IN THE HIGH COURT OF THE COOK ISLANDS
HELD AT RAROTONGA
(CRIMINAL DIVISION)

CR NO's 308-315/20
CR MISC. 15/2021

BETWEEN **PAUL RAUI ALLSWORTH**

Informant/Applicant

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

Defendants/Respondents

Date of Application for Leave to Appeal out of time: 6 July 2021

Date of Hearings by zoom: 9 August 2021 (adjournment)
23 August 2021 (substantive)

Counsel: Mr N George, for Informant/Applicant Allsworth
Messrs K Raftery QC and B Marshall for Defendant/Respondent Puna
Messrs K Raftery QC and T Arnold for Defendant/Respondent Brown

Date of Judgment: 1 September 2021

JUDGMENT OF HON. HUGH WILLIAMS, CJ
(Leave to Appeal Out of Time)

[0160.dss]

Result:

A. The finding is that there is no jurisdiction for the High Court to grant leave to informants to appeal to the Court of Appeal against judgments of the High Court holding there is no case for defendants to answer on informations brought against them, dismissing those informations and acquitting the defendants accordingly;

B. That even were there jurisdiction for the informant to appeal the oral judgment of 19 March 2021 in this matter to the Court of Appeal, for the reasons set out in this judgment the facts and the law do not disclose sufficient basis for extending the time for the informant to seek leave to appeal to the Court of Appeal or to make an order in the informant's favour granting that leave, and the applications to that effect are accordingly dismissed;

C. That, for the reasons in [75](c), this judgment will be released publicly after 5 working days from its delivery unless counsel submit to the contrary.

Introduction and Summarised Chronology

[1] On 6 July 2021 the abovenamed informant/applicant, Mr Allsworth, applied out of time for leave to appeal to the Court of Appeal against the dismissal on 19 March 2021 of the private prosecution he had brought as informant against the abovenamed defendants, Messrs Puna and Brown, at the time of the judgment respectively Prime Minister and Deputy Prime Minister of the Cook Islands[1].

[2] While a rather more detailed history of the efforts of the group which styles itself Citizens Against Corruption,[2] of which Mr Allsworth is a member,[3] to prosecute the defendants/respondents can be found in the numerous affidavits, exhibits, minutes and judgments filed or delivered in relation to the two private prosecutions they have brought, to put the present application in context, the following summarized history of the matters is pertinent.

[3] On 6 December 2019, a Mr Teokotai Noo George, another member of the Citizens Against Corruption group, filed informations against both Messrs Puna and Brown alleging they conspired with each other to breach s 280 of the Crimes Act 1969 and s 64(2)(d)(i) of the Ministry of Finance and Economic Management Act 1995-96 by arranging for two charters of Air Rarotonga aircraft to fly to Pukapuka and Penrhyn to uplift newly elected Members of Parliament and former Members of Parliament following the 14 June 2018 General Election. Generally put, the conspiracy alleged was that the defendants fraudulently arranged for public funds to be used to pay for the flights when they were for their private political purposes. The informations[4] asserted that the Penrhyn flight was disguised as an emergency medical evacuation when no medical emergency existed, while the Pukapuka flight was paid for out of

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1 In September 2021 Mr Puna resigned as Prime Minister and as a Cook Islands MP and is now Secretary-General of the Pacific Islands Forum and Mr Brown became Prime Minister.

2 Now Citizens Against Corruption Inc, an incorporated society.

3 As may be Mr Norman George, at most times counsel for both informants; T N George undated affidavit re costs, at 11.

4 CR 724-727/19.

the Civil List when it was alleged that the criteria for such payments were not met. The original informations were signed for Mr T.N. George by Mr Norman George[5].

[4] On 16 March 2020, after a number of amendments had been made to the informations and the informant had instructed new counsel, Messrs Pyke and Rasmussen, Mr T N George withdrew the informations.[6]

[5] On 22 July 2020 Mr Allsworth swore out a new set of informations against the defendants, the text of which appears in the judgment of 19 March 2021, as follows:

> [11] The two offences with which the defendants are charged fall into two pairs. CRN 311/20 & 315/20 allege that between 14 June and 3 July 2018 Mr Puna with Mr Brown, or in the other one of the pair, Mr Brown with Mr Puna,
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> (a) did conspire with each other by deceit or other fraudulent means to defraud Her Majesty The Queen by participating in a scheme whereby money which belonged to Her Majesty The Queen was fraudulently used for private purposes, namely the charter of an aircraft, paid for under the Civil List Act 2005, with cash, for the purpose of transporting the newly elected Member of Parliament for Pukapuka, Mr Tingika Elikana, in order to create political unity and stability in the Cook Islands Party when Mr Elikana needed to be pacified and consoled for missing out on a Cabinet post, together with the former MP for Pukapuka, Mr Tekii Lazaro, and their wives, all of them being residents of Rarotonga, and not entitled to free air transport under the Civil List Order 2009/04, s 6(a) and 7, in breach of s 280 of the Crimes Act 1969[7].
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> [12] The other pair of remaining operative[8] informations, CRN 310/20 & 314/20, allege that between 14 and 30 June 2018, Mr Puna with Mr Brown, or in the other half of the pair, Mr Brown with Mr Puna,
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> (a) did conspire with each other by deceit or other fraudulent means to defraud Her Majesty The Queen by participating in a scheme whereby money which belonged to Her Majesty The Queen was fraudulently used for private purposes, namely the charter of an aircraft, with cash, from the Ministry of Health Medivac Scheme, under the false pretence of a sick patient evacuation, the alleged patient being Mr Willie John, former MP for Penrhyn, when the real purpose was to uplift Mr Robert Tapaitau, the newly elected Member of Parliament for Penrhyn, and his wife, to Rarotonga on 30 June 2018 to secure

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5 "Mr George" to distinguish him from Mr T N George.

