IN THE SUPREME COURT OF THE PITCAIRN ISLANDS

SC 3/2022
[2024] PNSC 1

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

Hearing: 9 August 2023 (Pitcairn)/10 August 2023 (New Zealand)

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

Judgment: 9 January 2024 (Pitcairn)/10 January 2024 (New Zealand)

JUDGMENT OF HEATH CJ

Contents

The appeal

[1] On 29 January, 8 June and 9 June 2020, Mr Michael Warren walked naked along a road on Pitcairn Island. He was charged with three offences, one for each of those days, of behaving "in an indecent manner". Each charge was brought under s 5 of the Summary Offences Ordinance, which provides:

> 5. Any person who behaves in an indecent manner in any public place shall be guilty of an offence and liable to a fine not exceeding one hundred dollars or to imprisonment for a term not exceeding forty days.

[2] While there were some differences in the circumstances in which the alleged offending occurred,[1] Mr Warren acknowledged that:

(a) he was the individual observed by the witnesses;

(b) his decision to walk naked along the roads was deliberate; and

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[1] See paras [8]–[10] below.

(c) the road represented a "public place," for the purposes of s 5.[2]

[3] As a result of those concessions, the only remaining issue was whether the behaviour was "indecent".

[4] Mr Warren was tried in the Magistrate's Court at Adamstown on 6 December 2021, before the Island Magistrate (Mr Simon Young) and two Assessors (Mr Steve Christian and Ms Carol Warren).[3] At the conclusion of the hearing, the Island Magistrate, after seeking the Assessors' views,[4] found Mr Warren guilty on all three charges.[5] The Assessors were then discharged, and the Island Magistrate proceeded to sentence Mr Warren.[6] The maximum penalty for each offence was a period of imprisonment not exceeding 40 days or a fine of not more than $NZ100.00.[7] After hearing submissions, the Island Magistrate convicted Mr Warren, and imposed a fine of $NZ50 for each offence; a total of $NZ150.

The grounds of appeal

[5] Mr Warren appeals against both conviction and sentence. Dr Ellis, on his behalf, has raised five grounds on which he submits the conviction appeal should be allowed. I summarise Dr Ellis' contentions under four headings:

(a) The Island Magistrate and the Assessors lacked the independence and impartiality required of judicial officers;

(b) The Island Magistrate failed to direct the Assessors on relevant questions of law;

(c) The Island Magistrate and/or the Assessors gave insufficient reasons for returning guilty verdicts;

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2 The term "public place" is defined by s 2(1) of the Interpretation and General Clauses Ordinance of 2017 to include "every place to which the public are entitled or permitted to have access whether on payment or otherwise". Section 5 of the Summary Offences Ordinance is set out at para [1] above.

3 See ss 3(2) and 29 of the Justice Ordinance. When referring to "assessors", I use upper case to denote those who sat in the Magistrate's Court and lower case when speaking more generally about their role.

4 Justice Ordinance, s 32(1)(a), set out at para [32] below.

5 Ibid, s 32(1)(b). See paras [12] and [13] below.

6 Ibid, s 32(1)(c).

7 Summary Offences Ordinance, s 5, set out at para [1] above.

(d) The charges were unconstitutional, in the sense that the term 'indecent" is not defined by law, as should be required in a free and democratic society.

[6] The sentence is challenged on the grounds that the Island Magistrate lacked independence and impartiality (on the same basis as for the conviction appeal)[8] and, alternatively, for offending the totality principle. As to the latter, Dr Ellis contends that the absence of a penalty tailored to fit each of the individual offences rendered the sentence manifestly excessive.

The hearing in the Magistrate's Court

[7] The charges were heard in the Magistrate's Court on 6 December 2021. The Island Magistrate and the Assessors heard oral evidence from two witnesses. Evidence from a third, a police officer, was read due to the unavailability of the witness for health reasons.

[8] The first witness was Mr Nicholas Kennedy. At the time, Mr Kennedy was the Administrator on Pitcairn Island. He gave evidence by audio-visual link from the United Kingdom. Mr Kennedy deposed that, just after 6am on 29 January 2020, he and his wife went for a walk. At about 6.25am, they reached a point in the road close to Mr Warren's house. Mr Kennedy saw Mr Warren (from the back) walking fully naked on the road ahead of him. After seeing Mr Warren, Mr Kennedy turned around, manoeuvring his wife so she did not see Mr Warren, and walked away. This evidence formed the basis of the first charge.

[9] Ms Nadine Faulkner was the second witness. She gave evidence that at about 6.00am on 8 June 2020, she was on the deck of her home. She looked out towards the road and saw Mr Warren naked. She saw him from side on. During the hearing, counsel for the Crown asked Ms Faulkner if she had anything personally against someone who makes a choice to be a nudist or a naturist. She responded: "Not at all. You can do that. I just don't want to see it". Mr Faulkner's evidence supported the second charge.

[10] The third witness was Senior Constable Warrender. His statement was read by the Deputy Registrar. During 2020, Senior Constable Warrender was the Community Police Officer based on Pitcairn Island. In that capacity, he had interviewed Mr Warren about the

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8 See para [5](a) above.

incidents on 29 January and 8 June. He went to Mr Warren's home, at about 5.50am on 9 June 2020, in an endeavour to "deter [him] from repeating the same behaviour". At about 6.05am, Senior Constable Warrender saw Mr Warren walking naked, along the road, towards him from a westerly direction. That behaviour gave rise to the third charge.

[11] After the prosecution evidence had been given, Dr Ellis made an application for dismissal of the charges. The Island Magistrate dismissed that application. Mr Warren elected not to give or call evidence on his own behalf. Closing submissions were then made by Mr Raftery KC, for the Crown, and Dr Ellis, for Mr Warren.

[12] After hearing submissions, the Island Magistrate adjourned for two hours, following which he announced the outcome in public. The Island Magistrate is recorded as saying:[9]

> [Counsel] thank you very much indeed to both counsel for their submissions today and we've [namely, the Island Magistrate and the Assessors] carefully considered all of the issues that have been raised by counsel. The submissions have covered, but not limited to, the following. **[a]** Is there evidence that the behaviour occurred. **[b]** Was it deliberate. **[c]** Was there an intention to offend. **[d]** Is there evidence it took place in a public place. **[e]** Are the occurrences of walking naked on Pitcairn Island considered to be behaving in an indecent manner. **[f]** Is it reasonable to accept walking naked in public is a constitutional right provided for under the freedom of expression when there is an overlap of personal rights impeding on another's. The requirements that exist in a democratic society are to balance one person's rights with another. **[g]** Was there a sexual content to the events. **[h]** How far would the rights to shock, horrify or offend others be allowable without the act itself becoming illegal. Having considered all these and other points raised, we move to a verdict. With regards to the verdict. In accordance with section 32(1) of the Justice Ordinance, at the conclusion of the evidence I require the assessors to state their opinions.
>
> **With regards to the first charge** of behaving in an indecent manner in a public place contrary to section 5 of the Summary Offences Ordinance, in that on or about 29 January 2020 at Pitcairn Island on Pali Road walked naked on one or more public roads. Mr Christian, if you would please state your opinion?
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> **Mr Christian:** Guilty.
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> **Magistrate Young:** Mrs Carol Warren, please state your opinion?
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> **Mrs Warren:** Guilty.

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[9] I have added letters to highlight the issues that the Island Magistrate says that he and the Assessors "carefully considered". Other emboldened portions of the text are as originally transcribed.

Magistrate Young: Thank you very much indeed. Moving on to **the second charge** of behaving in an indecent manner in a public place contrary to section 5 of the Summary Offences Ordinance, in that on or about 8 June 2020 at Pitcairn Island on the main road through Adamstown, walked naked on one or more public roads. Again, Mr Christian, please, your opinions?

Mr Christian: I say guilty.

Magistrate Young: Mrs Warren, your opinions please?

Mrs Warren: Guilty.

Magistrate Young: Regarding the **third charge** of behaving in an indecent manner in a public place contrary to section 5 of the Summary Offences Ordinance, in that on or about 9 June 2020 at Pitcairn Island on the main road through Adamstown, walked naked on one or more public roads. Final time, Mr Christian, please, your opinion.

Mr Christian: Guilty.

Magistrate Young: Mrs Warren, your opinion please?

Mrs Warren: Guilty.

[13] Having obtained the Assessors' opinions, the Island Magistrate continued:[10]

Mr Michael Warren, please stand up. I have just read the charges so I will do an abridged form. With regard to the first charge of 29 January 2020, both assessors have found you guilty. I am in agreement with the assessors and I find you guilty of the first charge. There seems to be no dispute with regards to both that the behaviour occurred deliberately and it was in a public place. *The assessors, representing our community, do consider walking naked around Pitcairn Island on our public roads to be a violation of section 5 of the Summary Offences Ordinance in that it is behaving in an indecent manner, and I agree with them both.*

With regard to the second charge of 8 June 2020, both assessors have found you guilty. I am in agreement with the assessors and I find you guilty of the second charge. Again there seems to be no dispute with regard to both that the behaviour occurred deliberately and it was in a public place. *The assessors, again representing our community, do consider walking naked around Pitcairn Island on our public roads to be a violation of section 5 of the Summary Offences Ordinance in that it is behaving in [an] indecent manner. Again, I agree with them both.*

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[10] Section 32(1) of the Justice Ordinance, to which reference is made in this passage, is set out at para [32] below.

With regard to the third charge of 9 June 2020, both assessors have found you guilty. Again I am in agreement with the assessors and I find you guilty of the third charge. Again there seems to be no dispute with regards to both that the behaviour occurred deliberately and it was in a public place. *The assessors, representing our community, do consider walking naked around Pitcairn Island on our public roads to be a violation of section 5 of the Summary Offences Ordinance, in that it is behaving in an indecent manner. And again, I agree with them both.*

Mr Michael Warren, please sit down.

To my assessors, Mrs Carol Warren and Mr Steve Christian, I wish to thank them both for their service to both the Court and the Pitcairn Island community in this matter. If you would now kindly step down from the Bench and remain in the body of the courtroom.

[Counsel], I am now ready to proceed with the sentencing. Does any counsel have anything they wish to discuss first? [Mr Raftery indicated he was ready to proceed to sentencing. Dr Ellis, as well as referring to the sentencing process, reserved an issue (in relation to s 32(1) of the Justice Ordinance) over the need for reasons to be given by the Island Magistrate and/or Assessors for their guilty verdicts, by reference to *Taxquet v Belgium* [2009] ECHR 2279 and [2010] ECHR 1806]. …

…

Magistrate Young: Thank you very much, Dr Ellis. I actually do share your opinions on that. [Section 32(1) is] peculiarly written. I'll grant you that. Which is why I literally quoted that passage. I made it very clear to the assessors before we came out that where they go with that opinion is entirely up to them. But I do take your point. We come back to Mr Raftery then, if you would please present your submissions with regard to the sentencing.

Mr Raftery: I'll just say before I begin that my friend's musings now and where *[Taxquet] v Belgium* might take him is obviously for another place, it's not for any concern of yours at this stage.

(Emphasis in italics added)

Powers of the Supreme Court on appeal

[14] The Supreme Court's powers on hearing an appeal from the Magistrate's Court are set out in the Judicature (Appeals in Criminal Cases) Ordinance. Section 11(1) of that Ordinance provides:

> **11.**—(1) After hearing the appellant or his or her counsel, if appearing, and the Public Prosecutor, if appearing, the Supreme Court may, if it considers that there is not sufficient ground for interfering, dismiss the appeal, or may—
>
> (a) in an appeal from a conviction—
>
> (i) reverse the finding and sentence and acquit or discharge the accused, or order the accused to be retried on the same charge by a Court of competent jurisdiction, or commit the accused for trial on any other charge which appears to be disclosed by the evidence; or
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> (ii) alter the finding, maintaining the sentence or, with or without altering the finding, reduce or increase the sentence to any sentence which could have been imposed by the Magistrate's Court; or
>
> (iii) with or without such reduction or increase and with or without altering the finding, alter the nature of the sentence;
>
> (b) in an appeal from any other order, alter or reverse such order and, in either case, make any amendment or any consequential or incidental order as to costs or otherwise that may appear just and proper.
>
> …

[15] If I were to allow the appeal, I would have jurisdiction to acquit or discharge Mr Warren, or order that he be re-tried on the same charge by a court of competent jurisdiction.[11] No issue arises in relation to the possibility of committing Mr Warren for trial on any other charge that might be disclosed by the evidence.[12] On sentence, I have a general power to reduce or increase the sentence or alter its nature.[13] If Mr Warren were not to succeed, I would simply dismiss the appeal.[14]

[16] The structure of s 11(1) contemplates dismissal of the appeal if the Supreme Court does not consider that there is sufficient ground to interfere with a conviction or sentence but, conversely, to allow an appeal where satisfied it should do so. That approach to appellate

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11 Judicature (Appeals in Criminal Cases) Ordinance, s 11(1)(a)(i).
12 Ibid,
13 Ibid, s 11(1)(a)(iii).
14 Ibid, s 11(1).

review is broad in nature. No criteria are established; for example, on the face of s 11(1), there is no need to establish (for example) a "miscarriage of justice" as a prerequisite to a successful appeal. Section 11 provides a different standard to that applied on a conviction appeal to the Court of Appeal from a judgment of the Supreme Court.[15]

[17] During the hearing, Mr Raftery submitted that, even if I considered that some error had been made at first instance, the conviction appeal should be dismissed if I were not satisfied that a "substantial miscarriage of justice" had occurred. That submission was based on s 16 of the Judicature (Courts) Ordinance, which provides:

> (1) No information, charge, summons, conviction, sentence, order, bond, warrant or other document and no process or proceeding shall be quashed, set aside or held invalid by any Court or quasi-judicial authority *by reason only of any defect, irregularity, omission or want of form unless the Court or authority is satisfied that there has been a substantial miscarriage of justice*;
>
> (Emphasis added)

[18] I do not accept that s 16 applies. Section 16 is directed at a situation where there is some defect of the type envisaged by s 16(1), with the consequence that it applies only to questions of form, not substance. If Mr Warren were to succeed on a substantive ground (for example, a failure on the part of the Island Magistrate to direct the Assessors on the law), the conviction could not be saved by application of s 16. That interpretation is consistent with the approach taken in New Zealand under the present s 379 of the Criminal Procedure Act 2011 and its predecessor, s 204 of the Summary Proceedings Act 1957. Section 16 appears to have been modelled on the earlier of those provisions.

[19] The New Zealand authorities (which I apply) support a two-stage approach to the applicability of a provision such as s 16 of the Judicature (Courts) Ordinance. They are:[16]

> (a) Is the "defect irregularity omission or want of form" such that the proceedings are a nullity? If not,

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15 See para [21] below.

16 See *Mathieson v Allan* [1979] 2 NZLR 200 (HC) at 203 and *Dotcom v Attorney-General* [2015] 1 NZLR 745 (SC) at paras [129] and [130]. See also, *R v Kestle* [1973] 2 NZLR 606 (CA) at 609.

(b) Has the "defect irregularity omission or want of form" caused a miscarriage of justice? If not, then the defect or irregularity can be cured by the section.

[20] In my view, none of the grounds of appeal are directed to the types of situations covered by s 16. The grounds of appeal are substantive; not merely procedural. The issues raised by Mr Warren go beyond a "defect, irregularity, or want of form". Accordingly, s 16 is not engaged.

