

Privy Council Appeal No 109/2005

<p>(1) Steven Raymond Christian (2) Len Calvin Davis Brown (3) Len Carlisle Brown (4) Dennis Ray Christian (5) Carlisle Terry Young (6) Randall Kay Christian</p>	<p>v.</p>	<p><i>Appellants</i></p>
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<p>The Queen</p>	<p>v.</p>	<p><i>Respondent</i></p>
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FROM

**THE COURT OF APPEAL OF
THE PITCAIRN ISLANDS**

JUDGMENT OF THE LORDS OF THE JUDICIAL
COMMITTEE OF THE PRIVY COUNCIL

Delivered the 30th October 2006

Present at the hearing:-

Lord Hoffmann
Lord Woolf
Lord Steyn
Lord Hope of Craighead
Lord Carswell

[Delivered by Lord Hoffmann]

1. This is an appeal by special leave from the Pitcairn Court of Appeal (Henry P, Barker and Salmon JJA) affirming the convictions of the six appellants by the

Pitcairn Supreme Court on charges of rape, indecent assault and incest. The issues upon which leave was given do not concern the merits of the convictions but relate to the validity of the laws creating the offences and the question of whether the bringing of the prosecutions was an abuse of process. At the hearing before the Board, however, leave was sought to appeal on two further matters concerning respectively the elements of the crime of rape and the judge's approach to the evidence. Their Lordships will deal with these applications later.

2. Pitcairn is a small and remote island in the South Pacific between New Zealand and Chile. It was occupied in 1790 by a group of mutineers from HMAV *Bounty* and some Polynesian men and women. In 1856 the small population removed itself to Norfolk Island but a few families returned two or three years later and re-established themselves. In the nineteenth century the forms of government were rudimentary, consisting of rules drawn up locally or with the assistance of the commanding officers of ships of the Royal Navy which made infrequent visits.
3. In 1893 Her Majesty in Council made the Pacific Order in Council to provide a system of government for British settlements in the Pacific. The Order was made under the British Settlements Act 1887, which gave power to establish "all such laws and institutions" as might appear to Her Majesty in Council to be "necessary for the peace, order and good government of Her Majesty's subjects and others within any British settlement." A "British settlement" was defined as any British possession "which has not been acquired by cession or conquest" and which did not have its own legislature.
4. Article 6(1) of the Order provided that, until otherwise directed by the Secretary of State, jurisdiction should be exercised only over certain islands which did not include Pitcairn, but article 6(2) gave the Secretary of State power to direct that other British settlements in the Pacific should be added. In 1898 the Secretary of State directed that the Order should apply to Pitcairn. The

direction was therefore a statement by the Crown that Pitcairn was a British settlement.

5. The Order set up a High Commissioner's Court for the Western Pacific with criminal and civil jurisdiction. Article 20 provided that such jurisdiction should be exercised "so far as circumstances admit...upon the principles of and in conformity with the substance of the law for the time being in force in and for England."
 6. The application of the Pacific Order in Council to Pitcairn was revoked by the Pitcairn Order in Council 1952, which provided that the Governor of Fiji should also be Governor of Pitcairn and some neighbouring uninhabited islands ("the Islands") and have power to make laws for the "peace order and good government" of the Islands. A savings clause provided that until the Governor made other provision, the jurisdiction of the High Commissioner's Court and the law which it applied should continue in force. Other provision was made by Judicature Ordinance 1961, which replaced the jurisdiction of the High Commissioner with that of the Supreme Court of Fiji. The Ordinance also dealt with the law to be applied in Pitcairn:
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.
7. The independence of Fiji in 1970 meant that new provision had to be made for the governorship of Pitcairn. The Pitcairn Order 1970, made in exercise of the powers vested in Her Majesty by the 1887 Act "or otherwise" replaced the 1952 Order and provided for a

Governor appointed by Her Majesty with the same power, in section 5(1), to make laws for “the peace, order and good government of the Islands”. By section 5(3), all such laws made by the Governor were to be “published in such manner and at such place or places in the Islands as the Governor may from time to time direct.” The Governor made the Judicature Ordinance 1970, which repealed the 1961 Ordinance and created a Supreme Court having the same jurisdiction in Pitcairn as the High Court of Justice in England. Section 14 dealt with the law which the Supreme Court was to apply:

(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 as may be necessary to render the same applicable to the circumstances.

8. This Ordinance was duly published in accordance with section 5(3) and was in force at the time when the offences were committed. The appellants were charged under provisions of the Sexual Offences Act 1956, which was a law of general application in force in England at the time of the commencement of the Ordinance.
9. The first point taken by the appellants is that the 1970 Ordinance was *ultra vires* the 1887 Act, either because Pitcairn was never a British possession at all or, alternatively, because it had been acquired by cession and was therefore outside the definition of a “British settlement”. In support of the first argument, Mr Cook

QC proposed to take their Lordships to the history of the island to demonstrate that the islanders never acknowledged allegiance to the Crown. Their Lordships declined to investigate this question because it appears to them that the legal status of the island as a British possession is concluded by successive statements of the executive, starting with the direction of the Secretary of State in 1898 and ending with the making of the 1970 Order in Council. In *The Fagernes* [1927] P 311, 324, Atkin LJ said:

“What is the territory of the Crown is a matter of which the Court takes judicial notice. The Court has, therefore, to inform itself from the best material available; and on such a matter it may be its duty to obtain its information from the appropriate department of Government. Any definite statement from the proper representative of the Crown as to the territory of the Crown must be treated as conclusive.”

10. This is not the occasion on which to explore the limits of this doctrine, but their Lordships consider that the present case falls squarely within it. For over a hundred years Pitcairn has been administered by the Crown as a British possession and whatever its history or the inclinations of its people may have been, it is unthinkable that the Judicial Committee of Her Majesty's Privy Council would not accept an executive statement affirming it to be part of the territory of the Crown. The directions of 1898 and the Orders in Council of 1952 and 1970 are statements of this kind.

11. The argument that the Crown acquired Pitcairn by cession is a novel one. Cession by whom? The notion of cession contemplates a transfer of sovereignty by one sovereign power to another. So, for example, by the Treaty of Utrecht in 1713, Gibraltar was ceded to Great Britain by the Kingdom of Spain. In *Sammut v Strickland* [1938] AC 678 the Privy Council recognised the possibility of a cession by the people of a territory (in that case, Malta during the Napoleonic Wars) who had assumed sovereign authority over themselves. But the analogy with the people of Pitcairn seeking the protection of the Crown seems to their Lordships somewhat far fetched. In any case, the question appears

to their Lordships to be quite academic, since there is no doubt that the power of the Crown to legislate for a conquered or ceded possession is more extensive than its power to legislate for a settled colony: see Blackstone's *Commentaries* (4th ed 1770) at p. 107. As the 1970 Ordinance was made under the powers vested in Her Majesty by the 1887 Act "or otherwise", it is valid whether Pitcairn was settled or ceded.

12. Mr Cato submitted next for the appellants that the language of section 14 of the 1970 Ordinance was too imprecise to incorporate the 1956 Act as part of the law of Pitcairn. What was a statute "of general application"? And there could be much dispute over whether "local circumstances" made it appropriate for the law to apply. But this language has been used in legislation for British overseas possessions for many years without causing any difficulty. As Sir Kenneth Roberts-Wray said in his book on *Commonwealth and Colonial Law* (1966), at p 545:

"It has been in use for many decades, it has been the subject of judicial interpretation, it does not appear to have given the courts serious trouble, and it has much the same effect as the common law rule. So a change of formula may do more harm than good."

13. Similar language was considered by the Court of Appeal in *Nyali Ltd v Attorney-General* [1956] 1 QB 1, where Denning LJ said (at p. 17) that the task of making qualifications to English law to suit the circumstances of overseas territories called for wisdom on the part of their judges. But he described it (at p. 16) as a "wise provision" and did not suggest that it was incapable of application. Their Lordships think that there can be no doubt that the 1956 Act is an act of general application and that there are no local circumstances which make it inappropriate to apply the provisions about rape, indecent assault and incest.

