Supreme Court of Pitcairn Islands

R v Christian (No 2) [2005] PNSC 1; [2005] LRC 745 (24 May 2005)

[2005] LRC 745

PITCAIRN ISLANDS

R v CHRISTIAN AND OTHERS (NO 2)

Supreme Court
Blackie CJ, Johnson and Lovell-Smith JJ
18-22, 26-27 April, 24 May 2005

(1) Administration of justice - Criminal law - Enforcement - Estoppel - Sexual offences - Colony - Application of English law - Knowledge of law - Small, isolated island population - Whether familiar with criminal law and sexual offences - Whether administration of justice a reality - Standard of policing - Whether estoppel available in criminal law.

(2) Human rights - Rule of law - Legislation - Promulgation - Publication - Accessibility - Foreseeability - Requirements - Existence of law - Content of law - Ignorance of law - Effect - Colony - Ordinances - Regulations - Whether adequately communicated and publicised - Small, isolated island population - Whether having adequate access to applicable law - Convention for the Protection of Human Rights and Fundamental Freedoms 1950, art 7(2).

(3) Criminal procedure - Trial - Fair trial principle - Legislation establishing machinery of justice - Whether operating fairly - Whether usurping judicial power - Whether having retrospective operation.

(4) Criminal procedure - Trial - Equality of arms - Legal representation - Public Defender - Pre-trial discussion of possible amnesty for accused - Public Defender appointed only subsequently - Whether amounting to inequality of arms rendering trial unfair.

(5) Constitutional law - Fundamental rights - Right to fair trial - Right to trial within reasonable time - Delay - Accused first interviewed by police in 2000 - Accused charged in April 2003 - Trials commenced September 2004 - Whether delay reasonable - Relevant time period - Whether evidence of

prejudice - Effect of delay - Appropriate remedy where delay unreasonable - Human Rights Act 1998 (UK) - Convention for the Protection of Human Rights and Fundamental Freedoms 1950, art 6(1).

Seven accused persons were arraigned before the Supreme Court of Pitcairn Island on 22 August 2003, charged with various sexual offences. A number of pre-trial challenges made by the Public Defender, including challenges to the 'legality' of various ordinances and to the machinery of justice, were rejected by the Supreme Court on 19 April 2004 and the Court of Appeal dismissed the appeal from that judgment on 5 August 2004. The Supreme Court then dismissed applications by the accused for a stay of proceedings and for severance of the charges. On 14 and 20 September 2004 the Public Defender advised the Public Prosecutor that an application would be made for the Supreme Court to dismiss the charges for abuse of process, based on (i) inadequate publication of ordinances and consequent lack of knowledge of English law on the Island ('the promulgation of law issue'); (ii) the conduct of the police investigation; (iii) the actions of officials and political figures and (iv) the ad hoc constitution of the machinery of justice ('the late constitution issue'). Those issues were then included in the petition filed by the Public Defender seeking special leave to appeal to the Privy Council from the Court of Appeal decision of 5 August 2004. The criminal trials commenced on the island on 29 September 2004 before the judges of the Supreme Court, sitting alone, and were still in progress when the Privy Council on 11 October 2004 granted leave to appeal on pre-trial issues but declined to grant a stay of proceedings pending determination of the appeals: in its reasons given on 28 October 2004 the Privy Council held that the interests of justice were best served by allowing the Supreme Court to consider the evidence while it was still fresh and to proceed to verdicts and, if convictions followed, sentences. The Privy Council also directed that, as neither the Supreme Court nor the Court of Appeal had ruled on the promulgation of law or late constitution issues raised in September 2004, those arguments should be presented to the Supreme Court, where findings of fact could be made in the light of the evidence led. Those findings would then be taken into account by the Privy Council when it heard the appeal and disposed of all the issues raised. In accordance with a minute issued by the Supreme Court on 18 October 2004, the judges of the court continued to hear the trial evidence and, in findings announced on 24 October 2004, discharged one of the accused but found the charges against the other six accused to have been proved and indicated appropriate sentences, but deferred entering convictions until the new issues raised had been determined after evidence and argument. (The findings in respect of the individual accused are set out at paras [18]-[43], below) On 25 February 2005 the Public Defender applied to the Supreme Court for an order staying the criminal proceedings on the grounds of abuse of process; (i) denial of justice and (iii) delay, in violation of s 6(1) of the Human Rights Act 1998 (UK) and art 6(1) of the European Convention on Human Rights applied by that Act. The three trial judges sat together to determine those new issues at a hearing which commenced on 18 April 2005. The Public Defender submitted that those trials were the first trials ever on Pitcairn Island under English law and that during the relevant period there had been no information or publication on the island that English law, particularly the Sexual Offences Act 1956 (UK), was applicable, no effective means whereby the islanders could have ascertained the substance of the criminal law in force, no British police officers on the island purporting to uphold English laws and no publication of the relevant ordinances on the island. The Public Defender further argued that the judicature Ordinance 1970 was insufficient to found a prosecution for the offences charged because of, inter alia, the isolation of the island from, and limited communication with, the outside world, the islanders' lack of experience of the application of criminal laws, the lack of evidence that the Crown had ever proclaimed or publicised an intention to apply English criminal laws or attempted to do so and the fact that there had been no previous court cases conducted by English or legally qualified judges. The Public Defender also argued that the court structures put in place since 2000, and related ordinances, had been expressly provided ad hoc to

accommodate the trials of the accused and 'failed to take into account existing ordinances, local circumstances and limits of local jurisdiction', resulting in an appearance of 'systemic bias' or that the matter had been pre-determined and so violating the presumption of innocence under s 6 of the European Convention on Human Rights. In reply, the Public Prosecutor submitted that it was unnecessary for the accused to have been aware of the precise terms of legislation creating offences but sufficient that the accused with reasonable inquiry could have known that rape, indecent assault and incest were crimes on Pitcairn or alternatively that they were crimes according to the general principles of law recognised by civilised nations. He further submitted that abuse of process was not established because the machinery of justice created since 2000 had produced a transparent, independent, fair, modern system of criminal justice consistent with the rules against retrospectivity and other fundamental principles. The Public Prosecutor also argued that the only ground upon which criminal proceedings could be stayed for delay, whether pre-charge delay contrary to common law or post-charge delay contrary to art 6(1), was prejudice to a fair trial, which was not established in the instant case.

HELD: Application dismissed.

(1) The evidence established that at all relevant times Pitcairn was a developed society in which rape was known to be criminal and there was no reason to doubt that that knowledge extended to sexual offending generally, including indecent assault and incest. The wealth of historical material made available for the purposes of the instant litigation showed that the English administration of justice over the island was not a paper administration operating only in an occasional and ad hoc way but a reality, when considering how civil and criminal disputes were dealt with through the twentieth century. Documents exchanged between the Pitcairn Island Commissioner and the Island Council in connection with the justice Ordinance 1966 showed that Pitcairn was left in no doubt that the law of England could be invoked in any matter not covered by Pitcairn law. Although there was no professional English police presence on the island until 1996, whether particular offences had been detected and prosecuted in the past was irrelevant; there was no concept of estoppel in the criminal law and, even if there were, it could hardly apply to serious sexual offending. The evidence showed that there had been an island police officer on Pitcairn for at least 70 years, with authority from the High Commissioner or Governor to enforce all Pitcairn law, including incorporated English criminal offences. Although the standard of policing varied over the years, Pitcairn was not an anarchic or lawless society: documents showed that over more than fifty years the island police officer and the Island Magistrate had frequently been of high profile and enforcement of the law had loomed large in island affairs. The current proceedings were being conducted in a Pitcairn court under Pitcairn law, which expressly incorporated English law, following an investigation by Pitcairn police officers, officers from England having been appointed by the Governor as Pitcairn police officers. However, during the trials in October 2004 no evidence had been presented to assist the court to assess the effectiveness of island police officers during the periods of the offending by the accused. Although concerned to promote and ensure the administration of justice to an appropriate level, successive High Commissioners and Governors had to take into account local circumstances, including the desire of Pitcairn islanders to participate in the management of their own affairs to the greatest extent possible. However, 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 (see paras [108], [110], [113]-[120], [128]-[129], below).

(2) (i) The records showed that administrators of Pitcairn Island, including successive Governors and Commissioners, had been preoccupied with questions of law and order. Throughout the relevant period numerous copies of ordinances and regulations had been made available

to islanders. In some instances, copies of ordinances had been sent to the island for distribution to every household and in the mid-twentieth century it was not uncommon for ordinances or important letters or telegrams to be read out at public meetings. New ordinances were frequently accompanied by instructions from the administration explaining the purpose and operation of the new law. Although there had never been a barrister or solicitor in regular practice on the island, the islanders had had free access to information about their laws through the Government Adviser, the Commissioner and the Legal Adviser. The relationship between British administrators and the islanders had been close and there was constant communication on the subject of laws. Administrators had recognised and appreciated that the law significantly affected every individual's life and had dealt with even minor matters, if asked to assist. All Pitcairn islanders had had access to the law (see paras [143]-[147], below).

(ii) Accessibility of the law was a prerequisite to foreseeability as to its effect and both were demanded by the rule of law and the jurisprudence of the European Court of Human Rights. The rule of law required governments to ensure adequate publication of the existence of law, so that citizens wishing to do so might access the content of the law. That was compatible with the fundamental principle that ignorance of the law was no excuse and with precedents requiring the law to be accessible and foreseeable. The law demanded not that citizens had express awareness of the content of the law, nor that the law was promulgated to that extent, but that the law was accessible, so that people could regulate their conduct by it. Where it was so accessible, people within its jurisdiction would be deemed to know of it (see paras [155]-[168], below). *R v Bailey* [1800] EngR 9; (1800) Russ & Ry 1, dicta of Coleridge J in *R v Barronet and Allain* (1852) Dears CC 51 at 59, of Scott LJ in *Blackpool Corporation v Lockyer* [1948] 1 KB 349 at 361, of *Lord Diplock in Black-Clawson International Ltd v Papierwerke Waldhof-Aschaffenburg AG* [1975] UKHL 2; [1975] 1 All ER 810 at 836, of Lord Bridge in *Grant v Borg* [1982] 2 All ER 257 at 263 and of Lord Phillips in *R (on the application of L) v Secretary of State for the Home Department* [2003] EWCA Civ 25; [2003] 1 All ER 1062 at 1069 and *K-HW v Germany* [2001] ECHR 229; (2003) 36 EHRR 59 applied. *Lim Chin Aik v R* [1963] AC 160 distinguished.

Per curiam. It was unnecessary to determine whether, as an alternative to the promulgation issue, where the criminal law at the time of the offending was not accessible to the accused, the principles in art 7(2) of the European Convention on Human Rights, that the act was nevertheless against the law of civilised nations, could apply (see para [174], below).

(3) All the post-2000 ordinances were of general application and were designed to establish a fair trial process conforming to accepted human rights standards. They did not infringe the principle of the separation of powers by usurping judicial power, but had as their paramount concern the creation of a fair and just system for criminal trials. The ordinances had no particular features which operated unfairly against the accused: they were neutral as between the parties and facilitated the just and proper determination of criminal cases. The general rule against the retrospective operation of statutes did not apply to procedural provisions. Therefore, in legislating for a modern justice and corrections system, the Governor had not invoked any presumption against retrospectivity, nor put the accused at an unfair disadvantage or sought to ensure that the accused received anything other than a fair trial before a fair

and modern system of justice (see paras [186]-[190], below). *R v Makanjuola* [1995] 3 All ER 730 and *Nicholas v R* [1998] HCA 9 applied. *Liyanage v R* [1967] AC 259 distinguished.

(4) There had been no inequality of arms in relation to the arrangements for legal representation of the accused during the investigation process or in the timing of the appointment of the Public Defender. The legal representatives from New Zealand who had been available when the accused were interviewed on the island had acquitted themselves adequately. The Public Defender argued that, because he had been appointed more than two years after the Public Prosecutor, he had been deprived of the opportunity to participate in government deliberations about whether there should be an amnesty rather than criminal trials. However, it was unlikely that counsel would have been admitted to such a debate in circumstances where the documents showed that there was a heightened sensitivity toward keeping the executive and trial processes apart. Moreover, that had nothing to do with the trial processes and fair trial issues and furthermore it was doubtful whether the accused would have wished to engage with the administration in extra-legal solutions when they had shown no interest in taking up opportunities offered by the Sentencing Ordinance for restorative justice (see paras [191]-[196], below).

(5) The delay between the laying of charges on 3 April 2003 and the commencement of the trials on 23 September 2004 was not in breach of the guarantee of trial within a reasonable time in art 6(1) of the European Convention on Human Rights, given effect in domestic law by the Human Rights Act 1998. In considering whether there had been unreasonable delay, the relevant time period commenced at the earliest time at which a defendant was officially alerted to the likelihood of criminal proceedings against him and where, as in the instant cases, the issue had arisen mid-proceedings, post-trial but before the appeals were heard, the relevant period ended at the time the court was asked to assess its reasonableness: the court could not be expected to estimate the resolution date of all possible appeals. Although during the investigation the accused had been interviewed in 2000 and there had been some delay in the process of negotiating the agreement between the United Kingdom and New Zealand allowing hearings and trials to take place in New Zealand if necessary, there had not been a marked lack of expedition and the passage of time since the accused were interviewed was reasonable, with no evidence of prejudice arising (see paras [212]-[223], [234]-[235], below). *König v Federal Republic of Germany* (1978) 2 EHRR 170, *Eckle v Federal Republic of Germany* [1982] ECHR 4; (1982) 5 EHRR 1, *Corigliano v Italy* [1982] ECHR 10; (1982) 5 EHRR 334, *Howarth v United Kingdom* (2000) 31 EHRR 861 and dicta of Lord Bingham in *Dyer (Procurator Fiscal, Linlithgow) v Watson* [2002] 4 LRC 577 at [52]-[55] and in A-*G's Reference (No 2 of 2001)* [2004] 5 LRC 88 at [20]-[23], [27], [29], applied. Per curiam. It appears that the question of an appropriate remedy, where an unreasonable delay in breach of art 6(1) is established, has caused divergence between the law of Scotland and that of England: although the Privy Council, by a majority, had held that in that situation, even without proof of prejudice, the proceedings in Scotland could not continue, English law applies in Pitcairn and the court was bound by the majority decision by the House of Lords that the Privy Council decision, although not overruled, was wrongly decided. Accordingly, the remedy of a stay of proceedings on the ground of delay could be invoked only where issues of prejudice arise. Therefore it would not be appropriate to stay or dismiss criminal proceedings unless there could no longer be a fair hearing or it would otherwise be unfair to try the defendant (see paras [228]-[233], below). R v HM Advocate [2003] 2 LRC 51 considered. A-*G's Reference (No 2 of 2001)* [2004] 5 LRC 88 applied.

[*Editors' note:* Article 6 of the European Convention on Human Rights, so far as material, is set out at para [207], below.]

Cases referred to in judgment

A-G's Reference (No 2 of 2001) [2003] UKHL 68, [2004] 5 LRC 88[2003] UKHL 68; , [2004] 2 AC 72, [2004] 1 All ER 1049, UK HL
Bennett v Horseferry Road Magistrates' Court [1993] 3 LRC 94[1993] UKHL 10; , [1993] 3 All ER 138, [1994] 1 AC 42, UK HL
Black-Clawson International Ltd v Papierverke Waldhof-Aschafenburg AC [1975] UKHL 2; [1975] 1 All ER 810, [1973] AC 591, UK HL
Blackpool Corpn v Locker [1948] 1 All ER 85, [1948] 1 KB 349, UK CA
Corigliano v Italy [1982] ECHR 10; (1982) 5 EHRR 334, ECt HR
Darmalingum v State [2000] 5 LRC 522, (2000) 8 BHRC 662, [2000] 1 WLR 2303, Maur PC
Deweer v Belgium (Application 6903 / 75) [1980] ECHR 1; (1980) 2 EHRR 439, ECt HR
Dyer (Procurator Fiscal, Linlithgow) v Watson [2002] 4 LRC 577, [2004] AC 379, UK PC
Eckle v Federal Republic of Germany [1982] ECHR 4; (1982) 5 EHRR 1, ECt HR
Grant v Borg [1982] 2 All ER 25, [1982] 1 WLR 638, UK HL
Howarth v UK (2000) 31 EHRR 861, ECt HR
K-HW v Germany [2001] ECHR 229; (2003) 36 EHRR 59
König v Federal Republic of Germany (1978) 2 EHRR 170, ECt HR
Lim Chin Aik v R [1963] AC 160, Sing PC
Liyanage v R [1965] UKPC 1; [1966] 1 All ER 650, [1967] AC 259, Sri Lanka PC
Mills v HM Advocate (No 2) [2002] UKPC D2, [2002] 5 LRC 367, [2002] 3 WLR 1597, UK PC
Morris v Ireland [1988] ECHR 22; (1988) 13 EHRR 186, ECt HR
Mungroo v R [1992] LRC (Const)-591, [1991] 1 WLR 1351, (1992) 95 Cr App R 334, Maur PC
Neumeister v Austria (1968) 1 EHRR 9, ECt HR
Nicholas v R [1998] HCA 9, Aus HC
R (on the application of L) v Secretary of State for the Home Department [2003] EWCA Civ 25, [2003] 1 All ER 1062, [2003]1WLR 1230, UK CA
R v Bailey [1800] EngR 9; (1800) Russ & Ry 1
R v Barronet and Allain (1852) Dears CC 51
R v Esop(1836) 7 C & P 456
R v HM Advocate [2002] UKPC D3, [2003] 2 LRC 51, [2004] 1 AC 462, UK PC
R v Jones [2003] 2 Cr App R 134
R v Latif, R v Shahzad [1996] 1 LRC 415[1996] UKHL 16; , [1996] 1 All ER 353, [1996] 1 WLR 104, UK HL
R v Makanjuola [1995] 3 All ER 730, [1995] 1 WLR 1348, UK CA
R v Mullen [2000] QB 520, [1999] 2 Cr App R 143, UK CA
R v Staines Magistrates' Court, ex p Westfallen [1998] 4 All ER 210, [1998] 1 WLR 652, UK DC
Ridgeway v R [1995] 3 LRC 273, (1995) 184 CLR 19, Aus HC
Ringeisen v Austria (Application 2614/65) (1971) 1 EHRR 455, ECt HR
Stögmüller v Austria [1969] ECHR 25; (1969) 1 EHRR 155, ECt HR
Wemhof v Germany (Application 2122/64) (1968) 1 EHRR 55, ECt HR
X v United Kingdom (1979) 3 EHRR 271, ECt HR

Legislation referred to in judgment

German Democratic Republic

Constitution
Criminal Code

New Zealand
Parole Act 2002
Sentencing Act 2002, ss 3-10

Pitcairn Islands
Adoption of Infants Rules 1976
Annual Revision of the Laws Ordinance 2002
Bail Ordinance 2002
Births and Deaths Registration Ordinance 1952
CAPS 1-52
Children Ordinance 2003
Evidence (Proof of Written Laws) Ordinance 2000
Evidence (Special Measures Directions) Ordinance 2001
Interpretation and General Clauses Ordinance 1952
Judicature (Amendment) Ordinance 1971
Judicature (Amendment) Ordinance 1968
Judicature (Appeals in Criminal Cases) (Amendment) (No 2) Ordinance 2000
Judicature (Appeals in Criminal Cases) (Amendment) (No 2) Ordinance 2003
Judicature (Appeals in Criminal Cases) (Amendment) Ordinance 2000
Judicature (Appeals in Criminal Cases) (Amendment) Ordinance 2002
Judicature (Appeals in Criminal Cases) (Amendment) Ordinance 2003
Judicature (Appeals in Criminal Cases) (Amendment) Ordinance 2004
Judicature (Appeals in Criminal Cases) (No 2) (Amendment) Ordinance 2002
Judicature (Appeals in Criminal Cases) Ordinance 1999
Judicature (Appeals in Criminal Cases) Ordinance, s 37(1)
Judicature (Courts) (Amendment) Ordinance 2000
Judicature (Courts) (Amendment) Ordinance 2001, s 2
Judicature (Courts) (Amendment) Ordinance 2002
Judicature (Courts) (Amendment) Ordinance 2003
Judicature (Courts) Amendment) (No 2) Ordinance 2000
Judicature (Courts) Ordinance 1999
Judicature Amendment Order 1983
Judicature Amendment Ordinance 2003
Judicature Courts Amendment (No 2) 2003
Judicature Courts Ordinance 1999
Judicature Ordinance 1961, ss 7-8
Judicature Ordinance 1970, s 14
Justice (Amendment) (No 2) Ordinance 2000
Justice (Amendment) (No 2) Ordinance 2003
Justice (Amendment) (No 3) Ordinance 2000
Justice (Amendment) (No 4) Ordinance 2000
Justice (Amendment) (No 5) Ordinance 2000
Justice (Amendment) Ordinance 1970
Justice (Amendment) Ordinance 1972

