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

IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI

SC 129/2019
[2020] NZSC 92

BETWEEN	SHAY O'CARROLL Appellant
AND	THE QUEEN Respondent

Hearing: 11 June 2020

Court: Winkelmann CJ, Glazebrook, O'Regan, Ellen France and Williams JJ

Counsel: P M Keegan and N P Bourke for Appellant
P D Marshall and M J Lillico for Respondent

Judgment: 14 September 2020

JUDGMENT OF THE COURT

A The appeal is allowed.

B The sentence of 22 months' imprisonment is quashed and a sentence of 10 months' home detention is substituted. The sentence is subject to the conditions listed at [55] of this judgment.

REASONS
(Given by Williams J)

Introduction

[1] What sentencing law applies when a person is prosecuted, convicted and sentenced in New Zealand for an offence committed in the Cook Islands?

[2] The appellant, Mr O'Carroll, indecently assaulted a woman while he was on holiday in the Cook Islands. The Cook Islands Act 1915 (an Act of the New Zealand Parliament still partially in force[1]) provides that a person who offends in the Cook Islands against the Crimes Act 1969 (Cook Islands), can be prosecuted in New Zealand. Mr O'Carroll was prosecuted in New Zealand pursuant to this procedure. He pleaded guilty and was sentenced in the New Zealand High Court. The question arose as to whether Mr O'Carroll could be sentenced to home detention, given that Cook Islands law does not provide for home detention as a sentencing option. The High Court and Court of Appeal both held that he could not. And the Court of Appeal held that, in any event, there is no right of appeal from a sentence handed down in the High Court of New Zealand in relation to offending in the Cook Islands.

[3] A distinctive feature of this case is that both parties argued in the Courts below and in this Court that home detention is available.[2] They also argued that there was a right of appeal to the Court of Appeal. Their position in this Court was accordingly that the High Court and Court of Appeal were wrong.

Factual background

[4] Mr O'Carroll is a New Zealand citizen. In September 2016, he was on holiday in the Cook Islands. The complainant was also there on holiday from New Zealand, with her partner. The couple did not previously know Mr O'Carroll but were staying at the same resort.

[5] On the evening of 8 September, the complainant and her partner socialised with several others, including Mr O'Carroll, at a bar. There Mr O'Carroll consumed a large amount of alcohol. Once the bar closed in the early hours of the next morning, the complainant and her partner caught scooter rides back to their resort with the group they had been drinking with. The complainant rode pillion with Mr O'Carroll on his

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1 See below at [24].

2 As we explain below at [9], the High Court provided Mr O'Carroll with a sentencing indication. At that stage the Crown's position was that home detention was not available. The Crown changed its position by the time of actual sentencing but nevertheless maintained that imprisonment was the appropriate sentence. By the time of the appeal to the Court of Appeal, it accepted that home detention was both available *and* appropriate.

scooter, and her partner rode on the back of someone else's. It transpired that the complainant's partner suffered an accident on his scooter and was taken to the hospital. After seeing to her partner at the hospital, the complainant returned alone to the resort and went to bed.

[6] Some time later, Mr O'Carroll entered the complainant's room where she was asleep.[3] She awoke to him pulling off her bed sheet and pulling aside her clothing. He then indecently assaulted the complainant despite her protests. He left the room only when the complainant turned her body over and shuffled away from Mr O'Carroll. The complainant notified the resort's reception staff shortly after.

[7] Cook Islands Police arrested and interviewed Mr O'Carroll, before allowing him to return to New Zealand uncharged.

[8] When the complainant returned to New Zealand, she laid a complaint with New Zealand Police. The Solicitors-General of the Cook Islands and New Zealand both granted leave for Mr O'Carroll to be prosecuted in New Zealand for indecent assault under s 148 of the Cook Islands Crimes Act. This is a procedure specifically provided for by s 155 of the Cook Islands Act,[4] which as we have said is an Act of the New Zealand legislature.

[9] In October 2018, New Zealand Police filed the necessary charging documents in the District Court at Auckland. As contemplated by s 155 of the Cook Islands Act, the proceeding was transferred to the High Court.[5] In April 2019, Woolford J gave Mr O'Carroll a sentence indication. The Judge adopted a starting point of three years' imprisonment, with a discount of up to one third for a guilty plea and the possibility of additional discounts for matters subsequently referred to at sentencing. But the Judge considered the Court had no jurisdiction to commute a sentence of

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3 The complainant's partner was at the time still in hospital.

