Trinity Term
[2018] UKPC 20
Privy Council Appeal No 0013 of 2017

JUDGMENT

Warren (Appellant) *v* The State (Respondent) (Pitcairn Islands)

From the Court of Appeal of the Pitcairn Islands

before

Lord Mance
Lord Sumption
Lord Hughes
Lord Lloyd-Jones
Lord Briggs

JUDGMENT GIVEN ON

30 July 2018

Heard on 15 and 16 May 2018

Appellant	*Respondent*
Dr Tony Ellis Graeme Edgeler	Simon Mount QC, Attorney General Kieran Raftery QC Danielle Kelly
(Instructed by Alan Taylor & Co Solicitors)	(Instructed by Moon Beever Solicitors)

LORD HUGHES AND LORD LLOYD-JONES:

History of proceedings

1. The appellant, Michael Warren, is a resident of Pitcairn Island, the only inhabited island in Pitcairn Islands, a British Overseas Territory in the Pacific Ocean. He appeals against his convictions on 20 charges of possessing child pornography contrary to section 160 of the Criminal Justice Act 1988 (UK) and two charges of possessing grossly indecent items contrary to section 8 of the Pitcairn Summary Offences Ordinance. On 4 March 2016 he was sentenced by Tompkins J to 20 months' imprisonment on each of the child pornography charges and one month's imprisonment on each of the indecent articles charges, all to run concurrently.

2. These proceedings were accompanied below by numerous applications in which it was maintained that, as a result of alleged flaws in the Pitcairn Islands Constitution ("the Constitution"), failures in administration, deficiencies and impropriety in the appointment of judges, judicial bias and lack of independence and other similar causes, there was systemic constitutional error. The proceedings gave rise to 21 defence applications, 2,000 pages of written submissions, 60 days of oral hearings and 30 judgments. The first Supreme Court judgment on pre-trial issues was delivered by Lovell-Smith J on 12 October 2012 and the second by Haines J on 28 November 2014. Appeals to the Court of Appeal resulted in decisions on 23 October 2015, upholding the pre-trial decisions of the Supreme Court, and on 6 July 2016, upholding the appellant's convictions.

Scope of the leave to appeal

3. The appellant now appeals to the Judicial Committee of the Privy Council as of right under section 25(10) of the Constitution. This was confirmed by order of the Court of Appeal under section 25(10) made on 9 December 2016 in accordance with the procedure affirmed in *Ross v Bank of Commerce (St Kitts and Nevis) Trust and Savings Association Ltd* [2010] UKPC 28; [2011] 1 WLR 125).

4. Section 25 of the Constitution provides in relevant part:

> "25. Enforcement of protective provisions

(1) If any person alleges that any of the provisions of this Part has been, is being or is likely to be breached in relation to him or her (or, in the case of a person who is detained, if any other person alleges such a breach in relation to the detained person), then, without prejudice to any other action with respect to the same matter that is lawfully available, that person (or that other person) may apply to the Supreme Court for redress.

(2) The Supreme Court shall have original jurisdiction -

(a) to hear and determine any application made by any person in pursuance of subsection (1); …

and may make such declarations and orders, issue such writs and give such directions as it considers appropriate for the purpose of enforcing or securing the enforcement of any of the provisions of this Part.

(3) The Supreme Court may decline to exercise its powers under subsection (2) if it is satisfied that adequate means of redress for the breach alleged are or have been available to the person concerned under any other law.

…

(10) An appeal shall lie as of right to the Court of Appeal from any final determination of any application or question by the Supreme Court under this section, and an appeal shall lie as of right to Her Majesty in Council from the final determination by the Court of Appeal of the appeal in any such case; but no appeal shall lie from a determination by the Supreme Court under this section dismissing an application on the ground that it is frivolous or vexatious."

5. Section 25 applies only to matters relating to actual or potential breaches of rights under Part 2 of the Constitution in which it appears. Part 2 is entitled "Fundamental Rights and Freedoms of the Individual" and includes in section 8 a right to a fair trial and in section 11 a right to respect for one's private and family life and one's home. Part 2 is to be distinguished from other Parts including Part 3, The Governor; Part 4, The Executive; Part 5, The Legislature and Part 6, The Administration of Justice.

