IN THE PRIVY COUNCIL
ON APPEAL FROM THE COURT OF APPEAL OF THE PITCAIRN ISLANDS

BETWEEN	STEVENS RAYMOND CHRISTIAN
	LEN CALVIN DAVIS BROWN
	LEN CARLYLE BROWN
	DENNIS RAY CHRISTIAN
	CARLISLE TERRY YOUNG
	RANDALL KAY CHRISTIAN
	Appellants
AND	THE QUEEN
	Respondent

CASE FOR THE RESPONDENT

14 June 2006

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CASE FOR THE RESPONDENT

MAY IT PLEASE YOUR LORDSHIPS

1 INTRODUCTION

1.1 In January 2000, a 15 year old girl on Pitcairn Island reported to a visiting Police officer that she had been raped.[1] The most serious incident she described was a rape involving two men acting in concert. She told the Police the two men had held her down, inserted a t-shirt in her mouth as a gag, tied the t-shirt around her head, and taken turns to rape her while she struggled and cried.[2] At the time she was approaching her 11th birthday. The offenders were adult men, aged 19 and 21. 1-388/a – 1-391/e

1.2 The Police spoke to one of the men involved in that incident, the appellant Randall Christian, on 12 April 2000 and he denied that he had ever touched the complainant in a sexual way. 8-3593

1.3 A week later the Police spoke to another Pitcairn woman, who made a statement alleging a number of incidents of rape and other sexual assaults on Pitcairn from the time she was aged 8-9 years. She suggested that such offending was widespread on Pitcairn Island. This resulted in a much larger-scale investigation, involving interviews with complainants and suspects in several different countries. 8-3627 8-3649/c

1.4 As a result of this investigation, charges were laid against 13 men, and seven trials were held on Pitcairn Island in October 2004.[3] The six appellants were convicted of 30 offences, including rape, incest, and indecent assault, over the period 1964 to 1999.[4]

1.5 In summary:

(a) Four of the six appellants were convicted of a total of 13 counts of rape. The four convicted of rape were Randall Kay Christian, Carlisle Terry Young, Stevens Raymond Christian, and Len Carlyle Brown.

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1 She had earlier disclosed the offending informally, and made a formal statement to Police on 16 January 2000.

2 These allegations were ultimately proved at trial. The Record references are to the trial evidence.

3 Further proceedings are currently in progress: one man is awaiting trial in the Pitcairn Supreme Court following extradition from Australia, and two men have recently appeared in the Pitcairn Magistrate's Court following extradition from New Zealand. The prosecution has elected not to proceed with charges against two men, and a third man resident in New Zealand is awaiting an extradition hearing.

4 The seventh accused, Jay Calvin Warren, was acquitted on the sole charge he faced.

(b) The fifth, Len Calvin Davis Brown, was convicted of five counts of indecent assault, having pleaded guilty to three of those charges.[5]

(c) The sixth, Dennis Ray Christian, was convicted of one count of indecent assault and two counts of incest, having pleaded guilty to those charges. (The offences of incest were not identified as incest in the judgments below in order to protect the identity of the complainant.)

1.6 Of the 30 convictions,[6] three involved consensual behaviour where any consent was negatived by the age of the complainant,[7] and two involved potentially consensual behaviour (incest).[8] The remaining 25 convictions were for non-consensual offending.

1.7 The Appellants now appeal against their convictions on the grounds that:

(a) The English law of rape and sexual assault did not apply on Pitcairn at the relevant times because Britain did not have sovereignty over Pitcairn, and/or because the British Settlements Act 1887 did not apply to Pitcairn;

(b) The English law of rape and sexual assault did not apply on Pitcairn at the relevant times because English law was not in force in Pitcairn;

(c) The prosecutions were an abuse of process;

(d) The Governor was not entitled to incorporate aspects of New Zealand law into the Pitcairn Ordinances, or to appoint New Zealanders as Pitcairn lawyers and Judges;

(e) The Supreme Court did not apply the correct elements of the offence of rape in the case of Stevens Raymond Christian; and

(f) The trial Judge erred in her assessment of the complainant's credibility in the case of Carlisle Terry Young, and misdirected herself on the effect of lies.

1.8 The first issue was raised in a pre-trial challenge to jurisdiction in November 2003. The Supreme Court received a considerable volume of historical material between
1-61 November 2003 and February 2004, and dismissed the application in April 2004. The

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5 Len Calvin Davis Brown was found guilty of another 4 charges of indecent assault, but convictions were not entered in respect of those charges because of the House of Lords' decision in *R v J* [2005] 1 AC 562, which was released after his trial.

6 A possible 31st conviction, where the Judge had discharged Randall Christian without penalty, was confirmed by the Court of Appeal as being discharged: see 2-979 paras [184] to [186].

7 Len Calvin Davis Brown, counts 2 and 5; Carlisle Terry Young, count 7.

8 Dennis Ray Christian, counts 3 and 4.

Court of Appeal dismissed a pre-trial appeal against this decision in August 2004. In October 2004, Your Lordships granted leave to appeal in respect of the pre-trial issues. 1-125 2-443

1.9 The trials proceeded on Pitcairn Island in October 2004, and charges were proved against six of the seven accused. One of the appellants, Dennis Ray Christian, pleaded guilty to all the charges he faced, under reservation of the right to challenge the jurisdiction of the Court. Another man, Len Calvin Davis Brown, pleaded guilty to some of the charges he faced, on the same basis. 1-8 – 1-10 2-463/h – 2-464/a

1.10 Just prior to the commencement of the trials, the accused brought an abuse of process application. The Supreme Court dealt with this post-trial, in April 2005,[9] and dismissed the application. Convictions were then entered. 2-805/c 2-901 – 2-911

1.11 The appellants brought conviction appeals in the Pitcairn Court of Appeal in February 2006, which were dismissed in March 2006. 2-917

1.12 The appellants now appeal to this Board. The respondent respectfully submits that the appeals should be dismissed on the grounds that:

(a) The Queen's sovereignty over Pitcairn is not a justiciable issue in this Court, but in any event British sovereignty is conclusively established, and the Pitcairn Orders in Council 1952 and 1970 were in force in Pitcairn at all relevant times;

(b) The English laws against rape, incest and indecent assault were in force in Pitcairn at all relevant times pursuant to successive Judicature Ordinances;

(c) The trials were not an abuse of process;

(d) The Governor was entitled to base aspects of the Pitcairn Ordinances on New Zealand models, and to appoint New Zealanders as Pitcairn lawyers and Judges;

(e) The Supreme Court did not err in defining the elements of rape; and

(f) The learned trial Judge did not err when assessing the complainant's credibility in the case of Carlisle Terry Young, and did not mis-direct herself as to lies.

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9 It was necessary to adjourn the hearing of the abuse of process application for the reasons set out in the Supreme Court's minute of 18 October 2004: [2-447].

The Record and accompanying material

1.13 The original petition for these appeals was filed in September 2004. Since then, counsel have undertaken a substantial amount of factual and historical research, resulting in hundreds of relevant documents becoming available for the Court. New documents were admitted as recently as February 2006 in the Court of Appeal.

1.14 The result of this research is that the factual and historical basis for the appeals has been substantially clarified since the filing of the petition, and several of the factual assertions made in the petition are no longer maintained.[10] While the Crown will endeavour to deal with the factual basis as concisely as possible, there are a number of material factual differences between the appellants and the respondent, and it is likely that the Crown will need to take Your Lordships to the primary documents, to identify the nature and scope of the disputes.

1.15 In an endeavour to assist the Court, the Crown has prepared a reading guide or detailed chronology of events to accompany the record. In addition, the Crown will file before the hearing:

(a) A volume of Statutes, Ordinances, and Orders in Council.

(b) A volume of secondary material.

(c) A casebook of authorities.

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10 For example, in paragraph 39 of the Petition, it was suggested that the Pitcairn Ordinances may not have been published on the Island. It is now accepted that they were: submissions on behalf of the Public Defender, p 11 para (a). In paragraph 40(f) of the Petition, the petitioners stated that there had been "no court cases conducted by English judges or legally qualified persons under any Ordinance". It is now not disputed that a Magistrate from Fiji, Mr Donald McLoughlin, conducted a divorce case on Pitcairn Island in 1958, under the Pitcairn Order in Council 1952 and Pacific Order in Council 1893.

2 THE PITCAIRN ORDERS IN COUNCIL 1952 AND 1970 WERE IN FORCE IN PITCAIRN AT ALL RELEVANT TIMES

2.1 As their primary submission, the appellants seek to invalidate the Order in Council that underpins the Pitcairn legal system: the Pitcairn Order 1970, together with its predecessor, the Pitcairn Order in Council 1952. The appellants' purpose is to establish that the laws against rape and other sexual offences were not in force in Pitcairn during the period of their offending. No alternative law of rape or sexual assault is identified by the appellants: the effect of the submission, if accepted, would be to leave Pitcairn devoid of any such law. Indeed the appellants' submission would mean that Pitcairn Islanders did not have laws to prohibit murder and serious violence at any time over the last 50 years, if ever,[11] and that they have no such laws now. Moreover, Pitcairn would be left without any form of civil law, and without a functioning government. Even the Island Council, which has jurisdiction over minor local matters, traces its authority to the Pitcairn Order 1970. The appellants' submission, in a very real sense, is revolutionary. 7-3304 6-2549

2.2 The submission is put in alternative ways by the appellants:

(a) Mr Cook QC's principal submission is that Pitcairn is not and has never been a British possession. In stark terms, Mr Cook submits that Her Majesty has never had any form of sovereignty over Pitcairn Island or the Islanders. The Queen, it is submitted, has no basis whatsoever to be passing laws for Pitcairn.

(b) The Public Defender's principal submission is that Pitcairn is a ceded colony not a settled colony, and that the British Settlements Act 1887 did not authorise the relevant Orders in Council. He further submits that the Orders in Council cannot be validated pursuant to the Royal Prerogative, because the Queen divested herself of the power to pass laws for Pitcairn by granting the Islanders a form of representative government.

2.3 In response, the Crown submits that the Orders in Council were validly passed under the British Settlements Act 1887. This is addressed in part (a) below. In the alternative, if Pitcairn is found to have been a ceded colony, the Crown submits that L1 Tab 2

11 Except perhaps for a period from approximately 1830 until the visit of HMS *Fly* in 1838. In 1830 Captain Waldegrave reported there were laws against murder, theft, adultery, and removing a landmark – but there is no later record of these early laws: see [3-1215/h].

the Orders in Council were valid exercises of the Royal Prerogative. In the Crown's submission, the Queen has not at any time divested herself of the power to pass laws for Pitcairn Island. This alternative submission is addressed in part (b) below, from page 28.

(a) The Orders in Council were validly made under the British Settlements Act 1887

2.4 The primary authority relied on by the Queen in passing the Pitcairn Orders in Council was the British Settlements Act of 1887, as amended in 1945. For present purposes the key section is s 6, which defines "British settlement" and "British possession":[12]

L1 Tab 2

> "For the purposes of this Act … the expression "British settlement" means any British possession which has not been acquired by cession or conquest, and is not for the time being within the jurisdiction of the Legislature, constituted otherwise than by virtue of this Act or of any Act repealed by this Act, of any British possession.
>
> [And] … the expression "British possession" means any part of Her Majesty's possessions out of the United Kingdom."

2.5 The Crown submits Pitcairn is a British settlement for the purposes of the Act, because it is (and was at all material times):

(a) A British possession;

(b) Acquired by settlement (not by cession or conquest); and

(c) Not within the jurisdiction of the legislature ... of any British possession.

i) Pitcairn is a British possession

2.6 In the Crown's submission, the Courts below were correct to find that Pitcairn is a British possession. The Crown submits it is unnecessary to go beyond any of the various acts of State that conclusively establish Pitcairn's status as a British possession. In the alternative, the Crown submits that British sovereignty is established on the facts.

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12 Roberts-Wray notes that this definition differs from the colonial law concept of "settlement", and includes some territories that were not acquired by settlement in the colonial law sense, while excluding others that were. See Roberts-Wray, *Commonwealth & Colonial Law* (1966) 99. [A1 Tab 1]

The Queen's sovereignty is established by act of State

2.7 The main basis on which the Courts below proceeded was an acceptance of the "act of State" doctrine, under which the assertion of jurisdiction over a territory by the Crown is an act of State not susceptible to challenge in the domestic Courts. In *Sobhuza v Miller* [1926] AC 518, 523 **[A1 Tab 2]** the Privy Council said: 1-129 para [12]

> In South Africa the extension of British jurisdiction by Order in Council has at times been carried very far. Such extension may be referred to [as] an exercise of power by an act of State, unchallengeable in any British Court, or it may be attributed to statutory powers given by the Foreign Jurisdiction Act, 1890.
>
> ...
>
> In the *Southern Rhodesia* case Lord Sumner ... held that a manifestation by Orders in Council of the intention of the Crown to exercise full dominion over lands which are unallotted is sufficient for the establishment of complete power. [This implies] that what is done may be unchallengeable on the footing that the Order in Council, or the proclamation made under it, is an act of State. This method of peacefully extending British dominion may well be ... in law unquestionable. [p525]

2.8 Similarly, in *Nyali v Attorney General* [1956] 1 QB 1, 15 **[A1 Tab 3]** Denning LJ said:

> The courts rely on the representatives of the Crown to know the limits of its jurisdiction and to keep within it. Once jurisdiction is exercised by the Crown the courts will not permit it to be challenged. Thus if an Order in Council is made affecting the protectorate, the courts will accept its validity without question: see *Sobhuza II v. Miller* [1926] AC 518, 528. It follows, therefore, that in this case we must look not at the agreement with the Sultan, but at the Orders in Council and other acts of the Crown so as to see what jurisdiction the Crown has in fact exercised; because they are the best guide, indeed they are conclusive, as to the extent of the Crown's jurisdiction. I turn, therefore, to consider them.
>
> In the first place there is an Order in Council of 1920 which has brought the Kenya Protectorate very much within the orbit of Kenya Colony. The governor is also the governor of the protectorate and is entitled to all the powers of the Crown therein. The executive council of the colony is also the executive council of the protectorate. The legislative council of the colony legislates, not only for the colony, but also for peace, order and good government of the protectorate. And so forth. None of those provisions can be challenged in the courts.

2.9 The act of State doctrine was applied in the High Court of Australia in *Coe v Commonwealth* (1979) 24 ALR 118, **[A1 Tab 4]** by Gibbs J:

> The annexation of the east coast of Australia by Captain Cook in 1770, and the subsequent acts by which the whole of the Australian continent became

> part of the dominions of the Crown, were acts of state whose validity cannot be challenged.

2.10 Similarly, Lord Diplock in *Post Office v Estuary Radio* [1968] 2 QB 740 **[A1 Tab 5]** said:

> It still lies within the prerogative power of the Crown to extend its sovereignty and jurisdiction to areas of land or sea over which it has not previously claimed or exercised sovereignty or jurisdiction. For such extension the authority of Parliament is not required. The Queen's Courts, on being informed by Order in Council or by the appropriate minister or law officer of the Crown's claim to sovereignty or jurisdiction over any place, must give effect to it and are bound by it.

2.11 Finally, in *The Fagernes* [1927] P 311 **[A1 Tab 6]** Atkin LJ said:

> What is the territory of the Crown is a matter of which the Court takes judicial notice. The Court has, therefore, to inform itself from the best material available; and on such a matter it may be its duty to obtain its information from the appropriate department of Government. Any definite statement from the proper representative of the Crown as to the territory of the Crown must be treated as conclusive. A conflict is not to be contemplated between the Courts and the Executive on such a matter, where foreign interests may be concerned, and where responsibility for protection and administration is of paramount importance to the Government of the country. In these circumstances the Court requested the assistance of the Attorney-General who, ... informed the Court that he had consulted the Home Secretary, and was by him instructed to say that the place of collision was not within the limits to which the territorial jurisdiction of His Majesty extends. I consider that statement binds the Court, and constrains it to decide that this portion of the Bristol Channel is not within British jurisdiction, and that the appeal must be allowed.

2.12 In the Crown's submission, there is no basis to depart from this settled law. The doctrine is based on sound constitutional principle, and appropriately entrusts the Sovereign to know the extent of her own sovereignty. The extent of a nation's sovereignty is ultimately a question of international law, not domestic law. Perhaps unsurprisingly, the appellants have not pointed to any authority from anywhere in the world to the contrary.

4-1681 2.13 In this case, the first definitive act of State was the Instruction of the Secretary of State Joseph Chamberlain, gazetted on 22 June 1898, which provided:

> "INSTRUCTIONS TO THE HIGH COMMISSIONER, WESTERN PACIFIC
>
> Under and by virtue of the provisions of Articles 4 and 6 of the Pacific Order in Council, 1893, --
>
> I, the Right Honourable Joseph Chamberlain, Her Majesty's Principal Secretary of State for the Colonies, do hereby direct that jurisdiction under the

> said Order in Council shall be exercisable in relation to the British Settlement known as Pitcairn Island, situated in the Pacific Ocean, in Longitude 130° 6' W, and in Latitude 25° 3' S.
>
> And I hereby further direct that these Instructions shall be published in the Government Gazette of Fiji, and in the manner specified in the 147th Article of the said Order in Council, and that all persons within the limits of the said Order in Council as hereby further defined shall govern themselves accordingly.
>
> As witness my hand
>
> J CHAMBERLAIN"

2.14 This document unequivocally asserted British sovereignty over "*the British settlement known as Pitcairn Island*". In the Crown's submission it is not necessary for the Court to go any further than the Secretary of State's Instruction. There are, as the Courts below noted, a number of later and additional acts of State confirming Pitcairn's status as a British possession, including both the 1952 and 1970 Orders in Council. However, these acts of State merely confirmed the position established from at least 1898 by the Secretary of State's instruction.

1-131 para [21]

2.15 It is possible, also, that earlier actions on behalf of the Crown could be interpreted as acts of State asserting sovereignty over Pitcairn, and there are certainly signs that Pitcairn was regarded as a British possession before 1898 – for example Pitcairn was included in the "List of Islands belonging to Great Britain or under British Protection" in 1893. As in the case of *Attorney General for British Honduras v Bristowe* (1880) 6 App Cas 143, **[A1 Tab 7]** the Crown submits it is sufficient to conclude that by at least 1898 Pitcairn was formally brought within the jurisdiction of the Western Pacific High Commissioner, on behalf of the Queen.

4-1592/h

2.16 The Public Defender submits at para 53 on p 38: "*The act of State doctrine (however widely viewed) cannot preclude the courts examining whether the conditions precedent to and upon which the executive asserts its powers to act have been satisfied*." However, the Crown does not submit that the Orders in Council are immune from judicial review on the grounds of their *vires*. The only matter the Crown says is non-justiciable is whether Pitcairn is one of the Queen's possessions. That question, the Crown submits, is conclusively answered by the Queen's Secretary of State. Accordingly, the Crown submits the first requirement of the British Settlements Act is met.

The Queen's sovereignty is established in fact and law

2.17 Although the Crown submits it is unnecessary and indeed constitutionally inappropriate to go any further than this, the sovereignty of Pitcairn is an issue of great importance to the inhabitants, and for that reason the position under international law is addressed briefly below. In the Crown's submission, British sovereignty is unequivocally established on any international law test. It is significant, as the Court of Appeal noted, that counsel for the appellants was "*unable to refer ... to any example which could possibly be construed as a denial by the Islanders of their status as British subjects under the dominion of the Crown*." Nor has there been any claim to sovereignty over Pitcairn by any foreign State. The closest to such a claim was perhaps the fleeting interest shown by the French in 1859.[13]

1-137 para [45]

4-1487/g 2-654/2-21

2.18 As to the position at international law, there is no single rule prescribing a formal test for the acquisition of territory, but there are several well-recognised modes of territorial acquisition: see Lee, "Continuing Relevance of Traditional Modes of Territorial Acquisition in International law and a Modest Proposal" (2000) 16 Conn. J. Int'l L. 1. **[A1 Tab 8]** There are a number of relevant principles:

(a) It is common to speak of five traditional "modes of acquisition" of territory in international law: occupation, accretion, cession, conquest, and prescription: see Brownlie, "The Creation and Transfer of Territorial Sovereignty" in *Principles of Public International Law* (1998) 125, 129. **[A2 Tab 9]**

(b) The five traditional modes of acquisition do not operate as rigid or exclusive categories, and may overlap or blend into one another: see Lee, at p 1; Brownlie at p 129. (Indeed Brownlie is highly critical of undue focus on the traditional modes of acquisition.) In practice, sovereignty is often obtained in a composite manner. For example, Professor Joseph describes the "haphazard" way in which sovereignty was obtained over New Zealand:

> [Sovereignty over New Zealand] was acquired in haphazard fashion with little regard for constitutional forms. The historian Rutherford identified 13 dates on which it had been variously claimed that rights of British sovereignty were established. It has been disputed whether this was by discovery consummated by settlement, by occupation of "vacant" territory, by treaty of cession with the native chiefs, or by act of state (an assertion of sovereignty by prerogative act of the Crown). Conquest is the only mode of acquisition that has not been alleged.

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13 See also a similar story recorded in Rev. T.B. Murray, *Pitcairn: The Island, The People, and the Pastor* (12th ed, London, 1860) pp 151-152. **[S2 Tab 5]**

Joseph, *Constitutional and Administrative Law in New Zealand* (2nd ed 2001), 32. **[A2 Tab 10]**

(c) Sovereignty at international law is determined in a relative sense: the "best claim" wins. The International Court of Justice applies a balancing approach – looking for the strongest relative claim of sovereignty in a particular case. See for example *Minquiers and Ecrehos* 1953 ICJ 47. **[A2 Tab 11]** See also Quillen, "The 'Kuril Islands' or the 'Northern Territories': Who Owns Them? Island Territorial Dispute Continues to Hinder Relations Between Russia and Japan" (1993) 18 NCJ Int'l L & Com Reg 633, 645. **[A2 Tab 12]**

(d) Acquiescence or lack of protest by other States to the exercise of sovereignty can be significant evidence of sovereignty: Lee at 18 This factor was described by Lee as "*decisive*" in the El Salvador case: *El Salvador v Honduras (Case concerning the land, island, and maritime frontier dispute)* (1992) ICJ 351. **[A2 Tab 13]**

(e) Acquiescence or lack of protest can also operate by way of estoppel – thus preventing a party from denying the sovereignty of another party where that sovereignty has been previously acknowledged: see Brownlie at p 158. **[A2 Tab 9]**

(f) In terms of "*discovery and occupation*", the Permanent Court of International Justice held in the *Eastern Greenland* case that title by occupation involves two elements: (i) the intention or will to act as sovereign; and (ii) some actual exercise or display of authority: *Legal Status of Eastern Greenland (Den v. Nor.)* 1933 PCIJ No 43. **[A2 Tab 14]** Furthermore, two considerations must be taken into account when assessing whether the exercise of control is sufficient. The first is the presence or absence of any competing claim by another state. "*A relatively slight exercise of authority will suffice when no State can show a superior claim*": Lee, at p 6. The second is the character of the territory in question. "*The inhospitable and inaccessible nature of the uncolonized parts of Greenland made it unreasonable to look for evidence of continuous or intensive exercise of authority*.": Lee, p 6. The importance of context was also emphasised in the *Islands of Palmas Arbitration* 2 RIAA 829 (1928), **[A3 Tab 15]** and the *Western Sahara* case (1975) ICJ 12. **[A3 Tab 16]** What is sufficient exercise of sovereignty will therefore depend on

such factors as time, place, the geographical nature of the territory, and the size of the population.

(g) By way of illustration, several notable decisions and awards demonstrate the bases on which sovereignty has been recognised at international law:

(i) In the *Minquiers and Ecrehos* case, **[A2 Tab 11]** the International Court of Justice held that the following acts of the British Government were sufficient to establish sovereignty:

- Administration of judicial proceedings in respect of criminal offences committed on the Ecrehos;
- Investigation of corpses found on the islands;
- Registration of contracts of sale as to real property situated on the islands;
- Building and maintenance of habitable housing;
- Erection of the custom houses on the islands;
- Visits to the islands by official enumerators for the purpose of taking the census.

(ii) In the *Eastern Greenland* Case, **[A2 Tab 14]** the Permanent Court of International Justice recognised Denmark's sovereignty over the whole of Greenland, based on the following acts of the Danish State:

- Making legislation on various issues applicable to Greenland;
- Concluding conventions excluding their application to Greenland;
- Granting concessions for trading, hunting, mining, erection of telegraph lines, etc;
- Authorising and encouraging scientific expeditions by the Danish government.

