NOTE: HIGH COURT ORDER PROHIBITING PUBLICATION OF NAME OF COMPLAINANT REMAINS IN FORCE

IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA413/2019
[2019] NZCA 657

BETWEEN	SHAY O'CARROLL Appellant
AND	THE QUEEN Respondent

Hearing:	12 September 2019; further submissions filed 27 September and 10 October 2019
Court:	Courtney, Duffy and Wylie JJ
Counsel:	P M Keegan for Appellant P D Marshall for Respondent
Judgment:	3 December 2019 at 10 am
Reasons:	18 December 2019

JUDGMENT OF THE COURT

A The appeal is dismissed.

B The appellant must surrender himself to the Registrar in the High Court at Auckland (24 Waterloo Quadrant, Corner Waterloo Quadrant and Parliament Street) no later than 10 am on 10 December 2019 to commence his sentence of imprisonment.

REASONS OF THE COURT

(Given by Wylie J)

Introduction

[1] We gave a results judgment on this appeal on 3 December 2019. We now give our reasons for that judgment.

[2] This is an appeal against a sentence imposed by the High Court of New Zealand pursuant to Cook Islands law. The appeal raises two related points —

(a) Does this Court have jurisdiction to hear an appeal from a judgment of the High Court of New Zealand given pursuant to s 155(1) of the Cook Islands Act 1915?

(b) If this Court has jurisdiction, does s 155(4) of the Cook Islands Act preclude a judge of the High Court of New Zealand from imposing sentence of home detention on an offender who:

(i) is a New Zealander;

(ii) offended in the Cook Islands;

(iii) was charged under Cook Islands law but in New Zealand;

(iv) entered a guilty plea in New Zealand;

(v) was sentenced in New Zealand to a short term of imprisonment; and

(vi) is otherwise suitable to serve a sentence of home detention?

Factual background

[3] The appellant, Mr O'Carroll, is a New Zealand citizen. While on holiday in the Cook Islands and after an evening spent drinking, he entered the hotel room of a fellow New Zealand tourist. She was asleep. She woke to find Mr O'Carroll indecently assaulting her.

[4] The complainant raised the incident with the hotel's management. Mr O'Carroll was arrested and spoken to by the Cook Islands' police in Rarotonga before being allowed to return to New Zealand.

[5] When the complainant returned to New Zealand, she laid a complaint with the New Zealand Police. On 29 October 2018, with the leave of the Attorney-General of New Zealand and the Solicitor-General of the Cook Islands,[1] the police in this country charged Mr O'Carroll in the District Court at Auckland with indecent assault, contrary to s 148 of the Crimes Act 1969 (Cook Islands). An offence against this section is punishable by a maximum sentence of seven years' imprisonment.

[6] On 15 November 2018, Brewer J transferred the proceeding to the High Court under s 70 of the Criminal Procedure Act 2011,[2] and the Crown Law Office assumed responsibility for the prosecution on 13 February 2019.

[7] Mr O'Carroll sought a sentence indication. That indication was given by Woolford J on 5 April 2019.[3] Applying Cook Islands' sentencing practice,[4] the Judge indicated a starting point of three years' imprisonment, a discount of up to one third for a guilty plea and the possibility of further discounts for any other factors that might emerge.[5]

[8] At the time the sentence indication was given, it was the Crown's position that there was a jurisdictional bar to the imposition of a sentence of home detention by virtue of s 155(4) of the Cook Islands Act which provides that "[t]he punishment to be imposed by the High Court for any such offence shall be that which is provided for that offence by the laws of the Cook Islands." Home detention is not available in

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1 Cook Islands Act 1915, s 155(5). The grant of leave by the Solicitor-General of the Cook Islands was conditional on the Solicitor-General of New Zealand also granting leave. We observe that s 155 of the Cook Islands Act does not require the consent of the Solicitor-General of the Cook Islands. The reference in s 155(5) is to the Attorney-General and, by way of s 2 of the Act, to the Solicitor-General of New Zealand. Whether the approval given by the Solicitor-General of New Zealand in this instance was made with due regard to all relevant considerations is something that was not raised in this appeal.

2 *R v O'Carroll* HC Auckland CRI-2018-004-9592, 15 November 2018 (Minute of Brewer J).

3 *R v O'Carroll* [2019] NZHC 716 (Sentence Indication).

