HIGH COURT OF AUSTRALIA

FRENCH CJ,
GUMMOW, HAYNE, HEYDON, CRENNAN, KIEFEL AND BELL JJ

JULIAN RONALD MOTI APPELLANT

AND

THE QUEEN RESPONDENT

Moti v The Queen [2011] HCA 50
7 December 2011
B19/2011

ORDER

1. *Appeal allowed.*

2. *Set aside the order of the Court of Appeal of the Supreme Court of Queensland made on 16 July 2010 and in its place order that the appeal to that Court is dismissed.*

On appeal from the Supreme Court of Queensland

Representation

I M Barker QC with P J Doyle for the appellant (instructed by Herdlaw Solicitors)

J V Agius SC with M C Chowdhury for the respondent (instructed by Commonwealth Director of Public Prosecutions)

CATCHWORDS

Moti v The Queen

Abuse of process – Criminal proceedings – Appellant was citizen of Australia suspected of child sex offences against Australian law committed overseas – Appellant deported from Solomon Islands to Australia by Solomon Islands Government contrary to Solomon Islands law – Australian Government representatives in Solomon Islands aware, and informed superiors in Canberra, of illegality – Australian Government issued travel document for appellant and visas to Solomon Islands officials, which facilitated deportation – Appellant charged and prosecuted on arrival in Australia – Whether circumstances of appellant's removal from Solomon Islands required permanent stay of his prosecution.

Abuse of process – Criminal proceedings – Complainant and certain family members made statements about appellant's conduct to Australian Federal Police ("AFP") – Complainant and family later refused to participate in prosecution as witnesses unless given "financial protection" – AFP made significant payments to complainant and family – Payments exceeded AFP guidelines but not unlawful – Whether payments to witnesses required permanent stay of appellant's prosecution.

Private international law – Act of State – Act of foreign State – Appellant prosecuted in Australia for offences against Australian law committed overseas – Appellant asserted illegality of Solomon Islands Government's actions under Solomon Islands law in application for permanent stay of prosecution – Whether Australian court can examine, as preliminary to ultimate decision under Australian law, legality of foreign government's actions under foreign law.

Words and phrases – "abuse of process", "act of foreign State", "act of State", "deportation", "disguised extradition", "foreign law", "payment to witness", "preliminary".

Australian Passports Act 2005 (Cth), s 9.
Financial Management and Accountability Act 1997 (Cth), s 44.
Deportation Act (Solomon Islands) (c 58), ss 5(3), 7.

1 FRENCH CJ, GUMMOW, HAYNE, CRENNAN, KIEFEL AND BELL JJ. On 3 November 2008, the Commonwealth Director of Public Prosecutions presented an indictment in the Supreme Court of Queensland charging the appellant with seven counts of offences contrary to s 50BA of the *Crimes Act* 1914 (Cth). At the times relevant to this matter, s 50BA, read with s 50AD, provided that an Australian citizen who, whilst outside Australia, engages in sexual intercourse with a person who is under the age of 16 years commits an offence punishable by imprisonment for 17 years. Four of the counts charged in the indictment alleged conduct in the Republic of Vanuatu; the other three counts alleged conduct in New Caledonia. All counts related to the one complainant and were alleged to have occurred in 1997.

2 The central question in this appeal is whether further prosecution of the charges laid in the indictment should be stayed as an abuse of process. That question should be answered "yes". The appellant was brought to Australia from Solomon Islands without his consent. Officials of the Solomon Islands Government deported the appellant from Solomon Islands by putting him on an aircraft bound for Brisbane without power to do so. Having regard to the role that Australian officials played in connection with the appellant being brought to this country, the further prosecution of the charges would be an abuse of process. The appellant's alternative argument, that the proceedings should be stayed because payments made by Australian authorities to the complainant and her family brought the administration of justice into disrepute, should be rejected.

3 It is necessary to begin consideration of the issues in this matter by describing what was decided at first instance in the Supreme Court of Queensland and on appeal to the Court of Appeal.

Proceedings in the Supreme Court of Queensland

4 At first instance, the appellant alleged[1] that prosecution of the charges laid in the indictment was an abuse of process because his deportation from Solomon Islands was a "disguised extradition". He submitted[2] that the Australian Government had connived or colluded with the Solomon Islands Government in

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1 *R v Moti* (2009) 235 FLR 320 at 322 [3].

2 (2009) 235 FLR 320 at 332-333 [40].

that unlawful deportation. The appellant further alleged[3] that payments that had been made by Australian authorities to the complainant and her family "undermine confidence in the administration of justice".

5 The primary judge (Mullins J) rejected[4] the appellant's arguments about disguised extradition but stayed[5] further prosecution of the indictment on the ground that the payments made to the complainant and members of her family were "an affront to the public conscience" and that the court should not "countenance the means used to achieve the end of keeping the prosecution of the charges against the [appellant] on foot".

6 The primary judge took two steps of particular importance in dealing with the questions presented by the circumstances in which the appellant had been deported from Solomon Islands and flown to Australia. First, her Honour concluded[6] that the decisions of the Solomon Islands Government to deport the appellant and to do so in the way in which it did were decisions which that Government made and that "[i]t is not for this court to express an opinion on these decisions made by the Solomon Islands Government". The second step concerned her Honour's treatment of the appellant's argument that Australian officials had connived or colluded with the Solomon Islands Government. The appellant had submitted that several matters showed that connivance or collusion. Particular reference was made[7] to the provision of Australian visas to relevant Solomon Islands officers who were to accompany the appellant on his flight from Solomon Islands to Brisbane and an Australian document of identity for the appellant for use in connection with his entry to Australia. The primary judge concluded[8] that neither of these steps could "be characterised as connivance or collusion". This conclusion appears to have proceeded from her Honour's

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3 (2009) 235 FLR 320 at 322 [3].

4 (2009) 235 FLR 320 at 334 [45].

5 (2009) 235 FLR 320 at 345 [87]; see also at 346 [90].

6 (2009) 235 FLR 320 at 333 [43].

7 (2009) 235 FLR 320 at 326 [17], 329 [31].

8 (2009) 235 FLR 320 at 334 [45].

rejection[9] of the appellant's argument that "connivance or collusion" of the Australian Government could be shown by applying "the approach of the criminal law to establishing the liability of parties for an offence committed by a principal offender" and, in particular, by seeking "to characterise the Australian Government as an aider and abetter [of the decisions of the Solomon Islands Government] on the basis that wilful blindness is equivalent to knowledge"[10].

7 The Court of Appeal (Holmes, Muir and Fraser JJA) set aside[11] the stay ordered by the primary judge. In reasons agreed[12] in by the other members of the Court, Holmes JA held[13] that the primary judge had erred in deciding that the payments made to the complainant and her family were such as to bring the administration of justice into disrepute. Two errors were identified[14] as having been made by the primary judge in connection with that question: "the failure to recognise that the questioned payments were not designed to, and did not, procure evidence from the prosecution witnesses; and the failure to pay sufficient regard to the fact that the payments made, while beyond existing guidelines, were not illegal".

8 In respect of the allegation of "disguised extradition", Holmes JA (again with the concurrence of other members of the Court) rejected[15] the proposition that "mere knowledge on the part of the Australian Government that the [appellant's] deportation might be illegal equates to the active involvement in procuring deportation, in preference to the proper course of extradition", necessary to ground a stay. Her Honour concluded[16] that the Australian

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9 (2009) 235 FLR 320 at 334 [44].

10 Reference was made in this regard to *Giorgianni v The Queen* (1985) 156 CLR 473 at 482; [1985] HCA 29.

11 *R v Moti* (2010) 240 FLR 218.

12 (2010) 240 FLR 218 at 234 [56] per Muir JA, 234 [57] per Fraser JA.

13 (2010) 240 FLR 218 at 229 [38].

14 (2010) 240 FLR 218 at 229 [38].

15 (2010) 240 FLR 218 at 232 [50].

16 (2010) 240 FLR 218 at 232 [50].

Government had "rigorously abstained from expressing any view on what the Solomon Islands Government proposed". In her Honour's view[17] the issuing of a travel document for the appellant "could hardly have been refused in circumstances where he was an Australian citizen". Accordingly, Holmes JA found[18] that the primary judge had been right to conclude that "there was no collusion by the Australian Government in anything amounting to a disguised extradition".

The appellant's arguments in this Court

9 The appellant placed the chief weight of his submissions in this Court on the argument that the proceedings against him should be stayed because of what Australian officials did in connection with his deportation from Solomon Islands. He also submitted, however, that the Court of Appeal was wrong to disturb the primary judge's conclusion that the payments made to the complainant and her family brought the administration of justice into such disrepute that the proceedings should be stayed.

10 Both submissions were advanced under the rubric of "abuse of process" and sought to engage the well-established rule that in both civil and criminal proceedings "Australian superior courts have inherent jurisdiction to stay proceedings which are an abuse of process"[19]. As four members of this Court said in *Batistatos v Roads and Traffic Authority (NSW)*[20], "[w]hat amounts to abuse of court process is insusceptible of a formulation comprising closed categories". In *Ridgeway v The Queen*, Gaudron J stated[21] that the power extended to proceedings that are "instituted for an improper purpose", "seriously

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17 (2010) 240 FLR 218 at 233 [50].

18 (2010) 240 FLR 218 at 233 [50].

19 *Williams v Spautz* (1992) 174 CLR 509 at 518 (footnote omitted); see also at 531-532, 542-543, 552-553; [1992] HCA 34.

20 (2006) 226 CLR 256 at 265 [9] per Gleeson CJ, Gummow, Hayne and Crennan JJ; [2006] HCA 27.

21 (1995) 184 CLR 19 at 74-75; [1995] HCA 66.

and unfairly burdensome, prejudicial or damaging"[22] and "productive of serious and unjustified trouble and harassment"[23]. In *Williams v Spautz*[24], the plurality distinguished between "abuse of process in the sense of proceedings instituted and maintained for an improper purpose" and "abuse of process [that] precluded a fair trial". In *Rogers v The Queen*, McHugh J concluded[25] that, although the categories of abuse of process are not closed, many such cases can be identified as falling into one of three categories: "(1) the court's procedures are invoked for an illegitimate purpose; (2) the use of the court's procedures is unjustifiably oppressive to one of the parties; or (3) the use of the court's procedures would bring the administration of justice into disrepute".

11 Of particular relevance to the present case is the observation of the plurality in *Batistatos*[26], to which reference was made in *Dupas v The Queen*[27], which emphasised that the power to stay proceedings for abuse of process applies to civil and criminal proceedings "with somewhat different emphases attending its exercise". In *Dupas*[28], this Court reiterated that the power "exist[s] to enable the courts to protect themselves and thereby safeguard the administration of justice". But the Court emphasised[29] that, in considering whether to grant a stay, there is a "need to take into account the substantial public interest of the community in having those who are charged with criminal offences brought to trial … as a permanent stay is tantamount to a continuing immunity from prosecution".

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22 *Oceanic Sun Line Special Shipping Co Inc v Fay* (1988) 165 CLR 197 at 247; [1988] HCA 32.

23 *Hamilton v Oades* (1989) 166 CLR 486 at 502; [1989] HCA 21.

24 (1992) 174 CLR 509 at 521.

25 (1994) 181 CLR 251 at 286; [1994] HCA 42.

26 (2006) 226 CLR 256 at 264 [8].

27 (2010) 241 CLR 237 at 244 [16]; [2010] HCA 20.

28 (2010) 241 CLR 237 at 243 [14].

29 *Dupas v The Queen* (2010) 241 CLR 237 at 251 [37] (footnotes omitted).

12 The appellant's first argument was directed, in its terms, to whether the prosecution should be permitted to proceed and was founded on the proposition that conduct of the Executive in connection with the appellant's involuntary return to Australia was such that he should not be prosecuted. That is, the appellant submitted that to permit the prosecution to proceed, when the Executive had acted as it had in connection with him being amenable to criminal process in Australia, would bring the administration of justice into disrepute. The second argument, though expressed as directed to whether the prosecution should be permitted to proceed, appeared to be founded, at least in part, upon the proposition that the payments made to witnesses would result in an unfair trial[30]. It is convenient to deal at once with the second argument about payments to witnesses.