[21] Mr Raftery's submission reflects the way in which the Court of Appeal would determine an appeal from the Supreme Court, rather than one from the Magistrate's Court to the Supreme Court. Sections 11[17] and 37(1) of the Judicature (Appeals in Criminal Cases) Ordinance demonstrate the different standards of appellate review to be taken by the Supreme Court and the Court of Appeal respectively. While the proviso to s 37(1) (the proviso) empowers the Court of Appeal to dismiss an appeal if there has been no "substantial miscarriage of justice", no such provision is found in s 11. Relevantly, the proviso to s 37(1) states:

37. (1) …

> Provided that the Court may, notwithstanding that it is of the opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if it considers that no substantial miscarriage of justice has occurred.

Conviction appeal

(a) Structure of judgment

[22] Initially, I deal fully with three aspects of Dr Ellis' submissions.[18] The first involves the need or otherwise for directions to be given by the Island Magistrate. The second concerns allegations of a lack of independence and impartiality on the part of the Magistrate and the Assessors. The third considers whether any constitutional issues arise out of the absence of a statutory definition of the term "indecent". Then, in summary form,[19] I address the remaining points on the conviction and sentence appeals.

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17 The relevant parts of which are set out at para [14] above.

18 See para [5](a), (b) and (d) above.

19 This approach to disposal of the remaining grounds of appeal is consistent with the observations of the Privy Council in *Warren v The State* [2018] PNPC 1 and [2018] UKPC 20 at para 14.

[23] I structure this judgment as follows:

(a) First, I discuss the role and functions of the Island Magistrate and assessors, as a matter of Pitcairn law.

(b) Second, I consider whether it was necessary for the Island Magistrate to direct the Assessors on the elements of the charges.

(c) Third, I consider whether there is any substance to the claim that the Island Magistrate and the Assessors were not independent and impartial judicial officers.

(d) Fourth, I analyse Dr Ellis' submission that the offence of "indecent behaviour" is unconstitutional, having regard to the general way in which s 5 of the Summary Offences Ordinance is expressed.

(e) Fifth, I consider whether reasons were required or adequate reasons were given whether by the Island Magistrate and/or the Assessors for entering the convictions.

(f) Sixth, I consider whether the verdicts were justified on the evidence adduced before the Magistrate's Court.

(g) Seventh, I determine the sentence appeal.

(b) Role and functions of the Island Magistrate and the Assessors

(i) The Pitcairn statutory provisions

[24] Section 11 of the Judicature (Courts) Ordinance requires the Governor to appoint an "Island Magistrate … from among the permanent residents of the Islands, who shall not be required to be professionally qualified". The appointee must have been resident in the Islands for not less than five years, as at the time of his or her appointment.[20] The Island Magistrate

[20] Judicature (Courts) Ordinance, s 11(2).

may exercise the specific jurisdiction and powers conferred by Part II of the Justice Ordinance.[21] To put those requirements in context, Pitcairn's population, allowing for some fluctuations typical of the island's history, is in the vicinity of 50 people, none of whom are legally qualified. Plainly, the legislative intent was for minor offences to be dealt with by someone with knowledge of the local community; similar to the way in which Justices of the Peace are used in England and Community Magistrates, in New Zealand.

[25] Magistrates, other than the Island Magistrate, must be qualified in law and have practised in a Commonwealth country for not less than five years prior to the date of their appointment.[22] Every Magistrate is "subject at all times to the authority and directions of the Chief Justice or other judge of the Supreme Court".[23]

[26] Mr Young, the Island Magistrate who presided over Mr Warren's trial, is not legally qualified. While s 5(2) of the Justice Ordinance provides an ability for the Island Magistrate "to consult or to seek…advice" from any "Senior Magistrate"[24] on any question of law, Mr Young did not do that in this case.

[27] Section 3(2) of the Justice Ordinance states that the Magistrate's Court "shall be constituted by a Magistrate sitting with two assessors to be appointed". The selection process, together with the form of oath to be taken by an assessor, is set out in s 29 of that Ordinance:

> **Selection of assessors**
>
> **29**.—(1) In cases in which the Magistrate sits with assessors, the procedure set out in subsection (2) shall be followed.
>
> (2) (a) The Registrar shall inform the defendant and the prosecutor that the assessors for that case are about to be selected, that they each have the right to object to any person serving as an assessor in the case without assigning any reason for such objection and that if either of them has any objection it must be raised as each person's name is called before being sworn.

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21 Ibid, s 11(3).
22 Ibid, s 11(4).
23 Ibid, s 11(5).
24 There is no definition of the term "Senior Magistrate" in Pitcairn legislation. I interpret s 5(2) of the Justice Ordinance to be referring to a legally qualified Magistrate, appointed under s 11(4) of the Judicature (Courts) Ordinance: see para [25] above.

(b) The Registrar shall then call out in alphabetical order the names of the persons appearing on the list of assessors for that case.

(c) *As each name is called out, the defendant shall be asked by the Registrar if he or she has any objection to that person serving as an assessor in the case. The prosecutor shall then be asked if he or she has any objection to that person serving as an assessor in the case.* If neither the defendant nor the prosecutor has any objection, the person called shall then be sworn in as an assessor for the case. *If either the defendant or the prosecutor objects to the person whose name is called serving as an assessor in the case, the next name shall be called from the list of assessors and the same procedure followed until two assessors have been selected*.

(d) *If all the names on the list of assessors are called without two assessors being selected, the names of the persons objected to shall be again called in alphabetical order by the Registrar who shall ask first the defendant and then the prosecutor if they have any objections to such person serving as an assessor in the case and their reasons for such objection. The same procedure shall be followed with each name on the list of assessors until two assessors are selected against whom neither the defendant nor the prosecutor has any reason for objection*.

(e) If all the names on the list of assessors are again called without two assessors being selected, the Magistrate shall direct that a supplementary list of assessors be forthwith prepared in the manner provided by subsection (1) of section 9 and the procedure set out in paragraphs (b), (c) and (d) hereof shall be followed until two assessors have been selected.

(f) *When two assessors have been selected, the Magistrate shall discharge the other persons whose names appear on the list of assessors and the Registrar shall read the charge brought against the defendant to the two persons selected as assessors for the case and then swear each of them in on the following oath*:—

> *"I swear that I will well and truly serve as an assessor in this case and a true verdict on the evidence give."*

(Emphasis added)

[28] The way in which an assessor is chosen supports the view that persons living on the Island who may have general knowledge of the incident and character of an accused will not be prohibited from service. While s 29(2)(c) does contemplate a round of pre-emptory challenges, once the list is called again the focus is on whether there is any "reason for objection"; in other words, a challenge for cause. An objection for cause is likely to be upheld if a person had some involvement in the incident or was so closely connected to the accused as

to compromise his or her independence and/or impartiality.[25] But an objection based on some common knowledge of an accused's background would not (in the context of a jurisdiction of no more than 50 people) be enough. In some ways, the assessor system harks back to the origins of the jury system. In that regard, in a discussion paper on the topic of Juries in Criminal Trials, the New Zealand Law Commission said:[26]

> The common starting point for the history of the jury is its introduction into England by the Normans. However, it appears to have existed in various forms prior to that in other parts of Europe. At the time it was introduced to England the jury was a body of neighbours convened to answer some questions on oath. The custom soon developed where the jury delivered a verdict of guilty or innocent, although for many centuries the jury remained a body of men (of property) who gave their decision based upon their personal knowledge of the people, the case, or the locality. In this sense the jury resembled a body of witnesses. By the nineteenth century, however, the jury was expected to be entirely independent of the case it tried and to have no prior knowledge of it.

[29] Section 32 explains the way in which the presiding Magistrate must seek the views of the Assessors before a final decision is made:

> **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
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> (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.
>
> (2) In cases in which the Magistrate sits without assessors, he or she shall, at the conclusion of the evidence, give a decision and shall make such order as he or she shall think appropriate and just in accordance with that decision.

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25 Judged by reference to the test for apparent bias set out at para [160] below.

26 *Juries in Criminal Trials: Part One: a discussion paper* (NZLC pp 32) at para 2.

[30] While s 32(1)(a) refers to "opinions" being sought from the assessors, the oath that an assessor takes refers to "verdicts".[27] I treat those terms, for interpretation purposes, as synonymous. No other interpretation is tenable.

[31] The procedure to be followed in the Supreme Court empowers a judge to sum up to the assessors. Assessors are also enabled to confer as between themselves in private and not expressly forbidden from deliberating in the presence of the judge.[28] Section 9(3) and (4) of the Judicature (Courts) Ordinance states:[29]

> **9. Mode of trial**
> …
> (3) When in any trial held with the aid of assessors the case on both sides is closed, *the judge may sum up the evidence* and shall then require each of the assessors to state his or her opinion orally and the judge shall record each such opinion and shall then give judgment but in so doing shall not be bound to conform to the opinion of the assessors.
> (4) *Nothing in subsection (3) shall be construed as prohibiting the assessors or any of them from retiring to consider their opinion if they so wish, or, during such retirement or at any time during the trial, from consultation with one another*.
>
> (Emphasis added)

[32] In the Magistrate's Court, unlike the position in the Supreme Court, there is no specific requirement for a Magistrate to sum up to assessors. Nor is there any specific power for the assessors to confer with each other or with the Magistrate. Section 32(1)(a) and (b) of the Justice Ordinance explain the role of a Magistrate when sitting with assessors:

> **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
> …

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27 Section 29(2)(f) of the Justice Ordinance, set out at para [27] above.

28 Authority for the proposition that the judge and assessors are entitled to "collaborate" during deliberations is discussed at para [40] below.

29 Compare with s 32(1) of the Justice Ordinance (set out at para [32] below) which sets out the procedure to be followed when a Magistrate sits with Assessors.

[33] Although the legislation states that assessors are regarded as part of "the Court" in the Magistrate's Court,[30] different terminology is used when the Supreme Court sits with assessors. Nevertheless, even though the terminology differs, it appears to create a distinction without a difference. Because a Magistrate, sitting with assessors, is entitled to disregard the assessors' views in reaching the Court's decision,[31] for all practical purposes the assessors act only as advisers in both courts. Nevertheless, the difference in wording gives rise to some difficulty in determining whether a Magistrate presiding over a trial with assessors is required to sum-up to them.

(ii) The Privy Council decisions

[34] Beginning in the 18th Century,[32] the Parliament of the United Kingdom passed laws to provide for the involvement of laypersons in the criminal justice systems of many of its colonies. For various reasons, it was considered that the jury system was unworkable in some colonies. Therefore, lay participation was maintained in the form of assessors who assisted the judge in determining relevant facts.

[35] Under relevant legislation, criminal trials in those colonies in which assessors were used were broadly similar to that in Pitcairn. In a series of decisions on appeal from Fiji under provisions akin to s 9 of the (Pitcairn) Judicature (Courts) Ordinance (applicable to trials in the Supreme Court),[33] the Privy Council supported the view, that, even though assessors are treated as members of a panel hearing charges, they do no more than give an advisory opinion. In *Maharaj v The King*,[34] *Joseph v The King*,[35] and *Ram Bali v The Queen*,[36] the Privy Council held that the ultimate decision on whether a person is guilty or not guilty was for the judge alone. Delivering the advice of the Board in *Maharaj*, Sir John Beaumont said:[37]

> … the judge is required to give judgment, and it is for him to convict or acquit, and in doing so, he is not bound by the opinion of the Assessors.

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30 Justice Ordinance, s 3(1).
31 Justice Ordinance, s 32(1)(b) set out at para [28] above.
32 Neil Vidmar, *Juries and Lay Assessors in the Commonwealth: A Contemporary Survey* (Criminal Law Forum 13: 385-407, 2002 at 385 (Kluwer Academic Publications, Netherlands).
33 The relevant parts of s 9 are set out at para [31] above.
34 *Maharaj v The King* [1947] UKPC 87.
35 *Joseph v The King* [1947] UKPC 88.
36 *Ram Bali v The Queen* [1962] UKPC 16.
37 *Maharaj v The King* [1947] UKPC 87 at 88.

[36] At the time of the Privy Council decisions, relevant Fijian law was, in material terms, similar to that applied in the Supreme Court of the Pitcairn Islands.[38] That is unsurprising as, from 1952 until 1970, Pitcairn was governed from Fiji.[39]

[37] In *Maharaj*, the Privy Council allowed the appeal because, contrary to the legislation, the Judge appeared to have treated the assessors as if they were a jury and left the decision on all questions of fact to them.[40] In that case, both assessors had returned "verdicts" of "guilty". For the same reasons, the appeal was allowed in *Joseph*.[41] A different conclusion was reached in *Ram Bali* because the Privy Council held that the Judge had summed up correctly and, despite disagreeing with the not guilty opinions expressed by the three assessors, had made a decision open to him on the evidence.[42]

(iii) The New Zealand appellate decisions

[38] Decisions of the Full Court of the Supreme Court of New Zealand (to which I refer as the "Full Court"), on appeal from other Pacific jurisdictions, discuss the role of assessors, the obligation for a judge to direct assessors on the law and the circumstances in which it is appropriate for judge and assessors to collaborate in the deliberation process.[43] These appeals were from the High Court of the Cook Islands and the High Court of Samoa, to which a different procedural approach was mandated at first instance.[44]

[39] In *Tangi Puri v The Queen,* the Full Court (on appeal from the High Court of the Cook Islands) considered an appeal against conviction and sentence on a charge of rape. One of the grounds of appeal was that "the record contains no direction by the Judge to the assessors concerning Puri's statement, and the weight to be attached thereto, and no direction was given as to the necessary corroboration of the evidence of the complainant". Further "there [was] no record of any direction as to the onus of proof, and the record [was] silent whether the Judge

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38 Criminal Procedure Code, s 308 (Fiji).
39 For background, see *Christian v Lands Court (No. 2)* [2023] PNSC 2 at paras [81]–[86].
40 Ibid.
41 *Joseph v The King* [1947] UKPC 88 at p 2.
42 *Ram Bali v The Queen* [1962] UKPC 16 at p 4.
43 *Latoatama v Williams* [1954] NZLR 594, *Re Moke Ta'ala* [1956] NZLR 474 and *Tangi Puri v R* [1967] NZLR 328.
44 Cook Islands Act 1915 (NZ), s 119, set out at para [55] below.

retired with the assessors".[45] In the absence of a provision akin to s 9 of the (Pitcairn) Judicature (Courts) Ordinance,[46] McGregor J, delivering the judgment of the Court, said:[47]

> By virtue of s. 301 on a trial by assessors no person shall be convicted by the Judge of any offence unless the conviction is concurred in by not less than four of the assessors, and if the Judge is of the opinion that the accused should not be convicted, or if less than four of the assessors concur in the conviction, the accused shall be acquitted. It must be noted that the conviction is by the Judge alone, although prior thereto the conviction must be concurred in by not less than four of the assessors. Even if four of the assessors concur in the conviction, the Judge, if he is of opinion that the accused should not be convicted, may enter an acquittal. The position of the assessors is therefore, although analogous, somewhat different from the position of common jurors in New Zealand. …

[40] In *Poimatagi v The King*,[48] Finlay J pointed out that the Judge and the assessors should collaborate and by so doing the assessors have the benefit of what might be expected to be the greater legal knowledge and the wider experience in legal matters of the Judge, whilst the latter is afforded the advantage of information as to the psychology, habits and customs of the people of the Islands, a knowledge which might well be advantageous to a Judge who himself has not that knowledge.[49] These views reflected the rationale for the "assessor" system; knowledge of indigenous custom.[50]

[41] *Tangi Puri* went on to approve observations made by the Full Court in *Latoatama v Williams.*[51] McGregor J said:[52]

> We agree with the views of this Court in the judgment of the Court delivered by Stanton J. in *Latoatama, Folitolu and Tamaeli v Williams* …, when it is said that the procedure under the Cook Islands statute differs vastly from a trial by a Judge and jury, and an appeal to this Court differs materially from an appeal against conviction by the verdict of a jury. *By virtue of s. 119 the High Court is entitled to adopt such procedure as it considers "most consistent with natural justice and convenience"*.
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> (Emphasis added)

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45 *Tangi Puri v The Queen* [1967] NZLR 328 at 329.
46 Set out at para [31] above.
47 *Tangi Puri v The Queen* [1967] NZLR 328 at 330.
48 *Poimatagi v The King* [1948] G.L.R. 419.
49 *Tangi Puri v The Queen* [1967] NZLR 328, at 330.
50 See para [34] above.
51 *Latoatama, Folitolu and Tamaeli v Williams* [1954] NZLR 594, 600.
52 *Tangi Puri v The Queen* [1967] NZLR 328, at 330–331.

