IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU ROHE

CRI-2018-004-009592
[2019] NZHC 2035

THE QUEEN

v

SHAY O'CARROLL

Hearing: 19 August 2019

Appearances: E Woolley for the Crown
P M Keegan for the Defendant

Sentencing: 19 August 2019

SENTENCING REMARKS OF WOOLFORD J

Solicitors: Meredith Connell (Office of the Crown Solicitor), Auckland

Counsel: P M Keegan, New Plymouth

Introduction

[1] Mr O'Carroll has pleaded guilty to indecent assault under s 148 of the Cook Islands Crimes Act 1969 and is for sentence today. The criminal jurisdiction of the High Court extends to offences committed in the Cook Islands where offenders are found in New Zealand and with leave of the Attorney-General.[1] Mr O'Carroll is a New Zealander and leave of the Attorney-General was obtained on 5 September 2018, so the matter can be dealt with in this court.

[2] I gave a sentence indication on 5 April 2019 and Mr O'Carroll pleaded guilty on 8 May 2019.

Facts

[3] I set out the facts in full at the sentence indication hearing, a copy which is annexed to these notes. In short, Mr O'Carroll and the victim were both on holiday in Rarotonga, staying at the same resort. Mr O'Carroll was intoxicated, he went into the victim's hotel room without invitation and used his tongue to lick her vagina. She told him "No" a number of times. The offending would constitute sexual violation by unlawful sexual connection if he had been charged in New Zealand.

Jurisdiction issues

[4] A preliminary issue is the High Court's jurisdiction to impose a sentence of home detention. The sentencing laws of the Cook Islands do not provide for the option of home detention. Section 155(4) of the Cook Islands Act 1915 (NZ) provides:

> (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.

At the sentence indication and in accordance with the Crown's submissions, I concluded that I did not have jurisdiction to sentence Mr O'Carroll to home detention because it is not available in the Cook Islands.[2]

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1 Cook Islands Act 1915 (NZ), s 155.
2 *R v O'Carroll* [2019] NZHC 716 at [36].

[5] Mr O'Carroll applied to the Court of Appeal for leave to appeal this aspect of the sentence indication. The Court of Appeal dismissed the application on the basis that it did not have jurisdiction to hear the appeal before sentencing.[3] After sentencing, Mr O'Carroll can appeal both the availability of home detention and the sentence imposed.[4] The Court of Appeal directed that the sentencing decision of this court should indicate whether home detention would have been granted had jurisdiction been available, and if so, the length of such a sentence.[5]

[6] However, I have received further submissions on the question of jurisdiction. The Crown has now changed its mind and submits that s 155(4) should be interpreted as limiting only the maximum sentence that may be imposed to that which is available under Cook Islands law. The Crown submits that s 155 extends the New Zealand criminal jurisdiction, rather than providing that the High Court may exercise the Cook Islands' criminal jurisdiction.

[7] Counsel for the defence also submits that s 155(4) provides that the maximum penalty for the offence shall be that which is provided for in the Cook Islands. Counsel also noted that initially under the Sentencing Act 2002, home detention was a way of serving a sentence of imprisonment. It was not a sentence in its own right. The Parole Board decided whether an offender's term of imprisonment should be served by way of home detention. Therefore, prior to 1 October 2007, had Mr O'Carroll been sentenced to imprisonment the option of home detention would have been available to him through the Parole Board.

[8] The Sentencing Amendment Act 2007 revised the Sentencing Act so that home detention no longer constitutes a form of imprisonment; it is a stand-alone sentence which is imposed by the courts as an alternative sentence to imprisonment.[6] An important objective of introducing the new sentence of home detention was to reduce the prison population.[7] Counsel for the defence submits that if the High Court does not have the jurisdiction to sentence Mr O'Carroll to home detention, the result would

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3 *O'Carroll v R* [2019] NZCA 303.
4 At [14].
5 At [18].
6 *R v Hill* CA 559/07; [2008] NZCA 41 at [19].
7 At [32].

be that Sentencing Amendment Act 2007 has perversely taken away the availability of home detention as a means of serving a sentence of imprisonment. Counsel submits that this cannot have been Parliament's intention.

