

JERSEY / JUDGMENT

AG -v- Bhojwani [2009] JCA 115A (08 June 2009)

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COURT OF APPEAL nd th April June Before : The Hon Michael Beloff., Q. C., President; M. S. Jones., Esq., Q. C., and; J. Martin, Esq., Q. C.. Raj Arjandas Bhojwani Bhojwani -v- The Attorney General Advocate J. D. Kelleher for Bhojwani. Crown Advocate M. T. Jowitt for the Attorney General.

JUDGMENT

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INTRODUCTION

1. This is the judgment of the Court giving the reasons for conclusions announced on April nd after a hearing on March 31 st and April 1 st 2009. On that occasion we dismissed the Defendant's application to appeal in relation to what is described below as the transposition issue, but allowed his applications for leave to appeal, and the appeals themselves, in relation to two other issues known as the operative deception and bribery issues. 2. The applications arose out of the decisions of Mr Commissioner Clyde-Smith ("the Commissioner") of 1 st October 2008 and 29th January 2009 in the context of a preparatory hearing under Part 10 of the Police Procedures and Criminal Evidence (Jersey) Law 2003 which provides :- "83. Application and interpretation of Part 10
 - (1) This Part applies in relation to an offence if on or after the commencement of this Article the accused is committed for trial or proceedings are instituted before the Royal Court for the offence concerned.
 - (2) References in this Part to the prosecutor are to the Attorney General or any advocate acting on the Attorney General's behalf. 84 Power to order preparatory hearing
 - (1) Where it appears to the Bailiff - ...
 - b) that a case is so complex or is a case the trial of which is likely to be so long that substantial benefits are likely to accrue from a hearing before the trial and for any of the purposes mentioned in paragraph (2),
 - (2) The purposes are those of -

- (a) identifying issues which are likely to be material to the verdict of the Royal Court or jury;
- (b) assisting comprehension of those issues;
- (c) expediting the proceedings before the Royal Court or jury;
- (d) assisting the management of the trial." 3. Those decisions raised three issues of law which had been conveniently categorised as in the manner already described ("the preliminary issues"). Resolution of those issues will have an effect on the forthcoming - much postponed - trial of the applicant. THE INDICTMENT 4. The applicant stands indicted on 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 "). 5. Count 1 of the amended indictment (the remaining counts being in similar terms) is as follows:- "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 the 1 st October, 2000 and 30 th October 2000, in respect of criminal conduct, namely:
- (a) the dishonest inflation of true prices for motor vehicles sold by him to Nigeria;
- (b) the making of false representations that:
- (i) the inflated prices were genuine prices; (ii) it was necessary to pay US\$148,940,000 plus freight and other charges or about that sum in order to obtain the vehicles sold under one contract; and (iii) it was necessary to pay US\$28,961,192 or about that sum in order to obtain the vehicles sold under the other contract.
- (c) the obtaining of dishonestly inflated payments for the vehicles out of Nigerian public funds;
- (d) the dishonest receipt for the benefit of himself and others of the inflated payments thereby obtained.
- (e) the dishonest payment of monies by or on the instructions of the said Raj Arjandas Bhojwani to bank accounts connected to Nigerian public officials involved in the award of vehicle-supply contracts to TaTa Overseas Sales and Services Ltd. (conduct which, if it occurred in Jersey, would have constituted offences of misconduct in public office, fraud , conspiracy to commit fraud, fraudulent conversion, conspiracy to commit fraudulent conversion, and bribery ,) . converted his proceeds of such criminal conduct, namely credit balances held in the names of TaTa Overseas Sales and Services Ltd SA and Britannic Trade Corporation at the Bank of India in Jersey, into six bankers' drafts totalling approximately US\$43.9 million, for the purpose of avoiding prosecution for an offence listed in Schedule 1 to the said Law or the making or enforcement t , of a confiscation order against him." (Court underlining).
- SUMMARY OF ALLEGATIONS 6. The prosecution allege s that the applicant negotiated two contracts in 1996 and 1997 with the sons and henchmen of the military dictator, titled the President of the Republic of Nigeria, General Sani Abacha , for the supply of vehicles to the Republic of Nigeria at vastly inflated prices ("the dishonest transactions"). The sums payable

under the dishonest transactions, the excess of which was divided between the applicant and those sons and henchmen, came into the applicant's company accounts at Bank of India in Jersey. In October and November 2000 many millions of those sums were transferred by the applicant by six banker's drafts to bank accounts in other countries linked to the Abacha regime. THE APPLICANT'S CASE ON THE PRELIMINARY ISSUES OPERATIVE DECEPTION
Operative deception in relation to fraud 7. In *Foster v Attorney General*

