

**IN THE PITCAIRN ISLANDS
COURT OF APPEAL**

CA 1/2016

BETWEEN MICHAEL WARREN

Appellant

AND THE QUEEN

Respondent

Hearing: 05 July 2016

Coram: Potter JA (Acting President)
Blanchard JA
Hansen JA

Counsel: T Ellis and G Edgeler for Appellant
K Raftery for Respondent

**Result
Judgment:** 06 July 2016

**Reasons for
Judgment:** 29 July 2016

REASONS FOR JUDGMENT OF THE COURT

Table of Contents

	Para
Conviction appeal – s 160 offending	[8]
Conviction appeal – the summary offences	[16]
(a) <i>Admissibility of evidence</i>	[20]
(b) <i>Freedom of expression</i>	[24]
(c) <i>File not in evidence</i>	[34]
(d) <i>Failure of assessors to give reasons</i>	[35]
Sentence appeal	[41]
(a) <i>The sentence</i>	[45]
(b) <i>Local circumstances/comparative Pitcairn cases</i>	[61]
(c) <i>Applicability of English case law</i>	[71]
(d) <i>Mitigating factors/family circumstances</i>	[75]
(e) <i>Rehabilitation</i>	[78]
(f) <i>Section 174 Criminal Justice Act 2003 (UK)/ no prison available</i>	[83]
(g) <i>Viewing the images</i>	[92]
(h) <i>Conclusion on sentence appeal</i>	[95]
Result	[96]

[1] Mr Warren has appealed against his conviction in the Pitcairn Islands Supreme Court on 20 charges under s 160 of the Criminal Justice Act 1988 (UK) and two charges under s 8(1) of the Summary Offences Ordinance of Pitcairn Island, and against the sentences passed on 4 March 2016.

[2] We gave judgment on 6 July 2016 dismissing his appeal against both convictions and sentence, saying that our reasons would follow. These are our reasons.

[3] The complex history of the case appears from this Court's pre-trial decisions and need not be repeated. The trial of the s 160 offences of possession of child pornography was heard in two parts, in Auckland from 1-4 February 2016, when the Crown witnesses were heard, and on Pitcairn Island on 28 February, when Mr Warren elected not to give evidence, closing addresses were made, and Tompkins J found Mr Warren guilty and entered convictions.

[4] It had been agreed that the trial of the summary offences charges would also be before Tompkins J while he was on the Island but as they would normally have been heard in the Magistrates' Court with assessors, Tompkins J exercised his discretion under s 9 of the Judicature (Courts) Ordinance to sit with assessors in the Supreme Court. The selection of assessors and the trial took place on 29 February and 1-2 March 2016. Having retired to consider the evidence, both the assessors were of the opinion that both the chat transcript and the video clip, which were the subject of the summary offences charges, were indecent. The Judge was of the same opinion and convicted Mr Warren on 2 March.

[5] On 4 March 2016, Tompkins J imposed sentences of 20 months for the s 160 offending and of one month for each of the summary offences, all sentences to be served concurrently. That led to an immediate difficulty in that the Island prison had not been used for some years and was occupied by the Island library and other services. Arrangements would have to be made to bring prison officers to the Island. Mr Warren was minded to begin his sentence without delay and without waiting for the conclusion of an appeal. Indeed, we were told by Mr Ellis at the hearing in this Court that Mr Warren's position remains the same and that he does not want to await the result of any further appeal to the Privy Council.

[6] In these unusual circumstances, and on the application of the Crown, Tompkins J deferred the commencement of the sentences “for six months, the exact date to coincide with the arrival on Pitcairn Island of the prison officers from New Zealand or elsewhere and their taking up their duties”. He continued Mr Warren’s bail in the meantime. He also made a Sexual Offences Prevention Order to commence immediately.

[7] On 3 May 2016, Tompkins J gave his written reasons for the guilty verdicts at the two trials. Those reasons were subsequently recalled and reissued on 2 June 2016.

Conviction appeal – s 160 offending

[8] Mr Warren conceded for the purposes of the trial that in relation to each of the 20 charges he had been in possession of material that constituted an indecent photograph of a child under 18 years. The photographs consisted of images and video recordings stored on his computer. Mr Warren relied upon a defence under s 160(2) of the Criminal Justice Act. He did not give evidence and had at one time rather implausibly suggested that his possession of the photographs of children (in a collection of some 400,000 pornographic materials) was inadvertent. But it emerged through counsel’s submissions that Mr Warren also contended that he had a “legitimate reason” in terms of subs (2)(a). Tompkins J recorded the submissions as follows:¹

[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

¹ *R v Michael Warren*, T 1/2011 & T 1-2/2016, Reasons for Verdict, Tompkins J, 3 May 2016 (reissued 2 June 2016).

sharing software. Mr Ellis then asserted that, having done that, Mr Warren could not understand how the defendants in the Operation Unique trial 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.

[9] Tompkins J pointed out² that there was an obvious and insurmountable hurdle for Mr Warren, in that there was no evidence before the Court upon which the Court could properly, or at all, conclude that Mr Warren had, as required by s 160(2), proved that he had a legitimate reason for possessing the indecent material. The Judge said that the circumstances that he detailed in para [38] of his reasons comprehensively rebutted any suggested accidental downloading or retention of the “voluminous child pornography Mr Warren possessed” (some 1,000 items). As no attempt was made on this appeal to argue that Tompkins J’s conclusions concerning the s 160 charges were not well open to him, we have no need to take this matter further in relation to the conviction appeal.

