Court of Appeal of Pitcairn Islands

Christian v R (No 2) [2006] PNCA 1 (2 March 2006)

IN THE PITCAIRN COURT OF APPEAL

CA 1-6/2005

BETWEEN STEVENS RAYMOND CHRISTIAN LEN CALVIN DAVIS BROWN LEN CARLISLE BROWN DENNIS RAY CHRISTIAN CARLISLE TERRY YOUNG RANDALL KAY CHRISTIAN
Appellants

SHAWN BRENT CHRISTIAN
(Intervener)

AND THE QUEEN
Respondent

Hearing: 31 January, 1, 2, 3, 7 & 8 February 2006 (at Papakura District Court)

Judgment: 2 March 2006 (at High Court, Auckland)

Coram: Henry P Barker JA Salmon JA

Counsel: Mr S J Eisdell Moore (Public Prosecutor), Mr K Raftery,
Ms J C Gordon and Mr S J M Mount for the Crown
Mr P E Dacre (Public Defender), Mr A C Roberts and Mr C B Cato for Stevens Raymond Christian and Len Carlisle Brown
Mr G M Illingworth QC for Carlisle Terry Young
Mr A Cook QC for Randall Kay Christian, Dennis Ray Christian, Len Calvin Davis Brown and Shawn

Brent Christian

JUDGMENT OF THE COURT

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Introduction

[1] In May 2005, the above six appellants were convicted by the Pitcairn Supreme Court sitting in

Papakura, New Zealand, of a number of serious sexual offences involving rape, indecent assault and incest, following trials held on Pitcairn Island in October 2004. Hearings in New Zealand by Pitcairn Courts were authorised by an enactment of the New Zealand Parliament, namely the Pitcairn Island Trials Act 2002, which statute gave legislative effect to a treaty between the Governments of the United Kingdom and New Zealand.

[2] The sentences imposed were:

[a] Randall Kay Christian – 6 years imprisonment

[b] Carlisle Terry Young – 5 years imprisonment

[c] Stevens Raymond Christian – 3 years imprisonment

[d] Len Carlisle Brown – 2 years imprisonment, with leave to apply for home detention

[e] Len Calvin Davis Brown – 250 hours community work

[f] Dennis Ray Christian – 300 hours community work

The operation of the sentences has been suspended pending this appeal and the appeal from this Court to the Judicial Committee of the Privy Council, for which leave has already been given in respect of this Court's decision of 5 August 2004.

[3] The principal judgment under appeal was that of the Full Court of the Supreme Court delivered on 24 May 2005 after a seven day hearing in April 2005 which considered several of the issues raised in this appeal. Following the delivery of that judgment, which dismissed the various applications to terminate the proceedings against the appellants, convictions were entered and sentences imposed on individual appellants by the individual Judges who had presided over each appellant's trial.

[4] The trials had been held on Pitcairn between 29 September and 28 October 2004. The Public Defender had advised the Court that he wished to raise further grounds for dismissing the charges on a variety of abuse of process arguments. These were additional grounds to those covered by the earlier appeal to this Court which resulted in the Court's judgment of 5 August 2004.

[5] The Judicial Committee declined to stay the trials on Pitcairn, which proceeded. In those cases where an appellant was found guilty, a finding to that effect and an indication of sentence was given by the Judge. But no convictions were entered at that stage.

[6] Consequently, the lengthy and detailed argument before the Supreme Court on the late promulgation/abuse of process and associated grounds was part of the trial of each appellant. Appeals filed were technically against convictions entered by individual Judges. In some cases there are grounds of appeal of the usual sort, aimed at the Judge's interpretation of the law or facts. However, the bulk of the appeals are against the Supreme Court's ruling of 24 May 2005 on the late promulgation/abuse of process and related issues. Before reaching that ruling, the Supreme Court heard evidence from some Pitcairn residents, the Governor's legal adviser, a New Zealand solicitor who had advised some

residents, and a retired Kent police inspector.

[7] All six of the appellants named in para [2] appeal against conviction on grounds that can be summarised thus:

> The English law under which they were charged (that is, the **Sexual Offences Act 1956**) (the 1956 Act) was not in force on Pitcairn during the period of the alleged offending. There are several branches to this argument, which will be enlarged upon in the course of this judgment, including ultra vires and uncertainty aspects.

The Governor acted ultra vires in enacting a number of Ordinances based on New Zealand models and in appointing New Zealanders to positions in the Pitcairn justice system.

The Supreme Court should have granted a permanent stay of all criminal charges on several distinct grounds, which can be broadly grouped as abuse of process grounds. Some of these were not raised in the Supreme Court but are included in the summary below. The Crown did not object to all the grounds being considered, even if they had not been argued, or as fully argued, in the Court below. In summary, the grounds were:

> [i] No adequate promulgation or publication of or ready accessibility to the 1956 Act in Pitcairn and, consequently, no knowledge of that Act by the inhabitants of Pitcairn.
>
> [ii] The lack of a right of appeal at the time when the alleged offences were said to have been committed and, alternatively, no right of appeal when the 1956 Act came into force.
>
> [iii] The lack of an English police presence on Pitcairn.
>
> [iv] The incorporation into Pitcairn law of New Zealand, rather than English, penal legislation and other machinery of criminal justice.
>
> [v] The failure of the Governor to appoint English judges and prosecutors.
>
> [vi] The late installation of enforcement and other machinery of justice, including a new prison, – effected only after the investigation or institution of charges.
>
> [vii] The late appointment of the Public Defender.
>
> [viii] The delay in the laying of charges after the Public Prosecutor had determined which charges were to be laid.
>
> [ix] The hearing of the argument relating to late promulgation/ abuse of process, et cetera, after findings of guilt and indications of sentence.

[8] Stevens Raymond Christian and Carlisle Terry Young also appeal on the grounds that the Supreme

Court incorrectly applied the relevant law relating to the crime of rape in their trials. Carlisle Terry Young was granted leave to amend his appeal by adding further grounds.

[9] Randall Kay Christian sought leave to file further grounds of appeal. These have yet to be properly formulated and, presumably, relate to circumstances special to him. The Court indicated that it could not allocate a fixture for this aspect of his appeal until proper grounds had been formulated. However, Randall Kay Christian is a party, along with the other appellants, to the grounds of appeal summarised in para [7] above.

[10] In addition to hearing these appeals, the Court gave leave to Shawn Brent Christian, who is currently awaiting trial at Papakura, to intervene in the jurisdictional/abuse of process appeal brought by the other six appellants. This leave is restricted to his participation in the jurisdictional and general grounds advanced by the other six appellants. If those appellants are to succeed on those grounds, Shawn Christian could not be tried.

[11] In the course of the hearings the Supreme Court received, by consent, several thousand pages of historical documents, many of which were considered by this Court during the pre-trial appeal in which judgment was delivered on 5 August 2004. Counsel have augmented those documents and have consolidated and reduced the factual record, indexed the documents and put them into chronological order. This process has been overseen by the Crown, with the cooperation and agreement of the Public Defender.

[12] Included within the record are a number of additional relevant documents. These have been located since May 2005 through the ongoing process of research and in response to additional requests for disclosure from the Governor's office and the Foreign and Commonwealth Office. All documents were admitted by consent for the purposes of the appeal.

[13] The Crown has also filed a most helpful chronology of events from 1790 to 2005, with detailed references to the factual record.

[14] The Court records its gratitude to all counsel for their research and for their helpful and thorough submissions. The Court now deals with the various grounds of appeal, which come under two broad heads, namely jurisdictional invalidity and abuse of process, plus the individual appeals.

Sexual Offences Act 1956 – incorporated into Pitcairn law?

[15] In this Court it was submitted on behalf of all appellants that the 1956 Act, which was the source of all the convictions now in question and came into force in England on 1 January 1957, has never been validly incorporated into the law of Pitcairn. Five separate reasons why this is so were propounded. First, there was no publication of the 1956 Act in Pitcairn as required by the relevant Order in Council under which the 1956 Act was said to have been imported. Second, the incorporation of the 1956 Act was ultra vires the Governor, because he had not turned his mind to whether this particular provision of English law would be for the peace, order and good government of the Islands. Third, the enacting provision was void for uncertainty. Fourth, there being no provision for appeal against a conviction under the 1956 Act until 2000, the purported incorporation was therefore invalid and void ab initio.

Fifth, part of the 1956 Act was excluded from the ambit of s 14(1) of the **Judicature Ordinance 1970** (and s 7 of the **Judicature Ordinance 1961**) by reason of subs (2) of that 1970 Ordinance (s 8 of the 1961 Ordinance).

[16] Before considering each of those contentions, it is necessary to summarise the relevant history relating to the incorporation of English law, in respect of particular serious criminal offending, as part of Pitcairn law.

[17] As we understand it, it is common ground that when Pitcairn was first settled by the mutineers in 1790 (assuming that Pitcairn was or became a British settlement, as this Court has held to be the case) 'all the English laws then in being, [and applicable to their own situation] which are the birthright of every subject, are immediately there in force' (Blackstone, **Commentaries on the Laws of England** (4th edition, 1770) 107).

[18] As we noted in the earlier judgment of this Court of 5 August 2004, in 1838 Captain Elliot of HMS Fly drew up a form of constitution and a series of laws, which were adopted by the Islanders, under which serious crime was to be referred to the captain of the next visiting warship. Obviously it was intended English law was to be applied where appropriate. In 1898, Pitcairn came under the umbrella of the **Pacific Order in Council 1893**. The relevant provisions of this are contained in articles 20, 23 and 49:

> 20. Subject to the other provisions of this Order, the civil and criminal jurisdiction exerciseable under this Order shall, so far as circumstances admit, be exercised upon the principles of and in conformity with the substance of the law for the time being in force in and for England, and with the powers vested in and according to the course of procedure and practice observed by and before courts of justice and justices of the peace in England, according to their respective jurisdictions and authorities.
>
> 23. Crimes, offences, wrongs, and breaches of contract against or affecting the person, property, or rights of natives or foreigners, committed by persons subject to this Order, are, subject to the provisions of this Order, punishable or otherwise cognizable, in the same manner as if they were committed against or affected the person, property, or rights of British subjects.
>
> ...
>
> 49. The crimes punishable under this Order are:-
>
> (1.) Any acts or omissions which are for the time being punishable in England on indictment with death, penal servitude, or imprisonment, as treasons, felonies, or misdemeanours.
>
> (2.) Acts or omissions by this Order, or by any regulations

> made by virtue of this Order, declared to be punishable as offences against this Order.

[19] Under the Order in Council the existing office of High Commissioner for the Western Pacific was continued. The jurisdiction relevant to the provisions quoted above was vested in, and exercisable by, the High Commissioner's Court, which was also established under the Order in Council. Rape, indecent assault on females and incest were offences punishable under English statutory law as at 1898 and therefore during the currency of the applicability of the 1893 Order in Council also punishable under Pitcairn law.

[20] The jurisdiction of the High Commissioner's Court was expressly recognised for 'cases of a grave and serious character' by law 22 of the 1904 revised laws for Pitcairn as laid down by the Deputy Commissioner. The offences of rape, indecent assault on females and incest were not specified in those 1904 laws.

[21] In December 1940, the Pitcairn Island Government Regulations 1940 were promulgated by the Deputy Commissioner for the Western Pacific. The regulations made provision for an Island Court and under regulation 16 all cases not within the jurisdiction of the Island Court were to be heard and determined by the High Commissioner's Court.

[22] In 1951, the 1940 Regulations were held by the Fiji Supreme Court to be ultra vires because the Deputy High Commissioner had no power to create courts or to confer jurisdiction on courts. This judgment led to the Pitcairn Order in Council, 1952, article 3 of which provided:

> Without prejudice to anything lawfully done thereunder, the Pacific Order in Council is hereby revoked in so far as it applies to the Islands:
>
> Provided that, until the Governor, by law made under the provisions of this Order, provides that the jurisdiction of the High Commissioner's Court in the Islands shall cease, and subject as hereinafter provided –
>
> > (a) the High Commissioner's Court, when consisting of a Judicial Commissioner, shall continue to have all the jurisdiction with respect to causes or matters occurring or arising in the Islands which it would have if the Pacific Order in Council still applied to the Islands; and
> >
> > (b) such jurisdiction shall be exercisable upon the principles of, and in conformity with, such law, and according to such procedure and practice, as would be applicable if the Pacific Order in Council still applied as aforesaid; and
> >
> > (c) judgments, decrees, orders and sentences of the Court

> shall be enforced and executed as if the Pacific Order in Council still applied as aforesaid;

[23] Under the Order, the Governor of Fiji became the Governor of Pitcairn, Henderson, Ducie and Oeno Islands. Articles 5 and 7 provided:

> 5. (1) It shall be lawful for the Governor to make laws for the peace, order and good government of the Islands.
>
> (2) Without prejudice to the generality of the power conferred by subsection (1) of this section, the Governor may, by any such law, constitute a Court in and for the Islands with such jurisdiction, and may make such provisions and regulations for the proceedings in such Court and for the administration of justice, as the Governor may think fit.
>
> (3) All laws made by the Governor in exercise of the powers conferred by this Order shall be published in such manner and at such place or places in the Islands as the Governor may from time to time direct.
>
> (4) Every such law shall come into operation on the date on which it is published in accordance with the provisions of subsection (3) of this section, unless it shall be provided, either in such law or in some other enactment, that it shall come into operation on some other date, in which case it shall come into operation on that date.
>
> (5) The date on which every such law is published in accordance with the provisions of subsection (3) of this section shall be notified in the Fiji Royal Gazette, and such notification shall be conclusive evidence as to the date and fact of such publication.
>
> ...
>
> 7. The Governor may, by law made under the provisions of this Order, confer on the Supreme Court of Fiji such jurisdiction in respect of causes and matters occurring or arising in the Islands as might be conferred by Her Majesty in Council, and may make such provisions and regulations as the Governor may think fit respecting the exercise of any jurisdiction so conferred and respecting the enforcement and execution of the judgments, decrees, orders and sentences of the Supreme Court of Fiji made in the exercise of any such jurisdiction, and respecting

appeals therefrom.

