HOUSE OF LORDS SESSION 2003–04
[2004] UKHL 42

on appeal from: [2002] EWCA Crim 2983

OPINIONS

OF THE LORDS OF APPEAL

FOR JUDGMENT IN THE CAUSE

Regina
v.
J (Appellant)
(On Appeal from the Court of Appeal (Criminal Division))

ON
THURSDAY 14 OCTOBER 2004

The Appellate Committee comprised:

Lord Bingham of Cornhill
Lord Steyn
Lord Clyde
Lord Rodger of Earlsferry
Baroness Hale of Richmond

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LORD BINGHAM OF CORNHILL

My Lords,

1. The point of law of general public importance certified by the Court of Appeal (Criminal Division) under section 33(2) of the Criminal Appeal Act 1968 in this case is:

> "Whether it is an abuse of process for the Crown to prosecute a charge of indecent assault under section 14(1) of the Sexual Offences Act 1956 in circumstances where the conduct upon which that charge is based is an act of unlawful sexual intercourse with a girl under the age of 16 in respect of which no prosecution may be commenced under section 6(1) of the 1956 Act by virtue of section 37(2) of, and Schedule 2 to, the 1956 Act".

The Court of Appeal resolved that question in favour of the Crown and adversely to J, who appeals to the House against that decision.

2. In 1996–1997, when he was aged 35–37 and she was aged 13–14, J repeatedly had sexual intercourse with C and at his request she repeatedly had oral intercourse with him. He ran a business on land rented from C's father and she began working for him at the week-end and during the school holidays. He took this opportunity to cultivate a sexual relationship with her which culminated in the conduct already mentioned. J's conduct was plainly criminal. It was made the more serious by the disparity between the respective ages of himself and C; by his standing as a middle-aged man, an associate of C's father and her

employer; by the steps which he took to groom C and, it seems, record on video their sexual activity; by the frequency of that activity; and by the period over which it continued.

3. C did not reveal what had happened between her and J until some three years later, when she was seventeen. By that time, as will be seen, it was too late to prosecute J under section 6 of the 1956 Act, either summarily or on indictment, for having unlawful sexual intercourse with a girl under the age of 16. An indictment was accordingly preferred containing four counts. The first three of these were specimen counts charging J with indecently assaulting C on dates in 1996 and 1997, contrary to section 14(1) of the 1956 Act. The fourth was a specimen count charging him with committing an act of gross indecency with a child in 1996, contrary to section 1(1) of the Indecency with Children Act 1960. The prosecution's written case summary at the trial made plain that the first three counts were specimen counts relating to sexual intercourse between J and C and that the fourth count was a specimen count relating to oral sex. When J appeared before His Honour Judge Hume-Jones in the Crown Court at Taunton in October 2001, application was made to stay the prosecution on the ground that to charge indecent assault in such circumstances was a device to circumvent the time limit on a prosecution for unlawful sexual intercourse and so amounted to an abuse of the process of the court. The judge rejected that application, ruling (in written reasons given later) that there was nothing to prevent the prosecution charging indecent assault in the circumstances. Directing the jury in due course on the first three counts, the judge said:

> "the allegation is that the defendant had sexual intercourse with [C] when she was under 16 … there is no dispute that conduct such as that which is alleged is capable of constituting the offence of indecent assault … . In law, a girl under the … age of 16, cannot consent to an indecent assault … .The sole issue for you on these counts is this. Are you satisfied, so that you are sure, … that the defendant had sexual intercourse with [C]?"

By a majority, the jury convicted J on all four counts. He was sentenced to a total of three years' imprisonment on the first three counts and to 12 months' imprisonment consecutive on the fourth.

4. The Court of Appeal reduced J's sentence on the fourth count from 12 months' imprisonment to nine, acceding to a submission that he

need not be a long-term prisoner. But the lawfulness of his conviction on the fourth count was not challenged in the Court of Appeal or before the House. It related to an act of oral intercourse, which does not fall within the definition of sexual intercourse in section 44 of the Act. It was of course an act incidental to the sexual relationship which existed between J and C, but it was an independent act, not inherent in or forming part of the sexual intercourse which took place between them. The charge under count 4 was properly laid and there is no reason to doubt that J was properly convicted. That count need not be further considered.

5. J's challenge in the Court of Appeal to his convictions on the first three counts rested on essentially the same abuse of process argument as the judge had rejected. The Court of Appeal (Potter LJ, Butterfield J and Judge Paget QC) also rejected it: [2002] EWCA Crim 2983, [2003] 1 WLR 1590. Having reviewed a body of authority relied on by one or other party, the court concluded, at pp1601-1603:

(1) that "the substantive offence of indecent assault is plainly apt to cover the act of penile penetration involved in sexual intercourse and of the various acts of fondling and foreplay which precede it" (para 31);
(2) that selection of an appropriate charge generally lies within the discretion and responsibility of the Crown (para 32);
(3) that the court nonetheless reserves to itself a residual and discretionary power to stay criminal proceedings as an abuse of process (para 33);
(4) that the prosecution in this case had not been guilty of conduct which could fairly be characterised as a misuse of the process of the court (para 38); and
(5) that it was not necessarily an abuse of process to bring a charge of indecent assault after the expiry of 12 months in respect of facts which would justify a charge under section 6 of the 1956 Act (para 38).

Giving the judgment of the court, Potter LJ said, at p 1603, para 39:

> "39 We accept that the defendant is thereby deprived of a protection provided by the law in respect of prosecutions under section 6. However, we do not accept that it arises from misuse of process by the prosecution, so much as delay on the part of the complainant. The question is

> therefore whether, as a general proposition, so to proceed involves an affront to the public conscience, is necessarily contrary to the public interest, or undermines the integrity of the criminal justice system. In our view the answer to that question is "No"; it all depends upon the circumstances of the individual case. It must frequently be the position, as in this case, that the facts do not come to light until after the expiry of 12 months, upon the complaint of a victim who, free of the influence of the defendant, is able to appreciate the degree to which their relationship was an abusive one. The fact that Parliament may have thought fit to provide for a general limitation period in respect of prosecutions under section 6, based, it must be assumed, on the principle that stale complaints are inherently likely to give rise to evidential difficulty, does not in our view preclude a responsible prosecutor from taking the view that, in the particular circumstances, a fair trial is possible and that it is conducive, and not inimical, to justice to bring a different charge not subject to such a period of limitation."

Then, having referred to the facts and observed that the counts laid could not and should not be regarded as a misuse of the process of the court or an affront to justice (para 40), Potter LJ continued, at p 1604, para 41:

> "41 Nothing which we have said should be taken as an encouragement to prosecutors to bring defendants to court on charges of indecent assault in cases where, were the time-bar not applicable, the charge would have been laid under section 6. While the decision to do so will depend upon all the circumstances of the case, it seems to us that the decision to prosecute should depend, not simply upon the fact that the offence or offences have not come to light till after the expiry of a period of 12 months, but upon the presence of some unusual or aggravating feature sufficient to justify the avoidance of the limitation period provided for under section 6. Equally, nothing we have said should detract from the now settled practice of this court in treating two years' imprisonment as the maximum sentence appropriate to a charge of indecent assault brought in circumstances where, but for the expiry of the 12-month time limit, the charge would appropriately have been laid under section 6."

6. At the heart of this appeal lie three statutory provisions to which reference must now be made. The first of these is section 6(1) of the 1956 Act which, as amended and so far as material, provided:

> "*Intercourse with girl between 13 and 16*
>
> (1) It is an offence, subject to the exceptions mentioned in this section, for a man to have unlawful sexual intercourse with a girl … under the age of 16."

The subsection must be read with section 5 which made it an offence, and a much more serious offence, to have sexual intercourse with a girl under the age of 13. Section 6 was directed to the proscription of consensual intercourse with under-age girls, since intercourse alleged to be non-consensual would be prosecuted as rape. As Mr Perry, for the Crown, has helpfully and painstakingly demonstrated, section 6(1) was (until repealed by Schedule 7 to the Sexual Offences Act 2003) the latest in a series of statutory provisions directed to that end, although the age below which a girl was protected has been increased over the centuries from 10 (18 Eliz 1 cap 7, section 4) to 12 (9 Geo IV cap 31, section 17; Offences against the Person Act 1861 (24 & 25 Vict c 100), section 51) to 13 (Offences against the Person Act 1875 (38 & 39 Vict c 94), section 4) to 16 (Criminal Law Amendment Act 1885 (48 & 49 Vict c 69), section 5(1)). Neither of the exceptions provided in section 6 applies in this case, and it was not suggested that the terms of sub section (1) were in any way ambiguous or obscure. There can be no doubt that the acts of sexual intercourse with C charged against J in the first three counts, and found by the jury to have been committed, fell squarely within subsection (1).

7. The second statutory provision crucial to the outcome of this appeal, given effect by section 37 of the 1956 Act, is found in paragraph 10(a) of Schedule 2 to that Act. This sub-paragraph related to the offence of intercourse with a girl under 16 contrary to section 6 and specified (as described in section 37(2)) a special restriction on the commencement of a prosecution. The special restriction was that:

> "a prosecution may not be commenced more than 12 months after the offence charged."