[10] The only questions raised concerning the s 160 convictions were in furtherance of an argument that there had not been, or could not be, a fair trial before an independent and impartial tribunal, or one with that appearance. As we understood it, this argument attempted to build upon the arguments to that effect raised and rejected in the pre-trial hearing last year. As it happened, both issues arose whilst the Supreme Court was dealing with the summary offences charges in a separate trial, but in the way they were argued we understood Mr Ellis to be raising them as relevant to both trials, although the second point was largely related to sentencing.

[11] The first concerned the Judge’s choice of a police officer rather than a member of the Court staff to escort the assessors to the place where they deliberated. The

² Above n 1 at [33].

objection is solely to the fact that the escort was a police officer. It is not, and could not be, suggested that the officer chosen, who had had nothing to do with the investigation of the case or its prosecution, interfered with or intruded into the assessors' deliberations. He simply escorted them for a short distance to and fro and remained outside to ensure the security of their retirement. At one point the son of one of the assessors needed to speak to his father about an unrelated matter and the police officer facilitated that and ensured the discussion did not mention the trial.

[12] Like Tompkins J, we have no hesitation in rejecting the argument that this limited role for the police officer somehow compromised the summary offences trial, let alone the s 160 trial, which had already concluded. It is far-fetched to suggest that the Judge's choice of escort showed that the Judge was not independent and impartial, as was the analogy which counsel endeavoured to draw with cases in which jurors who were police officers or an employee of the prosecution were said to have caused an appearance of bias in the jury: *R v Abdroikof*³ and *Hanif and Khan v The United Kingdom*.⁴

[13] Those cases dealt with an entirely different situation in which the persons to whom objection was taken had been participants in the Court's decision. Nothing like that occurred here. Nor do we for a moment think that a fair-minded and informed observer would have considered that the Judge's choice of escort gave rise to a real possibility of bias by the Court.

[14] The second incident complained of in connection with the convictions was even more remote, given that it occurred after the guilty verdicts at both trials had been rendered and only during the sentencing hearing. Because the Deputy Governor gave evidence at the sentencing hearing about the effect of the offending on the Pitcairn community, it was submitted that there was "a breach of the separation of powers", which unduly and improperly influenced the Judge. We do not understand how it can be said that it influenced him in relation to the conviction, and in our view it was entirely proper for him to receive the evidence and give it such weight as he thought

³ [2007] UKHL 37.

⁴ ECHR (Application nos. 52999/08 and 61779/08), 20 December 2011.

appropriate in the sentencing process. We will return to this point when we come to deal with the sentences.

[15] There being no other new point raised concerning the s 160 convictions, the appeal against them failed.

Conviction appeal – the summary offences

[16] The charges concerned Mr Warren’s admitted possession of two items:

- (a) A written internet chat – an exchange of written messages – between Mr Warren and a 15 year old girl (or someone pretending to be a 15 year old girl) in England in which various objectionable acts are discussed, including putting faeces into her orifices; and
- (b) A short video, evidently a professionally produced film, in which a bound and gagged young woman (of unknown age) is digitally penetrated and then has a large hook inserted into her anus and steps are taken to tighten a rope attached to the hook as if to hoist her into the air, and during which she suffers pain or acts out such suffering.

[17] The charges were under s 8(1) of the Summary Offences Ordinance, which says:

8.—(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.

[18] It was agreed between the parties prior to the trial that for consistency with the guarantee in s 13 of the Pitcairn Constitution of freedom of expression, as required by s 5 of the Pitcairn (Constitution) Order 2010 and s 26 of the Constitution, s 8 needed to be interpreted as applying only to “gross” or “extreme” indecency, and that is the way in which the assessors were directed by Tompkins J to consider whether the two items offended against s 8:⁵

⁵ *R v Michael Warren*, T 1-2/2016, Summing up to Assessors, Tompkins J, 2 March 2016.

[8] So, what does “indecent” mean? How should you go about forming an opinion about whether an item is, in the context of this trial, indecent? As I have said, there is no definition in law, so it is not a legal question you are being asked to answer. Rather, something is indecent for the purposes of this trial if it is grossly or extremely indecent or obscene. When deciding whether the item you are considering falls within that description you should ask yourself:

- Is the item of such a nature that it must reasonably be assumed to have been produced solely or principally for the purpose of sexual arousal; and
- Is it grossly offensive, disgusting, depraved, or otherwise obscene.

And in the case of the video clip:

- Does it portray in an explicit and realistic way, an act which results, or is likely to result, in serious injury to a person’s anus.

[9] If you conclude that it does meet those tests, so that the item was produced for the principal purpose of sexual arousal, and is grossly offensive, disgusting, depraved or obscene, and in the case of the video that it portrayed explicitly and realistically an act which you fairly and reasonably infer was likely to result in serious injury to a person’s anus, then that item will be grossly or extremely indecent and will, for the purposes of this trial, properly be considered to be indecent.

[19] In putting the matter in this way, and in finding Mr Warren guilty, the Judge was guided by s 63 of the English Criminal Justice and Immigration Act 2008, which 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,

(a) Admissibility of evidence

[20] Mr Edgeler, who argued the summary offences conviction appeal for Mr Warren, began by challenging the Judge's decision to admit in evidence certain material that was said to be "extraneous" and therefore inadmissible. This consisted of two printed pages from a website appearing to be brief communications between Mr Warren and the girl, who says that she is a 15 year old, and a photograph purporting to have come from and depicting the girl and her twin sister. These were sent a few days earlier than the chat which was the subject of the charges

[21] Mr Edgeler's submission was that the only issue for the assessors and the Judge was whether the internet chat file was indecent, and that any other file or photograph was not relevant. The earlier communications and photograph did not bear on the alleged indecency of the chat file which, for this purpose, must stand alone. It was submitted also that the earlier materials were actually prejudicial because, although the Crown did not say so, they suggested that Mr Warren was grooming the young girl, an offence with which he was never charged.

