islands legislation, but the same result seems to apply: see Jennifer Corrin "Turning Back the Clock: The Cook Islands Amendment Act" (2022) 28 CLJP/JDCP 83 at 85-86. In any event, our concern is with the Judicial Committee of the Privy Council.

of Appeal rather than the two New Zealand courts. Second, Rule 2 of the 1910 Order was, in effect, revoked and replaced with the following:

> **Appeals to Her Majesty the Queen in Council**
>
> (1) Subject to these rules, an appeal shall lie to Her Majesty the Queen in Council from a judgment of the Court of Appeal—
>
> (a) if in the opinion of the Court the case involves a substantial question of law as to the interpretation or effect of any provision of the Constitution of the Cook Islands:
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> (b) from any final judgment of the Court, where the matter in dispute on the appeal amounts to or is of the value of 5,000 New Zealand dollars or upwards, or where the appeal involves, directly or indirectly, some claim or question to or respecting property or some civil right amounting to or of the value of 5,000 New Zealand dollars or upwards:
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> (c) from any other judgment of the Court, whether final or interlocutory, if in the opinion of the Court the question involved in the appeal is one which, by reason of its great general or public importance or otherwise, ought to be submitted to Her Majesty in Council for decision.

For ease of reference we will refer to this as the replacement Rule 2. In seeking leave to appeal to the Privy Council, the Applicant relied solely on replacement Rule 2(1)(c), arguing that the issue of the correct approach to considering discharges without conviction under s 112 was of great general or public importance.

[10] We reproduce below the original version of the Rule for comparison (we will refer to it as the replaced Rule 2). In part, we do this because Mr Clee argued that certain changes in the wording of the replacement Rule 2 were important to the question of this Court's power to grant leave to appeal in criminal matters; but apart from that, it is important to consider the meaning that the Courts had ascribed to the replaced Rule 2 in attempting to understand the meaning of the replacement Rule 2.

[11] The replaced Rule 2 provided:

> Subject to the provisions of these Rules, an Appeal shall lie:—
>
> (a) as of right, from any final Judgment of the Court of Appeal where the matter in dispute on the Appeal amounts to or is of the value of five thousand New Zealand dollars or upwards, or where the Appeal involves, directly or indirectly, some claim or question to or respecting

> property or some civil right amounting to or of the value of five thousand New Zealand dollars or upwards; and
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> (b) at the discretion of the Court of Appeal from any other Judgment of that Court, whether final or interlocutory if, in the opinion of that Court, the question involved in the Appeal is one which by reason of its great general or public importance, or otherwise, ought to be submitted to His Majesty in Council for decision; and
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> (c) at the discretion of the [High] Court from any final Judgment of that Court if in the opinion of that Court the question involved in the Appeal is one which by reason of its great general or public importance or of the magnitude of the interests affected or for any other reason, ought to be submitted to His Majesty in Council for decision.

[12] As can be seen, the replaced Rule 2 deals with appeals from two New Zealand courts, the Court of Appeal and the High Court, whereas the replacement Rule 2 deals only with appeals from the Cook Islands Court of Appeal, as provided for by the Constitution. In addition, the replacement Rule 2 contains a clause not found in the replaced Rule 2, namely Rule 2(1)(a). That clause provides for appeals to the Privy Council in cases involving substantial questions of law as to the interpretation or effect of any provision in the Constitution. On the face of it, this could apply to criminal cases, given that Part IVA of the Constitution deals with fundamental rights and freedoms, which may well be at issue in criminal cases.

[13] We pause here to note that the long-established interpretation of Rule 2(b) in the replaced Rule 2 was that it did not confer on the New Zealand Court of Appeal any power to grant leave to appeal to the Privy Council in criminal cases. This was reaffirmed by the New Zealand Court of Appeal in 1998 in *Nichols v Registrar of the Court of Appeal*. There Richardson P said:[6]

> New Zealand Courts have no jurisdiction to grant leave to appeal to Her Majesty in Council in criminal matters: *Oteri v R* [1976] 1 WLR 1272 (PC) at p 1275; *Fryer v Superintendent of Her Majesty's Prison at Paparua* [1979] 1 NZLR 693 (CA). An appeal to Her Majesty in Council from the decision of this Court in a criminal matter lies only with the special leave of Her Majesty granted on the advice of the Judicial Committee itself.

[14] The same limitation applied wherever the replaced Rule 2 was in force. In *Chung Chuck v The King*, the Privy Council held that an equivalent Order meant that the Court of Appeal of British Columbia had no power to grant leave to appeal to the Privy

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6 *Nichols v Registrar of the Court of Appeal* (1998) 16 CRNZ 111 (CA), at 113.

