

JERSEY / JUDGMENT

AG -v- Bhojwani [2009]

JRC 013 (28 January 2009)

[2009] JRC 013

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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 21 st April 2009. 2. On 12 th January 2009, I heard three applications by the defence which I had earlier ordered to be suitable for a preparatory hearing under Part 10 of the Police Procedures and Criminal Evidence (Jersey) Law 2003 , following which my decision was reserved. The Indictment 3. 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 to such criminal conduct, held in the names of TaTa Overseas Sales and Services Ltd SA and Britannic Trade Corporation namely credit balances 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 of a confiscation order against him." 4. As can be seen, the indictment as now amended includes misconduct in public office as one of the predicate offences, and this following the decision of the Court of Appeal on 6 th November 2008 (

- (2008) JCA 188) that misconduct in a public office is an offence known to Jersey customary law. Summary of the allegations 5. 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\$ 130M, 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. 6. I take each of the three applications in turn. 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. 8. The defence application relates to the third element. The defence 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. They refer to this as a requirement for " effective cause " and/or " operative deception ". 9. Although Mr Kelleher submitted that under English law there is little distinction in practice between the expressions "effective cause" and "operative deception" as used in references to cases of false pretence under the Larceny Act 1916 and deception offences under the Theft Act 1968, for the purposes of this judgment I am going to refer to "operative deception" as the requirement, contended for by the defence, that the prosecution must prove that the alleged false representation acted on the mind of the victim of the alleged fraud. Whether there should be a causal link between the false representation and the actual prejudice to the victim is plain from the third element of the offence as set out in *Foster* and the prosecution accept that this is the case. The issue is whether that causal link has to be by acting through the mind of the victim. 10. The defence further submitted that, other than in exceptional circumstances, it is for the prosecution to prove operative deception by the direct evidence of the person or party alleged to have been induced to act as a consequence of the alleged false representation. In this case, that must be evidence of the person properly authorised to give evidence for and on behalf of the Federal Republic of Nigeria. The application is significant for the defence, as it submits that the prosecution case contains no evidence of operative deception and never has. 11. The requirement for the prosecution to prove operative deception is clear, the defence contend, from the plain language of the Court of Appeal formulation in *Foster*. It relies by way of authority for this proposition on the judgment in *Chief Officer v Minwalla*

[2007] JLR 409 . That case concerned an application by the Chief Officer for determination by the Court that the assets of a trust represented the proceeds of criminal conduct. The Court was concerned with the fourth element in Foster , namely actual prejudice to the victim (referred to as "PIA"). Quoting from the relevant part of paragraph 59 of the judgment of Birt, Deputy Bailiff:- "Mr Cadin submits that there is no evidence of actual prejudice to PIA in this case whether in relation to the lease agreements or the purchase of the aircraft. We agree for the following reasons:- ... (vi) Inspector Faudemer conceded that the police had made no enquiries as to whether PIA had paid a fair price for the aircraft or could have obtained them for less elsewhere. He accepted the existence of the independent valuation from the American aviation consultants but said that he wished to visit them in order to see whether they had been bribed to provide such a valuation. Nevertheless the fact remains that there is no evidence before us to suggest that the purchase of the aircraft was in any way detrimental to PIA. (vii) This is further supported by the fact that, in most cases of fraud, a victim comes forward to assert that, if only the false statement had not been made to him, he would not have acted as he did. That is a necessary element in order to prove the offence . Here, there is no evidence before us that PIA has complained to anyone that it regrets the lease or purchase of the aircraft. Despite the fact that the Jersey police have alerted the National Accountability Board in Pakistan (the anti corruption authority) which has in turn made enquiries of PIA, there is no evidence of any complaint by PIA or any civil action against Cathay by PIA. There is no evidence that PIA has stated that, if only it had known that the representation in the broker clause was false and that payments had been made to DM and in turn to Mr Casey, Mr Hasan or Mr Hussein, it would not have agreed to lease or purchase, as the case may be, or would not have agreed the rental or purchase price in question. Indeed Inspector Faudemer conceded that he simply did not know the effect (if any) of the payments to Mr Hasan, Mr Hussein or Mr Kelly. For these reasons we conclude that the Chief Officer has not produced any evidence of actual prejudice to PIA, which leads us to hold that, on the balance of probabilities, no offence of fraud has been committed on PIA as contended by the Chief Officer. As this is the sole Jersey offence relied upon, this means that there has been no criminal conduct as defined in the 1999 Law." (emphasis added). The "necessary element" referred to by the Deputy Bailiff to prove the offence is, say the defence, operative deception. 12. In my view, this extract from the judgment does not bear the weight the defence seek to place upon it. The elements of Foster fraud and in particular the third element were not in issue. The Court was concerned solely with whether there was evidence of actual prejudice to the victim, the lack of which it found was supported by the absence of the victim coming forward. I entirely accept that in most cases of fraud a victim will come forward and assert that if the false representation had not been made he would not have acted as he did but the Deputy Bailiff was clearly not purporting to hold that this was necessary in all cases and thus in effect adding a further element to the Jersey offence of fraud to those laid down by the Court of Appeal namely the requirement in all cases for the prosecution to prove operative deception. 13. If the Court was not minded to conclude that the requirement for proof of operative deception is made out in reliance upon the plain

