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

CR NOS. 1343–1347, 1260–1263, 1955/24

R

v

RANGI UAI TUARU

On the papers:

Counsel: Mr T White for Crown
Ms J Crawford for Defendant

Original Judgment: 2 May 2025

Revised Judgment: 5 May 2025[1]

REVISED JUDGMENT OF KEANE, CJ

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[1] Rangi Tuaru, who is jointly charged with 10 burglaries between June–August 2024, and has still to plead because his capacity has been in issue, was bailed on 12 September 2024, on the condition he live with a family member, subject to a curfew.

[2] In December 2024 that condition was varied to require Mr Tuaru to live with another family member, an aunt; and on a curfew check at that address at 9:05 pm on Wednesday, 19 March 2025, he was found not to be living there.

[3] On Friday 28 March 2025, at 8:35 am, Mr Tuaru was arrested after having been interviewed at 8:14 am at the Police station. He had admitted that, perhaps two weeks before 19 March 2025, he had begun living at the house of his employer. He explained,

> I had some problem with my auntie and them. My stuff were going missing, my phone and money. That why I left.

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[1] This Revised Judgment deletes the original paras [74], [75], and substitutes paras [74] – [76].

[4] At 9.24 am that Friday morning Mr Tuaru was detained at the Arorangi Prison on behalf of the Police 'until … brought before a Judge or Justice'. That did not happen. On Sunday, 30 March 2025, at 5.10 pm, the Police bailed him to his then address with his employer, subject to a curfew. His counsel estimates he had been in custody for 55 hours.

[5] In a memorandum dated 9 April 2025, Mr Tuaru's counsel seeks to have the contempt charge in respect of the bail breach dismissed or stayed, even though he admits to the breach, contending he was imprisoned unlawfully, without justification, for a low level offence.

[6] In a second memorandum, dated 10 April 2025, counsel withdraws his dismissal application, accepting that the power to dismiss does not accrue in this context, and assuming that a discharge without conviction could only be given on a plea or finding of guilt (an assumption to which I will return). Counsel pursues the stay.

[7] In a memorandum, dated 10 April 2025, Crown counsel accepts the defence narrative, but contends that this is not one of those rare cases where a stay could be justified. The Crown would not oppose Mr Tuaru being convicted and discharged.

[8] I have then to decide two issues. Was Mr Tuaru in any sense 'imprisoned unlawfully', as he contends? If he was, does this Court have the ability to grant him a proportionate remedy?

Arrest, charge, detention

[9] In arresting, charging and detaining Mr Tuaru, the Police exercised a sequence of statutory powers, which are coupled with duties designed to safeguard his fundamental rights and freedoms.

[10] The issue whether the Police detained Mr Tuaru unlawfully calls, therefore, for what the Police did or did not do to be set against that statutory sequence prescribed by the Criminal Procedure Act 1980–81 and the Police Act 2012.

[11] It calls, moreover, for that assessment to be made from the standpoint that Mr Tuaru's rights and freedoms then engaged were, and indeed are, fundamental.

Fundamental rights and freedoms

[12] Under our Constitution the first two fundamental human rights and freedoms Art 64 (1) recognises and declares are:

> (a) The right of the individual to life, liberty, and security of the person, and the right not to be deprived thereof except in accordance with law:
>
> (b) The right of the individual to equality before the law and to the protection of the law.

[13] Article 65 prohibits our statutes being construed and applied in such a way as to cut into those fundamental rights and freedoms. No statute, it says in particular, may be construed or applied so as to:

> (a) Authorise or effect the arbitrary detention … of any person; or
> (b) …
> (c) Deprive any person who is arrested or detained –
> (i) …
> (ii) Of the right, wherever practicable to retain and instruct a barrister or solicitor without delay; or
> (iii) Of the right to apply … for a writ of habeas corpus …
> (d) Deprive any person of the right to a fair hearing ... for the determination of his rights …
> (e) …
> (f) Deprive any person charged with an offence of the right to reasonable bail, except for just cause; …

[14] As will be obvious, Arts 64 and 65 come into play whenever a person is arrested, charged and detained and the statutory powers and duties then engaged must be construed and applied consistently.

Arrest

[15] At 8:35 am on Friday, 28 March 2025, the charge sheet says Mr Tuaru was arrested and taken into custody without warrant; a power conferred on the Police by s 4, CPA 1980–81 and by s 45(1)(b) PA 2012. Both call for 'good cause to suspect' an offence 'punishable by imprisonment', in this case a contempt.[2]

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[2] Contempt of Court, ss 36(a), 37 Judicature Act 1980-81 (an offence attracting a $100 fine or 6 months' imprisonment).