[1992] JLR 6, the Court of Appeal found that, in order to establish criminal fraud under Jersey law, it is necessary to show that:- (i) The defendant deliberately made a false representation (ii) with the intention of causing thereby (iii) and with the resulting fact of causing thereby (iv) actual prejudice to someone and actual benefit to himself or somebody else. (Court's underlining) We refer to these as "the Foster criteria". 8. The applicant submits that the offence so defined requires the prosecution to 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 alleged victim i.e. that there was "operative deception". Transposition and misconduct in public office 9. The conduct whose proceeds the applicant is accused of converting or removing occurred in Nigeria. Article 34(1) of the 1999 Law requires the prosecution to establish that that conduct would have been criminal conduct if it had occurred in Jersey. 10. The applicant submits that the exercise of transposition so required offends against the requirement of legal certainty. Alternatively he argues that, if the conduct is susceptible of transposition, the "circumstances and conditions that prevailed at the place where and at the time when the thing is complained of was done or omitted" [i.e. Nigeria] must be taken into account. Bribery 11. The applicant submits that there is no offence of bribery known to the customary law of Jersey. THE COMMISSIONER'S JUDGMENT 12. As to these three issues the Commissioner found as follows:- (i) For the purposes of the Jersey offence of fraud the prosecution does not have to prove that the false representation acted on the mind of the victim. (ii) The principle of legal certainty was not infringed, and that the circumstances prevailing in Nigeria at the time of the dishonest transactions were irrelevant to transposition. (iii) Bribery is an offence under the customary law of Jersey. OPERATIVE DECEPTION 13. As we have already noticed, the Particulars of Offence in respect of Count 1 on the Indictment allege, amongst other things, fraud. In the addendum to the Prosecution Case Statement, the crown sets out the essential elements of its case on that matter. There is reference to an "overarching false representation" and to "deception", but it is not asserted that anyone was actually deceived or that it was intended that anyone should be deceived. 14. In challenging the Commissioner's determination that, whilst in many cases, 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 him, it is not a requirement that it should do so. In challenging that determination, the applicant raises two issues. The first is whether the representation must operate on the mind of someone and the second is, if so, on whose mind must it operate. The first issue 15. In resisting the application before us, the crown contended that it may meet the Foster criteria in any particular case without having to

prove that anyone was deceived by the false representation or was induced by reliance on it either to do anything or to refrain from doing anything. An example given was that of the execution of a scheme involving two joint conspirators whereby one produces a false invoice to the other who, on its receipt, orders payment of the invoice sum to be made from public funds to a third party. In the example, no reliance is placed on the truth of the invoice by the person ordering payment or by the bank in which the public funds are deposited. The former knows that the invoice is false and the latter is simply complying with the terms of its mandate. The public is, however, prejudiced because it is not getting value for money and the third party benefits by receiving a payment of money, to which he is not entitled. The purpose of the false invoice is to cover the tracks of the person who ordered payment, in the event that the circumstances of the payment are later investigated. 16. In that example, Foster fraud has been committed, argued the crown, because:- (i) the party producing the invoice deliberately made a false representation (via the medium of the invoice); (ii) with the intention of causing thereby; (iii) and with the resulting fact of causing thereby; (iv) actual prejudice to someone (the public) and actual benefit to somebody else (the third party). The "cause" of the prejudice and of the benefit was the production of the false invoice, because payment was ordered in accordance with the plan which required its production before payment would be ordered. Discussion on the first issue 17. At the heart of the Foster criteria lies the concept of misrepresentation. In the law of England and Wales, misrepresentation may give rise to a civil cause of action in a number of different circumstances. In that context, a representation is "a statement made by a representor to a representee". (See Halsbury's Laws of England; Fourth Edition, Volume 31, paragraph 703.): - "A representee in law includes: (1) any person to whom the representation was physically and directly made, or any principal or partner of such person: (2) any specific person, not coming within the description in head (1) above, but whom the representor, either actually or in contemplation of law, intended the representation to reach and influence; and (3) any individual member of the public, or of a class, who has acted upon a representation addressed to the public or class." (Halsbury, Volume 31, paragraph 735.) 18. At its most basic, a misrepresentation is an assertion that a state of affairs exists, when the truth is that it does not. Further, "(a) representee who knows the truth is not deceived. Proof, therefore, of such knowledge is a complete answer to any proceeding founded on misrepresentation." (Halsbury, Volume 31, paragraph 802.) 19. In our judgment, it is clear from these passages that, to be actionable in the civil law of England and Wales, a misrepresentation must have been relied on by the representee. That requirement needs to be met, also, in the realm of actionable misrepresentation in the law of Jersey. (See *Steelux Holdings Limited v. Edmonstone (née Hall)*)

[2005] JLR 152) It is the acting in reliance on the misrepresentation which constitutes the causal connection between the representation and the harm. 20. With these considerations in mind, we turn to Foster to consider whether there is anything in its judgment to indicate whether or not the Court of Appeal intended the casual connection which must exist between a criminal misrepresentation and the resulting prejudice and benefit to be

