IN THE HIGH COURT OF THE COOK ISLANDS
HELD AT RAROTONGA
(CRIMINAL DIVISION)

J.P.APPEAL 3/97
CR NO. 101/97

BETWEEN THE SUPERINTENDENT OF ARORANGI PRISON, Arorangi, Rarotonga.

Appellant

AND NGATEINA MAKITAE, Inmate of Arorangi, Rarotonga.

Respondent

Mr. Graham for Appellant
Mr. Mason for Respondent
Hearing: 6 March 1997
DATE OF DELIVERY: 11 MARCH 1997

REASONS FOR JUDGMENT

On the 26 February 1997 the Respondent appeared in the High Court before three Justices of the Peace and pleaded guilty to a charge of escaping from lawful custody. He was sentenced to 6 months' imprisonment, that term to be concurrent with the sentence of 4½ years' imprisonment which he was then serving. In addition the Justices ordered that the Respondent be released forthwith from maximum security. The Superintendent of the Prison has appealed against the sentence and the order made and that appeal was heard by me by telephone conference on6 March 1997. I then gave my decision allowing the appeal against sentence and directing that the sentence be served cumulatively rather than concurrently. As to the order for release from maximum security, I expressed doubt as to the Court's jurisdiction and recommended that a Visiting Justice be asked to investigate the matter of the Respondent's confinement. I undertook to put my reasons in writing and this I now do.

The Respondent has a very long list of previous offending, including two previous instances of escaping from custody. On 2 August 1996 he was sentenced to 4½ years' imprisonment on a charge of aggravated wounding and two charges of burglary. On 25 October 1996 he took advantage

of a moment of relaxed supervision and walked out of the prison. He was recaptured on 9 November 199[illegible], and , on the direction of the Superintendent was held in the maximum security block within the prison.

For the Appellant it was argued that a concurrent sentence of 6 months' imprisonment was, in effect, no sentence at all for a person already serving a long term of imprisonment and that the need to deter others who may be contemplating escape required a realistic sentence. On behalf of the Respondent Mr. Mason did not feel able to offer any real opposition to this, and I had no hesitation in saying that the sentence must be regarded as manifestly inadequate. It was, in fact, a meaningless sentence. Because of the rather open nature of the prison, and the need for prisoners to be outside the prison frequently for the purpose of being occupied with work, the temptation to escape must be present much of the time, and the history of frequent escapes reinforces this. It is therefore incumbent on the Court, when an escape has occured , to make it clear that such an offence will attract a significant punishment.

For these reasons the appeal against sentence was allowed and the sentence changed to one of cumulative imprisonment.

A matter of considerably greater difficulty concerns the order made for the Respondent's release from maximum security. I had occasion previously to consider the provisions of the Prisons Regulations 1968 as they applied to confinement in what is known as the punishment cell. This was on the sentencing of Metuevaine Miri, and on that occasion I delivered my reasons in writing which, however, did not have to deal with the matters which arise in this case.

The imprisonment of offenders is controlled by the

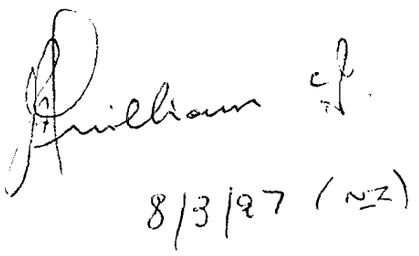
Prisons Act 1967 and the Prisons Regulations 1968. Section 26 of the Act defines what are "offences against discipline" which may be committed by an inmate. Section 26 (1) creates 12 categories of offences, and s. 26 (2) creates a further 9 categories. The latter are plainly the more serious offences, and they include escaping from custody. Section 27 empowers a Visiting Justice to deal with any offence against discipline and to impose penalties, one of which is "confinement in a cell for any period not exceeding fifteen days". Section 28 gives the Superintendent power to deal with the lesser offences under s. 26 (1), but there is no power for him to deal with offences under s. 26 (2).

The Regulations contain provisions as to the treatment of inmates who are undergoing punishment. Reg. 79 specifies the conditions to be observed by inmates sentenced to confinement in a cell. While the expression "confinement in a cell" may appear sufficiently descriptive, there remains a question as to whether c onfinement within the maximum security block in the prison is to be equated with confinement in a cell. Without an inspection and the opportunity for the presentation of argument I do not feel able to make an express finding on this.

Regulation 80 then makes provision for the transfer of an inmate to "penal grade". That expression is nowhere defined, and the problem in this case (and no doubt in others) arisesbecause neither "confinement in a cell" nor "penal grade" is defined. Instead, the practice appears to be to refer to "maximum security block" and "punishment cell". Whether these terms are synonymous with those used in the Regulations I am unable to say. It seems that the prison authorities have simply devised their own expressions and have not attempted to follow the provisions of the Act and Regulations. Having regard to the fact that imprisonment is a major deprivation of liberty, often for long periods, it is of the first importance that this is carried out only so far as the law allows. It cannot be said that this principle has been observed in the past.

I can see no basis upon which the Justices had any jurisdiction to make the order they did for the Respondent's release from maximum security, although I have no doubt they were moved by humanitarian considerations. I think I am obliged to quash the order they made, but I confirm my request to counsel that a Visiting Justice be asked to investigate and inspect within the powers given by the Regulations.

In the longer term interests of Justice, however, I recommend that the Act, and more particularly the Regulations, be examined by the Crown Law Office with a view to their clarification. In particular I consider urgent consideration be given to the expressions "confinement in a cell", "maximum security block", "penal grade" and "punishment cell". There should be clear definitions of such of them as are properly to be used, and of the provisions to be attached to each. I recommend also that any necessary amendments be made as a matter of urgency in order that the possibility of inmates being held in conditions which may be contrary to the provisions of the Constitution, and in particular of Article 64, is eliminated.



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