6 See *Allsworth v. Puna & Brown*, CRN 308-315/2020, Stay Judgment, 23 December 2020, Hugh Williams CJ, at [6]-[30].

7 "The Pukapuka Flight".

8 The use of this term is explained in the judgment at [2] and [3] but needs no recital as it is not relevant to the present application.

> his support for the Cook Islands Party and the personal benefit of the defendants as Prime Minister and Deputy Prime Minister respectively[9].

[6] After an unsuccessful application by the defendants to stay the 22 July 2020 informations[10], they went to trial before Hugh Williams CJ sitting, by consent, as a Judge Alone[11], with the evidence being given on 15-18 March 2021.

[7] After the informant's case was formally closed, Mr Raftery QC, senior counsel for the respondents, applied for dismissal of the informations on the ground that the evidence disclosed no case for them to answer and, in an oral decision delivered on 19 March 2021, the application was granted with the decision being summarised in the following passage:

> [136] Rounding all that off, and dealing first with the Pukapuka flight, the finding is that it has not been shown to the required standard that the circumstances amounted to the furtherance of a criminal conspiracy between Messrs Brown and Puna to commit a crime within the meaning of the authorities. No conspiracy was alleged and no crime proved, whether under s 280 or otherwise. In part, their actions as proved may have been legally erroneous but no part has been shown to have been founded in deceit or in other fraudulent means or with the intention of defrauding the public, and accordingly it has not been shown that the defendants have any case to answer in relation to the Pukapuka flight. There being no case to answer, the consequence of that is that informations 311/20 and 315/20 must be dismissed as having no possible basis for success. The defendants are therefore acquitted on those informations and verdicts of "Not Guilty" are entered on the same.
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> [137] In terms of the Penrhyn flight, again it has not been shown to the required standards that Messrs Brown and Puna entered into a conspiracy to commit a crime within the terms of the authorities, either under s 280 or otherwise. It has not been shown that their actions in respect of that flight were motivated by deceit or other fraudulent means and it has not been shown that such actions of theirs as were proved to have occurred were intended to defraud the public.
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> [138] Accordingly the orders will be that those two informations must also be dismissed as being incapable of leading to a verdict of guilty. The defendants are therefore acquitted on informations 310/20 and 314/20 and verdicts of "Not Guilty" are entered on the same.
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> [139] The charges under the Ministry of Finance and Economic Management Act are to be marked "not to be proceeded with without the leave of the Court or the Court of Appeal". In light of all the findings of law and fact throughout this judgment the

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9 "The Penrhyn Flight".

10 See fn 6 *supra.*

11 Judicature Act 1980-1, s 15A: s 280 has a maximum penalty of 5 years imprisonment and is in Part X of the Crimes Act 1969.

> possibility of leave being granted is not expected to excite any enthusiasm for leave to be sought.
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> [140] The overall result therefore is that the private prosecution is at an end with both defendants being acquitted on all charges.

[8] While the judgment was delivered in open Court on 19 March 2021 a few days elapsed before both a verified transcript of the evidence was available to the parties and a typescript of the judgment. As a result, at the informant's request, a summary of the judgment was issued on 1 April 2021. The typescript of the full judgment followed on 6 April 2021.

[9] On 27 April 2021, Mr Allsworth, acting personally and not through Mr George, filed his own application for leave to extend by 20 days the time available to him to file a Notice of Appeal on the grounds that the transcript of the evidence was still unavailable. The application was intituled as brought under ss 58(2)(b) and 59(b) of the Judicature Act 1980-1[12] but when it was pointed out to Mr Allsworth that those sections only relate to appeals in civil cases and that any application thereunder should not have been to this Court but to the President or a Judge of the Court of Appeal, no amendment was sought, no further action could be taken on the application and it lapsed accordingly.

[10] At the time, Mr Allsworth filed no second application, but on 6 July 2021, 108 days after delivery of the 19 March 2021 judgment, Mr Allsworth, by then again acting through Mr George, applied for leave to appeal the judgment and to extend the time for him so to do. It is with those applications that this judgment is concerned.

[11] On 30 April 2021 the defendants filed a Notice of Opposition to Mr Allsworth's 27 April 2021 application opposing the grant of leave on the basis that the judgment had been available from 1 April 2021 (summary) and a full copy issued on 6 April 2021 and making the point that production of a transcript of the evidence at the hearing was not vital to informants bringing appeals as any appeal would be based on the judgment, not the evidence, and saying "there is no good reason why the informant failed to meet the prescribed time for filing his notice of appeal".

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[12] Enacted by s 2 of the Judicature Amendment Act 2011.

[12] On 8 July 2021 the defendants filed a Memorandum in Opposition to Mr Allsworth's second leave application saying the "grounds of opposition to the original application … remain applicable to this latest application" and that "the defendants oppose this latest application on the same grounds".