4 Cook Islands Act 1915, s 155(5). The section requires only the leave of the New Zealand Attorney-General (there was no Attorney-General in the Cook Islands when it was enacted). In practice, the law officers of both countries give their consent. Under s 9A of the Constitution Act 1986, the Solicitor-General may exercise a power conferred on the Attorney-General.

5 *R v O'Carroll* [2018] NZDC 23563; and *R v O'Carroll* HC Auckland CRI-2018-004-9592, 15 November 2018. The transfer was effected pursuant to s 70 of the Criminal Procedure Act 2011.

imprisonment of two years or less to home detention because that sentence is not available in the Cook Islands Crimes Act.

[10] Mr O'Carroll pleaded guilty to indecent assault in May 2019.

Sentencing in the High Court

[11] Woolford J sentenced Mr O'Carroll in August 2019.[6] The Judge applied his sentence indication and accordingly set a starting point of three years' imprisonment.[7] This was based on both Cook Islands case law and the purposes and principles in ss 7 and 8 of the New Zealand Sentencing Act 2002. The Judge was advised that these have been adopted by the Cook Islands High Court as appropriate to sentencing in the Cook Islands context.[8]

[12] The Judge noted aggravating factors of this offending included the vulnerability of the complainant, the invasion of her privacy, the scale of the offending and the ongoing trauma the complainant experienced after the assault.[9] Mr O'Carroll's prior offending was not considered relevant to the index offending and so did not justify an uplift.[10] The Judge then applied a three-month discount for personal mitigating factors: Mr O'Carroll was remorseful, demonstrated insight into his offending and had offered emotional harm reparation of $1,000.[11] Finally, the Judge gave a further discount of 11 months (33 per cent) for Mr O'Carroll's guilty plea based on the applicable sentencing practice of Cook Islands judges.[12]

[13] The end sentence was 22 months' imprisonment.[13]

[14] The Judge considered that home detention would have been appropriate if it were available, given Mr O'Carroll's remorse, his commitment to rehabilitation and the likelihood of its success. But despite submissions from both parties to the contrary,

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6 *R v O'Carroll* [2019] NZHC 2035 [Sentencing remarks].
7 At [21].
8 At [21].
9 At [22].
10 At [23].
11 At [24].
12 At [25].
13 At [26].

he remained of the view that there was no jurisdiction to impose home detention.[14] This was because s 155(4) of the Cook Islands Act provides that the sentence imposed by the High Court shall be "that which is provided for that offence by the laws of the Cook Islands".[15] The laws of the Cook Islands do not provide for home detention.

Court of Appeal decision

[15] Mr O'Carroll appealed and, as we have noted, the Crown continued to support his position. The Court of Appeal nonetheless dismissed the appeal.[16]

[16] The appeal raised two distinct issues:

(a) whether there was a right of appeal at all from a sentence imposed by the New Zealand High Court pursuant to the Cook Islands Act; and

(b) if so, whether the Cook Islands Act precludes a sentence of home detention.

[17] The Court held that it had no jurisdiction to hear the appeal in the circumstances.[17] All appellate jurisdiction is statutory.[18] The Court noted that none of the various provisions that establish the Court of Appeal's appellate jurisdiction applies to the Cook Islands, including s 56 of the Senior Courts Act 2016.[19] In particular, the Criminal Procedure Act 2011 (to which s 56(1)(b) of the Senior Courts Act refers) does not purport to apply to the Cook Islands and it has not been adopted into Cook Islands law.[20]

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14 At [27].
15 At [9]–[15].
16 In a results judgment issued on 3 December 2019: *O'Carroll v R* [2019] NZCA 597 (Courtney, Duffy and Wylie JJ). It issued its reasons on 18 December 2019: *O'Carroll v R* [2019] NZCA 657 (Courtney, Duffy and Wylie JJ) [CA judgment].
17 CA judgment, above n 16, at [42]. This was despite an earlier Court of Appeal decision suggesting the contrary: see *O'Carroll v R* [2019] NZCA 303 (Stevens, Venning and Dunningham JJ). Mr O'Carroll had sought leave to appeal the home detention jurisdiction aspect of the sentencing indication, but the Court declined the application on the ground that he could raise the issue on an appeal against sentence under Part 6 of the Criminal Procedure Act: at [14].
18 CA judgment, above n 16, at [31], citing *The Colonial Sugar Refining Co Ltd v Irving* [1905] AC 369 (PC).
19 At [32]–[33].
20 At [35].