[42] In rejecting a submission that the Judge ought to have directed the assessors on evidential issues or the onus of proof, McGregor J continued:[53]

> The record is silent as to any direction in law by the Judge to the assessors as to the weight to be attached to the evidence, as to the necessity for corroboration, or as to the onus of proof. In the *Latoatama* case … it was agreed by the Court that the Judge and assessors were not bound to conduct their deliberations in open Court, and that to insist upon a summing-up in open Court would be merely to require that part of their deliberations be conducted in open Court. In *In re Moke Ta'ala* … an appeal from the High Court of Samoa under the provisions of the Samoa Act 1921, which does not differ in any material respect from the Cook Islands Act 1915, the decision in *Latoatama's* case … was approved, subject to this, that where the trial Judge thinks it expedient to sum up — and does in fact sum up — in open Court for the guidance of the assessors, then it was thought the summing up should conform with the rules which are followed and observed in British Courts of justice in summing up for the guidance of a jury.

(iv) The Pitcairn decisions

[43] Without reference to the earlier decisions of the Privy Council or Full Court, this Court took the same approach in *R v Warren.*[54] Tompkins J, who was dealing with a summary offence that had been transferred to the Supreme Court for hearing with more serious charges, sat (by agreement of counsel) with assessors.[55] As in the present case, the only factual issue was whether two articles found in Mr Warren's possession were "indecent". Tompkins J explained his approach as follows:[56]

> [47] … 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.
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> [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:
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> > "Yes, my opinion is that it is indecent".

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53 Ibid, at 335.
54 *R v Warren* [2016] PNSC 1.
55 Ibid, at para [41].
56 Ibid, at paras [47]–[48].

[44] It is apparent that Tompkins J allowed the assessors to confer with each other but did not, himself, confer with them. The Judge then proceeded to reach his own conclusion, given that he was not bound by the assessors' "opinions".[57] He agreed with the assessors' opinions and convicted Mr Warren on the relevant charges.[58]

[45] Mr Warren appealed to the Court of Appeal. In support of the appeal, it was submitted that the hearing had miscarried because the two assessors did not give reasons for their decisions. Dr Ellis, who was also counsel for Mr Warren on that appeal, relied upon a decision of the European Court of Human Rights, in *Taxquet v Belgium*,[59] in submitting that reasons were required to ensure proper account was taken of Mr Warren's "freedom of expression".[60]

[46] The Court of Appeal took the view that, on the facts of the case before it, there was no requirement for the assessors to give reasons. By contrast with *Taxquet*, the Court observed that there was a single issue (indecency) and that "the assessors were given careful instruction in writing about how they must approach that question". As a result, the Court said:[61]

> [38] … 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.

[47] The Court of Appeal added:[62]

> [39] … 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.

[48] While Mr Warren appealed against the Court of Appeal's decision on other grounds, this point was not advanced before the Privy Council.[63]

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57 Ibid, at para [49].
58 Ibid, at paras [63] and [66].
59 *Taxquet v Belgium* [2009] ECHR 2279 and [2010] ECHR 1806.
60 *Warren v R* [2016] PNCA 1 (Potter, Blanchard and Hansen JJA) at paras [35] and [36].
61 Ibid, at para [38].
62 Ibid, at para [39].
63 *Warren v The State* [2018] UKPC 20 (Lord Mance, Lord Sumption, Lord Hughes, Lord Lloyd-Jones and Lord Briggs).

(v) Summary

[49] To summarise:

(a) When assessors sit with a Magistrate to determine a criminal charge in the Magistrate's Court, they are part of "the Court".[64] Section 32(1)(a) of the Justice Ordinance mandates that the Magistrate, at the conclusion of the evidence, must "require the assessors to state their opinions" and to record them.[65] In the legislative context, the term "opinions" is to be equated with the term "verdicts".[66]

(b) It is open for a judge (in the Supreme Court) or a magistrate (in the Magistrate's Court) to give a judgment which does not conform with the opinions of the assessors, provided that reasons for reaching that view are given and transmitted to the Chief Justice.[67]

(c) The Privy Council decisions in *Maharaj, Joseph* and *Ram Bali* each deal with a provision that is materially similar to s 9(3) of the Judicature (Courts) Ordinance, which applies to trials in the Supreme Court. The Full Court's decisions in *Latoatama, Re Moke Ta'ala* and *Tangi Puri* are more closely analogous to the procedure in the Magistrate's Court where there is no specific requirement for the magistrate to sum up to the assessors.

(d) Adopting observations made by Finlay J in *Poimatagi v The King,*[68] McGregor J, giving the judgment of the Full Court in *Tangi Puri,* pointed out that, under a provision which did not require a summing up, "the Judge and the assessors should collaborate and by so doing the assessors have the benefit of what might be expected to be the greater legal knowledge and the wider experience in legal matters of the Judge".[69] However, those observations were

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64 See paras [26] and [33] above.
65 Section 32(1)(b) of the Justice Ordinance is set out at para [32] above.
66 See para [30] above.
67 Judicature (Courts) Ordinance, s 9(3) and Justice Ordinance, s 32(1)(b).
68 *Poimatagi v The King* [1948] GLR 419
69 *Tangi Puri v The Queen* [1967] NZLR 328 at 330. This passage is set out at para [39] above.

made in the context of a provision that gave a general discretion to the Court as to procedure,[70] and did not contemplate a "judge" who was not legally qualified.

(c) Was the Island Magistrate required to direct the Assessors?

[50] It is necessary to consider discretely whether the Island Magistrate had a legal duty to direct the assessors on relevant law. While s 9(3) of the Judicature (Courts) Ordinance[71] expressly contemplates the possibility of a summing up in Supreme Court cases, there is no similar provision for the Magistrate's Court. Although s 9(3), uses the phrase "the Judge may sum up the evidence", the Privy Council authorities create an expectation that the presiding Judge will direct assessors both on matters of law and evaluation of evidence. There is no comparable provision in s 32(1) of the Judicature (Courts) Ordinance in respect of the Magistrate's Court.

[51] There are two possible reasons for that difference, both of which are plausible. The first is that the Supreme Court deals with more serious crime and, as a result, assessors who sit as advisers to the judge might be said to require more guidance on legal principle and evaluation of the facts.[72] The second is the fact that the legislation expressly preferred to empower the Island Magistrate, sitting with assessors, to determine some summary offences While acknowledging that the Island Magistrate is unlikely to be legally qualified and unsuited to provide a summing up, this rationale has the benefit of retaining full community involvement in part of the criminal justice system.[73]

[52] The first of those reasons, while seemingly justifiable, is at odds with the decisions of the Full Court to which I have referred. Those cases involved appeals from the High Court of the Cook Islands and the High Court of Samoa respectively where serious criminal conduct was alleged. As to the second, s 5(1)(b)(i) of the Justice Ordinance limits the extent of the summary criminal jurisdiction of the Magistrate's Court that may be exercised by the Island Magistrate to those that attract a maximum penalty of $400 or imprisonment for a term of 100 days, or both, and authorises the Island Magistrate to confer with legally qualified magistrates

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70 For example, see s 119 of the Cook Islands Act 1915 (NZ), set out at para [55] below.

71 Set out respectively at paras [31] and [32] above.

72 The comparative criminal jurisdiction exercised by the Magistrate's Court and the Supreme Court respectively are set out in Parts IV and VII of the Justice Ordinance. A list of offences that are triable only on a summary basis is set out in the Schedule to the Justice Ordinance.

73 See paras [24] and [25] above.

who may assist him or her to navigate trial procedure.[74] In my view, the second provides the legal rationale for the legislature's decision to adopt different procedures in the Magistrates' and Supreme Courts.

[53] In *R v Warren,*[75] Tompkins J summed up to the assessors on the summary charges with which he was dealing, and provided written guidance on the issues on which their opinions were sought. The Court of Appeal approved that approach, primarily because the reasons for the Court's decision were "readily discernible from the procedural framework" that the Judge adopted.[76]

[54] Acknowledging that the Full Court decisions were not drawn to the Court of Appeal's attention, its approach differed from that taken in the appeals from the Cook Islands and Samoa. For example, in *R v Moke Ta'ala*,[77] the Full Court (on appeal from the High Court of Samoa) expressly distinguished cases in which the presiding judicial officer had elected to sum up in circumstances where it considered there was no legal obligation to do so. Delivering the judgment of the Court, McGregor J said:[78]

> Further argument in support of this appeal was founded on the proposition that one of the witnesses for the prosecution—Sione Peterson—was or might have been an accomplice, and that in his summing-up to the assessors the learned Chief Judge failed to give the warning that is appropriate and necessary in such a case. Upon this aspect of the appeal this Court has had the advantage of hearing an extremely able and well-presented argument by Mr Shires; but, for the reasons set out hereafter, we are of opinion that that argument ought not to prevail. *It should be mentioned in the first place that this was not a trial before a Judge and a jury, but a trial, in accordance with the law of Samoa, before a Court sitting with assessors. At such a trial a summing-up in open Court is not necessary: Latoatama, Folitolu*, *and Tamaeli v Williams* [1954] NZLR 594—a case in which the trial was governed by legislative provisions not materially different from those governing trials in Western Samoa for offences punishable by death or imprisonment for more than five years. *But where, as in this case, the trial Judge thinks it expedient to sum up—and does, in fact, sum up—in open Court for the guidance of the assessors, then we think the summing-up should conform with the rules which are followed and observed in British Courts of Justice in summing-up for the guidance of a jury.* Those rules include the well-known and long-established rule—now a rule of law, and no longer a mere rule of practice—that, when a witness for the prosecution is or may be an accomplice, it is incumbent

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74 See para [26] above.
75 *R v Warren* [2016] PNSC 1 at paras [47] and [48], set out at para [43] above.
76 *Warren v R* [2016] PNCA 1, at paras [38] and [39], set out at paras [46] and [47] above.
77 *R v Moke Ta'ala* [1956] NZLR 474 (SC).
78 Ibid, at 478 and 479.

> upon the trial Judge to direct the jury to decide whether in fact such witness is an accomplice, and to tell the jury that, if they find him to be an accomplice, they should pay heed to the warning which ought always to be given in such a case.
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> (Emphasis added)

[55] *R v Moke Ta'ala* was an appeal from the High Court of Samoa under the provisions of the Samoa Act 1921, which did not differ in any material respect from the Cook Islands Act 1915 under which *Tangi Puri* was decided. The Cook Islands Act 1915 was a statute of the New Zealand Parliament which was substantially repealed when the Constitution of the Cook Islands was promulgated after passage of the Cook Islands Constitution Act 1964, also by the New Zealand Parliament. The Cook Islands' legislation did not deal with the obligation (or otherwise) of a judge to direct assessors. Instead, the more general provisions of s 119 of the Cook Islands Act 1915 stated:[79]

> 119. Subject to the provisions of this Act and of rules of Court, the practice and procedure of the High Court in the exercise of its civil and criminal jurisdiction shall be such as the Court thinks in each case to be most consistent with natural justice and convenience.

[56] While not completely analogous, the broad discretion as to criminal procedure available under s 119 of the Cook Islands Act 1915 has parallels in the less prescriptive obligations cast on a magistrate presiding, in Pitcairn, over a summary trial with assessors. However, applying modern principles of criminal procedure designed to safeguard the constitutional rights of accused persons and to ensure fair trials, I consider that the decisions of the Full Court should be reconsidered. It is the constitutionally enshrined right to a fair trial[80] in all Pitcairn Courts that requires a fresh consideration of the obligation (or otherwise) of a Magistrate to sum-up to the appointed assessors.

(d) Was the trial fair?

[57] As I read s 11(1) of the Judicature (Appeals in Criminal Cases) Ordinance, it is for this Court to decide whether it is satisfied that the appeal should be allowed, and with what consequences.[81] In most instances, it is likely that an appeal will be allowed if the verdicts are

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79 Section 119 was repealed on 23 November 1982 by s 2 of the Cook Islands Amendment Act 1982 (NZ).
80 Article 8 of the Pitcairn Constitution, the relevant parts of which are set out at para [58] below.
81 See para [16] above.

unsafe or the trial unfair. Conventional "fair trial" requirements will demand that the decision-makers are adequately informed about the legal principles they need to apply before finding a person guilty of a crime.[82] Until such a finding is made, the accused party is entitled to the presumption of innocence. In my view, there is no principled basis on which this Court could dismiss an appeal against a conviction that had been entered after an unfair trial.

[58] Article 8 of the Pitcairn Constitution (the Constitution) deals with the right to a fair trial and, relevantly provides:

> **Right to a fair trial**
>
> **8.**—(1) In the determination of his or her civil rights and obligations or of any criminal charge against him or her, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. …
>
> (2) Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.
>
> …

[59] Article 8(3) of the Constitution sets out the rights of accused persons:

> (3) Everyone charged with a criminal offence has the following minimum rights—
>
> (a) to be informed promptly, in a language which he or she understands and in detail, of the nature and cause of the accusation against him or her;
>
> (b) to have adequate time and facilities for the preparation of his or her defence;
>
> (c) to defend himself or herself in person or through legal assistance of his or her own choosing or, if he or she has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;

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[82] Article 8(1) and (2) of the Constitution, are set out at para [59] above.

(d) to examine or have examined witnesses against him or her and to obtain the attendance and examination of witnesses on his or her behalf under the same Right to a fair trial conditions as witnesses against him or her;

(e) to have the free assistance of an interpreter if he or she cannot understand or speak the language used in court.

[60] The fair trial rights conferred by art 8(3) are much more prescriptive than those applied by the Full Court in the appeals from the Cook Islands and Samoa. In those cases, a flexible touchstone was used: one that the Court considered "in each case to be the most consistent with natural justice and convenience".[83] So, after enactment of the Constitution, is a full summing up required for a fair trial before a magistrate sitting with assessors?[84] In my view, that is the only substantive unfair trial question that requires detailed discussion.