(iii) In the *Island of Palmas* Arbitration, **[A3 Tab 15]** the arbitrator awarded a disputed island to the Netherlands, based on the following acts of the Dutch State:

- Conclusion of contracts with local rulers establishing the regime of suzerainty which had been effective;
- Taxation of the local people by the Dutch authorities;
- Patrols by a warship to maintain neutrality during the war of 1898-99 between the United States and Spain;
- Government assistance given in the islands after the typhoon of 1904.

(iv) In the *Clipperton Island* Arbitration, **[A3 Tab 17]** the Permanent Court of Arbitration concluded that France had established sovereignty based on:

- A French Lieutenant claiming the island on behalf of the French Government in 1858, coupled with an alleged landing by French naval crew members on the island;
- Publication of a French declaration of sovereignty over the Island in a Honolulu journal by French Consulate in Hawaii;
- A protest to the United States following the discovery of a group of Americans collecting guano on the island.

(h) The learned author Shaw summarises the relevant international law concepts applicable in this case as requiring a State to demonstrate "effective control" over the territory claimed:

> The principle of effective control applies in different ways to different situations, but its essence is that 'the continuous and peaceful display of territorial sovereignty…is as good as title'. Such control has to be deliberate sovereign action, but what will amount to effectiveness is relative and will depend upon, for example, the geographical nature of the region, the existence or not of competing claims and other relevant factors, such as international reaction. It will not be necessary for such control to be equally effective throughout the region. The doctrine of effectiveness has displaced earlier doctrines relating to discovery and symbolic annexation as in themselves sufficient to generate title. Effectiveness has also a temporal as well as a spatial dimension as the doctrine of intertemporal law has emphasised, while clearly the public or open nature of the control is essential. The acquiescence of a party directly involved is also a very important factor in providing evidence of the effectiveness of control. Where a dispossessed sovereign disputes the control exercised by a new sovereign, title can hardly pass. Effectiveness is related to the international system as a whole, so that mere possession by force is not the sole determination of title. This factor also emphasises and justifies the role played by recognition.
>
> Bilateral recognition is important as evidence of effective control and should be regarded as part of that principle. International recognition, however, involves not only a means of creating rules of international law in terms of practice and consent of states, but may validate situations of dubious origin. A series of recognitions could validate an unlawful acquisition of territory and could similarly prevent effectiveness control from ever hardening into title. The significance of UN recognition is self-evident. Acquisition of title, therefore, rests upon the interplay of a number of rules, particularly effectiveness, sovereignty, recognition and acquiescence."
>
> Shaw, *International Law* (1997) p 353. **[A3 Tab 18]**

2.19 Applying the above principles to the present case, the Crown respectfully submits that British sovereignty over Pitcairn is unequivocally established by, among other things:

(a) The manifestation of sovereignty over the Island for the better part of the past two centuries, including the establishment of laws, institutions, a machinery of government, the administration of justice, the visits of British War Ships, the provision of financial support, and the issuing of British passports to residents (including the appellants);

8-4012 - 8-4017

(b) Recognition of British sovereignty by foreign States (including France and New Zealand);

8-4002 – 8-4003

(c) UN and EU recognition of British sovereignty;

8-3903

(d) Acquiescence and recognition by the inhabitants of Pitcairn, including such actions as applying for and using British passports; and

2-594 para 3.6 8-4012

(e) The absence of competing claims to sovereignty.

2.20 The Court of Appeal's findings on this subject are at paragraph [34] to [45] of the decision of August 2005. The Crown also refers the Court to a sample of the documents in the record, which:

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(a) Record acts of State by the British government in exercising jurisdiction over Pitcairn;

(b) Provide evidence of the practical exercise of sovereignty and jurisdiction by the British government and those acting under its authority;

(c) Demonstrate acceptance of British sovereignty by foreign States.

(d) Provide evidence of acquiescence in, and indeed in many cases the enthusiastic welcoming of, British sovereignty by the residents of Pitcairn Island.

2.21 Without attempting an exhaustive catalogue of the documents, the Crown simply notes some of the more obvious examples below:

2.22 The acts of State claiming jurisdiction over Pitcairn Island include the Instructions of Secretary of State Chamberlain in 1898, the Pitcairn Order in Council 1952, and the Pitcairn Order 1970. 4-1681 6-2549 7-3304

2.23 The documents exemplifying effective rule over Pitcairn Island include:

(a) The Revised Edition of the Laws of Pitcairn, Henderson, Ducie and Oeno Islands. The 2001 Edition notes more than 80 Ordinances passed between 1952 and 2001;

(b) Records of the visits of British naval ships throughout the 19th and early 20th Centuries, exemplifying an active exercise of sovereignty by the British; 3-1115 3-1404

(c) Records of British naval captains approving laws and adjudicating on legal disputes for Pitcairn Islanders; 3-1002/b 3-1018/e 3-1022/e 3-1276/e

(d) The Harry Christian murder trial in 1898, conducted by a Judicial Commissioner from the Western Pacific High Commission; 4-1683-4-1722

(e) Laws drawn up and passed with the authority of the Western Pacific High Commissioner; 4-1800 5-2237

(f) The adoption of coins and stamps depicting Her Majesty the Queen of England as Head of State, and the use of armorial bearings. 8-4005 – 8-4011 7-3286

(Further reference is made below to the exercise of British sovereignty throughout the 19th Century.)

2.24 The acceptance of British sovereignty by foreign States and courts is shown by:

(a) French military requests; 8-4002

(b) The treaty between New Zealand and the United Kingdom in respect of the Pitcairn Islands; 8-3949

(c) United Nations reports on Pitcairn; 8-3903

(d) The decision of the New Zealand Court of Appeal in *Governor of Pitcairn v Sutton* [1995] 1 NZLR 426, 431 **[A3 Tab 19]**:

> "Pitcairn is a British colony, and as such a British dependent territory within the Commonwealth. It is subject to the British Settlements Acts

1887 and 1945, under which the present constitution was made by the Pitcairn Order 1970" (per Cooke P)

2.25 Examples of the acceptance and welcoming of British sovereignty by residents of Pitcairn include:

(a) The affidavit of the Island Secretary, Betty Christian, paragraph 3.6:

2-594 para 3.6

XXM: 2-632 – 2-635

"Although Pitcairn is physically isolated, and although our population is now small, Pitcairn Islanders have always been aware of, and proud of, our status as a British possession. At school concerts it was usual for us to sing "God Save the Queen". All public functions and gatherings, even movie nights, commenced by singing "God Save the Queen" as our National Anthem. Throughout the history of Pitcairn, Britain has provided some money for infrastructure, support, advice, and governance for this Island. There has never been an "independence movement" on Pitcairn, and Pitcairn has certainly never been considered an independent state in its own right. The first I ever heard of Pitcairn not being British was when Mr Cook QC raised the idea in 2004. It is not an idea that originated from the Island. I have always classed myself as a Pitcairn Islander, nationality British."

(b) The presentation by the appellant, Stevens Christian (then Mayor of Pitcairn), to a United Nations Regional Seminar in May 2002:

8-3930/b

"… the Laws operating on Pitcairn are covered by "the Pitcairn Order" and "the Pitcairn Royal Instructions" of 1970. Under these two documents the Governor of Pitcairn is the legislature for Pitcairn and is empowered to make laws on any subject."

(c) Numerous letters on behalf of the Islanders to the Sovereign, for example on 27 July 1853:

3-1384

"We, your Majesty's loyal and devoted subjects, the inhabitants of Pitcairn's Island, avail ourselves of an opportunity just offered us, to assure your Gracious Majesty of our loyal attachment to your person and Government.

The recollections of your Majesty's Ships' visits to our Island will be preserved with pride and gratitude and we desire to express in the most unqualified manner our thanks to these gracious marks of Royal favour. We humbly trust we may be allowed to consider ourselves your Majesty's subjects; and Pitcairn's Island a British Colony as long as it is inhabited by us in the fullest sense of the word.

Several years since the Captain of your Majesty's ship *Fly* took formal possession of our little Island, and placed us under your Majesty's protection, and if your Majesty's Government would grant us a document declaring us an integral part of your Majesty's dominion we should be freed from all fear (perhaps groundless) in that head, and such a gracious mark of Royal Favour would be

> cherished by us … in the discharge of the various duties incumbent on British subjects."

(d) The Chief Magistrate's reply to King George VI, thanking him for his message in 1948. 6-2424

2.26 The Crown submits that consideration of even a small sample of the available material is sufficient to establish British sovereignty over Pitcairn on any international law test.

None of the matters raised by the appellants affects the Queen's sovereignty

2.27 As noted, the submissions filed on behalf of the group of three appellants deny that Her Majesty has ever had sovereignty over Pitcairn. The appellants submit that:

(a) The mutineers who settled Pitcairn in 1790 were not British subjects on account of their acts of piracy; (para 6)

(b) Alternatively, the "*very long term failure*" of the Crown to ratify the settlement meant that sovereignty was never acquired over Pitcairn; (para 18)

(c) In any event, the Instructions issued by Secretary of State Chamberlain in 1898 were "*invalid, null and void and inoperable*", because "*the authority delegated to the Secretary of State could not permit such a re-defining of the limits of the Western Pacific Order in Council 1893 as amounted to an amendment by him of that Order in Council*". (para 24)

2.28 In the Crown's submission, none of these submissions is sustainable.

Piracy

2.29 The appellants have submitted that "*by reason of their mutiny and acts of piracy, the nine sailors on board HMAV Bounty on its arrival at Pitcairn Island were not British subjects*." (Case for the three appellants, para 6.) In support, the appellants cite *In re Piracy Jure Gentium* [1934] AC 586. **[A3 Tab 20]**

2.30 In response, the Crown submits the Court of Appeal was correct to conclude at para [35]: 1-135 para [35]

> "The duty of allegiance owed by the mutineers was never broken, either by their own acts or any act of the King. When they established a settlement they remained British subjects."

2.31 The starting point (which is conceded by the appellants) is that the mutineers were British subjects by birth, with the possible exception of Isaac Martin. At common law, every person born within the dominions of the Crown was a British subject, save only the children of foreign ambassadors: see Sir Alex Cockburn, *Nationality: or the law relating to subjects and aliens considered with a view to future legislation* (London, 1869) p 7 **[A3 Tab 23]**

2.32 Assuming for present purposes that the mutineers committed acts of piracy, the Crown submits those acts did not alter the status of the mutineers as British subjects:

> "... the law of England ... asserts, as an inflexible rule, that no British subject can put off his country or the natural allegiance which he owes to the Sovereign – even with the assent of the Sovereign: in short, that natural allegiance cannot be got rid of by anything less than an Act of the legislature, of which it is believed no instance has occurred."
>
> Sir Alex Cockburn, *Nationality* (London 1869) pp 63-64 **[A3 Tab 23]**

2.33 This proposition is supported by *Calvin's Case* 7 Co Rep 1 **[A3 Tab 24]**, *Joyce v Director of Public Prosecutions* [1946] AC 347, 366 **[A3 Tab 25]**, *R v Lynch* [1903] 1 KB 444, **[A3 Tab 26]** and *Johnstone v Pedlar* [1921] 2 AC 262 **[A3 Tab 27]**. In *Johnstone*, Viscount Findlay said at 274:

> "One who is by birth or by naturalisation a British subject and commits treason still, of course, remains for all purposes a British subject, and must be treated as such in every respect."

2.34 Similarly, in *Joyce,* Lord Jowitt LC said at p 366: **[A3 Tab 25]**

> "The natural-born subject owes allegiance from his birth, the naturalized subject from his naturalization, the alien from the day when he comes within the realm. By what means and when can they cast off allegiance? The natural-born subject cannot at common law at any time cast it off. '*Nemo potest exuere patriam*' is a fundamental maxim of the law from which relief was given only by recent statutes."

2.35 Like *Johnstone*, *Joyce* was a case concerning treason, the most serious crime possible against the State. Treason is conduct designed to endanger or harm the Sovereign or the Sovereign's family, and carried the death penalty until relatively recently. Yet, in *Johnstone* and *Joyce* it was said that even treason could not, in law, destroy the allegiance that the accused owed to the Crown. Although mutiny also attracted the death penalty under the naval penal code, the Crown submits that treason is equally if not more serious. If treasonous acts do not renounce a British subject's nationality, nor do mutinous acts, the Crown submits.

2.36 The position is further supported by Blackstone's *Commentaries on the Laws of England* (4th ed 1770), at pp 366-375 **[A4 Tab 28]**. Blackstone examined the oath of allegiance that affirmed the subject's loyalty to the King, but observed that this operated merely as a reminder of the natural-born subject's duty of allegiance that arose at birth. It was, he wrote at pp 368-369, "*an implied, original, and virtual allegiance, owing from every subject to his sovereign, antecedently to any express promise; and although the subject never swore any faith or allegiance in form*". The allegiance at law of natural-born subjects, Blackstone continued, was *perpetual* (in contradistinction to local allegiance owed by aliens) and *indestructible*. Blackstone wrote at p 369: "*Natural allegiance is therefore a debt of gratitude; which cannot be forfeited, cancelled, or altered, by any change of time, place, or circumstance, nor by any thing but the united concurrence of the legislature*." Crime could not extinguish the natural allegiance of subjects; only the legislature might do this. Blackstone added at p 370:

> "For it is a principle of universal law, that the natural-born subject of one prince cannot by any act of his own, no, not by swearing allegiance to another, put off or discharge his natural allegiance to the former: for this natural allegiance was intrinsic, and primitive, and antecedent to the other; and cannot be divested without the concurrent act of that prince to whom it was first due."

2.37 As noted, the appellants rely on *In Re Piracy Jure Gentium* [1934] AC 586. **[A3 Tab 20]** The relevant passage is at 589:

> "With regard to crimes as defined by international law, that law has no means of trying or punishing them. The recognition of them as constituting crimes and the trial and punishment of the criminals are left to the municipal law of each country. But whereas according to international law the criminal jurisdiction of municipal law is ordinarily restricted to crimes committed on its terra firma or territorial waters or its own ships, and to crimes by its own nationals wherever committed, it is also recognised as extending to piracy committed on the high seas by any national on any ship, because a person guilty of such piracy has placed himself beyond the protection of any State. He is no longer a national, but *hostis humani generis* and as such he is justiciable by any State anywhere: Grotius (1583-1645) "De Jure Belli ac Pacis," ..."

2.38 In the Crown's submission, this authority provides no support for the proposition advanced by the appellants. The question before the Judicial Committee was "*whether actual robbery is an essential element of the crime of piracy jure gentium*". In the course of addressing that question, Viscount Sankey LC noted the writing of Grotius cited above. However, the effect of the passage was to justify universal jurisdiction over pirates – that is, to enable <u>all nations</u> to prosecute piracy. The

decision did not purport to strip individuals of their status as nationals for the purposes of domestic law.

2.39 The principle articulated by Grotius was concerned to recognise an exception to the principle in international law that all crime is territorial. See, for example, *Macleod v A-G (NSW)* [1891] AC 455 at 458 **[A4 Tab 29]** where the Privy Council said: "*All crime is local*." Their Lordships continued at pp 458-459: "*The jurisdiction over the crime belongs to the country where the crime is committed, and, except over her own subjects, Her Majesty and the Imperial Legislature have no power whatever*." The exception to that principle recognised in *In re Piracy Jure Gentium* was unavoidable if acts of piracy on the high seas were not to go unpunished. A strict application of the rule that all crime is territorial would have provided a serious obstacle to the punishment of pirates operating on the high seas.

2.40 In the Crown's submission, the dictum in *In re Piracy Jure Gentium* is directed solely to establish jurisdiction over acts of piracy at international law, and has no effect upon the national status of persons who commit acts of piracy or mutiny on the high seas. Such persons do not lose their nationality as British subjects.

2.41 Finally, it is noted that the proposition advanced by the appellants would lead to absurd results. If acts of mutiny stripped the perpetrators of their status as British subjects, they would be immune from prosecution for any "ordinary" crimes committed on the high seas after the act of mutiny. That would amount to a licence to commit murder, rape or any other serious crime.

Alleged delay in ratifying the settlement

2.42 The second proposition advanced by the group of three appellants is that the alleged "*very long term failure*" of the Crown to ratify the settlement of Pitcairn meant that sovereignty was never acquired over the Island. (para 18) By "*very long term failure*", the appellants refer to the period between settlement in 1790 and Secretary of State Chamberlain's Instruction in 1898. No authority is cited for the proposition that the Queen can be estopped by the passage of time from ratifying a settlement founded by British subjects.

2.43 The Crown's primary submission in response, as outlined above, is that it is unnecessary for the Court to look behind the Secretary of State's Instruction identifying Pitcairn as a British possession. It is no answer, the Crown submits, for the

appellants to query the length of time Her Majesty took to formalise the Pitcairn's status as a colony.

2.44 In addition, however, the Crown submits that the appellants' contention is unsupported both in fact and law. As to the legal position, the Crown submits that the King first obtained rights of sovereignty over Pitcairn in 1790 when the Island was settled by British subjects. The position is described by Roberts-Wray at pp 100-101 of *Commonwealth and Colonial Law*: **[A1 Tab 1]**

> "If the settlement is a private venture, without any sort of prior authorisation, it must at least create an inchoate right which may be converted into title by annexation, the exercise of the Crown's legislative power or other formal Act. Thus, in *Attorney-General of British Honduras v Bristowe*, the Judicial Committee held that, though British Honduras was not formally declared to be a Colony until 1862, the Crown had assumed territorial dominion not later than 1817, when grants of land had been made by the Crown.
>
> But this is not sufficient. What is the status of the settlers in the meantime? They remain in the allegiance and under the protection of the Crown and within the jurisdiction of the mother country; they have no constitutional right to establish a separate independent state, and they acquire sovereignty, if at all, on behalf of the Crown. As Jenkyns points out, these principles, in their application to settlements not previously authorised by the Crown, appear to conflict with the doctrine that no addition can be made to the Crown's dominions without the Crown's consent. The conflict is, however, avoided if the settlers are to be regarded as securing sovereignty without dominion and the occupied country as comparable with a protectorate; a possibility suggested by the Murders Abroad Act, 1817, which described British Honduras at that time as "a Settlement, for certain Purposes, in the Possession and under the Protection of His Majesty, but not within the Territory and Dominions of His Majesty."
>
> During the course of argument in *Campbell v Hall*, Lord Mansfield said: "no colony can be settled without authority from the Crown." Read literally, this cannot be good law. It is inconsistent with the authorities cited above; it is not true as a statement of fact; and unauthorised settlement constitutes no civil wrong or criminal offence known to the law. Lord Mansfield admitted that the point was not material to the question being argued; and, as he had just asked counsel whether they had any idea on the subject, it may be that he was merely suggesting what the law was. It is more probable, however, that he meant only that settlers could not add to the Sovereign's dominions without the authority of the Crown.
>
> A complete list of the territories in this category appears to consist of British Honduras, Pitcairn Island and Tristan da Cunha."

2.45 Thus, when the mutineers arrived they established a British settlement, and rights of sovereignty were acquired on behalf of the King. This was followed by repeated manifestations of British sovereignty throughout the 19th Century, although Pitcairn

was not formally brought within the jurisdiction of the Western Pacific High Commissioner until 1898.

2.46 The Crown has submitted above that Secretary of State Chamberlain's Instructions in 1898 appear to have been the first definitive act of State identifying Pitcairn as a colony. It does not follow, however, that the Crown had no rights of sovereignty prior to that. Rights of sovereignty were often acquired long before the formal declaration of sovereignty or adoption of a territory as a colony. This is exemplified by *Attorney General for British Honduras v Bristowe* (1880) 6 App Cas 143, 148 (PC), **[A1 Tab 7]** where their Lordships said:

> "The country was formally declared to be a British colony, and formally annexed to the British dominions, by a proclamation of Her Majesty, dated on the 12th of May, 1862. The learned Chief Justice was of opinion that the Crown had not acquired or assumed territorial sovereignty in *Honduras* until this date. Their Lordships cannot concur in this view. Without going into the various acts previously done or exercised by the Crown with regard to this colony, or attempting to fix the precise date when the territorial sovereignty was first assumed, it is sufficient for the decision of this case to say that the fact, which is fully established, that grants of lands were made by the Brown as early as the year 1817, affords ample evidence that in that year at least the Crown had assumed territorial dominion in *Honduras*."

2.47 The same is true, the Crown submits, for Pitcairn. In the Crown's submission, Pitcairn's constitutional development went through three phases. During the first phase from 1790, the settlers acquired rights of sovereignty as British subjects on behalf of the King: see Roberts-Wray at p 100, cited above. **[A1 Tab 1]**

2.48 During the second phase, from the early 19th Century until 1898, numerous acts by the British Crown served to confirm British sovereignty over Pitcairn (some of which have already been referred to). These included:

3-1224

(a) Holding a formal enquiry into the conduct of Joshua Hill, and removing him from the Island.

3-1240/d

(b) Establishing the office of Chief Magistrate with authority over the Island "*until he is superseded by the Authority of Her Majesty the Queen of Great Britain.*"

3-1002/b
3-1018/e
3-1022/e
3-1276/e

(c) The actions of naval Captains in resolving legal cases and other disputes.

3-1126/d

(d) Providing arms to the inhabitants.

(e) Publicly declaring on behalf of the Secretary of State: "*no doubt has ever existed as to the sovereignty of your island*", in response to a request from the Island to be formally considered a colony. 3-1396/b

(f) Providing land on Norfolk Island for the inhabitants, and providing transport for the community to relocate to that Island.

(g) Continuing ship visits after the return from Norfolk, during a period when the Chief Magistrate's office was re-established, "*in subordination to Her Majesty, the Queen of Great Britain*". 3-1449/a-b

(h) Providing gifts from the Queen, including boats and an organ. 3-1408/b-c 3-1410/d

(i) Drafting laws for the Island in 1893. 4-1510

(j) Declaring in a Colonial Office printed paper in 1893 that Pitcairn was considered British territory. 4-1592/h

2.49 During this second phase, the Crown submits that British sovereignty over Pitcairn was confirmed by numerous acts such as those listed above, albeit that the Colonial Office was reluctant to formalise the Island as a colony.[14] Notably, during this period there were no attempts by the Islanders to distance themselves from British sovereignty, and innumerable expressions of loyalty and devotion to the Crown. As already noted, there were no competing claims to sovereignty from any foreign state.

2.50 Accordingly, the Crown submits there was no "*very long term failure*" to exercise sovereignty over Pitcairn. To the contrary, there were numerous ongoing manifestations of sovereignty, notwithstanding that Pitcairn was not a formal colony until 1898. These manifestations of sovereignty by the British were matched by expressions of loyalty on the part of the Pitcairn Islanders.

2.51 The third phase began in 1898, when Pitcairn was brought within the jurisdiction of the Western Pacific High Commissioner. Since then, the Island has been administered by British authorities based in London, Fiji, and New Zealand.

The Instructions of the Secretary of State

2.52 The appellants' next submission is that the Secretary of State's Instructions in 1898 bringing Pitcairn within the jurisdiction of the Western Pacific High Commissioner were

14 See, for example, the minute of Secretary of State Gladstone: 3-1308/e.

"*invalid, null and void and inoperable as a declaration of sovereignty over Pitcairn Island*", and "*the authority delegated to the Secretary of State could not permit such re-defining of the limits of the Western Pacific Order in Council 1893 as amounted to an amendment by him of that Order in Council.*" (para 24)

1-132 *2.53* The Court of Appeal dealt with this submission at paras [25] to [28] of its decision. In the Crown's respectful submission the Court of Appeal was correct to find that Secretary of State Chamberlain's Instructions were *intra vires* the Pacific Order in Council. Articles 4 and 6 of the Order in Council gave the Secretary the power to extend jurisdiction under the Order to any British settlement within the Pacific Ocean. Pitcairn was within the scope of the Order, and the Instructions were accordingly *intra vires*.

(ii) Pitcairn was not acquired by cession or conquest

2.54 The second part of the definition of "British settlement" in the British Settlements Act 1887 is that the possession was not acquired by cession or conquest. In the Crown's submission Pitcairn satisfies this requirement: it is well-established that Pitcairn was acquired by settlement, not cession or conquest.

2.55 As a starting point, the Crown notes the law set out at para 800 of 6 *Halsbury's Laws of England* (4th ed, 2003 Reissue) **[A4 Tab 30]**:

> "**800. Modes of acquisition of overseas territories.** Colonies are treated for purposes of constitutional law as either (1) settled or (2) conquered or ceded, and the manner of acquisition affects the constitutional position of the colony, particularly the powers of the Crown. Every colony must be assigned to one or other of these two classes; the classification is one of law, and once made by practice or judicial decision will not be disturbed by historical research.