[9] With respect, my view is, however, that Parliament never turned its mind to the availability of home detention for New Zealanders prosecuted in New Zealand for offences committed in the Cook Islands when it made home detention a stand-alone sentence.

[10] I also do not accept the interpretation of s 155(4) whereby 'punishment' is taken to mean 'maximum punishment'. The examples provided by counsel include phrases such as "an offence is punishable by" or "(offenders) shall be liable to imprisonment for a term of". Such phrases do refer to maximum punishment; they mean that the offence is capable of attracting a particular punishment, but the word 'punishment' used in s 155(4) simply means the sentence that can be imposed. I see no reason to resile from the clear wording of the section.

[11] Section 155 does not extend New Zealand's jurisdiction beyond what is necessary to enable the High Court of New Zealand to try offences under Cook Islands law in New Zealand. It is accepted that Mr O'Carroll could not have been charged with unlawful sexual connection under the New Zealand Crimes Act. The Cook Islands Constitution specifically provides that the New Zealand Parliament has no power to legislate for the Cook Islands, unless it has been requested by the Cook Islands' Government.[8] Article 47 of the Constitution provides that the Cook Islands High Court has all jurisdiction in the Cook Islands, except where provided by law. The New Zealand case *Drollett v Police* illustrates the limits of that exception.[9] The case involved was an appeal against a case heard in New Zealand pursuant to article 47. One of the grounds of appeal was the judge sentencing imposed his views as a New Zealander. The Cook Islands Court of Appeal dismissed this argument:

> Second, it was said because of the possible ramifications, including issues of sovereignty… We think this argument is overstated. Sitting in New Zealand, the Court is applying Cook Islands law, not New Zealand law.

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8 Cook Islands Constitution Act 1964, art 46.

9 *Drollett v Police* (Cook Islands Court of Appeal, CA 10/03, 20 December 2004).

[12] As to defence counsel's point about the purpose of the Sentencing Amendment Act 2007, it must be emphasized that the New Zealand sentencing regime is not operative in this matter. If he was being sentenced under New Zealand law, it would be contrary to Parliament's intention to refuse to consider imposing a sentence of home detention. However, Mr O'Carroll will be sentenced according to Cook Islands law, so the purpose of New Zealand's home detention regime is not relevant.

[13] Offenders sentenced under Cook Islands law, even in New Zealand cannot opt into New Zealand law. This was demonstrated in the *R v Kairoa Koia*, where it was held that offenders sent from the Cook Islands to New Zealand did not have the same appeal rights as New Zealand offenders:[10]

> It seems unreasonable to suppose that the Crimes Amendment Act 1920, is to apply merely by reason of the fortuitous circumstance that for the convenience of administration a prisoner from the Cook Islands is brought to New Zealand to serve his sentence, while it does not apply to prisoners convicted (let it be assumed) of precisely similar offences who are left in the Cook Islands to serve their sentences.

[14] For the same reason, Mr O'Carroll will also receive the benefits of being sentenced under Cook Islands law, rather than New Zealand law, when he pleaded guilty he was, in my view, erroneously given a first strike warning. Section 155(4) means that Mr O'Carroll should not have been issued a first strike warning. He did not commit an offence listed in s 86A of the Sentencing Act 2002, so he is not subject to the "three strikes" sentencing regime and the warning was given in error. Mr O'Carroll is also able to receive a guilty plea discount of up to one-third of his sentence, which is more than the equivalent discount in New Zealand sentencing practice.

[15] I will remain with my position from the sentencing indication that under s 155(4), Mr O'Carroll can only be punished as he would under Cook Islands law, so I am not able to impose a sentence of home detention.

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10 *R v Kairoa Koia* [1933] NZLR 314 at 319.