[61] Article 8(1) of the Constitution is based on art 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (the Convention), which formed part of English law by its inclusion in a schedule to the Human Rights Act 1998 (UK). In *R v Mushtaq*,[85] the House of Lords considered whether the absence of a direction to a jury that they should disregard any evidence of a confession that they found to have been obtained by oppression or other improper means infringed art 6, created an unfair trial.

[62] The principal speech in the House was delivered by Lord Rodger of Earlsferry. After setting out the relevant part of art 6 of the Convention (which is in materially the same terms as the first part of art 8 of the Constitution),[86] Lord Rodger said that it was well established that the right against self-incrimination fell within its scope. In concluding his analysis of the applicability of art 6(1) on the facts of the case, Lord Rodger (with whom Lord Steyn, Lord Phillips and Lord Carswell agreed on this point) held that the Judge contravened art 6(1) by directing the jury that they might rely on the confession without drawing to their attention that they must disregard it if (contrary to a *voir dire* ruling he had given) they concluded that it had been induced by oppression or other improper means.[87] So, in that case, fair trial considerations demanded a summing up that covered that important evidential issue.

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83 See s 119 of the Cook Islands Act 1915 (NZ), set out at para [55] above.
84 Other bases on which Mr Warren contends that his trial was unfair are addressed later.
85 *R v Mushtaq* [2005] 3 All ER 885 (HL).
86 Article 8(1) and (2) of the Constitution is set out at para [57] above.
87 *R v Mushtaq* [2005] 3 All ER 885 (HL) at para 53.

[63] Although the proviso does not apply in this case, it is necessary to start an analysis of the fair trial issue by reference to it. That is because relevant appellate decisions discuss whether an appeal should be allowed on grounds of unfair trial by reference to the concept of a "substantial miscarriage of justice" incorporated into the proviso.[88] For reasons that follow, if a trial is unfair, a "substantial miscarriage of justice" would have occurred.

[64] In the form in which it stood prior to repeal in 2011, s 385(1) of the Crimes Act 1961 (NZ) contained a proviso in similar terms to s 37(1) of the Judicature (Appeals in Criminal Cases) Ordinance. As a result the appellate authorities that discuss the proviso to s 385(1) inform interpretation of the Pitcairn legislation.

[65] In two decisions, the Supreme Court of New Zealand (*R v Condon,*[89] and *R v Matenga*[90]) confirmed that the proviso did not apply to an unfair trial. For the Supreme Court in *Matenga,* Blanchard J observed that an assessment of the "fairness" of a trial was to be made in relation to the way in which it had been conducted rather than by reference to substantive reasons for allowing an appeal on the basis of error by the trial judge.[91]

[66] It follows that a conviction entered after an unfair trial should not stand; whether in the Magistrate's Court or the Supreme Court. The circumstances in which a trial might be unfair was considered by the Privy Council, in *R v Howse*.[92] The differing views of the majority and minority of the Board demonstrate the difficulty of determining whether a trial is unfair.

[67] *Howse* was an appeal against guilty verdicts on charges of murder following a jury trial in New Zealand. Their Lordships started from the trite proposition that not every irregularity or error in the conduct of a trial makes the trial unfair. For a trial to be characterised as "unfair", it was necessary for the error to be of a fundamental kind. That was so to ensure that the proviso (then in force in New Zealand)[93] would not be "stultified" by setting the bar too low in determining whether a trial should be characterised as "unfair".[94]

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88 See para [21] above.
89 *R v Condon* [2007] 1 NZLR 300 (SC).
90 *R v Matenga* [2009] 3 NZLR 145 (SC).
91 Ibid, at paras [24]–[26]. See also *R v Condon* [2007] 1 NZLR 300 (SC) at paras [77] and [79].
92 *R v Howse* [2006] 1 NZLR 433 (PC).
93 Set out at para [64] above.
94 *R v Howse* [2006] 1 NZLR 433 (PC), at para [37].

[68] Although there was no substantive difference among the members of the Board who heard Mr Howse's appeal as to the principles to be applied in determining whether the trial had been "unfair", their Lordships divided as to whether the (acknowledged) serious defects in the trial Judge's summing up and other aspects of her management of the trial meant that Mr Howse did not receive a "fair trial," as guaranteed by s 25(a) of the New Zealand Bill of Rights Act 1990. In material respects, s 25(a) is in the same form as art 8(1) of the Constitution.[95]

[69] The majority (Lord Hutton, Lord Carswell and Sir Swinton Thomas) took the view that the trial had not been rendered unfair by the trial Judge's conduct and that the miscarriage of justice that was accepted to have occurred could be cured by application of the proviso to s 385(1) of the Crimes Act. For the majority, Lord Carswell said:[96]

> [33] The submission advanced on behalf of the appellant was that the defects in the trial were so many and so serious that it cannot be said that he had a fair trial. In considering this submission it is necessary to examine closely what is meant by a fair trial in this context and the relationship between the right to a fair trial and the operation of the proviso. The authorities make it clear that not every irregularity or error in the conduct of a trial, even if it might constitute a miscarriage of justice for the purposes of an appeal under s 385(1) of the Crimes Act, will in this context suffice to make the trial unfair. Barwick CJ in *Driscoll v R* (1977) 137 CLR 517 at p 527 warned that:
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> > "If . . . every irregularity of summing up, admission of evidence or in procedure warranted a new trial, the basic intent of the court of criminal appeal provisions would be frustrated and the administration of the criminal law plunged into outworn technicality."
>
> There may be errors in the course of a trial, whether relating to the admission of evidence or in legal rulings or in the terms in which the Judge sums up to the jury or in the conduct of the Judge or counsel, which, while they can be described as giving rise to unfairness, do not constitute such grave irregularities and so undermine the integrity of the trial that it can be said that the accused was denied a fair trial. On the other hand, there may be some trials where, notwithstanding the overwhelming weight of the evidence against the accused, the proceedings at trial have been so defective that there has scarcely been a trial at all, with the result that the proviso cannot be applied.
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> …

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95 Article 8(1) is set out at para [59] above.

96 *R v Howse* [2006] 1 NZLR 433 (PC) at para [33].

> [37] … There were undeniably very serious errors on the part of the trial Judge in a number of respects, which have been set out in this judgment and that of the Court of Appeal: the admission of a large body of hearsay evidence which was led by the Crown which was inadmissible; the admission of evidence which was more prejudicial than probative; the failure by the Judge to direct the jury that evidence of complaints was not to be treated as proof of the truth of the allegations, but only as proof that the allegations had been made and that the appellant was aware of them; and the Judge's explanation to the jury why the issue of manslaughter was not being left to them in terms which were too emotive and prejudicial to the accused.
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> [38] One is entitled and bound, however, to ask what the course of the trial would have been like if the errors had not been made. …
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> [39] Their Lordships entirely agree with the conclusion reached by the Court of Appeal that the prosecution case against the appellant was overwhelming. They consider that there was no realistic possibility that the jury would have felt it necessary to have recourse to the inadmissible evidence to be satisfied that the accused had murdered the two girls, and they think that the evidence wrongly admitted cannot have carried any significant additional weight having regard to the other evidence. No doubt the jury took the inadmissible evidence into account in coming to their verdict, and this will often be the position where inadmissible evidence pointing to guilt is admitted. But where the other evidence properly admitted proves with overwhelming force that the accused is guilty, Their Lordships consider that it cannot be said that the admission of the improper evidence constituted a fundamental error which made the trial unfair.

[70] The minority (Lord Rodger and Sir Andrew Leggatt) disagreed. They referred to the "long tradition" of New Zealand and English law that "every accused person is entitled to a trial in which the relevant law is correctly explained to the jury and the rules of procedure and evidence are strictly followed".[97] They emphasised what had earlier been said by the Privy Council in *Randall v R*[98] as to the absolute right of a defendant to a fair trial. Giving the advice of the Board in *Randall,* Lord Bingham had said:

> There will come a point when the departure from good practice is so gross, or so persistent, or so prejudicial, or so irremediable that an appellate court will have no choice but to condemn a trial as unfair and quash a conviction as unsafe, however strong the grounds for believing the defendant to be guilty. The right to a fair trial is one to be enjoyed by the guilty as well as the innocent, for a defendant is presumed to be innocent until proved to be otherwise in a fairly conducted trial.

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97 *R v Howse* [2006] 1 NZLR 433 (PC), at para [45], applying *Mraz v R* (1955) 93 CLR 493 (HCA) at 514 per Fullagar J.

98 *Randall v R* [2002] 1 WLR 2237 (PC) at para 28.

[71] Lord Rodger and Sir Andrew Leggatt considered the trial was unfair. They said:[99]

> [57] … As Lord Carswell has explained, the Court of Appeal identified a catalogue of defects in the trial: the admission of a large body of hearsay evidence which should have been excluded, having regard to the common law and the Evidence Amendment Act 1980; the admission of an undesirable amount of evidence which was more prejudicial than probative; the failure to give a clear and firm direction to the jury about the limited proper use of a particular item of evidence; and the inclusion in the summing up of an explanation of why manslaughter was not a live issue which was not only unnecessary but couched in terms that were more emotive than was desirable. The first question accordingly is whether these defects, taken singly or together, were so fundamental that, in substance, the appellant did not have the benefit of all those safeguards which must be observed if a trial is to be fair according to the law of New Zealand.
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> …
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> [61] We have reached the clear conclusion that, in this very unusual case, there was indeed such a fundamental or radical departure from the requirements of the law that the appellant's trial cannot be regarded as fair.
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> …
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> [69] It is impossible to imagine a clearer example of a trial that has gone off the rails by the admission of evidence which, the law provides, should not be admitted precisely because it is dangerous for a jury to rely on it. The rules of evidence were designed, precisely, to prevent a trial being conducted on that basis. Therefore, even if every other aspect of the trial had been perfection itself, in this core respect it would not have been conducted in the way that the law of New Zealand requires. In fact, however, as the Court of Appeal showed only too clearly, there were many other aspects of the trial which were far from satisfactory. We forbear to dwell on them. Even assuming – as we do for the sake of the argument – that none of these other factors, either singly or in combination, would have been enough to make the trial unfair, they certainly exacerbated the position in what was already, when judged by the standards of the law of New Zealand, an unfair trial. We could use more robust language to describe it but, with difficulty, restrain ourselves from doing so.

[72] Subsequently, in *Guy v R*,[100] the Supreme Court of New Zealand considered the question of what constituted "an unfair trial". At trial, the complainant's interview with police had not been introduced as evidence as it was a prior consistent statement. Nor was the police interview of Mr Guy adduced because he had been repeatedly questioned after indicating he

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99 *R v Howse* [2006] 1 NZLR 433 (PC) at paras [57], [61] and [69].

100 *Guy v R* [2015] 1 NZLR 315 (SC).

could not answer any questions as he did not remember the incident. Nevertheless, as a result of oversight, the transcripts of both interviews were included in the material provided to the jury when they retired to consider their verdicts. It was not known whether the jurors had read the material.

[73] Mr Guy's appeal was allowed, on the basis that the presence of inadmissible and prejudicial material before the jury was, of itself, sufficient to give rise to a miscarriage of justice. As to the outcome, Elias CJ, Glazebrook and O'Regan JJ took the view that it was not "inevitable" that Mr Guy would have been convicted but a minority (McGrath and William Young JJ) reached a different conclusion. For present purposes, it is the difference of view between Elias CJ and Glazebrook J (on the one hand) and McGrath, William Young and O'Regan JJ (on the other) on the question whether Mr Guy had received a fair trial that assumes importance. Their reasoning is set out below:

(a) Elias CJ, for herself and Glazebrook J, regarded the availability of materials to the jury not admitted in evidence as giving rise to an unfair trial. The Chief Justice said:[101]

> [45] Where evidence is wrongly admitted by the judge at trial, an appellate court has the confidence of assessing the materiality of the error in the context of a process that has not miscarried except in the admission of the evidence. Where additional information is received by the jury without the knowledge of judge or counsel, assessing whether the error was capable of affecting the verdict entails the sort of speculation the rules of natural justice, affirmed by s 27 of the New Zealand Bill of Rights Act, are designed to preclude for reasons explained by Megarry J in *John v Rees*.
>
> [46] There may be cases where the provision of extraneous material to the jury is immaterial. That is not the case here. The statements wrongly provided to the jury were those of the two people who were central to the issues at trial and bore on the critical issues: what had occurred between the complainant and the appellant; whether it was consensual; and whether the appellant believed on reasonable grounds that the complainant consented to the sexual contact of which she complained.
>
> (Footnotes omitted)

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101 Ibid, at paras [45]–[46].

(b) William Young J, on behalf of himself and McGrath J, held:[102]

> [80] A trial in which the jury received material which had not been adduced in evidence will often be able to be stigmatised as unfair. But here the material in question added nothing to what the jury already knew and thus had no relevant prejudicial potential. In our view, the conclusions reached in relation to the irregularity argument dispose of this ground of appeal.

(c) O'Regan J said:[103]

> [85] I prefer to approach the case on the same basis as both the Court of Appeal did and McGrath and William Young JJ do. I see that as being consistent with the approach set out in this Court's decision in *R v Matenga*. That approach starts from the proposition that not every flaw in a trial renders the trial unfair or constitutes a miscarriage of justice. In a case such as the present case, where material that was not in evidence is provided to, or becomes available to the jury during its deliberation, the question which must be answered is whether the availability of this material to the jury was "*capable* of affecting the result of the trial". If the answer is that the provision of the material to the jury was capable of affecting the result, then there will have been a miscarriage of justice in terms of s 385(1)(c). I consider that the trial will have been rendered unfair only if this test is met. I do not believe that the provision of the information to the jury in circumstances where that did not have the capacity to affect the result can be said to make the trial unfair and thereby occasion a miscarriage of justice. In that respect, I differ from Elias CJ and Glazebrook J.
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> …
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> [88] I agree with Elias CJ and Glazebrook J that the availability of the transcripts to the jury was capable of affecting the verdict, for the reasons they give at [54] to [61]. I acknowledge that the Crown case was strong and that the jury already had before it material along the same lines as that contained in the transcripts. It is possible the approach of the jury would have been the same whether or not the transcripts were available to, and read by, members of the jury. But the possibility that the jury's approach was affected by the availability of the transcripts cannot be ruled out. The issue is whether the availability of the material to the jury could have affected the outcome, not whether it did in fact do so.
>
> (Footnotes omitted)

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102 Ibid, at para [80].
103 Ibid, at para [85].