[24] The 1940 Regulations were effectively reinstated by a 1952 Ordinance made pursuant to the 1952 Order in Council.

[25] By the **Judicature Ordinance 1961**, the revocation of the **1893 Pacific Order in Council** became fully effective. The jurisdiction of the High Commissioner's Court in the Islands ceased and jurisdiction in respect of cases and matters arising in the Islands was vested in the Supreme Court of Fiji to the same extent as its jurisdiction existed in the colony of Fiji. A 'subordinate' court was established, with criminal jurisdiction being that vested in a Magistrate's Court of the first class in Fiji. Sections 7 and 8 of the 1961 Ordinance provided:

> 7. Subject to the provisions of section 8 of this Ordinance the substance of the law for the time being in force in and for England shall be in force in the Islands.
>
> 8. All the laws of England extended to the Islands by this Ordinance shall be in force therein so far only as the local circumstances and the limits of local jurisdiction permit and subject to any existing or future Ordinance and for the purpose of facilitating the application of the said laws it shall be lawful to construe the same with such formal alterations not affecting the substance as to names, localities, courts, offices, persons, moneys, penalties and otherwise as may be necessary to render the same applicable to the circumstances.

[26] The **Justice Ordinance 1966** revoked the **1940 Regulations** and established an Island Court exercising limited civil and criminal jurisdiction. Part X of the Ordinance listed the offences triable by the Island Court. The jurisdiction of the Subordinate Court continued and Part VII provided for committal of persons for trial before the Supreme Court and the Subordinate Court.

[27] The **Pitcairn Order 1970** then revoked the **Pitcairn Order in Council 1952**. By article 3(2), the revocation was without prejudice to the continued operation of laws made under the earlier 1952 Order. Article 5 provided:

> (1) The Governor may make laws for the peace, order and good government of the Islands.
>
> (2) Without prejudice to the generality of the power conferred by subsection (1) of this section, the Governor may, by any such law, constitute courts for the Islands with such jurisdiction, and make such provisions and regulations for the proceedings in such courts and for the administration of justice, as the Governor may think fit.
>
> ...
>
> (3) All laws made by the Governor in exercise of the powers conferred by this Order shall be published in such manner and at such place or places in

> the Islands as the Governor may from time to time direct.
>
> (4) Every such law shall come into operation on the date on which it is published in accordance with the provisions of subsection (3) of this section unless it is provided, either in such law or in some other enactment, that it shall come into operation on some other date, in which case it shall come into operation on that date.

[28] The **Judicature Ordinance 1970** followed. It established a Supreme Court for the Islands which was vested with the jurisdiction, powers and authorities for the time being vested in the High Court of Justice in England. It also established a Subordinate Court presided over by a magistrate vested with criminal jurisdiction and powers for the time being as those vested in Magistrates' Courts in England. Section 14 of the 1970 Ordinance provided:

> (1) Subject to the provisions of the next succeeding subsection the common law, the rules of equity and the statutes of general application as in force in and for England at the commencement of this Ordinance shall be in force in the Islands.
>
> (2) All the laws of England extended to the Islands by the last preceding subsection shall be in force therein so far only as the local circumstances and the limits of local jurisdiction permit and subject to any existing or future Ordinance and for the purpose of facilitating the application of the said laws it shall be lawful to construe the same with such formal alterations not affecting the substance as to names, localities, courts, offices, persons, moneys, penalties and otherwise and may be necessary to render the same applicable to the circumstances.

[29] By an amending **Ordinance of 1983**, s 14(1) was amended by substituting 1 January 1983 as the relevant date to determine the English law which was in force in the Islands. The **Judicature Ordinance 1970** was in turn repealed and replaced by the **Judicature (Courts) Ordinance 1999**, under which the laws of England were again extended to the Islands in similar terms to those earlier used, but the appropriate English law was designated as that 'for the time being'.

Publication

[30] At the forefront of Mr Illingworth's submissions was what he termed the failure by the Governor to follow the mandatory procedure required by article 5(3) of the **Pitcairn Order 1970** and previously also required by article 5(3) of the **Pitcairn Order in Council 1952**. The consequence was, he submitted, that as a matter of clear law the 1956 Act never came into force in the Islands. The argument was that because, by s 14 of the **1970 Judicature Ordinance** (and by s 7 of the **Judicature Ordinance 1961**) the Governor was purporting to make the 1956 Act law for the Islands, publication of the 1956 Act was therefore required under article 5(3). We note that the point in this stark form was not taken in, and therefore not considered by, the Supreme Court.

[31] The facts established in the Supreme Court are that the 1956 Act as such has never been published in Pitcairn, whether in its terms or in any summary form. The evidence is that it was not until about

1997 that **Halsbury's Laws of England** (4th ed) was received in Pitcairn, and that appears to be the first occasion on which it could be said that any written material setting out the relevant English law became available on the Island itself.

[32] This issue turns on the true construction of article 5(3). The **Pitcairn Order 1970** was made on 30 September 1970 and came into force on 10 October 1970. Also on 30 September 1970, and taking effect on 10 October 1970, the **Pitcairn Royal Instructions 1970** were issued by Her Majesty the Queen. These were directed to the Governor. Instruction 4 reads:

> In the making of laws for the Islands the Governor shall observe, as far as is practicable, the following rules:-
>
> (1) All laws shall be styled 'Ordinances' and the words of enactment shall be 'Enacted by the Governor of the Islands of Pitcairn, Henderson, Ducie and Oeno'.
>
> (2) Matters having no proper relation to each other shall not be provided for by the same law; no law shall contain anything foreign to what the title of the law imports; and no provision having indefinite duration shall be included in any law expressed to have limited duration.
>
> (3) All laws shall be distinguished by titles, and shall be divided into successive sections consecutively numbered, and to every section there shall be annexed in the margin a short indication of its contents.
>
> (4) All laws shall be numbered consecutively in a separate series for each year commencing with the number one and the position of each law in the series shall be determined with reference to the day on which the Governor shall have made the same.

[33] Instruction 5 contains a prohibition against making laws of certain classes, including any law for the divorce of married persons. Instruction 6 requires that a transcript of all laws be sent through the Secretary of State, together with an explanation of the reasons and occasion for making the law. That mechanism, which was always followed, enabled Her Majesty the Queen, through a Secretary of State, to disallow, under article 7 of the Order, any law made by the Governor. The relevant provisions of the 1961 and the 1970 Ordinances were not disallowed.

[34] We note at this point that in respect of this issue there is no difference in substance between the position under the 1970 Order and that under its predecessor, the 1952 Order. Mr Illingworth submitted that the purpose and intent when making the relevant provisions in the Order in Council was to ensure people had access to laws binding them.

[35] The interpretation of article 5(3) and its intention must be determined against its background. Prior to 1898, it seems clear that in general terms English law, including the criminal law and the common law, applied to Pitcairn. This was subject to any local laws which may have been made, and possibly subject also to debate as to the date on which any applicable English law fell to be determined. There is nothing to suggest that the Islanders may have understood otherwise. In the 1893 Order in Council the applicability of English law (in particular, criminal law) for the time being was expressed in clear terms. It was not contended before us that, subject to the uncertainty argument, the provisions of the 1893 Order in Council in that respect could in any way be impugned.

[36] That remained the position until 1961, when the revocation of the 1893 Order in Council became fully effective as regards the Islands, as was authorised and foreshadowed by the Pitcairn Order in Council 1952. The consequence of revocation was that, absent the enactment of some further provision or provisions, Pitcairn law would be restricted to that which could be described as its own local law, and arguably also the common law. In particular, as regards serious criminal offending, because there were no local laws there would be a vacuum which could only be filled – if at all – by reference to such of the common law as may then have been part of Pitcairn law arising from a source other than the 1893 Order in Council. In that situation it seems irrefutable that the expectation, and also the intention, was that there would be some form of continuation of appropriate law to supplement existing local laws. If Mr Illingworth's argument is correct, in respect of any statutory law which it was thought desirable to continue to apply to Pitcairn, that object could only be achieved in compliance with article 5(3) and the Royal Instructions by re-enacting each and every statute by way of separate formal Ordinance. If the Governor took the view, as well he might, that a raft of English statutes, both civil and criminal and previously in force, were desirable for the peace, order and good government of the Islands, then those would necessarily have to be enacted at the same time as revocation became effective if there was not to be an interim vacuum.

[37] We do not accept that such a consequence was intended. It must have been envisaged that a general provision of the kind set out in s 7 of the 1961 Ordinance, and repeated in the Ordinances of 1970 and 1999, would be enacted. And just how a requirement to publish the common law, as it existed in England as at 1952 or 1961, or the rules of equity, if either of those provisions were properly seen as desirable for the peace, order and good government of the Islands, could be met was not made clear.

[38] Turning then to s 14 of the Judicature Ordinance 1970, which is the law in question made by the Governor. What s 14(1) does is to declare English law to be in force, which, in essence, is no more than declaratory of the existing situation. Section 14(1) itself did not 'make' English law but, as s 14(2) states, extended (or continued the extension of) existing laws to Pitcairn. For example, the Governor did not 'make' the Sexual Offences Act 1956. The law the Governor made was s 14.

[39] This conclusion is reinforced in at least three ways.

[40] First, if the intention of article 5(3) was to require separate publication of any English law, then the extension of English law in general terms, as was effected by s 7 of the 1961 Ordinance, would surely have been disallowed as being impossible to implement in compliance with article 5(3). Next, it is clear that the extension made by s 7, pursuant to the 1952 Pitcairn Order in Council, was regarded as valid and operative at the time the 1970 Pitcairn Order was made. Article 3(2) made the revocation of the 1952 Order as being without prejudice to the continuing operation of any laws made under that Order, which

would have included the 1961 Ordinance which remained in force unchallenged until 27 October 1970. Although Mr Illingworth correctly submitted that if the law never came into force for non-publication, its inherent invalidity is not cured by the failure to exercise a power of disallowance or by an outward recognition of it being in force, these two factors nevertheless point strongly to how article 5 is to be construed and whether the Governor 'made' the 1956 Act, within the meaning of article 5(3). Third, as earlier noted, the Royal Instructions prohibited the Governor from making divorce laws without prior approval. This lends further weight to the conclusion that the expectation in revoking the application of the 1893 Order in Council was that existing English divorce law would continue to apply to Pitcairn under some general enactment, such as s 7 or s 14. Otherwise the settlement would be left without such a law.

[41] It was submitted that the interpretation propounded by the appellants was reinforced by reference to human rights jurisprudence recognising the need for subjects to have the means of ascertaining the existence and content of laws applicable to them, as well as reasonable or sensible access to those laws. We do not think this jurisprudence assists the present argument. The 1952 and 1970 Orders must be looked at in the context in which they were made, which essentially was a transition of jurisdiction initially from the Western Pacific High Commissioner to the Supreme Court of Fiji and then to the Island's own domestic Court. Associated with that last transition was the vesting of a power in the Governor to make laws appropriate for the Islands, and no doubt it was envisaged that ultimately there would be a full complement of domestic law enacted. But that could not happen overnight, and even the desirability of such a course of action would require careful evaluation when the size of the colony was considered. Neither can the content of the law in question be ignored and it does not assist to take extreme examples, such as the importation of the general laws of Venezuela instanced by Mr Illingworth. Such an enactment obviously could not be for the peace, order and good government of the Islands.

[42] Our conclusion therefore is that the failure by the Governor to publish the provisions of the 1956 Act did not prevent it from coming into force upon the commencement of the Judicature Ordinance 1961 and continuing in force following commencement of the Judicature Ordinance 1970. The issue of knowledge of, and accessibility to, the relevant laws is nevertheless of relevance to the question of abuse or unfairness in enforcing the 1956 Act, and will require separate consideration. It was that point which was really at the heart of the Public Defender's submissions.

Sexual Offences Act 1956 – ultra vires the Governor

[43] Mr Illingworth submitted that by extending the laws of England in such wide terms to the Islands, the Governor made an invalidating jurisdictional error. His mandate, it was contended, was to promulgate laws designed to cater for the needs of a small and remote Pacific island. To 'graft on a whole legal system designed to meet the needs of another country' could not have been for the peace, order and good government of the Islands. The effect of this submission is that the Governor could only promulgate such of the laws of England as he had specifically addressed and determined appropriate.