4 At [11]. There was affidavit evidence from the Deputy Solicitor-General of the Cook Islands as to Cook Islands' sentencing practice.

5 At [35].

the Cook Islands, and there is no ability to substitute a short sentence of imprisonment with some other form of sentence.[6] The Judge took the same view. He did not consider that he "[had] jurisdiction to commute a sentence of imprisonment of two years or less to one of home detention".[7]

[9] Mr O'Carroll pleaded guilty in the High Court on 8 May 2019. Sentencing however was delayed, because Mr O'Carroll sought leave to appeal against the sentence indication on an issue of law under s 296 of the Criminal Procedure Act. The issue he sought to raise was whether or not the High Court had jurisdiction to commute any short-term sentence of imprisonment to one of home detention.

[10] This Court declined Mr O'Carroll leave to appeal under s 296.[8] The Court held that questions of law which affect a sentence imposed are intended to be dealt with under the sentence appeal regime found in the Criminal Procedure Act. In the course of its judgment the Court requested the sentencing Judge indicate whether home detention would have been granted had jurisdiction been available and, if so, the length of such sentence.[9]

[11] Mr O'Carroll came before Woolford J for sentence on 19 August 2019.

[12] Prior to the sentence hearing, the Crown filed submissions advising the Judge that it no longer considered that s 155(4) of the Cook Islands Act was a jurisdictional bar to the court imposing a sentence of home detention.[10] It maintained however that imprisonment was the appropriate sentence, given the seriousness of the offending.[11]

[13] The following points from Woolford J's judgment are relevant:

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6 At [11].
7 At [36].
8 *O'Carroll v R* [2019] NZCA 303 at [12]–[15]. Whether or not this Court had jurisdiction to hear any appeal under the Criminal Procedure Act 2011 or otherwise was not considered by the Court.
9 At [18].
10 *R v O'Carroll* [2019] NZHC 2035 (Sentencing Notes) at [6].
11 At [17].

(a) The Judge adhered to his sentence indication. He took as his starting point a sentence of three years' imprisonment. In doing so, he followed the approach taken in Cook Islands' case law, as well as the principles and purposes of sentencing set out in ss 7 and 8 of the Sentencing Act 2002 which, the evidence showed, have been adopted by the Cook Islands' High Court.[12]

(b) The Judge found that there were aggravating factors — the vulnerability of the victim, the invasion of her privacy, the scale of the offending and the ongoing trauma experienced by her. He noted that Mr O'Carroll had prior convictions, but not for similar offending, and he did not uplift the starting point for these.[13]

(c) He accepted that Mr O'Carroll was remorseful and had demonstrated insight into his offending.[14] He also noted that there was an offer of emotional harm reparation.

(d) Taking these factors into account, the Judge discounted his starting point by three months.[15] Further, he discounted the starting point by a further 11 months — or 33 per cent — because Mr O'Carroll had pleaded guilty.[16] There was evidence before the Court that discounts of that magnitude are commonly applied by Cook Islands' judges. On this basis, the Judge imposed an end sentence of 22 months' imprisonment.[17]

(e) The Judge remained of the view that, pursuant to s 155(4) of the Cook Islands Act, Mr O'Carroll could only be punished as he would have been under Cook Islands law, and that therefore he was unable to impose a sentence of home detention.[18] The Judge noted that such

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12 At [21].
13 At [22]–[23].
14 At [24].
15 At [24].
16 At [25].
17 At [26].
18 At [4].

sentence is not available in the Cook Islands. He observed that the Sentencing Amendment Act 2007 revised the Sentencing Act, and that home detention is now a stand-alone sentence which can be imposed by the courts as an alternative to a sentence of imprisonment.[19] He did not accept the interpretation advanced by counsel that s 155(4) is directed to the maximum punishment available for any given offence.[20] He considered that s 155 does not extend the jurisdiction of the High Court of New Zealand beyond that necessary to enable the court to try offences under Cook Islands law in New Zealand. He took the view that New Zealand's sentencing regime did not apply to the case before him and that Mr O'Carroll had to be sentenced according to Cook Islands law.[21]

