

JERSEY / JUDGMENT

AG v Bhojwani [2008]

JRC 130 (12 August 2008)

[2008] JRC 130

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JUDGMENT

THE COMMISSIONER: 1. The defendant stands indicted for two counts of converting the proceeds of criminal conduct and one count of removing the proceeds of criminal conduct, contrary to the provisions of article 34(1)(b) of the Proceeds of Crime (Jersey) Law ("the 1999 Law"). His trial is due to commence on 20 th October 2008. 2. On 26 th February 2008, the Court ordered a preparatory hearing under part 10 of the Police Procedures and Criminal Evidence (Jersey) Law 2003 ("PPCE") in order that it could rule on certain issues of law described as "the predicate conduct application", "the purpose application" and "the particularisation application". The Court sat to hear these applications on 17 th and 18 th April 2008 and, following time for further research and written submissions on the predicate conduct application, the 11th July 2008 when judgment was reserved. 3. Article 34(1) of the 1999 Law is in the following terms:- "(1) a person is guilty of an offence if the person - (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". 4. "Criminal conduct" is defined in Article 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". 5. 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". 6. The three counts in the indictment are in similar terms and by way of illustration I set out below the terms of count 1:- "Statement of offence Converting the proceeds of criminal conduct, contrary to article 34(1)(b) of the Proceeds of Crime (Jersey) Law 1999. Particulars of Offence Raj Arjandas BHOJWANI, between st October 2000 and 30 th October 2000 converted the proceeds of criminal conduct, namely credit balances in the names of TaTa Overseas Sales and Services Ltd SA and Britannic Trade Corporation at the Bank of India in Jersey, into six banker's drafts totalling approximately US\$ 43.9M, for the purpose of avoiding

prosecution for an offence listed in Schedule 1 to the said Law or the making or enforcement of a confiscation order against him". 7. As can be seen, there are three ingredients to the offences with which the defendant is charged, namely:- (i) conversion or removal of (ii) property that represents the defendant's proceeds of criminal conduct (iii) for the purpose of avoiding prosecution or the making or enforcement of a confiscation order or both. 8. The criminal conduct alleged concerns two contracts negotiated between the defendant and officials of the military dictatorship of the President of the Republic of Nigeria, General Sani Abacha, in 1996 and 1997 for the supply of vehicles to the Republic of Nigeria at what the prosecution say were vastly inflated prices. The prosecution will seek to prove that the sums payable under these contracts, which it claims included an illegal surplus of some US\$ 113M, came to the defendant's company accounts at Bank of India in Jersey. Many millions were then allegedly transferred by the defendant to bank accounts in other countries linked to the Abacha regime. The alleged conversion and removal, which are the subject of the indictment and which involve some six banker's drafts, are said to have taken place in October and November 2000. 9. The prosecution have provided the defence with a case summary which by virtue of an order of the Court of 4th April 2008 has now been served upon the defence as a case statement pursuant to article 86(4) of PPCE . The case statement runs to 172 paragraphs broken down into the following sections, namely, introduction, case outline, the case in detail (cross referenced to statements and exhibits), propositions of law and consequences. Predicate Conduct Application 10. The criminal conduct alleged by the prosecution occurred in Nigeria and, to come within the definition of criminal conduct for the purposes of the 1999 Law, the prosecution must show that if that conduct had occurred in Jersey, it would have constituted an offence in Jersey, at the time at which the conduct in fact occurred, specified in Schedule 1, namely an offence in Jersey for which a person is liable on conviction to imprisonment for a term of one or more years. The prosecution assert that the offence in Jersey the alleged conduct would have constituted is the customary law offence of aiding and abetting another person to misconduct himself in a public office, the substantive offence being one that is recognised under English common law (as well as other common law jurisdictions) and which it says (following in part the decision of the English Court of Appeal in Attorney-General's Reference (No. 3 of 2003)

[2005] QB 73) is committed were:- (i) a public officer acting as such; (ii) wilfully neglected to perform his duty and/or wilfully misconducted himself; and (iii) to such a degree as to amount to an abuse of the public's trust in the office holder. The defence say there is no such substantive offence known to Jersey customary law. The onus of establishing that a particular category of crime is known to Jersey customary law rests firmly on the prosecution (see AG v Thwaites

[1978] JJ 179). 11. Before turning to the evidence for the existence of this offence under Jersey customary law, it is helpful to consider briefly the history of the offence which originated under English common law. That is usefully summarised in the decision of the Supreme Court of Canada in R v Boulanger

- [2006] 2 S C R 49, 2006 SCC 32, in which the elements of that part of the offence of misconduct in public office which had been codified under Canadian law (misfeasance), were considered and upon which I draw. 12. The first mention of the offence dates back to 1704:- "Every public officer is indictable for misbehaviour. Per Curiam. If a man be made an officer by Act of Parliament, and misbehave himself in his office, he is indictable for it at common law, and any public officer is indictable for misbehaviour in his office. (Anonymous (1704), 6 Mod. 96, 87 E. R. 853 (K. B.))" 13. The case which provides the seminal formulation of the offence is *R v Bembridge* (1783), 3 Dougl. 327, 99 E. R. 679 (K. B.) in which Lord Mansfield set out two basic principles in support of the existence of the offence, first 'that a man accepting an office of trust concerning the public, especially if attended with profit, is answerable criminally to the King for misbehaviour in his office' (p.681); and second, that 'where there is a breach of trust, fraud or imposition, in a matter concerning the public, though as between individuals it would only be actionable, yet as between the King and the subject it is indictable' (p.681). 'Misbehaviour', 'breach of trust', 'fraud' and 'imposition' were not defined. 14. *Bembridge* and the cases that followed it were concerned with positive misfeasance (or malfeasance) - acts committed with a corrupt, dishonest or oppressive intent. However, around the same time, another branch of misconduct in public office emerged which concerned nonfeasance - the neglect of official duties. In contrast to the offence of misfeasance in public office, the offence of nonfeasance did not require a specific intent or mens rea. 15. Recognising their distinct elements, Sir James F Stephen in his *Digest to the Criminal Law* (1887) divided these branches into two distinct offences:- "Article 121 Frauds and breaches of trust by officers. Every public officer commits a misdemeanor who, in the discharge of the duties of his office commits any fraud or breach of trust affecting the public, whether such fraud or breach of trust would have been criminal or not if committed against a private person" and "Article 122 Neglect of Official Duty. Every public officer commits a misdemeanor who wilfully neglects to perform any duty which he is bound either by common law or by statute to perform, provided that the discharge of such duty is not attended with greater danger than a man of ordinary firmness and activity may be expected to encounter." 16. These two offences had often been treated as one, giving rise to confusion over the distinct elements of each. In particular the failure to separate these two offences has created uncertainty as to when the mens rea of corruption, oppression or dishonesty must be made out. The English Court of Appeal was faced with this question in *R v Llewellyn-Jones*
- (1967) 51 Cr. App. R.204 in which it was argued that a count charging misbehaviour in public office had to specifically allege fraud, dishonesty or corruption, as these were essential elements of the offence at common law. The court declined to answer the question, holding that dishonesty was implicit in the facts as alleged. This uncertainty soon resurfaced in *R v Dytham*

