IN THE PITCAIRN ISLANDS SUPREME COURT
HELD AT ADAMSTOWN, PITCAIRN ISLAND

T 1/2011 &
T 1-2/2016

BETWEEN **THE QUEEN**

AND **MICHAEL WARREN**

Hearing:	1-4, 28, 29 February, 1, 2, 4 March 2016
Date of Reasons for Verdict:	3 May 2016
Issued on:	3 May 2016
Recalled on:	31 May 2016 pursuant to Order made 31 May 2016
Reissued on:	2 June 2016
Appearances:	Kieran Raftery for the Crown Tony Ellis and Graeme Edgeler for the Accused
In Attendance:	Graham Ford (Registrar) Maureen Dawson (Stenographer)

REASONS FOR VERDICT OF TOMPKINS J

Introduction

[1] Mr Michael Warren lives on Pitcairn Island. On 25 April 2010 he sent an otherwise innocuous email to various persons involved in the day to day administration of Pitcairn Island.

[2] The sending of this email triggered a long series of events which ultimately saw Mr Warren facing trial in the Pitcairn Island Supreme Court to answer numerous charges alleging the possession of child pornography and indecent articles.

[3] At the conclusion of the two trials on Pitcairn Island, on 2 March 2016, I found Mr Warren guilty of all the charges he faces. I indicated that my reasons for those verdicts would be delivered subsequently. These are those reasons.

Pitcairn Island

[4] A judgment of the Pitcairn Island Court of Appeal in this proceeding[1] conveniently describes Pitcairn Island:

> Pitcairn is one of a group of four islands situated in the Southern Pacific Ocean, its nearest neighbours are New Zealand, some 5,500 kilometres (3,500 miles) to the south-west, and Peru, approximately 10,000 kilometres (6,200 miles) in the opposite direction. There is no access to Pitcairn by air, there being no airport or airstrip, and there is no sea port. Access by sea must culminate in delivery of the passengers at Bounty Bay by longboats operated by the islanders, due to the precipitous perimeters of Pitcairn Island. There is limited internet and television access. Electricity is provided by generators.
>
> Pitcairn, occupying 4.6 km^2, is the only populated island. Henderson, Ducie and Oeno Islands are uninhabited. The population of Pitcairn is dwindling. It currently comprises approximately 50 people (down from 56 in 2014), 38 of whom have the right to vote while 30 comprise the able-bodied work force. The economy is largely subsistence, with United Kingdom aid providing approximately 90% of government expenditure. Recent efforts to encourage immigration have been ineffective.
>
> Pitcairn's small population and physical isolation for materials, technology, personnel and expertise, places it in a unique situation in many respects, including governance. It has the smallest population of any democracy in the world. Many islanders hold multiple roles. In 2010 Mr Warren was simultaneously the Mayor, the Communication Technician and Second Engineer for the island.

[1] *Warren v R*, Pitcairn Island Court of Appeal, judgment delivered 23 October 2015.

[5] When Mr Warren, then as now resident on Pitcairn Island, sent his 25 April 2010 email, he signed it as "Mike". But on its face it originated from an email address shown as kim-davis@hotmail.com. This feature of the email triggered some concern on the part of one of its on-island recipients. It was passed on to the then resident New Zealand Police officer on Pitcairn Island, Sergeant Medland.

[6] Sergeant Medland conducted some preliminary inquiries. As a result of what those inquiries revealed he subsequently obtained a search warrant authorising him to search both the Island Secretary's office (located on one side of the Adamstown Square) and Mr Warren's home, situated on the road or track known as Jack's Taty.

[7] On Wednesday 26 May 2010, those two premises were searched by Sergeant Medland. He was accompanied by a Pitcairn-born, island-based Police officer, and a social worker. A number of items were seized.

[8] Relevantly (a number of other items initially seized were later returned to Mr Warren or to the Island Secretary's office), Sergeant Medland seized two laptop computers, three external hard drives, and a number of compact disks.

[9] At the time Sergeant Medland was executing the search warrant at Mr Warren's home, he asked Mr Warren about the presence of child pornography:

> Q: Is there child pornography?
>
> A: Yes (Warren indicates towards a hard drive sitting in a caddy on the top shelf).
>
> Q: Pictures or movies?
>
> A: Movies, I was downloading on lime wire, do you know lime wire?
>
> Q: Yes I know it.
>
> A: Well I was downloading what I thought was something else and it was child porn.