Justice (Amendment) Ordinance 2000
Justice (Amendment) Ordinance 2002
Justice (Amendment) Ordinance 2003
Justice (Amendment) Ordinance 2004
Justice Ordinance 1966, ss 5, 8, 16, Pt VI
Justice Ordinance 1999
Justice Ordinance, ss 24(3), 66, 70CA, 70CB, 88
Legal Aid (Criminal Proceedings) (Amendment) Ordinance 2002
Legal Aid (Criminal Proceedings) (Amendment) Ordinance 2003
Legal Aid (Criminal Proceedings) Ordinance 2001
Legal Practitioners Ordinance 2001
Local Government (Special Electoral Provisions) Ordinance 2004
Marriage Ordinance 1952
Ordinance No 2 of 1952
Ordinance to Amend Certain Laws for the Purpose of the Revised Edition of the Laws 2001
Ordinance to amend Judicature (Courts) Ordinance 2005
Ordinance to Amend the Legal Aid (Criminal Proceedings) Ordinance 2002
Parole Ordinance 2002
Pitcairn (Amendment) Order 2002
Pitcairn Court of Appeal (Registry) Ordinance 2003
Pitcairn Island (Local Government Regulations) Ordinance 1952
Pitcairn Order in Council 1952, s 5 (3)-(5)
Pitcairn Order in Council 1970, ss 3, 5-6, 10, 14
Pitcairn Trials Act 2002
Prisons (Amendment) Ordinance 2002
Prisons Ordinance 1999
Public Defender in Criminal Proceedings Ordinance 2002
Revised Edition of the Laws Ordinance 1971
Sentencing (Community-based Sentences) Ordinance 2002
Sentencing Ordinance 2002
Summary Offences Ordinance 2000
Victim of Offences (No. 2) (Amendment) Ordinance 2002
Victims of Offences (No. 2) Ordinance 2002
Victims of Offences (Ordinance) 2002

United Kingdom
Criminal Justice Act 1988, s 32
Criminal Justice Act 2003, s 51
Human Rights Act 1998, ss 2(1), 6(1), 7(1), 8(1)
Offences Against the Persons Act 1861
Pacific Order in Council 1893, s 20
Sexual Offences Act 1956
Youth Justice and Criminal Evidence Act 1999

Other sources referred to in judgment
Agreement between the UK Government and the New Zealand Government signed in Wellington, New Zealand, on 11 October 2002 concerning the holding of Pitcairn trials in New Zealand and other related

matters
Bennion on Statutory Interpretation (4th edn, 2002), p 689
Convention for the Protection of Human Rights and Fundamental Freedoms

(Rome, 4 November 1950; TS 71 (1953); Cmnd 8969), arts 2, 6, 7(2), 34

Convention on the Rights of the Child (New York, 20 December 1989; TS 44

(1992); Cm 1976), Preamble, art 34

Finnis *Natural Law and Natural Rights* (1980)
Fuller *The Morality of Law* (1969) pp 43, 49, 92
Halsbury's Laws of England (4th edn)

Henry VII *Ordenaunces of Warre* (1492) HMS Fly Pitcairn Island Constitution (1838)

International Covenant on Civil and Political Rights 1966 (New York, 16 December 1966; TS 6 (1977); Cmnd 6702), Preamble, arts 1, 6(1)

Maude *Hints and Instructions to the Chief Magistrate* (1940)

Maude in Rosa and Moverely *The History of Pitcairn Island: an Introduction to the Pitcairnese Language* (1964) p 73

McLoughlin *The Development of the System of Government and Laws of Pitcairn Island from 1791 to 1971* (1971) p 51
Nobbs' Pitcairn Island laws (1829)
Pitcairn Island Government Regulations 1940 (the Neill/Maude Regulations), regs 6(5), 16
Rawls *A Theory of Justice* (1999,p 212
Simons' Pitcairn Island Constitution (1904), Laws 2, 3, 15, 21-22
Universal Declaration of Human Rights (Paris, 10 December 1948; UN TS 2 (1949); Cmd 7226), Preamble, arts 1, 3

Application

Before the commencement of criminal trials in the Supreme Court on 29 September 2004, the Public Defender, on behalf of six persons accused of various sexual offences, applied for a stay of the proceedings for abuse of process. A previous pre-trial application for declaratory relief had been dismissed by the Supreme Court on 19 April 2004 and by the Court of Appeal on 5 August 2004 ([2004] 5 LRC 706). In a petition to the Privy Council for special leave to appeal from the Court of Appeal decision and a stay of proceedings, the Public Defender included the issues which had been raised in September 2004 but not yet argued in the Supreme Court. In granting special leave to appeal but refusing a stay of proceedings on 11 October 2004, reasons given on 28 October 2004, the Privy Council directed that, before it heard the appeal, the trials should proceed to verdicts and that the new issues raised should be determined by the Supreme Court in the light of evidence presented ([2004] 5 LRC 735). The trials were concluded before individual judges, findings being announced on 24 October 2004 without convictions being entered, and the Supreme Court then heard the abuse of process application, the three trial judges sitting together, with evidence and arguments presented, on 18-22, 26-27 April

2005. The facts are set out in the judgment of the court.

P Dacre (Public Defender), *Adrian Cook* QC (of the New South Wales Bar), *A Roberts and C Cato* for the accused.
S Eisdell Moore, Ms C Gordon, F Pilditch and *S Mount* for the Crown.

24 May 2005. The following judgment of the court was delivered.

BLACKIE CJ, JOHNSON and LOVELL-SMITH JJ

INTRODUCTION

[1] This is a resumed hearing of the trials of the six remaining accused, part-heard on Pitcairn Island between 29 September and 28 October 2004. The individual trials were judge alone, for the purposes of the issues now to be considered, the three trial judges have sat as a consolidated court on account of the issues put forward having application to all.

PROCEDURAL BACKGROUND

[2] Originally, seven accused were committed for trial in the Pitcairn Islands Supreme Court on 4 July 2003. When they were arraigned before the court sitting at Adamstown on 22 August 2003, the Public Defender indicated that he would make a number of pre-trial challenges, including a challenge to the 'legality' of the ordinances and the machinery of justice for Pitcairn Island. Timetabling directions were made for the filing of submissions and supporting materials.

[3] The challenges were heard in the Supreme Court at Papakura. New Zealand, between 17 and 21 November 2003. At the request of the Public Defender, the hearing was adjourned for further argument to 6 February 2004. Alter granting an extension of time to 31 March 2004 for the filing of additional submissions, the Supreme Court ruled on all the issues raised on 19 April 2004. The accused appealed.

[4] The appeal was heard between 26 and 28 July 2004, by the Pitcairn Island Court of Appeal, sitting in the High Court at Auckland. The appeal was dismissed on 5 August 2004. In this court, the accused then sought a stay of the proceedings on the grounds of delay and an application for the severance of charges. These applications were declined.

[5] By mid-August 2004 all of the pre-trial matters had been concluded. In September the Supreme Court set out for Adamstown, Pitcairn Island, with a view to the hearings beginning soon after the court's arrival.

[6] On 14 September 2004 the Public Defender notified the Public Prosecutor by letter that two further issues would be raised at trial: the police investigation and prosecution; and the publication by the British authorities of an intention to apply or enforce either the common law or any specific criminal enactment on Pitcairn Island.

[7] While the court and counsel were en route to Pitcairn Island on 20 September 2004, the Public Defender advised the Public Prosecutor that the matters raised on 14 September 2004 would be pursued by way of an abuse of process application seeking that the Supreme Court dismiss the charges. The Public Defender revealed that the argument would involve historical questions about the knowledge of English law on Pitcairn Island and the publication of the ordinances ('the promulgation of law issue'); the conduct of the investigation; the actions of officials and political figures; and the constitution of the machinery of justice for Pitcairn Island ('the late constitution issue').

[8] Prior to departure, the Public Defender had filed a petition to the Privy Council seeking special leave to appeal the Court of Appeal's pre-trial judgment of 5 August 2004. This petition included the issues that had been raised with the Public Prosecutor on 14 September 2004 and 20 September 2004 but had not been argued in either the Supreme Court or the Court of Appeal.

[9] On 29 September 2004 the trials of the accused commenced on Pitcairn Island, the three judges sitting alone when hearing the charges against the individual accused.

[10] On 11 October 2004, while the trials were in progress, the Privy Council heard the application for special leave to appeal on pre-trial issues as well as an application to stay all proceedings pending the determination of the appeals. Leave to appeal was granted but the stay was declined. The Board indicated that its reasons would follow.

[11] The Privy Council's reasons were released on 28 October 2004. In dismissing the application for stay the Board stated that, given the stage the trials had reached, the interests of justice were best served by allowing the members of the Supreme Court to consider the evidence while it was fresh, to proceed to a verdict in each case and, if convictions followed, to decide what sentences should be imposed. The Board did not consider that it would be appropriate for the trials to be interrupted.

[12] The Privy Council also considered that as neither the Supreme Court nor the Court of Appeal had ruled on the promulgation of law or late constitution issues, the better course would be to allow those arguments to be presented to the Supreme Court, where evidence could be led and findings of fact made in light of that evidence.

[13] Finally, the Privy Council stated that in granting special leave and refusing a stay the Board had proceeded on the basis that any findings of fact made by the Supreme Court on the promulgation and late constitution issues would be taken into account when the appeal was heard. Should convictions follow the trials, the Board would proceed to hear and dispose of all the issues raised by the petitioners in their application for special leave.

[14] At a Chamber's conference before the Full Bench of the Supreme Court on 17 October 2004 it became clear that the scope of the Public Defender's arguments, coupled with the Privy Council's directions (which had been communicated to this court in draft form) to hear the evidence and make the necessary factual findings, meant that the applications would have to be adjourned to a resumed hearing following the return of counsel and the court to New Zealand. The court issued a minute to this effect on 18 October 2004. It determined that it would proceed to make factual findings on the trial evidence and indicate sentences whilst on the island, but defer the entering of any convictions until the new issues raised by the Public Defender were resolved.

[15] Having heard all the trial evidence, findings were announced on 24 October 2004. One of the accused, Jay Warren, was discharged on the sole count that he faced. A number of charges against other accused were proved.

[16] On return to New Zealand, a conference was convened on 3 December 2004 with a view to setting the Public Defender's applications down for hearing on 5 February 2005. At that conference it became clear that neither the Public Prosecutor nor the Public Defender would be ready to proceed by that date. There had been some difficulty in accessing archived documents.

[17] On 5 February 2005, at a further conference, timetabling orders were made for the filing of submissions and documents. The date of the hearing was set down for 18 April 2005.

FACTUAL FINDINGS-EVIDENCE AT TRIAL

[18] Before we proceed in consider the issues now raised, we set out briefly the findings of the individual judges in respect of the charges that were proved.

1. Stevens Christian (T 37-46/2003)

[19] Stevens Christian was charged with a total of ten counts. Six of these were counts of rape and four were counts of indecent assault. They covered a period of approximately eight years between 1964 and 1972 when the accused was aged between 14 and 21 years. Five counts of rape were proved. The remainder were dismissed.

[20] The evidence established that between September 1964 and February 1966, at the Banyan Trees, Jack Williams' Valley, the accused raped a 12-year-old girl. She and others had been walking through the Banyan Trees when the accused and two associates stopped and grabbed her. The accused had thrown her to the ground and his associates had held her arms and legs. The accused had then pulled her shorts down and raped her and, when he finished, had invited the others to 'have a go'. They were laughing and ran off to join the rest of the group. The complainant stated that she had struggled but was unable to get away. She was scared and had been a virgin prior to the incident. Consent was not an issue. The accused denied that the incident had taken place.

[21] On another occasion during the period 1967 to 1968, at the age of 16 to 17, Stevens Christian raped the same girl, aged at the time 14 to 15 years. He took her on the back of his motorcycle to a garden shed in Ante Valley. The complainant said she did not consent: she could not recall whether she had resisted. She was petrified of being hurt. The accused put her on the ground, lifted her dress, took off her pants and raped her. The accused was rough with her and caused her pain. Afterwards she was told by him not to say anything and that she would not in any event be believed.

[22] Two other counts were also proved in relation to the same complainant at Doodwi Ground. On both occasions she was taken there on the back of his motorcycle, pulled to the ground and raped. She did not consent and went with him on each occasion because she was scared and to avoid being hurt.

[23] In 1972 to 1973, at the age of 21, Stevens Christian took a 12-year-old girl on his motorbike to Highest Point where he led her into some bushes, asked her to lie down on the grass, removed her pants and raped her. The complainant was a virgin and had no previous sexual experience. She was secreted in bushes and taken advantage of. There was no romance, no affection, and no expression of any sort to indicate gentility. There was nothing that could suggest to the accused she was consenting. Consent was not an issue.

[24] The sentence for Stevens Christian was indicated to be two years' imprisonment on four of the rape charges and three years' imprisonment on the final charge. All of the sentences would be concurrent.

2. Dave Brown (T 3-18/2003)

[25] This accused was initially charged with 16 counts involving sexual offences. To three of these counts he pleaded guilty. They related to two complainants. One complainant was aged 14. She and the accused were on a quad bike. The complainant was seated in front of the accused. He put his hands down the front of her pants and penetrated her vagina with his fingers. She struggled to remove his hand and eventually had to stop the bike in order to do so. When they resumed their journey he repealed the same act and at the same time tried to grab her hand to put it on his erect penis, which was pressing into her back. She was struggling, and was scared and shocked by the event.

[26] In relation to the second complainant, the accused pleaded guilty to putting his hands down the front of her bikini bottom when they were out spear-fishing and rubbing her genitals briefly. She was aged 15 at the time and the accused was in his early thirties.

[27] At trial, the accused maintained a plea of not guilty to the remaining 13 counts of indecent assault. Six charges were proved. The remainder were dismissed,

[28] Dave Brown's sentence was indicated to be 400 hours of community work with an order to carry out a sentence of supervision of two years.

3. Len Brown (T 1-2/2003)

[29] Len Brown faced two counts of rape against a teenage girl. The rapes occurred between 1969 and 1972, when the complainant was aged approximately 18 years and the accused was 46 years old.

[30] The complainant was tending to the family watermelons at The Hollow when suddenly the accused grabbed her arm, saying 'I'm going to do it'. She said 'what?' and he said 'sex'. He dragged her to his motorbike and told her to get on. She stated that his grip was strong and that it hurt her. She was scared. When they arrived on the bike at Gannet's ridge she was told to get off the bike and was held by the arm again, the accused then tripped her to the ground, removed her shorts and underwear and raped her. He left her there when he was finished. She did not physically resist nor object in words. She was overcome by force and was afraid.

[31] The second offence occurred when the complainant was again in The Hollow tending to the watermelons. The accused approached her and, without any words, hooked her legs out from under her, pushed her to the ground and raped her. It was a rough act of sexual domination by a tall, strong, fit man over a frightened teenage girl.

[32] The charges having been proved, Len Brown was given an indication of sentence of two years' imprisonment on each charge, to be served concurrently, granted leave to apply for home detention with the commencement date of his sentence to be deferred for two months to allow him to apply.

4. Dennis Christian (T 20-22/2003)

[33] Dennis Christian admitted to sexual offending on ten occasions between February 1972 and March 1974 when he was aged 15 to 17 and the complainant 12 to 14 years. His sentence indication was 300 hours of community work and two years' supervision.

5. Terry Young (T 47-54/2003)

[34] Terry Young was charged with seven counts of indecent assault and one representative charge of rape. At all relevant times the complainants were under the age of 16. Proven were six of the indecent assault counts and the rape charges.

[35] Evidence had been given that between 1981 and 1984 Young had indecently assaulted a girl by touching her genital area underneath her clothing. The complainant was ten years old attending a public event at Putau School. She had used the girl's toilet and as she came out of that into the passageway between the toilet and the hand basin she saw the accused. He approached her, undid the zip on her trousers and placed his hand inside her underwear, touching her skin. He played with her genital area, and then walked out of the toilet. The accused would have been in his early twenties at the time.

[36] The accused also touched the vagina of a second complainant, a girl aged between 12 and 15 years and who was brought up as his sister, whenever they went to collect firewood. This was a regular occurrence and progressed to digital penetration and then rape. She was small for her age; he was eight years older and much stronger. He used force and would prise her legs apart. He told her not to tell anybody about his actions. This was a regular pattern of behaviour until the complainant left the island on 22 December 1981 just before her 16th birthday.

[37] Terry Young was also found to have touched a third complainant on her breasts and vagina on two or three occasions as they rode a quad bike together. The complainant was aged between 13 and 14 at the time. Terry Young would have been in his early thirties. He admitted this offending.

[38] A concurrent sentence of five years' imprisonment on the rape charges and six months' imprisonment on the indecent assault charges was indicated.

6. Randall Christian (T 23-36/2003)

[39] Randall Christian faced 15 counts of sexual offending. These included five counts of rape and seven counts of indecent assault. Three of the counts were dismissed. The court found proved four of the counts of rape and five counts of indecent assault.

[40] Between 1994 and 1996, at the age of 20, Randall Christian raped a 10-year-old girl in Aute Valley. He had put his hand down her skirt and then took her among some banana palms where he held her down. She had struggled against him but was told to be quiet or he would hit her. He took off her skirt and pants, forced open her legs and raped her. It was painful and she blacked out. When she came he told her not to tell anyone. A few months later he raped the same complainant at 'Big Fence'. She had gone to dinner there with her parents and siblings and had fallen asleep on the couch. She awoke to find herself lying across the accused's bed with the accused standing between her legs with his penis in her vagina. She pushed him away and went out into the kitchen. There was no question of consent.

[41] The court also found that in 1995, at the age of 21, Randall Christian raped the same girl, now aged 11 years. The complainant, together with a number of other children, were playing a game of hide-and-seek among the banana palms near the molasses shed and sugar cane mill. The accused and an associate cornered the complainant against some banana trees. They gagged her with a T-shirt, knotting it behind her head. She was put on her back on the ground and her elbows were held above her head. She was struggling and crying. Her shorts and underwear were removed and both men took turns to rape her. The men laughed and joked afterward, untied the gag and allowed her to go to the molasses shed. Two charges arose out of this incident.

[42] Also proved against Randall Christian was a charge of indecently assaulting the same complainant when she was aged 14, as well as indecently assaulting two other complainants of younger age.

[43] The sentence for this accused was indicated to be concurrent sentences of six years' imprisonment on the rape charges and 12 months imprisonment on the indecent assault charges.

CURRENT APPLICATIONS

[44] In relation to the abuse of process issues raised in this hearing, the solicitors for the Governor of Pitcairn Island, acting independently, have overseen a substantial disclosure process involving the release of relevant documents to the Public Prosecutor and the Public Defender. Documents have been disclosed from the Governor's office, the Foreign and Commonwealth Office in the United Kingdom, the Pitcairn Commissioner's Office, the Pitcairn Island Council, the honorary legal adviser and from what is known as the 'Harder-Salt proceedings'. The Public Prosecutor and the Public Defender have been advised that the only documents withheld are those subject to legal professional privilege and public interest immunity, in respect of which there has been no challenge. The documents produced to us have all been produced by consent.

[45] The Public Defender seeks an order from this court staying the criminal prosecutions of the remaining six accused, in an application filed on 25 February 2005. This application alleges it was (i) an

abuse of process, (ii) a denial of justice and (iii) a violation of s 6(1) of the Human Rights Act 1998 (UK) to initiate proceedings and prosecute the accused in all or any of the following circumstances.

(a) Where there has not been any plain or intelligible publication of law in the Pitcairn Island jurisdiction that alerts its inhabitants to the content of the law. This submission encompasses the issues of promulgation of law and that law should be accessible and precise.

(b) Where there has been no guidance or English presence in the administration of criminal justice on Pitcairn Island. Accordingly, there has been no advance notice given to Pitcairn islanders that offences and penalties existed; that transgressions would be met with prosecution and that a system of adjudication was in place for this purpose.

(c) Where there has been the deliberate creation of a mechanism by which to prosecute the accused. This has the appearance of 'systemic bias' or pre-determination and is a violation of the presumption of innocence guaranteed the accused under art 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953); Cmnd 8969) (the European Convention on Human Rights) ('the late constitution issue'). This submission also encompasses the concept of inequality of arms in relation to the timing of the appointment of the Public Defender and the legal representation that the accused received during the investigation process.

(d) When there has been considerable delay between the dates on which the accused were given notice that they were being investigated and the disposal of these proceedings, this delay is due to the systemic failure to have judicial processes in place and is a violation of the right to trial within a reasonable time under art 6 of the European Convention on Human Rights.

(e) Where there is in existence local Pitcairn law which covers the relevant offending and that excludes the application of English law.

(f) Where the limitation period for bringing a prosecution has passed under either Pitcairn or English law.

[46] We summarise the Public Defender's argument in the following way.

(a) The present trials were the first time in the history of Pitcairn Island that criminal prosecutions had been brought under English law or indeed that English law had been applied on the island in any form.

(b) During the relevant period of these trials, there had been no information or publication on Pitcairn Island that the islanders were subject to the application of English law, in particular the Sexual Offences Act 1956 (UK).

(c) During the relevant period there were no effective means whereby a Pitcairn islander could have ascertained the substance of the criminal law in force on Pitcairn.

(d) There had not been, until recently, any police officers or law enforcement personnel from Great Britain purporting to uphold English laws, especially criminal laws, on Pitcairn.

(e) The ordinances relied on in these proceedings had not (to the petitioners' knowledge) been published on Pitcairn Island.

