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IN THE SUPREME COURT OF NEW ZEALAND
I TE KŌTI MANA NUI

SC129/2019
[2020] NZSC Trans 17

SHAY O'CARROLL
Appellant

v

THE QUEEN
Respondent

Hearing:	11 June 2020
Coram:	Winkelmann CJ Glazebrook J O'Regan J Ellen France J Williams J
Appearances:	P M Keegan and N P Bourke for the Appellant P D Marshall and M J Lillico for the Respondent

CRIMINAL APPEAL

MR KEEGAN:
May it please the Court, my name is Keegan and I appear for the appellant along with my learned friend, Mr Bourke.

WINKELMANN CJ:
Tēnā kōrua.

MR MARSHALL:
Tēnā koutou, e ngā Kaiwhakawā ko Marshall, māua ko Lillico, et tū nei mō te Karauna.

WINKELMANN CJ:
Tēnā kōrua. Mr Keegan.

MR KEEGAN:
Unusually in this case the appellant and the respondent are unified in our position on the issues before the Court today. We were also of one voice before the High Court at the appellant's sentencing and again before the Court of Appeal. It made no difference in either case and here we are. Counsel submits that there are three issues before the Court.

First and foremost, did the Court of Appeal have jurisdiction to hear the appellant's appeal? If this Court decides that the Court of Appeal was wrong and it did have jurisdiction, then the second issue will arise. Did the High Court at the appellant's sentencing have jurisdiction to impose a sentence of home detention? If this Court decides that the High Court did have jurisdiction, then the last issue would be should the appellant in fact be sentenced to home detention.

My learned friends for the respondent identify and will address you on those same three issues. Today there will inevitably be some repetition and, perhaps, a small amount of plagiarism on my part. Counsel acknowledges in

that regard the considerable effort, expertise, that's reflected in the respondent's very comprehensive written submissions, particularly on the first issue of jurisdiction.

My learned friend, Mr Bourke, will address the Court in relation to the jurisdictional issue and then I will address you on the availability of home detention and its appropriateness.

Before my learned friend begins, if the Court wishes I would propose to give a brief summary of the offending and the procedural background to the case.

WINKELMANN CJ:
I mean, I don't know that we need it actually, we're quite familiar with it.

MR KEEGAN:
Okay.

WINKELMANN CJ:
Thank you, Mr Keegan.

MR KEEGAN:
Thank you. Then I'll yield to my learned friend.

MR BOURKE:
May it please the Court, I intend to commence basically with the fundamental nature of a right to appeal. Of course, importantly, that is found in the New Zealand Bill of Rights Act 1990 at section 25.

Section 25 of course provides that everyone who is charged with an offence has in relation to the determination of the charge the following minimum rights, including the right if convicted of an offence to an appeal, according to law, to a higher Court. That right as provided by the Bill of Rights is further reinforced by New Zealand's ratification of the ICCPR, and article 14 of the ICCPR provides that everyone convicted of a crime shall have the right to his

conviction and sentence being reviewed by a higher tribunal according to the law.

As the Privy Council observed in *R v Taito* [2002] UKPC 15, [2003] 3 NZLR 577 (PC), the commitment of New Zealand to the ICCPR has been evidenced by its ratification of the Treaty of 1978 and ratification of the optional protocol in 1989. The Privy Council in *Taito* in discussing the right provided by section 25 held, "It is intended to be an effective right of appeal which so far as is reasonably possible will ensure that justice is done in the appeal process. The context is one of access to justice and it calls for what Lord Wilberforce in *Minister of Home Affairs (Bermuda) v Fisher* [1980] AC 319 [1979] 3 All ER 21 (PC) at p 328 described as, 'A generous interpretation, avoiding what has been called 'the austerity of tabulated legalism'.' The substance must match the form." And it's the appellant's submission today that essentially the Court of Appeal's approach in the statutory interpretation exercise was a narrow and niggardly one and did not give weight to these minimum standards that are encapsulated in the Bill of Rights.

The right to an appeal has seen a fierce defence from senior courts, it is submitted. The Crown have helpfully cited a number of cases where the Courts have made clear that unless there is a specific statutory clear guidance that there is no right of appeal it will not be read down and there is a number cases cited, such as in *R v Cain* [1985] 1 AC 46 (HL), the House of Lords had read down and express statutory prohibition on appeals in relation to criminal bankruptcy orders. In that case the Board held that, notwithstanding a statutory prohibition, the general right of appeal against sentence would be available against an order that was not lawfully made.

It's submitted that the fierce defence of the right to an appeal is obvious when the Court considers what the result or consequences of the Court of Appeal 's approach could be, and to that extent I would posit some hypothetical situations. A defendant in Mr O'Carroll's position could theoretically face a trial that was demonstrably unfair, where we could have a situation where both the Crown and defence, as well as any Court subsequently hearing the

matter, may accept that the defendant did not receive a fair trial. The defendant could have counsel who was drunk for the majority of the case, and asleep for the rest of the case. Counsel who may –

WINKELMANN CJ:
We get the point.

MR BOURKE:
On the Court of Appeal's approach that defendant would have no recourse and we could have a situation where not only was there an unfair trial, but also obviously no fundamental right to appeal, and I would submit that that would be rather unpalatable to this Court.

WILLIAMS J:
That works at the heartstrings level but what about the words of the statute?

MR BOURKE:
Well the words of the statute, it is submitted, are clear. They provide that the Court is exercising the jurisdiction of the New Zealand Courts, and the Crown has helpfully gone through the legislative history, and I don't intend to repeat what they have said. Fundamentally in my submission that is distilled down to the fact that there is simply no discernible legislative intent to deny people in Mr O'Carroll's opinion an appeal right.

WINKELMANN CJ:
So what is the jurisdiction of the New Zealand Courts?

MR BOURKE:
Well it's submitted to be workable, for section 155 to be workable it must include the Criminal Procedure Act 2011, it must include the Bail Act 2000, it must include the Evidence Act 2006, and then in terms of if someone is to be sentenced, it must logically include the relevant Sentencing Act 2002, the Parole Act 2002 and the Corrections Act 2004. And as the appellant set out in submissions, if that were not the case, then this Court is confronted with some

rather tough questions of what governs Mr O'Carroll's imprisonment. When could he be released. What statutorial authority would he be held in a New Zealand prison. Those questions are not answered by the Cook Islands Act 1915.

WILLIAMS J:

Well, yes, but you've got to confront the words of subsection (4) which say despite the Supreme Court having jurisdiction over criminal offending in the Cooks, the punishment to be imposed shall be that which is provided by the laws of the Cook Islands. Now you have to work your way through that to get to the point that notwithstanding that the Sentencing Act applies, so does the Parole Act and so forth. It's not as straightforward as that it would be unfair.

GLAZEBROOK J:

I think Mr Bourke is just dealing with the first question though, which is whether there's a right of appeal, jurisdiction for appeal, aren't you Mr Bourke?

MR BOURKE:

That was my intention and really, as my friend Mr Keegan will later address, the appellant's position is that the punishment refers to the maximum available penalty.

WILLIAMS J:

Yes, yes.

MR BOURKE:

It's not uncommon –

WINKELMANN CJ:

Well let's not take you off the first ground. So I asked the question what is the jurisdiction because it seems to me that the High Court's criminal jurisdiction is the jurisdiction created by statute, apart from it would be undoubtedly

inherent jurisdiction to fill the gaps but the jurisdiction is predominantly statutory.

MR BOURKE:
The submission would be that the reference, particularly to the High Court, is the trial court. That is the court in which the matter is to be tried but the other, the Criminal Procedure Act is clear in terms of the other ancillary and associated rights, regardless of whether you are commencing in the District Court, the High Court, the approach to simply confine it to the High Court because that's the specified court, would again create these anomalous results where pre-trial there would be no available rights of appeal to the Court of Appeal or the Supreme Court, and in my submission again that would be entirely unpalatable given as the Court is aware these cases are fairly novel it would essentially be inviting the High Court, the unfortunate first High Court Judge who may be confronted with some unique legal issues, you would essentially be pinning your hopes on that Court getting everything 100% right, given there would be simply no way to revisit the issue, and that approach would not be consistent with obviously the Bill of Rights Act or the ICCPR in terms of providing at least a first instance appeal right.