Explanation for Delay in Filing Second Leave Application

[13] Mr Allsworth filed a brief affidavit in support of his 6 July 2021 leave application recounting the history of the availability of the transcript of the evidence and saying that, since 27 April 2021, "we have been trying to instruct a senior barrister and solicitor in New Zealand to act for us" but "to date we have not heard from him despite many follow ups" so "we have decided to reinstruct the prosecuting counsel to act for us again to file this application" as a consequence of which "Mr George, with some reluctance, agreed to act for us if we have no-one else". The affidavit said the Citizens Against Corruption group was taking its action in what it sees as the public interest.

[14] Mr George filed two sets of submissions in relation to the current matter, the first dated 6 July 2021 and attached to the second leave application, and the second dated 16 August 2021 in response to Mr Raftery's submissions dated 22 July 2021[13]. In the second, Mr George submitted[14] that the application for leave was out of time was "because local lawyers were scarce or unwilling to act and difficulties were experienced instructing a New Zealand based lawyer" and that "CAC has no funds to finance legal counsel from New Zealand and I was the only one willing to do it *pro bono* even though I was suffering from stress and fatigue working on my own". At the hearing Mr George said he was continuing to act *pro bono*. The submissions continued by submitting[15] that a "three month delay in seeking leave to appeal is not unreasonable comparing the position of the two parties"; that "CAC is impoverished with no access to legal, financial and logistical facilities," but that "the defence on the other hand had easy access to everything especially when the two defendants have government personnel and facilities at their disposal and unashamedly used them during these proceedings".

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13 The applicant's submissions will hereafter be referred to respectively as A (for Applicant) 1 or 2, followed by the paragraph reference.

14 A 2.12 (a)(b).

15 A 2.13 (a)-(c).

[15] Evaluating those assertions, it is to be noted that there is no evidence to support CAC's claimed indigence or underpinning Mr George's comments about the defendants' position and that difficulties engaging counsel are barely adequate as an explanation for delays in applying for leave. But, if the circumstances discussed in the following portions of this judgment disclose that there is both jurisdiction to bring an appeal in the circumstances of this matter and good grounds for so doing, the proper approach must be not to hold the inadequate reasons for delay in applying for leave as determinative against the informant.

Does Jurisdiction Exist to Appeal the 19 March 2021 Judgment in the Circumstances of this Matter?

[16] To reiterate, the 19 March 2021 judgment was on the defendants' application to dismiss the informations under s 280 of the Crimes Act 1969 on the basis that the evidence before the Court adduced by the prosecution – whose case had been closed – disclosed no case for the defendants to answer. The test to be applied in such situations is whether the evidence before the Court disclosed evidence on which the trier of fact, properly directed and applying the applicable law, might convict the defendants. But, as this was a Judge Alone trial, the trier of fact had the advantage of considering the evidence both in the context of its legal components and as the one making the jury-like decision as to whether the evidence, matched against the elements of s 280, could result in conviction. For that reason, the finding that there was no case on the evidence for the defendants to answer necessarily led to dismissal of the informations and acquittal of the defendants.

[17] It being common ground that acquittals are normally unappealable in Common Law jurisdictions such as the Cook Islands, the threshold question then arises as to whether there is jurisdiction in law for Mr Allsworth to appeal the acquittals in this case.

[18] Mr Raftery's submissions were that the law and traditional public policy were such that there could be no appeal against a finding that the evidence adduced by the prosecution provided no case for defendants to answer. This was on the basis that prosecutors have never been able to appeal acquittals whether by jury, Judge Alone or following a finding of no case to answer. He submitted that the only possible exception to that principle might be that provided by s 75D of the Judicature Act 1980-1[16] which gives High Court Judges power, during

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[16] Also enacted by s 2 of the Judicature Amendment Act 2011.

or after a trial, to reserve a question of law arising in the trial for the opinion of the Court of Appeal.

[19] That, however, requires identification of a question of law arising during or after the trial and, as will be seen, identification of any questions of law raised on Mr Allsworth's behalf is very difficult.

[20] Mr George – who candidly acknowledged during the hearing being unaware of s 75D until receiving Mr Raftery's submissions – suggested that the defendants' approach adopted New Zealand precedent, something which was inappropriate in the Cook Islands as a wholesale proposition[17] and, while acknowledging that there is no relevant statutory provision in the Cook Islands, suggested the applicability of the proviso to s 3 of the Criminal Procedure Act 1980-1 was tempered by s 99 dealing with preliminary proceedings.

[21] The proposition that the situation existing when the 19 March 2021 judgment was delivered might at this late stage be translated into a preliminary proceeding under s 99 fails when the terms of the section are considered. It applies "where a trial of any person is to be heard" so is clearly prospective, not retrospective; it applies only when the mode of trial is under ss 14, 16 or 17 of the Judicature Act 1980-81 when this was under s 15A; it provides for written witness statements being tendered at least 28 days before trial with the defence having the right to have those statements considered by a JP; and it applies only to the situation where a Justice has to decide whether a defendant should be committed for trial[18] with the requirements of the section to follow being set out. True, s 99(1)(k) provides that a "discharge of the defendant under this subsection shall not operate as a bar to any other proceedings in the same matter" by contrast with s 111(2), but those statutory requirements make clear that Mr Allsworth has no recourse to s 99 of the Criminal Procedure Act 1980-81 in the circumstances of this matter.

[22] Reverting to s 75(D)(1), there having been no request from the prosecution under that section during the trial for reservation of any point of law for the Court of Appeal, and s 99 of the Criminal Procedure Act 1980-81 being inapplicable, it would be strained and artificial to now reserve for the Court of Appeal any points of law that can be identified from Mr George's

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17 Sec 3, Criminal Procedure Act 1980-81. Article 46 of the Constitution. A 1.5.39.
18 Section 99(1)(h).

submissions for the Court of Appeal, particularly having regard to the findings later in this judgment which all assert, as Mr Raftery emphasised, matters of fact.