8. As, again, Mr Perry has helpfully shown, this provision also had a number of ancestors. Section 5 of the Criminal Law Amendment Act

1885 provided that no prosecution for an offence under subsection (1) (sexual intercourse with a girl aged between 13 and 16) should be commenced more than three months after the commission of the offence. Section 27 of the Prevention of Cruelty to Children Act 1904 increased the time limit to six months. Section 2 of the Criminal Law Amendment Act 1922 increased the period to nine months. Section 1 of the Criminal Law Amendment Act 1928 made a further increase to 12 months. That provision was consolidated in the 1956 Act.

9. An increase in the time limit from nine months to 12 was recommended in a Report of the Departmental Committee on Sexual Offences against Young Persons under the chairmanship of Sir Ryland Adkins KC (1925) (Cmd 2561), which said:

> "Para 41(8) The Criminal Law Amendment Act, 1885, section 5, provided that no prosecution for carnal knowledge of a girl between 13 and 16, or for the attempt, should be commenced more than three months after the commission of the offence. Six months was substituted for three months by a statute of 1904. The Criminal Law Amendment Act, 1922, section 2, has again extended the time, so that a prosecution for an offence under section 5 of the Act of 1885 must today be commenced within nine months of the commission of the offence.
>
> The extension from six to nine months was only made as recently as 1922, by way of compromise. There is a considerable body of evidence, however, to show that the limitation of nine months may be insufficient in many cases, to enable offenders to be brought to justice. There are occasions when the offence is not known until the girl has become a mother, and the evidence cannot be completed until after she has recovered sufficiently to make a statement. Or it may happen that the registration of the birth of a child, or an application for a summons for an affiliation order, is the first indication that an offence has been committed. In such cases it is clear that more than nine months may have elapsed since the commission of the offence and that, as the law now stands, no criminal proceedings can be taken. Unless some limitation of time is imposed for the prosecution of these offences injury may be caused by charges being held over; witnesses for the defence as well as for the prosecution may be lost; and important facts on one side or the other may not be provable. We are satisfied from the evidence, however,

that the present limitation of time may be too short in cases in which a prosecution is called for.

We therefore recommend that the time limit for the taking of proceedings under the Criminal Law Amendment Act, 1885, section 5(1), be extended to 12 months."

10. The 12 month time limit was in its turn reviewed by the Criminal Law Revision Committee under the chairmanship of Lord Justice Lawton which, in its Fifteenth Report (1984) (Cmnd 9213) on Sexual Offences, advised:

"**7. Limitation**

5.22 As we have already said, the object of the legislation against unlawful sexual intercourse is to protect girls, sometimes against themselves. The probability is that in the past the legislature was concerned with the damage that could be done to a young girl by pregnancy. In practice many complaints to the police are made when parents discover that their daughter has been made pregnant. In the last century a prosecution for unlawful sexual intercourse with a girl under 16 could not be commenced more than 3 months after the alleged act of intercourse. This has been extended gradually over the years and is now 12 months. In our opinion a period of limitation for this offence—which is only exceptionally found in the case of indictable offences—is of value in that it ensures that a prosecution may not be brought in respect of events that have become stale. For this purpose the present 12 month period seems right and we recommend that it should be retained.

5.23 Nothing we say here affects the offence of unlawful sexual intercourse with a girl under 13. No limitation period applies to that offence; nor, in view of its gravity, is it appropriate that one should."

11. After 1956, Parliament enacted statutes relating to sexual offences in 1960, 1967, 1976, 1985, 1992 and 1993, but it did not (until it enacted Schedule 7 to the Sexual Offences Act 2003) abrogate or amend the 12 month time limit enacted in paragraph 10(a) of Schedule 2 to the 1956 Act. It was not suggested in argument that this provision was in any way ambiguous or obscure. It plainly precluded any prosecution

of J under section 6 of the Act. That, of course, is why J was not prosecuted under that section for having sexual intercourse with C when she was under age.

12. The third statutory provision important for present purposes is section 14 of the 1956 Act which, so far as relevant, provided:

> "*Indecent assault on a woman*
>
> (1) It is an offence, subject to the exception mentioned in subsection (3) of this section, for a person to make an indecent assault on a woman.
>
> (2) A girl under the age of 16 cannot in law give any consent which would prevent an act being an assault for the purposes of this section."

13. The exception in subsection (3) has no bearing on this case. Indecent assault on a woman, as a separate offence, dates back to section 52 of the Offences against the Person Act 1861, and section 1 of the Criminal Law Amendment Act 1922 first provided that it should be no defence to a charge or indictment for an indecent assault on a child or young person under the age of 16 to prove that he or she consented to the act of indecency. The House was not addressed, and the present appeal calls for no decision, on the ingredients of indecent assault under section 14. It is enough to say that it includes an intentional touching of one person by another in circumstances of indecency, whether or not (where the person touched is a girl under 16) she consents: *Faulkner v Talbot* [1981] 1 WLR 1528, 1534. As the Court of Appeal held in para 31 of its judgment, quoted in part in para 5 above, this broad description is capable of covering the conduct of J when having sexual intercourse with C.

14. The Court of Appeal was quite right, in my respectful opinion, to hold that the conduct of the prosecution in this case did not fall squarely within the category of abuse of the process of the court stigmatised by Sir Roger Ormrod, delivering the judgment of Lord Lane CJ and himself, in *R v Derby Crown Court, Ex p Brooks* (1984) 80 Cr App R 164, 168–169. Nor was it within that considered by the House in *R v Horseferry Road Magistrates' Court, Ex p Bennett* [1994] 1 AC 42. As Mr Meeke QC, for J, roundly acknowledged, the prosecution had not been guilty of any devious, underhand or manipulative conduct. They had not sought to take unfair advantage of a technicality or to prejudice the conduct of the defence in any improper way. The delay in

prosecuting J, in no way the fault of the prosecution, did not imperil the fairness of the trial. There was no misconduct by the executive. This was a case in which the prosecution, learning of serious criminal conduct when it was too late to prosecute under section 6, sought to discharge its public duty by prosecuting under section 14. It was a decision which the general public would applaud.

15. In the course of argument before the House, however, it became clear that J's real complaint was not that the prosecution had abused the process of the court, as that expression is ordinarily understood, but that it had prosecuted under section 14 when, on a proper construction of the three statutory provisions discussed above and on the facts relied on to support the prosecution, it was precluded by statute from doing so. This approach calls for recognition of some very basic but fundamental principles. It is the duty of the court to give full and fair effect to the meaning of a statute. In a purely domestic context such as this, it cannot construe the statute by reference to any extraneous legal instrument. It must seek to give effect to all the provisions of a statute. It cannot pick and choose, giving effect to some and discounting others. It has no warrant, in a case such as this where no Convention right is engaged, to resort to the unique interpretative technique required by section 3 of the Human Rights Act 1998. If a statutory provision is clear and unambiguous, the court may not decline to give effect to it on the ground that its rationale is anachronistic, or discredited, or unconvincing. The historical derivation of the 1956 Act has been shown to result in much internal inconsistency and lack of coherence (see, for example, *R v K* [2001] UKHL 41, [2002] 1 AC 462, 467, para 4) but the deficiencies of the Act cannot absolve the court from its duty to give effect to clear and unambiguous provisions.

16. Thus the problem may be simply stated. In section 6 Parliament has criminalised a form of conduct compendiously described as having sexual intercourse with a girl under the age of 16. But it has prohibited the commencement of a prosecution for such conduct more than 12 months after the offence charged. In section 14 it has criminalised indecent assault, with or without her consent, on a girl under 16. Under that section a prosecution on indictment is, anomalously, subject to no time limit. Where, for good reason, a prosecution for having sexual intercourse is not commenced under section 6 within 12 months of the intercourse, may the defendant nonetheless be prosecuted, for the same conduct, under section 14?

17. Mr Perry submitted that this question be answered affirmatively. He accepted in argument that this was to read paragraph 10(a) of

Schedule 2 as if it provided that a prosecution for sexual intercourse with a girl under 16 might not be commenced more than 12 months after the offence charged but that, if a prosecution was not commenced within that time, the same conduct could thereafter be prosecuted under section 14.

18. This is, to my mind, an impossible reading, since Parliament must have intended the prohibition in paragraph 10(a) to have some meaningful effect and this reading would deprive it of any meaningful effect whatever, given that when the 1956 Act was passed the same maximum penalty applied on conviction under either section. Put another way, what possible purpose could Parliament have intended to serve by prohibiting prosecution under section 6 after the lapse of 12 months if exactly the same conduct could thereafter be prosecuted, with exposure to the same penalty, under section 14?

19. Authority on the application of other statutes, differently expressed, is of limited assistance in resolving a problem of this kind. But some help may be gained from *R v Cotton* (1896) 60 JP 824, which was not cited to the Court of Appeal. Section 9 of the Criminal Law Amendment Act 1885 provided that on a trial for rape the jury, if not satisfied that the defendant was guilty of rape but satisfied that he was guilty of having intercourse with a girl aged between 13 and 16, contrary to section 5(1) of the Act, might convict of the latter offence. The prosecutor opened the case as one in which that course could be adopted. Pollock B, the trial judge, questioned whether that was permissible where (as was the case) more than three months (the time limit for prosecution under section 5) had elapsed between the conduct alleged and the prosecution. He ruled, at p 825:

> "The conclusion I have come to is that you cannot go on with the charge under section 5, more than three months having elapsed since the last commission of the offence. In substance, if this could be done, by shaping your charge as a charge of rape, you could always evade the statutory limit of time. In a case such as this, it would be the more reasonable construction of the sections to hold that the time must be considered as the essence of the charge. In substance, an indictment of rape under circumstances such as these must be treated as a charge of the lesser offence."