Council in a criminal matter.[7] In that case, the Privy Council noted that Rule (2)(a) of the replaced Rule 2 conferred an appeal as of right in civil cases which met the specified financial parameters.[8] The Privy Council considered that the reference in Rule 2(b) to "other judgments" meant other judgments of the type referred to in Rule 2(a), ie, civil judgments.[9] The Privy Council also emphasised that the word "judgment" was defined in Rule 1 as including "decree, order, sentence, or decision" and considered it significant that the word "conviction" was not included. Given that the word "sentence" was used throughout the common law, the Privy Council did not consider that its use in the definition was intended to confer a right on the Court of Appeal to give leave to appeal in criminal cases.[10] Consequently, a person seeking to appeal from a decision of the British Columbia Court of Appeal in a criminal matter had to apply to the Privy Council for special leave to appeal, which would be granted only in rare cases.[11]

(ii) This Court's jurisdiction

[15] Given that the replaced Rule 2 has been interpreted as not permitting Courts of Appeal to grant leave to appeal to the Privy Council in criminal cases, the issue becomes whether the replacement Rule 2, taken in combination with Art 59 of the Constitution, was intended to confer that power on this Court. We are satisfied that it remains the position that the Court does not have the power to grant leave to appeal in criminal matters. We now explain that conclusion.

[16] We begin with Art 59(3) of the Constitution. As will be recalled, it reads as follows:

> There shall be a right of appeal to Her Majesty the Queen in Council, with the leave of the Court of Appeal, or, if such leave is refused, with the leave of Her Majesty the Queen in Council, from judgments of the Court of Appeal in such cases and subject to such conditions as are prescribed by Act.

That provision appears to envisage that the Court of Appeal could be empowered by an Act to give leave to appeal to the Privy Council in criminal cases. There is a relevant contextual argument, however. As we have said, "judgment" in the replaced Rule 2 was interpreted to exclude judgments in criminal cases as a result of the definition of the

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7 *Chung Chuck v The King* [1930] AC 244 (PC). See also Mance and Turner, above n 4, at para [3.21].
8 At 256.
9 At 256.
10 At 255.
11 At 258, citing *Nadan v The King* [1926] AC 482 (PC) at 495-496.

word "judgment" in Rule 1 of the 1910 Order. The word "judgment" in Art 59(3) appears to be subject to the same limitation.

[17] To explain, there is no definition of "judgment" in the Constitution's interpretation provision, Art 1. Nor is there any definition of it in Art 59 itself. However, Art 60, which deals with the Court of Appeal's jurisdiction to hear appeals from judgments of the High Court, contains the following clause:

> (3) *In this Article* the term "judgment" includes any judgment, degree, order, writ, declaration, *conviction*, sentence, or other determination.
>
> (Emphasis added.)

While this definition encompasses criminal matters, it is noteworthy that it applies only to Art 60. There is an identical definition in Art 62(5), which applies to the right of appeal from judgments of Justices of the Peace to the High Court, conferred by Art 62(3). Again, the definition is explicitly confined to Art 62. As there is no equivalent to Art 60(3) and Art 62(5) in Art 59, it seems likely that "judgment" in Art 59 had the same meaning as under the 1910 Order, ie, it applied only to civil cases.

[18] Next, we refer to the 1984 Act. Although that Act modified the 1910 Order in the respects mentioned at paragraph [12] above, it did not modify the definition of "judgment" in Rule 1 of the Order. The replacement Rule 2(1) opens with the words: "Subject to these rules, an appeal shall lie to Her Majesty the Queen in Council from a *judgment* of the Court of Appeal" (emphasis added). These words apply to each of the three categories of case then identified in clauses (a), (b) and (c) of the replacement Rule. "Judgment" remains defined in Rule 1 as including "decree, order, sentence, or decision", ie, there is no reference to "conviction". The long-established meaning given to those words in Privy Council and other decisions is that they exclude criminal cases. Consequently, we are obliged to apply that limitation to each of the three categories.

[19] So, even though the new clause (a) in replacement Rule 2(1) could, standing alone, encompass criminal as well as civil cases given the reference to cases involving substantial questions of law as to the interpretation or effect of the Constitution, in fact its meaning is limited by its context (ie, the use of the word "judgment" in the opening words of the replacement Rule) to civil cases, as with clauses (b) and (c). Accordingly, leave to appeal in criminal cases involving substantial questions of law as to the

interpretation or effect of a provision in the Constitution must be sought directly from the Privy Council under s 6 of the 1984 Act.