[23] In those circumstances, the only other possible provisions which might give the Court jurisdiction to grant Mr Allsworth's application for leave to appeal in the circumstances of the 19 March 2021 judgment are by way of s 68 of the Judicature Act 1980-1[19] or Article 60 of the Constitution.

[24] Section 68 reads:

> 68. Appeals with leave – (1) A person convicted before a Judge of the High Court sitting with or without a jury —
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> (a) whose sentence is a fine less than $200; or
> (b) who has been sentenced to a community sentence; or
> (c) who has been convicted and discharged,
>
> may, with the leave of a Judge of the High Court, appeal to the Court of Appeal against his or her conviction or sentence or both conviction and sentence.
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> (2) Both the prosecutor and any person convicted by a Justice or Justices of the Peace who has appealed to a Judge of the High Court under section 76(7) may further appeal to the Court of Appeal against the decision of the Judge of the High Court, with the leave of a Judge of the High Court.
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> (3) If a Judge of the High Court refuses leave to appeal under subsections (1) or (2), the intended appellant may apply in accordance with the Rules of Court to a single Judge of the Court of Appeal who is not also a Judge of the High Court for leave to appeal to the Court of Appeal[20].
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> (4) Leave to appeal may be given on conditions as to filing the appeal within a stated period but there shall be no condition imposed requiring the giving of security for costs of the appeal.

[25] Sections 68(1)(3)(4) being presently inapplicable, the only possible provision of s 68 enabling the High Court to grant leave to appeal to persons in Mr Allsworth's position would be by way of s 68(2) but, as was observed in Joint Minute (No's 22 & 14),[21] for Mr Allsworth as prosecutor to be given a right of appeal, with leave, to the Court of Appeal against the 19

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19 Also enacted by s 2 of the Judicature Amendment Act 2011.

20 All Court of Appeal Judges are High Court Judges: Art 56(2)(a)(3) enacted by s 7 of the Constitution Amendment (No.28) Act 2009.

21 Issued 19 July 2021, at [13].

March 2021 judgment under s 68(2) requires the insertion of commas after both the words "prosecutor" and "s 76(7)" and construing the subsection as if the word "further" were superfluous. As Mr Raftery submitted, s 68(2) clearly applies only to the situation where there has been an appeal to the High Court from a decision of a JP and gives a second appeal, with leave only, for that matter to proceed to the Court of Appeal. That is, of course, not the case here so s 68(2) is therefore inapplicable to create jurisdiction for the High Court to grant leave to appeal to persons in Mr Allsworth's situation.

[26] That leaves Art 60 of the Constitution[22] as the only possible avenue giving a right of appeal against acquittals. The Article reads:

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

[27] At this point, Art 60(2) is inapplicable but it is clear that, under Art 60(3), the judgment of 19 March 2021 is a "judgment … order … or other determination" of the informations and accordingly the question is whether the 19 March 2021 Judgment is appealable by dint of the operation of Art 60(1)(a).

[28] That consideration, in its terms, is narrowed as it was common ground that jurisdiction to appeal against the 19 March 2021 Judgment is nowhere "prescribed by Act" and that there is nothing elsewhere in the Constitution affecting the situation, so the possible avenue of appeal is not "subject to the provisions of this Constitution" itself.

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[22] Also enacted by s 7 of the Constitution Amendment (No.28) Act 2009.

[29] That means there is only power for this Court to grant Mr Allsworth's application to appeal against the 19 March 2021 if that situation can be brought within the phrase "the Court of Appeal shall have jurisdiction to hear and determine … any appeal from a judgment of the High Court".

[30] Mr George, naturally, submitted that the phrase created a general right of appeal rather the alternative construction that, if there is a right of appeal from judgments of the High Court created by some other provision, those appeals are to be heard and determined in the Court of Appeal. Mr Raftery, again naturally, contended that the relevant phrase in Art 60(1)(a) did not itself create a right of appeal in situations such as the present but ordained the forum for the determination of appeals brought pursuant to rights of appeal created by other statutory provisions.

[31] It is considered that the defendants' submissions are correct and the relevant provisions of Art 60(1)(a) prescribe the forum for hearing appeals from High Court decisions brought under other statutory provisions, but do not create a right of appeal from them.

[32] Looking at the issue from the viewpoint of policy, there is a wealth of authority from around the Common Law world that acquittals are unappealable.[23] The principle is regarded as a fundamental incident of the Rule Against Double Jeopardy. In some jurisdictions the principle is expressly set out in the Constitution.[24] In some the principle is grounded on Constitutional provisions similar to Art 60(1)(a) as supported by Court decisions.[25] In what would appear to be the case in virtually all jurisdictions, it seems to be accepted that any derogation from the principle can only be brought about by statute specifically addressed to the topic and, even in those jurisdictions, the grounds on which acquittals are challengeable are heavily restricted and do not apply in circumstances like the present[26].

[33] Those criteria not applying to the present case, there is no basis as a matter of principle for construing Art 60(1)(a) as creating jurisdiction for this Court to grant Mr Allsworth's application for leave to appeal the 19 March 2021 acquittals.