[44] This submission must fail. It ignores the wide law-making power which a provision such as article 5(1) bestows. It is sufficient to refer only to a passage in the judgment of Laws LJ in **R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs** [2001] QB 1067, at paras 54, 55:

> 54. I have already referred in paragraph 40 to what was said in **Ibrelebbe v The Queen** [1964] AC 900, 923: the words peace, order and good government 'connote, in British constitutional language, the widest law-making powers appropriate to a sovereign'. This was approved in **Winfat Enterprise (HK) Co Ltd v Attorney General of Hong Kong** [1985] AC 733, 747 (which shows also that it makes no difference to the power's breadth that the colonial legislature in question is not established on representative principles: cf **Li Hong Mi v Attorney General for Hong Kong** [1920] AC 735). **R v Earl of Crewe, Ex p Sekgome** [1910] 2 KB 576, which I have cited in dealing with the argument as to this court's jurisdiction, is also a case concerned with a 'peace, order and good government' provision, under whose authority the applicant's detention was held to have been plainly justified.
>
> 55. The authorities demonstrate beyond the possibility of argument that a colonial legislature empowered to make law for the peace, order and good government of its territory is the sole judge of what those considerations factually require. It is not obliged to respect precepts of the common law, or English traditions of fair treatment. This conclusion marches with the cases on the Colonial Laws Validity Act 1865, and I have dealt with that. But the colonial legislature's authority is not wholly unrestrained. Peace, order and good government may be a very large tapestry, but every tapestry has a border.

[45] Counsel suggested that s 14 was 'outside the border', but why that should be was far from clear. Extension of the laws of England in such broad terms to colonies is traced back through the centuries and, as noted in Cote, **The Reception of English Law** (1977) 15 Alberta Law Review 29, 49, when discussing the introduction of English law by this means into colonies by way of charter or statute, no-one ever seems to have questioned the effectiveness of the procedure. Examples of the introduction of this means is also discussed by Care, Newton and Paterson in **Introduction to South Pacific Law** (1999) at 50-55. There are many such examples, and the effectiveness of such provisions is recognised through to late in the 20th century. Section 14, and its 1961 predecessor, did no more than follow long-established principle, one which, assuming Pitcairn was a British settlement, applied to Pitcairn.

[46] The submission also ignores the reality of the situation and the need to utilise a general provision to provide good governance. We are unable to see how it could be contended that the continued application of English law with appropriate savings provisions could not, at the relevant times, be seen as reasonable for the peace, order and good government of the Islands.

Uncertainty

[47] It was further submitted on behalf of the appellants that s 14 of the Judicature Ordinance 1970 was itself void for uncertainty. This submission is novel, bearing in mind the longstanding history of this method of importing English laws into the colonies earlier discussed. There appears to be no authority to support the submission, but rather a general acceptance without reservation of the efficacy of such importation.

[48] The first area of uncertainty raised concerned the ambit of the phrase 'statutes of general application'

and the inability in advance of some legislative or judicial pronouncement of knowing whether a particular statute could properly be so described. We do not see that as necessarily invalidating s 14 and preventing it from having any operative effect. There may well be argument in respect of a particular enactment as to whether or not it is one of general application, but that falls to be decided on a case by case basis. Here there can be no question but that the 1956 Act is a statute of general application, and indeed the contrary was not propounded before us.

[49] Similarly, as regards the further objection that the savings provisions of subs (2) resulted in uncertainty as to the possible effect of local circumstances or the limits of local jurisdiction on a given statute or, for that matter, the common law. Again, there may be argument on those issues but that does not mean the provision cannot be applied or that the laws which it clearly does encompass can be ignored by the inhabitants simply for that reason.

[50] The observation in some academic writing to the effect that a particular law is not engrafted on to the law of the colony under this form of enactment until a legislative or a judicial pronouncement has been made, and which in principle would not have retrospective effect, was not advanced in any substantive way before us. We do no more than observe that such an approach would really be tantamount to denying the provision any efficacy and requiring the specific adoption of each and every law it is intended should apply before it could be applied. That would seem to be contrary to the plain words of subs (1).

[51] What is of more concern is whether the application or enforcement of any individual law, particularly a penal statute, is in all the circumstances fair and just and not an abuse of process. In respect of the present appeals, that issue – which is different from the issue of the general validity or invalidity of s 14 – will need careful consideration.

The late provision of a right of appeal

[52] The appellants' submission was that the absence of a right of appeal in Pitcairn at the time the Sexual Offences Act 1956 was imported into Pitcairn law meant that the Act was not suitable to the circumstances of Pitcairn or was not consistent with the limits of jurisdiction in Pitcairn. An examination of the history of the Pitcairn court system is relevant.

[53] The various Orders in Council and Ordinances relevant to the establishment of a court system for Pitcairn are detailed earlier in this judgment in paras [18] to [29]. The following additional comments are relevant.

[54] The 1952 Order in Council, in addition to the powers set out earlier, also gave the Governor power to make provision with respect to appeals from the High Commissioner's Court. That power was never exercised.

[55] In 1955, the Pacific Order in Council was amended to provide that where the jurisdiction of the Court was exercised by a Judicial Commissioner an appeal would, in any civil or criminal case, go to the Fiji Court of Appeal. That Court of Appeal was subject to appeal to Her Majesty in Council. However, by 1955 the Pacific Order in Council had been revoked insofar as it applied to Pitcairn.

[56] It was not until 2000 that a Pitcairn Court of Appeal was established by the Pitcairn Court of Appeal Order of that year. It seems then that until 2000 there was no appeal from a decision of the Supreme Court or its predecessors, including the High Commissioner's Court, other than by way of petition to Her Majesty in Council.

[57] It is against this background that the submissions referred to below must be considered. On behalf of the Public Defender, Mr Cato submitted that if the Sexual Offences Act 1956 was otherwise imported into the law of Pitcairn, the provisions of that Act were not suitable to the circumstances of Pitcairn as they existed at the time because of the absence of a right of appeal. He acknowledged that this argument was not put to the Supreme Court. He submitted that the omission of an appeal provision in the Judicature Ordinances meant that a Pitcairner, as at the date of enactment of the Ordinance importing English criminal law, was in a worse position, if convicted, than a person convicted of an offence under the Act in England. He referred in support of this submission to the decision of the High Court of Australia in **Quan Yick v Hinds** [1905] HCA 10; [1905] 2 CLR 345. That case, which will be referred to in more detail later, determined that the absence of the particular appeal rights under examination showed that offences created under other statutes were not suitable to the circumstances of the colony. Mr Cato accepted in his oral submissions that he could not challenge the lack of an appeal right on human rights principles because, by the time of trial, that lack had been remedied.

[58] Mr Illingworth, in his reply submissions, approached the matter from a slightly different perspective. He submitted, by reference to s 14(2) of the Judicature Ordinance 1970, that local jurisdiction was limited by the absence of an appeal right and that therefore the English offence, which was subject to the appeal rights given by the Criminal Appeal Act 1968, was not consistent with the limits of local jurisdiction.

[59] We have concluded that the decision of the High Court of Australia in **Yick v Hinds** may be distinguished. It is unnecessary to go into detail in relation to the facts of this case. It is sufficient to note that the statute which imported English law into New South Wales provided that such laws and statutes 'shall be applied in the administration of justice in the Courts of New South Wales and Van Diemen's Land respectively so far as the same can be applied within the said Colonies ...' (p 353). The Court held that the words 'can be applied' should be read 'can reasonably be applied'.

[60] The law in question related to prohibition on the sale of tickets in unauthorised lotteries. The penalty and appeal provisions were contained in a separate statute. They provided for penalties for a breach of the law and for an appeal to the Quarter Sessions, with a provision for release from custody pending the hearing of the appeal. At the time of the statute there were no Quarter Sessions in New South Wales, although such provision was made about a year later. Several reasons for allowing the appeal commended themselves to the Court, in particular to Griffith CJ, but all members of the Court concluded that the absence of the appeal procedure and the provision for release pending hearing meant that the English law could not reasonably be applied at the time of its importation and that it therefore had never become law in New South Wales. The lotteries legislation was then left without any enforcement provision so that it became ineffective.

[61] The provision importing the Sexual Offences Act and other English statute law into Pitcairn is in rather different terms to that contained in the New South Wales statute. This difference in wording distinguishes this case from that of **Yick**. Section 14 of the Judicature Ordinance 1970, insofar as it is relevant to this issue, provides:

> (1) Subject to the provisions of the next succeeding subsection the common law, the rules of equity and the statutes of general application as in force in and for England at the commencement of this Ordinance shall be in force in the Islands.
>
> (2) All the laws of England extended to the Islands by the last preceding subsection shall be in force therein so far only as the local circumstances and the limits of local jurisdiction permit ...

[62] For the purposes of this case the statute to be imported is the Sexual Offences Act. It contains both the offence and the sentence. It contains no provision for appeal; that is separately provided for in the Criminal Appeal Act. It must next be remembered that until the year 2000 there was no appeal from the Supreme Court or its predecessors, although the Governor had been given the power to make provision in respect of appeals as early as 1952. There had been legislation in force in England regarding the offence of rape and associated penalties for many years. If the lack of a right of appeal prevented the English laws from being imported to Pitcairn, it would mean that, at least during the time that statutory provision had been made in respect of rape in England, there had been no similar offence created in Pitcairn. The same would apply to the offences of indecent assault and incest.

[63] We do not consider that s 14(2) has the meaning attributed to it by Mr Illingworth in his reply submissions. We consider that 'the limits of local jurisdiction' must include the jurisdiction of the courts to deal with the particular issue in contemplation. There is no doubt that the Supreme Court and its predecessors have always had jurisdiction to try the offences of rape and indecent assault. The submission of the Public Defender, to the effect that the people of Pitcairn were in a less advantageous position than the people of England, can, we consider, be answered by reference to authorities relating to the power to make laws for the peace, order and good government of a territory. The Governor had such a power in relation to Pitcairn.

[64] The authorities are usefully gathered in the **Bancoult** decision. In that case it was argued that a law requiring the inhabitants of a territory to leave that territory and resettle elsewhere could not be said to be authorised by the words 'peace, order and good government'. A note of warning was sounded about dealing with the ambit of developed English law in the context of a colony with no written Constitution, such as Pitcairn or the British Indian Ocean territory with which the **Bancoult** case was concerned, and the Court noted that the words, peace, order and good government 'connote, in British constitutional language, the widest law-making powers appropriate to a sovereign'. Relevant to this case the Court said, at paras 43 and 57:

> 43. So approaching the issue, I cannot see that Sir Sydney's appeal to constitutional principle as it was described in **R v Lord Chancellor, Ex p Witham** [1998] QB 575 can withstand the authority of **Liyanage v The Queen** [1967] 1 AC 259. I acknowledge a consequence of this conclusion, namely that as regards fundamental or constitutional rights, there is a difference of approach between the developed law of England and the law applicable in the colonies. Belongers here take the benefit of the constraints which the common law imposes upon the construction of legislation which interferes with such rights; belongers there do not. However I think it plain that in practice, in the post-imperial world as it is, this is a misfit which nearly always will be nothing but theoretical; territories

> such as Gibraltar possess written constitutions which enshrine fundamental rights based on or akin to the model of the European Convention on Human Rights. But BIOT does not, and there is therefore a dissonance, one which may strike real lives, between the richness of the rights which our municipal law today affords and the wintry asperity of authority such as **Liyanage v The Queen**. The court's task here is accordingly acute. We should, however, ourselves affront the rule of law if we translated the liberal perceptions of today, even if they have become the warp and weave of our domestic public law, into law binding on established colonial powers in the face of authority that we should do no such thing.
>
> ...
>
> 57. ... The people may be taxed; they should be housed; laws will criminalise some of the things they do; maybe they will be tried with no juries, and subject to severe, even brutal penalties; the laws made for their marriages, their property and much besides may be far different from what obtains in England. All this is vouchsafed by the authorities.

[65] Similarly, in this case we are satisfied that the power to make laws for the peace, order and good government of Pitcairn permits the importation to Pitcairn of laws enabling trial for offences in respect of which there is no right of appeal other than by way of petition to Her Majesty in Council. We would add that the right of petition is, we believe, a meaningful one, particularly where there is no intermediate right of appeal. We conclude, therefore, that at the time the Sexual Offences Act was imported into the law of Pitcairn, that importation was effective despite the lack, at that time, of a statutory right of appeal against conviction or sentence for the offences of rape and indecent assault. The fact is, of course, that all those convicted in the current offending have full rights of appeal, as is apparent from these proceedings.

Relationship of Judicature Ordinance 1970 with Sexual Offences Act 1956

[66] Mr Illingworth mounted a further argument which had not been presented to the Supreme Court, namely: assuming that the 1956 Act had been imported into Pitcairn law, there was a local law inconsistent with the indecent assault provisions of the Act. Under s 14(2) of the Judicature Ordinance 1970 English law applied to Pitcairn 'so far only as the local circumstances and the limits of local jurisdiction permit and subject to any existing or future Ordinance'. The submission was that the offences covering sexual misconduct in the Justice Ordinance 1966 were a 'code' and covered sexual misconduct differently from the 1956 Act. Therefore, those parts of the 1956 Act inconsistent with the provisions of the Ordinance, identified as those relating to indecent assault, were never validly incorporated into Pitcairn law.