[10] In early June 2010 these items (along with other material) were shipped to New Zealand. They were taken for analysis to the New Zealand Police's Electronic Crime Laboratory.

[11] There the items were examined and analysed by Sergeant Medland, who had also left the island in June 2010 and travelled back to New Zealand. Sergeant Medland had assistance from appropriately qualified personnel, and used appropriate technical equipment so as to preserve the integrity of the original computers, hard drives and compact discs. The examination and analysis did not in any way alter, change, affect or otherwise contaminate the originally seized electronic devices.

[12] In cross examination during trial the chain of custody, and the integrity of storage and access to these devices whilst at the Electronic Crime Laboratory, was traversed. Despite that, I am amply satisfied that both the chain of custody and the integrity of devices was appropriately maintained from the moment of seizure on Pitcairn Island, and thereafter.

[13] In broad summary Sergeant Medland described in his evidence what was found on the items uplifted from Mr Warren's possession:

> I identified approximately 1,600,000 images on the exhibits.
>
> Of these, more than 424,000 were pornographic images.
>
> I assessed each individual image and bookmarked it for further analysis if it appeared to be child pornography or "indecent or obscene" material falling within s 8 of the Summary Offences Ordinance.
>
> I initially bookmarked all of the images that appeared to be child pornography (3903 images and videos). On further analysis I bookmarked 1013 images and videos as apparent child pornography.
>
> Given the volume of adult pornographic material, I marked only some of the images and videos as "indecent or obscene". I initially bookmarked 310 images and videos, and subsequently selected 97 of these as "indecent or obscene". I also marked 2 documents as "indecent or obscene".

[14] Sergeant Medland explained that he then divided the images he had identified into five categories based, as he said, on his understanding of the applicable English practice (this categorisation was not, in principle or in substance, challenged during trial):

> Level 1: Images depicting erotic posing with no sexual activity, subject does not necessarily have to be naked.

Level 2: Non-penetrative sexual activity between children, or solo masturbation by a child.

Level 3: Non-penetrative sexual activity between adults and children.

Level 4: Penetrative sexual activity involving a child or children, or both children and adults.

Level 5: Sadism or penetration of, or by, an animal.

[15] Following on from that analysis, Mr Warren was charged with 20 specific and representative counts under the applicable (English) Criminal Justice Act 1988, and (initially 5 but subsequently reduced to) 2 summary charges under s 8(1) of Pitcairn Island's Summary Offences Ordinance.

[16] Tables produced at trial conveniently summarise these charges and the levels into which each relevant file falls (reference to their location on various trial Exhibits have been deleted):

Counts in the Information under s 160 of the Criminal Justice Act 1988:

Count	Description	Level
1	Possession of an indecent film of a child *Hc Vim04 – Babysitter And Girl 8Yo – 10Yo Having Sex with Older Sister (Anal Toys!!) Incest – Pedo Mom Helps Dad Fuck His Tiny Daughter (B) (Pthc – 20m15S).mpg* (20 mins 15 seconds)	Level 4
2	Possession of an indecent photograph of a child *Luy9878fty.jpg*	Level 1
3	Possession of an indecent film of a child *(Pthc) Girl 8Yo Fakes lit Sooo Cute 2008.mpg* (3 mins 5 seconds) Representative of 744 photographs and 79 films	Level 1 **Representative of 823** Level 1 images
4	Possession of an indecent photograph of a child *Childlover Pedo Rape Kinderficker Missbrauch Vergewaltigen 6-11Yo Daugther Nack Nude Incest ficken (318).jpg*	Level 3
5	Possession of an indecent photograph of a child *11yo in Heaven Dad Cums she loves it.jpg* Representative of 5 photographs and 2 films	Level 3 **Representative of 7** Level 3 images
6	Possession of an indecent photograph of a child *Pictures from ranchi torpedo dloaded in 2009- pedo kdv kidzilla pthc toddlers 0yo 1yo 2yo 3yo 4yo 5yo 6yo 9yo tara babyj (151)(2).jpg*	Level 2
	Possession of an indecent film of a child	Level 2 **Representative**