[74] In *R v Wiley* ,[104] the Court of Appeal of New Zealand, held that if there had been an unfair trial it was unnecessary to consider whether that may have affected the outcome of the trial. The Court took the view that if an accused person had not received a fair trial, any conviction arising must be set aside. For the Court of Appeal, Randerson J added: "this is consistent with the authorities establishing that a conviction resulting from an unfair trial cannot be sustained even if a different outcome was unlikely or a conviction was inevitable".[105]

[75] The Court of Appeal then considered (what it described as) the "more difficult question" as to the types of error intended to fall into the category of an unfair trial.[106] After referring to *Guy v R,*[107] Randerson J stated that the Court of Appeal "would prefer to determine the approach to this question in a case in which the question plainly arises",[108] but did observe:[109]

> [40] We hesitate to give examples of cases of error, irregularity or occurrence that might be appropriately treated as resulting in an unfair trial … since the range of such matters may be extensive. However, without in any way limiting the type of cases that might fall into this category we instance merely by way of example: *Condon* (lack of legal representation); *Hall* (failure by counsel to follow the defendant's instructions on fundamental issues such as plea, the giving of evidence and advancing a defence based on the defendant's version of events); *Kaka* (appellant deprived of an adequate closing address).
>
> (Footnotes omitted)

[76] European authorities provide further guidance on what constitutes an "unfair trial". The Constitution requires all Pitcairn courts to take account of the jurisprudence of the European Court of Human Rights when interpreting rights derived from instruments interpreted by that court. In *Christian v Lands Court (No. 2)*, I explained the basis on which European instruments should be applied to the interpretation of constitutional rights:[110]

> [97] … art 25 [of the Constitution] contains a list of European instruments that, if the Supreme Court considers are "relevant to the proceedings in which [the] question has arisen", shall be taken into account in dealing with any questions of interpretation or application of Part 2 of the Constitution. In particular, reference is made to judgments or advisory opinions of the European Court of Human

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104 *Wiley v R* [2016] 3 NZLR 1 (CA).
105 Ibid, at para [37].
106 Ibid, at para [38].
107 *Guy v R* [2015] 1 NZLR 315 (SC).
108 Ibid, at para [39].
109 Ibid, at para [40].
110 *Christian v Lands Court* [2023] PNSC 2 at paras [97] and [98].

> Rights, and those of superior courts of the United Kingdom on the interpretation or application of the European Convention on Human Rights (the Convention).
>
> [98] In *Warren v The State*, Mr Warren relied on "international instruments", including the Convention. The Privy Council described that reliance as "misplaced". Their Lordships said that "None of the provisions relied on by the appellant has been implemented into domestic law in Pitcairn". While that is correct, the Constitution makes it clear that decisions given on equivalent Convention provisions are relevant to interpretation of the Constitution.
>
> (Footnotes omitted)

[77] In *Taxquet v Belgium,*[111] in the context of a submission that fair trial rights had been breached because inadequate (or no) reasons had been given for the appellant's conviction, the Grand Chamber of the European Court of Human Rights considered whether procedures adopted by the Assize Court in Belgium to protect an accused's fair trial rights were sufficient. Under Belgian law, a presiding judge was required to put questions to the jurors to assist them in reaching a decision and was also entitled to give legal directions. Further, also as a matter of Belgian law, the jurors were not permitted to give reasons for their "personal convictions" which led them to reach guilty verdicts. The European Court of Human Rights considered whether the fair trial right required an assessment of whether sufficient safeguards were in place to avoid any risk of arbitrariness and to enable the accused to understand the reasons for his conviction. The Court said that "such procedural safeguards may include, for example, directions or guidance provided by the presiding judge to the jurors on the legal issues arising or the evidence adduced … and precise unequivocal questions put to the jury by the judge, forming a framework on which the verdict is based or sufficiently offsetting the fact that no reasons are given for the jury's answers".[112]

[78] In the present case:

(a) Mr Warren was tried before the Island Magistrate, sitting with two assessors.

(b) The Island Magistrate was not a qualified lawyer.

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111 *Taxquet v Belgium* [2009] ECHR 2279 and [2010] ECHR 1806.

112 *Taxquet v Belgium* [2010] ECHR 1806, at para 92.

(c) The Assessors were required to express "opinions" but those opinions were not binding on the Island Magistrate.

(d) There was no express statutory requirement for the Island Magistrate to sum up to the Assessors.

(e) The live trial issue was confined to the question whether Mr Warren's behaviour, in walking naked along the road, was "indecent".[113]

[79] The narrow nature of the only live trial issue raises the question whether, on the particular facts of this case, it was necessary for the Island Magistrate to sum up to the Assessors in order to safeguard Mr Warren's fair trial rights. I now explore that issue.

[80] In *Clark (Procurator Fiscal, Kirkcaldy) v Kelly*,[114] the Privy Council considered, in the context of a devolution issue referred to it by the High Court of Justiciary of Scotland, whether a trial was rendered unfair if a legally-qualified clerk to a lay decision-maker exercising jurisdiction in a District Court failed to advise the decision-maker in open court or, at least, ensure that the substance of what was advised in chambers was repeated in open court so that counsel for the parties could be heard on any matters arising. Given the nature of the devolution issue, it was unnecessary for the Privy Council to rule on that particular question, though helpful statements of principle can be found in the judgments delivered by members of the Board.

[81] Lord Bingham described the nature of the proceeding in issue by reference to the way in which lay decision-makers are supported by legally qualified clerks in the courts. Lord Bingham said:[115]

> [2] In England and Wales the role of justices has evolved over the centuries since the Justices of the Peace Act 1361. In Scotland the system is of more recent growth. But in both countries the systems as they now exist have very few equivalents outside the mainland of Britain. There are two features in particular which distinguish them from almost every trial regime to be found elsewhere. …

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113 See paras [2] and [3] above.
114 *Clark (Procurator Fiscal, Kirkcaldy) v Kelly* [2003] 1 All ER 1106 (PC).
115 Ibid, at paras [2]–[5].

> [3] The first key feature of both systems is that justice is administered by (on the assumption made) a person usually lacking any formal legal education or qualification (although the beneficiary of some training). Such person, working voluntarily and without reward, is for all legal purposes a judge: carefully chosen as possessing qualities of judgment, fairness, open-mindedness and common sense; bound to observe a formal judicial oath; and irremovable (below the age of retirement) save for good cause. To such person, and to such person alone, it falls to decide what evidence should be believed and what doubted or rejected, and whether the charge is proved or not. The lay justice is the sole legal decision-maker in the district court.
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> [4] In very many of the cases which routinely come before district courts, involving minor traffic offences, petty thefts and assaults and matters of that kind, the issue in the case (if it is defended) will turn on the facts and raise no question of law. But it is, of course, true that in any case, however minor, a question of law may arise, whether on the admissibility of evidence, or the existence of evidence capable of corroborating other evidence, or the ingredients of a common law offence, or the interpretation of an offence-creating statutory provision or, after conviction, on the sentencing powers and duties of the court. In such instances the lay justice, lacking the legal expertise of those representing the prosecutor and the accused before the court, is at a disadvantage.
>
> [5] The solution to this problem, developed and refined over many years, is found in the second key feature of both systems, the legally-qualified clerk to the court, who must in Scotland be an advocate or a solicitor. The task of the clerk is to advise the lay justice on any question of law arising during the case. It is the clerk's duty, as a professional person bound by an exacting code of conduct, to give advice to the best of the clerk's ability, with the independence and impartiality (and also the care) required of any solicitor or advocate expressing a professional opinion. The clerk represents no party and his approach should be wholly unpartisan. … If the clerk were at any point, publicly or privately, to offer any opinion on the facts of any case, that also would be a culpable dereliction of duty, since all factual decisions are for the justice alone (although if the justice wishes to be reminded of the effect of any oral evidence given during the hearing the clerk may properly remind him, provided this is done in open court).

[82] Lord Hope drew on a Practice Note issued by Lord Woolf CJ on 2 October 2000, after the Human Rights Act 1998 (UK) came into force and gave the Convention force of law.[116] The guidance, given to clerks and authorised legal advisors in England and Wales, was in the following terms:[117]

> 8. At any time, justices are entitled to receive advice to assist them in discharging their responsibilities. If they are in any doubt as to the evidence which has been given, they should seek the aid of their legal adviser, referring to his/her notes as appropriate. This should ordinarily be done in open court. Where the

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116 Practice Note (Magistrates: clerk and authorised legal advisor) [2000] 4 All ER 895.

117 Ibid, at para 8.

> justices request their adviser to join them in the retiring room, this request should be made in the presence of the parties in court. Any legal advice given to the justices other than in open court should be clearly stated to be provisional and the adviser should subsequently repeat the substance of the advice in open court and give the parties an opportunity to make any representations they wish on that provisional advice. The legal adviser should then state in open court whether the provisional advice is confirmed or if it is varied the nature of the variation.

[83] Lord Hope took the view that this practice should be followed in Scotland. He said:[118]

> [69] I suggest that the practice which should be followed by the clerks and justices in the district court in this matter should be as follows. Any advice which the clerk gives to the justice in private on matters of law, practice or procedure should be regarded by them as provisional until the substance of that advice has been repeated in open court and an opportunity has been given to the parties to comment on it. The clerk should then state in open court whether that advice is confirmed or is varied, and if it is varied in what respect, before the justice decides to act upon it. It would be helpful if guidance on this matter could be incorporated in the *Handbook* and brought to the attention of justices and clerks by issuing an appropriate circular. It will, of course, be open to the parties to bring such guidance to the attention of the court if there is reason to think that it is not being observed by either the justice or the clerk at the trial.

[84] Lord Rodger considered that the failure of the clerk to ensure advice given in private to the lay decision-maker was not repeated in public for counsel's consideration did not give rise to an unfair trial. His Lordship considered that the "giving and receiving of legal advice by the clerk and justice [could] be compared with the private discussion among judges about a prospective decision", thereby negating any need for the advice to be repeated in public. In common with Lord Hoffmann, Lord Rodger did not consider that the failure to repeat the advice in open court infringed art 6(1) of the Convention. Lord Rodger took the view that the Convention "does no more than set minimum standards to be observed by the signatory States" and that, not "infrequently, a state may choose to observe higher standards". The Practice Note issued by Lord Woolf CJ was cited as an example of a legal system that had adopted a higher standard.[119]

[85] Nevertheless, Lord Rodger concluded his judgment by saying:[120]

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118 *Clark (Procurator Fiscal, Kirkcaldy) v Kelly* [2003] 1 All ER 1106 (PC) at para [69].

119 Ibid, at para [103].

120 Ibid, at para [106]. Lord Bingham generally agreed with Lord Hope but did not endorse specifically Lord Hope's adoption of the Practice Note. Lord Hutton expressly agreed with Lord Hope's view on that issue.

> [106] … Since, however, the issue has been ventilated before the Board, I see advantages in following the course proposed by Lord Hope of Craighead. I accordingly agree that, when a clerk requires to give legal advice to the justice, the general approach outlined by Lord Hope of Craighead should be followed. It may be that the District Courts Association or the Central Advisory Committee for Scotland on Justices of the Peace, which is chaired by the Lord Justice Clerk, could take steps to ensure that this guidance is not only made known to justices and clerks but is also followed by them.

[86] The discussion of the interrelationship between a lay decision-maker and a qualified adviser is relevant to the Pitcairn situation, and in particular whether there was a need for some public and transparent exposition of legal issues to constitute a fair trial. In my view, the approach taken by Elias CJ, Glazebrook and O'Regan JJ in *Guy*,[121] narrows the question to whether in the particular circumstances of this case, it was inevitable that the outcome would have been the same even if a summing up had been provided by the Island Magistrate to the Assessors. The discussion in *Clark (Procurator Fiscal, Kirkcaldy) v Kelly*[122] is relevant to the extent of transparency required where a lay decision-maker is advised by a legally qualified person. Although neither the Island Magistrate nor the Assessors were legally qualified, the possibility that the Island Magistrate might have sought advice from another Magistrate brings the principles discussed in *Clark* into play.[123]

[87] Focussing only on the elements of the offence, the Island Magistrate would, had he summed up to the Assessors, have been obliged to tell them that, before they could express a guilty "verdict", they must be satisfied beyond reasonable doubt that, on each charge:

(a) Mr Warren was the individual observed by the witnesses;

(b) Mr Warren's decision to walk naked along the road was deliberate;

(c) The road was a "public place" for the purposes of s 5 of the Summary Offences Ordinance; and

(d) Walking along a public road in Pitcairn constituted indecent behaviour.

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121 See the extracts from the judgments in *Guy v R* [2015] 1 NZLR 315 (SC), set out at para [73] above.

122 *Clark (Procurator Fiscal, Kirkcaldy) v Kelly* [2003] 1 All ER 1106 (PC), discussed at paras [80]-[85] above.

123 See para [120] below.

[88] The charges with which the Magistrate's Court was concerned did not raise any complex questions of law or assessment of evidential weight. As a result of admissions made by Mr Warren, there was only one live issue at trial: was Mr Warren's behaviour on each of the days in issue "indecent"?[124]

[89] Quintessentially, the question of "indecency" is to be determined by representatives of the community.[125] What follows is a summary of the way in which the concept of "indecent" conduct has been interpreted in other jurisdictions, and factors that in the Pitcairn context, should be taken into account in determining whether particular behaviour can be characterised as "indecent". My analysis addresses also Dr Ellis' constitutionality argument.[126]

[90] I start by reference to the concept of "freedom of expression". I accept that the right to freedom of expression, protected by the Constitution,[127] encompasses the right to express ideas through mode of dress, including views as to the inoffensive nature of the naked human body.[128] I also accept that in determining whether conduct is "indecent", for the purposes of the Summary Offences Ordinance, the constitutional rights of the minority must be weighed.[129]

[91] The question whether something is indecent is one of fact, not law. At its most simplistic level, something is "indecent" if, applying relevant contemporaneous community standards, the conduct would be regarded as "indecent". Context is everything. In giving the principal speech in the House of Lords, in *Brutus v Cozens,* Lord Reid said:[130]

> I therefore conclude, that *on a charge of indecent assault the prosecution must not only prove that the accused intentionally assaulted the victim, but that in so doing he intended to commit an indecent assault, ie an assault which right-minded persons would think was indecent.* Accordingly, any evidence which tends to explain the reason for the defendant's conduct, be it his own admission or otherwise, would be relevant to establish whether or not he intended to commit, not only an assault, but an indecent one. The doctor's admissions in the two contrasting examples which I have given would certainly be so relevant. The appellant's admission of 'buttock fetish' was clearly such material. It tended to confirm, as indeed did the events leading up to the assault and the appellant's

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124 See paras [2] and [3] above.
125 See paras [91] and [92] below.
126 See para [5](d) above.
127 Constitution, art 13.
128 *Gough v United Kingdom* (2014) 38 BHRC 281 2014 at [149]-[150]. Discussed further below.
129 See paras [97]–[104] below.
130 *Brutus v Cozens* [1972] 2 All ER 1297 (HL) at 1299 (Lord Reid). To similar effect, see 1301 (Lord Morris of Borth-y-Gest) and 1303–1304 (Lord Kilbrandon).

> conduct immediately thereafter, that what he did was to satisfy his peculiar sexual appetite. It was additional relevant evidence. It tended to establish the sexual undertones which gave the assault its true cachet.
>
> (Emphasis added)

[92] The same approach to interpretation of the term "indecent" was adopted by the Court of Appeal of New Zealand (also in the context of a charge of indecent assault) in *R v Nazif*.[131] Delivering the judgment of the Court of Appeal, Somers J said:

> **Indecency**
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> The Judge correctly told the jury that an indecent assault was an assault "in circumstances of indecency". He then added "By circumstances of indecency we mean touching the private parts of another person". That was much too favourable to the accused. *The word "indecent" is an ordinary word in the English language and it is for the jury to find the facts and decide whether that which they have found amounts to indecency:* cf *Cozens v Brutus* [1973] AC 854"(insulting . . . behaviour)". That in our experience is the way in which juries have been directed for many years now. *It results in juries applying current standards of what is indecent and thereby reflecting the attitude of the community. This we think is a proper function of the jury and one which it is right that they undertake.*
>
> (Emphasis added)

[93] Under English law, constraints on the utterance of insulting language and/or offensive or indecent behaviour are linked, in a legislative sense, to maintenance of public order. Section 5 of the Public Order Act 1936 (UK) created an offence for any person in a public place or at a public meeting to use "threatening, abusive or insulting words or behaviour … with intent to provoke a breach of the peace or whereby a breach of the peace is likely to be occasioned". The need for such a nexus supports the proposition that something more than the utterance of words or behaviour of which some members of the community may be offended will justify the intrusion of the criminal law.