(f) The provisions of the judicature Ordinance 1970 were not sufficient to found a prosecution for the offences charged in this case because, among other things:

(i) Pitcairn has limited communication and access to the outside world;

(ii) Pitcairn islanders have had little or no experience in the modern world of the application of penal laws, aside from limited local laws which were regularly applied in the management of their internal affairs;

(iii) There was little or no evidence that the Crown ever proclaimed or publicised an intention to apply and enforce the criminal laws of England on Pitcairn Island and made no attempt to do so or assert such a jurisdiction:

(iv) There had been no 'English police presence' on the island until this inquiry;

(v) There had been no court cases conducted by English judges or legally qualified persons under any ordinance.

(g) The court structures put in place since 2000, and related ordinances, 'failed to take into account existing ordinances, local circumstances and limits of local jurisdiction'.

[47] In reply, the Public Prosecutor contends:

(a) That, while it is a fundamental principle that law must be accessible and foreseeable, the primary issue is whether the law in relation to sexual offences on Pitcairn could, with reasonable inquiry, have been known by the accused. He submits that it is unnecessary for the accused to have been aware of the precise terms of the statutes or provisions creating the offences but that it is sufficient that the accused with reasonable inquiry could have known that on Pitcairn-

(i) it was a criminal offence for a man to rape a woman or girl;

(ii) it was a criminal offence for a man to indecently assault a woman; and

(iii) incest was a crime

In the alternative, the Public Prosecutor submits that if the court is not satisfied that the criminal law of Pitcairn was foreseeable and accessible, it is sufficient for the purposes of

the human rights jurisprudence if the conduct in question was criminal, according to the general principles of law recognised by civilised nations.

(b) That the machinery of justice created since 2000 has produced transparent, independent, modern, criminal justice system that preserves fundamental principles. In essence, the Public Prosecutor submits that all of the changes implemented since 2000 have been legal, consistent with the rules against retrospectively and fair. An abuse of process is not established.

(c) That in respect of an allegation of delay, prejudice to a fair trial is the only ground on which the prosecution can be stayed, whether the delay alleged is pre-charge delay (covered by common law principles) or post-charge delay, covered by art 6(1) of the European Convention on Human Rights. The inherent difficulties of investigating and proceeding with the cases against the accused, as a result of the physical isolation of Pitcairn Island, is relevant to the question of delay. The Public Defender, however, has not shown that there has been a delay that has prevented the accused from receiving a fair trial and, accordingly, a stay of proceedings would be an inappropriate remedy for any finding of delay by the court.

[48] For convenience, our analysis of the arguments traversed by both counsel fall to be considered under the following headings:

(a) The promulgation of law;

(i) The development of the Pitcairn legal system;

(ii) Publication of ordinances on Pitcairn;

(iii) Knowledge of sexual offences law on Pitcairn;

(iv) Policing and law enforcement on Pitcairn;

(v) Access to information about laws on Pitcairn; and

(vi) the rule of law and legal considerations.

(b) Late constitution - systemic bias.

(c) Delay - art 6(1) European Convention for the Protection of Human Rights and Fundamental Freedoms 1950.

THE PROMULGATION

The development of the Pitcairn legal system

[49] In an earlier decision, this court held that the United Kingdom lawfully exercises sovereignty over the Pitcairn Islands. In doing so, it was necessary to traverse the history of the application of imperial

statutes and Orders in Council and the way in which British administrative activity drew Pitcairn into the imperial fold. The present argument challenges the application of the criminal laws of England to Pitcairn Island and the legal entitlement of a court other than that of the Island Magistrate to try local cases. A more detailed analysis of the application of substantive and procedural criminal laws is therefore required.

[50] Since the arrival of the mutineers and their companions in January 1790, followed by the well-documented murders and other fatal misfortunes that soon ensued, and the period of orderly civilisation under the paternal leadership of John Adams until his death in 1829, there have been seven recognisable periods of constitutional development. They are:

(i) 1829: G H Nobbs' written laws;
(ii) 1838: The HMS Fly Constitution;
(iii) 1893: Captain Rookes' Parliament;
(iv) 1904: R T Simons' redrafted Constitution;
(v) 1940: The J S Neill/H E Maude Pitcairn Island Regulations;
(vi) 1952: Pitcairn Order in Council and Ordinances;
(vii) 1970: Pitcairn Order in Council and Ordinances.

[51] The mariners Nobbs, Buffett and Evans, all British, arrived to live on the island before Adams' death and formed the new leadership of the community in 1829. Buffett succeeded as teacher and pastor, to be supplanted by Nobbs, formerly of the Royal Navy. He prepared the first set of written laws. They were limited to murder (death), theft (three-fold restitution), fornication (whipping of both, followed by marriage) and removal of a landmark. Trial was before three elders, who would pronounce sentence. These laws applied until 1838 and, in our view, this was the only period when serious crime was able to be tried according to locally made law.

[52] There was, during the period of the Nobbs' written laws, an interval when the population was removed from the island to Tahiti in 1831 by HMS Comet, at the earlier request of John Adams to Captain Beechey RN. This experiment lasted only six months before the islanders returned, about eleven having died of disease and, it is said by H E Maude (writing in Rosa and Moverely *The History of Pitcairn Island: an Introduction to the Pitcairnese Language* (1964)), appalled by the sexual mores evident in Tahiti. As a group they were strongly conscious of their European heritage and unwilling to be assimilated into Polynesia. No effort has been made to argue the status of the laws during this short period and we have not attempted an analysis. The community resumed life on Pitcairn as it had been before.

[53] Later, during the period of Nobbs' laws, another Englishman, Joshua Mill, arrived, deposing Nobbs and claiming to be Governor. He exercised power harshly, flogging Buffett and Evans and exiling Nobbs. The Royal Navy reacted to an appeal from Nobbs and an inquiry into Hill's conduct was held on board HMS Actaeon in 1837. Hill's subsequent banishment was effected by HMS Imogene and Nobbs was reinstated.

[54] Our April 2004 judgment, and that of the Court of Appeal in August 2004, detailed the circumstances of Captain Elliot RN arriving in HMS Fly in 1838 and granting Pitcairn Island the protection of the United Kingdom. The motivations were for the avoidance of a future dictator similar to

Hill and to protect the inhabitants from the depredations of American whalers, including the violation of unprotected Pitcairn women. The Constitution drafted by Captain Elliot provided for the annual election of a magistrate, to be assisted by two Council members as assessors, who was accountable to the Queen or her representative. Crimes of a serious nature were to be dealt with by visiting Royal Navy captains. H E Maude (at p 73) describes the working of this Constitution in a way which we accept is correct and which applied thus for many years:

> 'While amendments to the code of laws were decided upon at a public meeting of "Heads of Families", which in the next decade was superseded by the General Assembly of the community, important legislative changes were still reserved for settlement by the captains of visiting warships, whose decisions were, of course, made after due consultation with the local authorities. These captains, furthermore, acted as Courts of Appeal in all cases where the decision of the Magistrate in Council was not accepted, as well as being de facto courts of First Instance for the occasional crime of a more serious nature.'

These visiting warships were from the Royal Navy, principally those attached to various Pacific stations.

[55] In our April 2004 judgment we held that the 'Norfolk' period between 1856 and 1864 did not at law constitute an abandonment of the island, and its laws continued as they had been the day the population of 194 sailed for Norfolk Island to resettle.

[56] In 1870 James Russell McCoy was elected Chief Magistrate and, for 22 of the next 37 years, was the leader of the island. Captains of warships continued to provide legal authority, supplementing the powers of the local court during ship visits. By 1890, the 1838 Constitution had been augmented by a series of additions and was in need of a general revision. This was effected by Captain Rooke RN of HMS Champion, who drafted a new Constitution based on parliamentary government.

[57] On 3 October 1892 Captain Rooke held a meeting with the principal members of the community and suggested a new form of government, whereby a Parliament of seven was formed, from whom a President, a Vice-President, two judges and a secretary were to be elected. The voters assembled on 1 January 1893 and carried this proposal into effect. A court was constituted to hear breaches of the laws, which included-topically-fornication, adultery and others, but not rape or murder. The Council could be constituted as a Court of Appeal from the island judges. The Constitution was silent on serious crime. It continued in existence until 1904.

[58] In 1893 the Pacific Order in Council created the Western Pacific High Commission. Section 20 provided for civil and criminal jurisdiction to-

> '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.'

[59] In 1898 Pitcairn Island was brought under the administrative control of the High Commissioner for the Western Pacific at Suva, in the direct province of Mr R T Simons, the British Consul at Tahiti. He, with the sailings of the Seventh Day Adventist Mission ship Pitcairn, would be able to keep in contact

with the Pitcairn islanders. We are persuaded by the documentation placed before us that the extension of jurisdiction to Pitcairn by then Secretary of State, Joseph Chamberlain, was motivated by the perceived need to try Harry Christian for the murder of his wife and child during that year. The transcript of his trial records that the terms of the order were read out publicly before he was arraigned.

[60] The trial was conducted by the Chief Police Magistrate of Fiji. Mr Hamilton Hunter, sworn in as a judicial Commissioner. He held a preliminary inquiry, followed promptly by a trial. While the quality of this trial might attract criticism in the modern day because the accused represented himself, did not call evidence and had nothing to say before the announcement of the death sentence, it nevertheless resembled a trial held under English law in procedure. There was evidence before us that some of the population greeted the verdict and sentence with 'howling and wailing'.

[61] In 1904 Consul Simons visited Pitcairn to review the Constitution. His version reverted to the traditional elected Chief Magistrate as head of local government, supported by an elected Council of four, two of whom were to act as assessors in the local court. Provision was made for regular sittings of the court on the Monday of the second and fourth weeks of each month. In the event of serious cases not provided for in the local laws, jurisdiction was to be exercised by the High Commissioner's Court for the Western Pacific sitting at Pitcairn Island, as occasion required, under the Western Pacific Order in Council 1893.

[62] The Constitution dealt with matters of law. The age of 14 appears to have been fixed as the age of consent. Law 2 made an offence of 'seducing a girl under the age of 14 yrs'. From a handwritten copy of this Constitution made on the island in 1932, Law 3 is recorded:

> 'The questions of Adultery and Rape cannot be dealt with by the Local Court. Such matters must be referred to the High Commissioner's Court for the Western Pacific.'

[63] Law 15 provided for a new crime of abortion as follows:

> 'Abortion is a serious crime and is punished by a lengthy term of imprisonment. Any such cases occurring on Pitcairn Island must he brought to the notice of the Deputy Commissioner who will deal with them under the provisions of His Majesty's Order in Council. The Chief Magistrate will not fail to keep himself informed of any such cases, or suspected cases, and will immediately act as directed above.'

[64] Malicious defamation, theft and habitual disturbance of the peace were crimes reserved for the High Commissioner's Court. Laws 21 and 22 reserved jurisdiction for serious crimes thus:

> '21. In the event of the death of a person under suspicious circumstances, the Chief Magistrate assisted by his Council, will enquire into the matter, examine witnesses and take down evidences and submit the same, together with his covering report, for the consideration of the Deputy Commissioner.
>
> 22. No punishments, pains or penalties, other than those above provided for can be imposed by the Chief Magistrate. Cases of a grave and serious character will be dealt with by His Majesty's High Commissioner's Court for the Western Pacific at Pitcairn Island.'

[65] The Simons' 1904 Constitution remained in force until 1940. An examination of court records by D McLoughlin, Legal Adviser to the Governor, writing in his 1971 history *The Development of the System of Government and Laws of Pitcairn Island from 1791 to 1971*, shows that:

(a) Between 1904 and 1908 43 cases were held in the Island Court. Of these-

(i) Seven were inquiries by the magistrate into matters outside the jurisdiction of the court;
(ii) One was a civil case concerning ownership of land:
(iii) 35 were criminal cases within the magistrate's jurisdiction; and
(iv) One case was reversed on appeal to Mr Simons, then Deputy Commissioner of the Western Pacific.

(b) Between July 1908 and February 1916 128 criminal cases were heard by the court, 84 verdicts of guilty, involving 163 persons, were returned.

(c) In the period 20 January 1920 to 10 December 1934 there were 167 cases before the court. Findings of guilt were returned in 141 of those, involving 247 people, an average of 17 offenders convicted per year.

(d) The population of the island was:

(i) 1914-140 inhabitants;
(ii) 1920-169 inhabitants;
(iii) 1932-200 inhabitants;
(iv) 1936-209 inhabitants.

[66] Royal Navy ships ceased regular visits to the island in 1913, but the opening of the Panama Canal in 1934 led to a new economy based on the calls of merchant ships crossing the Pacific to and from New Zealand. Over 10 per cent of the population sought employment in New Zealand.

[67] During the period between the Simons' 1904 Constitution and the 1940 promulgation of the new Pitcairn Island Government Regulations, in addition to the seven inquiries referred to in para [65](a)(i), the following known matters were referred to the High Commissioner for determination:

(a) 1905-Edward Christian-domestic violence.

(b) 1934-distribution of the Nils O Jacobsen estate.

(c) 1937-allegation of attempted murder of Eldon Coffin by his wife Julia. This was investigated by J S Neill, appointed Deputy Commissioner for the purpose, and dismissed by him on Pitcairn Island for want of evidence.

[68] During his period on the island in 1937, J S Neill, an officer of the High Commission, drafted a new legal code and rules of procedure for the court and explained the workings of the law at a public

meeting. Later, H B Maude, also an administrative officer from the High Commission, visited the island in 1940 and oversaw the implementation of these laws as the Pitcairn Island Government Regulations 1940. These were a complete codification of existing laws with concise provisions for elections, powers, functions and procedures of the Island Council and the conduct of cases before the court. The jurisdiction of the court was fixed with the upper limit of three months' imprisonment. Regulation 16 provided:

> ‘All cases, civil and criminal, not within the jurisdiction of the Island Court, shall be heard and determined by the High Commissioner's Court for the Western Pacific in accordance with the provisions of the Pacific Order in Council 1893.'

[69] The Fiji Supreme Court was appointed the Court of Appeal. Crimes of rape, murder or other serious sexual offending were not referred to in the regulations. Provision was made for the formal promulgation of laws by reading the same in Council and affixing a copy to the public notice board (reg 6(5)). A return of all court cases was required to be sent to the High Commissioner by the Island Secretary.

[70] Also in 1940, H E Maude produced a document styled Hints and Instructions to the Chief Magistrate, which emphasised the limited jurisdiction of the local court and stated:

> 'Should any offence be committed in the island which is not within the jurisdiction of the court the particulars should be sent immediately to Fiji, if possible by telegraph, in order that an official may be sent competent to deal with the case-see Regulation 16.'

Maude returned to Pitcairn in 1944 and invited comment and criticisms of the Regulations. The only reactions were favourable.

[71] In 1950 Deputy Commissioner H A C Dobbs spent several weeks on Pitcairn. He recommended that the power of appointment of police officers be transferred from the Island Council to the High Commissioner, there be an appointment of an Inspector of Police, the island gaol be rebuilt and an increase in the number of visits by administrative officers from the Western Pacific High Commission.

[72] In 1951 the 1940 Regulations were tested on an appeal to the Fiji Supreme Court by Floyd McCoy. Vaughan CJ declined jurisdiction, holding that the Regulations were ultra vires the High Commissioner's powers, which did not include power to create courts or confer jurisdiction on courts. This led to the enactment of the Pitcairn Order in Council of 1952, creating the office of Governor of Pitcairn Island by the Governor of Fiji, empowering the Governor to make laws for peace, order and good government of Pitcairn, and for the creation of courts. Ordinances were passed giving effect to the Pitcairn Island Government Regulations (Ordinance No 2 of 1952) and amendments made relating to the term of office of the magistrate. Four other ordinances were passed and forwarded to the Chief Magistrate with an explanatory letter requiring that one copy of each 'be fastened on the notice board for all the people to see' and warning that certain offences under the Marriage Ordinance-

> ‘are beyond your power as Chief Magistrate to impose. Any offences against this Ordinance will therefore be dealt with by the High Commissioner's Court which has jurisdiction in Pitcairn until the Governor establishes his own court. Section 43 of the

> Ordinance covers this matter.'

[73] In February and March 1958 D McLoughlin visited the island as judicial Commissioner to hear a divorce case. He wrote, at p 51 of his history:

> 'Over a period of nearly six weeks I discussed the various aspects of the island administration with the island officials and with the newly appointed education officer ... devoted a considerable amount of time in explaining and demonstrating court procedures to the members of the Island Court and to the Inspector of Police.'

[74] In 1961 the Judicature Ordinance divested the High Commissioner's Court of jurisdiction and gave jurisdiction to the Supreme Court of Fiji, declaring the substance of law in force in England to be in force in the island (s 7) but only to the extent local circumstances permit (s 8). The Chief Magistrate's Court was styled the Subordinate Court.

[75] The next revision of the 1940 Regulations occurred with the 1966 Justice Ordinance, which created an Island Court, Island Secretary and (in s 5) gave jurisdiction over criminal cases, arising from offences committed on the island against the provisions of any ordinance, to the Island Court. This jurisdiction expressly excluded English offences as referred to in s 7 of the judicature Ordinance 1961.

[76] Section 16 of the 1966 Justice Ordinance provided for the issue of an arrest warrant where a charge of treason or murder was laid, and Pt VI of the Ordinance provided the procedure for preliminary inquiry and committal where a charge was brought for an offence not triable by the Subordinate Court.

[77] In our view, the absence of the creation by ordinance of any serious offences infers the application of English criminal offences, which were, in any event, in force pursuant to s 7 of the Judicature Ordinance 1961.

[78] The archival materials furnished during the hearing give a clear reconstruction of the process undertaken leading to the enactment of the 1966 Justice Ordinance. In early 1965, 15 copies of the draft Judicature Ordinance and Local Government Regulations were sent to the Island Council from London.

[79] In March 1965 Commissioner Reid Cowell visited Pitcairn and discussed the draft with the Council, using notes, prepared in advance. The notes contain references to the procedure for obtaining legal advice by radio in cases of doubt (s 5(b)). In a letter of 22 November 1965 to the Island Magistrate, Cowell noted, in particular, the limits on the application of English laws by local circumstance (ss 55-68):

> 'This means that if there is any matter not covered by the law of Pitcairn the law of England could be invoked.'

As to sexual offending, he said, of s 88:

> 'We have left the wording of this provision as the Council last March wanted it. Remember, however, that English law also applies and that if any male person should have

> carnal knowledge of a female child under the age of 12 years, that male person would be liable to be prosecuted under the English law of rape.'

The minutes of the island Council meeting of 8 December 1965, record in part:

> 'The G.A. [Government Adviser] chaired the remaining part of the meeting. G.A. carefully read through the New Justice Ordinance to the I.C. [Island Council] Moved Tom sec Jacob that the New Justice Ordinance be accepted & a telegram acknowledging the Council's resolution on this matter be transmitted to the Com [Commissioner]. Carried.'

The telegram, dated 10 December 1965, from the Magistrate Pitcairn to Govcom Suva, reads starkly: 'Justice Ordinance No. 1 of 1966 approved in full by Council.'

[80] Known legal matters referred to the High Commissioner or Governor during the period 1940 to 1971 because of doubts about local jurisdiction include:

> (a) 1941-recidivist serial, and mentally weak, offender Maurice Christian during Maude's visit of 1941.
>
> (b) 1946 - Laura Christian abortion case.
>
> (c) 1947-Trespass. Cutting of Eileen's orange trees by Elwyn.
>
> (d) 1958-Clarence Young's divorce heard by McLoughlin during visit.
>
> (e) 1971-Donald Young's intrusion into Tom and Betty Christian's house.

[81] The granting of independence to Fiji in 1970 brought the next event in the legal development of Pitcairn. The Pitcairn Order in Council, effective from 10 October 1970, continued the regime put in place in 1952, but the governorship was transferred to the incumbent holding the position of UK High Commissioner to New Zealand, in Wellington. The Judicature Ordinance of 1970, dated 27 October 1970, was published on the notice board at Pitcairn on 1 December 1970. This ordinance provided for:

> (a) The creation of the Supreme Court of Pitcairn, Henderson, Dueie and Oeno Islands (s 3).
>
> (b) Judges thereof to be appointed by the Governor (s 5).
>
> (c) Such court to possess all the powers, jurisdiction and authorities of the High Court of Justice in England (s 6).
>
> (d) The continuation of the Island Magistrate's Subordinate Court (s 10).
>
> (e) The Supreme Court was deemed duly constituted notwithstanding any vacancy in the office of any judge (s 5(2)).

(f) Section 14 provided that the common law, the rules of equity and the statutes of general application in force in England at the commencement of the Ordinance were in force in the islands 'so far only as the local circumstances and the limits of local jurisdiction permit'.

[82] On 6 November 1970, not suspecting that subsequent events would show otherwise, Commissioner C E Dymond wrote to the Island Magistrate, forwarding new legislation and explanatory notes, expressing a view which we think reveals the administration's state of mind, for no judges were appointed until the investigations leading to these trials became necessary, he said (at para 3):

> 'With Pitcairn's splendid record of freedom from crime and civil litigation it seems highly improbable that a need will ever arise for the establishment of such courts, but you will appreciate that provision for doing so must be made for the continued protection of the people of Pitcairn however unlikely this need may appear to be.'

[83] The discovery of allegations of sexual offending in the late 1990s made apparent to the Governor's office the need for adequate legislative provision to enable trials involving serious crime to be held according to modern requirements. There followed both executive activity to make appointments and legislative activity, as tabled in the schedule which we adopt from the Public Defender's submissions.