[22] The Crown's justification for the admissibility of the earlier communications and photograph was that they went to show that the other participant was indeed a 15 year old girl, as one of the messages said and the photograph may have shown. They became admissible when at trial the defence put in issue the age of the girl or, indeed, that the other participant was even a female, let alone a young person.

[23] We agree, however, with Mr Edgeler's argument that the decency or otherwise of the internet chat file must be judged upon the file alone. It would be strange if a document could be indecent in the possession of one person because of material found in another document in his possession but not indecent in the possession of a second person who did not have the other document. We also accept that, in any event, the earlier materials did not prove that the other participant was actually a 15 year old girl, rather than an adult pretending to be, any more than did the contents of the file itself, in which there were references to age and attendance at school. On the other hand, the earlier material paled into insignificance compared with what was recorded in the file itself, in particular the references to putting faeces into the girl's orifices, and Mr Warren's obvious sexual arousal from his belief (or his fantasy) that he was

encouraging a young girl in such behaviour. As to the asserted prejudice, the Crown did not allege grooming, even in relation to the contents of the file, and such an allegation would have no credibility when the other participant was clearly not on Pitcairn. We therefore concluded that the earlier communications and photograph should not have been admitted but would have had no material influence on the conclusion of guilt reached by the Court.

(b) Freedom of expression

[24] It was submitted that the finding that the internet chat and the video were indecent was an unreasonable limitation on freedom of expression as protected by s 13 of the Constitution, even if indecency is taken to mean gross or extreme indecency. The argument at this point concentrated on the video which was said not to be extreme. There was a depiction of discomfort but no apparent injuries from the use of the hook. The participants could have been actors and the hook could, contrary to its appearance, have been made of rubber, it was said.

[25] Reference was made by counsel to *Handyside v The United Kingdom*,⁶ in which it was said that freedom of expression included that which may offend, shock or disturb the State or any sector of the population. However, as Mr Raftery for the Crown pointed out, *Handyside* also makes it clear that the protection of morals is a legitimate aim for a democratic society and in deciding what is a proportionate means of achieving that aim, a society is accorded a margin of appreciation even where the freedom encroached upon is as fundamental as freedom of expression.

[26] Subject to one point, it seems to us that when “indecent” in s 8 is read as meaning grossly or extremely indecent and that question is tested by what is found in s 63, material which is properly regarded as failing the test is not protected by s 13 of the Constitution because such a limitation on freedom of expression, where material of such a degree of indecency is involved, is a proportionate means of protecting public morals. The video plainly does fail the test, even if the participants were actors and the infliction of pain was simulated. There is no doubt, in terms of s 63, that what was depicted was a moving image that was pornographic and extreme. It portrayed, that is,

⁶ (1979 – 80) 1 EHRR 737.

showed or purported to show, in an explicit and realistic way “an act which results, or is likely to result, in serious injury” to a person’s anus. An act of the character portrayed, insertion of a hook into the anus with a view to lifting the person off the ground, was certainly likely to cause injury to the anus, regardless of whether it did so on the occasion of the making of the video (accepting the possibility that on that occasion the hook may have been a dummy). It is the character of the act portrayed that is important, not whether it was in fact a simulation – a suggestion that the prosecution would rarely if ever be able to disprove in relation to a filmed image.

[27] As to the internet chat, we consider that it was well open to the assessors and to the Judge to find that its contents were produced by the participants solely or principally for the purposes of sexual arousal and were grossly offensive, disgusting, depraved or otherwise obscene. There can have been no other reason than Mr Warren’s sexual gratification for the conducting of the chat session and the references to the use of excrement are properly viewed as disgusting and depraved.

[28] There is, however, the point we reserved above. Counsel referred us to decisions of the Supreme Court of Canada in which that Court introduced an exception to the definition of “child pornography” in s 163 of the Canadian Criminal Code in order for there to be consistency with the right of freedom of expression in the Charter of Rights and Freedoms. “Child pornography”, as defined in that section, includes visual representations that show a person who is or is depicted as under the age of 18 years and is engaged in or is depicted as engaged in explicit sexual activity and visual representations, the dominant characteristic of which is the depiction, for a sexual purpose, of a sexual organ or the anal region of a person under the age of 18 years. The definition also includes visual representations and written material that advocates or counsels sexual activity with a person under the age of 18 years that would be an offence under the Code.

[29] The Supreme Court of Canada concluded in *R v Sharpe*,⁷ and confirmed in *R v Barabash*,⁸ that s 163.1 should be read as though it contained an exception for:⁹

⁷ [2001] 1 SCR 45.

⁸ [2015] 2 SCR 522.

⁹ Above n 7 at para 129.

- (1) any written material or visual representation created by the accused alone, and held by the accused alone, exclusively for his or her own personal use; and
- (2) any visual recording, created by or depicting the accused, provided it does not depict unlawful sexual activity and is held by the accused exclusively for private use.

[30] The Court was concerned that without the exception the prohibition on child pornography would capture in its sweep materials that arguably posed little or no risk to children and that deeply implicated the freedoms guaranteed under the Charter:¹⁰

The ban, for example, extends to a teenager's sexually explicit recordings of him- or herself alone, or engaged in lawful sexual activity, held solely for personal use. It also reaches private materials, created by an individual exclusively for him- or herself, such as personal journals, writings, and drawings. It is in relation to these categories of materials that the costs of the prohibition are most pronounced. At the same time, it is here that the link between the proscribed materials and any risk of harm to children is most tenuous, for the reasons discussed earlier: children are not exploited or abused in their production; they are unlikely to induce attitudinal effects in their possessor; adolescents recording themselves alone or engaged in lawful sexual activity will generally not look like children; and the fact that this material is held privately renders the potential for its harmful use by others minimal.