So in my submission, as has been set out quite comprehensively by the Crown, the Act itself, not only is there no discernible legislative intent to deny people in Mr O'Carroll's position an appeal right, the Acts are quite careful to prescribe appeal rights to others who aren't in Mr O'Carroll's position. Someone who is tried in the Cook Islands has an appeal right. A New Zealand citizen under New Zealand charges has an appeal right. There's no discernible indication. To the contrary, the fact that the Act broadly specifies that the New Zealand criminal procedure is to apply would mean that there must be as of right via the Criminal Procedure Act a right of appeal.

In my submission, not only is there no discernible indication, there could also be simply no discernible or really arguable policy reason as to why a person in Mr O'Carroll's position should be denied a fundamental right. There hasn't been one identified by any of the Courts and there hasn't, of course – the

Crown don't identify one or suggest one, and whilst the Court often likes a contravener, in my submission there simply isn't a policy reason why a person, when this is a fundamental right, and that really goes without any dispute, there's simply no reason why someone would have those fundamental rights taken away from them.

WINKELMANN CJ:
So when you go to interpret the language, you say the New Zealand Bill of Rights Act applies?

MR BOURKE:
Well, yes, in my submission it must. The –

WINKELMANN CJ:
Whereas the Court of Appeal said it didn't.

MR BOURKE:
They did. I think it's worth pointing out that, of course, the Cook Islands Act 1915 is a New Zealand piece of legislation and in this case Mr O'Carroll had a charging document brought in a New Zealand Court. He faced trial in New Zealand, in the New Zealand High Court. He was convicted here and theoretically will serve his sentence here. Given it's a New Zealand piece of legislation, in my submission it's clear and section 6 of the Bill of Rights Act must govern that legislation and must weigh heavily in terms of interpreting the actual application of section 155. In my submission, it can be distilled down to essentially saying what section 155 provides is to say try this offence which, yes, it happened in the Cook Islands but try it in New Zealand like it's one of your own. Try it like it's a New Zealand offence.

It is not the situation which, in my submission, perhaps the Court of Appeal seemed to think of the New Zealand High Court masquerading as the Cook Islands Court. If that were the case it simply wouldn't make sense for the legislation to require that the New Zealand criminal jurisdiction applies. That's an extremely strong indicator that this, of course, is a New Zealand

Court exercising their New Zealand jurisdiction and the criminal jurisdiction must be read as including those relevant, the standard criminal procedure statutes, including the Evidence Act, otherwise, as the Court of Appeal recognised, it would be unworkable, and that fundamentally, in my submission, answers the jurisdictional issue. This is a New Zealand Court exercising New Zealand jurisdiction, expressly, that's what the statute expressly says, and as the Criminal Procedure Act applies it must be the case that Mr O'Carroll has a right of appeal. Section 6 of the Bill of Rights Act mandates a rights consistent interpretation. That is to be preferred.

ELLEN FRANCE J:

Mr Bourke, in terms of the wording, do you need to, in section 155(1), is it necessary to read anything further in because what it's saying is that the jurisdiction is to be exercised in the same manner "as if", so treating them as if the offence, the offence here, was committed in New Zealand. So on the face of the section, using that legislative use of a fiction if you like, it's saying will you treat it as though Mr O'Carroll committed the offence here.

MR BOURKE:

Well, in my submission, that is the plain reading of the Act and the preferable one. If there is two interpretations and the Court of Appeal adopted what I would submit is contrary to the plain words that Your Honour has identified, in my submission it could not be said that that second interpretation, if it is available, is consistent with section 6 of the Bill of Rights Act. Simply, no one can realistically stand up and say there is a genuine policy reason why Mr O'Carroll or a person in his situation should not have a right of appeal when it that is enshrined in the Bill of Rights Act and the English Courts have said, and I would submit that this Court would follow those decisions, that there would need to be an express exclusion of such a fundamental right. Here there is no express exclusion and rather the words make it clear, and another interpretation would really lead to difficulties in implementing the legislation and leave all of those unanswered questions that we have addressed.

That essentially is the nub of the appellant's submission. The Act is clear that New Zealand Court is treating the charge as if it has occurred in New Zealand. The Court of Appeal themselves seemed to recognise that their approach essentially led to an injustice for Mr O'Carroll and the Court of Appeal suggested that legislative amendment may be required. The appellant's submission is that no legislative amendment is required. All that is required is a rights consistent interpretation of the Act as is mandated by section 6 of the Bill of Rights Act.

WINKELMANN CJ:
What do you say about concerns regarding sovereignty?

MR BOURKE:
Well, I would submit that as the Crown has submitted in written submissions this is a situation where it's legislated that the case is to be heard in New Zealand trying the, using the New Zealand criminal jurisdiction. So it's not in any way implied. You have an express – it's expressly provided that that is to occur, that the case is to be tried in New Zealand using the New Zealand jurisdiction. So in terms of some sort of concern that New Zealand is usurping the Cook Islands, that simply couldn't be the case when it's expressly provided for and as the Crown point out if there were concerns then undoubtedly you wouldn't have had the sign-off from both the New Zealand and Cook Islands authorities.

The other relevant point that has been made in Crown submissions is that it's not unheard of for the Court to criminally try New Zealand defendants for offending that took place out of New Zealand, and reference has been made to charges involving child sex exploitation overseas. So it's not only both not uncommon but here it's expressly provided for in the legislation. So in terms of the extraterritorial concern I would submit that the words of Parliament expressly cover that concern.

Really, in conclusion, the appellant's submission is that the words of the statute, the plain words, provide that Mr O'Carroll is entitled to the same

appeal rights as any other citizen tried in New Zealand that are provided by the Criminal Procedure Act 2011. That that approach is consistent with New Zealand's international law obligations. It is consistent with what is mandated by the Bill of Rights Act. That there is no legislative indication that it shouldn't be the case, and that there is certainly absolutely no policy reason why a person in this situation should be denied an absolutely fundamental right being the case this Court would be governed by section 6 of the Bill of Rights Act and required to adopt the interpretation of section 155, that is consistent with that very fundamental right. Unless the Court has any questions at this stage I was going to accede to my learned friend.

WINKELMANN CJ:
Thank you Mr Bourke. Mr Keegan?

MR KEEGAN:
Did the High Court have jurisdiction to impose home detention on the appellant. The issue is framed quite nicely, in fact, in the submissions of the Crown at paragraph 80. At issue is the meaning of section 155(4), particularly the phrase, "The punishment to be imposed… shall be that which is provided for that offence by the laws of the Cook Islands," and my learned friend has identified two interpretations. Either the provision limits the particular sentence to be imposed, to that which would have been imposed under Cook Islands, or the provision limits the maximum sentence that may be imposed to that available under Cook Islands law. The Crown and the appellant submit that the second of these interpretations should be preferred.

It is submitted that the purpose of section 155(4) is to provide that the maximum penalty for the offence shall be that which is provided for in the Cook Islands, in this case seven years' imprisonment. But that in other respects the New Zealand criminal jurisdiction applies. The approach is consistent with section 155(1) which provides that offences tried pursuant to this provision are within the jurisdiction of the High Court of New Zealand. Counsel submits that the term "punishment" is regularly used in the Crimes Act 1961, to refer to the maximum available sentence. There are

many examples of that. Section 74, 109, 223, the punishment for attempted treason, the punishment for perjury, the punishment for theft. Similarly the Crown points out the word "punishment" when used in the Cook Islands generally refers to the maximum sentence available. The sentence to which a person is liable on conviction and at paragraph 86 of the Crown submissions there are a number of examples of that listed.

Home detention itself was enacted in the Sentencing Act 2002 as a way of serving a sentence of imprisonment rather than a stand-alone sentence in its own right with the Parole Board making the decision as to whether an offender's term of imprisonment should be served by way of home detention. It follows, therefore, that prior to the 1st of October 2007 had Mr O'Carroll been sentenced to imprisonment the option of home detention would still have been available to him via the Parole Board.

WINKELMANN CJ:
I suppose no one has done this exercise, which might be a historical exercise of some complexity, but I imagine that at the time that this legislation was enacted we had a pretty, in both nations there would have been a very simple Corrections regime.

MR KEEGAN:
I agree.

WINKELMANN CJ:
Imprisonment regime.

MR KEEGAN:
And certainly not electronically monitored options being available.

WINKELMANN CJ:
No, imprisonment, fines, possibly suspended sentences, but it would have been a limited range…

MR KEEGAN:

Probation, I think, a fine, and whipping.

WINKELMANN CJ:

In New Zealand?

MR KEEGAN:

I think in the…

WINKELMANN CJ:

No, in the Cook Islands.