7	*8 Simon Cute 12yo Preteen Boy Looks At Porn Naked Nude Close Up Of Him Caressing His Wide Spread Legs Caressing His Boner Balls And Ass Pedo Young Child Sex Kdv Rbv Pjk.mpg* (21 seconds) Representative of 67 photographs and 24 films	**of 91** level 2 images
8	Possession of an indecent film of a child *(PJK) – PTHC – KDV – RBV – PEDO --- 14 ---SK Starskysh --- Boys – 12yo – 13 yo – 26-13min.MPG* (26 minutes 13 seconds) Representative of 34 photographs and 38 films	Level 4 **Representative of 72** level 4 images
9	Possession of an indecent photograph of a child *Kopie (2) von Pedo – 8Yo Girl Suck 8Yo Boy Dick pthc 1yo 2yo 3yo 4yo 5yo 6yo 7yo 8yo 9yo 10yo 11yo 12yo hussyfan qqaazz lsm lsbar ls-island Ls-magazine kdquality vdbest(4).jpg*	Level 4
10	Possession of an indecent photograph of a child *Pictures from ranchi torpedo dloaded in 2009- pedo kdv kidzilla pthc toddlers 0yo 1yo 2yo 3yo 4yo 5yo 6yo 9yo tara babyj (135)(1).jpg*	Level 4
11	Possession of an indecent photograph of a child *Childlover Pedo Rape Kinderficker Missbrauch Vergewaltigen 6-11Yo Daugther Nackt Nude Incest Fickent (182).jpg*	Level 4
12	Possession of an indecent photograph of a child *13yo Hayley sucking Dads cock(1) childfugga childlover pthc collection.jpg*	Level 4
13	Possession of an indecent photograph of a child *Childlover Pedo Rape Kinderficker Missbrauch Vergewaltigen 6-11Yo Daugther Nackt Nude Incest Ficken (243).jpg*	Level 4
14	Possession of an indecent film of a child *147.mpg* (12 minutes 32 seconds)	Level 4
15	Possession of an indecent film of a child *(((Kingpass))) St Petersburg & Cums On Her 11Yo (Moscow)(Nablot)(Ptsc)(Hussyfan)(Kleuterkutje)(R@Ygold)(Kiddy)(Video Lolita).mpg* (17 minutes 58 seconds)	Level 4
16	Possession of an indecent film of a child *(Hussyfan)(Pthc) Vicky 7yo and 10yo 69 Pedo Child Porno Lolita.mpg* (14 minutes 11 seconds)	Level 4
17	Possession of an indecent film of a child *12yo boys playing sex – boyorgie01 kdv rbv pjk rf# s00 hmv brn gerbys Preteen boys boy sex starskysh yamad fuck pthc crimea kingpass p101 zz fkk.mpg* (9 minutes 37 seconds)	Level 4
18	Possession of an indecent film of a child *XXX – Incent – 5yo raped, hymen penetrated – kiddy little girl young Porn real child sex baby pedo (no sound).mpg* (1 minute 41 seconds)	Level 4
19	Possession of an indecent film of a child *Vicky – Pedofilia 13 anos [pedo preteen 13yo Lolita BDSM bondage Ropes] 15m32s.mpg* (15 minutes 32 seconds)	Level 5

20	Possession of an indecent film of a child *(Pthc) 14yo Isabel – (Rape and Fuck) (R@ygold).mpg* (21 minutes 16 seconds)	Level 5

Charges under s 8(1) Summary Offences Ordinance:

Charge	Charge/description
3	Possession of an indecent document *C.....858.xml*
22	Possession of an indecent film *3759_1.wmv*

The Criminal Justice Act 1988: Possession of an indecent photograph of a child

[17] As set out in the table above, 20 of the charges were laid under s 160 of the Criminal Justice Act 1988. In pre-trial proceedings, the Pitcairn Island Court of Appeal held that the relevant sections of this Act apply on Pitcairn Island under section 42 of the Pitcairn Constitution.[2]

[18] Section 160 provides:

> **160 Possession of indecent photograph of child**
>
> (1) Subject to section 160A, it is an offence for a person to have any indecent photograph or pseudo-photograph of a child in his possession.
>
> (2) Where a person is charged with an offence under subsection (1) above, it shall be a defence for him to prove –
>
> (a) that he had a legitimate reason for having the photograph or pseudo-photograph in his possession; or
>
> (b) that he had not himself seen the photograph or pseudo-photograph and did not know, nor had any cause to suspect, it to be indecent; or
>
> (c) that the photograph or pseudo-photograph was sent to him without any prior request made by him or on his behalf and that he did not keep it for an unreasonable time.