Pitcairn's status as a settled colony is established by long-standing practice, and should not now be disturbed

2.56 There is a long-standing practice of treating Pitcairn as a settled colony. That practice is evidenced by the following:

(a) Para 1161 of 6 *Halsbury's Laws of England* (4th ed), **[A4 Tab 30]** which states:

> "The colony of the Pitcairn … Islands was acquired by settlement in the first half of the nineteenth century, and is regarded as a British settlement for the purposes of the British Settlements Acts 1887 and 1945."

(b) The decision of the Fiji Supreme Court, *In the Matter of Floyd McCoy* (1951), which states at para 4:

> "Pitcairn is a British settlement … not under the jurisdiction of a local legislature." 6-2539/h

(c) Sir Kenneth Roberts-Wray, *Commonwealth and Colonial Law* (1966), which states at p 908: **[A1 Tab 1]**

> "Constitutional Status [of Pitcairn]
>
> A Colony acquired by settlement. It is generally assumed also to be a British Settlement for the purposes of the British Settlements Act 1887, and this assumption appears to be correct."

(d) The opinion of the Solicitor-General and Attorney-General, 4 March 1898:

> "Pitcairn Island is a British Settlement, and the laws against murder in force in England when it was first settled apply to it." 4-1635/d-e

(e) *Governor of Pitcairn v Sutton* [1995] 1 NZLR 426, 431 (NZCA) **[A3 Tab 19]:**

> "Pitcairn is a British settlement for the purposes of the British Settlements Acts 1887 and 1945." (per Richardson J)
>
> "Pitcairn is a British colony, and as such a British dependent territory within the Commonwealth. It is subject to the British Settlements Acts 1887 and 1945, under which the present constitution was made by the Pitcairn Order 1970" (per Cooke P)

2.57 On the basis of this long-standing practice, the Crown submits that Pitcairn's status as a settlement is established, and should not now be altered. This was accepted by the Court of Appeal at para [54] in its decision of August 2004. 1-141 para [54]

Alternatively, if Pitcairn's status is open to re-examination, its status as a settlement is established in fact and law

2.58 The classification of a territory as settled or ceded is determined at the time of acquisition:

> "... the classification [of colonies as settled or ceded] is one of law, and once made by practice or judicial decision will not be disturbed by historical research. The basis of the distinction is the stage of civilisation considered to have existed in the territory at the time of acquisition: if there was no population or no form of government considered civilised and recognised in international law, possession was obtained by settlement; where there was an organised society to which international personality was attributable, acquisition rested on cession or conquest."
>
> *Halsbury's Laws of England* (4th ed, 2003 Reissue) Vol 6 para 800 **[A4 Tab 30]**

2.59 This principle was recently reiterated in *R (Bancoult) v Foreign Secretary* [2001] QB 1067, 1102 per Laws LJ. **[A4 Tab 31]**

2.60 In the case of Pitcairn, the Island was acquired in 1790 when it was settled by British subjects. At that time it was *terra nullius*, and the only basis on which the Island could possibly have been acquired was by settlement. The Crown submits there is no basis to overturn the long-standing practice of classifying Pitcairn as settled territory.

2.61 This conclusion is further supported by the actions of inhabitants of Pitcairn, who conducted themselves as British subjects well before the arrival of Captain Eliott in HMS *Fly*:

3-1232/f (a) The Islanders were flying a merchant Union Jack when Captain Eliott arrived in 1838.

3-1224 (b) The Islanders accepted the authority of Captain Russell in 1837 to resolve the unsatisfactory situation created by Joshua Hill.

3-1216/b (c) In 1830 it was noted that the Pitcairn Islanders "*consider the King of England as their sovereign, and pray for him at divine service*."

3-988/g (d) In 1825 John Adams enlisted the authority of Captain Beechey to perform his marriage ceremony.

3-984/d (e) The *Register* entry for 1793 (probably written in around 1823) described the surviving mutineers as "Englishmen".

2.62 The Crown submits these actions were all consistent with Pitcairn's status as a British possession acquired by settlement in 1790. There was no momentous event which changed Pitcairn's status after 1790; rather there was a continuum of events in which the Pitcairners consistently conducted themselves as British subjects.

2.63 By the same token, the Crown submits there is little or no support for the Public Defender's contention that Pitcairn was ceded to the Crown in 1838. As a starting point, it appears unlikely that the Pitcairners had international legal personality in 1838 sufficient to effect a transfer of sovereignty. To the contrary, they were flying a merchant Union Jack, and had for many years prayed for the King of England as their Sovereign. There does not appear to be any factual support for the conclusion that Pitcairn had any separate sovereignty to cede to Great Britain in 1838.

2.64 Moreover, there is nothing which transpired between Captain Eliott and the inhabitants in 1838 to imply a change in sovereignty. Captain Eliott's visit was merely another example of the Pitcairn Islanders turning to the Mother Country for support and guidance, as they had done with respect to Joshua Hill and the removal to Tahiti. The "*hasty regulations*" penned by Captain Eliott in 1838 were a pragmatic response to the specific situation that confronted him, and there is no indication that either the Captain or the Islanders considered they were transferring the sovereignty of the Island. 3-1256/d

2.65 It must be acknowledged that the entry for the *Fly's* visit in Brodie's book, *Pitcairn's Island, and the Islanders, in 1850* contains the words: "*This island was taken possession of by Capt. Elliot, on behalf of the Crown of Great Britain, on the 29th of November*". **[S1 Tab 4, p 116]** This entry was later repeated in the Rev. Murray's book, *Pitcairn, The Island, the People, and the Pastor* in successive editions from 1854, incorrectly attributing it as an entry in the *Register.* **[S2 Tab 5, p 262]** As noted in the reading guide, these words do not appear in the original *Register*, and are most likely attributable to George Hunn Nobbs, an Englishman who had settled on Pitcairn in 1828. The significance of the entry may be open to debate, but it certainly appears that the visit of the *Fly* had come to be viewed with significance by the Islanders, at least by 1850.[15] That is perhaps understandable given the anxiety of the Pitcairners throughout the 19th Century to cement their position in the British Empire. However, the Crown submits it is impossible to conclude from this entry in Brodie's book that Pitcairn was in fact ceded in 1838.

2.66 In the Crown's submission, the visit of HMS *Fly* provides no basis to alter Pitcairn's constitutional status to a ceded colony, as contended by the Public Defender.[16]

iii) Pitcairn is not excluded from the definition of "British settlement" in the Act of 1887

2.67 The third part of the definition of British settlement in the Act of 1887 is that the territory is "*not for the time being within the jurisdiction of the Legislature, constituted otherwise than by virtue of this Act or of any Act repealed by this Act, of any British possession*." L1 Tab 2

2.68 It has not been suggested by the appellants that Pitcairn has ever been under such a Legislature. Roberts-Wray considered the issue at p 908 of *Commonwealth and Colonial Law* **[A1 Tab 1]**, and concluded that Pitcairn did fall within the British

15 See also the letter from the inhabitants of Pitcairn to the Queen: 3-1386/d.

16 This submission is made without any concession that the concept of "voluntary cession" in a case such as this is well-founded.

7-3010 – 7-3017

Settlements Act. Sir Kenneth had raised the topic in correspondence with H.E. Maude (formerly of the Western Pacific High Commission) in 1963, and foreshadowed this conclusion.

2.69 In the Crown's submission, there is no reason to doubt that Pitcairn satisfied the third element of the definition of "British settlement", and accordingly the Orders in Council were validly passed pursuant to the British Settlements Act 1887.

b) Alternatively, if Pitcairn is a ceded colony, the Orders in Council were valid pursuant to the Royal Prerogative

2.70 In the alternative, if the Public Defender's submission is upheld, and Pitcairn is found to be a ceded colony, the Crown submits the Pitcairn Orders in Council were in any event empowered by the Royal Prerogative.

i) The Queen has a prerogative power to pass laws for a ceded colony

2.71 It is uncontroversial that the Queen has the power to pass laws for a ceded colony. So much is established by *Calvin's Case* (1608) 7 Co Rep 1, [A3 Tab 24] and accepted by the Public Defender in paragraph 104 of his submissions on page 56. Indeed, under the common law the Queen's powers to pass laws for a ceded colony are greater than in settled colonies, because the citizens of a ceded colony do not have the privileges and rights of British subjects.

2.72 Accordingly, even if Pitcairn is a ceded colony, the Queen has a prerogative power to pass laws for the colony. In the Crown's submission it is of no moment that the Orders in Council were expressed to have been made under the British Settlements Act. The Orders were said to have been made under Queen's powers in the British Settlements Act, "*or otherwise in Her Majesty vested*". In *R (Bancoult) v Foreign Secretary* [2001] QB 1067, 1095 [A4 Tab 31] Laws LJ said: "*An Order in Council may in the context of the Crown's powers to make law for a colony amount to an act of primary legislation under the prerogative.*" In the Crown's submission the Orders in Council are equally valid whether Pitcairn is found to be a ceded colony or a settled colony.

ii) The Queen has not divested herself of the power to pass laws for Pitcairn

2.73 In order to overcome this situation, the Public Defender submits that prior to 1952 the Queen had granted Pitcairn a representative legislature, and thus divested herself of the power to pass laws for Pitcairn: paras 109-110 on pages 57-58. On the authority of *Campbell v Hall* (1774) 1 Cowp 204; 98 ER 848, [A4 Tab 32] the Public Defender

submits that only the Westminster Parliament could legislate for Pitcairn because of the existence of a local representative legislature.

2.74 The *Campbell* doctrine relied upon by the Public Defender was explained in *Sammut v Strickland* [1938] AC 678, 704 **[A4 Tab 33]**:

> "The true proposition is that, as a general rule [the grant of representative institutions] without the reservation of a power of concurrent legislation precludes the exercise of the prerogative while the legislative institutions continue to exist".

2.75 To fall within this principle, the Public Defender must establish:

(a) the grant of representative institutions;

(b) which existed at the time the Orders in Council were passed; and

(c) no reservation of a power of concurrent legislation.

In the Crown's submission none of these requirements was established in Pitcairn when the Orders in Council were passed.

2.76 When the first Order in Council was passed in 1952, the Pitcairn Island Government Regulations 1940 had been declared invalid by the Chief Justice of Fiji. There was accordingly no effective Government for Pitcairn, which was the reason the Order in Council was necessary. Even assuming, however, that the 1940 Regulations were still in force at the time the Order in Council was made in 1952, the Regulations clearly limited the role of the Island Council to local affairs, and reserved the power to make laws to the High Commissioner. There was therefore no local "representative institution" with plenary law-making power on Pitcairn, and there was a clear reservation to Her Majesty of the power to pass laws. The pertinent parts of the Regulations are as follows:

5-2237
6-2539

2.77 Regulation 4 established the Island Council:

> "4-(1) Subject to such Regulations and Orders as may from time to time be made or given by the High Commissioner, the Government of the island and the management of the affairs thereof shall be administered by the Island Council, consisting of the Chief Magistrate, the two Assessors, the Chairman of the Internal Committee and the Island Secretary.

5-2240/g

2.78 Regulation 5 provided:

> "5. It shall be the duty of the Council to provide for the enforcement of the provisions of these Regulations, together with any rules made under

5-2241/b

> Regulation 6, and <u>any other laws and regulations authorized by the High Commissioner</u>."

5-2241/b-c 2.79 The powers of the Island Council were set out in regulation 6, and included the power to make "rules" concerning such matters as:

(a) the keeping clean of the town and any other settlements in the island;

(b) the removal or stopping of any public nuisance;

(c) the removal and disposal of rubbish;

(d) the provision and cleanliness of latrines;

(e) the enforcement of drainage, and cleaning of houses;

(f) the making maintenance and cleaning of roads ...

2.80 There was a distinction between the "rules" made by the Island Council, and the "laws" and "regulations" made by the High Commissioner. Regulation 6(5) provided that "*Public notification of any order of the High Commissioner, or other law, regulation or order shall be made by reading the same in Council and affixing a copy to the public notice-board.*"

5-2241/g

2.81 In terms of the criminal law, Regulation 16 provided:

> "16. 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."

5-2243/f

2.82 Regulation 21 provided that "*The High Commissioner or a Judicial Commissioner may direct that any judgment of the Court shall be sent to the Court of Appeal for review in the manner laid down below*."

5-2244/c

2.83 When the Regulations are read in full, the Crown submits it is clear they provide for only a limited form of local government. This was consistent with Pitcairn's laws from the time of Captain Eliott and HMS *Fly*. The position had been equally clear under the 1904 laws drafted by Simons. This submission is borne out by the laws passed by the local Pitcairn Council over the years. They have never attempted to deal with serious matters – and have been limited to things such as cats, dogs, hogs etc. Notably, on the occasion of the murders on Pitcairn Island by Harry Christian in 1897, the local authorities did not attempt to deal with the matter, but simply held the offender in custody until the arrival of the next British naval ship. On the arrival of HMS *Comus*,

4-1800

3-1320 – 3-1321

the community asked the captain "*to take the man to England for trial*".[17] It was inconceivable that Pitcairn's local authorities would have attempted to deal with something so serious.

2.84 Therefore, even assuming the widest possible ratio of *Sammut v Strickland* [1938] AC 678, 704, [A4 Tab 33] the Crown submits there was nothing in 1952 that could possibly have been interpreted as the Queen divesting herself of the power to pass laws for Pitcairn. In 1970 the position was even stronger: the 1952 Order in Council plainly reserved to the Queen the power to establish laws for Pitcairn. For these reasons the Crown submits that, if Pitcairn is a ceded colony, the Royal Prerogative empowers the Queen to pass laws for Pitcairn, and the Pitcairn Orders in Council were and are valid on that basis.

3 THE ENGLISH LAWS AGAINST RAPE, INCEST AND INDECENT ASSAULT WERE IN FORCE IN PITCAIRN AT ALL RELEVANT TIMES

3.1 If the Pitcairn Orders in Council are upheld, the appellants' next submission is that the English law of rape and other sexual offences was not in force in Pitcairn during the relevant time. In response, the Crown submits that the relevant English law:

(a) was in force in Pitcairn from first settlement pursuant to the common law;

(b) continued in force by the Pacific Order in Council from 1893; and

(c) continued in force from 1961 pursuant to successive Judicature Ordinances.

(a) The laws against rape and other serious crimes were in force from first settlement pursuant to the common law

3.2 As a starting point, the Crown submits that the English criminal laws prohibiting rape, murder, and other serious crime were in force on Pitcairn from the time of the Island's first settlement in 1790. This was so by virtue of the common law doctrine that English settlers take English law with them as far as it is applicable to the local conditions:

> "*… it hath been held that if an uninhabited country be discovered and planted by English subjects, all the English laws then in being, which are the birthright of every subject, are immediately there in force.*"
>
> Blackstone, *Commentaries on the Laws of England* (4th edition 1770) p 107 [A4 Tab 28]

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17 Captain Dkye of HMS *Comus* declined to take Harry Christian off the Island at that time, promising he would refer the case to the authorities without delay.

3.3 This statement of Blackstone's cited the decision of Holt CJ in *Blankard v Galdy* (1693) 91 ER 356, 357 **[A4 Tab 34]** where the Chief Justice said:

> "*In case of an uninhabited country newly found out by English subjects, all laws in force in England are in force there …*"

3.4 As Blackstone explained, the doctrine was not as absolute as Holt CJ's statement might imply if read in isolation, and only those laws that were "*applicable to their own situation*" applied to the settlers in each colony. Laws that were neither necessary nor convenient for the settlers were not in force:

> "*[The general principle] must be understood with very many and very great restrictions. Such colonists carry with them only so much of the English law, as is applicable to their own situation and the condition of an infant colony; such, for instance, as the general rules of inheritance, and of protection from personal injuries. The artificial refinements and distinctions incident to the property of a great and commercial people, the laws of police and revenue, (such especially as are inforced by penalties) the mode of maintenance for the established clergy, the jurisdiction of spiritual courts, and a multitude of other provisions, are neither necessary nor convenient for them, and therefore are not in force*."
>
> Blackstone, *Commentaries on the Laws of England* (4th edition 1770) p 107 **[A4 Tab 28]**

3.5 As Your Lordships are aware, this doctrine has afforded the benefits and obligations of English law in colonies all over the globe from the 18th Century to the present day, including places as diverse as New York, Australia, Canada, New Zealand, and Pitcairn Island.

3.6 It has already been submitted that Pitcairn was a British settlement, and accordingly the only question is whether the laws against rape and other sexual offences at the time of settlement were "*applicable to the local conditions*"?

The laws of rape and serious crime were applicable to Pitcairn's local circumstances

3.7 In the Crown's submission, the crimes of murder, rape, and serious violence were plainly part of the English law that applied to Pitcairn in 1790. Blackstone's paradigm example of laws that were presumptively in force was those laws providing "*protection from personal injuries*."[18] In the Crown's submission, rape and other forms of sexual assault fall squarely within that category.

3.8 By the same token, the laws of rape and sexual assault were clearly outside Blackstone's second category, which he described as:

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18 Blackstone, *Commentaries on the Laws of England*, Vol 1 (4th edition 1770) p 107 **[A4 Tab 28]**

> "*The artificial refinements and distinctions incident to the property of a great and commercial people, the laws of police and revenue, (such especially as are inforced by penalties) the mode of maintenance for the established clergy, the jurisdiction of the spiritual courts, and a multitude of other provisions, are neither necessary nor convenient for them, and therefore not in force.*" (at 107)

3.9 Cote expanded on the meaning of this category in "The Reception of English Law" in 1977 **[A4 Tab 35]**:[19]

> "*Police forces as we know them did not exist in 18th Century England, but it seems probable nevertheless that "laws of police" refers to policing or regulation of the community. This is a branch of criminal law which can be distinguished both from elementary criminal wrongs like assault or theft, and from protection of the state from treason, sedition, corruption, and peculation. …*
>
> *One would therefore take "laws of police" to refer to provisions for local government and administration, such as curfews, licensing and regulation of taverns, harbour regulations, laws for safety in travel and factories, the manner of conducting local government, and the like.*"

3.10 The distinction may be analogous to that between wrongs that are *malum in se* and those that are *malum prohibitum*. Crimes *malum in se* are those that are "*inherently immoral, such as murder, arson, or rape*": *Black's Law Dictionary* (8th ed 2004) **[A4 Tab 36]**. In contrast, a crime is *malum prohibitum* if it is illegal "*merely because it is prohibited by statute, although the act itself is not necessarily immoral*." Thus, matters such as "*jaywalking*" and "*many regulatory violations*" are examples of *mala prohibita*: *Black's Law Dictionary* (8th ed 2004) **[A4 Tab 36]**. The distinction is not on all fours with that drawn by Blackstone – but the Crown submits that crimes *mala in se* (murder, rape, arson etc.) fall by definition within the first of Blackstone's categories.[20] These are "elementary criminal wrongs", to adopt Cote's terminology.[21]

3.11 The case of *Attorney General v Stewart* (1817) 2 Mer 143 **[A4 Tab 39]** elaborates somewhat on the "applicability" requirement described by Blackstone.[22] In interpreting

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19 J.E. Cote, "The Reception of English Law" (1977) 15 Alberta L. Rev. 29, 77-78. **[A4 Tab 35]**

20 The distinction between crimes *mala in se* and *mala prohibita* has frequently been subject to academic criticism, most famously and eloquently by Jeremy Bentham, who said "*the acute distinction between mala in se, and mala prohibita; which being so shrewd and sounding so pretty, and being in Latin, has no sort of an occasion to have any meaning to it; accordingly it has none.*" See Wolfe, "Mala in se: A Disappearing Doctrine?" (1981) 19 Criminology 131 **[A4 Tab 37]**; Note, "The Distinction Between Mala Prohibita and Mala in Se in Criminal Law" (1930) 30 Colum. L. Rev. 74. **[A4 Tab 38]**

21 Cote, above at note 19, at 77.

22 In that case it was accepted by the Master of the Rolls that English law applied in Grenada, although Grenada was a conquered rather than settled colony. Following victory over the French in Grenada, the King had issued a proclamation in 1763 guaranteeing "the benefit of the laws of England" to the inhabitants. In the succeeding years, various local statutes had been passed on the assumption that English law applied, and "in the courts of judicature, it was the English and not

that requirement, the Master of the Rolls asked himself whether the particular statute was one of purely "*local policy*", or one of more general application:

> "*Whether the statute of mortmain be in force in the island of Grenada, will, as it seems to me, depend on this consideration – whether it be a law of local policy adapted solely to the country in which it was made, or a general regulation of property equally applicable to any country in which it is by the rules of English law that property is governed*."
>
> (at pp 160-161)

3.12 In the particular case, the Master of the Rolls concluded that the statute "*grew out of local circumstances, and was meant to have merely a local operation.*" (p 161) The purpose of the act "*was a consideration purely local. It related to land in England and to land in England only.*" (p 162) Accordingly, the statute was not in force.

3.13 In the Crown's submission, the laws against rape and sexual assault are the epitome of general laws. There is nothing peculiar to England about the crime of rape: it is an essential element of all civilised societies. Without the law of rape and sexual assault, personal security cannot be guaranteed, and the State fails in its fundamental duty to protect citizens from violence. As the European Court of Human Rights has said, "*[t]he essentially debasing character of rape is ... manifest*", and prosecution of rape is "*in conformity with ... the fundamental objectives of the Convention, the very essence of which is respect for human dignity and human freedom.*"[23] For these reasons, the Crown submits rape is and has always been an archetypal example of a crime that is *malum in se*, and the law against rape was plainly "*applicable to the situation*" of every English colony, including Pitcairn.

3.14 The Crown accordingly submits that the English criminal laws prohibiting rape and other serious sexual offences were in force on Pitcairn from the earliest days of the settlement.[24]

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the French law that was administered in civil as well as criminal cases" (at 158). On that basis, the Master of the Rolls was satisfied that English law applied, and that Blackstone's qualification applied equally as if Grenada had been a settled colony:

> "What Mr Justice Blackstone says in his *Commentaries*, with respect to newly settled colonies, is in a great degree applicable to any colony to which the laws of England may be extended." (at p 159)

23 *SW v United Kingdom* (1996) 21 EHRR 363, 402. **[A4 Tab 40]**

24 This was demonstrated in the murder trial of Harry Christian in 1898, and was subsequently reflected in the laws of Pitcairn, for example in the 1904 laws drafted by Simons: [4-1806/f]

> "*Civil and criminal matters of a serious character for which punishment is not provided for in the local laws and regulations must be dealt with by His Majesty's High Commissioner's Court for the Western Pacific at Pitcairn Island*"

(b) The laws against rape and other serious crime were continued in force by the Pacific Order in Council 1893

3.15 As noted above, the Pacific Order in Council was extended to Pitcairn in 1898. Articles 20, 49 and 50 provided: L1 Tab 3

> "20. Subject to the provisions of this order, the civil and criminal jurisdiction exercisable under this order shall, so far as circumstances admit, be exercised upon the principles of and in conformity with the substance of the law for the time being in force in and for England ..."
>
> 49. The crimes punishable under this Order are :-
>
> > (1) Any acts or omissions which are for the time being punishable in England on indictment with death, penal servitude, or imprisonment, as treasons, felonies, or misdemeanours.
> >
> > (2) Acts or omissions by the Order, or by any regulations made by virtue of this Order, declared to be punishable as offences against this Order.
>
> 50. In case an act or omission is punishable both as a crime under the law in force in England and as an offence against this Order, the accused person may be tried and punished for such act or omission either as a crime or as aforesaid, or as an offence against this Order, but he shall not be liable to be tried or punished in both ways."

3.16 The appellants do not appear to dispute that these provisions were effective to continue the application of English law on Pitcairn from 1898 until 1961.

(c) The laws against rape and other serious crime were continued in force by successive Judicature Ordinances from 1961

3.17 In 1961 the jurisdiction of the High Commissioner's Court under the Pacific Order in Council over Pitcairn was terminated, and the Supreme Court of Fiji assumed jurisdiction for Pitcairn pursuant to the Judicature Ordinance 1961. This created a need to reaffirm the applicability of English law on Pitcairn, which was done in s 7 of the Judicature Ordinance 1961 and its two successors: the Judicature Ordinance 1970, and the Judicature (Courts) Ordinance 1999. 6-2946 6-2549/g

3.18 The Judicature Ordinance 1961 provided from 7 September 1961: 6-2946 L1 Tab 15

> "*7. Subject to the provisions of section 8 of this Ordinance the substance of the law for the time being in force in and for England shall be in force in the Islands.*
>
> *8. All the laws of England extended by this Ordinance shall be in force therein so far only as the local circumstances and the limits of local jurisdiction permit and subject to any existing or future Ordinance and for the purpose of*

facilitating the application of the said laws it shall be lawful to construe the same with such formal alterations not affecting the substance as to names, localities, courts, offices, persons, moneys, penalties and otherwise as may be necessary to render the same applicable to the circumstances."