6. It is, therefore, necessary to distinguish between those grounds of appeal for which leave to appeal has been granted under section 25 and those for which special leave is required.

7. In the proceedings below the appellant made three relevant applications in the Supreme Court on 19 August 2011, 29 May 2014 and 8 August 2014 respectively, alleging breach of his rights under sections 8 and 11 of the Constitution. Each was both an application pursuant to section 25 of the Constitution and an application for relief in the criminal proceedings, the Supreme Court having jurisdiction over both matters. Those applications were addressed in the Supreme Court by Lovell-Smith J. and Haines J. and, on appeal, by the Court of Appeal in its judgment of 23 October 2015.

8. The grounds of appeal now relied upon by the appellant are diffuse, amorphous and often overlap with each other. Some 40 grounds in which the appellant submits that he has been denied a fair and public hearing by an independent and impartial tribunal established by law have been grouped together by the appellant in his "Synopsis of Case" under the heading "Ground 1, Independence, Impartiality and Nullity". The Crown accepts that these grounds fall within the scope of the appeal to this court as of right pursuant to section 25 of the Constitution confirmed by the Court of Appeal, save in those instances where it is sought to advance new grounds on this appeal for the first time.

Grounds founded on section 25, Pitcairn Constitution

9. The grounds founded on section 25 are wide ranging and allege a denial of a right to be tried before an independent and impartial tribunal. These grounds include (a) the appointment of judges by the Governor who has a conflict of interests; (b) the appointment of judges exclusively from serving and retired New Zealand judges and barristers; (c) failure to pay judges from Pitcairn funds; (d) the use of New Zealand courtroom facilities; (e) appointment of part time judges; (f) specific complaints concerning the appointment of the Chief Justice; (g) specific complaints concerning the appointment of three Court of Appeal judges in 2012; (h) deficiencies in the swearing of judicial oaths; and (i) impropriety in a consultation in 2000 concerning the appointment of judges and counsel in the legal system of Pitcairn.

10. In her judgment of 12 October 2012, Lovell-Smith J, addressing the first of the three applications referred to above, considered (at paras 85-88) that the application of section 25 was inappropriate and an abuse of process as the completion of the criminal proceedings and the exercise of any criminal appeal rights were the more natural relief available at that time. In her view, dealing with constitutional issues in that venue would unnecessarily complicate the criminal proceedings and might affect the appellant's right to a fair trial, given the factual disputes that would arise during the actual trial. Similarly,

in his judgment of 28 November 2014, Haines J concluded (at para 309) that insofar as the abuse of process issues raised under the three applications were also characterised as "constitutional challenges" they were to be addressed in the context of criminal proceedings. Because in those proceedings the appellant had an adequate means of redress, there was no need for the court to exercise its powers under section 25.

11. In its judgment of 23 October 2015 the Court of Appeal considered in detail the various grounds of appeal founded on section 25 of the Constitution. It dismissed them all. It then went on to note that those matters were able to be and had been fully addressed within the criminal proceedings. Had there been any merit in the allegations of breach of the Constitution, a remedy was available within the criminal proceedings by way of the issuance of a stay, or other remedy proportionate to the breach, if that were appropriate. That being so, it was an abuse of process for the appellant also to resort to section 25. In this regard the Court of Appeal referred to *Harrikissoon v Attorney General of Trinidad and Tobago*, [1980] AC 265 (PC) per Lord Diplock at 268, *Chokolingo v Attorney General of Trinidad and Tobago* [1981] 1 WLR 106 (PC), *Durity v Attorney General of Trinidad and Tobago* [2008] UKPC 59 and *Jaroo v Attorney General of Trinidad and Tobago* [2002] UKPC 5; [2002] 1 AC 871 where Lord Hope observed at para 39:

> "Their Lordships respectfully agree with the Court of Appeal that, before he resorts to this procedure, the applicant must consider the true nature of the right allegedly contravened. He must also consider whether, having regard to all the circumstances of the case, some other procedure either under the common law or pursuant to statute might not more conveniently be invoked. If another such procedure is available, resort to the procedure by way of originating motion will be inappropriate and it will be an abuse of the process to resort to it. If, as in this case, it becomes clear after the motion has been filed that the use of the procedure is no longer appropriate, steps should be taken without delay to withdraw the motion from the High Court as its continued use in such circumstances will also be an abuse."