[67] The only provisions of the Justice Ordinance relating to sexual misconduct, as that term is understood by today's standards, is s 88, which prohibits a male having carnal knowledge of 'any female child of or over the age of twelve years'. 'Child' is defined as a person under the age of 15 years. The maximum penalty was 100 days' imprisonment. This corresponds, but not exactly, with the offence of unlawful intercourse with a girl aged between 13 and 16 under s 6 of the Sexual Offences Act. Section 87 creates an offence of behaving in an indecent manner in a public place. This type of offending (usually exhibitionism) is commonly treated as a law and order/police offence. It is not within the ambit of the 1956 Act.

[68] It is a reflection of the conservative nature of Pitcairn society that adultery (under s 89) and cohabitation by the unmarried (s 90 – maximum fine five pounds) are offences under the Justice Ordinance 1966 and remained so until the replacement Ordinance of 1999.

[69] Counsel focused on s 82 of the Justice Ordinance, which reads as follows:

> Any person who without lawful excuse assaults any other person shall be guilty of an offence and liable to a fine not exceeding ten pounds:
>
> Provided that if such assault is of such an aggravated nature, either by reason of the youth, condition or sex of the person assaulted or by reason of the nature of the weapon used or the violence with which the assault has been committed, that in the opinion of the Court such penalty is inadequate the Court may substitute for such penalty a fine not exceeding twenty-five pounds or imprisonment for any period not exceeding one hundred days.

It was submitted that this section encompassed an indecent assault – a term that is usually understood as an assault accompanied by circumstances of indecency. Accordingly, s 14 of the 1956 Act, indecent assault on a woman, being subject to the Ordinance, was not in force in the Islands.

[70] We cannot interpret s 82 as including indecency in the list of aggravating features which distinguish the assault from what is usually called 'common assault' – the offence in the first part of the section. Importantly, there is an absence of any reference to indecency in the proviso which lists what can be the aggravating features to the concept of common assault. This reflects the separate nature of indecent assault – indecency is an additional element which creates a separate offence. It is relevant also to note that the penalty for assault absent any statutory aggravating feature is restricted to a fine not exceeding ten pounds.

[71] In our view, apart from the unlawful carnal knowledge section (s 88), there is just no equivalent of any offence under the 1956 Act in the Justice Ordinance. Consequently, the submission must fail.

[72] The exclusionary provisions of s 14(2) do not assist the appellants. The Act does not run counter to any local additions, none other than the 1996 Ordinance being identified. The only possible relevant limit of local jurisdiction could be the penalty prescribed for an offence which is also an offence under English law, in which case the limit imposed by the local jurisdiction would apply. Even in such a situation, it would seem that s 29 of the Interpretation and General Clauses Ordinance 1952 would apply to protect any prosecution from a claim of invalidity. Section 29 provides:

> Where an act or omission constitutes an offence under two or more Ordinances, or both under an Ordinance and under any other law which applies to the Islands the offender shall, unless the contrary intention appears, be liable to be prosecuted and punished under either or any of those Ordinances or under such other law, but shall not be liable to be punished twice for the same offence.

[73] That situation, however, does not arise because, as we have held, there is no Ordinance covering the

offence of indecent assault on a woman.

Incorporation of New Zealand processes and appointment of New Zealand personnel

[74] The next ground of appeal was the submission that some ten Ordinances made by the Governor were ultra vires, being beyond his powers. These Ordinances covered legal aid, sentencing, parole, bail, and rights and protection of victims.

[75] Allied with this submission was the further one that it was ultra vires for the Governor to appoint New Zealand judges to Pitcairn courts, as well as New Zealand prosecutors, court officials and (presumably) the Public Defender. The argument was that, assuming (a) Pitcairn is an English colony, possession or settlement, and (b) the relevant English laws had been sufficiently promulgated on Pitcairn, the appellants should have been prosecuted by English prosecutors and tried by such English judges competent to try charges which carried a possible life sentence penalty.

[76] This second argument was raised for the first time in the Supreme Court on the hearing of pre-trial applications made by Shawn Brent Christian (who has yet to be tried). The argument was not advanced before the Full Court of the Supreme Court and was therefore not included in the matters covered by the Full Court's comprehensive judgment of 24 May 2005.

[77] Blackie CJ rejected the argument in a judgment of 1 December 2005 as one of a number of issues raised by Shawn Christian in his pre-trial applications.

[78] The appellants claim that if (contrary to their submissions) they were inhabitants of a British settlement to which English criminal law applied, then, just as English police had investigated the alleged offending, they were entitled to be tried by English judges and prosecuted by English counsel – all well versed in the English criminal law. They submit that the United Kingdom has abrogated its responsibility to them as subjects of the Queen by imposing on them the criminal procedures and judicial officers of another country.

[79] The appellants also complain about the introduction – with or without adaptations – of New Zealand laws and procedures on sentencing, parole, bail and victims' rights. For example, they point to the inability of a court acting under a New Zealand penal model to impose a suspended prison sentence, which they say could well have been an appropriate penalty for at least one appellant.

[80] In respect of the appointment of New Zealand personnel, the Chief Justice in the Court below stressed the breadth of the Governor's powers to make 'laws for the peace, order and good governance of the Islands'. He considered that there was no apparent restriction on the origins of any judge appointed to sit on any Pitcairn Court and that there was no prejudice shown to the accused by the appointments made of judges. He rejected an argument that the situation was analogous to that in **Bancoult**. There, the English Court of Appeal held that the removal of the whole population from the territory of Diego Garcia could hardly be said to touch on the 'peace, order and good government' of the territory.

[81] We have no hesitation in holding that the submission is without merit. As was said in **Ibrelebbe v The Queen** [1964] AC 900, 923, the words '"peace, order and good government' connote, in British constitutional language, the widest law-making powers appropriate to a Sovereign'. The extract from the judgment in **Bancoult**, cited at para [64] of this judgment, reinforces the view the Court has taken.

[82] The present case is totally different from **Bancoult**. The Governor here was doing exactly what he was mandated to do, that is, enacting laws for the 'peace, order and good government of Pitcairn'. It mattered not whether the Governor followed New Zealand or English models in the passing of these Ordinances. Indeed, it is not hard to see why New Zealand models were thought appropriate, given the historical transport and governance links between New Zealand and Pitcairn and the fact that, over the years, some Pitcairners had emigrated to New Zealand. New Zealand criminal law (although codified) is similar to English criminal law and court procedures. New Zealand rules of evidence are also similar. Logistical considerations must also have come into the decision-making process.

[83] New Zealand is the nearest English-speaking common law state of any size to Pitcairn. New Zealand has become the administrative base for the Island's affairs. New Zealand has provided personnel, such as teachers and radio technicians, and many other forms of assistance.

[84] Whether the Governor's choice of New Zealand precedent for various Ordinances relating to the justice system was the preferable course to adopt is not for this Court to decide. It is sufficient to record that the Ordinances in question were clearly within his powers. This is certainly not a situation of 'fraying the border of the large tapestry', as suggested by counsel for the appellants.

[85] The argument about the nationality of judges, officials and prosecutors cannot be that their appointments were ultra vires the Governor's powers under the Ordinance in the same way as it was said that the machinery of justice Ordinances, based on New Zealand precedent, were ultra vires. Under the relevant Ordinances the Governor alone has the power to appoint judges and magistrates. Yet it is said that the Governor was acting outside his powers in appointing other than English personnel to these offices.

[86] This submission is untenable. There is no apparent limit to the Governor's power to appoint to judicial and other relevant office whomsoever he/she chooses – other than the Judges of this Court, who must have certain qualifications. One would expect that appointees would have relevant legal and/or judicial experience suitable for the relevant court in the Pitcairn hierarchy to which an appointment is made. There could be concerns if persons with no legal training or qualifications were appointed to high judicial office, or if an appointee came from a non-common law background. But there is no suggestion of that.

[87] The unreality of the appellants' argument is shown by their lack of complaint about the way in which the Supreme Court Judges discharged their duties, both under difficult circumstances on the Island as well as in New Zealand. There are appeals over the correctness of their decisions, which are to be expected, since the issues with which the Judges have had to grapple are both novel and complex. To the members of this Court, the trial procedures followed by the Supreme Court seem beyond reproach. Although the actual decisions are under appeal, the Full Court's judgments are conscientiously and comprehensively written and obviously based on an appreciation of legal principle. Likewise, New Zealand counsel for both sides appear to us to have conducted these stressful and difficult cases – under less than ideal conditions when on Pitcairn – in an exemplary way.

[88] It is relevant to observe that there is no suggestion of prejudice to the appellants arising out of the employment of New Zealand judges and counsel. We note that there is no Pitcairner qualified to be a Supreme Court judge and that it is commonplace amongst the common law jurisdictions in the South Pacific for judges (especially appellate judges) from New Zealand and Australia to sit in the superior

courts of those jurisdictions. Even a jurisdiction as sophisticated as Hong Kong calls on the services of English, New Zealand and Australian judges for its final Court of Appeal.

[89] We also see no prejudice to the appellants in the Ordinances importing New Zealand laws on corrections, parole, bail and victims' rights. These constitute a regime for the modern implementation of the criminal law in various respects. Such laws must be for the benefit of the appellants, not to mention the complainants and the Pitcairn population generally.

Unfairness/Abuse of process

[90] The second broad ground of appeal was that, even assuming validity of the importation of the 1956 Act into Pitcairn law, the prosecutions of the appellants under that Act nevertheless constituted an abuse of process; therefore, the convictions should be quashed and a permanent stay granted. The submission claimed injustice and/or unfairness on a number of grounds.

[91] 'Abuse of process' can cover a multitude of situations – usually, but not necessarily, caused by the action or inaction of a public authority. Numerous instances of abuse of process are found in the commentary in **Archbold Criminal Pleading, Evidence and Practice** (2005 ed) 4-48 to 4-75. Abuse of process was defined in **Hui Chi-Ming v R** [1992] 1 AC (PC) 34, 57 as 'something so unfair and wrong that the court should not allow a prosecutor to proceed with what is in all respects a regular proceeding'.

[92] A good summary of the rationale behind the Court's power to stay a trial for abuse of process is found in the judgment of Brennan J in the High Court of Australia in **Jago v District Court of New South Wales** [1989] HCA 46; (1989) 168 CLR 23, 47-8:

> More radical remedies may be needed to prevent an abuse of process. An abuse of process occurs when the process of the court is put in motion for a purpose which, in the eye of the law, it is not intended to serve or when the process is incapable of serving the purpose it is intended to serve. The purpose of criminal proceedings, generally speaking, is to hear and determine finally whether the accused has engaged in conduct which amounts to an offence and, on that account, is deserving of punishment.
>
> **When criminal process is used only for that purpose and is capable of serving that purpose, there is no abuse of process.** Although it is not possible to state exhaustively all the categories of abuse of process, it will generally be found in the use of criminal process inconsistently with some aspect of its true purpose, whether relating to the hearing and determination, its finality, the reason for examining the accused's conduct or the exoneration of the accused from liability to punishment for the conduct alleged against him. When process is abused, the unfairness against which a litigant is entitled to protection is his subjection to process which is not intended to serve or which is not capable of serving its true purpose. But it cannot be said that a trial is not capable of serving its true purpose when some unfairness has been occasioned by circumstances outside the court's control unless it be said that an accused person's liability to conviction is discharged by such unfairness. (Emphasis added)

[93] Brennan J's judgment was specifically approved by Lord Lane CJ in the English Court of Appeal in

Attorney-General's Reference (No. 1 of 1990) [1992] 1 QB 630, 643 in these words:

> Stays imposed on the grounds of delay or for any other reason should only be employed in exceptional circumstances. If they were to become a matter of routine, it would be only a short time before the public, understandably, viewed the process with suspicion and mistrust. We respectfully adopt the reasoning of Brennan J in **Jago v District Court of New South Wales** [1989] HCA 46; (1989) 168 CLR 23.
>
> In principle, therefore, even where the delay can be said to be unjustifiable, the imposition of a permanent stay should be the exception rather than the rule. Still more rare should be cases where a stay can properly be imposed in the absence of any fault on the part of the complainant or prosecution. Delay due merely to the complexity of the case or contributed to by the actions of the defendant himself should never be the foundation for a stay.
>
> In answer to the second question posed by the Attorney-General, **no stay should be imposed unless the defendant shows on the balance of probabilities that owing to the delay he will suffer serious prejudice to the extent that no fair trial can be held:** in other words, that the continuance of the prosecution amounts to a misuse of the process of the court. In assessing whether there is likely to be prejudice and if so whether it can properly be described as serious, the following matters should be borne in mind: first, the power of the judge at common law and under the Police and Criminal Evidence Act 1984 to regulate the admissibility of evidence; secondly, the trial process itself, which should ensure that all relevant factual issues arising from delay will be placed before the jury as part of the evidence for their consideration, together with the powers of the judge to give appropriate directions to the jury before they consider their verdict. (Emphasis added)

[94] All the various grounds now advanced in this part of the appeal must necessarily be based on the jurisdiction to stay criminal proceedings on the ground of abuse of process. Descriptions such as 'unfairness', 'injustice', 'denial of justice', are all encompassed by the broad category of 'abuse of process' as the fall-back ground for staying a prosecution permanently.