something more or less than acting in reliance on it. 21. The Foster criteria were formulated in the determination of an appeal against the refusal of a plea in bar of trial. The particulars in the Indictment alleged that, by willfully wilfully misrepresenting certain facts, and by withholding certain other facts, the appellant fraudulently induced his employers to buy a property at an inflated price. It is clear, on the alleged facts of Foster , (i) that the representations were relied on by the employers and (ii) that they acted on the faith of these representations, to their prejudice. 22. Reading the Foster criteria in their context, in our judgment it cannot be said that the appellant intended to cause the necessary prejudice and benefit by making these false representations, unless he intended to communicate them to his employers. Nor can it be said that he intended the false communications to cause prejudice and benefit, unless he intended them to be believed. 23. We are further of the view that the prejudice that resulted from the false representations was caused by the employers' acting in reliance on them, in the belief that they were true. Understood in the context in which Foster was decided , therefore, we are of the opinion that it is implicit in the criteria that the false representation must operate to deceive. 24. The question which then arises is whether the Court of Appeal in Foster intended to hold that a completed fraud may be committed where a false representation is made, but where no one is deceived by it and no one is induced to do anything in reliance on it. In our opinion, there is nothing in its judgment to suggest that the Court of Appeal so intended. The cases which the court considered in determining the rule can all be classified as reliance cases. In rejecting the statement of the ingredients of fraud which was advanced by the Bailiff in his first instance judgment in Foster , the Court of Appeal explained that it did so because the Bailiff's formulation went beyond the law established by the cases they had seen and the law established by those cases . 25. In our judgment, therefore, the Foster criteria are to be understood as being restricted to reliance cases. If the intended representee knows the truth, he cannot be said to have acted in reliance on the representation, and the representor has not committed Foster fraud. Not only does this conform to the general law on misrepresentation to which we have referred, but the criminal context would , if anything fall , favour a narrowing rather than a if anything, in favour of a narrowing rather than a broadening broadening of this law. Discussion on the S s econd I i ssue 26. The fourth limb of the Foster criteria is that the defendant's false representation must cause "actual prejudice to someone and actual benefit to himself or somebody else". The applicant contends that the "someone" referred to must be the person to whom the representation was made. 27. As a matter of language, in our view, if the Court of Appeal had intended that the application of the criteria should be thus restricted, it could easily have said so in terms. Further, we are unable to identify any policy reason why the victim must be the person to whom the misrepresentation is made. In any event, the case of Le Gresley , referred to in the Bailiff's judgment in Foster at page 92, is a clear example of an attempt to defraud someone (the defendant's husband's creditors) by making a false representation to someone else (the Viscount). 28. Consequently, in our judgment, Foster fraud does not require that the person who suffers prejudice is the same person to whom the misrepresentation was made. TRANSPOSITION 29. Article 34(1) of

the 1999 Law is in the following terms:- "A person is guilty of an offence if the person -

- (a) conceals or disguises any property that 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." 30. "Criminal conduct" is defined by Article 1 of the 1999 Law as:- "...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." 31. The applicant is charged with converting or removing the proceeds of criminal conduct which is said to have occurred in Nigeria. The crown must therefore prove that that conduct would have amounted to a Schedule 1 offence if it had occurred in Jersey instead of in Nigeria. The conduct will have to be hypothetically transposed from Nigeria to Jersey. 32. The applicant contended that the Commissioner was wrong to hold that the process of transposition contemplated by Article 34 was consistent with the principle of legal certainty. He also complained that the Commissioner had taken too narrow a view of the transposition exercise. Legal certainty 33. The applicant claimed that, if the crown attempted to prove that his conduct amounted to criminal conduct, it would be seeking to punish him indirectly for what he had done in Nigeria at a time before the 1999 Law was in force in Jersey. This, he said, contravened the principle of legal certainty, which is conveniently summarised in the speech of Lord Bingham of Cornhill in *R v Rimmington*

[2006] 1 AC 459, 482, as follows:- "...no one should be punished under a law unless it is sufficiently clear and certain to enable him to know what conduct is forbidden before he does it; and no one should be punished for any act which was not clearly and ascertainably punishable when the act was done". 34. We do not accept the applicant's contention. 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 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. That will be assessed according to the state of the 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 acts would have attracted had they in fact occurred in Jersey. The Commissioner was right to reject the applicant's contention. Extent of transposition 35. The applicant claimed that, in order to decide whether or not his actions would have constituted an offence if they had occurred in

Jersey, it was necessary to assume that those actions and the circumstances surrounding them had occurred as in fact they did, but in Jersey instead of in Nigeria. Thus, for example, in relation to the predicate offence of procuring misfeasance in public office, it would be necessary to assume that the applicant had procured in Jersey a Nigerian official to place contracts at inflated prices for the supply of vehicles to Nigeria, and to consider whether the official's conduct was an unacceptable departure from the standards expected by the Nigerian public of a Nigerian official. Anything less than this would, it was argued, mean that the applicant was to be judged solely by the standards of Jersey law and would deprive him of the benefit of procedural and evidential protections that would have been available to him if his conduct was judged by Nigerian standards. 36. The Commissioner rejected this contention. In summary, his view - expressed in paragraph 25 of his Judgment of 1 st October 2008 - was that "the fact that the person with whom the defendant was dealing was a dictator and the other prevailing circumstances at the time are adventitious and irrelevant to the transposition process". 37. The extent of the transposition exercise has been considered in two English House of Lords cases, to both of which the Commissioner referred at length. They are *Cox v Army Council*

[1963] AC 48 and *Norris v Government of the United States of America*

[2008] 1 AC 920 . In *Cox* , the defendant was charged under section 70 of the Army Act, which made it an offence for anyone subject to military law to commit a civil offence in the United Kingdom or elsewhere; and a civil offence meant "any act or omission punishable by the law of England or which, if committed in England, would be punishable by that law" . The defendant was said to have driven without due care and attention on a road in Germany; and his argument in essence was that the offence of driving without due care and attention contained in the Road Traffic Act 1960 could only be committed on a road in England. The House of Lords rejected that argument. Viscount Simonds said the following:- "It is true that in the Road Traffic Act, "road" means a road in England. But the essence of the offence lies in driving without due care and attention on a road to which the public have access. I see no difficulty in at least this degree of translation. Nor should the issue be confused by saying that in England and (say) Germany the traffic regulations are different. A driver shows due care and attention by observing the regulations which prevail in the country where he is driving. Nor, again, does it appear to be relevant that the Road Traffic Act contains numerous provisions in which "road" can only have a sensible meaning if it is confined to roads in England, and other provisions, for example, in regard to the Menai Bridge, which by their nature can have no application except to a particular subject-matter. It appears to me that here at least in a negative sense is the test of the applicability of the section. If the act is of its nature one that can only be committed in England the section cannot operate. I need say no more than that it is otherwise with such acts as driving without due care or, it may be, dangerously on a highway or larceny from a dwelling-house or an offence against the person. All such acts have what, for want of a better expression, I will call a character of universality which makes it sensible to bring them within the scope of section 70. I mean the same thing whether I refer to them

