IN THE SUPREME COURT OF THE PITCAIRN ISLANDS
HELD IN ADAMSTOWN, PITCAIRN ISLANDS

SC 3/2022
[2022] PNSC 2

BETWEEN	**MICHAEL WARREN** Appellant
AND	**THE KING** Respondent

Hearing: 6 December 2022 (Pitcairn)/7 December 2022 (New Zealand)

Counsel: A J Ellis for Appellant
K Raftery KC for Crown

Judgment: 12 December 2022 (Pitcairn)/13 December 2022 (New Zealand)

JUDGMENT OF HEATH CJ
[ON PRE-APPEAL APPLICATION]

Introduction

[1] Mr Michael Warren was charged with three offences contrary to s 5 of the Summary Offences Ordinance. The charges arose out of three events, occurring on different days, when Mr Warren walked nude on Pitcairn. As a result of that conduct, he was charged with behaving in an indecent manner in a public place.

[2] The trial of the charges took place in the Magistrate's Court at Adamstown on 6 December 2021. The Court was comprised of the Island Magistrate (Mr Simon Young) and two Assessors (Mr Steve Christian and Ms Carol Warren). At the conclusion of the hearing, after seeking the Assessors' views, the Island Magistrate found Mr Warren guilty on all three charges. Convictions were entered on 20 December 2021 and fines of $NZ50.00 were imposed for each offence; a total of $NZ150.00.

[3] Mr Warren appeals against his convictions and the sentences imposed. This judgment deals with a pre-appeal application for appointment of independent counsel to interview the Assessors and an order requiring the Island Magistrate to provide a report to this Court (the application).

Background

[4] The application is based on evidence from Mr Warren's sister, Ms Melva Warren-Evans. Dr Ellis, for Mr Warren, has submitted that the Assessors acted inappropriately, to an extent that justifies a decision to quash the convictions. The purpose of the proposed inquiries of the Island Magistrate and the Assessors is to obtain further information about the nature of the alleged inappropriate conduct.

[5] Relevantly, Ms Warren-Evans deposed:

> …
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> 4. I make this affidavit to put before the Court my recollections of the conversations I had with the two assessors. Carol Warren, and Steve Christian.
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> 5. I had an opportunity to separately discuss with both Assessors. Carol Warren, and Steve Christian aspects of the trial.

6. In the week ending on Saturday 26 March 2022, I sent an email to Dr Ellis at 10.42 a.m. Pitcairn time. I confirm what I said is a true record of my conversation with the Assessor, Carol Warren, at [Mr Warren's] trial:

> I was having a conversation with one of the 'assessors' the other day. She mentioned that 'Mark' - who was the Island Registrar at the time - had told her about an incident in the UK after a cricket match, where members of the winning team ran out onto the pitch, stark naked. Mark told Carol that the players were all arrested, charged and fined for (she said) being naked in public. Her decision was based largely on that bit of information.
>
> My question is this: Is it proper for the court registrar to be influencing an assessor (I can't think of any other way to put it) in that manner?

7. This information about the cricket match was not part of the trial.

8. A few weeks later on 11 April 2022 at around 08.00. a.m. I had a conversation with the other Assessor, Steve Christian.

9. I promptly advised Dr Ellis by email, which I confirm accurately reflects my recollections:

> [Dr Ellis],
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> Just a few minutes ago, I asked Steve, the other assessor, if he was present when the Registrar mentioned the 'cricket incident' to Carol. My aim was to establish whether the comments had been made as an 'aside' during an informal casual encounter, or was it said during some other case-related discussion, which, in my assessment, would have been improper behaviour, regardless.
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> At first, Steve took on a pensive look and shook his head 'no'. Then he said I would have to ask Carol (that made no sense), and I replied that I didn't want to talk to her anymore about it. I then related to Steve what she said when she told me that Mark had talked about "that cricket tournament where the winning team had run out onto the pitch to celebrate the win"; at which point, Steve interrupted to say, "Not all, just one." And again said, "It wasn't the whole team; it was just one of the players." So, he did know what I was talking about.
>
> With that comment, Steve all but confirmed that this had been a conversation attended by the Registrar and both assessors. And who else???

> I have a sick feeling about this. I leave it to you to take it from here. Whether you decide to do anything about it, I also leave that with you. I will say nothing further to anyone here about it.
>
> …

10. I did not discuss either conversation with anyone else, apart from Dr Ellis by email, either before or after I advised Dr Ellis of my conversations.

11. Dr Ellis advised me he had informally discussed the conversations with Kieran Raftery, the Prosecutor, and would consider further whether or not to a make a formal complaint

12. I am prepared to discuss this with any person the Court appoints to investigate.

13. I am also prepared to come to Court, and give my evidence on Oath, and be cross-examined if that is required.

[6] Mr Raftery KC, for the Crown, opposed the application, contending that legal argument was required on the extent of the Court's powers to make orders of that type. Mr Raftery informed me that there was no relevant authority dealing with the role of Assessors under the Pitcairn criminal justice system. Whether any order was required was, he submitted, dependent upon the roles that the Assessors were fulfilling.