WILLIAMS J:

In New Zealand too, I think.

WINKELMANN CJ:

Really? You think so?

WILLIAMS J:

Well, the birch was brought back in 1968, ‘69, for youth offending.

WINKELMANN CJ:

Anyway, there wasn’t a wide range, so you could say that that suggests that the policy intent was not to regulate the punative response, the form that the punitive response, the focus was on the maximum term of imprisonment.

MR KEEGAN:

Yes. To just finish the point, and it’s really a point of absurdity, is that prior to 2007 he could have ended up on home detention once that became a stand-alone sentence and the purpose of which was reduce the prison population, that it under the Court of Appeal’s approach would be denied to him, and it’s submitted that that can’t have been Parliament’s intention.

ELLEN FRANCE J:

Mr Keegan, how far does that go? So if you take something like the three strikes regime, what's the basis then for saying that doesn't apply to someone like Mr O'Carroll. Because the warning was quashed here, wasn't it?

MR KEEGAN:

I think that would be going too far, to read in the three strikes legislation.

ELLEN FRANCE J:

Well, I'm just…

MR KEEGAN:

Not being something which operates in the Cook Islands.

ELLEN FRANCE J:

Well, you can't have, I suppose I'm trying to test your interpretation of the legislation by – because you're taking something that's favourable and rejecting something that's not favourable.

MR KEEGAN:

Another thing that is favourable is that the maximum penalty is seven years' imprisonment, because of course here this would be, in terms of what the appellant did, would be a sexual violation and 20 years' imprisonment, and we probably would not be, in terms of *A v M*, be talking about sentences. So he benefits already.

WINKELMANN CJ:

But you say that's explicit in the legislation on your interpretation.

MR KEEGAN:

Yes.

WINKELMANN CJ:

But what Justice France is asking you is you say that all sorts of things come in by necessary implication and she is asking you what's the – well, that's a thing I've not seen before.

WILLIAMS J:

Peace has broken out.

GLAZEBROOK J:

Well, what you might say is if it's only looking at the maximum you actually do get everything that's favourable in fact, because it can't be more than what happened in the Cook Islands.

MR KEEGAN:

That's right.

GLAZEBROOK J:

So in fact it is right that you only get the favourable parts of it.

MR KEEGAN:

Thank you.

GLAZEBROOK J:

Would that be the submission?

MR KEEGAN:

Yes.

GLAZEBROOK J:

Because it only means the maximum penalty, and that must mean anything that is more severe than would have been in the Cook Islands you can't impose.

MR KEEGAN:

That's right.

GLAZEBROOK J:

So it's New Zealand law as if it happened in New Zealand except that you can't do anything more but you can do less than you would do in the Cook Islands.

MR KEEGAN:

Because it happened in the Cook Islands.

WINKELMANN CJ:

So do you want to look at what Mr Lillico has pointed out?

MR KEEGAN:

I'm not sure I get the context he's given me – ah, yes, the three strikes law, does it apply to specific New Zealand offences, and of course this is not one of them

ELLEN FRANCE J:

No, but I suppose, I mean, my point is a more general one. There are a range of other things that would come with applying the New Zealand sentencing regime, and just what that means in terms of the wording…

MR KEEGAN:

I think we've traversed some – I mean, there are all sorts of bells and whistles that need to come in, including the Parole Act 2002 and how he is detained, even the Legal Services Act 2011, Mr O'Carroll is legally aided, and so that is also something which is very much of New Zealand.

ELLEN FRANCE J:

And what would be the position if the sentence in the Cook Islands was not something palatable in the New Zealand context? I'm thinking about something like, an extreme would be the death sentence. How would that work, on your approach, if this is dealing with the maximum?

MR KEEGAN:

Well, that would be a matter for the Courts here. Clearly it would have to be an available option but a New Zealand Court would have no ability I think to enforce an execution.

ELLEN FRANCE J:

No. That may not be a good example but what I'm trying to understand is if this means only the maximum, quite how does this exercise work? One response is potentially that it means the New Zealand Courts don't apply as Justice Woolford did the approach taken in the Cooks to sentencing. You apply the New Zealand approach. That's one response.

WINKELMANN CJ:

Which is what the Crown says.

MR KEEGAN:

Yes. One sentencing option which is available is probation but that has to be administered by a Cook Islands probation officer. So it is a sentence which is available but one which is impossible to implement so therefore it's denied. The other point is a fine is available but one wouldn't think that an offence which is committed in the Cook Islands but then prosecuted in New Zealand would be at a fineable level. So in terms of the if this as an interpretation is it's just the type of sentence, the only sentence really effectively that Mr O'Carroll is left with is a sentence of imprisonment and nothing else.

WINKELMANN CJ:

So if Justice Glazebrook's interpretation is right which is the policy intent behind this legislation is to ensure that the person is not prejudiced by being tried here, that tends to resolve where you draw the line on your submission, does it?

MR KEEGAN:

Yes.

WILLIAMS J:

How does that work with respect to one of the examples given which was of a greater sentence in the Cooks than here or an offence that's an offence in the Cooks but not in New Zealand, like blasphemy? How do you make sense of subsection (4) then?

MR KEEGAN:

What would a Court do? I don't know the –

WILLIAMS J:

Not what would a Court do but what does subsection (4) say about those two circumstances.

MR KEEGAN:

In terms of the appellant's position and in reference to the section, that it is the maximum penalty provided for in respect of that –

WILLIAMS J:

Right, so it's not always going to be good for you. It could be rather bad for you.

MR KEEGAN:

It could be bad.

WILLIAMS J:

And what about offences that aren't offences in New Zealand any more? Where there is no New Zealand sentencing regime, what do you do? What law do you apply?

MR KEEGAN:

Well, I suppose there is a filter and that is the respective Solicitor-Generals in both jurisdictions agreeing to do this, so that if somebody had said "Jehovah" in the Cook Islands and therefore blasphemed that might not be given leave in

New Zealand. But I think the point you make is a good one, that it can work both ways.

WILLIAMS J:

Well, let's say that the two Solicitors-General do give leave. If subsection (4) means maximum and maximum only you've got a problem, haven't you?

GLAZEBROOK J:

But section 155(1) I don't think would give you the ability to create an offence in New Zealand that wasn't an offence, so I'm not sure that if it wasn't an offence in New Zealand that it could actually be tried in New Zealand Courts, but this isn't a case of that type.

WILLIAMS J:

Yes, well, what do you think, Mr Keegan? Do you agree with Justice Glazebrook?

MR KEEGAN:

I do. Can I assist you any further on this issue, otherwise I will briefly make submissions on home detention itself.

GLAZEBROOK J:

So Mr Keegan, you're adopting the Crown position that effectively you do it as if it's in New Zealand. The only thing constraining you is the maximum. You don't look at Cook Islands sentencing policy or what would have happened in the Cook Islands. You treat it as if it was a New Zealand offence. You sentence it here and the only constraint is that you can't be worse off than you would have been if you'd been dealt with in the Cook Islands. Is that the submission?

MR KEEGAN:

Thank you for articulating that. Although in Justice Woolford's sentencing of the appellant he looked at a number of Cook Islands cases.

GLAZEBROOK J:

I understand that. But I think that was on the basis that Cook Island sentencing policy was relevant rather than merely the maximum, wasn't it?

MR KEEGAN:

Yes. In terms of home detention, when the appellant applied for a sentence indication of April last year, he was given an indication of a starting point of three years and that it could come down into home detention range but that His Honour didn't think he had jurisdiction to impose that. So there was a guilty plea entered after that and sentencing was delayed for us to go to the Court of Appeal, which we did, on a point of law, the point of law being the one that we've just discussed. However the Court of Appeal took the view that this was essentially an appeal, a pre-sentence appeal, and so there was no jurisdiction to hear it. But the Court directed, and in contemplation ironically enough, given what's happened, in contemplation of a post-sentence appeal that Justice Woolford ought to give some indication as to his assessment of the availability or the appropriateness of a sentence of home detention for the defendant who was in front of him, and he did that. He concluded that because of Mr O'Carroll's remorse, his commitment to rehabilitation and the likelihood of its success, that the appropriate end sentence was one of 10 months' home detention. And the Crown at sentencing, after considering the pre-sentence report, agreed that that would be an appropriate outcome. That is still the case today.