being done at Sundern or at Surbiton" (pp68-9). To similar effect was Lord Reid:- "Any act or omission committed abroad was committed there and nowhere else. So the statute requires us to imagine another act committed in England. It cannot require that that other act should be precisely the same in every detail because that would be impossible. So it must require that we can imagine another act committed in England which is similar in all relevant respects. With many types of offence that is easy. For example, murder and theft are the same all the world over. But at the other end of the scale there are acts or omissions so closely connected with conditions which are peculiar to England, or at least which are absent in the place where the act was committed, that it would be impossible to find the necessary degree of similarity between the act or omission committed abroad and any act or omission which could be committed in England. The requisite degree of similarity must depend on the nature of the offence. In this case the appellant was found guilty of driving a motor-vehicle on a road without due care and attention contrary to section 3 (1) of the Road Traffic Act 1960. But the question is not whether that Act applies to Germany, or whether the road on which he was driving was a road within the meaning of that Act. The question is whether there is the requisite degree of similarity between what the appellant did and an act done in England which would be contrary to that section. I can see no relevant difference between the two. No doubt traffic regulations are different in Germany from those in England. But conditions vary greatly in England and the essence of the offence is failure to drive with due care and attention having regard to all the circumstances of the particular place and time. I therefore find no difficulty in equating failure to drive with due care and attention in particular circumstances in Germany with a similar failure in England, and that is sufficient to dispose of this case" (p70). Finally, in a passage on which the applicant based some reliance, Lord Radcliffe said this:- "[T]he occurrence that is said to constitute the offence is always the actual occurrence itself as it took place outside England and that means importing into the hypothetical English occurrence the circumstances and conditions that prevailed at the place where and the time when the thing that is complained of was done or omitted. The difficult question, as I see it, is to decide in any particular case how far those circumstances and conditions are an essential element of the act which it is said would have constituted an offence if committed in England, and how far the English offence is capable of being applied to the non-English occurrence" (pp71-2). 38. Norris was an extradition case. It is a policy of English law (and of other systems of law) that, before there can be extradition, there should have been criminality according to both the law of the requesting State and the law of England. An exercise in transposition is accordingly an essential part of extradition cases. In Norris, the defendant was accused of obstructing an American investigation into price-fixing. The decision of the House of Lords on this topic is encapsulated in the following passage from the committee's joint opinion:- "If, then, we ignore the adventitious circumstances connected with the conduct alleged against Mr Norris in counts 2-4 of the indictment and concentrate instead on the essence of his alleged acts, the substance of the criminality charged against him is not that he obstructed the criminal investigation into price-fixing in the carbon products industry being carried

out by the Pennsylvania Grand jury, but that he obstructed the criminal investigation into that matter being carried out by the duly appointed body. Making the necessary changes, we would have to translate counts 2-4 into counts of obstructing in England a criminal investigation into price-fixing in the carbon products industry being conducted by the appropriate investigatory body in this country" (para 99). 39. In reaching their decision, the House placed reliance on *In re Collins* (no 3)

- (1905) 10 CCC 80, a Canadian extradition case. Collins was accused of perjury in making a false statement on oath in California. There was nothing in Canadian law which made it perjury to make a false deposition before a competent Californian tribunal or officer; and on that basis it was argued that Collins' conduct would not amount to a crime if it had occurred in Canada. Duff J rejected that argument; and on the basis that the approach to be applied was to conceive the defendant, and the acts of the defendant, transported to Canada, he said this: "It is contended by the applicant that on these authorities to which I have referred, you have to go through the conduct upon which the criminal charge is based, and you have to come to the conclusion that his identical acts, if done in this country, would have constituted a crime in accordance with the law of Canada. Taken with due qualifications, we need not quarrel with that; but it is obvious from the outset that there must be some qualification. In the first place, the treaty itself, which, after all, is the controlling document in the case, speaks not of the acts of the accused, but of the evidence of "criminality", and it seems to me that the fair and natural way to apply that is this -- you are to fasten your attention not upon the adventitious circumstances connected with the conduct of the accused, but upon the essence of his acts, in their bearing upon the charge in question. And if you find that his acts so regarded furnish the component elements of the imputed offence according to the law of this country, then that requirement of the treaty is complied with. To illustrate, I apprehend that in the case of perjury, the accused cannot be heard to say, "the oath on which the charge is based was administered by AB, an officer who had no authority to administer oaths in Canada (although duly authorised in the place where the oath was taken); and, consequently, if I had done here the identical thing I did there (viz : the taking of an oath before AB), perjury could not have been successfully charged against me". The substance of the criminality charged against the accused is not that he took a false oath before AB but that he took a false oath before an officer who was authorised to administer the oath. Any other view would, I conceive, simply make nonsense of the treaty" (pp100-1). 40. The House also referred with favour to a subsequent passage from the same judgment, in which (at p 103) Duff J said the following:- "If you are to conceive the accused as pursuing the conduct in question in this country, then along with him you are to transplant his environment; and that environment must, I apprehend, include, so far as relevant, the local institutions of the demanding country, the laws affecting the legal powers and rights, and fixing the legal character of the acts of the persons concerned, always excepting, of course, the law supplying the definition of the crime which is charged". 41. The applicant suggested that this latter passage provided strong support for his argument that the exercise of

