

# Jersey & Guernsey Law Review – June 2011

## MONEY LAUNDERING IN JERSEY

A case analysis: *Att Gen v Bhojwani*

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### Introduction

1 On 5 March 2010, Raj Arjandas Bhojwani was convicted before the Royal Court on three counts of money laundering contrary to Art 34(1)(b) of the Proceeds of Crime (Jersey) Law 1999 (“the 1999 Law”). On 25 June 2010, he was sentenced by the Superior Number of the Royal Court to six years imprisonment on each count, to run concurrently.

2 Mr Bhojwani had been arrested at Heathrow Airport on 8 February 2007 whereupon he was brought to Jersey where, following a two week remand in custody, he was released on bail, one of the conditions of which was the he remain in Jersey. He was then indicted before the Royal Court. Between February 2007 and the close of trial in March 2010, there were numerous hearings before the Royal Court, two hearings before the Court of Appeal and one before the Privy Council. To the date of trial, the case spawned 32 reasoned judgments, often on multiple subjects. Since trial, there have been two more reasoned decisions of the Royal Court and one from the Court of Appeal.<sup>1</sup>

3 To anyone seeking to understand the details of the case, the sheer number of judgments, let alone the complexity of some of the subject matter, presents a daunting task. This article is intended to assist such a task by explaining the route the case took and highlighting the legal points in issue. It is not intended to be a critique and with a few exceptions will not seek other than to record what transpired.<sup>2</sup> As will become apparent, clarity is better achieved by addressing this task by subject rather than in a strictly chronological order.

4 As we shall see, the offence under art 34(1)(b) is not straightforward to understand or apply. This state of affairs was compounded by the facts alleged in the case. It was alleged by the prosecution that Mr Bhojwani had been criminally involved in two contracts in 1996 and 1997 between a company he owned and the Federal Government of Nigeria. Both contracts were executed during the presidency (a military dictatorship) of General Sani Abacha. Both contracts concerned the supply of a large number of military vehicles to Nigeria. And both contracts were alleged to have involved senior Nigerian government officials, including General Abacha. It was alleged that Mr Bhojwani had been involved in the inflation of the contract prices in order to pay the monies so obtained by way of kick-

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<sup>1</sup> Throughout reference is made to “Mr Bhojwani” and the “defence” in a manner which will be self-explanatory. Similarly references to the “prosecution” and the “Attorney General”. All cases cited unless otherwise expressly stated are references to judgments in the case *Att Gen v Bhojwani*.

<sup>2</sup> The authors were counsel for Mr Bhojwani. Advocate Nicole Langlois also appeared for Mr Bhojwani at two hearings.

backs to certain parties connected with the Abacha regime. Both contracts involved a significant amount of money. It was alleged that the illegal inflation of the contract prices was in the sum of \$130 million. The contract monies were received into a Jersey bank account at the Bank of India Jersey in 1996 and 1997 and significant sums were then paid out to accounts in other jurisdictions. These accounts were alleged to be linked to people in the Abacha regime. Two of these accounts in Switzerland bore the name “Kaiser” and “Seuze”, respectively, said to draw their names from the elusive criminal mastermind in the Oscar-winning 1995 film *The Usual Suspects*.<sup>3</sup>

5 The 1999 Law came into force on 1 July 1999. Prior to that date, the only money laundering offences in Jersey related to monies derived from the proceeds of drug trafficking and terrorism. The 1999 Law ushered in an all-crimes money laundering regime.

6 In the week beginning 23 October 2000, Mr Bhojwani closed the bank accounts at Bank of India Jersey which contained a residue of monies received from the 1996 and 1997 contracts. On his instructions, the balances were converted into Bankers Drafts which were then sent by courier to London on 25 October. They returned to Jersey on 2 November at which point the monies were credited to other accounts linked to Mr Bhojwani. These actions formed the basis of the three counts alleged against Mr Bhojwani, namely that he had converted, removed and converted again his proceeds of crime.

7 The catalyst for these actions, alleged the prosecution, was a number of articles in *The Financial Times*, dated 20 October 2000, which revealed large scale efforts by Nigeria to recover monies unlawfully taken from State funds during the Abacha regime by and on behalf of General Abacha and those associated with him. The articles revealed that Nigeria was seeking the assistance of a number of jurisdictions around the world which had received or processed funds. They recorded that Jersey had “frozen” an account and that Switzerland had identified the “Kaiser” and “Seuze” accounts as recipients of funds. These articles, said the prosecution, must have been read by Mr Bhojwani and could be the only explanation for his subsequent closure of accounts and removal of funds. Furthermore, he had taken these actions to avoid a Jersey prosecution for a serious offence and/or a Jersey confiscation order consequent upon a Jersey conviction.

8 Mr Bhojwani denied the allegations and pleaded not guilty to the charges.

#### **Article 34(1)(b) and its interpretation**

9 Article 34(1) reads as follows—

“(1) a person is guilty of an offence if the person—

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<sup>3</sup> *The Financial Times* 20 October 2000.

“(a) conceals or disguises any property that is or in whole or in part represents the person’s proceeds of criminal conduct; or

“(b) converts or transfers that property or removes it from the jurisdiction.

for the purpose of avoiding prosecution for an offence specified in Schedule 1 or the making or enforcement in the person’s case of a confiscation order.”

10 “Criminal conduct” is defined in art 1 as follows—

“‘Criminal conduct’ means conduct, whether occurring before or after Article 3 comes into force, that—

(a) constitutes an offence specified in Schedule 1; or

(b) if it occurs or has occurred outside Jersey, would have constituted such an offence if occurring in Jersey”.

11 Schedule 1, after setting out the articles to which it applies, is in the following terms—

#### “OFFENCES FOR WHICH CONFISCATION ORDERS MAY BE MADE

Any offence in Jersey to which a person is liable on conviction to imprisonment for a term of one or more years (whether or not the person is also liable to any other penalty) but not being—

(a) any drug trafficking offence; or

(b) an offence under any of articles 15 to 18 of the Terrorism (Jersey) Law 2002.”

12 There are thus three ingredients to the art 34(1)(b) offence with which Mr Bhojwani was charged, namely: (1) conversion or removal of (2) property that represents the defendant’s proceeds of criminal conduct (3) for the purpose of avoiding prosecution for a serious Jersey offence or the making or enforcement of a Jersey confiscation order or both. On the facts alleged in this case, the conduct which was said to have generated the necessary “proceeds of criminal conduct” occurred in Nigeria (the “predicate conduct”). To come within the definition of “criminal conduct” for the purposes of the offence, the prosecution must show that if the predicate conduct had occurred in Jersey, it would have constituted an offence in Jersey at the time at which the conduct in fact occurred. Moreover, the Jersey offence must be an offence specified in Schedule 1, namely an offence in Jersey of which a person is liable upon conviction to imprisonment for a term of one or more years. This is known as a single criminality test and means that notwithstanding that the predicate conduct is committed outside Jersey it can be relied on

to criminalise the “proceeds” so that, in consequence, criminal money laundering can be in issue.<sup>4</sup>

13 The intrinsic complexity of the art 34(1)(b) offence and a lack of certainty as to its meaning and ambit gave rise to a number of applications by the defence. These focused on predicate conduct and the purpose element, and we shall turn now to examine the key decisions. In addition, we shall thereafter turn to a number of applications which arose on the facts of the case. The degree of explanation provided is commensurate with the complexity of the subject to hand.

#### **A. Predicate conduct**

14 The predicate conduct gave rise to a number of important issues which the defence sought to have clarified by the Court.

##### ***1. Identification of the predicate offence, whether it has to be particularised in the indictment and whether it has to be proved as an offence committed by the accused***

15 The defence submitted to the Royal Court that the prosecution must prove the commission of a specific predicate offence by Mr Bhojwani in Nigeria and should be required to give the same particulars in the indictment in relation to that offence as it would be required to give if the indictment brought a specific charge in relation to the conduct in issue. As to the first proposition, the Royal Court concluded<sup>5</sup>—

“the prosecution must prove that there has been [conduct which has occurred outside Jersey] and that if it had occurred here, it would have constituted [a Jersey offence], but it is not required to treat this as prosecution within a prosecution, identifying the offenders and effectively trying them in their absence. Furthermore, the prosecution do not have to prove that the defendant is guilty himself of such conduct, merely that it has taken place and the property represents his proceeds from it.”

The Court of Appeal did not agree. In its judgment on 6 November 2008, it held<sup>6</sup>—

“we do not support, however, the Commissioner’s ruling ... in relation to proof of predicate conduct and his conclusion that the prosecution do not have to prove that the defendant himself is guilty of such conduct, merely that it has taken place and that the property represents his proceeds from it. Our conclusion is that [para 24 of the] Montila judgment, which relates to the [sub-s] (1) offences, should be applied to [art] 34(1) and, on the facts of this case, we find that the prosecution must prove that the defendant’s proceeds are the proceeds of his own criminal

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<sup>4</sup> As compared to a double criminality test where the relevant conduct must be shown to be a criminal offence both where it actually occurred and where it is hypothetically deemed to occur, as in extradition cases.

<sup>5</sup> [2008] JRC 130, para 85.