Payments to witnesses

13 Because the point about payments to witnesses is not dispositive of the appeal it may be dealt with shortly. Between February 2008 and November 2009 the Australian Federal Police ("the AFP") made substantial payments to the complainant and to members of her family. Those payments were made following repeated statements by the complainant and her father in December 2007 and January 2008 to the effect that the complainant would not participate any further in the prosecution of the appellant unless she and her family were brought to Australia and given "financial protection". Between February 2008 and November 2009 the complainant was paid more than $67,500 and her family was paid more than $81,600. The payments were said to be made to provide for the "minimal daily needs" of the complainant, her brother, father and mother and, for part of the time, to provide accommodation in Vanuatu. The family were said to be unable to support themselves because the publicity given to the charges against the appellant adversely affected their ability to earn income.

14 Before any of the requests for payments were made, the complainant and those members of her family who might be called to give evidence as prosecution witnesses had given statements to police. The Commonwealth Director of Public Prosecutions had advised police that there were reasonable prospects of conviction and Australian authorities had taken several steps towards securing the return of the appellant to Australia. In particular, in October 2006 the

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30 cf *Dupas v The Queen* (2010) 241 CLR 237.

Australian Government made a request to the government of the Solomon Islands for the appellant's provisional arrest pending a formal request for extradition.

15 In these circumstances, the Court of Appeal was right to conclude[31] that the payments "were not designed to, and did not, procure evidence from the prosecution witnesses". Further, contrary to the appellant's submissions in this Court, the payments were not shown to be unlawful. It was not demonstrated that any of the payments were made in breach of any provision of the *Financial Management and Accountability Act* 1997 (Cth) or the Financial Management and Accountability Regulations (Cth). More particularly, it was not shown that the payments (whether considered separately or together) could not have been seen as an "efficient, effective and ethical" use of Commonwealth funds[32]. Nor was it demonstrated that the payments could not be seen as "not inconsistent with the policies of the Commonwealth"[33]. Describing the payments (as the appellant did) as payments made in response to "demands" or "threats" by the complainant does not lead to any different conclusion. It was not open to the primary judge to conclude that the payments were "an affront to the public conscience"[34] justifying a stay of the appellant's prosecution. And to the extent that the appellant argued he could not have a fair trial due to the payments, that argument should be rejected. As Mason CJ and Toohey J said in *R v Glennon*[35], in what this Court in *Dupas*[36] called "an authoritative statement of principle":

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31 (2010) 240 FLR 218 at 229 [38].

32 *Financial Management and Accountability Act* 1997 (Cth), s 44(1), (3); Financial Management and Accountability Regulations (Cth), reg 9.

33 *Financial Management and Accountability Act* 1997 (Cth), s 44(1), (3), as amended by item 49 of Sched 1 of the *Financial Framework Legislation Amendment Act* 2008 (Cth), with effect from 20 March 2009; Financial Management and Accountability Regulations (Cth), reg 9.

34 (2009) 235 FLR 320 at 345 [87].

35 (1992) 173 CLR 592 at 605; [1992] HCA 16.

36 (2010) 241 CLR 237 at 245 [18]; see also at 250 [35].

> "a permanent stay will only be ordered in an extreme case[37] and there must be a fundamental defect 'of such a nature that nothing that a trial judge can do in the conduct of the trial can relieve against its unfair consequences'[38]."

If the payments were said to bear upon the evidence witnesses gave at trial, that issue could be explored fully in evidence and could be the subject of suitable instructions to the jury that would prevent unfairness to the appellant[39].

The appellant's deportation from Solomon Islands

16 The events that surrounded the deportation of the appellant from Solomon Islands took place against a background provided by what was known as the Regional Assistance Mission to Solomon Islands. In July 2003, Solomon Islands, Australia and a number of other Pacific nations had agreed[40] that Australia and other assisting countries would deploy a visiting contingent of police forces, armed forces and other personnel to Solomon Islands. The purposes of the deployment were described[41] as being to assist in the provision of security and safety, to maintain supplies and services essential to the life of the Solomon Islands community, to prevent and suppress violence, to support and develop Solomon Islands institutions, and generally to assist in the maintenance of law and order. The most senior Australian police officer of the participating

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37 *Jago v District Court (NSW)* (1989) 168 CLR 23 at 34 per Mason CJ; [1989] HCA 46.

38 *Barton v The Queen* (1980) 147 CLR 75 at 111 per Wilson J; [1980] HCA 48.

39 cf *R v Oliver* (1984) 57 ALR 543 at 547-548.

40 Agreement between Solomon Islands, Australia, New Zealand, Fiji, Papua New Guinea, Samoa and Tonga concerning the operations and status of the police and armed forces and other personnel deployed to Solomon Islands to assist in the restoration of law and order and security ("the Solomon Islands Agreement") [2003] ATS 17, Art 2.

41 Solomon Islands Agreement, Art 2.

police force was head of that force[42]. He was appointed a Deputy Commissioner of the Solomon Islands Police Force[43].

17 In September 2006, the appellant was appointed Attorney-General of Solomon Islands. His appointment was suspended in October 2006, but he was reappointed in July 2007. As already noticed, in October 2006 the Australian Government requested the government of Solomon Islands to arrest the appellant provisionally for extradition to Australia. In December 2006, the Australian Government made a formal extradition request to Solomon Islands. That request was refused in September 2007.

18 On 11 December 2007, a cable from the Department of Foreign Affairs and Trade in Canberra to Australia's High Commission in Honiara, Solomon Islands, noted that there were reports that, if there were to be a change of government in Solomon Islands, the new government would "deport [the appellant] to Australia … given its view that deportation would be a faster process than extradition". The cable said that:

> "In order to minimise the potential for [the appellant] to raise claims of abuse of process by reason of perceived Australian government involvement in any deportation plans, or discussions about the Moti issue more broadly, posts should *maintain their current practice of not volunteering information, or engaging in discussion, when the issue is raised by Opposition MPs or any other person in Solomon Islands*." (emphasis added)

An internal AFP minute prepared subsequently and sent on 17 December 2007 recorded that the Senior Police Liaison Officer attached to the Australian High Commission in Honiara (Federal Agent Peter Bond) was "cognisant of the DFAT cable in relation to not discussing this issue with MPs and this has been complied with throughout the last 14 months". As the minute also recorded, both Mr Bond and the Australian High Commissioner to Solomon Islands were aware of information that "[d]eportation was the preferred option of removing [the appellant] from the country as a [p]rohibited [i]mmigrant".

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42 Solomon Islands Agreement, Art 5(1).

43 Solomon Islands Agreement, Art 5(2).

19 On 20 December 2007, a new Prime Minister took office in Solomon Islands. The fact that the head of government changed did not, of itself, terminate the appellant's appointment as Attorney-General.

20 On the day after the new Prime Minister took office in Solomon Islands (21 December 2007) a warrant was issued in Brisbane for the appellant's arrest. On the same day the Australian High Commissioner recorded, in an email to Canberra, that a Solomon Islands official had sought "guidance" from him about "the handling of the Moti issue". The High Commissioner told Canberra that he had responded that there were "two avenues open" to the Solomon Islands Government – "extradition and deportation". He reported telling the official that "[d]eportation was entirely their affair" and that Australia would be "lodging a request for the provisional arrest of [the appellant], prior to a request for his extradition, as soon as the new Minister of Justice was sworn in".

21 On 22 December 2007, the Australian High Commissioner to Solomon Islands was on leave. The Deputy High Commissioner (Ms Heidi Bootle) became Acting High Commissioner.

22 On the morning of 22 December 2007, Ms Bootle and Mr Bond presented a request for the provisional arrest of the appellant dated 21 December 2007 to the Permanent Secretary of the Solomon Islands Department of Foreign Affairs.

23 Later that morning the appellant applied to the High Court of Solomon Islands for an injunction directed, in effect, to the Minister for Commerce, Industry, Labour and Immigration, restraining the Minister from "threatening, continuing or proceeding with the deportation and or expulsion and or removal of the [appellant] from the Solomon Islands". The Chief Justice of Solomon Islands (Palmer CJ) refused the application, noting that the appellant's rights to remain in Solomon Islands were directly connected to his appointment as Attorney-General and that the decision whether to retain the appellant in that office rested with the new government. Palmer CJ further noted that there were "proper procedures" for initiating the processes of extradition or deportation to which, once activated, the appellant would "have opportunity to respond" and that "[a]ny rights [the appellant] has are governed by legislation covering those processes".

24 During the afternoon of 22 December 2007, the Acting High Commissioner and the Senior Police Liaison Officer (Mr Bond) were told that the Solomon Islands cabinet "had determined a two step process in the removal" of the appellant: termination of his employment as Attorney-General by the Judicial and Legal Services Commission of Solomon Islands followed by his

"removal from the country either by the [e]xtradition process or by [d]eportation".

25 On 24 December 2007, the Judicial and Legal Services Commission terminated the appellant's employment as Attorney-General. On the same day a Deportation Order made by the Minister for Commerce, Industry, Labour and Immigration was published in a supplement to the *Solomon Islands Gazette*. The order recited that the appellant's exemption under the *Immigration Act* of Solomon Islands had been cancelled, that his continuing presence in the country was contrary to a specified provision of that Act ("and is therefore unlawful") and that he had been declared by the government "as an undesirable person who has conducted himself in a manner prejudicial to the peace, public order, public morality, security and good government of Solomon Islands". The order concluded in the following terms:

> "AND pursuant to section 7(2)(a) and (b) of the said Deportation (Amendment) Act 1999, I hereby authorise and direct any Immigration Officer or Police Officer any time this order is served on the said JULIAN RONALD MOTI, QC to place him on board any ship or aircraft leaving Solomon Islands.
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> AND I further authorise and direct the officer-in-charge of the Central Prison Rove or any Police Station in Solomon Islands to detain the said JULIAN RONALD MOTI, QC until arrangements are completed for so placing him on board the ship or aircraft."

26 On 24 December 2007, the appellant sought urgent interim orders from Palmer CJ (in his capacity as a single Justice of the Court of Appeal of Solomon Islands) in effect restraining the Minister for Commerce, Industry, Labour and Immigration (and the Minister of Justice and Legal Affairs) from "continuing or proceeding with" the appellant's deportation, expulsion or removal pending the hearing of his appeal against the earlier refusal by Palmer CJ to grant the appellant relief. Palmer CJ dismissed the application.

27 On the same day the Acting High Commissioner met with the head of the Justice Ministry (who told her that the Solomon Islands Government had decided to "pursue [the appellant's] deportation") and then with the permanent secretary responsible for the Immigration portfolio (Mr Jeffrey Wickham) to deliver copies of the request for provisional arrest. The Acting High Commissioner sent a cable to Canberra recording her conversation with Mr Wickham.

28 This cable of 24 December 2007 recorded four matters of importance to the determination of this case. First, the Acting High Commissioner recorded that Mr Wickham had said that the Solomon Islands Government intended to put the appellant "on a flight from Solomon Islands tomorrow at 4 pm". He proposed that the appellant be accompanied by a Solomon Islands immigration officer and by Mr Bond. Mr Wickham said that after the appellant was detained he would "instruct Solomon Airlines … to free up three seats on the flight to Brisbane". Later that day, the Australian Attorney-General's Department advised the AFP that Mr Bond should *not* accompany the appellant on the plane by which he left Solomon Islands and the Acting High Commissioner instructed Mr Bond accordingly.

29 Second, the cable of 24 December 2007 recorded that "[a]ccording to Wickham" the deportation was "in accordance with s 7(2) of the amended Solomon Islands Deportation Act". (It will be recalled that "section 7(2) … of the … Deportation (Amendment) Act 1999" had been referred to in the Deportation Order published in the *Solomon Islands Gazette* as providing the requisite powers to detain and remove the appellant[44]. It will be convenient to refer to the relevant Solomon Islands deportation legislation as amended as "the Deportation Act".)

30 Third, the cable attached a copy of the Deportation Act and recorded the following comment by the Acting High Commissioner about the operation of that Act:

> "on our reading of the Deportation Act, [the appellant] has seven days in which to appeal to the High Court before being deported in this manner".