[94] That there is often a link between indecent behaviour and public disorder can be seen in a decision of the Divisional Court in *Abrahams v Cavey*.[132] In that case, charges had been brought under the Ecclesiastical Courts Jurisdiction Act 1860 (UK), in relation to alleged

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131 *R v Nazif* [1987] 2 NZLR 122 (CA) at 127.
132 *Abrahams v Cavey* [1967] 3 All ER 179.

"indecent" behaviour at a church service which was held as part of a Labour Party conference in a Methodist church in Brighton. Section 2 of the Act read:

> Any person who shall be guilty of riotous, violent or indecent behaviour … in any place of religious worship duly certified under the provisions of the Places of Worship Registration Act, 1855 [the Dorset Gardens Methodist Church was so certified], whether during the celebration of divine service or at any other time … shall, on conviction thereof before two justices of the peace, be liable to a penalty.

[95] The Divisional Court took the view that "indecent behaviour" fell to be determined in the context of the surrounding words "riotous" and "violent". As Lord Parker CJ, with whom Diplock LJ and Widgery J agreed, said:[133]

> It is quite clear here that indecency is not referring to anything in the nature of tending to corrupt or deprave; it is quite clearly used without any sexual connotation whatsoever, but it is used in the context of riotous, violent or indecent behaviour, to put it quite generally, within the genus of creating a disturbance in a sacred place.

[96] Lord Parker CJ emphasised the contextual nature of the charge, in answering a submission that the same behaviour outside the church could not have amounted to an offence. The Lord Chief Justice said that "it makes all the difference because one is dealing with a sacred place and when a service is taking place".[134]

[97] In New Zealand, there is no separate offence of "indecent behaviour". Rather, s 4(1)(a) of the Summary Offences Act 1981 creates an offence when a person "in or within view of any public place, behaves in an offensive or disorderly manner". Behaviour that might be regarded as "indecent" is considered under the rubric of "offensive" behaviour, a concept discussed by the Supreme Court of New Zealand in *Morse v Police.*[135]

[98] All members of the Supreme Court in *Morse* emphasised the need for the behaviour to rise to a level beyond what could be expected to be tolerated in a democratic society. In taking that approach, the Supreme Court took account of both the freedoms and rights conferred by the New Zealand Bill of Rights Act 1990 and whether it was necessary for the criminal law to respond to the particular behaviour. For all material purposes, the provisions of the

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133 Ibid.
134 Ibid.
135 *Morse v Police* [2012] 2 NZLR 1 (SC).

Constitution are the same as those of the New Zealand Bill of Rights Act on which the Supreme Court placed reliance.[136]

[99] *Morse* was not an "indecency" case but one involving the burning of the New Zealand flag at a War Memorial in Central Wellington when people were present, on a solemn occasion, to commemorate ANZAC Day. However, the same issue subsequently arose in the case of a man running naked along tracks in parkland in the early hours of a morning: *Pointon v Police.*[137] In the particular circumstances out of which the charge arose, the High Court found that Mr Pointon ought not to have been convicted of offensive behaviour. Because the charge was one of "offensive" behaviour, the test developed by the Supreme Court in *Morse* applied.

[100] In *Morse,* the Supreme Court divided on how to determine the hypothetical reasonable person from whose perspective the characterisation of the relevant behaviour should be assessed. However, they generally agreed (albeit using different language) as to the test for offensive behaviour.

[101] As to the "hypothetical reasonable person" Blanchard and Tipping JJ considered that objectivity was achieved by this person being one "who takes a balanced, rights-sensitive view, conscious of the requirements of s 5 [of the Bill of Rights] and therefore is not unreasonably moved to wounded feelings or real anger, resentment, disgust or outrage".[138] Section 5 of the Bill of Rights states that the rights affirmed in that statute are subject "only to such reasonable limits prescribed by law as can demonstrably be justified in a free and democratic society".

[102] Although there is no express provision to the same effect in the Constitution, art 26 performs much the same function in Pitcairn:

> **26.** So far as it is possible to do so, legislation of Pitcairn must be read and given effect in a way which is compatible with the rights and freedoms set forth in this Part.

[103] McGrath J referred to a degree of interference with the use by others of a public place that must go beyond "what a society respectful of democratic values is reasonably expected to

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136 Compare Constitution, art 8 and s 25(a) New Zealand Bill of Rights Act 1990.
137 *Pointon v Police* [2012] NZHC 3208 (HC).
138 *Morse v Police* [2012] 2 NZLR 1 (SC), at para [64] per Blanchard J and [70] per Tipping J.

tolerate".[139] Both Elias CJ[140] and Anderson J[141] preferred an approach based on the view that would be taken by a hypothetical reasonable member of the public chosen by reference to a broader range of persons who might be present and see the behaviour in issue. Elias CJ said:

> [30] . . . It is not necessary to tailor behaviour to the specific audience in order to protect the vulnerable, such as children. In a public place to which all members of society may have resort, the vulnerable and the young are included in the objective assessment.

[104] As I read the judgments given in *Morse*, the Supreme Court took the view, unanimously, that behaviour that inhibits others from using or returning to a public place will be offensive, provided that (viewed objectively) this behaviour rose to a sufficient level to justify intervention of the criminal law.

[105] In Pitcairn, s 5 of the Summary Offences Ordinance speaks only of indecent behaviour. There is no suggestion that some threat to public order is required, as opposed to the types of behaviour listed in a provision such as the Summary Offences Act 1981 (NZ). Contextually, Mr Pointon's right (as a matter of freedom of expression) to run naked to draw attention to his lifestyle choice was one to be weighed against the hypothetical reasonable person's right to use the park as a public amenity. In my view, s 5 should be interpreted in a manner which, while characterising the behaviour as sufficient to require intervention of the criminal law, does not require proof that disruption of public order is likely.

[106] I emphasise the importance of context in decision-making about whether particular behaviour should be characterised as "indecent". In a small island-state, such as Pitcairn, community values will be determined by reference to the size of the population, the extent to which religious considerations may assume significance, and the right of a person to express himself or herself in a manner designed to draw attention to lifestyle choices, such as naturism. It will be an assessment made to reflect contemporary community standards. In this case, the Assessors and the Island Magistrate represented the voice of the community. It was their task to decide whether Mr Warren's behaviour reached a level that should attract the intervention of the criminal law.

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139 Ibid, at para [103].
140 Ibid, at para [30].
141 Ibid, at para [127].

[107] Clearly, there is a distinction between a person walking naked on the street, potentially in the view of others who may then be dissuaded from using that particular part of the roadway (whether generally or at any given time) and one who is in a state of undress in the confines of his or her own home or surrounds, away from the view of any passer-by. The former has the capacity to amount to indecency whereas the latter does not. This distinction is plain from s 5's reference to a public place".[142]

[108] My obligation, under s 11(1) of the Judicature (Appeals in Criminal Cases) Ordinance is to determine whether or not there is sufficient ground to interfere with the convictions that Mr Warren is appealing.[143] I have reached the conclusion that I should not. Although it would have been desirable for the Island Magistrate to confer with a legally qualified Magistrate to ascertain whether any particular legal directions were required, the absence of directions did not render the trial unfair.

[109] In *Warren v R*,[144] the Court of Appeal was satisfied that the way in which Tompkins J explained the legal position to the Assessors met the requirements of the law, even though no summing up (as such) was given. In this case, the Island Magistrate, when returning from an adjournment during which he and the Assessors deliberated, told counsel the nature of the submissions that they had "carefully considered". Although there is no express power for a Magistrate to confer with Assessors, on any view it was necessary for some communication to take place so that the Assessors were aware of the questions that they needed to answer. I adopt the approach taken by the Full Court in *Tangi Puri*, in which it approved collaboration between "the Judge and the assessors".[145]

[110] I have already set out what was said by the Island Magistrate after the deliberation phase.[146] I summarise the eight submissions that the Magistrate had considered:

(a) Is there evidence that the behaviour occurred.

(b) Was it deliberate.

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142 See para [1] above.
143 See paras [14]–[15] above.
144 *Warren v R* [2016] PNCA 1, at paras [38] and [39], set out at paras [46] and [47] above.
145 *Tangi Puri v The Queen* [1967] NZLR 328 at 330, set out at para [39] above.
146 See para [12] above.

(c) Was there an intention to offend.

(d) Is there evidence it took place in a public place.

(e) Are the occurrences of walking naked on Pitcairn Island considered to be behaving in an indecent manner.

(f) Is it reasonable to accept walking naked in public is a constitutional right provided for under the freedom of expression when there is an overlap of personal rights impeding on another's. The requirements that exist in a democratic society are to balance one person's rights with another.

(g) Was there a sexual content to the events.

(h) How far would the rights to shock, horrify or offend others be allowable without the act itself becoming illegal.

[111] All elements of the offence of "indecent behaviour" were covered. There was uncontroverted evidence that Mr Warren behaved as alleged, and did so deliberately. It was accepted that the behaviour occurred in a public place. The Island Magistrate also covered relevant considerations in determining whether the relevant behaviour was "indecent", including the need to balance freedom of expression against alternative personal rights. To that extent, all elements of the offence were covered. The remaining points made were not strictly elements of the offence and did not require to be proved. Immediately after the Island Magistrate had recounted the submissions, the two Assessors each expressed their opinions on whether Mr Warren was guilty on each of the three charges in turn.

[112] After the Assessors had given their opinions and the Island Magistrate had announced his decision, Ms Warren, as one of the Assessors, gave a public explanation of her reasons for deciding that the conduct was indecent. Although Dr Ellis dealt with Ms Warren's statement of reasons for her decision as an aspect of apparent bias, I consider it is also relevant to the appeal point directed to the meaning of "indecent" in s 5 of the Summary Offences Ordinance.[147]

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[147] Section 5 of the Summary Offences Ordinance is set out at para [1] above.

[113] Ms Warren was explicit about the reasons for her decision. It was apparent from those reasons that her decision was based on the application of what she believed to be Pitcairn community standards. Ms Warren said:

> **Mrs Warren:** Just so that there's no confusion, I offered to do this. I had written this down before I even spoke to [the Island Magistrate]. *It's my opinion that I represent the community and it is my belief that the majority of the community finds Michael's nude behaviour offensive, embarrassing, and quite disgusting.* However, if he wants to parade around in the nude, do it at home on his property where no one has to witness it. That's pretty much all I can say. It pretty much sums it up. Thank you. [Applause from the body of the courtroom]
>
> (Emphasis added)

[114] Dr Ellis submits that Mrs Warren's statement of explanation of her opinion demonstrates that she was unlawfully influenced by the community, surrendering her power of decision making to the majority community view, and not acting as an independent and impartial judicial officer. Dr Ellis submitted that the majority view in respect of nudity is irrelevant, discriminatory and damaging.

[115] Mr Raftery argued that Mrs Warren's explanation of her opinion merely demonstrated her understanding of her role and a correct application of the test of whether Mr Warren's behaviour was indecent; namely, was it indecent by Pitcairn standards?

[116] Dr Ellis disputed that the appropriate legal test could be equated with the views of the "majority" of the Pitcairn community, and referred me to what was said by Baroness Hale in *A v Secretary of State*:[148]

> No one has the right to be an international terrorist. But substitute "black", "disabled", "female", "gay", or any other similar objective for "foreign" before "suspected international terrorist" and ask whether it would be justifiable to take power to lock up that group but not the "white", "able-bodied", "male", or "straight" suspected terrorist international terrorists. The answer is clear...
>
> Democracy values each person equally. In most respects, this means that the will of the majority must prevail. But valuing each person equally also means that the will of the majority cannot prevail if it is inconsistent with the equal rights of the minorities. As Thomas Jefferson said in his inaugural address:

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148 *A v Secretary of State* [2004] UKHL 56, para 236-7.

> "Though the will of the majority is in all cases to prevail, that will to be rightful must be reasonable...The minority possess their equal rights, which equal law must protect, and to violate would be oppression."

[117] In assessing Mr Warren's behaviour through the lens of "right-thinking members of the Pitcairn community", Dr Ellis says the assessors were obliged to consider, not just the majority view, but those of the minority as well, and weigh the minority's right to freedom of expression in reaching a conclusion.

[118] I do not accept that in reflecting the views of what Mrs Warren considered to be the "majority" of the Pitcairn community, she appeared to "surrender" her opinion to the views of the community or to base her opinion otherwise than on the facts and applicable law. Mrs Warren, as required by law, expressed her opinion on whether the conduct was "indecent", the only live issue at trial. The "community" view on what is or is not "indecent" must be gauged by reference to the majority; it would be absurd for the "community view" to be determined by the minority. In my view, the approach taken by McGrath J, in the Supreme Court of New Zealand's decision in *Morse,* adequately captures the balance to be struck.[149] The balance between the views of the majority and the rights of the minority was expressly considered by the Island Magistrate and Assessors.[150]

[119] In the context of a single live issue for determination, I do not consider that it was necessary for the Island Magistrate to sum up on the elements of the charges to the Assessors. It is clear that the Assessors understood what the elements were and reached their own opinions about the discrete issue of indecency; and that the Island Magistrate reached his decision based on the same criteria. On the facts of this particular case, it can safely be concluded that the Assessors and the Island Magistrate answered the right questions. For those reasons, Mr Warren's fair trial rights were not undermined by the absence of a summing up.

[120] Having reached that conclusion, it is important that I emphasise the need, in most criminal case, for a summing up or (at least) the provision of an appropriate question trail for the assessors to follow. Best practice would be for the Island Magistrate to hear from counsel on what (if any) legal points they considered the assessors should be directed, then to confer

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149 See para [103] above.
150 See para [110](f) above.

with a legally qualified magistrate[151] about any directions that may be required and to provide any directions suggested by the legally qualified magistrate to the assessors. I add that counsel should be given the opportunity to make submissions on the proposed directions before the assessors are instructed.[152] That will avoid the need for this Court to delve more deeply into the trial process when appeals are brought.

(e) Independence and impartiality

[121] Dr Ellis submits that the Island Magistrate, Mr Young, was compromised by his political activity, in his alleged membership of a Policy Committee tasked with, among other things, considering the revision of penalties for summary offences. Mr Young acknowledged the Policy Committee's work at the hearing on 6 December 2021.[153]

[122] Dr Ellis put the following chronology, in respect of Mr Young's alleged political activity, to me:

(a) The three charges against Mr Warren were each laid on 23 July 2020.

(b) The Attorney-General and Assistant Attorney-General met with members of the Island Council on-line on 9 September 2020. Among other things, penalties in the Summary Offences Ordinance were discussed.

(c) As at 8 September 2021 (or before) Mr Young, was Chair of the Council Policy Group.