The pre-sentence report, which was available, and this is in volume 2 of the case on appeal, said that Mr O'Carroll had taken full responsibility for his actions, he'd demonstrated good insight into his offending, that he was described as being deeply embarrassed and ashamed, he acknowledged the role that alcohol played in the offending and was highly motivated to address his alcohol misuse. The report writer described him as being articulate and transparent and his risk of re-offending and his risk to the community was assessed as low provided he undertook the rehabilitative strategies recommended. The report writer suggested that he would respond positively to a community-based rehabilitative sentence because he had not appeared

in Court since 2011. The 2011 appearance was for peeing on a tree in public and he has one other conviction which is a drink-driving conviction a few years before that.

WINKELMANN CJ:
So the theme is alcohol.

MR KEEGAN:
It was alcohol, and as he said to police who interviewed him the next day, "I can't believe that I did that." He also said in, I recall, in a notebook statement, "I think I've stuffed up.'"

The defendant is now a 33 year old Māori man who lives in in Waitara with his partner and their three year old daughter. He is employed as a logger. The address –

WINKELMANN CJ:
He has changed his employment, has he?

MR KEEGAN:
He has changed his employment, correct. If he were given a sentence of home detention he would still be able to do his job, with a bracelet on. The address has not changed and that has been fully assessed in the pre-sentence report. It wouldn't need any further work done on it, depending on the Court's view of things.

The pre-sentence report also recommended – and I think His Honour Justice Woolford had this is mind – that special conditions should apply and an alcohol assessment and treatment programme as one of them and also a Māori-focused programme as well was recommended. So those would be the special condition attaching to the sentence of home detention to address the underlying needs. There has been no incident or concern in respect of the appellant while he's been on bail.

May I assist you any further?

ELLEN FRANCE J:

Just one question, Mr Keegan. Because he applied the Cook Islands practice, Justice Woolford discounted the sentence by 33%?

MR KEEGAN:

Yes.

ELLEN FRANCE J:

Do you say the same approach would apply if you were applying the New Zealand approach?

MR KEEGAN:

He's applying Cook Islands methodology and included in that is consideration of Cook Islands cases which I think is appropriate. I think it's the right approach because he'd have, if this had've been in the Cook Islands, of course, he would have got his third discount.

WINKELMANN CJ:

In the sense – but that's different to the approach I think that the Crown suggests which is just to apply New Zealand methodology.

WILLIAMS J:

It also suggests that 155(4) applies to the whole sentence, not to the maximum.

WINKELMANN CJ:

Well, sentencing methodology perhaps. We could say that much is what your submission is.

MR KEEGAN:

My concern, of course, is for my client and however he gets to a sentence of home detention.

GLAZEBROOK J:

Well, would you say that because of the remorse and the guilty plea that that would be the approach in New Zealand as well in any event that…

MR KEEGAN:

There would be 25% plus additional discounts, Ma'am.

GLAZEBROOK J:

Plus additional discount for remorse which…

MR KEEGAN:

Which are evident on the pre-sentence report.

ELLEN FRANCE J:

That just leaves me a little bit unclear, Mr Keegan, as to what your submission is. So are you saying you apply Cook Islands methodology?

MR KEEGAN:

I think, taking a pragmatic stance, any way that gets my client down to a sentence of home detention is preferred and there are a couple of options before the Court.

WINKELMANN CJ:

Right, because I mean your written submissions didn't address whether you took the same position as the Crown. I think you answered us initially that you did take the same position on methodology but now your submission really is that you just want to hang on to that home detention point. That's –

MR KEEGAN:

Correct.

WINKELMANN CJ:

All right, I understand.

MR KEEGAN:

Can I assist you any further?

O'REGAN J:

So is your position then that the Court, if we're with you on these arguments, that we should just impose the sentence of home detention that Justice Woolford would have imposed?

MR KEEGAN:

Exactly.

WINKELMANN CJ:

That is your submission, isn't it?

MR KEEGAN:

Thank you.

ELLEN FRANCE J:

Sorry, Mr Keegan, are the conditions those set out in the pre-sentence report?

MR KEEGAN:

Correct. There are appendices attached to the pre-sentence report and those special conditions are listed under the home detention option.

MR MARSHALL:

May it please the Court, I don't propose to go over territory that's already been covered.

WINKELMANN CJ:

So are you going to cover the whole submissions, Mr Marshall, or…

MR MARSHALL:

No, Your Honour, if it's acceptable to the Court Mr Lillico was going to address Your Honours on the second and third questions.

WINKELMANN CJ:

Thank you.

MR MARSHALL:

Really the Crown's submission in a nutshell is that the Court of Appeal here had express statutory jurisdiction to hear and determine Mr O'Carroll's appeal against sentence, and we say that because of the words of the Criminal Procedure Act. So we say that his right of appeal is as provided in section 244 of the Criminal Procedure Act and that jurisdiction is not excluded either expressly or by necessary implication by the Cook Islands Act. Turning to the Cook Islands Act first before the Criminal Procedure Act.

WILLIAMS J:

Is it not better to say that jurisdiction is implicitly or expressly included in section 155 rather than to say it's not expressly excluded?

MR MARSHALL:

Perhaps. Perhaps, Sir.

WILLIAMS J:

Because my point is that the Court of Appeal is right, isn't it, on the basic proposition that an appeal right is a statutory right.

MR MARSHALL:

Yes.

WILLIAMS J:

You've got to find it in the words of the statute, so you've got to start with 155(1) because that's the source of the High Court's jurisdiction.

MR MARSHALL:

Yes.

WILLIAMS J:

And the rest of the process you say?

MR MARSHALL:

So we say that 155(1) gives the High Court jurisdiction here, but when it comes to the Court of Appeal's jurisdiction that's found in other statutes, and it's (inaudible 10:50:31) or contingent on the High Court having jurisdiction.

WILLIAMS J:

Yes, but I guess my point is that 155(1) has to let it in. You have to find the bringing in of section 244 in section 155(1).

MR MARSHALL:

Yes Sir, and I suppose the point could be put that once the 155(1) gives the High Court criminal jurisdiction as if it were a New Zealand offence, that by necessary implication carries with it the High Court's full New Zealand criminal jurisdiction, which is statutory in the most part.

WINKELMANN CJ:

So it's perhaps a two-step thing. It's necessary implication and there's nothing to exclude it otherwise in the scheme of the legislation or the policy of the legislation.

MR MARSHALL:

Yes Your Honour. Thank you.

WILLIAMS J:

What do you say about the equivalent civil provisions in the Cook Islands Act which seem to be a bit more comprehensive or plenipotentiary or whatever the word might be. They say in all respects, for example. I think it's 153 isn't it?

MR MARSHALL:

Yes, 153 and 154 provide –

WILLIAMS J:

What do you make of that distinction where one is very plain that it's everything, and 155 isn't quite so big.

MR MARSHALL:

I suppose there is, the unusual feature of 155(1) is that it incorporates Cook Islands offences, and that may be the explanation for the difference in language. 153 reads as though perhaps you might be able to find New Zealand causes of action in the civil proceeding. It effectively deems them, for the purposes of civil proceedings. I mean 153 has never been considered.

WILLIAMS J:

No, I know, but the wording there is plainly bigger, and I wondered whether that wording is bigger because of 155(4), because you couldn't have that sort of wording in 155(1) given that pullback in 155(4).

MR MARSHALL:

Yes Sir, and if the wording was replicated, contrived criminal offences in the Cook Islands as if they were part of New Zealand, then there would be an argument that you'd be imposing New Zealand criminal law on the Cook Islands.

WILLIAMS J:

Right.

MR MARSHALL:

So that may be the explanation.

WILLIAMS J:

So it makes no difference?

MR MARSHALL:

In terms of appeal pathways we say it doesn't. Of course there's no appeal pathways provided for civil proceedings in the Supreme Court here either.

WILLIAMS J:

Good, thank you.

WINKELMANN CJ:

So if we take it back to where you were, so you were saying that given the High Court jurisdiction brings all the necessary, all that's necessary to support that jurisdiction in, and there's nothing to exclude it, and – so you go on how you want to Mr Marshall.

MR MARSHALL:

Thank you Your Honour. Yes, that jurisdiction is, as I said, almost exclusively in statute, perhaps with the exception of the law of contempt, it's found in the Criminal Procedure Act, the Crimes Act, Criminal Procedure (Mentally Impaired Persons) Act 2003, for example, and so our position is that that extension of jurisdiction carries with it all New Zealand domestic jurisdiction imbued in the High Court. It's just extended to include offences being committed in the Cook Islands.