language of the formulation of the offence by the Court of Appeal and upon the authority of Minwalla, the defence went on to submit that nevertheless, and by analogy with and reference to persuasive English case authority, such a requirement is in any event made out. In inviting the Court to proceed in this way, it acknowledged that great care must be exercised in looking to contemporary English case authority for assistance in the determination of the elements of the Jersey offence of fraud. I was referred to the following extract from the judgment in Foster (at page 31):- "The Bailiff remarked at one point in his judgment (1989 JLR at 87) that "...as far as it may be possible, the Royal Court should not prevent the evolution of the law of fraud in this Island if that is consistent with the basic principles which have evolved through the cases over the last 120 years or so."

We respectfully endorse this statement, which may equally be applied to this court. The Bailiff's statement is particularly apposite in pointing out that further evolution of the law of fraud should not involve abandonment of the developments of the last 120 years. These have included the adoption of English categories and English forms for the prosecution of offences of fraud falling within the ambit of the Larceny Act 1916. The advantage of this, as we have pointed out, has been to introduce a large measure of definition over a considerable part of the field of fraud, so that all concerned can know with certainty both what types of conduct are criminal and also what has to be proved when those types of conduct are charged. It would be to nobody's advantage to abandon what has thus been gained. It will probably be found convenient to continue to prosecute frauds covered by the Larceny Act as they have been prosecuted hitherto, making use to that extent of English categories and English forms to enforce the Jersey law." 14. Although the Larceny Act 1916 has now been repealed by the Theft Act 1968 as amended by the Theft Act 1978, the Court of Appeal in Foster suggested that it remained relevant to look at the categories of offence set out in the Larceny Act which held fraud as a constituent element, namely:-

(i) Section 10

- Extraction of electricity (ii) Section 17--Larceny and embezzlement by clerks or servants (iii) Section 20 - Fraudulent conversion (iv) Section 21 - Conversion by a trustee and (v) Section 32 - Obtaining by a false pretence. 15. The defence accepted that the Larceny Act played no part in the determination of the elements of the Jersey offence of fraud as identified in Foster, none of the elements of which were drawn from the Larceny Act offences. Nevertheless, the defence submitted that these offences should inform the nature and scope of the Jersey offence. In particular, the defence relied on, by way of analogy, the offence of obtaining by false pretence under Section 32 and the English cases that have equated that offence with the deception offences created by Section 15 of the Theft Act 1968. It is clear from Archbold 2006 edition, paragraph 21 - 196 that it is a requirement of the deception offences under the Theft Act that the deception must operate on the mind of the person deceived and that was also a requirement of Section 32 of the Larceny Act. Humphreys J in R v Sullivan

(1945) 30 Cr App R 132 stated in relation to the latter offence:- "In order that a person may be convicted of that offence it has been said hundreds of times that it is necessary for the prosecution to prove to the satisfaction of the jury that there was some misstatement which in law amounts to a pretence, that is, a misstatement as to an existing fact made by the accused person; that it was false and false to his knowledge; that it acted upon the mind of the person who parted with the money, and that the proceeding on the part of the accused person was fraudulent. That is the only meaning to be applied to the words "with intent to defraud." 16. Mr Kelleher acknowledged that interpreting the third element laid down in *Foster* as requiring proof of operative deception by way of analogy with Section 32 of the Larceny Act and the subsequent deception offences was to restrict its application. It would for example exclude cases involving machines, because machines have no minds which can be deceived. Thus a person who steals a person's Internet banking details and uses them to empty that person's bank account would not be guilty of fraud even though he makes a false representation which leads to benefit and prejudice. 17. It is the case that the Larceny Act was not used by the Court of Appeal in defining the elements of the Jersey offence of fraud which had evolved under Jersey law over the last 120 years or so prior to *Foster*. The Court of Appeal was clear that the Jersey offence of fraud was wider in its application than the Larceny Act offences:- "It will probably be found convenient to continue to prosecute frauds covered by the Larceny Act as they have been prosecuted hitherto, making use to that extent of English categories and English forms to enforce the Jersey law. The present case shows, however, that the Jersey offence of fraud extends beyond the confines of the Larceny Act. A case not covered by that Act may still be a case of criminal fraud here." 18. I see no basis for restricting the Jersey offence of fraud by applying to it through analogy the requirements of the quite separate English offence of obtaining by false pretences. From the language of the third element of the formulation by the Court of Appeal in *Foster* - "and with the result in fact of causing thereby"