- (1979) 69 Cr. App. R.387 (C. A.) in which a police officer was charged with misconduct of an officer of Justice after having watched as an individual was kicked to death outside a night club. He had done nothing to intervene, and had left the scene of the crime. No dishonesty, corruption or oppression was alleged or implied. Widgery L. C. J. concluded that Dytham could be convicted for neglect of duty, but specified that neglect had to be wilful and not merely inadvertent. Widgery L. C. J. did not specify whether this characterisation was restricted to the 'neglect of duty' line of cases upon which he relied or whether his comments also applied to the cases dealing with misfeasance in office, where corruption, dishonesty or oppression had typically been required. 17. This confusion extended beyond England to other parts of the Commonwealth. In *Shum Kwok Sher v HKSAR*
- [2002] 5 HKCFAR 381, the Court of Final Appeal in Hong Kong was called upon to establish the elements of the common law offence of misconduct in public office in order to determine whether it was consistent with the rights guaranteed by the Basic Law. Sir Anthony Mason, formerly Chief Justice of Australia, reviewed the history of the offence of misconduct in office and determined that it comprised different types of conduct, each of which required a different mental element. He then went on to impose, in all instances, an overriding requirement of seriousness. 18. Shortly thereafter, in light of the unsatisfactory state of the law after *Dytham* and the reconsideration of the concepts of 'recklessness' and 'wilful neglect' by the House of Lords in *R v G*
- [2004] 1 AC 1034, a reference was directed to the English Court of Appeal (Criminal Division) asking for clarification of the elements of the offence of misconduct in public office (Attorney General's Reference No. 3). In that case a prisoner had died whilst in police custody as a result of a number of failures by the defendant police officers. After reviewing the cases, the Court of Appeal held that misconduct in public office required a breach of duty by the officers, consisting either in an act of commission or one of omission, but that in either case, the conduct must be wilful. Wilful misconduct was held to mean 'deliberately doing something which is wrong knowing it to be wrong or with reckless indifference as to whether it is wrong or not' (para. 28) and recklessness to mean 'an awareness of the duty to act or a subjective recklessness as to the existence of the duty' (para. 30). The recklessness test was said to apply to the determination of whether a duty arises in the circumstances, as well as to the conduct of the defendant if it does. The subjective test would apply both to reckless indifference to the legality of the act or omission and in relation to the consequences of the act or omission: (para. 30). The result was a unified offence that incorporated both the former offences of public misfeasance and neglect of official duty. However, in keeping with the development in recent cases of the requirements of a criminal state of mind, simple neglect, in itself, would no longer suffice. At a minimum, reckless indifference was required. Over and above these basic requirements, the Court of Appeal endorsed the condition imposed in *Shum Kwok Sher* that the misconduct at issue be serious misconduct. 19. In Question of Law Reserved (Number No2 of 1996)

- (1996) 67 SASR 63, the Full Court of the Supreme Court of South Australia had to consider a number of questions in relation to the common law offence of misconduct in public office and in particular whether the common law recognised a generic offence or only a number of specific types of misconduct. The Court held that the law in the matter was correctly stated by Dr Finn in his article *Official Misconduct*
- (1978) 2 Crim. L. J. 307, the relevant extracts of which I set out below:- "By at least the middle of the eighteenth century the common law had evolved a general, though ill-defined, offence variously described as 'official misconduct', 'breach of official trust', or 'misbehaviour in a public office'. To this day the precise metes and bounds of this offence remain uncertain. Indeed there has been - and is still - a tendency to regard 'official misconduct' as but a descriptive formula for a series of specific but interrelated offences such as oppression, neglect of duty, abuse of official power, fraud in office, etc. As a general offence it is, none the less, still recognised and applied as part of the common law of England. In Canada the offence has been incorporated into the Criminal Code. It has been retained and extensively utilised as a common law offence in United States State jurisdictions. And in common law jurisdictions in Australia its existence has been acknowledged - though it has rarely been invoked. The Australian Code States, however, have discarded the general offence in favour of an odd assortment of specific offences covering little of the ground of the common law. Unlike with the more narrow offences of bribery and extortion, official misconduct is not concerned primarily with the abuse of official position for pecuniary gain, with corruption in the popular sense. Its object is simply to ensure that an official does not, by any wilful act or omission, act contrary to the duties of his office, does not abuse intentionally the trust reposed in him". 20. Dr Finn went on to deal with the principal applications of the offence as follows:- "Turning now to Lord Mansfield's 'first principle' - to official misconduct
- and accepting that it is perhaps unwise to attempt an exhaustive definition of what it covers it can none the less be said that its principal applications encompass at least - (1) frauds and deceits by officers (fraud in office) as where a consular official misappropriates moneys which he is duty bound to remit to a Government department; (2) wilful neglects of duty (nonfeasance) as where a police officer wilfully refuses to enforce the law; (3) 'malicious' exercises of official power (misfeasance) as where licensing authorities grant or refuse an application for reasons known to be improper; (4) wilful excesses of official authority (malfeasance) as where a magistrate assumes to act in a matter known to be beyond the competence of his office, and (5) the intentional infliction of bodily harm, imprisonment, or other injury upon a person (oppression) as where a justice, without authority, orders a person to be whipped". 21. The Supreme Court of South Australia, having examined a number of authoritative texts dealing with the criminal law concluded that there was, at common law, both a generally described offence based upon misconduct or misbehaviour and a number of specific offences which might be regarded as specific instances of the general offence or as additional to it. The second question considered by the court was whether the common law offence had been abolished by the Statutes Repeal (Public

Offences) Act 1992 which abolished a large number of common law offences set out in a schedule as follows:- "1. The following common law offences are abolished: ... (8) bribery or corruption in relation to judges or judicial officers; (9) bribery or corruption in relation to public officers; (10) buying or selling of a public office; (11) obstructing the exercise of powers conferred by statute; (12) oppression by a public officer; (13) breach of trust or fraud by a public officer; (14) neglect of duty by a public officer; (15) refusal to serve in public office" Whilst repealing the specific forms of the offence, the statute had not expressly repealed the generic offence itself. The court concluded that the combined effect of the statute which enacted a comprehensive Code and the abolition of a number of specific common law offences did indicate an intention to abolish the generic offence. 22. I draw two things in particular from this summary, firstly the very wide range of conduct covered by the generic offence as described by Finn and the fact that the common law recognised specific offences within that range which might be regarded as specific instances of the generic offence. 23. The question before me is whether what I will now describe as the generic offence of misconduct in public office is known to Jersey customary law. It is clear that I must form my opinion upon proper evidence of the law and custom of Jersey without being influenced by considerations of convenience or by analogies derived from the laws and customs of other countries (see *La Cloche v La Cloche* (1870), 4 Moo. P. C. C. N. S. 383; 16 E. R.) 24. The defence submit that it is instructive that a form of offence of misconduct in a public office has only recently been created pursuant to the Corruption (Jersey) Law 2006 which came into force on 6 th March 2007 ("the Corruption Law"). Article 7 provides that:- "(1) It shall be an offence for a public official to do or not to do any act in relation to the official's position, office or employment, for the purpose of corruptly obtaining any advantage, whether for his or her own benefit or for the benefit of any other person. (2) A person guilty of an offence under this Article shall be liable to imprisonment for a term of 10 years and to a fine". 25. The Projet for the Corruption Law includes the following in respect of Article 7:- "Article 7 would make it an offence for a public official, as defined in Article 4, to do or not to do something in relation to his post, with a view to gaining an advantage for himself or another. This is equivalent to the U. K. common law offence of misfeasance in, or abuse of, office . It would cover situations such as where a public officer uses his power to grant or withhold a licence or permission, in order improperly to benefit himself or someone else. This sort of activity would not be covered by Article 5 or 6 because there is, in such cases, often no element of bribery. The person may act on their own, for their own personal benefit, whether in a financial form or otherwise and without the involvement of anyone else. This Article is based on section 8 of the Prevention of Corruption (Amendment) Act 2001 (Eire). The penalty is, once again, a maximum of ten years imprisonment and/or a fine". (Emphasis added). 26. Where a statute impacts upon an existing common law offence, it is usual, the defence submits, for both the statute and the projet itself to make reference to that fact. Here the projet is silent as to any existing common law offence of misconduct in public office and this is in contrast to other offences referred to in the projet and repealed by the Corruption Law; for example Article 9 of the Corruption Law relating to the common law offence of bribery. 27. Neither the prosecution nor the defence have been able to find any

