

IN THE HIGH COURT OF THE COOK ISLANDS

HELD AT RAROTONGA

(CRIMINAL)

CR NO. 475/92

POLICE

v

TORUARIKI MIRI

Defendant

Mr Appleby for Police

Mr Wichman for Respondent

Date: 12 August 1992

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JUDGMENT OF DILLON J

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This appeal relates to Information No. 475/92 which alleges that Mr Miri on the 26th of April 1992 at Arorangi assaulted Tangatatutai Ngatupuna. The charge is in relation to Section 216 of the Crimes Act 1969. This came before the Justice on the 25th of June 1992 when Mr Appleby appeared for the Police because they were unable to attend the Court on that date and he was asked to stand in at short notice and to act on a number of matters which were called before the Justice on that occasion.

The details that have been given to me by Counsel and by Mr Appleby are as follows:

The case was called and Mr Appleby asked for the matter to be adjourned so that a Probation Report could be obtained. This application was declined by the Justice on the insistence of Mr Wichman who was appearing as Counsel for the defendant. Mr Wichman wanted this matter dealt with on that day because he alleged that there had been delays previously in connection with this matter and when it had been called before the Court on earlier occasions. Mr Appleby was caught short at that particular stage because he had only had the opportunity of a brief perusal of the Police files and had expected his application for an adjournment to be granted so that a Probation Report could have been obtained on the plea of guilty and he would have been able to more fully brief himself on the circumstances and the background to the case.

However because the application for an adjournment was refused by the Justice without giving any reasons but presumably on the basis of Mr Wichman's application, Mr Appleby then proceeded to read from the summary or one of the statements some details about the alleged assault. Mr Appleby said that he read two sentences when there was an objection from Mr Wichman. Mr Wichman on the other hand suggests that Mr Appleby had read a little further than the two sentences alleged. Whatever was done it was clear that Mr Wichman had indicated to Mr Appleby that he didn't agree with the summary and objected to the manner in which Mr Appleby was presenting to the Court the circumstances of the case.

At that stage the Justice appears to have made a decision that on so much of the statement or facts as presented by Mr Appleby because Mr Appleby suggests that Mr Wichman didn't make any detailed submissions on behalf of his client. The Justice at that stage then convicted the Accused who had pleaded guilty and discharged him. In the course of that

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decision the Justice made an observation that he took that course of action "because of the actions of the Police, the defendant is convicted and discharged". It's not clear why that observation was made. Miss Maki suggests that it was because the Police had not been preparing their cases when presented at call over dates and this has been an irritation to both the Court and the Justices in the past and this may have been the reason. Whatever it is it's not clear why the Justice took this course of action.

Those seem to be the circumstances and it is now the Crown's stance that the matter should be the subject of this appeal and that a re-hearing of the matter be secured in order to ensure that a proper sentence is carried out, whatever is appropriate in the circumstances. At this stage I've heard nothing regarding the facts although they must have been of a somewhat serious nature in view of the fact that there was a charge that was withdrawn of wounding with intent and that carries a severe penalty.

The position at this stage is therefore this; Mr Wichman appears for the Respondent and objects to the appeal on the jurisdiction. Firstly he says that the appeal was not filed within the 21 days and there was the dispute as whether it was 15th or 16th of July. The evidence of the Crown Law, of the lady from the Crown Law Office, is quite clear that she filed it on the 15th of July even though it's date stamped the 16th of July. That objection is therefore disallowed and I accept that the appeal was filed in time.

The second ground of objection by Mr Wichman is that under Section 76 of the Judicature Act the Respondent is supposed to be filed with the proceedings within 21 days. I don't take that interpretation from that Act and I believe that the

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appeal has to be filed within 21 days and that the appeal papers have to be served on this case, the Respondent. That objection is therefore disallowed.

We come now to the third question and the manner in which the sentence was imposed by the Justice. It appears that Mr Appleby was caught by surprise at the manner in which the sentence was imposed when his summary of facts was momentarily cut short and Mr Wichman didn't make any submissions in mitigation. Normally that would have been the appropriate manner in which such a case is dealt with and Mr Appleby by way of explanation has indicated that he was so caught by surprise at the swiftness of justice that was meted out on this occasion that he wasn't able to grasp the situation and was forced to deal with the other matters which had been handed over to him by the Police. Upon reflection he now questions as to whether it was in fact justice that was meted out on this occasion apart from it being swift, or whether it was fair. I don't know, as I say, I don't know the circumstances of the incident which gave rise to this assault.

I am however mindful that a Justice has a discretion and while I am able to comment on the method in which these proceedings were dealt with I don't believe I am entitled to consider the question of the discretion which is undoubtedly imposed in a Justice as to the type and term of a sentence that is imposed.

Dealing with the procedure, it is clear that Mr Appleby has been precluded from presenting to the Court all the facts that he wanted to in support of the Police Prosecution concerning the circumstances of this case. That Mr Appleby chose to not protest at the manner in which he was cut short as he says, from presenting the circumstances for him to consider and also

for the Justice to consider. Everybody is entitled to a fair opportunity to present on behalf of their respective clients the circumstances surrounding a case. In this instance, Mr Appleby was entitled to present the facts to the Court. If Mr Wichman was shuffling his feet and getting excited because he didn't agree with what Mr Appleby was saying, then he would have his opportunity in due course.

In this particular case, he didn't even have to have the opportunity, the decision was given for him without making any submissions which is unusual because it then comes down to the fact that Mr Wichman was not able to answer when I asked him the question that while the Justice is entitled to a discretion in imposing any sentence what in this case will the circumstances that were presented to the Justice that entitled him to make a decision based on the discretion which he has exercised. As I understand it, there have been no facts or insufficient facts presented to the Justice to make a decision. Whether that is an over-simplification of the circumstances, whether the Justice was able to make an assessment on what he was told, limited though it may have been, from Mr Appleby, only the Justice is able to advise. Nevertheless there is no doubt that there is a discretion and that a re-hearing of the whole of the case and whatever it may present would in my view not provide a basis for an attack on the discretion of a Justice. There is a discretion which could only be the subject of an appeal if it was demonstrably wrong in some particular way which has not been indicated and really can't be indicated in these present proceedings. It's for those reasons that I don't believe that an appeal is going to achieve anything, even if it was a complete re-hearing. If it was a re-hearing of submissions since there has been a plea of guilty, the Court is then faced with whether or not a

sentence imposed on a defendant is bad because the Justice has exercised a discretion which the law entitles him to exercise. While I can sympathise with Mr Appleby, at the predicament in which he found himself I can't see that an appeal for the reasons that I have explained is going to achieve the result which normally one would expect from an appeal.

Listening to the facts of the case, I don't believe it's going to allow me to reach a decision where I can with justification say that the Justice in exercising his discretion which he is entitled to exercise was wrong. In view of all those circumstances the appeal is dismissed. No costs are allowed to the Respondent.