[31] The Court expanded on this, recognising that what it called "auto-depictions" might involve more than one participant:¹¹

Similar considerations apply where the creator of the recordings is not the sole subject; that is, where lawful sexual acts are documented in a visual recording, such as photographs or a videotape, and held privately by the participants exclusively for their own private use. Such materials could conceivably reinforce healthy sexual relationships and self-actualization. For example, two adolescents might arguably deepen a loving and respectful relationship through erotic pictures of themselves engaged in sexual activity. The cost of including such materials to the right of free expression outweighs any tenuous benefit it might confer in preventing harm to children.

[32] All of this is, of course, a world away from the internet chat in the present case and the 45 year old Mr Warren's "conversation" with someone actually or purporting to be a 15 year old schoolgirl. Nor is it a production made just by Mr Warren as a creator. It was created by the two participants and transmitted via the internet, even if, in the end, Mr Warren's copy may have been the only one. We are not prepared to further read down s 8 to create an exception for a situation of the present kind.

¹⁰ Above n 7 at para 105.

¹¹ Above n 7 at para 109.

[33] Counsel sought to persuade us that the guarantee of freedom of thought was also engaged, but what occurred here went well beyond mere private thought and was a species of expression by the two participants.

(c) *File not in evidence*

[34] A further argument concerning the chat file was made in the appellant's written submissions but rightly not pursued in oral argument. It was that the assessors were given a partial transcript of the chat file (of the portions said to be in breach of s 8) but that they did not have the file itself. This was a hopeless argument since the contents of the file could never be read except on screen or in a transcript. And in fact the file had actually been produced to the Court during the s 160 trial and agreement had been reached in a joint memorandum of counsel that the evidence could be taken as applying to the summary charges. The file was thus in evidence.

(d) *Failure of assessors to give reasons*

[35] The assessors were given instructions by the Judge¹² but, on indicating that they had made their decision, both were simply asked, separately, whether they were sure that the two items were indecent, to which each responded affirmatively. The Judge then indicated his agreement with that opinion, convicted Mr Warren and later gave his written reasons.

[36] The appellant says that this was insufficient to make the trial fair by allowing Mr Warren to know why he was convicted and whether proper account was taken of his freedom of expression. For this submission Mr Ellis relied upon the decision of the European Court of Human Rights in *Taxquet v Belgium*.¹³ That case involved a trial procedure under which there appears to have been no summing up or instructions to the jury but the judge compiled a series of questions which the jury then answered in finding the accused guilty. Having reviewed European case law, the Grand Chamber said:¹⁴

It follows from the case-law cited above that the Convention does not require jurors to give reasons for their decision and that Article 6 does not preclude a

¹² See [18] above.

¹³ ECHR Grand Chamber (Application no 926/05), 16 November 2010.

¹⁴ At para 90.

defendant from being tried by a lay jury even where reasons are not given for the verdict. Nevertheless, for the requirements of a fair trial to be satisfied, the accused, and indeed the public, must be able to understand the verdict that has been given; this is a vital safeguard against arbitrariness.

[37] The Grand Chamber concluded that neither the indictment presented against the accused, nor the questions to the jury, contained sufficient information as to the accused's involvement in the offences of which he was accused. The questions did not refer to any precise and specific circumstances that could have enabled the applicant to understand why he was found guilty; they did not enable him to ascertain which of the items of evidence and factual circumstances discussed at the trial had ultimately caused the jury to answer questions concerning him in the affirmative. The trial was therefore unfair, in breach of Article 6.1 of the European Convention.

[38] That can be contrasted with the present case where there was a single issue (indecent or not) in relation to each item which was the subject of a charge and the assessors were given careful instruction in writing about how they must approach that question. The public, and Mr Warren, could have had no difficulty in understanding that the assessors had formed the opinion that the items were indecent because they met the test framed by the Judge, who then confirmed that he was of the same opinion and gave his written reasons.

[39] The Grand Chamber did not question the ordinary operation of a jury system in which the jury does not give reasons. The flaw in *Taxquet* lay in the surrounding procedure. As the Scottish Court had earlier said in *Beggs v HM Advocate*,¹⁵ the European Court had taken the view in several cases that the absence of any direct delivery of reasons by the jury itself might be offset by the discernibility of the jury's decision from the procedural framework in which the jury operates. Nothing in the Grand Chamber's subsequent decision in *Taxquet* contradicts that view. In the present case the reasons for the decision are readily discernible from the procedural framework adopted by the Supreme Court. The absence of reasons from the assessors did not render the trial unfair or breach Mr Warren's constitutional right of freedom of expression.

¹⁵ [2010] HCJAC 27, at para 203.

[40] For these reasons, the appeal against conviction on the summary offences charges also failed.

Sentence appeal

[41] Mr Warren appealed against the sentences imposed by the trial Judge Tompkins J on 4 March 2016. The appellant contended that the effective sentence of 20 months' imprisonment is manifestly excessive and that a community-based sentence is appropriate. Although the appeal encompassed the one month sentence for the summary offences, no submissions were made about that aspect of the sentencing.

[42] On an appeal against sentence the Court of Appeal may quash the sentence or replace it with any sentence or order that was available to the Supreme Court, so long as the sentence is not more severe than that imposed by the Supreme Court.¹⁶

[43] Under the English common law, which is part of Pitcairn law by s 42 of the Pitcairn Constitution, the Court of Appeal will only intervene if a sentence is manifestly excessive or wrong in principle.

