

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

**CR NO's 65, 68/2023**

**R**

**v**

**JOSHUA NGA UTANGA**

Hearing: 24 October 2023 (via Zoom)

Appearances: Ms J Crawford for the Crown  
Mr T Clee for the Defendant

Judgment: 24 October 2023

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**JUDGMENT  
ON DISCHARGE WITHOUT CONVICTION AND SENTENCING  
OF THE HONOURABLE JUSTICE DAME JUDITH POTTER**

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[12:11:33]

**Introduction**

[1] On 14 October 2023 this Court adjourned part-heard an application by the defendant, Mr Utanga, for discharge without conviction on two charges of assault on a female under s 214(b) of the Crimes Act 1969. Each charge carries a maximum penalty of two years imprisonment. The purpose of the adjournment was to check the Court record of the trial to ascertain whether convictions were entered following the return of guilty verdicts by the jury on the two assault charges. The Court record confirmed that on 24 July 2023, I, as the trial judge, entered convictions on counts 1 and 5 following the jury's verdicts of guilty on those charges.

[2] I have since received written submissions by the Crown and the Defence as to the Court's jurisdiction to proceed with the defence application for discharge without conviction. Essentially counsel are agreed that the Court has the requisite jurisdiction either pursuant to s 80 of the Criminal Procedure Act 1980-81 or the Court's inherent jurisdiction. After considering the submissions I confirmed to counsel by Minute dated 16 October 2023 that I would proceed with the hearing on the basis that the defendant's application would become an application to set aside the convictions entered on the two charges and to discharge him without conviction.

[3] The defendant's application is brought under s 112 of the Criminal Procedure Act 1980-81 which provides that the Court after an inquiry into the circumstances of the case may in its discretion discharge the defendant without convicting him. The full text of s 112 follows:

**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.

(4) Nothing in this section shall affect the power of the Court to convict and discharge any person.

The Crown opposes the defendant's application for discharge without conviction.

### **Factual Background**

[4] The factual background to the two assault charges of which the defendant was found guilty as evidenced at trial may be summarised as follows.

[5] The first assault took place on 10 July 2022. The victim was six months pregnant at the time. Mr Utanga and the victim were at home when they began to argue about the house

being untidy. The victim was breastfeeding their daughter when Mr Utanga approached the victim and hit her in the face with an open palm. The victim's nose began to bleed.

[6] The following day on 11 July 2022, they were driving home after work. They began to argue and Mr Utanga told the victim to get out of the car, stopping on three occasions. On the third occasion he stopped the car, he climbed over the front seat into the back where the victim was and pushed her out of the vehicle. The victim received bruising to her arm from the incident. She was picked up by a passing motorist.

### **Application for Discharge without Conviction**

[7] In an application for discharge without conviction there is a four-step process. Section 112 of the Criminal Procedure Act was identical to s 42(1) of the Criminal Justice Act 1954 (NZ). Section 54 has been replaced in New Zealand by ss 106 and 107 of the New Zealand Sentencing Act 2002.

[8] In the Court of Appeal judgment in *R v Katoa*<sup>1</sup>, the Cook Islands Court of Appeal noted that there are no statutory guidelines in the Cook Islands as to the manner in which the Court's discretion under s 112 is to be exercised and referred for guidance to the New Zealand legislation, noting s 107 of the Sentencing Act, which provides:

“The Court must not discharge a defendant 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 offending.”

The Court of Appeal stated<sup>2</sup>, that when considering a discharge without conviction the Cook Islands Court should work through the four steps that follow from s 107. This approach has been subsequently followed by Cook Islands Courts considering an application for discharge without conviction. The four steps are:

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<sup>1</sup> *R v Katoa*, CA 508/2022, 14 November 2022.

<sup>2</sup> At [37].

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

[9] I turn to consider the four steps.

### 1. Gravity of the offending

[10] Mr Clee, for the defendant, submitted the offending is in the moderate to lower level of this type of offending. He pointed to the maximum penalty to two years imprisonment on each charge and by comparing facts of other cases submitted this offending should attract an end sentence of 3-4 months imprisonment.

[11] Defence counsel accepted the aggravating factors of the offending as detailed by the Crown but emphasised the mitigating factors relating to Mr Utanga: His previous good character, at age 35 he has no previous convictions, and comes to the Court as a first offender. His success in sporting activities including international representation for the Cook Islands and success in business ventures. Further, that he is now in a new stable relationship with a child on the way.