[20] Finally, we come to other arguments made by Mr Clee. Mr Clee emphasised that the issue of leave to appeal to the Privy Council depends on the law of the country concerned. He argued that the Crown's reliance on authorities such as *Chung Chuck* was misplaced because the replacement Rule 2(1) was "entirely different" from the replaced Rule 2. Mr Clee submitted that despite the similarity of language between the replacement Rule 2(1)(b) and (c) and the replaced Rule 2(a) and (b), it was necessary to reconsider the interpretations reached in earlier cases against the background that it was now accepted that jurisdictions were free to make their own rules about appeals to the Privy Council. As Mr Clee put it, "the goal posts have moved" since the decision in *Chung Chuck*, so that the decision in that case needs to be reassessed.

[21] Mr Clee drew attention to the absence of the word "and" at the end of clauses (a) and (b) of the replacement Rule 2(1) (as opposed to its presence at the end of clauses (a) and (b) in the replaced Rule 2). This indicated, Mr Clee argued, that clauses (a), (b) and (c) of the replacement Rule 2(1) provided three distinct options. His argument was that the clauses were not linked in the way that the three clauses in the replaced Rule 2 were. Mr Clee also emphasised the change from the words "that Court" in the replaced Rule 2(b) and (c) to "the Court" in the replacement Rule 2(1)(a), (b) and (c).

[22] While we accept that there have been significant changes in the powers of former colonies since the decision in *Chung Chuck*, the issue for us is the intention of the Cook Islands legislature when enacting the 1984 Act. The Court derives guidance as to that from the fact that, although the language of the replacement Rule 2(1)(a) is new, the language of replacement Rule 2(1)(b) and (c) is essentially identical to that of the replaced Rule 2(a) and (b). As the Crown argued, the linguistic changes referred to by Mr Clee are simply cosmetic or stylistic in nature.

[23] Equivalents to the new clause (a) in replacement Rule 2(1) (dealing with appeals in cases raising constitutional issues) are found in numerous Commonwealth countries which adopted written constitutions. Often, there is an appeal as of right, albeit that there must be an initial application for conditional leave to the local Court of Appeal.[12]

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[12] See Mance and Roberts, above n 4, at paras [3.04], [3.07]-[3.11] and Table at pp 56-66.

But the critical point is that this type of clause is not unusual. Equally critical in our view is the fact that, as at 1984, the language of replaced Rule 2(a) and (b) had a settled meaning, which the Cook Islands Legislature adopted without substantive change in replacement Rule 2(1)(b) and (c). There is nothing to indicate that the Legislature intended to vary the meaning previously given to those provisions or to alter their meaning by the addition of replacement Rule 2(1)(a). Nor is there anything to indicate the Legislature intended the new clause (a) to be interpreted other than in the context of the whole Rule and consistently with clauses (b) and (c). In other words, there is no indication that clause (a) was intended to be read as a standalone provision.

[24] There is support for the view just expressed in an article by Dr Alex Frame, who was an independent advisor to the Cook Islands Government over many years. In 1984 Dr Frame published an article entitled "The Cook Islands and the Privy Council".[13] In that article, Dr Frame traced the history of appeals from Cook Islands courts, which initially went to New Zealand courts. He noted that following the inclusion of Art 59(2) in the Constitution, there were several uncertainties that needed to be resolved concerning appeals to the Privy Council, which could most conveniently and authoritatively be done by an Act of the Cook Islands Legislature. Dr Frame concluded:[14]

> To comply with article 59(2) of the Constitution the 'cases' and 'conditions' should be 'prescribed by Act'. The need to provide an accessible set of rules and procedures for appeals would be met by providing the grounds for appeal in an Act of the Cook Islands Parliament and the technical detail in the widely available New Zealand Regulations series. *The result would be that the 1910 Rules would be, for the Cook Islands, exactly as they are in New Zealand except for the express recasting of Rule 2 of the 1910 Rules*. In the event that New Zealand abandoned appeals to the Privy Council and, consequently, sought the revocation of the 1910 Rules, the scheme adopted would not be affected. The Rules would continue in force as part of Cook Islands law whatever their fate as part of New Zealand law.
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> (Emphasis added.)

The recasting referred to was to address the uncertainties Dr Frame had identified. These did not include conferring on the Cook Islands Court of Appeal the right to grant leave to appeal to the Privy Council in criminal cases.

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[13] Alex Frame "The Cook Islands and the Privy Council" (1984) 14 VUWLR 311.
[14] At p 316.