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23 Google search, any more traditional research being impossible in the present circumstances.
24 Such as the 5th Amendment to the Constitution of the USA.
25 E.g. *People v. O'Shea* [1982] I R 384 (Supreme Court of Ireland).
26 See Criminal Procedure Act 2011(NZ), ss 147 & 151-6.

[34] Then, considering the issue from a more domestic viewpoint, the most telling factor against a finding that acquittals are appealable in the Cook Islands is that, when Parliament was passing Part IV – the Part containing the "Provisions Relating to **All**[27] Appeals" – of the Criminal Procedure Act 1980-1, it created, especially in s 131, a comprehensive suite of powers for Courts dealing with appeals against convictions or sentences, but created no powers relating to appeals against acquittals. Had Parliament intended to depart from the Common Law principle that acquittals are unappealable when it was enacting provisions relating to "all" appeals it would have provided an express regime for appeals against acquittals. It enacted nothing in that area.

[35] Further, counsel were unable to refer to any attempt by prosecutors to appeal acquittals in the 40 years since the Criminal Procedure Act 1980-1 was passed. Mr George, the main defence counsel in Rarotonga for many years, would have known of any such attempt had it been made, but referred to none, even though such a precedent might have assisted Mr Allsworth.

[36] To this point, those two matters are strong indicators that acquittals are to be regarded as unappealable in the Cook Islands and that Art 60(1)(a) should not be construed so as to create a right of appeal in those circumstances.

[37] Additional, though less potent, factors against the reading of Art 60(1)(a) for which the informant contends are that, were Mr George's submissions correct, the Article would create a right of appeal against any judgment of the High Court, even those which are by statute unappealable[28]. To construe Art 60(1)(a) as creating a general right of appeal against High Court decisions could found arguments cutting across the provisions creating a right of appeal from High Court decisions but only with leave. Given that the Court in which JPs who qualify under s 11 of the Justices of the Peace Act 2017 sit is the High Court,[29] such a construction could run counter to the provisions governing appeals from JPs' sittings. Those difficulties also militate against a finding that this Court has power to grant Mr Allsworth's application.

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27 Emphasis added.

28 E.g. Chief Justices' refusals under s 390A(2) to make orders under s 390A of the Cook Islands Act 1915 (NZ) in applications under that section.

29 Justices of the Peace Act 2017, ss 4, 11 & 12.

[38] Given all of that, both as a matter of principle and because of the lack of any enabling statutory provision, the conclusion is that no jurisdiction is given to this Court to grant informants' attempts to appeal acquittals in criminal cases, either in the circumstances in which the 19 March 2021 judgment was delivered or generally, and accordingly Mr Allsworth's applications for leave to appeal to the Court of Appeal against that judgment and to extend the time for him so to do must be dismissed for lack of the requisite jurisdiction.

Was the Judgment of 19 March 2021 a "wrong decision on the question of law based on … mistaken identification and interpretation of the facts"?[30]

[39] Despite the conclusion that the acquittals judgment of 19 March 2021 is unappealable, it was made clear during the hearing that the view of Mr Allsworth and the CAC Group as to the correctness of their attitude to the matters in issue in the private prosecutions is so single-minded that they intend to try to appeal to the Court of Appeal if the decision goes against them[31]. In light of that, some comments on the other matters raised by the informant may be germane.

[40] As already noted, it is difficult to define any points of law in the judgment which the informant challenges as being erroneous but, from the matters listed as grounds in the applicant's submissions, the following appear to be the points which are claimed to be "wrong decisions on the questions of law based on mistaken identification and interpretation of the facts":

(a) an error in paragraph [34] of the 19 March 2021 judgment as to those present at a swearing-in ceremony on 5 July 2018 which is said to be a "fundamental error in using [the Chief Justice's] mistaken analysis of the above facts, to set him off course, to cleanse the two defendants of their criminal conduct"[32];

(b) an error in the judgment "by switching the order and priority of the prosecution case back to front"[33];

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30 A 1.1.

31 It was also hinted they may endeavour to appeal to the Privy Council (A 1.5.40) and it was said (A 2.14(f)&(g) p 24 of hearing transcript) that, if the group is ultimately unsuccessful in this case, a third set of informations may follow based on a different section of the Crimes Act 1969.

32 A 1.2.(a)-(h).

33 A 1.3.

(c) "the actions and activities of both defendants, setting off the conspiracy activities were completely ignored in the judgment"[34];

(d) "there is no allegation in this case of falsehood"[35];

(e) that the Cabinet Submission which was exhibited in evidence "was invalid and should not have been allowed to be minuted"[36];

(f) some general points concerning a Cabinet Minute exhibited in evidence and the evidence relating to that which "raises the question that a Cabinet Minute approving an unlawful act cannot validate that unlawful act"[37];

(g) criticisms that there were overt acts in the evidence other than those appearing in the Notice of Overt Acts[38];

(h) that paragraphs [122] and [123] of the judgment "captured the real issues of the entire case" but were erroneous on the facts[39].

[41] The overall thrust of the informant's submissions is perhaps most neatly summarised in the following passage[40]:

> 37) It is submitted that the Court's decision in reaching its conclusion that there was no case to answer was wrong, it slipped when it decided that the gathering on 5 July 2018 was to swear all MPs after the section 78 confirmation on 28 June 2018 and its finding that the switch to a non-urgent medivac evacuation from Penrhyn was a "coincidental" opportunity to uplift Robert Tapaitau, when the evidence showed a long planned arrangement. Robert Tapaitau said in evidence that he knew the charter flight to Penrhyn was intended for him all along.
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> 38) It is submitted that these are exceptional circumstances where a substantial miscarriage of justice has occurred.

