

**IN THE FALKLAND ISLANDS SUPREME COURT**

**Case References:**

**SC/CRIM/2/15**

**SC/CRIM/3/15**

**SC/CRIM/4/15**

**SC/CRIM/5/15**

**SC/CRIM/6/15**

**SC/CRIM/7/15**

**SC/CRIM/8/15**

**JASON PAUL MORRIS  
JEANNIE PAULINA McKAY  
KENNETH BARRY STEWART  
KENNETH WILLIAM DUVALL  
MATTHEW JOHN McMULLEN  
SYLVIA JEAN FRANCIS  
STEVIE COPPELL BONNER**

Appellants

**v.**

**THE QUEEN**

Respondent

**Judgment**

1. These appeals come before me on references by the Governor under section 3(1) of the Criminal Justice (Amendment) (Miscarriages of Justice) Ordinance (No.7 of 2006) (the "Miscarriages of Justice Ordinance").
2. The Miscarriage of Justice Ordinance provides, in material respects at sections 3 and 4, as follows:

*3 Reference to the Supreme Court as to possible miscarriages of justice in summary trials*

*(1) Where a person has been convicted of an offence by a court of summary jurisdiction, the Governor -*

*(a) may at any time refer the conviction to the Supreme Court; and*

*(b) (whether or not he refers the conviction) may at any time refer to the Supreme Court any sentence imposed on, or in subsequent proceedings relating to, the conviction.*

*(2) A reference under subsection (1) of a person's conviction shall be treated for all purposes as an appeal against the conviction (whether or not he pleaded guilty).*

*(3) A reference under subsection (1) of a sentence imposed on, or in subsequent proceedings relating to, a person's conviction shall be treated for all purposes as an appeal by the person against -*

*(a) the sentence; and*

*(b) any other sentence imposed on, or in subsequent proceedings relating to, the conviction or any related conviction.*

...

#### *4 Conditions for making of reference*

*(1) A reference of a conviction, verdict, finding or sentence shall not be made under either of sections 2 and 3 unless -*

*(a) the Governor considers that there is a real possibility that the conviction, verdict, finding or sentence would not be upheld were the reference to be made;*

*(b) the Governor so considers -*

*(i) in the case of a conviction, verdict or finding, because of an argument, or evidence, not raised in the proceedings which led to it or on any appeal or application for leave to appeal against it; or*

*(ii) in the case of a sentence, because of an argument on a point of law, or information, not so raised, and*

*(c) an appeal against the conviction, verdict, finding or sentence has been determined or leave to appeal against it has been refused.*

*(2) Nothing in subsection (1)(b)(i) or (c) shall prevent the making of a reference if it appears to the Governor that there are exceptional circumstances which justify making it."*

3. In each of these matters the Appellant was either convicted of, or pleaded guilty to, an offence under the Protection from Harassment Act 1997 (an England and Wales criminal statute), and was in due course sentenced in relation to the same.
4. In the Governors' Statement of Reasons in relation to each reference, the Governor stated in accordance with section 4(1) of the Miscarriage of Justice Ordinance that he considered that there was a real possibility that the conviction would not be upheld were the reference made and that although no appeal has ever been heard in relation to the conviction it appeared to him that there were exceptional circumstances which justified the making of the reference.
5. In this regard the Statement of Reasons in each case also stated, and I quote:

"I make this reference following the legal ruling of the Senior Magistrate in the case of *Regina -v- Kevin Derek Charles McLaren (MC/CROIM/57/13, MC/CRIM66/13 and MC/CRIM/67(13)* delivered in the Magistrate's Court of the Falkland Islands on 20 January 2014. The Revised Laws of the Falklands (at Volume 2, 23 Imp/37) state that the Protection of Harassment Act 1997 applies in the Falkland Islands by virtue of section 78 of the Interpretation and General Clauses Ordinance as an augmentation of the Offences Against the Person Act 1861 and the Public Order Act 1986. The two said Acts apply in the Falkland Islands by virtue of section 6 to and Schedule 1, Part 1 of the Crimes Ordinance. The Senior Magistrate ruled that the Revised Laws of the Falklands are manifestly in error and that the Protection from Harassment Act 1997 does not augment the two said Acts."