[16] As to that there was and is no issue. The arrest was open on the basis that Mr Tuaru had just made a written statement admitting he had not complied with his bail condition as to residence for some weeks.

Rights on arrest

[17] On Mr Tuaru's arrest, and perhaps indeed before his arrest, the Police had to comply with s 9(1) CPA 1980-81:

> It is the duty of every person arresting any other person to inform promptly the person arrested of the grounds of his or her arrest, and of any charge against them and to allow the person to consult a legal practitioner of their own choice without delay.

[18] In the same vein, s 47(1), PA 2012, which secures the first of the 'rights of persons arrested or detained' states:[3]

> Every person who is arrested or who is detained under any enactment –
>
> (a) Must be informed at the time of the arrest or detention of the reason for it; and
>
> (b) Has the right to consult and instruct a lawyer without delay and to be informed of that right;

[19] Mr Tuaru may have been told why he was arrested. That may indeed have been obvious. He was also told before his arrest, when he made his statement admitting his offence, of his right to advice if only formally; a right he then declined to exercise. But why was he not asked then or later whether he wanted to consult his counsel on the primary charges on which he was bailed? Why counsel was not told of his arrest?

[20] There was at that time an issue about Mr Tuaru's capacity to plead, to be assessed psychologically, which might or might not have been obvious. And, as it then turned out, his fundamental rights and freedoms were about to be infringed. He was about to be charged and detained, not taken before the Court, and not allowed Police bail. Had his counsel been contacted that would not have happened.

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[3] See also s 9 'Duty of persons arresting', CPA 1980-81.

Charge decision

[21] On Mr Tuaru's arrest, as I have just set out, s 9(1) CPA 1980–8 required the Police to inform him of any charge against him; and, more pointedly, s 47(2), PA 2012, stipulated:

> Every person who is arrested for an offence has the right to be charged promptly or released.

[22] At this point the Police had to weigh two considerations. First, whether they had the evidence to charge, and they clearly did. Mr Tuaru admitted the offence. Second, whether a charge was in the public interest, as to which there were contrasting factors.

[23] On the one hand, Mr Tuaru was on bail in respect of significant alleged offending, a series of burglaries, and had not complied with his residency clause for some weeks. On the other, he had shifted address for good reason. He was at a stable address, his employer's, to which the Police bailed him later in the weekend.

[24] Mr Tuaru's capacity to understand that he was only entitled to shift address if the Police agreed and his bail was varied by the Court, may also have been in question; and that too might have demonstrated that he had not breached his bail deliberately.

[25] The Police could then have dealt with this administratively and had Mr Tuaru's bail varied. They decided instead that it was in the public interest to charge him with contempt; a decision he has not challenged; and, in any event, a choice for the Police to make, which is not open to review or appeal.

[26] But when the Police made that decision, as they were entitled to, the issue of concern on this application became acute – the issue of continuing detention. Was Mr Tuaru to be held in custody or released on bail? And this was an issue, not for the Police but for the Court.

An immediate Court issue

[27] Once Mr Tuaru was charged, the Police came under the duty imposed by Section 9(5) CPA 1980-81:

> Every person who is arrested on a charge of any offence must be brought before the Court, as soon as possible, and in any case no later than 48 hours after the time of their arrest, to be dealt with according to law.

[28] Section 9(5) does not grant the Police a licence to detain an arrested person for up to 48 hours. It imposes a duty on the Police to bring that person before the Court 'as soon as possible', a duty which continues for as long as the person remains detained. Section 47(3) PA 2012 is equally imperative:

> Every person who is arrested for an offence and is not released must be brought as soon as possible before the Court. …

[29] The 48 hour maximum does not detract from the immediacy and continuing nature of that duty. It is a long stop to ensure that, even where it has not been possible to bring an arrested person before the Court 'as soon as possible' after arrest, that must happen within 48 hours.

[30] The Police appear not to have made any attempt to comply with this duty. The charge sheet shows Mr Tuaru was to be brought before the Justice's Court on Thursday, 29 March 2025, almost a week later. Yet on that Friday a Judge was sitting. A Justice could easily have been called in.