<sup>6</sup> [2010] JCA 188, para 93.

conduct. Although the defendant cannot be convicted in Jersey of an offence in relation to the predicate conduct, the Jurats should be directed to consider first whether the Crown has proved that the defendant is guilty of the criminal conduct alleged. Only then, and if they are so satisfied, and satisfied also that the conduct will have constituted an offence as described in [art] 1 (in that if it occurred outside Jersey it would have constituted a Schedule 1 offence if it had occurred in Jersey), do they go on to consider whether the property converted/transferred is proved to be the proceeds of his own criminal conduct. It would then be open to the Jurats to consider those facts, if established, in relation to the defendant's purpose when the property was converted/ transferred."

As to the second proposition, the Royal Court found that, as made clear in the Indictment Rules 1972 and in the interests of fairness, the indictment must give reasonable information as to the nature of the charges.<sup>7</sup> The then current indictment contained no particulars of the predicate conduct at all and the Court concluded it was therefore deficient (*ibid*, para 87).

16 The prosecution, whilst accepting its task was to prove the predicate conduct, namely what had happened in respect of the two Nigerian contracts, submitted it was not required to make the Jurats sure that such conduct would be criminal in Jersey. The Royal Court did not agree<sup>8</sup>—

"The prosecution must, in my view, not only prove the conduct, but also that it is 'criminal' as defined. Article 1 of the 1999 Law is quite specific that the conduct is criminal only if it would have constituted an offence specified in Schedule 1. The Jurats cannot determine that without at least identifying one or more Jersey offences which the conduct would constitute. Furthermore, the Jurats would need to be directed as to the ingredients of the Jersey offence or offences identified in order to determine whether the conduct constitutes that offence or offences."

It continued<sup>9</sup>—

"As it is the prosecution which has the burden of proving that the conduct was criminal, it is incumbent on it to identify which Jersey offence or offences it asserts the conduct constitutes, so that the defence can know the case it has to meet and be in a position to address the Jurats on whether the conduct asserted does indeed constitute the Jersey offence/s upon which the prosecution rely."

## **2. Misconduct in public office**

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<sup>7</sup> See [2008] JRC 130, para 86.

<sup>8</sup> *Ibid*, para 90.

<sup>9</sup> Para 91.

17 From the outset of the prosecution, specifically from the issue of the prosecution case statement, the prosecution asserted that the offence in Jersey which the alleged predicate conduct would have constituted, had it occurred there, was the customary law offence of aiding and abetting another person to misconduct himself in public office. The defence alleged that there was no such offence known to Jersey customary law. It argued that, whilst there was evidence that Jersey customary law had recognised the specific offences of “*péculation*”, “*concession*”, “*malversation*” (respectively, the diversion of public funds, misappropriation of public funds and fraud in public office) and dereliction of duty, there was no evidence that it ever recognised “the wide ranging generic offence of misconduct in public office”. The Royal Court agreed.<sup>10</sup>

18 The prosecution appealed against the decision and the Court of Appeal overruled the Royal Court, finding that the offence of misconduct in a public office was recognised by Jersey law, even if it had not been prosecuted specifically as that offence.<sup>11</sup>

19 The Royal Court subsequently ruled on the elements of misconduct in public office and the *mens rea* of that offence. In relation to the former, it stated that the elements of the Jersey offence were the same as the English offence as summarised in *Att Gen’s Ref (No 3 of 2003)*,<sup>12</sup> namely, (1) a public officer, acting as such, (2) wilfully neglects to perform his duty and/or wilfully misconducts himself to (3) such a degree as to amount to an abuse of the public’s trust in the office holder and (4) without reasonable excuse or justification.<sup>13</sup> As to the *mens rea*, it was accepted that this would also be drawn from *Att Gen’s Ref (No 3)* and that the English Court of Appeal in that case had made it clear that the mental element of the offence must be considered in relation to the particular circumstances and consequences of each case (para 11)

### **3. Foster fraud**

20 One of the effects of the defence’s application that the offence of misconduct was unknown to Jersey law was the prosecution’s identification of other Jersey offences which it said would have been committed by Mr Bhojwani had the predicate conduct actually occurred in Jersey. This identification included the offence of fraud as defined in *Foster v Att Gen*.<sup>14</sup> In that case the Court of Appeal stated that the elements of the offence of fraud were as follows—

- (i) the defendant deliberately made a false representation
- (ii) with the intention of causing thereby
- (iii) and with the resulting fact of causing thereby

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<sup>10</sup> [2008] JRC 130, para 55.

<sup>11</sup> See 2010 JLR 24, para 58.

<sup>12</sup> (2005) QB 73.

<sup>13</sup> Paras 3, 4 and 31, [2009] JCA 013.

<sup>14</sup> 1992 JLR 6.

(iv) actual prejudice to someone and actual benefit to himself or somebody else.

21 Following the prosecution's identification of *Foster* fraud as a predicate offence, the defence made a consequential application in relation to the third element of the offence, submitting that it required of the prosecution that it prove that the alleged false representation acted on the mind of the victim of the alleged fraud so as to be the effective cause of prejudice to the victim. The submission was relevant because of certain aspects of the factual matrix relating to the predicate conduct in this case. The Royal Court dismissed the defence application: it concluded that operative deceit was not a requirement of the third element.<sup>15</sup>

22 The defence appealed the decision in relation to operative deceit. The Court of Appeal concluded that it was a requirement of *Foster* fraud that the false representation must operate to deceive. It further found that operative deceit did not require the person who suffered the prejudice to be the person on whom the deceit operated.<sup>16</sup>

#### **4. Bribery**

23 In similar fashion to its identification of *Foster* fraud, the prosecution also identified the offence of bribery as a predicate offence. The defence asserted that the offence of bribery was unknown to Jersey law. The Royal Court disagreed.<sup>17</sup>

24 The defence appealed and the Court of Appeal found as contended that the offence of bribery was not an offence known to the common law of Jersey.<sup>18</sup>

#### **5. Transposition**

25 The process whereby the conduct alleged to have occurred abroad is hypothetically transferred to Jersey and examined to see whether, had it occurred in Jersey, it would have constituted a Jersey criminal offence is known as "transposition". There is little authority on this process and that which there is does not relate to money laundering offences.<sup>19</sup>

26 The defence was particularly concerned with the potential for injustice that lay within the single criminality test which, it submitted, could be mitigated by transposition under which the local conditions and circumstances prevailing in Nigeria at the material time (1996 and 1997) should be taken into account. Specifically, the defence submitted that transposition must include the nature of General Abacha (a notorious military dictator) and

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<sup>15</sup> See [2009] JRC 013, from para 7.

<sup>16</sup> See [2010] JCA 078, from para 15.

<sup>17</sup> See [2009] JRC 013, from para 43.

<sup>18</sup> See [2010] JCA 078, from para 46.

<sup>19</sup> In the main, the case law comprised *Cox v Army Council* [1962] 2 WLR 950 (a case concerning s 70 of the Army Act 1955). The Royal Court and the Court of Appeal also relied on *Norris v Government of the United States of America* [2008] 2 WLR 673 (an extradition case involving a double criminality test).

his unbridled powers and whether what Mr Bhojwani was alleged to have done in Nigeria was unlawful there. In other words, the defence sought to temper the consequences of plucking conduct which had taken place in a West African state under a notoriously repressive military regime and judging it only as if it had occurred in a small island with a stable Western democracy.

27 The Royal Court was not persuaded. Importing the local conditions and circumstances prevailing in Nigeria at the material time would, it found, place—

“upon the Court, as part of the transposition process in this case, the burden of inquiring into and identifying the circumstances and conditions in Nigeria in 1996 and 1997 and determining firstly which of those are relevant to the acts alleged and secondly which of them are essential to those acts. In my view this would involve the Court in embarking upon a potentially wide ranging exercise when the essence or essential elements of those acts alleged are already clear.

This is because by particularising the criminal conduct alleged in the indictment, the prosecution has now set out the essence or essential elements of the conduct alleged, which it will seek to show, if proved, would constitute the Jersey offences if it occurred in Jersey. That is its case and it accepted that it has the burden of proving each of the particulars to the criminal standard.”<sup>20</sup>

28 The Royal Court continued—

“In my view and in principle, the Jurats should be directed to approach the second element of the offence in the following manner and this in respect of each count:—

- (i) The first stage, which is evidential, is for the Jurats to determine whether they are sure that the conduct set out in each of the sub-paragraphs of the particulars in the count took place. If they are not sure that any of the conduct particularised took place, then they will acquit. If they are sure that some, if not all, of the conduct set out in the particulars took place, then they will move on to the second stage.
- (ii) The second stage, also evidential, is for the Jurats to determine whether they are sure that ‘the property’ referred to in the count represents the defendant’s proceeds of such conduct, to the extent proved. If they are sure, then they will move onto the third stage. If not sure, they will acquit.
- (iii) The third stage is the process of transposition of the conduct, to the extent proved, to Jersey, which in this case can be achieved with very little substitution of the circumstances ... Assuming, for the sake of argument, all of the particulars of the alleged conduct in count one are proved, that

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<sup>20</sup> [2008] JRC 172A, paras 22–23.



conduct can be transferred to Jersey by making the following limited amendments to the particulars.”

[The Court then set out suggested potential amendments to the particulars in the indictment to illustrate its point. An example of which was: “(a) the dishonest inflation of true prices for motor vehicles sold *by a person (through a company) to Jersey*”; the italicised words being added by the Court. The Royal Court referred to this as “the transposed conduct”.]