(f) Consistent with this view, the Judge accorded to Mr O'Carroll the benefits of being sentenced under Cook Islands law. He revoked the first strike warning which had earlier been given to Mr O'Carroll and he allowed Mr O'Carroll a guilty plea discount of one third of the starting point sentence.[22] The Judge expressed the view that home detention could have been appropriate if it had been available, along with special conditions under s 80D of the Sentencing Act. He recorded that he would have imposed an end sentence of 10 months' home detention if he had jurisdiction to do so.[23]

[14] Mr O'Carroll appealed. The High Court extended the grant of bail pending the hearing of this appeal and the delivery of this judgment.[24]

[15] The issue initially raised on the appeal was whether or not the Judge was correct in his interpretation of s 155(4) of the Cook Islands Act. In the course of

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19 At [8].
20 At [10].
21 At [11]–[15].
22 At [14], [25] and [28]. Such discount is more than the equivalent discount available in New Zealand under current sentencing practice: see *Hessell v R* [2010] NZSC 135, [2011] 1 NZLR 607.
23 At [27].
24 At [29].

argument before us, the question arose as to whether or not this Court had jurisdiction to hear the appeal at all. At our request, counsel filed further submissions dealing with this point.

The appeal

[16] Mr Marshall, for the Crown, submitted that this Court does have jurisdiction to hear and determine the appeal. He argued that once criminal proceedings have been commenced under s 155 of the Cook Islands Act, they are New Zealand proceedings governed by domestic law, and that the appeal pathway set out in the Criminal Procedure Act is available. He argued that this interpretation is consistent with both the Cook Islands Act and the Cook Islands Constitution Act 1964. He also referred to s 25(h) of the New Zealand Bill of Rights Act 1990, arguing that any interpretation of the relevant provisions which detracted from the right of appeal referred to in that section should be avoided.

[17] Mr Keegan, for Mr O'Carroll, adopted the Crown's submissions in this regard.

[18] In relation to the substantive issue — whether or not the Judge was correct in his interpretation of s 155(4) of the Cook Islands Act — both Mr Keegan and Mr Marshall submitted that s 155(1) of the Act extends the criminal jurisdiction of the High Court of New Zealand to offences committed in the Cook Islands as if they were offences committed in New Zealand. They argued that this includes the jurisdiction to sentence or otherwise deal with offenders under the Sentencing Act. Both submitted that s 155(4) permits two interpretations, either:

(a) the subsection limits the particular sentence to be imposed for an offence to that which could have been imposed under Cook Islands law; or

(b) the subsection limits only the maximum sentence that could be imposed to that available under Cook Islands law.

[19] Both argued that the second interpretation should be preferred, that the appeal should be allowed and that the sentence of home detention which the Judge indicated

he would have imposed had he had jurisdiction to do so, should be substituted for the sentence of imprisonment imposed.

Analysis

[20] The Cook Islands are a self-governing state.[25] They have their own constitution and laws and their laws are exclusively under their control, notwithstanding that they remain part of the Realm of New Zealand. This position was initiated by the Cook Islands Act and completed by the Cook Islands Constitution Act, an act of the New Zealand Parliament, but in force in the Cook Islands as part of that country's laws. In New Zealand law, the Cook Islands are now described as "the self-governing state of the Cook Islands".[26]

The Cook Islands Act

[21] The Cook Islands Act came into force on 1 April 1916.

[22] The Crown helpfully discussed its provenance in its submissions. It seems that, in 1913, it was discovered that no properly constituted legislative body had existed in the Cook Islands since 1904. The resident Commissioner, Henry William Northcroft, in his annual report for 1913, described the state of affairs then pertaining in the Cook Islands as a "chaotic mess".[27] He noted that the laws of the Cook Islands were in a most unsatisfactory state, and that legislation of the New Zealand Parliament was urgently needed to extricate the Cook Islands laws from this position. The Solicitor-General at the time — Sir John Salmond — set about drafting a bill. He sought to consolidate the laws of the Cook Islands and to make them as near as possible to New Zealand law, but with some relatively minor differences.[28]

[23] The product of Sir John's efforts was the Cook Islands Act. As its long title records, the Act was intended "to make better provision with respect to the government

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25 Cook Islands Constitution Act 1964, s 3; and Alison Quentin-Baxter *The Laws of New Zealand – Pacific States and Territories: Cook Islands* (online ed, LexisNexis) at [8].