[44] The Crown submitted that the sentence imposed was within the sentencing range available to the Supreme Court and was neither manifestly excessive nor wrong in principle, and therefore should be upheld.

(a) *The sentence*

[45] Tompkins J said that the sentencing was governed by the Pitcairn Island Sentencing Ordinance, which requires the sentencer to hold Mr Warren accountable and to promote in him a sense of responsibility for his offending and the harm it has done; to give due recognition to the victims of the offending; to denounce his conduct; to deter him and others from similar offending; to protect the community; and to assist in rehabilitation and reintegration.

[46] He said that Mr Warren had assembled a curated collection of in excess of 400,000 adult pornographic images and videos, of which a little over 1,000 were classified as child pornography.

¹⁶ Section 41 Judicature (Appeals in Criminal Cases) Ordinance.

[47] He referred to the pre-sentence report prepared by the Island's Supervision Officer (Constable TA Moore) and to the psychological assessment (prepared by Dr Nick J Wilson of New Zealand). He noted that Mr Ellis objected to parts of the psychological assessment and that, without necessarily accepting Mr Ellis' objections, he had not considered those aspects of the assessment.

[48] He described the assessment as "largely pessimistic". Mr Warren is described as having a clinically significant elevation for compulsive personality and narcissistic personality, to the extent they would be regarded as problematic and would be likely to cause interpersonal difficulties and unsuccessful social reactions. He is reported as being interpersonally distant and rarely responsive to the actions and feelings of others, which would be congruent with his disassociation from the effect of child pornography on its victims. The Judge said those factors were confirmed in the pre-sentence report, from which he noted Mr Warren's lack of remorse and insight into his offending.

[49] From the psychological assessment he recorded that Mr Warren considered he did not need to engage in treatment and that although he was not necessarily against treatment, he simply did not see a purpose for it; that Mr Warren's compulsive personality traits would likely be barriers to anything more than superficial engagement in treatment; and that participation alone should not be viewed as indicating substantive engagement or the making of real change.

[50] He accepted the submissions from both the Crown and Mr Ellis that the sentencing needs to take account of the particular circumstances of Pitcairn Island. He then referred to the sentencing in Operation Unique and that the Court in that case, minded towards leniency, tailored the sentences to Pitcairn. He noted the observation of the Court that:¹⁷

This is not to say, however, that if there is future offending, the same degree of leniency will apply.

[51] He accepted that the sentences in that case related to different kinds of offences, but observed that Mr Warren, having been a resident on the Island at the time of those trials and when the sentences were imposed, was fully aware both of the offending and the sentences, and that his offending needs to be viewed against that background.

¹⁷ *R v Michael Warren*, T 1/2011 & T 1-2/2016, Sentence of Tompkins J, 4 March 2016, at [13].

[52] The Judge turned to aggravating factors of the offending and accepted those advanced by the Crown: persistent and deliberate offending over an extended period of time; previewing, downloading and frequently duplicating files; the high volume of child pornography images, which he described as “being significantly large”; the deliberate searching and targeting of child pornography images and their retention for a significant period of time; that the offending occurred while Mr Warren was in a position of responsibility on Pitcairn Island during his terms as Mayor, when he was in his official capacity directly involved in the child protection work which followed from the earlier convictions in Operation Unique; and that the children shown in the files included vulnerable and very young children with signs of visible distress, which the Judge described as perhaps the most serious aggravating factor.

[53] He accepted the absence of previous convictions but said there was a lack of remorse and of steps taken towards rehabilitation. He noted the defence submission that Mr Warren had been on bail and subject to wide publicity for an extended period of time. He referred to Mr Warren’s family circumstances, including his care for his elderly mother and his record of employment on the Island.

[54] He also referred to the “significant detrimental effect that Mr Warren’s offending has had on Pitcairn Island’s reputation in the outside world”¹⁸ and that his offending had undermined the extensive rehabilitative and positive child protection work that had been done in the Pitcairn Island community since the Operation Unique offending came to light and was prosecuted.

[55] The Judge took a starting point of 12 months’ imprisonment, as advocated by the Crown, rejecting endeavours by the defence to downplay or minimise the seriousness of the offending. He considered that a full-time sentence of imprisonment was appropriate, particularly, without downplaying the other aggravating factors, because of the vulnerable and very young children frequently portrayed and the very high number of child pornographic images and video clips, “the almost arrogant absence of remorse and insight”, and the reluctance on anything other than a superficial level to engage in rehabilitation.

¹⁸ Above n 17 at [30].

[56] From the starting point of 12 months' imprisonment he applied an uplift of 12 months for the combined effect of the aggravating factors, and allowed a discount of four months for mitigating effects, the absence of previous convictions and Mr Warren's other contribution to the Pitcairn community.

[57] Tompkins J imposed concurrent sentences of 20 months' imprisonment on each of the charges under s 160 of the Criminal Justice Act. On each of the two summary charges he imposed concurrent terms of imprisonment of one month each.

[58] He imposed three special release conditions as set out in the pre-sentence report and made a Sexual Offences Prevention Order for a period of seven years. He deferred the start date of the sentence for six months on the application of the Crown.

[59] Following the sentence being handed down, Mr Ellis sought suspension of the sentence for two years. This was opposed by the Crown and rejected by the Judge, even had he jurisdiction to suspend the sentence, which he concluded he did not.

[60] In support of his principal submission that the sentence imposed was manifestly excessive, Mr Warren advanced submissions under a number of headings, to which we now turn.