“(iv) The fourth stage is the process by which the elements of the Jersey offences are applied to the transposed conduct. It is only if all the elements in respect of at least one of the Jersey offences are found by the Jurats to be present in the transposed conduct, that the conduct is constituted ‘criminal conduct’. They will be directed as to the elements in Jersey offences. If they find that all the elements of at least one Jersey offence are present in the transposed conduct and the second element of the offence charged in the account is proved ... If not they will acquit.”<sup>21</sup>

29 Thus the Court concluded—

“The fact that the person with whom the defendant was dealing was a dictator and the other prevailing circumstances in Nigeria are adventitious and irrelevant to the transposition process. In particular, the fact that the conduct proved may have been lawful or acceptable or tolerated in Nigeria is irrelevant to that process.”<sup>22</sup>

30 The defence appealed against the Royal Court’s decision on transposition, asserting that the Royal Court was wrong to hold that the process of transposition contemplated by art 34 was consistent with the principle of legal certainty and that it had, in any event, taken too narrow a view of the transposition exercise.<sup>23</sup> In relation to the former, the defence argued that if the prosecution sought to prove that Mr Bhojwani’s conduct in Nigeria amounted to criminal conduct, it would amount to seeking to punish him indirectly for what he had done in Nigeria at a time before the Proceeds of Crime (Jersey) 1999 was in force in Jersey. This, it was argued, contravened the principles of legal certainty, conveniently summarised in *R v Rimmington*.<sup>24</sup> This was rejected by the appellate Court—

“He is not being prosecuted for his actions in Nigeria in 1996 and 1997: he is being prosecuted for his actions in Jersey in 2000, those actions being alleged to be the conversion or removal of the proceeds of criminal conduct. When the conversion or removal is said to have occurred, the Jersey statute was in force and clearly identified the elements of the offence. One such element is that the

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<sup>21</sup> See *ibid*, para 24.

<sup>22</sup> See *ibid*, para 25.

<sup>23</sup> See [2010] JCA 078, from para 29.

<sup>24</sup> [2006] 1 AC 459, p 482.

money should be proceeds of conduct that would have constituted an offence in Jersey had it occurred there. The prosecution must therefore prove that what the applicant did in Nigeria in 1996 and 1997 would have amounted to an offence in Jersey if the applicant had done it there in 1996 and 1997. [Therefore it] will be assessed according to the state of law in Jersey at that time. Nothing in the 1999 law changes the law prevailing in Jersey prior to its enactment; nor does it otherwise change the legal consequences that the applicant's act would have attracted had they in fact occurred in Jersey."<sup>25</sup>

31 It also rejected the defence arguments as to transposition, upholding the Royal Court and stating—

“in a case such as the present, what has to be assumed to have occurred in Jersey is the essence of the conduct that in fact occurred abroad, shorn of irrelevant or adventitious factors, which include those elements in the conduct which have reference to a place other than Jersey. In simple terms, the conduct is to be judged as though it had nothing to do with Nigeria. Thus, in relation to procuring misfeasance in public office, the facts the prosecution will have to prove are that the defendant induced a person in public office to award publicly funded contracts at prices greatly in excess of their true value, and to procure payment of public money to the contractor, in return for a share of the proceeds. In proving those facts, it will be necessary to show, for example, that the individual said to have been induced by the defendant to breach his duties was indeed a person in public office, and that will in turn require consideration of the formal position occupied in Nigeria by that person. Once the relevant facts are proved, however, the question becomes whether those circumstances would have amounted to procurement of misfeasance in public office if they had occurred in Jersey; and that question will be answered solely by reference to Jersey standards, without regard to the standards expected in Nigeria of a Nigerian official.”

32 The Court continued—

“It will remain open to the applicant to defend himself on any ground that would have been available to him had his conduct in fact incurred in Jersey; so that, for example, he would in principle be entitled to advance a case that he did not know the person with whom he dealt with was a public officer. This issue, as we understand it, does not, however, permit him to assert that as a matter of practice persons holding such office in Nigeria took, and were expected to take, a less stringent attitude to their duties; for that would be to judge him not according to the essence of his conduct but by reference to adventitious circumstances.”<sup>26</sup>

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<sup>25</sup> See [2010] JCA 078 , para 34.

<sup>26</sup> *Ibid*, paras 43–44.

33 Following the Court of Appeal decision that the offence of misconduct in public office was known to Jersey law, the defence made a consequential application that the conduct required for the crime of misconduct in public office was not susceptible to transposition. The basis for this submission was that it was a crime so inexorably linked to the political circumstances and cultural values of the place where it was committed that the requisite conduct for the crime lacked the “universality” required for transposition in accordance with *Cox v Army Council*.<sup>27</sup> In the alternative, the defence argued that if the conduct were susceptible of transposition, the “circumstances and conditions that prevailed at the place where and at the time when the thing that is complained of was done or omitted” must be taken into account. Fleshed out, the defence submissions were, firstly, that the characteristics of the public office in question are essential to the offence because of the *mens rea* element: the offence presupposes actual knowledge of the particular duties in positive law and custom that attached to the public office or recklessness in respect therefore. It was impossible to postulate that the President of Nigeria wilfully misconducted himself by reference to the duties of the Chief Minister of Jersey “such as amounted to an abuse of the trust of the people of Jersey and the President of Nigeria.” Secondly, that there could be no such thing as a generic office holder for the purpose of the offence because the *mens rea* element was linked to the nature and scope of the duties attaching to the public office. It had to be distinguished from universal offences like murder, theft or fraud. Thirdly, the constituent elements of the offence are so closely intertwined with the political circumstances and cultural values of Jersey that it was impossible to criminalise conduct occurring in a foreign country by analogy through the device of transposition. Fourthly, practice considered to be an abuse of the public’s trust in Jersey may not rise to that level in the context of a military dictatorship in Nigeria and therefore this was precisely the type of offence that the Court in *Cox* had in mind as failing the text of universality and thus fell outside the scope of the single criminality test.

34 The Royal Court disagreed. It found that the Jersey offence of misconduct in public office was an offence which could be applied to conduct transposed to Jersey. In addition, it found no reason to differentiate between misconduct in public office and the other identified predicate offences in the manner in which they would be treated on transposition.<sup>28</sup>

## **6. Non-justiciability**

35 Non-justiciability arose as a result of the unusual facts of the case. The defence argued that the Court must exercise judicial restraint on the basis of non-justiciability, since to find proved the predicate conduct alleged, the Court would be required to adjudicate on the actions of General Abacha, who at the relevant time was President of the Republic of Nigeria, and Colonel Marwa, at the relevant time a defence adviser to the Nigeria and, by the time of the trial, the Nigerian Ambassador to South Africa. Both men

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<sup>27</sup> [1963] AC 48.

<sup>28</sup> [2008] JRC 172A; see also [2009] JRC 013, from para 28.

were alleged to have been involved in negotiating the two contracts to which Nigeria was a party and both were said to have benefitted financially from the contracts. It would therefore be necessary for the Court to adjudicate on the affairs and transactions of a sovereign state. The prosecution would have to show that Mr Bhojwani did in fact aid and abet misconduct in public office by these parties and this would amount to a *de facto* finding of guilt on their part by the Court. For the Court to make such an adjudication would place it in a position where there was a manifest risk of embarrassment to international relations and in which there are no judicial or manageable standards by which to judge the relevant issues. The Court was asked to exercise judicial restraint and strike out the prosecution.

36 This application drew on the principles of non-justiciability as a consequence of the principle of judicial restraint from adjudicating on the actions of foreign sovereign States, as set out in the English House of Lords case *Buttes Gas & Oil Co v Hammer (Nos 2 & 3)*<sup>29</sup> and developed in subsequent case law.

37 The Royal Court was unpersuaded. It accepted that the prosecution was required to prove, to the criminal standard, that the alleged conduct in Nigeria actually took place. And that this would involve findings as to whether the actions of General Abacha and Colonel Marwa occurred. There would be no adjudication and no finding of guilt in relation to their conduct. Similarly there would be no adjudication on the two contracts. This is because—

“the requirement of the 1999 Law that the conduct (not the parties to it) be brought hypothetically to Jersey in order to determine whether, as a matter of Jersey law, it would, if it had occurred here, have been an offence under Jersey law. For this exercise, the Court would be applying exclusively Jersey law. It will not be in a judicial no-man’s land with no judicial or manageable standards to apply.”<sup>30</sup>

38 The defendant appealed this decision. The Court of Appeal, in a very detailed judgment, upheld the Royal Court’s decision, save for the following point—

“We have noted that the learned Commissioner was inclined to accept that the matrix of facts in cases that might come before the Court under the 1999 Law is very wide and that the principle of judicial restraint might have a role to play. Whilst at one stage we considered that a decision on this view may not be necessary for the purpose of the grounds of appeal presented to us in this case, we consider ourselves bound to differ from the learned Commissioner. In our opinion, once the single criminality test is accepted, there is no scope for engagement of the principle of a judicial restraint. The offences identified in Schedule 1 of the 1999 Law are offences according to the law of Jersey. There is no adjudication on any person

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<sup>29</sup> [1981] 3 All ER 616.

