IN THE HIGH COURT OF NEW ZEALAND
ROTORUA REGISTRY

I TE KŌTI MATUA O AOTEAROA
TE ROTORUA-NUI-A-KAHUMATAMOMOE ROHE

CRI-2024-463-000148
[2026] NZHC 1629

BETWEEN	SOLICITOR-GENERAL Appellant
AND	XAVIER RICHARD JOHN GRAY-GILL Respondent

Hearing: 3 November 2025

Appearances: I Auld and W Harvey for Appellant
Respondent appeared in person by AVL
P Morgan KC and M Bradley as Amicus Curiae

Judgment: 11 June 2026

JUDGMENT OF BECROFT J

This judgment was delivered by me on 11 June 2026 at 10am
pursuant to s 341 of the Criminal Procedure Act 2011.
Registrar/Deputy Registrar

……

Solicitors/Counsel:
Crown Law, Wellington
Thackeray Chambers, Hamilton

What this appeal is about

[1] At about 10.30 am on Tuesday, 26 November 2024, Mr Xavier Gray-Gill was walking his dog along the footpath on Old Taupō Road, Rotorua.

[2] Mr Gray-Gill was wearing two leather vests with visible Black Power gang insignia on the front.

[3] A passing police patrol car noticed Mr Gray-Gill and did a U-turn to speak with him. However, he disappeared. He was subsequently located in the driveway of a nearby property, lying on the ground, attempting to hide from the police.

[4] As the police approached, Mr Gray-Gill removed his two vests and covered them with a black hooded jersey. He was arrested and was found to be carrying a pocket knife and cannabis material.

[5] Mr Gray-Gill said he had an argument with his partner and was walking down the road to "cool down".

[6] Mr Gray-Gill was charged under the Gangs Act 2024 (the Act) with knowingly and without reasonable excuse displaying gang insignia, namely a Black Power gang patch in a public place.[1] He promptly pleaded guilty and was convicted and discharged.[2]

[7] The police sought a destruction order for both the leather vests bearing Black Power gang insignia.

[8] Judge Wickliffe's sentencing notes record that she had "ordered destruction of the cannabis and the knife but not [his] patch." Her Honour noted that Mr Gray-Gill would "get that back".[3] Sometime later, Mr Gray-Gill asked the police to return it to

---

1 The charge was laid under s 7(1)(2) of the Gangs Act 2024. He was also charged with possession of a knife in a public place without reasonable excuse under s 13A of the Summary Offences Act 1981 and being in possession of a controlled drug, namely cannabis, under s 7(1)(a)(2) of the Misuse of Drugs Act 1975. But those charges are not relevant to the present appeal.

2 He was convicted and discharged under s 108 of the Sentencing Act 2002.

3 *Police v Gray-Gill* [2024] NZDC 29820.

him. The Judge then, upon request by the police, clarified her earlier direction. Her Honour recorded on the charging document "Insignia is to be forfeited to the Crown but is not to be destroyed".

[9] Judge Wickliffe's decision, and this appeal, turns on the interpretation of s 7(3) of the Act which provides:

> **7 Prohibition on display of gang insignia in public place**
>
> …
>
> (3) If a person pleads guilty to, or is convicted of, an offence against subsection (1), the gang insignia concerned—
>
> (a) is forfeited to the Crown; and
>
> (b) may be destroyed or otherwise disposed of as the court, either at the time of the conviction for the offence or on a subsequent application, directs.

[10] The Solicitor-General appealed.[4] It is submitted that a non-destruction order was not available to the Judge: once a person pleads guilty to or is convicted of displaying gang insignia in a public place, the insignia is automatically forfeited to the Crown. Following forfeiture, it is argued the Crown is entitled to destroy the patch, unless a court makes an order for an alternative means of disposal.

[11] Further, it is said that the while the court can order a method of disposal other than destruction, it cannot direct that the patch "not be destroyed". The Crown seeks that the non-destruction direction be quashed.

[12] This is clearly a live matter throughout the District Court. I am advised that there are other cases waiting finalisation of this appeal.