It's notable, we say, that 155(1), and in fact 153 and 154, don't purport to suggest that the Supreme Court is sitting as if it were the High Court of the Cook Islands. It doesn't say that the Supreme Court possesses the jurisdiction of the High Court of the Cook Islands, and Your Honours may wish to have reference to section 526 which does that but in reverse. It says the High Court of the Cook Islands has the same jurisdiction of the Supreme Court of New Zealand in relation to suits for nullity of marriage.

O'REGAN J:

What section is it?

MR MARSHALL:

This is 526, Sir. So conceivably the legislature could have provided a mirror image of that and said that the Supreme Court in respect of criminal offences in the Cook Islands possesses the High Court of the Cook Islands' jurisdiction.

WILLIAMS J:

It wasn't going to do that though, because the Supreme Court was the appeal Court from the Cook Islands High Court, so that wouldn't make sense.

MR MARSHALL:

No, Sir, yes. It certainly couldn't hear an appeal from…

WINKELMANN CJ:

But your point simply is that there are other formulations if you were wanting to constrain the Court in the manner the Court of Appeal suggested it was constrained, there were statutory formulations.

MR MARSHALL:

Yes. And we say that's the fundamental error in the Court of Appeal's judgment is that they proceed from the starting point that the Supreme Court, now the High Court, is applying Cook Islands law and effectively Cook Islands criminal jurisdiction. We say that's contrary to the plain wording of subsection (1).

GLAZEBROOK J:

And in any event, if they were there would be an appeal, so you'd have to, you say, then have something very explicit to say, but not in this case?

MR MARSHALL:

If it were applying, if it was sitting effectively as a Cook Islands Court then there would now be appeal pathways to the Cook Islands Court of Appeal. There wouldn't have been then because the Supreme Court was the appellate court.

GLAZEBROOK J:
Yes.

MR MARSHALL:
And perhaps just on that point, the remaining section – so Part 4 of the Cook Islands Act is unusual in the scheme of the Act as whole, because most of the Act deals exclusively with the law as applying in the Cook Islands. Part 4 of the Act deals with the jurisdiction of the New Zealand Supreme Court, and sections 156 to 172 create appellate jurisdiction in the Supreme Court from decisions of both the Cook Islands High Court and the Native Land Court of the Cook Islands. But the jurisdiction is unsurprisingly limited to proceedings in Cook Islands Courts, you wouldn't have expected the Supreme Court to be able to sit on an appeal from a decision of itself.

Another notable feature of that jurisdiction is the legislature has been express where its limited appeal rights. So 156 and 157 don't provide just general appeal rights, they limit them. So as enacted you could only appeal a criminal conviction where the sentence exceeded six months or the fine exceeded £100, there's a limitation on that appeal right. But, perhaps even more importantly, 156(3) and section 170 prohibit any further appeal to the Court of Appeal. Interestingly, I referred Your Honours to section 526 about the suits for nullity of marriage. There's another limitation on appeal rights in 534, which excludes the Supreme Court's appellate jurisdiction where the High Court of the Cook Islands is sitting on, makes a decree for the dissolution of marriage. As I said before, that's where the High Court of the Cook Islands is possessed of the jurisdiction the Supreme Court of New Zealand otherwise would have had.

The Crown says that an analysis of the Act as a whole – and it's most helpful, in my submission, to consider it as enacted because it's been substantially modified and repealed in the 105 years since its enactment – analysis of the enactment reveals that Parliament gave careful consideration to ensuring that there were appeal rights from Cook Islands Courts, it was careful to limit appeal rights and exclude them altogether in certain cases, and it follows, we

say, the Act's complete silence as to appeal pathways from the Supreme Court is very unlikely to have been intended as an exclusion of appeal rights or as precluding by necessary implication, if one puts it that way.

WILLIAMS J:
I see they repeat section 170 in, is it 63 of the '64 Act, so they keep doing that, the prohibition on appeals.

MR MARSHALL:
Yes, in the Cook Islands Constitution Act 1964.

WILLIAMS J:
Yes. Even in the modern regime they expressly exclude appeal when they want to.

MR MARSHALL:
Yes, yes, and now at Cook Islands law I understand it you have an appeal to the Cook Islands Court of Appeal there's an express right of appeal to the Privy Council. Your Honours may have seen there was a question about whether you could appeal from the Supreme Court to the Privy Council.

WILLIAMS J:
Mmm.

MR MARSHALL:
Although it never arose for determination. So yes, and that, I'll come to this shortly, but that mirrors the common law approach of the interpretation of appeal rights. That where there's a general appeal right, and here you would say generally proceedings heard before the Supreme Court of New Zealand had further appeals to the Court of Appeal. In order to exclude that further appeal, Parliament expressly said so.

Now our submissions traverse the subsequent amendments made to the various statutes and that really reinforces, in our submission, the unlikeliness of Parliament simply missing the fact that it hadn't created appeal rights at all, and that people tried under 155 would be completely without appeal rights. The 1956 Amendment Act, for example, extended appeal rights from Cook Islands courts so that they mirrored those in the New Zealand Criminal Appeals Act of 1945. It would have been very unusual to go to the trouble of extending rights to mirror those in New Zealand, while at the same time leaving a prosecution in New Zealand, of a defendant in New Zealand without any appeal rights.

There's – 155 remains part of the law of both the Cook Islands and New Zealand, and there's some suggestion in the Court of Appeal's judgment that that might be an oversight or inappropriate in some way, "anachronistic" I think is the term used. That's not, in my submission, the obvious inference. The obvious inference is that 155 is seen by both legislatures as still serving some purpose. The report to the members of the Cook Islands Legislative Assembly that preceded the Constitution Act. This is quoted at paragraph 49 of our submission, recommends the retention of those instances where the Supreme Court is given original jurisdiction, and paragraph 63 at the bottom of the page records that, "We have not given detailed consideration to the desirability of abolishing this jurisdiction. We understand that it has on occasion proved to be an advantage to the Cook Islands authorities and to residents in the Cook Islands to have some cases heard in New Zealand." Now they propose that the jurisdiction be maintained, but reviewed. Of course 155 most recently was amended by the Criminal Procedure Act itself to allow for the filing of charging documents in the District Court and removing references to indictable offences.

Just on the point about indictable offences that, in our submission, is quite a strong indication in subsection (1) deeming an offence to be an indictable offence, that it was envisaged that the proceedings would be under New Zealand criminal procedure. It would have made no sense to have included that provision because the Cook Islands Act itself abolished the

distinction between indictable and summary offence. So an indictable offence simply didn't exist in Cook Islands law. The fact that Parliament chose to include that can only mean it was clarifying for the New Zealand Court how it's New Zealand jurisdiction would be exercised.

Turning to the Criminal Procedure Act, our submissions on this begin at paragraph 58 and really follow through how once a charging document is filed in the District Court, as can be done via section 155(3A), Mr O'Carroll really falls squarely within the words used by that statute. Now the purpose of the Criminal Procedure Act is to set out the procedure for the conduct of criminal proceedings, and while criminal proceedings isn't defined in the Act, this Court in *Mafart v Television New Zealand Ltd* [2006] NZSC 32, [2006] 3 NZLR 18 observed that if proceedings can result in conviction for a crime, or punishment of an offender, they're clearly criminal. I don't think it could be seriously disputed that this was not a criminal proceeding here.

From the point that charging documents were filed Mr O'Carroll was a defendant as defined in section 5. That is a person against whom proceedings have been commenced by filing a charging document in relation to an offence in any category. It was a category 3 offence. I reference the maximum penalty. Following his conviction he had in the words of section 212 a sentence imposed on him, and then under sections 229 and 244 as a person convicted of an offence he had rights of appeal against conviction and sentence.

So the Crown's submission is that one could perhaps simply start with the Criminal Procedure Act, assuming a charging document had been validly filed, and from that point the reason that Mr O'Carroll on the face of the statute had a right of appeal falls within the plain words of the provision which is why, Your Honour, one way of formulating it is then to ask whether that has been excluded by anything in the Cook Islands Act.

I note that this was effectively the approach averted to in *The King v Kairoa Koia* [1933] NZLR 314 (CA) where the Court of Appeal observed that the

rights then in the Crimes Amendment Act 1920 clearly applied to the case of a prisoner convicted or sentenced in New Zealand.

WILLIAMS J:

Can you take us to that, please?