<sup>30</sup> See [2008] JRC 129, para 57.

other than the defendant. Accordingly we cannot support the learned Commissioner on this point.”<sup>31</sup>

### **7. The test for dishonesty in relation to predicate conduct**

39 The test for dishonesty under Jersey law is that applied in *R v Ghosh*<sup>32</sup>—

“A jury must first of all decide whether according to the ordinary standards of reasonable and honest people what was done was dishonest. If it was not dishonest by those standards, that is the end of the matter and the prosecution fails.

If it was dishonest by those standards, then the jury must consider whether the defendant himself must have realised that what he was doing was by those standards dishonest.”

40 The defence contentions as to the proper test for dishonesty in relation to the predicate conduct in this case are succinctly summarised by the Royal Court as follows—

“The defence submitted that no fair finding as to the defendant’s actual state of mind can be made without taking account of the prevailing standards of honesty which influenced it. The defence does not contend that the defendant should be judged by his own standards of honesty, but simply that there is no basis for an assumption of the universality as to dishonesty extending beyond the territorial jurisdiction of the Court. In consequence the Jurats must have regard to evidence which is capable of showing the existence of a different value system and must consider the effect of that value system on the actual state of mind of the defendant. To criminalise the conduct of the defendant by imputing or inferring that the knowledge of a value system different to that of the jurisdiction in which the alleged conduct took place is wrong and would produce an inherently unfair trial process in breach of the defendant’s fundamental rights under Article 6 of the ECHR as applied by the Human Rights (Jersey) Law 2000.”<sup>33</sup>

41 One can see immediately the inherent unfairness in applying a dishonesty test the first limb of which determines the accused’s dishonesty by reference to the ordinary standards of honesty in the place where the conduct did not actually take place. Put another way, an accused acting in Nigeria cannot reasonably be expected to have contemplated his conduct by reference to Jersey standards of honesty. The effect of the transposition process is thus to ignore his actual state of mind.

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<sup>31</sup> See [2010] JCA 024, para 124 specifically, and more generally from para 95.

<sup>32</sup> (1982) QB 1053. See *Michel & Gallichan v Att Gen* [2006] JCA 152, p 9, para 49.

<sup>33</sup> Para 12, [2009] JRC 207A, noted at 2010 JLR N [5].

42 The defence submitted that the *Ghosh* test should be changed to accommodate the peculiar circumstances of the offence and the facts to the following—

“Whether according to the ordinary standards of reasonable honest people *in Nigeria* what was done was dishonest. If it was not dishonest by those *Nigerian standards*, that is the end of the matter and the prosecution fails. If it was dishonest by those *Nigerian standards*, then the Jurats must consider whether the defendant himself must have realised that what he was doing was by those *Nigerian standards* dishonest.”<sup>34</sup> (emphasis added)

43 The Royal Court did not accept the contention and found—

“The 1999 Law provides a single criminality test *i.e.* the criminal law of Jersey. Offences under the 1999 Law are to be treated no differently to other offences under our criminal law and that is because it applies the criminal law of Jersey, exclusively, to conduct which either occurs here or which by the process of transposition is deemed to have occurred here. It will be for the Jurats to determine the ordinary standards of reasonable and honest people in the same way that they would any other offence under our criminal law. I do not agree that they will do this by reference to ‘Jersey Standards’ whatever they are. It will be a matter for the individual judgement [sic] of the Jurats whose backgrounds and life experiences will be diverse and various.”

“In my view there is a universality in the concept of dishonesty. A dishonest person is one who lies, cheats or steals or who practises deceit (see *Shorter Oxford English Dictionary*). Even in communities where corruption is rife and widely tolerated, reasonable and honest people in those communities would, I suggest, still regard cheating, stealing or deceit as dishonest. By definition honest people everywhere are bound to do so because they are honest.”<sup>35</sup>

44 There was a further reason which concerned the Court and it was that if the defence were correct—

“then such cases in my view would be rendered untriable and this because the prosecution would have to prove, through expert evidence, the ordinary standards of reasonable and honest people in the foreign jurisdiction concerned.”<sup>36</sup>

45 Even though the Court was against the defence contention as to the amended *Ghosh* test, under the usual *Ghosh* test it was open to Mr Bhojwani to give evidence as to

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<sup>34</sup> Para 10, [2009] JRC 207A.

<sup>35</sup> *Ibid*, paras 16–17. It is submitted that there is no juridical basis for asserting that there is a universal standard of dishonesty. The fact that the Royal Court turned to the *Shorter OED*, that touchstone of the English language, to substantiate its conclusion in this respect illustrates its fallacy. The *OED* does not speak for other jurisdictions.

<sup>36</sup> *Ibid*, para 19.

whether he himself must have realised that what he was doing was by *Jersey* standards dishonest. Nevertheless, a further obstacle was put in his way because the Court ruled that expert evidence as to concepts of honesty and dishonesty in Nigeria was not a subject matter susceptible of expert evidence—

“I conclude that the subject matter, namely ‘the ordinary standards of honest and reliable people in Nigeria’ does not form part of a body of knowledge or experience which is sufficiently organised or recognised to be accepted as a reliable body of knowledge or experience.”

Further,

“The question of the defendant’s alleged conduct has never been, logistically could never be, put directly to the people of Nigeria, let alone to ‘reasonable and honest’ people in Nigeria. How is one to assess in a reliable way whether people, wherever they live, are ‘reasonable’ and ‘honest’?”<sup>37</sup>

## **B. The purpose element**

46 As already explained, one of the elements of the three offences charged was that Mr Bhojwani converted and/or removed his proceeds of criminal conduct for the purpose of avoiding a Jersey prosecution for an offence specified in Schedule 1 or the making or enforcement of a confiscation order consequent on a conviction for that offence. It was common ground and rather an obvious point of statutory construction that any offence which Mr Bhojwani was alleged to have had the purpose of avoiding prosecution for, must predate the commission of the offences charged in the indictment.

### ***1. Existence and knowledge of the offence for which the accused is seeking to avoid prosecution***

47 There arose the following issues which were not common ground: (1) did there have to be an actual offence for which Mr Bhojwani could have been convicted; and (2) did Mr Bhojwani have to be aware of the offence for which he was seeking to avoid prosecution?

48 The defence submitted that the offence for which Mr Bhojwani was avoiding prosecution could not have been the predicate conduct in Nigeria, as that was not an offence in Jersey. In addition, there was no offence in Jersey that he could have been avoiding. Furthermore, under art 3(2) of the Proceeds of Crime (Jersey) Law 1999 a Jersey confiscation order could only be made following sentence for an offence committed on or after 1 July 1999. The defence further contended that the prosecution was required to prove that Mr Bhojwani had committed an independent and pre-existing offence prior to the alleged conversion and/or removal from the jurisdiction, which the prosecution asserted he was trying to avoid.

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<sup>37</sup> *Ibid*, paras 26 and 23.

49 The Royal Court, applying the decision in *R v Saik*<sup>38</sup> (albeit the case concerned a third party money laundering offence worded quite differently from art 34(1)(b)), concluded that the purpose element in art 34(1)(b) was subjective and that therefore the prosecution was not required to prove that there was an offence in Jersey or a Jersey confiscation order which Mr Bhojwani sought to avoid—

“The offence is committed if the defendant apprehended a risk that he might be prosecuted or a confiscation order imposed and therefore converted/removed his proceeds of criminal conduct to avoid the same.”

50 It continued—

“It is irrelevant that as a matter of objective fact there may have been no offence for which he could have been prosecuted, or, even if there was, some legal impediment existed to the bring of such a prosecution.”<sup>39</sup>

51 The defendant appealed the Royal Court’s decision. The Court of Appeal accepted the Royal Court’s reasoning that the purpose element was purely subjective and that the prosecution need not prove that Mr Bhojwani had actually committed an offence in Jersey for which he could have been prosecuted or in respect of which a confiscation order could be made. It also accepted the finding of the Royal Court that, if a defendant apprehended a risk that he might be prosecuted or have a confiscation order imposed and therefore converted/removed his proceeds of criminal conduct, the offence was committed. In addition, there was, it found, no requirement that the predicate criminal conduct and the conduct which the defendant believes may put him at risk of prosecution must be one and the same.<sup>40</sup>

52 The Court of Appeal however did not support the Royal Court’s ruling that the prosecution did not have to prove that Mr Bhojwani himself was guilty of the predicate conduct, merely that it had taken place and that the property had represented his proceeds from it. Drawing on the case of *Montila*,<sup>41</sup> it found that—

“the prosecution must prove that the defendant’s proceeds are the proceeds of his own criminal conduct. Although the defendant cannot be convicted in Jersey of an offence in relation to the predicate conduct, the Jurats should be directed to consider first whether the Crown has proved that the defendant is guilty of the criminal conduct alleged. Only then, and if they are so satisfied, and satisfied also that the conduct would have constituted an offence as described in [art] 1 (in that, if it occurred outside Jersey it would have constituted a Schedule 1 offence had it occurred in Jersey), do they go on to consider whether the property

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<sup>38</sup> [2007] 1 AC 18.

<sup>39</sup> Paras 66 and 67, [2008] JRC 130.

<sup>40</sup> Paras 90–93, [2010] JCA 024.