[7] I heard argument on the application on 6 December 2022 (Pitcairn)/7 December 2022 (New Zealand). I made a direction under ss 15E and 15F of the Judicature (Courts) Ordinance that the hearing of the application would take place in Pitcairn, with counsel and myself participating from New Zealand by audio-visual link. Mr Raftery and I participated in the hearing in person, at the ADR Centre in Hurstmere Road, Takapuna, Auckland. Dr Ellis appeared by audio-visual link from Kawakawa. A Deputy Registrar and members of the public attended in Adamstown.

Analysis

[8] Section 3(2) and (3) of the Justice Ordinance provides that charges of the type faced by Mr Warren be heard before a Magistrate sitting with Assessors chosen through the process mandated by s 29(2)(a)–(f) of that Ordinance. Section 32(1) of the Justice Ordinance sets out the procedure to be followed on completion of evidence:

32.—(1) In cases in which the Magistrate sits with assessors—

(a) the Magistrate shall at the conclusion of the evidence require the assessors to state their opinions and such opinions shall be recorded;

(b) the Magistrate 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 Magistrate shall record his or her reasons for giving such decision and shall forthwith after the conclusion of the case send a copy of the record to the Chief Justice; and

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

….

[9] Dr Ellis contended that inquiries of the Island Magistrate and the Assessors were necessary to establish whether there had been any contravention of the processes required by s 32 of the Justice Ordinance. After hearing extensive submissions from both Dr Ellis and Mr Raftery, I asked Dr Ellis (in reply) whether his concerns would be met if the affidavit of Ms Warren-Evans[1] were admitted as evidence on the substantive appeal. Dr Ellis indicated that would likely avoid the need for further inquiry.

[10] I directed that Mr Raftery should file and serve a memorandum setting out the Crown's position with regard to admission of the affidavit and whether it would be challenged. Subsequently, he advised that there was no objection to the affidavit being admitted for the purpose of the appeal, without cross-examination. In doing so, Mr Raftery made it clear that the Crown did not accept Dr Ellis' submission that there were "irregular discussions that could have had an effect on the outcome". The Crown will make submissions at the hearing of the appeal on what inferences might be drawn from the evidence of Ms Warren-Evans, and its impact on the safety (or appropriateness) of the convictions. Dr Ellis raised no objection to that approach.

[11] In my view, that concession by the Crown renders the application moot. The information required by Dr Ellis to support his argument is available through the affidavit of Ms Warren-Evans. On that basis, I propose to make an order dismissing the application for appointment of independent counsel and the provision of a report from the Island Magistrate. Instead, I will make an order granting leave for Ms Warren-Evans' affidavit to be read as

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1 See para [5] above.

additional evidence and considered on the appeal without cross-examination. The affidavit filed in support of the application may be used for that purpose; no further copy need be filed.

[12] I make it clear that my reason for dismissing the application rests solely on the Crown's agreement that Ms Warren-Evans' affidavit be received on appeal without the need for cross-examination.

[13] During the hearing of the application, counsel addressed me in detail on the legislation dealing with the role of a Magistrate and Assessors in conducting a trial of this type, by reference (in particular) to s 32 of the Justice Ordinance. That argument is relevant to the appeal itself. At this stage, I do not embark upon any consideration of the points raised. Those issues can be ventilated further at the hearing of the appeal.

Result

[14] The application for appointment of an independent counsel and an order that the Island Magistrate provide a report is dismissed.

[15] Leave is granted for the affidavit of Ms Warren-Evans to be admitted on the appeal. I record that the Crown does not wish to cross-examine her at that hearing.

[16] The appeal is adjourned for a case management conference to be held by Microsoft Teams at 3.00pm on Monday 19 December 2022 (NZ time). Unless counsel make any submission to the contrary, I do not propose to make an order for the conference to be held by video-link to Pitcairn. The Registrar shall make necessary arrangements for the conference.

[17] At the 19 December conference, I will hear from counsel as to any further directions required to ready the appeal for hearing, preferably during February 2023. As I understand it, directions would be limited to:

(a) The filing and service of any amendments to the notice of appeal in light of the arguments advanced on the application;

(b) Filing and service of submissions in support of and in opposition to the appeal;

(c) Provision of agreed bundles of documents and authorities.

[18] I ask counsel to confer in advance of the conference as to the directions that may be necessary. Without requiring filing and service of memoranda beforehand, it would be helpful if counsel could advise the Registrar by email of any agreement reached between them and, any differences on which I will need to rule at the conference.

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Paul Heath
Chief Justice