Year	Short Title and description	How repealed or otherwise dealt with
1952	Interpretation and General Clauses Ordinance	Now CAP 1
1961	Judicature Ordinance	Repealed by CAP 2 of 1970
1966	Justice Ordinance	Repealed by CAP 3 OF 1999
1968	Judicature (Amendment) Ordinance	Repealed by CAP 2 of 1970
1970	Judicature Ordinance	Repealed by CAP 2 of 1999
	Justice (Amendment) Ordinance	Repealed by CAP 3 of 1999
1971	Judicature (Amendment) Ordinance	Repeated by CAP 2 of 1999
	Revised Edition of the Laws Ordinance	Spent
1972	Justice (Amendment) Ordinance	Repealed by CAP 3 of 1999
1999	Judicature (Courts) Ordinance	Now CAP 2
	Justice Ordinance	Now CAP 3
	Judicature (Appeals in Criminal Cases) Ordinance	Now CAP 4
	Prisons Ordinance	Now CAP 7
2000	Justice (Amendment) Ordinance	Incorporated in CAP 3
	Judicature (Courts) (Amendment) Ordinance	Incorporated in CAP 2
	Justice (Amendment) (No 2) Ordinance	Incorporated in CAP 3
	Judicature (Appeals in Criminal Cases) (Amendment) Ordinance	Incorporated in CAP 4
	Justice (Amendment) (No 3) Ordinance	Incorporated in CAP 3
	Evidence (Proof of Written Laws) Ordinance	Now CAP 6

	Provides judicial notice to be taken of written laws	
	Judicature (Courts) (Amendment) (No 2) Ordinance	Incorporated in CAP 2
	Justice (Amendment) (No 4) Ordinance	Incorporated in CAP 3
	Judicature (Appeals in Criminal Cases) (Amendment) (No 2) Ordinance	Incorporated in CAP 4
	Summary Offences Ordinance *Provides for summary offences in the Magistrates' Court*	Now CAP 5
	Justice (Amendment) (No 5) Ordinance	Incorporated in CAP 3
2001	Legal Aid (Criminal Proceedings) Ordinance *Provides far the granting of legal aid in criminal cases*	New CAP 9
	Legal Practitioners Ordinance *Provides for the admission of legal practitioners and in particular provides that a legal practitioner can hold the appropriate authority from any Commonwealth country*	Now CAP 10
	Ordinance to Amend Certain Laws for the Purpose of the Revised Edition of the Laws 2001	
	Judicature (Courts) (Amendment) Ordinance *Amends the Judicature Ordinance to update the references to courts in England and Wales in s 2*	Incorporated in CAP 2
	Evidence (Special Measures Directions) Ordinance *Provides for special measures directions in evidence in criminal cases for the protection or assistance of disadvantaged witnesses, in line with the Youth Justice and Criminal Evidence Act 1999 (UK)*	Now CAP 31
2002	Annual Revision of the Laws Ordinance	Now CAP 52
	Sentencing (Offences against the Person) Ordinance *Reproduces the provisions of ss 3 to 10 of the Sentencing Act 2002 (NZ) as to the purposes and principles of, with reference to offences against the person, including all sexual offences*	Repealed
	Public Defender in Criminal Proceedings Ordinance *Provides for the establishment of the Office of Public Defender*	Now CAP 33
	Sentencing (Community-based Sentences) Ordinance *Modelled upon the Sentencing Act 2002 (NZ) as to*	Repealed

	sentences of supervision and community work	
	Parole Ordinance *Reforms the law relating to the release from detention of offenders serving sentences of imprisonment. Closely based on Parole Act 2002 (NZ)*	CAP 34
	Legal Aid (Criminal Proceedings) (Amendment) Ordinance	Incorporated in CAP 9
	Victims of Offences (Ordinance) *Provides for ensuring the rights of protection of victims of crime*	Repealed
	Sentencing Ordinance *Reforms and consolidates the law on sentencing. This is based on the Sentencing Act 2002 (NZ)*	Now CAP 35
	Victims of Offences (No 2) Ordinance	Now CAP 36
	Prisons (Amendment) Ordinance *Authorises the Governor to declare prisons in other countries where a Pitcairn court is authorised to sit by reason of the Pitcairn (Amendment) Order 2002*	Incorporated in CAP 7
	Justice (Amendment) Ordinance *Amends the Justice Ordinance by: (i) expanding the language of s 24(3) to allow for the sitting of the court in any place other than the islands, (ii) replacing s 66 of the ordinance with a paper committal, (iii) making the necessary provision for the validity of and objections to certain counts in informations filed in the Supreme Court, and (iv) prescribing procedure of the preliminary determination of the admissibility of evidence*	Incorporated in CAP 3
	Judicature (Appeals in Criminal Cases) (Amendment) Ordinance *Amends the Judicature (Appeals in Criminal Cases) Ordinance by (i) providing a right of appeal in various important preliminary matters arising before trial, (ii) establishing a right of appeal against sentence by the Public Prosecutor; and (iii) clarifying the degree of miscarriage of justice to which the proviso to s 37(1) of the principal ordinance applies*	Incorporated in CAP 4
	Judicature (Courts) (Amendment) Ordinance *Amends by (i) making provision for the formal appointment of registries of the Pitcairn Courts, (ii) prescribing a procedure for seeking a change of venue of any sitting of the Supreme Court of Magistrates' Court, and (iii) providing that court*	Incorporated in CAP 2

	documents and proceedings shall not be invalidated only for a defect or form unless substantial injustice has resulted	
	Bail Ordinance *Provides for bail in criminal cases*	Now CAP 37
	Victim of Offences (No 2) (Amendment) Ordinance *Ensures the rights and protection of victims of crime*	Incorporated in CAP 36
	Judicature (Appeals in Criminal Cases) (No 2) (Amendment) Ordinance	Incorporated in CAP 4
	Ordinance to Amend the Legal Aid (Criminal Proceedings) Ordinance *By classifying as to experience and skill*	Now CAP 9
2003	Judicature Amendment Ordinance *Gives effect in Pitcairn law to the Agreement between the UK Government and the New Zealand Government signed in Wellington, New Zealand, on 11 October 2002 concerning the holding of Pitcairn trials in New Zealand and other related matters*	Now CAP 38
	Judicature (Appeals in Criminal Cases) (Amendment) Ordinance *Amended the Ordinance by repealing s 35DD(4)*	Incorporated in CAP 4
	Justice (Amendment) Ordinance	Incorporated in CAP 3
	Pitcairn Court of Appeal (Registry) Ordinance	Now CAP 39
	Justice (Amendment) (No 2) Ordinance	Incorporated in CAP 3
	Legal Aid (Criminal Proceedings) (Amendment) Ordinance	Incorporated in CAP 9
	Children Ordinance	Now CAP 11
	Judicature (Appeals in Criminal Cases) (Amendment) (No 2) Ordinance	Incorporated in CAP 4
	Judicature (Courts) (Amendment) Ordinance	Incorporated in CAP 2
	Judicature Courts Amendment (No 2) *Enacted on or about 10 November 2003 and gives tenure to the magistrates and judges*	Incorporated in CAP 4
2004	Justice (Amendment) Ordinance *Enacted 2 September 2004 amending the Justice Ordinance by inserting s 70CA and 70CB to empower the Supreme Court to direct that evidence by given in criminal proceedings by way of live telephone link. The Ordinance is based on s 32 of the Criminal Justice Act 1988 (UK) and s 51 of the Criminal Justice Act 2003 (UK)*	Now CAP 3

	Judicature (Appeals in Criminal Cases) (Amendment) Ordinance *Enacted 17 September 2004 to amend the Ordinance by repealing s 35DD4*	Now CAP 4
	The Local Government (Special Electoral Provisions) Ordinance 2004 *Enacted October 2004, provided a special definition for "conviction" and "convicted" and terminated the current term of office of the Mayor and the Chairman of the Internal Committee*	
2005	Ordinance to amend Judicature (Courts) Ordinance *Amends s 11(5) by omitting the words "during Her Majesty's pleasure"*	Now Cap 2

[84] The recent legislation continues the tradition which has existed in the Pitcairn legal structure since 1838, that the justice system for minor offences articulated in the various Constitutions and, later, ordinances, was administered at a local level through the Island Magistrate in his various manifestations. In addition, serious crime is brought before the Supreme Court, which, since 1970, is the successor to British Naval captains, the High Commissioner of the Western Pacific and the Supreme Court of Fiji. This court has always existed, though its judges have usually been appointed ad hoc, with the exception of the Supreme Court of Fiji period. The appointments now made with tenure under the current ordinances are in recognition of the modern requirements for judicial independence,

[85] While the full range of offences which might be regarded as serious has never been articulated on the island, many have been, as is evidenced by the documents referred to above, and there has been a long tradition of recognising rape and other sexual offending, abortion, and murder among them. The instances where offshore help was sought, historically, demonstrates, we believe, a conservatism on questions of sexual morality from the earliest days and a recognition of public wrongdoing and legal complexity, comparable with the citizens of any other civilised nation. The failure to articulate a definition of rape within a criminal code leaves the Pitcairn citizen in no different a position from Englishmen, until recently. The oral evidence of the current island Mayor, given before us, demonstrates a standing knowledge that sexual intercourse achieved by force was a concept of rape understood on Pitcairn.

PUBLICATION OF ORDINANCES ON PITCAIRN

[86] The accused have questioned whether Pitcairn ordinances have ever been properly published on Pitcairn Island. In their petition to the Privy Council they state (at para 39):

> 'There is no evidence known to your Petitioners when, where or if, Ordinances under the 1952 Order or the judicature Ordinance 1970 was published at a place or places in Pitcairn Island. This apparent failure to publish on Pitcairn raises significant issues because the said laws were to come into operation on the date on which they were published in the Island unless in those laws or in some other enactment a date on which they were to come into operation was provided.'

[87] This question forms part of the promulgation argument which has been developed on behalf of the accused. Their starting point, as is apparent from the petition, is to challenge whether the relevant ordinances have ever been published at all, before going on to submit that even if the ordinances themselves were published, such publication was insufficient to alert the island population, or more specifically the accused, that they were subject to English laws in the case of serious criminal offending.

[88] As the argument developed before us, it became apparent that the actual publication of ordinances was not as strong an issue as pleaded in the petition because of the abundance of material that has now, since the trials on the island, been discovered to both sides by the British government and the Pitcairn Administration. We have had placed before us copies of the relevant ordinances, supported by exchanges of correspondence, Council minutes, telegram acknowledgements, printing requests for Gazette notices, all for the purpose of showing that on each occasion an ordinance was enacted by the Governor, whether in Fiji or more recently in New Zealand, it was properly published to the island community.

[89] The Order in Council 1952, as well as empowering the Governor to make laws for the peace, order and good government of the island and to constitute a court in and for the island, also made the following provision for the promulgation of those laws (s 5):

> '(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.'

[90] When the Pitcairn Order in Council 1970 came into effect on 10 October 1970 the powers conferred on the Governor under s 5 to make and publish laws were the same as provided in 1952, except that the requirement for notification in the Fiji Royal Gazette was, for obvious reasons relating to Fiji's independence, dispensed with. No alternative form of notification was substituted.

[91] Of importance to these proceedings, having regard to the dates of the charges brought against the individual accused, are the dates of publication and the coming into force of the following.

(a) The Pitcairn Island (Local Government Regulations) 1952;

(b) The Judicature Ordinance 1961;

(c) The Justice Ordinance 1966;

(d) The Judicature Ordinance 1970;

(e) The Judicature Amendment Order 1983; and

(f) The Judicature Courts Ordinance 1999.

[92] To meet the Public Defender's challenge, the Public Prosecutor presented documents to demonstrate a number of occasions during the period 1952 to 2000 when memoranda, explanatory notes and guidelines were sent to the island by officials from the Governor's office, with instructions on the publication and distribution of ordinances. More than one copy of the ordinance was invariably sent to the island, sometimes sufficient copies for every household. Ordinances dealing with matters of law, courts and the administration of justice form only part of the laws relating to Pitcairn. Other ordinances have been enacted over the same period relating to such diverse areas as local government, lands and administration of estates, adoption of infants, births and deaths registration, marriage, pensions, post office, trade unions and trade disputes, fugitive criminals, visiting forces, and the application of the Geneva Conventions. The practice on every occasion, as directed by the Governor, was that a copy of the ordinance or proposed ordinance be placed (affixed) to the notice board and the date of placing or affixing immediately notified by radio, telegram or, more recently, email to the Governor's office. That long-established practice is continued, as confirmed before us by island witnesses.

[93] Having considered the documentation produced, we are satisfied that the requirements of the Governor as to the publication, the date of publication, and therein the coming into force of the ordinances, were correctly carried on in respect of the following:

(a) Pitcairn Island (Local Government Regulations) Ordinance 1952 made under the Order in Council of 1952

On 21 August 1952 the Governor directed that in accordance with 55(3) of the Pitcairn Island Order in Council 1952 laws shall be published by posting a copy on the public notice board at the courthouse in Pitcairn Island. Subsequently, on 2 September 1952, the Secretary for the Governor wrote to the Chief Magistrate at Pitcairn Island in the following terms:

> ‘1. In my telegram of the 5th April I told you that I would be sending some new laws to regularize the Island Regulations and general customs. As the Chief Secretary explained in his letter of the 9th January, when the High Commissioner governed Pitcairn he made laws or regulations under the United Kingdom Pacific Order in Council, 1893, but when the Governor of Fiji took over the responsibility for the administration on the 1st April this year a new United Kingdom Order in Council came into force, called 'The Pitcairn Order in Council 1952' and the old Order of 1893 ceased to have effect.
>
> 2. Therefore to keep the Island Regulations in force, to make the island Court's decisions legal, to provide for the proper registration of births and deaths and to provide for the celebration and registration of marriages, a new series of laws had to be made under this Order in Council, and the Governor has made the following four laws-"Ordinances" as they are called in legal language:

(i) The Interpretation and General Clauses Ordinance 1952;
(ii) The Pitcairn Island (Local Government Regulations) Ordinance 1952;
(iii) The Births and Deaths Registration Ordinance 1952;
(iv) The Marriage Ordinance 1952.

Four printed copies of each are enclosed. One complete set of these is for your records as Chief Magistrate and you should see that they are kept in a safe place as part of the public records of Pitcairn Island. One of 9 the other sets should be fastened on the notice board for all the people to see and the other two sets are "spares" to be used as required.

3. Before going on to explain each Ordinance there is an important duty which I wish you to carry out faithfully. You will notice at the top of each Ordinance, just under the heading, a line of type like this: [-, 1952]. The date which has to be filled in there is the date on which the Ordinances come into force. Now it is obvious that they cannot become law until the people have seen them so the Governor has directed that they shall come into force on the date you fasten them on the notice board. Accordingly I wish you to send me an urgent telegram as soon as you have done this and telling me the date when you did it.' (Emphasis in original>)

By a telegram dated 17 October 1952 the Chief Magistrate advised that the ordinances came into force on Thursday 16 October. A notice to that effect was prepared for publication in the Fiji Royal Gazette. A letter of confirmation was subsequently sent by the Governor to the Secretary of Stale.

(b) Judicature Ordinance 1961 (No 1 of 1961)

This ordinance substituted the Supreme Court of Fiji for the High Commissioner's Court and stated by way of further provision:

‘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 of the laws of England extended to the Islands by this Ordinance shall be in force therein so far only us 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, officers, persons, moneys, penalties and otherwise as may be necessary to render the same applicable to the circumstances.'

The ordinance was forwarded to the Chief Magistrate under cover of a letter dated 11 September 1961 written as directed by the Governor with the request that the magistrate publish one copy on the public notice board and notify by radio the date of publication. By telegram dated 9 October 1961 the Chief Magistrate confirmed publication on the notice board on 8 October 1961. Notice of the ordinance having been so published was forwarded to the Fiji Royal Gazette on 12 October 1961.

(c) Justice Ordinance 1966

The publication of this ordinance has already been discussed in para [79], above.

(d) Judicature Ordinance 1970

This ordinance established the Supreme Court of Pitcairn, Henderson, Ducie and Oeno Islands and also made provision for a Subordinate Court in addition to the Island Court to be presided over by a magistrate appointed by the Governor. As to English law being in force on the island, s 14 of the 1970 Ordinance replaced s 7 of the 1961 Ordinance, stating:

> '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.'

The reference to English law being subject to the limits of local jurisdiction remained the same. A copy of a telex communication from the magistrate on Pitcairn island confirms that the judicature Ordinance 1970 was published on the public notice board on 4 March 197, although in this case it had officially come into force on the date of its enactment, 27 October 1970.

(e) Judicature Amendment Ordinance 1983.

The principal purpose of this ordinance was to provide that the law then in force in England as at 1 January 1983 applied to Pitcairn Island, an advance in time from the law as it was on 27 October 1970. A telegram from the island Magistrate confirming that the ordinance was placed on the Pitcairn Island notice board on 14 November 1983 was produced to the court. Further, by that time it had been suggested by the Commissioner to the Education Officer stationed on the island that attention be drawn to new ordinances in the Pitcairn Island news sheet Miscellany,

(f) Judicature (Courts) Ordinance 1999

This ordinance established the current Supreme Court and the Magistrates' Court. It repeats in similar terms to previous ordinances that the common law, rules of equity and the statutes of general application as in force in and for England, but states for the time being, shall be in force in the islands, subject to local jurisdiction and circumstances. Confirmation of the publication of the ordinance by posting on the public notice board on 25 January 2000 is contained in an email letter signed by the Acting Mayor, Jay Warren.

[94] We are left with no doubt that during the period the offending by the accused took place there had been proper publication of the 1961, 1970 and 1983 Judicature Ordinances stipulating that English law applied to the island, subject to local laws and circumstances.

[95] We accept, however, that at no time during the currency of the accused's offending was English law

itself published on the islands. There was no despatch of statutes, legal texts or such compendium publications as *Halsbury's Laws of England*. Not until 1997 did a copy of *Halsbury's Laws of England* (4th edn) arrive on the island.

KNOWLEDGE OF SEXUAL OFFENCES LAW ON PITCAIRN

[96] In the light of our findings in relation to publication, the question now to be considered is whether this degree of publication, together with other factors that have been, or are to be, referred to in this judgment relating to the accused's knowledge of the law, is sufficient to alert the accused that rape, indecent assault and incest are crimes punishable, if committed on the island, under English law.

[97] The Public Defender submits that apart from an oblique reference to the English general statutes applying to Pitcairn in the Judicature Ordinances, the substance of English criminal offences and penalties were not set out so as to inform Pitcairn islanders clearly in advance of prosecution of the seriousness of offending under English law. Documents relied on by the Public Defender reveal a process of consultation with the Governor, generally after an incident had occurred, in an ad hoc and occasional way. The fact that advice was sought from time to time could have heralded to the Administrators that there was a need to confront this issue directly and provide Pitcairn with a clear and meaningful summary of the relevant laws and penalties under English law. Had the Pitcairn islanders been properly advised of the consequences of serious offending and-young men in particular-educated on the threat to their liberty if they engaged in serious criminal misconduct, these crimes may never have happened.

[98] In particular, the Public Defender relies on the following documents:

> (a) In 1996 Leon Salt, Pitcairn Commissioner, had suggested to the Governor that a case could be made to the Overseas Development Agency (ODA) for support to conduct a complete revision of Pitcairn's judicial system.
>
> (b) Governor Williams commented on the inadequacy of the current Pitcairn legal system to deal with cases involving sex and underage girls in a letter to Mr C J B White of the ODA dated 16 December 1999.
>
> (c) Mrs K S Wolstenholme, the Deputy Governor, in a letter dated 6 January 2000 to Commissioner Salt, informed him that the Governor was very concerned to have a workable legal system in place as soon as possible and that the age of consent question be settled.
>
> (d) Mrs Wolstenholme's letter (as Acting Governor) to Mr Stephen Evans of the Foreign and Commonwealth Office (FCO), dated 1 May 2000, acknowledges that the situation was partly of the Administration's making and that it was 'not altogether surprising if the community does not see the laws as applicable to them'.
>
> (e) Governor Williams, in a letter to Mr Evans dated 24 October 2000, expressed concern that if the prosecutions were to fail because the law was so obscure it could not reasonably be enforced, or the widespread nature of the offences, and the total absence over many years of any attempt by Her Majesty's Government to apply the law, meant that it could not reasonably be applied now without further warning,

> (f) A memorandum dated 30 October 2000 from Mr C J B White to Baroness Scotland, copied to others, noted that the National Institute for Social Work commented that with hindsight the structure of governance on Pitcairn had failed the community.

[99] The Public Defender submitted that at the meeting of the Pitcairn Council held on 9 November 1970 concern was expressed for the protection of girls, and the fact that rape was dealt with under English law evidences that little was done to properly inform the Pitcairn population covering the application of English law between Commissioner Reid Cowell's efforts in about 1965 to the present.

[100] The Public Prosecutor, in response, identified specific occasions where, he submitted, Pitcairn islanders have been informed, or demonstrated knowledge, that English sexual offences law applied.