<sup>41</sup> [2004] UK HL 50.



converted/transferred is proved to the proceeds of his own criminal conduct. It would then be open to the Jurats to consider those facts, if established, in relation to the defendant's purpose when the property was converted/ transferred."<sup>42</sup>

## **2. Receiving goods stolen abroad as the purpose offence**

53 In the face of the challenge from the defence on the purpose element of the offence, and notwithstanding how the position evolved before the Royal Court and Court of Appeal (*supra*), the prosecution indicated that despite its argument that there need be no offence for which Mr Bhojwani could have been prosecuted in Jersey, in fact he could have been prosecuted for receiving goods stolen abroad.<sup>43</sup>

54 The defence asserted that there was no such offence known to Jersey law and that given the extra-jurisdictional nature of such an offence it could be created only by statute in similar fashion to the English common law position as remedied by the Larceny Act of 1896, and then by s 33(4) of the Larceny Act 1916. The Royal Court disagreed, drawing on *Foster* and concluding—

“In my view, *Foster* is clear and binding authority that the provisions of the Larceny Act [1916], in so far as they relate to criminal conduct, have been adopted into and form part of the law of Jersey. The offence created by Section 33(4) of the Larceny Act [1916], therefore, is an offence known to Jersey law.”<sup>44</sup>

55 The defence appealed this finding, but the decision was upheld by the Court of Appeal.<sup>45</sup>

## **3. Proof of purpose where there is more than one purpose**

56 As we have seen, the third element of the art 34(1)(b) offence is that the conversion or removal should have been “for the purpose of avoiding prosecution or the making or enforcement of a confiscation order or both”. But what should be the prosecution's burden of proof if more than one purpose was capable of being made out on the evidence? The defence argued that where two purposes were made out, the purpose argued for by the prosecution must be Mr Bhojwani's dominant or, in the alternative, substantial purpose.

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<sup>42</sup> See *ibid*, para 93.

<sup>43</sup> The prosecution subsequently also suggested *Foster* fraud and obtaining the execution of a valuable security by deception.

<sup>44</sup> Para 77, [2008] JRC 130.

<sup>45</sup> See [2010] JCA 024 from para 134. In the authors' respectful opinion, the decisions on receiving property stolen abroad rank as amongst the most extraordinary in this case. In a single stroke the position of the Jersey legislature as the only source of the statutory criminal law is writ to nought and by the simple fact that the prosecution has previously chosen to charge offences in the manner set out in the Larceny Act 1916 that statute has been incorporated wholesale into Jersey law insofar as it concerns criminal offences.

The defence drew on a number of cases for this proposition.<sup>46</sup> Behind this application lay the submission that the Jurats might conclude that Mr Bhojwani had two (or more) purposes in converting or removing his proceeds of criminal conduct, one which was for the alleged criminal purpose and the other being perfectly legitimate. Relying on the case of *R v Causey*,<sup>47</sup> the Royal Court decided that “if something is criminal it remains criminal and punishable no matter how many non-criminal activities are engaged in at the same time.”<sup>48</sup> Thus the Royal Court determined that the direction that would be given to the Jurats was that they had to be sure that one of the defendant’s purposes was a purpose set out in art 34(1)(b). This judgment also included a decision on admissibility of evidence.

### **C. Abuse of process**

57 Mr Bhojwani made a number of applications in relation to allegations of abuse of process by the Attorney General. These applications may be classified as, firstly, that which related to the reason why the defence contended it had been decided to prosecute Mr Bhojwani and, secondly, those which related to the unlawful nature of the evidence gathering process in Nigeria whereby evidence for the prosecution had been provided to Jersey.

#### **1. The decision to prosecute Mr Bhojwani**

58 In relation to the decision to prosecute, the defence first sought disclosure from the prosecution on the basis that there were reasonable grounds for believing that the information sought would be relevant to a defence application that the case against Mr Bhojwani should be stayed as an abuse of process. It was a case where the defence had some information, but sought more in order to assist it to make a substantive application. In particular, the defence sought disclosure of material relevant to the States of Jersey’s knowledge of, and role in, negotiations which had taken place between Mr Bhojwani and Nigeria with a view to the settlement of Nigeria’s claims to the monies held in his accounts in Jersey, together with *inter alia* material relevant to the arrangements which existed between Jersey and Nigeria concerning the ultimate division between them of those funds, whether by settlement or a confiscation order following a conviction. The defence indicated that it was likely to contend that Jersey had played a role in dissuading Nigeria from accepting a settlement and the motivation for such an intervention may well have been the relative sums of money which would be received by Jersey in the event that Nigeria accepted the settlement figure, as compared to the sum which may have flowed to Jersey in the event of a criminal prosecution and subsequent confiscation proceedings. The defence was able to identify the type of abuse of process application to which the requested material was relevant, namely the second limb of the abuse of process test set out in *R v Beckford*,<sup>49</sup> that is an application based on an argument that in all the

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<sup>46</sup> *4Cast Ltd v Mitchell (Inspector of Taxes)* (2005) S.T.C.(S.C.D.) 287, *R v Southwalk Crown Court ex p Bowles* (1998) AC 641, *Inland Revenue Commrs v Hashmi* (2002) EWCA C iv 981.

<sup>47</sup> Unreported 18 October 1999.

<sup>48</sup> Para 32, [2008] JRC 172A.

<sup>49</sup> (1996) 1 Cr App R 94.

circumstances of the case it would be unfair to try the defendant. The basis for the contentions that the defence envisaged making were denied by the prosecution.

59 The Royal Court refused the application for disclosure. The Court concluded that even if the allegations were made and were made good, they did not have the potential to bring Jersey's administration of justice into disrepute amongst right thinking people. The Proceeds of Crime (Jersey) Law 1999 was aimed at combating international crime and the laundering of proceeds of that crime. The local legislation envisaged co-operation between states which included asset sharing arrangements. This, itself, necessitated discussions between jurisdictions which would include the potential for sharing money duly confiscated. The purpose of confiscating proceeds of crime was not for the confiscating state to profit financially but to remove from criminals the benefit of that crime. The Court concluded—

“There have been no negotiations between the Attorney General of Jersey and the defendant. Even if there had been, it is clear that a subsequent prosecution would not be an abuse of process unless there had been a clear statement to the defendant by the prosecutor that there would not be a prosecution.”<sup>50</sup>

The Court found that was not the case here. It continued—

“In my view there is no conduct which has been drawn to the Court's attention in its supervisory role that has the nature or character of abuse and which taken at its highest could lead to a stay of the prosecution as an abuse of process. Furthermore the central allegation of interference has been denied by the Attorney General and there are no reasonable grounds to suspect that his denial is not true or accurate. To order disclosure would be to embark upon an expensive and time wasting exercise which would have the potential of delaying a prosecution for which the Attorney General has determined there is a strong Jersey public interest.”<sup>51</sup>

60 The defence appealed unsuccessfully against this decision.<sup>52</sup>

61 Notwithstanding the Royal Court's decision not to order disclosure, the defence applied to develop its substantive arguments on abuse and to adduce the evidence it had obtained from elsewhere in support. As the Royal Court recorded—

“The defence put its case for a stay on what it submitted could be best articulated as a matrix of facts which included elements to which it is possible to apply the ‘labels’ applied by the authorities to conduct characterised as an abuse of process. It invited the Court to consider the whole of the conduct identified when making a

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<sup>50</sup> Para 47, 2010 JLR 1.

<sup>51</sup> Para 48, 2010 JLR 1.

<sup>52</sup> See [2010] JCA 024 from para 143.

determination as to whether, in all the circumstances, it was 'fair' that the defendant should be tried on the indictment proffered against him."<sup>53</sup>

62 Based on that evidence, including the Attorney General's dealings with another party caught up in the Abacha investigations, a Mr Bagadu, the defence submitted that the Attorney General had an arrangement with Nigeria outwith the arrangements contemplated by the 1999 Law by which Jersey was to receive 10% of any amounts returned to Nigeria, what the defence called a "commission". Such an arrangement it was alleged existed outside any statutory regime and outside any judicial scrutiny and in consequence there were no safeguards of transparency applicable to the application of monies to the criminal offences confiscation fund. Succinctly put, the defence alleged this would amount to a policy of non-prosecution for profit. If such an arrangement did exist and provided the backdrop to the exercise of the decision to prosecute Mr Bhojwani, the defence alleged that this represented an affront to the public conscience justifying an immediate stay or an order for disclosure so that the defence could develop its substantive arguments. The Royal Court rejected this submission on the basis that—

"even if the Attorney General had sought in other cases, in particular that of Mr Bagadu, to earn Jersey commissions by not prosecuting, it is simply irrelevant to this case where there is a prosecution ... I agree with the prosecution's submission that this prosecution avoids all the 'problems' identified by the defence because no financial payment will be made to any Jersey body unless the defendant is convicted and the funds confiscated."<sup>54</sup>

63 The defence argued, in addition, that the conduct of the Law Officers, taken as a whole, gave rise to a legitimate expectation on the part of the defendant that, in the event that he reached an agreement with Nigeria at a price acceptable to Jersey, he would satisfy Jersey's public interest in the pursuit of a prosecution against him. It was asserted that Mr Bhojwani believed he had achieved this and therefore the bringing of the prosecution was a breach of his legitimate expectation. Having considered the facts put before it, the Court indicated that it was "doubtful" whether a legitimate expectation could have any application in cases such as the present one, citing *R v Abu Hamza*.<sup>55</sup> It stated—

"Importing such concepts into this field risks embroiling the prosecution in the kind of arguments being pursued by the defence in this case, when it is in the public interest that those who are reasonably suspected of criminal conduct should be brought to trial. Only an unequivocal representation of the kind described can justify the Court taking the exceptional step of staying a prosecution on the grounds of abuse of process. The defence do not assert that there has been such a representation."