[2] See *Warren v The Queen* CA 1/2012, 23 October 2015 at [114] – [120].

> (2A) A person shall be liable on conviction on indictment of an offence under this section to imprisonment for a term not exceeding five years or a fine, or both.
>
> (3) A person shall be liable on summary conviction of an offence under this section to imprisonment for a term not exceeding six months or a fine not exceeding level 5 on the standard scale, or both.
>
> (4) Sections 1(3), 2(3), 3 and 7 of the Protection of Children Act 1978 shall have effect as if any reference in them to that Act included a reference to this section.

[19] Pursuant to s 7 of the Protection of Children Act 1978, s 160 of the Criminal Justice Act 1988 is relevantly interpreted so that:

(a) An 'indecent photograph' includes an indecent film (s 7(2));

(b) A 'photograph' includes data stored on a computer disc or by any other electronic means which is capable of conversion into a photograph (s 7(4)(b));

(c) A 'film' includes any form of video recording (s 7(5)); and

(d) 'Child' means a person under the age of 18 (s 7(6).

[20] Section 2(3) of the Protection of Children Act 1978 provides that:

> "In any proceedings under this Act relating to indecent photographs of children, a person is to be taken as having been a child at any material time if it appears from all the evidence as a whole that he was then under the age of 18".

Summary Offences Ordinance: Possession of an indecent article

[21] Section 8(1) of the Summary Offences Ordinance states:

> **8. Indecent and obscene material**
>
> (1) **Any person** who imports into the Islands, or **who has in his or her possession, any indecent** or obscene books, cards, **photographs**, casts, figures, pictures, lithographic or other engravings, cinematographic or other

films **or any other indecent** or obscene **article shall be guilty of an offence** and liable to a fine not exceeding two hundred and fifty dollars or imprisonment for a term not exceeding one hundred days or to both such fine and imprisonment and any such article may be confiscated and destroyed in such manner as the Court shall direct.

(2) Any person who without lawful excuse by means of any form of electronic technology transmits or receives visual images which are indecent or obscene shall be guilty of an offence and liable to a fine not exceeding two hundred and fifty dollars or imprisonment for a term not exceeding one hundred days or to both such fine and imprisonment and any electronic equipment used in the commission of such an offence may if the Court so directs be confiscated and forfeited to the Crown.

(3) No prosecution for an offence under this section may be commenced by any person without the consent of the Public Prosecutor.

Admissions by the defendant, and the determinative issues at trial

[22] After the charges were initially laid in the Pitcairn Island Magistrate's Court (sitting in Auckland, New Zealand on 19 November 2010, after the New Zealand Minister of Justice granted permission under the Pitcairn Trials Act 2002 (NZ), for the Pitcairn Island Courts to sit in New Zealand in relation to this matter), the Crown and Mr Warren jointly filed a "plea and directions memorandum" on 29 September 2011.

[23] This memorandum contained the following substantive admissions:

The accused admits the following facts, subject to a defence of legitimate or reasonable excuse:

(a) On 26 May 2010 he possessed the photographs and video recordings referred to in the 20 charges;

(b) Those images if put before an English jury would be found to be indecent under English law;

(c) Those images depicted children aged under 18 years.

[24] By those admissions those matters are all proved beyond reasonable doubt.

[25] The unchallenged and substantive effect of these admissions at trial was therefore that the sole and determinative issue in relation to the Criminal Justice Act

charges was whether Mr Warren had, in terms of s 160(2)(a) of that Act, proved that he had a "legitimate reason" for his admitted possession of the indecent photographs and video recordings of children. If he had proved that, he was entitled to be acquitted. If he had not, then convictions would follow.