26 Letters Patent Constituting the Office of the Governor General of New Zealand 1983, cl 1(b). See also Interpretation Act 1999, s 29 (definition of "New Zealand").

27 Henry William Northcroft "Annual Report of the Resident Commissioner [1913–1914] I AJHR A-3 at 5.

28 (24 September 1915) 174 NZPD 163.

and laws of the Cook Islands". The Act, in its original form, provided, exclusively and comprehensively, for the legal system of the Cook Islands, their substantive laws, and their governance.[29] It was enacted by the New Zealand Parliament (and in that sense is part of New Zealand's law) but it applies to the Cook Islands only and not to New Zealand, except insofar as a contrary intention is expressed.[30] It re-established the High Court of the Cook Islands and the Native Land Court, both as courts of record.[31] It conferred on the High Court of the Cook Islands:[32]

> …except so far as exclusive jurisdiction is conferred upon any other Court …, have all jurisdiction, whether civil or criminal, which may be necessary to administer the laws of the Cook Islands.

The Act contained a criminal code, a code of criminal procedure and a code of evidence. All offences against the laws of the Cook Islands were to be tried by the High Court of the Cook Islands, except where otherwise expressly provided,[33] and there were appeals to the then Supreme Court of New Zealand.[34] There was no further appeal to the Court of Appeal in this country.[35]

[24] Much of the Cook Islands Act has since been repealed, but relevantly, and under New Zealand law, it still confers jurisdiction on what is now the High Court of New Zealand:

(a) Section 153(1) provides that the civil jurisdiction of the High Court in this country extends to the Cook Islands and can be exercised in New Zealand in respect of the Cook Islands in the same manner in all respects as if those islands were for all purposes part of New Zealand.

(b) Section 155 of the Act provides as follows:

> **155 Criminal jurisdiction of High Court in respect of Cook Islands**

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29 *The Laws of New Zealand,* above n 25, at [4]. See in particular, Cook Islands Act, s 618 (repealed).
30 Cook Islands Act, s 3.
31 Sections 101 and 367 (repealed).
32 Section 114 (repealed).
33 Section 279 (repealed).
34 Section 157–172 (repealed).
35 Section 170 (repealed).

> (1) Notwithstanding anything in this Act, the criminal jurisdiction of the High Court of New Zealand shall extend to offences committed in the Cook Islands, and may be exercised in New Zealand in respect of such offences accordingly in the same manner as if they were offences committed in New Zealand that are within the jurisdiction of the High Court of New Zealand.
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> (2) Such jurisdiction shall be exercised only over offenders found in New Zealand.
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> (3) In respect of any offence which is within the jurisdiction of the High Court under this section the like preliminary proceedings before Justices of the Peace or a District Court Judge may be taken in New Zealand as in the case of such offences committed in New Zealand.
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> (3A) The charging document for any such offence shall be filed either in the District Court at Auckland or the office of the District Court appointed for the exercise of criminal jurisdiction which is nearest by the most practicable route to the place where the prosecutor believes that the defendant may be found.
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> (4) The punishment to be imposed by the High Court for any such offence shall be that which is provided for that offence by the laws of the Cook Islands. Any person so liable to be imprisoned may be sentenced to imprisonment with or without hard labour as the High Court thinks fit.
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> (5) No prosecution in New Zealand for an offence committed in the Cook Islands shall be commenced without the leave of the Attorney-General.

There was and is no express provision in the Act for appeals from decisions of the then Supreme (now High) Court exercising its jurisdiction under either ss 153 or 155.

[25] Both ss 153 and 155 remain in force in New Zealand. They were amended on 1 April 1980 to substitute the High Court for the Supreme Court.[36] Section 155 was amended in 1967 to add subs (3A)[37] and further amended by the Criminal Procedure Act to provide for the abolition of indictable offences and informations.[38] Section 153 however is no longer in force in the Cook Islands.[39]

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36 Judicature Amendment Act 1979, s 12.
37 Cook Islands Amendment Act 1967, s 2(2).
38 Criminal Procedure Act, s 413 and sch 3.
39 See below at [28].