[25] When enacted, the 1984 Act incorporated the 1910 Order as part of the law of the Cook Islands. It made only one substantive change to Rule 2, namely explicitly addressing appeals which raised substantial constitutional points but, for the reasons we have given, only in relation to civil cases. The other changes were part of the process of incorporation.

[26] In the result, we conclude that the Court does not have the power to grant leave to appeal to the Privy Council in criminal cases. In such cases, special leave must be sought directly from the Privy Council. Despite this, however, we have gone on to consider whether this is the type of criminal case which might merit consideration by the Privy Council. We have concluded that it is not, for the reasons set out below.

Merits

[27] The Privy Council grants special leave to appeal in criminal cases "where, in the opinion of the Appeal Panel, there is a risk that a serious miscarriage of justice may have occurred".[15] The test is a relatively high one. In *Nadan*, the Privy Council said:[16]

> It has for many years past been the settled practice of the Board to refuse to act as a Court of criminal appeal, and to advise His Majesty to intervene in a criminal case only if and when it is shown that, by a disregard of the forms of legal process or by some violation of the principles of natural justice or otherwise, substantial and grave injustice has been done.

[28] In relation to sentence appeals (and putting death penalty cases to one side), the Privy Council is most unlikely to grant special leave to appeal. In *Badry v Director of Public Prosecutions*, the Privy Council took the opportunity to reiterate its traditional approach to granting special leave in criminal cases.[17] In respect of sentencing matters, the Privy Council repeated the practice direction issued by Lord Dunedin[18] as follows:[19]

> Their Lordships have repeated ad nauseam the statement that they do not sit as a Court of Criminal Appeal. For them to interfere with a criminal sentence there must be something so irregular or so outrageous as to shake the very basis of justice. Such an instance was found in *In re Dillet* ((1887) 12 App Cas 459), which has all along been held to be the leading authority in such matters. In the present case - an Indian petition for special leave to appeal against conviction and sentence of death for murder - the only real point is a point for argument

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15 JCPC Practice Direction 3, at [3.36]. See Mance and Roberts, above n 4, at paras [3.59]-[3.64].
16 *Nadan*, above n 11, at 495.
17 *Badry v Director of Public Prosecutions* [1983] 2 AC 297 (PC).
18 Practice Note (1932) 48 TLR 300.
19 *Badry*, above n 17 at p 303.

> on a section of a statute, and all that the petitioners can say is that it was wrongly decided. That is to ask the Board to sit as a Court of Criminal Appeal and nothing else.

Given changing attitudes to the death sentence, the approach articulated in this extract may now be modified somewhat in that context, but that is not an issue in the present case.

[29] Against this background, we turn to the issue which the Applicant wishes to raise on appeal before the Privy Council, namely the correct approach to discharges without conviction under s 112 of the Criminal Procedure Act.

[30] Sections 112(1) and (2) provide:

> (1) The Court, after inquiry into the circumstances of the case, may in its discretion discharge the defendant without convicting him, unless by an enactment applicable to the offence a minimum penalty is expressly called for.
>
> (2) A discharge under this section shall be deemed to be an acquittal.

[31] In addressing the application for a discharge without conviction, which the Crown opposed, Potter J noted that the two charges on which the Applicant had been found guilty each carried a maximum penalty of two years imprisonment. Her Honour then referred to the decision of this Court in *R v Katoa*.[20]

[32] In that case, noting that there were no statutory guidelines in the Cook Islands relating to the exercise of the discretion conferred by s 112, the Court adopted the approach set out in s 107 of the New Zealand Sentencing Act 2002, to the effect that a court could not discharge a defendant without conviction under s 106 unless satisfied that "the direct and indirect consequences of a conviction would be out of all proportion to the gravity of the offending". The Court identified four steps in the analysis:

> (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.

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[20] *R v Katoa* [2022] CKCA 3.

(d) Decide whether the overriding discretion conferred by s 106 should be exercised.

[33] In relation to these steps, Potter J concluded:[21]

(a) The offending was domestic violence of moderate to high gravity and the Applicant showed no remorse or regret.

(b) The Applicant's ability to travel to the United States would be affected by a conviction, but would be affected even if a discharge was granted because arrests and charges were also required to be disclosed to US immigration authorities. The Judge regarded the limitations on the Applicant's ability to travel as "somewhat nebulous and uncertain".

(c) The consequences of conviction were not out of all proportion to the gravity of the offending.

(d) From the perspective of the overriding discretion, the Judge was satisfied that that a discharge without conviction would "fail to meet or respect the purposes and principles of sentencing, accountability, responsibility, denunciation and deterrence, and provision for the interests of the victim".