Pre-sentence report

[16] The pre-sentence report states that Mr O'Carroll has taken full responsibility for his actions and demonstrated good insight into his offending. The report writer described him as deeply embarrassed and ashamed. He acknowledged the role that his alcohol played in the offending and is highly motivated to address his alcohol misuse. The report writer described Mr O'Carroll as articulate and transparent. His risk of reoffending and his risk to the community was assessed as low provided he undertakes the rehabilitative strategies recommended. The report writer suggested he would respond positively to a community based rehabilitative sentence, because he had not appeared before court since 2011. He has strong family support and he has a full-time job with a supportive employer.

Crown submissions

[17] The Crown submits that imprisonment is the most appropriate sentence, based on the following points:

(a) A term of imprisonment would have been imposed had Mr O'Carroll been sentenced in the Cook Islands, based on the authorities from the sentence indication;

(b) The offence is only one of indecent assault because that is the only offence provision available for this type of offending under Cook Islands law. A presumption of imprisonment would have applied had Mr O'Carroll been sentenced under New Zealand law for a sexual violation charge;

(c) The Court of Appeal in *Troon v R* considered the appropriate sentence to be imposed for offending that had been resolved at trial on two charges of indecent assault but was in reality sexual violation:[11]

> [44] There is no guideline judgment of this Court for the offence of indecent assault for the obvious reason that it can be committed in an infinite variety of ways. The starting points

[11] *Troon v R* [2019] NZCA 265.

> adopted in other cases will therefore seldom provide assistance in fixing the starting point on this type of charge. The aggravating and mitigating factors relevant to the offence will therefore usually provide the greatest assistance because they inform the overall culpability of the offending having regard to the maximum sentence for the charge.

(d) In *Troon v R*, the most significant aggravating factors of the indecent assaults were the penetration of the complainant's vagina with a beer bottle and mouth with a penis, without her consent.[12] The Court considered this to be the most serious offending of its type, so the maximum penalty of seven years' imprisonment should have been imposed under s 8(c) of the Sentencing Act 2002.

Defence submissions

[18] Counsel for the defence submits that a sentence of home detention should be imposed even though the offence was serious. Counsel discussed the positive assessments of the pre-sentence report and referred to further mitigating factors personal to Mr O'Carroll:

(a) He has held himself accountable for the offending by pleading guilty early;

(b) He has taken responsibility for the harm he has caused. Mr O'Carroll requested the opportunity to participate in restorative justice with the victim, but this was not able to occur.

(c) Although they are of limited financial means, Mr O'Carroll and his family would also like to offer the victim emotional harm reparation or offer a donation to a suitable charity if that is more appropriate.

[19] Counsel for the defence also provided me with letters from Mr O'Carroll's family and friends. They describe Mr O'Carroll as being a loving father and a caring person. Mr O'Carroll has two children who he pays child support for.

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12 At [45].

[20] Based on his limited criminal history, pro-social support, and **his** personal motivation, counsel submits that the Court should impose a sentence lower than the one indicated.

Sentence

[21] I sentence Mr O'Carroll today on the basis of the sentence indication from 5 April. I found that a starting point of three years' imprisonment was appropriate. I followed the approach set out by Cook Islands' case law and the principles and purposes of sentencing from ss 7 and 8 of the Sentencing Act 2002 (which have been adopted by the Cook Islands High Court, according to an affidavit sworn in these proceedings by the Deputy Solicitor-General of the Cook Islands).

[22] I found that the significant aggravating factors of the offence were: the vulnerability of the victim; the invasion of her privacy; the scale of the offending and the ongoing trauma experienced by the victim after the assault.

[23] I held that no uplift was justified for Mr O'Carroll's prior convictions because they were not for similar offending.

[24] I stated at the sentence indication that a further discount may be available for personal factors, such as reparation or remorse. Looking at the pre-sentence report and the information provided by defence counsel, Mr O'Carroll is clearly remorseful and has demonstrated insight into his offending. He has also, through counsel, offered emotional harm reparation of $1,000. I will, therefore, discount his sentence by three months or approximately eight per cent for these mitigating factors.

[25] Finally, I will discount the sentence by eleven months or 33 per cent because Mr O'Carroll has pleaded guilty, and this discount is based on the practice of Cook Island judges.