As will later be demonstrated, the Acting High Commissioner's opinion about the operation of the Deportation Act was plainly right.

31 Fourth, the cable concluded with a request by the Acting High Commissioner for advice. It said: "Grateful advice on travel documentation for [the appellant]."

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44 This appears to have been a reference to s 7(2) of the Solomon Islands *Deportation Act* (c 58) as inserted by s 3 of the Solomon Islands *Deportation (Amendment) Act* 1999.

32 Later on 24 December 2007, a cable was sent from Canberra to the High Commission in Honiara advising that the "Post is authorised to issue a Document of Identity to [the appellant] to enable deportation to Australia".

33 On 27 December 2007, without any application by or on behalf of the appellant[45], the High Commission issued a document of identity[46] in respect of the appellant, valid for the period from 27 December 2007 to 10 January 2008. (The document was not issued until 27 December 2007 because, as Ms Bootle was later to depose, the instruction from Canberra to issue the document was received on 24 December "too late to be dealt with on that day".)

34 This was not the only travel document relevant to this matter that the High Commission in Honiara issued. On 24 December 2007, a Solomon Islands police officer and a Solomon Islands immigration officer attended at the High Commission. There they met Mr Bond, who filled out on behalf of each of them an application for a Business (Short Stay) visa permitting each to visit Australia between 25 December 2007 and 30 December 2007. The appellant pointed out that many of the questions in the forms were left unanswered but attached no consequence to that fact beyond an implicit suggestion that Australian authorities were willing to smooth the path for deportation. In her evidence, however, Ms Bootle said that it would have been "quite extraordinary" for the High Commission not to issue a visa to a Solomon Islands official upon request without good reason to do so. Visas of the kind sought were issued.

35 As events turned out, the Solomon Airlines' flight to Brisbane for 25 December 2007 was cancelled. The Deportation Order was not served on that day.

36 On 25 December 2007, solicitors acting for the appellant applied to the Central Magistrates Court of Solomon Islands for interim orders directed to the "Director of Immigration" and the "Commissioner of Police" preventing execution of the deportation order. Magistrate Lelapitu ordered that execution of the deportation order be stayed pending the hearing and determination by the Court of Appeal of the appellant's appeal against the orders made by Palmer CJ on 22 December 2007. The magistrate further ordered that the defendants to that

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45 cf *Australian Passports Act* 2005 (Cth), s 9.

46 Australian Passports Determination (Cth), s 6.3

proceeding not enter the appellant's home for the purposes of serving documents on him or of removing or evicting him from that home and that they not approach the appellant or his home for those purposes.

37 On 27 December 2007 a cable was sent from the Australian High Commission in Honiara to Canberra recording that Mr Wickham had "advised that the Deportation Order will be executed shortly before the next Brisbane flight scheduled for 3.10 pm today". The cable further recorded that the appellant had not been detained under the Deportation Act or arrested but that he remained "under surveillance by police".

38 It is convenient, at this point in the narrative, to identify why the Acting High Commissioner was right to conclude (as she had said in her cable of 24 December 2007) that the appellant had "seven days in which to appeal to the High Court before being deported in this manner".

39 On the hearing of the appeal to this Court, the parties treated the text of the Deportation Act as having been proved in evidence[47] and proceeded on the footing that the text should be construed according to its plain meaning. Section 5(3) of the Deportation Act provided that a person on whom a deportation order was served could apply to the High Court, within seven days of the service of the order, for a review of the order. Most importantly, s 7 of the Deportation Act gave power to place a person against whom a deportation order was in force "on a ship or aircraft about to leave Solomon Islands" *only* if that person had not made an application for review within the time prescribed or, if an application for review had been made, the person had "failed to have the order set aside". Section 7 provided:

> "(1) Where an application has been made against a deportation order under subsection (3) of section 5 the operation of the order shall be suspended until the application is finally disposed of or abandoned.
>
> (2) Where a person against whom a deportation order is in force –

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47 See *Neilson v Overseas Projects Corporation of Victoria Ltd* (2005) 223 CLR 331 at 370-373 [115]-[127]; [2005] HCA 54.

(a) has either not made application for review of the order to the High Court within the time prescribed in subsection (3) of section 5; or

(b) has made application for review of the order to the High Court within the time prescribed in subsection (3) of section 5, but has failed to have the order set aside,

the Minister may, if such person is not detained by an order made under section 6, order that the person against whom the deportation order is in force be detained in such manner as may be directed by the Minister and be placed on a ship or aircraft about to leave Solomon Islands and shall be deemed to be in lawful custody whilst so detained and until the ship or aircraft leaves Solomon Islands.

(3) Where any person against whom a deportation order is in force has been placed on any ship or aircraft, the master of the ship or the commander of the aircraft shall, if so required by the Minister or by any person authorised by the Minister, take such steps as may be necessary for preventing such person from landing from the ship or aircraft before it leaves Solomon Islands and may for that purpose detain such person in custody on board the ship or aircraft."

It follows that s 7 of the Deportation Act (the provision relied on for the appellant's deportation from Solomon Islands) did not give power to place the appellant on a ship or aircraft about to leave the country until either the time for making application for review had elapsed or, if an application was made, the application was dismissed. Yet despite the Acting High Commissioner believing this to be the case, and despite her telling her superiors in Canberra that this was her belief and sending to Canberra a copy of the legislation which revealed unequivocally that she was right, Canberra told the High Commission in Honiara to issue a travel document relating to the appellant for use in his deportation. And the High Commission, having issued visas to those Solomon Islands officials who would effect the appellant being placed, against his will, on an aircraft bound for Australia, issued a travel document for the appellant knowing that this was to be done within hours of his being served with the Deportation Order.

40 The appellant was placed on the Solomon Airlines flight bound for Brisbane that was due to depart from Honiara at 3.10 pm on 27 December 2007. He was accompanied by the two Solomon Islands officials to whom the High Commission had issued Business (Short Stay) visas. At some point before the

appellant left Solomon Islands, the document of identity which the High Commission had issued was given to those who were to accompany the appellant. (A cable the Acting High Commissioner sent to Canberra on that day said that the "AFP SLO" (Mr Bond) would "pass the document to the Director of Immigration". A cable sent the next day recorded that Deputy Commissioner Marshall of the Royal Solomon Islands Police Force had handed the document to "Immigration officials" at the airport before the aircraft took off for Brisbane.)

41 At first instance and on appeal in this Court, the appellant submitted that it should be found that the Senior Police Liaison Officer (Mr Bond) had actively encouraged Solomon Islands officials who were going to the appellant's house on 27 December 2007 to execute the Deportation Order to "do it quickly because the plane will be waiting". In his affidavit and oral evidence Mr Bond accepted that he had spoken to Solomon Islands officials who were going to serve and execute the Deportation Order respecting the appellant. He said that he could not recall saying the particular words attributed to him. The primary judge made no finding about what was said in the conversation. Rather, her Honour said[48] only that there had been "a casual conversation to which I attribute no significance in the circumstances in which it occurred". The Court of Appeal did not refer to the issue.

42 It is not necessary to consider whether, as the appellant urged, this Court should make any finding about what was said in, or what significance should be given to, the conversation between Mr Bond and the Solomon Islands officials. Nor is it necessary to examine whether, as the appellant submitted, Mr Bond had passed on to Deputy Commissioner Marshall "'legal advice' to the effect that the planned deportation was lawful, when he knew full well that it was not". To embark on this latter question would likely require examination of whether relevant Solomon Islands officials, or Mr Bond, believed that the order that Magistrate Lelapitu had made was made without jurisdiction and, if they did, whether that belief was well founded. It would also require examination of Mr Bond's understanding of the Deportation Act.

43 Rather, the focus of attention may be confined to the steps that the High Commission in Honiara took (on instructions from Canberra) to provide travel documentation in respect of the appellant on 27 December 2007 when the Acting High Commissioner believed, rightly, that Solomon Islands officials intended to

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48 (2009) 235 FLR 320 at 328 [27].

use that document in deporting the appellant on that day and further was of the opinion, again rightly, that deporting the appellant on that day was not authorised by Solomon Islands law, the Acting High Commissioner having told her superiors in Canberra of those matters.

44 The respondent did not contest the proposition that the removal of the appellant to Australia without resort to extradition procedures could enliven the power of the Australian court before which the appellant was prosecuted to stay the proceedings as an abuse of process. That position is to be readily understood, given that the existence of such a power has been accepted in decisions over the last 30 years by appellate courts in Australia and the United Kingdom[49]. What the respondent did contest was the appellant's case that the facts and circumstances here were such as to attract the exercise of that power. In particular, the respondent invoked what has been called "the act of state" doctrine and also emphasised the finding by Holmes JA that the Australian Government had "rigorously abstained" from expressing any view on the proposals by the Solomon Islands Government for deporting the appellant to Australia.

45 It is convenient to deal with those two matters, the first under the heading "Act of State?" and the second under the heading "Abuse of Process?".

Act of State?

46 At first instance, on appeal to the Court of Appeal and in this Court considerable reliance was placed by the respondent on two propositions: first, that the decision to deport the appellant in the manner adopted was made by officials of the Solomon Islands Government and, second, that Australian officials stayed silent about that decision, conveying neither approval nor disapproval of it.

47 As noted earlier in these reasons, the primary judge said that it was not for an Australian court "to express an opinion on … decisions made by the Solomon

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49 See, for example, *Levinge v Director of Custodial Services* (1987) 9 NSWLR 546; *R v Bow Street Magistrates; Ex parte Mackeson* (1981) 75 Cr App R 24; *R v Horseferry Road Magistrates' Court; Ex parte Bennett* [1994] 1 AC 42; *R v Latif* [1996] 1 WLR 104; [1996] 1 All ER 353; *R v Mullen* [2000] QB 520. See also *Re Ditfort; Ex parte Deputy Commissioner of Taxation* (1988) 19 FCR 347.

Islands Government"[50]. Her Honour referred in this regard to *Attorney-General (United Kingdom) v Heinemann Publishers Australia Pty Ltd* ("the *Spycatcher Case*")[51]. In the *Spycatcher Case* this Court adverted to the principle that domestic courts will not enforce a foreign penal or public law, which it identified as the rule with which it was presently concerned. However, their Honours also referred[52] to an "associated rule" or principle. This they identified by reference to the well-known dictum of Fuller CJ in *Underhill v Hernandez*[53] that "the Courts of one country will not sit in judgment on the acts of the government of another done within its own territory" and by citation of that dictum by the House of Lords in *Buttes Gas & Oil Co v Hammer*[54] and the Supreme Court of the United States in *Banco Nacional de Cuba v Sabbatino*[55]. The proposition stated by Fuller CJ was identified by the plurality in the *Spycatcher Case*[56] as resting "partly on international comity and expediency"[57] and by Lord Wilberforce in *Buttes Gas*[58] as being a principle of "judicial restraint or abstention", "inherent in the very nature of the judicial process".

48 In *Potter v Broken Hill Proprietary Co Ltd*[59], this Court referred at some length to the decision in *Underhill* and to what was seen as the associated rule

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50 (2009) 235 FLR 320 at 333 [43].

51 (1988) 165 CLR 30 at 40-41 per Mason CJ, Wilson, Deane, Dawson, Toohey and Gaudron JJ; [1988] HCA 25.

52 (1988) 165 CLR 30 at 41.

53 168 US 250 at 252 (1897).

54 [1982] AC 888 at 933.

55 376 US 398 at 416 (1964).

56 (1988) 165 CLR 30 at 41.

57 Reference was also made to *Oetjen v Central Leather Co* 246 US 297 at 304 (1918).

58 [1982] AC 888 at 931-932.

59 (1906) 3 CLR 479; [1906] HCA 88.

established in *British South Africa Company v Companhia de Moçambique*[60] which would preclude a court determining a disputed question of title to foreign land. As has recently been pointed out[61], consideration of questions of "act of state" was important to the decision in *Potter*.