Police bail

[31] On Mr Tuaru's arrest and charge the Police did have power to bail him, under s 51(1) PA 21012, the power they eventually exercised on the Sunday evening:

> Where any person is arrested without warrant and charged with an offence, not punishable by … imprisonment for more than 2 years, and cannot practicably be brought immediately before the Court, any constable, if it is prudent to do so, may take the bail bond of that person.

[32] To exercise that power the Police had first to have attempted to bring Mr Tuaru before the Court, and there is nothing to suggest they did. But Mr Tuaru looks to have been bailable as of right under s 83(2) CPA 1980–81; and the Police could have bailed him to appear in the Justices' Court on the Thursday, just as they intended. Section 51(1)(d) required any bail bond to specify:

> … a time and place … not later than 7 days from the date of the bond, the person bailed attend personally before the Court.

[33] If on the Friday morning the Police did decide against bail, therefore, one can only assume they decided it was imprudent having regard to the three s 51(4) risks:

> In making a decision under subsection (1), the constable must have regard to any other statutory requirements or risk that the arrested person may –
>
> (a) fail to appear in Court; or
>
> (b) interfere with witnesses; or
>
> (c) offend while on bail.

[34] I am unaware of any other impinging 'statutory requirements'. And even though Mr Tuaru faced serious charges, those three risks that Friday morning look to have been negligible.

[35] Mr Tuaru had, so far as I am aware, complied with his terms of bail apart from a single curfew breach. There appears to have been no suggestion he had interfered with witnesses. The curfew breach apart, he had not been charged with further offending.

[36] What then had changed by the Sunday evening, when the Police bailed him to his employer's address, where he was living when arrested? If there was no reason or risk to impede bail then, why was he not granted such bail on the Friday morning?

Resulting unlawfulness

[37] On the Friday morning, as I have said, at 9.24 am, the Police elected instead to have Mr Tuaru detained at Arorangi Prison, where he remained detained until Sunday, 30 March 2025, at 5.10 pm, when they bailed him, some 55 hours.

[38] The Police did so in breach of their s 9(5) CPA 1980–81 duty to bring Mr Tuaru before the Court 'as soon as possible, and in any case no later than 48 hours after the time of (his) arrest'; a continuing duty that remained constant throughout his detention.

[39] Throughout those 55 hours, that being so, the Police arbitrarily detained Mr Tuaru, denying him recourse to the Court to 'be dealt with according to law'. They infringed his fundamental rights and freedoms. His detention throughout was unlawful.

Stay or other remedy

[40] Finding as I do that the defendant was detained unlawfully, am I able to give him any proportionate remedy? He seeks a single remedy, a stay. Is that within my power? If it is not, is he entitled to any other remedy?

Stay of proceedings

[41] A stay of proceedings on the ground of Police misconduct, as the New Zealand Supreme Court said in *Wilson v R*,[4] 'has long been recognised as necessary to enable a Court to prevent an abuse of its processes'. It has four salient features.

[42] First, as the Court then said, state misconduct justifying a stay is conduct prejudicing a fair trial, or undermining public confidence in the integrity of the judicial process if a trial is permitted to proceed:[5]

> … the analysis is not backward-looking, in the sense of focussing on the misconduct, but rather forward-looking, in that it relates to the impact of the misconduct on either the fairness of the proposed criminal trial or the integrity of the judicial process if the trial proceeds.

[43] Second, in then outlining the three rationales for the power, the Court confirmed equally that in New Zealand as in the United Kingdom:[6]

> The purpose of granting a stay is not to punish the Police or other state agency for misconduct. Rather … stays are granted … to uphold the integrity of the criminal justice system.

[44] Third, where state misconduct is alleged to prejudice a fair trial (not in issue here) the proponent must 'demonstrate a connection between the misconduct and the prejudice'.[7] But where (as is in issue here) the misconduct undermines the integrity of the justice process:

> … a connection between the misconduct and the proposed trial will not be decisive … though it will be relevant to the balancing process.[8]

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4 *Wilson v R* [2016] 1 NZLR 705, 721, [39].
5 *Wilson v R*, 722, [40].
6 *Wilson v R*, 722-724, [45]-[49].
7 *Wilson v R*, 727, [62].
8 *Wilson v R*, 728, [63].

[45] Fourth, as to the balancing exercise that second category of misconduct calls for the Court ended by saying this:[9]

> … a stay in a category two case is an extreme remedy which should be given only in the clearest of cases. This means that it is important to consider whether there are alternative remedies which adequately address the interests at stake.