[26] On that basis, I impose an end sentence of 22 months' imprisonment.

[27] My view is that home detention would have been appropriate if it was available because of Mr O'Carroll's remorse, his commitment to rehabilitation and the

likelihood of its success. I also consider that special conditions imposed under s 80D of the Sentencing Act 2002 tailored to Mr O'Carroll's particular circumstances would have been appropriate. I would have imposed an end sentence of 10 months' home detention if I had the jurisdiction to do so.

[28] I also make an order revoking the first strike warning that was incorrectly given to Mr O'Carroll. So on that basis, I sentence Mr O'Carroll to 22 months' imprisonment and order him to pay $1,000 emotional harm reparation to the victim.

[29] With the consent of the Crown, I grant bail on existing terms and conditions to Mr O'Carroll until the determination of the proposed appeal against sentence. An extra condition of bail is that Mr O'Carroll is to pursue the appeal promptly, although I do note that the Court of Appeal has already allocated a date of 12 September 2019 for the hearing of the appeal.

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Woolford J

Sentence indication given on 5 April 2019

Introduction

[1] Mr O'Carroll is charged with indecent assault under s 148 of the Crimes Act 1969 (Cook Islands). The maximum penalty is seven years imprisonment. He now seeks a sentence indication on that charge.

[2] A sentence indication is an indication of the sentence that would be imposed in the event that Mr O'Carroll was to enter a guilty plea shortly after the indication is given. If he does not accept the indication, he will go to trial. If he is found guilty, the Judge who presides at the trial will impose sentence based on his or her view of the facts as they emerge at trial. The sentence indication would be of no relevance in that context.

Alleged facts

[3] The sentence indication is given on the basis of a summary of facts that has been accepted for today's purposes.

[4] The summary of facts reveals that the complainant and the defendant were both on holiday in Rarotonga, in the Cook Islands, staying at the same resort. They were not known to each other.

[5] The complainant and her partner were drinking at a bar, where they began socialising with a group of males that included the defendant. The complainant's partner informed her that he had arranged to catch a ride back to their resort on the back of the group's scooters. The complainant got on the back of the defendant's scooter and rode back to the resort. Her partner was involved in a minor vehicle accident, so the complainant went with him to Accident and Emergency. The complainant returned to the resort an hour later and was escorted to her room by staff members, because she had left her keys at the hospital.

[6] She lay on her bed and fell asleep. She was woken by the defendant pulling her bed sheet off. The defendant pulled aside her jumpsuit and bikini bottoms and used his tongue to lick her vagina. He said, "Don't you like this". The complainant

stated "No" a number of times to the defendant. The defendant responded by saying, "Don't you want this East Coasty" and continued to lick her vagina. The complainant managed to turn her body and shuffle away from the defendant. This caused the defendant to leave the bedroom. The complainant notified the resort staff shortly after.

[7] The defendant told the Police he had been drinking with the complainant and that the evening was a blur. He denied that he assaulted the complainant, further stating that he could not believe he would do such a thing.

Jurisdictional Issues

[8] The High Court in New Zealand has jurisdiction to try offences committed in the Cooks Islands by s 155(1) of the Cook Islands Act 1915 (New Zealand), which provides:

> 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.

[9] This jurisdiction can only be exercised over offenders found in New Zealand and with the leave of the Attorney-General. In this case, both pre-requisites are met. Mr O'Carroll is a New Zealander and resides in Waitara and leave of the Attorney-General was obtained on 5 September 2018.

[10] Section 155(4) of the Cook Islands Act 1915 (New Zealand) further provides:

> 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.

[11] According to an affidavit sworn by the Deputy Solicitor-General of the Cook Islands, the Cook Islands High Court has adopted the purposes and principles of sentencing in ss 7 and 8 of the Sentencing Act 2002 (New Zealand). Home detention and community detention are, however, not available and there is no ability to substitute a short sentence of imprisonment with some other form of sentence. There are no tariff cases for indecent assault in the Cook Islands and judges often look for

guidance to New Zealand caselaw. In relation to guilty pleas, judges usually apply a one third discount for an early guilty plea.