transposition required his actions to be considered by reference to the context, or environment, in which they had occurred. We do not agree. In *Collins*, the defendant had made an affidavit containing a wilfully false statement of fact in the course of an action of alimony in California. In order to determine whether equivalent conduct would have amounted to an offence in Canada, it was necessary for the Canadian court to consider if sufficient parallels existed; and in order to do that it would need to understand the essential nature of the defendant's acts in the place where they occurred. Thus the Canadian court would have had to have regard to the nature and purpose of the Californian proceedings and the status and duties of the person administering the oath in order to see whether an equivalent statement made in equivalent Canadian proceedings before a person having equivalent powers would have attracted criminal liability. But that is the limit of the exercise required. 42. The second quoted passage from *Collins* was plainly not intended to, and in our view does not, detract from the test suggested by the first quoted passage, that it is the essence of the accused's acts, not the adventitious circumstances associated with them, that alone is relevant. That test is consistent with the focus in *Norris* on establishing the essence of the conduct, and accords with the references in *Cox* to "the essence of the offence" (Viscount Simonds and Lord Reid) and the "essential element of the act" (Lord Radcliffe). It may sometimes be difficult, as Lord Radcliffe suggested, to decide what is essential and what is adventitious; although the task may be easier where the crime has - as the applicant conceded all the suggested predicate offences in the present case indisputably had - the "character of universality" referred to by Viscount Simonds in *Cox*. In all cases, however, the aim is to establish what is the essence of the accused's conduct; and, although that may often require an understanding of the formal background against which the conduct took place, how the accused's acts would have been categorised or regarded in the place where they occurred will ordinarily be irrelevant. 43. Thus, 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. 44. 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 occurred 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 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. 45. In our view, the Commissioner was right, substantially for the reasons he gave, to hold against the applicant on this aspect of the case; and we consider that the directions he proposes to give to the Jurats as set out in paragraph 24 of his Judgment of 1 st October 2008 correctly reflect the legal position. BRIBERY 46. We accept that it is always for the prosecution to establish the existence of an offence with which a defendant is charged. The exercise where the offence is created by statute is one of interpretation of the statutory language. The exercise where the offence is one of customary law is necessarily distinct. Here a range of sources may be consulted: jurisprudence; commentary; the opinions of those learned in the law; precedents of charges. Neither exercise is comparable to that involved in the ascertainment of fact: and the vocabulary of "beyond reasonable doubt", applicable to that of conclusions drawn from evidence is inappropriate. 47. Nonetheless we are content to adopt the criterion deployed by the Royal Court in *AG v Thwaites*

[1978] JJ 179 that the existence of the crime must be "well established" (p.182). Mr Jowitt's proposal of a need for us to be "satisfied" or "confident" of the existence of the offences seemed to us to be not materially dissimilar. Any lesser test would be inconsistent with fundamental principles of legal certainty, and (analogically) of the narrow construction of criminal offences. 48. On two recent occasions this Court has had to decide on whether Jersey recognised a particular customary criminal offence: (*Foster v AG*

[1992] JLR 51 (fraud) and *AG v Bhojwani*

[2008] JCA 188) (misconduct in public office). Both give valuable pointers to the proper approach to this issue. Essential features are as follows:- (i) The vast bulk of the substantive criminal law is to be found in the customary/common law. Only recently has custom be en transmuted into code. "... The criminal law of the Island of Jersey is, and has long been, in a remarkably fluid state ..." *Renouf v AG*

(1936) AC 455 at p.472 . (ii) The law was originally the criminal law of Normandy in the *Grand Coutumier* . "The great repository of early Norman law was very defective in relation to crime." (*Renouf* p.473 (see too 1847 Report of the Commissioners; *Foster* p.15 l.16). (iii) By the 17 th century, when two Lieutenant Bailiffs Poingdestre and Le Geyt wrote treatises on the Law of Jersey generally, English Law had begun to be referred to, *Foster* at (para 35). (iv) At the date of the Commissioners' inquiry in 1847 "there was not in any Act, Order or even in any work of authority any specific definition of crimes or their punishments" (*Renouf* p.471) (v) Jersey has always been too small for there to be a sufficient number of cases for a comprehensive criminal jurisprudence to emerge. (The 1847 Commissioners Report at xxviii, the evidence to the Commissioners at 87 and *Foster*

p 21.135). (vi) By the mid 19th century English Law was almost the exclusive source for substantive questions of criminal law, (the 1847 Commissioners' report at xxvii - xxviii). (vii) "Up to the middle of the 19th century the Royal Court was exercising the power to adapt and develop the criminal law in the course of dealing with individual cases" Foster p.23 1.20-22. (viii) There were virtually no reasoned judgments in criminal cases until the second half of the 20th century. The criminal cases were recorded separately in manuscript in the Court rolls, the Poursuites Criminelles (Royal Court) Cause Criminelles (Police Court) from 1797 and in French. The focus of these records is on describing the conduct being prosecuted, and the result, not the reason (the 1847 Report at ix, Foster at 21(35) and 16 & 17, Bhojwani at paragraph 42). (ix) By the 1930s this process of Anglicization was largely completed. "It has been used to refer to English legal works and precedents as authorities and the Court has in many cases regarded English law as a guide in laying down the modern laws of Jersey" (Renouf p.474) "Jersey thus rests almost entirely on the modern practice of the Royal Court and this tends more and more to imitate English models". [Renouf pp476]. See too Foster ,