49 Two points must be made about *Potter* and its status as authority. First, *Potter* does not stand unaffected by subsequent decisions. The majority in *Regie Nationale des Usines Renault SA v Zhang*[62] reserved for further consideration not only the *Moçambique* rule but also the standing of *Potter*. Second, the decision in *Potter* concerned an action brought in the Supreme Court of Victoria in respect of the infringement, in New South Wales, of a New South Wales patent. The case was argued on a basis which, though conceded, can now be seen to be false, namely[63], "that, for the purposes of the question … under consideration, the several States of Australia stand towards each other in the position of foreign States". No consideration appears to have been given in argument or in the judgments to relevant constitutional questions including, but not limited to, the application of the full faith and credit provisions of s 118 of the Constitution.

50 In these circumstances consideration of questions of act of State and the decision of Fuller CJ in *Underhill* is better conducted by reference to more recent examination of those questions. And, as will be explained, neither what was said in the *Spycatcher Case* nor the decision of Fuller CJ in *Underhill* should be understood as establishing as a general and universally applicable rule that Australian courts may not be required (or do not have or may not exercise jurisdiction) to form a view about the lawfulness of conduct that occurred outside Australia by reference to foreign law.

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60 [1893] AC 602. See also *Companhia de Moçambique v British South Africa Company* [1892] 2 QB 358 at 395.

61 *Lucasfilm Ltd v Ainsworth* [2011] 3 WLR 487 at 507-509 [60]-[68], 512 [85] per Lord Walker of Gestingthorpe JSC and Lord Collins of Mapesbury (with whom Lord Phillips of Worth Matravers PSC and Baroness Hale of Richmond JSC agreed); [2011] 4 All ER 817 at 837-839, 842-843.

62 (2002) 210 CLR 491 at 520 [76]; [2002] HCA 10.

63 (1906) 3 CLR 479 at 510; see also at 489, 491, 495, 502-503, 505-507.

51 It should be emphasised that it follows that there will be occasions when to decide the issues that must be determined in a matter an Australian court must state its conclusions about the legality of the conduct of a foreign government or persons through whom such a government has acted. The present case is an example of an occasion of that kind.

52 The dictum of Fuller CJ was stated in absolute and universal terms. It is a dictum often associated with the expression "act of State". But both the dictum, and the phrase "act of State", must not be permitted to distract attention from the need to identify the issues that arise in each case at a more particular level than is achieved by applying a single, all-embracing formula. Thus, as has now been pointed out in successive editions of *Dicey and Morris*[64], the result to which the dictum of Fuller CJ would point is often a result dictated by the application of ordinary rules governing the choice of law. So, for example, there could be no recovery by an action brought in this country in tort for the governmental seizure of property in a foreign country if the law of the place where the alleged tort was committed permitted that seizure[65]. Whether the acts of which complaint was made in such a case were tortious would be determined by reference to the law of the place where the alleged tort was committed[66]. And other circumstances in which the dictum might be thought to be engaged will more appropriately require the application of well-established rules about foreign states immunity[67]. As F A Mann has cogently argued[68], issues like those considered in *Buttes Gas* and in *Sabbatino* are better approached at a more particular level of inquiry than the

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64 *Dicey and Morris on the Conflict of Laws*, 11th ed (1987), vol 1 at 110-112; 12th ed (1993), vol 1 at 109-111; 13th ed (2000), vol 1 at 101-103 [5-039]-[5-041]; 14th ed (2006), vol 1 at 114-118 [5-043]-[5-050].

65 cf *Banco Nacional de Cuba v Sabbatino* 376 US 398 (1964). See also *Re Ditfort; Ex parte Deputy Commissioner of Taxation* (1988) 19 FCR 347 at 371-372.

66 *Regie Nationale des Usines Renault SA v Zhang* (2002) 210 CLR 491.

67 See *Foreign States Immunities Act* 1985 (Cth).

68 "Conflict of Laws and Public Law", [1971] I *Recueil des Cours* 107 at 148-149, 151-156; "The Sacrosanctity of the Foreign Act of State", in *Studies in International Law*, (1973) 420 at 421, 435; *Foreign Affairs in English Courts*, (1986) at 27-29, 164, 176-182. See also Holdsworth, "The History of Acts of State in English Law", (1941) 41 *Columbia Law Review* 1313.

level of generality reflected in the dictum of Fuller CJ and in references to international comity and the conduct by the executive branch of foreign relations. Rather, as Mann has correctly said[69], "the Courts are free to consider and pronounce an opinion upon the exercises of sovereign power by a foreign Government, if the consideration of those acts of a foreign Government only constitutes a preliminary to the decision of a question … which in itself is subject to the competency of the Court of law". The fact that the decision of a foreign official is called into question does not of itself prevent the courts from considering the issue[70]. Here, the question of the lawfulness of the appellant's removal from Solomon Islands, although effected by the Solomon Islands Government, was "a preliminary" to the decision whether a stay should be granted. The primary judge was not right to conclude[71] that "[i]t is not for this court to express an opinion on these decisions made by the Solomon Islands government".

Abuse of process?

53 In considering whether prosecution of the charges laid in the indictment preferred against the appellant would be an abuse of process of the Supreme Court of Queensland, the focus of the inquiry must fall upon what Australian officials had done or not done in connection with the appellant's deportation from Solomon Islands. To conclude that the deportation was not effected lawfully was a necessary but not a sufficient step towards a decision about abuse of process. In deciding whether there is an abuse of process, three basic propositions must be borne at the forefront of consideration.

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69 "The Sacrosanctity of the Foreign Act of State", *Studies in International Law*, (1973) 420 at 433-434, quoting von Bar, *Das Internationale Privat- und Strafrecht*, (1889), vol 2 at 685, translated by Gillespie as *Private International Law*, (1892) at 1121. See also *Re Ditfort; Ex parte Deputy Commissioner of Taxation* (1988) 19 FCR 347 at 372-373; *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Lam* (2003) 214 CLR 1 at 33 [100] per McHugh and Gummow JJ, 38-39 [122] per Hayne J; [2003] HCA 6.

70 *Lucasfilm Ltd v Ainsworth* [2011] 3 WLR 487 at 512-513 [86]; [2011] 4 All ER 817 at 843.

71 (2009) 235 FLR 320 at 333 [43].

54 First, as was pointed out by the plurality in *Lipohar v The Queen*[72], the trial of an indictable offence must generally be conducted in the presence of the accused, "there being no trial in absentia at common law in the ordinary course[73]". If the appellant was to be tried in the Supreme Court of Queensland for the offences charged in the indictment he had to be brought before that Court.

55 The appellant came to Australia, and was available in Queensland to be charged with and tried for the offences the subject of the indictment, only because he was deported from the territory of Solomon Islands by officers of the executive government of that country detaining him and putting him on an aircraft bound for Brisbane. As has been pointed out, the appellant's removal from Solomon Islands was not authorised by the Solomon Islands legislation relied on by the officials of that country's government who detained him and put him on the aircraft.

56 The second basic proposition to notice is that, if Australia seeks the extradition of a person from another country for that person to stand trial in Australia for some offence against Australian law, principles of double criminality[74] and speciality[75] would ordinarily be applied. Application of those principles would determine whether the person whose extradition was sought would be surrendered and, if surrendered, what charges might be preferred. By

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72 (1999) 200 CLR 485 at 514 [69]; [1999] HCA 65.

73 See *Lawrence v The King* [1933] AC 699 at 708; *Athanassiadis v Government of Greece* [1971] AC 282 at 294-296 (n); *R v Jones (Robert) (No 2)* [1972] 1 WLR 887 at 890-891; [1972] 2 All ER 731 at 734-736; *Tassell v Hayes* (1987) 163 CLR 34 at 43-44; [1987] HCA 21; *Wiest v Director of Public Prosecutions* (1988) 86 ALR 464 at 494; *R v Hallocoglu* (1992) 29 NSWLR 67 at 71-72; *Kunnath v The State* [1993] 1 WLR 1315 at 1319-1320; [1993] 4 All ER 30 at 35-36; *R v Jones* (1998) 72 SASR 281 at 292-295; *Ebatarinja v Deland* (1998) 194 CLR 444 at 454; [1998] HCA 62.

74 See, for example, *Truong v The Queen* (2004) 223 CLR 122 at 149 [52], 151 [58] per Gummow and Callinan JJ; [2004] HCA 10; *Riley v The Commonwealth* (1985) 159 CLR 1 at 15-19 per Deane J; [1985] HCA 82.

75 See, for example, *Truong* (2004) 223 CLR 122 at 139-141 [21]-[24] per Gleeson CJ, McHugh and Heydon JJ, 155 [75] per Gummow and Callinan JJ, 184-185 [185]-[189] per Hayne J.

contrast, if an alleged offender arrives in Australia because he or she was deported from another country, the principles that apply in determining whether the person could be extradited from that other country, and in limiting what charges he or she might face, may not apply. In the present case, where the offences with which the appellant was charged were offences that it was alleged he had committed outside Australia, the question of double criminality may have been controversial. It is neither necessary nor appropriate to consider how such a question might have been resolved.

57 The third basic proposition is that, as pointed out in the joint reasons of four members of this Court in *Williams v Spautz*[76], two fundamental policy considerations affect abuse of process in criminal proceedings. First, "the public interest in the administration of justice requires that the court protect its ability to function as a court of law by ensuring that its processes are used fairly by State and citizen alike"[77]. Second, "unless the court protects its ability so to function in that way, its failure will lead to an erosion of public confidence by reason of concern that the court's processes may lend themselves to oppression and injustice"[78]. Public confidence in this context refers to the trust reposed constitutionally in the courts to protect the integrity and fairness of their processes. The concept of abuse of process extends to a use of the courts' processes in a way that is inconsistent with those fundamental requirements.

58 In the present case, the appellant alleged that his deportation from Solomon Islands was illegal. He alleged that Australian authorities so acted in connection with his deportation that it would be an abuse of process to prosecute the charges preferred against him. Whether there would be an abuse of process cannot be decided without deciding whether the appellant's deportation was illegal. In the particular circumstances of this case, only if the appellant's deportation was illegal would any action of Australian authorities in connection with that deportation bear upon the allegation of abuse of process. And the significance that is to be given to what Australian authorities did or did not do in

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76 (1992) 174 CLR 509 at 520 per Mason CJ, Dawson, Toohey and McHugh JJ. See also *Batistatos v Roads and Traffic Authority (NSW)* (2006) 226 CLR 256 at 264-265 [6]-[9] per Gleeson CJ, Gummow, Hayne and Crennan JJ.

77 (1992) 174 CLR 509 at 520.

78 (1992) 174 CLR 509 at 520.

connection with the appellant's deportation cannot be assessed without first deciding not only whether the deportation was illegal but, if so, *why* it was illegal.

59 In deciding whether subsequent criminal proceedings in the country to which the accused has been moved without resort to extradition procedures should be stayed, particular facts and circumstances have led courts to express the issue in different ways. So, for example, in this Court, in *Truong v The Queen*[79], Gummow and Callinan JJ spoke of whether there had been "a *deliberate disregard* by the Australian authorities and by the respondent prosecutor of the statutory requirements of s 42 [of the *Extradition Act* 1988 (Cth)] or a *knowing circumvention* thereof" (emphasis added). And in the Court of Appeal of the Supreme Court of New South Wales in *Levinge v Director of Custodial Services*[80] reference was made to whether there had been the *wrongful or unlawful* involvement by Australian authorities in bypassing extradition procedures or participating in unauthorised or unlawful removal[81] and to Australian authorities being *party to or conniving at* unlawful conduct[82].

60 But the forms of expression adopted in the decided cases must be understood in the context of the particular facts of each case. None should be read as attempting to chart the boundaries of abuse of process. None should be read as attempting to define exhaustively the circumstances of removal of an accused to this country that warrant exercise of the power to stay criminal proceedings against that person or as giving some exhaustive dictionary of words by one or more of which executive action must be described before proceedings should be stayed. None should be read as confining attention to whether any act of an Australian Government official constituted participation in criminal wrongdoing, whether as an aider and abettor or as someone knowingly concerned in the wrongdoing. And the use of words like "connivance", "collusion" and "participation" should not be permitted to confine attention in that way. All should be understood as proceeding from recognition of the basic proposition that the *end* of criminal prosecution does not justify the adoption of any and

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79 (2004) 223 CLR 122 at 161 [96].

