

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

JP APPEAL NO. 7/2021

COOK ISLANDS POLICE

v

WAYNE PETER MITCHELL

Hearing date: 1 December 2021 (via Zoom)

Appearances: J Crawford for the Crown
T Nicholas for Respondent

Judgment: 13 December 2021

JUDGMENT OF THE HONOURABLE JUSTICE DAME JUDITH POTTER

[0966.dss]

[1] On 29 September 2021 the Respondent, Wayne Peter Mitchell, was sentenced by JP Manarangi to a fine of \$500 on each of the following charges:

- a) Excess breath alcohol, pursuant to s 28A(1) and (2) of the Transport Amendment Act 2007. Maximum penalty is one year imprisonment and/or \$1,000 fine. Mandatory period of disqualification of up to one year.
- b) Dangerous driving, pursuant to ss 5 and 27(1)(b) of the Transport Act 1966. Maximum penalty is one year imprisonment and/or \$1,000 fine.

The Respondent was also disqualified from driving for 12 months.

[2] On 22 October 2021 the Crown filed an appeal under s 76 of the Judicature Act 1980-81 (“the Act”) on the basis that the sentence imposed was manifestly inadequate.

[3] A threshold issue has arisen as to this Court’s jurisdiction to hear and determine the appeal.

[4] Section 76 of the Act provides a general right of appeal to the High Court from a decision of a Justice of the Peace:

“General right of appeal to Judge – (1) Except as expressly provided in any enactment, where on the determination of any proceedings, civil or criminal, by a Justice sitting alone or by Justices sitting together any party thereto is not satisfied with the decision therein, he may appeal from that decision to a Judge.

(2) Notice of appeal shall be filed in the Court within 21 days after the decision is given, and copies of that notice shall be served on all other parties affected by the decision.”

[5] Ms Crawford for the Crown acknowledged the application to appeal was filed two days late and sought exercise of the Court’s discretion to extend time for filing in the circumstances of the case, relying on the Court’s inherent jurisdiction.

[6] For the respondent, Mr Nicholas submitted s 76(2) prescribes a statutory deadline to file a notice of appeal, and there is no discretion for the Court to allow an appeal out of time.

[7] Section 76 of the Act requires filing of the notice of appeal “within 21 days after the decision is given”. There is no provision for time for filing to be extended.

[8] In relation to appeals to the Court of Appeal, s 70(2) of the Judicature Amendment Act 2011 provides that the time within which notice of appeal or application for leave to appeal may be given, may be extended at any time by the Court of Appeal.

[9] Section 231 of the Criminal Procedure Act 2011 (NZ) specifies a period of 20 working days after the date of sentence for filing of an appeal, but then provides the Appeal Court may, at any time, extend the time allowed for filing the appeal.

[10] The Act and Cook Islands legislation provides no like statutory discretion in relation to appeals from decisions of JPs filed out of time.

[11] Counsel referred the Court to the two only decisions bearing on this point they had been able to locate.

[12] *Deputy Solicitor-General v. Michael Brown*¹. The appellant sought an extension of time to file an application to appeal against a decision of a JP, which was filed 14 days out of time. The main ground of appeal was that the wrong standard of proof was applied by the JP. Grice J referred to s 76(2) of the Act and the 21 days period for filing an appeal. She then stated at [4]: “The Court may extend the time prescribed for appealing. This is a matter within the discretion of the Court”.

Relevantly she noted: “... the Respondent consents to the extension of time, the granting of the appeal and remission back to the JP for hearing ... there is no issue of prejudice. The parties are agreed on the merits of allowing the appeal ... the consent of the Respondent is an important factor in granting the extension and allowing the appeal.” After considering factors bearing on the overall interests of the justice, leave to extend time for appeal was granted, the appeal allowed and a new trial before a JP ordered.

[13] *Tamarua v. Tamarua*². An application to appeal in the Land Division of the High Court was heard by Mr Justice Savage. A written judgment is not available but the transcript of the proceeding on 12 and 15 October 2020 has been produced by the Registry. It was common ground that the Notice of Appeal filed under s 76(2) of the Act was out of time. Savage J noted the statute did not make provision for the Court to extend time to appeal. He rejected a submission that the Court had inherent jurisdiction to extend time, stating: “Rights of appeal throughout the Commonwealth are statutory. There’s no common law right to appeal.” He struck out the appeal.

[14] In *Deputy Solicitor-General v. Brown*, Grice J placed significant reliance on the consent of the respondent to the appellant’s application to extend time for filing the appeal. The Judge referred to no statutory or other authority in support of the statement at [4], that the Court had a discretion to extend time. Given the respondent’s consent to the application to

¹ JP Appeal 4/11, CKCH, 16 December 2011, Grice J.

² Application No. JP 1/20, CIHC (Land Division), 12 & 15 October 2020, Savage J.

extend time and allow the appeal, the Court's jurisdiction to do so may not have been specifically addressed.

[15] In *Tamarua*, following a discussion about the impact of the Acts Interpretation Act 1924 in determining the 21 day period under s 76(2), the Judge reached the clear conclusion that absent statutory power to extend time to appeal, the Court lacked jurisdiction to hear the appeal, and it must be struck out.

[16] There is no statutory authority in the Cook Islands akin to s 231(3) of the Criminal Procedure Act 2011 (NZ) that provides a general discretion for an appeal court to extend time to appeal. Where the right of appeal is conferred by statute, as it is by s 76 of the Act, the Court may not resort to its inherent jurisdiction to imply authority to, as Crown counsel submitted, "fill a gap". There is no "gap". The statute is silent as to extension of time to appeal. Statutory amendment is a matter for the legislature.

[17] Article 64 (1) of the Cook Islands Constitution recognises and protects the fundamental rights and freedoms to liberty of the person, and the right not to be deprived of it except in accordance with the law. A convicted and sentenced offender must carry out the sentence in accordance with the law. An appeal against conviction and/or sentence may, if allowed, impact on the freedom and liberty of the offender. In appealing a conviction or sentence, the Crown must exercise its right of appeal in accordance with the statutory provisions that create that right.

[18] Accordingly the Crown's application to appeal is dismissed.

[19] In dismissing the appeal I make no inference as to its merits. The respondent, Mr Mitchell, will be well aware of the warning issued by JP Manarangi when she imposed sentence or when she imposed the sentence the Crown sought to appeal, on 29 September 2021.

A handwritten signature in blue ink that reads "Potter, J." with a horizontal line underneath.

Judith Potter, J