14. Mr Cato also submitted that the phrase "the substance of the law for the time being in force in and for England" in section 7 of the 1961 Ordinance and the "statutes of general application" in section 14(1) of the 1970 Ordinance did not incorporate the criminal law.

He contrasted this language with section 20 of the 1893 Order in Council, which referred expressly to civil and criminal jurisdiction. Their Lordships think that there is nothing in this point. “The law” obviously means the whole of the law and “statutes” means all statutes. Indeed, if it did not incorporate the criminal law, it is hard to see how, by the same process of reasoning, it could have incorporated the civil law.

15. Mr Cato also submitted that, at the time when the offences were committed, the 1956 Act and all other English statutes creating indictable offences failed the test of suitability to local circumstances because until the creation of the Pitcairn Court of Appeals by the Pitcairn Court of Appeal Order 2000, there was no right of appeal against a conviction by the Supreme Court. In their Lordships’ opinion, the right of appeal is a question of procedure which has no connection with the applicability of the substantive law. If there is a need for a right of appeal (as to which their Lordships express no opinion) that requirement arises at the time of conviction. The Australian case of *Quan Yick v Hinds* (1905) 2 CLR 345 concerned a special kind of English offence (being deemed to be a “rogue and a vagabond”) in which an appeal to Quarter Sessions was an essential part of the machinery for enforcing that law. The High Court decided that it could not apply in New South Wales, where there was no court of Quarter Sessions. It is however no authority for the general proposition that no English criminal statute can be incorporated into the law of a British overseas settlement until there is a right of appeal. Indeed, until 1907 there was no right of appeal in England either.

16. Mr Perry, for the appellant Carlisle (Terry) Young, submitted that the 1956 Act could not apply because it had not been published in accordance with section 5(3) of the 1970 Order in Council. But that subsection applies to laws made by the Governor in the exercise of his powers under section 5(1). Under that section the Governor made the 1970 Ordinance, which was duly published, but obviously not the 1956 Act. Mr Perry submitted that in the peculiar circumstances as they existed on Pitcairn, section 5(3) should be read as applying not only to laws made by the Governor but

also to any laws incorporated by an Ordinance as part of the law of Pitcairn. Quite apart from the fact that this is not what section 5(3) says, their Lordships think that such a construction would be quite unrealistic. Section 14(1) incorporates not only statutes but also the common law and the rules of equity, which hardly admit of “publication”. It is true that if, contrary to Mr Cato’s argument, Pitcairn was a British settlement, the settlers would have taken the rules of common law and equity to the island without the need for express legislation. Nevertheless, the Ordinance purports to incorporate them.

17. Furthermore, if section 5(3) is to be read as requiring publication of incorporated statutes, the same construction must have applied to section 5(3) of the 1952 Ordinance. At that time, English statutes applied to Pitcairn by virtue of the 1893 Pacific Order in Council. Assuming that Order to have been validly made and applied to Pitcairn, as their Lordships think it was, there is no dispute about the validity of its incorporation of English law. At the time of the Judicature Ordinance 1961, therefore, the substance of English statute law applied to the island. But Mr Perry’s submission is that once the Governor, by that Ordinance, exercised his power to bring the application of the 1893 Order in Council to an end, English statute law ceased to apply except in so far as each statute was subsequently published on the island. Their Lordships think it unlikely, in the absence of express language, that such a result was intended. And so far from there being express language, the result can be achieved only by a bold process of implication into the language of the 1952 and 1970 Orders. For these reasons, which are the same as those of the Court of Appeal (see paragraphs 34 to 37) their Lordships reject the submission.

18. Their Lordships pass to the alternative ground of appeal, that the prosecution was in all the circumstances an abuse of the process of the court. The chief reasons put forward are that the Sexual Offences Act 1956 had not been published in the island and that the rudimentary policing of the inhabitants gave the impression that English law would not be enforced, but

there were other grounds such as delay and inequality of arms.

19. In *Regina v Latif* [1996] 1 WLR 104, 112-113 Lord Steyn said that a judge had power to stay a criminal prosecution on broad considerations of “the integrity of the criminal justice system” when there has been an abuse of process which “amounts to an affront to the public conscience”. In exercising this discretion, it was necessary for the judge to weigh in the balance “the public interest in ensuring that those who are charged with grave crimes should be tried” and the competing public interest in not conveying an impression that “the end justifies the means”.

20. The Supreme Court was referred to the principle stated in *Latif* and invited to exercise its discretion to stay the proceedings. It examined all the grounds with great care and declined to do so. The Court of Appeal re-examined those grounds and concluded (at paragraph 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.”

21. In support of the exercise of its discretion, the Supreme Court made certain findings of fact. Their Lordships set out those which they consider to be the most important:

“[108] 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.

[110] We find that English administration of justice over Pitcairn Island was not a paper administration operating in an occasional and ad hoc way, but a reality when considering how civil and criminal disputes were dealt with throughout the 20th century.

[118] We do not accept the suggestion that Pitcairn may in some way be an anarchic or lawless society. Over the years the roles of the Island Police officer and the Island Magistrate have frequently been of high profile and the law, and enforcement of the law, has loomed large in Pitcairn affairs.

22.The findings on knowledge of the criminality of rape, indecent assault and incest were upheld by the Court of Appeal (see paragraphs 114 and 115) which went on to say:

“[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...

[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...The other maximum penalties of two years’ imprisonment could not be regarded as unforeseeable.”

23.The findings on policing were similarly upheld. The Crown conceded that the standard of policing had been “variable, to say the least” but the Court of Appeal said:

“[134] ...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.”

24. Their Lordships would accept that the fact that a law had not been published and could not reasonably have been known to exist may be a ground for staying a prosecution for contravention of that law as an abuse of process. It is however unnecessary to discuss the philosophical basis or legal limits of such a principle because, in the light of the concurrent findings of fact and the agreement of both the lower courts as to the exercise of what on any view is a discretion, their Lordships think that it is an impossible task to persuade the Board to interfere. They can find no error of principle in the way in which the discretion was exercised and on the facts as found would have exercised it in the same way. These were serious offences and the balance to which Lord Steyn referred in *Latif* comes down firmly in favour of bringing them before a court of justice.

25. That leaves the subsidiary grounds upon which it was submitted that the prosecutions should have been stayed. One was the delay which occurred between the time when the accused were first notified that they might be charged and the time when they were indicted. The main period of delay (between a year and two years) was caused by the need to determine a venue for the trials and appoint Supreme Court judges to conduct them. This required a diplomatic agreement between the United Kingdom and New Zealand, followed by primary legislation by the New Zealand Parliament. These arrangements were, all things considered, carried through with remarkable speed but the appellants say that it all took a good deal longer than it would have done if the necessary institutions had already been up and running when the charges were first investigated. That is no doubt true, but the Supreme Court found that the delay had not caused prejudice to the fairness of the trials and although there was for a year or so uncertainty about when and where the appellants would be tried, their Lordships agree with both of the lower courts that

the period was nowhere near long enough to make the prosecutions an abuse of process.

26. Finally, the appellants argued that (1) the legislation passed after the appellants had been charged to establish a suitably fair trial procedure and a right of appeal “compromised the appearance of even-handed justice” and suggested inequality of arms (2) the Supreme Court judges should have come from the United Kingdom rather than New Zealand and the new laws should have been based on United Kingdom rather than, as they were, on New Zealand models (3) the appellants were prejudiced by the appointment of a Public Defender some time after the appointment of a public prosecutor, resulting in a period before the trial when there was inequality of arms. It is hard to take any of these points seriously. There is no dispute that the new legislation made the trial and appeal process fair. There is no suggestion of any lack of competence on the part of the judges or a restriction on the Governor’s power of appointment on grounds of nationality. And there is no dispute that the Public Defender had all the time he required to prepare the defences.
27. Finally, their Lordships consider the two applications which were made for special leave to appeal. The first was on a point which had been considered by the Court of Appeal, namely whether on a charge of rape under the 1956 before it was amended in 1976, it was necessary to prove that non-consensual intercourse was accompanied by force or the threat of force. The Court of Appeal said that the authorities against the existence of this requirement were overwhelming and it is unnecessary for their Lordships to repeat the citation of those authorities by the Court of Appeal. They agree and refuse leave.
28. The second application was on behalf of Terry Young on a ground not raised in the Court of Appeal, namely that the trial judge, who sat without a jury, should have said expressly in her reasons for judgment that she had cautioned herself that telling lies is not necessarily an admission of guilt. Otherwise, it was said “she may have treated lies as an implied admission of guilt”. Their Lordships do not accept that this was necessary.