Crown submissions

[12] The Crown submits that in this case, the important purposes of sentencing that may be considered under s 7 of the Sentencing Act 2002 are:

(a) Accountability for harm done to the victim and community (s 7(1)(a));

(b) Denunciation (s 7(1)(e)) and deterrence (s 7(1)(f)).

[13] The Crown further submits that the important principles of sentencing to be taken into account under s 8 of the Sentencing Act 2002 are:

(a) The gravity of the offending, including the degree of culpability (s 8(a));

(b) The seriousness of the type of offence (s 8(b));

(c) The effect of offending on the victim (s 8(f));

(d) The need to impose the least restrictive outcome appropriate in the circumstances (s 8(g)).

[14] The Crown submits that the following are aggravating features of the offending:

(a) Vulnerability of the victim: She was intoxicated and asleep on her bed at her holiday accommodation.

(b) Invasion of privacy: Offending against a tourist in tourist accommodation. The Crown submits that although the defendant was also a tourist, he nevertheless entered the complainant's room without authority.

(c) Scale of offending: The offence involved connection to the complainant's genitalia and the defendant persisted despite the complainant's clear verbal indication that she did not consent.

(d) Harm to the victim: The complainant has experienced continuing effects of the incident and has needed to visit a clinical psychologist. She has described suffering from anxiety, her difficulty sleeping and feeling less confident than she did before the incident.

[15] In order to set a starting point, the Crown referred to three Cook Islands cases.

[16] *Police v Manuel* involved offending in tourist accommodation, where the victim was asleep in her room and woke when the offender touched her hip, breasts and shoulder.[13] The offender ran away when the victim woke and screamed. The offender had previous convictions including unlawful entry into the unit where the offending took place. The Judge considered the fact that it was an attack on a tourist particularly egregious. He said:

> Attacks on tourists are cowardly attacks by people such as you because offenders know that quite often, by the time the matter comes to trial, the victim will have gone back to her own country and be disinclined to return here. So it is difficult to get convictions on those charges against vulnerable women …

The Judge also considered the invasion of the victim's privacy an aggravating feature. Taking into account totality, the offender was sentenced to 12 months imprisonment.

[17] *Crown v Manuela* involved an offender entering backpackers accommodation with his face covered by a sarong and kissing the mouth and touching the breasts and vagina of the victim who was asleep.[14] The offender ran away when the victim woke and screamed. The fact that the offender disguised himself and invaded the privacy of someone who was asleep and vulnerable were aggravating features, and the Judge noted also the cowardly nature of attacks against tourists, since they leave and it is difficult to collect evidence. Mitigating factors were it was the offender's first offence

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13 [2012] HC Cook Islands (Rarotonga) CR 439/11 (22 June 2012).
14 [2017] HC Cook Islands (Rarotonga) CR 228/17-230/17 (26 July 2017).

and he pleaded guilty early on. The Judge adopted a starting point of two and a half years imprisonment, with an end sentence of 18 months imprisonment.

[18] *Police v Taufehema* involved the offender entering tourist accommodation, where the victim was asleep and naked in bed with her partner.[15] The offender touched the complainant on her genitalia and nipples. The offender ran away when the victim woke and screamed. The offender was on probation. The Judge considered the fact that it was an attack on a tourist an aggravating feature, because such offending affects the Cook Islands' reputation as a desirable tourist venue. The effect of the offending on the victim was also considered an aggravating feature. The mitigating features were the offender's youth, guilty plea and family circumstances. The Judge adopted a starting point of three years imprisonment, with an end sentence of 18 months imprisonment.

[19] The Crown submits the current offending is clearly a more serious example of indecent assault than in *Manuel,* and is similar to, but more serious than *Manuela* and *Taufehema.* This is because the offending involved a connection between mouth and genitalia and the offender persisted when the complainant awoke and said "no". The Crown submits this justifies a higher starting point of four years imprisonment.