(b) *Local circumstances/comparative Pitcairn cases*

[61] The appellant submitted that the Judge failed to pay due regard to local circumstances and wrongly applied English and New Zealand sentencing standards. He referred to a previous discussion of this Court concerning s 23 of the Pitcairn Constitution (prohibition of discrimination) where this Court said that "... the special circumstances in Pitcairn can warrant different treatment from that of UK residents" and referred to "... the stark contrast in their [people living in the UK] circumstances from those in Pitcairn" which would make an exercise in comparison "very strained".¹⁹

[62] The appellant then submitted that Tompkins J was wrong to reject an analogy with Bermuda because "Bermuda is a British Overseas Territory and a better fit than mainland England", having a population of some 64,000, some 1,500 times that of

¹⁹ *Michael Warren v R*, CA 1/2012, 23 October 2015, at [104]. The Court determined that s 23 of the Pitcairn Constitution related to prohibition of discrimination among people living on Pitcairn Island.

Pitcairn but more analogous than the United Kingdom's upwards of 64 million population.

[63] Mr Ellis referred to the 2014 Bermuda Guidelines recommending a sentence of between 6-32 months' imprisonment for serious cases of sexual exploitation in the Magistrates' Court and a sentence between two and four and a half years' imprisonment for the most extreme pornography. By comparison with the 2007 UK Guideline (which has been replaced by a revised 2013 UK Guideline applicable to all offenders sentenced after 1 April 2014),²⁰ which recommended a sentencing range of 4-9 years from a starting point of six years' imprisonment for the most serious cases (production of Level 4 or 5 images shown or distributed), Mr Ellis extrapolated that "the English maximum sentence can be twice that of Bermuda". He submitted that the circumstances in Pitcairn are even more special than those in Bermuda, so that Bermuda's Guidelines would be excessive in Pitcairn.

[64] The suggested comparison with the Bermuda Guidelines was correctly rejected by the Judge. Comparison in size of population is only one factor. The Bermuda Guidelines were developed following consultation in Bermuda with a range of service providers as identified in the Chief Justice's announcement of the new Sentencing Guidelines set out in the appellant's written submissions. They are tailored to circumstances in Bermuda and there is no basis for applying them to the special circumstances of Pitcairn.

[65] The general approach to sentencing must, rather, and as submitted by the Crown, begin with the acknowledgement that English law applies under s 42 of the Pitcairn Constitution. However, some departure from English sentencing practices may be required.

[66] In the Operation Unique trials Blackie CJ, in sentencing the several offenders convicted of charges including rape and indecent assault, noted they were the first sentences by the Supreme Court under the new Pitcairn Sentencing Ordinance and that there were no tariffs, guidelines or precedents. He said:²¹

²⁰ Sentencing Council (UK) Sexual Offences Definitive Guideline 2013, effective from 1 April 2014.

²¹ *R v Stevens Raymond Christian*, T 37-46/2003, 28 October 2004.

[2] ... ultimately the sentences to be determined are those appropriate for a community of 50 people and not sentences which might be considered appropriate for a community of 60 million people with a long-established social and legal culture.

...

[8] Whereas the principles enunciated by the English Courts are a valuable guideline, particularly as they reflect the seriousness with which offences like rape should be generally regarded, it is the task of this Court to impose sentences which are appropriate for this Island. The Court cannot overlook the seriousness of the offending, but it can take into account factors unique to this Island, such as its isolation, its permanent population of less than 50 people, its dependence on the manpower of its able-bodied citizens, the need for members of the community to be responsible for most of the facets of modern living, including working machinery, construction, carpentry and building, electrical reticulation and servicing, off-Island communications, social organisation, commercial organisation, health, dentistry, x-ray, emergency procedures and search and rescue (both on and off Island). It is therefore quite clear to the Court that in the event that it imposes sentences of imprisonment as long as those that might be expected in much larger jurisdictions, there could be adverse effects to the community that the Courts and the law have the responsibility to protect.

[9] An additional factor, as far as the Island is concerned, must be that there is no precedent. The Court must now set a precedent. At this time it is minded towards leniency. Hence, the penalties to be imposed by this Court may be seen as far less than what might be expected in the world at large. They are tailored to Pitcairn. This is not to say, however, that if there is future offending, the same degree of leniency will apply.

[67] There are no previous sentencing decisions for pornography offences on Pitcairn Island so, as in sentencing in Operation Unique, the Supreme Court had to apply the principles in the Sentencing Ordinance and seek guidance from other jurisdictions, appropriately England. The Court had to take account of the special circumstances of Pitcairn, but important relevant factors applicable in Operation Unique do not apply in respect of Mr Warren, such as the requirement for availability of manpower on the Island. Nor can Mr Warren claim an element of surprise, or suggest that “a culture of offending” was a relevant factor in his offending. Mr Warren’s offending took place in full knowledge of Operation Unique and against the background, well established by Operation Unique, that sexual offending involving children (which underlies child pornography) has a particularly serious community impact on Pitcairn, as is set out in the statement of Deputy Governor Lynch referred to above.

[68] Deputy Governor Lynch explained the relevance of immigration to Pitcairn’s future sustainability. He said that following Operation Unique considerable resources

have been devoted to ensuring child safety on Pitcairn and that considerable progress has been made. However, his contact with prospective immigrants leaves him in no doubt that the presence on Pitcairn of an Islander with convictions for child pornography will act as a deterrent to immigration. As we have said above, it was entirely proper for the Judge to receive and take into account on sentencing the Deputy Governor's evidence. There can be no doubt that Mr Warren's offending, which started during Operation Unique and continued while he was Mayor of Pitcairn, and in that capacity was involved in various child safety initiatives, has had, in the words of the Judge, a "significant detrimental effect", both for the Pitcairn community and for Pitcairn's reputation in the wider world. It has revived the Operation Unique events and had the capacity to undermine the rehabilitative initiatives on Pitcairn.