The law requires, as a matter of caution, that a jury of lay persons should be warned about how lies should be treated. A judge requires no such warning and it is unnecessary that she should encumber her reasons with express statements that she has avoided all the fallacies into which untutored persons may lapse. Unless the contrary appears from the reasons for judgment, it is assumed that she did so. In *R v Thompson* [1977] NI 74, 83 Sir Robert Lowry CJ, in a passage which has since been frequently cited in appeals from trials by a judge alone in Northern Ireland:

“[The judge] has no jury to charge and therefore will not err if he does not state every relevant legal proposition and review every fact and argument on either side. His duty is not as in a jury trial to instruct laymen as to every relevant aspect of the law or to give (perhaps at the end of a long trial) a full and balanced picture of the facts for decision by others. His task is to reach conclusions and give reasons to support his view and, preferably, to notice any difficult or unusual points of law in order that if there is an appeal it can be seen how his view of the law informs his approach to the facts.”

Their Lordships refuse leave.

29.Their Lordships will humbly advise Her Majesty that the appeals should be dismissed.

Judgment by Lord Woolf

30.I have had the advantage of reading in draft the opinion of the Board prepared by my noble and learned friend Lord Hoffmann and I am in agreement that the appeals should be dismissed for the reasons he gives. I have also had advantage of reading the judgment of my noble and learned friend Lord Hope of Craighead. I shared Lord Hope’s concerns about the issue involving the appellants’ lack of knowledge of the provisions of sections 1 and 14 of the Sexual Offences Act 1956. However with the assistance of the additional facts that Lord Hope has set out so clearly in his judgment I am able to briefly set out my views on this issue.

31. The circumstances of these appeals are most unusual. The six appellants are a significant proportion of the tiny population of the South Pacific Island of Pitcairn. The island is still today very difficult to access and it remains remote from the rest of the world.
32. This created immense challenges for everyone who has been involved in these proceedings. The proceedings in the courts below involved an immense amount of research and study by those representing both the prosecution and the appellants. In addition, detailed investigations had to be made by the Kent Police into the complaints made by certain of the islanders of inappropriate sexual behaviour on the part of the fellow islanders, including the appellants. The whole history of the government of the island since it was occupied in 1790 following the mutiny on the Bounty had to be investigated. A broad range of esoteric legal issues had to be considered and then the cases for the prosecution and the defence had to be presented before the Supreme Court, the Court of Appeals and the Privy Council. Infinite care appears to have been taken by all those involved to ensure that the investigation and the proceedings were conducted fairly. It is very much to the credit of the authorities, the legal representatives of the parties and those responsible for arranging the hearings in the courts below and before us that matters were handled so well. Clearly this involved the expenditure of considerable resources and I commend those who were responsible for making the resources available. From my reading of the voluminous papers it has meant that every issue which could be raised on behalf of the appellants has been fully canvassed and justice has been done. It is reassuring that such care has been taken to achieve justice for a small community of limited means. I also commend the detailed and careful judgments of the Supreme Court and the Court of Appeal. They enabled their Lordships to deal with the hearing of the appeals more expeditiously than had been expected.
33. This is true of the issue as to whether the courts below were correct to find on the facts and by relying on the doctrine of act of state that Pitcairn is a British possession. In my view the evidence that Pitcairn is and

was at all relevant times a British possession was overwhelming and so I agree with Lord Hoffmann, that for the purposes of determining these appeals, it is not necessary to explore the limits of the act of state doctrine. Where this is not the position, in my view it would be necessary to carefully re-examine the authorities including those cited by Lord Hoffmann which support the contention that an act of state is to be regarded as conclusive on issues as to the status of alleged British possessions overseas. Recent developments, mainly in relation to judicial review have demonstrated a greater willingness on the part of the courts to scrutinise the use by the Crown of prerogative powers and so far the limits, if any, of the courts power of review has not been clearly determined. So today it can no longer be taken for granted that the courts will accept that there is any action on the part of the Crown that is not open to any form of review by the courts if a proper foundation for the review is established.

34. Having made those preliminary remarks I turn to the issue about which I was primarily concerned, namely the fact that the Sexual Offences Act 1956 was never promulgated on Pitcairn. I start with the fact that the offences in respect of which the appellants were charged, indicted and convicted were offences under sections 1 or 14 of that Act. This being the position it was essential for the Crown to establish that the Act was in force on Pitcairn at the time of the alleged offences. If the Act was not then in force this is fatal to these convictions. In my view having been indicted or tried on the statutory offences of rape and indecent assault the appellants could not be convicted of common law or other offences of a similar nature.

35. In view of this, there are two questions that have to be answered positively if the convictions are to stand. They are:

- a Was the Sexual Offences Act 1956 part of the law of Pitcairn at the time of the offences?
- b Were the appellants sufficiently aware of nature of the offence of rape and indecent assault charged respectively under sections 1 and 14 of the Sexual Offences Act 1956 to

justify prosecuting them on the charges on which they were convicted?

36. Mr David Perry, who represented Carlyle Terry Young, advanced an argument that the Sexual Offences Act never became part of the law of Pitcairn. This was based on article 5 (3) of the Pitcairn Order in Council 1970 that was made under the British Settlements Acts of 1887 and 1952. His argument was adopted by the other appellants.

37. Lord Hope sets out the legislative history fully in his judgment. Briefly, article 5 (1) of the Pitcairn Order 1970 (the same is true of the earlier Order of 1952) gave the Governor power to make laws for the peace, order and good government of the Island. Article 5 (3) requires laws made by the Governor to be published in such manner and in such place or places in the Island as the Governor may from time to time direct. As result of article 5 (4) a law comes into operation on the date on which it is published.

38. In the case of the Judicature Ordinance 1970 section 14 provided that “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” were to be in force in the Island so far only as local circumstances permit. The earlier legislation made similar provision for the incorporation of the laws of England. Mr Perry, correctly in my view, does not dispute that an incorporation by a general reference of this nature is permissible. There was a specific offence under section 88 of the Pitcairn Ordinance of 1966 of having unlawful sexual intercourse but no legislation dealing with offences as serious as rape or indecent assault. And so, as there is nothing that would make offences set out in sections 1 and 14 of the Sexual Offences Act inappropriate to the circumstances in Pitcairn, sections 1 and 14 of the Sexual Offences Act 1956 were as a result of the general words capable of being made part of the law in force in Pitcairn at the relevant times.

39. However, Mr Perry relies on the fact that that the Act of 1956 was never published on Pitcairn so he submits

sections 1 and 14 never came into force on Pitcairn. I have no hesitation in agreeing with Lord Hoffmann and Lord Hope, that Mr Perry's submission that article 5 of the Pitcairn Order 1970 (and the 1952 Order) required all the laws of England or at least the Sexual Offences 1956 to be published on the Island before they came into force on the Island is incorrect. The proper interpretation of article 5 is that what are required to be published are the Judicature Ordinance and not all the laws of England incorporated by reference. This answer accords with the language of the Orders. In addition it is the only practical answer, if the Orders were to operate in a practical manner. The corpus of English law could not realistically be published on Pitcairn and even if it was attempted to achieve this by having, for example, all the volumes of Halsbury's Laws and Statutes gathering dust on the island, this would not be more than a meaningless gesture and not what the Orders intended. The first of the two questions I identified above is, accordingly, answered positively.