reported cases in which the generic offence using the English term 'misconduct in public office' has been charged. The lack of decided cases in Jersey which concern the existence and ambit of cases concerning public officials is referred to in the project to the Corruption Law in the following terms:- "The paucity of decided cases is at least one of the reasons why the exact scope of the customary law offence [i.e. of bribery] is uncertain. It is, for instance, unclear whether it would apply in cases where the corruption was by persons in private business, a persistent and growing problem in many places outside the Island, and it is also doubtful whether the offence would cover bribes offered by persons in Jersey to officials or agents elsewhere, and vice versa". 28. As 'misconduct in public office' is an English term, it is necessary to see whether any equivalent offence was ever known under Jersey customary law. Under the section "Traité des Crimes" of his work "Constitution, Les Lois et Les Usages de Jersey" (1847) Le Geyt makes reference to two relevant crimes namely "du pécumat" and "de la concussion". Pécumat was embezzlement of church money or money belonging to the Prince or to the public by those in public office who falsify the books. Concussion is described in these terms:- "La concussion est un abus de l'autorité publique. Les charges ne sont que pour la protection du peuple et les concussionnaires les pillent à la faveur de leur emploi". (Misappropriation is an abuse of public authority. Public charges exist for the protection of the people and concussionnaires foray/plunder under the cover of their employment/office). The prosecution do not assert and it is clear that neither 'pécumat' nor 'concussion' constitute the wide ranging generic offence. 29. The generic offence was not one of those listed in the Statement of Messrs Pipon and Durell referred to in the Report of the Commissioners on the state of the criminal law in the Channel Islands (1847) but the Report states at page xxvi:- "Other offences are cognizable under a power, which the Court seems to assume, of punishing generally whatever appears to be in its nature offensive or criminal. To this, it seems, we are to refer the law on coining (which has been punished here since it ceased to be treason in England), sedition, misconduct of officers, returning from transportation or banishment, provoking a breach of the peace, nuisances, brothel keeping, indecency, unchasteness, solicitation of chastity. For these the Court imposes punishments in its discretion, varying from transportation to imprisonment and fine". (emphasis added). 30. The following exchanges took place with John Hammond (senior advocate), J W Dupré (Avocat Général) and Mr F Godfray (Greffier):- "2921. How is misconduct in an officer punished? - It is laid before the Court. 2922. In the case of bribing an officer?

- The Court would take cognizance of all those offences. 2923. Do you mean, as a contempt of justice?
- No; the Queen's Procureur Général will prosecute them. 2924. He prosecutes in all cases? - Yes; it would be a public action on the part of the Procureur Général against the party who was a delinquent. 2925. Tried by the enditement, or decided by the Court? - Before the Court generally. There are some cases in which it would be tried by the enditement. 2926. (To Mr Dupré). Within your own practice, have you any instance of any officer of the Court being tried for misconduct in the discharge of his duty, or for accepting a bribe? - For misconduct, I have; not for receiving a bribe. 2927. Would it be tried before the enditement, or before the

Court? - Bribery would be tried before the enditement, I should think. A simple case of misconduct in a public officer would be tried, I should think, before the Court, without the enditement. 2928. How would a case of that sort originate?

- A case before the enditement usually commences in the constable's report. 2929. It would depend upon the manner in which the information was laid? - If it were laid by the constable, it would come on upon his report. If the information was given to the Attorney General directly, it would be done by a process which we call a Représentation. 2929. Mr F Godfray (Advocate). There was a case in point; the Lieutenant Governor prosecuted me as constable. 2930. For alleged misconduct as constable?
- Yes, and for writing a letter which he thought contemptuous. That was tried before the Court merely, though I tried to have it sent to a jury. 2931. Was it tried at the simple instance of the Procureur Général? - Yes. The Lieut. Governor wrote to the Procureur Général; and he made a representation to the Court. I should say that I was acquitted. There was also the case of Mr Nicolle; he was dismissed from office. 3932. Was that at the representation of the Procureur Général? - Yes: he was constable; and he had presided at a meeting which the Court declared to be illegal; that was under the law of 1797. 2933. Was that also tried before the Court?
- Yes. 2934. The Vicomte. I have here a prosecution of the date of 1770, in which a vingtenier was discharged and punished for seditious language The same was read as follows:- 'A la Cour Royale de l'Ile de Jersey. L'an 1770, le 13 me jour d'Aout, sur l'action du Pro r Gen l du Roi vers Mr. Jean Robichon jun., un des vingteniers de la paroisse de St Martin, saisi de fait et présenté en justice par le Député Vicomte en vertu de l'Acte de la Cour de l'an 1770, le 11 me du courant, pour subir ce que justice trouvera propre, pour s'être servi de propos séditieux et menaçans à l'assemblée de ladite paroisse, tenue le ème de ce mois, ayant déclaré, en parlant de l'Ordonnance récemment faite pour les chemins, que cela occasioneroit une seconde révolte, et en outre, que cet ordre là étoit un bougre d'ordre. Après l'aveu du dit Robichon, et sa soumission à la Cour, oui le Pro r Gen l du Roi en ses conclusions, il demeure déchargé de la place de vintenier et d'officier du con ble , condamné à l'amende de deux cents livres d'ordre, applicable tiers au Roi, tiers à la réparation de la cohue royale, et l'autre tiers à l'Hôpital Gen l et à demander pardon à Dieu, au Roi, à Mons. le Commandant et Chef, et à la justice, ce qu'il a présentement effectué, et à donner caution de son bon et paisible comport, et envoyé en prison au pain & à l'eau pour l'espace de quinze jours, étant défendu au geolier de lui administrer d'autres alimens : en suite de quoi a produit Mr Jean Carter sen., pour sa caution, lequel y est demeuré accordamment". 31. What is striking, the prosecution say, about these exchanges is that although they were concerned with the procedure by which misconduct of officers was dealt with before the Court, the underlying premise that an offence existed under Jersey law was apparently accepted without demur by all three witnesses. Indeed, one of the witnesses had himself been prosecuted with such an offence and acquitted. 32. Mr Kelleher accepted that at first glance this commentary supported the existence of the offence at that time. However, he submitted

that closer inspection allowed the reasonable conclusion to be drawn that the subject matter or substance of any offence was the 1797 Law referred to in the context of the constable who had presided over a meeting which the Court declared to be illegal. There is a reference to the Loi (1797) sur les Rassemblements Tumultueux, a law which proscribes 'tumultuous assemblies' of the public to prevent against sedition and uprising against the authorities. I do not agree that such a reasonable conclusion can be drawn. The misconduct referred to was the constable presiding over an illegal meeting and it was that which led to his dismissal. Furthermore, the exchange goes on to deal with the prosecution of a vingtenier prior to that law for using seditious and menacing language at a parish assembly. 33. There are further exchanges in which it is assumed that criminal prosecutions could lie against police officers for dereliction of duty (paragraphs 592 to 680) and in which complaints are made about the refusal of the Attorney General to prosecute the police for failing to perform their duties until after the cause "en ajonction" had been disposed of (capable of taking so long that witnesses may be dead). 34. However it is not possible, in my view, to draw any conclusions as to the existence of the generic offence from any of these exchanges. There can be no doubt that the Royal Court, which assumed to itself the jurisdiction to punish anything which appeared offensive or criminal to it, punished public officers, but the exchanges were entirely procedural in nature and throw no light on the issue of whether Jersey customary law recognised the generic as opposed to or in addition to specific offences. 35. A surer source for resolving the question lies in the work of the Royal Court itself as recorded in its proceedings. Quoting from the seminal judgment of *Foster v The Attorney General*