Cook Islands Constitution Act

[26] The Cook Islands Constitution Act transformed the status of the Cook Islands from a non-self-governing territory to a self-governing state in the law of both New Zealand and the Cook Islands.[40] The Act included, as a schedule, the Constitution of the Cook Islands, which is now "the supreme law of the Cook Islands".[41]

[27] Article 77 of the Constitution provides that any law in force in the Cook Islands before Constitution Day (4 August 1965) was to continue in force until repeal. This extends to the Cook Islands Act, and there was at that time no clear repeal of ss 153 and 155. There was still a dual jurisdiction in the High Courts of both New Zealand and the Cook Islands after Constitution Day.[42] This reflected expert advice given to the Cook Islands Legislative Assembly at the time.[43]

[28] In 1969, the Cook Islands' legislature repealed inter alia s 153 of the Cook Islands Act and substituted new provisions.[44] This repeal however was not followed in New Zealand. Later, in 1981, the Cook Islands amended its Constitution to establish the Court of Appeal of the Cook Islands to hear appeals from the High Court of the Cook Islands.[45] The following year, the New Zealand Parliament repealed a number of provisions in pt 4 of the Cook Islands Act because they were considered to be of no effect.[46] Sections 153 and 155 were not however repealed in this country. Section 155 remains in force in the laws of both New Zealand and the Cook Islands.[47]

[29] Pursuant to the Cook Islands Act, various specific New Zealand statutes were declared to also be in force in the Cook Islands. Initially, under art 46 of the Cook Islands' Constitution, the passing of an Act by the New Zealand Parliament

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40 *The Laws of New Zealand,* above n 25, at [8].
41 Cook Islands Constitution Act, s 4.
42 *Tangata v Speaker of the Cook Islands Legislative Authority* [1979] 2 NZLR 182 (SC) at 184.
43 C C Aikman, J W Davidson and J B Wright *Report to the Members of the Legislative Assembly of the Cook Islands on Constitutional Development* (Government Printer, Rarotonga, September 1963), reproduced in (1999) 30(2) VUWLR 519.
44 Cook Islands Amendment Act 1969 (Cook Islands), s 2.
45 Constitution Amendment (No 9) Act 1980–1981 (Cook Islands), s 56.
46 Cook Islands Amendment Act 1982, s 2; and Statutes Amendment Bill 1982 (110-1) cl 25.
47 *The Laws of New Zealand*, above n 25, at [21].

could apply in the Cook Islands if the Act had been requested and consented to by the Government of the Cook Islands, and the New Zealand Act expressly declared that the Government of the Cook Islands had so requested and consented.[48] The New Zealand Act then became part of the law of the Cook Islands. Article 46 has since been amended by the Cook Islands' Government to remove altogether the power of the New Zealand Parliament to make laws for the Cook Islands.[49] Since 5 June 1981, no New Zealand Act can extend to the Cook Islands as part of their laws, unless provision to that effect has been made by an Act of Parliament of the Cook Islands.[50]

[30] Against this background, we turn to consider the questions posed by this appeal.

Does this Court have jurisdiction to hear an appeal from the High Court sitting under s 155(1) of the Cook Islands Act?

[31] A right of appeal is a substantive right and it is trite law that all appellate jurisdiction is statutory.[51] Such jurisdiction must be derived from an empowering statute and that there is no inherent appellate jurisdiction.[52] The position was succinctly stated by the House of Lords in 1864 as follows:[53]

> The creation of a new right of appeal is plainly an act which requires legislative authority. The Court from which the appeal is given, and the Court to which it is given, must both be bound, and that must be the act of some higher power. It is not competent to either tribunal, or to both collectively, to create any such right. Suppose the Legislature to have given to either tribunal, that is, to the Court of the First Instance, and to the Court of Error or Appeal respectively, the fullest power of regulating its own practice or procedure, such power would not avail for the creation of a new right of appeal, which is in effect a limitation of the jurisdiction of one Court, and an extension of the jurisdiction of another.

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48 The Constitution of the Cook Islands, art 46.

49 Constitution Amendment (No 9) Act (Cook Islands), s 5. See also *The Laws of New Zealand,* above n 13, at [8] and [15].

50 5 June 1981 was the date the amendment took effect.

51 *The Colonial Sugar Company Ltd v Irving* [1905] AC 369 (PC).

52 *Jones v R* [2014] NZSC 85, [2014] 1 NZLR 838 at [12]; *R v Clark* [2005] NZSC 23, [2005] 2 NZLR 747 at [3]; and *Taylor v C* [2017] NZCA 372 at [25].