- it is clear that the false representation must, as the prosecution accept, be causative of the prejudice to the victim but it is not clear that it must always act on the mind of the victim. I accept that in many cases it will so act but it is not a requirement that it should do so. 19. In *Barrette v Attorney General*

[2006] JLR 407, Sir John Nutting QC described the elements of the Jersey offence of fraud as being:- "(1) False representation; (2) dishonestly made; (3) leading to loss" (emphasis added) 20. Whilst the elements of the Jersey offence of fraud were not in issue in *Barrette*, the Court of Appeal's interpretation of this element and its use of the words "leading to" are of significance. What is required is proof that the false representation led to the prejudice. Neither Jersey Court of Appeal has sought to add the further requirement of the English deception offences that it can only do so by acting on the mind of the victim. 21. Thus, I conclude that under the third element of the Jersey offence of fraud as laid down in *Foster*, the prosecution must prove that the false representation was causative of or led to actual prejudice to someone and actual benefit to the defendant or somebody else. It is not a requirement of the third element that the false representation acted on the mind of

the victim. 22. Mr Kelleher did not pursue at the hearing (although he did not withdraw) the second submission that operative deception has to be proved by direct evidence of the person alleged to have been induced to act as a consequence of the alleged false representation. This was because of three recent English Court of Appeal decisions cited by the prosecution, which have made it clear that where the offence of obtaining by deception is charged under English law, there is no such requirement. 23. In *R v PS, CS*

(2007) EWCA Crim 2058 the charge was obtaining a money transfer by deception in relation to a mortgage fraud. The defence succeeded at trial in arguing that as the prosecution had not called the man who accepted the application form they had failed to prove that the underwriter relied and acted on the alleged misrepresentation. The Court of Appeal overturned this decision and ordered a new trial. It held: '17 Mr Barraclough ... relies heavily on the fact that the prosecution, although put on notice by the defence statement that this point was being taken, made no attempt to find Mr Craggs and to cause a statement to be taken from him ... The question of whether or not a person is or is not induced to act in a particular way by a dishonest transaction is a question of fact. If any authority is required for this self-evident proposition it can be found in Lord Roskill's speech in *Lambie* (

[1982] AC 449) (see 460E to F). Questions of fact can be proved either by direct evidence or inference from the surrounding circumstances and other known facts. In cases where the prosecution seek to prove that a false representation acted on the mind of the person to whom it was made, the only decision of this court which restricts to any extent the proposition above is to be found in *Laverty* ([1970] 3 All ER 432). Both *Laverty* and *Sullivan* ((1945) 30 Cr App R 132) were discussed by Lord Roskill in his speech in *Lambie*. His speech was one with which all the other members of the House of Lords agreed. It is sufficient to refer to part of Lord Roskill's speech at page 460G. It reads:- 'My Lords, credit card frauds are all too frequently perpetrated, and if conviction of offenders for offences against sections 15 or 16 of the Act of 1968 can only be obtained if the prosecution are able in each case to call the person upon whom the fraud was immediately perpetrated to say that he or she positively remembered the particular transaction and, had the truth been known, would never have entered into that supposedly well-remembered transaction, the guilty would often escape conviction. In some cases, of course, it may be possible to adduce such evidence if the particular transaction is well remembered. But where as in the present case no one could reasonably be expected to remember a particular transaction in detail, and the inference of inducement may well be in all the circumstances quite irresistible, I see no reason in principle why it should not be left to the jury to decide, upon the evidence in the case as a whole, whether that inference is in truth irresistible as to my mind it is in the present case. In this connection it is to be noted that the respondent did not go into the witness box to give evidence from which that inference might conceivably have been rebutted. My Lords, in this respect I find myself in agreement with what was said by Humphreys J giving the judgment of the Court of Criminal Appeal in *R v Sullivan* (1945) 30 Cr App R 132, 136:- 'It is, we think, undoubtedly

good law that the question of the inducement acting upon the mind of the person who may be described as the prosecutor is not a matter which can only be proved by the direct evidence of the witness. It can be, and very often is, proved by the witness being asked some question which brings the answer: "I believed that statement and that is why I parted with my money"; but it is not necessary that there should be that question and answer if the facts are such that it is patent that there was only one reason which anybody could suggest for the person alleged to have been defrauded parting with his money, and that is the false pretence, if it was a false pretence.' It is true that in *R v Lavery* Lord Parker CJ said, at p 498, that the Court of Appeal (Criminal Division) was anxious not to extend the principle in *R v Sullivan* further than was necessary. Of course, the Crown must always prove its case and one element which will always be required to be proved in these cases is the effect of the dishonest representation upon the mind of the person to whom it is made. But I see no reason why in cases such as the present, where what Humphreys J called the direct evidence of the witness is not and cannot reasonably be expected to be available, reliance upon a dishonest representation cannot be sufficiently established by proof of facts, from which an irresistible inference of such reliance can be drawn". If any further citation of authority is necessary to show that that is an accurate statement of the law it can be found in *R v Hamilton*