[1992] JLR 6 which was concerned with the issue of whether the general common law offence of fraud was recognised under Jersey law:- "There is, however, a stronger reason for not placing upon these old materials, whether local or French, more reliance than they can easily bear. It is that from the end of the 18th century there are available Jersey records which provide a much firmer ground for the solution of the present problem. Criminal proceedings in the Royal Court have been recorded separately from other proceedings since 1797. These records of criminal proceedings, which have never been published, are called *Poursuites Criminelles*. From the institution of the Police Court in 1854, there are also the *Causes Criminelles* (likewise unpublished) recording proceedings in that court. The records in the *Poursuites Criminelles* vary somewhat in form, but for every case they give a summary of the behaviour of the defendant which was alleged to be criminal and, either preceding or following this summary, a characterization of the behaviour in legal terms". 36. The prosecution have found four cases in the *Poursuites Criminelles* from the second half of the 19th century in which Jersey public officers were charged with *inter alia* 'malversation'. The prosecution say that this is the generic offence of misconduct in public office. It is of note that there is no reference to 'malversation' in the Commissioner's Report. 37. 'Malversation' is derived from the Latin 'male' meaning 'badly' and 'versare' meaning 'behaving'. Interestingly nineteenth century English judges used the term 'malversation' when describing misconduct in a public office (see for example *Booth v Arnold*

- [1895] 1 QB 571 and *Alexander v Jenkins*
- [1892] 1 QB 797). Howitt's Dictionary of English Law defines it as 'misbehaviour in an office, employment or commission, as breach of trust, extortion, etc'. I take each of the four cases cited in turn. 38. In *AG-v-Le Quesne*
- (1849) PC 276, Nicholas Le Quesne, who held the position of constable of the Parish of Trinity, was charged with committing 'une fraude et malversation au préjudice de ladite Paroisse '. Over a course of years he doctored parish account books by ripping out pages. He then produced a new 'account book'. He did this in order to defraud the parish of £177 and to conceal the fact. Clearly his conduct was fraudulent but the prosecution argue that the additional charge of 'malversation' would appear to relate to the fact that he held public office and his abuse of that office. 39. In *AG v De St Croix*
- (1858) PC 261, Charles de Ste Croix, who was the Greffier of the Royal Court was charged with ' le crime de péculat, malversation et de détournement d'argent appartenant auxdites Etats et au public '. He was under a duty at law to receive annually the licence fees of publicans and to account to the States for the money. Between 1855 and 1858 he misappropriated such fees for his personal benefit. Misappropriation of public funds constituted a crime in its own right whether as ' Péculat ' (the diversion of public funds) or as " détournement " (criminal diversion in breach of trust) but the prosecution submit that the additional charge of ' malversation ' again would appear to relate to his public office, which it says becomes clear from the fact that his conduct was held to be:- "contraire à la loi, aux devoirs de sadite charge et aux obligations résultant de sa qualité et fonction de Receveur de derniers publics " (Contrary to the law, to the duties of the said office and the obligations upon him by virtue of his function as receiver of public moneys). 40. In *AG v Gosset*
- (1886) PC122, Philip Gosset, who held the position of Treasurer of the States, was accused ' en abusant de la confiance reposée en lui ' of misappropriating to himself some £37,046. He was charged with ' le crime de malversation et de détournement d'argent appartenant aux Etats et au public de cette Ile ' . ' Détournement ' (a frequent offence) appears to have been used to describe fraud by a person in breach of trust with ' malversation ' again, the prosecution argue, being directed to his abuse of his public office and the trust placed in him by the public. 41. In *AG v Nicolle*
- (1896) PC 276, Philip Nicolle, who held the position of Inspector of Public Works, was accused of producing false accounts to understate the fees he had received in his office and misappropriating the funds. He was accused ' en abusant de la confiance reposée en lui ' of committing the crime of ' malversation du dernier public en détournant et s'appropriant frauduleusement diverses sommes d'argent - au préjudice du public de cette Ile ". This is the only case in which ' malversation' appears to have been charged on its own and it is charged in the narrow sense of fraud or embezzlement but the prosecution submit that the inference is clear that ' malversation' was charged because ' fraude ' or ' détournement '

did not address the full mischief of Nicolle's crime which was his abuse of his public office. 42. The defence argue that there is nothing in the reports of Le Quesne , de Ste Croix and Gosset suggesting that the addition of ' malversation ' to the description of the offences means that the relevant conduct or offence is distinct and separate from that of fraud and nothing to indicate what the essential ingredients of ' malversation ' were. In view of the defence ' malversation ' is an adjunct to the other offences which deal with the specific mischief making it clear that if a person commits an offence, whilst acting pursuant to public duty, it is to be regarded as an aggravating factor to the commission of that offence. 43. It needs to be borne in mind that the focus of the authors of the Poursuites Criminelles was on describing the conduct complained of rather than on naming the offences, which is consistent with the approach taken in England in former times (see History of the Criminal Law of England by Stephen pages 280 to 283 and 293). In fact there was no requirement in Jersey that there be a "label" until the introduction of the Indictment Rules in 1971. 44. ' Malversation' in these four cases is not an adjunct but an independent crime as it is specifically referred to as such - 'le crime de...malversation'. In my view ' malversation ' here is the specific offence of fraud in office or fraud by a public officer. This is clear not only because the four cases are concerned with fraud committed by a person in public office but also from the fact that in the one case where it is charged on its own (Nicolle) it is used precisely in that sense (as accepted by the prosecution). I also draw support for this view from the Dictionnaire Générale de Jurisprudence, 1835, (a surer guide to the meaning of the expression as used in Jersey in the 19th Century than Howitt's Dictionary of English Law) which defines ' malversation' as ' Faute grave, commise par cupidité, dans l'exécution d'un mandat en partic. Détournement, à son profit, des fonds publics' , thus linking it to financial crime. I accept that in de St Croix reference is made to ' péculat', which could also be described as fraud in office, but even so there is nothing in these four cases to support the prosecution's submission that ' malversation ' is the wide ranging generic offence of misconduct in public office. 45. The prosecution and defence agree that there are a number of cases in the Poursuites Criminelles evidencing the existence of an offence of dereliction of duty or neglect in public office, namely Le Maistre

(1816) 6 PC 20, Le Petevin

(1817) 6 PC 152, Farley

(1817) 6 PC 182, (unnamed) (1819) 6 PC 284, Chevalier

(1820) 6 PC 382, Nicolle

(1823) PC 256. In none of these cases was the defendant charged with ' malversation' or with the generic offence. 46. The prosecution referred me to a number of 20 th century cases which, although not making any reference to ' malversation' or the generic offence, it argues implies recognition of the generic offence. In AG-v-Urgate