The jury acquitted the defendant of rape, and he was discharged. The very brief report makes no reference to indecent assault, of which it was also open to the jury to convict under section 9. I would hesitate to accept all the reasoning of the learned baron. But the authority does show the rigour with which the time limit was applied on its first enactment, despite the consequence which might (and did) ensue.

20. *R v Cotton* was cited in the Court of Appeal of New Zealand in *R v Blight* (1903) 22 NZLR 837. The Criminal Code in force at the time, reflecting the English, included an offence of sexual intercourse with a girl under 16, to which a one month time limit applied, and also an offence of indecent assault to which no time limit applied but to which, in the case of a young victim, consent was not a defence. Well after expiry of the time limit, the defendant was prosecuted for indecent assault, he having had sexual intercourse with a girl under 16. A majority of the court held this course to be impermissible. As Williams J put it, at p 847:

> "In the present case it is clear that everything done by the accused was an offence under section 196 [unlawful sexual intercourse] and nothing more. I think, therefore, the prosecution was instituted out of time. If the above construction be not adopted the result is that no effect could be given to section 196, and that section would be practically expunged from the Act, and the protection given by the time limit would be quite illusory."

Given that the maximum penalty for indecent assault was significantly greater than that for unlawful sexual intercourse, it is hard to accept the reasoning of Stout CJ, dissenting, that a defendant indicted for a minor offence is not entitled to be acquitted because the prosecution prove a major offence. The reasoning of the majority was recently approved and applied by the Court of Appeal of New Zealand in *R v Hibberd* [2001] 2 NZLR 211.

21. *R v Blight* 22 NZLR 837 was not followed by the Court of Criminal Appeal of New South Wales in *R v Saraswati* (1989) 18 NSWLR 143. The defendant had been convicted on several counts of indecency with a child, the only evidence relied on, in relation to some counts, being evidence of full sexual intercourse. There were statutory time limits which precluded prosecution for unlawful sexual intercourse and indecent assault, and it was held to be no abuse of process for the

prosecution to rely on the evidence of sexual intercourse to establish the charge of indecency (pp 145, 169–170). A majority of the High Court disagreed: (1991) 172 CLR 1. Toohey J (p 16) and McHugh J (p 23) relied on a

> "rule that, when a statute specifically deals with a matter and makes it the subject of a condition or limitation, it excludes the right to use a general provision in the same statute to avoid that condition or limitation".

They could not accept (pp 16, 24) that when Parliament amended the relevant Act to criminalise acts of indecency it intended that general power to be used to circumvent the time limit placed on prosecutions under the specifically applicable sections of the same statute.

22. The House was referred to a number of sentencing decisions of the Court of Appeal (Criminal Division) which, in my opinion, throw no light on the present problem. The issues addressed in these cases were the result of two things: the increase in the maximum penalty for indecent assault from two years' imprisonment to 10, enacted by section 3(3) of the Sexual Offences Act 1985; and the practice of prosecutors to lay charges under section 14 when the time for doing so under section 6 had expired. In *R v Quayle* (1992) 14 Cr App R(S) 726, it appears, the prosecution proceeded under section 14 because of the higher penalty. In *R v Hinton* (1994) 16 Cr App R(S) 523 it did so because the section 6 time limit had expired. In these, and a long string of later cases, the court tried to achieve a fair result for defendants by adjusting the sentences imposed on those whose indecent assaults consisted of unlawful sexual intercourse so that they reflected the maximum sentence fixed by statute for that offence. In none of these sentencing decisions was the court called upon to consider the legitimacy of prosecuting acts of unlawful sexual intercourse as indecent assault after expiry of the time bar. It is, however, symptomatic of the irregularity of the exercise on which the courts were engaged that they felt constrained informally to reduce, by four-fifths, the maximum penalty set by Parliament for the offence of which the defendants had in fact been convicted.

23. In arguing for the construction summarised in para 17 above, Mr Perry suggested that any other construction would emasculate certain other provisions of the 1956 Act. The examples he gave were not persuasive. The essence of an offence under section 4 (administering drugs to obtain or facilitate intercourse) was the administering of the

drug; there needed to be no proof of sexual intercourse. An offence against section 7 (intercourse with defective) was a specific offence, not subject to any time limit. In a case of incest by a man, prohibited by section 10, paragraph 14(a) of Schedule 2 provided that the jury might, as an alternative verdict, find the accused guilty of intercourse with a girl under 13 (contrary to section 5) or intercourse with a girl between 13 and 16 (contrary to section 6). A prosecution under section 10 could not be commenced except by or with the consent of the Director of Public Prosecutions, but was not stipulated to be the subject of any time limit. While it is unnecessary to decide the point, I incline to the view that an alternative verdict under section 6 in this context was subject to no time limit: the section 10 offence itself was not time-limited; nor was the section 5 offence; there was no repetition of the section 6 time limit; and the requirement for the Director's consent could have been expected to ensure that section 10 would not be used as a means of circumventing the time limit applicable to prosecutions under section 6. Even if Pollock B was right to reach the conclusion he did in *R v Cotton* (1896) 60 JP 824 (see para 19 above), I would incline to put a different construction on paragraph 14(a) of Schedule 2 to the 1956 Act.

24. Mr Perry contended that conduct may not infrequently be covered by more than one criminal offence and that prosecutors must enjoy a wide measure of discretion in selecting what charges they should prefer. With this in general I agree, while observing that if conduct falls within a more general and also a more specific statutory provision one would ordinarily expect a charge to be laid under the latter, as exposing the defendant to the penalty which Parliament prescribed for the particular conduct in question. But these principles are not engaged by the present provisions, in which Parliament has ordained that conduct of a certain kind shall not be prosecuted otherwise than within a certain period.

25. In very many cases, even where the 12 month time limit has passed, there will be independent acts other than sexual intercourse itself, or conduct inherent in or forming part of it, on which a prosecution could properly be founded. The present case is a good example, since oral intercourse was charged in the fourth count, other acts of oral intercourse could have been charged and there may well have been other acts independent of the sexual intercourse between J and C, and not inherent in or forming part of it, on which additional charges could have been founded. It is only where the time limit has expired, and when only evidence of sexual intercourse is relied on, that the defendant may not be prosecuted.

26. I would answer the certified question by ruling that:

> "It is impermissible for the Crown to prosecute a charge of indecent assault under section 14(1) of the 1956 Act in circumstances where the conduct upon which that charge is based is only an act of unlawful sexual intercourse with a girl under the age of 16 in respect of which no prosecution might be commenced under section 6(1) of the Act by virtue of section 37(2) of and Schedule 2 to that Act."

27. It follows that the prosecution of J under counts 1–3 should have been stayed, or those counts dismissed. For these reasons, and also those given by my noble and learned friends Lord Steyn and Lord Rodger of Earlsferry, I would allow J's appeal and quash his convictions on those counts.

LORD STEYN

My Lords,

28. Until very recently the Sexual Offences Act 1956 differentiated between offences by a man of unlawful sexual intercourse with a girl under the age of 16 years, contrary to section 6(1), and by a person of indecent assault on a woman, contrary to section 14, in a curious way. Under section 6(1) a prosecution could not be brought more than 12 months after the offence was charged: see section 37 and paragraph 10(a) of Schedule 2 to the Act. But under section 14 no similar time bar was applicable. The policy underpinning the time bar under section 6 was apparently to prevent prosecutions in respect of stale charges. But that policy would appear to apply equally to charges under section 14. Allowing a time bar in one case but not in the other seemed strange. Moreover, in modern times the provision of a relatively short time bar of 12 months in respect of charges under section 6 was widely regarded as not in the public interest. Not surprisingly, Parliament abolished the time limit with effect from 1 May 2004 by the Sexual Offences Act 2003. The change in the law is, of course, not of retrospective effect. This appeal is concerned with the pre-existing law under which section 6 of the Act contained a time limit of 12 months on prosecutions but section 14 did not. The House has been told that there may be a number

of other old cases which raise the same problem as is presently before the House.

29. The broader policy issue whether there is, in the modern world, a sensible scope for some time limits under statutes like the Sexual Offences Act 1956 is a matter for Parliament. For my part I would not wish without examination to rule out some time limits for prosecutions under the Sexual Offences Act 2003. Time limits necessarily have an arbitrary element. But it may well be that the bringing of truly stale charges, very many years after the events took place, are not in the interests of victims and society. This is a subject which could benefit from a Law Commission investigation.

30. It is essential to concentrate on the precise way in which the appeal comes before the House. The problem arises in a stark form. On counts 1, 2 and 3 of the indictment the prosecution case was that the defendant had unlawful sexual intercourse with a girl under the age of 16 years. That was how the case was presented by the prosecution to the jury and how the judge summed up the case to the jury. The case fell squarely within section 6(1). But there was no charge under section 6(1) of the Act. In order to avoid the time limit under section 6(1), which would have been applicable on the facts of the case, the Crown Prosecutor in charge of the prosecution decided to frame the charge under section 14. He thought he was entitled to do so. It is necessary to emphasize that in this particular case, apart from the wish to avoid the time limit under section 6(1), there was no rational reason for deciding on a charge under section 14. The problem before the House arises in a simple form: was the Crown Prosecution Service ("the CPS") entitled, for the sole purpose of avoiding the 12 months time limit under section 6(1) to frame the charge under section 14?