[18] Section 155(1) of the Cook Islands Act provides that the High Court's jurisdiction is to be exercised in respect of offences committed in the Cook Islands in the same manner as if they were offences committed in New Zealand. The Court of Appeal took this to mean that the High Court, when exercising jurisdiction over such offences, is to apply the parts of the Criminal Procedure Act necessary for it to carry out its prescribed function.[21] But the Court of Appeal considered that s 155 does not expressly confer a right of appeal, and so the Criminal Procedure Act has no application beyond the High Court.[22]

[19] Nor, the Court considered, could the inclusion of a right of appeal in the list of minimum standards of criminal procedure in s 25 of the New Zealand Bill of Rights Act 1990 be relied on. Unless the rights affirmed in that Act fell for consideration by the High Court under s 155, the Court considered the Bill of Rights Act does not apply to the Cook Islands.[23]

[20] Further, to imply an appeal right in this case would be to incorporate New Zealand law into Cook Islands law without express reference to, request by or consent of the Cook Islands.[24] The Court concluded this would be inconsistent with the strong presumption that legislation is not intended to have extraterritorial effect.[25]

[21] The Court observed, however, that this is a highly unsatisfactory state of affairs which calls for urgent legislative amendment.[26]

[22] In relation to the second issue, the Court noted that it would have dismissed the appeal even if it did have jurisdiction because there is no sentence of home detention in the Cook Islands.[27] The power to impose home detention was introduced into the Sentencing Act by the Sentencing Amendment Act 2007. Neither Act is part of, nor can be implied into, Cook Islands law. The Court agreed with the High Court

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21 At [36].
22 At [37].
23 At [39]–[40].
24 At [41].
25 At [40], citing *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.
26 At [43].
27 At [44].

that s 155(4) of the Cook Islands Act precludes the New Zealand High Court from imposing home detention because it requires the High Court to sentence according to Cook Islands law.[28]

Law and issues on appeal

[23] The appeal to this Court engages the same two issues: is there a right of appeal in this case; and, if there is, is the New Zealand sentence of home detention available?

[24] The answers to these questions are to be found in the words of s 155. This section remains in force despite the repeal of much of the rest of the Cook Islands Act and its replacement, upon independence, with the Cook Islands Constitution Act 1964.[29] But s 155 is no relic. It performs a useful function in light of the close relationship between the two countries. It has accordingly been updated as necessary in line with reforms in New Zealand such as the abolition of indictments and the High Court's name change.[30]

[25] Section 155 now provides:

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

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28 At [44].

29 Also an Act of the New Zealand Parliament.

30 See Judicature Amendment Act 1979, s 12; District Courts Amendment Act 1979, s 18; and Criminal Procedure Act, s 413 and sch 3.

> 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.
>
> (5) No prosecution in New Zealand for an offence committed in the Cook Islands shall be commenced without the leave of the Attorney-General.

First issue: jurisdiction to appeal

[26] All appellate jurisdiction in New Zealand is of course statutory.[31] The Court of Appeal's jurisdiction is presently set out in s 56 of the Senior Courts Act. Section 56(1) provides three appeal pathways:

> (a) from a judgment, decree or order of the High Court;
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> (b) under the Criminal Procedure Act; and
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> (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".

[27] As the Court of Appeal noted, the first pathway applies only to civil proceedings.[32] Nor do the parties suggest that there is any other Act that confers jurisdiction in this case pursuant to the third pathway. They argue instead that the Criminal Procedure Act pathway is available via the general language of s 155(1). Section 155(1) extends the jurisdiction of the New Zealand High Court to offences committed in the Cook Islands. Crucially, that jurisdiction is to be exercised "in the same manner as if they were offences committed in New Zealand". It does not deem the New Zealand High Court to be the Cook Islands High Court for the purpose of trial or sentencing. Rather, it requires the High Court of New Zealand to exercise its

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31 *Jones v R* [2014] NZSC 85, [2014] 1 NZLR 838 at [12].