[20] The Crown acknowledges the defendant has no previous convictions that would justify an uplift. However, he also cannot receive a discount for this being his first conviction. The Crown notes that if a guilty plea is entered, the defendant may receive a discount of up to one-third of his sentence, in keeping with practice in the Cook Islands.

[21] The Crown submits that imprisonment is the only appropriate sentence. It is noted that only probation, rather than home detention or community detention, is available, and that the Criminal Justice Act 1967 (Cook Islands) provides for a sentence of probation to be supervised by a Cook Islands probation officer, so that realistically is unavailable too.

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15 [2016] HC Cook Islands (Rarotonga) CR 505 & 527 (31 May 2016).

Defence Submissions

[22] Defence counsel refers to the bands for unlawful sexual connection offences set out in the New Zealand case of *R v AM*.[16] The bands are based on the prevalence of the following factors:[17] planning and premeditation; violence; detention and home invasion; vulnerability of victim; harm to victim; multiple offenders; scale of offending; breach of trust; hate crime; degree of violation; mistaken belief in consent; consensual sexual activity immediately before the offending, and offending against person with whom offender is in or has been in a relationship.

(a) USC Band one: 2-5 years.[18] Involves offending at the lower end of the spectrum. Where no factors that would increase culpability are present, the lower end of the band is appropriate. Where one or more factors are present to a low to moderate degree, a starting point closer to the top of the band is required.

(b) USC Band two: 4-10 years.[19] Encompasses cases which involve two or three factors which increase culpability to a moderate degree.

(c) USC Band three: 9-18 years.[20] Encompasses cases which involve two or more of the factors increasing culpability to a high degree.

[23] Counsel submits that the following factors are relevant in this case:

(a) The complainant's vulnerability, because she was intoxicated and sleeping. Intoxication is not a specific example of vulnerability provided for in *R v AM*.[21] This matter does not involve a victim who may be old, infirm or a child, or involve specific power dynamics. Counsel submits this aggravating feature is present to a low to moderate degree.

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16 *R v AM* [2010] NZCA 114.
17 At [37] – [64].
18 At [114].
19 At [117].
20 At [120].
21 At [42].

(b) The offending can be viewed as premeditated, but also could have been opportunistic. The defendant was attracted to the complainant when he took her home on his scooter and took advantage of a situation where she would be alone. Counsel submits this aggravating feature is present to a low to moderate degree.

(c) The offending was a one-off instance of short duration, with some persistence, but when the complainant rolled over the defendant stopped and left. There was no violence, physical force or a high degree of violation. *R v AM* set out that harm is inherent in sexual offending.[22] In this case, there are no additional aspects such as physical harm, or the risk of pregnancy or infection from unprotected sex.

[24] Counsel therefore submits that the offending is at the lower end of Band one. Counsel compared this case to the two following New Zealand cases:

(a) In *Gonzales v Police* a starting point of 32 months imprisonment was adopted for a charge of sexual violation by unlawful sexual connection.[23] The offender stayed over at the victim's house because he was intoxicated after a party. He entered her bedroom where she was sleeping with her partner. He touched her breasts, rubbed her vagina, used his tongue to lick her vagina and masturbated. She awoke, told him to stop touching her and he left.

(b) In *R v O'Shaughnessy* a starting point of three years imprisonment was imposed.[24] The offender was in the same taxi returning from a night socialising as the victim and her friend. The friend left and the offender helped the victim, who was extremely intoxicated, back to her bedroom. After spending some time with the victim's flatmate, the offender went into the victim's bedroom. He kissed her neck, touched

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22 At [44].
23 *Gonzales v Police* [2013] NZHC 1691.
24 *R v O'Shaughnessy* [2017] NZDC 19417.

her breasts and licked her vagina with his tongue. The flatmate came looking for the offender and made him leave the house immediately.

[25] Balancing the lower maximum penalty operating in this case, the cases referred to by the Crown from the Cook Islands and the authorities discussed above, defence counsel submits a starting point of around two and a half years imprisonment is warranted.

[26] Counsel submits that the aggravating factors of his previous convictions do not warrant an uplift because they did not involve similar offences.