[1991] 92 Cr App R 54 at 60. After citing a part of the passage from *Lambie*, to which we have referred, Evans J, giving the judgment of the Court, said:- "Mr Cause's submission in the present case is that the inference or inferences are not irresistible, and that if in truth the cashiers had no recollection of the particular transactions, then it must be because they did not consciously rely upon any representation which was made to them or decide to make any payments to the appellant on that basis. We think however that this submission tends to confuse rather than distinguish between primary facts which have to be proved, and inferences which may properly be drawn from them. There was evidence that the appellant signed each of the withdrawal slips and that these were received by the cashier in the normal course of the business (the cashiers stamped each slip, which already bore the appellant's signature by way of receipt of the money in question). From these facts it can be inferred that the slip was handed to the cashier and that the cash payment was made by her. There might still be room for the argument as to the extent and nature of any inducement just as there might be other evidence affecting the terms of the representation made, but the material facts were proved by sufficient evidence, properly admitted. For these reasons the second ground of appeal must also fail." 20. It follows, in our judgement, that there is no rule of law that such a fact, as was in the issue in this case, namely whether the underwriter acted on the false representation made by the respondents, could only be proved by the underwriter being called to give evidence orally." (emphasis added) 24. In *R v Olden*

- (2007) EWCA Crim 726 there were a number of counts of obtaining by deception in relation to bank accounts, mortgages and loans. The defence made a submission of no case to answer on the basis that there was no evidence from the decision makers who authorised the individual loans. The judgment of the Court of Appeal contains the following passages:-
"40 We were referred to other authorities. It is only necessary to refer to R v Lambie
- (1981) 73 Cr App R 294 and the speech of Lord Roskill ... Having referred to this passage from the speech of Lord Roskill, the judge in the instant case said this: "In that light, it does not mean in my judgement that a jury can only be asked to consider the inference contended for if and when evidence cannot reasonably be expected to be available and when there is evidence as to why not. In my judgement the crown are entitled to put before the jury what they can and ask them to consider it. As to the possible inference contended, I am quite satisfied on the evidence in each of these remaining cases that there is a possible inference such as that asserted by the crown. It will of course be a matter for the jury to say whether that inference is the only one and whether it is the only realistic and irresistible inference which arises from the evidence. They may or may not, but it seems to me quite clear that on the law they are perfectly entitled to consider that question when there is sufficient evidence raising the inference contended for. As I say I find there is." In our view the judge's statement of the legal position on the first part of that ruling was correct. It is true that in Lambie Lord Roskill referred to the situation where the person who could give direct evidence of having been deceived either has no recollection or is not available. But it seems to us that there is no rule of law to the effect that a jury may not be invited to draw an irresistible inference that a false representation operated on the mind of the party deceived unless the person allegedly deceived either is unavailable or has no recollection of the transaction in question. It may be a matter for the jury to decide on the evidence that is placed before it." 25. In R v Kiernan
- (2008) EWCA Crim 972 the Court of Appeal held:- "70 We therefore reject the submission that the operative deceptions had to be proved "through the mouth" of the person on whom the deception is said to have operated." 26. Mr Kelleher accepted that there was no rule of law in Jersey that prejudice to the victim can only be proved through the evidence or mouth of the victim. In my view it is clear that under Jersey law the third element of Jersey offence of fraud as laid down in Foster is a question of fact to be proved either by direct evidence or inference from the surrounding circumstances or other known facts. 27. Paragraph 2.18 of the Law Commission on Fraud (Law Com No 276) makes reference to the deception under English law for deception offences being the reason or one of the reasons "why the dupe relinquished control over the thing in question". I raised with Mr Kelleher whether, as a matter of Jersey law, the false representation had to be the reason or only one of the reasons for the prejudice or put another way did the false representation have to be the effective cause as opposed to a contributing cause? Mr Kelleher's initial reaction was that it only had to be one of the reasons or a contributing cause. Mr Jowitt wanted more time to consider the issue. I therefore invite the prosecution first to set out its considered view in this respect seven days before the hearing on 23 rd February 2009 so that consideration

can be given at that hearing as to whether, having heard from the defence, further argument is required. Transposition and misconduct in public office 28. This application must be considered as an extension of the earlier application on transposition and my judgment of 1 st October 2008 (