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34 A 1.4.
35 A 1.5.
36 A 1.5.7.
37 A 1.5.23.
38 A 1.5(g)-(i).
39 A 1.5.24.
40 A 1.5.37 and 38.

[42] Before dealing with the individual points raised by Mr George it is pertinent to note that, although the 19 March 2021 judgment dealt with a number of moderately complex issues of law, no challenge is brought by Mr Allsworth to the observations in the judgment relating to any of them. As set out above, even the grounds on which Mr Allsworth's application is based only refer to factual matters. Examples of the issues of law dealt with in the judgment include the effect of Art 18(2) of the Constitution,[41] the rights, entitlements and obligations of MPs[42] and the interpretation to be given to provisions of the Electoral Act 2004, the Civil List Act 2005 and the Remuneration Tribunal (Queen's Representative and Members of Parliament Salaries and Allowances) Order 2009/04.[43] Some of those were contentious or had the potential to change existing practice, yet those matters are not mentioned in the application for leave to appeal. All of that may be seen as throwing doubt on the submission that the 19 March 2021 judgment includes a "wrong decision on the question of law based on … mistaken identification and interpretation of the facts"[44] and that a "wrong interpretation of the facts leads to the wrong application of the law"[45].

(A): Error in Paragraph [34] of the 19 March 2021 Judgment

[43] Turning from those general observations to the specific points raised for the informant, the first centres around paragraph [34] of the judgment which reads:

> [34] For the 2018 General Election the dissolution of Parliament occurred on 11 April 2018 under Article 37 of the Constitution. The General Election itself was held on 14 June 2018 and the Section 78 Declaration was issued on 28 June 2018. The Members who became the Government and the Members of the Opposition were all sworn in as MPs by His Excellency on 5 July 2018. And as is customary, the Members of the Parliament attended on His Excellency on that occasion.

[44] In relation to that paragraph Mr George submitted that the third (and fourth) sentences were incorrect as the only Cabinet Ministers sworn in on 5 July 2018 were the two independent MPs and the One Cook Islands Party MP, an assertion he supported by reference to Art 29 of the Constitution, the evidence as to when the s 78 Declaration of the successful MPs was made

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41 At [75] ff.
42 At [84]-[98].
43 Particularly at [99]-[115].
44 A 1.
45 A 2(a).

and the evidence as to when election petitions filed following the 14 June 2018 General Election were determined plus the date of the summons by the Queen's Representative to the MPs for the subsequent term of Parliament.

[45] Though the oral evidence was equivocal,[46] Exhibits 2 and 3 covered the swearing-in of two Ministers and it is now common ground, agreed by Mr Raftery, that the third and fourth sentences of paragraph [34] were in error and that the only persons sworn in on 5 July 2018 were Ministers Vainetutai Rose Toki-Brown, Robert Tapaitau and, possibly, George Maggie Angene[47].

[46] But does that mistake amount, as Mr George submitted, to a "fundamental error … using … mistaken analysis of the … facts, to set him off course to cleanse the two defendants of their criminal conduct"? Should that error be regarded as having the effect for which Mr George contends?

[47] There are a number of reasons why such a conclusion would be inappropriate.

[48] First, in a lengthy judgment[48] minor slips in recounting some of the detail are not uncommon. It was for that reason that the judgment began – as oral judgments habitually do – with the reservation appearing in paragraph [1] which reads:

> [1] Before beginning this judgment there are one or two housekeeping matters that need to be addressed. The first of those is that, as with any oral judgment, the right is reserved to edit it, change part and add to it on editing. There are some necessary additions – e.g. dictating footnotes disturbs the narrative of a judgment but they need to be included afterwards – and there are always infelicitous choices of words which need to be corrected and expansions needed for clarity. So there may be different routes to the terminus but the terminus will certainly be the same.

[49] As participants in the administration of justice, counsel, no matter whom they represent, have an obligation to point out erroneous statements of fact in judgments. No counsel intervened during or following delivery of the 19 March 2021 judgment to correct the oversight and no application has been filed to recall the judgment to correct the error, yet it now forms a

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46 E 6.

47 He may not have been sworn in on 5 July 2014.

48 140 paragraphs and 36 pages of typescript dealing with 475p of evidence given over the preceding four days plus a number of legal issues.

major plank of the submissions made on Mr Allsworth's behalf. That may undermine the reliance Mr George puts on it.

[50] Then, paragraph [34], because it was principally concerned with Mr Tapaitau's position, was only relevant to the charges relating to the Penrhyn flight so could have had no effect on the charges relating to the Pukapuka flight.

[51] Thirdly, the conspiracy alleged in relation to the Penrhyn flight was pleaded to have occurred between 14-30 June 2018 so the issue of who participated in the 5 July 2018 swearing-in ceremony was well after completion of the alleged conspiracy and was not therefore especially relevant to whether the evidence established the elements of a conspiracy within the dates in the informations. It was, however, relevant to the following passages in the judgment as to the rights, entitlements and obligations of MPs following a s 78 Declaration and the discussion concerning the Civil List Act 2005 and the 2009/04 Order. It was included for that purpose. The error in the third and fourth sentences of paragraph [34] was therefore, even putting it at its highest for the informant, at most only minimally consequential as far as determining whether the defendants had a case to answer, particularly as it related to the Pukapuka charges.