(d) The hearing on the present charges occurred on 6 December 2021. By an oversight, convictions were not entered following the hearing on 6 December 2021, but were, by consent, on 20 December 2021.

(e) As of 2 April 2022, Mr Young became a full member of the Island Council, being one of two candidates for two vacant positions.

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151 See para [26] above.

152 This practice would reflect that used by lay-decisionmakers in the United Kingdom: see *Clark (Procurator Fiscal, Kirkcaldy) v Kelly* [21003] 1 All ER 1106 (PC), at para [5], set out at para [80] above.

153 The full extract from the transcript of the 6 December hearing is set out at para [12] above.

(f) Mr Young was elected Mayor of the Pitcairn Islands on 9 November 2022.

[123] Dr Ellis submits that the Island Magistrate's position as Chair of the Council Policy Group was incompatible with his role as Island Magistrate and that he was inappropriately influenced by the views of the Island Council because Mr Young was involved in political activities associated with the penalty for public indecency. Consequently, it is alleged that he was neither an independent nor impartial judicial officer; at least, it is said, Mr Young lacked that appearance.

[124] The principles underpinning the independence of those who exercise judicial powers are not in dispute. Article 44 of the Constitution states:

> Independence of the judiciary
>
> 44. The judges and judicial officers appointed to preside or sit in any court of Pitcairn shall exercise their judicial functions independently from the legislative and executive branches of government.

[125] To illustrate the incompatibility of the judicial function with the legislative and executive functions, Dr Ellis relied upon the following extract from the United Nations' Commentary on the *Bangalore Principles of Judicial Conduct* (UN Commentary):[154]

> Incompatible activities
>
> 135. *A judge's duties are incompatible with certain political activities, such as membership of the national parliament or local council. Judges should not be involved in public controversies*.
>
> 136. A judge should not involve himself or herself inappropriately in public controversies. The reason is obvious. The very essence of being a judge is the ability to view the subjects of disputes in an objective and judicial manner. It is equally important for the judge to be seen by the public as exhibiting that detached, unbiased, unprejudiced, impartial, open-minded, and even-handed approach which is the hallmark of a judge. *If a judge enters the political arena and participates in public debates – either by expressing opinions on controversial subjects, entering into disputes with public figures in the community, or publicly criticizing the government – he or she will not be seen to*

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[154] The *Bangalore Principles of Judicial Conduct* as the international benchmark for the conduct of judiciaries, was discussed by the Privy Council in *Re The Report of the Tribunal to the Governor of the Cayman Islands – Madam Justice Levers (Judge of the Grand Court of the Cayman Islands)* [2010] UKPC 24 at paras 48–50.

> *be acting judicially when presiding as a judge in court.* The judge will also not be seen as impartial when deciding disputes that touch on the subjects about which the judge has expressed public opinions; nor, perhaps more importantly, will he or she be seen as impartial when public figures or government departments that the judge has previously criticized publicly appear as parties, litigants or even witnesses in cases that he or she must adjudicate.
>
> (Emphasis added)

[126] Mr Raftery did not dispute the applicability of the UN Commentary to the present facts but, rather, submitted that Mr Young's alleged political participation (particularly when viewed contextually) fell well short of compromising his impartiality or independence or the appearance thereof.

[127] Mr Raftery submitted that there is no evidence that the Island Magistrate's position as Chairperson of, what he called, the "Island's Policy Steering Group" undermined his independence or impartiality (or the appearance thereof) in dealing with Mr Warren's prosecution. Importantly, Mr Raftery points out that the policy with which Mr Warren was most concerned was the increase in penalty for indecent behaviour to a fine of $5,000. That proposal was made at a meeting on 9 September 2020 and the draft amendment Ordinance was discussed and approved at a meeting on 14 October 2020, some 14 months prior to Mr Warren's trial. No amendments to the law had been made before Mr Warren's alleged offending.

[128] Mr Raftery referred to correspondence between Dr Ellis and the Attorney-General's office. In response to Dr Ellis' inquiries the Assistant Attorney-General wrote:

> By way of background, in June 2020 the Mayor contacted the AG's office and Governor in light of Mr Warren's alleged conduct. The Mayor said she would be putting public nudity on the Island Council agenda with a view to working towards a law change. The Governor subsequently requested that the AG and I review the Summary Offences Ordinance, including penalties.
>
> At Council's request, the AG and I met with Council members online on 9 September 2020. Among other things we discussed penalties generally in the Ordinance, which have not been updated for many years. One Council member suggested the penalty for indecent behaviour should be increased to $5000. Other Council members agreed with that suggestion.
>
> After that meeting we produced a draft amendment Ordinance, which I have **attached**. On behalf of the Governor, we provided the draft to Council for consideration in September 2020. The draft amendment would increase penalties

for a range of offences in the Summary Offences Ordinance and amend the jurisdiction of the Island Magistrate to enable him or her to deal with those offences.

The Council discussed and approved the draft at its meeting on 14 October 2020: see the **attached** minutes which are publicly available on the Pitcairn Government website.

In January 2021, I provided the draft to the Public Defender and Public Prosecutor for comment. I **attach** their responses.

…

In response to your specific queries (with your original questions copied below for reference):

Can you advise whether those discussions included discussion with Simon Young, who I now understand was an acting member of the Island Council from around August last year, and is now a full member? Simon Young was not a member of Council at the time and not involved in the discussions.

Please also advise when Simon Young became an acting member of Council., and a full member. We are not aware of that information: the Island Secretary may be able to assist.

I understand he is Chair of the Council's Policy Review Committee, when was this appointment? We are not aware of that appointment: the Island Secretary may be able to assist. and has that Committee had any input into the proposed legislative change? No.

Outside of the Magistrate's activities as Magistrate, and Councillor, have you discussed legislative reform of the matters associated with walking naked on the Island with Simon Young? No.

[129] The correspondence between the Attorney-General's office and Dr Ellis, establishes that:

(a) The Island Policy Steering Group/Policy Review Committee had no input into the proposed legislative change.

(b) Mr Young was neither a member of the Island Council at the time the Summary Offences Ordinance and penalties were discussed nor involved in those discussions.

[130] A community notice was also put before the Court, in which the Island Policy Steering Group (of which Mr Young was then a member) stated that the policies being reviewed could be found on a Government website and added that "[i]n consultation with the community and other stakeholders, if anyone has any thoughts on proposed changes to any of these documents, please inform anyone listed below". The document went on to list three names, including that of Mr Young as the "Chair" of the Policy Steering Group.

[131] It appears from the evidence before the Court that the "Council Policy Group" referred to by Dr Ellis was in fact a steering committee responsible for transmitting the views of the island population to the Island Council.[155] Dr Ellis argued that membership of the steering committee was sufficient, at least, to compromise the appearance of impartiality and independence with respect to Mr Warren's conviction and sentence. I disagree.

[132] In my view, there is nothing to suggest that these discussions had any impact on the entry of a conviction or the penalty imposed on Mr Warren. The maximum penalty for the offence had not been increased. Further, Mr Warren was sentenced to pay a fine of $50 on each charge; well short of the maximum available financial penalty of $100 per offence and significantly less than the proposed maximum penalty of $5000 for each offence.

[133] In my view, the role of the Steering Committee was to canvas the local population and submit their views to the Island Council. The role did not require Mr Young to involve himself in public controversy, express any opinions, or in any way to participate in public debate. Any discussion was confined to penalties, and did not suggest any predilection on his part to convict any person charged with walking naked on the island.

[134] As a result, I do not consider that the Island Magistrate's involvement compromised his ability to bring an impartial or independent mind to Mr Warren's hearing or sentence or to give the appearance of his ability to do so. I do not accept that the role of Chair undermined his ability to act judicially and impartially, or the appearance thereof.

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[155] According to Ms Kelly's email to Mr Warren's counsel on 12 April 2022, the Steering Committee had no direct involvement in the proposed legislative changes. Rather, the Steering Committee was responsible for transmitting the views of the island population to the Island Council.

[135] This conclusion is reinforced by the nature of the community in which the independence and impartiality of the judiciary is being considered. As previously indicated,[156] Pitcairn's population is, typically, around 50 people. That, of itself, causes difficulties in the selection of independent and impartial judicial officers. Yet, the legislature has expressly provided for limited circumstances in which a lay person who is resident on the island can exercise jurisdiction as an Island Magistrate.[157] Plainly, it will be difficult to find any resident who has not, at one time or another, expressed views on matters of controversy on the island.

[136] Although it is unnecessary, in the context of the present case, to express any view on the compatibility (or otherwise) of the offices of Mayor of Pitcairn and Island Magistrate, as both of those positions are now held by Mr Young, I have decided to offer some provisional thoughts. I do so because of the importance of the issue. The Mayor is, in effect, the "political leader" of the island and necessarily he or she takes a lead in "political" concerns. It can legitimately be said that a dual role of Mayor and Island Magistrate could give rise to greater concerns about the appearance of bias in the event that any such controversy might be relevant to his or her judicial role. I suggest that it may be prudent for Mr Young to reconsider whether he should hold both offices contemporaneously. Were the two offices to be held at the same time, any difficulties could only be resolved on a recusal application in individual cases. The possibility of regular challenges is undesirable.

[137] Counsel for Mr Warren also argued that the Island Magistrate was unlawfully influenced by the views of the Island Council and was not, therefore, independent or impartial, and/or lacked that appearance. Specifically, Dr Ellis took issue with the following comments by the Island Magistrate made at the hearing on 6 December 2021:

> **Magistrate Young:** Thank you very much, Mrs Warren. In the interests of just concluding this, I won't take another adjournment to prepare for what was going to be just the sentencing aspect. I take your point, Dr Ellis, that you could delineate all three charges and try to come up with perhaps an appropriate penalty for each one. I really had always approached this with the idea that if a financial penalty was sought that I would just do a single figure for all three charges. Though I do take your point, Dr Ellis. You could dissect them and take some time to work that out.
>
> I'm very happy to follow the Crown's recommendations of (a) avoiding the recognisance, for some of the reasons that he's mentioned and also, Dr Ellis, the

156 See para [24] above.
157 Ibid.

> reasons you've mentioned. I'm happy to leave that one alone. I'll just deal with the three charges accepting the sum of NZ$ 50.00 for each offence and hoping that the message has got through to the defendant that this behaviour is not acceptable on Pitcairn Island, hopefully clarified a little bit by Mrs Warren just a few moments ago.
>
> I'm not quite sure whether this is the right moment to raise it, but you talked about potential reoffending and how that would be viewed in the future. I know that the Council has also made recommendations to the Attorney General's office and the Governor, and they've addressed a whole barrage of laws that are quite out of date in terms of the penalties that can be attributed to them. In fairness, this is a very low denomination that can be attributed to this. As an indicator of the seriousness of how the Council view it, which of course is the elected body on Pitcairn Island and they represent the entire community, I know that they've made recommendations to the Governor and the Attorney General that a number of laws are changed, this being one of them. I know that they are seeking to raise the penalty to NZ$ 5,000.00.

[138] Mr Raftery pointed out that these comments by the Island Magistrate were explicitly in response to concerns raised by Mr Warren about likely penalties for reoffending and went no further than addressing Mr Warren's expressed concern of knowing the likely consequences of further nudity in public spaces on Pitcairn.

[139] I agree with Mr Raftery's analysis of the Island Magistrate's comments. Mr Young described the ongoing process regarding revising the penalties for summary offences. He did no more than that. He expressed no view as to the merits of that approach. I do not consider that this passage evidences a lack of impartiality or independence on the part of the Island Magistrate. He could not be said to be endorsing the Island Council's approach. He was merely describing it. That view is reinforced by the fact that the penalty imposed ($50 on each charge) was half of existing the maximum financial penalty of $100 per charge.

[140] Dr Ellis also submitted that the Island Magistrate engaged in private discussions with the Assessors that compromised the constitutional requirements that the hearing be both fair and public. That, he contended, affected perceptions of potential partiality on the part of both the Island Magistrate and the Assessors. Dr Ellis pointed to the following excerpt of the hearing transcript, which arose in the context of a submission that there was "no case to answer":

> **Magistrate Young:** Thank you very much, Dr Ellis. Stand by please. [consults with assessors]. Thank you, gentlemen. Dr Ellis, thank you for these recent applications to have the three charges dismissed for the reasons you've stated. Mr Raftery, thank you also for your response. The application to dismiss the three

> charges is declined. I'll put that in writing within a few days to both counsel, rather than hold up the proceedings and adjourn to produce that now. That will hopefully be the end of that issue for the moment. Dr Ellis, do you wish to actually open the case for the defence now please?

[141] While acknowledging that the inaudible conferral was "short", Dr Ellis submits that private discussions with assessors are self-evidently not in public and cause an unfair trial. Dr Ellis asserted that the communication was inconsistent with the requirements for a fair and public hearing as set out in s 8 of the Constitution.[158]

[142] Mr Raftery points out that, at the conclusion of the no case to answer submissions, the Court – that is the Island Magistrate and the Assessors sitting together – was required to determine whether a case had been made out against Mr Warren that was sufficient to require him to make a defence to the charge. This is borne out by s 31 of the Justice Ordinance which states:

> 31. At the close of the evidence for the prosecution—
>
> (a) if it appears to the *Court* that a case is made out against the defendant sufficiently to require the defendant to make a defence to the charge, the Magistrate shall
>
> (i) again explain the substance of the charge to the defendant and shall inform the defendant that he or she has the right to give evidence but does not have to do so and that if the defendant wishes to give evidence he or she may give such evidence on oath, in which case he or she will be liable to be cross-examined by the prosecutor and asked questions by the Court; and
>
> (ii) ask the defendant if he or she has any witnesses to call, and the Court shall then hear the defendant and any witnesses called for the defence. If the defendant states that he or she has witnesses to call but they are not present in Court and the Magistrate is satisfied that the absence of such witnesses is not due to any fault or neglect of the defendant, and that there is a likelihood that they could, if heard, give material evidence on behalf of the defendant, the Magistrate may adjourn the trial and take steps to secure the attendance of such witnesses;

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158 Set out at para [57] above.

(b) if it appears to the *Court* that a case is not made out sufficiently to require the defendant to make a defence to the charge, the Court shall dismiss the charge and shall forthwith acquit the defendant.

(Emphasis added)

[143] I reiterate that the "Court" was comprised of both the Island Magistrate *and* the two Assessors.[159] In *Re Moke Ta'ala*, the Full Court reinforced this point, in the context of the question whether it was necessary for the Judge to give the Assessors directions on how to assess accomplice evidence. The Full Court said:[160]

> We say "Court" advisedly; for the issue of accomplice *vel non* was one for the Court—comprising Judge and assessors—and not, as in the case in a criminal trial in New Zealand, for the jury alone.