- (1920) PC 154, the defendant was charged with insulting an immigration officer in the course of his duty. The prosecution say this illustrates the importance which the law attached to the dignity of public office and that it would be an astonishing proposition that whilst the law allowed that a layman could commit an offence specifically against the dignity of public office, nonetheless the public officer himself could not commit an offence against the dignity of his own office by misconducting himself in that office. The defence point out that Urgate was not a public official. 47. In *AG v Langtry*
- (1945) PC 249, Langtry offered an illicit payment to a public official in order to secure favourable treatment for herself. It was said that this amounted to 'une tentative de corrompre ledit Sieur Orange dans l'exercice des devoirs de sa charge' (an attempt to corrupt Mr Orange in the exercise of the duties of his office). On the face of it this would appear to be a straightforward case of attempted bribery but the prosecution submitted that a conscious and careful effort was made to emphasise in the charge that the gravity of the matter lay not in the fact of illicit payment which a bribe would constitute, but in the attempt by Langtry to pervert the proper exercise of the official's public duty. In other words, Langtry's attempted assault on the integrity of public duties performed for the public good was viewed more significantly than the mischief of her personal dishonesty in offering a bribe, and the charge was intended to reflect that. A contemporary criminal lawyer might very properly term Langtry's offence as "incitement to misconduct in a public office". The prosecution argue that if misconduct in public office was unknown to the law of Jersey, it would be surprising that the Crown's chief law officer would have cast the mischief of the matter in such a way as to suggest it was, rather than charging the more immediately obvious offence of attempted bribery. Again the defence point out that Langtry was not a public official. 48. In *AG v Dumond and Others*
- (1945) PC 191, Dumond and his co-defendants were auxiliary police officers who illegally enter premises and stole property whilst on duty. The prosecution submit that the charges against them were not confined to illegal entry and larceny simpliciter of but embraced illegal entry and larceny 'lorsqu'ils exerçaient les devoirs de leur charge comme membres de la Police Auxiliaire' (in the course of their official duties) which the prosecution submit suggests the officers were guilty of misfeasance in public office - the malicious execution of their official duties. The defence say the carrying out of this offence whilst on duty was nothing more than an aggravating factor. 49. However the recognition of the generic offence has to be based on firmer ground than inferences or suggestions made from cases in which the offence has not been charged and brought against defendants, in the case of Urgate and Langtry, who were not public officials. Furthermore none of these cases assist on the question of whether Jersey customary law has ever recognised the generic offence, as opposed to or in addition to specific offences. 50. The defence make the point, which is accepted by the prosecution, that there have been a number of instances where the offence of misconduct in a public office might have been charged but was not, which the defence say is telling. Examples are *AG v Cabot*

(1891) PC 86, AG v Le Feuvre

(1904) PC 140, AG v Raley

(1932) PC 282, In the matter of the representation of Centenier Pearce [1987-1988] JLR 109 and AG v Sutherland

[2000] JRC 50 . 51. There are powerful arguments for the necessity of the generic offence. In R v Bembridge , Lord Mansfield said that it was ' essential to the existence of the country ' and in R v Boulanger the Chief Justice said this:- "The crime of breach of trust by a public officer, embodied in s.122 of the Criminal Code, R. S. C. 1985,c. C-46, is both ancient and important. It gives concrete expression to the duty of holders of public office to use the offices for the public good. This duty lies at the heart of good governance. It is essential to retaining the confidence of the public and those who exercise state power. Yet surprisingly, the elements of this crime remained uncertain. This appeal requires us to clarify those elements so that citizens, police and the courts have a clear idea of what conduct the crime encompasses". 52. It could be argued that this necessity had been met by Jersey law recognising a number of specific offences as opposed to the generic offence. In any event, powerful as these arguments may be, my task is to ascertain from the evidence whether the generic offence, as opposed to specific offences, is known to Jersey customary law and there is no authority for the proposition that necessity is relevant to that task. Doubtless in earlier times the court incorporated offences into our customary law on the grounds of necessity but the law has to be certain:- "The state and its representatives and the citizens both need to know whether conduct alleged or proved against a defendant is indeed criminal conduct" (Foster page 21 line 29) Accordingly it is no longer open to the courts today to create new offences. If there is a lacuna in our criminal law then it is for the legislature to act. In Thwaites , the Court was concerned with whether the act of committing a public mischief was an established category of crime in Jersey. There had been one previous prosecution for such an offence but it was accepted that that could not be used to support the argument that it was well established under Jersey customary law. The Court resisted the temptation to declare an offence in order to catch a certain type of extremely mischievous conduct which ought to be punishable, leaving it to the legislature to do so. 53. The prosecution have drawn my attention to In the matter of the Yaheeb Trust, the Havana Trust and the Yaheeb No. 2 Trust

[2003] JLR 92 , where, in the context of alleged damage being done to relations between the State of Qatar and Jersey, Bailhache, Bailiff, said:- "Both the State of Qatar and the Bailiwick of Jersey are subject to the rule of law. Bribery, corruption and misuse of public office for gain are offences equally under the law of Qatar as under the law of Jersey. The 1999 Law is reflected in the statute law of many European nations. An investigation cannot be stifled because it is the cause of political embarrassment. The law must take its proper course". I agree with the defence that in making these clearly obiter statements the Bailiff was not asserting the existence of the specific offences (indeed this was before the introduction of

the Corruption Law and it is doubtful whether an offence of 'corruption' has ever existed under Jersey customary law) but instead was making an illustrative reference to the types of conduct for which criminal liability might exist under Jersey law. Certainly the prosecution did not argue for the existence of an offence restricted to 'misuse of public office for gain'. 54. Jersey law does recognise the tort of misfeasance in public office, which under English law overlaps to some extent with the offence (see Attorney General's Reference No 3 and *Three Rivers District Council and Ors v Governor and Co of the Bank of England (No 3)*)

(2003) AC 1), but it was not asserted by the prosecution that in recognising the tort, Jersey law had by implication recognised the offence. 55. I therefore conclude that whilst there is evidence that Jersey customary law has recognised the specific offences of 'péculation', 'concussion', 'malversation' and dereliction of duty, there is no evidence that it has ever recognised the wide ranging generic offence of misconduct in public office. Mr Jowitt argued powerfully as to the ramifications of Jersey having developed in partial isolation to the United Kingdom and other common law jurisdictions in relation to this offence but in my view I cannot properly take such ramifications into account when considering how, in fact, Jersey law has developed. In essence, his position must be that because Jersey customary law has recognised specific offences which in other jurisdictions form part of the generic offence then it must follow that the generic offence has also been recognised here. I see no reason why it should follow. There may be good reason for recognising distinct specific offences, the elements of which are certain (or at least more certain) and not recognising a wide ranging generic offence the elements of which are uncertain, as evidenced by the somewhat tortuous history of the generic offence under English and other common law jurisdictions. 56. The influence of English criminal law on Jersey criminal law is clear (see *The Origin and Development of Jersey Law*, an Outline Guide by Stéphanie C Nicolle QC, paras 15.6 - 15.14) but the issue of whether a crime is known to the law of Jersey can only be answered by an examination of the laws of Jersey and, in particular, the work of the Court. The fact is that the prosecution cannot point to a single case in which it is clear that the wide ranging generic offence of misconduct in public office, as recognised under English common law and other common law jurisdictions, has been charged. 57. Whatever the necessity and notwithstanding the ramifications, I therefore find, on the evidence put forward by the prosecution, that the offence of misconduct in public office is not an offence known to Jersey customary law. Purpose application 58. As stated above, one of the elements of the offences with which the defendant is charged is that he converted and/or removed his proceeds of criminal conduct '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'. 59. It is accepted by the prosecution that the purpose element of the offences created by Article 34(1) refers to a Jersey prosecution and a Jersey confiscation order. It is also clear that any offence which the defendant is alleged to have had the purpose of avoiding prosecution for, must pre-date the commission of the offences charged in the indictment. Thus, submit the

defence, the offence for which the defendant was avoiding prosecution cannot have been the predicate conduct in Nigeria, as that was not an offence 'in Jersey', and there is no offence 'in Jersey' that he could have been avoiding. Furthermore, under Article 3(2) of the 1999 Law a Jersey confiscation order can only be made following sentence for an offence committed on or after 1 st July 1999. 60. The defence further contend that the prosecution are required to prove that the defendant had committed an independent and pre-existing offence prior to the alleged conversion and/or removal from the jurisdiction, prosecution for which he was trying to avoid. In correspondence, the prosecution suggested that the defendant could have been prosecuted for receiving pursuant to section 33(4) of the Larceny Act of 1916 ("the Larceny Act") which is of course a continuing offence. Section 33(4) of the Larceny Act is directed to receiving goods stolen outside the Island and is not, the defence submit, an offence known to Jersey law. 61. These contentions raise the issue of whether the purpose element of Article 34(1) of the 1999 Law is subjective or objective. 62. In *R v Saik*