- p. 22. (x) There were no formal rules of criminal pleading until the Indictment Rules 1972. (xi) The advent of court reporting dates only from 1950 with the Jersey Judgments series. THE INDIVIDUAL MATERIALS RELIED ON BY THE PROSECUTION 49. We find it useful to deal with individual sources in chronological sequence to seek to discern whether this is a consistent trend confirming the existence of a customary offence of bribery. 50. Poingdestre under the caption *Ascauoir s'il est licite d'acquérir une Dette sur autrui ?* in his *Les Loix et Coutumes de L'ile de Jersey* writes (at page 254):- "Quand un Juge ou Officier de Justice menace, ou intimide quelqu'un de ses inferieurs , pour extorquer de luy argent, ou autre chose, soit meuble ou immeuble ; ou pour l'induire a contracter , transiger , composer ou faire accord avec luy ou autre; ou qu'il intente procez ciuil ou criminal contre un Innocent; ou qu'il laisse choir un procez encommencé contre ung coupable ; ou qu'il le poursuit laschement par corruption; ou qu'il recoit de l'argent ou autre chose d'un criminel ou autre personne coupable pour luy faire faueur , c'est une Concussion ; laquelle est punissable par les loix de Depriuation d'office & de punition extraordinaire, ou du quadruple, si elle est estimable" 51. Thus the only passage which contemplates bribery [ie ou qu'il recoit de l'argent ou autre chose d'un criminel ou autre personne coupable pour luy faire faueur , c'est une concussion] does so from the perspective of the bribee , not the briber, and, moreover, in the context of court proceedings. The focus of the extract is on the criminal conduct of the judicial officer. 52. Le Geyt, in his *Privileges loix et coustumes de l'isle de Jersey* refers to the imposition of punishment for gross ignorance and corruption. (Article 8, *Des injures et délits*):- "Les Hommes d'Enditement et d'Enqueste sont punis par amende ou par prison en cas d'ignorance grossière , ou plus sévèrement s'il y avait corruption prouvée ." 53. In his *Constitution, Les Loix , et les Usages* , Le Geyt deals with corruption more broadly under *Traité des Témoins* and the heading " De la corruption par argent, par commerce ou par prière ", and under *Traité des crimes* (which he accepts is an incomplete exposition of the criminal law) and the heading " de la concussion " writes:- " L'argent qu'on donne au

témoin est une très juste cause de reproche ... Que deviendrait le genre humain s'il étoit permis d'acheter des témoins , et si les dépositions tomboyent dans le commerce ?... A Jersey, l'on ne permettoit pas même de venir dans une auberge payer à boire à des témoins , qui seroient venus de la campagne pour témoigner , et j'ai vu juger cela digne d'amende . "

The focus is on the briber, but again in a forensic context and a limited one at that. 54. A later reference "Il (Le Brun) dit que le Sergent qui, au lieu d'exécuter , prend argent de celui qui il doit contredire et un le contraindre pas, et coupable de concussion", refers again to the briber, and, again, to an officer acting (it appears) in execution of a Court's Judgment. 55. While at that time - and until 1771 - members of the Court also formed part of the legislature of the Island the legislature was a distinct organ of government from the judiciary and one cannot assume in this context a bridge between the two. The Courts have always and obviously been particularly jealous to protect the integrity of the law - especially judge made law. Contempt of Court is an offence: contempt of a politician is not. 56. We accept in respect of Poingdestre and Le Geyt that "Neither author was writing a systematic treatise on criminal law" (Foster p.15 - 31) but the prosecution cannot build a case on an absence of material. 57. The most one can infer from these classic sources is that it would not be illogical for both parties to a corrupt transaction (the person who proffers the bribe to the official, and the officer who receives it) being viewed as partners in crime: but neither commentator expressly says that such was the position. We find the citations insufficient by themselves to make good the prosecution's case, although not inconsistent with it. 58. In 1789 statements were made by Hemery and Dumaresq (for the States) and Pipon and Durell in response to an order of the Privy Council. 59. Neither party before us identified any passages in the statements of the former pair of any relevance. In the statement of Pipon and Durell (the two law officers) Foster p.490: - a statement of what " they conceive to be the CRIMINAL LAW of the Island" - bribery is nowhere enumerated. This does not of itself prove that the offence did not exist; the authors of the statement could simply have overlooked it, the 1847 Commission noted that their exposition was not exhaustive. Mr Jowitt argues too that no concept of desuétude is applicable in Jersey law, if customary law previously existed it could not have lapsed. But its existence previous to the time of Pipon and Durell has not been proved. 60. The 1847 Commission Report is the high watermark of the P p rosecution case. The Commission was set up to inquire into the criminal law of an emerging modern society seeking clarification of that law. The Commissioners were appointed by the Crown. [They were one of a number of panels of commissioners appointed in the nineteenth century to inquire into the criminal law, both in England and in British territories.] 61. The Commissioners began by addressing three series of written questions to the Royal Court, the legal profession and others in the island who may have been able to give useful evidence. The questions and the written answers from the Bailiff, 10 of the 12 Jurats (who were judges of law at that time), the two law officers, each of the advocates, the greffier of the Royal Court and the Viscount are appended to the Report (see p5 - 11). 62. The Commissioners then came to Jersey and heard evidence, most of it in the presence of the Bailiff and other lawyers (see page: vi). The oral evidence is also appended to the report (see p. 100 and following). 63. The publication of the report represents the only time such a comprehensive