80 (1987) 9 NSWLR 546.

81 (1987) 9 NSWLR 546 at 556 per Kirby P.

82 (1987) 9 NSWLR 546 at 565 per McHugh JA.

every *means* for securing the presence of the accused. And in this case, as in others, the focus of attention must fall upon what Australian officials did or did not do.

61 It may readily be accepted, as the primary judge decided[83], that the Solomon Islands Government was determined to deport the appellant and that it was officials of that Government who decided to execute that intention in the way in which it was done. It is clear that Australian officials had more than once told officials of the Solomon Islands Government that Australia sought the appellant's extradition. It may be accepted that, as Holmes JA said[84], the Australian Government "rigorously abstained from expressing any view on what the Solomon Islands Government proposed". It is not necessary to decide whether the silence of Australian officials in the face of detailed descriptions by Solomon Islands officials of what was intended might have been understood by Solomon Islands officials as tacit assent to what they proposed.

62 It is also not necessary to decide whether the silence of Australian officials in the face of the expression by Solomon Islands officials of confidence in the legality of what was proposed might have affirmed that confidence. Nor is it necessary to decide whether steps taken by Australian officials (issuing travel documents) or presence in the vicinity of the place where the appellant was served with the Deportation Order (as Mr Bond was) might have encouraged Solomon Islands officials to believe that what was being done was done with the assent (if not positive approval) of Australian officials.

63 It is enough to observe three matters. First, Australian officials (both in Honiara and in Canberra) knew that the senior representative of Australia in Honiara at the time (the Acting High Commissioner) was of opinion that the appellant's deportation was not lawful. Second, the Acting High Commissioner's opinion was obviously right. Third, despite the expression of this opinion, and its obviously being right, Australian officials facilitated the unlawful deportation of the appellant by supplying a travel document relating to him (and travel documents for those who would accompany him) at a time when it was known that the documents would be used to effect the unlawful deportation. That is, Australian officials supplied the relevant documents in time to be used, with

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83 (2009) 235 FLR 320 at 333 [43].

84 (2010) 240 FLR 218 at 232 [50].

knowledge that they would be used, to deport the appellant before the time for deporting him had arrived.

64 These three matters present a sharp contrast with the circumstances considered in the decision upon which the respondent in this appeal placed weight: *R v Staines Magistrates' Court; Ex parte Westfallen*[85]. Two of the applicants in that matter had been deported from Norway and were arrested on their arrival at Heathrow airport. They alleged that their presence within the jurisdiction had been improperly procured by means other than formal extradition procedures and that further proceedings against them should be stayed. The respondents in *Ex parte Westfallen* submitted[86] that what had taken place "was not disguised extradition, but undisguised deportation" and further submitted that "there is no taint of impropriety against the British authorities". And by contrast with the circumstances in this case, Lord Bingham of Cornhill CJ accepted these submissions, finding[87] that the British authorities had not "acted illegally or procured or connived at unlawful procedures or violated international law or the domestic law of foreign states or abused their powers in a way that should lead this court to stay the proceedings against the applicants".

65 It is no answer to the three matters that have been identified in relation to the present case to say that the High Commission could not deny an issue of a document of identity to the appellant. That may or may not be right if the appellant had sought the issue of such a document[88], but he had not. Nor is it an answer to these matters to say that the High Commission would not deny the issue of visas to Solomon Islands officials. The critical observation is that what was done by Australian officials not only facilitated the appellant's deportation, it facilitated his deportation by removal on 27 December 2007 when Australian officials in Honiara believed that this was not lawful and had told Australian officials in Canberra so. It follows that the maintenance of proceedings against the appellant on the indictment preferred against him on 3 November 2008 was an abuse of process of the court and should have been permanently stayed by the primary judge.

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85 [1998] 1 WLR 652; [1998] 4 All ER 210.

86 [1998] 1 WLR 652 at 656; [1998] 4 All ER 210 at 213.

87 [1998] 1 WLR 652 at 665; [1998] 4 All ER 210 at 222.

88 See *Australian Passports Act* 2005 (Cth), s 9(1), (3).

Conclusion and order

66 For the reasons that have been given, further prosecution of the charges laid in the indictment preferred against the appellant on 3 November 2008 should be stayed as an abuse of process. The appeal to this Court should be allowed. The order of the Court of Appeal of the Supreme Court of Queensland made on 16 July 2010 should be set aside and in its place it should be ordered that the appeal to that Court is dismissed.

67 HEYDON J. One of the appellant's arguments for a permanent stay of the criminal proceedings against him is that there will be unfairness in his trial in the Queensland courts by reason of potentially unreliable evidence. The other argument centres on illegality in the method by which he was removed from the Solomon Islands and brought before the Queensland courts, but does not contend that that illegality would generate an unfairness in the trial.

Paying witnesses

68 The payment of money to the complainant and her family does not justify a permanent stay because it does not create incurable unfairness in the forthcoming trial. The payments did not bring the appellant before the Queensland courts. They were not unlawful. They were not offered in order to induce the complainant to provide information to detectives with a view to considering whether to prosecute. Instead they were requested by the complainant and her father in the summer of 2007-2008, after the Australian Federal Police had obtained affidavits from the complainant and her family, after the Commonwealth Director of Public Prosecutions had advised on 9 August 2006 that there were reasonable prospects of conviction, and after the Australian Government had in October 2006 taken steps with the Solomon Islands Government to procure the appellant's return to Australia. It is one thing to pay a person's living expenses as the price for the provision of a statement of the evidence which that person could give if called as a witness. Different considerations arise where payment of the living expenses of a person is requested after that person has provided a witness statement and the payment is made with a view to ensuring that that person is in a position to attend to give evidence. That is particularly so in cases where, as here, the prosecution was not in a position to compel the attendance at the trial of the witnesses who were paid. Finally, any bearing which the payments had on the witnesses' credit could have been explored in cross-examination at the trial, debated in address, and, if appropriate, referred to in the summing up.

Deportation of the appellant

69 The submissions of the respondent assumed that the appellant's case would have been made good had the Australian authorities "[connived] in [or colluded] with the Solomon Islands authorities to execute an unlawful deportation." The appellant's submissions depended on a test requiring "knowledge and connivance or involvement of the Australian executive". These submissions of the parties assumed the correctness of statements made by the Court of Appeal of the Supreme Court of New South Wales in *Levinge v Director of Custodial Services*[89] and by the House of Lords in *R v Horseferry*

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89 (1987) 9 NSWLR 546 at 565.

Road Magistrates' Court; Ex parte Bennett[90]. Those statements were to the effect that where an accused person is removed from one country and brought into another country in which a criminal prosecution is to take place, even though the removal does not create any risk of an unfair trial, and even though the court retains jurisdiction to try the accused person, the court has a discretionary power, or perhaps a duty, to order a permanent stay of the prosecution in certain circumstances. Below this will be called "the assumed rule". The statements in *Levinge's* case, being dicta, did not bind the courts below. And the statements in *Bennett's* case, being statements of the House of Lords, did not bind the courts below either[91]. They certainly do not bind this Court. It was in the respondent's interest to attack the correctness of these statements in the courts below and in this Court. But no attack was made.

70 Thus the question whether the assumed rule exists was not debated in argument. However, in order to reach a view about whether the facts of this case fit within any test for abuse of process justifying a stay, it is necessary to ascertain what that test is. To that end, its precise formulation was discussed from time to time in argument. An examination of the authorities for the purpose of discovering the formulation of the test and then applying it suggests that the assumed rule does not exist.

71 It would have been necessary to re-list the matter for further argument about that conclusion if it stood as a barrier to the allowing of the appeal. But since the majority of the Court accepts the existence of the assumed rule, there is no point in exposing the parties to the expense and delay of that course, and no point in taking much space in exploring the reasons for denying the existence of the assumed rule.

72 *Bennett's* case resolved a conflict in the English authorities. There was a substantial line of decisions by distinguished judges which were inconsistent with the assumed rule[92]. And there were also authorities supporting the assumed

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90 [1994] 1 AC 42.

91 *Cook v Cook* (1986) 162 CLR 376 at 390; [1986] HCA 73.

92 *Ex parte Scott* (1829) 9 B & C 446 [109 ER 166] (Lord Tenterden CJ); *Sinclair v Her Majesty's Advocate* (1890) 17 R 38 (Lords Macdonald (Lord Justice-Clerk), Adam and McLaren); *R v OC Depot Battalion, RASC* [1949] 1 All ER 373 (Lord Goddard CJ, Humphreys and Finnemore JJ); *Moevao v Department of Labour* [1980] 1 NZLR 464 at 470 (Richmond P, discussing the correctness of *R v Hartley* [1978] 2 NZLR 199 as an authority on abuse of process); *R v Plymouth Justices; Ex parte Driver* [1986] QB 95 (Stephen Brown LJ, Stuart-Smith and Otton JJ, as they then were) and the Divisional Court (Woolf LJ and Pill J, as they

(Footnote continues on next page)

rule[93]. *Bennett's* case upheld the latter line of cases, and it has been said that at least in England it "broke new ground."[94] What was that new ground?

What is the test?

73 The authorities favouring the assumed rule reveal considerable difficulties in stating what it is.

74 One case supporting the assumed rule, though it does not appear to have been cited in *Bennett's* case, is *Levinge's* case[95]. The appellant's arguments contended or perhaps assumed that a trial in Australia could be permanently stayed on the ground that Australian authorities had known of, or connived in, the appellant's unlawful removal from Mexico to the United States of America, whence he was brought to Australia. The crucial question for decision was whether the authorities had in fact had that knowledge or engaged in that connivance[96]. The Court of Appeal held that the authorities had not known of or connived in the unlawful removal. It followed that those things which were said about the assumed rule were obiter dicta. McLelland A-JA, indeed, declined to say anything about the assumed rule. He said it was unnecessary to decide whether "improper activities on the part of the prosecuting authorities in procuring an alleged offender to be brought within the jurisdiction to answer criminal charges could be the basis of a finding that continuation of the prosecution is an abuse of process."[97] Kirby P surveyed the competing authorities as they stood in 1987. He favoured the law as stated in *R v Hartley*[98] and *R v Bow Street Magistrates; Ex parte Mackeson*[99]. What the law stated in

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then were) against whose decision the appeal in *Bennett's* case was brought: *R v Horseferry Road Magistrates' Court; Ex parte Bennett* [1993] 2 All ER 474.

93 *R v Hartley* [1978] 2 NZLR 199 at 216-217; *Moevao v Department of Labour* [1980] 1 NZLR 464; *R v Bow Street Magistrates; Ex parte Mackeson* (1981) 75 Cr App R 24.

94 *R v Martin* [1998] AC 917 at 926 per Lord Lloyd of Berwick (Lords Browne-Wilkinson and Slynn of Hadley concurring).

95 (1987) 9 NSWLR 546.

96 See Kirby P's summary of the arguments: (1987) 9 NSWLR 546 at 549.

97 (1987) 9 NSWLR 546 at 567.

98 [1978] 2 NZLR 199.

99 (1981) 75 Cr App R 24.

those cases was is not clear, but Kirby P said that his inclination was to prefer the view that the conceptual basis of the law was "to assert the entitlement of the courts to protect the integrity of their own process and to uphold that integrity and the perception of it in the eyes of the parties, of the community and of the judges themselves."[100] But the passages he quoted or summarised did not state precisely what the test reflecting that conceptual basis was. McHugh JA treated the law as applying "where there is in existence an extradition treaty which is knowingly circumvented by the prosecuting authorities"[101]. He said that "before a stay can be granted the prosecution must have been either a party to the unlawful conduct or connived at it."[102] He also said[103]:

> "it is necessary to balance the public interest in preventing the unlawful conduct against the public interest in having the charge or complaint determined. … [C]onduct which might be regarded as constituting an abuse of process in respect of a comparatively minor charge may not have the same character in respect of a serious matter."