(2007) 1 AC 18, the Court of Appeal had certified two questions of law of general public importance for the House of Lords to consider, the second of which was in the following terms:- "(2) Is the objective requirement that a defendant can be convicted of an offence under Section 93C(ii) of the Criminal Justice Act 1988 if he had reasonable grounds to suspect that the property converted etc. was the proceeds of crime (without having actual knowledge or suspicion) incompatible with the subjective requirement that the activity of the defendant must be for the specified purpose of assisting another to avoid prosecution for a criminal offence or avoiding the making or enforcement of a confiscation order?" 63. Section 93C(2) is the equivalent of Article 34(2) of the 1999 Law. Article 34(1) is concerned with concealing or transferring a person's own proceeds of criminal conduct and Article 34 (2) is concerned with concealing or transferring another person's proceeds of criminal conduct. The articles are similarly structured, Article 34(2) being in the following terms:- "A person is guilty of an offence if, knowing or having reasonable grounds to suspect that any property is or in whole or in part directly or indirectly represents another's proceeds of criminal conduct, the person - a. conceals or disguises that property; or b. converts or transfers that property or removes it from the jurisdiction, for the purpose of assisting any person to avoid prosecution for an offence specified in Schedule 1 or the making or enforcement in a person's case of a confiscation order". 64. In *Saik*, both the House of Lords and the Court of Appeal were clear that the purpose requirement was subjective. The House of Lords held that there was no incompatibility between this requirement and the requirement that a defendant have 'reasonable grounds to suspect' because as a matter of law the "reasonable grounds to suspect" test has both a subjective (actual suspicion) and an objective (reasonable grounds for that suspicion) element. In relation to the nature of the purpose test Lord Hope (with whose reasoning on this question Lord Nicholls and Steyn agreed) said at paragraph 54:- "The second requirement, as to what the purpose was, is where the essence of the mens rea of the offence is to be found. It must be proved that the defendant's purpose was to launder the proceeds of another person's criminal

conduct. If he knows the criminal origin of the property, his knowledge is linked to his purpose in engaging the activity. If he had reasonable grounds to suspect that it had a criminal origin, his suspicion is linked to his purpose in the same way. Proof of what his purpose was will usually have to be found by drawing inferences. Evidence that the defendant knew or had reasonable grounds to suspect will usually be sufficient to show what his purpose was when, knowing or suspecting what the origin of the property was, he actually engaged in the prescribed activity". 65. Lord Brown, who gave the other majority judgment, took a similar view but using more colourful language (paragraph 107):- "107. For simplicity's sake I shall hereafter refer to

- (i) "property [which] is, or in whole or in part directly or indirectly represents, another person's proceeds of criminal conduct" as "hot property" (the equivalent of Lord Hope's description in paragraph 76 of cash being "A"); (ii) any treatment of such hot property described in paragraphs (a) and (b) of the sub-section as its "laundering"; and (iii) the purpose of assisting someone to avoid prosecution or confiscation as 'an illicit purpose'." Lord Brown continued:- "109. I should perhaps add that I can see an argument for suggesting that not even actual suspicion that the property is hot is a sufficient basis for inferring that when laundering it D had the necessary illicit purpose: if all D knows is that the property may be hot and he suspects it is, it is not immediately obvious that any dealing with it is then for an illicit purpose. Again, however, it seems to be necessarily implicit in the section that it is. The section would otherwise be unworkable. The illicit purpose requirement must be regarded as satisfied whenever property is laundered by someone suspecting it to be hot. He has at least that contingent purpose". 66. This reasoning in relation to our equivalent Article 34(2) is equally applicable in my view to Article 34(1) and constitutes the clearest authority that the purpose element is subjective. I therefore accept the prosecution's submission that there is no requirement for the prosecution to prove that there was an offence in Jersey or a Jersey confiscation order which the defendant 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. 67. It is what was in the defendant's mind that is relevant. Did he think that he might be prosecuted or the funds confiscated and converted/transferred the funds to avoid that? It is irrelevant that as a matter of objective fact there may have been no offence for which he could have been prosecuted for, or, even if there was, some legal impediment existed to the bringing of such a prosecution. The prosecution do not have to prove therefore that there was such an offence for which the defendant could have been prosecuted or a confiscation order that could have been imposed. 68. The defence say that it is an extraordinary proposition that if a person tries to avoid prosecution and/or the making of a confiscation order for an offence he has not, in fact, committed, then he can nonetheless be found guilty of an offence which carries a sentence of imprisonment of up to fourteen years. The legislature, they submit, cannot possibly have intended to create such a draconian offence. However, the offence here is not avoiding a prosecution or confiscation order. The offence is the conversion/transfer of the defendant's proceeds of criminal conduct for the purpose of

avoiding prosecution/confiscation. The purpose is one element in that offence and I see nothing extraordinary or draconian in that purpose being subjective, as clearly intended by the legislature. Mr Jowitt drew the analogy of the offence of perverting the course of justice. In England it is an attempt to pervert the course of justice for a person to expose an innocent person to investigation, arrest or imprisonment even if he could not in fact expose the person to those things. In *R v Brown*

- (2004) Crim. LR 665 the Court of Appeal said:- "All that this case decides, or other recognizes as always having been the law, is that the mere fact that no actual perversion of the course of justice could take place as a result of false allegations is not in itself either a ground for saying that the offence of attempting to pervert the course of justice has not taken place or a ground in itself not prosecuting with that offence the person who makes the allegations". 69. Furthermore, it cannot be argued in my view that the reference to avoiding prosecution for an offence specified in Schedule 1 means it must be proved by the prosecution that the defendant had in mind a specified offence. As the prosecution point out that would mean that the offence could only be committed by a person versed in Jersey criminal law. I agree with the prosecution's submissions that the confining of the purpose to offences in Schedule 1 is only to make it consistent with the statutory scheme which is (a) not concerned with minor matters and (b) is not concerned with matters dealt with in other statutes. It also maintains the link with the types of predicate conduct which can be dealt with under the 1999 Law. 70. I would intend directing the Jurats in relation to the purpose element of the offence upon the following lines:- (i) The test is subjective, i.e. they are concerned with what was in the defendant's mind, not with whether, as a matter of objective fact, there was an offence in Jersey for which the defendant could have been prosecuted or whether, in fact, a Jersey confiscation order could have been made or enforced; (ii) The issue for them is whether they are sure that one of the purposes of the conversion and/or transfer of the funds was the avoidance of a prosecution in Jersey for a serious offence (i.e. an offence for which he would have been liable on conviction to imprisonment for a term of one or more years) or the making or enforcement of a Jersey confiscation order or both. 71. It follows from this that there is no burden upon the prosecution to prove that the defendant has actually committed an offence for which he was seeking to avoid prosecution. Receiving 72. The Crown submitted that there were at least three offences for which the defendant could have been prosecuted, namely receiving, Foster fraud and obtaining the execution of a valuable security by deception. Because receiving had been flagged up by the prosecution in earlier correspondence, the defence addressed itself exclusively to it. In his letter of 24 th January 2008, Mr Jowitt had referred to Section 33(4) of the Larceny Act 1916 , which covers the receiving of property illegally obtained abroad, which is in the following terms:- "Every person who, without lawful excuse, knowing the same to have been stolen or obtained in any manner whatsoever under such circumstances that if the act had been committed in the United Kingdom the person committing it would have been guilty of felony or misdemeanour, receives or has in his possession any property so stolen or obtained outside the United