[101] We were referred to the documents leading up to the enactment of the justice Ordinance 1966, in particular the exchange between Commissioner Reid Cowell and the Island Council referred to in para [79], above. Reid Cowell prepared a paper recording his discussion with the island Council on the justice Ordinance. He noted points which required further consideration by Mr McLoughlin. In all cases he had the Council's specific approval to resolve them with Mr McLoughlin and once the text was prepared it would be sent to Pitcairn for final approval by the Council before enactment. The Council agreed that, in view of the type of offence provided for in the ordinance, it might be expeditious and less inconvenient to the Supreme Court, if the Chief justice (or puisne judge) were the first point of appeals. He recorded (s 10): 'I have no doubt at all in my own mind that this would be the more advantageous procedure for the Island.' He made reference to the draft s 69 and said:

> 'This is an extremely controversial provision and, after much discussion, it was decided to change only the penalty, to 100 days' imprisonment. There was a strong feeling, however, that sexual relations with a girl under 12 years should carry a heavier penalty and the Council wondered whether it, like rape, could be dealt with under s 6 if a need arose.'

On enactment, s 69 became s 88 dealing with unlawful carnal knowledge.

[102] Reid Cowell wrote to the Island Magistrate on 22 November 1965, concluding his letter by noting that during his last visit to Pitcairn they discussed the new justice Ordinance in Council section by section. Mr McLoughlin had taken action on the recommendations that had been made and he was enclosing a revised text for further consideration by the Council. His letter included the following notes prepared to assist the Council in its discussion of the ordinance section by section:

> ‘s. 5. The Court decide whether a case is within its jurisdiction or not. If there is any doubt South Pacific Office can be consulted by radio.
>
> s. 6. From time in time cases may arise over which the Court has no jurisdiction. We have provided in this section for jurisdiction to be extended if a need arises. The procedure to follow is to let South Pacific Office know by radio the outline of the offence when we can advise the court how to proceed. It should be remembered that in addition to the local law of Pitcairn as enacted in the Ordinance, certain parts of the law of England apply by virtue of s. 7 of the judicature Ordinance No. 1 of 1961.

> ss. 55-68. As noted in the comment on s. 6, the Law of England applies to Pitcairn "so far only as the circumstance and the limits of local jurisdiction permit and subject to any existing or future ordinance" (s. 8 Ordinance of 1961). This means that if there is any matter not covered by the Law of Pitcairn the law of England could be invoked. This law may be applied by the Supreme Court or the Subordinate Court or the jurisdiction of the Island Court may be specifically extended-see s. 6. If therefore, any person commits an offence on Pitcairn (such as murder, treason, rape etc.) and the island Court does not have jurisdiction a preliminary inquiry can be held under the provisions of this part.'

Reid Cowell gave specific advice relating to the process in such trials, reminding the island, that if they were doubtful of any point of procedure they could always consult the South Pacific Office by radio:

> 'The Magistrate alone conducts the preliminary inquiry-see s.3 (3)(b)(ii). The procedure is quite straight forward but please note it is an inquiry not a trial and that the accused has a complete right to make no statement himself (s.61(1)). If he elects to make a statement he may be questioned. Note that the whole record of the inquiry, properly authenticated, must be sent to the Governor and also to the Legal Adviser
>
> (s.67), if the accused is committed for trial. If any cause for a preliminary inquiry should arise and you are doubtful on any point of procedure you can always consult South Pacific Office by radio.' (Cowell's emphasis.)

He referred to the unlawful carnal knowledge provision in s 88:

> ‘We have left the wording of this provision as the Council last March wanted it. Remember, however, that English law also applies and that if any male person should have carnal knowledge of a female child under the age of 12 years, that male person would be liable to be prosecuted under the English law of rape. In such a circumstance it would be proper for the court to hold a preliminary inquiry under part VII of this Ordinance.'

[103] A public meeting was held on 9 November 1970 when all Council members, parents and children from age 10 were present. The purpose of the meeting was to warn the parents and children about s 88. The minutes of the meeting read:

> 'PRESENT: All Council Members with Parents and children from age 10 years in attendance. Pastor offered a prayer to open the meeting.
>
> PURPOSE: to warn the parent and children against the Unlawful Carnal Knowledge-Section 88 of Pitcairn Ordinance of 1966. A complaint was made that raping or the illicit carnal knowledge of a girl age 11 years without her consent was suspected to have been committed but owing to no definite proof nothing could be done other than a warning given in Council Meeting. Anderson queried the modification of ages from 16 years to 12 years. The I.M. [Island Magistrate] said it was modified when Mr Cowell was here. O.A. [Government Adviser] and Tom said that if an offence is committed to a girl below the age of 12 years the case will require higher Authorities to deal with the case. Pastor stressed the

> importance of the parents guarding their young girls from acting free with the boys especially running around with the boys at various places on the island. After discussing different matters concerning Carnal Knowledge the parents was dismissed and Council Meeting open for Monthly Government Business.'

[104] On 13 November 1997 Leon Salt, as Government Adviser, wrote to Thomas Christian in response to his note (12 November 1997, para 6) regarding the Council motion to raise the level of consent from 12 to 16 years old, as follows:

> Assume this is with reference to Section 88 of justice Ordinance. Age of consent on Pitcairn is 16 years, under British law ... British law applies to females under the age of 12 years (offence punishable by life imprisonment). Pitcairn law (Section 88) applies to females aged 12 to 16 years. Note that Pitcairn law does not cover rape-this comes under British law, punishable with up to life imprisonment.'

[105] Leon Salt wrote to the Commissioner for Pitcairn Islands on 28 March 1984 about the results of an alcohol referendum on the island. He was a permanent resident on Pitcairn island at the time. He noted that the opponents of alcohol on the island are concerned about the risk that alcohol could lead to rape, among other things.

[106] Two prominent Pitcairn islanders gave evidence before us. Betty Christian, in an affidavit dated 27 October 2004, stated (at para 3.7):

> 'Given our status as a British possession, it has always been obvious that British law would apply to Pitcairn if the need arose. All our legal authority ultimately comes from Britain, and it has always been common sense that British law would cover this Island for anything not dealt with in the Local Ordinances or Regulations.'

And (at para 5.2):

> 'Our Ordinances and local law have never attempted to deal with serious crimes (like murder, rape, major dishonesty and so on). However, it has never been thought that Pitcairn has been "lawless", or a place where major crimes could be committed without consequences. To the contrary, it has always been obvious that serious crime would be prosecuted under English law, with the assistance of the Governor's office. If anyone had ever been in doubt about the laws covering serious crime, they could have contacted the Governor's office, or the Administrator's office. An approach could also have been made to the Island Magistrate, the Island Police Officer, a Councillor, or the Government Advisor, who would no doubt have contacted the Governor's office for advice. Information about the laws was readily available from any of these sources.'

Further (at para 5.3):

> '... it has always been a matter of common sense that serious sexual offending, such as

> rape, incest, or indecent assault, would be prosecuted under English law'

[107] Thomas Christian, in his affidavit dated 27 October 2004, stated (at para 2.2):

> "I agree that it is common sense that English law has always applied in Pitcairn, if no local law applies. I remember a provision in the Ordinances that English law applies here if no local law applies, and I would always 9 have expected serious offending, including murder, rape, and serious sexual offending, to have been prosecuted under English law, with the assistance of the Governor's Office and the Administration Office.'

And (at para 2.3):

> 'I am not aware of any belief among Pitcairn Islanders that we are somehow immune from prosecution. Nor has there been a sense that this is a "lawless" society. Pitcairn is a Community of civilised, educated people, and I have never been aware of any sense that sexual offending would be tolerated or condoned here.'

[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. 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.

[109] We are of the view that the concerns over governance and the laws expressed by the Acting Governor and Governor Williams to Mr Evans at the Foreign and Commonwealth Office, and the National Institute of Social Workers, were made with the benefit of hindsight and in the context that the British were 'now facing a very different prospect from the one we anticipated' (Mrs Wolstenholme to Mr S Evans at the FCO, 1 May 2000). By this time, 13 females had made serious allegations against 17 different males (four of whom were now deceased) over a period of 20 years. Unlike the court, these commentators have not had the opportunity to assess or consider the wealth of historical material that has now been made available as a result of this litigation,

[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 through the twentieth century.

POLICING AND LAW ENFORCEMENT ON PITCAIRN

[111] The Public Defender, by way of further submission, contended that until recently there had been no police or law enforcement personnel from Great Britain purporting to uphold English law, especially criminal law, on Pitcairn. The Public Defender argued that whereas Pitcairn had island police officers, in reality they were limited in their training and experience to enforcement of local laws administered by the Island Magistrates. It was contended that island police officers had no experience in the English criminal law. They could be no substitute for a properly trained and experienced British or overseas police officer whose presence would serve to emphasise to the local population that Pitcairn was subject to English law and would constitute a demonstration that, in the event of breaches of that law, it would be enforced.

[112] In similar vein, the Public Defender submitted that the absence of English police officers until 1996 meant that there was little to reinforce in the minds of Pitcairn islanders (particularly Pitcairn youth) an appreciation that English law could be invoked to prosecute serious sexual offending and that, indeed, the law would be enforced if such offending ever came to notice. With no English police presence, no indictable crime having been prosecuted on Pitcairn since 1898 and no accessible publication of the English criminal law, how could it be foreseeable, particularly to a young or youthful islander, that he was at risk of prosecution under English law?

[113] We accept immediately that there was no professional English police presence until the visit of Gail Cox in 1996. In exchanges of correspondence and memoranda between officials and the Commissioner's office now produced (see para [98], above), views have been expressed supporting the appointment of an outside police officer on account of the fact that Pitcairners appear incapable of upholding or enforcing the law in their own community. An 'outside' police presence would enable a new culture to be embedded.

[114] The Public Defender obviously drew strength from the seeming realisation by the administrative authorities, on reflection, that a more efficient police presence may have seen the law, particularly the English law as it applied to the island, upheld and enforced.

[115] The Public Prosecutor responded that notwithstanding the points raised, given the seriousness of the charges, the nature of policing is not a factor that could immunise the accused from prosecution. Once the requirements of accessibility and foreseeability have been met, it must be irrelevant whether particular offences have been detected and prosecuted in the past. There is no concept of estoppel in the criminal law and even if there were such a concept, it could hardly apply to such serious sexual offending.

[116] It was pointed out to us by the Public Prosecutor that the present prosecutions are being conducted in a Pitcairn court under Pitcairn law following an investigation by Pitcairn police officers. English law provides the basis for the charges because Pitcairn law explicitly incorporates English law into local law. It would be wrong to view these proceedings as directly involving 'English police' or 'English authorities' in those capacities. From the point of view of carrying out inquiries on the island, personnel from the Kent County Constabulary have been appointed by the Governor as Pitcairn police officers.

[117] There is evidence before us to show that historically there has been an island police officer present on Pitcairn for at least 70 years. That officer has, since 1950, derived his or her authority from the High Commissioner/ Governor. The role has been to enforce all Pitcairn law, including the Pitcairn law that incorporates English criminal offences.

[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. Before us were documents extending back 50 years and beyond, relating to the duties and responsibilities of island police officers, the duties and responsibilities of, and the instructions for, magistrates, the charging of offenders and the conduct of Island Court hearings, the maintenance of records, the reporting to the Administration and matters incidental to the administration of justice.

[119] In our view, although successive Commissioners and Governors have been concerned to promote and ensure the administration of justice on Pitcairn Island to an appropriate level, they have to take into account local circumstances, including what has been seen to be the desire of Pitcairn islanders to participate in the management of their own affairs to the greatest extent possible. As long ago as 1937 it was observed in a memorandum (no 2334) of the Western Pacific High Commission (at para 10) that:

> 'The Pitcairners appear to be deeply attached to their present system of Government, and it is their desire that Pitcairners, under the High Commissioner, should rule Pitcairn. This disposes of the often repeated recommendation that an officer should be permanently stationed on Pitcairn. The islanders do not want an outsider and, after reading Mr. Neill's report, I do not think the conditions demand it.'

[120] Evidence shows that initially island police officers were appointed by the island community. In the documentation produced are the following.

> (a) A letter dated 30 June 1938 from Richard Edgar Christian, Chief Magistrate, to the Western Pacific High Commission advising that Calvert Warren had been appointed as court policeman.
>
> (b) A note recording that on 1 January 1940 Henry Young was chosen as policeman.
>
> (c) A letter dated 10 January 1941 from the Chief Magistrate to the Secretary, Western Pacific High Commission, advising that Burnett S Christian and Calvert A Warren had been appointed policemen.
>
> (d) A telegram dated 14 June 1941 from the Secretary, Western Pacific High Commission, to the Chief Magistrate as to police salaries.

These appointments demonstrate the desire of the Pitcairn islanders to control their own internal affairs, as far as law enforcement was concerned.

[121] The situation changed in May 1950, when an Inspector of Police and Prisons was appointed directly by the High Commissioner. The Inspector was to have control over two policemen appointed by the island Council. Mr Floyd McCoy, who was to gain a high profile with regard to policing during the 1950s, was appointed as the first Inspector. During his tenure he became involved in the investigation and prosecution of a number of cases heard before the Pitcairn Island Court, as is evidenced by his reports, and also reports from the on-Island Government Adviser (Education Officer), to the Governor in

Suva. He sought guidance as to the approach to be taken with regard to particular offending, the nature and limits of punishment, whether the High Commissioner's Court could be involved in cases of habitual offending and the imposition of more serious penalties.

[122] Floyd McCoy was the prosecutor in 1955 during the trials of a number of Pitcairn Island men accused of carnal knowledge offences involving underage girls. In the case of one accused, Clive Christian, whose offending was more serious, consideration was given to a trial before the High Commissioner's Court on charges under the Offences Against the Persons Act (UK), where the penalty in such a case would be a maximum of 'several years' as against three months allowed under Island Regulation 65. This is an example of knowledge by police on Pitcairn Island that in serious cases resort could be made to English law.

[123] An extract from a Pitcairn Island Administration Report circa 1959 records a request by the island police officer, Floyd McCoy, for direct assistance from Suva when investigating offences such as rape and abortion:

> 'FLOYD McCOY RE CORRESPONDENCE
>
> Although this is a chestnut of some maturity, he has found one more point to discuss. He requests if he may address Suva direct where the matter is outside the jurisdiction of the Island Court - e.g. rape, abortion, etc. He was apparently told to investigate such matters by very quiet methods by McLoughlin and feels that should the Chief Magistrate's family be involved he is in a difficult position.'

[124] We can see from reviewing the documentation that the standard of policing varied over the years. Nevertheless, successive police officers were given instructions as to how to carry out their duties and responsibilities by legal advisers attached to the Pitcairn Island Administration, whether it was the Western Pacific High Commission or its successors, H E Maude, D McLoughlin and J B Claydon would be included.

[125] A good example is contained in a memorandum to the Chief Magistrate dated 23 December 1953, when the Governor's Representative, Mr Claydon, included the following observations under the heading 'Law Enforcement':

> 'During my stay I have been forced to the reluctant conclusion that the Island Council is either unable or unwilling to enforce the laws. The Council is the body elected by the people as their local government and one of its first duties is to see that law and order is kept. When I make these statements I do not mean that I expect the Council now to turn round and institute a reign of terror on Pitcairn: that would achieve nothing. What I mean is that if a person flagrantly and wilfully breaks a law, he or she should be brought to account for it and suitably punished. Nor do I wish to imply that from what I have seen on Pitcairn I consider a general state of lawlessness exists. In fact I have found quite the opposite. The people as a whole seem very happy and peaceful: but even in a community of this size you will always get those few individuals who go too far and flout the law openly. It is those individuals whom the Council should keep in check by a sensible and wise application of the laws-and the Governor expects them to do it. The Inspector of Police is the officer responsible for investigating offences and laying charges, if necessary

> after consultation with the Chief Magistrate. I have instructed the Inspector of Police to make a full report to Suva in future when any charge is abandoned or not proceeded with in court, and to give reasons why.'

[126] It is apparent to us that throughout the 1950s law and order and policing on Pitcairn Island was the subject of regular exchange between the Inspector of Police, the Island Secretary, the Schoolteacher /Administrator, and the British authorities in Fiji. In many cases the cause for these exchanges was offending in respect of adultery, unlawful carnal knowledge and teenage pregnancy. There were frequent trials before the Island Magistrate. The Inspector of Police was the prosecutor and, in some instances, periods of imprisonment were imposed within the limits of the magistrate's jurisdiction.

[127] After 1961, and the coming into effect of the new judicature Ordinance, records relating to policing are not as extensive as in the 1950s. Nevertheless, there is evidence of continued regular visits to the island by such administrative officials as R Cowell (1964), Dr Derek Jakeway (1967), Mr Bain (1968), F E Warner and Mr C E Dymond (both 1971). Their reports indicate that during island visits officials continued to be involved in the giving of legal advice, the explaining of existing laws, the need for new laws or amendments to laws, and the issuing of instructions to island administrators, including the police officer.

[128] During the trials before us on Pitcairn Island in October 24, no evidence was given or adduced that might have assisted us in assessing the effectiveness of island police officers during the periods covering the offending by the individual accused.

[129] 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.

ACCESS TO INFORMATION ABOUT LAWS ON PITCAIRN

[130] The Public Defender submitted that the absence of any intelligible, accessible and plainly publicised code or body of laws prescribing serious criminal offending deprived Pitcairn islanders not only of any practical means of ascertaining what the law was but also meant there was an absence of prescribed laws for serious criminal misconduct. Even if it was accepted that ordinances were published by the Governor so as to bring them into force consistent with the Pitcairn Order in Council 1952 the objection is that there was no practical, meaningful and accessible publication of the fact that Pitcairn islanders were governed by the Sexual Offences Act 1956 and other English statutory legislation governing sexual crimes. The criminal statutes could apply to Pitcairn only by implication and their application would be even more confusing by the fact they were said to be subject to local circumstances, laws and ordinances. There is no express mention in the judicature Ordinances of the application of English criminal law. If the criminal law was not published on Pitcairn, and was merely implied, then it must follow that the accused could not know of the application of the Sexual Offences Act 1956, and related Acts, to them. There is no record of any law on Pitcairn or history of English prosecution under English law. Mr Wayne Richards, a lawyer on Norfolk Island, who was present when Stevens Christian was interviewed, informed Detective Inspector Vinson and Detective Inspector George that he was having difficulty advising on the law and procedure in relation to Pitcairn and English law.

[131] The further submission was made that it is fundamental that a person should not be punished under

the criminal law unless there has been a prior intelligible and practically accessible publication of the criminal law in that jurisdiction sufficient to alert its citizens or in this case, its inhabitants, of the appropriate law that governs their conduct, and the penalties for transgressions. According to the Public Defender, to seek to punish individuals now under English law is unfair, an abuse of process, a denial of rights and of art 6 of the European Convention on Human Rights. Indeed, it was argued it is fundamental in the modern age that the criminal law should be readily accessible and plain to those who are liable to punishment. The more isolated the community, the greater must steps be taken by those responsible for administration to ensure that its inhabitants are informed as to what the criminal law is.

[132] The Public Prosecutor submitted that from the earliest days Pitcairn was in direct contact with captains of Royal Navy ships who personified the law.

[133] The Simons' 1904 Constitution provided:

> 'Should it at any time be necessary, this Council is authorized through the Chief Magistrate to submit to the Deputy Commissioner for the consideration of His Majesty's High Commissioner for the Western Pacific, any suggestions or questions affecting the local laws or regulations either in regard to their amendment, their execution, their extension, or otherwise: but no such suggestions or amendments can be carried into effect pending the written authority of the Deputy Commissioner.'

[134] From the 1950s, there has been a permanent 'Government Adviser' present on Pitcairn to provide a point of contact for islanders with the Administration and a source of information and advice. The role of Government Adviser included acting as an adviser to island officials and the Island Council. A list of education officers contained in the Pitcairn Guide who held contemporaneous appointments as Government Advisers include such names as A Wotherspoon, R Henry, G D Harraway and L Salt, all of whom played a significant part in island life.

[135] In December 1956 the Government Adviser sought advice from the Governor over the payment of fines with money from an offender's friends. When the Inspector of Police F H McCoy, asked a similar question in December 1956, the Governor again responded with advice.

[136] During 1957 Mr Wotherspoon wrote to the Secretary to the Governor about a house of doubtful fame, seeking his opinion as to whether a regulation could be enacted to the effect that the magistrate and his Council could have power to intervene in such a case.

[137] On 16 March 1961 the Government Adviser wrote to the Commissioner in Suva regarding Regulation Number 95, seeking a ruling about public work. A government official had avoided public work and had gone fishing. The response was by telegram on 13 April 1961.

[138] The Government Adviser, in February 1971, sent a telegram about fire damage which was suspected arson. The Commissioner responded and included legal advice regarding the court process. In response, the Government Adviser asked the Commissioner, on behalf of the police officer, what action he should take if a situation arises once more, when, for example, damage caused would appear to warrant a fine exceeding £200.

[139] During June 1976 the Government Adviser sent a telegram to the British High Commissioner about a request by Jay and Carol Warren to adopt a son. The Government Adviser referred to Chapter 8 of the laws and pointed out that the Council had no jurisdiction. Subsequently, in accordance with the wishes of the Island Council, the Governor made the Adoption of Infants Rules 1976. The Island Magistrate was advised of this by letter dated 11 November 1976 and correspondence by telegram and letter demonstrating a supervisory role, until the order was made in July 1979.

[140] In October 1980 Ben Christian asked on behalf of the Council about the obligations of a visitor to the island to carry out public work. A legal opinion was obtained from the honorary Legal Adviser, which was forwarded to the Government Adviser and to the Island Secretary of the Council on Pitcairn Island.