review of the criminal law of Jersey has been undertaken in the last two centuries; there has, indeed, never been a text book on the subject. Since the Report was based on the evidence of the most eminent lawyers of the time, including the majority of Jurats, it can properly be taken to be the best source of the then current law. 64. At around p.230 of the Report a long section of evidence is taken up with questions and answers about substantive Jersey offences. We quote from the entirety of the only relevant passage, emphasising what appear to us to be the critical interchanges by underlining them . In the course of examination of Mr. Hammond, the Senior Advocate at the time and a future Bailiff, the following passage occurs:- "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 cognisance of all those offences. 2923 Do you mean, as a contempt of justice ? - No; the Queen's Procureur General will prosecute them. 2924 He prosecutes in all cases? - Yes; it would be a public action on the part of the Procureur General 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. (underlining added) "2926 (To Mr. Dupre (the then Solicitor General)) 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 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 ... I should say that I was acquitted" At 2932-2934 other examples of misconduct are given. 65. We can - and do - accept that bribery was discussed, albeit in terms of procedure rather than of substantive law. We also accept that those who discussed procedure must have presumed the offence to exist. But the questions posed and the answers given appear to relate once again to bribery of judicial - and not other
- public officers. 66. In short, where bribery was discussed it was in the context of bribing judicial officers: where other officers were discussed, it was not in the context of bribery. 67. 22. In AG v Thwaites

[1978] J. J. 179 at page 182, the Royal Court noted:- "There is no doubt that, at that date, the Royal Court did assume the power to declare as a crime acts which appeared to it to be wrong, mischievous, offensive or criminal" 68. But the fact that the Royal Court enjoyed that power did not mean that they had exercised it to create an offence of bribery (or indeed any other offence). Could have and did are distinct. 69. In Attorney-General v Langtry (1945) Poursuites Criminelles 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" . She was not charged with bribery. This Court has specifically said that the case " concerned incitement to misconduct in a public office". [Bhojwani at para. 50). 70. In 2001 the Bailiff in In the matter of the Yaheeb Trust

[2003] JLR 92 stated:- "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". 71. The Bailiff was considering an application by the Attorney General to cross-examine the Foreign Minister of Qatar on the basis that he was conducting a criminal investigation into funds in Jersey. The issue for the criminal investigation was at least partly, as set out in the Judgment, whether the funds in Jersey were the proceeds of bribery. In that context we accept the Commissioner's analysis that "these statements were obiter and the Bailiff was not asserting the existence of specific offences rather than illustrating the type of conduct for which criminal liability may exist under Jersey law." [para 54 of the Judgment dated 29 th January 2009] Certainly the Bailiff was not required to determine whether an independent offence of bribery was part of Jersey customary law: and even if his dictum could be read as an expression of opinion, he provided no supportive source material. 72. The Projet to the Corruption (Jersey) Law 200 - had the following to say in relation to a customary law offence of bribery:- "Jersey has, up to now, been without general anti-corruption legislation. There are a number of specific anti-bribery offences in various Laws such as the States of Jersey Law 1966 and the Companies (Jersey) Law 1991) and there is a customary law offence of bribery, just about the only recorded incidence of which, since the Second World War, is Attorney General v Langtry, in October 1945 . Mrs Langtry was convicted and fined £25 for offering a bribe, in the form of a £5 note, to the Chief Aliens officer in return for a permit to travel to England. (The Chief Aliens Officer, incidentally, declined both to accept the bribe and to issue the permit, and instead, reported Mrs Langtry to the police.) The paucity of decided cases is at least one of the reasons why the exact scope of the customary law offence 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." (Court's underlining). 73. As to the sentence underlined, we observe en passant first that Langtry was not a case where bribery was charged; second, the author of the Projet cites no other incident of bribery either before or after the Second World War. 74. The Project recommended a " start from scratch " approach and recommended abolition of the customary offence of bribery (p.5). 75. Article 9 of the Law as follows:- "Customary law offence of bribery abolished (1) The customary law offence of bribery is abolished. (2) Paragraph

- (1) shall not affect any investigation or criminal proceedings in respect of an act committed before paragraph (1) comes into force, and any such investigation or criminal proceedings may be instituted, continued or enforced as if paragraph (1) had not come into force." This shows at any rate a perception of a legislative body that the offence existed; no purpose would be served by proposing abolition of a non-existent offence. But we know of no principle by which such perception provides sufficient evidence of an offence. 76. We accept:- (i) No legal opinion to the effect that the offence of bribery does not exist in Jersey customary law has been identified. (ii) The absence of reported cases if of little significance given the immature state of law reporting in Jersey until the mid twentieth century. (iii) Uncommon prosecution is no argument for non existence of an offence, (although common prosecution would be a compelling proof of the offence's existence) nor could an offence cease to exist from a failure to charge. (iv) Two cases in the House of Lords in the 1960s show that commentary, even in the absence of jurisprudence, can be used to establish the existence of an offence at common law. (a) In the first case: *Sykes v DPP*