[12] Mr Utanga and his partner filed affidavits dated 9 October 2023 providing detail on these matters.

[13] The Crown noted that this is domestic violence offending and that domestic violence offending generally, is treated seriously by the Courts because of the vulnerability of the victim and the breach of trust involved.

[14] The Crown submitted the gravity of the offending in this case is moderate to high, referring to the following aggravating factors:

- (a) That there are two incidents of physical abuse over two days;
- (b) That at the time of the assaults the victim was in the early stages of her second pregnancy;
- (c) On the first occasion Mr Utanga hit the victim in the face resulting in a bleeding nose;
- (d) The victim was particularly vulnerable given she was at the time breastfeeding their daughter;
- (e) On the second occasion Mr Utanga pulled the victim out of the vehicle and she landed on the ground on her back;
- (f) Independent witnesses gave evidence at trial on the distressed state of the victim after the incident and they offered help;
- (g) The second assault was again in the presence of the couple's young daughter who was in a car seat in the front of the car;
- (h) The extent of harm caused by the offending has been set out in the Victim Impact Statement. The victim was fearful about leaving the house and had chronic anxiety. She is now challenged with bringing up two young children.
- (i) No remorse has been shown by Mr Utanga. He continues to blame and shame the victim.

[15] The Courts in the Cook Islands have frequently given clear, strong messages that domestic violence is unacceptable. In *Police v Kaokao*<sup>3</sup>, approximately 10 years before this

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<sup>3</sup> *Police v Kaokao* [2012] CKHC 42.

offending, Justice Grice said<sup>4</sup>: “The position of domestic assault and the way the Courts here have treated it cannot be continued. It can no longer be that domestic violence is swept under the carpet. Domestic violence cannot be treated lightly. A line needs to be drawn.”

[16] In *Police v Anguna*<sup>5</sup>, the then Chief Justice, Weston CJ, said<sup>6</sup>: “First of all, I address the gravity of the offence. As I have already said, this offence comprises several components. While the complainant was not permanently or significantly damaged as a result of the assault there is no doubt that domestic violence of the sort that occurred here is regarded as being serious. Therefore, while the assault itself is at the lower end of the scale, I regard this as significant offending.”

[17] In that case there was a single charge which arose from the defendant kicking the victim, grabbing and shoving and then punching her. In that case the appeal was allowed, a conviction entered, and an end sentence of 12 months’ probation with 2 months community service imposed.

[18] The Chief Justice confirmed that each such application must be considered on its merits. These and other cases demonstrate that domestic violence will be regarded by the Courts in the Cook Islands, and indeed in New Zealand and other jurisdictions, as significant offending, even when the assaults involved are at the lower end of the scale.

[19] I assess the offending in this case as moderate to high. The offending extended over two days. This was not an impulsive one-off act later regretted. Mr Utanga shows no remorse or regret except in respect of the situation to which his offending has led him.

## 2. Consequences of the conviction

[20] For Mr Utanga, it was submitted that convictions are likely to have negative consequences on future immigration, travel and employment opportunities with subsequent undue hardship for his family and dependants. They include M/s X, his current partner, their

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<sup>4</sup> At [14].

<sup>5</sup> *Police v Anguna* [2013] CKHC 41.

<sup>6</sup> At [23].

unborn child, and Kiana, his daughter by the victim of the assaults. M/s X is a highly talented photographer with impressive international credentials and career opportunities as explained in her affidavit dated 9 October 2023. She has lived for the past 12 years between the Cook Islands and Australia but now looks to the United States where she has close family connections, for the future of her new family.

[21] Mr Utanga has successful businesses in the Cook Islands and New Zealand. He sees growth opportunities in the United States, both in marketing his existing businesses and developing new opportunities. Being well aware of the impact on entry into the United States of criminal convictions, he says he is ashamed of the negative consequences on his, as he puts it, “second chance of a family”.

[22] The Crown submitted that the consequences of conviction faced by Mr Utanga are the ordinary consequences that flow from a conviction. The Crown notes that on the basis of information from the United States Embassy and Consulate and other online sources, even if no conviction has resulted, applicants for a United States Visa must disclose to the United States Immigration authorities any arrests or charges.

[23] Referring to the successful businesses operated by Mr Utanga in the Cook Islands and New Zealand and Mr Utanga’s – as described by the Crown – “unspecified and ambiguous earning potential” in the United States, the Crown rejects that the consequences of conviction would result in undue hardship to Mr Utanga, M/s X, their unborn child, or Kiana.