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<sup>53</sup> Para 6, [2008] JRC 129.

<sup>54</sup> *Ibid*, para 18.

<sup>55</sup> (2007) QB 659.

The Court continued—

“I do not doubt that the defendant, who like Mr Bagadu, was not at the relevant time in the jurisdiction (and would therefore have to be located and extradited) was hoping to conclude an agreement with the Republic of Nigeria and Jersey by which funds would be repaid to Nigeria and the prosecution in Jersey would be dropped. For that purpose, propositions would have to be put to both the Republic of Nigeria and Jersey in the hope of satisfying their respective public interests. There could be nothing objectionable and indeed one would expect the authorities of each jurisdiction to indicate, in response to these proposals, where their respective public interests lay. One of the factors that the Attorney General would no doubt weigh in the balance would be the cost to the Island (and risk) involved in locating and extraditing the defendant. It is possible that if both jurisdictions could be satisfied, then such an agreement could have been achieved.”<sup>56</sup>

64 The defence also submitted that the subjecting of Mr Bhojwani’s bank accounts in Jersey to the withholding of consent under the provisions of art 32(3)(b)(i) of the 1999 Law,<sup>57</sup> over a period of six years without any application by the prosecution to obtain a *saisie*, was inherently improper and unfair and amounted to the relevant assets being “held hostage,” as well as being a breach of his European Convention rights (part 1 of art 7 and part 2, the first protocol of the ECHR). The Royal Court was unsympathetic to this submission, indicating that, in accordance with Jersey case law, Mr Bhojwani had two courses of option open to him. He could either seek judicially to review the decision of the police not to consent to payment, where he would face the high threshold of showing that the decision was one to which they could not reasonably have come, or to issue an ordinary action against the Bank seeking an order that they comply with their mandate to pay the money out as instructed.<sup>58</sup> Nor did the Court see how art 7 had any application.<sup>59</sup>

## **2. The use by the prosecution of the evidence gathered in Nigeria**

65 In relation to the defence contention as to the unlawful nature of the evidence gathering process in Nigeria whereby evidence for the prosecution had been provided to Jersey, some background detail will assist at this stage.

66 The Attorney General sought the assistance of Nigeria in the evidence gathering process in relation to his investigation into Mr Bhojwani. He did so by two letters of request dated 17 June and 15 November 2002 (the former was the substantive request, the latter a chaser) issued under the Criminal Justice (International Cooperation) (Jersey) Law 2001. The defence, firstly, took issue with the specific form of the letters of request, asserting that on a proper construction of the letters the evidence gained thereby could not

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<sup>56</sup> *Ibid*, paras 26 and 30.

<sup>57</sup> See *Ani v Barclays Private Bank & Trust* 22 April 2004, Jersey, unreported, for an explanation of how this works in practice.

<sup>58</sup> *Ibid*, para 34.

<sup>59</sup> Para 35.

be used in the prosecution of Mr Bhojwani. Secondly, following proceedings issued by Mr Bhojwani in Nigeria, on 15 October 2009 the Nigerian High Court ruled that the evidence gathered as a result of the Attorney General's letters of request had as a matter of Nigerian law been unlawfully obtained and transmitted to Jersey, and that, as a result, Nigeria's sovereignty had thereby been breached.

67 There followed over a three month period, a number of communications from Nigeria (including from the Attorney General of Nigeria) which required the evidence gathered from Nigeria not to be used in the prosecution of Mr Bhojwani, for it to be returned to Nigeria and which indicated that Nigerian witnesses would no longer be available for the trial. The decision of the Nigerian High Court and the events that unfolded in its wake brought applications from the defence that the evidence so obtained should be excluded on the basis of comity and/or abuse of process. It is worth noting a particular difficulty which Mr Bhojwani found himself in. Following his arrest, he obtained Nigerian legal advice as to the lawfulness of the evidence gathering process in Nigeria. That advice was that the gathering and therefore the transmission was unlawful. In addition, in order to ensure that this unlawfully gathered evidence was not subsequently used against him in Nigerian proceedings he needed to obtain a declaratory judgment within the relevant limitation period which was shortly to expire. This he did, understandably. However, the declaration as to the unlawfulness of the Nigerian process, in the end, did nothing to stop the evidence so gathered being used against him at his trial and in fact no doubt caused the refusal by Nigeria to allow Nigerian witnesses to attend the trial. This resulted in the prosecution's Nigerian witness statements being read in, no opportunity being afforded to Mr Bhojwani to cross-examine these witnesses and in his inability to call the evidence of Colonel Marwa in his defence. To compound this state of affairs, the Royal Court, in determining whether to allow the prosecution to read in the witness statements, considered that Mr Bhojwani had brought this state of affairs upon himself by issuing the Nigerian proceedings.<sup>60</sup> Can there be a better example of a Hobson's choice in a multi-jurisdiction prosecution?

***a. The letters of request***

68 The application brought in relation to the letters of request focused on art 4(4) of the Criminal Justice (International Cooperation) (Jersey) Law 2001 which states—

“Except with the consent of the court, tribunal or authority that supplied the evidence, evidence obtained by virtue of a letter of request can not be used for any purpose other than that specified in the letter.”

69 The letters of request spoke only of requests for the purpose of investigation. The defence contended that neither letter specified the purpose of using the evidence sought

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<sup>60</sup> Para 32, 2010 JLR 153.

at the trial of Mr Bhojwani in Jersey.<sup>61</sup> Accordingly, it could not be used for such. The defence referred to the case of *R v Malcolm Gooch*<sup>62</sup> and *R v Ibor*<sup>63</sup> in support.<sup>64</sup>

70 The Royal Court did not accept *Gooch* as authority for the proposition that art 4(4) was to be strictly construed. Rather, it found, *Gooch* was concerned with the “specialty” principle; notwithstanding that the case made no reference to that principle. The specialty principle is a principle drawn from the law of extradition and which prescribes that a State must not prosecute for an offence other than that stated in the request for extradition without the prior consent of the requested State. The Court found that the letters of request did sufficiently specify the purpose for which the evidence was sought—

“which by necessary implication extended to criminal proceedings against the person and for the criminality specified, and that there has been no breach of the letter and spirit of the Co-operation Law.”

“If I am wrong in so finding, then I find that there is an overwhelming inference that the authority ‘that supplied the evidence’ namely the Special Investigation Panel, consented to the evidence being used for the purposes of a criminal proceedings, again through the provision of Jersey police statements and procuring the witnesses to come and give evidence. Thus if a consent was necessary for the evidence to be used for criminal proceedings, it was in fact given.”<sup>65</sup>

***b. The use of the Nigerian evidence in the wake of the declaration that it had been obtained unlawfully***

71 The declaratory judgment of the Nigerian High Court on 15 October 2009 that the evidence gathered as a result of the Attorney General’s letters of request had been unlawfully obtained and transmitted to Jersey as a matter of Nigerian law, and the subsequent demands from Nigeria that the evidence not be used in the Jersey prosecution spawned three applications to the Royal Court. Two applications were made to the trial Court and one to a separately constituted Royal Court by way of an application for leave for judicial review of the Attorney General’s decision to use the Nigerian evidence notwithstanding Nigeria’s requests to the contrary.

72 The applications to the Royal Court sought a stay of proceedings on the basis that to allow the Attorney General to use the evidence in the face of Nigeria’s opposition was in breach of comity and/or amounted to allowing an abuse of process by the Executive.<sup>66</sup> Drawing on a number of English and Commonwealth cases which spoke to the principle of

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<sup>61</sup> This contrasted with the letter of request to the Indian authorities which specified the purpose as criminal and confiscation proceedings.

<sup>62</sup> [1999] 1 Cr App R (S) 283.

<sup>63</sup> Unreported, 7 June 2010 (Southwark Crown Court).

<sup>64</sup> Reference was also made to *R v Gordon Foxley* [1995] 2 Cr App R 523.

<sup>65</sup> Paras 55–56, 2010 JLR 128.

<sup>66</sup> [2010] JRC 128; [2010] JRC 027; [2010] JLR N [14].

comity, the defence in particular focused on the English Court of Appeal decision in *R v CII, AP & TI*<sup>67</sup> as a basis for the Court's jurisdiction and a good example where it might be exercised. There the Court disallowed the use of evidence at trial when it had been received without the requisite consent of Nigeria's Attorney General.