31. In the Crown Court, and in the Court of Appeal, the issue was regarded as whether it was an abuse of process for the CPS to act as it did. The judge held that it was not an abuse of process. The Court of Appeal came to a similar conclusion: *R v J* [2002] EWCA Crim 2983; [2003] 1 WLR 1590. The court accepted that the defendant was "deprived of a protection provided by the law in respect of prosecutions under section 6". The court concluded that this did not arise from a misuse of process by the prosecution, but from delay by the complainant: p 1603, para 39. But this was not a case about delay.

32. In giving the judgment of the court Potter LJ was alive to the potential difficulties. He observed, at p 1604, para 41:

> "Nothing which we have said should be taken as an encouragement to prosecutors to bring defendants to court on charges of indecent assault in cases where, were the time-bar not applicable, the charge would have been laid under section 6. While the decision to do so will depend upon all the circumstances of the case, it seems to us that the decision to prosecute should depend, not simply upon the fact that the offence or offences have not come to light till after the expiry of a period of 12 months, but upon the presence of some unusual or aggravating feature sufficient to justify the avoidance of the limitation period provided for under section 6."

This observation raises the question: why should the Crown Prosecutor not *always* be entitled to avoid the time limit by charging an offence under section 6(1) as an offence under section 14? It is a question to which our law provides straightforward answers.

33. Departing somewhat from the agreed issues on this appeal, it is in my view necessary to approach the problem from two different but connected angles. First, the question is whether as a matter of the correct interpretation of the Act a Crown Prosecutor may charge conduct covered by section 6(1) under section 14 for the sole purpose of avoiding the time limit under the former provision. Secondly, whatever the answer to the first question, whether it is within the powers of a Crown Prosecutor, tested against public law principles, to act in this way. I deal first with the question of statutory construction.

34. Let it be imagined that the Director of the CPS issued an instruction, with the approval of the Attorney-General, that in *all* cases covered by section 6(1) where a time limit arises the charge must be brought under article 14. The result would be that by the decision of the CPS the time limit provided by Parliament would be rendered wholly meaningless. That would be a comprehensive evasion of the intent of Parliament in making provision for the time limit.

35. Let me now assume that instead the CPS permitted Crown Prosecutors to avoid the relevant time limit in particular cases where

they deem it in the public interest. It is, of course, what happened in practice. That too must be an evasion of the intent of Parliament because Parliament provided for a general time limit on prosecutions under section 6(1) and not a discretionary one.

36. An authority not cited in the Court of Appeal throws light on the correct approach to the adoption of such a prosecutorial strategy. In *R v Cotton* (1896) 60 JP 824 the defendant was charged with rape. By section 9 of the Criminal Law Amendment Act 1885 the offence under section 5(1) of the Act of unlawfully and carnally knowing a girl over 13 and under 16 years of age, was a statutory alternative to rape. There was, however, a proviso to section 5(1) that no prosecution should be commenced more than three months after the commission of the offence. Pollock B held, at p 825:

> "The conclusion I have come to is that you cannot go on with the charge under section 5, more than three months having elapsed since the last commission of the offence. In substance, if this could be done, by shaping your charge as a charge of rape, you could always evade the statutory limit of time. In a case such as this, it would be the more reasonable construction of the sections to hold that the time must be considered as the essence of the charge. In substance, an indictment of rape under circumstances such as these must be treated as a charge of the lesser offence."

The jury acquitted the defendant of rape and he was discharged. It was thus held that as a matter of statutory interpretation the intent of Parliament cannot be lawfully evaded. A similar approach was adopted in *R v Blight* (1903) 22 NZLR 837 by a majority of the New Zealand Court of Appeal. This decision was recently followed in *R v Hibbard* [2001] 2 NZLR 211; see also the decision of the majority in the High Court of Australia in *Saraswati v The Queen* (1991) 172 CLR 1.

37. The legislative adjuration is explicit and strong: under section 6(1) "a prosecution may not be commenced more than 12 months after the offence charged". Parliament does not intend the plain meaning of its legislation to be evaded. And it is the duty of the courts not to facilitate the circumvention of the Parliamentary intent: *Bennion, Statutory Interpretation,* 4th ed., 2002, at pp 867-871. In the present case the intent to avoid the statutory time limit is freely acknowledged and, in any event, manifest. In these circumstances the conclusion is

inescapable: as a matter of construction of the Act the time limit cannot be circumvented by the manipulation of the indictment to charge conduct falling squarely within section 6(1) as an offence under section 14 solely in order to avoid the time limit under the former provision.

38. Although this conclusion is sufficient to dispose of the appeal I will also consider the position under the common law. The present case is not easily accommodated under any of the traditional categories of abuse of process. It is not profitable to try to analyse it by reference to dicta about wholly different categories of abuse of process. On the other hand, it must be borne in mind that the category of cases in which the abuse of process principles can be applied are not closed: *R v Latif* [1996] 1 WLR 104, 112-113. In any event, this is pre-eminently a corner of the law which must be considered from the point of view of legal principle. In our system of government Parliament has the primary responsibility for the bulk of the criminal law which is statute based. The role of the courts is to interpret and apply statutes. The courts must loyally give effect to the statutes as enacted by Parliament. The judiciary may not render a statutory provision, such as a time limit, nugatory on the ground that it disagrees with the reason underlying it. The CPS as an independent law enforcement agency carry out duties of a public character. It must act fairly and within the law. It must observe statute law as Parliament framed it. In our Parliamentary democracy nobody is above the law. The powers of the CPS are extensive but not extensive enough to permit it to take decisions intended to evade the clear intent of Parliament. And it is plain as a pike staff that the CPS policy under challenge in the present appeal was intended to circumvent the intent of Parliament in creating a time limit for prosecutions under section 6(1).

39. It is, of course, true that the CPS has acted in good faith and in what it considered the public interest. But the particular policy it adopted unquestionably fell beyond its powers. It was *ultra vires.* For this further reason, which overlaps with the point of statutory construction, I would hold that the decision of the CPS to charge the defendant under section 14 in order to avoid the time limit under section 6(1) was unlawful.

40. For these reasons, as well as the reasons given by my noble and learned friends Lord Bingham of Cornhill, and Lord Rodger of Earlsferry, I would also allow the appeal and quash the convictions on counts 1, 2 and 3 of the indictment.

LORD CLYDE

My Lords,

41. Section 6(1) of the Sexual Offences Act 1956 provides that subject to certain exceptions it shall be an offence for a man to have unlawful sexual intercourse with a girl under the age of 16. Section 14(1) provides that subject to certain exceptions it shall be an offence for a person to make an indecent assault on a woman. Section 37 and Schedule 2 state the maximum sentences for these offences. In the case of section 6(1) the maximum sentence is two years. In the case of section 14(1) it is on indictment 10 years. In the case of section 6(1), but not in the case of section 14(1), Section 37 and Schedule 2 prescribe a special restriction on the commencement of a prosecution, namely that a prosecution may not be commenced more than 12 months after the offence charged. The present case concerns the inter-play between these two sections. What happened here was that the appellant was alleged to have had unlawful sexual intercourse with a girl under the age of 16 which at the trial was proved to the satisfaction of the jury, but he was charged and was convicted of indecent assault under section 14(1) because the 12 month limit for proceedings to be taken under section 6(1) had expired.

42. The respondent provided a history of the development of the statutory provisions which lay behind the Act of 1956. If one goes no further back than the Offences against the Person Act 1861 one can find in sections 50 and 51 provisions for the offences of unlawful carnal knowledge of a girl under 10 years of age in the one section and over 10 and under 12 in the other. Section 52 provided for the offence of any indecent assault upon a female and any attempt to have carnal knowledge of a girl under 12 years of age. It is not clear whether or not the mere act of intercourse with a willing girl, even if she could not in law consent, would have been understood in 1861 to be sufficient to comprise a charge of indecent assault. If the mere act of intercourse would not have been treated as an assault then at least at that period there would not have been the problem which arises in the present case. But whatever may have been the understanding at that earlier time, the law proceeded to develop both through judicial decision and statute. The various statutory provisions were eventually consolidated in the Act of 1956. In *R v McCormack* [1969] 2 QB 442, 445G it was held as "plain beyond argument" that if a man inserted his finger into the vagina of a girl under 16 that would be an indecent assault in view of her age, however willing and co-operative she might be. The charge in question

in that case was one of unlawful sexual intercourse and it was held to have been correct to leave to the jury as an alternative verdict a verdict of indecent assault.

43. The present case however is not concerned with problems of alternative verdicts. Nor is it concerned with the problem of the appropriate sentence in circumstances where what was in substance an offence under section 6(1) is presented as an indecent assault. That problem has been considered in such cases as *R v Hinton* (1994) 16 Cr App R(S) 523 and more recently in *R v Figg* [2003] EWCA Crim 2752; [2004] 1 Cr App R(S) 409. The problem in the present case is whether a prosecution for what is in substance unlawful sexual intercourse with a girl under 16 should properly have proceeded as an indecent assault when it was too late to proceed under section 6(1).