Kingdom, shall be guilty of an offence of the like degree (whether felony or misdemeanour) and on conviction thereof liable to penal servitude for a term not exceeding seven years". 73. The history of this provision was explored in the case of *R v Smith*

- (1962) 2 WLR 1145. It was introduced into the Larceny Act of 1896 as a result of two cases, one of which involved goods stolen in Guernsey and received in England, which held that the crime consisted of the guilty receipt of goods stolen according to the law of England which did not recognise a stealing in a foreign country as a crime which it will punish. 74. The defence argue that the Jersey customary law offence of receiving corresponds to the position in England prior to the enactment of the 1896 Larceny Act in respect of extraterritoriality. Section 33(4) was expressly created by Parliament to extend the offence of receiving to conduct outside the jurisdiction; as such, it was an express legislative exception to the general rule that the English courts did not accept jurisdiction over offences committed outside England and Wales, even if the accused is a British subject. No such express legislative provision has been enacted in Jersey. Foster provides no general licence to import offences under the Larceny Act in the absence of equivalent offences pre-existing under the Jersey customary law. In *Foster*, whilst recognizing 'that cases falling within the scope of that Act [being the Larceny Act 1916] are prosecuted here [in Jersey], as far as concerns pleading and the identity of the essential elements of the offence charged, exactly as they would be in England' the Court of Appeal concluded (at page
- 272) that:- "The criminal character of conduct covered by the Larceny Act is derived in Jersey from the common law. The development of the practice has not changed this derivation of criminality. It means only that conduct which is both criminal by the common law and also within the ambit of the Larceny Act may be prosecuted according to the provisions of that Act. This is convenient for both prosecution and defence, for it substitutes the relatively clear requirements of the Act for the boundaries, hitherto vague and ill-defined, of the common law offence". 75. The defence submitted that Section 33(4) is not reconcilable with Jersey customary law as its extraterritorial element precludes its assimilation into the Jersey customary law offence of receiving. It is conduct which is manifestly criminal under the Larceny Act but not the customary law of Jersey and thus falls outside the principles set down in *Foster*. Any offence relating to conduct taking place outside the jurisdiction cannot be imported without express legislative provision and no such legislative provision exists in relation to Section 33(4) of the Larceny Act. 76. The defence faces the difficulty that the extent of the application of the Larceny Act in Jersey has been definitively explored in *Foster*. As *Le Quesne JA* said (at page 24):- "The court has thus modified the law to this extent; that it became - and remains - lawful to charge offences according to the categories of the Larceny Act 1916, and to prove them by establishing the elements required by that Act as interpreted and applied in England". In *Manning v Attorney General*

- [2000] JLR 32 , a case involving the offence of receiving, the Court of Appeal clarified the limits of the adoption of the Larceny Act as follows (as per Southwell JA):- "In our view the exhaustive research of Le Quesne, JA into the way in which the provisions of the English Larceny Act have been adopted into the law of Jersey defines the limits of that adoption. As we have observed, the Larceny Act was a codifying statute whose sections proved to be of use and relevance in this jurisdiction in so far as they defined criminal conduct. But there is nothing in the judgment of Foster
- (2) which would justify the conclusion that those parts of the same statute which prescribed evidential rules for English courts should have any application in Jersey". 77. In my view, Foster is clear and binding authority that the provisions of the Larceny Act, 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, therefore, is an offence known to Jersey law. 78. Whilst I accept that the primary basis of the Jersey courts' criminal jurisdiction (as in England) is territorial (see the *Minquiers and Ecrehou* (United Kingdom/France) Judgment of November 1953; ICJ Reports 1953 page 47), the more modern approach is reflected in R
- v. *Smith (Wallace Duncan) (No.4)* (2004) 2 Cr. App. R.17 where it was held that the Court had jurisdiction to try an offence of obtaining services by deception where the obtaining took place outside the jurisdiction but a substantial part of the deception took place within the jurisdiction, provided that there was no reason of international comity why the Court should not do so. 79. The gravamen of the offence of receiving is the receiving or possession of stolen property in Jersey and I see no reason why the Court today should wish to follow English 19th century case law restricting its jurisdiction to cases where the received goods were stolen in Jersey. On the contrary and adopting the words of Lord Griffiths in *Liangsiriprasert (Somchai) v Government of the United States of America*
- (1991) 1 AC 225 , crime has ceased to be largely local in origin and effect (a comment particularly pertinent to this jurisdiction with its well developed finance industry) and there is nothing in precedent, comity or good sense to inhibit the customary law of Jersey from regarding the offence of receiving in Jersey of property stolen abroad as justiciable in Jersey. 80. The defence did not address me on (and I therefore leave over) the prosecution contentions that the defendant could also have been prosecuted for Foster fraud in relation to the second contract and obtaining the execution of a valuable security in relation to Resurgent India Bonds obtained by the defendant from the Bank of India in Jersey. Particularisation of the Indictment 81. The defence applications in this respect relate to two aspects of the indictment which it says are deficient. 82. The particulars sought by the defence are to some extent contained within the Case Statement but I accept Mr Kelleher's submission that it is important that the Indictment be sufficiently particularised. Rule 1 of the Indictment Rules provides that every Indictment shall contain "such particulars as may be necessary for giving reasonable information as to the nature of the charge" and it is to the Indictment that the defendant pleads. Not every prosecution will involve a Case Statement,

which would not in any event be seen by the Jurats, but significantly in my view, the Indictment cannot be amended without leave. Predicate conduct 83. Taking first the predicate conduct, the defence submission is that the prosecution must prove the commission of a specific offence, namely that "a particular person committed a particular offence on a particular occasion". Specifically, it argues the prosecution must prove that the predicate conduct in question was committed by the defendant himself. In effect, the defence say this is a second offence within each count which must be proved as such and it follows that the prosecution should be required to give the same particulars 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 question. 84. There is nothing in the wording of Article 34(1) of the 1999 Law nor is there any authority to support this proposition. This element of the offence is made out if the prosecution can prove that the property converted or transferred represented the defendant's proceeds of criminal conduct. There are two aspects to this; firstly, that there must be criminal conduct as defined and secondly that the property must represent the defendant's proceeds of that conduct. 85. Conduct which has occurred outside Jersey is defined as criminal for the purpose of this element of the offence if it would have constituted an offence in Jersey for which a person would be liable on conviction to imprisonment for a term of one year or more if it had occurred here. Thus, the prosecution must prove that there has been such conduct and that if it had occurred here, it would have constituted such an offence, but it is not required to treat this as a 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. 86. However as made clear in the Indictment Rules and in the interests of fairness, the Indictment must give reasonable information as to the nature of the charges. In England the Criminal Justice Act 1988, upon which the 1999 Law is based, has been superseded by the Proceeds of Crime Act 2002 ("POCA") which has simplified the principal money laundering offences and made provisions for the civil recovery of the proceeds of crime. Cases on the civil enforcement provisions have established that the director must identify at least in general terms the type of conduct relied on as constituting criminal conduct (see *Director of Assets Recovery Agency and others v Green*

(2005) EWHCAdmin 3168 and *Director of Assets Recovery Agency v Szepietowski and others*

(2007) EWCA Civ 766 .) In *R v NW, SW and RC and CC*

(2008) EWCA Crim.2, the Court of Appeal held that it would be 'anomalous' and 'bizarre' if conclusions reached in *Green* and *Szepietowski* with respect to the civil recovery provisions of POCA were not also read across to those provisions of Part 7 of POCA which established criminal liability for money laundering offences. The defendants at NW had been charged inter alia with offences of transferring and removing criminal property contrary to Section 327 of POCA, the offence which corresponds most closely to the offences with which the defendant has been charged under Article 34(1) of the 1999 Law.