Legitimate reason: defence submissions

[26] Mr Ellis, as counsel for Mr Warren, had in May 2012 encapsulated the substance of the asserted legitimate reason, when appearing before Her Ladyship Justice Lovell Smith in earlier pre-trial proceedings in this matter:

> *".. Let us also remember, not that it played much part in these matters yet, my client has notified, as he is required to, that he has a legitimate reason defence. He says, yes, I was looking at these and I've got good reason. We haven't expanded on it but it's to the effect that he was looking at what child pornography was, because he didn't understand it and was trying to follow it on from the Operation Unique trials, and he looked at these pictures from time to time to see whether the Internet was still rife with them, because he was quite horrified at what he saw."*

[27] No evidence was called by the defendant at trial.

[28] However Mr Ellis, in his closing submissions, sought to enlarge upon the asserted legitimate reason. Mr Ellis submitted that after the internet came to Pitcairn Island in the mid 2000s, and Mr Warren being unfamiliar (so Mr Ellis asserted from the Bar) with things such as the age of consent, sexual abuse and the like, but having become aware of those matters as a result of earlier sexual abuse trials conducted on the island (referred to throughout the trial as the "Operation Unique trials") he wanted to learn about them. Mr Ellis submitted Mr Warren wanted to know more about those issues but because there was no one on the island he could talk to, as he didn't trust the resident social worker, and as he had heard a little about child pornography, he began to use the internet to discover, so Mr Ellis argued, what child abuse was.

[29] On the basis, he said, of Mr Warren's initial instructions, Mr Ellis submitted that Mr Warren had "*inadvertently downloaded images of adult and child pornography*", and was "*disgusted and disturbed*". Mr Ellis submitted, from the bar

and solely on the basis of his client's instructions to him, that Mr Warren located child pornography relatively easily on the Internet, using file sharing software. Mr Ellis then asserted that, having done that, Mr Warren could not understand how the defendants in the Operation Unique trials had been convicted, yet those involved in the images he was seeing on the Internet "*got away with it*".

[30] Mr Ellis noted that only some 1,000 or so images and videos of child pornography had been identified, within the much larger number, in excess of 400,000 pornographic images and videos, assembled by Mr Warren over an extended period. This, he argued, supported his submission of accidental or inadvertent downloading. He submitted that overall Mr Warren was curious about child pornography, angry that it was about, and that those directly involved in it were not prosecuted. Mr Ellis submitted that Mr Warren was perhaps stupid and naïve, but the uniqueness of Pitcairn Island, and the unavailability of regular or indeed any sexual partners for Mr Warren, meant that his not turning to or committing physical sexual abuse of children, but rather his resort to pornography, was to be commended.

Crown submissions

[31] Identifying the two formulations of the legitimate reason already referred to, Mr Raftery submitted that both were untenable and unsupported by the evidence.

[32] He submitted that the cumulative effect of a number of relevant factual matters rebutted any suggestion of either a legitimate reason or indeed an accidental or inadvertent accumulation of child pornography, submitting rather that Mr Warren "*was deeply into pornography, both adult and child pornography*", and despite the limitations imposed by Pitcairn Island's unique physical and electronic/digital isolation, he had persisted in assembling and curating his extensive collection over an extended period of time.

Discussion

[33] The first, obvious, and insurmountable hurdle faced by Mr Warren is that there is before the Court no evidence upon which the Court could properly or at all conclude that Mr Warren has, as required by s 160(2), proved that he had a

"legitimate reason" for possessing the indecent images and video recordings depicting children aged under 18 years.

[34] In *Atkins v DPP* (2000) 1 WLR 1427 at 1435 the Court discussed what constituted "a legitimate reason":

> The question of what constitutes 'a legitimate reason,' for the purposes of both Section 160(2)(a) of the Act of 1988 and Section 1(4)(a) of the Act of 1978, is a pure question of fact, for the Magistrate or jury, in each case. The central question where the defence is legitimate research will be whether the defendant is essentially a person of unhealthy interest in possession of indecent photographs in the pretence of undertaking research, or by contrast a genuine researcher with no alternative but to have this sort of unpleasant material in his possession. In other cases there will be other categories of 'legitimate reason' advanced. They will each have to be considered on their own facts. Courts are plainly entitled to bring a measure of scepticism to bear upon such an inquiry: they should not too readily conclude that the defence has been made out.