[13] This appeal has been heard together with the Crown's appeal against another District Court decision in respect of s 7(3) — *Solicitor General v Leef*.[5] In that case, upon application by Mr Leef, Judge Rowe in the District Court determined the court had the power to return Mr Leef's gang patch to him.[6] He issued a very comprehensive

---

4 For convenience, I will refer to the Solicitor General as the Crown for the rest of this judgment.
5 *Solicitor-General v Leef* [2026] NZHC 1628.
6 See *Police v Leef* [2025] NZDC 14940.

and reasoned decision. In that appeal, I concluded that the Judge did not have that power.

[14] There is no need to repeat all of that decision in this case. The conclusions as to the meaning and effect of s 7(3) and the detailed analysis apply equally in this case.

[15] Mr Gray-Gill is unrepresented. However, he appeared at the hearing by way of AVL link. He was clearly interested in the proceedings.

[16] Mr Morgan KC, was appointed as amicus curiae in both this case and the related *Leef* appeal to ensure that this Court was given as much assistance as possible, and, as he put it, "to provide the Court with additional argument to the argument presented by counsel [for Mr Gray-Gill] … particularly that articulated by Judge Rowe [in the *Leef* decision]." Mr Morgan emphasised that he did not advocate any particular outcome.

[17] I can state the result of this judgment from the outset. I conclude that the Judge was correct in that part of her very brief ruling that the insignia is to be forfeited to the Crown. However, she was incorrect to direct that it is "not to be destroyed." And to the extent that she suggested that Mr Gray-Gill could have his two items of gang insignia returned, with respect, she was wrong in law.

Is there jurisdiction to appeal?

[18] In his very helpful submissions, Mr Morgan properly questioned whether the Solicitor-General could appeal a decision such as that made by Judge Wickliffe. That involves questions of statutory interpretation of relevant sections of the Criminal Procedure Act 2011 (CPA). I cannot help but highlight the irony that a statutory interpretation exercise is required to determine whether the gate can be opened to an appeal where the central issue itself is statutory interpretation.

[19] This question raised by Mr Morgan is more complex than the similar question raised in the parallel decision of *Solicitor-General v Leef*.[7] It arises because in this case, Mr Gray-Gill was convicted and discharged. The issue is whether such a decision is a "sentence" that can be appealed.

[20] Mr Morgan first draws attention to the wording of s 108 of the CPA which provides for a conviction and discharge (which is what happened here), as follows:

> **108 Conviction and discharge**
>
> (1) If a person is convicted of an offence, a court before which the offender appears for sentence may, *instead of imposing sentence*, direct that the offender be discharged, unless by any enactment applicable to the offence the court is required to impose a minimum sentence.
>
> (2) *A court discharging an offender under this section may—*
>
> (a) make an order for the payment of costs or for the restitution of any property; or
>
> (b) make any order for the payment of any sum that the court thinks fair and reasonable to compensate any person who, through, or by means of, the offence, has suffered—
>
> (i) loss of, or damage to, property; or
>
> (ii) emotional harm; or
>
> (iii) loss or damage consequential on any emotional or physical harm or loss of, or damage to, property; or
>
> (c) *make any order that the court is required to make on conviction*.
>
> …
>
> (emphasis added)

[21] Mr Morgan's initial point is that this Court might conclude that a conviction and discharge is not, in terms of the wording of s 108 of the CPA, a sentence that is imposed by the court; rather it is expressly a non-sentence. And s 7(3) of the Act as it relates to forfeiture, is not a minimum sentence, required to be imposed. But Mr Morgan accepts that a court discharging an offender, may under s 108(2)(c) of the CPA make any order the court is required to make on conviction.

---

7 *Solicitor-General v Leef* above n 4.

[22] With that in mind, Mr Morgan then turns to two provisions relevant to sentence appeals.

[23] The first provision is s 246 of the CPA, as to a prosecutor's right of appeal, which provides:

> **246 Prosecutor's right of appeal**
>
> (1) A prosecutor may, in accordance with this section, appeal under this subpart to the first appeal court against the sentence imposed for an offence, unless the sentence is one fixed by law.
>
> (2) An appeal under this subpart by a prosecutor may be brought only by or with the consent of the Solicitor-General.
>
> (3) However, if the defendant is the Crown Law Office, the appeal may be brought only with the consent of the Attorney-General and any decision to give consent must be given personally by the Attorney-General.

[24] Mr Morgan notes that jurisdiction for a prosecutor's appeal is expressly in respect of a sentence, "unless the sentence is one fixed by law."