32 CA judgment, above n 16, at [34], citing *Mafart v Television New Zealand Ltd* [2006] NZSC 33, [2006] 3 NZLR 18 at [6].

own jurisdiction in the same way it would if the offence had been committed in New Zealand.

[28] It follows that the New Zealand procedural regime will apply to such cases. The High Court could not feasibly exercise its jurisdiction under s 155(1) otherwise. The Court of Appeal made this point in its judgment:[33]

> Under [s 155(1)], 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.

[29] The crucial question is thus not whether, but how much of, the Criminal Procedure Act applies in these circumstances. The answer turns on what it means for the High Court's criminal jurisdiction to be exercised "in the same manner as if [the offence was] committed in New Zealand".

[30] This phrase can be interpreted in two ways.

[31] On a narrow interpretation, the language in s 155(1) imports all the law and procedure necessary for the High Court to exercise its own discrete criminal jurisdiction as the relevant trial court, but no more. This would limit the applicable Criminal Procedure Act provisions to those sections necessary to complete the proceedings in the High Court. That is, it would include the form and procedure for the commencement of proceedings in Part 2 of that Act, pre-trial procedure in Part 3, trial procedure in Part 4, and the general provisions in Part 5; but *not* Part 6 in relation to appeals. The Court of Appeal adopted this construction.[34]

[32] There is an alternative, broader interpretation. It is significant that s 155(1) does not simply refer to the content of the High Court's criminal jurisdiction. It refers to the *manner* in which that jurisdiction is exercised. When the High Court is seized of a proceeding in relation to local charges and must exercise some aspect of its criminal jurisdiction, it is subject to all provisions of the Criminal Procedure Act

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33 At [36].
34 At [36]–[37].

relevant to its task. It is also subject to the applicable infrastructure created by that Act. An extremely important element of that broader context is that the High Court judge will determine the question before the Court in circumstances where any error they may make can be corrected. In other words, the High Court does not have the last word when exercising first instance jurisdiction in relation to New Zealand offending. It is not a strained or unnatural construction to suggest that these matters too form part of the manner in which the High Court exercises its first instance criminal jurisdiction. Thus on this interpretation, s 155(1) imports not just the jurisdiction and infrastructure for trial and sentence, but the associated appeal infrastructure in Part 6 too. This would mean the Court of Appeal has jurisdiction to hear and determine an appeal from a decision of the High Court exercising the jurisdiction provided by s 155.

[33] There is no reason to read s 155(1) narrowly where this broader interpretation is available. On the contrary, there are four reasons why the broader interpretation should be preferred.

[34] First, it is consistent with the fundamental importance of the right to appeal a criminal conviction and sentence, which is recognised in both the New Zealand Bill of Rights Act and the International Covenant on Civil and Political Rights (ICCPR).[35] Section 25 of the Bill of Rights Act relevantly provides:

> **25 Minimum standards of criminal procedure**
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> Everyone who is charged with an offence has, in relation to the determination of the charge, the following minimum rights:
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> …
>
> (h) the right, if convicted of the offence, to appeal according to law to a higher court against the conviction or against the sentence or against both:
>
> …

[35] International Covenant on Civil and Political Rights 999 UNTS 171 (opened for signature 16 December 1966, entered into force 23 March 1976).

Similarly, art 14(5) of the ICCPR provides that "[e]veryone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law".

[35] While the Court of Appeal cannot be faulted for reasoning that the New Zealand Bill of Rights Act does not apply to the Cook Islands, that is not the point. It *does* apply to the interpretation of the Cook Islands Act (which is a New Zealand Act) and to the New Zealand High Court.[36] And in the present case, Mr O'Carroll is a New Zealander being tried in a New Zealand court under a power given to it by a New Zealand Act.