75 In *Bennett's* case Lord Griffiths treated the matter as discretionary – as turning on "the question whether assuming the court has jurisdiction, it has a discretion to refuse to try the accused"[104]. He said[105]:

> "where process of law is available to return an accused to this country through extradition procedures our courts will refuse to try him if he has been forcibly brought within our jurisdiction in disregard of those procedures by a process to which our own police, prosecuting or other executive authorities have been a knowing party."

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100 (1987) 9 NSWLR 546 at 557.

101 (1987) 9 NSWLR 546 at 564. See also *Re Ditfort; Ex parte Deputy Commissioner of Taxation* (1988) 19 FCR 347 at 367, which summarised what was said in *Levinge's* case as turning on "knowing circumvention of provisions of an extradition treaty otherwise applicable to the accused."

102 (1987) 9 NSWLR 546 at 565.

103 (1987) 9 NSWLR 546 at 565.

104 [1994] 1 AC 42 at 59.

105 [1994] 1 AC 42 at 62.

Lord Bridge of Harwich said[106]:

> "When it is shown that the law enforcement agency responsible for bringing a prosecution has only been enabled to do so by participating in violations of international law and of the laws of another state in order to secure the presence of the accused within the territorial jurisdiction of the court, I think that respect for the rule of law demands that the court take cognisance of that circumstance."

Lord Lowry said that the Court was not concerned with irregularities committed abroad with which the executive was not involved[107]. His test turned on participation in or encouragement of the irregularities[108].

76 Lord Slynn of Hadley considered[109] that there was power to grant a permanent stay if the following allegation was made out[110]:

> "the English police took a deliberate decision not to pursue extradition procedures but to persuade the South African police to arrest and forcibly return the appellant to this country, under the pretext of deporting him to New Zealand via Heathrow so that he could be arrested at Heathrow and tried for the offences of dishonesty he is alleged to have committed in 1989."

77 Lord Oliver of Aylmerton dissented. Aspects of his reasoning will be considered below[111].

78 In *R v Martin*[112] Lord Lloyd of Berwick (Lords Browne-Wilkinson and Slynn of Hadley concurring) said that in *Bennett's* case the reasoning of the House of Lords had turned on "a deliberate abuse of extradition procedures."

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106 [1994] 1 AC 42 at 67.

107 [1994] 1 AC 42 at 77.

108 [1994] 1 AC 42 at 76.

109 [1994] 1 AC 42 at 84.

110 [1994] 1 AC 42 at 52 per Lord Griffiths.

111 See at [91], [94] and [95].

112 [1998] AC 917 at 927.

79 In this Court, the assumed rule has only been considered in *Truong v The Queen*[113]. The appellant contended that his appeal against conviction should be allowed on the ground that the prosecution had contravened s 42 of the *Extradition Act* 1988 (Cth). It had done so, on the appellant's case, because while the appellant had been extradited from the United Kingdom in respect of offences of conspiracy to kidnap and conspiracy to murder, he had been tried and convicted instead of the offences of kidnapping and murder. The assumed rule was thus not directly in point. In that case the Commonwealth accepted its correctness and did not challenge it[114]; so did Victoria[115]. Gummow and Callinan JJ treated the cases stating the assumed rule as authority for the proposition that an allegation by the appellant of abuse of process could not succeed unless the appellant made out a case "that there was a deliberate disregard by the Australian authorities and by the respondent prosecutor of the statutory requirements of s 42 or a knowing circumvention thereof"[116]. Kirby J considered that a stay could be granted, not only in "cases of deliberate and knowing misconduct", but also in "serious cases where, whatever the initial motivation or purpose of the offending party, and whether deliberate, reckless or seriously negligent, the result is one which the courts, exercising the judicial power, cannot tolerate or be part of."[117] He also said that a stay was "not available to cure some 'venial irregularity'"[118] and that a stay had rightly been refused in *R v Raby*, where only a "technical" breach of extradition law had taken place[119]. In *R v Raby*, Byrne J said[120]:

> "It is not sufficient for a stay … merely that there has been some departure from the proper procedures from bringing the accused from outside the jurisdiction; the Court must undertake some assessment of the seriousness of the departure and of the guilty mind of those involved, for it is only where there is a deliberate and serious departure from the required legal

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113 (2004) 223 CLR 122; [2004] HCA 10.

114 (2004) 223 CLR 122 at 129.

115 (2004) 223 CLR 122 at 131-132.

116 (2004) 223 CLR 122 at 161 [96].

117 (2004) 223 CLR 122 at 171-172 [135].

118 (2004) 223 CLR 122 at 172 [136], quoting *Bennett's* case [1994] 1 AC 42 at 77 per Lord Lowry.

119 (2004) 223 CLR 122 at 172 [136].

120 [2003] VSC 213 at [37].

> procedures that the Court will register its disapproval by denying to the prosecuting authority the right to proceed against an accused person. In the present case, the departure was minimal and inadvertent and there is no evidence of the required guilty mind."

80 In *Bou-Simon v Attorney-General (Cth)* the Full Court of the Federal Court of Australia (Black CJ, Tamberlin and Katz JJ) treated the assumed rule as law: there was no contrary argument. The problem discussed by the Full Court concerned the effect of providing an allegedly misleading affidavit to a French court hearing proceedings for the appellant's extradition. That problem was different from the present problem. The Full Federal Court said[121]:

> "Bennett's case is concerned with serious misconduct and … it provides no support for a conclusion that there was an abuse of process in the present case. The formulations all differ somewhat, but in the absence of bad faith, it cannot possibly be said, for example, that something occurred here that was so gravely wrong as to make it unconscionable that a trial … should go ahead, or to make it unconscionable that the extradition proceed to enable a trial to take place. … To make out a case of abuse of process on the basis of Bennett's case, the appellant would be required, at the very least, to prove that [the deponent] deliberately set out to mislead the French Court and acted fraudulently or in bad faith".

81 In *Mokbel v Director of Public Prosecutions (Vic)*[122] Kaye J held that save in a very rare or exceptional case an abuse of process relating to extradition to Australia would not be made out unless there had been unlawful conduct by Australian authorities, or unlawful conduct by officers of the extraditing jurisdiction in which the Australian authorities had been complicit. Hence he held that there was no abuse of process in prosecuting a person whom the Government of Greece had decided to extradite but who, to the knowledge of the Government of Australia, had made a challenge to that decision in the European Court of Human Rights which had not yet been determined. In *Director of Public Prosecutions v Mokbel*[123], Whelan J rejected a contention that the Australian authorities had acted unlawfully.

82 If all that mattered was authority, it might be said that the reasoning of the House of Lords in *Bennett's* case is somewhat marred in the following respects. It relies[124] on dissenting United States opinions rather than majority ones. It

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121 (2000) 96 FCR 325 at 337-338 [34].

122 (2008) 26 VR 1 at 17-18 [53]-[55].

123 [2010] VSC 331 at [43]-[51].

124 [1994] 1 AC 42 at 65-66.

relies[125] on the decision in *S v Ebrahim*, which was based on Roman-Dutch law[126]; and which proceeded on a different foundation from the *Bennett* line of authorities in denying that there was any jurisdiction to try the accused. It relies on a New Zealand decision, *R v Hartley*[127], which one participant in that decision, Richmond P, later disavowed[128]. But the correctness of the assumed rule is not a question of authority; it is a question of principle.

83 This survey reveals the following difficulties in defining the assumed rule.

84 The first is provoked by a question linked to the circumstances of this case. What was the vice in the conduct of the Solomon Islands Government in which Australian officials were implicated? Was the vice merely the appellant's removal by an unlawful deportation? If so, there would have been no problem had the Solomon Islands Government waited for the appeal period to expire, and, if no appeal had been brought or any appeal that was brought failed, thereafter deported the appellant. Or does the vice lie in the denial to the appellant of the opportunity to enjoy the rights conferred on him by extradition procedures? If so, the consequence is that any right the Solomon Islands Government would otherwise have had to carry out its desire to deport the appellant, which could have been done lawfully, was overcome by a duty to comply with the requirements of a procedure it did not choose to employ, namely extradition. That conclusion would render wrong Lord Bingham of Cornhill CJ's acceptance in *R v Staines Magistrates' Court; Ex parte Westfallen*[129] that there was no abuse of process when a lawful deportation took place even if extradition proceedings had not been availed of. He saw no vice where what took place "was not disguised extradition, but undisguised deportation"[130]. A conclusion that a decision of Lord Bingham that there had been no abuse of process – particularly since if there had been it would have been a violation of human rights – is wrong

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125 [1994] 1 AC 42 at 60-61 and 65.

126 1991 (2) SA 553. The reasons for judgment of the Appellate Division are in Afrikaans, but the predominant influence of Roman-Dutch law can be seen from the headnote (at 555), the argument of the successful appellant (at 557-559), the argument of the respondent (at 561) and the Appellate Division's copious references to writings on Roman law (at 569-570) and Roman-Dutch law (at 570-582).

127 [1978] 2 NZLR 199 at 216-217: see [1994] 1 AC 42 at 54-55, 66-67 and 75.

128 *Moevao v Department of Labour* [1980] 1 NZLR 464 at 470.

129 [1998] 1 WLR 652 at 665; [1998] 4 All ER 210 at 222-223. Hooper J agreed.

130 [1998] 1 WLR 652 at 656; [1998] 4 All ER 210 at 213.

is one only to be reached after the gravest consideration. Lord Bingham's view is not consistent with some of the language in *Bennett's* case[131]. There Lord Griffiths said that if "extradition is not available very different considerations will arise". But why?

85 Secondly, as the Full Court of the Federal Court of Australia said in *Bou-Simon v Attorney-General (Cth)*[132], the formulations of the test "all differ somewhat". They range from the need for "deliberate abuse"[133] to the need for "something so gravely wrong as to make it unconscionable that a trial should go forward, such as some fundamental disregard for basic human rights or some gross neglect of the elementary principles of fairness"[134] to something as minor as well-motivated but "seriously negligent" conduct[135].

86 Thirdly, the difficulties in perceiving the relevant test are increased by the very indeterminate language employed by the authorities. Thus there are references to the "principles of the rule of law" without explanation as to how a stay order which ensures that there will be a failure to enforce the law against the accused vindicates the rule of law[136]. There are references to "international law", "the limits of territorial jurisdiction" and the need for "the sovereignty of states to be respected", even though the substantive laws of international law are increasingly difficult to discern[137], and even though the assumed rule appears to apply as much to conduct in which the foreign jurisdiction acquiesces (as here) as it does to conduct against its wishes (as when Israeli agents seized Eichmann in violation of Argentinean sovereignty). There are references to "the comity of nations"[138]. How these were reconcilable with the international rule of comity

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131 [1994] 1 AC 42 at 62, quoted above at [75]; see also at 68.

132 (2000) 96 FCR 325 at 337 [34].

133 *R v Martin* [1998] AC 917 at 927 per Lord Lloyd of Berwick (Lords Browne-Wilkinson and Slynn of Hadley concurring).

134 *R v Martin* [1998] AC 917 at 946-947 per Lord Clyde.

135 *Truong v The Queen* (2004) 223 CLR 122 at 172 [135] per Kirby J.

136 For example, *R v Hartley* [1978] 2 NZLR 199 at 217 per Richmond P, Woodhouse and Cooke JJ; *Bennett's* case [1994] 1 AC 42 at 55, 59, 62 and 64 per Lord Griffiths, 67 per Lord Bridge of Harwich, and 76-77 per Lord Lowry.

137 For example, *Bennett's* case [1994] 1 AC 42 at 60 per Lord Griffiths, 64-65 per Lord Bridge of Harwich and 76 per Lord Lowry.

138 For example, *Bennett's* case [1994] 1 AC 42 at 76 per Lord Lowry.

that the courts of one country will not sit in judgment on the acts of the government of another done within its own territory was not explained. There are references to "acts which offend the court's conscience"[139], to an act which is "an affront to the public conscience"[140], to what "offends the court's sense of justice and propriety"[141], and to acts which "by providing a morally unacceptable foundation for the exercise of jurisdiction over the suspect taint the proposed trial"[142]. There are references to "basic human rights"[143]. There are references to "unworthy conduct"[144]. It has been said that the "issues … are basic to the whole concept of freedom in society."[145] There are references to "the dignity and integrity of the judicial system" and to the need for the prosecution to "come to court with clean hands"[146]. There are references to "the public interest in the integrity of the criminal justice system"[147]. These exercises in rhetoric do not assist in defining the relevant test. Indeed they cast doubt on whether there is any relevant test.