[141] The Public Prosecutor points to there being a full-time Pitcairn Island Commissioner since at least the mid-twentieth century who was responsible for liaising with islanders over practical and logistical matters and who has also been a point of contact for advice over legal matters. There has been correspondence from the Government Adviser to the Commissioner about court procedures, law of carnal knowledge, evidential matters and charges of aiding and abetting. The Commissioner has always had the ability to refer legal questions to the Legal Adviser or the Governor's office.

[142] Administrators, including successive Governors and Commissioners, visited Pitcairn Island, especially after 1950. Although it is unlikely to be a complete list, in this period from 1937 to 1971 (when the Administration shifted from Fiji to New Zealand) the following Administrators were known to have visited the island: J S Neill (five-and-a-half weeks in 1937); H E Maude (eight months in 1940-1941 and again in 1944); H A C Dobbs (in 1950); J B Claydon (1953); D McLoughlin (1958); J W Deering (1959); T R Cowell (1964); Dr D Jakeway (1967); Bain (1968); F E Warner and G E Dymond (both 1971).

[143] We find that the records show that Administrators were preoccupied with questions of law and order, as seen most clearly in the types of ordinance or regulations they consulted on (as to amendments or revisions), the instructions they issued, typically to the Chief Island Magistrate and police officer about court proceedings generally and criminal procedures, including such matters as the adequacy of the island's prison.

[144] Throughout the relevant period numerous copies of ordinances and regulations have been made available to Pitcairn islanders. In some instances, copies of ordinances have been sent to the island with instructions to distribute them to every household. In the mid-twentieth century it was not uncommon for ordinances or important letters or telegrams to be read out at public meetings. Frequently, new ordinances were accompanied by instructions from the Administration explaining the purpose and operation of the new law.

[145] There has never been a barrister or solicitor practising permanently on Pitcairn Island. This is hardly surprising having regard to the size of the population. Nevertheless, the conclusion we have reached is that Pitcairn islanders have had free access to information about their laws through the Government Adviser, the Commissioner and Legal Adviser. Although some of the submissions and requests from islanders have been of a minor nature regarding the substance and content of laws, for example, exchanges over the maximum number of passengers able to be carried on motorcycles and the importation of liquor, the Governor's office has always responded.

[146] We regard the relationship between British administrators and a Pitcairn islanders as close, and there was constant communication on the subject of laws. Betty and Tom Christian both said in their affidavits that it was always possible to refer queries to the Administration through the Government Adviser.

[147] We are left in no doubt 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, such as overhanging coconut trees, if asked to assist. All Pitcairn islanders had access to the law.

THE RULE OF LAW AND LEGAL CONSIDERATIONS

[148] Relying on the factual issues that we have so far discussed, it was the Public Defender's central submission that there was an obligation under the rule of law or a governing body to properly promulgate to its citizens the law that applies to them. Specifically, the Public Defender argues that there was an obligation to promulgate to the Pitcairn Island community not only the local ordinances but also English criminal offences and penalties.

[149] The Public Defender based his argument on the theoretical writings of three extra judicial authors, Lon Fuller, John Finnis and John Rawls. These three authors are in agreement that the promulgation of law is an essential ingredient of the ideal or 'perfect' legal system. Fuller referring to a 'utopia of legality' and Rawls to the 'ideal conception'. Lon Fuller, in his book *The Morality of Law (1969)*, posited that there are eight desirable elements in a legal system. These are: (i) that there must be rules or laws; (ii) that the laws must be promulgated; (iii) that the laws be prospective and not retroactive; (iv) that the laws must be clear (which presupposes that their legal effect can be foreseen); (v) that the laws must not contradict one another; (vi) that the laws must not command the impossible; (vii) that the laws must not change so frequently that citizens are unable to orient their actions by them; and (viii) that there must be congruence between official action and the law.

[150] When discussing the second of these features, that there must be promulgation of the law, Fuller made several further points. He noted (at p 49):

> 'Obvious and urgent as this demand [for promulgation] seems, it must be recognized that it is subject to the marginal utility principle. It would in fact be foolish to try to educate every citizen into the full meaning of every law that might conceivably be applied to him, though Bentham was willing to go a long way in that direction. The need for this education will, of course, depend upon how far the requirements of law depart from generally shared views of right and wrong.'

He further elaborated on this (at 92) where he stated that-

> ' 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.'

[151] With respect to the mechanics of promulgation, he noted (at 43):

> 'Here we have a demand that lends itself with unusual readiness to formalization. A written Constitution may prescribe that no statute shall become law until it has been given a specified form of publication.'

He added:

> ‘A formalization of the desideratum of publicity has obvious advantages over uncanalized efforts, even when they are intelligently and conscientiously pursued. A formalized standard of promulgation not only tells the lawmaker where to publish his laws: it also lets the subject-or a lawyer representing his interests-know where to go to learn what the law is.'

[152] Fuller was of the view that promulgation, while necessary, did not demand that every citizen know the content of the law. Rather, the requirement for promulgation is met where it is publicised pursuant to a formalised standard, and where a person may access law that affects them. In addition, Fuller considered that the need for publication diminished where the matters addressed by the law were part of a community's general knowledge of right and wrong.

[153] John Finnis in Natural Law and Natural Rights (1980) agreed with Fuller that the rule of law was exemplified in a legal system where the eight components that have been referred to were in existence. He expressed the view that promulgation was not fully achieved by the printing of official copies of enactments, decisions and precedents, but also required the existence of a professional class of lawyers whose business it is to know their way around the books and who are available to give advice to the populace without undue difficulty and expense. He considered that this was part of the quality of institution and process of promulgation.

[154] John Rawls addressed the need for adequate promulgation in A Theory of Justice (1999), stating (at p 212) that:

> 'Unless citizens are able to know what the law is and are given a fair opportunity to take its directives into account, penal sanctions should not apply to them.'

[155] It is our view that, despite the face value of some of these statements, in particular, those of Finnis and Rawls, none of the authors can be taken to have said that promulgation demands that the minutiae of the law be declared to every citizen. Rather, it is our view that these remarks indicate that in order to meet the requirements of the rule of law with regard to promulgation, governments must ensure adequate publication of the fact that law which applies to citizens exists, so that those citizens are able to know the law by accessing its content should they wish to. This interpretation of the philosophical position taken by the three theorists is the only one compatible with the fundamental legal principle that 'ignorance of the law is no excuse' and cases that state that the law must be accessible and foreseeable.

[156] Historically, the Ordenaunces of Warre printed by Henry VII in 1492 was the first official statement to declare that the King's subjects would not be able to claim ignorance of the law-

> 'and to the intent they have no cause to excuse theim of their offences by a pretense of ignorance of the saide ordenances, his highnesse hath ovir and above the open proclamation of the saide statutes commaunded and ordeyned by wey of emprynte diverse and many several bokes conteignyng the same statutes to be made and delivered to the capitaignes of his ost charginge them as they wyl avoyde his greate displeasure to cause the same twyes or ones at the lest in every weke hooly to be redde in their presence of theire retynue.'

The law would be primed in order that it be known. Ignorance of the law could not be an excuse.

[157] This principle has since been rigorously applied in English law Examples include such cases as *R v Bailey* [1800] EngR 9; (1800) Russ & Ry 1, where an English sea captain was convicted of maliciously shooting a mariner, it being an offence created by a statute which was passed while he was at sea and which he could not possibly have known about at the time of the offending. The judges, however, recommended that the prisoner be pardoned on the basis that he could not have known of the creation of the offence. Similarly, in *R v Esop* (1836) 7 C & P 456 and *R v Barronet and Allain* (1852) Dears CC 51 foreigners were convicted under English law of having on English soil committed offences which were not transgressions in their native lands. In *R v Barronet and Allain* (1852) Dears CC 51 at 59 Coleridge J remarked:

> 'We are told to lay down a different rule to what we should apply to native born subjects, because these persons are foreigners and ignorant of our law relating to duelling. But I agree with the Lord Chief justice, that foreigners who come to England must in this respect be dealt with in the same way as native subjects. Ignorance of the law cannot, in the case of a native, be received as an excuse for a crime, nor can it any more be urged in favour of a foreigner.'

[158] In more recent times Lord Bridge in *Grant v Borg* [1982] 2 All ER 257 at 263 observed that:

> '... the principle that ignorance of the law is no defence in crime is so fundamental that to construe the word "knowingly" in a criminal statute as requiring not merely knowledge of the facts material to the offender's guilt, but also knowledge of the relevant law, would be revolutionary and, to my mind, wholly unacceptable.'

[159] The basis for the maxim was explained by Scott LJ in the Court of Appeal in *Blackpool Corpn v Locker* [1948] 1 All ER 85 at 87 as follows:

> 'That maxim applies in legal theory just as much to written as to unwritten law, ie, 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.'

[160] It is clear from the authorities that accessibility to the law is therefore both a requirement, and a cornerstone, of the law. Where the law is accessible, persons within the jurisdiction of the law will be deemed to know of it.

[161] *Lim Chin Aik v R* [1963] AC 160, on which the Public Defender relies for the proposition that the law must be made known to those it affects before it can be applied, really goes no further than to illustrate the point that the law must be accessible. That case was concerned with the ingredient of mens rea in delegated legislation specifically directed at the appellant, one Lim Chin Aik, which prohibited him from entering the State of Singapore. There was, however, no provision or publication of the order or for otherwise bringing it to the appellant's attention, nor was there any evidence that he was notified of the order, or that any step had been taken to publish the order so as to bring it to his notice.

[162] The Privy Council decision noted (at 171) that the precept ignorance of the law is no excuse could not apply where there was no provision for publication 'or any other provision designed to enable a man by appropriate inquiry to find out what "the law" is'. The Board remarked (at 175) that one of the objects of the order was the expulsion of prohibited persons from Singapore, but that there was nothing that a man could do if, before the commission of the offence, there was no practical or sensible way by which he could ascertain whether he was a prohibited person or not.

[163] Lord Phillips in the Court of Appeal more recently in *R (on the application of L) v Secretary of State for the Home Department* [2003] EWCA Civ 25, [2003] 1 All ER 1062 at 1069 observed that:

> 'It is an aspect of the rule of law that individuals and those advising them, since they will be presumed to know the law, should have access to it in authentic form.'

[164] Accessibility is, of course, a prerequisite to foreseeability as to the effect of the law. The jurisprudence of the European Court of Human Rights (the Strasbourg court) demands both, as does the rule of law. Lord Diplock emphasised this point in *Black-Clawson International Ltd v Papierverke Waldhof-Aschafenburg AC* [1975] UKHL 2; [1975] 1 All ER 810 at 836, where he stated:

> 'The acceptance of the rule of law as a constitutional principle requires that a citizen, before committing himself to any course of action, should be able to know in advance what are the legal consequences that will flow from it.'

[165] In *K-HW v Germany* [2001] ECHR 229; (2001) 36 EHRR 59 an East German border guard was convicted in 1993 of intentional homicide, committed in February 1972, when he shot a man who was attempting to swim across the East German border in order to enter the West. Citizens of the German Democratic Republic (GDR) were at the time prohibited from leaving the state and the guard's standing orders were to 'arrest border violators or to annihilate them and to protect the State border at all costs' (para 17). He had, however, contravened the Constitution and the Criminal Code of the GDR by his actions.

[166] The Strasbourg court stated that its task was to consider whether the guard's act at the time that it was committed was an offence accessible and foreseeable as to its effect, under the law of the GDR or international law. The a court observed that the question arose as to what extent the guard knew, or should have known, that firing on persons who merely wanted to cross the border was an offence

according to the law. In that connection the court found as a fact that (para 73):

> '... the written law was accessible to all. The provisions concerned were the Constitution and Criminal Code of the GDR, not obscure regulations. The axiom "ignorance of the law is no defence" applied to the applicant too.'

[167] From the standpoint of international law, the court stated that the question which required an answer was whether, at the time when the offence was committed, the guard's act constituted an offence defined with sufficient accessibility and foreseeability under international law, particularly the rules on the protection of human rights, The court considered that primary international law instruments, such as art 3 of the Universal Declaration of Human Rights (Paris, 10 December 1948; UN TS 2 (1949); Cmd 7226), art 6(1) of the International Covenant on Civil and Political Rights 1966 (New York, 16 December 1966; TS 6 (1977); Cmnd 6702) and art 2(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950. expressly protected the right to life The convergence of such instruments indicated that the right to life is an inalienable attribute of human beings and the apex of human rights principles. Moreover, the Criminal Code of the GDR had provided from as long ago as 1968 that criminal responsibility would be borne by those who violated human rights and fundamental freedoms. Accordingly, as the guard could not have been unaware of the legislation of his own country, he should have known, as an ordinary citizen, that firing on unarmed persons who were merely trying to leave their country infringed these fundamental and human rights. The court considered therefore that the guard's act constituted an offence defined with sufficient accessibility and foreseeability by the rules of international law. The view of the court as to the required degree of the guard's knowledge is compatible with Fuller's view that the more a law merely serves to bring to explicit expression conceptions of right and wrong widely shared in the community, the less the need for it to be publicised and clearly staled.

[168] On the basis of these principles, we conclude 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.

[169] In addition, it is also apparent from the decision of the Strasbourg court in *K-HW v Germany* that, where an offence is committed which violates fundamental human rights protected in international law, a perpetrator may be expected to know, as an ordinary citizen, that such an offence is a violation. In this regard, we refer to the Preambles to the Universal Declaration of Human Rights 1948, the International Covenant on Civil and Political Rights 1966, ratified by the United Kingdom 20 August 1976, and the Convention on the Rights of the Child (New York, 20 December 1989; TS 44 (1992);Cm 1976), ratified 15 January 1992, which all state that-

> ‘recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world.'

The International Covenant on Civil and Political Rights 1966 goes on to recognise 'that these rights derive from the inherent dignity of the human person'.

[170] While none of these instruments expressly acknowledge sexual rights as human rights, nor

articulate any rights protecting the sanctity of a person's body, these resolutions do recognise a person's right to self-determination. Article 1 of the International Covenant on Civil and Political Rights 1966 affirms this right in these terms. Article 1 of the Universal Declaration of Human Rights 1948 likewise declares that: All human beings are born free and equal in dignity and rights.' The rights of personal dignity and autonomy are therefore considered in international law to be the primary rights to which all individuals are equally entitled.

[171] It should also be observed that each of these three covenants contain articles protecting against arbitrary interference with a person's privacy, family, home or correspondence, and against attacks upon a person's honour and reputation. In addition, the Convention on the Rights of a Child includes art 34, which places an obligation on contracting states to protect the child from all forms of sexual exploitation and sexual abuse. This article, in our view, must be fundamentally designed to protect the inherent dignity and person of the child.

[172] We consider that these covenants are unified in recognising the inherent dignity and autonomy of the person, and that they articulate, with respect to a person's honour and reputation, common values that are to be protected in, and by, the international community.

[173] It is true that in this case some of the accused have committed offences prior to ratification by the United Kingdom of all of these instruments. Others of the accused have offended after the ratification of all of them. Our view, however, is that activities which violate these universally accepted standards may be recognised by the international community's citizens as conduct that is intrinsically wrong.

[174] It was submitted to us by the Public Prosecutor as an alternative to the promulgation issue that where it could be shown that the criminal law at the time of the offending was not accessible to the perpetrators, it could then be argued that the principles contained in art 7(2) of the European Convention on Human Rights, that the act was nevertheless against the law of civilised nations, apply. However, as we have found the law to have been promulgated and accessible on Pitcairn Island, this alternative argument requires no further consideration.

LATE CONSTITUTION - SYSTEMIC BIAS

[75] The Public Defender submits that the courts have the power to restrain executive action and stay prosecutions for abuse of process. In support he relies on statements of principle made in the English and Australian courts in *R v Latif, R v Shahzad* [1996] 1 LRC 415, *R v Jones* [2003] 2 Cr App R 134, *Ridgeway v R* [1995] 3 LRC 273, *Bennett v Horseferry Road Magistrates' Court* [1993] 3 LRC 94, *R v Mullen* [2000] QB 520 and *R v Staines Magistrates' Court, ex p Westfallen* [1998] 4 All ER 210.

[176] In particular, the Public Defender relies on a statement from the House of Lords in *R v Latif* [1996] 1 LRC 415 at 423:

> 'In this case the issue is whether, despite the fact that a fair trial was possible, the judge ought to have stayed the criminal proceedings on broader considerations of the integrity of the criminal justice system. The law is settled. Weighing countervailing considerations of policy and justice, it is for the judge in the exercise of his discretion to decide whether there has been an abuse of process, which amounts to an affront to the public conscience and requires the criminal proceedings to be stayed ...'

[177] As a background to this aspect of the case, the Public Prosecutor and the Public defender have agreed upon a statement of facts. For ease of reference we set this out in full:

> '1. Since 1979, Mr Paul Treachveil QBE, a New Zealand Barrister and Solicitor, has been retained as the honorary Legal Adviser to the Governor of the Pitcairn Islands. He succeeded Mr Donald McLoughlin LLB, who held the position from approximately 1950.
>
> 2. On 18 September 1996 Superintendent Dennis McGookin and Detective Inspector Peter George, both officers of the Kent Constabulary, were appointed as Pitcairn island police officers. Their appointment followed a request from the Foreign and Commonwealth Office (FCO) to the Kent County Constabulary to provide personnel to investigate an allegation of sexual offending said to have occurred on Pitcairn Island.
>
> 3. On 25 September 1996 Superintendent McGookin and Detective Inspector George arrived on Pitcairn Island. The two officers interviewed a Pitcairn Islander in relation to sexual allegations.
>
> 4. On 30 September 1996 following consideration of admissions made by the offender and telephone consultations with the Legal Adviser, the offender was cautioned for offences under the Sexual Offences Act 1956 (UK) and the Justice Ordinance.
>
> 5. In or about 1997 copies of *Halsbury's Laws of England* (4th edn) were received on Pitcairn Island.
>
> 6. Following this investigation, it was agreed between the FCO and the Kent Constabulary that the Kent Police would send an officer to Pitcairn island for a three-month period every two years to train and support the island Police officer.
>
> 7. In accordance with this arrangement, Constable Gail Cox of the Kent County Constabulary was appointed a Pitcairn Island police officer in September 1997. She travelled to Pitcairn Island in October 1997. She returned to the UK in January 1998.
>
> 8. Constable Cox returned to Pitcairn Island in September 1999. On 11 December 1999 she investigated allegations of sexual offending against Ricky Quinn, a New Zealand citizen.
>
> 9. Ricky Quinn was charged with two offences. One charge was withdrawn and on 20 December 1999 he pleaded guilty to the second, which was a charge of unlawful carnal knowledge contrary to s 8 of the justice Ordinance 1966.
>
> 10. It appears that the complainant was aged 15 at the time of the offence.
>
> 11. The Governor commuted Quinn's sentence, and Ricky Quinn left Pitcairn Island on 23 December 1999.
>
> 12. On 16 December 1994 Mr Williams, the then Governor of Pitcairn, wrote to Mr C J B White, Head of the Overseas Territories Department of the FCO, referring to reports of sexual offending on Pitcairn.

13. During the course of Constable Cox's time on Pitcairn Island she took a statement from A', a complainant in the present trials. The statement included allegations of rape.

14. Constable Cox took no other statements in relation to matters currently before the Pitcairn courts.

15. On 31 January 2000 Constable Cox wrote to Leon Salt, the then Pitcairn Island Commissioner.

16. In or about January 2000 the FCO requested the Kent County Constabulary to provide personnel to investigate the allegation of sexual offending made by A' referred to above, and to report their findings directly to the individual to be appointed as Public Prosecutor for Pitcairn island for a decision on prosecution.

17. The FCO approved the funding for the investigation and all matters relating to the inquiry and trial process. Decisions regarding investigative lines of inquiry were taken by the police officers concerned, without any direction from the FCO. The FCO received updates from the investigating police officers as to the progress of the investigation for the purpose of ascertaining likely budgetary issues and assessing future funding requirements.

18. Mr Gray Mitchell Cameron, a Barrister of Auckland, was appointed a magistrate of the Magistrates' Court effective from 1 February 2000.

19. On or about 6 March 2000 the Governor confirmed in writing earlier discussions with Mr Simon Moore, the Crown Solicitor for Auckland, who had agreed to accept appointment as the Pitcairn Public Prosecutor. The appointment took effect from 1 February 2000.

20. Subsequent to his appointment, the Pitcairn Public Prosecutor had various communications with the Governor, police, and other parties concerning the investigation and matters relevant to it.

21. Or 6 April 2000 Detective Inspector Rob Vinson, an officer of the Kent County Constabulary, was appointed a Pitcairn Island police officer. 22. On 6 April 2000 Constable Cox met with the Pitcairn Public Prosecutor, Detective Inspector Vinson and Detective Inspector George, in Auckland, and briefed them about her time on Pitcairn.

23. After this meeting Constable Cox took up another posting and had no further involvement in Pitcairn matters.

24. Detective Inspector George and Detective Inspector Vinson, overseen by Detective Superintendent McGookin, carried out further investigations relating to possible victims and suspects on Pitcairn Island and elsewhere between April 2000 and June 2002.

25. As part of the investigation, the police identified all females under the age of 16 who had lived in Pitcairn Island for any significant period1980 and 2000. The vast majority of those females were interviewed. The only exceptions were those who were very young children at the time.