12. The Court of Appeal noted that, consistently with this passage, section 25(3) of the Constitution allows the Supreme Court to decline to exercise its powers under the section if satisfied that adequate means of redress are available under any other law, as, it considered, they were here. It concluded (at para 231):

> "The section 25 applications served no useful purpose other perhaps than providing an appeal as of right to this Court. Lovell-Smith J and Haines J dismissed the applications. We consider they were an abuse of process and uphold their decisions."

13. The Board agrees with the Court of Appeal that the applications should not have been made under section 25 because, had there been any substance in any of the grounds advanced, adequate means of redress would have been available within the criminal proceedings. The Board further agrees that the making of the section 25 applications was an abuse of process. Accordingly, the Board dismisses the appeal pursuant to section 25(10) for this reason.

14. In these circumstances the appellant requires special leave to pursue the grounds of appeal falling within this category. The appellant has not filed a formal application for special leave but, in his case, seeks special leave if it is necessary. The Board has come to the clear conclusion that special leave to appeal should be refused as it is not demonstrated that there is a risk that a serious miscarriage of justice may have occurred. (Judicial Committee of the Privy Council Practice Direction 3.3.3(b)) First, each of these grounds of appeal considered individually is totally lacking in merit. The Board does not intend to address in this judgment each of the grounds in turn but simply adopts the full reasons given by the Court of Appeal in relation to the grounds which were canvassed before it. Secondly, there is no basis for the appellant's submission that the cumulative effect of the alleged breaches demonstrates a "systemic constitutional error" rendering the proceedings a nullity. Thirdly, none of the complaints made in these grounds is capable, even if any had been established, of having any bearing at all on the fairness of the appellant's criminal trial. The courts below would have been entitled to dismiss the applications summarily on this basis rather than spend on them the disproportionate time which they were persuaded to devote to them.

15. To the extent that the appellant seeks to raise within this category new grounds not argued below, it is sufficient to state that they cannot succeed for the second and third reasons stated above and that special leave to argue them is accordingly refused.

16. During the hearing the appellant acknowledged that a passage in Halsbury's Laws cited in his written case did not justify the contention there made that there was a duty to publish proposed legislation so that the population could if it wished object. He sought and was given permission to lodge additional written submissions citing accurate authority if such could be found. Instead, he lodged ten further pages of argument suggesting, first, that the British Settlements Act 1887 is not in terms wide enough to authorise retrospective ratification of an invalidly made judicial appointment. The Board can summarily dismiss this suggestion, in the light of the width of the powers conferred by that Act (see para 24, below). His main contention in this document, however, was that the various alleged defects in the appointment of judges ought to have been published. This argument was new and not open to him after the hearing had closed. Moreover, the suggested defects in the manner of the appointment of the judges were, for the reasons given by the Court of Appeal and above, irrelevant to the appellant's right to a fair trial. To the extent that he now seeks to rely on the Crown's undoubted duty in criminal cases to disclose material which might undermine its case,

the argument is misconceived because (a) the material in question was all known by the time of the trial and (b) it did not, for the reasons given, undermine the Crown case.

Grounds not founded on section 25, Pitcairn Constitution

17. On behalf of the appellant, Dr Ellis seeks to advance three further grounds of appeal. Ground 2 is entitled "Lack of a system of judicial review". Ground 3 is entitled "Lack of Democracy". Ground 4 relates to the seizure of computer and photographic images and the removal of the seized material for analysis in New Zealand. The Board will address each in turn and will also make observations on the appellant's submission that the offences contrary to section 160, Criminal Justice Act 1988 do not form part of Pitcairn law.