Conceptual problems

87 Whatever the test is, it appears to be anomalous. In standard instances of the problem to which the test is to be applied, the officials of a foreign government will be in breach of the laws in force in the territory ruled by that government. The test turns on the secondary participation in that breach by the officials of the Australian Government. It is usually sufficient, in relation to liability for secondary participation, that the secondary participant has knowledge of the facts which make the conduct unlawful. But the test under debate appears

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139 For example, *Bennett's* case [1994] 1 AC 42 at 76 per Lord Lowry.

140 *R v Latif* [1996] 1 WLR 104 at 112; [1996] 1 All ER 353 at 361.

141 For example, *Bennett's* case [1994] 1 AC 42 at 74 per Lord Lowry.

142 For example, *Bennett's* case [1994] 1 AC 42 at 76 per Lord Lowry.

143 For example, *Bennett's* case [1994] 1 AC 42 at 62 per Lord Griffiths.

144 For example, *Bennett's* case [1994] 1 AC 42 at 77 per Lord Lowry.

145 *R v Hartley* [1978] 2 NZLR 199 at 217 per Richmond P, Woodhouse and Cooke JJ quoted in *Bennett's* case [1994] 1 AC 42 at 54 per Lord Griffiths and 66 per Lord Bridge of Harwich.

146 *Bennett's* case [1994] 1 AC 42 at 60 per Lord Griffiths and 65 per Lord Bridge of Harwich, quoting the headnote to *S v Ebrahim* 1991 (2) SA 553 at 555.

147 *R v Latif* [1996] 1 WLR 104 at 113; [1996] 1 All ER 353 at 361.

to involve "a deliberate disregard of statutory requirements"[148], which implies knowledge of what the statutory requirements are and what conduct, in the particular circumstances, they compel or forbid.

88 Then there are difficulties concerning the relationship between the conduct on which the application of the assumed rule depends and the prosecution. Are the acts in the foreign country part of the prosecution process? In *Bennett's* case[149] Lord Bridge of Harwich said:

> "If a resident in another country is properly extradited here, the time when the prosecution commences is the time when the authorities here set the extradition process in motion. By parity of reasoning, if the authorities, instead of proceeding by way of extradition, have resorted to abduction, that is the effective commencement of the prosecution process and is the illegal foundation on which it rests."

On the other hand, Lord Lowry thought the acts in the foreign country were not part of the prosecution process, but "the indispensable foundation for the holding of the trial."[150] If an act is not part of the prosecution process, how can it be an abuse of it?

89 There is a further doubt about the character of the assumed rule. Is it an absolute rule? Does it rest on a discretionary test[151]? Does it rest on a balancing test[152]? If it is an absolute rule, it is either a wide rule which is attracted by any illegality, however trivial, or a narrower one. If it is wide, it is undesirable because of its extreme quality. That is no doubt why many formulations of the assumed rule seek to downplay its width[153]. If it is less wide, it is undesirable because its indeterminacy leads to uncertainty. If it is not an absolute rule but rests on a "discretionary" test or a "balancing" test, the difficulty of predicting its application also creates uncertainty.

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148 *Levinge's* case (1987) 9 NSWLR 546 at 564 per McHugh JA.

149 [1994] 1 AC 42 at 68.

150 [1994] 1 AC 42 at 76.

151 See *Levinge's* case (1987) 9 NSWLR 546 at 556.

152 See *Levinge's* case (1987) 9 NSWLR 546 at 565 (quoted above at [74]).

153 For example, *R v Raby* [2003] VSC 213 at [37] and *Truong v The Queen* (2004) 223 CLR 122 at 172 [136], quoted above at [79].

Drawbacks to the rule

90 At the outset it must be remembered that the assumed rule operates even though the conduct complained of has no impact on the fairness in fact of the trial. The assumed rule prevents the trial proceeding even though it is a trial which would be fair. The proposition that in some ill-defined circumstances an indeterminate duty may apply, or a discretion may be exercised or a balancing exercise performed, in an unpredictable way, to stay a prosecution which will operate fairly is one which requires weighty justifications. That is particularly so in that while sometimes a permanent stay is a necessary remedy, it can have unsatisfactory consequences. As Brennan J said in *Jago v District Court (NSW)*[154]:

> "interests other than those of the litigants are involved in litigation, especially criminal litigation. The community has an immediate interest in the administration of criminal justice to guarantee peace and order in society. The victims of crime, who are not ordinarily parties to prosecutions on indictment and whose interests have generally gone unacknowledged until recent times, must be able to see that justice is done if they are not to be driven to self-help to rectify their grievances. … Refusal by a court to try a criminal case does not undo the anxiety and disability which the pendency of a criminal charge produces, but it leaves the accused with an irremovable cloud of suspicion over his head. And it is likely to engender a festering sense of injustice on the part of the community and the victim."

91 The primary drawback of the assumed rule is that it defeats the "strong public interest" in the prosecution of criminal allegations, and the proof and punishment of crimes[155]. A contravention of the laws of a foreign state which results in the bringing of an accused person before the courts of another state is an evil thing. To stay the trial, however, does not right that evil. It creates a second evil – a failure to examine an allegation thought by the authorities to be sufficiently serious for examination with a view to determining whether the accused should be acquitted, or convicted and perhaps punished. The criminal is to go free because the official has blundered[156].

92 The problem for Australian courts of which this case is an illustration concerns Australian officials who seek to secure the attendance in court of persons alleged to have committed crimes – some of them extremely serious – by

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154 (1989) 168 CLR 23 at 49-50; [1989] HCA 46.

155 *Bennett's* case [1994] 1 AC 42 at 68 per Lord Oliver of Aylmerton (dissenting).

156 See *People v Defore* 150 NE 585 at 587 (NYCA, 1926).

becoming involved in the illegalities committed by the officials of foreign states. The defaults of Australian officials in that regard could be dealt with by the more direct means of disciplining those who do not comply with the prescribed systems and if necessary setting up better systems. It is irrational to seek to "solve" the problem by the indirect means of immunising the accused. Immunising the accused defeats justice if the charges are sound. In part justice is defeated because the accused remains free from punishment and able to commit other crimes. And in part justice is defeated because a complaint that the order of society has been disrupted is to be abandoned without resolution, so that the members of society will remain ignorant about whether the complaint had justification or not. Society has been wounded. But the wound can never be healed by the conventional processes having that function.

93 Another drawback to the assumed rule is its possible impact on Australia's relations with friendly foreign states. In *Bennett's* case Lord Bridge of Harwich said[157]: "To hold that the court may turn a blind eye to executive lawlessness beyond the frontiers of its own jurisdiction is … an insular and unacceptable view." But the examination and condemnation of executive lawlessness in which officials of a foreign state participate would tend to create considerable diplomatic difficulties for the Executive in dealing with that foreign state. The conduct of diplomacy and foreign policy is a field which traditional thinking sees as committed to the Executive, not the judiciary. One cannot conclude that an official of the prosecuting jurisdiction was involved in an illegality in the foreign jurisdiction from which the accused is brought without examining the question whether there was an illegality in the foreign jurisdiction. If investigation of that question is offensive to the foreign state, it is offensive whether or not an official of the prosecuting state was also involved. And the examination and condemnation of executive lawlessness in which officials of a foreign state participate in circumstances where neither the officials nor their state are represented is contrary to natural justice.

94 A further drawback to the assumed rule is that it draws an anomalous distinction. It is a distinction between misconduct abroad and misconduct within the jurisdiction. Lord Oliver of Aylmerton asked, in his dissenting speech in *Bennett's* case, whether there is "some special quality attaching to the unlawful and abusive activity abroad which confers or ought to confer on the criminal court a discretion which it would not otherwise possess"[158]. He went on[159]:

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157 [1994] 1 AC 42 at 67.

158 [1994] 1 AC 42 at 71.

159 [1994] 1 AC 42 at 72.

> "The matter can, perhaps, best be illustrated by a hypothetical example of two terrorists, A and B, who, having detonated a bomb in London, make their way to Dover with a view to escaping abroad. A, as a result of a quarrel with a ticket inspector, is wrongfully detained by the railway police and whilst still in wrongful custody is duly arrested for the terrorist offence and subsequently charged. B, having successfully boarded a Channel ferry, is recognised as he steps ashore in Calais by two off-duty constables returning from holiday who seize him on the quayside and take him back on board keeping him under restraint until the ferry returns to Dover where he is arrested and charged. Now nobody would, I think, suggest for a moment that the trial of A should not proceed, simply because, as a result of a wrongful arrest and detention, he has been prevented from making good his escape, although he has in fact been put in the position of being charged and brought to trial only by reason of an unlawful abuse of executive power. What, then, distinguishes the case of B and confers on the criminal court in his case a discretion to stay his trial and discharge him which the court … does not possess in the case [of] A?"

Lord Lowry dealt with the problem of A by saying[160]:

> "A person wrongfully arrested here can seek release by applying for a writ of habeas corpus but, once released, can be lawfully arrested, charged and brought to trial. His earlier wrongful arrest is not essentially connected with his proposed trial and the proceedings against him will not be stayed as an abuse of process."

This is both artificial and unrealistic. There are some types of wrongful arrest without which there could never be a later prosecution. Depending on the strength of the case and other relevant factors, it is not likely that a person accused of a terrorism offence, even if the initial arrest had been unlawful, would be released, with all the risk of absconding that that course would bring. If that release were likely, it would be scandalous.

95 Lord Oliver denied that the distinction he criticised could be explained on the basis that to engage in unlawful activity abroad which brings a suspected offender before an English court infringes a "right" in English law possessed by the suspected offender. He said[161]:

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160 [1994] 1 AC 42 at 77.

161 [1994] 1 AC 42 at 73.

> "It is not suggested for a moment that if, as a result of perhaps unlawful police action abroad – for instance, in securing the deportation of the accused without proper authority – in which officers of the United Kingdom authorities are in no way involved, an accused person is found here and duly charged, the illegality of what may have occurred abroad entitles the criminal court here to discontinue the prosecution and discharge the accused. Yet in such a case the advantage which the accused might have derived from the extradition process is likewise destroyed. No 'right' of his in English law has been infringed, though he may well have some remedy in the foreign court against those responsible for his wrongful deportation. What is said to make the critical difference is the prior involvement of officers of the executive authorities of the United Kingdom. But the arrest and detention of the accused are not part of the trial process upon which the criminal court has the duty to embark. Of course, executive officers are subject to the jurisdiction of the courts. If they act unlawfully, they may and should be civilly liable. If they act criminally, they may and should be prosecuted. But I can see no reason why the antecedent activities, whatever the degree of outrage or affront they may occasion, should be thought to justify the assumption by a criminal court of a jurisdiction to terminate a properly instituted criminal process which it is its duty to try."

With respect, this reasoning is sound.

96 The assumed rule is also defective in drawing another anomalous distinction. It is the distinction between misconduct in which officials of the prosecuting state are involved and misconduct in which they are not involved but of which circumstances permit them to take advantage. Lord Lowry said that the court in which the prosecution takes place "is not concerned with irregularities abroad in which our executive … was not involved"[162]. But if the court is concerned with the "irregularities" abroad of its own officials, why is the court not concerned with "irregularities" in which its own officials were not involved? Why is it necessary that the Executive of the prosecuting state be involved in "irregularities"[163]? What is the relevant difference between a deportation or extradition which entails an illegality for which the prosecuting state had no responsibility and of which it did not know before the accused arrived in the place of trial, and one which involves an illegality for which it did have responsibility and of which it had knowledge? Either way the prosecuting state is taking advantage of an illegality. Either way, there is an infringement of the

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162 [1994] 1 AC 42 at 77.

163 [1994] 1 AC 42 at 77 per Lord Lowry.

