

IN THE HIGH COURT OF THE COOK ISLANDS
HELD AT RAROTONGA
(Criminal Division)

Misc. NO: 88/2002
(CR 326/2002)

IN THE MATTER OF an application by the informant
pursuant to section 115 Criminal Procedure Act
1980-1981

BETWEEN The Cook Islands Police Department
Informant.

AND Alfred George Manu of Titikeveka
Defendant

Mr T Elikana for Informant
Mr Little for Defendant
Hearing: 20 January 2003

Judgment of Greig CJ
Dated the day of January 2003.

1. This is an application by the Police Department made pursuant to section 115 of the Criminal Procedure Act 1980-1981 for correction of an erroneous sentence and the imposition of a proper sentence.
2. On 18 November 2002 after a defended hearing before me the Defendant was convicted on a charge of indecent assault on a female. On 28 November 2002 he was sentenced to a period of community service to be followed by a period of probation.

In the course of my sentencing I said:

This was in my judgment a serious matter and a matter which I would ultimately feel that a custodial sentence was required. There seem however to be some rather unusual circumstances in that you are it appears alone on this island with principal responsibility for your two young children who have been with you here, under your sole care for some 14 months.

Your partner who seems to have been prepared in the past to take some responsibility or look after the children to some extent apparently is no longer willing to do that. The mother of the children although she has come over here now has not accepted any immediate responsibility to look after the boys. She has not in any event been looking after them for

some little time and it might not be best for the children if they were to be taken back to New Zealand in the meantime.

I have decided therefore not to impose a custodial sentence and you can say you have been saved by your children. I do say however that this was a serious offence and it does require an appropriate punishment as far as one can impose one.

3. The Informant deposes that the children left Rarotonga on an Air New Zealand flight for New Zealand on Friday 29 November 2002. They left with their mother. It is alleged that they are now living in New Zealand but the Defendant through his Counsel challenges that. It is said that the Defendant seeks the return of the children to Rarotonga, that they went to New Zealand for a holiday only.
4. The Informant contends that the facts as they have turned out show on their face that the sentence I imposed was not a proper one and one I would not have imposed if it had been known that the children were about to depart from Rarotonga.
5. The jurisdiction of the Court under s.115 of the Act is a narrow one. It is to be applied in either of two situations: namely when the sentence is one that could not by law be passed or when the Judge does not pass a sentence that is required by law to be passed. The first is when the Judge has exceeded jurisdiction and passed a sentence which the law as applicable to him or her or applicable generally forbids or does not allow. The second is where the Judge has failed to follow the requirements of the law and has not passed the sentence which the law compels. It is not a provision which permits a review or appeal of a sentence in any general sense.
6. In this case the sentence I imposed is not one that could not by law be passed even apart from the circumstances which influence me in the particular case. A sentence of community service and probation is not forbidden or contrary to law in the case of indecent assault though it might in the circumstances be thought to be insufficiently severe. Nor is it a case where another sentence is required to be passed. There is no minimum sentence or any requirement that a custodial sentence be passed.
7. Mr Elikana referred to *R v Shepherd* (1990) 3 NZLR30 which is a case under s. 372 of the Crimes Act 1961 of New Zealand a similar provision to S.115. In that case reference is made to a sentence which on its face requires correction. But this is not a case where the sentence I imposed "on its face" requires correction. It is because of the background facts and the subsequent events that the Informant claims the sentence is not a proper one.
8. My conclusion is that I do not have jurisdiction under the Act to apply the section. The application is refused.

L M Greig CJ