6. The nature of an appeal to the Supreme Court is identified in Section 48(2) of the Administration of Justice Ordinance 1949 (the "Ordinance") which provides:-

*"So far as is convenient and practicable, the practice and procedure of the Supreme Court in the exercise of its appellate jurisdiction shall be that of the Court of Appeal in England (disregarding or modifying any provisions relating to a multiplicity of judges)."*

7. The provisions of the Ordinance in this regard were considered by the Supreme Court in the case of *Brian John Williams v R (SC/CRIM/03/05)* in which it was confirmed, rightly in my view and for the reasons given, that the practice and procedure of the Supreme Court in the exercise of its appellate jurisdiction was that of the Court of Appeal in England, namely a hearing on submissions as to the safety of the conviction.
8. The issue that arises on these appeals is whether the Protection from Harassment Act 1997 does or does not apply to the Falkland Islands. If it does not apply then the convictions are unsafe as the offence charged in each case did not relate to the purported commission of an offence known to Falkland Islands law.
9. Section 57 of the Ordinance sets out the powers of the Supreme Court on a criminal appeal. These include at section 57(a)(i) the power to quash the conviction. If the convictions are unsafe, then this is the course of action which is appropriate.
10. In the *McLaren* case referred to by the Governor in his Statement of Reasons for making each reference, the previous Senior Magistrate identified how an English

statute might become part of Falkland Islands law, and proceeded to examine the issue that arises on these appeals in some detail and with considerable care.

11. It is common ground that there is no specific Falkland Islands Ordinance which deals with the same subject matter as is dealt with by the 1997 Act, nor is there an Ordinance which expressly brings its provisions into force in the Falkland Islands, nor is there any reference to it in the Crimes Ordinance or amendments thereto.
12. However the (loose-leaf) Revised Laws of the Falkland Islands at Volume 2, 23 Imp/37 states as follows:

*"PROTECTION FROM HARASSMENT ACT 1997*

***Extent of application***

*The whole Act, except sections 8 to 11 (inclusive) and 13*

***Modifications***

*The Act applies subject to the general modifications prescribed by the Interpretation and General Clauses Ordinance (Title 67.2), s.76 and Schedule"*

13. Under this entry, the Notes provide as follows:

*"NOTES*

*Application to Falkland Islands. Applicable by virtue of Interpretation and General Clauses Ordinance (Title 67.2), s.78, as an augmentation of the Offences Against the Person Act 1861 and Public Order Act 1986 (applicable as indicated above)."*

14. The Revised Edition of the Laws Ordinance (Ordinance No.17 of 1991) (the "Revised Edition of Laws Ordinance") contemplated that the Revised Edition as most recently revised would be published at least annually on CD-ROM, each publication to be authorised by the Governor. Suffice it to say that although CD-ROMs have subsequently been produced, and continue to be produced, these have never been authorised by any Governor under the terms of the Revised Edition of Laws Ordinance and they cannot be relied upon as providing a full and accurate version of the law. To ascertain what the law is in such circumstances, the normal starting point is to have regard to the loose-leaf Revised Laws of the Falkland Islands and then consider all subsequent published legislation in the

Falkland Islands. No subsequent legislation has been identified which impacts upon the question of whether the 1997 Act applies to the Falkland Islands.

15. A preliminary question that arises is whether the Court is bound to follow what is stated in the loose-leaf Revised Edition of the Laws of the Falkland Islands. In this regard sections 6 of the Revised Edition of Laws Ordinance provides:-

*6 Certification and admissibility in evidence*

*(1) Upon publication of an Order under section 4(2) the Attorney General shall transmit to the Courts Administrator three copies of the CD-ROM of the issue of the Revised Edition thereby authorised to be published. If any question shall thereafter arise as to what is contained in that issue of the Revised Edition, that question shall be determined by reference to one of the copies so transmitted, but if no such copy is available by the Attorney General producing to the relevant court a CD-ROM under cover of a certificate under his hand to the effect that the copy is a true and complete copy of the last published issue of the Revised Edition.*

*[S. 2/Ord. 15/06/w.e.f. 5/6/06.]*

*(2) Subject to subsection (3) the issue of the Revised Edition last authorised by Order under section 4(2) shall be deemed accurately to reflect the law of the Falkland Islands as at the revision date in relation to which it is issued.*

*[S. 2/Ord. 15/06/w.e.f. 5/6/06.]*

*(3) Subsection (2) shall not preclude any court from receiving in evidence any officially published copy of any law in force in the Falkland Islands but, unless that court is satisfied that the Revised Edition is manifestly in error in the relevant particular, the court shall in relation to that particular prefer the copy of the law published in the Revised Edition to any other copy."*

16. I consider that, notwithstanding the terms of section 6(2), the effect of section 6(3) is that the Court is not bound to follow what is stated in the loose-leaf version of the Revised Edition of the Laws of the Falkland Islands where it concludes that the Revised Law is manifestly in error in the relevant particular (and that this is not dependent upon receiving into evidence any other officially published law). In circumstances where, as appears below, I consider that the statement of the Revised Edition of the Laws of the Falkland Islands in relation to the 1997 Act is manifestly in error, I would prefer to leave open to a future case (if one should ever arise) the question of the effect of the "deeming" provision in section 4(2), and the breadth of the Court's power to scrutinise legislation so as to establish what the law actually is, in circumstances where the statement of the law is not "manifestly in error".