40. The issues raised by the second question are not so straight forward. The more general argument advanced in the courts below and relied upon by Mr Perry is not a matter of interpretation. It is based on the principle that it is a requirement of almost every modern system of criminal law, that persons who are intended to be bound by a criminal statute must first be given either actual or at least constructive notice of what the law requires. This is a requirement of the rule of law, which in relation to the criminal law reflects the need for legal certainty. As the Supreme Court in its judgment of 24th May 2005 recognised (para.155) governments must ensure adequate publication or at least reasonable access to the criminal laws which they wish to enforce.

41. I have no difficulty with the generality of this freestanding argument, but in my view it has no application on the facts to the present appeals. I say this despite the fact that on the findings of the Supreme Court it is clear that the appellants were probably unaware of the terms of the Sexual Offences Act or even that there was legislation of that name or the sentences that could be imposed for those offences. They were aware, however, that their conduct was

contrary to the criminal law. The community of Pitcairn may be small in numbers and isolated but it is not the appellants' contention that rape and indecent assault was conduct which was regarded as being other than criminal on Pitcairn. Furthermore, while the precise terms of the 1956 Act had not been published on the island, the fact that there were offences such as rape and possibly indecent assault which had to be dealt with by the Supreme Court because they required greater punishment than was possible otherwise was generally known. In addition, the Supreme Court came to the conclusion (paragraph 145) that "Pitcairn Islanders have had free access to information about their laws through the Government Advisor, the Commissioner and Legal Advisor". This was because the Supreme Court was left in no doubt that "the British Administrators recognised and appreciated that because of Pitcairn's physical isolation and small population, the law significantly affected each individual's life and therefore dealt with even minor matters...if asked to assist. All Pitcairn Islanders had access to the law" (paragraph 147). The Court of Appeal was unimpressed by this finding (paragraph 108), but it appears to be justified by the evidence and of the greatest significance. As Lord Bridge of Harwich pointed out in this context in *Grant v Borg* [1982] 1 WLR 638, 646, if information is accessible, a defendant is deemed to know of it. This must be the appropriate approach. The problems of obtaining knowledge of the contents of the law in Pitcairn are not the same as those, for example in a very different society such as England but in both there are problems. The sheer volume of the law in England, much of which would be inapplicable and have no application to Pitcairn, creates real problems of access even to lawyers unless they are experts in the particular field of law in question. The criminal law can only operate on Pitcairn, as elsewhere, if the onus is firmly placed on a person, who is or ought to be on notice that conduct he is intending to embark on may contravene the criminal law, to take the action that is open to him to find out what are the provisions of that law.

42. The Supreme Court (at paragraph 96 of the judgment of 24th May 2005) correctly raised the question whether the "degree of publication" together with the other

factors to which the Court referred in their judgment accords knowledge that is sufficient to alert the appellants to the fact that rape, indecent assault and incest are crimes punishable, if committed on the island, under English law. While the appellants needed to know that rape and indecent assault were contrary to the criminal law, they did not need to know of the precise provisions of sections 1 and 14 of the Sexual Offences Act 1956 which produced this result. It was sufficient that they could have obtained detailed information relating to the Act if they had wanted to do so. Obtaining that information could be a more protracted exercise on Pitcairn because of its inaccessibility, but the fact that information could be obtained suffices to make the appellants responsible for their conduct.

43. The argument on lack of publication therefore is defeated by the findings of the Supreme Court as to the knowledge of the islanders and availability of information if it was wanted. Lord Hope also regards as being critical the fact that the 1956 Act was not creating in sections 1 and 14 new offences. He is right, that rape and indecent assault were not new offences so far as English law is concerned but I am not sure why this assists. Even though the antecedents of those sections included like offences this does not alter the fact that the prosecution was based on the 1956 Act and the appellants would not be any more aware of the position under the earlier Act or at common law.

44. The absence of the required knowledge as to the criminality of their actions and inaccessibility of information could be an appropriate basis for an allegation of abuse of process. Abuse of process should however be reserved for cases where it would be an affront to justice for the person concerned to be prosecuted. To prosecute an individual for an offence of which he has no means of knowing the details is capable of being such a departure from the requirements of due process as to justify the prosecution being stayed. However, it is of the essence of an argument based on the lack of due process that the individual concerned would if the prosecution proceeded be treated unjustly and in this sense prejudiced. As in this case the appellants suffered no prejudice in view of their state of

knowledge an argument based on abuse of process would not be established. It may be the case that the argument under this head could be freestanding and not based on abuse of process. However if this be so the need for prejudice would still be a requirement. The great majority of criminal offences require mens rea. If you do not know and are not put on notice that the conduct with which you are charged was criminal at the time you are alleged to have committed the offence, it can be the case that you do not have the necessary criminal intent. Whether or not this is the situation will very much depend on the facts and in this developing area of criminal law it is undesirable to generalise.

45. I would dismiss these appeals.

Judgment by Lord Hope of Craighead

46. The judgment of the Board has been given by Lord Hoffmann. But I have been much more troubled by some of the questions raised by these appeals than the way he has dealt with them in his judgment might be thought to indicate. So I should like to explain in my own words why, in the end, I have come to be of the opinion that the appeals should be dismissed.

47. In order to set the scene for what I wish to say I must first deal more fully with the facts. The circumstances which gave rise to these prosecutions are highly unusual – almost certainly unique in the Board's experience. They raise some fundamental issues about the rule of law in remote communities and about the responsibilities of the colonial power which seeks to exert its authority over them. I agree with all that Lord Hoffmann has said in his judgment on the question whether the Judicature Ordinance 1970 was ultra vires the British Settlements Act 1887. In my opinion the evidence shows that Pitcairn was established by settlement. As para 800 of 6 *Halsbury's Laws of England* (4th ed, 2003 Reissue) puts it, every colony must be assigned to one or other of two classes, either (1) settled or (2) conquered or ceded. This is a classification of law, and once made by practice or judicial decision it will not be disturbed. Much interesting historical research has been laid before us.

But, as long standing practice has established Pitcairn's status as a settled colony, it must be held to be irrelevant to the issue of classification raised in these appeals. I agree that the Governor had legislative authority to enact laws for the peace, order and good government of Pitcairn.

48. But the vesting of legislative authority in the Governor is one thing. The manner of its exercise is quite another. It is this aspect of the case that I have found much more difficult. As I shall show in my account of the facts, the central question is whether sections 1 and 14 of the Sexual Offences Act 1956, a United Kingdom statute, were in force on Pitcairn at the time when the offences were committed. Let me not mince words. This case is about child sexual abuse on a grand scale. The extent to which it was practised on Pitcairn is deeply disturbing. Conduct of that kind cannot be regarded as other than criminal and deserving of punishment. But abhorrence at the nature of these crimes must not blind us to the rule of law. Thomas Hobbes, *Leviathan* (1651), Ch 31, para 3, made this point as clearly as anyone when, having declared in Ch 30, para 20 that a good law is "withal perspicuous", he wrote:

"To rule by words, requires that such words be manifestly made known; for else they are no laws: for to the nature of laws belongeth a sufficient, and clear promulgation, such as may take away the excuse of ignorance; which in the laws of man is but of one only kind, and that is, proclamation, or promulgation by the voice of man."

49. The issue on which I wish to concentrate, then, is whether the legislative technique that was adopted by the Governor was sufficiently well adapted to conditions on Pitcairn for it to be possible for us to say that the 1956 Act was in force there at the relevant time, with the result that the Supreme Court had jurisdiction to entertain the charges that were laid against the appellants under the statute. I agree with the way Lord Hoffmann has disposed of the other issues in these appeals.

The offences

50. I must now set out the offences of which the six appellants were convicted in greater detail. This needs to be done to reveal the extent of the problem which lay beneath the surface when an allegation of rape was brought to the attention of the Foreign and Commonwealth Office in 1996 and Kent Police were asked to provide personnel to investigate the allegation. Following an investigation which was conducted on Pitcairn by two officers of Kent Police in September 1996 it was decided that there was insufficient evidence to prosecute the suspect for the offence of rape. But he had admitted consensual intercourse with the complainant on six occasions before and after her 12th birthday. This was contrary to section 88 of the Justice Ordinance 1966, which makes it an offence on Pitcairn for any male person to have carnal knowledge with a female child of or over the age of 12 years. It was also contrary to section 5 of the Sexual Offences Act 1956, assuming it to be part of the laws of Pitcairn, under which it is an offence for a man to have sexual intercourse with a girl under the age of thirteen.