7-3310
L2 Tab 20

3.19 The Judicature Ordinance 1970 modified this formula, and applied a "snapshot" of English law at the date of commencement of 27 October 1970:

"*14.(1) Subject to the provisions of the next succeeding subsection the common law, the rules of equity and the statutes of general application as in force in and for England at the commencement of this Ordinance shall be in force in the Islands.*

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

8-3482
L2 Tab 23

3.20 The Judicature (Amendment) Ordinance 1983 changed the date of the snapshot to 1 January 1983:

"*2. Subsection (1) of section 14 of the Judicature Ordinance is hereby amended by deleting the words "at the commencement of this Ordinance and replacing them by the words "on the 1st day of January 1983".*"

L2 Tab 25

3.21 For completeness, the current law (the Judicature (Courts) Ordinance 1999) has returned to the situation under the 1961 Ordinance, whereby the English law in force "for the time being" applies on Pitcairn:

"***16.****-(1) Subject to the provisions of subsection (2), the common law, the rules of equity and the statutes of general application as in force in and for England for the time being shall be in force in the Islands.*

(2) All the laws of England extended to the Islands by subsection (1) shall be in force therein so far only as the local circumstances and the limits of local jurisdiction permit and subject to any existing or future ordinance and for the purpose of facilitating the application of the said laws it shall be lawful to construe the same with such formal alterations not affecting the substance as to names, localities, courts, offices, persons, moneys, penalties and otherwise as may be necessary to render the same applicable to the circumstances."

3.22 These Ordinances were far from unique. Not surprisingly, they followed the standard approach used in most British colonies and former colonies,[25] including among many

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[25] The references to Pacific Islands law are drawn from Care, "Colonial Legacies? A Study of Received and Adopted Legislation Applying in the University of the South Pacific Region" (1997) 21

others New South Wales,[26] British Columbia,[27] New Zealand,[28] the Solomon Islands,[29] Kiribati,[30] Tuvalu,[31] Vanuatu,[32] and Tonga.[33]

3.23 The qualification used in all three Judicature Ordinances – "*so far only as the local circumstances and the limits of local jurisdiction permit*" – was essentially a codification of Blackstone's 18th Century principle that colonists carry with them only so much of the English law "*as is applicable to their own situation and the condition of an infant colony*".[34] (Blackstone's *Commentaries*, at p 107) **[A4 Tab 28]**

3.24 The question whether an Act is "applicable" to a colony has been considered on a number of occasions, some of which have been noted above. In summary:

Journal of Pacific Studies 33. **[A4 Tab 41]** See also Care, Newton and Paterson, *Introduction to South Pacific Law* (1999), pp 49-80. **[A4 Tab 42]**

26 New South Wales *Act* 9 Geo. IV c 83, s 24. **[A4 Tab 43]**

27 See the English Law Ordinance 1867 (BC), discussed in *Ford Credit Canada Limited v Deputy Minister of National Revenue for Customs and Excise* [1995] 2 WWR 664 (BCSC). **[A4 Tab 44]** The English Law Ordinance provided: "*… the Civil and Criminal Laws of England, as the same existed on the 19th day of November, 1858, and so far as the same are not from local circumstances inapplicable, are and shall be in force in all parts of the Colony of British Columbia*."

28 The English Laws Act 1858 (NZ) **[A4 Tab 45]** provided:

> "Whereas the laws of England as existing on the fourteenth day of January, one thousand eight hundred and forty, have until recently been applied in the administration of justice in the Colony of New Zealand so far as such laws were applicable to the circumstances thereof: And whereas doubts have now been raised as to what Acts of the Imperial Parliament passed before the said fourteenth day of January, one thousand eight hundred and forty, are in force in the said Colony : And whereas it is expedient that all such doubts should be removed without delay :
>
> BE IT THEREFORE DECLARED AND ENACTED by the General Assembly of New Zealand in Parliament assembled, and by the authority of the same, as follows :--
>
> 1. The Laws of England as existing on the fourteenth day of January, one thousand eight hundred and forty, shall, so far as applicable to the circumstances of the said Colony of New Zealand, be deemed and taken to have been in force therein on and after that day, and shall continue to be therein applied in the administration of justice accordingly."

29 Constitution of the Solomon Islands, s 76 (A schedule to the Solomon Islands Independence Order 1978 (UK)): "Subject to this Constitution and to any Act of Parliament, the Acts of Parliament of the United Kingdom of general application and in force on 1st January 1961 shall have effect as part of the law of Solomon Islands, with such changes to names, titles, offices, persons and institutions and as to such other formal and non-substantive matters, as may be necessary to facilitate their application to the circumstances of Solomon Islands from time to time."

30 Section 15 of the Western Pacific (Courts) Order 1961 (UK) provided that "the statutes of general application in force in England on the 1st day of January 1961" were in force in Kiribati. This situation was continued by the Kiribati Independence Order 1979 (UK).

31 See the Constitution of Tuvalu Ordinance 1986, preserving the former situation under s 15 of the Western Pacific (Courts) Order 1961 (UK).

32 The High Court of the New Hebrides Regulation 1976, continued in force by Art 93 of the Constitution of Vanuatu.

33 Civil Law Act 1966.

34 In *MacDonald v Levy* (1833) SCC 39, 51, **[A4 Tab 46]** Forbes CJ made the observation that the New South Wales Act 1828, which imported English law into New South Wales was "*affirmative of the law, as it stood before, as it is laid down by the oldest text writers on the subject, and confirmed by a long and uninterrupted current of legal authorities.*" In particular, the Chief Justice relied on Blackstone's *Commentaries* cited above, stating at p 52: "*This passage in the Commentaries is considered to be a sound exposition of the law by all the writers on Colonial law; and is received as authority in our courts.*"

(a) Blackstone's original formulation (whether the Act is applicable to the situation and condition of the colony) has continued to be the guiding principle.

(b) The issue has been approached as a question of law, without the need for evidence or "proof".

(c) A statute or rule is likely to be found applicable if it is founded on considerations of policy that are universal or common to both countries. In *Cooper v Stuart* (1889) 14 App Cas 286 **[A4 Tab 47]** the Privy Council was satisfied that this was the case because there was: "*no reason to suppose that the rule [was] not required in New South Wales by the same considerations which have led to its introduction here, or that its operation in that Colony would be less beneficial than in England*." (at p 293)

(d) Examples of situations where statutes have been held not to apply have included statutes that have resulted from purely local concerns,[35] or where an essential part of an Act's machinery has been absent in the colony,[36] so that the Act could not be realistically applied.

3.25 For example, in *Attorney General v Edgley* (1888) 9 NSWLR 157, **[A4 Tab 48]** the issue for the Chief Justice of New South Wales was whether an English statute concerning lotteries was in force in New South Wales. That issue was governed by the New South Wales Act 1828 (9 Geo. IV c 83), **[A4 Tab 43]** which provided that all Acts in force in England at the date the Act was passed were in force in New South Wales "*so far as the same can be applied in the said colony*." The Chief Justice held that the English statue was in force (with Windeyer J and Owen J concurring):

> "*The question, then, is whether the [Lottery Act] is in force in this colony by virtue of the [New South Wales Act], and to decide that question we have to consider whether it was in force in England at the time of the passing of the [New South Wales Act], and whether there is anything in the Act which would render it inapplicable to this colony. It certainly was in force in England when the [New South Wales Act] was passed, and indeed is so still. And looking the object of the Act, which we have already seen to be the preservation of morality and the protection of the unwary, we can see nothing in the Act or the circumstances of the colony which would render it inapplicable, and we are accordingly of opinion that it is now in force in New South Wales*."
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> *Attorney General v Edgley* (1888) 9 NSWLR 157, 160.

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35 For example, *Attorney General v Stewart* (1817) 2 Mer 143. **[A4 Tab 39]**

36 For example *Quan Yick v Hinds* (1905) 2 CLR 345 (HCA) **[A5 Tab 49]**; *R v Maloney* 1 Legge 74. **[A5 Tab 50]**

3.26 Similarly, in *Jex v McKinney* (1889) 14 App Cas 77, **[A5 Tab 51]** the issue for the Privy Council was whether an English statute dealing with intestacy was in force in British Honduras. The relevant statute declared among other things that English common law, various criminal laws, and "*all laws of universal application relating to … descents, inheritances, and successions*" were in force in British Honduras. This was qualified by a later Ordinance which limited the application of English laws "*so far only as the jurisdiction of the Court and local circumstances permit*." In considering the issue of applicability, Lord Hobhouse said at 81-82:

> "*we are brought back to the question whether the [relevant statute] is suitable to a young English colony in a new country. The principle on which such questions should turn has been laid down by Blackstone in his Commentaries, vol i. p 108.*"

3.27 In the particular case, the Privy Council held that the statute "*was framed for reasons affecting the land and society of England, and not for reasons applying to a new colony.*" (p 82) Accordingly, the statute was not extended to British Honduras.

3.28 A further example of the "applicability" issue is the case of *Quan Yick v Hinds* (1905) 2 CLR 345. **[A5 Tab 49]** The question for the High Court of Australia was whether the Lotteries Act 1823 (4 Geo. IV. C 60) **[A5 Tab 52]** was in force in New South Wales in 1905. The Lotteries Act 1823 was linked to another English statute, the Vagrants Act 1824 (5 Geo. IV c 83) **[A5 Tab 53]** – and the applicability of both fell to be considered together.

3.29 As in *Edgley*, the issue was governed by the New South Wales Act 1828 (9 Geo. IV c 83), **[A5 Tab 43]** which provided that all the laws and Statutes in force within the realm of England at the time of the passing of the Act (25 July 1828) "*shall be applied in the administration of justice in the Courts of New South Wales … so far as the same can be applied within the said Colonies …*". The High Court of Australia adopted the applicability test based on Blackstone's *Commentaries* in the mid-18th Century, and referred to the authorities noted above including *Jex v McKinney* (1889) 14 App Cas 77 (PC) **[A5 Tab 51]**, *Attorney General v Stewart* (1817) 2 Mer. 143 **[A5 Tab 39]**, and *Attorney-General v Edgley* (1888) 9 NSWLR 157. **[A5 Tab 48]**

3.30 Griffith CJ began by noting that the provisions of the criminal law had undoubtedly been imported into New South Wales by virtue of the New South Wales Act: (at p 359)

> "*It has never been doubted that the general provisions of the criminal law were introduced by the [New South Wales Act] 9 Geo. IV c. 83*"

3.31 However, the Chief Justice went on to observe that the law in question was not in Blackstone's first category (laws against "protection from personal injuries"), but rather the second category ("laws of police"):

> "*I think that the laws as to rogues and vagabonds and idle and disorderly persons, which are laws intimately connected with the social conditions of a country, are laws of police within the meaning of the passage cited from Blackstone, and are prima facie inapplicable to a new country.*" (at p 363)

3.32 In the case before the Court, the Chief Justice concluded that the Vagrants Act 1824 was not suitable to the circumstances of the colony. At p 362 he commented, "*It is obvious that many of the provisions of this Act were quite inapplicable to New South Wales in the year 1828*". In particular, the Chief Justice was concerned that a vital part of the machinery of the Vagrants Act did not exist in New South Wales (the ability to appeal to the Court of Quarter Sessions) – rendering the Act inapplicable.[37] Under s 14 of the Vagrants Act, there was a right of appeal to the Court of Quarter Sessions, as a result of which an appellant could be discharged from custody pending the appeal. At the time the Act was passed there was no Court of Quarter Sessions in New South Wales. The Chief Justice held that was a fatal omission, with the effect that "*the provisions of sec. 21 applying the penal provisions of the Act to offences created under other Statutes were not suitable to the circumstances of the Colony*". (pp 364-365)

3.33 These conclusions were supported by the fact that there was a later statute specifically applying to New South Wales and dealing with the subject of vagrancy. This, the Chief Justice held, amounted to an implied repeal of the Lotteries Act 1823: (pp363-364)

> "*… I am disposed to accept the argument that the [later Vagrancy Act] 6 Wm. IV. ought to be read either as a legislative declaration that those provisions were not in force, or as a codification of the law … and as a consequent repeal by implication of the English Act.*"

3.34 The other two Judges also based their decisions in part on the fact that part of the machinery of the Vagrancy Act 1824 did not exist in New South Wales in 1828. Barton J said at 373:

> "*We cannot hold that the punishment provisions of the [Vagrants Act 1824] are enforceable without the correlative right of appeal to Quarter Sessions granted by that Act. They must stand or fall together, and to hold that an offender is liable to the whole force of punishment given by the Act without being able to clear himself by way of the appeal which the Act purported to*

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37 The phrase "vital part of the machinery appropriate to its enforcement" is Barton J's at 374.

> *give at the same time and as part of the same scheme, would be out of all reason.*"

3.35 In particular, Barton J concluded at 374:

> "*At the time, therefore, that the New South Wales Act came into force, the [Vagrants Act 1824] could not apply to make this breach of the [Lotteries Act 1823] punishable, for want of a vital part of the machinery appropriate to its enforcement.*"

3.36 It was significant for Barton J that the appeal machinery was required "*as part of the scheme*" of the Act: p 373. On that basis, the *Quan Yick* case is authority, the Crown submits, for the proposition that a statute may be inapplicable to the needs of a colony if a vital part of its internal machinery, or an essential part of the scheme of the Act, do not exist in that colony.

3.37 Returning to the Judicature Ordinances in Pitcairn, the Crown submits that they had the effect of continuing the situation that had existed on Pitcairn from first settlement, where the law covering serious criminal offending was imported from England.[38] The Crown submits that the two requirements of the Ordinances were clearly met at all material times in relation to the Sexual Offences Act 1956:

(a) In 1961 the Sexual Offences Act was part of "*the substance of the law for the time being in force in and for England*", and from 1970 onwards it was a "*statute of general application ... in force in and for England*"; and

(b) There were no "*local circumstances*" incompatible with its incorporation into Pitcairn law.

d) None of the objections raised by the appellants prevented the application of the laws against rape and other serious crimes in Pitcairn

3.38 In this case, the appellants have submitted that the Sexual Offences Act 1956 was not imported into Pitcairn law by the various Judicature Ordinances commencing in 1961.

3.39 In responding to the appellants' submissions, it may be helpful to separate two questions: first whether <u>as a matter of law</u> the Sexual Offences Act was imported into Pitcairn law, and second whether, <u>as a matter of fairness</u>, particular cases can or should be prosecuted. The first is a question of positive law; the second is a question of fairness/abuse of process in light of the facts relative to each appellant. This

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38 For the avoidance of doubt, the Crown submits that the Judicature Ordinances merely confirmed the pre-existing common law position in Pitcairn. If the Judicature Ordinances were invalid, the Crown submits it would be open to the Court to find that rape and other sexual offences continued in Pitcairn, pursuant to the common law.

section of the Crown's submissions deals with the first issue; the following section deals with the fairness/abuse of process issue.

3.40 The appellants have advanced four main reasons for the submission that the Sexual Offences Act 1956 was not imported into Pitcairn law:

(a) The Governor did not comply with the publication requirements of the Pitcairn Order 1970.

(b) The Judicature Ordinances were "*void for uncertainty*", and the phrase "*statutes of general application*" was an "*inadequate vehicle*" by which to import the Sexual Offences Act 1956 into Pitcairn law.

(c) The alleged lack of an appeal right from the Supreme Court of Pitcairn prevented the Sexual Offences Act being incorporated into Pitcairn law.

3.41 In the Crown's submission none of these submissions is sustainable, and the Sexual Offences Act did form part of the law of Pitcairn at all material times.

i) The Governor complied with the publication requirements of the Pitcairn Orders in Council when passing the Judicature Ordinances

7-3304
L2 Tab 18

3.42 As a starting point, counsel for the appellant Young submits that the terms of the Pitcairn Order 1970 were not complied with. In particular, he submits that s 5 of the Order in Council required the Governor to publish all applicable English laws on the Island: [paras 21-46]. Under this interpretation, the Pitcairn Order 1970 would have required the Governor to send a large portion of the common law and statutory law of England to Pitcairn Island immediately on passing the Judicature Ordinance 1970.

2-929 –
2-934

3.43 The Crown submits that these arguments are based on a misinterpretation of the Pitcairn Order 1970, as the Court of Appeal found in paras [30] to [42]. The publication requirements in s 5 of the Order apply only to the Ordinances made by the Governor, not the full text of the English statutes and common law received into Pitcairn law by operation of law.

3.44 Section 5 of the Order in Council provides:

7-3305/c
L2 Tab 18

> "***5—****(1) The Governor may make laws for the peace, order and good government of the Islands.*
>
> *(2) Without prejudice to the generality of the power conferred by subsection (1) of this section, the Governor may, by any such law, constitute courts for the Islands with such jurisdiction, and make such provisions and regulations*

> *for the proceedings in such courts and for the administration of justice, as the Governor may think fit.*
>
> *(3) All laws made by the Governor in exercise of the powers conferred by this Order shall be published in such manner and at such place or places in the Islands as the Governor may from time to time direct.*
>
> *(4) Every such law shall come into operation on the date on which it is published in accordance with the provisions of subsection (3) of this section unless it is provided, either in such law or in some other enactment, that it shall come into operation on some other date, in which case it shall come into operation on that date.*"

3.45 This is in very similar terms to s 5 of the Pitcairn Order in Council 1952. 6-2550/g L1 Tab 9

3.46 Read in full, it is clear that s 5 deals exclusively with the publication of "*[a]ll laws made by the Governor in exercise of the powers conferred by this Order*": s 5(3). In para 24, Mr Young's submissions quote only the words "*all laws*" without quoting the following words "*made by the Governor in exercise of the powers conferred under this Order.*" Those words add an important qualification, and in the Crown's submission it is clear that the Pitcairn Order in Council deals exclusively with the laws that are made by the Governor. The Court of Appeal reached this conclusion at para [38].[39] 2-932

3.47 This interpretation is reinforced by the long-established history of the reception of English law in English colonies. Although settlers were held to have carried English law with them, it has never been suggested that they were required to physically carry the law reports or statutes with them to newly-settled lands. The notion that every English statute and every common law decision needed to be published in every colony in order to take effect is inconsistent with the fact that English law was held to have been received in all British colonies from the time of first settlement – often long before the first consignment of statutes or law reports ever reached the colony. In the Crown's submission it is impossible to read the Pitcairn Orders in Council 1952 or the Pitcairn Order 1970 as imposing a duty on the Governor to publish the "whole constellation"[40] of English law applicable to Pitcairn.

3.48 It is clear that the Governor has complied with s 5 of the 1970 Order in Council on each occasion he has enacted an Ordinance.[41] Following a thorough factual enquiry, the Supreme Court found there was an established practice followed "on every occasion" to place a copy of each Ordinance on the notice board, and specifically that 2-835 – 2-839

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39 It is clear the FCO legal adviser, Mr Gordon-Smith, also shared this interpretation in 1970. See page 7-3344/f.

40 Young, para 16, p 5.

41 The same is also true in respect of s 5 of the Pitcairn Order in Council 1952.

this had taken place in respect of all Ordinances relied on in these prosecutions. (paras [92] – [94]) This is no longer disputed.[42]

ii) The Judicature Ordinances were not "void for uncertainty"

3.49 The appellants next submit that the phrases used in the Judicature Ordinances 1961 and 1970 were "*inadequate phrases by which to import English penal law*", [PD, para 125, p 63] and that the Judicature Ordinances should be declared void for uncertainty because it would have been "*utterly impossible, even for a skilled lawyer*", [Young para 58(iv), p 18] to know which statutes were incorporated into Pitcairn law. The written submissions for Mr Young describe this task as "*impossibly large*" and "*impossibly difficult*" [Young para 58(v) p 18]. However, the written submissions do not address any of the authorities, constitutional texts, or academic articles that have considered and approved this method of importing English law over the last 300 years.

3.50 In the Crown's submission, far from it being impossibly difficult to know whether the law of rape applied on Pitcairn in the 1960s, it was known to Islanders and administrators throughout the 20th Century that it did. See for example:

4-1808/f (a) 1904 laws.

5-2012 – 5-2014 (b) Discussion of rape allegation, 1927.

6-2933/f (c) Request of Island Police Officer, 1959.

7-3198/f 7-3203/d (d) Visit of Commissioner Cowell, 1965.

7-3367/b (e) Island Council meeting, 1970.

2-596/e (f) Evidence of Island Secretary, Betty Christian, 2004.

2-598/e (g) Evidence of Thomas Christian, 2004.

3.51 Moreover, far from the mechanism in the Judicature Ordinances being an "*inadequate vehicle*" to import English law, this was the long-standing and well-established method of doing so, supported by a 300-year line of authority in the common law and a long history of application in the British Empire stretching from New York to New Zealand.

3.52 The appellants have queried whether this form of received law was sufficient to import the criminal law into Pitcairn. This was in fact the standard way of doing so throughout

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[42] Consequently, hundreds of pages of documents establishing publication of Ordinances on the Island have been omitted from the record.

English colonial history. As Cote observed in "The Reception of English Law" in 1977, *"the raw colony needs criminal law far more than civil law"*.[43] **[A4 Tab 35]** By way of example, the Chief Justice of the High Court of Australia said in 1905 (as quoted above):[44]

> "*It has never been doubted that the general provisions of the criminal law were introduced by the [New South Wales Act] 9 Geo. IV. C. 83*"
>
> *Yick v Hinds* (1905) 2 CLR 345, 359 **[A5 Tab 49]**

3.53 Thus, in *R v Black Peter* (1863) 2 SCR (NSW) 207, **[A5 Tab 54]** an accused was tried and convicted of murder in New South Wales under an English statute, Lord Landsdowne's Act of 1828 (9 Geo. IV, c. 31). **[A5 Tab 55]** A submission that this Act was limited to England was rejected by the Supreme Court of New South Wales:

> "*… we are of the opinion that [Lord Landsdowne's Act] being applicable to the condition of this colony, was introduced by the [New South Wales Act 1828] and that, therefore, as the cause of death happened in this colony, the Courts of this colony had jurisdiction to try the prisoner, whether the death itself occurred in this colony or Victoria.*"

3.54 The following year, the Supreme Court of New South Wales upheld a conviction for bigamy under 9 Geo. IV. c 31: *R v Packer (1864) 3 SCR (NSW) 40.* **[A5 Tab 56]** The Chief Justice said, at p 48:

> "*The doubt which I suggested at the trial has been removed, by further considering the words of the statute creating this offence. That statute was, by the [New South Wales Act] incorporated in our laws, and is therefore the law of the colony. If the enactment had been passed by a colonial legislature, it would have no force as to marriages contracted elsewhere than in the colony legislating. But the British Parliament has legislative authority over all the colonies, and over all British subjects everywhere. I think, therefore, that the Courts of this colony have jurisdiction over the offence, although committed out of the colony.*"

3.55 Similarly, the Chief Justice of New Zealand said in 1889:

> "*… until the English Criminal Law Consolidation Acts dealing with larceny, forgery, coining, offences against the person, etc., were re-enacted here in 1867, we depended on the English Statute Law as it existed in January 1840 for our laws on these subjects, as we do now for many other branches of the criminal law.*"
>
> *Ruddick v Weathered* (1889) 7 NZLR 491 **[A5 Tab 57]**

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43 (1977) 15 Alberta LR 29, 77. **[A4 Tab 35]**

44 See also Castles, "The Reception and Status of English Laws in Australia" (1963) 2 Adel. L. Rev. 1, 2. **[A5 Tab 59]**

3.56 Thus, in the New Zealand case of *R v Graham* (1865) Co LJ 16, **[A5 Tab 58]** the Court of Appeal (Arney CJ, Johnston J, Gresson J, Chapman J) upheld a conviction under 7 & 8 Geo. IV c. 28 for committing a felony with a previous felony conviction. There was no doubt that the English statute had been imported into New Zealand law under Blackstone's doctrine, as reinforced by s 1 of the English Laws Act 1858:

A4 Tab 45

> "*The laws of England as existing on the fourteenth day of January, one thousand eight hundred and forty, shall, so far as applicable to the circumstances of the said Colony of New Zealand, be deemed and taken to have been in force therein on and after that day, and shall continue to be therein applied in the administration of justice accordingly*."