"rule of law", a failure to "maintain the purity of the stream of justice"[164], an act offensive to "conscience" and to "the court's sense of justice and propriety", "unworthy conduct"[165], and so forth.

97 In short, the assumed rule goes either too far or not far enough. Its logic suggests that it applies to any illegality in a foreign jurisdiction, whether officials in the prosecuting jurisdiction were involved in it or not. If it went as far as its logic suggests, it would create such serious diplomatic difficulties in relation to foreign jurisdictions that had acquiesced in or procured what had been done as to point against its existence in any form.

"Public confidence" and "disrepute"

98 The assumed rule is sometimes expressed in terms of whether a particular use of the court's procedures would bring the administration of justice into "disrepute"[166]. Sometimes the assumed rule is expressed as being based on the need to avoid an erosion of public confidence or community confidence. Thus in *Levinge's* case Kirby P inclined "towards a preference" for the view that the conceptual basis of the assumed rule included an entitlement in the courts "to uphold [the] integrity of [the court's process] and the perception of it in the eyes … of the community"[167].

99 Allegations that particular rules promote or damage "public confidence" in the courts are common. The question whether there is diminution in public confidence in the integrity of the judiciary as an institution has been relied on in various fields. One is whether the conferment on a judge of non-judicial power as persona designata is incompatible with the proper discharge of judicial responsibilities[168]. Another field is legislation providing for preventive

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164 [1994] 1 AC 42 at 77 per Lord Lowry.

165 See the expressions collected at [86] above.

166 See *Rogers v The Queen* (1994) 181 CLR 251 at 286 per McHugh J; [1994] HCA 42.

167 (1987) 9 NSWLR 546 at 557.

168 *Grollo v Palmer* (1995) 184 CLR 348 at 365-368, 376-378, 380 and 395; [1995] HCA 26. See further *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 189 CLR 1 at 12, 14-16, 21-22, 24-26, 28, 46 and 49; [1996] HCA 18; *Wainohu v New South Wales* (2011) 243 CLR 181 at 201 [29], 205-206 [38], 225-226 [94]; [2011] HCA 24.

detention[169]. Another field is the giving by courts of fair hearings[170]. Another field is the doctrine in *Kable v Director of Public Prosecutions (NSW)*[171].

100 There are other areas in which public confidence in the administration of justice is said to be relevant. One is the validity of legislation relating to federal courts and tribunals[172]. Another is the binding quality of judgments and orders made without jurisdiction[173]. Another is the rule that courts generally sit in public[174]. Another relates to public confidence as a hallmark of judicial power[175]. Another is the re-litigation in criminal proceedings of issues decided in earlier criminal proceedings[176]. Another is the immunity of barristers from actions for in-court negligence[177]. Another field is the abuse of process which arises when legal processes are used for purposes alien to their proper purposes[178]. Public confidence is a factor relevant to whether there should be a permanent stay of

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169 *Thomas v Mowbray* (2007) 233 CLR 307 at 432 [357] and 478 [512]; [2007] HCA 33.

170 *Cesan v The Queen* (2008) 236 CLR 358 at 380-382 [71]-[76] and 386 [88]; [2008] HCA 52.

171 (1996) 189 CLR 51 at 98, 107-108, 116-118, 124 and 133; [1996] HCA 24. See *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575 at 593 [23] and 638 [166]; [2004] HCA 46; *Baker v The Queen* (2004) 223 CLR 513 at 519 [6] and 541 [75]; [2004] HCA 45.

172 *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1 at 52, 91, 102 and 104; [1992] HCA 46.

173 *Residual Assco Group Ltd v Spalvins* (2000) 202 CLR 629 at 661 [79]; [2000] HCA 33.

174 *Hogan v Hinch* (2011) 85 ALJR 398 at 406 [20]; 275 ALR 408 at 414; [2011] HCA 4.

175 *Westport Insurance Corporation v Gordian Runoff Ltd* (2011) 85 ALJR 1188 at 1194 [20]; 281 ALR 593 at 599; [2011] HCA 37.

176 *Rogers v The Queen* (1994) 181 CLR 251 at 257 and 280.

177 *D'Orta-Ekenaike v Victoria Legal Aid* (2005) 223 CLR 1 at 34-35 [97], 39 [105], 42 [113], 49-50 [144] and 56 [166]; [2005] HCA 12.

178 *Jago v District Court (NSW)* (1989) 168 CLR 23 at 30; *Williams v Spautz* (1992) 174 CLR 509 at 520; [1992] HCA 34.

criminal proceedings on the ground of delay by the prosecution[179] or a professional disciplinary body[180]. Another field is the unsatisfactoriness of granting too readily orders permanently staying criminal proceedings[181]. Another field concerns the question whether legislation demeans the integrity of court processes[182]. Another is the exclusion of evidence of crimes incited by police officers, and the permanent staying of the prosecutions for those crimes[183]. Another field relates to State legislation validating ineffective judgments[184]. Another field is the rule that courts must act impartially and be seen to do so[185]. There are many more.

101 "Public confidence", considered as a criterion of statutory validity in relation to the *Kable* doctrine, is in retreat[186]. There are various other difficulties with appeals to "public confidence"[187]. The expression is tending to become an automatic reflex, to be used in almost any context in which an attempt is made to stimulate a vague feeling of goodwill, just as restaurant owners cannot answer any question about their restaurants without referring to "fresh ingredients". The expression is beginning to lack meaning. It usually postpones or evades problems. It does not face them or solve them. At least that is so in this particular field. What does "public confidence" mean? What does "disrepute"

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179 *Jago v District Court (NSW)* (1989) 168 CLR 23 at 30; *Ridgeway v The Queen* (1995) 184 CLR 19 at 76; [1995] HCA 66.

180 *Walton v Gardiner* (1993) 177 CLR 378 at 396; [1993] HCA 77.

181 *Jago v District Court (NSW)* (1989) 168 CLR 23 at 50.

182 *Nicholas v The Queen* (1998) 193 CLR 173 at 224 [120], 256 [201] and 265 [213]; [1998] HCA 9.

183 *Ridgeway v The Queen* (1995) 184 CLR 19 at 77, 83, 85 and 88.

184 *Re Macks; Ex parte Saint* (2000) 204 CLR 158 at 193 [80]-[81]; [2000] HCA 62.

185 *R v Watson; Ex parte Armstrong* (1976) 136 CLR 248 at 263; [1976] HCA 39; *Johnson v Johnson* (2000) 201 CLR 488 at 492-493 [12]; [2000] HCA 48; *Ebner v Official Trustee* (2000) 205 CLR 337 at 359 [65] and 363 [81]; [2000] HCA 63.

186 *Baker v The Queen* (2004) 223 CLR 513 at 542-543 [79]-[80]; *Forge v Australian Securities and Investments Commission* (2006) 228 CLR 45 at 122 [194] and 149 [274]; [2006] HCA 44; *South Australia v Totani* (2010) 242 CLR 1 at 49-50 [73], 82 [206], 96 [245]; [2010] HCA 39.

187 *South Australia v Totani* (2010) 242 CLR 1 at 96 [245] n 391; *Wainohu v New South Wales* (2011) 243 CLR 181 at 248-249 [174]-[176].

mean? Among which members of the public is disrepute, or a rise or fall in confidence, to be searched for or avoided? Might it not be better for courts not to keep looking over their shoulders by worrying about their reputation or any perceived level of confidence in them? Should they not rather simply concentrate on doing their job diligently, carefully, honestly and independently, whatever the public or the community think? To answer the first question "the trust reposed constitutionally in the courts to protect the integrity and fairness of their processes" is novel. It tends to contradict the hypothesis on which the assumed rule rests, namely that there will be no unfairness in the process of trial before the Queensland courts. It does not explain how the integrity of those courts could credibly be challenged.

102 Even if public confidence analysis is relevant, it does not follow that it supports the existence of the assumed rule. While the assumed rule is said to be supported by the need to maintain public confidence in the administration of justice, it could actually diminish that confidence. As Brennan J said in *Jago v District Court (NSW)*[188]:

> "If permanent stay orders were to become commonplace, it would not be long before courts would forfeit public confidence. The granting of orders for permanent stays would inspire cynicism, if not suspicion, in the public mind."

If "public confidence" refers to the opinions of members of the public, taken individual by individual, no doubt many people would support the assumed rule. But many others – perhaps a majority – would reject it because of the considerations referred to by Brennan J.

Justifications for the rule

103 The explanations and justifications given for the assumed rule are unconvincing. Examples can be found in the vagueness of the rhetorical expressions quoted above[189].

104 Another justification sometimes given is deterrence. Thus the English Court of Appeal said[190]:

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188 (1989) 168 CLR 23 at 50.

189 See above at [86].

190 *R v Mullen* [2000] QB 520 at 535-536.

> "The need to discourage such conduct on the part of those who are responsible for criminal prosecutions is a matter of public policy to which … very considerable weight must be attached."

In the same vein, in *Bennett's* case Lord Lowry said that a stay "will not only be a sign of judicial disapproval but will discourage similar conduct in future"[191]. But which is more likely to deter: the grant of a stay, which has no direct impact on the officials responsible for the impugned conduct, or vigorous disciplinary action against them – financial penalties, demotion, dismissal, even criminal sanctions?

105 It is sometimes said that the grant of a stay expresses the court's disapproval of the impugned conduct[192]. But Lord Lowry said: "The discretion to stay is not a disciplinary jurisdiction and ought not to be exercised in order to express the court's disapproval of official conduct."[193] What, then, is the point of the assumed rule?

106 Another point was raised by the New Zealand Court of Appeal. Richmond P, Woodhouse and Cooke JJ said[194]: "this must never become an area where it will be sufficient to consider that the end has justified the means." That statement has particular significance, having been quoted by Kirby P in *Levinge's* case[195] and Lord Griffiths in *Bennett's* case[196]. The statement would have its greatest force if the officers responsible for launching and continuing the prosecution of the appellant, for example, were the officers involved in a breach of Solomon Islands law. But the lucid exposition of the factual circumstances in this appeal by the majority does not show that that was the case here. The circumstances do not suggest either that those in charge of the prosecution knew what was happening in the Solomon Islands in the last days of December 2007, or, that if they did, they appreciated that the behaviour of the Solomon Islands Government was in contravention of a local statute, and, worse, of Magistrate Lelapitu's order staying the execution of the deportation order, and in particular her order that the defendants before her not enter the appellant's house or

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191 [1994] 1 AC 42 at 77.

192 For example, *R v Raby* [2003] VSC 213 at [37]: see above at [79]. See also *Bennett's* case [1994] 1 AC 42 at 62.

193 [1994] 1 AC 42 at 74.

194 *R v Hartley* [1978] 2 NZLR 199 at 217.

195 (1987) 9 NSWLR 546 at 555-556.

196 [1994] 1 AC 42 at 54.

approach the appellant. More fundamentally, however, the need not to let the end justify the means cannot support the assumed rule. That is because the means are incapable of justification. The question is what should be done given that unjustifiable means have been employed. One branch of government – the legislature – has enacted a command that a norm of conduct be complied with, backed that command with a sanction, imposed a duty on another branch of government – the executive – to investigate and prosecute alleged breaches of that command, and imposed on a third branch of government – the judiciary – the duty to decide whether the command has been disobeyed and whether the sanction should be imposed. Certain members of the second branch of government, the executive – state officials carrying out the duties of investigative and prosecuting authorities – have decided that a sufficient case exists to put a person accused of disobeying the command on trial. The third branch of government – the judiciary – is invited to frustrate the enforcement of the legislative command, to nullify the prosecuting authorities' decision, and to refuse to carry out its duty to try the case. The invitation is advanced not because the case against the accused is weak. It is not advanced because there would be any unfairness at the trial. Instead the invitation is advanced because certain officials who may be quite unconnected with the state officials responsible for the decision to investigate and prosecute have behaved in a particular way. A rule of law which holds that the judiciary should decline the invitation does not treat the end as justifying the means. It merely ensures that the accident of evil means should not disrupt the fulfilment of a just end. It ensures that a second evil will not be added to the first. It ensures that the judiciary will carry out its duty.

Order

107 The appeal should be dismissed. The respondent did not seek a costs order, and none should be made.