[36] Where an interpretation is available that is consistent with the Bill of Rights Act or allows New Zealand to meet its international obligations, that interpretation ought to be adopted.[37] Indeed, in the case of the Bill of Rights Act, such interpretation *must* be adopted.[38]

[37] Second, the Cook Islands Constitution Act suggests that had Parliament intended to remove a right of appeal to the Court of Appeal, it would have done so expressly. Clause 61 of the schedule to that Act (which sets out the Cook Islands constitution) provides for a right of appeal from the Cook Islands High Court to the New Zealand "Supreme Court" (now the High Court). Clause 63 then expressly provides that an appeal to the New Zealand High Court under cl 61 may *not* be further appealed to the New Zealand Court of Appeal. The implication is that where there is no such express curtailment in the Cook Islands Act, the jurisdiction of the High Court under s 155 is subject to the appeal pathways ordinarily available.[39] The broad interpretation of s 155(1) is consistent with this.

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36 New Zealand Bill of Rights Act 1990, s 3(a).

37 See for example *Ye v Minister of Immigration* [2009] NZSC 76, [2010] 1 NZLR 104 at [24]; and *Zurich Australian Insurance Ltd v Cognition Education Ltd* [2014] NZSC 188, [2015] 1 NZLR 383 at [40].

38 New Zealand Bill of Rights Act, s 6.

39 The absence of a curtailment cannot be accidental. Parliament has continued to update s 155 as recently as 2013: see above at [24] and n 30.

[38] Third, as the Court of Appeal noted, the narrow interpretation would create an unsatisfactory and plainly unintended anomaly.[40] Had Mr O'Carroll been sentenced in the Cook Islands, he would have had a right to appeal,[41] as he would if he had offended in New Zealand. Adopting a purposive approach to the construction of s 155(1) would avoid creating this anomaly, and be consistent with what must have been the drafter's intention.

[39] Finally, there is a common sense reason to adopt the broader construction. We accept Mr O'Carroll's submission that if s 155(1) were read as speaking only to the powers of the High Court and nothing more, unintended practical difficulties could arise. For example, once Mr O'Carroll begins his prison sentence, what law controls the date and conditions of his release? These matters are not within the jurisdiction of the High Court but are subject to the rules in the Parole Act 2002 (in relation to short-term sentences)[42] and the jurisdiction of the Parole Board (in relation to release conditions).[43] Does the narrow construction of s 155(1) mean the Parole Board is required instead to apply Cook Islands parole law? There is no express direction to that effect in s 155. These potential difficulties should be avoided where possible. The broader interpretation avoids them.

[40] Indeed, the better view, both as a matter of construction and in order to allow this special bilateral arrangement to work as intended, is that once the High Court assumes responsibility for a criminal proceeding (in the same manner as if the offence had been committed in this country), the law in New Zealand regulating both the conduct of criminal proceedings and the administration of sentences applies unless there is provision to the contrary. This includes not only the Criminal Procedure Act, but also the Evidence Act 2006, the Bail Act 2000, the Parole Act, the Corrections Act 2004, the Criminal Procedure (Mentally Impaired Persons) Act 2003, the Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003, and so on.

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40 CA judgment, above n 16, at [43].

41 Judicature Act 1980–81 (Cook Islands), s 67(1)(b)(i), substituted by s 2 of the Judicature Amendment Act 2011 (Cook Islands).

42 Parole Act 2002, s 86.

43 See ss 21–32. See also s 14 as to standard release conditions and s 15 as to special release conditions.

[41] We therefore agree with the parties that the appeal pathways in the Criminal Procedure Act apply to proceedings in which the High Court is exercising its jurisdiction under s 155(1).

Second issue: availability of home detention

[42] The next issue is whether the High Court has jurisdiction to impose a sentence of home detention. This turns on the interpretation of s 155(4), which we set out again for convenience:

> 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.

[43] The question is whether "punishment to be imposed" refers only to the maximum sentence available, or to the end sentence actually imposed.

[44] If the former, home detention is available: the New Zealand Sentencing Act applies subject only to the maximum period of imprisonment permitted under s 148 of the Cook Islands Crimes Act.