53 *Attorney-General v Sillem* (1864) 10 HLC 704, (1864) 11 ER 1200 (HL) at 1207–1208.

[32] This Court was first established in 1862.[54] There were various rights created to appeal or refer criminal matters determined by the then Supreme Court to this Court.[55] The Court's appellate role in criminal matters was confirmed in various subsequent statutes.[56] In 1957 the permanent Court of Appeal was established in Wellington with three specifically appointed Court of Appeal judges. The jurisdiction of the Court was set out in the Judicature Amendment Act 1957 (which amended the Judicature Act 1908). It is now provided for in the Senior Courts Act 2016. Relevantly, s 56 of that Act now provides as follows:

> **56 Jurisdiction**
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> (1) The Court of Appeal may hear and determine appeals—
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> (a) from a judgment, decree, or order of the High Court:
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> (b) under the Criminal Procedure Act 2011:
>
> (c) from any court or tribunal under any other Act that confers on the Court of Appeal jurisdiction and power to hear and determine an appeal.
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> …

[33] None of the various statutes conferring appellate jurisdiction on this Court applies to the Cook Islands. The earlier statutes were not listed as applying to the Cook Islands in the Cook Islands Act. The Government of the Cook Islands did not request or consent to later statutes conferring rights of appeal applying in the Cook Islands. The statutes (and in particular, the Senior Courts Act) do not purport to apply to the Cook Islands.

[34] As noted, this Court's jurisdiction is now conferred by s 56 of the Senior Courts Act. Counsel do not suggest that s 56(1)(a) assists Mr O'Carroll. It re-enacts s 66 of the Judicature Act, and that provision applied only to civil proceedings.[57] It follows that Mr O'Carroll can only appeal to this Court against his

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54 Court of Appeal Act 1862, s 3. See also Peter Spiller *The New Zealand Court of Appeal 1958–1996: A History* (Brookers, Wellington, 2002).

55 Sections 68–73.

56 Court of Appeal Act 1882, s 19; Criminal Code Act 1893, ss 412–413; Judicature Act 1908, ss 57and 70; Crimes Act 1908, s 442 (amended by the Crimes Amendment Act 1920 to provide for appeals with leave against sentences imposed by the Supreme Court, in addition to appeals against conviction); and Criminal Appeal Act 1945, s 3.

57 *Mafart v Television New Zealand Ltd* [2006] NZSC 33, [2006] 3 NZLR 18 at [6].

sentence under either the Criminal Procedure Act or under any other Act that confers appellate jurisdiction on this Court.

[35] The Criminal Procedure Act is an Act of the New Zealand legislature. Although it is primarily concerned with procedure, it also confers rights of appeal to this Court. It does not however purport to apply to the Cook Islands and it has not been adopted into Cook Islands law by the Cook Islands' legislature.

[36] Section 155(1) refers to the criminal jurisdiction of the High Court of New Zealand. It deals with that Court's jurisdiction over persons who could have been tried in the Cook Islands but instead are being tried in New Zealand. Under the section, the jurisdiction of the High Court falls to be exercised in respect of Cook Islands' offences in the same manner as if they were offences committed in New Zealand. This must mean that, when the High Court is exercising its jurisdiction over such offences, relevant parts of the Criminal Procedure Act apply. Otherwise the jurisdiction conferred would be unworkable. Once the High Court has convicted and sentenced, it is functus officio and can no longer exercise jurisdiction under s 155(1).

[37] Section 155 focuses on the jurisdiction of the High Court – not this Court – and it is only the High Court that is given jurisdiction. There is no appellate jurisdiction conferred on this Court and therefore no basis on which the Criminal Procedure Act can have wider application.

[38] It was argued that, given the New Zealand Parliament turned its attention to appeal rights in passing the Cook Islands Act, the natural implication must be that any appeal rights from what was then the Supreme Court must be those then afforded under New Zealand law. It was submitted that this interpretation is consistent with subsequent amendments to s 155, and that it is consistent with the Constitution of the Cook Islands and with s 25(h) of the New Zealand Bill of Rights Act.