73 The Royal Court did not find this authority supportive of the defence position. It was, the Court concluded—

“no authority for the proposition that a trial judge can exclude evidence on the grounds for comity. It is entirely concerned with the interpretation of a specific treaty between the United Kingdom and Nigeria which does not have application to the requests made by Jersey to Nigeria in this case.”<sup>68</sup>

Ultimately, it concluded—

“There are no judicial or manageable standards by which a domestic court can judge such a request [as that made by Nigeria for the non-use and return of the evidence]. To accept the defence's invitation is to accept an invitation into a judicial no-man's land, one in which delicate questions of mutual relations going beyond this case may well be raised and which a domestic court is ill equipped to deal with.”<sup>69</sup>

“In the Court of Appeal decision in *Buttes*, the Court refrained from exercising a power clearly vested in it in the interests of international comity. In this case I am being asked to invoke the Court's inherent jurisdiction in a manner which is without precedent either in this or the English jurisdiction and upon grounds which a domestic court is not equipped to evaluate.”<sup>70</sup>

74 In relation to the defence application for a stay of the prosecution on the ground that it was an abuse of the Attorney General's power to seek to adduce the Nigerian evidence in the Jersey proceedings in the face of the Nigerian Attorney General's assertion that its use constituted a violation of Nigerian's sovereignty, the Court again concluded that the defence was seeking to draw it into a judicial no-man's land, dealing with issues of mutual relations between Jersey and Nigeria with which it was not equipped to deal. In addition, it found that the defence case did not meet the settled test established in the Court of Appeal decision in *Warren v Att Gen*.<sup>71</sup> This was not, it concluded, a situation in which, but for an abuse of executive power, the defendant would not be before the Court at all. There had been no breach of the rule of law by the Jersey Executive. All that was being

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<sup>67</sup> [2008] EWCA 3062.

<sup>68</sup> Para 14, [2010] JRC 027.

<sup>69</sup> Para 25, [2010] JRC 027.

<sup>70</sup> Para 26, [2010] JRC 027.

<sup>71</sup> [2008] JCA 135.



impugned by the defence was the decision of the Attorney General to use admissible evidence at the trial of Mr Bhojwani.<sup>72</sup>

75 In relation to the judicial review application, the defence sought an order quashing the Attorney General's decision to adduce and rely upon the Nigerian evidence in the Jersey trial and not to return the evidence to the Nigerian authorities. The application was not heard until after the criminal trial had commenced. Two grounds were put forward. First, the Attorney General did not have the power to decide how Jersey should respond to Nigeria's request and accordingly his decision was *ultra vires*. It was asserted that the decision resided in the Chief Minister who was the person in Jersey responsible for external relations. Second, even if the Attorney General were the correct person to have taken the decision, he failed to take into account a material consideration, namely that a refusal to accede to Nigeria's request would constitute a breach of international law and would also be a breach of the principles of comity.

76 The Royal Court declined the application for leave on the basis that the applicant had an alternative remedy. It recorded—

“The applicant has run the arguments before Clyde-Smith, Commr but has lost and the evidence has in fact now been admitted. The trial is shortly to conclude. If the applicant is acquitted, the issue will become moot so far as he is concerned. If he is convicted, he will be able to raise on appeal against conviction all the points which he seeks to raise by way of judicial review. Reduced to its essentials, the allegation is that the Nigerian evidence was obtained unlawfully under Nigerian law and ought to have been returned to Nigeria upon its demand which was made prior to the commencement of the criminal trial. Such matters are entirely within the province of a trial judge when considering whether to allow evidence to be admitted or whether there has been an abuse of process. As Advocate Langlois very properly conceded, the sole purpose in seeking a decision from the civil court on judicial review is to strengthen the applicant's hand on any appeal. That is just the sort of parallel or satellite litigation which [*Sharma v Brown-Antoine*<sup>73</sup>] discouraged.”<sup>74</sup>

77 The authors would make one point in relation to that decision. It is difficult to see how it could be conceived that Mr Bhojwani could have made the same arguments of *ultra vires* and a failure to take into account a material consideration in the context of a criminal appeal. Those are public law matters which sit outside the criminal context before a trial court.

#### **D. Evidence obtained in India**

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<sup>72</sup> Paras 15–40, [2010] JRC 027.

<sup>73</sup> [2007] 1 WLR 780.

<sup>74</sup> Para 19. See more generally paras 18–19; 2010 JLR 181.

78 There were a number of other pre-trial applications which resulted in reasoned decisions of the Royal Court. Space does not allow that we refer to them all. However we refer to two prosecution applications which were unusual and may be of interest to the reader. Both concerned the obtaining of evidence from India.

79 On the application of the defence, the Bailiff issued letters of request to the Chief Magistrate of Chennai in India for the obtaining of evidence of three witnesses. The Chief Magistrate ordered an Indian barrister to be the commissioner with power to summon the witnesses and record the evidence given. In the event, the evidence of two witnesses was taken on two separate trips to India. The prosecution made two applications in relation to this process.

80 The first application sought directions from the Royal Court as to the status and use that may be made by the defence of an art 2 Investigation of Fraud (Jersey) Law 1991 interview during the examination in chief of one of the proposed witnesses. The directions sought were clearly intended to restrict the use that could be made of the interview. The Royal Court rejected the application, finding it wrong in principle to give such directions. In particular, it found that it would be wrong and contrary to the principles of comity for the Royal Court to seek to give direct orders to the Indian presiding judge as to how the commission hearing should proceed and would therefore also be wrong to seek to do so indirectly through personal orders against officers of the Royal Court (*i.e.* counsel) who might be attending the hearing. In addition, there was a risk that, if any issue arose in relation to any directions given or for the need for further directions, the presiding judge in India might be inclined to refer the matter back to the Royal Court for clarification.<sup>75</sup>

81 The second application (made after the evidence of the first Indian witness had been taken) sought the attendance of the Jersey judge appointed to deal with the Bhojwani trial (Clyde-Smith, Commr) at the taking of evidence in India, not to take any part in relation to that actual process, but rather to be available to make decisions on points of Jersey law in the event that such should arise. The application was said to be driven by efficiency since any subsequent ruling that evidence obtained was inadmissible as a matter of Jersey law might result in a time-consuming process to edit the transcripts of evidence. The Royal Court declined the application, concerned that an interaction of a foreign court and a local court would give rise to confusion and, more fundamentally, a judge of the Royal Court could give rulings only when presiding over a duly constituted sitting of the Royal Court. There was no precedent for the Royal Court sitting outside its own jurisdiction. In addition, pursuant to art 72 of the Loi (1864) Réglant la Procédure Criminelle, the accused is required to be present at all sittings of the Court involving his prosecution and this was not possible in circumstances where Mr Bhojwani's bail conditions required him to remain in Jersey.<sup>76</sup>

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<sup>75</sup> [2008] JRC 148A.

<sup>76</sup> [2010] JLR N [3] and [2009] JRC 056.

82 Following the taking of the evidence in India, which process pre-dated the commencement of the trial in Jersey, the prosecution sought to oppose the disclosure of the transcripts and DVD recordings of the evidence of the witnesses. It did so on the basis of art 77 of PPCE 2003 which sets out the general rule, subject to the discretion of the Court, that an accused wishing to give evidence in his own defence must do so before any other defence witnesses of fact. The equivalent rule in England and Wales is explained in *R v Smith (Joan)*<sup>77</sup> as seeking to avoid the temptation of an accused person to trim his or her evidence to be consistent with what his witnesses have said. The Royal Court gave leave for such disclosure pursuant to art 77 of PPCE 2003. It observed the anomalous position that would in effect result if evidence were taken on commission in Jersey, where the accused would be required to be present (art 70 of the Loi (1864) Régulant la Procédure Criminelle), but if taken abroad would be barred from attending. In balancing advantage and disadvantage, the Court noted that whilst evidence obtained on commission pre-trial might give an accused the opportunity to trim his or her evidence, it also enabled the prosecution to have advance notice of what a defence witness will say. Furthermore, the Court concluded—

“In my view ... it would wholly undermine the relationship between the defence and the defendant in this case if it can not reveal to him what transpired at the Commission hearings in India.”

The Court doubted whether leave was required under art 77 of PPCE, but to avoid any doubt granted it.<sup>78</sup>

### **Appeal post-conviction and sentencing**

83 By notice of appeal dated 26 May 2010 Mr Bhojwani appealed against his conviction. There were 12 grounds of appeal. Ground 2 may be of particular interest.

84 Ground 2 of the notice of appeal alleged that verdict of the Jurats was unreasonable and/or could not be supported on the evidence. The Ground is based on part of art 26(1) of the Court of Appeal (Jersey) Law 1961 (“the 1961 Law”) which states—

“26 Determination of appeals in ordinary cases

(1) Subject to the following provisions of this Part, on any appeal against conviction, the Court of Appeal shall allow the appeal if it thinks that the verdict should be set aside on the ground that it is unreasonable or cannot be supported having regard to the evidence, or that the judgment of the court before which the appellant was convicted should be set aside on the ground of a wrong decision of any question of law or that, on any ground, there was a miscarriage of justice, and in any other case shall dismiss the appeal:

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<sup>77</sup> [1968] 1 WLR 636.

<sup>78</sup> [2009] JRC 055 and/or 2010 JLR N [2].

Provided that the Court may, notwithstanding that it is of opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if it considers that no substantial miscarriage of justice has actually occurred.”