[25] He then refers to s 212 of the CPA, which provides:

> **212 Interpretation**
>
> In this Part, unless the context otherwise requires,—
>
> **sentence**—
>
> (a) *includes any method of disposing of a case following conviction*; but
>
> (b) does not include—
>
> (i) a decision, on conviction, to make or decline to make an order against the convicted person for the payment of costs under section 364 or under the Costs in Criminal Cases Act 1967; or
>
> (ii) a decision, on conviction, to make or decline to make an order under any of sections 200, 202, or 205 (suppression orders); or
>
> (iii) a decision, on conviction, under section 208 to vary or revoke an order under any of those sections specified in subparagraph (ii).
>
> (Emphasis added)

[26] Mr Morgan accepts that there is a very wide definition of "sentence", which includes any method of disposing of a case following conviction.

[27] In essence, Mr Morgan submits that it is difficult to imagine how a court, having decided to convict and discharge — without imposing a sentence — can then be said to have undertaken "a method of disposing of a case following conviction" when, under s 7(3)(a) of the Act, the Crown argues that provision provides that forfeiture is automatic.

[28] As I understand Mr Morgan's submission, it is first that a conviction and discharge does not operate as a "sentence", in its own terms, because of the wording of s 108, which says a conviction and discharge is "instead of a sentence." Neither conceptually can there be an appeal against an order that the Crown regards as being automatic and inflexible.

[29] As I held in *Leef*, s 212 of the CPA should be interpreted widely and purposively. Appeal rights should not be unreasonably constrained. In my view, an order under s 7(3)(b) of the Act, which provides for the post-conviction destruction or otherwise disposal of gang insignia, is "a method of disposing of a case following conviction". It is intrinsically connected to and is part of the sentencing process, consistent with the broad definition of sentence in s 212 of the CPA.[8]

[30] In support of that conclusion, s 108 of the CPA provides that a court discharging an offender under the section may make any order that the court is required to make on conviction. That, too, must be regarded as a method of disposing of the case. And, Mr Morgan also points to, and accepts the relevance of, s 10A of the Sentencing Act 2002 (the Sentencing Act), which is headed *"Hierarchy of sentences and orders."* He accepts that under s 10A(ii)(a) of the Sentencing Act, the "discharge" referred to includes a conviction and discharge. This is made plain in s 11 of the Sentencing Act. So, for what it is worth, the Sentencing Act generally refers to a discharge without conviction as a type of sentence. In any case, a wide interpretation of s 212 of the CPA is more than sufficient to determine the issue.

---

[8] The courts have traditionally taken a wide view of rights to appeal sentences. For instance, in 1998, in *Ministry of Fisheries v Dowey* [1998] 3 NZLR 5 (CA), in an appeal by a person under the Fisheries Act 1986 where the District Court Judge had refused to make an order "not barring him from fishing", the Court of Appeal held:

> While it is true that the forfeiture and ban is mot imposed by the Court in the form of an order but simply by operation of law, it still remains as and has the effect of a penalty, imposed by the legislation as a consequence of the conviction. It is therefore part of the sentence.

[31] The Crown helpfully notes the Court of Appeal's decision in *Auckland City Council v Hill*.[9] In that case, the Court held that a dog destruction order made under s 57(3) of the Dog Control Act 1996 is an order made in criminal proceedings and is properly categorised as a sentence for the purpose of s 212 of the CPA.

[32] Similarly, the Crown notes that appeals against instrument forfeiture orders under s 142N of the Sentencing Act are dealt with as appeals against sentence under s 246 of the CPA.[10]

[33] In my view, an order under s 7(3)(b) of the Act is materially similar in that it provides for a court to order destruction or disposal of the offending property.

[34] And, as I held in *Leef*, the very appeal point here is whether forfeiture is automatic and whether gang insignia can ever be returned to a defendant. This question of law, as in *Leef*, is at the heart of this appeal. In my view, it would be unduly limiting, bordering on the excessively technical, if the Crown in a case such as this were precluded from appealing under s 246 of the CPA.