[34] On appeal to this Court, Potter J's analysis was upheld.[22]

[35] Ms Jayanandan, who argued this part of the case, did not dispute the application of the proportionality principle in this context. What she objected to was the importation of the "out of *all* proportion" standard from s 107 of the New Zealand Sentencing Act, which she said created a higher bar than simple proportionality and placed an improper fetter on the discretion conferred on Cook Island courts by the Legislature in s 112. Ms Jayanandan argued in addition that New Zealand's "clean slate" legislation[23] accommodated a higher proportionality test for a discharge without conviction because it allowed a person convicted of certain offences to achieve a "clean slate" after seven years. Given that there was no similar legislation in the Cook Islands, the New Zealand "out of all proportion" test operated unfairly against Cook Islanders. Accordingly, simple proportionality was the appropriate approach.

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[21] *R v Utanga*, above n 2, at [10]-[29].
[22] *Utanga v R*, above n 3, at [71].
[23] The Criminal Records (Clean Slate) Act 2004.

[36] We make two points. First, it is commonplace in common law jurisdictions which do not have sentencing councils for courts of criminal appeal to develop sentencing guideline judgments. Legislatures often simply indicate the types of sentence available for particular offences and, if imprisonment is an option, do no more than identify the maximum term available. Sentencing guideline judgments help ensure consistency and rationality in sentencing, which are important components of a functioning criminal justice system in a liberal democracy. In developing such judgments, appellate courts may sometimes refer to experience from jurisdictions with which they have close links, but if they do so, they recognise that such experience may not be transferrable as a result of, for example, social, cultural or economic differences. The key point, however, is that guideline sentencing judgments are ultimately guidelines and typically allow sentencing judges the flexibility necessary to accommodate any special circumstances in individual cases.

[37] Second, the four-step guideline adopted by this Court in relation to discharges without conviction meets each of these elements, that is, the systemic concern for consistency and rationality together with the ability to do justice in the individual case. The latter point is illustrated by the following extract from this Court's judgment in the Applicant's appeal:

> [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. Contrary to Mr Clee's submission, it is therefore safe in the Cook Islands to 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.

In short, the guidelines do not amount to a straitjacket.

[38] Finally, for the sake of completeness we note that there may be cases where a sentencing judge could legitimately take in to account the absence of "clean slate" legislation in the Cook Islands when considering whether or not to grant a discharge without conviction.

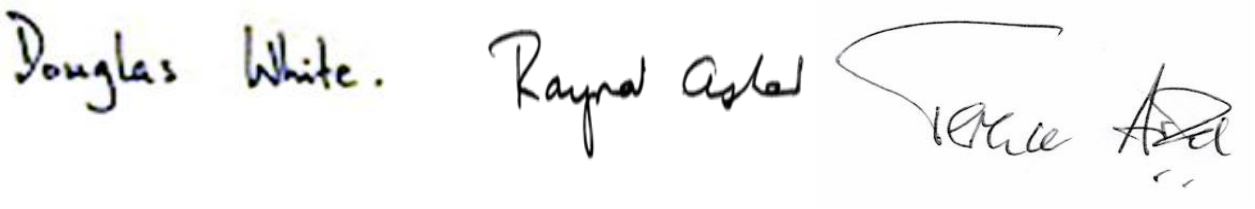
[39] In these circumstances, we would not have granted leave to appeal to the Privy Council had we had the power to do so.

Decision

[40] For the reasons given in this judgment, the application for leave to appeal to the Privy Council is dismissed.

[41] On 12 May 2025 (CI time)/13 May 2025 (NZ time), the Court, by consent, directed that the Applicant's sentence of one year of supervision be stayed pending the outcome of his application for leave to appeal. At the conclusion of the hearing, Mr Clee asked that in the event the application was unsuccessful, the stay be continued for one month to permit the Applicant to take steps to lodge an application for special leave to appeal with the Privy Council. If that step was taken within the one month time period, the Applicant asked that this Court to extend the stay until the Privy Council had finally determined the matter, either by refusing leave or determining the substantive appeal.

[42] There being no objection from the Crown, the Court is prepared to accede to this request. Accordingly, we stay the Applicant's sentence of one year's supervision for 30 days from the date of delivery of this judgment. If an application for special leave to appeal is filed with the Privy Council before the expiry of the month, the stay will remain in force until the Privy Court determines the matter, either by refusing leave or dismissing the substantive appeal.



Douglas White P **Raynor Asher JA** **Terence Arnold JA**