Lack of a system of judicial review

18. Dr Ellis explains that, faced with the Crown's submission that a constitutional challenge under section 25 was an abuse of process, on 11 September 2013 he filed an application for judicial review in the civil jurisdiction of the Pitcairn Supreme Court. It pleaded issues which were identical to those already advanced before Lovell-Smith J and Haines J. No substantive progress was made on this application due to uncertainty as to the applicable procedure. In his judgment of 28 November 2014 Haines J considered whether English or New Zealand procedure on judicial review should be followed, a significant difference being that English procedure included a requirement of permission to apply for judicial review. Haines J held (at paras 456-466) that by virtue of section 42 of the Pitcairn Constitution UK rules of civil procedure apply in Pitcairn, subject to the limitations in section 42(2), and that the appropriate procedure for judicial review was that of the High Court of Justice of England and Wales. The Court of Appeal in its decision of 23 October 2015 (at paras 233-235***)*** upheld that decision and remitted the civil proceeding to the Supreme Court where it was open to the appellant to pursue an application for permission if he still wished to pursue the judicial review.

19. Under this ground the appellant submits that

(1) The Supreme Court was wrong to rule that English as opposed to New Zealand procedure applies in Pitcairn;

(2) The non-availability of judicial review forced the appellant to bring constitutional challenges;

(3) The non-availability of judicial review on Pitcairn is constitutionally offensive and isolates the executive from judicial scrutiny.

The appellant requires special leave in order to raise this ground.

20. Section 42 of the Constitution provides:

> "(1) Subject to subsection (2), the common law, the rules of equity and the statutes of general application as in force in and for England for the time being shall be in force in Pitcairn.
>
> (2) All the laws of England extended to Pitcairn by subsection (1) shall be in force in Pitcairn so far only as the local circumstances and the limits of local jurisdiction permit and subject to any existing or future Ordinance, and for the purpose of facilitating the application of the said laws it shall be lawful to construe them with such formal alterations not affecting the substance as to names, localities, courts, offices, persons, moneys, penalties and otherwise as may be necessary to render those laws applicable to the circumstances."

21. The Board refuses special leave on this ground for the following reasons:

(1) The Court of Appeal was unquestionably correct in its conclusion that, by virtue of section 42 of the Constitution, the procedure of the High Court of Justice of England and Wales was applicable.

(2) Judicial review is available in Pitcairn in appropriate cases. The requirement of leave is a legitimate control whereby only those applications which disclose an arguable case which merits full investigation are permitted to proceed.

(3) The appellant decided not to take any further steps in the proposed judicial review until all criminal proceedings had been determined. The court acceded to the appellant's request and deferred the case management conference until after the conclusion of the criminal proceedings.

(4) Judicial review is a remedy of last resort and was not appropriate in these circumstances because there existed an equally effective alternative remedy in the form of applications in the criminal proceedings.

(5) In any event, the grounds advanced duplicated the constitutional issues raised under section 25 and were totally lacking in merit.

Lack of Democracy

22. Under Ground 3 "Lack of Democracy", the appellant submits that the Constitution is undemocratic and is, therefore, in breach of the Bill of Rights 1688 which confers guarantees of freedom of election, freedom of speech in Parliament and frequent sittings of Parliament. It is submitted that the Constitution is itself unlawful because it contravenes the Bill of Rights and international human rights norms and that, accordingly, all organs of government established under it and all ordinances created under it by the Governor are also unlawful. On this basis it is submitted that all arrangements for trials on or pertaining to Pitcairn are unlawful.

23. The Pitcairn Constitution Order was made under the British Settlements Act 1887 ("the 1887 Act") which provides in section 2:

> "2. Power of the Queen in Council to make laws and establish courts.
>
> It shall be lawful for Her Majesty the Queen in Council from time to time to establish all such laws and institutions, and constitute such courts and officers, and make such provisions and regulations for the proceedings in the said courts and for the administration of justice, as may appear to Her Majesty in Council to be necessary for the peace, order, and good government of Her Majesty's subjects and others within any British settlement."