[2008] JRC 172A), where I said at paragraphs 19 and 20:- "19 Although I have found in an earlier judgment that misconduct in public office is not an offence known to Jersey law (which decision is under appeal) the defence would have argued that such an offence was not susceptible of transposition at all, because it is an offence that is so closely intertwined with the political circumstances and cultural values of Jersey that it would be impossible to criminalise conduct occurring in another country by analogy through transposition. However, the defence conceded that the Jersey offences now particularised in the indictment are susceptible to transposition but maintain that the process must take into account the prevailing circumstances in Nigeria. In any event we are not dealing here with acts which of their nature can only be committed in Jersey. All of the acts alleged here, namely fraud, fraudulent conversion (and conspiracy to commit the same) and bribery have what Viscount Simonds described as a character of universality." 29. The Court of Appeal has found (

[2008] JCA 188) that there is such an offence, which is now particularised as a predicate offence within the indictment, and the defence have now therefore proceeded with the argument that it would have made in the earlier application, that the conduct required for the crime of misconduct in a public office is not susceptible to transposition because it is a crime that is inexorably linked to the political circumstances and cultural values of Jersey. In other words, the requisite conduct for this crime lacks the "universality" for transposition in accordance with *Cox v Army Council*

(1963) AC 48. 30. The defence made a second submission, namely that even if the Court accepts that the conduct is susceptible of transposition, the "circumstances and conditions that prevailed at the place where and at the time when the thing that is complained of was done or omitted" must be taken into account pursuant to *Cox*. 31. Although there has been no ruling on the elements of the Jersey offence of misconduct in public office, it can be assumed for the purposes of this argument that the Court will follow the leading English Court of Appeal decision in *Attorney General's Reference No. 3 of 2003* , 2005 QB 73 . That case held that the elements of the English offence of misconduct in a public office are - (i) a public officer acting as such (ii) wilfully neglects to perform his duty and/or wilfully misconducts himself (iii) to such a degree as to amount to an abuse of the public's trust in the office holder (iv) without reasonable excuse or justification. 32. The defence submissions can be summarised as follows:- (i) The characteristics of the public office in question are essential to this offence because of the mens rea element: the offence presupposes actual knowledge of the particular duties in positive law and custom that attach to the public office or reckless indifference in respect thereof. The public officer must wilfully i.e. deliberately misconduct himself by reference to those duties. It is

impossible to postulate that the President of Nigeria wilfully misconducted himself by reference to the duties of the Chief Minister of Jersey "such that it amounted to an abuse of the trust of the people of Jersey in the President of Nigeria". (ii) There can be no such thing as a generic office holder for the purpose of this offence because the mens rea element is linked to the nature and scope of the duties attaching to the public office. It is thus distinguished from universal offences like murder, theft or fraud. (iii) The constituent elements of the offence are so closely intertwined with the political circumstances and cultural values of Jersey that it is impossible to criminalise conduct occurring in a foreign country by analogy through the device of transposition. (iv) Practices considered to be an abuse of the public's trust in Jersey may not rise to that level in the context of a military dictatorship in Nigeria and therefore this is precisely the type of offence that their Lordships in Cox had in mind as failing the test of universality and thus falling outside the scope of the single criminality test. 33. As to mens rea, the defence submissions amount to an assertion that the necessary mens rea is an intent to commit the criminal offence, which the prosecution observe would mean that ignorance of the law would be a defence. The prosecution rightly submit that in criminal law the mens rea is always directed at the acts, namely in this context whether the person wilfully committed acts, which were, objectively speaking, misconduct. 34. The prosecution point out that there is nothing in Cox and no other cited case which supports the principle that crimes which are linked to the political and cultural values of Jersey cannot bite on transposed conduct. The whole point about a single criminality test in a money laundering statute is precisely to impose the political and cultural values of Jersey on dealings with assets here. That is why the Jersey legislature imposed the single criminality test and that is the law which the Court must apply. 35. The prosecution further submitted and I agree that Cox merely recognises an obvious point namely that there are some English laws so specific to the place or subject matter (such as the Menai Bridge) that no conduct overseas would as a matter of fact when transposed to England fall foul of those laws. The limit is an extremely narrow one but the offence of misconduct in a public office cannot fall foul of it. Every country has public officers and the abuse of public trust by public officers is a matter of universal concern. 36. Mr Kelleher maintained that in addition to the conduct, you must also hypothetically transpose Mr Abacha himself to Jersey and indeed the public of Nigeria. In my view that is to misunderstand the process at work. That process was helpfully described by the Court of Appeal (