(B): Claimed Error in Dealing with the Order and Priority of the Informations

[52] Mr George submitted that all matters relating to the Penrhyn charter flight were the prosecution's principal case, drawing on the numbering of the informations in support, and it was therefore an error for the judgment to deal with the Pukapuka flight first.

[53] The pre-eminence of the Penrhyn charges may have grown in retrospect, but, even so, this point is no more than marginally persuasive as far as the leave application is concerned for a number of reasons.

[54] The first of those is that the numbering and order of informations filed in the Court merely represents a numerical sequence not, in principle, allied to seriousness. Even if the sequence in which Mr George handed the informations across the counter was deliberate, it could not be argued that the filing sequence imposed on the Court an obligation to deal with them in that order.

[55] Secondly, despite some submissions seemingly to the contrary,[49] Mr George accepted that this was not a case where the evidence given in relation to the Penrhyn flight could be used to strengthen the evidence given in relation to the Pukapuka flight or vice versa. Absent a situation where settled law dictates to the contrary – not the case here – it is fundamental in criminal law that the evidence given in relation to any particular information must be the only evidence used to decide whether there is a case to answer on that information.

[56] Thirdly, by contrast with jurisdictions which use indictments encompassing all the offences faced by an accused which might imply a cascade of consideration, the Cook Islands uses no such procedure. Each information must be for one offence only[50] so there is nothing to be derived from the separate informations which implies that the various charges must be dealt with in any particular order. In jury trials, while verdicts must of course be taken in respect of each charge, there is no requirement as to the order in which the verdicts are taken and no way of knowing in what order the jury considered them.

[57] Fourthly, Mr George submitted no authority to suggest that the Court was obligated to deal with the informations in any particular order. They were in fact largely dealt with in date order where it seemed logical to "clear away" the legal issues relating to the overall matter and thus create the legal landscape against which the largely factual issues concerning the charges, particularly those relating to the Penrhyn flight, could be more readily assessed.

(C): Texts as Evidence of Conspiracy

[58] Mr George's submissions dealt extensively – as had his submissions at the no case to answer stage – on text messages to and from the defendants and Mr Taipatau. That lead him to submit that the "actions and activities of both defendants setting off the conspiracy activities were completely ignored in the judgment".

[59] It is unnecessary to repeat the detail appearing in the judgment on this topic, or the conclusions, but it is perhaps symptomatic of the approach to the facts adhered to by Mr Allsworth and his supporters that Mr George's submissions completely omitted reference

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49 A 1.3(c).
50 Section 15, Criminal Procedure Act 1980-81.

to the contemporaneous texts and negotiations between Mr Tapaitau and a representative of the Democratic Party.

[60] What was also missing from the submissions was any recognition of the fact that, after the s 78 Declaration on 28 June 2018, as recorded in the judgment[51] neither of the principal parties had a majority of the 24 seats in Parliament and thus, to be able to form a government, each had to secure the allegiance of the two independent MPs and the One Cook Islands Party MP by entering into coalition agreements with them.

[61] Though the detail is obviously private, the fact that such negotiations are undertaken in those circumstances is publicly known, routine and not, of itself, conspiratorial, whether in the Cook Islands or elsewhere. In any democracy, if the electors give no party an outright majority, negotiations between political parties follow aimed at forging a majority and thus enabling a coalition government to be formed. That occurred following the 14 June 2018 poll, and for the informant's submissions not to acknowledge that, or to approach the fact that negotiations between Mr Tapaitau and the defendants took place as evidence of itself of conspiracy gave an unbalanced slant to the submissions. That was compounded by the omission of reference to the parallel negotiations between Mr Taipatau and the Democratic Party.

[62] As the judgment said, the fact of the simultaneous negotiations was relevant only as a background to the charges faced by the defendants, with the nub of the discussion of those charges being whether the overall circumstances surrounding the making of arrangements for the charter flights and, more, the payment for the same from the public purse, was shown to have created a case of possible breach of s 280.

[63] While the text messages between Messrs Puna, Brown and Tapaitau were relevant to those questions, whether or not the defendants' actions in the form of the texts put in evidence demonstrated a case for them to answer against the elements of s 280 also had to be seen in the context of the texts between Mr Tapaitau and Mr Willis, the representative of the Democratic Party. Those parallel negotiations, unremarkable in a political context, affected the inferences which might otherwise have been available from the defendants' texts alone.

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51 At [37].

[64] Turning to the making of the arrangements for the Penrhyn flight and the payment for it, there was an allegation in the informations that the Penrhyn flight was not a genuine non-urgent medivac flight and was an aspect of the defendants' conspiracy. But that was not made out in that the evidence showed that the flight was arranged on medical grounds, organised in accordance with Te Marae Ora's Referral Process and paid for by the Ministry of Health[52]. Certainly, one of the passengers for whom the flight was arranged was, by coincidence,[53] the unsuccessful CIP candidate for the Penrhyn seat, but the fact that there was to be a medivac flight was notified by the all-government email[54] of 29 June 2018 advising a large number of recipients that the Ministry of Health was chartering a flight to and from Penrhyn the following day and offering seats to any recipient who cared to book – and pay – for them. Mr Tapaitau's travel on that flight at public expense could not be challenged, he then being a declared MP. It may have been a convenient means for the defendants to continue their negotiations with him in Rarotonga, but, once he was in Rarotonga, he was available to both major parties. In the circumstances, seen in the round, all of that was not a major factor tending to proof of the elements of the s 280 charge against the defendants as far as the Penrhyn flight was concerned.