[35] Mr Ellis, in his closing submissions, posed as the test for the Court to answer:

> "Is his version believable, on the balance of probabilities?"

[36] Mr Warren did not give 'his version' in evidence. The only account he has given is the very short and unsupported assertion to Sergeant Medland on the occasion of the seizure of the electronic equipment from his home, where he said:

> "Well, I was downloading what I thought was something else and it was child porn."

[37] It is axiomatic that counsel's submissions, even if they are said to be based on their client's instructions, are not evidence. The asserted accidental downloading was not able to be tested under cross examination. There is no other evidence to support it.

[38] In any event I accept the Crown's submission that the cumulative effect of all the proved circumstances in this case rebut comprehensively any suggested accidental downloading or retention of the voluminous child pornography

Mr Warren possessed. These circumstances, in summary and as established by the detailed evidence given at trial, include:

(a) Mr Warren's deliberate and repetitive actions of downloading, saving, and then on many occasions copying the various files to often duplicate locations on the various digital storage media.

(b) The high level of frequency of sexually-related downloads and other digital gathering and sharing (via file-sharing software) of child pornography.

(c) The frequently evocative and often detailed and descriptive file names, which leave no or little doubt as to the nature of the image or video involved.

(d) The sheer volume of images downloaded. Sergeant Medland, for example, noted that on one hard drive he found 517 indecent child images and 56 indecent child videos, together with 44 other (non-child) images and videos. Within the child images and videos there located, 187 images and videos, in a variety of Levels 1-5, were all written to their location on the hard drive on 23 July 2008, and a number of mainly Level 1 images, with graphic filenames but also including the Level 4 Count 1 video, were written to their respective locations on a variety of dates in December 2008 and January 2009; and 55 images ranging from Level 1-4 were created over 3 days on 6-8 January 2010.

(e) The location of a number of the files in more than one place within Mr Warren's collection. By way of examples:

- The video that is the subject of Count 1 is found in two locations: on one of the laptops and on one of the hard drives.

- Two videos, Levels 4 and 2 respectively (Blonde&BF and 12Yo Girl Exercises and then Strips), were copied to their

location on one of the external hard drives (written there on 16 July 2006), then on to the second external hard drive on 29 December 2008; and also on to one of the compact discs on 6 November 2006.

- One of the compact discs, created on 6 November 2006, contained 50 images and videos: of these, 41 were also present on one of the external hard drives including the images that are the subject of Counts 8, 12, 19 and 20.

(f) The differences between the dates on which the relevant files were originally downloaded, and then accessed for example:

- The video that is the subject of Count 20 was copied to its location on an external hard drive on 5 November 2006, and then last accessed on 7 September 2009.

- The Count 19 file was previewed, using file sharing software, on 16 December 2005, downloaded to an external hard drive on 17 December 2005, copied to another location on 16 July 2006, and last accessed on 29 August 2009.

(g) Some digital storage locations used by Mr Warren to store his collection contained only child pornography, and some contained only adult pornography. But others contained mixed adult and child pornography images and videos:

- A folder on one of the external hard drives contained some 308 individual relevant files and folders, and those latter folders also contained further relevant files. Some of these files are also found on one of the 6 seized compact discs.

- Of the 48 compact discs originally seized and examined, 6 contained child pornography images and videos, with the balance containing adult pornography.

Verdicts on the Criminal Justice Act charges

[39] The cumulative effect of the above is, first, that Mr Warren has not proved to the required standard on the balance of probabilities, or indeed at all, that he had a legitimate reason for possessing any of the images or videos that are the subject of each separate count. Given that each of those images or videos are 'indecent' images or videos of a child or children, he is convicted on each count.

[40] Indeed the effect of the evidence is such that, had the Crown been required to disprove the existence of a legitimate reason or reasons beyond reasonable doubt, I would readily have concluded that the Crown had met that higher standard of proof.

The Summary Offences Ordinance trial: possessing indecent articles

[41] By agreement this Court sat with assessors to determine the two Summary Offences Ordinance charges, after the trial of the Criminal Justice Act counts had concluded.