44. The provision of a time limit on prosecutions for unlawful sexual intercourse with girls can be traced back to a proviso to section 5 of the Criminal Law Amendment Act 1885 which related to unlawful carnal knowledge of girls over 13 and under 16 years of age. The limit was then one of three months. The limit was successively increased in later legislation to the eventual period of 12 months which was consolidated into the Act of 1956. Whatever the precise reasoning behind the imposition of the time limit may have been, its intention must at least in part to have been to serve as a protection to an alleged offender. It was argued that the rationale for it was long out-dated, but it was still standing in the legislation when the present case arose and it is for Parliament to decide whether or not it should be changed. It has in fact recently been abolished by section140 and Schedule 7 of the Sexual Offences Act 2003. But that cannot entitle us to ignore its existence for the purposes of the case before us or to modify its effect.

45. The present case is plainly one where the act of sexual intercourse constituted the essence of the complaint. That was how the issue was presented by the trial judge to the jury. He said to the jury (at page 13 of the Appendix) "The sole issue for you on these counts is this. Are you satisfied, so that you are sure….that the defendant had sexual intercourse with [C]?" There was nothing in the defendant's behaviour other than the act of intercourse which was of such significance or importance as to justify the framing of a charge of indecent assault in place of one of unlawful sexual intercourse. The decision to prosecute under section 14(1) and not under section 6(1) appears to have been simply dictated by the expiry of the time limit.

46. It is for the prosecution to decide at the outset in light of the factual material available what the appropriate charge should be. But it cannot be that the prosecutor should have a free discretion to decide which of these two sections to select. His decision upon the appropriate charge must be principally governed by the predominating facts of the case. The behaviour complained of may include sexual intercourse but that may be only one element in a course of what was predominantly an indecent assault. The problem arises where the facts disclose nothing more in the way of assault than the act of unlawful sexual intercourse. That was the situation so far as the first three counts in the indictment in the present case were concerned.

47. It cannot be that in every case where the facts fit the provisions of section 6(1) a prosecution could also be taken under section 14(1). If every case of unlawful sexual intercourse against a girl under 16 was necessarily to constitute an indecent assault, then section 6 would be otiose. Even if there may be some overlap between the provisions some distinct content must be found for section 6(1).

48. The appellant presented the case primarily as one of abuse of process. But in the course of the argument a second line of approach emerged, namely one of statutory construction, or of statutory application. In my view this is a sound approach to the problem. It recognises that it would be a misapplication of the statute to allow a case which neatly and comprehensively falls within section 6(1) to proceed under section 14(1). To do so would be to ignore the clear provision regarding the time limit for prosecution which Parliament has attached to the offence detailed in section 6(1). It has of course to be accepted that the Act of 1956 is a consolidating statute and that a complete coherence is not necessarily to be found among all its provisions. But the two offences detailed in sections 6(1) and 14(1) have in substance co-existed in the legislative history over a long period and should be open to a mutually consistent interpretation. Section 6(1) makes the particular facts with which it deals a distinct offence and attaches to that offence a limitation on the period for prosecution. The effect of that is, that once the time limit has passed it is not possible to present the same facts as an offence under section 14(1). On the approach to construction adopted by Pollock B in *R v Cotton* (1896) 60 JP 824 “the time must be considered as the essence of the charge”, and on that approach the exclusion of the one offence from the ambit of the other after the operation of the time limit becomes all the more obviously necessary.

49. The case does not fall readily into the established categories of abuse but the concept of abuse may defy exhaustive definition. What the prosecution did here, albeit with good intention and without malice or dishonesty, was to cut across the intention of Parliament and in particular the provision of a protection for a person against whom a particular offence has been alleged. The substance of the argument on abuse is that the prosecutor should not be entitled to circumvent that protection by resorting to another offence which is less suited to the facts of the case. In my view it can at least be argued that it would be something so wrong as to make it proper for a court to refuse to allow a prosecutor to proceed on such a course. The essence of the wrong is an illegality which in turn is based upon a misconstruction of the Act. While the label of abuse may not be appropriate for such a situation the illegality of the course would justify the intervention of the court. At the heart of the matter is the proper understanding of the relationship between the two statutory provisions. The two lines of approach may eventually turn out to be different ways of viewing the same point. But they both lead to the same result.

50. I accordingly agree that the appeal should be allowed.

LORD RODGER OF EARLSFERRY

My Lords,

51. In 1996 the complainant began working for the appellant. In March 2000 she complained to the police that he had had consensual sexual intercourse with her on many occasions from July 1996 to September 1997 when she was between the ages of 13 and 15. It is agreed that these acts of intercourse would have constituted offences against section 6(1) of the Sexual Offences Act 1956 ("the 1956 Act") and would have been punishable with a maximum sentence of two years' imprisonment. Section 37(1) and (2) of that Act, together with paragraph 10 of Part I of Schedule 2, provide, however, that such offences are to be prosecuted on indictment and that "a prosecution may not be commenced more than 12 months after the offence charged". Since the complainant did not approach the police to report the matter until more than two years after the end of the period in which the alleged conduct took place, it was impossible for the appellant to be prosecuted under section 6(1).

52. Under section 14 of the 1956 Act it was an offence, punishable with a maximum sentence of 10 years' imprisonment, to make an indecent assault on a woman, including a girl. Schedule 2 prescribes no time-limit for commencing the prosecution of such offences. In this case, therefore, the Crown prosecutor, realising that a prosecution under section 6 was barred by the lapse of time, deliberately chose to prosecute the appellant under section 14 in order to avoid the time-bar. Counts 1 to 3 on the indictment against the appellant, which related to acts of sexual intercourse, were specimen counts of indecent assault contrary to section 14. Count 4, which related to distinct episodes of oral sex, was a specimen count of indecency with a child, contrary to section 1(1) of the Indecency with Children Act 1960. That offence is punishable with a maximum of 10 years' imprisonment. In the result, on conviction the appellant was sentenced to concurrent terms of 18 months' imprisonment on counts 1 and 2, to a consecutive term of 18 months' imprisonment on count 3 and to a consecutive term of 12 months' imprisonment, reduced on appeal to nine months, on count 4. No issue arises in relation to count 4, but the appellant contends that it was an abuse of process for the Crown to indict him on counts 1 to 3 when a prosecution under section 6 of the 1956 Act would have been time-barred.

53. While Mr Perry was unaware of any particular instruction to Crown prosecutors in relation to prosecutions under section 14 after the expiry of the time-bar relating to section 6, it is clear that the Crown prosecutor's decision in this case was in line with decisions taken by the Crown in other cases in recent years. This can be seen from a series of cases, from *R v Hinton* (1994) 16 Cr App R (S) 523 to *R v Figg* [2004] 1 Cr App R (S) 409, in which the Court of Appeal has had to consider the proper approach to sentencing where defendants have been convicted following such prosecutions. In none of these cases did the Court of Appeal criticise the Crown's practice of prosecuting under section 14 when a prosecution under section 6 was barred by section 37 and Schedule 2. I therefore approach the matter, as counsel for the appellant did, on the footing that the decision to prosecute the appellant under section 14 was taken in all good faith, in the belief that it was something that the prosecutor was entitled to do. What matters, however, is not that the prosecutor acted in good faith but that he did so with the intention of avoiding or - to use other more or less loaded expressions - bypassing or circumventing or getting round the 12-month time-limit applying to section 6.

54. The law of England, like the law of Scotland, has no general rule of limitation or prescription of crimes. Provided that the defendant can have a fair trial, proceedings may be begun long after the alleged crime. And in recent years, especially in the area of sexual offences, there have been many prosecutions for offences that came to light only decades after they were committed when, for the first time, the victim or victims revealed what had happened. Such prosecutions are not without their difficulties but, in general, the stance of the law is that time does not run against iniquity.

55. It is all the more significant that in certain cases Parliament has indeed provided that prosecutions can be brought only within a limited time after the offence was committed. Most obviously, section 127(1) of the Magistrates' Courts Act 1980 sets a six-month time-limit for laying an information or making a complaint in the magistrates' court, while in Scotland, under section 136(2) of the Criminal Procedure (Scotland) Act 1995, there is a similar time-limit for commencing summary prosecutions - but only of statutory offences. In addition, it has long been the practice for individual statutes to say that any prosecution must begin within a certain time after the conduct complained of. Section 62(1) of the Coal Mines Regulation Act 1887, discussed in *Macknight v MacCulloch* 1910 SC(J) 29, and section 27 of the Food and Drugs (Adulteration) Act 1928, discussed in *Robertson v Page* 1943 JC 32, are old examples, while section 2(3) of the Theatres Act 1968, prescribing that proceedings on indictment for presenting or directing an obscene performance cannot be commenced more than two years after the commission of the offence, is an example from a statute that is currently in force outside the realm of sexual offences.