24. Setting to one side for present purposes issues as to the justiciability of the matters raised by this ground (*R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No 2)* [2008] UKHL 61; [2009] 1 AC 453 per Lord Hoffmann at para 50, per Lord Rodger of Earlsferry at para 109, per Lord Carswell at para 130; *R (Misick) v Secretary of State for Foreign and Commonwealth Affairs* [2009] EWCA Civ 1549 per Laws LJ at para 18), the short answer to this proposed ground is that it is clearly established that the 1887 Act permits the Crown to set up a non-representative legislature which might otherwise be contrary to the Bill of Rights. In *Sabally and N'Jie v Attorney General* [1965] 1 QB 273 at p 294 Lord Denning MR observed:

> "When English folk settled in a colony (as distinct from conquest or cession) they took their English law with them, that is to say, the common law and the statute law as it existed at that time. They

> took with them, too, the Crown prerogative, in this sense, that the Crown could give them a representative legislature in which they elected their own representatives: but the Crown could not impose on the settlers a legislature on which they were not represented. It could not impose on them a non-representative legislature. The usual practice in a settled colony was for the Crown to issue a Royal Commission providing for a governor and council and an assembly elected by the people. The assembly, with the consent of the governor and council, had legislative authority over the colony. A good instance will be found set out in the case of Newfoundland, which was a settled colony, in *Kielley v Carson-Kent* (1842) 4 Moo PCC 63, 84-6. Thenceforward the legislative authority could only be exercised by the assembly or by any Act of Parliament of Great Britain: see the case of Jamaica discussed by Lord Mansfield in *Campbell v Hall* (1774) 1 Cowp 204, 212-214. There were, however, some settled colonies for which a representative legislature was unsuitable. The population was too sparse: the inhabitants too little educated. Such were the Falkland Islands and the colonies on the West Coast of Africa, including the Gambia. For these colonies it was desirable to set up in those days a non-representative legislature; and as the Crown could not do it by its prerogative for a settled colony, Parliament intervened so as to enable the Crown to do it by statutory authority. It passed Acts in 1843 and 1860, which were repealed and replaced by the British Settlements Act, 1887. Under these Acts the Crown had power to, and did, appoint a governor to legislate with a nominated council but no elected assembly. This was the form of legislature in the Colony of the Gambia until recent times. It was a non-representative legislature constituted under the British Settlements Act, 1887, and nothing else."

25. The population of Pitcairn is approximately 50 persons of whom fewer than 40 are adults.

26. The Bill of Rights is not entrenched legislation nor does it impose any manner and form restriction on subsequent legislation. Accordingly, reliance on authorities such as *Attorney General for New South Wales v Trethowan* [1932] AC 526 (PC) is misplaced.

27. The appellant's reliance on international instruments is similarly misplaced. Here, the appellant relies on articles 1, 73 and 75, UN Charter, on articles 1 and 25, International Covenant on Civil and Political Rights and on article 3, Optional First Protocol to the European Convention on Human Rights ("ECHR"). Neither ECHR nor

the First Protocol has been extended to Pitcairn. None of the provisions relied on by the appellant has been implemented into domestic law in Pitcairn.

The applicability of section 160 Criminal Justice Act 1988

28. The Court of Appeal dealt with section 160 at paras 114 to 120 of its judgment of 23 October 2015. It correctly rejected two separate arguments, no longer advanced, (a) that section 160 was not a statute of general application and (b) that the maximum sentence prescribed by itself demonstrated that local circumstances took section 160 outside section 42 of the Constitution. At paras 118-119 it concluded that there is no basis for the proposition that section 8 of the Summary Offences Ordinance was intended completely to cover the field of child pornography. The Board agrees with both its conclusions and the reasons there given. Since it is possible that the argument advanced to the Board was put a little differently from the way it had been before the Court of Appeal, the Board adds simply the following.

29. The argument now advanced runs as follows:

(1) Until November 2000 the English Criminal Justice Act 1988, section 160 (possession of indecent photograph of a child) was a summary only offence.