3.57 In *Attorney General v Stewart* (1817) 2 Mer 143, 158 **[A4 Tab 39]** the Master of the Rolls noted that in the Courts of Grenada, "*it was the English and not the French law that was administered in civil as well as in criminal cases.*"

3.58 It must be acknowledged that at the margins, the phrases "*the substance of the law for the time being in force in and for England*", and "*statutes of general application*" could perhaps leave scope for debate. However this is not a case at the margins. The law of rape and sexual assault is and was fundamental. Moreover, although Sir Kenneth Roberts-Wray was mildly critical of the phrase "statutes of general application" in his text in 1966, he went on to say at p 545: **[A1 Tab 1]**

> "*[The phrase] has been in use for many decades, it had been the subject of judicial interpretation, it does not appear to have given the Courts serious trouble, and it has much the same effect as the common law rule. So a change of formula might do more harm than good.*"

3.59 In the Crown's submission, while it may be possible to engage in academic criticism of the conceptual certainty of the law in the penumbra, it is quite another thing to suggest that the Sexual Offences Act was not part of the substance of the law of England, or a "*statute of general application*" within the plain meaning of those terms, in the 1960s and 1970s.

iii) The appeal provisions for Pitcairn did not render the Sexual Offences Act 1956 inapplicable

3.60 The appellants submit that "*the incorporation of English criminal law failed under both the 1961 Judicature Ordinance and the [1970] Judicature Ordinance because there was no provision for a general appeal from a conviction of the Supreme Court included in either Ordinance*." [PD, para 136, p 67] This argument was rejected by the Court of

2-937

Appeal at paragraphs [52] to [65]. The appellants' submission is based on the decision of the High Court of Australia in *Quan Yick v Hinds* (1905) 2 CLR 345 (HCA). **[A5 Tab 49]** In the Crown's submission, this is unsustainable for two reasons.

3.61 First, the *Quan Yick* case was decided on a basis that does not apply in the present cases. In *Quan Yick*, a statute was held to be inapplicable because "*a vital part of the machinery appropriate to its enforcement*" was lacking in New South Wales. (at 374 per Barton J) In that case, the Vagrants Act 1824 created a particular mechanism involving an appeal to the Court of Quarter Sessions. That mechanism did not exist in New South Wales at the relevant time.

3.62 In contrast, at all relevant times there was a mechanism in place in Pitcairn to enforce the Sexual Offences Act 1956. That mechanism was a trial before the Superior Court of Pitcairn. Over the period relevant to these appeals there were three such Courts: the High Commissioner's Court until 1961, the Fiji Supreme Court from 1961 to 1970, and the Pitcairn Supreme Court from 1970 until the present day. The three Courts were empowered as follows:

(a) The High Commissioner's Court retained jurisdiction over Pitcairn from 1952 pursuant to s 3(a) of the Pitcairn Order in Council 1952. From 1955, there was an appeal provided from the High Commissioner's Court to the Fiji Court of Appeal.[45] 6-2549 L1 Tab 9

(b) From 1961, the Supreme Court of Fiji assumed first instance jurisdiction over Pitcairn under s 3 of the Judicature Ordinance 1961. No separate right of appeal was provided in the Ordinance, beyond the right of appeal to the Privy Council referred to below. 6-2946 L1 Tab 15

(c) In 1970, the Supreme Court of Pitcairn was created by s 3 of the Judicature Ordinance 1970, with all the jurisdiction of the High Court of Justice in England. Although no Judge was appointed to the Supreme Court until 2000, the Court remained fully constituted: s 5(2) Judicature Ordinance 1970. Indeed, there was optimism in 1970 that the Supreme Court would never need to sit, as the following extract from correspondence between Commissioner Dymond and the Chief Magistrate indicates: 7-3310 L2 Tab 20

> "*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 [the Supreme Court of Pitcairn or the Subordinate Court of Pitcairn], 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.*" 7-3352/f

45 This right of appeal was created by the Pacific (Amendment) Order in Council 1955 with effect from 18 July 1955. **[L1 Tab 13]**

3.63 Therefore, despite the optimism created by the absence of reported crime on Pitcairn, there was at all times a Superior Court in existence in Pitcairn capable of enforcing the Sexual Offences Act.

3.64 Moreover, there was an explicit right of appeal to the Fiji Court of Appeal under the Pacific Order in Council at the time the Sexual Offences Act was passed in 1956. As noted above, this was created in 1955 by the Pacific (Amendment) Order in Council 1955. **[L1 Tab 13]** The position changed in 1961 when the High Commissioner's Court ceased to have jurisdiction over Pitcairn, and the Supreme Court of Fiji assumed jurisdiction, without a right of appeal established by Ordinance. It should be noted that the appellants' submission, if accepted, would lead to the odd situation where the Sexual Offences Act applied on Pitcairn from 1956 to 1961, then ceased to apply from 1961 to 2000, but applied again from 2000.[46]

3.65 In addition, at all material times there was an appeal available from the Superior Court of Pitcairn to Her Majesty in Council. As Sir Kenneth Roberts-Wray explained in *Commonwealth and Colonial Law* at 436: **[A1 Tab 1]**

> "*The Sovereign has a Prerogative right to grant special leave to appeal from any Court whatever the nature of the case*."

3.66 Thus, in *Re the Lord Bishop of Natal* (1865) 3 Moo PCC NS 115, **[A5 Tab 60]** the Lord Chancellor said:

> "*It is the settled prerogative of the Crown to receive appeals in all Colonial cases.*"

3.67 Similarly, in *R v Bertrand* (1867) LR 1 PC 520, 530 **[A5 Tab 61]** Sir John Coleridge said:

> "*… in all cases, criminal as well as civil, arising in places from which an appeal would lie, and where, either by the terms of a Charter or Statute, the authority has not been parted with, it is the inherent prerogative right, and, on all proper occasions, the duty, of the Queen in Council to exercise an appellate jurisdiction, with a view not only to ensure, so far as may be, the due administration of justice in the individual case, but also to preserve the due course of procedure generally.*"

3.68 It was not until 12 July 2000 that the Pitcairn (Appeals to Privy Council) Order 2000 was made by Her Majesty. **[L2 Tab 29]** However, that Order did not create the right of appeal to the Sovereign; it simply provided rules and procedures to govern such

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[46] A right of appeal was provided in the Judicature (Appeals in Criminal Cases) Ordinance 1999. **[L2 Tab 27]**

appeals. Section 22 of the Order specifically preserved the Queen's prerogative to admit any appeal by special leave.[47]

3.69 Accordingly, in the Crown's submission, the *Quan Yick* case is not analogous to the present situation, and all the machinery necessary to enforce the Sexual Offences Act 1956, including an appeal mechanism, was in place on Pitcairn at all relevant times.

Reliance on 19th Century case law

3.70 Finally on the subject of the reception of English law, the appellants state [PD, para 130, p 65] that the most recent of the cases regarding reception of English law was at the turn of last Century. While there are more recent examples – such as from Prince Edward Island in 1971,[48] it must be acknowledged that Pitcairn is an historically unusual case. The normal colonial pattern was for English criminal law to be received at the commencement of a colony's development by way of the common law rules of reception, then subsequently by way of general laws such as the Judicature Ordinances. Later, as a colony developed and its population increased, and as a more sophisticated legislature and system of courts emerged, it was usual for a local criminal code to be enacted. Such a criminal code has never been enacted for Pitcairn, although Pitcairn's law has been revised and modernised on a number of occasions.

3.71 Although the process of further revising of Pitcairn's legal system was mooted in 1996, it is not difficult to understand why that project may have been prioritised below other development projects for the Island. Throughout the 20th Century, the reality is that Pitcairn's population, economy, and levels of reported crime did not develop to the extent experienced by other colonies in the 18th and 19th Centuries. Although the Island has developed many of the indicia of civilisation over the years, Pitcairn's current population is fewer than 50 people, which compares with a population of approximately 1000 Europeans in New Zealand in the late 1830s. When the Judicature Ordinance was enacted in 1961, the Island's population included only 38 adult men out of a total population of 128. Indeed, current official US Government

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47 This right was more than merely theoretical for Pitcairn: there appears to have been provision to pay the costs of an appellant from Pitcairn on a criminal appeal to the Privy Council from 1971: see pages 7-3395 to 7-3401.

48 *Delima v Paton* (1971) 19 DLR (3d) 351. **[A5 Tab 62]**

statistics list Pitcairn as having the smallest population of any country or territory in the world, by a comfortable margin.[49]

3.72 For these reasons, the Crown submits it is not surprising that the legal mechanism successfully used to provide English law to thousands of colonists in countries such as Canada, Australia and New Zealand in the 19th Century remained in place for the dozens of people on Pitcairn during the 20th Century. As for the fairness and appropriateness of using that mechanism in these cases, that is the topic of the next section of these submissions.

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[49] See http://www.cia.gov/cia/publications/factbook/rankorder/2119rank.html. The five lowest populations in the world are:

Vatican City	932
Cocos Islands	628
Johnson Atoll	361
Christmas Island	361
Pitcairn Islands	45

4 THE TRIALS WERE NOT AN ABUSE OF PROCESS

4.1 If, as the Crown submits, it is established that the laws against rape and other serious crimes were in force on Pitcairn between 1961 and 1999, the next issue is whether it was fair to apply the law to the appellants in these cases. The appellants submit that the trials were an abuse of process because:

> The "*failure or neglect to provide Pitcairn with intelligible publication of the Sexual Offences Act 1956, accompanied by other deficiencies in governance such as the lack of provision of any warning that the criminal law would be enforced in modern times by the presence of British police officers on the Island, and the absence of any machinery of justice for the trial of indictable offences, constitute one of those other non-defined instances where to use the words of Lord Bingham .... 'they will be recognised [as an abuse of process] when they appear'.*"
>
> [PD, para 151 p 73]

4.2 The specific matters raised by the appellants giving rise to an abuse are:

(a) The fact that the text of the Sexual Offences Act 1956 was not published on Pitcairn Island;

(b) The absence of an English police officer on Pitcairn Island prior to 1996;

(c) The delay between the decision to charge the appellants and the date of charge;

(d) The "late constitution" of the machinery of justice, and "crushing appearance" of the steps taken by the Governor.

4.3 The Crown submits that the Courts below were correct to find that there was no abuse of process in these cases, because:

(a) The crimes involved were so plainly wrong that knowledge of their criminality can be deemed to have existed on Pitcairn at the relevant time, without further inquiry. In the Crown's submission, the appellants' crimes of rape, indecent assault and incest were *mala in se*, and it is sufficient to establish that the laws against those crimes were <u>in force</u> on Pitcairn at the relevant time.

(b) Alternatively and in any event, it was foreseeable on Pitcairn throughout the relevant period that the actions of the appellants were criminal and liable to prosecution.

(c) At all relevant times the law against rape and other sexual crimes was accessible to the people of Pitcairn through reasonable enquiry.

(d) The absence of English Police on Pitcairn prior to 1996 did not render the trials an abuse of process.

(e) There was no abuse of process occasioned by delay.

(f) The other matters raised by the appellants did not give rise to an abuse of process.

a) Abuse of process: the legal test

4.4 The general principles governing the abuse of process jurisdiction are very broad, and are summarised in *Archbold* (2005) para 4-54 [A5 Tab 63] in the following way:

> "*The power to stay proceedings for abuse of process has been said to include a power to safeguard an accused person from oppression or prejudice (Connelly v. DPP, ante, §4-48), and has been described as a formidable safeguard, developed by the common law, to protect persons from being prosecuted in circumstances where it would be seriously unjust to do so (Att.-Gen. of Trinidad and Tobago v. Phillip [1995] 1 A.C. 396, PC). An abuse of process was defined, in Hui Chi-Ming v. R.[1992] 1 A.C. 34, PC, as "something so unfair and wrong that the court should not allow a prosecutor to proceed with what is in all other respects a regular proceeding.*
>
> *In Re Barings plc (No. 2); Secretary of State for Trade and Industry v. Baker [1999] 1 All E.R. 311, CA (Civ. Div.), it was said (in the context of proceedings under section 6 of the Company Directors Disqualification Act 1986 that a court may stay proceedings where to allow them to continue would bring the administration of justice into disrepute among right thinking people and that this would be the case if the court was allowing its process to be used as an instrument of oppression, injustice or unfairness.*"

4.5 The threshold is a high one, requiring something "*seriously unjust*" that "*would bring the administration of justice into disrepute*", or that would result in "*oppression or prejudice*".

4.6 In this case, the appellants' submission is to a large extent novel. There is no direct authority on the point, and the issue largely turns on first principles:

(a) As a starting point, it is well-established in English law that "*an Act of Parliament takes legal effect on the giving of the royal assent, irrespective of publication*": *R (on the application of L and another) v Secretary of State for the Home Department* [2003] 1 All ER 1062 (CA). [A5 Tab 64] There is no general requirement that every Statute be published in order for it to take

effect. Generally speaking, the only issue is whether an Act is in force – not whether a copy of the Act can be found in any particular location within the jurisdiction.

(b) Secondly, it is axiomatic in English law that mere ignorance of the law is no excuse: see *Blackpool Corporation v Locker* [1948] 1 KB 349, 361. **[A5 Tab 65]**

(c) Third, there is authority for the proposition that the criminal law must be sufficiently accessible and foreseeable to the public in order to found a prosecution.

4.7 This third principle has not been disputed by the Crown, and was accepted by the Court of Appeal in para [105]. To the Crown's knowledge, this principle has never before been applied as part of the abuse of process doctrine to stay a criminal prosecution. However, as the Court of Appeal noted, the existence of the principle draws support from the following authorities: 2-953

(a) In *Blackpool Corporation v Locker* [1948] 1 KB 349, 361 **[A5 Tab 65]** Scott LJ said:

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

(b) In *R (on the application of L and another) v Secretary of State* [2003] 1 All ER 1062 (CA), **[A5 Tab 64]** there was obiter comment suggesting that reliance on an unpublished and inaccessible law could amount to unfairness warranting judicial intervention. In that case, the Secretary of State made decisions regarding the rights of asylum seekers during a time when no text of the relevant law was accessible. Although the Court described the issue as one of common law fairness, it was influenced by the jurisprudence of the European Court of Human Rights, and quoted from the *Sunday Times case*. Lord Philips MR said at p 1067: **[A5 Tab 66]**

> "*In cases where the justification for a prima facie invasion of a convention right depends on the state's having acted 'in accordance with a procedure prescribed by law' ... the court declines to*

> *recognise national laws which are not adequately accessible: see Sunday Times v UK (1979) 2 EHRR 245 at 271 (para 49).*"

(c) In the well-known case of *Lim Chin Aik v R* [1963] AC 160, 171 **[A5 Tab 67]** the Crown was prevented from relying on the maxim that ignorance of the law is no excuse because there was no provision "*for the publication in any form of an order of the kind made in the present case or any other provision designed to enable a man by appropriate enquiry to find out what 'the law' is.*"

(d) Another interesting example is the European human rights case of *K-HW v Germany* (2003) 36 EHRR 59. **[A5 Tab 68]** In 1972, a 20 year old East-German border guard shot and killed an unarmed civilian attempting to escape to West Germany. More than 20 years later, following the re-unification of Germany, he was found guilty of intentional homicide and sentenced to suspended detention. He appealed to the European Court of Human Rights on the grounds that his act in shooting the civilian was not criminal by the law of East Germany in 1972, and that it was unforeseeable that he would be prosecuted and sentenced for that act. By 14 votes to 3 the European Court upheld the conviction. In the Court below, the German Federal Constitutional Court said: (para 20, pp 1095-6)

> "*What is decisive is ... whether the breach of the criminal law was so obvious that it was plain without further thought or inquiry to an average soldier possessed of the information which the recipient of the order had. ...*
>
> *... it is not self-evident that the dividing line between criminal and non-criminal conduct would be crystal clear to the average soldier, and it would be inconsistent with the principle of guilt to hold that the breach of criminal law was obvious to the soldiers on the sole basis that there had – objectively – been a serious breach of human rights; it must therefore be shown in greater detail why the individual soldier, in view of his education, indoctrination and other circumstances, was in a position to recognise that his action undoubtedly contravened the criminal law. The criminal courts did not discuss the facts in detail from this point of view in the initial proceedings. They did, however, show that the killing of an unarmed fugitive by sustained fire was, in the circumstances of the case, such a dreadful and wholly unjustifiable act that it must have been immediately apparent and obvious even to an indoctrinated person that it breached the principle of proportionality and the elementary prohibition on the taking of human life. The other explanations given by those courts likewise show sufficiently clearly, in the light of all the reasons stated in the judgments ... that the principle of guilt has been respected.*"

(e) On appeal in *K-HW v Germany*, the European Court of Human Rights defined the issue as "*to what extent the applicant, as a private soldier, knew or should have known that firing on persons who merely wanted to cross the border was an offence according to GDR law.*" (para 72, p 1110) The Court noted that the written law was accessible to all, and that the maxim that ignorance of the law is no defence applied. (para 73, pp 1110-1) Finally, the Court concluded that "*at the time when it was committed the applicant's act constituted an offence defined with sufficient accessibility and foreseeability by the rules of international law on the protection of human rights.*" (para 105, p 1116).

(f) Finally, on the question of foreseeability, there is the decision of the European Court of Human Rights in *SW v United Kingdom* (1996) 21 EHRR 363. **[A4 Tab 40]** As a matter of English common law prior to 1990 a husband was immune from prosecution for the rape of his wife. That law was changed by a decision of the English Courts in July 1990. The *SW* case arose because a man was convicted after 1990 in accordance with the new law, of raping his wife in November 1989, before the law had been altered by the courts. The man argued that his conviction violated the principles against retrospectivity, but his conviction was upheld by the English Court of Appeal, the House of Lords, the European Commission, and the European Court of Human Rights. The ECHR held at 402:

> "*The decisions of the Court of Appeal and then the House of Lords did no more than continue a perceptible line of case law development dismantling the immunity of a husband from prosecution for rape upon his wife. ...*
>
> *[T]here was an evident evolution, which was consistent with the very essence of the offence, of the criminal law through judicial interpretation towards treating such conduct generally as within the scope of the offence of rape. This evolution had reached a stage where judicial recognition of the absence of immunity had become a reasonably foreseeable development of the law.*"

4.8 As the Court of Appeal noted, the idea that law should be accessible to the citizenry is further supported by jurisprudential writing, including Lon Fuller, *The Morality of Law* (Yale University Press, 1969), **[A5 Tab 69]** John Finnis *Natural Law and Natural Rights* (Oxford University Press, 1980) **[A5 Tab 70]** and John Rawls, *A Theory of Justice* (Harvard University Press, 1999). **[A5 Tab 71]**

2-954
Para [109]

b) It was unnecessary to have a copy of the Sexual Offences Act physically present on Pitcairn Island

i) Rape and sexual assault are mala in se, and universally known to be criminal

4.9 In the Crown's submission, the crimes in these appeals were *mala in se*, and knowledge of their wrongfulness can be deemed to have existed throughout the relevant period without further enquiry. On that basis it was open to the Courts below to dismiss the applications on the simple basis that the crimes of rape, indecent assault, and incest were prohibited by the law in force on Pitcairn at the time, and no abuse of process could have arisen on the facts alleged. In other words, the criminal nature of rape, indecent assault and incest is so inherently obvious that the law against those crimes can be deemed to be both accessible and foreseeable to the public in any British settlement.

4.10 That proposition is supported by the following authorities and submissions:

(a) First, it is consistent with the doctrine of reception of English law referred to above. Under the well-established doctrine associated with Blackstone, English settlers were deemed to have carried the basic English laws with them into a new settlement. The more esoteric and "*artificial requirements*" of English law were not implied in the new settlement, but as far as the basic laws were concerned there was no requirement to publish or publicise them – they were simply deemed to be in force. Thus, Blackstone's doctrine is consistent with the proposition that knowledge of the basic laws (such as those for "*protection from personal injuries*") can be deemed or implied in any British settlement.

(b) Second, it is consistent with the practice of English law under Blackstone's doctrine. While colonies such as New South Wales and New Zealand relied upon English law to supply their criminal laws for many decades, there does not appear to be any reported case where the Courts enquired into the publication of the English laws in a particular locality. As a matter of practice, English criminal law was almost certainly applied in areas where there were no copies of the English law reports or statutes. One obvious example is the Harry Christian trial. The case was considered by the highest Law Officers of the Crown in 1898, who advised that the offender could be tried under the English law then in force on the Island, and that was done. There is no suggestion that there was a copy of 24 & 25 Vict. Cap. 100. on Pitcairn in

1897, but it could hardly have been questioned that murder was a crime on Pitcairn at that time. If the question had been asked, it is likely that anyone (including Harry Christian, who repeatedly confessed) would have said that murder was "obviously" a crime. In the Crown's submission, there is no reason to treat the offences of rape and sexual assault any differently.

(c) Third, it is consistent with international human rights norms. In *K-HW v Germany*, the European Court of Human Rights held that the crime of murder was so fundamental that the Appellant could not claim ignorance of it: **[A5 Tab 68]**

> "*... even a private soldier could not show total, blind obedience to orders which flagrantly infringed not only the GDR's own legal principles but also internationally recognised human rights, in particular the right to life, which is the supreme value in the hierarchy of human rights.*" (para 75)

In doing so, the Court applied an objective standard in considering the foreseeability of prosecution. The issue was "*to what extent the applicant, as a private soldier, knew or should have known that firing on persons who merely wanted to cross the border was an offence according to GDR law.*" (para 72, p 1110) The essence of such an objective standard is to deem knowledge based on universal or fundamental norms.

In *K-HW v Germany*, the Court had no hesitation in deeming knowledge in relation to the crime of murder. In the Crown's submission, there is no reason to treat the crimes of rape and sexual assault any differently. Indeed, in *SW v United Kingdom* (1996) 21 EHRR 363, 402 the European Court of Human Rights said that prosecuting a husband for raping his wife was "*in conformity not only with a civilised concept of marriage but also, and above all, with the fundamental objectives of the Convention, the very essence of which is respect for human dignity and human freedom.*" **[A4 Tab 40]**

(d) Fourth, in the Crown's submission, the proposition is consistent with the very nature of the crimes of rape, indecent assault, and incest. Rape and indecent assault involve sexual contact against the will of the victim. This type of non-consensual offending is a form of violence that violates fundamental rights and universal norms. Similarly, incest is regarded universally as both morally and legally wrong. In the Crown's submission these are crimes at the core of

those *mala in se*, and the law should not hesitate to deem knowledge of their criminality.

4.11 Although the concept of crimes *mala in se* has frequently been subject to academic criticism,[50] the Crown submits the concept is useful and relevant in this case. It has endured for centuries notwithstanding the conceptual and definitional difficulties that can exist in drawing the line between crimes *mala in se* and those *mala prohibita*. In the Crown's submission there is no need to engage in a line-drawing exercise in this case: rape and other non-consensual sexual offences are plainly within the category of crimes *mala in se*.

4.12 However, the Crown's submission does not ultimately turn on the adoption of any particular label or theoretical framework, and is equally grounded in simple common sense. Everyone knows that rape and sexual assault are crimes.

The criminality of the appellants' acts in these cases

4.13 In the cases before the Court, the Crown submits that the actions of the appellants were such that their criminality was objectively obvious. The conduct of the appellants is described in the individual judgments and sentences on pages 2-453 to 2-589, and summarised at paras [18] to [43] of the Supreme Court's judgment.

2-807 – 2-812

4.14 As noted above, 25 of the 30 convictions in these cases relate to non-consensual offending. Some of the offending was particularly serious, for instance count 3 proved against Randall Christian, which was the charge referred to in the opening paragraph of these submissions:

2-513 para [51]

> "[51] *The complainant told the Court that in July or August of 1995 when she was nearly 11 years of age, a number of children, including complainant D, and also the accused and S, were playing a game like hide-and-seek among the banana palms adjacent to the molasses shed and sugar cane mill on the Island. Most of the adult population of the Island was there, working on the sugar cane. From there the view was across the tops of the palms in the gulley. After the other children went back to the shed, S and the accused cornered the complainant against some banana trees. From here she could not see the shed. S removed his t-shirt and, putting it in her mouth, knotted it behind her head as a gag. She was put on her back on the ground. The accused, kneeling beside her, held her elbows on the ground above her head. She struggled but the men were too strong for her. S was standing undressing himself, and then removed her shorts and underwear. Her top was left on. He then positioned himself and penetrated her vagina with his penis while her arms were held above her head by the accused. She does not know if he ejaculated, but he moved his body back and forth over her.*

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50 See footnote 20 above.