56. It is not always easy to discern the policy behind the provisions limiting the time for bringing proceedings. For instance, the bar on summary proceedings after six months in the Magistrates' Courts Act 1980 cannot be based on any notion that the evidence then becomes stale since this would apply equally to the evidence in prosecutions on indictment, which are permitted. Similarly, evidence does not go stale more quickly for statutory than for common law offences and yet the six-month limit in the Criminal Procedure (Scotland) Act 1995 applies only to statutory offences. In any event, the court will take notice of any difficulties with the evidence when making sure that the defendant can have a fair trial. It seems, therefore, that in these cases Parliament takes the rather broader view that, if the offences are worth prosecuting at all at summary level, they are only worth prosecuting if they come to light and can be dealt with soon after they are committed, in accordance with the prescribed time-limit. Similarly, in passing the Theatres Act 1968,

Parliament must have taken the view that, if the prosecuting authorities could not decide within two years that the director of an obscene play was worth prosecuting on indictment, that should be an end of the matter. In enacting all these time-limits, Parliament has taken a conscious decision to depart from the general rule that proceedings can be taken at any time. Moreover, it has done so, having regard to the spectrum of offending to which the time-limit in question applies. Inevitably, in particular cases the time-limits may seem to work capriciously and to give immunity to someone who deserves to be prosecuted. Especially after so many years of enacting and re-enacting time-limits, Parliament must be taken to have been well aware of this risk, but to have decided none the less that the overall benefits of the limits outweigh their disadvantages. It follows that, even in "hard" cases, the policy of Parliament must be applied and effect given to the time-limits it has prescribed. If problems emerge, Parliament can, at any time, legislate to remedy them.

57. The time-bar relating to prosecutions under section 6 of the 1956 Act is to be considered in this light. It originated in section 5 of the Criminal Law Amendment Act 1885 which required prosecutions to be brought within three months. That time-bar was, of course, applied by the courts, as can be seen not only from *R v Cotton* (1896) 60 JP 824 but, for instance, from *M'Arthur v Lord Advocate* (1902) 10 SLT 310. The period was progressively extended until it was fixed at 12 months by section 1 of the Criminal Law Amendment Act 1928. To modern eyes at least, in a case like the present that 12-month time-bar is likely to seem arbitrary, cutting off the otherwise legitimate prosecution of a man who, when in his mid-thirties, knowingly indulged in a prolonged sexual relationship with a girl between 13 and 15 years of age. Presumably, it is because of this perception that, in recent years, the Crown has sought to get round the time-bar by bringing proceedings under section 14 of the 1956 Act. In their written case counsel for the Crown referred to the passage in the judgment of Edwards J in *R v Blight* (1903) 22 NZLR 837, 851 – 853 where he sought to explain the thinking behind the one-month time-limit in the equivalent New Zealand legislation of 1893. His Honour's observations were very much of their time and, even assuming that they were valid then, they would not justify the time-limit in the different social conditions of today. Mr Perry therefore felt able to denounce the time-limit for prosecuting section 6 offences as being insupportable at the beginning of the twenty-first century. He urged the House in effect to hold that it is out of date and can properly be ignored, at least in cases with aggravating features. It is fair to say that he had some difficulty in identifying either the principled basis for such an approach or the class of cases where it would be appropriate.

58. None the less, if one concentrates exclusively on cases like the present, Mr Perry's argument may seem powerful, if bold. But, although all too common, cases of this kind form only one part of a wider picture. Section 6 also applied to boys of roughly the same age who had sexual relations with girls under 16. If surveys of the sexual habits of teenagers are to be believed, or even half believed, there must be many thousands of boys and young men who would be exposed to the risk of prosecution under section 6 if their under-age partners or their partners' parents were to inform the police of the sexual relations in which they had agreed to indulge. Without the time-limit, this would remain a risk even many years later, when the boys were grown up, perhaps with a family and a successful career. In such cases, at least, there is something to be said for a provision that draws a line 12 months after the incident.

59. In this regard it is not without interest that, when the law relating to homosexual offences in Scotland was modernised in 1980, Parliament provided that no prosecution for committing or procuring unlawful homosexual acts is to be commenced more than 12 months after the date on which the offence was committed: section 13(5), (6) and (11) of the Criminal Law (Consolidation) (Scotland) Act 1995. And, under section 5(3) and (4) of the same Act, in the case of prosecutions for sexual intercourse with a girl over the age of 13 but under 16, the time-limit of one year remains in place, even though the offence now attracts a maximum sentence of 10 years' imprisonment. On the other side of the world, the New Zealand legislature modernised the law relating to homosexual relationships by enacting the Homosexual Law Reform Act 1986 so as to amend the Crimes Act 1961. Section 3 of the 1986 Act introduced a new section 140A which created an offence relating to various kinds of indecent conduct with a boy between 12 and 16. There is no time-limit for prosecutions for indecent assault but, in the case of any act of indecency with or upon such a boy, section 140A(6) provides that the prosecution has to be commenced within 12 months.

60. These modern enactments for Scotland and New Zealand suggest that, on one view, in the sensitive area of prosecutions for sexual offences there is still room for time-limits. In any event, the question is one for the legislature, having regard to the offences in question. In England and Wales Parliament has introduced an entirely new scheme in the Sexual Offences Act 2003 and has taken the view that under that Act there should be no time-limit for bringing prosecutions. That is how things are to be for the future, but it is no warrant for the courts to

disregard the time-bar relating to prosecutions under section 6 of the 1956 Act, as it applies to offences committed before 1 May of this year.

61. In the courts below, and again in this House, Mr Meeke QC argued that bringing the prosecution under section 14, in order to avoid the time-bar applying to section 6, amounted to an abuse of process on the part of the Crown. The argument was rejected in the courts below. It seems to me that if, on a proper construction of section 14 in the context of the 1956 Act as a whole, it was open to the Crown to prosecute the appellant under section 14, then there can have been no abuse of process. But, equally, if on a proper construction of the legislation, it was not open to the Crown to prosecute the appellant under section 14, the appeal must succeed. The critical question is one of the construction of the Act. It appears that counsel for the appellant veered away from that approach because of the rag-bag nature of the 1956 Act as described by my noble and learned friend, Lord Bingham of Cornhill, in *R v K* [2002] 1 AC 462, 467, para 4. Counsel considered that, since the 1956 Act disclosed no single, coherent legislative scheme, one could not argue that section 14 must be construed and applied in a way that respected the time-bar applying to section 6 offences. The fact that the 1956 Act is not by any means entirely coherent is not, however, a reason for the courts to abandon their usual approach to interpretation and to construe its provisions in isolation, as if they had no bearing on one another.

62. Sections 6 and 37 and Schedule 2 disclose a clear intention on the part of Parliament that a man who has sexual intercourse with a girl over 13 and under 16 is not to be prosecuted for doing so unless the prosecution is begun within 12 months of the intercourse. Section 14 must be construed and applied in a way that respects and does not defeat that intention. This is enjoined by more than one principle of statutory construction.

63. Where Parliament has specifically provided a régime for the commencement of proceedings for the offence of having sexual intercourse with an under-age girl, no other more general words, such as are to be found in section 14, are to derogate from that special provision: *generalia specialibus non derogant.* That was the approach favoured by the majority of the High Court of Australia in *Saraswati v The Queen* (1991) 172 CLR 1, 17–18 and 23–24, per Gaudron and McHugh JJ respectively. To put the point another way, the Crown cannot do indirectly what it is forbidden to do directly.

64. Another approach, which may be particularly apt in a case such as the present, is to say that section 14 must not be construed and applied in such a way as would amount to a fraud upon section 37 as it affects section 6. The notion of a fraud upon an Act, acting *in fraudem legis*, is ancient. Although the outer limits of the doctrine remain notoriously difficult to define, this case at least falls squarely within its scope. It would be wrong to construe section 14 in such a (literal) way as to permit the prosecutor, however well-intentioned, to use it in order to evade the time-bar applying to prosecutions for sexual intercourse with an under-age girl. To use the expression of Lord Eldon when proposing the question for the judges in *Fox v Bishop of Chester* (1829) 1 Dow & Cl 416, 429; 6 ER 581, 586, it would be "an insult" to Parliament's intention in enacting section 37, since "in substance, if this could be done, … you could always evade the statutory limit of time": *R v Cotton* (1896) 60 JP 824, 825 per Pollock B. As Williams J said in *R v Blight* (1903) 22 NZLR 837, 847, section 37 and the relevant provision in Schedule 2 "would be practically expunged from the Act, and the protection given by the time limit would be quite illusory." An interpretation of section 14 that has such a result must be rejected. I accordingly hold that section 14 of the 1956 Act does not permit a prosecutor to raise proceedings for indecent assault where the act in question was simply sexual intercourse with an under-age girl and a prosecution under section 6 would be barred by section 37 and paragraph 10 of Part I of Schedule 2. This interpretation is in line with the approach to time-limits for sexual offences envisaged by the High Court of Justiciary in *Webster v Dominick* 2003 SLT 975, 985, para 60 per Lord Justice Clerk Gill.

65. Deploying his learning and experience, Mr Perry held up the prospect of all kinds of difficulties that would, he said, arise if your Lordships were to interpret the Act in this way. I am prepared to accept that there may indeed be some initial difficulties. But your Lordships would merely be adopting the same approach as has applied in the case of the equivalent legislation in New Zealand for over a century, following the decision in *R v Blight* 22 NZLR 837. Significantly, Mr Perry was unable to point to any insuperable problems which the prosecutors or courts had encountered there. On the contrary, when, in *R v Hibberd* [2001] 2 NZLR 211, the Court of Appeal came to interpret the Crimes Act 1961 as amended to cover homosexual offences, in the light of their experience they deliberately adopted the same approach to the time-bar as had been laid down in *R v Blight*.

66. For these reasons, as well as those given by your Lordships, I would allow the appeal and make the order proposed by Lord Bingham of Cornhill.