26. On or about 1 May 2000 the Deputy Governor expressed a number of views to Mr Evans of the FCO

27. In 2000 Baroness Scotland was the Minister for Overseas Territories Baroness Scotland's views on the investigation were recorded in a letter from her Private Secretary on 10 May 2000.

28. In or about June 2000 Judge Charles Blackie was appointed the Chief Justice for Pitcairn, Ducie, Henderson and Oeno Islands. Subsequently, two other Supreme Court justices were appointed, namely Judge Russell Johnson and Judge Jane Lovell-Smith. All three appointees are judges from the New Zealand Bench.

29. On 8 August 2000 Senior Constable Karen Vaughan of the New Zealand police was appointed a Pitcairn Island police officer. She assisted with the interviewing of the complainants from the date of her appointment.

30. The investigating police officers consulted with Mr Moore from time to time during the investigation and met with him on more than one occasion.

31. Detective Inspector Vinson was not briefed on offences under the Justice Ordinance 1966 prior to commencing the investigation. Nor was he asked to consider issues relating to the applicable law. The role of Pitcairn police officers was to investigate the factual allegations made by complainants, to put allegations to suspects, to gather evidence, and to refer that evidence to the Pitcairn Public Prosecutor for decision as to the applicable law and decisions as to appropriate charges, if any.

32. Interviews were carried out with the on-Island accused at various locations by Detective Inspector Vinson and Detective Inspector George:

(a) Randall Christian on 12 April 2000 on Norfolk Island and26 August2000 on Pitcairn Island;

(b) Stevens Raymond Christian on 25 August 2000 on Norfolk Island and 16 November 2000 at Auckland;

(c) Calvin Davis Brown on 7 September 2000 and 28 March 2001 on Pitcairn Island;

(d) Len Carlisle Brown did not wish to participate in an interview;

(e) Dennis Christian on 6 September 2000 and 28 March 2001 on Pitcairn Island;

(f) Carlisle Terry Young on 6 September 2000 on Pitcairn Island.

33. During the interview of Stevens Raymond Christian on Norfolk Island on 25 August 2000, Mr Wayne Richards, Solicitor of Norfolk Island, made a series of comments to Detective inspector George and Detective Inspector Vinson regarding the availability of

British law on Norfolk Island.

34. When on Pitcairn Island, Detective Inspector Vinson did not look to see whether there was a copy of the Sexual Offences Act 1956 (UK) on the Island.

35. It was generally known by those on Pitcairn Island during the year 2000 that a major investigation into sexual offending was being conducted on Pitcairn Island and elsewhere.

36. On 10 November 2000 a meeting was held at the British Consulate in Auckland.

37. This meeting was attended by the Deputy Governor (Chair), Mr Treadwell, Mr Salt, Commissioner for Pitcairn, Mr Ford, the Registrar of the Pitcairn courts, Detective Inspector George, Detective Inspector Vinson, Senior Constable Vaughan, Mr S Evans, Pitcairn Desk Officer, FCO, and Melanie Morrison, British High Commission.

38. The meeting was for the purpose of considering logistics in the event that the Pitcairn Public Prosecutor decided he would lay charges against one or more persons.

39. On 20 December 2000 the Chief justice met with Baroness Scotland and an officer of the FCO.

40. On 26 January 2001 Mr Moore was formally appointed as Pitcairn Public Prosecutor and Christine Gordon, a New Zealand Barrister and Solicitor, was appointed Deputy Public Prosecutor.

41. In mid-2001 the Pitcairn Public Prosecutor approached Mr Paul Dacre, an experienced criminal Barrister of Auckland, to ascertain whether he would be prepared to become involved in the case and provide a defence perspective on issues arising. Mr Dacre agreed to do this.

42. In or about June /July 2001 a logistics team (PLT) was established by the Governor's office for the purpose of providing logistics advice and support in the event of any court hearings arising out of any decision by the Pitcairn Public Prosecutor to lay charges. The role of the PLT was to liaise with all parties likely to be affected by any trials, whether on Pitcairn Island or elsewhere.

43. On Friday 20 July 2001 Mr Moore and Mr Dacre met with the PLT to observe a demonstration of a satellite video link for the purpose of considering the manner in which evidence might be given in any trials.

44. On the following day, Saturday 21 July 2001, Mr Moore and Mr Dacre met with the two senior members of the PLT who were due to sail from New Zealand bound for Pitcairn Island on Monday 23 July for the purpose of discussing the potential defence and prosecution requirements for each of the three trial venue options then under discussion, should any trials eventuate.

45. On this occasion and at other times, there were also discussions involving the Pitcairn Public Prosecutor, Mr Dacre and the PLT about how many counsel might be required if

charges were to be laid on Pitcairn Island. The reason for the involvement of the PLT in such discussions was to assess potential financial implications.

46. In October 2001 the Pitcairn Public Prosecutor, the Deputy Public Prosecutor, a law clerk and Senior Constable Vaughan travelled to Pitcairn Island for the purpose of considering public interest issues in relation to the exercise of the Pitcairn Public Prosecutor's discretion to prosecute.

47. At a public meeting on Pitcairn Island on 22 October, the Pitcairn Public Prosecutor explained that the purpose of his visit was (inter alia) to consider the possible consequences of any prosecutions on the Pitcairn Island community. He told the meeting that his decision on whether or not to prosecute could be made soon after his return to Auckland but that an announcement would be delayed because of other issues which could arise, particularly the venue for any trials.

48. On 28 March 2002 Mr Dacre's appointment as Public Defender for Pitcairn Island was formalised. Mr Allan Roberts, an experienced criminal Barrister of Auckland, was appointed his Deputy.

49. In April 2002 the Pitcairn Public Prosecutor recorded a videotaped statement for Pitcairn Islanders regarding his decision to lay charges.

50. At or about the same time, the Public Defender also recorded a videotaped statement for Pitcairn Islanders.

51. Both videos were played by the Governor's representative at a public meeting on Pitcairn Island on 6 May 2002.

52. On 20 May 2002 the Public Defender wrote to the Pitcairn Public Prosecutor with a number of requests.

53. The Pitcairn Public Prosecutor replied by way of letter dated 28 June 2002.

54. Throughout the course of 2002 discussions took place between representatives of Her Majesty's Government and the Government of New Zealand culminating, on 11 October 2002, in an 'Agreement Between The Government Of New Zealand And The Government Of The United Kingdom Of Great Britain And Northern Ireland Concerning Trials Under Pitcairn Law In New Zealand And Related Matters" being signed.

55. On 18 December 2002 the Pitcairn Trials Act 2002 was passed, giving effect to this agreement.

56. On 7 February 2003 a meeting was held with members of the PLT Those present included the Deputy Governor, the Pitcairn Public Prosecutor, Deputy Public Prosecutor, Assisting Prosecutor, Public Defender and Registrar. The purpose of the meeting was to discuss logistics of the journey proposed for the purpose of laying charges and initial appearances on Pitcairn Island.

57. On or about 12 February 2003 the Pitcairn Public Prosecutor and the Public Defender each recorded a separate video message for the Pitcairn Island community. The videos were played at a public meeting prior to the arrival of the legal team in April 2003.

58. On 31 March 2003 the legal team, consisting of Prosecutors, Defence counsel, Magistrate, Registrar and Police officers left Auckland for Pitcairn Island. On 4 April 2003, the Pitcairn Public Prosecutor laid charges in these proceedings in the Pitcairn Magistrates' Court.

59. In the United Kingdom it is standard practice for the Police, at a reasonably early stage in an investigation, to advise victims of crime that there is a Criminal Injuries Compensation Board, which is an independent body separate from the Police that can make compensation available to victims of crime. In 2003, following advice from the Pitcairn Public Prosecutor, the investigating Police officers advised the complainants that they may be entitled to apply for compensation but that their entitlement was uncertain.

60. Throughout the twentieth century there has been a decline in the population of Pitcairn Island so that, at present, the permanent population does not exceed 50.

61. Throughout the history of Pitcairn Island there have not been English police officers on the island. There have been Pitcairn Island police officers on the Island for at least 75 years.

62. The current Legal Adviser has not visited Pitcairn Island.

63. The case, including the investigation, prosecution, trial and venue issues, has been dealt with by Pitcairn police officers and the Pitcairn Public Prosecutor, rather than English prosecuting authorities. However, in 2000 the Pitcairn Public Prosecutor had informal discussions with the Deputy Public Prosecutor for England and Wales, Sir David Calvert-Smith QC, and he thereafter corresponded with senior officials in the CPS.

64. In 2005 work began on the sealing of the road leading from The Landing and known as 'The Hill of Difficulty'. Prior to this work, there have been no tar-sealed or paved roads on Pitcairn Island

65. Sixteen solicitors have been admitted to the Pitcairn Bar. Of those 16, 14 currently hold practising certificates for Pitcairn.'

[178] The Pitcairn Island Supreme Court has existed in its current form since 1971 (albeit without judicial appointees) and the predecessors to the Supreme Court, being the Fiji Supreme Court and the Western Pacific High Commissioner's Court, have been in existence for a hundred years.

[179] A number of logistical matters, including the issue of venue for the trial, the appointment of personnel to public offices, the construction of a new prison and the extradition of an accused, have been considered by the police, the Foreign and Commonwealth Office, the Governor's Office and the Registrar. As a consequence, a number of ordinances have been passed since 2000 in order to accommodate the trials and to deal with logistics and procedure. All of the ordinances passed are

concerned with procedural or system matters. The non-legislative actions concern the appointment of judges and the appointment of the Public Prosecutor and Public Defender.

[180] The Public Defender concedes that there was provision for the constitution of the Pitcairn Islands Supreme Court in the Judicature (Courts) Ordinances. However, he notes that most, if not all, of the trial and adjudication 'machinery' has been expressly constituted by legislation in order to accommodate the offences of the accused.

[181] In the Public Defender's submission, the need to pass such legislation points to a previous failure of the administration to provide an adequate system of adjudication. Further, the Public Defender submits that the creation of this system at considerable expense, post-allegation or post-charge, leads to an appearance of 'systemic bias' or that the matter has a been pre-determined. It does not appear, he argues, that there is a dispassionate and even-handed system of criminal justice.

[182] In summary, the Public Defender argues that the machinery and procedures have been implemented in an ad hoc fashion, and that this has adversely affected the appearance of a fair trial by enhancing the appearance of pre-determination. He also submitted that the presumption of innocence guaranteed under art 6 of the European Convention on Human Rights has been violated because, in the perception of the accused, they have been denied a fair trial, which is a matter of primary importance.

[183] The Public Prosecutor's response to these arguments is that the matters raised by the Public Defender do not establish an abuse of process. To the contrary, the machinery of justice created since 2000 is of neutral, general application: protective of rights and fair to the accused. The changes have produced a transparent, independent and modern criminal system that preserves fundamental principles, including: (a) the separation of powers; (b) the independence of the judiciary; (c) the right to counsel; (d) an independent Public Prosecutor; (e) an independent Public Defender; (f) meaningful appeal rights; and (g) all associated fair trial rights.

[184] In summary, the Public Prosecutor submits that the implementations since 2000 have been:

> (a) Legal, in the sense that they have been properly within the Governor's legislative and executive powers and do not infringe on any constitutional rule or principle.
>
> (b) Consistent with the rules against retrospectivity, because they are neutral, general, procedural changes, that do not criminalise previously legal behaviour.
>
> (c) Fair, because the system is protective of rights and does not compel adverse findings against any individual.

With respect to legality, the Public Prosecutor submits that there is no argument that any of the post-2000 ordinances are invalid or of no effect.

[185] The Public Prosecutor also submits that nothing enacted infringes any constitutional limitation on the Pitcairn authorities, nor any rule of law. *Liyanage v R* [1965] UKPC 1; [1966] 1 All ER 650 is cited as an example of a case in which the Privy Council decided that certain Acts of the Ceylon legislature were ultra vires and invalid, being 'legislative judgments: and an exercise of judicial power'. The legal principle of the separation of powers was therefore infringed.

[186] The present case is very different from that in *Liyanage*. The post-2000 ordinances are all of general application, are intended to endure indefinitely for all criminal cases, and are designed to establish a fair trial process that conforms to accepted human rights standards. The ordinances relate only to the court structure and criminal procedure: they are not designed to secure the convictions of known individuals. In *Liyanage* [1965] UKPC 1; [1966] 1 All ER 650 at 659 the Privy Council noted that-

> 'not every enactment which can be described as ad hominem or ex post facto must inevitably usurp or infringe judicial power.'

[187] We were referred to the Court of Appeal (UK) and the High Court of Australia in *R v Makanjuola* [1995] 3 All ER 730 and *Nicholas v R* [1998] FICA 9, which have upheld the principle that a law that merely prescribes a court's practice or procedure is valid. Accordingly, the Public Prosecutor properly argues that there is no principled basis for exempting the present trials from the machinery of Pitcairn justice. There can be no legitimate inference that, as a matter of interpretation of the judicature (Courts) Ordinance, the Supreme Court is only entitled to hear matters that occurred from 1 February 2000. The same applies to every other Pitcairn ordinance that sets out the features of the justice system. Each ordinance applies to all trials that occur after their enactment, even in relation to events that predate enactment. This does not result in unfairness,

[188] In the Public Prosecutor's submission, the operative principle is that a court system may well be changed. If it is changed, the only question is whether it remains a fair system offering fair trials. A changed system, however, is not precluded from inquiring into matters that occurred before the changes were made.

[189] Finally, the Public Prosecutor submits that the Public Defender's argument that the system as a whole is in some way biased against the accused is baseless. There is nothing objectionable about the creation of the Pitcairn machinery of justice. Accordingly, there can be no bias, systemic or otherwise, in the fact of laying charges and having them tried before lawfully constituted Pitcairn courts. There is nothing in the evidence or in the Public Defender's submissions to support the argument that the system preordains guilty verdicts.

[190] The general rule against the retrospective operation of statutes does not apply to procedural provisions (*see Bennion on Statutory Interpretation* (4th edn, 2002), p 689). We accept that all of the post-2000 ordinances have had as their paramount concern the creation of a fair and just system for trying criminal offences. We see no particular feature of those ordinances which operates unfairly against the accused. In our view, the ordinances are neutral as between the parties and facilitate the just and proper settlement of criminal disputes. In the light of that, we accept that in legislating for a modern justice and corrections system after the detection of these charges, the Governor has not invoked any presumption against retrospectivity, nor put the accused at an unfair disadvantage, and not sought to ensure by legislation that the accused received anything other than fair trial before a fair and modern justice system.

INEQUALITY OF ARMS

[191] In an associated submission, the Public Defender argued that there was inequality of arms in

relation to legal representation the accused received during the investigation process and the timing of the appointment of the Public Defender. He submits that although lawyers were made available, they were not generally available for consultation aside from at the interview stage. It was argued that there is also no evidence that the lawyers who were provided to the accused were versed in New Zealand, English or Pitcairn criminal law and practice. In addition, there is no evidence that they were qualified as legal practitioners in England or Pitcairn at the time of the interviews.

[192] We are grateful to both counsel for taking us through the relevant dates and events which occurred after the investigations began. The first allegations surfaced in late 1999. Police conducted interviews of accused persons between 12 April 2000 and 7 September 2000. The relevant dates are set out in para [177](32), above. Those interviewed on Pitcairn had counsel brought from New Zealand available to them. Some of the criticism by the Public Defender of the level of experience of those lawyers is valid, although matters of privilege prohibited examination by us of the quality of their work. However, there was no challenge made to any statements adduced during the trials. At trial the judges drew no inferences from failure to provide an explanation. In our view, the legal representatives acquitted themselves adequately in their function as advisers to accused persons.

[193] It is evident from the statement of agreed facts inserted at para [177], above, that Mr Moore became involved informally early in 2000 and that he was formally appointed as Pitcairn Public Prosecutor with effect from 1 February 2000. Mr Dacre became informally involved in defence issues in mid-2001 and was formally appointed as Public Defender on 28 March 2002. The charges were laid on Pitcairn on 4 April 2003.

[194] The Public Defender argued before us that his appointment later than the Public Prosecutor has contributed to the inequality of arms issue. On our inquiry as to how, it transpired that the Public Defender maintained that this deprived him of the opportunity to become involved at the stage when there was debate, demonstrated by the documents discovered for this trial, within Foreign and Commonwealth Office circles and the Governor and his officers about whether there should be trials or an amnesty allowed. The Public Defender was concerned that his later appointment worked to the disadvantage of the accused because he was not available to tip the balance in their favour during these government deliberations.

[195] We think there is a sense of unreality about this part of the argument. First. while we do not know, we think it unlikely that counsel would have been admitted to such a debate in circumstances where we accept that the documents show there was a heightened sensitivity toward keeping the executive and the trial processes apart. Second, we note that this has nothing to do with the trial processes and issues as to fair trial. Thirdly, we wonder about the probability of the accused wishing to engage with the administration on extra-legal solutions to the Pitcairn issue when there has been no interest shown by them in taking up the opportunities for restorative justice which the Sentencing Ordinance offers.

[196] The trial processes were at all stages, in our view, conducted with the full range of evidential and procedural protections. We conclude that there has been no inequality of arms.

DELAY - ART 6(1) OF THE EUROPEAN CONVENTION FOR THE PROTECTION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS 1950

[197] The Public Defender submitted that the delay in prosecuting the accused will result in a violation

of art 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950, which states that everyone is entitled to a fair and public hearing within a reasonable time. His contention is that this delay is not attributable to the conduct of the accused but, rather, is the result of failure to have appropriate judicial mechanisms in place in advance. Any difficulties in logistics and administration should not be visited upon the accused.

[198] Relying on *Eckle v Federal Republic of Germany* [1982] ECHR 4; (1982) 5 EHRR 1 and *Neumeister v Austria* [1968] ECHR 1; (1968) 1 EHRR 91, the Public Defender submits that the period to be considered under art 6(1) of the Convention commences at the time the accused were given official notice they were being seriously investigated and runs until the conclusion of any appeal. In this case, the accused were given such notice when it was made plain that a major investigation was proceeding and when they were interviewed by Detective Inspector Vinson and Detective inspector George between 12 April 2000 and 16 November 2000.

[199] The Public Defender points out that the charges were not laid against the accused until April 2003, nearly two-and-a-half years after the first interviews. In the interim, the Public Prosecutor made various announcements to the people of Pitcairn about the progress of the institution of the machinery of justice and also indicated that charges would be laid. The problem for the Public Prosecutor in formally laying the charges was one of logistics and an absence of certainty as to the venue. In this regard the administration, the Public Defender says, was plainly at fault.

[200] Further, that although the trials of the accused began in September 2004, they will not be concluded until a period of approximately four-and-a-half to five years after the interviews have passed. This total delay results in a breach of the accused's rights.

[201] It was emphasised before us that not only has there been, but there will be, further delay before final resolution of the charges, due to the failure of the administration to put in place procedures and the machinery of justice, including appeals, to enable the charges to be heard expeditiously. The Public Defender suggested that if prejudice is required, as contended by the Public Prosecutor, prejudice can be found in the pressure which the accused have had to face since the time of the interview, and which is still ongoing.

[202] Finally, it was submitted that art 6(1) of the Convention is in the nature of a constitutional guarantee and that a case of inordinate delay, coupled with other deficiencies, would justify convictions not being entered, or a permanent stay being granted.

[203] Relying on *A-G's Reference (No 2 of 2001)* [2003] UKHL 68, [2004] 5 LRC 88, the Public Prosecutor argued that art 6 applies to 'post-charge' delay, being the point at which an accused is given official notice of an allegation that he or she has committed an offence. In terms of post-charge delay, the accused were charged in April 2003 and committed to the Supreme Court in July 2003. The trials were then held in September 2004, the pre-trial process taking from November 2003 to August 2004. In August 2004 this court dismissed a pre-trial application for stay based in part on post-charge delay.

[204] The Public Prosecutor referred to statements of principle made in *A-G's Reference (No 2 of 2001)* [200415 LRC 88 that prejudice to a fair trial is the only ground on which a prosecution can be stayed, whether the delay alleged is pre-charge delay (covered by common law principles) or post-charge delay, covered by art 6(1) of the Convention. The Public Prosecutor noted that the Court of Appeal in that case

made it clear that the Privy Council's position in *Darmalingum v State* [2000] 5 LRC 522, that a stay would be the normal remedy in cases of extreme delay, was not the position in English law. The Court of Appeal also noted that the rights contained in art 6(1) of the Convention were not unqualified and that the court would need to undertake a balancing exercise between the rights of accused and the rights of the public.

[205] The Public Prosecutor further argued that the inherent difficulties in investigating and proceeding with the case are relevant to the question of delay: *Mungroo v R* [1992] LRC (Const) 591.

[206] Finally, the Public Prosecutor contended that the Public Defender has not shown that any delay has prevented the accused from having a fair trial and on this basis a stay of proceedings would be an inappropriate remedy for any finding of delay by the court.

[207] Article 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 provides:

> 'In the determination of ... any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law' (Our emphasis.)

[208] The Human Rights Act 1998 (UK) gives effect in domestic law to the rights and freedoms guaranteed under the Convention. Under s 6(1) of this Act it is unlawful for any public authority, including a court or tribunal, to act in a manner which is incompatible with a Convention right. A person who claims that a public authority has acted, or is proposing to act, in a manner made unlawful under the Act may rely on the Convention right in any legal proceedings providing that they are the 'victim' for the purposes of art 34 of the Convention: s 7(1) of the Human Rights Act 1998 (UK). The Strasbourg court has held that the concept of a 'victim' includes any person who runs the risk of being directly affected by a law: Morris v Ireland [1988] ECHR 22; (1988) 13 EHRR 186. Section 8(1) of the Act provides that where the court finds an act or proposed act to be unlawful, it may grant such relief or remedy, or make such order, within its powers as it considers just and appropriate.