MR MARSHALL:

Yes, Sir, it's at tab 30 of the bundle and it's a decision of the Court of Appeal of New Zealand in relation to defendants tried and convicted in the High Court of the Cook Islands and they were seeking a sentence appeal under the Crimes Amendment Act 1920 which introduced a right of appeal against sentence, and they appeared to accept that they couldn't – the only way they could appeal to the New Zealand Court of Appeal was via the New Zealand statute and the only way they could bring themselves within the New Zealand statute, having been tried and convicted in the Cook Islands High Court, was by virtue of the fact they had later been brought to New Zealand, a provision that applies effectively sentence administration law once you're brought to New Zealand notwithstanding your conviction in the Cook Islands. And the passage that I referred Your Honours to is at page 450 of our bundle and it's the first page of the judgment of Chief Justice Myers.

GLAZEBROOK J:

Sorry, you're going to have to take me back because…

WILLIAMS J:

316, I think, of the report.

MR MARSHALL:

Yes, 316 of the report.

GLAZEBROOK J:

So just what case are you referring to?

MR MARSHALL:

It's *The King v Koia*.

WINKELMANN CJ:

It's at tab 30.

GLAZEBROOK J:

Yes, I know that. I just can't seem to find whatever page you're referring to.

WINKELMANN CJ:

316 of the report, isn't it?

MR MARSHALL:

Yes, Your Honour.

And it's certainly not part of the ratio of the decision but the observation at the end of that first paragraph, "Clearly that section," the appeal rights in the amendment Act, "applies only to the case of a prisoner convicted or sentenced in New Zealand, unless some statutory enactment can be found extending the provisions of the section to the case of a prisoner convicted or sentenced elsewhere," and the simple point I make about that is that the same logic applies here. We say clearly the rights of appeal in the Criminal Procedure Act apply to a person convicted and sentenced in New Zealand before a New Zealand Court.

Now there was a concern in the Court of Appeal that this interpretation involved giving the Criminal Procedure Act extraterritorial effect. We say, at least as far as appeal rights go, it doesn't involve an extension of the extraterritorial effect that is inherent in the grant of jurisdiction under 155(1). 155 is undoubtedly an expressly extraterritorial provision, allows the prosecution of Cook Islands offences in a New Zealand Court, and it's no doubt for this reason that it prevents charges being filed against, unless the defendant is found in New Zealand and has effectively brought him or herself

within the jurisdiction of New Zealand and, two, the Attorney-General consents to the prosecution.

But we say that applying the CPA to such a prosecution, including rights of appeal, doesn't involve any extension of that extraterritoriality. It's not a further incursion into the principles underlying that interpretive doctrine.

Indeed, as Justice Tipping put it in *Mafart*, "Any exercise of judicial authority should generally be susceptible to examination on appeal. Judges always strive to reach correct decisions, but inevitably errors do occur. Unless the issue is of little moment, most systems of justice recognise the importance of providing at least one appeal." So it's inherent in the grant of jurisdiction that there would be some reviewability of the decision made.

And further to that, in terms of international comity or respect for sovereignty, we argue that those sorts of concerns actually weigh in favour of Mr O'Carroll being afforded appeal rights. As a general principle comity would suggest that those tried under 155 should have the same rights as those tried for domestic offending, and as the Court of Appeal noticed, under Cook Islands law Mr O'Carroll would have had a right of appeal. Comity would suggest that there's some sort reciprocity in terms of the rights afforded to criminal defendants in both countries.

Furthermore, law officers in both states consider prosecution in New Zealand the appropriate course of action in the particular circumstances and it's not difficult to see why, given Mr O'Carroll and the victim are both New Zealand residents with no connection as far as appears in the record to the Cook Islands other than having gone there on holiday.

So we say on an ordinary purposive interpretation of the Criminal Procedure Act and the Cook Islands Act appeal rights were available. That's only reinforced by the application of the Bill of Rights Act. Section 3(a) of course applies the Bill of Rights Act to acts done by the judicial branch of the Government of New Zealand. So we say here the Court of Appeal was bound

as a New Zealand Court interpreting New Zealand statutes to apply the Bill of Rights Act, particularly section 6, to its interpretation.

My learned friend has spoken at some length about the guarantee in the Bill of Rights Act of the right to appeal.

So if there are two interpretations available, undoubtedly a complete exclusion of any right of appeal could not be justified in the circumstances of this case under the Bill of Rights Act. So section 6 says that an available alternative interpretation shall be preferred.

Your Honours may note in both *Petryszick v R* [2010] NZSC 105, [2011] 1 NZLR 153 and *Marteley v The Legal Services Commissioner* [2015] NZSC 127, [2016] 1 NZLR 633 this Court relied on 25(h) of the Bill of Rights Act in interpreting the appellate provision in *Petryszick*, 385 of the Crimes Act, and in *Marteley* it was interpreting the right to legal aid on appeal in the Legal Services Act.

The common law approach is to similar effect and we've cited and my learned friend has taken Your Honours to the cases of *R v Emmett* [1998] AC 773 (HL) and *Cain* in the House of Lords where perhaps there was more of an interpretative question. Indeed, in *Cain* there was an express prohibition on appealing against criminal bankruptcy orders and the House of Lords emphasising the fundamental importance of the right to appeal against in sentence read that limitation down to permit appeals against bankruptcy orders made effectively without jurisdiction where the Court had no power to impose them.

Also, relatedly, this common law approach can be seen in the cases of this Court in *Mafart* and of the Court of Appeal in *Lyttelton v R*. In *Mafart* the Court was prepared to categorise the application for access to documents in a criminal proceeding as in substance civil and it's clear from the judgments that driving that interpretation was a concern to ensure the availability of an appeal right given the privacy and other interests at stake. *Lyttelton* was a case

concerning take-down orders made in a criminal proceeding to preserve the defendant's fair trial rights, and the Court of Appeal applying *Mafart* categorised it as civil, effectively to enable there to be an appeal against it to the Court of Appeal.

In conclusion, on this issue, the Crown notes that the Court of Appeal acceptance that the result or the point that it reached was highly unsatisfactory illustrates, in our submission, the unworkability of where we get to, if that interpretation holds. It is difficult to see how the Attorney-General could ever consent to a prosecution in a New Zealand Court where there would be no rights of appeal at all. To do so would likely put New Zealand in breach of its international obligations and, indeed, be inconsistent with the Bill of Rights Act. The Crown says this Court should avoid such an unworkable approach and apply the Criminal Procedure Act.

ELLEN FRANCE J:
And what about other aspects of the criminal jurisdiction, so the Bail Act, Corrections Act and so on? Is your approach the same as the appellants?

MR MARSHALL:
Yes, our approach is that the full criminal jurisdiction of the High Court applies, subject to any modifications required by 155(1), and we would say those, principally two, that the trial has to take place in the High Court and, secondly, as to the maximum penalty that's available.

WINKELMANN CJ:
Does it go beyond that? Because it has to be more than a criminal jurisdiction of a High Court to make this thing workable, I suppose, it has to in fact include the Corrections Act, doesn't it, and Parole Act?

MR MARSHALL:
Yes, undoubtedly, and the fact Parliament applies those statutes to any offender transferred from the Cook Islands to New Zealand under 275

certainly suggests that they would otherwise apply to a person sentenced under 155.

If Your Honours have no further questions on that issue I'll hand over to Mr Lillico.

WINKELMANN CJ:
Thank you.

MR LILLICO:
May it please the Court, Justice France's question was, to my friend Mr Keegan, was how would it work and, just to clarify, the Crown's conception of how sentencing a case that's governed by 155 would work is that the New Zealand law, sentencing law, would apply bounded, as Justice Glazebrook would say, to prevent prejudice to the defendant, bounded by the top end of the maximum sentence provided by Cook Islands law and, as Justice Williams said, sometimes that might not work to the favour of the defendant because there are some variances between our law, unsurprisingly, our law and the Cook Islands law, most notably in relation to controlled drugs. Because you may have seen a decision, a Cook Islands decision, in the Crown bundle where it's apparent that dealing in cannabis is dealt with or viewed much more seriously in the Cook Islands than it is here and the maximum penalty there is 20 years. So it's not always going to be to the favour of the defendant at all, and that decision is *Marsters v R* CA3/2012, 30 November 2012 (Court of Appeal of the Cook Islands), which is in the Crown bundle at page 707. But, as I say, sentencing bounded by the maximum penalty of the Cook Islands offence, then takes place in accordance with New Zealand law. Perhaps a major limitation is that our law somewhat falls in its reliance sometimes in specifying actual offences, as the three strikes legislation does and as some of the name suppression provisions do as well. In those cases the New Zealand law won't apply because it's predicated on the idea that a specific offence provision in our Crimes Act, usually, will have been offended against, where here that is not the case.