(2) It became an either-way offence with significantly enhanced maximum sentence as a result of amendment by the Criminal Justice and Courts Services Act 2000, enacted in November 2000.

(3) The Governor would have been aware of the change to English law.

(4) Section 8 of the Summary Offences Ordinance covers an offence of possession of an indecent photograph of a child.

(5) So, in promulgating the Summary Offences Ordinance in December 2000 in the same terms as before the Governor must have made a deliberate choice to retain the section 8 offence in preference to the newly changed English offence.

30. This is not tenable.

(1) The re-promulgation of the Summary Offences Ordinance was simply to repeat legislation which had existed in Pitcairn for many years.

(2) Doing so by no means tells one that the Governor was turning his back on section 160, as newly amended. On the contrary, the newly amended statute of general application in England would apply in Pitcairn under section 42 of the Constitution. If, as the defendant asserts, the Governor is to be taken as being aware of the change to section 160, it follows that he would expect it to apply to Pitcairn under section 42.

(3) Section 8 of the Summary Offences Ordinance had not for years been a comprehensive provision for indecent material or for child pornography. Ever since 1978 there had been, in an English statute of general application, the Protection of Children Act 1978, section 1, an enhanced offence of taking an indecent photo of a child, which was indictable and carried a substantial prison sentence. Anyone who committed that offence would normally also commit the offence of possessing the resultant photograph and thus the offence under section 8 of the Summary Offences Ordinance. Indeed, since 1994 (when amended by the Criminal Justice and Public Order Act 1994 section 84(2)(a)) the Protection of Children Act offence had included making such a photo, which expression includes downloading from the internet. (See *R v Bowden* [1999] EWCA Crim 2270 (10 Nov 1999).) Long before the 2010 Constitution confirmed the position by section 42, English statutes of general application applied in Pitcairn in the absence of clear reasons why they could not.

(4) Re-promulgating section 8 tells nobody anything except that the Governor wished to continue also to cover possession of indecent material which is not the subject of more serious offences.

The search warrant

31. The appellant challenged the validity of the issue of the search warrant and its execution on a large number of grounds. They included (a) the jurisdiction of the island magistrate and his suggested lack of independence, (b) the grounds on which it was sought, (c) an asserted lack of independence in the police officer making the application, (d) an asserted lack of candour or good faith in the application, (e) breach of the appellant's right to respect for his private and family life and home (section 11 of the Constitution), (f) asserted excessive seizure of material which on examination turned out to be unconnected to the offences charged, and (g) removal of the exhibits to New Zealand for examination.

32. The Court of Appeal dealt seriatim with these challenges at paras 142 to 224 of its judgment of 23 October 2015. The Board agrees with its conclusions and with the reasons given for them. Special leave to appeal on this ground is, accordingly, refused.

33. It should, however, be added that even if there had been any of the suggested irregularities in the issue or execution of the search warrant, it would not follow that the evidence of the contents of the appellant's computer would thereby have become inadmissible. In English law, the admissibility of evidence depends in the first instance on its relevance. Irregularity or illegality in the obtaining of evidence does not result in automatic inadmissibility: see *Kuruma, son of Kaniu v The Queen* [1955] AC 197, *Jeffrey v Black* [1978] QB 490, *R v Sang* [1980] AC 402, and a great many other cases. Prosecution evidence may of course be excluded if its effect on the trial would be unfair: this has been the rule since at least *Noor Mohammed v The King* [1949] AC 182 and it now has statutory endorsement in section 78 of the Police and Criminal Evidence Act 1984. But the test of exclusion is not the nature of any irregularity in obtaining the evidence, but rather the extent of any unfairness caused thereby. The Board did not understand counsel for the appellant to differ from those very well-established propositions. In the present case, no argument has at any stage been presented which could have justified the exclusion of the hard evidence of the contents of the appellant's computer, and in due course he admitted possession of the material. For this additional reason, the several challenges to the search warrant could not, even if they had been made out, have availed the appellant in the criminal trial, nor could they affect the safety of his conviction.