(D): That there was no Allegation of Falsehood

[65] This matter can be dealt with briefly. Mr George's submissions covered a number of aspects of the evidence which he submitted demonstrated falsehood on the defendants' part. But the passage to which he referred, paragraph [16], is no more than a recital of the elements of s 280 with a note that, although falsehood can be one of the pleaded elements of s 280, none of the informations in this case asserted falsehood. Accordingly, consideration as to whether there was evidence of a breach of s 280 was confined to considering whether there was evidence of, as pleaded, "deceit or other fraudulent means," not whether there was evidence of falsehood.

(E): Notice of Overt Acts

[66] Paragraphs [22] and [23] the judgment described the Notice of Overt Acts given on behalf of the informant said to amount to a conspiracy and noted that the formal document

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52 At [126]-[135] especially [132].

53 Mr George's submissions said (A 15(f)) the word "coincidence" was in the oral judgment but not in the written transcript, perhaps implying a generous use of paragraph [1] of the judgment, but Mr George was incorrect: see [127].

54 Exhibit 12A.

confined itself to recounting text messages to and from the defendants and only relating to the Penrhyn flight.

[67] Mr George was critical of that section[55] saying other overt acts appeared in emails, the Cabinet Submission of 28 June 2018 and Cabinet Minute (18) 0164.

[68] Again, Mr George is mistaken in this approach.

[69] The Notice of Overt Acts, something required as a normal incident of criminal procedure in conspiracy cases, was in this case expressly limited to the Penrhyn text messages so, if the usual evidential requirements of the notice had been strictly applied, the prosecution might have been precluded from adducing any other evidence to make out the alleged conspiracies. That would have dramatically reduced the evidence on which the prosecution could have relied. Sensibly, the defence did not seek to confine the prosecution to its Notice of Overt Acts, raised no objection to the wealth of other evidence adduced on the informant's behalf, and, as a result, the formal Notice was largely disregarded during the hearing.

(F): Cabinet Submission of 28 June 2018, Cabinet Quorum, Cabinet Manual and Cabinet Minute (18) 0164

[70] These topics were extensively covered in the judgment.[56] It is unnecessary to repeat that detail. Mr George's submissions[57] repeated his submissions on these topics at the hearing and argued that the Cabinet Submission was unnecessary, there was no Cabinet quorum as defined by the Cabinet Manual for the reasons he advanced and that the "Cabinet Submission was invalid and should not have been allowed to be minuted". In his later submissions[58] his earlier submissions were amplified to submit that the Cabinet Minute did not validate the Pukapuka charter which was, in Mr George's submissions, unlawful and that the Cabinet Submission was a critical part of the prosecution's evidence. These were said to be questions of law in that the "interpretation of procedures adopted by the defendants did not follow the requirements of the law".

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55 A 1.5 (g)-(i) relating to Exhibits 5, 6 and 7.
56 At [51]-[80].
57 A 1.5(i) (6)-(23).
58 A 2.8 and 9.

[71] It is unnecessary for present purposes to repeat, or specifically adhere to, the discussion in the judgment, particularly the section Mr George challenged as to the signature of the Cabinet Submission by the then Solicitor-General[59].

[72] All of that discussion was described in the judgment as "tangential" because its relevance was only as appears from the following passage:

> [81] That, however, is not directly the point because, as mentioned before this exercise needed to be undertaken, the point for present purposes is not whether the Cabinet submission and the resolution were valid – that is only of tangential interest – the point is whether all the circumstances relating to this aspect of the matter can be taken into account in deciding whether the prosecution has proved that the actions of the defendants were undertaken as part of their conspiracy and fraudulently and deceitfully in terms of s 280.
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> [82] The result of all of that as far as the Pukapuka flight is concerned, is that it has not been demonstrated by the prosecution that they can show that the defendants were acting fraudulently in any aspect of that matter, or that they were acting pursuant to a conspiracy, or that, if they thought they were entitled to act as they did, they were not acting pursuant to their honest though mistaken belief as to the effect of the provisions and the evidence.
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> [83] On that basis therefore, and irrespective that no Overt Act said to amount to a conspiracy was pleaded, the conclusion must be that the evidence fails to satisfy that there is a prima facie case in relation to the Pukapuka informations.

(G): Paragraphs [122] & [123]

[73] The submission that these paragraphs were factually in error, to the extent that factual errors, even if proved, might give grounds to grant leave to Mr Allsworth to appeal, have already been addressed, and require no further discussion.

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59 A 1.5(i) (18)-(20).

Result

[74] The result is:

(a) That there is no jurisdiction for informants to appeal to the Court of Appeal judgments of the High Court holding there is no case for defendants to answer on informations brought against them, dismissing the informations against them and acquitting them accordingly;

(b) That even were there jurisdiction for the informant to appeal the oral judgment of 19 March 2021 in this matter to the Court of Appeal, for the reasons set out in this judgment the facts and the law do not disclose sufficient basis for extending the time for the informant to seek leave to appeal to the Court of Appeal or to make an order in the informant's favour in that regard and the applications for orders to that effect are accordingly dismissed;

(c) The hearing of the leave application was in chambers. Chambers judgments are not usually made public, but the interest of the public in the outcome of this matter is such that it may not be appropriate for the normal rule for such judgments to be followed. Unless, within 5 working days of delivery of this judgment, counsel file memoranda arguing to the contrary, this judgment will be released publicly, including to the media.

Hugh Williams, CJ