51. For the reasons explained by Paul Treadwell, the legal adviser to the Governor of Pitcairn, in his letter to the first secretary in the British High Commission in Wellington dated 5 January 1997, it was decided that the suspect should be formally cautioned but not prosecuted for these offences. Section 88 of the Justice Ordinance 1966 does not prohibit intercourse with a girl below the age of 12 years. So it was decided to draft an indictment under sections 5 and 6 of the Sexual Offences Act 1956. But Mr Treadwell thought it fair to assume that the offender was unaware of the terms of these provisions of the 1956 Act and of the very substantial penalties attaching to them. Furthermore no United Kingdom statutes were available to the public on Pitcairn. It was a moot point whether they would be understandable by members of the public, even if they were. As he put it, the decision not to prosecute was taken out of concern for the current state of the criminal law on Pitcairn, and for its implications for the liberty of Her Majesty's subjects on the island.

52. There had never been any British police presence on Pitcairn until the arrival of the Kent Police in 1996. So, following this investigation, it was decided that a police officer should be sent to Pitcairn for a three month tour of duty to train and support the existing Island officer who up until then had the sole responsibility of policing the island. WPC Gail Cox was selected for this duty and she made her first visit to Pitcairn in October 1997. It was as a result of her painstaking investigation under very difficult circumstances that the extent of the child sexual abuse being practised on the island was revealed and the prosecutions brought that have led to these appeals.

53. Four of the appellants were convicted of rape on counts brought against them under section 1 of the Sexual Offences Act 1956.

- (a) Len Carlyle Brown (“Len Brown”), who was born in March 1926, was convicted of two offences of rape committed between January 1969 and June 1972 when he was aged between 42 and 46, on each of which he was sentenced to 2 years imprisonment. The complainant, who was the same individual in both cases, was aged between 15 and 18 years when the offences were committed against her.
- (b) Stevens Raymond Christian, who was born in January 1951, was convicted of four offences of rape committed against one complainant between September 1964 and October 1968 when he was aged between 13 and 17 and she was aged between 11 and 15 years, on each of which he was sentenced to 2 years imprisonment. He was also convicted of one offence of rape committed between February 1972 and February 1973 when he was 21 or 22 against a different complainant who was 12 or 13 years old, for which he was sentenced to 3 years imprisonment.
- (c) Carlisle Terry Young (“Terry Young”), who was born in October 1958, was convicted of repeatedly raping the complainant between December 1977 and December 1981 when he was 19 to 23 and she was aged between 12 to 15 years, for which he was sentenced to 5 years imprisonment.

- (d) Randall Kay Christian, who was born in March 1974, was convicted of four offences of rape committed between September 1994 and October 1996 when he was 20 to 22 and the complainant, who was the same individual in all four cases, was aged between 10 and 12 years, on each of which he was sentenced to 6 years imprisonment.

54. Three of the appellants were convicted of indecent assault on counts brought against them under section 14 of the 1956 Act.

- (a) Dennis Ray Christian pleaded guilty to one count of indecent assault under section 14 of the Sexual Offences Act 1956 and two counts of incest between February 1972 and March 1974 when he was aged 15 to 17 and the complainant was 12 to 14 years old, for which he was sentenced to 300 hours of community work and placed under supervision for two years.
- (b) Len Calvin Davis Brown (“Dave Brown”), who was born in October 1954, pleaded guilty to two offences of indecent assault under section 14 of the 1956 Act against one complainant and one against another which were committed between January 1986 and January 1987 when he was aged 31 to 32 and the complainants were aged 14 and 15 at the time of the offences. He was found guilty on a further six counts of indecent assault between December 1989 and December 1991 when he was aged 35 to 37 and the complainant was aged between 13 and 15 years. The Public Prosecutor conceded that the conduct in relation to four other counts of indecent assault which were proved against him came within section 88 of the Justice Ordinance 1971, with the result that those counts were dismissed as they were out of time. For the offences of which he was convicted he was sentenced to 400 hours of community work and placed under supervision for two years.
- (c) Carlisle Terry Young was convicted of six counts of indecent assault under section 14 of the 1956 Act in addition to that of rape. The indecent assaults were committed against three different complainants between December 1972 and December 1991 when he was aged 14 to 33. In one case the complainant was only 5 years

old when he began to touch her. In all the other cases the complainants were under 15 years old. He was sentenced to six months imprisonment on the indecent assault charges, to be served concurrently with the sentence of 5 years on the charge of rape.

- (d) Randall Kay Christian was convicted of four counts of indecent assault under section 14 of the 1956 Act committed between October 1998 and February 1999 when he was 24 and the complainers were aged 14, for which he was sentenced to 12 months imprisonment to be served concurrently with his sentence of six years for rape.

55. Some indication of the scale of the sexual abuse that was found to have been perpetrated on Pitcairn can be gathered from the ages of the men who were engaging in this practice and the dates between which the offences were committed that were found to have been proved. The ages of the perpetrators range from 13 in the case of Stevens Christian to 46 in the case of Len Brown. The offences were committed between September 1964, more than 38 years before the charges in these proceedings were laid in Pitcairn Magistrate's Court in April 2003, and February 1999. Between them the appellants were convicted on thirty counts, several of which involved a course of conduct that was repeated many times over against the same complainant. It is impossible to believe that the appellants were not aware that what they were doing was wrong. The Supreme Court was satisfied, after considering the material placed before it, that at all relevant times Pitcairn was a developed society in which rape and sexual offending generally was known to be criminal: para 108 of its judgment of 24 May 2005 as to promulgation of laws and related issues.

56. But the fact that this scale of offending, of which the offences that have been proved in this case was almost certainly the tip of the iceberg, was tolerated for so long in such a small, isolated and closely knit community is an indication of the poor state of supervision exercised over its affairs by the colonial authorities. To put the scale of offending into context it should be noted that the population of Pitcairn in 1964 was 90, of whom 34

were men and 13 were girls under 16: *A Guide to Pitcairn*, Revised edition, 1970, Appendix 1. By 1989 it had fallen to 55, of whom 18 were men and 9 girls under 16: *A Guide to Pitcairn*, 5th edition, 1990, Appendix 1. On the figures that the Board has been given it appears that the appellants comprise about a third of the adult male population of Pitcairn. Further proceedings are currently in progress against three men in New Zealand. It is scarcely credible that the population of the island as a whole was unaware of what was going on. The Supreme Court, after studying the evidence in great detail in its judgment on the promulgation of laws and related issues, concluded 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 youths as they grew up: para 129. Nevertheless no steps were taken to deal with these offences until Kent Police began their investigation.

The development of the Island's legal system

57. The Board was provided with a wealth of material about the history and social conditions on Pitcairn from the date when it was first settled to the present day, all of which was considered by the judges in the Supreme Court and in the Court of Appeal with great care and attention to detail. It is impossible to summarise this material in a few paragraphs, and I shall not attempt to do so. But a few points which stand out from the rest must be mentioned to provide the necessary background.