The Court of Appeal had to decide whether in order to establish guilt the prosecution had to prove the particular conduct, or at least the type of criminal conduct which had generated the benefit which the criminal property represented. The prosecution contended that the offence under Section 327 would be made out if it could be shown by circumstantial evidence (such as, for example, proof that the sums involved were large and that the defendant had no obvious means of support) that the money in question had no lawful origin. The Court of Appeal judgment concluded at paragraph 38 as follows:- "In short, we do not consider that Parliament can have intended this state of affairs in which, in any given instance, no particulars whatsoever need to be given or proved of a cardinal element in the case, namely the criminal conduct relied on. It is a requirement, to use Sullivan J's expression, of elementary fairness". 87. The current Indictment contains no particulars of the predicate conduct at all and in this respect I find that it is deficient. The prosecution clearly accepted that further particulars of the predicate conduct could be put into the indictment in that at the hearing it submitted a draft of a proposed amendment which in relation to Count 1 is as follows:- "Particulars of offence Raj Arjandas Bhojwani between 1 st October 2000 and 30 th October 2000 in respect of criminal conduct, namely the dishonest inflation of two prices charged for motor vehicles sold to him to Nigeria and the dishonest retention for himself and others of the proceeds of sale thereof, converted the proceeds of such criminal conduct namely credit balances held in the name of TaTa Overseas Sales and Services Limited SA and Britannic Trade Corporation at the Bank of India in Jersey into six banker's drafts totalling approximately US\$43.9M, for the purpose of avoiding prosecution for an offence listed in Schedule 1 to the said Law or the making or enforcement of a confiscation order against him". (additions underlined) 88. The prosecution accept that its task is to prove the conduct, namely what happened in respect of the two Nigerian contracts, but it submits that it is not the prosecution's task to make the Jurats sure that such conduct would be criminal in Jersey. That would be decided by the Jurats, in the light of judicial direction on the criminal law of Jersey, that if it had occurred in Jersey, it would be criminal conduct for the purposes of the 1999 Law. The prosecution has identified a particular offence (misconduct in a public office) (although it says others arise on the same facts) but the authorities say that it need not go that far. 89. In *Michel v Attorney General*

[2007] JCA 239 an issue arose under one count under Article 32(1) of the 1999 Law as to whether the prosecution had proved that the monies in question were the proceeds of criminal conduct on the part of a certain person and if so, whether the appellant knew or suspected that this person had engaged in such conduct. Birt, Deputy Bailiff, said this:- "Mr Le Quesne submitted that the prosecution had failed to show that this count involved the proceeds of crime, not least because no specific criminal conduct had been identified. 118. However, in our judgment, there was ample evidence upon which the jurats could properly conclude that the monies received as the result of the false invoices and the large amounts of cash paid in were the proceeds of crime, for example, tax evasion. It is not necessary for the jurats to have identified with certainty the particular crime; the statute

simply requires them to be satisfied that the property is the proceeds of criminal conduct". In an earlier Court of Appeal decision involving one of the same defendants (Michel and Gallichan v Attorney General

[2006] JLR 287 , Smith JA expressed the following view:- "In our view it was a recipe for confusion to describe the criminal conduct as 'cheating the U. K. Public Revenue and/or theft' when what the Jurats had to decide was whether the conduct of the directors would have constituted an offence falling within Schedule 1 of the Law if it had occurred in Jersey. Bearing in mind that the Law does not require the conduct in question to have constituted an offence in the place where it occurred, it seems to us that the prosecution case would have been much better appreciated if the offences which it was alleged would have occurred in this jurisdiction had been clearly stated in the relevant count in the indictment." 90. I have difficulty with the prosecution's submission that in relation to this element of the offence its burden is discharged by proving the conduct alone. The legal or persuasive burden in any criminal prosecution (subject to certain limited exceptions) is upon the prosecution. 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. I do not see how the Jurats can proceed properly without going through that exercise. Thus if the offence identified was Foster fraud, the Jurats would have to be directed as to the ingredients of that offence as laid down in Foster (i.e. a person deliberately making a false representation with the intention of causing thereby - and with the result in fact of causing thereby - actual prejudice to someone and actual benefit to himself or somebody else) in order to apply those ingredients to the conduct and thus to determine whether that conduct (if proved) constitutes the offence. 91. As it is the prosecution which has the burden of proving that the conduct was criminal, it is incumbent upon 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. This places no undue burden on the prosecution, as it would have to have gone through that process itself (as indeed it has in this case) before deciding to prosecute. 92. In my view therefore the current Indictment is deficient in that it contains no particulars of the predicate conduct and does not identify the Jersey offence or offences which the prosecution assert the conduct constitutes and which, in view of my finding in the Predicate Conduct application, cannot now be or include misconduct in public office.. Purpose element 93. The defence assert, on the back of their contentions in relation to the purpose application, that it is necessary for the prosecution to prove that the defendant had committed the Jersey offence for which he was trying to avoid prosecution and/or the

making of a confiscation order. In effect, this is a third offence within each count that must be proved by the prosecution and it follows, the defence submits, that the prosecution should be required to give the same particulars as it would be required to give if the indictment bore a specific charge in relation to the offence in question. 94. There is nothing in the wording of Article 34

- (1) of the 1999 Law nor is there any authority to support these contentions, but in any event I have found that the purpose element is subjective, and the prosecution do not have to prove that the defendant has actually committed an offence for which he was seeking to avoid prosecution. However this leaves open the issue of whether the prosecution should be required to give particulars of which of the two purposes they say the defendant was avoiding, namely a prosecution or the making or enforcement of a confiscation order. I do not see how the prosecution can properly or fairly be required to provide further particulars of the defendant's state of mind. The Jurats must be sure that one of his purposes, subjectively, was the avoidance of a prosecution or the imposition of a confiscation order or both. Summary 95. I summarise my findings therefore as follows:- (i) The offence of misconduct in public office is not known to Jersey customary law, (ii) The purpose element of the offence under Article 34(1) is subjective and the prosecution do not therefore have to prove that there was an offence for which the defendant could have been prosecuted or confiscation order that could have been imposed or that he had actually committed such an offence. (iii) The offence created by Article 33(4) of the Larceny Act 1916 is an offence known to Jersey customary law. (iv) The indictment is deficient in that it contains no particulars of the predicate conduct and does not identify the Jersey offence or offences which the prosecution asserts the conduct constitutes (which cannot now be or include misconduct in public office). (v) The defence applications for particulars of the indictment are otherwise rejected. Authorities Proceeds of Crime (Jersey) Law 1999. Police Procedures and Criminal Evidence (Jersey) Law 2003. Attorney-General's Reference (No. 3 of 2003)

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