[95] We also take guidance from the majority of the House of Lords in **Attorney-General's Reference (No 2 of 2001)** [2003] UKHL 68; [2004] 2 AC 72, notably the speech of Lord Bingham of Cornhill, at paras 24 and 25, in these words:

> 24. If, through the action or inaction of a public authority, a criminal charge is not determined at a hearing within a reasonable time, there is necessarily a breach of the defendant's Convention right under article 6(1). For such breach there must be afforded such remedy as may (section 8(1)) be just and appropriate or (in Convention terms) effective, just and proportionate. The appropriate remedy will depend on the nature of the breach and all the circumstances, including particularly the stage of the proceedings at which the breach is established. If the breach is established before the hearing, the appropriate remedy may be a public acknowledgement of the breach, action to expedite the hearing to the greatest extent practicable and perhaps, if the defendant is in custody, his release on bail.
>
> **It will not be appropriate to stay or dismiss the proceedings unless (a) there can no longer be a fair hearing or (b) it would otherwise be unfair to try the defendant.** The

> public interest in the final determination of criminal charges requires that such a charge should not be stayed or dismissed if any lesser remedy will be just and proportionate in all the circumstances. The prosecutor and the court do not act incompatibly with the defendant's Convention right in continuing to prosecute or entertain proceedings after a breach is established in a case where neither of conditions (a) or (b) is met, since the breach consists in the delay which has accrued and not in the prospective hearing. If the breach of the reasonable time requirement is established retrospectively, after there has been a hearing, the appropriate remedy may be a public acknowledgement of the breach, a reduction in the penalty imposed on a convicted defendant or the payment of compensation to an acquitted defendant. Unless (a) the hearing was unfair or (b) it was unfair to try the defendant at all, it will not be appropriate to quash any conviction. Again, in any case where neither of conditions (a) or (b) applies, the prosecutor and the court do not act incompatibly with the defendant's Convention right in prosecuting or entertaining the proceedings but only in failing to procure a hearing within a reasonable time. (Emphasis added)
>
> 25. The category of cases in which it may be unfair to try a defendant of course includes cases of bad faith, unlawfulness and executive manipulation of the kind classically illustrated by **R v Horseferry Road Magistrates' Court, Ex p Bennett** [1944] 1 AC 42, but Mr Emmerson contended that the category should not be confined to such cases. That principle may be broadly accepted. There may well be cases (of which **Darmalingum v The State** [2000] 1 WLR 2303 is an example) where the delay is of such an order, or where a prosecutor's breach of professional duty is such (**Martin v Tauranga District Court** [1995] 2 NZLR 419 may be an example), as to make it unfair that the proceedings against a defendant should continue. It would be unwise to attempt to describe such cases in advance. They will be recognisable when they appear. Such cases will however be very exceptional, and a stay will never be an appropriate remedy if any lesser remedy would adequately vindicate the defendant's Convention right.

[96] Although their Lordships were considering a claim of delay in having a hearing within a reasonable time contrary to human rights legislation, we consider that their Lordships' dicta are of general application to all types of abuse of process. Delay in the present appeals is but one of the grounds advanced for a finding of abuse of process.

[97] Lord Bingham, at para 13, referred with approval to **Attorney-General's Reference (No. 1 of 1990)** and noted that although it was not a Convention case it was not discordant with Convention jurisprudence.

[98] The Supreme Court, rightly in our opinion, followed the majority view as set out in the quotation from the speech of Lord Bingham cited above. The Public Defender submitted that a departure from that general approach was appropriate where the delays were systematic and attributable to a failure of government. We see no justification for this gloss on the general principles found in the authorities.

[99] When considering the application of authority such as the above House of Lords case to Pitcairn, we bear in mind that the **European Convention on Human Rights**, which is now part of English law, does not apply in Pitcairn because it has not been specifically applied. This conclusion stems from the decision of the House of Lords in **R v Secretary of State for Foreign and Commonwealth Affairs, Ex p Quark Fishing Ltd** [2005] UKHL 57. That case was concerned with a British Overseas Territory

even more remote and less populated than Pitcairn. However, prior English authority, such as **Attorney-General's Reference (No 2 of 2001)** are to similar effect as Convention cases and can be applied in a Pitcairn context.

[100] The **Quark** decision had not been made at the time of the Supreme Court's ruling in this case. Nor was it available when this Court gave judgment on the earlier constitutional matters affecting Pitcairn on 5 August 2004. The Supreme Court's judgment under appeal canvassed a number of European Human Rights cases and accepted (at paras 231 and 232) Lord Bingham's dicta in **Attorney-General's Reference (No 2 of 2001)**. Therefore, the Quark case was not directly in point. However, basic human rights apply to Pitcairn despite the fact that the Convention does not there apply. In particular, the law as to staying criminal proceedings on the abuse of process ground applies to Pitcairn.

[101] We distil from the above authorities the following principles applicable to claims of abuse of process:

> [a] 'Abuse of process' can cover a wide range of situations which are recognisable when they occur. They include, but are not restricted to, allegations of delay but are generally found in the use of the criminal process inconsistently with some aspect of its true purpose.
>
> [b] The true purpose of criminal proceedings, generally speaking, is to hear and determine whether the accused has engaged in conduct which amounts to an offence, and if so, whether the accused is deserving of punishment.
>
> [c] It is not appropriate to stay or dismiss proceedings unless (i) there can no longer be a fair hearing or (ii) it would otherwise be unfair to try the accused. The imposition of a stay should be the exception and not the rule.
>
> [d] The onus is on an accused to show, on the balance of probabilities, that he/she will suffer serious prejudice to the extent that no fair trial can be held.

[102] We now turn to the individual grounds for claiming abuse of process. When considering each ground we seek to apply the principles enunciated above.

Accessibility and enforceability

[103] Under the general head of abuse of process it was a major submission of the Public Defender that the failure to promulgate or advertise in an intelligible form the nature of the offences with which the appellants were charged and the penalties to which they were subject under English law constitutes an abuse of process. It is the appellants' contention that laws must be accessible and foreseeable before they can be fairly applied. The submission was that publication emphasises the moral force and authority of the law. It is notice to the community at large of the lawful standards of conduct expected of members of that community, and prescribes the consequences if those standards are not met.

[104] The Public Defender's submissions referred at length to academic writing on the question of accessibility and foreseeability. Reference was made to a number of decisions of the English courts and the European Court of Human Rights in which it was argued that accessibility to the law is both a requirement and a cornerstone of the law and is the basis of the doctrine that ignorance of the law is no excuse. Counsel stressed that at the time of the commission of the offences the subject of these appeals, communication with the outside world was slow, difficult and expensive and that there was also an absence of legally qualified personnel.

[105] The Crown conceded that there was authority for the proposition that the criminal law must be sufficiently accessible and foreseeable to the public in order to found a prosecution, and that principle was accepted by the Supreme Court in the decision now appealed. The Crown said that, so far as was known, this principle had not been applied as part of the abuse of process doctrine to stay a criminal prosecution, but accepted that the existence of the principle drew support from authorities such as **Blackpool Corporation v Locker** [1948] 1 KB 349; **R (on the application of L and another) v Secretary of State for the Home Department** [2003] EWCA Civ 25; [2003] 1 All ER 1062 (CA); **Lim Chin Aik v R** [1963] AC 160; **K-HW v Germany** [2001] ECHR 229; (2003) 36 EHRR 59 and **SW v United Kingdom** [1995] ECHR 52; (1996) 21 EHRR 363. We proceed on the basis of that principle.

[106] The following passage in the judgment of Scott LJ in **Blackpool Corporation** (at 361) is relevant:

> The maxim that ignorance of the law does not excuse any subject represents the working hypothesis on which the rule of law rests in British democracy. That maxim applies in legal theory just as much to written as to unwritten law, i.e., to statute law as much as to common law or equity. But the very justification for that basic maxim is that the whole of our law, written or unwritten, is accessible to the public – in the sense, of course, that, at any rate, its legal advisers have access to it, at any moment, as of right.

[107] In **R (on the application of L and another)** there was obiter comment suggesting that reliance on an unpublished and inaccessible law could amount to unfairness warranting judicial intervention. In **Lim Chin Aik** it was held that the maxim that ignorance of the law was no excuse could not be relied upon where there was no provision for publication of an order of the kind made in that case, or any other provision designed to enable a man by appropriate enquiry to find out what the law was. That, however, was an extreme case. There it was sought to enforce an order prohibiting the appellant from remaining in Singapore. The order was directed against him personally, had never been brought to his attention, and his lack of knowledge of its existence could not be attributed to any fault on his part. The enforcement of the order was set aside for those reasons.

[108] Here the Supreme Court concluded that the law demands not that citizens have express awareness of the content of the law, nor that the law is promulgated to that extent, but that the law needs to be accessible in order that people can regulate their conduct by it. Where it is so accessible, people are deemed to know of it. We agree with that analysis. The Supreme Court went on to hold that in fact the law was accessible on Pitcairn Island and determined the matter on that basis. It reached that conclusion by referring to a number of instances where Pitcairners had sought the advice of the authorities in all related matters and, in particular, the availability of the Government Adviser for that purpose. It is unnecessary to repeat the factual findings which, although significantly relevant to the issue, are not, in our view, determinative of it. We do, however, have some reservations as to whether accessibility in the way described could as a general proposition be an adequate safeguard and necessarily always answer a

challenge to any law which is sought to be enforced. It seems to us that accessibility through a government agency may not always be sufficient to meet the tests described in the decisions.

[109] At the outset we note the comment of Lon Fuller in his book **The Morality of Law** (revised ed, 1969) where, at 92, he said:

> ... to the extent that the law merely brings to explicit expression conceptions of right and wrong widely shared in the community, the need that enacted law be publicized and clearly stated diminishes in importance.

[110] The decisions relating to accessibility all appear to arise in the context of exceptions to the rule that ignorance of the law is no excuse. Depending on the circumstances, where the person in question knows the law, the issue of accessibility may well lose its force.

[111] The concept of accessibility and foreseeability run together. If a person has no sensible access to the law then it is not foreseeable that the law will be applied to that person. That is where the unfairness or injustice may lie. The principle has particular application in criminal law which carries the risk of prosecution and the imposition of a penalty.

[112] But as with all general principles, in any given case it is necessary to determine its relevance and its applicability in the light of the facts peculiar to that case. Principle does not operate in a vacuum. The starting point for the enquiry must be to identify the law which it is said should not be enforced against the person making the challenge. For the purposes of the present appeal that is the 1956 Act, as it was in force at the relevant dates. The particular provisions are those establishing the offences of rape (s 1), indecent assault on a woman (s 14) and incest (s 10) and the maximum penalties prescribed for such offending: for rape – life imprisonment, for indecent assault on a woman – two years imprisonment, and for incest – two years imprisonment.

[113] The enquiry therefore is whether the appellants can legitimately claim lack of knowledge that they were liable to prosecution under English law for the offences of rape, indecent assault on a woman and incest.

[114] There can be no doubt that the inhabitants were aware that for serious criminal offending English law applied. As we have earlier outlined, that was the known position since the early days of settlement and in particular came to the fore in 1897 when Harry Christian was handed over to the British authorities to be tried on charges of murder. The case has been referred to from time to time over the years in written material and no doubt is well known to the inhabitants of Pitcairn. Importantly, the 1961 Ordinance and the 1970 Ordinance both expressly refer to the extension of English law to Pitcairn and both were duly promulgated. Apart from the imputation of knowledge arising from that, the Supreme Court made the following factual findings (at para 108), which were not the subject of challenge in this Court:

> When considering the material placed before us as a whole, we are satisfied that the evidence establishes that at all relevant times Pitcairn was a developed society in which rape and various sexual offending were known to be criminal. There is no reason to doubt that this knowledge of rape extended to sexual offending generally, including indecent assault and incest. The exchange of documents in respect of the Justice Ordinance 1966

> between Pitcairn Island and the Pitcairn Island Commissioner Reid Cowell sets out the relationship between Pitcairn law and English law. Pitcairn was left in no doubt that if there was any matter not covered by the law of Pitcairn, the law of England could be invoked. It was made clear by Reid Cowell to the Island Council that the Island Court did not have jurisdiction in cases of rape and that in such circumstances a preliminary inquiry should be held. If any cause for a preliminary inquiry should arise and the Islanders were doubtful on any point of procedure, they could always consult the South Pacific Office by radio. There was also discussion about the carnal knowledge offence and the specific reminder that the law of rape applied on Pitcairn.