[209] The accused in this case are, in consequence, entitled to rely on the Convention in these proceedings. In determining whether their rights under the Convention have been violated, it is a general duty of the courts to take into account relevant judgments of the European Court of Human Rights, opinions of the European Commission of Human Rights and decisions of the Committee of Ministers of the Council of Europe: s 2(1) of the Human Rights Act 1998 (UK).

[210] Article 6(1) of the Convention contains a series of separate and distinct guarantees:

> (i) the right to a fair hearing;
>
> (ii) the right to a public hearing;
>
> (iii) the right to a hearing by an independent and impartial tribunal; and
>
> (iv) the right to a hearing within a reasonable time.

The last of these rights, violation of which is claimed in this case, is designed to prevent a person from remaining 'too long in a state of uncertainty about his fate': *Stögmüller v Austria* [1969] ECHR 25; (1969) 1 EHRR 155 and *Dyer (Procurator Fiscal, Linlithgow) v Watson* [2002] 4 LRC 577.

[211] In *Dyer (Procurator Fiscal, Linlithgow) v Watson* [2002] 4 LRC 577 at [52] Lord Bingham remarked:

> In any case in which it is said that the reasonable time requirement ... has been or will be violated, the first step is to consider the period of time which has elapsed. Unless that period is one which, on its face and without more, gives grounds for real concern it is almost certainly unnecessary to go further, since the Convention is directed not to departures from the ideal but to infringements of basic human rights. The threshold of proving a breach of the reasonable time requirement is a high one, not easily crossed.'

[212] Consideration of the length of time that has elapsed first requires determination of the starting and ending points of the period to be assessed. The Strasbourg court has developed a general test to decide this issue, aware no doubt of the differing procedural regimes of the member states to the Convention. In *Eckle v Federal Republic of Germany* [1982] ECHR 4; (1982) 5 EHRR 1 the court commented (a para 73 (footnotes omitted)):

> 'In criminal matters, "the reasonable time" referred to in Article 6 par. 1 (art 6-1) begins to run as soon as a person is "charged": this may occur on a date prior to the case coming before the trial court (see, for example, the Deweer judgment of 27 February 1980, Series A no. 35, p. 22, par. 42), such as the date of arrest, the date when the person concerned was officially notified that he would be prosecuted or the date when preliminary investigations were opened (see the *Wemhoff* judgment of 27 June 1968, Series A no. 7, pp. 26-27, par. 19, the *Neumeister* judgment of the same date, Series A no. 8, p 41, par. 18 and the *Ringeisen* judgment of 16 July 1971, Series A no. 13, p. 45, par. 110). "Charge", for the purposes of Article 6 par. 1 (art. 6-1), may be defined as "the official notification given to an individual by the competent authority of an allegation that he has committed a criminal offence", a definition that also corresponds to the test whether "the situation of the [suspect] has been substantially affected" (see the above-mentioned *Deweer* judgment, p. 24, par. 46).

[213] In *Eckle v Federal Republic of Germany* the government had submitted that the starting date for one set of proceedings against the applicant was when the applicant's premises had been searched, being 7 October 1964. The court and the Commission preferred the date of 1 January 1961, although the court observed (at para 74) that that date was chosen 'having been unable to ascertain as from what moment the applicants officially learnt of the investigation or began to be affected by it'. The court noted that a 'true preliminary investigation' had in fact begun in August 1960 when numerous witnesses were interviewed in connection with allegations against the applicant.

[214] In *Corigliano v Italy* [1982] ECHR 10; (1982) 5 EHRR 334 the court pronounced (at a para 34):

> ‘Whilst "charge", for the purposes of Article 6 § 1 (art. 6-1), may in general be defined as

> "the official notification given to an individual by the competent authority of an allegation that he has committed a criminal offence", it may in some instances take the form of other measures which carry the implication of such an allegation and which likewise substantially affect the situation of the suspect.'

[215] Referring to the end point of the period, the Strasbourg court in Eckle v Federal Republic of Germany stated (at para 76) that:

> 'As regards the end of the "time", in criminal matters the period governed by Article 6(1) covers the whole of the proceedings in issue, including appeal proceedings.'

This view was also preferred in *König v Federal Republic of Germany* (1978) 2 EHRR 170 (at para 98) and in *Neumeister v Austria* [1968] ECHR 1; (1968) 1 EHRR 91. In the latter case the court commented (at para 19):

> 'Article 6(1), furthermore, indicates, as the final point, the judgment determining the charge; this may be a decision given by an appeal court when such a court pronounces upon the merits of the charge.'

[216] When determining the starting point of the time period, the European jurisprudence evidently prefers the date of 'official notification', which may not necessarily be the date of formal charge. Recent cases such as *Howarth v UK* (2000) 31 EHRR 861 illustrate this point. In that case it was found that the period to be taken into consideration began when the applicant was first interviewed in connection with his fraudulent activities. This interview had occurred on 17 March 1993 while formal charges had not been laid until 30 July 1993. The period ended after the applicant's appeals on sentence, and after a further Attorney General's reference for review of the applicant's sentence.

[217] The House of Lords in *A-G's Reference (No 2 of 2001)* [2004] 5 LRC 88 has revisited this issue, on which there was no division in the House. Lord Bingham, after examining the dicta of the Strasbourg court in *Eckle v Federal Republic of Germany* referred to above, stated (at [27]):

> 'As a general rule, the relevant period will begin at the earliest time at which a person is officially alerted to the likelihood of criminal proceedings against him. This formulation gives effect to the Strasbourg jurisprudence but may (it is hoped) prove easier to apply in this country. In applying it, regard must be had to the purposes of the reasonable time requirement: to ensure that criminal proceedings, once initiated, are prosecuted without undue delay; and to preserve defendants from the trauma of awaiting trial for inordinate periods. The Court of Appeal correctly held ([2002] 1 WLR 1869 at [10]) that the period will ordinarily begin when a defendant is formally charged or served with a summons, but it wisely forbore (at [11]-[13]) to lay down any inflexible rule.'

[218] Lord Bingham concluded his judgment on this point (at [29]), stating that the 'opinion of the House' was that-

> 'the relevant time period commences at the earliest time at which a defendant is officially alerted to the likelihood of criminal proceedings against him, which in England and Wales will ordinarily be when he is charged or served with a summons.'

[219] With respect to the end point of the period, it should be recognised that the Strasbourg court, in stating that the time to be assessed concludes at the end of any appeals, examines cases retrospectively and not prospectively and therefore has the benefit of hindsight. Lord Bingham's view, in *A-G's Reference (No 2 of 2001)* [2004] 5 LRC 88 at [24], was that any breach exists in the delay which has accrued up to the time of hearing and not in the prospective hearing. Of course, in that case the House of Lords was assessing the issue of pre-trial, rather than post-trial, delay. Similarly, the Privy Council in *Dyer (Procurator Fiscal, Linlithgow) v Watson* [2002] 4 LRC 577 was assessing pre-trial delay when, in establishing the period to be assessed, the Board utilised the projected time of trial to establish the end of the period.

[220] In the cases before us, the issue of delay has arisen post-trial but prior to the hearing of appeals. The issue of delay has arisen mid-proceedings. It is our view that where the trials have already been held, domestic courts cannot be expected to foresee or estimate the resolution date of all possible appeals in order to determine with finality the close of the period to be assessed. Such extrapolations would lead to uncertain results. It is therefore our opinion that the period to be assessed for the purposes of determining whether the hearing has occurred within a reasonable time must conclude, in these circumstances, at the time that the court is asked to make the assessment.

[221] Once the period to be assessed is established, the issue arises, as stated in *Dyer (Procurator Fiscal, Linlithgow) v Watson* [2002] 4 LRC 577, as to whether the time that has elapsed gives cause for concern. Where the time does gives such cause. Lord Bingham suggests that two consequences follow (at [52]-[55]):

> '[52] ... First, it is necessary for the court to look into the detailed facts and circumstances of the particular case. The Strasbourg case law shows very clearly that the outcome is closely dependent on the facts of each case. Secondly, it is necessary for the contracting state to explain and justify any lapse of time which appears to be excessive.
>
> [53] The court has identified three areas as calling for particular inquiry. The first of these is the complexity of the case. It is recognised, realistically enough, that the more complex a case, the greater the number of witnesses, the heavier the burden of documentation, the longer the time which must necessarily be taken to prepare it adequately for trial and for any appellate hearing. But with any case, however complex, there comes a time when the passage of time becomes excessive and unacceptable.
>
> [54] The second matter to which the court has routinely paid regard is the conduct of the defendant. In almost any fair and developed legal system it is possible for a recalcitrant defendant to cause delay by making spurious applications and challenges, changing legal advisers, absenting himself, exploiting procedural technicalities and so on. A defendant cannot properly complain of delay of which he is the author. But procedural time-wasting on his part does not entitle the prosecuting authorities themselves to waste time unnecessarily and excessively.

> [55] The third matter routinely and carefully considered by the court is the manner in which the case has been dealt with by the administrative and judicial authorities. It is plain that contracting states cannot blame unacceptable delays on a general want of prosecutors or judges or courthouses or on chronic under funding of the legal system. It is, generally speaking, incumbent on contracting states so to organise their legal systems as to ensure that the reasonable time requirement is honoured. But nothing in the Convention jurisprudence requires courts to shut their eyes to the practical realities of litigious life even in a reasonably well-organised legal system ... But a marked lack of expedition, if unjustified, will point towards a breach of the reasonable time requirement, and the authorities make clear that while, for purposes of the reasonable time requirement, time runs from the date when the defendant is charged, the passage of any considerable period of time before charge may call for greater than normal expedition thereafter.'

[222] The dicta of the Privy Council in this respect echoes the remarks of the Strasbourg court in *König v Federal Republic of Germany* (1978) 2 EHRR 170 (at para 99):

> 'The reasonableness of the duration of proceedings covered by Article 6 para. 1 (art. 6-1) of the Convention must be assessed in each case according to its circumstances. When enquiring into the reasonableness of the duration of criminal proceedings, the court has had regard, inter alia, to the complexity of the case, to the applicant's conduct and to the manner in which the matter was dealt with by the administrative and judicial authorities (above-mentioned *Neumeister* judgment, pp. 42-43, paras. 20-21: above-mentioned *Ringeisen* judgment, p 45, para. 110). The court, like those appearing before it, considers that the same criteria must serve in the present case as the basis for its examination of the question whether the duration of the proceedings before the administrative courts exceeded the reasonable time stipulated 9 by Article 6 para. 1 (art 6-1).'

[223] Accordingly, where the case is not complicated, where a defendant has acted so as to delay proceedings or where the prosecuting authorities have failed to act, a breach of the article may result.

[224] In *Neumeister v Austria* [1968] ECHR 1; (1968) 1 EHRR 91 the applicant had faced various charges of fraud. The Strasbourg court observed (at para 20) that more than seven years had passed since the laying of the charges 'without any determination of them having yet been made in a judgment convicting or acquitting the accused'. In the court's view, this was an 'exceptionally long period which in most cases should be considered as exceeding the reasonable time laid down in Article 6(1)'. The majority of the court, however, found that art 6 had not been breached, largely due to the complexity of the case (at para 21). Similarly, in *Ringeisen v Austria* (No 1) (1971) 1 EHRR 455 the applicant had also faced fraud and fraudulent bankruptcy charges. The fraud charges were not resolved for five years, but the court did not find that the reasonable time requirement to be breached, again for reason of the complexity of the proceedings (at para 110).

[225] In *X v United Kingdom* (1979) 3 EHRR 271 the applicant faced three sets of criminal charges. The least serious of these were left to lie until the more serious charges were resolved. After four years and eight months, these less serious charges were still not resolved. The Commission found the delay to be adequately explained and that the reasonable time limitation had not been breached. In *Howarth v UK*

(2000) 31 EHRR 861, however, the court reached a different conclusion, but on different facts. In that case, the proceedings against the applicant had lasted for just over four years. There had been a lapse of two years between the date of receipt of sentence and when the appeal on this sentence was resolved. The court found that there was no indication that the applicant was responsible for the time taken to deal with the appeal and that no convincing reasons had been given which could justify the delay. In fact, no judicial activity had taken place from the grant of leave to appeal in December 1995 until the appeal was heard in March 1997 (paras 27-29). The court found that the reasonable time requirement had been breached.

[226] In *Dyer* (*Procurator Fiscal, Linlithgow) v Watson* [2002] 4 LRC 577 the Privy Council accepted that a period of 20 months would have elapsed between the time of charge of two police officers and the projected time of their trial. They were not in custody during that time. Lord Bingham stated that while a shorter period between charge and trial would be preferable, it was not an interval that on its face gave cause for concern that basic human rights had been violated (at [56]). Lord Hope concurred with this assessment, noting (at [98]) that the 'case fell far short of the relatively high threshold that had to be crossed before the respondents' right to a hearing within a reasonable time under art 6(1) was engaged'.

[227] Where the time which has elapsed is considered to be unreasonable, however, the question of remedy emerges. This has been in issue in both the House of Lords and the Privy Council.

[228] In *R v HM Advocate* [2002] UKPC D3, [2003] 2 LRC 51 the question arose as a Scottish devolution issue before the Privy Council sitting as a court of five. The majority in that case, consisting of Lord Hope of Craighead, Lord Clyde and Lord Rodger of Earlsferry, held that once it had been established that the right to a determination within a reasonable time had been breached, any continuation of the proceedings was not possible. The Lord Advocate of Scotland would be acting in a way that was incompatible with the Convention right and, accordingly, the only remedy was dismissal of the charges. There was no need to establish prejudice. The minority did not accept the reasoning or the conclusions drawn by the majority. To quote Lord Bingham in *A-G's Reference* (No 2 of 2001) [2004] 5 LRC 88 at:

> ‘The minority [in *Dyer v Watson* [2002] 4 LRC 577] (at [17]-[18]) saw grave dangers to the administration of criminal justice and the maintenance of public confidence in it if a breach of the reasonable time requirement were automatically to lead to termination of the proceedings, even though a fair trial could still be held.'

[229] Lord Steyn, in dissent in *R v HM Advocate* [2003] 2 LRC 51 at [11], was of the view that-

> 'Domestic courts have available a range of remedies for breach of the reasonable time guarantee. In a post-conviction case the remedies may be a declaration, an order for compensation, reduction of sentence or a quashing of the conviction: see *Mills v HM Advocate (No 2)* [2002] UKPC D2, [2002] 5 LRC 367 at [16]. In a pre-conviction case the remedies may include a declaration, an order for a speedy trial, compensation to be assessed after the conclusion of the criminal proceedings or a stay of the proceedings. Where there has been a breach of the reasonable time guarantee, but a fair trial is still possible, the granting of a stay would be an exceptional remedy. In marked contrast to the fair trial and independence guarantees there is therefore no automatic consequence in

respect of the breach of a reasonable time guarantee.'

[230] The House of Lords has since addressed the issue in the English context in A-*G's Reference (No 2 of 2001)* [2004] 5 LRC 88 on appeal. The House of Lords held (seven Lords in the majority and two in dissent) that the decision of the Privy Council in *R v HM Advocate [2003]* 2 LRC 51, although not overruled, was wrongly decided.

[231] Lord Bingham in the majority saw four reasons for rejecting the argument that where a public authority causes or permits a delay in breach of art 6(1) of the Convention, any further prosecution of the offence must be unlawful and therefore not permissible. In his Lordships view, these reasons were (at [20]-[23]), in summary:

(a) A defendant has the right to a hearing.

(ii) A rule of automatic dismissal or stay of the proceedings could not sensibly be applied in civil proceedings.

(c) A rule of automatic termination would have the effect in practice of emasculating the right which the guarantee was designed to protect, as the judicial response would undoubtedly be to set the threshold for breach unacceptably high.

(d) The jurisprudence of the Strasbourg court gave no support to the contention that there should be no hearing of a criminal charge once a reasonable time had passed. In this respect, Lord Bingham noted that the court had never treated the holding of a hearing as a violation or a proper subject of compensation.

[232] Accordingly, Lord Bingham remarked (at [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 art 6(1). For such breach there must be afforded such remedy as may be just and appropriate (s 8(1) of the Human Rights Act 1998) 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.'

[233] It appears, therefore, that there has been a divergence between the law that applies in Scotland and the law of England. As this court applies English law, however, it is bound by the ruling of the House of Lords in *A-G's Reference (No 2 of 2001)* [2004] 5 LRC 88. Accordingly, the remedy of a stay of proceedings on grounds of delay can only be invoked where issues of prejudice arise, as the Public Prosecutor contends.

[234] In a decision of the Chief justice delivered on 6 August 2004 it was found that the delay between the laying of charges on 3 April 2003 and the commencement of the trials on 23 September 2004 was not in breach of the 'reasonable time' provision of the Convention. We see no reason to differ from that conclusion,

[235] We accept that during the investigation the interviews with the accused took place between April 2000 and November 2000. We also accept that there has been some delay in the process of negotiating the agreement between the United Kingdom and New Zealand allowing hearings and trials to take place in New Zealand, in the event that they could not be held on Pitcairn Island for reasons of practicality and logistics. Nevertheless, we do not accept that there has been a marked lack of expedition and we view the passage of time since the accused were interviewed to have been reasonable, with no evidence of prejudice arising.

SUMMARY

[236] This judgment deals with arguments which arose during the trials held at Pitcairn Island in 2004 but could not be adequately heard and ruled upon on the island because of the detailed factual research required from materials located elsewhere in the world. The court was also constrained by logistical limitation from sustaining its continued presence on the island, due to its isolation. The court therefore completed the trial phase subject to these arguments, and adjourned for the research to be undertaken and the arguments heard in New Zealand.

[237] The Public Defender has applied to the court to stay the further prosecution of the charges on the basis that an abuse of process had occurred in these trials resulting in unfairness to the accused persons and an injustice, if the Public Defender's argument were to be upheld, the result would be that these trials would be halted and the accused would not be further proceeded against. If the arguments were rejected, then the findings made at trial on Pitcairn would result in convictions being entered and the sentences indicated on the island would be formally imposed. None of this would affect the one man acquitted at trial.

[238] The Public Defender's application contained several grounds. Paraphrased, he contended the charges against the accused and the trials were an abuse of process because:

(a) There was no authority for the people of Pitcairn to be tried by a court other than their own Island Court.

(b) The Governor's laws and the English laws which are said to apply to Pitcairn islanders were never properly published, or published at all.

(c) In particular, they had no way of knowing that the English Sexual Offences Act 1956 applied to them and made them liable to be imprisoned if they offended.

(d) There had been no knowledge that such laws as may legally apply would be enforced against them because, for example, there was no English police presence, and no court cases had been tried under laws other than local laws.

(e) The actions of the Governor since the investigation into these offences began in late 1999, by legislating retrospectively for the creation of criminal justice procedures and structures designed to ensure these accused persons were tried, created the appearance of a pre-determination, and compromised a fair trial.

(f) The appointment of a Public Defender later than the appointment of a Public Prosecutor had the unfair consequence that the accused were unrepresented and were prevented from arguing that they should not be tried before the processes were begun. There was an 'inequality of arms'.

(g) There was delay in setting up the trial process unacceptable at law and under the European Convention on Human Rights.

[239] We heard detailed argument from the Public Defender and Public Prosecutor on these matters over seven days and were referred to nearly 2,000 pages of historical and recent documents made available to counsel by the Governor from various archival sources. This judgment sets out in detail both the arguments and our conclusions.

[240] In short, we found against each of the points raised in the application, though on some matters of detail we agreed with the Public Defender. We hold that:

(i) History demonstrates that from the early days on Pitcairn Island there was a conservatism of sexual morality, a recognition of public wrongdoing and its legal complexity, comparable with the citizens of any other civilised nation.

(b) There is a court structure, honoured by time and repeated legislation over the years, for the trial of Pitcairn islanders in a court other than the island Court.

(c) There was proper promulgation of the Pitcairn ordinances and a long-held understanding of the islanders that serious crime such as rape and other serious sexual offending would be heard in the Supreme Court or its predecessors.

(d) English laws applied to them, including the Sexual Offences Act 1956.

(e) The accused could be tried for rape and other serious crimes under English laws, which are, in any event, crimes recognised as contrary to their own standards and are violations of universally accepted standards recognised by citizens of the international community.

(f) The setting up of structures and systems to enable trial under modern processes and according to modern standards was not retrospective legislation which rendered the accused liable for any substantive offence after the events had occurred.

(g) There has been no unreasonable delay in the trial process nor in the period between the police interview of individual accused and the laying of charges.

(h) There was no element of pre-determination or bias in the system and the accused have been fairly represented and tried.

[241] For these reasons, and those articulated in this judgment, we decline the application that we stay the trials as an abuse of process. This will have particular consequences for each of the accused, which will be dealt with by the separate trial judge concerned sitting alone.

Solicitors:
S Eisdell Moore (Public Prosecutor), *Meredith Connell* (Auckland) for the Crown.
P Dacre (Public Defender) (Ponsonby, Auckland) for the accused.