58. Pitcairn, which is one of four widely scattered islands comprising the Islands of Pitcairn, is one of the most remote communities in the world. It lies approximately midway between New Zealand, some 3,000 miles to the west, and Chile, some 4000 miles to the east. Pitcairn is the only one of the islands in the group that is inhabited. The nearest inhabited island lies in the Gambia Archipelago, some 300 miles to the north-west. It is also very small, but quite high and rugged. It is about two and a half miles long and one mile wide, extending to about 1100 acres. Much of the land slopes steeply to a peak of 1,140 feet, and only about 39 per cent of the

island is comparatively flat and arable. Consequently, although the soil is fertile and it has a favourable climate, the island has never been able to sustain a population of more than about 200 people. In recent years the population has declined sharply as islanders seek their fortunes elsewhere, particularly in New Zealand

59. When Pitcairn was settled in about 1790 by 9 male Bounty mutineers, who were well aware that the Admiralty would seek to bring them to justice, and the 19 Polynesians (13 women and 6 men) they brought with them it was deliberately chosen as a place where they could avoid detection. It remained isolated from the rest of civilisation for nearly two centuries. The shoreline is steep and rocky and there are no harbour or port facilities. Nor are there facilities for any type of aircraft. Until about 1985 the islanders had no means of communicating with the outside world, other than by transacting with visiting ships, except by radio using the Morse code. They had no operative internal legal system for almost all the period of the island's habitation other than a local island magistrate assisted by two assessors, none of whom had any legal training. Apart from one small book of Pitcairn laws, no legal texts, statutes or law reports were available on the island until about 1997.

60. From time to time however various measures affecting Pitcairn have been passed in the exercise of the authority conferred on Her Majesty in Council by section 2 of the British Settlements Act 1887 and the authority given to it to delegate the power of making laws under section 3. The history was reviewed in detail by the Supreme Court in its judgment on the promulgation of laws and related issues. It is unnecessary to repeat all but a few of these details. The Pacific Order in Council 1893 applied English law to a defined area in the Western Pacific which did not include Pitcairn. It conferred jurisdiction to deal with offences committed within that area on the Court of the High Commissioner for the Western Pacific in Fiji. In 1898, following the murder of Clara Warren and her one year old daughter on Pitcairn Island by Harry Christian, the 1893 Order was extended to include the

area in which Pitcairn is located so that he could be put on trial for these crimes. A new legal code and rules of procedure for the High Commissioner's Court was introduced by the Pitcairn Island Government Regulations 1940. It provided, among other things, for the election, powers and procedures of a Council for the island and for the conduct of cases before the Island Court. All cases not within the jurisdiction of the Island Court were to be heard and determined by the High Commissioner's Court for the Western Pacific in Fiji.

61. The Pacific Order in Council 1893 was revoked by the Pitcairn Order in Council 1952 which provided that the Governor of Fiji was to be the Governor of Pitcairn. Section 5(1) of the 1952 Order provided that it was to be lawful for the Governor to make laws for the peace, order and good government of the Pitcairn Islands. Section 5(2) provided that, without prejudice to the generality of the power conferred by subsection (1), the Governor was to have power to constitute a court in and for the islands with such jurisdiction as he might think fit. Section 5(3) provided that all laws made in the exercise of that power conferred by the Order were to be published in such manner and at such place or places in the Islands as he might from time to time direct and section 5(4) provided that every law was to come into force on the date when it was published.

62. The Judicature Ordinance 1961 terminated the Pitcairn jurisdiction of the High Commissioner's Court for the Western Pacific, conferred jurisdiction over Pitcairn on the Supreme Court of Fiji and constituted a Subordinate Court for the Pitcairn Islands in addition to the Chief Magistrate's Court constituted by the Pitcairn Island Government Regulations 1940, which was to be presided over by a magistrate. By sections 7 and 8 of the 1961 Ordinance the substance of the law for the time being in force for the time being in and for England was declared to be in force in the Pitcairn Islands, but so far only as the local circumstances and the limits of the local jurisdiction permitted. At first sight this appears to be a general importation of the whole of English law into Pitcairn, subject to that proviso. But its primary purpose, as indicated by its title, was to confer jurisdiction on the Supreme Court, to

constitute an intermediate court “and for matters relating thereto.”

63. On 14 April 1966 the Justice Ordinance 1966 was enacted by the Governor of Pitcairn relating to the administration of justice and the preservation of order on the Islands. It provided for the constitution of an Island Court, which was to comprise an Island Magistrate to be assisted by two assessors. It was to have jurisdiction in both criminal and civil matters. But the maximum penalty that it could impose in the exercise of its criminal jurisdiction was a fine of £25 or 100 days imprisonment, and it was not to hear or determine proceedings for any offence unless the complaint relating to it was brought within six months after the time when the matter of the complaint arose. Part X of the Ordinance contains a series of what may be described as local offences dealing with a variety of matters such as contempt of court, perjury, assault, disorderly conduct and stealing.

64. Among the offences in Part X of the 1966 Ordinance is section 88, which provides:

“Any male person who shall have carnal knowledge of any female child of or over the age of twelve years shall be guilty of an offence and liable to imprisonment for a hundred days.”

Section 1 provides that the word “child” means any person who is under the age of 15 years. Section 82, which provides that a person who without lawful excuse assaults another person shall be guilty of an offence and is liable to a fine not exceeding ten pounds, contains this proviso:

“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.”

65. When Fiji became an independent state in 1970 the administration of the Pitcairn Islands was transferred to New Zealand. The Pitcairn Order 1970 was made by Her Majesty in Council in the exercise of the powers conferred by the British Settlements Act 1887 and 1952. It revoked the Pitcairn Order in Council 1952, but without prejudice to the continued operation of any laws made thereunder and having effect as part of the law of the Islands immediately before the appointed day: section 3(2). Section 4 of the Order provided that there was to be a Governor of the Pitcairn Islands appointed by Her Majesty. In practice the Governorship of Pitcairn has been conferred on the holder of the office of High Commissioner for the United Kingdom in Wellington. Section 5(1) provided that the Governor was to have power to make laws for the peace, order and good government of the Islands. Section 5(2) provided that, without prejudice to the generality of the power to make these laws, he was to have power, by any such law, to constitute courts for the Islands with such jurisdiction as he might think fit. Section 5(3), repeating the equivalent provision in the 1952 Order, provided:

“All laws made by the Governor in the 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.”

66. In 1970, in the exercise of the powers conferred on him by the 1970 Order the Governor of Pitcairn made the Judicature Ordinance 1970. It repealed the Judicature Ordinance 1961 which conferred jurisdiction on the Supreme Court of Fiji, and created in its place a Supreme Court for the Pitcairn Islands with all the powers, jurisdiction and authorities of the High Court of Justice in England which was to be deemed duly constituted notwithstanding any vacancy in the office of any judge. It continued the jurisdiction of the Island Magistrate's Court. Sections 7 and 8 of the 1961 Ordinance to the effect that the law for the time being in force in England were to be in force in the Islands so far only as the local circumstances and the limits of local jurisdiction permit were re-enacted by section 14. But

section 14(1) was more specific than the 1961 Ordinance had been as to what these laws were. It provided that the laws that were to be in force in the Islands were to comprise:

“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”.

67. The Supreme Court was provided with evidence showing the steps that were taken to publish, among other measures, the Judicature Ordinances 1961 and 1970. The Judicature Ordinance 1961 was forwarded to the Chief Magistrate on Pitcairn under cover of a letter written on the directions of the Governor which requested that one copy of it be published on the public notice board and that the date of publication be notified by radio. By telegram dated 9 October 1961 the Chief Magistrate confirmed that it had been published on the notice board on 8 October 1961. The Magistrate confirmed by telex that the enactment of the Judicature Ordinance 1970 on 27 October 1970 was followed by its publication on the notice board on 4 March 1971.

68. There had therefore been proper publication of the making of these Ordinances, as required by the Pitcairn Order in Council 1952 and the Pitcairn Order 1970. But the Supreme Court accepted in para 95 of its judgment as to promulgation of laws and related issues that at no time during the currency of the accused's offending was English law itself published on the Islands. None of the relevant statutes or legal texts were sent to the island. Nor had any publications such as Halsbury's Laws of England been provided. There is no evidence that anyone on Pitcairn was aware of the provisions of sections 1 and 14 of the Sexual Offences Act 1956 prior to the commencement of the police investigation in 1996.