85 The interpretation of the words “unreasonable or cannot be supported having regard to the evidence” by a Jersey Court rests with the decision of the Privy Council in *Att Gen v Edmond-O’Brien*.<sup>79</sup> In that case, the Privy Council considered an appeal by the Jersey Attorney General against a decision of the Court of Appeal to set aside a verdict of the Inferior Number on the ground that it could not be supported by the evidence. The judgment records that the decision of the Court of Appeal appeared to be the only recorded instance of a successful appeal against a verdict of the Jurats on that ground.<sup>80</sup> Lord Hoffmann referred to *Aladesuru v R*,<sup>81</sup> which concerned a Nigerian statute in similar terms to art 26(1), which the Privy Council held was to be interpreted as precluding the Court of Appeal “from reviewing the evidence and making its own evaluation thereof”. Lord Hoffmann also referred to *R v Hopkins-Husson*<sup>82</sup> as establishing the test to the effect that—

“If there is evidence to go to the jury, and there has been no misdirection, and it cannot be said that the verdict is one which a reasonable jury could not arrive at, this Court will not set aside the verdict of guilty which has been found by the jury.”<sup>83</sup>

86 However Lord Hoffmann went on to say—

“In England, the test laid down in *R v Hopkins-Husson* was found to be somewhat too restricted and was replaced (by s 2 of the Criminal Appeal Act 1968) with a duty to allow the appeal where ‘under all the circumstances of the case [the verdict] is unsafe or unsatisfactory.’ No such change has been made in Jersey but their Lordships would not exclude the possibility of a more liberal interpretation of the old statutory language.”<sup>84</sup>

87 Mr Bhojwani invited the Court of Appeal to apply a “more liberal interpretation of the old statutory language.”

88 Article 26(1) of the 1961 Law reflects s 4(1) of the Criminal Appeals Act 1907 (“CAA 1907”) which was applicable to England and Wales. The CAA 1907 was first amended by

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<sup>79</sup> [2006] JLR 133.

<sup>80</sup> The difficulty with such a statistic is, of course, is that it gives no clue as to the reason behind it. There could be a number of reasons, the most obvious being that the test on appeal presents such a high threshold to the appellant.

<sup>81</sup> [1956] AC 49.

<sup>82</sup> [1950] 34 Cr App R 47.

<sup>83</sup> *Ibid*, at para 23.

<sup>84</sup> *Ibid*, at para 25.

s 2(1) of the Criminal Appeals Act 1968, then by s 44 of the Criminal Law Act 1977, then by s 2(1) of the Criminal Appeal Act 1995. The Criminal Appeals Act 1968 (as originally enacted) allowed the Court of Appeal under s 2(1)(a) to allow the appeal *inter alia* if “the verdict of the jury should be set aside on the ground that under all the circumstances of the case it is unsafe or unsatisfactory”. Following the amendment to the wording by the Criminal Appeal 1995 the wording under s 2(1) of the Criminal Appeals Act 1968, which is the current wording, became—

“(1) Subject to the provisions of this Act, the Court of Appeal—

“(a) shall allow an appeal against conviction if they think that the conviction is unsafe; and

“(b) shall dismiss such an appeal in any other case.”

89 Article 26(1) of the 1961 Law was promulgated at a time when s 4(1) of the CAA 1907 was already under criticism which resulted in its significant amendment in 1968.<sup>85</sup> And yet the wording of s 4(1) finds itself replicated in many parts of the Commonwealth, including Guernsey (art 25(1) of the Court of Appeal (Guernsey) Law 1961), Australia (which operates a federal system where the criminal appeal provisions are in common form in the various states),<sup>86</sup> New Zealand (s 385(1) of the Crimes Act 1961) and Canada (s 686(1)(a) of the Canadian Criminal Code).

90 Nonetheless, the appellate Courts of Australia, New Zealand and Canada have taken a more expansive view of their role in criminal cases where the ground is “unreasonable or cannot be supported having regard to the evidence”, moving away from a bare sufficiency of evidence test to one where the appellate Court analyses the whole of the evidence to determine if the verdict was properly reached. For a detailed analysis see in the first instance the comprehensive review of relevant authorities from New Zealand and other Commonwealth jurisdictions by the New Zealand Court of Appeal in *R v Munro*,<sup>87</sup> then the cases of *M v R*,<sup>88</sup> *Owen v R*<sup>89</sup> and *R v Biniaris*.<sup>90</sup>

91 The Court of Appeal in Bhojwani dismissed the appeal on all grounds.<sup>91</sup> On the interpretation of art 26(1) of the 1961 Law, the Court of Appeal rejected the possibility of a “more liberal interpretation of the old statutory language” for a number of reasons. Firstly,

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<sup>85</sup> See for example the Report of the Interdepartmental Committee on the Court of Criminal Appeal presented to the UK Parliament in August 1965, known as the *Donovan Report*; the comments of Viscount Dilhorne and Kilbrandon, LJ in *Stafford v DPP* (1974) AC 878, at 891 and 911; Michael Dean, “Criminal Appeal Act 1966” in *The Criminal Law Review* [1966] 535.

<sup>86</sup> See *M v R* (1994) HCA 63.

<sup>87</sup> (2007) NZCA 510.

<sup>88</sup> (1994) HCA 63.

<sup>89</sup> [2008] 2 NZLR 37.

<sup>90</sup> (2000) SCC 15.

<sup>91</sup> See [2011] JCA 035.

citing *inter alios* *Hall v Att Gen*,<sup>92</sup> *Barette v Att Gen*,<sup>93</sup> *Styles v Att Gen*<sup>94</sup> and *Hamilton v Att Gen*,<sup>95</sup> because—

“This Court has consistently and recently approached its role in a way which recognises the difference between the Jersey and the English statute ... Notably it has been observed that the ‘unsafe and unsatisfactory verdict’ is no part of Jersey law ...”

Secondly—

“In principle, the difference in statutory language ought rationally to lead to different results and ought sensibly to be respected. If the States wished to align Jersey to mainland law in this area, they could have done so. Our researchers suggest that the issue of reform has never been seriously raised: the record shows that, even if it had been raised, it was rejected.”<sup>96</sup>

Thirdly—

“Lord Hoffmann’s *dictum* was *obiter* and provisional (‘would not exclude the possibility’) and fell far short of a direction to this Court to abandon its longstanding jurisprudence. Nor did Lord Hoffmann clarify precisely what liberal interpretation he would adopt.”<sup>97</sup>

92 The Court of Appeal also considered a costs application from the prosecution and, helpfully for the future, construed art 3(1) of the Costs in Criminal Cases (Jersey) Law 1961 as not prescribing a presumption that costs follow the event.<sup>98</sup>

### **A postscript**

93 Leaving aside the facts of this case, at the end of a long and continuing process, there is need to pause for thought. In promulgating art 34(1)b) of the 1999 Law, the States of Jersey decided that its anti money laundering efforts can punish someone for conduct which took place in a far flung jurisdiction as if his or her conduct actually took place in

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<sup>92</sup> 1995 JLR 102.

<sup>93</sup> 2006 JLR 407.

<sup>94</sup> 2006 JLR 210.

<sup>95</sup> [2010] JCA 136A.

<sup>96</sup> Although, it is relevant to note that the issue has been the subject of questions in the States: see the Official Report of the States Sitting for Tuesday 28 April 2009 (para 3.15) and 13 September 2010 (para 2.12). In reply to the latter question, the Chief Minister asserted: “It is not apparent to me that the cumulative effects of the grounds set out in the Jersey law are, in substance, very different from the United Kingdom position and I have seen no case to support the proposition that the English position ... is necessarily better than ours.” The source of these surprising conclusions is unclear.

<sup>97</sup> Paras 201–216.

<sup>98</sup> [2011] JCA 035, para 2. This is particularly useful in light of recently expressed public concern as to when the prosecution decide to seek costs against a defendant: see *The Jersey Evening Post* dated 30 November and 20 December 2010, the latter including an interview with the Attorney General on this issue.

Jersey. This is so even though the person in question is unlikely to have given a thought to Jersey and its laws, assuming he or she had even heard of Jersey, at the relevant time, let alone been conversant with how it views conduct and what its concepts of honesty and dishonesty are. Such a state of affairs represents imperialism of the highest order: we in Jersey will judge your conduct wherever it occurred by our standards and if we find that conduct to be criminal by our standards we can imprison you for up to 14 years and confiscate your money. No right thinking person in Jersey would argue that money laundering is not pernicious, especially in an Island whose economy is dominated by financial services offered to the world and as a result continually and closely scrutinised by world powers. However no right thinking person in Jersey would also doubt that a touchstone of Western democracy is fairness and equality before the law.

94 True, the States of Jersey might find refuge in the fact that when art 34(1)(b) was promulgated it reflected the then equivalent provision in English law. Such an observation does little to weaken the responsibility of the States of Jersey to scrutinise closely what it proposes be the law of Jersey, all the more so when English law has abandoned the severity of the single criminality test in its unqualified form. A corresponding reform does not appear even to be on the agenda, let alone the horizon, of the Jersey legislature. And right thinking people cannot be optimistic that it will be. After all, it is well over three years since the Royal Court in *States Police (Chief Officer) v Minwalla*,<sup>99</sup> referred to the changes in the UK legislation (upon which the Jersey law is based) in relation to the informal freezing of assets suspected of being criminally tainted and recorded—

“Finally, we would refer back to para. 20 of this judgment which describes the changes in the UK legislation (upon which ours is based) in order to avoid the practical difficulties and potential injustice referred to in that para. The English Court of Appeal has held that the legislation as amended strikes a fair balance between the competing interests. The legislation in Jersey remains in its original form and we would urge that immediate consideration be given to introducing amendments similar to those which have been introduced in the United Kingdom.”

95 The response from the legislature has been a deafening silence.

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<sup>99</sup> 2007 JLR 409, para 75.