Discharge without conviction

[46] Mr Tuaru, as I have said, at first sought to have the charge dismissed or stayed, but elected only to seek a stay assuming that a discharge without conviction could only be given on a plea or finding of guilt.

[47] In my recent decision concerning Police diversion, *Police v Akava*[10], I came to the opposite conclusion. I held that on completion of diversion, without any plea being entered and after any guilty plea was withdrawn by leave, a discharge without conviction under s 112 CPA 1980–81, deemed an acquittal, could and should be granted.

[48] I have since set s 112 against its antecedents, and compared it with its contemporary New Zealand equivalent, s 106 of the Sentencing Act 2002 [NZ], and I adhere to my *Akava* conclusion.

[49] Section 112(1) CPA 1980–81, 'Power to discharge defendant without conviction or sentence', says this:

> The Court, after inquiry into the circumstances of the case, may in its discretion discharge the defendant without convicting them, unless by any enactment applicable to the offence a minimum penalty is expressly provided for.

[50] Section 106 of the Sentencing Act 2002 [NZ], 'Discharge without conviction', by contrast, must and may only be considered under s 11(1) on a plea or finding of guilt. Section 106(1) says this:

> If a person who is charged with an offence is found guilty or pleads guilty, the Court may discharge the offender without conviction, unless by any enactment applicable to the offence the Court is required to impose a minimum sentence.

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9 *Wilson v R*, 738, [92](e).
10 *Police v Akava* CR No: 188/25, 10 April 2025.

[51] As will be apparent, s 112(1) CPA 1980–81, in contrast to s 106 SA 2002, does not expressly yoke the power to discharge it confers to a prior plea or finding of guilt. It yokes the power to a Court 'inquiry into the circumstances of the case', without specifying when in the process that may or must be.

[52] On that basis, I concluded in *Akava*, the Court may and must grant such a discharge to persons who have admitted responsibility for offences, but completed diversion to the satisfaction of the Police, without any need for a prior guilty plea.

[53] That conclusion, I accept now, is open to this question. Is it not necessarily implicit in s 112(1), just as it is explicit in s 106(1) SA 2002, that a discharge without conviction, deemed an acquittal, can only arise once guilt has been admitted or found?

[54] The answer lies, I consider, in s 42(1), Criminal Justice Act 1954 [NZ], on which s 112(1) is evidently modelled:

> Where any person is accused of any offence, any Magistrate's Court, after inquiry into the circumstances of the case, may in its discretion discharge that person without convicting him, unless by any enactment applicable to the offence a minimum penalty is expressly provided for.

[55] There the Magistrate's Court's ability to inquire into the circumstances of the case plainly arose before plea. It arose from the fact that the person able to be discharged was simply anyone 'accused of any offence'; any charged person before the Court, before plea as much as after.

[56] Those specific words 'accused of any offence' are not, I accept, in s 112(1). But that does not mean that a void results which can only be filled by importing words equally absent, 'found guilty or pleads guilty'. The foundation words that are there, 'after an inquiry into the circumstances of the case' are a sufficient and intelligible basis for the power.

[57] Nor is it to be assumed that s 112 CPA 1980–81 and s 106(1) SA 2002 are so nearly identical that s 106(1) must make explicit what s 112 leaves implicit. The two provisions are quite different in scope.

[58] The first difference, that the s 106(1) power may only be exercised on a plea or finding of guilt, introduced by s 19(1) of the Criminal Justice Act 1985 (NZ), is not the only one.

Section 106(1) is subject to s 107, 'Guidance for discharge without conviction', introduced so far as I can see by the Sentencing Act 2002 itself:

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

[59] The s 112(1) CPA 1980–81 discharge power, by contrast, modelled on the Magistrate's Court power in s 42(1) of the Criminal Justice Act 1954 [NZ], is so widely expressed as to confer a broad and flexible discretion to discharge in the interests of justice even at the outset. In this it is very similar to the equally broad and flexible 'equity and good conscience' discretion the Magistrate's Court then possessed in minor civil cases.[11]

[60] Finally, in this analysis, I have not ignored s 112 (3):

> Where the Court discharges any person under this section, it may, if it is satisfied that the charge is proved against them, 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 or she is charged if it had convicted and sentenced them, and the provisions of any such enactment apply accordingly.

[61] Section 112(3) simply confirms, to my mind, that the discharge power may be exercised at trial before any conviction is entered. It does exclude a discharge being given before plea in an appropriate case.