69. The position as to the promulgation of the Justice Ordinance 1966, which contained the series of local laws already referred to, was markedly different. In March 1965 a draft of the Ordinance was discussed on Pitcairn with the Island Council. Among other matters

the law as to sexual offending was discussed. In a letter dated 22 November 1965 the Council were advised in general terms that if there was any matter not covered by the law of Pitcairn the law of England could be invoked. They were also advised that the wording of section 88 had been left as the Council in March had wanted it but that they should remember that, as English law also applied, a male who had carnal knowledge of a female child under the age of 12 would be liable to be prosecuted under the English law of rape. At a meeting of the Island Council on 8 December 1965 the Government Adviser, who chaired the meeting, read through the draft ordinance. A motion that it be approved was accepted. On 10 December 1965 a telegram was sent from the Magistrate to the Commissioner reporting to him that it had been approved in full by the Council.

70. The situation throughout the period of offending can therefore be summarised in this way. All the formal steps that were needed to provide a workable legal system in the exceptional circumstances of Pitcairn had been taken before September 1964 when the first of the series of offences was committed. The orders that provided for the setting up of that system had been duly promulgated. The wording of the Justice Ordinance 1966, which set out the local offences that were thought at the time to be appropriate for Pitcairn, was discussed in detail with the Island Council before the Ordinance was enacted by the Governor. But no steps were taken to bring to the notice of the Island's Council or its inhabitants, other than in the most general way, any of the laws of England that might be invoked on Pitcairn to deal with any serious criminal matter not covered by the Ordinance.

The prosecution

71. The offence of rape was known to the common law of England long before it was provided for by statute. So too was the offence of assault with all its aggravations, including that of indecency. It was not until they were made statutory offences by sections 48 and 52 of the Offences against the Person Act 1861, which sections 1 and 14 of the 1956 Act replaced, that the common law

offences fell out of use in England. The settlers of Pitcairn took the common law with them when they decided to settle there. As Blackstone, *Commentaries on the Laws of England*, 4th ed 1770, Vol 1, p 107, puts it:

“... it hath been held that if an uninhabited country be discovered and planted by English subjects, all the English laws then in being, which are the birthright of every subject, are immediately there in force.”

So these offences, like murder, were already common law crimes on Pitcairn long before they were made statutory offences in England. But the decision was taken to prosecute the appellants under the English statute, not under the common law.

72.It appears too that many of the offences of which the appellants were convicted under the 1956 Act could have been charged against them under the Justice Ordinance 1966, although the sentences that could have been imposed would of course have been much more lenient and questions would have arisen as to whether the prosecutions were out of time. The offences of which they were convicted under section 14 of the 1956 Act could have been charged against them as aggravated assaults contrary to section 82 of the Ordinance. Seven of the twelve offences of rape of which they were convicted could have been brought against them under section 88 of the Ordinance, as in those cases the complainers were all of or over the age of twelve years. No complaint on the grounds of non-promulgation or abuse of process could have been made if these offences had been prosecuted in the Islands Court under the 1966 Ordinance. But the decision was taken to prosecute all but a handful of these offences under the 1956 Act. How did this come about?

73.Reference is made in the written case for Stevens Christian and Len Brown to the documentary evidence that was before the Supreme Court as to discussions that took place in correspondence between the Governor of Pitcairn and the Foreign and Commonwealth Office (“the FCO”) in London about the action that ought to be taken when the first of these offences came to light. In

a letter to the FCO dated 16 December 1999 the Governor noted that the sentences that were available under the existing laws in Pitcairn (under the Justice Ordinance 1966) were quite inadequate to the seriousness of the offences. In a letter to the Deputy Governor dated 29 April 2000 Paul Treadwell, the legal adviser, said that the public interest required that such serious offences against the person should be detected and punished, even though the destruction that might result within the tiny island community seemed incalculable. He also mentioned that there were obvious reasons for searching for a path of compromise, among which was the fact that it was possible to attribute a degree of responsibility for the unbridled sexual licence of Pitcairn men over past generations to the absence of any meaningful civil authority and actual system of justice representing the guidance and supervision of the colonial power.

74. In a further letter to the FCO dated 1 May 2000 the Acting Governor expressed concern as to whether it would be practicable or desirable to investigate a whole raft of offences going back many years when, given the timescale, it would be difficult to treat everyone even-handedly. She also acknowledged the validity of Paul Treadwell's suggestion that the situation was partly of the colonial power's own making:

“There is no civil authority on the island. Governors, Deputy-Governors and Commissioners reside 3000 miles away in New Zealand, visit irregularly and for short periods of a few days only. The schoolteacher (from New Zealand) doubles as the Government Adviser. But is not viewed by the islanders as being in a position of real authority. We rely on a local Police Officer – who is related to every member of the community they serve – to uphold the law which, until we began a comprehensive review with the assistance of the Good Government Fund (in 1998), was in any case unworkable. Recent media reports have underlined the islanders' views on their remoteness from the UK. Perhaps, therefore, it is not altogether surprising that if the community does not see the laws as applicable to them.”

She concluded however that all the allegations had to be investigated thoroughly, and that if, as had been suggested, the line of offending that had been revealed was a cultural trait, an end had to be put to it once and for all.

75. Suggestions that the offenders should be offered an amnesty were rejected and the matter was put into the hands of the public prosecutor. One can infer that the decision to bring these prosecutions under the 1956 Act was reached out of a desire to deal even-handedly with all the offenders, and to root out the cultural trait once and for all by seeking convictions under legislation that would enable sentences to be imposed that gave full weight to the gravity of the crimes that had been committed. These were laudable aims. But they give rise to an important and difficult issue as to whether the law under which the offenders were to be prosecuted had been sufficiently promulgated in Pitcairn for it to be permissible for them to be dealt with in this way.

Incorporation by reference

76. The method that was chosen to make laws for Pitcairn by means of the Judicature Ordinance 1970 was incorporation by reference, in the most general terms, of all the statutes of general application in force in England at the commencement of the Ordinance but only so far as local circumstances permit. The problem does not lie in the meaning of the words that were used in section 14 to bring this about. Sir Kenneth Roberts-Wray, *Commonwealth and Colonial Law*, 1966, p 545 said that if the phrase “statutes of general application” were to be offered as a novelty to a legislative draftsman today he would disclaim responsibility for its consequences unless it were defined. But he acknowledged that it had been in use for many decades, that it does not appear to have given the courts serious trouble and that it has much the same effect as the common law rule by which the English law taken by the settlers is both the unwritten law (common law and equity) and the statute law in force at the time of settlement: see p 540.

77. A survey of cases in New Zealand and Pacific countries of decisions where this criterion for a source of law has

been considered has revealed that, without exception, all the statutes in question applied to matters other than the criminal law: Tony Angelo and Fran Wright, *Pitcairn: sunset on Empire?* (2004) NZLJ 404, 405. The writers of this note suggest that one reason for this is perhaps to be found in the principles of legality, due process and the protection of human rights. I agree that these principles must not be overlooked, but I do not think that they justify excluding the whole of the criminal law from the generality of the phrase. A more likely reason is the other one that they give, which is that the usual practice was for a colony to have its own criminal law so resort to the criminal law of England was unnecessary. The Sexual Offences Act 1956 is a public general Act which extends to the whole of England and Wales without qualification. In my opinion it is a statute of general application within the meaning of section 14 of the 1970 Order.

78. As for the qualification in section 14(2) that the law thus imported was to be in force only so far as “local circumstances” permit, Sir Kenneth Roberts-Wray said at pp 544- 545 that this amounted to no more than the rounding off of a common law rule and that all the circumstances are to be taken into account including the local relevance or otherwise of circumstances in England which explain a particular law. In *Nyali Ltd v Attorney-General* [1957] 1 QB 1, 16 Lord Denning, speaking about the common law, said that this qualification was a wise provision, and that it should be liberally construed as a recognition that the common law cannot be applied in a foreign land without considerable qualification:

“Just as with an English oak, so with the English common law. You cannot transplant it to the African continent and expect it to retain the tough character which it has in England.”

How statutes of general application in force in England are to be qualified in the light of local circumstances is less clear. Sir Kenneth notes at p 548 that in a few cases the uncertainty has been reduced by legislative intervention locally. But none of these problems affect the provisions of the Sexual Offences Act 1956 which were invoked in this case. As I have

said, it is a statute of general application. While some of the sections that it contains such as those about abduction and the keeping of brothels might have no relevance on Pitcairn, that is not so in the case of the sections under which these prosecutions were brought. There are no circumstances either locally on Pitcairn or in England which require the provisions of either section 1 or section 14 to be qualified in any way.