[115] There was ample evidence to support these findings. For example, two Pitcairn residents who gave it as their view that it was obvious that British law would apply to Pitcairn if the need arose, that their Ordinances and local laws did not attempt to deal with serious crimes like murder, rape, major dishonesty and so on, and that it was a matter of common sense that serious sexual offending such as rape, incest or indecent assault would be prosecuted under English law. One of the witnesses said that he was not aware of any belief among Pitcairn Islanders that they were somehow immune from prosecution, nor has there been a sense that Pitcairn was a lawless society. Indeed, he said that Pitcairn was a community of civilised, educated people and he had never been aware of any sense that sexual offending would be tolerated or condoned there. Those statements were not challenged in cross-examination. Evidence was also called by the defence from another resident, who said that he had no reason to think that English criminal law did apply on Pitcairn and that he disagreed with the proposition that it was well known that English law applied. In cross-examination, however, he agreed that rape was unacceptable on Pitcairn and that it was a matter that he would expect to be referred to the administration office. He accepted that rape was not something with which the Island Magistrate could deal. No witness gave evidence of being unaware rape was a crime and punishable as such. Similarly, with indecent assault and incest.

[116] Faced with this factual situation it becomes unreal to contend that it was unfair or unjust to commence these prosecutions because the 1956 Act or a summary of its provisions had not been separately published locally. There was never any contention that the appellants, or any of them, did not or could not reasonably have known that the allegations against them constituted serious criminal offending making them liable to punishment. Importantly also, they were aware that a Supreme Court (initially the Supreme Court of Fiji and from 1970 a local Supreme Court) had been established whose jurisdiction was not confined to breaches of local laws. They knew that some law, which had to be English law, governed such offending because it was not covered by local legislation.

[117] Counsel for the appellants also relied on an absence of knowledge of the penalties provided by the 1956 Act. While we agree that the penalty factor is something to be taken into account in the overall assessment, we do not see it as having any significant effect on the present argument. It was self-evident that for rape a substantial term of imprisonment would be available to the sentencer, and in our view there is no analogy to be drawn between the maximum of life imprisonment for that and the local maximum of 100 days' imprisonment for unlawful carnal knowledge. That latter is in no way indicative of a likely sentence for rape. The other maximum penalties of two years' imprisonment could not be regarded as unforeseeable.

[118] For the above reasons, we are satisfied that the Supreme Court was correct in concluding that these

appellants were sufficiently aware of the unlawfulness of their conduct and its consequence and, despite the absence of local publication, the enforcement of the particular provisions of the 1956 Act did not constitute an abuse.

Delay in prosecution

[119] In the course of the hearing in this Court the issue of delay was reduced to a narrow point. The Public Defender submits that there was an unacceptable delay between the dates upon which the accused were given notice that they were being seriously investigated and the date of disposal of these proceedings, and that the delay violated article 6(1) of the European Convention on Human Rights concerning the right to trial within a reasonable time. This was the only complaint of delay pursued.

[120] Again, this issue was considered in considerable detail by the Supreme Court. The appellants concede that once charges were laid, the trial process has proceeded with reasonable despatch. The period of delay which is the subject of concern is principally that which occurred between the announcement by the Public Prosecutor in April 2002 that a decision had been reached as to prosecution but that it could not proceed because the question of where trials would be held had not been finalised, and the actual laying of the charges a year later in April 2003.

[121] The submission on behalf of the appellants was that the delay was a result or a consequence of a systemic failure to provide proper facilities in advance and that difficulties in logistics and administration should not be visited upon the accused. The Public Defender acknowledged that no prejudice could be said to arise from the delay. Mr Cato relied upon the decision of the Judicial Committee of the Privy Council in **H M Advocate v R** [2004] 1 AC 462. That appeal concerned the appellant's rights under s 6(1) of the **European Convention for the Protection of Human Rights and Fundamental Freedoms**, as scheduled to the **Human Rights Act 1998**, and the interpretation of s 57(2) of the **Scotland Act 1998**. Similar issues arising from the European Convention were considered by the House of Lords in **Attorney-General's Reference (No 2 of 2001)**. A majority of seven of the nine Law Lords who sat in that case took a different view to the majority in **H M Advocate**.

[122] For the Crown, Ms Gordon submitted that there had been no unreasonable delay over the period referred to above. She submitted that the delay that occurred arose because of the number of accused and the unique circumstances that resulted. She said that if there had been only one or two offenders the charges could have been laid much earlier but that, given the circumstances, it was appropriate to delay while options for trial venue were considered and, in particular, enabling a venue to be chosen so that all accused could be tried at the same time. This necessitated treaty negotiations between the United Kingdom and New Zealand, which were concluded in October 2002 and which then resulted in the enactment of legislation in New Zealand enabling the trials, or parts of the trials, to be heard in this country and facilitating appropriate procedures. Ms Gordon submitted that there were three factors contributing to the delay. They were the number of accused, the complexity of the trial and the issue of venue. She submitted that if the treaty with New Zealand had not been negotiated, every one of the hearings, whether procedural or substantive, would have had to take place on Pitcairn, which would have caused massive delays. The treaty has enabled the cases to proceed with much greater despatch. She pointed out that at the actual trials on Pitcairn there were 19 support people involved and that these people would have had to go to Pitcairn for each hearing, had all hearings been held there. She produced a schedule of hearings. There were 14 hearings prior to the trials. These included depositions, pre-trial applications and conferences, pre-trial issues, applications for stay, severance and adjournment, and other procedural applications.

[123] In **H M Advocate v R** (at para 76) Lord Hope said, in relation to reasonableness:

> It is clear that the concept of reasonableness implies that a relatively high threshold must be crossed before it can be said in any particular case that a period of delay is unreasonable: **Dyer v Watson** [2004] 1 AC 379, 401-402, paras 51-52, per Lord Bingham of Cornhill. As Lord Bingham put it, the threshold is a high one, not easily crossed. Among the factors to be taken into account in deciding where that threshold lies is the public interest: see also **Martin v Tauranga District Court** [1995] 2 NZLR 419, 424-425, per Cooke P. A fair balance must be struck between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights. But once that threshold has been crossed and it has been held that there has been a delay which is unreasonable within the meaning of the article, the position is irretrievable.

We accept the Crown's submissions and are satisfied that the delay was not unreasonable in the circumstances of this case.

[124] In **H M Advocate** the majority of the Judicial Committee held that once it was found or accepted that there had been an unreasonable delay in bringing a criminal charge to trial, there was a breach of the article 6(1) right which could not be remedied and for the prosecution to continue in such circumstances would be incompatible with a determination of the charges within a reasonable time. The majority in **Attorney-General's Reference** held that a finding of unreasonable delay should not require the proceedings to be stayed or dismissed unless a fair hearing was no longer possible or it would be, for any compelling reason, unfair to try the defendant. The Court held that the public interest in the final determination of criminal charges required that such a charge should not be stayed or dismissed if any lesser remedy would be just and proportionate in all the circumstances. A stay would never be an appropriate remedy if any lesser remedy would adequately vindicate the defendant's Convention right.

[125] We have held in para [99] that the **European Convention** does not apply to Pitcairn. As we have noted earlier, this does not mean that human rights principles have no application or relevance. It will be seen from the above factual analysis and finding that even applying the stricter test of **H M Advocate** it would not be appropriate for a stay to be granted as a consequence of the delay in this case. However, it is our view that because English law applies to Pitcairn, a more appropriate test would be that set out by the House of Lords in Attorney-General's Reference. It is apparent that on that test too, which is effectively identical to the pre-Convention common law test referred to in para [92] of this judgment, a stay would be an inappropriate response to the delay in this case because there has been no prejudice to the defendants arising from that delay.

[126] We therefore agree with the conclusion of the Supreme Court that this ground of appeal does not justify a stay.

Lack of police presence on Pitcairn

[127] The appellants' submission is summarised as follows:

> 112. There was no English presence on Pitcairn until the arrival of Kent police

> in or about 1996. It is the submission of the appellant that the absence of any English police presence on Pitcairn further compounded the problems associated with the failure to publish English law intelligibly on the Island. It is submitted by reference to the items of evidence referred to above that, contrary to the view of the Supreme Court and the proposition advanced by the Public Prosecutor, the reality is that the standard of policing on the Island was seriously flawed by any civilised standards. The appellant has not contended that any principle of estoppel operates but that the deficiencies were well documented and known to colonial administrators and Governor Williams before these proceedings were instituted and that as a consequence it was an abuse of process, denial of justice, and of ss 6(1) and 7 of the Human Rights Act 1999 to commence these proceedings.

[128] The Supreme Court found:

> [a] That there were no professional police officers on Pitcairn until 1996 when an officer of the Kent Constabulary came to the Island.
>
> [b] Various administrators, before that year, had supported the notion of an outside police officer for Pitcairn on the grounds that Pitcairners seemed incapable of upholding or enforcing the law in their own community.
>
> [c] There had been an Island police officer for at least 70 years who had the authority of the Governor to enforce Pitcairn law. Such a person was not a trained officer. He was a local resident. The appointment of a local was in keeping with the Pitcairners' desire to control their own affairs.
>
> [d] In 1950, a Mr Floyd McCoy was appointed by the High Commissioner as Inspector, with control over the policemen appointed by the Island Council. This person prosecuted several cases before the Island Court and occasionally sought guidance from the Government Adviser on the Island and officials in Fiji.
>
> [e] Successive Island police officers were given instruction as to their duties from time to time by the administration, either in Suva or, after 1970, in New Zealand.
>
> [f] After 1961, records about policing on Pitcairn are less extensive. Officials from the administration visited the Island sporadically and, on their visits, offered legal advice, explained existing laws and gave instructions to the Island administrators, including the police officer.

[129] The Supreme Court rejected the submission of abuse of process based on a limited police presence on Pitcairn in the context of its findings that: (a) English law applied in Pitcairn, in particular the 1956

Act; (b) there had been proper promulgation of such laws; and (c) a general understanding that serious crimes, such as rape, could be the subject of charges under English law and not under the Island law.

[130] Counsel for the appellants stressed the lack of records about policing on Pitcairn since 1970 when Pitcairn ceased to be governed from Fiji. The last record of any possible prosecution was in 1971, when a prosecution for unlawful entry into a dwelling house was considered (but not actioned) by the Government Adviser and the Governor's office. Interestingly, the Government Adviser stated, in the correspondence about the 1971 incident, his belief that where there was no local law the laws of England applied, as far as circumstances permit.

[131] There was a plea of guilty in the Island Court to a charge of unlawful carnal knowledge in 1962. This appears to have been the last conviction in this court before 1999, when one Ricky Quinn was convicted. Quinn was later pardoned by the Governor as there had been irregularities about his conviction – which do not need to be canvassed. There was a meeting on the Island in November 1970 at which that alleged offence had been discussed. The Government Adviser is recorded as one of those who had stated that if the offence were to be committed on a girl below the age of 12 '... the case will require higher authorities to deal with the case'. Against these facts, the Public Defender criticised the Supreme Court's finding that: 'In a community the size of Pitcairn, issues of law and order and of punishment could not have escaped the notice of the community at large, including the youth as they grew up' (para 129).

[132] Counsel for the appellants submitted that the Harry Christian murder case in 1898 should have provided a timely lesson for the administrators that serious crime could take place on Pitcairn and that practical steps to deal with this possibility, including an educated and effective police presence, should have been taken. On the contrary, in our view, the Harry Christian case, which must be etched into the Pitcairn race memory, clearly demonstrated that English law would apply to those who committed a serious crime. The presence of a professional police officer would not have any influence on the basic understanding about serious sexual crimes amongst what was essentially a law-abiding community.

[133] The Crown submits that the standard of policing on Pitcairn (variable, to say the least) is not a factor so as to render these prosecutions an abuse of process. There is no estoppel in criminal law. Once it is accepted that the law was in force and sufficiently promulgated, then the lack of a police presence is irrelevant. What the appellants seem to be saying, taken to its logical extension, is that the absence of a proper police presence on the Island made it easier for serious offences, notably serious sexual offences, not to be detected and/or prosecuted. One should also have to enquire, on this scenario, what information might the police officer (or any other adviser/lawyer/administrator) impart? Would the enquiries to such persons have been: Is it lawful to have sex with a girl under 12? Is it lawful to commit incest? Is intercourse lawful if the woman does not consent? Merely to state these questions – which are unlikely even to be asked – is to show how unreal it is to suggest that it was an abuse of process not to have a professional police presence on the Island.

[134] Applying the tenets enunciated earlier, we see at best no prejudice to the accused of a sufficient weight as to stay the prosecution on abuse of process on this ground. The lack of an English police presence did not mean that the appellants could not and did not receive fair trials. Lack of policing could not possibly immunise serious offenders from prosecution.

New Zealand Judges

[135] We have already dealt with this contention under the ultra vires point. The same considerations apply under an abuse of process argument. If anything, the lack of unfairness to the accused caused by the importation of New Zealand laws and the employment of New Zealand judges and officials becomes more important because of the requirements of an abuse of process plea. This argument deserves no more consideration.