17. Turning then to the question as to whether, by virtue of section 78 of the Interpretation and General Clauses Ordinance (No. 14 of 1977) (the "Interpretation Ordinance"), the 1997 Act is incorporated into Falkland Islands law, section 78 of the Interpretation Ordinance provides as follows:-

78 Construction of reference to imperial enactment

(1) A reference in any written law of the Falkland Islands to any imperial enactment or to any provision, part or division thereof shall be construed as a reference to the same as it may from time to time be amended (provided that the enactment, provision, part or division referred to is not wholly repealed without being replaced), and as a reference to any imperial enactment or to any provision, part or division of any imperial enactment substituted therefor, but this subsection shall not have effect so as to apply as part of the written law of the Falkland Islands-

(a) any amendment of an imperial enactment, provision, part or division thereof where that amendment is enacted or made after the cut-off date; or

(b) any imperial enactment, provision, part or division of any imperial enactment substituted after the cut-off date for any imperial enactment, provision, part or division of an imperial enactment which applied as part of the written law of the Falkland Islands on the cut-off date.

[S. 3(a)/Ord. 13/04/w.e.f. 13/8/04.]

(2) Without prejudice to subsection (1), a reference in any written law of the Falkland Islands to an imperial enactment shall be construed as extending to any later imperial enactment enacted or made before the cut-off date which-

(a) modifies or augments that earlier imperial enactment or any other imperial enactment which amends or is substituted for that enactment;

(b) amends or is substituted for any imperial enactment applying by virtue of paragraph (a).

...

(7) In this section "cut-off date" means 31st July 2004."

18. Ultimately, therefore, the question is whether the 1997 Act "modifies or augments" the Offences against the Person Act 1861 or the Public Order Act 1996 (each of which is listed in Schedule 1 to the original Crimes Ordinance of 1989, and are, therefore, a "written law of the Falkland Islands").

19. I consider that the answer to that question is "no". The 1977 does not "augment" in the sense that I consider it is to be understood (namely to add to) either of those two Acts. It creates new offences and a new category of criminal behaviour (stalking), and is properly to be regarded as a stand-alone statute. I reject any

suggestion that a later Act can augment an earlier one simply because its subject matter is in some way similar to that dealt with in the original Act, for example because it modifies or augments an area of law with which the earlier Act could be said to be concerned. If such had been the intention different words could, and I consider would, have been used. Such an interpretation would also be inconsistent with the actual wording of section 78(2) which refers to a later imperial enactment which "modifies or augments **that** earlier enactment" (emphasis added). These are specific words which should be given no wider meaning than necessary, given that the effect of the provision is that later laws are incorporated into the laws of the Falkland Islands without legislative scrutiny.

20. Of course even if the subject matter is not identical it is possible that there may be indications that a later Act does augment an earlier Act - for example if it is cross-refers to the earlier Act, or indeed the earlier Act (by amendment) refers to it. But that is not the present case. Ultimately each Act must be considered on its own terms.
21. In the above circumstances I conclude, and find, that the entry in the Revised Edition of the Laws as set out in the loose-leaf version is manifestly in error in relation to the application of the Protection from Harassment Act 1997, and that the 1997 Act does not apply to the Falkland Islands.
22. That being the case, the convictions in relation to the offences under the 1997 Act in relation to each appellant are unsafe. Pursuant to section 57(a)(i) of the Administration of Justice Ordinance I allow the Appellants' appeals in relation to the offences under the 1997 Act and quash each of the Appellants' convictions under such Act.
23. As a result of their convictions two of the Appellants were ordered to pay financial penalties and all seven Appellants were ordered to make contributions towards the cost of the prosecution. The Attorney-General has undertaken to ensure that the Appellants are reimbursed an amount equivalent to the fines and costs that they were ordered to pay as a result of their convictions, and in such circumstances I make no separate order in that regard.

24. The Criminal Justice (Amendment) (Miscarriages of Justice) Ordinance 2006 makes provision for the payment of compensation for miscarriages of justice. However pursuant to section 6(3) thereof, any such payment of compensation is a matter to be determined by the Governor of the Falkland Islands, and accordingly does not arise for consideration on these appeals.

13 January 2016  
Simon Bryan QC  
Chief Justice