WILLIAMS J:
So by your point I guess is by definition those add-ons are never going to apply because they apply to New Zealand offences and these aren't New Zealand offences, they're just deemed to be?

MR LILLICO:
Yes, and sometimes, as in this case, inherent jurisdiction filling in the gaps, as the Chief Justice said earlier, will need to be applied, and that happened in this case, as I understand it, because the complainant wasn't entitled to name suppression automatically via the CPA, because we specify particular offences. But justice could be done because we were in the High Court and inherent jurisdiction could be used.

There is an example in the Crown bundle of how we say, and I do say Crown bundle, and just emphasise that despite shoving an iPad under poor Mr Keegan's nose earlier, that is the party we act for.

WINKELMANN CJ:
It was a nice moment to see.

MR LILLICO:
Perhaps not for Mr Keegan. So there is a brief example of how we say the sentencing should work, and it's not an example that's burdened by a great deal of jurisprudential analysis, but the cases are *R v Ngaakapi* HC Auckland CRI-2001-092-202653, 23 April 2004 it's at page 584, and it's at page 584 of the bundle.

WILLIAMS J:
Can you give me the tab, because I've got a hard copy, please.

MR LILLICO:
Certainly.

GLAZEBROOK J:

Tab 37 I think.

MR LILLICO:

Thank you Your Honour. Yes, 37. A sentencing of Justice Doogue where the Court at paragraph 2, which is at page 584, notes that, "It was accepted by your counsel that the Court has jurisdiction to sentence in respect of the Rarotonga offences in accordance with the material put before me as to the maximum sentences for those offences in Rarotonga." So, and there isn't a great deal to point to following that, but it's notable that in this sentencing exercise there wasn't reference by counsel to the sentencing practices of the Cook Islands, which have some notable features which diverge from our own, and the sentencing proceeded really in a normal manner. There wasn't an affidavit from the Deputy Solicitor-General of the Cook Islands for instance as there was here, and the sentencing proceeded in a way you might expect in a New Zealand Court.

WILLIAMS J:

What are the deviations?

MR LILLICO:

Well for instance the 33% discount.

WILLIAMS J:

Right.

MR LILLICO:

Sentences are generally shorter so the Cook Islands' cases that are collected in the Crown bundle demonstrate an effort to mitigate particularly violent offences downwards from the *Taueki* bands because of the – and also somewhat controversially the observation in the Cook Islands that the people of the Cook Islands are generally more forgiving and that's reflected in the sentences that are imposed.

WINKELMANN CJ:

Where does that observation appear?

MR LILLICO:

I think it's in our submissions at 93.2. So the *Goodwin v R* CA11/2018, 3 May 2019 decision is the reference.

GLAZEBROOK J:

Sorry, I didn't quite catch the paragraph number?

MR LILLICO:

Sorry, paragraph 93.2 of the Crown submissions at page 30. And if I ask you to turn up paragraph 44 of the *Goodwin* decision itself. *Goodwin* is at tab 44.

WINKELMANN CJ:

What paragraph sorry?

WILLIAMS J:

44.

O'REGAN J:

No that's the tab. What paragraph within the decision is it?

WILLIAMS J:

44.

WINKELMANN CJ:

No that's the tab.

WILLIAMS J:

No it's the paragraph.

WINKELMANN CJ:

It's the paragraph and the tab?

MR LILLICO:

It's both Your Honours, yes. Perhaps if I read it. The Court here is drawing on a decision of Justice Doherty of the Cook Islands High Court where he observed in sentencing that, "For a number of reasons the cost of – ". Sorry, he goes over differences where a third deduction, the 33% deduction which we've already discussed, is appropriate and he reasons why that might be the case, and he says, "For a number of reasons the cost of trials and bringing people to justice is high in this country." The Cook Islands. "Frankly, the conditions of imprisonment are perhaps more extreme than they are in New Zealand. And the culture of this country is different. I think this country is more, the people are perhaps more forgiving."

Now in other decisions some doubt is cast on some of that reasoning but not the idea that the Cook Islands people are more forgiving, and the decisions we have collected in the bundle almost, without exception, feature cases where even in cases of violence complainants come along and forgive the offender. One case is marked by a petition of some 200 people asking for a term short of imprisonment to be imposed. So that seems to be without doubt a feature of sentencing in the Cook Islands.

WILLIAMS J:

Perhaps we should import a bit more of that.

MR LILLICO:

Petition Sir?

WILLIAMS J:

Well, just people turning up and forgiving the accused.

MR LILLICO:

Well it happens here but perhaps receives little acknowledgement in the media tumult.

WILLIAMS J:

Yes.

GLAZEBROOK J:

Well, of course in New Zealand it's just if there is an additional factor like remorse, then victims are likely to be more forgiving, whether they're from the Cook Islands or New Zealand, as against somebody who pleads guilty but with no expression of remorse, and of course we would give extra discount for remorse.

MR LILLICO:

Yes, and that perhaps –

GLAZEBROOK J:

And 33 would not be out of range at all for that.

MR LILLICO:

No and that probably brings me to the final point, which is even though we ought to be applying New Zealand sentence methodology in sentencing law, not the Cook Islands sentence methodology and provisions, we can come to rather the same end point because while we don't apply a third quite in the same manner, we do end up applying a third in case where guilty pleas are early and there is genuine remorse demonstrated by the offender. The only, and it's probably worth turning up the sentencing notes themselves at this point, and this is at around about page 32 of the Court of Appeal's case. You'll see that after taking a starting point of three years at paragraph 21 the learned Judge then looked at the emotional harm reparation offer from Mr O'Carroll, mitigated the sentence by three months, and then for the wrong reasons but rightly we say, ultimately deducted 33%, this is at paragraph 25, for a guilty plea the Judge says is based on the practice of Cook Islands Judges. An end sentence of 22 months and the Judge translated that to 10 months' home detention if he had the jurisdiction to do so, which he decided he didn't. So the only difficulty there, perhaps, in translating to a New Zealand methodology is perhaps the perceived double counting of 24

where an emotional harm reparation was acknowledged with three months and then on the New Zealand basis the 33% would have to include remorse, the payment of the reparation really being a physical manifestation of the remorseful feelings of Mr O'Carroll. So wearing the hat that I'm supposed to wear, double counting, but Mr O'Carroll hasn't received other discounts he might got had the Judge been so minded, and 10 months' home detention isn't manifestly inadequate sentence, given that especially he had a very limited criminal history, some might say an entirely absent criminal history. He had a fineable-only offensive behaviour matter and an EBA, which really is possibly by-the-by, given his very good employment record and supportive family. So he could have got perhaps at the outside, discount for character, he could have got, but more importantly he could have got a discount for his rehabilitative prospects because, I think as the Court's already observed, the offending had its genesis in drinking, the Probation report writer – this is at page 16 of the Court of Appeal's case – observed that – sorry, 15 of the case – that he presented as articulate and transparent, indicated he well understood the seriousness, impressed as ashamed and remorseful, "Risk of his re-offending in the community is currently assessed as low provided he undertakes the rehabilitative strategies recommended." During interview – and this is at page 17 – he was assessed as, "Highly motivated to address his alcohol misuse and decision-making whilst under the influence." So he was someone that the probation officer saw as being able to cope with or being able to succeed with addressing the reasons for his offending, and that could have been recognised, if the Judge was so minded to, in relation to a discount. So although we say the reasoning, importing Cook Islands practice in sentencing law, was incorrect, the Judge could well have got there anyway, applying New Zealand law.

WINKELMANN CJ:

Right, we'll take the morning adjournment now. Were going to go on to whether there was jurisdiction though on home detention, aren't we, with you?

MR LILLICO

I really didn't have anything to add, unless I can assist.

WINKELMANN CJ:

Add to what Mr Keegan said?

MR LILLICO

Add to Mr Keegan's submission, no, unless I can assist.

WINKELMANN CJ:

Well, any questions of Mr Lillico. Because if those are your submissions we might just hear reply rather than taking the morning adjournment.

MR LILLICO

Justice Glazebrook?