[1962] AC 528 the issue was whether the offence of misprision of felony existed. While the speeches in that case refer to the occasional prosecution for the offence over a period of some 700 years, the bulk of the reasoning of the Law Lords who gave the main Judgments, Lord Denning and Lord Goddard rested on the writings of eminent commentators or of judges writing extra curially . Lord Denning appears to have considered that the writings of eminent lawyers would alone have been sufficient (see especially p. 558 and 559), adding of the offence under consideration:- "It is true that until recently it has been rarely invoked, but that is no ground for denying its existence". p.560 Lord Goddard said:- "... For centuries there has been communis opinio among all the writers and such of the judges who have had to consider the matter that there is such an offence and no trace of it ever having been doubted until the present case." (page 566): We repeat, however, that we have been shown no such communis opinio among Jersey commentators. (b) In the second case, *Button v DPP*

[1966] AC 591, the issue was whether an offence at common law could only be committed in a public place, as suggested by a number of cases decided since the 19 th century. The DPP argued that this line of authority was heretical: "The common law offence of an affray had been a recognised offence long before the beginning of the 19 th century and consisted of two or more persons fighting together to the terror of the Queen's subjects and that it need not be committed in a public place." (p.624) A unanimous House of Lords agreed with this submission relying solely on recognised commentaries and cited not a single case to support the conclusion that the common law offence had been recognised before the beginning of the 19 th century. (p.627) We make the same observation as in relation to *Sykes* . (v) Mr Jowitt also cited the passage from the Judgment of the Privy Council in the *Pitcairn Islands* case: *Christian v. The Queen*

- [2007] 2 AC 400 when Lord Hope said:- "There is an air of unreality about the objection that the appellants were disadvantaged by the fact that the provisions of Sections 1 and 14 of the 1956 Act were not ascertainable on Pitcairn ... here we are dealing with conduct which the common law has regarded as criminal for centuries, and the appellants cannot have been in any doubt that what they were doing amounted to criminal conduct." (p. 431) In our view sexual contact (including rape) with underage girls who did not consent stands on a different footing to bribery. The alleged read across is unpersuasive. We must remind ourselves that our concern is in any event not whether it would have been wise, or useful, to have such an offence in Jersey customary law, but whether such an offence was in fact created. (vi) Mr Jowitt noted that in *R v Whittaker*
- (1913) 2 KB 1283 the Court of Criminal Appeal recognised that in England, from at least the time of Lord Mansfield, (i) bribery was an offence in relation to both to the giver and the taker of the bribe (ii) such taker, to commit an offence, could be a public, without being a judicial officer. "When an officer has to discharge a public duty in which the public is interested to bribe that officer to act contrary to his duty is a criminal act." (Page 297). (See generally *Nicholls Q. C and Others: Corruption and Misuse of Public Office* para 2.01-2.19 ("Nicholls")) Mr Jowitt's submission was that if Jersey law had adopted so many English models of criminal offences, it would be illogical if it had accepted misconduct in public office but rejected the closely related English model of bribery. (vii) In *Bhojwani* this Court did not, in fact, ascribe English roots to the customary criminal law offence of misconduct in public office (para 58), but that apart, we find Mr Jowitt's submissions on this point unpersuasive. In our view the very fact of the existence of the one offence (misconduct in public office) made reception or reflection of the other (bribery) unnecessary. Langtry is the product of that choice. There is an overlap between facts which would undeniably have been capable of attracting a charge of attempting to procure misconduct by a public law officer and those which attract a charge of bribery, cf : *Nicholls* op cit: para. 2.27. Jersey, which recognised and received the former offence, had then no substantial need for the latter. (viii) In short when we draw up a balance sheet, there is in our view insufficient in the credit column to sustain the prosecution case, and the more general submissions ably developed by Mr Jowitt cannot compensate for that lack of material. In our view the enactment of legislation in 2006 can be seen to have been an action ex abundanti cautela . The offence which it purported to abolish had in fact never existed. *Authorities* *Police Procedures and Criminal Evidence (Jersey) Law 2003. Proceeds of Crime (Jersey) Law 1999. Foster v Attorney General*
- [1992] JLR 6 . *Steelux Holdings Limited v. Edmonstone (née Hall)*
- [2005] JLR 152 . *R v Rimmington*
- [2006] 1 AC 459 . *Cox v Army Council* [1963] AC 48. *Norris v Government of the United States of America*

- [2008] 1 AC 920 . Road Traffic Act 1960. In re Collins (No 3) (1905) 10 CCC 80. AG v Thwaites [1978] JJ 179. AG v Bhojwani
- [2008] JCA 188 . Renouf v AG (1936) AC 455. Les Lois et Coutumes de L'île de Jersey, Poingdestre. Privileges loix et coutumes de l'isle de Jersey , Le Geyt. Constitution, Les Loix , et les Usages , Le Geyt. Attorney-General v Langtry (1945) Poursuites Criminelles 249.
- [2003] JLR 92 . Sykes v DPP [1962] AC 528. Christian v. The Queen
- [2007] 2 AC 400 . R v Whittaker (1913) 2 KB 1283. Corruption and Misuse of Public Office, Nicholls Q. C and Others. Page Last Updated: 29 Jul 2016 BAILII: Copyright Policy | Disclaimers | Privacy Policy | Feedback | Donate to BAILII

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