THE BARONESS HALE OF RICHMOND

My Lords,

67. The appellant was born on 16 August 1960. He is thus 18 years older than the complainant who was born on 28 September 1982. They lived in the same village and their families were friends. The appellant began a business making horse boxes and trailers in premises rented from the complainant's father. The complainant, then aged 13, began working for him on Saturdays and in the school holidays. She complained that the appellant had regularly had vaginal sexual intercourse with her between July 1996, when she was 13, and September 1997, when she reached 15. She also complained of oral sexual intercourse when she was 13. However, she did not make these complaints until March 2000, when she was 17. As this was more than 12 months after the acts concerned, the appellant could not be charged with the offence of unlawful sexual intercourse with a girl under 16, contrary to section 6(1) of the Sexual Offences Act 1956, because by virtue of section 37(2) and paragraph 10 of Schedule 2 to the Act, a prosecution for that offence (or for an attempt to commit that offence) may not be commenced more than 12 months after the offence charged. However, it is now clear that the act of vaginal sexual intercourse also constitutes an indecent assault, to which no such time limit applies. Accordingly, the appellant was charged with and convicted of three specimen counts of indecent assault. He was sentenced to concurrent terms of 18 months' imprisonment on the first two and a further consecutive term of 18 months imprisonment on the third. It is against those three convictions that he appeals. He was also charged with one specimen count of indecency with a child, contrary to section 1(1) of the Indecency with Children Act 1960, in respect of the oral sexual intercourse. Again, no time restriction applies. He was convicted and sentenced to a term of 12 months' imprisonment, consecutive to the other terms, but reduced to nine months on appeal so as to reduce the total sentence below four years. This was because "the overall picture was not such that it was necessary to render the appellant a long term prisoner" [2003] 1 WLR 1590, 1605, para 44. One can only speculate about what the Court of Appeal might have thought of the "overall picture" had the oral sexual intercourse been the only criminal conduct

with which the appellant could be charged. There is no appeal against his conviction on that count.

68. The point of law certified by the Court of Appeal for this House under section 33(2) of the Criminal Appeal Act 1968 is:

> "Whether it is an abuse of process for the Crown to prosecute a charge of indecent assault under section 14(1) of the Sexual Offences Act 1956 in circumstances where the conduct upon which that charge is based is an act of unlawful sexual intercourse with a girl under the age of 16 in respect of which no prosecution may be commenced under section 6(1) of the 1956 Act by virtue of section 37(2) of, and Schedule 2 to, the 1956 Act."

69. The parties' statement of facts and issues puts the matter in the same way. I have no difficulty in answering "no" to that question. Moreover, unlike your Lordships, I do not see this as a "problem" to which other solutions have to be found so that the appeal may be allowed. In my view, the appellant was guilty of conduct which constituted the offences with which he was charged at the time when he committed them; there is no good reason why he should not have been charged with and convicted of them; and the only unfairness will be that done to his victim, and the many others in her situation, by your Lordships' decision.

Abuse of process

70. There are two broad categories of abuse of the criminal justice process. The first is where the defendant cannot receive a fair trial, for example because of delay: see *R v Derby Crown Court, Ex p Brooks* (1984) 80 Cr App R 164. There are cases where, because of the lapse of time since the alleged events, it will be so difficult for the defendant to rebut apparently credible accusations made against him or so difficult for the jury to assess the accuracy or reliability of competing accounts that he could not have a fair trial. But no-one has suggested that in this case. It is acknowledged that the appellant could have and did have a fair trial.

71. The second category of abuse is where it would be unfair for the defendant to be tried at all. The guiding principle was stated thus by my noble and learned friend, Lord Steyn, in *R v Latif* [1996] 1 WLR 104, 112, a case of entrapment involving illegal conduct on the part of the customs officers concerned:

> "In this case the issue is whether, despite the fact that a fair trial was possible, the judge ought to have stayed the criminal proceedings on broader considerations of the integrity of the criminal justice system. The law is settled. Weighing countervailing considerations of policy and justice, it is for the judge in the exercise of his discretion to decide whether there as been an abuse of process, which amounts to an affront to the public conscience and requires the criminal proceedings to be stayed: *R v Horseferry Road Magistrates' Court, Ex p Bennett* [1994] 1 AC 42."

72. What are the "countervailing considerations of policy and justice" in this case? On the one hand there is the need to protect the young from sexual exploitation and abuse, which we now know can cause very considerable physical, social and psychological harm. The law has for centuries taken a serious view of sexual intercourse with a girl who has in all probability not yet reached puberty. Ravishing a "maiden within age" (ie under 12), with or without her consent, was an offence under the first Statute of Westminster, 3 Edw 1 stat 1 cap 13, (1275). The "abominable wickedness" of carnally knowing and abusing a woman-child under the age of 10 was made a felony by 18 Eliz 1 cap 7 in 1576. Blackstone reports that Sir Matthew Hale (later to be so much maligned by feminists) was "of the opinion that such profligate actions committed on an infant under the age of 12 years, the age of female discretion by the common law, either with or without consent, amount to rape and felony: as well since as before the statute of queen Elizabeth"; but in general that law had been held to extend only to children under 10, although girls of 11 and 12 were still protected by the Statute of Westminster (*Blackstone's Commentaries on the Laws of England*, vol IV, p 212). The same distinction was drawn in their 19th century statutory replacements, first by 9 Geo IV cap 31, sections 16 and 17, in 1828; and second by the Offences against the Person Act 1861 (24 & 25 Vict c 100) sections 50 and 51. The respective age limits were raised from 10 to 12 and from 12 to 13 by the Offences against the Person Act 1875 (38 & 39 Vict c 94) sections 3 and 4.

73. Section 52 of the 1861 Act also introduced, for the first time, the offence of indecent assault upon "any female". There was no statutory age of consent, but it may very well be that the common law approach to the age of discretion would have applied, so that a girl under 12 would have been deemed incapable of consenting. At this stage, neither common law nor statute laid down a minimum age for marriage, but "it seems that the Common Law applied a presumption that a boy under 14 and a girl under 12 were not capable of marriage" (S M Cretney, *Family Law in the Twentieth Century: A History*, (2003), pp 57-58), although if they married before that age and cohabited after it, they were deemed to have ratified the union.

74. The law was slower to recognise that even consensual sexual activity with children who might well have reached the age of puberty was both harmful and abusive. The offence of "unlawful carnal knowledge" of a girl of 13 but under 16 was introduced by the Criminal Law Amendment Act 1885 in response to a campaign against child brothels and trafficking in young girls, famously championed by W T Stead in *The Maiden Tribute of Modern Babylon – the Report of the Pall Mall Gazette's Secret Commission*. Dr Cretney reports, at p 59, footnote 147, that "the Act was strongly opposed, much of the opposition based on fears that no man with young sons would be able safely to employ girls under 16 as domestic servants", though he does not say whether this was because of fear that the normal activities to be expected of the young men of the house would now land them in trouble or because of a fear of unjust accusations.

75. No doubt it was a bit of both. No prosecution could be brought for this new offence more than three months after its commission, although no such time limit applied to the equivalent offence with a girl under 13 or to an indecent assault. The time limit under the equivalent offence in New Zealand was one month. In *R v Blight* (1903) 22 NZLR 837, 848, Denniston J made the obvious point that this offence might lead to pregnancy: it was thought then that a girl who fell pregnant, and thus was unquestionably the victim of an offence, was so likely to name the wrong man that the accused needed the exceptional protection of a very short time limit, one which elapsed before her pregnancy had become obvious or even known. Edwards J made the additional point, at p 852, that "the fact that the girl has consented to such an act is in itself strong evidence that her moral perceptions are not of a high character …. There is no vice more prevalent among persons of low moral perceptions than the vice of lying". Thus were the victims blamed for the very abuse against which the law was supposed to protect them.

76. Whatever the original rationale in England, it cannot long have been the supposed need to identify a perpetrator before a pregnancy became apparent, because the time limit was soon raised, first to six months by the Prevention of Cruelty to Children Act 1904, then to nine months by the Criminal Law Amendment Act 1922, and finally to 12 months by the Criminal Law Amendment Act 1928. It was precisely because a pregnancy or childbirth might reveal the offence that the limit was raised. The reasons given for having any limit at all – loss of witnesses and the difficulties of proof – might equally apply to many other offences. But complainants in sexual offences were then still regarded with much more suspicion than other complainants, and so abolition may have been thought too radical to contemplate. However, it is hard to discern any coherent rationale after 1922, because the 1922 Act also provided that consent would no longer be a defence to an indecent assault upon a child or young person under the age of 16. Thus most forms of sexual activity with a girl under 16 became a criminal offence whether or not she consented, but no time limit was prescribed.

77. Carnal knowledge was not "unlawful" if the couple were married to one another, but the law of marriage was aligned with the criminal law by the Age of Marriage Act 1929, which made void any marriage either party to which was under 16. Among the reasons given was consistency with the 1885 Act: a girl could not consent to a single act of intercourse outside marriage but could give the perpetual and irrevocable consent involved in marriage (under the law as it was then understood to be, on the strength of a statement of Sir Matthew Hale). Girls might also be persuaded to leave their homes and families by the false promise of marriage, thus frustrating the object of combating trafficking in girls and the "white slave trade".