### 3. Proportionality of the offending

[24] I have determined that the gravity of the domestic violence offending in this case is moderate but tending to high rather than low, taking into account and noting particularly Mr Utanga’s lack of remorse. The consequences of conviction, essentially limitation on Mr Utanga’s ability to travel, especially to the United States, are somewhat nebulous and uncertain, relating to future business, employment and lifestyle opportunities.

[25] Mr Clee in submissions referred to the situation in *Katoa*, (a Court of Appeal case I have previously referenced), as a travel and immigration case in which a discharge without

conviction was upheld by the Court of Appeal. But the situations of the respondent *Katoa* and Mr Utanga are importantly different. Mr Katoa held international positions which required him to travel overseas representing the Cook Islands for various international events and conferences. The Court of Appeal observed, at paragraph 43: “Such travel is of obvious benefit to the people of the Cook Islands as well as the respondent himself.” And at paragraph 44: “If he were denied entry there would be the detriment to members of the Cook Islands public as well as to himself.” The situation of Mr Utanga is personal to him and his immediate family and relates to future intentions and prospects.

[26] There are always negative consequences of criminal offending, not only for the offender but for the offender’s family. Often those consequences are far reaching.

[27] I conclude that the consequences of a conviction in this case are not out of all proportion to the gravity of the offending.

### **Court’s Overriding Discretion**

[28] The gateway presented by steps 1, 2 and 3 in the proportionality analysis has not been passed in this case. However, in the exercise of the Court’s overriding discretion, I am satisfied that a discharge without conviction in the circumstances of this case 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.

[29] The result is that the application to set aside the convictions and for discharge without conviction is dismissed. The convictions entered on the two charges of assault on a female are confirmed.

[30] I turn to the matter of sentencing.

### **Sentencing**

[31] After consideration of relevant authorities, the Crown does not seek a custodial sentence but rather submits that a sentence of probation as recommended by the Probation Service with a term of community service should be imposed.



[32] Mr Clee, for the defendant, notes the Crown's position but submits that an appropriate penalty in this case would be a fine which could be directed to the complainant and the community in proportions, if the Court were so minded. He notes that any period of community service may limit the income earning of Mr Utanga and his important responsibility prior to the birth of Ms X's child.

[33] I reject that a fine is an appropriate penalty in this case. Indeed I would go so far as to say that it will rarely be an appropriate penalty in cases of significant domestic violence offending, given the seriousness which the Courts have been insistent, attaches to this type of offending. Of course, the circumstances of all cases differ and each case must be considered on its own merits. But in this case I am satisfied that a fine would not meet the purposes and principles of sentencing, particularly accountability, responsibility and the need for deterrence both of the offender and generally. A clear message has been sent on frequent occasions, and I send it again, that domestic violence will be viewed seriously by the Courts in the Cook Islands.

[34] I consider that a sentence of probation is appropriate but I wish to discuss with counsel the conditions that should attach to that sentence. I can indicate that I propose a sentence of 12 months' probation but I am minded in the particular circumstances of this case, not to impose a term of community service because I accept this may be particularly difficult for Mr Utanga, given the timing of the birth of the child about to be born.

[35] Mr Utanga needs to travel between New Zealand and the Cook Islands quite frequently and I am advised that the birth of the child will take place in New Zealand. There would normally be conditions to surrender the passport to the High Court and not to depart from the Cook Islands without the approval of the High Court.

#### Sentence

[36] I will now confirm the sentence. The sentence imposed on Mr Utanga for the two charges of assault is a sentence of 12 months' probation with the following conditions:

- (a) He is not to leave the Cook Islands without the approval of the High Court;

- (b) He is to surrender his passport to the High Court;
- (c) He is to attend counselling as directed by the Probation Service.

[37] In respect to Condition (a), not to leave the Cook Islands without the approval of the High Court, I grant approval for Mr Utanga to travel to New Zealand on 26 October in anticipation of the birth of his child being carried by M/s X. He is to return to the Cook Islands not later than 31 December 2023 and on his return by that date or sooner he is to report to the Probation Service.

[38] If any variation of that dispensation is to be considered, application is to be made to the High Court.

[39] There will be an order that \$20 on account of medical costs be paid forthwith to the High Court.

A handwritten signature in blue ink that reads "Potter, J." with a horizontal line underneath.

**Judith Potter, J**