The promulgation issue

79. Mr Perry, who appeared for Carlisle Terry Young only but whose argument on this issue was adopted by counsel for the other appellants, said that he was not attacking the principle of incorporation by reference. This was, he said, a legitimate device, subject always to the requirement of legal certainty. His point was that Pitcairn was a wholly exceptional case, and that it was unreasonable to expect an island community of about 50 people to absorb the entirety of a legal system designed to meet the needs of more than 50 million people in England and Wales. He also submitted that, as the Governor was required by article 5(3) of the Pitcairn Order 1970 to publish all laws made by him in the exercise of the powers conferred on him by the order and the date when every such law is to come into operation was to be the date when it was published, publication was an essential requirement of each any every law that he chose to enact for Pitcairn. So the fact that the 1956 Act had never been published even in summary form on Pitcairn meant that sections 1 and 14 of the Act were not in force in the islands when these offences were committed.

80. The question whether, as a matter of form, the requirements of article 5(3) of the 1970 Order were satisfied is relatively easy to answer. As the Court of Appeal pointed out in paras 37 and 38 of its judgment of 2 March 2006 on abuse of process and the conviction appeals, these requirements extend not just to statutes of general application but also to the common law and to the rules of equity which are not susceptible to publication in the way that this argument contemplates. Furthermore the laws that are to be published are those made by the Governor. The law which he was seeking to make by means of the Judicature Ordinance 1970 was really no more than declaratory of the existing

situation at the commencement of the Order. He was not making new laws but was providing for the continuation of existing laws, many of which had been part of the law of Pitcairn since the earliest days of the settlement. It was his own law that he was required to publish, not all the law that he was incorporating by reference.

81. But meeting the formalities that the 1970 Order lays down is one thing. Satisfying the principles on which the rule of law is founded is another. It is here that this method of legislating in the exceptional circumstances of Pitcairn seem to me to be highly questionable. There is no evidence that the Governor ever applied his mind to the question whether it was appropriate to apply the Sexual Offences Act 1956 to Pitcairn, and if so which parts of it were appropriate for application there and which were not. Of course it can be said that the method of legislating that he chose to adopt made it unnecessary for him to do this. But it is one thing for this well-established method of legislating to be used in circumstances, such as in New South Wales or New Zealand, where ample resources existed for finding out what the law was and for obtaining advice about it in case of doubt. It is quite another to use it in the circumstances of a tiny, remote and isolated community like Pitcairn, where at the relevant time these resources were entirely absent. As Lord Diplock observed in *Fothergill v Monarch Airlines Ltd* [1981] AC 251, 279, elementary justice requires that the rules by which the citizen is bound should be ascertainable by reference to sources that are accessible. In *R v Rimmington* [2005] UKHL 63; [2006] 1 AC 459, 482, para 33 Lord Bingham of Cornhill said:

“There are two guiding principles: no one should be punished under a law unless it is sufficiently clear and certain to enable him to know what conduct is forbidden before he does it; and no one should be punished for any act which was not clearly and ascertainably punishable when the act was done.”

The requirement of ascertainability is an essential component of the rule of law. But in the case of statutes of general application in force in

England, as the Governor should have known, it was incapable of being met on Pitcairn

82. The use of this method for legislating about the criminal law in the circumstances of Pitcairn is made all the more unsatisfactory in the light of the steps that were taken when the Judicature Ordinance 1966 was under preparation to ensure that all its provisions were understood and were acceptable to the Island Council as representing the whole community on the island. The differences between penalties for committing the offences described in sections 82 and 88 of the 1966 Ordinance and those which apply to the overlapping offences described in sections 1 and 14 of the 1956 Act are substantial. The fact that no attempt was made to reconcile the terminology of the 1966 Ordinance with that of the 1956 Act, or to explain the circumstances in which the more severe penalties laid down in the Second Schedule to the 1956 Act would be invoked in place of those provided for by the Ordinance is a further ground for unease.

The turning point

83. These considerations would have led me to conclude that it was an abuse of process for these prosecutions to be brought under sections 1 and 14 of the 1956 Act, but for one fact which in the end has persuaded me that the use of these provisions can be reconciled with the principles of legality. It is to be found in the language of sections 48 and 52 of the 1861 Act, from which these sections were derived. Section 48 of the 1861 Act provides:

“Whosoever shall be convicted of the crime of rape shall be guilty of a felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for life or for any term less than three years, or to be imprisoned for any term not exceeding two years, with or without hard labour.”

Section 52 of the 1861 Act provides:

“Whosoever shall be convicted of any indecent assault upon any female, or of any attempt to have carnal knowledge of any girl under twelve years of age, shall be liable, at the discretion of the court, to be imprisoned for any term not exceeding two years.”

84. It can be seen from the way these provisions are worded that they were not creating new crimes. They assume that the crimes of rape and of indecent assault already exist, as indeed they did as they were already known to the common law. They were building on the common law to this extent only, that they were prescribing the penalties that were to attach to these offences. Sections 1 and 14 are differently worded, but their function was to identify – as was necessary in the days when the 1956 Act was passed – which of the offences it contained was or was not a felony and to provide, when read together with section 37 and the Second Schedule, for the prosecution and punishment of these offences. They did not create new crimes, any more than the 1861 Act had done. The offences mentioned in sections 1 and 14 can therefore be traced back directly to the common law. There is an air of unreality about the objection that the appellants were disadvantaged by the fact that the provisions of sections 1 and 14 of the 1956 Act were not ascertainable on Pitcairn. This case is quite unlike *R v Rimmington* [2006] 1 AC 459, where the objection was to the enlargement of the common law crime of causing a public nuisance. Here we are dealing with conduct which the common law has regarded as criminal for centuries, and the appellants cannot have been in any doubt that what they were doing amounted to criminal conduct.

85. This feature of the legislation makes it possible to reconcile the failure to promulgate the fact that the 1956 Act was to be part of the laws of Pitcairn with the principle of legality. The islanders brought the common law of England with them when they settled there. Rape and indecent assault were part of the criminal law of the island long before the Justice Ordinance 1966 and the Judicature Ordinances 1961 and 1970 were enacted. No objection could have been taken on the ground of lack of promulgation if the prosecution of the appellants had been brought under the common law. The only

practical difference that resulted from bringing the prosecutions under the statute was as to the sentences that were available. But the effect of the statute was simply to replace the common law, under which there was no limit to the length of any sentence that could be imposed, by the statutory maxima. Substitution of the statutory system for the common law which leaves everything to the judge's discretion works in favour of the accused, not against him. This reduces the risk of any unfairness. It is not possible to detect any unfairness in the sentences imposed on any of the appellants, which were not challenged in the Court of Appeal. My noble and learned friend Lord Woolf is not sure why this assists: see para 14. The answer, I suggest, is to be found in the point which he makes in the next paragraph. We are dealing here with acts which were wrong in themselves. So I do not think that it was an affront to justice for them to be prosecuted for such acts under the statute.

86.It would have been open to question whether these convictions could have been sustained on the ground that the offences were contrary to the common law and that it was unnecessary to proceed under the statute. As a general rule the prosecutor is tied to the ground that he chooses to fight on. If he decides to prosecute under a statute, it is not open to him to ask for a conviction under the common law unless the statute in question provides for this as an alternative. But I do not need to resolve this issue as I have concluded, although not without difficulty, that as sections 1 and 14 of the 1956 Act were not creating new crimes it was open to the prosecutor to bring the prosecutions under the statute notwithstanding its lack of promulgation.

87.I wish finally to associate myself with all that Lord Woolf has said about the way in which these proceedings were conducted by both sides and by the courts below. I also pay tribute to the careful way in which the papers were prepared both in hard copy and electronically for our use by both sides in these appeals, and to the conspicuous fairness and sensitivity with which these proceedings have been conducted throughout by the Public Prosecutor.