[144] I agree with Mr Raftery's submission that it was appropriate for the Island Magistrate to confer with the two Assessors (as other members of the Court) in arriving at a decision on the no case to answer submissions. In addition to the point made in *Re Moke Ta'ala*,[161] the Full Court's earlier description (in *Poimatagi v The King,*[162] quoted with approval *in Tangi Puri*)[163] of the relative roles of the judicial officer and the assessors as "collaborative" is instructive. I have adopted those observations.[164]

[145] Dr Ellis also submitted that the Assessors' impartiality and independence were compromised by:

(a) The Assessors' in-private discussion with the Registrar regarding convictions for offences of nudity in the United Kingdom; and

(b) A statement of explanation given by one of the Assessors, Ms Carol Warren, which (Dr Ellis contended) rendered the trial unfair, and a "political trial" by surrendering her individual opinion to that of the majority, which was in breach

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159 Justice Ordinance, s 3(2). See also para [27] above.
160 *Re Moke Ta'ala* [1956] NZLR 474 at 479.
161 Ibid, set out at para [143] above.
162 *Poimatagi v The King* [1948] GLR 419.
163 *Tangi Puri v The Queen* [1967] NZLR 328. The relevant passage is set out at para [38] above.
164 See paras [39] and [40] above.

of the Oath of the Assessor and not the actions of an independent and impartial judicial officer.

[146] Mr Warren's sister, Ms Melva Warren-Evans, swore an affidavit on 3 August 2022 detailing conversations she had with the assessors after the trial had taken place.[165] Relevantly, the affidavit states:

> …
>
> 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.
>
> 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],
> >
> > Just a few minutes ago, I asked Steve, the other assessor, if he was present when the Registrar mentioned the 'cricket

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165 The use of this affidavit was the subject of a pre-appeal ruling: see *Warren v* R [2022] PNSC 2 at paras [9]–[12].

> 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.
>
> 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.

[147] Dr Ellis submits that the conversations detailed in Ms Warren-Evans' affidavit were irregular and could have compromised the fairness of Mr Warren's hearing in breach of art 8(1) of the Constitution. Dr Ellis sought to draw parallels between *ex parte* communications with a judge and extraneous influences on juries. He cited *Charisteas v Charisteas*[166] for the

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166 *Charisteas v Charisteas* [2021] HCA 29.

proposition that a decision-maker (in that case, a judge) should not be communicating *ex parte* with parties during the case. He referred to the following passage from a unanimous judgment of the High Court of Australia:[167]

> 13. Ordinary judicial practice, or what might be described in this context as the most basic of judicial practice, was relevantly and clearly stated by Gibbs CJ and Mason J in *Re JRL; Ex parte CJL* in 1986 by adopting what was said by McInerney J in *R v Magistrates' Court at Lilydale; Ex parte Ciccone* in 1972:
>
> > The sound instinct of the legal profession – judges and practitioners alike – has always been that, save in the most exceptional cases, there should be no communication or association between the judge and one of the parties (or the legal advisers or witnesses of such a party), otherwise than in the presence of or with the previous knowledge and consent of the other party. Once the case is under way, or about to get under way, the judicial officer keeps aloof from the parties (and from their legal advisers and witnesses) and neither he nor they should so act as to expose the judicial officer to a suspicion of having had communications with one party behind the back of or without the previous knowledge and consent of the other party. For if something is done which affords a reasonable basis for such suspicion, confidence in the impartiality of the judicial officer is undermined.

[148] I do not regard *Charisteas* as apposite. This case is concerned with conversations between the Assessors and the Registrar. There is no indication that the Registrar was in any way aligned with one or other of the parties. Communications with the Registrar are not *ex parte* communications in the sense in which that term is used in *Charisteas*.

[149] I am, however, satisfied that the jury tampering cases referred to by Dr Ellis have some tangential relevance. While the confidentiality of jury deliberations is generally to be protected, where extraneous forces may have influenced those deliberations an inquiry may be ordered and/or convictions quashed.

[150] For example, in *JM v R*,[168] the Court of Appeal of New Zealand considered a case in which the appellant had been convicted of cultivating cannabis when, around two months later, a police prosecutor told the Crown prosecutor in the appellant's trial that he had spoken with a juror or a person associated with a juror in the case. The juror had told him that "the Crown

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167 Ibid, at para 13.
168 *JM v R* [2016] NZCA 383.

did not prove it" and the jury had conducted its own inquiries and "found out about his other things". The prosecutor recorded the conversation in a memorandum which was disclosed to the appellant. The appellant appealed his convictions and in an application for directions from the Court of Appeal, sought to interview members of the jury about the statement.

[151] The Court of Appeal considered the allegation that the jury, in "conduct[ing] its own inquiries", must have engaged in conduct occurring outside of their deliberations. The application was allowed on the basis that it was in the "interests of justice" to obtain the evidence sought; the appellant did not need to show exceptional circumstances to warrant an inquiry. The Court directed an independent barrister to interview the foreperson of the jury to inquire into whether any juror brought information into the jury room beyond that which was introduced as evidence.

[152] Mr Raftery referred me to *R v Mirza*,[169] by Mr Raftery. Mr Mirza had been convicted of six counts of indecent assault, being specimen (representative) charges reflecting alleged sexual abuse of his step-daughter. Mr Mirza was a Pakistani national who had settled in England in 1988. He was convicted by a jury majority of 10:2 and sentenced to four years imprisonment, subsequently reduced on appeal to three years. This was upon a retrial after an earlier jury had failed to agree.

[153] Six days after the verdict a juror wrote a letter to counsel for the appellant. A summary of the letter was agreed as follows:

> From the beginning of the trial, there was a theory, among some of the jury, that the use of an interpreter was in some way a devious ploy. The writer of the letter was not able to convince anyone that she knew from her experience that there was nothing suspicious about the use of an interpreter. The writer of the letter claimed to be the only juror with any insight into the defendant's culture which others on the jury regarded with undue suspicion. The question of the interpreter was raised early during the jury's deliberations and the letter writer claimed that she was shouted down when she objected to this and sought to remind the other members of the jury that there was an admission to the effect that the interpreter was not a matter which should count adversely against the defendant.

[154] Counsel for Mr Mirza argued that the jury disregarded the direction of the judge; attached undue significance to the idea that Mr Mirza did not need an interpreter; described an

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169 *R v Mirza* [2004] UKHL 2, [2004] 1 AC 1118, [2004] 1 All ER 925.

admonition not to attach importance to the use of an interpreter as "playing the race card"; and were influenced by racial prejudice.

[155] The Court held that the evidence of the allegations in the letter by the former juror was not extrinsic to the juror's deliberations and was not, therefore, admissible as a basis to conclude that the verdicts of the juries were unsafe. In dismissing the appeals, Lord Steyn noted that "[t]he only exception is where there has been, or may have been, an irregular occurrence of an extraneous nature, which may have compromised the impartiality of the jury, the evidence may be admitted."[170]

[156] In dismissing the appeal, the House of Lords referred to a number of authorities where extraneous influences on the jury *were* admissible and, in some cases, justified quashing convictions. In *R v Brandon*,[171] for example, the evidence was that a jury bailiff had told the jury of the accused's previous convictions. This was held to be a grave irregularity and the conviction was quashed. In *R v Young (Stephen)*,[172] evidence was given that the jurors had consulted a ouija board in their hotel in order to arrive at a decision. This evidence was held to be admissible, and a retrial ordered.

[157] In *R v Young (Stephen)* Lord Rodger discussed the general rule and distinction between extrinsic evidence and actual deliberations. His Lordship said:[173]

> Where, on the other hand, the allegation is that the jury has been subjected to some improper influence from outside, such as bribery or intimidation, appeal courts have been prepared to admit evidence relating to that allegation, investigate the matter and set aside the jury's verdict if the allegation is made out. Since proof of improper extrinsic influence will be sufficient by itself to make the jury's verdict unsafe, no question of admitting evidence as to actual deliberations of the jurors need arise. For the most part at least, such cases are relatively easy to deal with.

[158] Mr Raftery submitted that Ms Warren-Evans' evidence falls short of being credible evidence of extraneous material being used in the Assessor deliberations for the following reasons:

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170 Ibid, at para [11].
171 *R v Brandon* (1969) 53 Cr App R 466.
172 *R v Young (Stephen)* [1995] QB 324.
173 Ibid at [162].

(a) The evidence of the allegation arises from reports of Mr Warren's sister as to her recollection and interpretation of conversations that took place months after the trial with the Assessors. There is no direct evidence of the alleged material being used as part of the deliberations, or indeed about the timing of any conversation regarding the United Kingdom cricket match incident, which could have taken place at any time before or after the trial. The duration of time since the trial that the conversations took place, the lack of specificity, and the potential partiality of Ms Warren-Evans cumulatively suggest that the evidence falls short of a credible direct allegation that the Assessors' deliberations were corrupted.

(b) By contrast, there is other evidence on the face of the court record as to the reasons for the decision from one of the Assessors, that do not support the allegation. Ms Carol Warren clearly links her reasoning to applying community standards, and not to what may or may not be the approach in the United Kingdom.[174]

(c) In any event, the alleged material has very little (or arguably no) potential prejudicial effect. Unlike most cases dealing with extraneous material, it did not involve disclosure of a defendant's previous convictions or other reports as to what the facts of this case were. Rather, it simply tended to support submission that counsel for the defendant had already put before the court, that in the United Kingdom, in some (but not all) circumstances public nudity was considered unlawful.

(d) Ms Warren had the additional safeguard of the Island Magistrate's final verdict on the matter. If he had been concerned that the Assessor's opinion was based on irrelevant material, the Island Magistrate could have overruled their opinions.

(e) The risks of inviting questions of assessors in this context is high. Assessors may feel subject to scrutiny for months after they have concluded their duties, and it could inhibit assessors from being able to rebuild their relationships with

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174 See para [146] above.

other members of the community who may have been unhappy with their opinion as expressed during the trial.

[159] While any conversation with the Registrar of the type suggested ought not to have taken place, I am satisfied that it could not have led to unsafe verdicts or an unfair trial. While I make it clear that the communication should not have happened, on the evidence, I am not satisfied that it throws any doubt on the impartiality of the Assessors.

[160] The test for apparent bias is well-established. It turns on whether a fair-minded lay observer might reasonably apprehend that the decision-maker might not bring an impartial mind to the resolution of the question required to be decided.[175] There are two questions to consider:[176]

(a) First, it is necessary to establish the actual circumstances which have a direct bearing on a suggestion that a judicial officer was or may be seen to be biased. This factual inquiry must be rigorously undertaken.

(b) The second inquiry is to ask whether such circumstances as are established might lead a fair-minded lay observer to reasonably apprehend that the judicial officer might not bring an impartial mind to the resolution of the instant case.

[161] Applying that test to the evidence put forth in Ms Warren-Evans' affidavit and considering the points raised by both Dr Ellis and Mr Raftery, I conclude that a fair-minded lay observer would not reasonably apprehend that, as a result of their conversations with the Registrar, the Assessors would not bring an impartial mind to the resolution of the question of whether Mr Warren's conduct was "indecent".

[162] A fair-minded lay observer would have realised that the United Kingdom case took place in a different jurisdiction and in a very different context to that of Pitcairn. Further, a fair-minded, lay observer would not have expected the Assessors to place more weight on the mention of that case by the Registrar than all of the submissions made before the Court by Mr Warren's counsel and the Crown. Had the Assessors themselves known of the United

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175 *Saxmere Co Ltd v Wool Board Disestablishment Co Ltd* [2009] NZSC 72, [2010] 1 NZLR 35 at [3].
176 *Muir v Commissioner of Inland Revenue* [2007] E NZLR 495 (CA) at para [62].

Kingdom case prior to their discussion with the Registrar it would not have rendered them unfit to act as assessors at Mr Warren's hearing. In particular, it would not have provided cause to object to their appointment as assessors for the trial.[177] The information was not of a kind that could reasonably be thought to compromise the Assessors' impartiality.

Is the offence of "indecent behaviour" unconstitutional?

[163] I do not consider that there is any merit in the submission that the offence of "indecent behaviour" is so vague in nature as to be unconstitutional.

[164] First, there is no basis under the Constitution to disapply, or declare void, legislation enacted by the Governor. The only source of legislation by which such a response could be achieved is the Colonial Laws Validity Act 1865 (UK), discussed in *Christian v Lands Court*.[178] In that case, I cited a passage from Baroness Hale, for the majority of the Privy Council, in *Suratt v Attorney-General of Trinidad and Tobago*.[179] Her Ladyship said:

> 45. … The constitutionality of a parliamentary enactment is presumed unless it is shown to be unconstitutional and the burden on a party seeking to prove invalidity is a heavy one: see *Grant v The Queen* [2007] 1 AC 1, para 15, citing *Mootoo v Attorney General of Trinidad and Tobago* [1979] 1 WLR 1334, 1338-1339. On the other hand, the Constitution itself must be given a broad and purposive construction: see *Minister of Home Affairs v Fisher* [1980] AC 319, 328.

[165] Applying what was said by the Privy Council in *Surat,* there is no constitutional basis on which s 5 of the Summary Offences Ordinance can be attacked as creating an unconstitutional offence of indecent behaviour.

[166] Second, the law has always regarded the assessment of "offensive", "indecent" or "insulting" behaviour as one of community standards, generally determined by a jury in common law jurisdictions. The assessors reflect the voice of the community and perform the same function as a jury. Necessarily, the word "indecent" is general in nature. What constitutes

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177 Justice Ordinance, s 29, set out at para [27] above. See also para [28] above.
178 *Christian v Lands Court* [2023] PNSC 2 at paras [63]–[71].
179 *Suratt v Attorney-General of Trinidad and Tobago* [2007] UKPC 55, at para 45.

indecent behaviour is a question of fact, not of law.[180] I have already discussed these considerations in some depth, and refrain from repeating myself.[181]

Were adequate reasons given?

[167] I am bound by the judgment of the Court of Appeal in *Warren v R*,[182] in relation to the need for reasons to be given by the Assessors or the Judge. The Court of Appeal held that: "The absence of reasons from the Assessors did not render the trial unfair or breach Mr Warren's constitutional right of freedom of expression". For that and other reasons I have given in holding that Mr Warren did not receive an unfair trial, this challenge must fail.

Were the verdicts justified on the evidence?

[168] For the reasons previously given, three of the four elements of the offences were admitted by Mr Warren, and did not need to be proved beyond reasonable doubt.[183] The fourth, whether the behaviour was "indecent", involved application of contemporary community standards. That was done by the two Assessors and the Island Magistrate, all of whom live on-island. All three of them took the view that the behaviour was "indecent" when viewed from the standpoint of the Pitcairn community. As a result, all elements of the offence were proved, on the basis of adequate evidence.

Sentence appeal

[169] While there is some merit in Dr Ellis' submission that the Island Magistrate ought to have separated out the three offences and addressed each individually, there is no basis on which I am prepared to interfere with the sentence imposed.

[170] A fine of $50 per charge was significantly below the maximum available of $100 per charge. There was insufficient difference between the events underlying each charge,[184] to justify a financial penalty at a different level for one or more of them.

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180 Generally, see *Brutus v Cozens* [1972] 2 All ER 1297 (HL) at 1299 (Lord Reid), 1301 (Lord Morris) and 1303–1304 (Lord Kilbrandon). See also paras [91]–[104] above.
181 See paras [89]–[107] above.
182 *Warren v R* [2016] PNCA 1, at para [39], set out at para [47] above.
183 See para [2] above.
184 See paras [8]–[10] above.

[171] Viewed from a totality perspective, a fine of $150 was well within range. The appeal against sentence fails.

Result

[172] For the reasons given:

(a) Mr Warren's appeal against all three convictions is dismissed.

(b) Mr Warren's appeal against sentence is dismissed.

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Paul Heath
Chief Justice