Miscellaneous grounds

[136] The appellants raised other issues under the general head of abuse of process. The appellants argued that the late enactment of the machinery of justice constituted 'systemic bias' on the part of the Governor. It was also argued that unfairness arose through the late appointment of the Public Defender. The first of these arguments relates to the enactment of a number of Ordinances since 2000 designed to accommodate the trials and to deal with logistics and procedure. All of these Ordinances are concerned with procedural or systems matters.

[137] The Public Defender submits that the absence of a workable machinery of justice diminished the rule of law on Pitcairn and gave an appearance of expediency and the lack of an even-handed approach to justice. Mr Cato submitted that the administration of criminal justice is a prime responsibility of government and that all the necessary machinery should have been properly in place before the investigations in this matter proceeded. Mr Cato submits that there is an appearance of pre-determination in enacting these provisions during the course of the investigation and, indeed, in some cases after charges had been laid.

[138] In his written submissions the Public Defender said:

> 136. The administration of criminal justice on Pitcairn in relation to English criminal law appears to have been no more than a paper administration for many years as have been submitted. To constitute subsequently at considerable expense, the machinery of justice, the construction of a prison, and the introduction of a considerable weight of legislation to govern the prosecution of several offenders for crimes 'some of which are historical' on a small Island in the South Pacific with a resident population of no more than 50 leads to an appearance and complaint of systemic bias against the Governor by the appellants as further illustrated also in the particular examples given below.

[139] The Crown submits that the machinery of justice created since 2000 is entirely neutral and unbiased in its application and was enacted in large part to avoid unnecessary delay in the trials.

[140] The Supreme Court concluded that there was no particular feature of the Ordinances which operated unfairly against the accused. It accepted the submission on behalf of the Crown that the Ordinances were neutral as between the parties and were designed to facilitate the just and proper settlement of criminal disputes. The Court held that in legislating for a modern justice and corrections system after the detection of the charges, the Governor had not invoked any presumption against retrospectivity, nor put the accused at an unfair disadvantage and had not sought to ensure by legislation that the accused received anything other than a fair trial before a fair and modern justice system.

[141] In this Court the appellants provided three examples of what was said to be a direct involvement of the Governor in the trial process as it was developing and affecting the appellants specifically. The first of the examples referred to an amendment to an Ordinance providing for applications for stay of proceedings. The amendment repealed a provision which provided for an interim stay during the appeal period and pending any appeal. The amendment was made on the day that the legal defence team departed for Pitcairn for the trials. In cross-examination the Governor's legal adviser stated that the reason for the amendment was to prevent the trials taking place on the Island from being stayed. The desire to prevent this was understandable, given the expense of setting up the trial process and the number of people that had to be taken to Pitcairn so that the trials could take place. Given the logistics of setting up a trial process on Pitcairn, we think that the amendment, even though it was prompted by these trials, was acceptable. It did not, in fact, act to the detriment of the appellants. The Court retained its jurisdiction to grant adjournments. Indeed, in our experience a provision such as that which was repealed is most unusual, enabling as it does a trial to be stopped without any ability on the part of the Judge to exercise discretion in that regard.

[142] The second change complained of was one giving tenure to the Judges and the Magistrate who had been appointed. This change apparently occurred after a complaint about lack of tenure had been made by the Public Defender in a pre-trial application. In our view, this change was not in any way prejudicial to the appellants.

[143] The final change specifically complained of was designed to prevent certain individuals, who had been found guilty of sexual offences against minors but whose conviction had been deferred pending the resolution of legal arguments, from holding certain local government offices. This Ordinance did not in any way interfere with the trial process.

[144] It is significant that there has been no complaint concerning the fairness of the trial process itself. Certainly none of the Ordinances relating to the trial were directed specifically against the appellants. Nor can it be said that it placed them at any disadvantage in relation to their trials. The essentials of the judicial process were in place prior to the detection of the offences, in that there existed a Magistrate's Court, a Supreme Court and a prison. The sheer extent of the alleged offending and the number of accused required steps to be taken to ensure that the justice system could adequately accommodate a lengthy trial involving a substantial number of accused, beyond anything which might reasonably have been contemplated in earlier years.

[145] Essentially for the reasons set out above and in the judgment of the Supreme Court, this ground of appeal cannot succeed.

[146] An associated submission was to the effect that there was unfairness arising from the fact that the Public Defender had been appointed later than the Public Prosecutor. The submission was that this had deprived the Public Defender of the opportunity to become involved at a stage when there was debate within Foreign and Commonwealth Office circles about whether there should be trials or whether an amnesty should be allowed. The Public Defender's submission was that as he had not been appointed, he was not available to attempt to tip the balance in favour of the appellants during these deliberations.

[147] The Supreme Court concluded that there was a sense of unreality about this part of the argument because it thought it unlikely that counsel would have been admitted to that debate. In submissions before this Court, Ms Gordon for the Crown pointed out that this issue was resolved very rapidly over a period of about two weeks. Again, we are in agreement with the finding of the Supreme Court on this

issue. It would be unusual for counsel for accused persons to be invited to be involved in what was a policy discussion conducted at government level.

[148] The Public Defender argued that the adjournment to Auckland from Pitcairn of the arguments which were the subject of the Supreme Court's judgment of May 2005, after the findings of guilt and provisional sentencing, was irregular and placed further pressure on the accused. That may be so, but it is hard to see what else the Supreme Court could do. It felt it was important to hold the trials on Pitcairn. The Privy Council did not order that they be stayed. Clearly, the Supreme Court wanted the community to see the trial process unfold. It would have been quite impracticable to have held on Pitcairn the complex legal argument that the Supreme Court heard. As the Supreme Court noted, it was only when Judges and counsel were en route to Pitcairn that the Public Defender advised that he would be bringing the abuse of process application. Obviously, it could not have been heard at the same time as the trials.

Conclusion

[149] We have considered whether, even if individual grounds were not grounds for abuse of process, all or any of them in combination may have been (a sort of 'strands in the rope' type of argument).

[150] Even viewed cumulatively, the alleged grounds for abuse of process do not militate against a fair hearing. The proceedings were instituted and prosecuted in accordance with the true purpose of criminal proceedings, that is, to hear and determine the charges against the accused and to assess punishment of those found guilty. The appellants did not show that they will suffer serious prejudice if the proceedings were allowed to proceed.

Rape under the Sexual Offences Act 1956

[151] All convictions for the offence of rape now under appeal were brought under s (1) of the 1956 Act. In respect of Stevens Raymond Christian, some offending occurred prior to the commencement of the **Sexual Offences (Amendment) Act 1976** and therefore fell to be determined under the law which applied prior to that enactment. The significance is that until 1976, s 1(1), which states that 'it is a felony for a man to rape a woman', contained no elaboration as to what constituted the elements of the offence. Following the decision of the House of Lords in **R v Morgan** [1975] UKHL 3; [1976] AC 182, the 1976 amendment was enacted. In particular, in these terms:

> (1) For the purposes of section 1 of the **Sexual Offences Act 1956** (which relates to rape) a man commits rape if –
>
> > (a) he has unlawful sexual intercourse with a woman who at the time of the intercourse does not consent to it; and
> >
> > (b) at that time he knows that she does not consent to the intercourse or he is reckless as to whether she consents to it;

[152] The point was also argued under the appeal of Carlisle Terry Young, although the indictment

contained in the case on appeal appears to allege offending between 30 December 1977 and 23 December 1981, a period subsequent to the amendment coming into force.

[153] What is now at issue is whether the trial Judges erred in law in holding that for pre-1976 offending it was not necessary for the prosecution to establish that the non-consensual intercourse was accompanied by force or threat of force. There was a difference of approach to this issue. It was submitted by Mr Cato for the Public Defender that force was an element of the actus reus – rape was the act of intercourse without consent and by the use of force. The necessary additional element was knowledge that the victim was not consenting or recklessness as to whether or not she was consenting. On the other hand, Mr Illingworth submitted that proof of some degree of force was required at common law (and under statute law from 1861) in order to demonstrate that the offender knew he was acting without consent. Mr Illingworth's approach creates some difficulty, as all the speeches in Morgan make it clear that the mental element in rape as at that time, that is, 1975, was knowledge the woman was not consenting or being reckless whether or not she consented. The resulting difficulty is in seeing why force, or indeed, fear or fraud, if they are alternative necessary elements of the offence, should be needed to demonstrate a state of recklessness and, indeed, how any of those could do so. However, whichever approach is adopted it is necessary to consider whether this additional element was required to be established.

[154] We have given careful consideration to the submissions and, in particular, the analysis of the historical treatment of the offence of rape set out in the Crown's submissions.

[155] We are unable to accept the contention that the offence of rape under s 1 of the 1956 Act, prior to the 1976 amendment coming into operation, required proof of force. The authorities to the contrary are, in our view, overwhelming. Reference need only be made to the **Report of the Advisory Group on the Law of Rape** presented to Parliament in December 1975 (Cmnd 6352) which followed on the House of Lords' decision in Morgan. The report included the following:

> 18. There is no modern definition of the crime of rape and although it is an offence under s 1 of the Sexual Offences Act 1956, the statute contains no attempt at a definition. The traditional common law definition, derived from a 17th Century writer (1 Hale 627 ff. 1 East PC 434) and still in use, is that rape consists in having unlawful sexual intercourse with a woman without her consent, by force, fear or fraud.
>
> 19. This definition can be misleading, since the essence of the crime consists in having sexual intercourse with a woman without her consent and it is, therefore, rape to have intercourse with a woman who is asleep or with one who unwillingly submits without a struggle.
>
> 20. Smith & Hogan point out in their text book on the Criminal Law rd Edn, 1973, p 326): 'Earlier authorities emphasised the use of force; but it is now clear that lack of consent is the crux of the matter and this may exist though no force is used. The test is not 'was the act against her will?' but 'was it without her consent?''
>
> 21. It is, therefore, wrong to assume that the woman must show signs of injury or that she must always physically resist before there can be a

> conviction for rape. We have found this erroneous assumption held by some and therefore hope that our recommendations will go some way to dispel it.
>
> 22. The actus reus in rape, which the prosecution must establish for a conviction consists of (a) unlawful sexual intercourse and (b) absence of the woman's consent.

[156] The issue is put beyond doubt in the judgment of the Court of Appeal in **R v Olugboja** [1981] 3 All ER 443. The question of law raised in that appeal was whether to constitute the offence of rape it was necessary for there to be force, the fear of force or fraud or whether it was sufficient to prove that in fact the victim did not consent. The element of actus reus was therefore in point. The Court rejected the proposition that the position at common law before 1976 was different from that stated in the report of the Advisory Group. Effectively it was held that the Amendment Act 1976, which defined rape as being unlawful sexual intercourse with a woman who at the time of the intercourse does not consent to it, was merely declaratory of the common law.

[157] Confirmation of the position can be also found in Smith and Hogan's **Criminal Law** (9th ed 1999) at 457:

> At one time it was stated that the intercourse must have been procured through force, fear or fraud. Some books continued to state the law in these terms until very recently but they have been out-of-date for well over a century. If the victim did not consent, the actus reus occurs, whatever the reason for the absence of consent ...

[158] A consideration of the speeches in **Morgan** makes it clear that the prohibited act for the offence of rape is sexual intercourse without consent. Lord Cross, at 203, stated:

> Rape is not a word in the use of which lawyers have a monopoly and the first question to be answered in this case, as I see it, is whether according to the ordinary use of the English language a man can be said to have committed rape if he believed that the woman was consenting to the intercourse and would not have attempted to have it but for this belief, whatever his grounds for so believing. I do not think that he can. Rape, to my mind, imports at least indifference as to the woman's consent.

[159] Lord Hailsham, at 215:

> I am content to rest my view of the instant case on the crime of rape by saying that it is my opinion that the prohibited act is and always has been intercourse without consent of the victim and the mental element is and always has been the intention to commit that act, or the equivalent intention of having intercourse willy-nilly not caring whether the victim consents or no.

[160] Lord Simon, at 218:

> The actus reus is sexual intercourse with a woman who is not in fact consenting to such intercourse.

[161] Whilst both Lord Hailsham and Lord Edmund-Davies refer to the definition of rape as being 'intercourse without consent by force, fear or fraud' by reference to such authorities as **1 East's Pleas of the Crown** 434 and **1 Hale's Pleas of the Crown** 627, it is clear that those additional words, or variants of them, are seen as indicative of knowledge of the unwillingness of the woman to have intercourse as being an essential ingredient. There is nowhere a statement to reflect the contention that absence of force, fear or fraud means the actus reus, or alternatively the necessary mens rea, of the offence is not established. What is clear from the use of those words is that submission resulting from their use does not negate rape but constitutes unwillingness.

[162] We were not referred to any contemporary authority in which it was held that a conviction for rape could not be upheld because there was no sufficient evidence that it was accompanied by force, fear or fraud. The common thread of all authorities is that the act of intercourse must be against the will of the woman.

[163] In **R v Camplin** (1845) 1 Cox CC 220 it was contended that to constitute rape there must be actual force used and actual resistance to that force. The contention was rejected by the Court, Lord Denman observing that resistance, and inferentially force, was not essential to rape.

[164] In **R v Mayers** (1872) Cox CC 311, in response to a submission that there had to be evidence that force was used in a case where it was alleged that the woman was asleep when the intercourse took place, Lush J ruled that the absence of some evidence of force or violence did not negate the offence of rape.