[62] The scope of the s 112(1) power is, as I found in *Akava,* congruent with that of Police diversion schemes, both as to the qualifying offence range and as to the considerations that come into play, which are likely to include these:

(a) The solidity of the foundation for the charge in evidence or as the result of an admission.

(b) The seriousness of the category of offence charged and, as importantly, that of the conduct underlying the charge.

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[11] Section 59, Magistrates' Courts Act 1947, 'Equity and good conscience': Where the amount claimed or the value of the property claimed or in issue does not exceed fifty pounds, a Court may receive any such evidence as it thinks fit, whether the same be legal evidence or not, and may give such judgment between the parties as it finds to stand with equity and good conscience

(c) The justifiable level of public interest in the entry of a conviction and sentence.

(d) The presence of factors militating against conviction, including acceptance of responsibility, remorse, redress, and making a fresh start.

(e) The interests of justice and the need to safeguard and promote public confidence.

[63] A discharge without conviction will be justifiable, I consider, where the public interest in conviction and sentence is slight, or offset by something else, and a discharge appears consistent with the interests of justice and likely to safeguard and promote public confidence

Proportionate remedy

[64] The stay Mr Tuaru seeks is, I find, beyond his reach. It is an 'extreme remedy' given only in the 'clearest of cases'; and, while Police conduct made his detention arbitrary and unlawful, there is not to be any trial capable of being rendered unfair, or of striking at public confidence. He admits the offence.

[65] There is, furthermore, a more proportionate remedy, a s 112 (1) CPA 1980–81 discharge without conviction, in law an acquittal, able to be given Mr Tuaru without any need for him to enter a plea.

Conclusions

[66] At the time of his arrest on the morning of Friday, 28 March 2025, Mr Tuaru had not been living at his bail address for some weeks; a potentially serious breach. In reality it was minor and likely to have been inadvertent.

[67] Mr Tuaru, as he explained just before his arrest, had difficulties with family members at his bail address, and had moved in with his employer. He appears not to have understood that this called for Police consent and a bail variation. There was then, and is still, a question as to his ability to understand such things as these.

[68] The Police could have dealt with this by contacting Mr Tuaru's counsel and agreeing a bail variation. But they elected, as they were entitled to do if they concluded it was in the public interest, to charge Mr Tuaru with contempt of Court. As to that there can be no issue.

[69] The Police then became duty bound to bring Mr Tuaru before the Court 'as soon as possible … to be dealt with according to law'. There was a Judge sitting that day and, if he were busy, a Justice could easily have been called in. But, as it appears, the Police made no attempt to contact the Court.

[70] The Police could equally, though they should have approached the Court first, have allowed Mr Tuaru bail themselves, as they eventually did on the evening of Sunday, 30 March 2025, after he had been detained by the Police at Arorangi Prison for in excess of 55 hours.

[71] Instead, in breach of their duty to bring Mr Tuaru before the Court 'as soon as possible', the Police elected that Friday morning to detain him at the prison, and remained in continuing breach of their duty until he had been held for an excess of 48 hours, the outer limit applying where it is impossible to bring a suspected person before the Court any sooner. As a result, Mr Tuaru was throughout that 55 hours detained unlawfully.

[72] I think it highly unlikely the Police deliberately flouted their duty to bring Mr Tuaru before the Court 'as soon as possible'. I think it much more likely they were unaware of their duty, or misunderstood it. They might, for example, have thought they were entitled to detain Mr Tuaru for 48 hours

[73] If that is so it suggests the officers, who charged and detained Mr Tuaru, lacked essential training and experience; and, if those decisions were delegated to junior officers, that is as concerning. Decisions to charge and detain are more complex than decisions to arrest. Fundamental rights and freedoms are at stake.

[74] Be that as it may, Mr Tuaru, on his arrest, was detained unlawfully by the Police for 55 hours, in breach of his fundamental rights and freedoms, for what looks to have been an inadvertent breach of bail, as to which on a guilty plea the Court might have convicted and discharged him.

[75] To convict and discharge Mr Tuaru now, as if his detention was irrelevant, would be a compounding injustice. It could indeed suggest this Court considers to be insignificant that significant breach of his fundamental rights and freedoms. And that could strike at public confidence in the Court itself.

[76] This seems to me one of those plain cases where there is no public interest in a conviction being entered, and the interests of justice and the need to safeguard and promote public confidence call for a s 112(1) CPA 1980–81 discharge without conviction. I discharge Mr Tuaru accordingly.

P J Keane, CJ