[42] Following, with appropriate changes, the process set out in s 9 of the Justice Ordinance, a list of potential assessors resident on Pitcairn Island was identified and summonsed. Following the process as set out in s 29 of the Justice Ordinance, and allowing both the prosecution and the defence their rights of objection, two assessors were ultimately selected from those that attended. The two assessors were duly sworn in, and sat for the hearing of the Summary Offences Ordinance charges.

[43] Section 32 of the Justice Ordinance relevantly reads (with changes made to recognise that the charges were heard by the Supreme Court sitting with assessors):

> 32(1) In cases in which [the Supreme Court] sits with assessors –
>
> (a) [The Court] shall at the conclusion of the evidence require the assessors to state their opinions and such opinions shall be recorded;
>
> (b) [The Court] shall then give the decision of the Court and in so doing shall not be bound to conform with the opinions of the assessors, provided that, if the decision of the Court is given against the opinions of the assessors, [the Court] shall record his or her reasons for giving such decision and shall

forthwith after the conclusion of a case send a copy of the record to the Chief Justice; and

(c) After giving the decision of the Court, [the Court] shall discharge the assessors and proceed to deal with the defendant by determining the penalty or process then to follow.

[44] In relation to the two Summary Offences Ordinance charges, there is in that Ordinance no defence of legitimate reason for possession. But the Crown accepted at trial (given that the Summary Offences Ordinance charges were, by consent, heard in the Supreme Court by me as trial Judge sitting with two assessors) that if in the Criminal Justice Act charges the defence of legitimate reason was established, then a similar defence would be available to Mr Warren in relation to the summary charges.

[45] However as it transpired at trial, and in relation to the Summary Offences Ordinance charges, "legitimate reason" was not advanced as a defence. Rather the sole and determinative issue for trial in relation to those two charges was whether the two articles were, in terms of the statute, "indecent". If they were, convictions would follow. If they were not, the defendant would be acquitted.

[46] The Crown accepted that the proper test to be applied, both by the assessors when reaching their opinion as required by the Ordinance and subsequently by the Court, was whether or not the articles were grossly or extremely indecent or obscene. In this respect, the Crown submitted, correctly in my view, that the Court should properly be guided by the approach adopted in s 63 of the English Criminal Justice and Immigration Act 2008. Relevantly, that section provides:

63 Possession of extreme pornographic images

(1) It is an offence for a person to be in possession of an extreme pornographic image.

(2) An "extreme pornographic image" is an image which is both-

(a) pornographic and

(b) an extreme image.

> (3) An image is "pornographic" if it is of such a nature that it must reasonably be assumed to have been produced solely or principally for the purpose of sexual arousal.
>
> ...
>
> (6) An "extreme image" is an image which-
>
> (a) falls within subsection (7), and
>
> (b) is grossly offensive, disgusting or otherwise of an obscene character.
>
> (7) An image falls within this subsection if it portrays, in an explicit and realistic way, any of the following:
>
> ...
>
> (b) an act which results, or is likely to result, in serious injury to a person's anus, breasts or genitals,

[47] As already noted, the sole factual issue falling for determination in the Summary Offences Ordinance charges was whether or not the two relevant articles were, in terms of the ordinance, "indecent". At the conclusion of the evidence, I briefly summed up to the assessors, who then retired to the Island Secretary's office, under supervision of the Registrar of the Court, to consider their opinion.

[48] Upon the assessors indicating that they had reached their opinions, and after they had returned to Court, I asked each of the two assessors individually whether, in relation to the two charges separately, they were sure that the article in question was indecent. Each of the two assessors in relation to each of the two separate charges responded, and I recorded each assessor's opinion thus:

> *"Yes, my opinion is that it is indecent."*

[49] As noted above, and pursuant to s 32(1)(b) of the Justice Ordinance, the Court is not bound by that opinion. I therefore now turn to my own consideration of whether or not the articles are "indecent".

[50] For convenience, the table summarising the substance of the two Summary Offences Ordinance charges is reproduced:

Charge	Charge/description
3	Possession of an indecent document *C.....858.xml*
22	Possession of an indecent film *3759_1.wmv* (24 seconds)

[51] The document in question in the first charge was an extended transcript of an internet chat between Mr Warren and another person, variously identified but for present purposes conveniently referred to as "C"; and extending over numerous days and different occasions.