> *She was crying, but gagged. When he had finished, he got up and dressed and the accused filled his place, also penetrating the complainant with his penis, and also rising and dressing on completion of the act.*
>
> *[52] One of the men untied the gag and they laughed and joked. She was allowed to go up to the molasses shed. Though her father was there, and her mother probably at her grandfather's house nearby, she told no-one of the event.*
>
> *[53] The complainant was challenged on her failure to tell anyone. Why did she not tell? Also, the molasses shed is a building without sides. Would not people be able to see? She did not seek to justify these things but spoke of them matter-of-factly.*
>
> *[54] I accept her evidence, over the denials of the accused on his audio-taped interview, because it appeared honest, detailed, and was a recount of an event of a magnitude not susceptible to forgetfulness. I detected no sign of dishonesty on her part. The evidence proves the charges of rape and aiding and abetting rape by another.*"

4.15 In the Crown's submission, the Court of Appeal's findings on abuse of process can be upheld on the simple basis that the appellants' offending was obviously criminal on any objective test.

ii) It was foreseeable that rape and other sexual offences would be prosecuted on Pitcairn

4.16 In the alternative, the Crown submits that the Court of Appeal was correct to find it was objectively foreseeable at all relevant times that rape and other sexual crimes would be prosecuted on Pitcairn Island. The Supreme Court's finding on this issue, upheld by the Court of Appeal, was set out in para [240] [c]: 2-894

> "*There was ... 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*"

4.17 Further, at para [108]: 2-845

> "*... 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.*"

4.18 In the Crown's submission, those findings were amply justified by the evidence before the Court. As a starting point, the evidence of all three Pitcairn Islanders called before the Supreme Court supported the conclusions reached by the Court. The Crown in particular notes the following evidence:

(a) Betty Christian's affidavit at paras 3.7, 5.2 and 5.3:

2-594/d

"*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. ...*

2-596/a

5.2 Our Ordinances and local laws 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.

5.3 The Harry Christian murder trial in 1898 is a well-known part of the Island's history. It is an obvious example of British assistance in prosecuting serious crime on Pitcairn Island. If there were a murder today on Pitcairn, I would expect that to be prosecuted in the Supreme Court under English law. The same would have been true at any time since the Supreme Court was created in the early 1960s. By the same token, 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."

The substance of these statements was not challenged in cross-examination.

(b) Thomas Christian's affidavit at paras 2.2 and 2.3:

2-598/e

"*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 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.*

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."

Again, the substance of these statements was not challenged in cross-examination.

(c) Evidence was called by the defence from a former accused, Jay Warren, who was acquitted in October 2004 following trial for indecent assault. His affidavit stated he had no reason to think that English criminal law applied on Pitcairn, and that he disagreed with the proposition that it was well-known that English law applied on Pitcairn. However, in cross-examination he agreed that rape was unacceptable on Pitcairn and said that rape was a matter that would have to be referred to the Administration office: 2-610 – 2-611

> *[2] ... you're certainly not a lawless society, are you, where people can commit crimes and expect to get away with it? ..... No, we deal with our own crimes and that. With the black book.* 2-768/a – 2-769
>
> *Yes. And if someone committed a really serious crime, like rape or murder, you'd expect them to be dealt with under the law, wouldn't you? ..... If it's something too much to handle here, we refer to the Auckland office. For guidance from them.*
>
> *Well, take, for example, murder. If – heaven forbid – there was another murder on Pitcairn you wouldn't expect the Island Magistrate to deal with that, would you? ..... No.*
>
> *Because you would know that a crime of that seriousness would exceed the jurisdiction of the Magistrate, wouldn't you? ..... Well, at the moment we don't have a Magistrate. Yes.*
>
> *But you know that that would exceed the Magistrate, whether you've got a Magistrate or not at the moment? ..... That's why we'll seek advice from the administration.*
>
> *Yes. And you - - let's take, for example, the crime of rape. You'd know that rape was something which the Island Magistrate couldn't deal with. That would be something that you would have to refer to the administration office, wouldn't it? ..... Yes.*
>
> *And you know what rape is in the 1970s and the 1980s, for example, you know what rape is, don't you? ..... If you're taken by force, yes.*
>
> *You know that rape is sexual intercourse without the consent of the person ..... Yes.*
>
> *You know that, don't you? ..... Yes.*
>
> *[...]*
>
> *[2] ... You would know that, just as murder isn't acceptable on Pitcairn, neither too is rape, is it? ..... Yes.*
>
> *You agree with that proposition I've just put to you? ..... Yes.*
>
> *Just in the same way that serious violence, really serious violence, wouldn't be acceptable, would it? ..... Yes.*

4.19 In contrast, no Pitcairn Islander has given evidence that he or she was unaware rape was a crime, or was unaware that it would be dealt with severely. To the contrary, Thomas Christian said he had not heard anyone on Pitcairn say they didn't know rape was a crime:

> "*... have you heard anyone on the Island say I didn't know rape was against the law? ... No, I have not heard anyone say that. But I do agree that if* 2-653 line 17

anything is said on the Island – I mean, we believe that English law applies if there isn't a local law that covers the subject."

Again, he was not challenged on this evidence.

4.20 In addition, there are a number of documents that show the crime of rape was specifically discussed on Pitcairn Island, as was the possibility of English law applying on Pitcairn. They include:

(a) Letter from Commissioner Cowell to Chief Magistrate dated 22 November 1965:

7-3203/d

"s.88 *We have left the wording of this provision as the Council last March wanted it. Remember, however, that the 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 the Ordinance."*

(b) Further extract from the same letter:

7-3200/b

"*... 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*"

(c) Further extract from the same letter:

7-3202/e-g

"*ss. 55-68 As noted in the comment on s.6, the law of England applies to Pitcairn "so far only as the circumstances 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 specially 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. ...*

(d) Note by Commissioner Cowell recording his discussions with the Island Council:

7-3198/f

"*s 69 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."*

(e) Extract from administrative report circa 1959 by J.W. Deering:

> "*FLOYD MCCOY RE CORRESPONDENCE* 6-2933/f-h
>
> *Although this is a chest nut of some maturity, he has found one more 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 McCloughlin [sic] and feels that should the Chief Magistrate's family be involved he is in a difficult position. …"*

(f) Law 3 of the 1904 Laws:

> "*3. The questions of Adultery and Rape (violation by force) cannot be dealt with by the local Court. Such matters must be referred to the High Commissioner's Court for the Western Pacific.*" 3-1808/f

(g) Council minutes regarding an allegation of rape enquired into by the High Commissioner, 26 September 1927:

> "*... Council stated that the case the letter referred to has been gone over and the parties (parent, daughter, and man) stated that it is not rape*." 5-2012/g

(h) Chief Magistrate's letter to the High Commissioner 30 September 1927:

> "*As for a case of rape on the island there is no such happening on the island, and as for sexual intercourse being committed on the island, and no actions taken, that is an untruth. I have made an investigation in these matters and am glad I could tell you that it is not true.*" 5-2014/d

(i) Case of attempted rape reported by Islander in 1996. The complainant did not ultimately want to take the matter further, but a letter was sent to the Island Council by the Commissioner explaining the seriousness of the matter.[51] 8-3533

(j) Advice from Commissioner to Island Mayor, 13 November 1997:

> "*Note that Pitcairn law does not cover rape – this comes under British law, punishable with up to life imprisonment. L.H. Salt*" 8-3543/f

(k) Letter from Commissioner, 28 March 1984 noting that some Islanders were concerned the presence of alcohol on the Island could lead to rape, among other things. 8-3485/h

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51 The details of the complaint were not included in the Record for reasons of privacy.

4.21 In the Crown's submission, the effect of all these documents is to provide ample justification for the Supreme Court's conclusion at para [108] that "*at all relevant times Pitcairn was a developed society in which rape and various sexual offending were known to be criminal.*" 2-845

The Justice Ordinance 1966

4.22 The comments from Commissioner Cowell quoted in paragraphs 4.20(a) to (d) above arose in the context of the draft Justice Ordinance 1966. It is significant to note that the parts of this Ordinance dealing with "unlawful carnal knowledge", and with other minor offences against the person, made sense only because English criminal law was in force on Pitcairn to deal with more serious offences. In this regard, the Justice Ordinance continued the long-established pattern on Pitcairn, whereby the local law dealt with some relatively minor breaches of the social code, and English law supplied the sanctions for all serious matters, such as rape or murder.[52]

4.23 The development of the "carnal knowledge" section (s 88) is a particularly clear illustration of this point:

> "***88.*** *Any male person who shall have carnal knowledge of any female child of or over the age of twelve years shall be guilty of an offence and liable to imprisonment for a hundred days.*" 7-3247/c

4.24 The unusual feature of the section was the use of the phrase "of or <u>over</u> the age of twelve years". To understand that provision it is necessary to understand two things. First, the Justice Ordinance in s 2 defined "child" to be a person under the age of 15 years. Second, the section was drafted on the understanding that intercourse with a child <u>under</u> 12 would be prosecuted under English law. The result was that intercourse with a girl aged 12, 13, or 14 was punishable under the local law (s 88), whereas intercourse with a girl aged under 12 – the more serious offence – was punishable under English law.

4.25 By way of background, the offence of unlawful carnal knowledge was first enacted on Pitcairn under reg 65 of the 1940 Regulations, and the age of consent was set at 14 years.

> "***65.*** *Any male person who shall have carnal knowledge of any female under the age of fourteen years shall be liable to be imprisoned for three months.*" 5-2249

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52 It is not intended to suggest that English law was limited to dealing only with "serious" matters. See for example the discussion regarding cruelty to cats and the possible application of English law on page 6-2504/e.

4.26 In late 1957, both the School Board and the Men's Club requested that the age of consent be raised to 16 years. On 25 August 1957, the Island Council took matters into its own hands, and passed an amendment to reg 65 raising the age of consent to 16. The Island Secretary advised the Governor's Office of this, and the Government Adviser later explained that the Council knew they did not have the power to amend the Regulations, but "*they hoped Fiji will allow this unofficial rule to remain in force until the law is amended*". 6-2703 6-2704 6-2705 6-2706 6-2707

4.27 The Governor promptly responded to this purported amendment, and validated the change by Ordinance with effect from 15 December 1957. 6-2709

4.28 However, in 1964, the Island Council passed a resolution that the age of consent should be lowered from 16 years to 15 years. This was accepted, and adopted in the draft Justice Ordinance taken to the Island in 1965 by Commissioner Reid Cowell. Section 69 of the draft read: 7-3062/e

> "***69.*** *Any male person who shall have carnal knowledge of any female child shall be guilty of an offence and liable to imprisonment for three months.*" 7-3183/h

4.29 "Child" was defined in s 2 as any person under the age of 15. 7-3147/e

4.30 Commissioner Cowell discussed this draft with the Island Council in March 1965, and reported back:

> "*s.69. 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*." 7-3198/f

4.31 The reference to s 6 was a reference to the possibility of English law applying on Pitcairn, and the potential extension of the local court's jurisdiction. As Commissioner Cowell explained to the Council: 7-3152/b

> "*s. 6 From time to 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 ...* 7-3200/b
>
> *ss. 55-68 As noted in the comment on s.6, the law of England applies to Pitcairn "so far only as the circumstances 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* 7-3202/e

> *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 specially 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. ...*

4.32 As a result of the Council's concerns, the section was amended so that the local offence of carnal knowledge would apply to girls over 12 and the English law would apply to those under 12. On 22 November 1965, Cowell wrote to the Island Magistrate enclosing a revised draft of the Justice Ordinance, with commentary. The carnal knowledge provision had been renumbered by this stage as s. 88, and Cowell explained:

7-3203/d

> *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.*"

4.33 On 8 December 1965 the Island Council met, and the Government Adviser "*carefully read through the New Justice Ordinance*" It was "*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. Carried*." It is recorded that all Council members were present at the meeting, including John Christian, Pervis Young, Christy Warren, Ivan Christian, and Ben Christian. On 10 December a telegram was sent to the South Pacific Office (the Commissioner's office) reading:

7-3205/c

7-3206

> "*Justice Ordinance No. 1 of 1966 approved in full by council.*
> *MAGISTRATE."*

4.34 As noted, the wording of s 88 was unusual and prompted many queries over the years. The first of these came on 21 September 1966, when the Under-Secretary for State wrote to the Governor asking whether "over" in s 88 should read "under". In response, the Governor explained the reason for the unusual drafting:

7-3252/e

7-3253/d

> "*2. My legal adviser has commented that "the phrasing of section 88 is deliberate and has the purpose of affording the Island Court jurisdiction in cases of unlawful carnal knowledge of a girl between the ages of 12 and 15 but reserving jurisdiction in the case of unlawful carnal knowledge of a girl under the age of 12 years to the Supreme Court, in which jurisdiction is vested by the provisions of the Judicature Ordinance, 1961".*
>
> *3. This section was inserted in its present form at the express wish of the Island Council.*"

4.35 Fourteen years later, in 1970, the topic was raised at an Island Council meeting, and Tom Christian reminded the meeting that intercourse with a girl under 12 would "*require higher Authorities to deal with the case*" (plainly a reference to English law and the Supreme Court):

7-3367/b

> "*A complaint was made that raping or the illicit carnal knowledge of a girl age 11 years 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. G.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 high Authorities to deal with the case.*"

4.36 It is significant, the Crown submits, that the Justice Ordinance was designed at the request of the Island Council to operate in tandem with English law. Without the Sexual Offences Act, there would have been a major lacuna in Pitcairn's sexual offences law. In particular:

(a) Intercourse with a girl aged under 12 would not have been punishable, although intercourse with a 12, 13 or 14 year old would have been.

(b) There would have been no offences covering non-consensual sexual contact, including rape and indecent assault.

4.37 Once again, it should be emphasised that this unusual drafting technique, which relied on English law to make sense, came about at the request of the Island Council.

The history of British authority over Pitcairn

4.38 The Crown submits that the entire history of administration on Pitcairn has made it clear to the Islanders that the ultimate legal authority for Pitcairn rests with the British Crown. That history is separately detailed in the reading guide provided to the Court. What the history reveals is that Pitcairn's legal system has been inseparable from English authority since the visit of the *Fly* in 1838, and that English legal authority has gone hand in glove with the local government on Pitcairn from the earliest days.

4.39 This English authority has always been accepted by Islanders, and there has never been any serious suggestion that Pitcairn would become independent from Britain. The question whether it would be feasible for Pitcairn to become independent was put to Betty Christian in evidence, and she described it as "*ridiculous*". She explained:

2-627/18

> "*... it was never suggested when we had a population of 160, 170, people when I was a young girl growing up and Pitcairn had financial resources at*

that time. Now we're down to less than 50 people, we have no resources. So it's totally out of the question."

2-627 4.40 Further, at line 25, she said: "*... the older generation have referred to Britain as home, the mother country. We've always looked to Britain as our sovereign country*." Thus, in 1968 the Island Council approved the following statement to the United Nations Committee on Colonialism:

7-3284/f

" *DECLARATION BY THE PITCAIRN ISLAND COUNCIL*

The Pitcairn Island Council, having noted the discussions which have taken place from time to time in the United Nations Committee on Colonialism about the future status of the remaining smaller colonial territories and having also noted that the British Colony of the Pitcairn Islands is one of the territories considered by the Committee.

The Council declares that it has no present wish to seek to change the nature of the relationship between the Government and people of Pitcairn and the Government and people of the United Kingdom; but if, at any time, change should be desirable, the Council has full confidence that this can and will be negotiated by free agreement between those whose sole concern it is.
The Council further declares that independent statehood would be administratively and economically impracticable for the small, isolated island community of Pitcairn."

4.41 In the Crown's submission, even a relatively superficial examination of Pitcairn's history demonstrates that English legal authority has been an accepted and integral part of life on Pitcairn from the earliest days. Against that background it is not difficult to see why Islanders describe it as "common sense" and "obvious" that English law would be used to prosecute serious criminal offences on Pitcairn. Furthermore, there are numerous examples of English law applying on Pitcairn over the years, and many examples of Pitcairn Islanders turning to the English authorities for the resolution of legal issues. By way of example, the Crown refers to the following matters (which are detailed in the reading guide):

3-1224 (a) Enquiry into and removal of Joshua Hill in 1837.

3-1018/e (b) Adjustment of "pressing judicial cases" by Captain Thompson in 1843.

3-1360/d (c) Appeal to Captain Morshead from decision of Island jury in 1853.

4-1615 (d) The Harry Christian murder trial in 1898.

4-1855 (e) The Edward Christian domestic violence case in 1905.

4-1916 (f) Queries regarding the Pacific Islands Civil Marriages Order in 1912.

(g)	Case of alleged adultery referred to the High Commissioner in 1914.	4-1964/d
(h)	Appeal against conviction by William Christian dealt with by a Deputy-Commissioner in 1917.	4-1968/c
(i)	Potential bigamy case referred to Chief Judicial Commissioner in 1918.	4-1971
(j)	Dealings with the estate of Leonard Christian for his wife Mrs Eliza Brothers in 1920.	5-1981
(k)	Query regarding illegitimate children dealt with by Western Pacific High Commission in 1921.	5-2006
(l)	Alleged rape matter in 1927.	5-2012
(m)	Advice to Chief Magistrate regarding legal separation in 1928.	5-2018
(n)	Administration of the estate of Neils Jacobsen in 1934.	5-2031
(o)	Attempted murder allegations dealt with by Judicial Commissioner J.S. Neill in 1936.	5-2064
(p)	Numerous examples of wills following the English legal format, many adopting the form of will left by J.S. Neill in 1937.	5-2150
(q)	The trials of Elmer Smith and "Mento" in the High Commissioner's Court in 1941.	5-2358
(r)	Adjustment of penalty imposed by Island Court by Deputy-Commissioner Shepherd in 1945.	5-2410/d
(s)	The allegation of abortion against Laura Christian in 1946.	5-2411
(t)	The case involving orange trees in 1947.	6-2418
(u)	The *McCoy* appeal case in 1951.	6-2528
(v)	Reminder to Islanders that the English laws of cruelty to animals apply in 1952.	6-2504/e
(w)	Claydon's investigations into the validity of a marriage in 1953.	6-2611/b
(x)	The case of *Queen v Radley Christian*, and appeal in 1956.	6-2660

6-2701 (y) Advice regarding the "House of doubtful fame" in 1957.

6-2712 (z) The Young divorce case heard in the High Commissioner's Court in 1958.

7-2951 (aa) Queries regarding carnal knowledge prosecutions in 1962-63.

7-3367/a (bb) Island Council discussion of carnal knowledge in 1970.

7-3402 (cc) Alleged burglary case in 1971.

8-3455 (dd) Adoption case in 1976.

8-3533 (ee) Case of attempted rape in 1996.

4.42 These examples are not a complete account of the reach of English law onto Pitcairn Island, or recourse by the Pitcairn Islanders to English legal authority. More examples are listed in the reading guide. In addition, many documents post-1975 have not been made available to counsel on the grounds of legal privilege, and many of the historical records have been impossible to locate, or have been lost or destroyed.

4.43 In the Crown's submission, the available records demonstrate the degree to which Pitcairn Islanders have been subject to English legal authority over their history. This has not been a one-sided or authoritarian imposition — in many cases the Pitcairn Islanders have come to see their English administrators as friends and trusted advisers. Throughout the mid-19th Century, Pitcairn Islanders actively solicited the protection and governance of the British Crown, and their expressions of devoted loyalty to the Sovereign in both the 19th and 20th Centuries are legend.

4.44 The Crown does not, of course, submit that Pitcairn Islanders were well-versed in the details of English civil law any more than most citizens of the world are familiar with the details of their governing civil laws. This was recognised by the Administration, and specific Ordinances were passed to deal with particular areas. For example, in 1966 the Governor passed a Wills Ordinance for Pitcairn. The Legal Adviser's "Legal Report and Certificate" recorded:

7-3279 "*The law in force in the Islands in relation to wills is by section 7 of the Judicature Ordinance 1961, that for the time being in force in England. The provisions of the Law of England are not, however, readily accessible to or capable of being understood by many of the inhabitants of the Islands and are therefore seldom observed in practice. The purpose of this Ordinance is, accordingly to declare in a manner more capable of being understood by the Islanders the existing law in force in relation to the preparation of wills with*

> *minor modifications designed to make such law more readily applicable to the Islands.*"

4.45 This demonstrates that the Administration was sensitive to questions of access to law. The Crown submits there can be little doubt that the Governor would have passed a similar Ordinance if there been any concern that Pitcairn Islanders were unaware of the law of serious crime, or that rape was wrong.

4.46 Finally, it is notable that two of the appellants in these cases told their victims "not to tell anybody" about their offending: Carlyle Terry Young, para [42] on page 2-489 and para [57] on page 2-493; Randall Kay Christian para [38] on page 2-511. In the Crown's submission, this is a further indication that the appellants knew their actions were wrong, and provides additional evidence that it was foreseeable that sexual offending was criminal on Pitcairn.

2-489
2-493
2-511

4.47 For all these reasons, the Crown submits the Supreme Court's and Court of Appeal's conclusions regarding foreseeability were amply justified.

c) The law of sexual offences was accessible to all Pitcairners

4.48 In the Crown's submission, the Courts below were correct to conclude that the law of sexual offences was accessible to all Pitcairners throughout the relevant period.

4.49 The Supreme Court found that "*Pitcairn Islanders have had free access to information about their laws through the Government Adviser, the Commissioner and Legal Adviser.*" Further, the Court said:

2-856
para [145]

> "*[146] We regard the relationship between British administrators and 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,[53] if asked to assist. All Pitcairn Islanders had access to the law.*"

4.50 In the Crown's submission, these conclusions were amply justified on the evidence. As a starting point, Betty Christian's evidence was clear and unchallenged in cross-examination:

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53 See pages 8-3470 to 8-3474.

2-596

> "5.2 ... *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.*"

4.51 As the Supreme Court noted, there has been a full-time "Government Advisor" present on Pitcairn since the early 1950s. Successive GAs have played an active role in the life of the Island, as well as providing a point of contact with the administration, and a source of information and advice for the Islanders. In addition to acting as schoolteacher, the roles of the GA have included:

6-2653 – 6-2657

- Explaining Ordinances to the people, and helping ensure they were implemented. For example, see pages 6-2653 to 6-2657.

6-2564

- Ensuring the Chief Magistrate complied with the requirement to post Ordinances on the notice board, and to advise the administration of the date of publication. For example, see page 6-2564.

6-2658/f

- Monitoring and providing advice as to Court procedure. For example, see 6-2658.

6-2636
6-2680
6-2701
6-2938

- Providing legal advice to the Islanders, and facilitating access to legal advice through the administration. For example see pages 6-2636, 6-2680, 6-2701. From at least 1961, written advice as to Pitcairn's constitutional and administrative structure was provided to GAs – see page 6-2938. "Handing over notes" were also provided by outgoing GAs: see for example 6-2894.

5-2929/f

- Providing a conduit for general communication between the Islanders and the administration (in both directions). For example, see 5-2929/f.

4.52 The reference document left for the guidance of GAs from 1961 stated:

6-2940/d

> "*5.6 The Supreme Court of Fiji has jurisdiction, under the Pitcairn Order in Council, 1952 in cases outside the competence of the Island Court. Occasion to use the Supreme Court is rare. ...*
>
> *9.1 Reference has been made in paragraph 5.6 to the jurisdiction of the Supreme Court of Fiji. When the Island Court has no jurisdiction the Supreme Court may apply the statutory law contained in local ordinance or English law, when no local law exits.*"

4.53 In addition, since 1958 there has been a full-time Pitcairn Island Commissioner. The Commissioner has been responsible for liaising with Islanders over practical and

logistical matters, and has been a point of contact for advice over legal matters. The Commissioner has always had the ability to refer legal questions to the Legal Adviser or the Governor's office. The current Legal Adviser, Paul Treadwell, gave evidence that two former Commissioners, Mr Harraway and Mr Salt "*often*" referred queries regarding English law. He noted that they were "*both extremely experienced and conscientious officers*", and that he never declined to give advice when requested. In 1970, the Governor advised London that the Legal Adviser was involved in "*some thirty legal advices per annum*". This was in response to a query on page 7-3325.

2-698/17

2-711/10

7-3327/d

4.54 There are many examples of legal queries from Pitcairn Islanders being dealt with by the administration, some of which have been referred to above. Examples after 1975 are largely unavailable because of the rules of legal privilege. However, there are numerous examples throughout the reading guide, which include by way of a small sample:

(a) Query regarding exemption from public work for Island Officers. 6-2936

(b) Queries regarding the offence of carnal knowledge. 7-2955 – 7-2959

(c) Query regarding the power of Police to obtain a search warrant. 6-2500

(d) Query regarding the legal grounds for divorce. The reply is not available, most likely because it is legally privileged. The Island Magistrate's enquiry was included in a fax dealing with matters such as honey, glue, and timber – suggesting that queries over the law were neither unusual nor requiring particular formality. 8-3550/c

(e) Advice regarding criminal law. 5-2387/e

4.55 In the Crown's submission, these matters, together with those referred to by the Pitcairn Supreme Court on pages 2-853 to 2-856, demonstrate that Pitcairn Islanders have in fact enjoyed a greater degree of access to information about their laws than almost any other modern community. It is precisely because of Pitcairn's physical isolation and small population that access to the Administration – and the Executive – has been so open.[54]

54 In the Crown's submission, many of the assertions in paragraph 42 of Mr Young's submissions are not borne out by the evidence. The Crown submits an examination of the documents in the record reveals a different picture, as the Supreme Court found in 2005.