[165] In **Harling** (1937) 26 Cr App R 127, Humphreys J, in restating the law which applied to the alleged rape of a girl under the age of 16, said, at 128:

> In every case of rape it is necessary that the prosecution should prove that the girl or woman did not consent and that the crime was committed against her will. It may well be that in many cases the prosecution would not need to prove much more than the age of the girl, and in this case that fact, coupled with the fact that the girl was a weakling, is enough to prove that there was no consent on her part.

[166] Counsel for the two present applicants relied substantially on a statement in **Howard** (1965) 50 Cr App R 56, at 58:

> The court thinks it as well to repeat that it seems to this court that in the case of a girl under sixteen, the prosecution, in order to prove rape, must prove either that she physically resisted, or if she did not, that her understanding and knowledge were such that she was not in a position to decide whether to consent or resist.

Howard was concerned with the alleged rape of a six year old girl. At issue was whether absence of consent was an element, having regard to the fact that it was no defence to a charge of carnal knowledge of a girl under 16 that she consented to such activity. The passage in the judgment just quoted needs to be read in the context of the immediately preceding sentence, where Lord Parker stated:

> In every case of rape it is necessary that the prosecution should prove that the girl or woman did not consent and that the crime was committed against her will.

The reference in the judgment to the need for physical resistance is not sourced. The alternative formulation for young persons, namely the inability to decide whether to consent or resist is sufficient, is a clear acceptance that force is not necessary. Rather, the critical enquiry is whether there was, what would be termed in modern parlance, a real consent.

[167] We therefore hold that the trial Judges correctly applied the law relevant to the charges in question. The element of force did not form a necessary ingredient. What had to be proved was that there was the act of sexual intercourse, that it occurred without the consent of the complainant and, also, that the offender knew that the complainant was not consenting or was reckless as to whether or not there was consent.

Further grounds in the appeal of Carlisle Terry Young

[168] We granted consent on the application of Mr Illingworth to amend Mr Young's grounds of appeal. Mr Illingworth defined those grounds as follows:

> The conviction of the appellant on counts 2 to 6 was unsafe because:
>
> [a] The learned Judge erred in her assessment of the credibility of complainant B.
>
> [b] The learned Judge erred in failing to direct herself correctly on the question of lies allegedly told by the appellant when interviewed by the police.
>
> [c] The learned Judge erred by failing to direct herself correctly on the question of whether it was essential for the prosecution to prove the unlawful use of force.
>
> [d] The learned Judge erred by finding that at the material time the appellant knew that complainant B did not consent to sexual intercourse.

The issue raised by ground [c] has already been discussed and determined in this judgment.

Facts relating to the charges

[169] The evidence records that complainant B was born on 3 December 1968. It seems that the date of birth of the complainant recorded in the evidence is not correct. All the references to her age at various points in time indicate that the age difference between the complainant and the appellant was about eight years, so that she must have been born in December 1966. The appellant was born on 14 October 1958. The complainant's mother was 15 when the complainant was born prematurely. She was fairly small for

most of her childhood. She never knew her natural mother. She was brought up by her grandparents, whom she regarded as her parents. The appellant was part of the household when she was growing up and the complainant looked upon him as her brother. The complainant's grandparents were very strict. The complainant was often punished. The appellant, too, had a very bad temper and would verbally abuse her. The complainant's evidence was that she was never shown any affection by anyone in the household.

[170] One of the complainant's chores was to collect firewood. The appellant would take her to the collection area on a motorbike. Her evidence is that he began touching her on her genitals when she was quite young. That progressed to digital penetration of her genital area and then to the appellant putting his penis in her vagina. She said that initially she said 'no' when he performed these acts, but 'After a while I stopped saying no. There was no point in saying no. So I just lay there and let him do what he had to do.' Her clear recollection of these events was from the age of 12, when the appellant started putting his penis part-way into her vagina. Later, after she had lost her virginity to someone else, she says the appellant put his penis all the way inside her vagina. The sexual intercourse continued until she was about 15 years of age.

The judgment in the Supreme Court

[171] The trial was judge-alone before Lovell-Smith J. The appellant did not give evidence nor did he call any evidence. In her written judgment the Judge reminded herself that the appellant was not obliged to give evidence and that failure to do so must not be taken as an admission of guilt. She referred to the legal basis of the counts under ss 1 and 14 of the Sexual Offences Act 1956. She set out the essential elements of each of the two offences. In the case of rape, she discussed the defence proposition that at the time of the offending the law was that intercourse must have been procured through force, fear or fraud, and that it must be proved that the complainant 'physically resisted'. In rejecting that proposition, she referred to the judgment of Blackie CJ of the Supreme Court delivered on 13 October 2004, in which the Chief Justice, after hearing argument on the question of whether force by the accused or physical resistance by a complainant needed to be proved, rejected those contentions. This Court, of course, earlier in this judgment has upheld that view.

[172] The Judge in the Court below went on to describe the circumstances of the indecent assaults and later the intercourse. Importantly, she noted that the complainant was initially very reluctant to make a statement to the police and at first mentioned only some touching by the appellant. But in a statement about a month after that initial interview, the complainant made allegations consistent with the charges faced by the appellant.

[173] The appellant made a statement to the police. He admitted what he described as 'rubbing down' the complainant over her whole body when they were both very young. He said he could not remember whether the rubbing down included putting his fingers inside her vagina and he could not remember whether he ever had full sex with the complainant. As earlier indicated, he did not give evidence at trial.

[174] The Judge accepted the evidence of the interviewing police officer, Senior Constable Karen Vaughan, that the complainant was very anxious and distressed when first interviewed. The Judge noted Senior Constable Vaughan's evidence to the effect that the complainant's level of distress was such that eventually she decided that she was not able to continue, and that the reference to minor touching by the

appellant was made at the beginning of the interview. She went on to consider issues of credibility. She said she accepted the evidence of the complainant and believed her. She considered the reasons for the delay in making the complaint and the complainant's initial reluctance, together with the significant increase in detail by the time she came to give her evidence. She found that the appellant was 'less than frank' in his video-taped interview. She found all counts proved. In particular, in relation to the representative count of rape, she found that the complainant did not consent and that the appellant knew that she did not consent. In that regard her judgment includes the following passage, at para 75:

> She had been brought up as his sister. He ignored her when she initially said no. She was small for her age. He was about eight years older and much stronger. He knew she was the most vulnerable member of the household, subjected to physical and verbal abuse by his parents, her grandparents. He would verbally abuse her. When he had sexual intercourse with her he would prise her legs apart. I find the accused used force because as he knelt down he would use one knee and then the other knee until her legs were open and then he would start to have sexual intercourse with her.

Submissions on behalf of the appellant and the Crown

[175] Mr Illingworth submitted, first, that the Judge's analysis of the evidence in relation to credibility was inadequate and faulty. He submitted that the evidence conflicted in a number of crucial respects and that the Judge did not deal with these conflicts. He said that the statements of the complainant reflected not just an increase in detail, but sharp conflicts. In particular, counsel submitted that the complainant had only said 'no' on one occasion when the touching first began and that the Judge had failed to acknowledge that fact. He submitted that the Judge did not refer to the conflict between the complainant's initial statement that the abuse by the appellant related only to minor touching on her body and that this was in contrast to abuse by another person that had included rape. He submitted that there was conflict between a statement that she had lost her virginity at the age of 13 and another statement that she had been raped from the age of about six years, and he pointed to other instances of alleged conflict.

[176] As to the need for a lies direction, he submitted that the Judge's observation that the appellant had been 'less than frank' must be a statement that he had lied and that she had failed to direct herself as to the danger of drawing inferences from lies. As to knowledge of lack of consent, he submitted that there must be evidence of force or resistance and that the evidence of the appellant prising the complainant's legs apart was not sufficient to establish this requirement beyond reasonable doubt. He submitted generally that the evidence did not establish knowledge by the appellant that the complainant did not consent.

[177] For the Crown, Ms Gordon dealt in detail with each of the alleged inconsistencies and submitted that in fact there were no inconsistencies, but that even if there were, the Judge was not obliged to deal with every issue arising. She cited in support of this proposition **R v Connell** [1985] 2 NZLR 233 (CA) and **R v Eide** (2004) 21 CRNZ 212 (CA). These decisions were given in the context of judge-alone criminal trials in New Zealand. We would add for completeness that in **R v Meyrick** (CA 513/04, 14 June 2005) the New Zealand Court of Appeal emphasised that in such cases it was essential that the judge identify the findings critical to a guilty verdict. Ms Gordon submitted that under English law no lies direction was required in the circumstances of this case and that the evidence established the

required knowledge on the appellant's part as to lack of consent.

Decision

[178] We have given careful consideration to counsel's submissions and have examined the transcript of evidence and the Judge's decision with those submissions in mind. Mr Illingworth's submission that force or resistance must be established before knowledge of lack of consent could be proved is rejected for the reasons given earlier in this judgment.

[179] As to the credibility findings, we are satisfied that the Judge sufficiently analysed the evidence. We do not agree that there are inconsistencies in the evidence referred to by Mr Illingworth. What he describes as inconsistencies is a progression of disclosure by a complainant initially very reluctant to make a complaint at all. What is said to be an inconsistency in her evidence as to when she was first raped appears to be based on a misunderstanding of the complainant's evidence. She said that she lost her virginity at age 13, but she was referring there to full penetration. The earlier incidents to which she referred involved only partial penetration.

[180] As to the Judge's finding that the appellant had been 'less than frank' when interviewed by the police, we are satisfied that she was not required to caution herself in relation to lies. Although it is not clear to what she was referring, it could only have been the appellant's 'no comment' observations or his statement on occasion that he could not remember. He, of course, was not obliged to make a statement at all, but once he had decided to do so the Judge was entitled to comment upon it. If, as is likely, the Judge's statement referred to occasions when the appellant said he could not remember, we would accept the submission by Mr Illingworth that it is at least likely the Judge concluded that he was not telling the whole truth. It does not follow, however, that a lies direction is required. The law to be applied is, of course, English law. The English law, as established in cases such as **R v Goodway** (1994) 98 Cr App R 11 (CA) and **R v Burge & Pegg** [1996] 1 Cr App R 163, is that a lies direction is necessary where lies are relied on by the prosecution or might be used by the jury to support evidence of guilt, as opposed to merely reflecting on the accused's credibility.

[181] In the present case the Judge's observation was certainly not used to support her findings of guilt. It is indeed doubtful that it was used even for a credibility purpose. She had earlier held that she had accepted the evidence of the complainant. There was no denial by the appellant, other than through his plea of not guilty, that he had committed these offences. Once the Judge accepted the evidence of the complainant, convictions were inevitable.

[182] Mr Illingworth submitted that the evidence was inadequate to establish beyond reasonable doubt that the appellant knew that the complainant did not consent or was reckless as to whether she was consenting. We do not accept that submission. There was ample evidence to enable this finding to be made. It included the age difference, the treatment of the complainant by the appellant and other members of her family, the force used by the appellant, and the fact that the complainant said 'no'. As to this last factor, we are satisfied on the evidence that she did not just say 'no' on one occasion when the touching first commenced. Her evidence is that she said 'no' on more than one occasion, including those occasions when rape occurred, but that eventually, because that indication of her lack of consent had no effect, she, to use her own words, just 'lay there and let him do what he had to do'. It is also relevant in this regard that the complainant's evidence was that she never gave any indication of enjoying what was happening to her, there was never any demonstration of affection on the part of the appellant and that so

far as the acts of sexual intercourse were concerned, the only part of her body that was touched was her vagina.

[183] For all the above reasons, we are satisfied that none of the additional grounds of appeal have been established.

Appeal by Randall Kay Christian

[184] This appellant was charged in count 12 of indecently assaulting a girl under the age of 13 years by having sexual intercourse with her. He was convicted of this and other charges. The Judge indicated that the appellant was to be discharged without penalty on this count, the appellant having been sentenced to imprisonment on other charges.

[185] The Crown conceded in this Court that because of the decision of the House of Lords in **R v J** [2004] UKHL 43, it was impermissible for the Crown to prosecute a charge of indecent assault on a girl under 16 where the conduct upon which the charge was based was an act of intercourse. It is, however, unclear from the record before us whether or not a conviction was entered. The charge should have been dismissed.

[186] Consequently, in order to clarify the position, we confirm the conviction on count 12 against this appellant cannot stand.

Result

[187] For the reasons we have set out, we are satisfied that none of what can be described as the general grounds of appeal has been made out. The separate grounds of appeal propounded on behalf of Stevens Raymond Christian and Carlisle Terry Young also fail.

[188] Accordingly, the appeals of Stevens Raymond Christian, Len Calvin Davis Brown, Len Carlisle Brown, Dennis Ray Christian and Carlisle Terry Young are dismissed.

[189] The appeal of Randall Kay Christian is allowed but only in respect of count 12 of his indictment. Any conviction under that count is quashed. The appeal otherwise remains adjourned sine die, to be brought on for hearing following determination of his application to amend the grounds of appeal.