[52] The film in question in the second charge was a short 24 second video clip, showing a naked and bound woman who is first digitally penetrated, and then has inserted into her anus a large hook attached to a rope descending from above her, which is then tightened as if to hoist her into the air.

[53] There was no dispute as to the appropriate approach, already referred to above, that the Court should take to deciding whether these articles are indecent. In summary:

- There is no definition of indecent in law, so indecency or otherwise is not a legal question.
- Rather, an article will be indecent for the purposes of this trial if it is grossly or extremely indecent or obscene. When deciding whether an article falls within that description, the Court should consider:
    - Whether the item is of such a nature that it must reasonably be assumed to have been produced solely or principally for the purpose of sexual arousal; and
    - Whether it is grossly offensive, disgusting or otherwise obscene;
- And in the case of the video clip:
    - Whether it portrays, in an explicit and realistic way, an act which results or is likely to result in serious injury to a person's anus.

Submissions

[54] The Crown say that irrespective of who 'C' in the chat transcript actually was, Mr Warren was aged 45 and then 46 when he chatted to this person in an often predominantly and highly sexualised way. Given the content of the chat exchanges, the Crown say Mr Warren must have known or believed or thought that 'C' was a 15 year old English schoolgirl.

[55] In summary the Crown say that, in that context, this explicit material was created principally for Mr Warren's sexual arousal, and that the material recorded in the transcript relating explicitly to excrement of various types, in the context of its insertion into various orifices, is grossly and extremely offensive, disgusting and obscene, as is Mr Warren's encouragement of sexual activity on the part of a 15 year old child, and his encouraging of sexual contact with her similarly aged sister.

[56] The defence stressed that it is important to distinguish between conduct described and the words used to describe that conduct. The defence highlighted that Mr Warren is only charged in relation to possessing the words on the pages comprising the transcript, and not the conduct supposedly described on those pages. The defence submitted that the Court should readily infer that it was all completely made up, that none of what was described ever really happened, that there never was a 15 year old girl who did any or all of those things.

[57] So, the defence say, the whole thing is ridiculous and fanciful and completely made up, so that the Court should in the end conclude the words in the transcript document are <u>not</u> grossly or extremely indecent, especially when those words are balanced against the freedom of expression that the Pitcairn Island Constitution guarantees.

[58] The Crown submitted the short video clip was undoubtedly created, by its very nature, solely or principally for sexual arousal, and then that the insertion of the hook (of whatever material that hook was in fact made) into the bound and gagged naked woman's anus, followed by the beginning of the hoisting of her upwards, is extremely and grossly indecent.

[59] And the Crown say that the Court can and should properly infer that serious injury is likely to result from those actions, portrayed as they are in that film clip in an explicit and realistic way, especially given what is evident on the video of the woman's response to what was happening to her.

[60] So, the Crown submit, the video clip is indecent.

[61] The defence argue that, from the nature of the film and the words that appear after it ends, the Court should infer that the people it depicts are professional adult actors, who have, the defence say, consented to everything that is shown happening. Further, and given that, the defence submit that it is unlikely that the female shown would be injured by what happens to her, happening as it does, the defence say, on a film set with professional actors.

[62] The defence accept that the video is unpleasant and upsetting, but submit that it is not grossly or extremely indecent.

Discussion

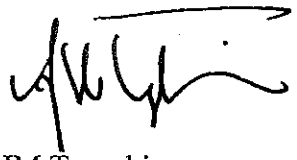
[63] Applying the approach as set out above, and in conformity with the opinions delivered by the two assessors, I am clearly of the view that both the chat transcript and the video clip, individually, are "indecent".

[64] Both can properly be characterised as extreme pornography: the former by the frequent references to matters scatological, and the latter by its graphic depiction of extreme cruelty to a naked and bound woman in circumstances where (whatever material the hook was made of) serious injury was likely to result.

[65] It is difficult to conceive of a reasonable or rational basis upon which the contrary view could be reached. I readily conclude that both articles, individually, were obscene in the extreme, disturbing to watch or read, and were grossly and offensively indecent.

Result

[66] That being the view of both the Court and of the two assessors, Mr Warren is convicted on the two summary offences ordinance charges.



AIM Tompkins
Judge of the Supreme Court of the Pitcairn Islands