[35] In any case, as I noted in *Leef*, if there was any doubt about jurisdiction for this sentence appeal, I accepted the Crown's view that the appeal could easily be amended and "converted" into an appeal on a question of law under s 296 of the CPA. Under s 296(3)(a) of the CPA, the power to return the insignia is fundamentally a question of law, and it unquestionably arose "in proceedings that relate to or follow the determination of the charge". I agree with the Crown's approach. And there could be no prejudice in so doing, if necessary, as Mr Morgan realistically accepted.

The central conclusions of the *Leef* decision

[36] As I have indicated, there is no need to repeat all my analysis and conclusions in *Leef*. The decision speaks for itself.

[37] It is sufficient that I set out the summary of my conclusions at [211] of *Leef*. Section 7(3) of the Act provides for the following two-step process:

---

9 *Auckland City Council v Hill* [2019] NZCA 296.
10 For example, see *Mackie v R* [2012] NZCA 588 and *Wright v R* [2013] NZCA 210.

(a) If a defendant pleads guilty to or is convicted of an offence against s 7(1) of the Act, the gang insignia concerned is forfeited to the Crown under s 7(3)(a). This is the first step in a two-step process.

(b) Forfeiture is automatic and absolute. Upon forfeiture to the Crown, a defendant irretrievably loses their insignia.

(c) The forfeited insignia is then in the custody of the Crown (usually the police).

(d) The insignia remains in the Crown's possession until an application is made to the Court. This is the second step, under s 7(3)(b).

(e) Usually, the application will be made by the police, but potentially can be made by a third party or even the defendant. The application must be for the insignia to be destroyed, or otherwise permanently disposed of depending on the nature of the insignia and the manner in which it is displayed (e.g. on a car or attached to some other item).

(f) Such an application may be made at the time of the defendant's guilty plea or conviction, or at any time thereafter.

(g) Whether the insignia is "destroyed or otherwise disposed of", the one thing that s (7)(3) does not permit is for the forfeited insignia to be returned to the defendant. The two-step process cannot be reversed.

(h) The meaning of the subsection is precise and clear. The necessary and clear implication of the subsection is to override the common law right to own personal property.

(i) It is not possible to find a tenable meaning that is consistent, or less inconsistent, with the rights affirmed in NZBORA. Parliament's intention is clear and must be given effect to.

The conclusions in *Leef* applied to this case

[38] The conclusions in *Leef* can be easily applied to this case, as follows.

[39] First, Judge Wickliffe did not have the power to return either or both gang insignia to Mr Gray-Gill. If that is what she said, following Mr Gray-Gill's guilty plea, she was, with respect, in error, and there was no lawful basis for that finding.

[40] Second, the Judge was correct to record on the Charging Document that the insignia was forfeited to the Crown. That is the effect of s 7(3)(a) of the Act.

[41] Third, under s 7(3)(b), an application is required so that the Court can direct either at the time of guilty plea or conviction, or thereafter, whether the gang insignia be destroyed or otherwise disposed of. In this case, as recorded in the Summary of Facts, at the time of conviction, the police applied for a "Destruction Order" for the insignia.

[42] Fourth, as an application to the Court has been made, the gang insignia must either be destroyed or otherwise disposed of. If it is not to be destroyed, then the Judge needs to order how it is to be otherwise disposed of, in a way consistent with the ruling in *Leef*, with the bottom line being that the gang insignia can never be returned to Mr Gray-Gill.

[43] Fifth, the direction made by the Judge that the insignia "is not to be destroyed", indicates that her Honour has not engaged with s 7(3)(b). It is not a lawful option open to the Court.

[44] Sixth, the police have made an application for the destruction of the gang insignia. That application is to be properly considered. Mr Gray-Gill or any relevant third party will have the chance to argue why it should not be destroyed and to suggest any other appropriate means of disposal consistent with the ruling in *Leef*, short of returning it to Mr Gray-Gill.

Result

[45] The Solicitor-General's appeal is upheld. The Judge's directions are quashed, save for her confirmation that the insignia are forfeited to the Crown.

[46] Any direction made by the District Court Judge that Mr Gray-Gill can have his gang insignia returned to him, has been suspended by the High Court, pending determination of this appeal. That order is now made final.

[47] I remit the matter back to the District Court for Judge Wickliffe to deal with the police application for an order for destruction of the gang insignia, and any other application that might be made by any other person, in accordance with this judgment.

_____

Becroft J