78. The girl's age of consent has remained at 16 since then, although policy makers have seriously contemplated change: see, for example, the Policy Advisory Committee on Sexual Offences, *Report on the Age of Consent in relation to Sexual Offences*, (1981) (Cmnd 8216). It is recognised that they need protection from two rather different sorts of harm. One is from premature sexual activity. It is entirely natural for young people to be interested in sex and to desire one another. But it is important for everyone to proceed at their own pace and when they feel ready. Girls must be free to say "no" if that is how they think and feel. The possibility of pregnancy is, or should be, an important factor in how they think and feel. The physical and psychological consequences of premature intercourse may be so much greater for them than they are for boys. Whether the age of consent is an important component in giving them some protection has been the subject of debate, but the conclusion

so far has favoured its retention. The other sort of harm is sexual abuse of the sort shown by the facts of this case: a much older man in a position of trust who takes advantage of her youth and vulnerability. There is no debate at all that girls require protection from this sort of behaviour: it can cause untold damage to their self-esteem, their capacity to form ordinary intimate relationships in the future, and their perceptions of how to live in families, all of which are so crucial to their own ability to be effective partners and parents in their turn. Those with professional experience of trying to pick up the pieces, sometimes many years after the event, are in no doubt of the gravity of the risks involved. Such considerations of policy clearly favour prosecution for any offences committed, provided that a fair trial is possible.

79. If that were not enough, the integrity of the criminal justice system requires that it make sense to victims and the general public as well as to the accused. How can it possibly be explained to the victim in this case that her abuser can be prosecuted for the oral sexual intercourse but not for the vaginal? Women vary in whether they see oral or vaginal intercourse as more serious and in their degrees of reluctance to comply with either. How can it be explained that he can be prosecuted for any peripheral and preparatory sexual acts but not for those which were part and parcel of committing or attempting to commit the act of vaginal intercourse? And if he is prosecuted for those other acts, will the fact that they also had vaginal sexual intercourse be considered relevant or will it have to be kept from the jury? Mr Meeke was careful not to offer us an answer to this question. This sort of irrational and incoherent distinction is exactly what brings the legal system into disrepute.

80. On the other hand, what are the countervailing considerations of justice to the offender? The offender knows perfectly well that he is committing a criminal offence at the time when he commits it. A time limit is not an essential ingredient of the substantive offence or a substantive defence. It is in no way comparable to the requirement of mens rea, as held by this House in *R v K* [2001] UKHL 41; [2002] 1 AC 462. It is a procedural bar which brings a fortuitous advantage to a defendant, even if there is a good reason for it. Sometimes the advantage is particularly undeserved. We do not know why this complainant said nothing until she was 17, but sexual abusers commonly groom their victims by making them believe that their behaviour is normal. They make their victims fall in love with them. They often threaten or cajole their victims into silence. Delayed reporting is then the result of the abuser's own actions and merits no special protection. It is only when the delay has prejudiced the chances of a fair trial that special protection is deserved. That is not this case.

81. In my view, the countervailing considerations of policy and justice did not require the trial judge to stay the proceedings as an abuse of process and he was entirely justified in refusing to do so. The public conscience would be more affronted by the prohibition of prosecution for offences which have undoubtedly been committed. Although the categories of abuse of process cannot be closed, it would be a misuse of principle and language to call what happened in this case an abuse.

Statutory construction

82. Nevertheless, although not an abuse, the prosecution has been able to side-step a limitation which remained on the statute book at the material time. The fact that many now think that it should not be there, and that Parliament has since legislated to remove it, is neither here nor there if the statute must be construed so as to give it effect in this case. The normal process of statutory construction involves ascertaining the intention of Parliament from the words used. Two possible constructions of the words used might have been argued in this case although neither was.

83. The first is that the time bar applied to the offence of unlawful sexual intercourse under section 6(1) by paragraph 10 of Schedule 2 was also intended to apply to the offence of indecent assault under section 14. This cannot be so. There are many offences of indecent assault to which any supposed rationale for this time bar cannot possibly apply – forcible oral intercourse being a good example. If Parliament had wanted to apply the time limit to indecent assault, it has had ample opportunity so to do, most notably in 1922 when it was legislating for both offences at the same time. There is absolutely nothing in the Schedule to suggest that the express words in paragraph 10 should be read by implication into paragraph 17 where they do not appear.

84. The second is to suggest that the offence of indecent assault does not include the indecent touching involved in vaginal sexual intercourse. This too is quite untenable. Vaginal sexual intercourse is rarely if ever the sort of passive invitation involved in the cases of *Fairclough v Whipp* [1951] 2 All ER 834 and *DPP v Rogers* [1953] 1 WLR 1017 which necessitated the Indecency with Children Act 1960. It was decided in *R v McCormack* [1969] 2 QB 442 that a charge of unlawful sexual intercourse necessarily included an allegation of indecent assault; it was also decided in that case that penetration of the vagina with something other than a penis is an indecent assault unless done with

valid consent, even if there was no evidence of compulsion or hostility. Penetration of other orifices with a penis is either an indecent assault or buggery. No rational distinction can be drawn between the different sorts of penetration for this purpose. There is nothing in the words "indecently assaults" to suggest that it should be.

85. The only way in which this argument can be put is not at the level of the language used by Parliament in defining the individual offences but at the general level of underlying intention: when Parliament enacted a general offence which was capable of covering conduct included in a more specific offence it did not intend that the general offence could be prosecuted in circumstances where the more specific one could not. There are several difficulties with applying this principle in this case.

86. The first is that there is no rational coherence in the statutory scheme which makes it necessary to draw such a conclusion. It has developed piecemeal over time, sometimes by Parliamentary amendment and sometimes by statutory interpretation. Perhaps Parliament did not foresee either in 1922 or in 1956 that an indecent assault might include a consensual act without compulsion or hostility: see *R v McCormack* [1969] 2 QB 442. Perhaps it did not address its mind to exactly what was meant by sexual intercourse: the definition in section 44 of the 1956 Act makes it clear that penetration but not emission of seed is required but does not say which orifice is to be penetrated: the reference to sexual intercourse "whether natural or unnatural" might suggest that orifices other than the vagina were included. But if that were so, there should also have been an appeal against the conviction on count 4.

87. The second difficulty is that it is not possible, in the light of the Parliamentary history, to say which came first, the general or the particular. Indecent assault was enacted before the time-limited offence of unlawful sexual intercourse, but was extended to consensual activities with girls under 16 afterwards. Nor is it possible to say which, at whatever may have been the material time for ascertaining the Parliamentary intention, was regarded as the more serious offence. Throughout most of their combined history, they attracted the same maximum penalty of two years' imprisonment, but unlawful sexual intercourse was triable only on indictment whereas indecent assault could be tried summarily, no doubt because some of the behaviours covered were seen as less serious. Then in 1985, the maximum penalty for indecent assault upon a woman was raised to 10 years. This was mainly to bring it into line with the penalty for indecent assault upon a

man, but also in recognition of the fact that some of the behaviours included were indeed serious.

88. The third difficulty (which weighed with Deane and Dawson JJ, the dissenters in *Saraswati v The Queen* (1991) 172 CLR 1 in the High Court of Australia) is that there are many situations in which the general and the more specific offences are not mutually exclusive. The fact that the more specific cannot be charged does not necessarily preclude a charge of the more general: the fact, for example, that a boy under 14 was presumed at common law to be incapable of the act of intercourse and therefore could not be charged with rape did not preclude his being charged with indecent assault based on the same conduct. The fact that the same conduct may amount to a summary offence which can only be prosecuted within six months and a more serious offence for which there is no time limit does not preclude the bringing of the more serious charge.

89. In short, the 1956 Act was a mess when it was enacted and became an ever greater mess with later amendments. It is not possible to discern within it such a coherent Parliamentary intention as to require it to be construed so as to forbid prosecution for a "mere" act of sexual intercourse after 12 months where that act properly falls within the definition of an indecent assault. Although we do have to try to make sense of the words Parliament has used, we do not have to supply Parliament with the thinking that it never did and words that it never used.

Ultra vires

90. I fully accept that there are certain things which are outside the competence of prosecutors as public officials to do. The difficulty is in formulating a reliable principle which would forbid a prosecution which was neither an abuse of the criminal justice process nor contrary to the implied intention of Parliament. The rationale behind the time limit can no longer be that which it was said to be in *R v Blight* 22 NZLR 837. If it is that the defendant can no longer have a fair trial, I would certainly agree that such prosecutions should be stayed either as an abuse of process or as outside the prosecutor's competence to bring. If it is, as was suggested by the Criminal Law Revision Committee when it recommended retention of the time limit in its 15th report in 1984, that people should not be prosecuted for offences which were "stale", it is unclear what this means in a case where a fair trial is still possible. If it

means that something which was once a matter deserving of punishment is no longer so because of the passage of time, then this will not invariably be so. At one extreme will be the teenage romance between a boy and a girl who have since gone their separate ways, where no possible personal or public interest would be served by prosecution. At the other will be prolonged and serious abuse of a position of trust by a person who might well be left to do it again unless action is taken. It will all depend upon the circumstances, in which the interests of the accused, the victim and of society will all play their part. A just and humane prosecution policy should be capable of taking all these factors into account.

91. But I cannot see any balance of those interests in this case which would lead to the conclusion that this prosecution should not have been brought. I would dismiss this appeal.