4.56 Finally, the Crown notes the conspicuous lack of reality in any submission that the accused would have consulted a barrister and solicitor before engaging in serious sexual offending. Despite the unreality of that concept, it is very clear that any Pitcairn Islander who had approached the Government Advisor or any other official would have been told in no uncertain terms that sexual offending was criminal on Pitcairn. Of course, no such enquiry was ever made.

d) The absence of English Police on Pitcairn prior to 1996 did not render the trials an abuse of process

2-960 – 2-963

4.57 The Crown respectfully submits the Court of Appeal was correct not to uphold the appellants' submissions regarding the absence of an English police presence.

4.58 In addressing this topic, the Court of Appeal accepted the Supreme Court's findings. It had been accepted in the Supreme Court that there were no professional English police officers on Pitcairn until 1996. However, the Court found:

2-847 Para [113]

2-848 para [117]

(a) There have been Island Police Officers on Pitcairn for at least 70 years, and since 1950 the Officer has derived his or her authority from the High Commissioner / Governor.[55] The role of the Police Officer is and was to enforce all the law in force on Pitcairn, including English criminal law.

2-848 para [118]

(b) Over the years, the roles of Island Magistrate and Police Officer have frequently been high-profile, and enforcement of the law has often loomed large in Pitcairn affairs.

2-848 para [119]

(c) Successive Commissioners and Governors have been concerned to promote and ensure the administration of justice on Pitcairn Island to an appropriate level, taking into account local circumstances: para [119]. The local circumstances have included the perceived desire of Pitcairn Islanders to participate in the management of their own affairs to the greatest extent possible. The Court quoted from a memorandum written by R.H. Garvey (later the Governor of Pitcairn) in response to Neill's report in 1937:

5-2136/g

> "*10. <u>Form of Government.</u> 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*

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55 Since 1950 the Island Police Officer has been appointed by the Governor: see appointment of Floyd McCoy on 30 May 1950: page 6-2480.

want an outsider and, after reading Mr Neill's report, I do not think the conditions demand it."

(d) The standard of policing varied over the years, but successive Police Officers were given instructions as to how to carry out their duties and responsibilities. 2-850 para [124]

4.59 Examples of such guidance for the Police Officer and Chief Magistrate include:

(a) The "Police Instructions" left by Mr Dobbs in 1950. 6-2437

(b) The memorandum left by Mr Claydon in 1953. The memorandum stated:

> "*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.*" 6-2640/g

(c) The document entitled "*Proceedings to be followed in dealing with offences against the Pitcairn Island Government Regulations*", left by Mr McLoughlin in 1958. 6-2869

(d) The "*Hints and Instructions*" left by Mr Maude for the Chief Magistrate in 1940. 5-2292

4.60 In 1958, Mr McLoughlin advised the Island Police Officer "*to report direct to Suva in the event of his learning of any criminal offence not covered by the Regulations and not to take any action beyond preliminary inquiries until he received instructions from the Pitcairn office*". The following year, the Police Officer raised this topic with Mr Deering: 6-2806/f

> "*FLOYD MCCOY RE CORRESPONDENCE* 6-2933/f
>
> *Although this is a chest nut of some maturity, he has found one more 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 McCloughlin [sic] and feels that should the Chief Magistrate's family be involved he is in a difficult position. …"*

This clearly implies that the Island Police Officer knew his role included the investigation of serious crime such as rape.

4.61 Further, those administrators who visited the Island prior to the 1970s were preoccupied with questions of law and order, as can be seen from their reports, including Neill [5-2083], Maude [5-2198], Dobbs [6-2425], Claydon [6-2585], McLoughlin [6-2759], and to a slightly lesser extent Cowell [7-3114]. The work of

these administrators established the framework for law and order on Pitcairn before the population decline of the latter part of the 20th Century. Whilst these men were obviously not police officers, they no doubt left the population well aware that the enforcement of the law on Pitcairn was a matter of priority for the British administration.

4.62 There has been a prison on Pitcairn since 1832, and many Pitcairners have been subject to sentences of imprisonment over the years. As to the general standard of policing and administration of law on Pitcairn, there are numerous examples and references throughout the reading guide, including many carnal knowledge and other criminal prosecutions, the regular filing of Police reports,[56] and frequent correspondence between the Police Officer, the Chief Magistrate, the Island Secretary and the administration on subjects of law and order.

4.63 The Crown acknowledges it is not difficult to find statements over the years deprecating the standard of justice on Pitcairn. By the same token, it is not difficult to find statements fulsomely praising the Islanders and their leaders. Closer examination of the historical record reveals a more complex picture, and it is clear that many of the more extreme statements are exaggerated or unsupported. Even individual authors have made seemingly contradictory statements. An example is Claydon's report in 1953. On one hand he opined that the word "*anarchy*" could appropriately be used to describe the administrative situation on the Island [para 50], while on the other hand he stated that "*a splendid atmosphere of harmony prevails*", [para 49] and that:

6-2585

6-2599

> "*It would be wrong ... to leave an impression that the majority of the Islanders are not law-abiding and peaceful folk which they undoubtedly are. [And] ... regardless of the lack of a government with backbone, the Islanders live in a reasonably happy state, and that with many inhibiting influences present, a major breakdown in government is unlikely.*" [paras 54-55]

6-2600 – 6-2601

4.64 In the same vein, whilst stating that "*law has little meaning to the average Pitcairner or to his local government*" [para 50], Claydon also stated that "*the commission of a major crime ... is not , I agree, likely*". [para 77] In the Crown's submission it would be wrong to take a selection of the more extreme comments from over the years, and to draw from these the conclusion that Pitcairn was a lawless society.[57] Many of those who have commented adversely on the standard of justice on Pitcairn – even among

6-2599

6-2608

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56 A continuous record of monthly police reports from 1965 at least as far as 1993 survives. Invariably they simply record that "nil" complaints were received in the particular month. See pages 6-2516 – 6-2527 and 7-3018 – 7-3036.

57 The Crown submits this includes many of the comments of the social worker, Ms Learner, referred to by the Public Defender.

those in positions of authority – did not have the benefit of the material now available to the Court, which provides a more complete picture. For these reasons, the Court should be hesitant to rely on isolated or unsupported statements of opinion.

4.65 In the Crown's submission, it is little more than speculation to suggest that these offences would have come to light earlier had there been a British police officer on the Island. The offences were not reported during the visit of Superintendent McGookin and Detective Inspector George in September 1996. Nor were they reported to Constable Cox in September/October 1997. Nor, it seems, were they initially reported to Constable Cox in 1999. It appears that the initial complaint was in fact made to the schoolteacher's daughter. She passed on the complaint to the Governor and Deputy-Governor, who insisted that the matter be investigated. The Governor explained this sequence of events in a letter dated 1 November 2000:

> "*I first learned of the allegations when the former school teacher, [S. C.], told the Deputy Governor and me that two Pitcairn girls had confided in her own daughter. By chance WPC Gail Cox was visiting the island, so we asked her to enquire further. She took statements from both girls, and later from [S]'s daughter. The girls on Pitcairn did not themselves come forward to WPC Cox. ... It was actually we who took the first initiative to treat the affair seriously, rather than just dismissing it.*" 8-3795/f

4.66 It is therefore speculative at best to consider what would have happened if there had been a British police officer on Pitcairn earlier than 1996.

4.67 More fundamentally, while acknowledging that the standard of policing on Pitcairn varied, the Crown submits this is not a factor that could possibly have rendered the trials of these appellants an abuse of process. No concept of estoppel exists in the criminal law, as the appellants accept.[58] Once it is established that the law was in force, and that the law was accessible and foreseeable, it must be irrelevant whether particular offences have been detected and prosecuted in the past. There are many small communities in the world where policing is infrequent, and where crime goes undetected for many years. The appellants have submitted that the answer is to "*stay these proceedings and look to the future*".[59] The Crown submits the answer is to uphold the law in force on Pitcairn.

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58 Paragraph [112]. The general principle that there is no issue estoppel in the criminal law was most recently upheld in *R v. Z* [2000] 2 A.C. 48 (HL), **[A6 Tab 72]** although the point is not directly applicable in this case.

59 Paragraph [154].

e) There was no abuse of process occasioned by systemic delay

4.68 The Public Defender submits that there was an "*... unacceptable delay ... between the date upon which the Public Prosecutor formed the view that he would charge the Appellants which was on or about February 2002 and the date of charge April 2003, a period of about 13 months*." [PD para 278, p 157]

4.69 The appellants do not submit there was any prejudice to their fair trial rights; indeed it is accepted that there was no such prejudice: [PD para 295, p 165]. This would ordinarily preclude a stay on the grounds of abuse of process: *Attorney General's Reference (No 2 of 2001)* [2004] 2 AC 72 (HL). [A6 Tab 73]

2-959/f 4.70 The Court of Appeal accepted the Crown's submission that the delay was not unreasonable in the circumstances of the case. [para 123]

4.71 In summary, the principal reasons for the delay following the decision to charge were as follows:

(a) The number of defendants, the location of the defendants and complainants in several countries, and the size and complexity of the operation required considerably more detailed planning and logistical preparation than a single accused trial in an "ordinary" jurisdiction.

(b) In particular, there was a concern that frequent trips to Pitcairn Island for Court hearings at every stage of the proceedings could result in extremely lengthy delays. As a result, the British Government approached the New Zealand Government with a view to negotiating a treaty to allow Pitcairn Courts to sit in New Zealand, and to provide that Pitcairn orders would be enforceable in the New Zealand jurisdiction. New Zealand was chosen because several of the defendants lived in that country, as did many of the complainants. New Zealand is also the location of the Governor and the Pitcairn Island Administration Office. A Treaty was signed on 11 October 2002, by the Governor and the New Zealand Minister of Foreign Affairs. The New Zealand Parliament passed a statute, the Pitcairn Trials Act 2002, in fulfilment of the agreement between the two States. That Act received the Royal assent on 24 December 2002. The benefits of the Act included:

8-3949

(i) Avoiding the need for the defendants and legal personnel to travel to Pitcairn for every stage of the proceedings.[60] There were 14 hearings from the laying of charges to the commencement of trials in October 2004. These included the laying of charges, depositions, judicial conferences, applications for stay, adjournment, severance etc. If the Pitcairn Trials Act had not been passed, every one of these hearings would have needed to take place on Pitcairn Island.

(ii) Avoiding lengthy remands, possibly in custody.

(iii) Avoiding the discomfort/inconvenience of accused being compelled to travel to Pitcairn for hearings, and possibly being required remain there throughout the proceedings.

(iv) Allowing New Zealand resident defendants to maintain local family support structures.

(c) There was a wish to treat all those charged consistently. Given the large number of potential defendants, and geographical factors, it was necessary to invest considerable effort into planning the proceedings to ensure fairness. This required not only waiting for the outcome of the treaty negotiations, but also such matters as investigating the technological options for evidence via video-link, and the provision of facilities for trials in different locations.

(d) No arrangements for travel to the Island could be put in place until the Public Prosecutor had made his decision. These arrangements required booking flights from Auckland and accommodation on Tahiti for the Magistrate, Court staff, and counsel. Flights from Tahiti to Mangareva (which operate only once a week) and charter vessel of sufficient size to accommodate the legal personnel needed to be arranged. This vessel necessarily had to sail from New Zealand or be chartered from within French Polynesia. Inevitably, these arrangements required several months' notice.

4.72 In short, these trials were well outside the ordinary. In light of the logistical challenges, and the size and scale of the investigation, the Crown submits the proceedings in fact moved expeditiously. Even assuming that the issue of delay can be raised in the

60 For the trials which took place on Pitcairn Island, 26 people were required to be transported by air and sea to the Island, and then accommodated, prior arrangements relating to the shipping of equipment and food having been made.

absence of prejudice, the Crown submits there was no unreasonable delay that could justify a stay on the grounds of abuse of process.

f) The other matters raised by the appellants did not give rise to an abuse of process

The "late constitution" argument

4.73 The appellants submit that the trials were an abuse of process because "*most if not all of the trial and adjudication machinery and procedures and laws such as Sentencing and Parole Ordinances have been enacted to accommodate these offences after the investigation commenced, and some Ordinances enacted after charge.*" [PD, para 249, p 138] They further submit:

> "*... the deficiencies in the promulgation of English law, and the absence of any British police presence was further compounded by the failure to put in place the machinery of justice which would have further impressed upon Pitcairners the need to respect English criminal law as it applied to them and would have demonstrated that the means to enforce such law existed.*" (para [126])

4.74 However, the means to enforce the law did exist prior to 2000. At all relevant times:

(a) Rape and the other sexual offences were criminal on Pitcairn;

(b) There was an Island Police Officer empowered and instructed to investigate serious crime;

(c) The administration maintained oversight of the Police Officer's activities;

(d) There was a Superior Court capable of trying serious offences; and

(e) There was an Island prison.

4.75 The Ordinances passed after 2000 allowed for practical matters such as the use of video-linked evidence, flexible trial venue, legal aid, bail, the appointment of the public defender, and additional sentencing options. Many of these were required as a response to the scale of offending that emerged in the year 2000, and it could hardly be suggested that it was an abuse of process not to have enacted such Ordinances earlier.

4.76 In the Crown's submission, the earlier enactment of Ordinances providing for the mechanics of complex trials would not have "*further heralded to Islanders the importance of English criminal law and abiding by it*". [PD, para 254, p 146] It may be doubted whether procedural laws are ever capable of having such an impact.

4.77 The Court of Appeal concluded at para [144]:

> "It is significant that there has been no complaint concerning the fairness of the trial process itself. Certainly none of the Ordinances relating to the trial were directed specifically against the appellants. Nor can it be said that it placed them at any disadvantage in relation to their trials. The essentials of the judicial process were in place prior to the detection of the offences, in that there existed a Magistrate's Court, a Supreme Court and a prison. The sheer extent of the alleged offending and the number of accused required steps to be taken to ensure that the justice system could adequately accommodate a lengthy trial involving a substantial number of accused, beyond anything which might reasonably have been contemplated in earlier years." 2-966

4.78 In the Crown's respectful submission, neither the enactment of the post-2000 Ordinances, nor their absence prior to the year 2000 could have rendered these prosecutions an abuse of process.

The appearance of justice

4.79 The Public Defender further submits that "*the steps taken to build a prison and the totality of the legislation passed to construct a workable system of justice, extradition, trial, and sentence was such that the reality is that it had a crushing appearance.*" [PD, para 258, p 148]

4.80 In the Crown's submission there was no such crushing appearance, and Pitcairn's criminal justice system is demonstrably neutral and unbiased in its application. There was no bias – systemic or otherwise – in the simple fact of laying charges and having them tried before the lawfully constituted Pitcairn courts.

4.81 Dealing with the specific matters raised by the appellants:

(a) "Stays" (para 261). The Judicature (Appeals in Criminal Cases) (Amendment) Ordinance 2004 **[L2 Tab 34]** corrected an anomaly that had been created by the Judicature (Appeals in Criminal Cases) Ordinance 2003. **[L2 Tab 32]** There was an obvious and valid need for the amendment, and its principal effect was to avoid unnecessary and unwanted delay in the trials. This amendment did not adversely affect any of the appellants. The subsection it removed required an <u>enforced</u> 28-day delay in proceedings, even when neither party sought delay. The removal of this anomaly did not interfere with the Court's general discretion to grant a stay in any appropriate case.

(b) "Tenure of office" (para 265). **[L2 Tab 33]** This Ordinance put the security of Judicial tenure beyond doubt, and could have had no possible adverse effect on any of the appellants.

(c) "Deemed conviction Ordinance" **[L2 Tab 35]** (para 271). In October 2004, the appellant Stevens Christian was found guilty of five counts of rape. The Governor formed the view that Mr Christian was no longer a fit and proper person to serve as Island Mayor, and invited him to resign. When Mr Christian declined, the Governor removed him from office. This Ordinance was designed to apply to any other male persons in the future found to have committed similar offences against girls on Pitcairn, and the Crown submits it was a legitimate exercise of the Governor's powers. In any event, the Governor's action had no impact whatsoever on the trial process, and is accordingly irrelevant in these appeals.

(d) "The late appointment of the Public Defender" (para 298). The Crown submits there is no basis to interfere with the Supreme Court's findings on this topic, which were endorsed by the Court of Appeal in paragraph [147]. The

2-967

Supreme Court said:

2-879

> "*[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 enquiry 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. Secondly, 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.*"

4.82 For all the above reasons, the Crown submits the Courts below were correct to conclude the trials did not constitute an abuse of process.

5 THE GOVERNOR WAS ENTITLED TO BASE ASPECTS OF THE PITCAIRN ORDINANCES ON NEW ZEALAND MODELS, AND TO APPOINT NEW ZEALANDERS AS PITCAIRN LAWYERS AND JUDGES

5.1 The next matter advanced by the appellants is a submission that the Governor acted *ultra vires* the Pitcairn Order 1970 when he enacted Ordinances based on New Zealand rather than English models. [PD, paras [299] to [313] pages 167 – 174] Further, the appellants submit it was ultra vires the Governor's powers to appoint a Public Prosecutor, Public Defender and Judges of the Supreme Court drawn from the New Zealand legal system. Ironically, having previously submitted that Pitcairn is not English, the appellants now submit that their legal system is not English enough.

5.2 The Crown submits that the Governor's actions in enacting the various Ordinances were plainly reasonable, *intra vires*, and in accordance with the Governor's assessment of the best interests of Pitcairn Island. Indeed, given the strong connections between Pitcairn and New Zealand, the approach followed was ideally suited to the needs of the Pitcairn Islanders.

5.3 In relation to the Judicial appointments, it is not at all clear that the Governor's choice of Judges is a justiciable issue. However, to the extent that the matter may be justiciable, the Crown submits that the Judicial appointments made by the Governor were entirely appropriate, and the nationality of the appointees is irrelevant.[61] Similarly, the Crown submits that the identity and background of the Public Prosecutor and Public Defender are irrelevant in these appeals, in the absence of any substantive complaint about the conduct of the cases.

5.4 The reality is that Pitcairn is the smallest country or territory in the world, situated in the Pacific Ocean. There was no possibility that any Judge of the Supreme Court could have been a Pitcairn resident. Looking to Pitcairn's Pacific neighbours, many if not most have sitting Judges drawn from the larger countries of the region including New Zealand and Australia. All appointments to the Supreme Court of Pitcairn were sitting New Zealand Judges, regularly involved in hearing rape trials, and the Crown submits their appointments could not possibly have been *ultra vires* the Governor's powers.

5.5 Furthermore, the Supreme Court Judges, committing Magistrate, Public Defender, Public Prosecutor, and other key officers have now spent a substantial amount of time on Pitcairn Island in a combined total of many dozens of trips. As a result, the Judges

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61 At least one of the Supreme Court Judges is, in any event, English. Another practised English criminal law at the Hong Kong bar.

can genuinely be considered Pitcairn Judges, not New Zealand or English Judges. Similarly, the counsel are Pitcairn lawyers, and in many cases they have formed close and genuine associations with the Islanders. These connections have been facilitated and enabled by New Zealand's relative proximity to Pitcairn Island, and because of the proximity to the Island's Administration and Pitcairn community in New Zealand. These important connections would have been very much more difficult to achieve if appointments had been made from the United Kingdom.

The validity of the Ordinances

5.6 As to the validity of the various Ordinances, the appellants have not been specific in identifying particular laws they claim were ultra vires.

5.7 However, in any event, the test for the validity of subordinate legislation passed under a general power to legislate for the "*peace order and good government*" of a territory is so broad that it is difficult to imagine any possible objection to the current Pitcairn Ordinances. In *R v Burah* (1878) 3 AC 889, **[A6 Tab 74]** the Privy Council said:

> "The established Courts of Justice, when a question arises whether the prescribed limits have been exceeded, must of necessity determine that question; and the only way in which they can properly do so, is by looking to the terms of the instrument by which, affirmatively, the legislative powers were created, and by which, negatively, they are restricted. If what has been done is legislation, within the general scope of the affirmative words which give the power, and if it violates no express condition or restriction by which that power is limited . . . it is not for any Court of Justice to inquire further, or to enlarge constructively those conditions and restrictions."

5.8 More recently, in *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs* [2001] QB 1067, 1102 **[A4 Tab 31]** Laws LJ said (with emphasis added):

> "53 ... Mr Pannick marshalled a formidable body of authority to support the proposition that the formula "peace, order, and good government", used so often in measures conferring powers to make colonial law, was to be taken as having the widest possible intendment. *Riel v The Queen* (1885) 10 App Cas 675 concerned an Act of the Imperial Parliament authorising the Canadian Parliament to make laws "for the administration, peace, order, and good government of any territory". Their Lordships in the Privy Council stated, at p 678:
>
> > "it appears to be suggested that any provision differing from the provisions which in this country have been made for administration, peace, order, and good, government cannot, as matters of law, be provisions for peace, order, and good government in the territories to which the statute relates, and further that, if a court of law should come to the conclusion that a particular enactment was not calculated as a matter of fact and policy to secure peace, order, and

> good government, that they would be entitled to regard any statute directed to those objects, but which a court should think likely to fail of that effect, as ultra vires and beyond the competency of the Dominion Parliament to enact. Their Lordships are of opinion that there is not the least colour for such a contention. The words of the statute are apt to authorise the utmost discretion of enactment for the attainment of the objects pointed to."

54 I have already referred in paragraph 40 to what was said in *Ibrelebbe v The Queen* [1964] AC 900, 923: the words peace, order and good government "connote, in British constitutional language, the widest law-making powers appropriate to a sovereign". This was approved in *Winfat Enterprise (HK) Co Ltd v Attorney General of Hong Kong* [1985] AC 733, 747 (which shows also that it makes no difference to the power's breadth that the colonial legislature in question is not established on representative principles: c f *Li Hong Mi v Attorney General for Hong Kong* [1920] AC 735). *R v Earl of Crewe, Ex p Sekgome* [1910] 2 KB 576, which I have cited in dealing with the argument as to this court's jurisdiction, is also a case concerned with a "peace, order and good government" provision, under whose authority the applicant's detention was held to have been plainly justified.

55 The authorities demonstrate beyond the possibility of argument that a colonial legislature empowered to make law for the peace, order and good government of its territory is the sole judge of what those considerations factually require. It is not obliged to respect precepts of the common law, or English traditions of fair treatment. This conclusion marches with the cases on the Colonial Laws Validity Act 1865, and I have dealt with that. But the colonial legislature's authority is not wholly unrestrained. Peace, order and good government may be a very large tapestry, but every tapestry has a border. In *Trustees Executors and Agency Co Ltd v Federal Comr of Taxation* (1933) 49 CLR 220, 234-235, Evatt J in the High Court of Australia stated:

> "The correct general principle is ... whether the law in question can be truly described as being for the peace, order and good government of the Dominion concerned ... The judgment of Lord Macmillan [in Croft v Dunphy [1933] AC 156] affirms the broad principle that the powers possessed are to be treated as analogous to those of 'a fully sovereign state', so long as they answer the description of laws for the peace, order, and good government of the constitutional unit in question ..."

56 In answering the question whether a particular measure, here section 4 of the Ordinance, can be described as conducing to the territory's peace, order and good government, it is I think no anachronism, and may have much utility, for the court to apply the classic touchstone given by our domestic public law for the legality of discretionary public power as it is enshrined in *Associated Provincial Picture Houses Ltd v Wednesbury Corpn* [1948] 1 KB 223. Could a reasonable legislator regard the provisions of section 4 as conducing to the aims of section 11? In answering the question, the force of the cases shows that a very wide margin of discretion is to be accorded to the decision-maker; yet in stark contrast our modern domestic law tends in favour of a narrower margin, and a more intrusive judicial review, wherever fundamental or constitutional rights are involved. This recalls the dissonance to which I referred at paragraph 43 between the rights which the common law confers here, and the thinner rule of law which the jurisprudence has accorded the

colonies. But the dissonance is historic, and in my judgment does not in any event drive the result in this present case."

5.9 Accordingly, the issue for the Court is whether a reasonable legislator could have regarded the various laws as being for the peace, order and good government of Pitcairn.