[45] If the latter, the New Zealand Sentencing Act does not apply, and home detention is not available because the High Court can only impose sentences that are available in the Cook Islands—and, as we have said, Cook Islands law does not provide for home detention. Under this interpretation, s 155(1) effectively means that the High Court shall exercise its criminal jurisdiction in the same manner as if the offence was committed in New Zealand, except in relation to sentencing. The Court must instead apply Cook Islands sentencing law because New Zealand sentencing law is excluded by s 155(4). The Court of Appeal adopted this interpretation.[44]

[46] Both parties submit that interpretation is incorrect. They say that "punishment" in s 155(4) refers only to the maximum sentence. This means the New Zealand Sentencing Act does apply, and home detention is therefore available. They submit that this is consistent (and the Court of Appeal's interpretation inconsistent) with the

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44 CA judgment, above n 16, at [44].

wording of s 155(1). They say further that when "punishment" is used in the Crimes Act 1961 (NZ), and "punishment" and "punishable" in the Cook Islands Act, they invariably refer to the maximum sentence available, not the sentence actually imposed.[45]

[47] Mr O'Carroll further submits that the Court of Appeal's interpretation creates a de facto presumption of imprisonment for Cook Islands offences prosecuted in New Zealand, which is inconsistent with both s 16 of the Sentencing Act and s 6 of the Bill of Rights Act.

[48] The Crown submits that its proposed interpretation is supported by the language in s 155(4), and further that it would avoid anomalies and the complexity that would come with requiring a New Zealand court to apply overseas sentencing practice.

[49] We agree that the language in s 155(4) suggests "punishment" is a reference to the maximum sentence only. Both the Cook Islands Act and the New Zealand Crimes Act tend to use derivatives of "punish" ("punishment", "punishable") when referring to maximum sentences available for any particular offence.[46]

[50] Further, offenders are generally said to be "liable to" a consequence when the legislature is setting the range of *possible* consequences. Section 155(4) uses this formula. It provides that an offender who is "liable to" a punishment of imprisonment under Cook Islands law "*may be sentenced* to imprisonment" with or without hard labour.[47] There is therefore a distinction between the "punishment" for which an offender may be liable, and the "sentence" actually imposed. It follows that when s 155(4) refers to the "punishment to be imposed", it is referring to the maximum

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45 For example, Crimes Act 1961 (NZ), ss 74, 109 and 223; and Cook Islands Act, ss 226, 263(1), 265(1) and 289. The Cook Islands Act sections have since been repealed and replaced by the offence provisions of the Crimes Act 1969 (Cook Islands), which continue to use the phrases "punishment", "punishable" and "liable to".

46 For an analogous situation, see *Morgan v Superintendent, Rimutaka Prison* [2005] NZSC 26, [2005] 3 NZLR 1, in which the reference to "penalty" in s 6 of the Sentencing Act 2002 was taken as a reference to the maximum available penalty, not the actual sentence served: at [57] per Blanchard J, [87] per Tipping J and [112] per Henry J. See also at [28] per Gault J.

47 Emphasis added.

sentence, not the sentence handed down in any particular case. This means home detention will be available.

[51] In our view, therefore, the High Court had jurisdiction to impose a sentence of home detention when sentencing Mr O'Carroll.

Should home detention be imposed?

[52] In light of these conclusions, the final question is whether home detention should have been imposed on Mr O'Carroll.

[53] The sentencing Judge was satisfied 10 months' home detention was the appropriate sentence if it were available.[48] Both parties agree that this is an appropriate sentence. Mr O'Carroll also accepted the recommended special conditions in the pre-sentence report would apply. In these circumstances, that is the sentence we impose.

Result

[54] The appeal is allowed.

[55] The sentence of 22 months' imprisonment is quashed and a sentence of 10 months' home detention is substituted, with the following conditions:

(a) The sentence is to take effect as soon as the Department of Corrections makes the necessary arrangements.

(b) Until that time Mr O'Carroll is to remain on bail on existing conditions.

(c) Once the sentence takes effect, Mr O'Carroll is to reside at the address specified on page five of the pre-sentence report and not move from that address without the prior permission of his probation officer.

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[48] Sentencing remarks, above n 6, at [27].

(d) If found suitable, Mr O'Carroll is to attend Te Ihu Waka as may be directed by the probation officer.

(e) Mr O'Carroll is to attend alcohol and drug counselling as may be directed by the probation officer.

Solicitors:
Crown Law Office, Wellington for Respondent