[39] As noted, implying a right of appeal is contrary to well established authority. Further, it is inconsistent with the provisions of the Cook Islands Act as it initially stood. Section 618 of that Act (since repealed) provided that the statute law of

New Zealand, whether enacted before or after the commencement of the Act, was not to be in force in the Cook Islands. The interpretation suggested by counsel is also inconsistent with the Cook Islands Constitution Act discussed above. The New Zealand Bill of Rights Act may apply if rights detailed in the Act may fall for consideration by the High Court in the exercise of its jurisdiction under s 155, but the right of appeal against conviction confirmed in s 25(h), is not a right that can be afforded by the High Court in the exercise of the s 155 jurisdiction.

[40] Except to the limited extent discussed in the preceding paragraph, the New Zealand Bill of Rights Act does not apply to the Cook Islands. While the Parliament of New Zealand can legislate extraterritorially, there is a strong presumption that legislation is not intended to have extraterritorial effect.[58] As the Privy Council explained in an appeal from New Zealand, where colonies possess and have exercised the power of legislating on matters for themselves, there is every reason why legislation of the home government should not unnecessarily be held to extend to the colonies, overruling, qualifying, or adding to their own legislation on the same subject.[59]

[41] Here, the Parliament of this country has not endeavoured to legislate in respect of the Cook Islands by creating a right of appeal from the High Court sitting under s 155 of the Cook Islands Act. The effect of counsels' interpretation would be that New Zealand law, passed by the New Zealand Parliament, which does not expressly refer to the Cook Islands, and which was not requested or consented to by the Cook Islands, is part of Cook Islands law. In our judgment, this proposition is contrary to the relevant statutory provisions and to established authority.

[42] The only jurisdiction given to the High Court of New Zealand under s 155 of the Cook Islands Act is the application of Cook Islands law, albeit in a manner that is consistent with New Zealand law. Now that the Cook Islands have become self-governing, s 155 is in many respects an anachronism. It nevertheless remains in place. It confers jurisdiction on the High Court of New Zealand to try people in this

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58 *Poynter v Commerce Commission* [2010] NZSC 38, [2010] 3 NZLR 300 at [30] and [36]–[45]; and *Governor of Pitcairn and Associated Islands v Sutton* [1995] 1 NZLR 426 (CA) at 438.

59 *New Zealand Loans & Mercantile Agency Co v Morrison* [1898] AC 349 (PC) at 357.

country under the now Cook Islands' Crimes Act. Whether persons convicted under that statute by the High Court of New Zealand have a right of appeal against conviction and/or sentence, and if so to which Court, are matters which, now, can only be dealt with by the Cook Islands legislature. It has not seen fit to confer a right of appeal to this Court. It follows, in our judgment, that this Court has no jurisdiction to hear an appeal from a judgment of the High Court given pursuant to s 155(1) of the Cook Islands Act.

[43] We observe that, insofar as we are aware, this is the first case in which s 155(1) has been invoked. The position Mr O'Carroll finds himself in is highly unsatisfactory. Had he been sentenced in the Cook Islands, he would have had a right of appeal to the Cook Islands' Court of Appeal. Had he offended in New Zealand, he would have had rights of appeal. In our judgment, the situation calls for urgent legislative amendment — either by repealing s 155, or amending it to confer a right of appeal to this Court.

Does s 155(4) of the Cook Islands Act preclude a Judge of the High Court of New Zealand from imposing a sentence of home detention on an offender tried in New Zealand?

[44] It follows, and for much the same reasons, that even if this Court does have jurisdiction, the appeal must nevertheless be dismissed. There is no sentence of home detention in the Cook Islands. The power to impose a sentence of home detention was introduced into New Zealand's Sentencing Act in 2007 as a stand-alone sentence.[60] However, the Sentencing Act and the Sentencing Amendment Act 2007 form no part of Cook Islands law and cannot be implied into Cook Islands law. In our view, s 155(4) of the Cook Islands Act precludes a judge of the High Court of New Zealand from sentencing an offender who has come before the High Court pursuant to s 155(1) to a sentence of home detention.

Result

[45] For these reasons, the appeal was dismissed for want of jurisdiction.

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[60] Sentencing Amendment Act 2007, s 10; and Sentencing Act 2002, s 15A.

[46] We note that the High Court made an order, pursuant to its inherent jurisdiction, prohibiting publication of the name of the complainant. There was no challenge to this order by either party, and it remains in place.

Solicitors:
Crown Law Office, Wellington for Respondent