5.10 The starting point is that it was open to the Governor to base Pitcairn's criminal procedure on any model he saw fit. In the event, he based many of the Ordinances on precedents from New Zealand, Pitcairn's closest major Commonwealth (and common law) neighbour. The precedents themselves continue to be used as the law of New Zealand, and were modified by the Legal Adviser with the aim of making them appropriate for Pitcairn.

5.11 The Crown submits it was both logical and appropriate to look to New Zealand in designing laws for Pitcairn. The connections between Pitcairn and New Zealand are long established and strong. As long ago as 1945, Maude wrote:

"*(1) Since 1915, when the Panama Canal was opened, Pitcairn's contact with the outside world has been almost exclusively with New Zealand, with which Dominion there is direct and frequent communication.* 7-3320

(2) As a result, the island has in actuality become a dependency of that country, both economically and as regards social relations.

(3) Most of the Islanders visit New Zealand from time to time and a number live there more or less permanently: inter-marriage with New Zealanders is becoming common.

(4) The transfer of Pitcairn to New Zealand Administration would therefore be of direct benefit to the islanders. It would also be of advantage to the British Government owing to the exceptional world interest in the island, resulting in wide publicity being given to criticisms of our administration, which seldom take into account the difficulty of providing adequate services.

5.12 In 1970, a memorandum to the Legal Adviser regarding the possible transfer of administration to New Zealand noted that:

"*(a) Auckland is the starting or terminal point of most of the ships which serve Pitcairn in one way or another;* 7-3324

(b) Pitcairn's agents are situated there;

(c) we can call upon doctors in New Zealand in arranging medical treatment for Pitcairn Islanders more easily than is the case in Fiji;

(d) there is already a Pitcairn community in New Zealand;

(e) the firms supplying the Pacific Islanders are there;

(f) all Pitcairners travelling to and from New Zealand must pass through Auckland, and it is a ready point of contact."

5.13 Over the years, New Zealand has supplied doctors, schoolteachers, commissioners, radio technicians, road contractors, military assistance, training for Island Police Officers, educational training for Pitcairn Islanders, and a multitude of other forms of assistance. In the Crown's submission there was nothing wrong with using New Zealand legislative precedents and personnel in Pitcairn's legal system, and this ground of appeal is without merit.

6 THE SUPREME COURT CORRECTLY APPLIED THE ELEMENTS OF THE OFFENCE OF RAPE

6.1 The Public Defender submits that the Supreme Court incorrectly applied the elements of rape in the trial of Stevens Christian. It is said that the Court should have found that "*resistance or some kind of protest must be demonstrated in order for a conviction of rape to be sustained.*" [PD, para 314, page 174]

6.2 In the Crown's submission, the Supreme Court was correct to rule that the elements of rape at the relevant time were those set out by Lord Hailsham in *R v Morgan* [1976] AC 182, 215: [A6 Tab 75]

> "*... the prohibited act is and always has been intercourse without consent of the victim and the mental element is and always has been the intention to commit that act, or the equivalent intention of having intercourse willy-nilly or not caring whether the victim consents or no*."

6.3 Thus in the judgment in Stevens Christian's trial, the Chief Justice found that the elements of rape were: 2-525/e

(a) An act of sexual intercourse, that is penetration of the complainant's vagina by the accused's penis.

(b) Lack of consent of the part of the complainant.

(c) Knowledge by the accused that the complainant was not consenting or intending to commit the act willy-nilly not caring whether the complainant consents or not.

6.4 The Chief Justice had earlier rejected the purported additional requirements of force and resistance, in a ruling delivered on 13 October 2004. 2-433

6.5 The Court of Appeal upheld this interpretation of the law in para [167]. 2-973

6.6 In the Crown's submission, the Courts below were correct to rule that the purported additional requirements of force and resistance did not form part of the law of rape at the time of these alleged offences; nor have they at any time since.

The purported additional requirement of resistance by the victim

6.7 There is no doubt that in ancient times in England it was a requirement of the offence of rape that the act was effected by physical force.[62] However, by the mid-late 19th Century, a series of authorities established that the element of force was no longer required, and that the physical elements of rape were simply the act of intercourse without the woman's consent: *Camplin* (1845) 1 Cox CC 225; **[A6 Tab 76]** *Mayers* (1872) 12 Cox CC 311 **[A6 Tab 77]**; *Young* (1878) 14 Cox CC 114 **[A6 Tab 78]**. This position was affirmed in the 20th Century: see *Bradley* (1910) 4 Cr App R 225; **[A6 Tab 79]** *Harling* (1937) 26 Cr App R 127 **[A6 Tab 80]**.

6.8 However, an "erroneous assumption" was held by some, even in the mid-late 20th Century, that the requirements of force and resistance still formed part of the law of England.[63] In 1975, a Home Office Report to Parliament stated:

> "*It is … wrong to assume that the woman must show signs of injury or that she must always physically resist before there can be a conviction for rape. We have found this erroneous assumption held by some and therefore hope that our recommendations will go some way to dispel it*."
>
> *Report of the Advisory Group on the law of Rape* (presented to Parliament by the Secretary of State for the Home Department, December 1975)

6.9 The following year, in 1976, the House of Lords stated the position succinctly in *R v Morgan* [1976] AC 182, 215, **[A6 Tab 75]** as quoted above. Although *Morgan* was a 1976 case, the Crown notes that Lord Hailsham was prepared to state that the law "*is and always has been*" as stated.

Authorities establishing that force and resistance are not required

6.10 In the Crown's submission, the law of rape at the relevant time required only the three elements set out above, namely (i) deliberate penetration; (ii) lack of consent by the victim; and (iii) knowledge that the victim was not consenting, or recklessness as to her consent. A number of authorities support this proposition.

6.11 The first is *R v Camplin* (1845) 1 Cox CC 220. **[A6 Tab 76]** In that case the prisoner gave a 13 year old girl alcohol, then had intercourse with her while she was insensible.

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62 MacFarlane, in an article entitled "Historical Development of the Offence of Rape" (1993) **[A6 Tab 81]** refers to a number of ancient authorities including: Coke's second Institute (1671); Hawkins, Pleas of the Crown (1716); Blackstone, Commentaries on the Laws of England (1769); Hale, History of the Pleas of the Crown (1736); and East, Pleas of the Crown (1803).

63 For example, the 1973 edition of *Archbold* stated that the offence of rape required "force" and that the complainant must have "physically resisted": *Archbold* (39th ed 1973) para 2881.

Because of her state, the victim can have offered no resistance and the prisoner can have required no force. The prisoner was nonetheless convicted of rape.

6.12 An appeal was taken on the grounds that: "*there must be actual force used, and actual resistance to that force*" in order to constitute rape. Counsel for the prisoner cited Hale's Pleas of the Crown (1736), and Hawkins' Pleas of the Crown (1716) in support. A Full Bench of all of Her Majesty's Judges was constituted (13 in total – 2 were apparently unavailable), and dismissed the appeal. The Chief Justice Lord Denman CJ said:

> "*It is put as if resistance was essential to rape; but that is not so, although proof of resistance may be strong evidence in the case*."

6.13 This case is high authority for the proposition that force and resistance are not required for the offence rape. The point was placed squarely before the Court for decision; the prisoner had used no force and found no resistance; he was convicted in the absence of those elements; his counsel appealed on the grounds of the ancient authorities regarding force and resistance; and a Full Bench of all available Judges rejected that purported requirement. At the time, the penalty for rape was death by hanging.

6.14 Thus, in the Crown's submission, from the time of *R v Camplin* in 1845, force and resistance were not elements of the offence of rape, but simply facts capable of providing evidence of lack of consent. *Camplin* made it clear that a conviction for rape could properly be entered in the absence of force or resistance on the part of the complainant.

6.15 The next case is *R v Mayers* (1872) Cox CC 311. **[A6 Tab 77]** In that case the prisoner had attempted to have sex with a woman while she was asleep. His counsel argued that "*there must be evidence that he used force*." The learned Judge held: "*if she was asleep, she is incapable of consent, and therefore it would be a rape. … if she was asleep it is against her will, and I shall rule that if he had, or attempted to have, connection with the woman while she was asleep he is guilty*." Again, the purported requirement of force was argued, but rejected by the Court.

6.16 In *R v Young* (1878) 14 Cox CC, **[A6 Tab 78]** the Court of Criminal Appeal upheld the *Mayers* ratio. The trial judge had ruled in reliance on *Mayers* that "*if a man has or attempts to have connection with a woman while she is asleep, it is no defence that she did not resist*." The Chief Justice Lord Coleridge CJ held that this was a correct finding.

6.17 In the 20th Century, the Court of Criminal Appeal continued to describe the offence of rape as simply requiring lack of consent, and without any requirement of force or resistance. In *Bradley* (1910) 4 Cr App R 225, **[A6 Tab 79]** the Court overturned a conviction on the grounds that the trial Judge had not explained the onus of proof sufficiently:

> "*It would have been more satisfactory if it had been explained to the jury that the onus of proof was upon the prosecution to shew that the girl had not consented. On the whole we think it safer that the conviction should not be allowed to stand. There was not sufficient evidence before the jury to justify them in concluding that the girl did not consent*."

6.18 Although the case was one in which the complainant had alleged a physical struggle, the Court of Criminal Appeal did not suggest that the prosecution needed to prove the struggle or force for the offence of rape.

6.19 In *Harling* (1937) 26 Cr App R **[A6 Tab 80]** the Court of Criminal Appeal stated:

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

6.20 The Court of Criminal Appeal approved the Judge's summing up:

> "*… the Judge summed up in terms which are unexceptionable. He told the Jury that, to establish the crime of rape, the prosecution must prove that connection by a man with a woman has taken place without her consent and against her will*."

6.21 Again, there was no suggestion that the Crown needed to prove the use of force, or physical resistance on the part of the victim.

6.22 In 1955, Halsbury's *Laws of England* (3rd ed 1955) paras 1436 – 1439 **[A6 Tab 82]** stated simply:

> "*1436 Rape. Anyone is guilty of the felony of rape who has unlawful carnal knowledge of a woman against her will. […]*
>
> *[…]*
>
> *1438. Evidence required. There must be evidence of penetration of the private parts of the woman by the private parts of the prisoner, but the slightest penetration is sufficient, and it is not necessary that the hymen should be ruptured. […]*

> *1469. Consent. The connexion must have been against the will of the woman. […]* "

6.23 There was no suggestion in Halsbury that there was any requirement of force or physical struggle. To the contrary, *Camplin* was cited for the proposition that:

> "*If a person by giving a woman liquor makes her intoxicated to such a degree as to be insensible, and then has connexion with her, he may be convicted of rape, whether he gave her the liquor to cause insensibility or merely to excite her.*"

6.24 The footnote to paragraph 1469 cited *Bradley* (1910) **[A6 Tab 79]** and *Harling* (1938) **[A6 Tab 80]** as follows:

> "*There should be clear evidence of the absence of consent (see R v Bradley (1910); R v Harling [1938] 1 All ER 307.*"

6.25 This confirms the position established in 1845 in *Camplin* **[A6 Tab 76]** – namely that force or resistance were merely possible types of evidence to prove lack of consent, but by no means mandatory elements of the offence.

Contrary authorities

6.26 Notwithstanding the apparently clear position of the law, a number of contrary views were expressed around the middle of the 20th Century (as noted in 1975 by the Home Office paper):

(a) As noted, *Archbold* continued to refer to the ancient law well into the latter part of the 20th Century.

(b) In *Howard* (1965) 50 Cr App R 56, **[A6 Tab 83]** the Court made the following partially obiter statement:

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

In that case the conviction was upheld even though the complainant had not resisted. The girl was only 6 years old, and in those circumstances the Court readily inferred that she did not "have sufficient understanding and knowledge to decide whether to consent or resist."

(c) The 1976 edition of *Halsbury's Laws of England* (4th ed) Vol 11 **[A6 Tab 84]** stated at para 1226: "*Rape consists in having sexual intercourse with a*

woman without her consent, by force, fear or fraud." The citation for that proposition was to *R v Miller* [1954] 2 QB 282. **[A6 Tab 85]** *Miller* was a first instance decision, in which the Accused was charged with raping his wife. The issue in the case was whether the wife's imputed consent to sexual intercourse with her husband applied. However, in a passing obiter comment the trial judge said "*Rape is the offence of having carnal knowledge of a woman without her consent by force, fear or fraud, and it is an essential ingredient of that particular offence that it must be without the woman's consent*." In the Crown's submission this case does nothing to displace the high appellate authority that force and resistance are not required for the offence of rape. Notably, *Miller* refers to "fear" as a sufficient basis for a rape conviction—which again emphasises that the purported requirements of force and resistance had no place in English law from the mid 19th Century.

6.27 The Crown has not found any case in which it has been found that a victim did not consent, but in which a rape conviction has been avoided because of a lack of physical resistance or force.

Modern authority

6.28 Two cases in the 1980s and 1990s serve to confirm and reinforce the above submissions:

(a) The first is *Olugboja* [1981] 3 All ER 443 (CA). **[A6 Tab 86]** As noted above, the Court of Appeal rejected the proposition that a victim's submission must have been induced by fear of violence to support a rape charge (p446). The decision also quoted the findings of the Rape Advisory Group, cited above, that:

> "*It is … wrong to assume that the woman must show signs of injury or that she must always physically resist before there can be a conviction for rape. We have found this erroneous assumption to be held by some and therefore hope that our recommendations will go some way to dispel it*."

The Court went on to say:

> "*We have not been persuaded by counsel for the appellant that the position at common law was different from that stated from the report of the advisory group …*"

Thus the Court of Appeal was clearly of the view that prior to 1975 there were no requirements of physical force or resistance.

(b) The position was then emphatically reviewed by the Court of Appeal in *R v Malone* [1998] 2 Cr App R 447. **[A6 Tab 87]** The Court reaffirmed that:

> "*The actus reus of rape is an act of sexual intercourse with a woman who at the time of the act of sexual intercourse does not consent to that act of sexual intercourse. There is no requirement that the absence of consent has to be demonstrated or that it has to be communicated to the defendant or the actus reus of rape to exist. …No doubt there will have to be some evidence of lack of consent to go before the jury. But what that evidence will be will depend on the particular circumstances of the case that the jury is trying. The evidence may be of widely differing kinds as a few illustrations will show. It may be the complainant's simple assertion "I did not consent to sexual intercourse with the defendant.""* …

6.29 The Court upheld the *Olugboja* findings. In the course of doing so, it stated that pre-1976 cases are not binding and should be read with some caution. The Crown submits that this note of caution is not an indication that there was a requirement of force or resistance before 1976, but rather that care should be taken to reject any cases relying on the "erroneous assumption" identified above.

6.30 The significance of the year 1976 is that the Sexual Offences (Amendment) Act 1976 **[L2 Tab 22]** came into force, enacting the following statutory definition of rape that makes no reference to force or resistance:

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

Alternative submission: the Court is entitled to apply the law as clarified post-1976

6.31 The Crown's primary submission is that force and resistance were not required in English law from 1845, and accordingly there was no such requirement in Pitcairn law in the late 1960s and early 1970s.

6.32 In the alternative, even if the cases in the late 1960s and early 1970s had required force and resistance, the Crown submits that the Supreme Court would have been entitled to apply the law as clarified after 1976.

6.33 The clearest support for that submission derives from the case of *R v C* [2004] 2 Cr App R 15. [A6 Tab 88] In that case, the Appellant was charged with a number of sexual offences between 1967 and 1987. One of the counts alleged rape of his wife between 1967 and 1971.

6.34 The Appellant submitted he could not be convicted of raping his wife because at the time this was not a criminal offence. Indeed it would not be recognised as a criminal offence fully until two decades later. The English Courts first held that a man could be found guilty of raping his wife in 1991: *R v R* (1991) 93 Cr App R 1 (CA). [A6 Tab 89] The Appellant argued that any conviction for raping his wife would be an abuse of process and/or a contravention of Article 7 of the European Convention on Human Rights: [L2 Tab 24]

> "*No-one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed*. …"

6.35 The Court rejected that argument and upheld the conviction. A similar submission had been made to the European Court of Human Rights in *S.W. v United Kingdom* (1996) 21 EHRR, [A4 Tab 40] and the European Court there held that there was no infringement of Article 7 where a man was convicted of raping his wife before 1991. In the *C* case, the English Court of Appeal extended the European Court's reasoning back as far as conduct in the late 1960s or early 1970s.

6.36 On the basis of that decision, the Crown submits that extension of post-1976 law to the period covered by this trial would not violate the prohibition on retrospectivity.

6.37 For these reasons, the Crown submits that the Court of Appeal was correct to rule that the purported additional elements did not form part of the law of England at the relevant time.

7 THE SUPREME COURT DID NOT ERR WHEN ASSESSING THE COMPLAINANT'S CREDIBILITY IN THE CASE OF CARLISLE TERRY YOUNG, AND DID NOT MIS-DIRECT ITSELF ON LIES

7.1 Your Lordships' Board will review the merits of a decision of a general Court of Appeal in a criminal case only where it is established that by disregard of the forms of legal process, or by some violation of the principles of natural justice, or otherwise, a

substantial and grave injustice has likely occurred. Irregularity is ordinarily insufficient. The question is whether the Petitioner has been deprived of the substance of a fair trial and the protection of law.

7.2 In the present case the Petitioner (for such he is in regard to this ground of appeal) does not say that the evidence is insufficient to found a conviction. These grounds relate solely to:

(a) A complaint about the trial Judge's assessment of the credibility of the complainant B. 2-496

(b) A complaint about the trial Judge's view (expressed at paragraph 72 of her judgment) that the Petitioner "was less than frank" in his video-taped interview. 2-497

7.3 Where a ground advanced in support of a petition for special leave to appeal impugns the content of a summing up or relates to the exercise of a judicial discretion in respect of a decision, and the matter has been considered by a Court of Appeal in the country where the trial took place, it is generally exceptional for Your Lordships' Board to intervene.

7.4 Similarly, issues involving the weight of evidence, conflicts of evidence or inferences to be drawn from evidence are also, save in exceptional circumstances, to be determined by the Court of Appeal in the local jurisdiction.

The Complainant's Credibility

7.5 In essence the complainant said different things on different occasions. There were opposing contentions as to how this should be viewed by the Court.

7.6 For the Crown it was submitted that the differences reflected no more than the oft-encountered situation where a complainant makes gradual disclosure over time as she becomes more comfortable or confident with the process.

7.7 For the Defence it was submitted that these differences were such as to amount to inconsistencies, stripping her of all credibility and reliability, or at least sufficiently so to render guilty verdicts inappropriate.

7.8 The trial Judge in effect noted these matters, in particular at paragraphs 44 and 45; 60-63; 64-66, before reaching her conclusion expressed in paragraphs 67-71. Apart from the matters summarised in those paragraphs the learned Judge also had the 2-489 – 2-497

advantage of seeing the witness and thereby bringing her Judicial experience to bear upon the assessment of credibility.

7.9 The Petitioner does not assert that it was not open to the trial Judge to make the finding of credibility she did. Rather his complaint is that she should have said even more than she did when making her finding.

7.10 In this connexion the comment of Henry LJ in *Flannery Estate Agencies Ltd* [2000] 1 WLR 377 at 382, **[A6 Tab 90]** is apt:

> "The extent of the duty [to give reasons], or rather the reach of what is required to fulfil it, depends on the subject matter. Where there is a straightforward factual dispute whose resolution depends simply on which witness is telling the truth about events which he claims to recall, it is likely to be enough for the judge (having, no doubt, summarised the evidence) to indicate simply that he believes X rather than Y; indeed there may be nothing else to say."

7.11 Further, credibility findings are usually based upon an exercise in judgment borne of experience, knowledge of human behaviour and the evaluative process. In such circumstances, it is difficult to expect a Judge to expand into detailed reasons for particular findings and preferences.

2-973 et seq.

7.12 As the Board knows this matter was traversed in the Court of Appeal. From that Judgment it is clear, in particular from paragraph 177, that the opposing contentions were meticulously examined by the Court:

2-977

> "For the Crown Ms Gordon dealt <u>in detail</u> with each of the alleged inconsistencies…." (emphasis added)

7.13 And further at paragraphs 178-179:

2-978

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

7.14 For these reasons, it is the Crown's submission that, having been traversed before the trial Judge and exhaustively scrutinised by the Court of Appeal, this is not a matter

upon which special leave should be granted by Your Lordships on the basis of this Board's traditional approach in such circumstances.

The Petitioners 'economy of candour'

7.15 For similar reasons to those expressed above, it is the Crown's further submission that this ground of appeal, having been examined and determined by the local appellate Court, does not warrant the grant of special leave.

7.16 What the accused said in his video interview is summarised at paragraph 61 of Her Ladyship's Judgment: 2-494

> "….The accused admitted that from when the complainant was seven "he rubbed her down" over her whole body. He claimed that she had asked him to do that. He said he could not remember whether "the rubbing down" included putting his fingers inside her vagina. He could not remember whether he had ever had "full sex" with the complainant."

7.17 In making the finding she did (at paragraph 72) that the Petitioner was "*less than frank*" in that interview, she was in effect doing little more than contrasting the economy of his candour with the totality of the complainant's. Bearing in mind that she had just spent some time in explaining that she arrived at the conclusion "*I believed her*" (para 70), it was entirely appropriate for Her Ladyship to pause and consider whether the Petitioner had given her any cause to modify that finding of credibility. 2-496

7.18 The Petitioner had not chosen to give evidence, so all the Court was able to take into account on his behalf was his interview. Thereafter she was dependant on what assistance she derived from his counsel's submissions on his behalf.

7.19 The Court of Appeal, at paragraph 180 of their judgment, said:

> "….If, as is likely, the Judge's statement referred to occasions when the Appellant said he could not remember, we would accept the submission of Mr Illingworth that it is at least likely the Judge concluded that he was not telling the whole truth." 2-978

7.20 The Crown, with respect, agrees with this assessment. The Petitioner, a man 12 years the complainant's senior, had admitted that he had "rubbed her down" over her whole body from when she was aged 7 onwards. But he did not remember whether his penis had penetrated her vagina/genitalia. In those circumstances it is indeed open to a trier of fact to form the view that she had not been told "the whole truth".

7.21 More importantly, however, it does not follow, as the Court of Appeal said, that the trial Judge thereby needed to give herself a lies direction.

7.22 As Kennedy LJ said in *R v Burge and Pegg* (1996) 1 Cr App R 163 at 172-173: **[**A6 Tab 91**]**

> "….our view is that the direction on lies approved in *Goodway* comes into play where the prosecution say, or the judge envisages that the jury may say, that the lie is evidence against the accused: in effect, using it as an implied admission of guilt."
>
> …."If a *Lucas* [lies] direction is given where there is no need for such a direction (as in normal case where there is a straight forward conflict of evidence), it will add complexity and do more harm than good." (emphasis added)

7.23 The Court was at pains to emphasise that a case involving a normal conflict of evidence did not require a lies direction. However, Kennedy LJ said a direction was necessary where the prosecution has identified and proved a particular lie which is alleged to be explicable on the basis of a consciousness of guilt on the accused's part

7.24 In the Crown's respectful submission those are correct statements of the law, and were correctly followed and applied by the Court of Appeal. In this case the Crown did not seek to rely in any way on an actual or inferred lie on the part of the Petitioner. Nor did the Judge use it to support her findings of guilt. She had found the complainant to be truthful, notwithstanding the cross-examination and defence submissions in closing. The Petitioner had never directly denied the accusation of rape, and had made (partial) admissions in relation to some indecent assaults.

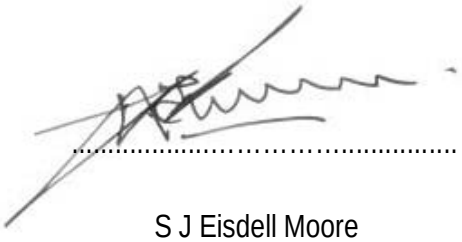
7.25 The Court of Appeal's assessment therefore that, once the Defence failed to make any inroads into the complainant's credibility, a conviction could be regarded as "inevitable" is entirely correct.

7.26 In the Crown's respectful submission, there is nothing in this ground of appeal (either in its original form or as proposed in its amended form in paragraph 130 of his submissions) that calls for the accepted approach to lies and lies directions to be revisited by Your Lordships' Board.

8 CONCLUSION

8.1 For these reasons, the Crown respectfully submits that special leave to appeal should not be granted in relation to the new grounds of appeal, and that there is no basis to interfere with the conclusions of the Court of Appeal in respect of the substantive grounds of appeal.

DATED at Auckland this 14th day of June 2006.



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S J Eisdell Moore
Pitcairn Public Prosecutor