GLAZEBROOK J:

So the submission really is that 155(4) only refers to the maximum and that's based on the same factors that Mr Keegan, is that…

MR LILLICO

Essentially the contextual factors from the drafting of the Cook Islands Act and anomalies it creates in terms of the requirements of the Cook Islands law, if we're sentencing according to Cook Islands sentencing practice then we're going to have to determine what that is, and in this case we had the benefit of the affidavit. But *Ngaakapi* and other cases demonstrate that that won't always be the case.

GLAZEBROOK J:

Well, that was an interesting case because of course there were two offences, one here and one there, which would make it very difficult to work out exactly what you were doing when you're at, say, totality for the two offences – well, there might have been more than one – oh, no, they were representative, weren't they?

MR LILLICO

They were both representative, yes, spanning the lifetime of the family, shifting from New Zealand to…

WINKELMANN CJ:

Well, we might just take the morning adjournment and just get you to take us through your argument on that point a little bit after the break.

COURT ADJOURNS: 11.34 AM

COURT RESUMES: 11.50 AM

MR LILLICO:

I think just before the morning tea adjournment I was addressing the Court really about the difficulties posed if we were to take punishment as an individual sentence less than the maximum and –

WINKELMANN CJ:

Yes. Well, we were really asking you to take us through step-by-step your reasoning as to why the approach you suggest is the right one, even if just an overview.

MR LILLICO:

Yes, certainly. So the starting point as with the argument about jurisdiction for appeals is that we have section 155(1) which extends the criminal jurisdiction in the New Zealand High Court and subsection (4) is obviously an exception or a qualification to this, but 155(1) extends criminal jurisdiction of our Court and that includes, must include, the Sentencing Act because as we've already averted to criminal jurisdiction is controlled and dictated by a number of statutes, the Sentencing Act being the most prominent one in relation to the issue of home detention.

So that's the starting point. Secondly, the use or the contextual argument would be in relation to the Cook Islands Act that sentence is used in contrast

to the word “punishment” and this is really set out in paragraph 87 of the submissions, and it becomes clear when the rest of the Act is considered that the Act makes a distinction as we do, I would suggest, in New Zealand between what an offence is punishable by and what the actual sentence is because invariably the actual sentence imposed is going to be very much less than the maximum one would hope. So that’s apparent in the Cook Islands Act too and at paragraph 87.1, .2 and .3 we set out the provisions for conspiracy sentencing, sentencing for incitement, sentencing to a fine in the absence of the offender where there is a contrast between what an offence is punishable by and what the actual sentence imposed is or the language admits to a distinction between the two.

WILLIAMS J:

The impression I got from just a quick flick through the long list of offences was they generally said “liable to” and then gave a maximum, didn’t use the word “punishment” at all or “sentence” for that matter.

MR LILLICO:

Yes, and again “liable to” assists the interpretation too we would say because penal statutes are in the business usually in those fundamental sections that you’re referring to, Your Honour, where the offence provision is set out, the actus reus is provided for, the mens rea and the maximum penalty that you are liable to because the Act is concerned with telling you what the worst story is, what the most prejudice to you is, if we pick up on Justice Glazebrook’s language, so the “liable to” – and that is repeated in 155(4) where the statute says where you are so liable after talking about punishment. Perhaps we should turn it up, or at least I should.

WILLIAMS J:

“Any person so liable,” yes.

MR LILLICO:

Thank you, Sir. So…

WILLIAMS J:

So that punishment must be the punishment liable to, not the punishment actually imposed.

MR LILLICO:

The worst you're going to get, Sir, yes, the maximum. So the first sentence, just to recap, in subsection (4), says, "The punishment to be imposed by the High Court for any such offence shall be that which is provided for that offence," in those mechanical fundamental sections you have looked at, Sir, "by the of the Cook Islands any person so liable to be imprisoned may be sentenced to imprisonment with or without hard labour."

WILLIAMS J:

So if the broader meaning of punishment at the front end of the section was the individual sentence, you would have had any person so imprisoned?

MR LILLICO:

Yes, so maybe you could substitute, on our reading of it the better drafting would be to say, or the drafting that's suggested by the rest of the Act, would be, "The sentence 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 to be imprisoned, any person actually to be imprisoned, because they're the only ones worth talking about, "May be sentenced to imprisonment with or without hard labour," and hard labour of course varies what we say the section is talking about, the maximum, because the maximum in New Zealand, at this time maximum penalties for imprisonable offences were combined with hard labour, they specified in those offence sections that the maximum sentence was 10 years' imprisonment or whatever with hard labour.

WILLIAMS J:

Ah, so the "hard labour" there is a reference to the New Zealand jurisdiction, not the Cook Islands jurisdiction?

MR LILLICO:

Yes. To tell you that, to tell the sentencing Judge that the Cook Islands, although I think the Cook Islands allowed you to be ordered to carry out work on roading but didn't use the hard labour sentence. But it allows New Zealand Judges to sentence hard labour, despite the maximum in the Cook Islands only being imprisonment, and silent as to hard labour.

WILLIAMS J:

Right. So that's an argument that 4 is, the first sentence in 4 is intended to be slim in a sense, because there's the New Zealand jurisdiction as to sentencing is explicitly imported in the second sentence anyway, at least in respect of that. The Judge has the discretion to impose a New Zealand aspect of the sentence despite the first sentence.

MR LILLICO:

Yes.

WILLIAMS J:

And you could say that was in indication that the first sentence is to be read in the narrow way you're suggesting.

MR LILLICO:

To be read only as a reference to the maximum penalty in the Cook Islands, then why have this allowance.

So the contextual argument, we say it allows in the way that the words "punishment" and "sentence" are used in the remainder of the statute really point to this interpretation of punishment.

Perhaps the only other thing worth pointing out is that in terms of if we accept that the High Court jurisdiction of New Zealand includes the Sentencing Act, and of course we admit that not all of the Sentencing Act entirely works because of its reliance at some points on specific named New Zealand offences using the offence section number. If that's accepted then the

Sentencing Act provides of course in section 10A hierarchy of sentences, and the importance of section 10A providing a hierarchy of sentences is because it ties in very explicitly with one of the principles of sentencing at 8(g), which is that Courts are to sentence to the least restrictive outcome. And so the interpretation suggested by the parties in this case, where punishment is read as "maximum penalty" allows the Court to give full effect to the Sentencing Act, which undoubtedly would have to apply in any sentencing exercise. Not even, the Court of Appeal didn't dispute that the sentencing exercise would have to take place in accordance with the Sentencing Act but carved off parts of the High Court's jurisdiction which would otherwise apply. But surely, even on the Court of Appeal's reasoning, the Sentencing Act would apply, it's just that, "I'm sorry, Mr O'Carroll, you have to have imprisonment." But why wouldn't the hierarchy apply, why wouldn't the imperative to impose the least restrictive outcome "appropriate", I think is also the word, why wouldn't that also, why wouldn't that imperative have to be honoured also?

So the interpretation suggested by us, the parties, allows an interpretation consistent with those rights. Ordinarily when we talk about rights we talk about Bill of Rights right, but her the right is a statutory one, and that's to have the least restrictive outcome imposed.

WINKELMANN CJ:
Do you say the Bill of Rights Act supports this interpretation?

MR LILLICO:
Well, disproportionate punishment arguably includes – well, I don't have the references at my fingertips but there is a debate, I believe, about whether disproportionate punishment in terms of the Bill of Rights is driving at sentences which are merely manifestly excessive. I don't have anything else really to offer in respect to that. Clearly the rights that is engaged without even turning to the Bill of Rights is the statutory one, which is about proportionality, which is an underpinning of the Bill of Rights. But whether a right, the right not to be subject to disproportionately severe punishment, is directly engaged by this should probably leave to another occasion or, if the

Court needs to hear about it, perhaps further submissions. But the Court might find a path to this case without it.

WINKELMANN CJ:
I don't think it's necessary, unless anybody else thinks it is.

MR LILLICO:
So that's really what I wanted to say about the basis for the parties' interpretation and why there is jurisdiction to impose home detention, unless I can assist further?

WINKELMANN CJ:
Thank you, Mr Lillico.

MR LILLICO:
As the Court pleases.

WINKELMANN CJ:
So, Mr Keegan, do you have anything to say by way of reply? I can't imagine you do really.

MR KEEGAN:
Nothing, other than to remark that my friend, Mr Lillico, would make a very fine defence counsel. May it please the Court.

WINKELMANN CJ:
Thank you. Thank you all counsel for your excellent submissions, we've been much assisted. We'll take some time to consider our decision.

COURT ADJOURNS: 12.03 PM