[69] Thus, the circumstances that guided Blackie CJ towards leniency in sentencing in Operation Unique do not prevail to the same extent in relation to Mr Warren's sentencing.

[70] Mr Ellis' comparisons with release dates for some of the offenders in Operation Unique with Mr Warren's release date after 10 months served of his 20 month sentence (a short-term sentence) are unhelpful. Mr Raftery advised this Court that all of the Operation Unique prisoners released on parole were released under home detention conditions after consideration and decision by the Parole Board.

(c) *Applicability of English case law*

[71] The appellant submitted that the sentencing Judge was wrong to adopt a starting point of 12 months' imprisonment based on English case law and sentencing guidelines.

[72] The Crown referred Tompkins J to two English authorities for guidance as to the appropriate starting point, *R v Labonn*²² and *R v Jones*.²³ The Judge referred to these cases in the context of Mr Warren's awareness, or lack of awareness, of the impact of his offending on his victims.²⁴

²² [2014] EWCA Crim 1652

²³ [2014] EWCA Crim 1859.

²⁴ Above n 17 at [11] and [12].

[73] Mr Ellis criticised the Crown's reliance on these authorities, noting that Mr Labonn had seven previous convictions whereas at the age of 52 Mr Warren was a first offender. Mr Jones had two previous convictions and had committed the offences for which he was sentenced while on bail.

[74] The offending in *Labonn* involved around 150 images at Level 4 and five at Level 5 under the 2007 UK Guideline, and in *Jones* around 130 images with approximately one-quarter of those at Category A Level under the 2013 UK Guideline. The sentences imposed in those cases appropriately took account of the aggravating and mitigating factors applicable in each case, but the relevance of these authorities for Mr Warren's sentencing is the approval of the English Court of Appeal in both cases of a starting point of about 12 months' imprisonment before considering aggravating and mitigating factors. The Crown's referral of these cases to the sentencing Judge on this point was relevant and cannot be criticised.

(d) Mitigating factors/family circumstances

[75] Mr Warren has an 88 year old mother for whom he cares. She receives a government subsidy but has no other source of income. Mr Warren no longer has employment with the Pitcairn government. He submitted that an immediate sentence of imprisonment, given these factors, "resonates inhumanity" and is "disproportionately severe", contrary to s 7(f) of the Sentencing Ordinance.

[76] The families of criminal offenders invariably suffer, often considerably, from their criminal offending and its sanctions. Mrs Warren's situation is unfortunate but some other family support is available and the Island's small population is a close-knit community who rally to support those who need it. The pre-sentence report by the Supervision Officer, Constable TA Moore, who is resident on the Island, describes Mrs Warren as "still remarkably independent", with other siblings on the Island as well as extended family who would willingly assist her where and when required. The relevant prison regulations allow temporary release from custody for the purpose of conducting supervised work within the community. The personal and family circumstances of Mr Warren do not render the sentence imposed "disproportionately severe".

[77] The appellant also submitted that the Judge failed to take into account his lengthy period on bail (approximately five years) which restricted him to the Island throughout that period. The Judge identified²⁵ as personal and mitigating factors Mr Warren's absence of previous convictions and his contribution to the community. While he had previously noted the submission concerning bail, he did not refer in this context to the period on bail. But the situation was clearly before him and can be inferred as included in the discount of four months he allowed for mitigating effects. In any event, any failure to take account of the bail terms has not led the Judge to impose an end sentence that is manifestly excessive, given the seriousness of the offending.

(e) Rehabilitation

[78] The appellant submitted "it appeared Tompkins J dismissed a rehabilitative approach". Counsel described "the rather rapid dismissal of rehabilitation" as "worrying".

[79] The Judge was provided with a comprehensive psychological report by Dr Nick J Wilson, Registered Clinical Psychologist from New Zealand, following a joint application to the Registrar by counsel for the Crown and Mr Warren. The purpose of the report was to provide guidance to the Court under s 25(2) of the Sentencing Ordinance. Dr Wilson, with the consent of counsel, was present via audio-visual link during final submissions and the verdict. He interviewed Mr Warren by audio-visual link over a total period of two and three-quarter hours and subsequently spoke with him by telephone to clarify certain matters.

[80] The pre-sentence report by Constable TA Moore was largely consistent with the findings and recommendations of Dr Wilson, except the report writer considered Mr Warren was very willing to engage with respect to any sentence he received, despite his lack of remorse, whereas Dr Wilson reported that while Mr Warren was not necessarily against treatment, he simply did not see the purpose of it. Further, that participation alone should not be viewed as indicating substantive engagement or the making of real change.

²⁵ Above n 17 at [28] and [31].

[81] The Judge referred extensively to Dr Wilson's report, which he agreed with the Crown was "pessimistic", a description Mr Ellis accepted. The Judge carefully set to one side those parts of the report to which Mr Ellis raised objection. But he noted that Mr Warren's compartmentalising and disassociating traits, together with his narcissistic and obsessive personality characteristics, were not challenged. The Judge also referred to the pre-sentence report and noted "the almost arrogant absence of remorse and insight" recorded in both reports. He adopted as special release conditions the three special conditions (as to supervised internet access, treatment, and opportunity to engage with the local community) set out in the pre-sentence report.