[2008] JCA 188) in the context of justiciability in the following terms:- "123 In our view this submission cannot stand once it is accepted, as it is for the Appellant, that "criminal" under Article 34(1)(b) means criminal according to the law of Jersey rather than the law of Nigeria. One of the principal planks of Article 34(1)(b), read together with Article 1 of the 1999 Law, is that the criminality of the conduct which has given rise to the proceeds is to be appraised as a matter of Jersey law. It matters not, therefore, that the conduct which occurred outside Jersey did not carry a criminal taint in the State or States where it in fact occurred. Once that is understood, the existence of criminality emerges as a result of the

application of the law of the jurisdiction with which those carrying out the conduct had no concern at the time when the conduct took place. The Jersey Court is, therefore, in no sense passing judgment as to whether those who carried out the acts were acting in a morally reprehensible way having regard to the laws of the State or States where the acts occurred. There is, therefore, no ascription to the actual conduct of a determination that the carrying out of that conduct itself carried a criminal taint. When "criminal conduct" requires to be proven for the purposes of the 1999 Law, it is proven by showing, according to the usual standard of proof, that the conduct would have constituted a Schedule 1 offence if it had occurred in Jersey. It is a single criminality test." 37. At paragraph 14 of my judgment of 1 st October 2008, having considered the House of Lords decisions of Cox and Norris v Government of the United States of America

- (2008) 2WLR 673 , I found as follows:- "I extract from both authorities the following, namely, that in the context of the 1999 Law, for the purpose of transposing the conduct which occurred outside Jersey to Jersey, you must not fasten upon the adventitious circumstances connected with the conduct but upon the essence or essential elements of that conduct which it is said would constitute a crime or crimes if it occurred in Jersey." 38. For the purposes of transposing the conduct alleged in this case, it is necessary to fasten upon the essence or essential elements of that conduct which it is said by the prosecution constitute a crime or crimes if it occurred in Jersey, which is now particularised in the indictment in respect of each count. At paragraph 24(iii) of my judgment of the 1 st October 2008, I transposed that conduct by reference to the particulars in the indictment as follows:- "(a) the dishonest inflation of true prices for motor vehicles sold by a person (through a company) to Jersey . (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 Jersey 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 person to bank accounts connected to Jersey public officials involved in the award of vehicle-supply contracts to the company. " (amendments underlined) 39. This has not been the subject of comment from the parties and will no doubt need refinement before being incorporated into directions to the Jurats but it is irrelevant for the purposes of transposition:- (i) to postulate that the President of Nigeria wilfully misconducted himself by reference to the duties of the Chief Minister of Jersey or that he did so such that it amounted to an abuse of the trust of the people of Jersey in the President of Nigeria or (ii) that practices considered to be an abuse of the public's trust in Jersey may not rise to that level in the context of a military dictatorship in Nigeria. (iii) Whether the public of Nigeria would regard such misconduct by a Jersey public official as an abuse of their trust. It is the essence of the conduct which it is said would constitute a crime or crimes if it occurred in Jersey that is transposed to Jersey, not

the parties to it or public affected by it. 40. I can see that there may be conduct which, when transposed to Jersey, may not constitute the Jersey offence of misconduct in public office because the elements of the offence are not made out. It will be for the Jurats to determine such issues but the conduct alleged in this case is self evidently not conduct which can only be committed in Jersey. It has the same character of universality as fraud, fraudulent conversion (and conspiracy to commit the same) and bribery. 41. I therefore find that the Jersey offence of misconduct in public office is an offence which can be applied to conduct transposed to Jersey. 42. As to the second submission, namely that the circumstances and conditions prevailing in Nigeria must be taken into account, this is subject to the findings in my judgment dated 1 st October 2008 which apply as much to misconduct in public office as they apply to the other predicate offences. Bribery as a customary law offence 43. The amended indictment provides that the conduct as particularised, if it had occurred in Jersey, would have constituted the offence of bribery *inter alia* . The defence submit that there is no foundation from which the Royal Court can conclude the existence of the offence of bribery under Jersey customary law. The prosecution submit that bribery is and always has been an offence at Jersey customary law. 44. Jowitt's Dictionary of English Law defines a bribe as "a gift to any person in office or holding a position of trust, with the object of inducing him to disregard his official duty or betray his trust for the benefit of the giver." 45. Both parties point to the same evidence in support of their submissions which I take in chronological order. 46. Poingdestre, under the caption *Ascauoir s'il est Licite d'acquerir une Debte 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 criminel 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. Glo.1.1.ff. de concuss. Item Glo. in c. indicatur. 89. distinct. " This text refers to two types of conduct by members of the judiciary - the use of threats to extort a benefit of some kind and the receipt of a benefit from someone accused in return for a favour - which fall within the offence of concussion , that is misappropriation as an abuse of public authority. Such conduct is to be met with "punition extraordinaire" . 47. The defence accept that the conduct described by Poingdestre might be viewed in common parlance as bribery, although it is grouped under the single head of concussion . Set in its historical context, it has wide application, bearing in mind the role of the Bailiff, Jurats and Court in the administration of the Island at that time. The prosecution say Poingdestre clearly recognises that the receipt of a bribe is an offence. 48. Le Geyt in his *Privileges loix et coutumes de l'ile de Jersey* also refers to the imposition of punishment for gross ignorance and corruption. (Article 8 page 87, Book 5, Title 1 *Des injures et délits*):- "Les Hommes d'Enditement et d'Enquete sont punis par amende ou