[27] Counsel did not calculate a discount with respect to personal mitigating factors at this stage, but submitted that the mitigating factors may include:

(a) The defendant has two young children and is in full time employment;

(b) He has two minor previous convictions;

(c) He has co-operated with the Police investigation; and

(d) Although it was thought that restorative justice may be available, the Crown now advises that the complainant does not wish to partake in such a process.

[28] Counsel also submits that a full discount of twenty-five to thirty-three per cent would be warranted if the defendant pleads guilty.

[29] Counsel submits that an end sentence of two years imprisonment or less is available, in which case home detention could be available to the defendant. Counsel submits that punishment in s 155(4) only refers to the maximum penalty and should not determine the sentencing outcome, because the requirement to impose the least restrictive outcome allows for an interpretation that is most favourable to the defendant.

Analysis

Setting a Starting Point

[30] The fact that this case involves an attack on a New Zealander is not an aggravating factor. The Crown referred to cases in which the Courts in the Cook Islands have considered indecent assaults on tourists particularly egregious. However, the cases referred to by the Crown involved offending by locals against tourists. In those cases, the fact that the complainant would leave the country, as well as the negative effect that such offending could have on Cook Islands' reputation and tourism, were considered aggravating features. Here, the offender was also a New Zealander, so these cases are not analogous.

[31] Bearing in mind the aggravating and mitigating factors set out in s 9 of the Sentencing Act 2002, the following aggravating factors are relevant in the offending:

(a) Vulnerability of the victim: She was intoxicated and asleep. This did not involve an abuse of trust or another factor that made the complainant psychologically vulnerable.

(b) Invasion of privacy: *Manuela* stated that entering a hotel room without permission is the equivalent of entering a person's home. The defendant invaded the complainant's private space.

(c) Planning and premeditation: It is not clear that the offending was premeditated.

(d) Scale of the offending: It involved a connection between mouth and genitalia and the offender persisted when the complainant awoke and said "no". The offender did leave the room when the complainant turned away from him and he did not use physical violence.

(e) Harm to the victim: The victim's statement demonstrates that she is suffering some ongoing trauma from the assault.

[32] This case is similar to *Manuela* and *Taufehema*, although the act of indecent assault itself is slightly more serious here. Nonetheless, this case does not involve the aggravating factor of offending by a local against a tourist**.** A starting point of three years imprisonment is appropriate. This would fit into USC Band one, where one or more aggravating factors are present to a low or moderate degree.

Adjusting the Starting Point

[33] The defendant has prior convictions, but these are not for similar offences, so an uplift is not justified. No other factors that are personal to the defendant can be finally ascertained at this stage. Defence counsel has noted that further relevant reports relating to the defendant's personal factors, such as reparation or remorse may be sought following the sentence indication, if it is accepted.

[34] If the defendant pleads guilty, he will receive a discount up to a one-third in accordance with the practice of the Cook Island judges.

Result

[35] I consider a starting point of three years imprisonment is appropriate with a discount of up to one-third for a guilty plea. A further discount may be available for personal factors, such as reparation or remorse. That then raises the issue of whether home detention may be available.

[36] I am, however, of the opinion that I do not have jurisdiction to commute a sentence of imprisonment of two years or less to one of home detention. Section 155(1) refers only to manner or procedure, whereas s 155(4) specifically states punishment imposed by the High Court shall be that which is provided for that offence by the laws of the Cook Islands. The laws of the Cook Islands do not provide for home detention. Imprisonment is therefore the only sentence practically available.

[37] Although I remanded the defendant on bail to appear by way of AVL from New Plymouth High Court at 9.00 am on Wednesday, 8 May 2019, upon reflection, that is unnecessary for the Court to be advised whether or not the defendant accepts the sentence indication. Instead, I request counsel to file a memorandum on or before Wednesday, 8 May 2019, advising the Court whether or not the defendant accepts the sentence indication. If he does accept the indication, then a date will be set by the Court for sentencing and the defendant remanded to that date. In the meantime, however, the defendant is remanded on bail to the trial date of 7 October 2019.

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Woolford J