[82] It is clear that Tompkins J did not dismiss a rehabilitative approach without careful consideration, but he nevertheless reached the conclusion, in light of a combination of all the relevant factors, that a full-time sentence of imprisonment was appropriate. The Judge was not in error in so concluding. This was a serious case of child pornography involving a very high number of images and video clips, frequently portraying vulnerable and very young children. A sentence commensurate with the seriousness of the offending was required. Home detention or any other type of community-based sentence, as sought by the appellant, would not have met the requirements to hold Mr Warren accountable for his wrongdoing and of denunciation and deterrence.

(f) Section 174 Criminal Justice Act 2003 (UK)/no prison available

[83] The appellant submitted that the Judge failed to explain the effect of the sentence, as required by s 174 of the Criminal Justice Act 2003, in particular that the prison was not available for Mr Warren to immediately start serving his sentence, as he says he wished to do. Mr Warren says that for this reason he did not apply for bail, and bail was granted only on the Crown's application.

[84] The appellant submitted that the omission of the prosecution to advise the Judge of the delay in availability of the prison for six months, "materially misled the Court as to what sentences were properly and immediately available" and unfairly extended the prison start date.

[85] Mr Raftery explained that no prisoners were housed in the prison building at the time of Mr Warren's sentencing, and the building was occupied by various entities who needed to be accommodated elsewhere before the prison could be available for Mr Warren to serve his sentence. Further, corrections staff and facilities have to be brought from New Zealand.

[86] He also noted previous experience in Operation Unique, where the Privy Council required an assurance from the Crown that sentences would not be implemented until the Privy Council had considered the legality of the appeal, and that the Crown would not oppose bail. Mr Warren has previously sought leave to appeal to the Privy Council, to the extent he does not have leave to appeal as of right.

[87] Mr Raftery submitted that it would have been wrong for the prosecution or the executive to anticipate Mr Warren's conviction by making arrangements for the availability of the prison immediately upon sentence, but assured the Court that arrangements could and would be put in place as promptly as possible if Mr Warren elects to start serving his sentence, as Mr Ellis said he would do. Mr Raftery sought a prompt indication from the Court of the result of the appeal in order that the authorities could facilitate arrangements for the imprisonment at the earliest possible time.

[88] The sentence of Tompkins J clearly explains Mr Warren's sentence. The Judge set out the starting point of 12 months' imprisonment, the uplift for aggravating factors and the discount for mitigating factors, in compliance with s 174. He then said:²⁶

[31] ... The net result is that on each of the 20 counts in the information in respect of which Mr Warren was sentenced after the Supreme Court trial, he is sentenced to concurrent sentences of 20 months' imprisonment, with three special release conditions as set out in the pre-sentence report.

[32] On the summary charges he is convicted and sentenced to concurrent terms of imprisonment of one month on each, with the same special release conditions.

[33] There will be a Sexual Offences Prevention Order in the draft form as earlier circulated by the Crown, but taking into account the defence submissions as advanced by Mr Edgeler, I have concluded that that should be for seven years. If Mr Warren engages substantively in rehabilitative work and if on the conclusion of that rehabilitative work it is considered at the expiration of that term that no further order is required, then that will be a matter for the appropriate authorities at the relevant time.

²⁶ Above n 17 at [31] to [34].

[34] There will also be an order for confiscation and destruction of all the seized material but with the rider that unrelated personal computer files should be downloaded and returned to Mr Warren.

[89] The decision rejecting suspension of the sentence is clearly set out in an Addendum to the sentence.²⁷

[90] The Crown properly applied for deferral of the sentence promptly after sentence was passed. Deferral was granted by the Judge as follows:²⁸

There will be deferral of commencement of the imprisonment sentence for six calendar months, the exact date to coincide with the arrival on Pitcairn Island of the prison officers from New Zealand or elsewhere and their taking up their duties.

[91] Even if the Judge was unaware of the delay in availability of the prison, this does not render the sentence he imposed wrong in principle or manifestly excessive. A full-time sentence of imprisonment was, as he concluded, the least restrictive option in all the circumstances.²⁹

(g) *Viewing the images*

[92] In his submissions in reply to this Court, Mr Ellis, while not disputing the large number of pornographic images in Mr Warren's possession, asserted there was no evidence that Mr Warren had viewed the images. This appeared to be a new proposition and Mr Raftery immediately contested the assertion, referring to evidence of downloading of images in 2006 and access in 2008 and 2010.

[93] We consider that possession of the significant number and type of images involved raises the reasonable inference that the person in possession held them to view. But confirmation is provided by the appellant himself when in a pre-trial proceeding before Lovell-Smith J, his counsel, encapsulating the appellant's defence of "legitimate reason" to the charges under s 160 of the Criminal Justice Act, stated:

He says, yes, I was looking at these [the images] and I've got good reason ... 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

²⁷ Above n 17 at [35] to [37].

²⁸ *R v Michael Warren*, T 1/2011 & T 1-2/2016, Sentencing transcript, 4 March 2016, at page 30, line 7.

²⁹ Above n 17 at [29].

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.

[94] The above statement was conveyed by Mr Warren's counsel from the Bar on the basis of Mr Warren's instructions and was quoted by Tompkins J in his Reasons for Verdict.³⁰ Mr Warren did not give or call evidence at the trial.

(h) Conclusion on sentence appeal


[95] The effective sentence of 20 months' imprisonment was neither manifestly excessive nor wrong in principle. It appropriately reflected the applicable sentencing principles and the seriousness of Mr Warren's offending. None of the matters raised by the appellant has merit. The appeal against sentence accordingly failed.

Result

[96] For these reasons the appeals against conviction and sentence were dismissed.



Potter JA (Acting President)



Blanchard JA



Hansen JA

³⁰ Above n 1 at [26].