par prison en cas d'ignorance grossière, ou plus sévèrement s'il y avait corruption prouvée." 49. 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 ". Quoting from the former:- "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 tomboient 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. " 50. Neither Poingdestre nor Le Geyt, say the defence, take the issue of the existence of bribery to any point of clarity, whereas for the prosecution both commentators record the existence of the offence. Both commentators were clearly affronted by conduct which equates to bribery namely the purchase of a witness, jury member, judge or court officer and in my view there can be little doubt that under Jersey Customary law in the 17 th and 18 th century the use of money or other reward to " corrompre" or bribe a public official attracted criminal liability. 51. Bribery is not listed as an offence in the statement of Messrs Pison and Durell, referred to in the Report of the Commissioners on the state of the criminal law in the Channel Islands (1847) or amongst the other offences which the Court seemed to punish generally (page xxvi). However, the following exchange occurred between Mr Hammond (then a senior advocate and future Bailiff) and the commissioners:- "2921 How is misconduct in an officer punished?

- It is laid before the Court. In the case of bribing an officer? - The Court would take cognizance of all those offences. Do you mean, as a contempt of justice? - No; the Queen's Procureur General will prosecute them. 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." The following exchange occurred between the Solicitor General and the commissioners: "2926 (To Mr Dupre) 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." 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, or without the Enditement. (emphasis added)" 52. As the Court of Appeal has made clear in its judgment dated 6 th November 2008 (2008 JCA 188), the fact that these discussions are procedural in nature does not detract from their importance in evidencing the existence of the offence of bribery which is assumed by both witnesses. 53. In AG v Langtry (1945) PC 249, Langtry offered an illicit payment to a public official in order to secure f a vourable 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 ". In its submissions on misconduct

in public office as a customary law offence in Jersey, the prosecution argued that this could be interpreted as the offence of " incitement to misconduct in a public office ". I have no doubt that it is a straightforward case of attempted bribery. I accept that one case cannot on its own support the argument that the crime of bribery is well established under Jersey customary law (see AG v Thwaites

(1978) JJ 179 at page 190), but it has to be seen in the context of the other evidence put before me. 54. In the case of In the matter of the Yaheeb Trust, Havannah Trust and the Yaheeb No. 2 Trust

[2003] JLR 92 , Bailhache, Bailiff said, in the context of alleged damage being done to relations between the State of Qatar and Jersey:- "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". In my judgment of 15 th August 2008 (2008 JRC 134) dealing with misconduct in public office (at paragraph 53), I agreed with the defence that these statements were obiter and that 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. Certainly the prosecution was not arguing for the existence of an offence restricted to " misuse of public office for gain ". 55. Corruption and misuse of public office are terms which encompass a wide range of no doubt morally reprehensible conduct but not all of which would necessarily attract criminal liability. The threshold for the offence of Misconduct in Public office, for example, is high, requiring serious misconduct so far below acceptable standards as to amount to an abuse of the public's trust in the office holder (see Attorney General's Reference No 3 at paragraph 56). Bribery, on the other hand, is a discreet form of corruption which the prosecution argues has always attracted criminal liability. 56. The Projet to the Corruption (Jersey) Law 2006 has the following to say in relation to the 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." 57. Article 9 of the Law itself went on to

abolish the customary law offence 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." 58. Although the abolition of a customary law offence is not on its own conclusive as to its existence in the first place, it is in my view evidence that its existence was sufficiently established in the minds of the crown officers and legislature to warrant not only its abolition but an express saving for existing investigations and proceedings. 59. It is surprising that there only appears to have been one prosecution for bribery. Caution has to be exercised when looking at precedent as the advent of court reporting dates from 1950 and it was not until 1972, when the indictment rules were introduced, that offences were defined and charged. The Poursuites Criminelles were closely written pages of French text with no precise record of the offences charged, only the conduct committed by the defendant with the result. 60. As Mr Jowitt pointed out, a prosecution is never a source of law. It can only be evidence of the existence of an offence. In legal theory, the common or customary law is found (or in the alternative theory is developed) by the Court. I agree with Mr Jowitt that it must be theoretically possible in a common law system which is regarded by all commentators as being too small to have developed a comprehensive jurisprudence, for an offence to be known by all lawyers to exist, but due to the law-abiding or other nature of the community, never to have been or seldom to have been prosecuted. 61. Some support for this view is to be found in the judgment of Lord Hope in *Christian v The Queen*
- (2007) 2 AC 400 at 431. That case concerned the Pitcairn Islands. Islanders were prosecuted for various sexual offences under the English Sexual Offences Act 1956 and there were various arguments about the legality of the prosecution. These were based on the reception of English law and on promulgation of that Act. It does not appear that there had been any prosecutions for sexual offences either before or after the 1956 Act. Many of the judgments in the Privy Council are irrelevant to the present point, but Lord Hope had this to say:- "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." 62. I agree with the prosecution that it is not credible to argue that bribery is a legal activity in Jersey. I doubt whether any law-abiding citizen of the Island, let alone any lawyer, would regard it as legal to offer money to say a public official in the Planning Department to induce him to procure the issuing of a planning permit. Such conduct is and always has been criminalized under our customary law. It was an affront to the legal consciences of Poingdestre and Le Geyt, as the passages cited above demonstrate, and it is an affront to the legal consciences of judges and practitioners today. 63. In my view, the author of the *Projet* to the Corruption Law describes the position correctly. There always has been a customary law offence of

bribery but, because of the paucity of decided cases, there exist uncertainties as to its precise scope, i.e. whether it applies to persons in private business or bribes offered by persons in Jersey to officials outside the Island and vice versa . However, the bribing of a Jersey public official comes well within the boundaries of the customary law offence. 64. Taking all of the evidence into account I conclude that bribery is an offence under Jersey Customary Law 65. Under the provisions of the States of Jersey Law 1966 the offering to or receiving by members or officers of the States of any bribe is a statutory offence, punishable by a fine or term of imprisonment for a term not exceeding two years or both. 66. Although only touched on briefly at the hearing, to the extent that in transposing the conduct alleged in the indictment to Jersey, the Jersey public official is to be equated with a member or officer of the States, then consideration may need to be given as to whether such conduct may stand to be regarded as criminal under the States of Jersey Law 1966 as opposed to the customary law offence of bribery. 67. To summarise:- (i) With reference to the third element of the Jersey offence of fraud as defined in *Foster* , I find firstly that the prosecution does not have to prove that the 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 and secondly that the third element is a question of fact to be proved by direct evidence or inference from the surrounding circumstances and other known facts. (ii) The prosecution is invited to file its views on whether the false representation has to be the reason or only one of the reasons for the prejudice, seven days before the hearing on 23 rd February 2009 (iii) I find that misconduct in public office is an offence which can be applied to conduct transposed to Jersey. The extent to which circumstances and conditions prevailing in Nigeria must be taken into account in the process of transposition is subject to the findings in my judgment of the 1 st October 2008 (JRC 172A). (iv) I find that bribery is an offence under the customary law of Jersey. Authorities Proceeds of Crime (Jersey) Law 1999. Police Procedures and Criminal Evidence (Jersey) Law 2003. AG v Bhojwani

[2008] JCA 188 . *Foster v Attorney General*

[1992] JLR 6 . *Chief Officer v Minwalla*

[2007] JLR 409 . Larceny Act 1916. Theft Act 1968. Theft Act 1979. *R v Sullivan* (1945) 30 Cr App R 132. *Barrette v Attorney General*

[2006] JLR 407 . *R v PS, CS* (2007) EWCA Crim 2058. *R v Hamilton* [1991] 92 Cr App R 54. *R v Olden* (2007) EWCA Crim 726 . *R v Kiernan*

(2008) EWCA Crim 972 . *Cox v Army Council* (1963) AC 48. Attorney General's Reference No. 3 of 2003, 2005 QB 73 . *Norris v Government of the United States of America*

(2008) 2WLR 673 . Jowitt's Dictionary of English Law. Les Lois et Coutumes de L'île de Jersey, Poingdestre. Privileges loix et coutumes de l'île de Jersey, Le Geyt. Constitution, Les Loix, et les Usages , Le Geyt. AG v Langtry (1945) PC 249. AG v Thwaites (1978) JJ 179. In the matter of the Yaheeb Trust, Havannah Trust and the Yaheeb No. 2 Trust

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