

JERSEY / JUDGMENT

AG v Bhojwani [2009]

JRC 052 (20 March 2009)

[2009] JRC 052

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JUDGMENT

THE commissioner: 1. On 18 th March, 2009, the defence brought an application under Article 6 of the Criminal Procedure (Notice of Expert Evidence) Rules 2000 ("the Expert Evidence Rules") for leave to adduce expert evidence at the trial of the defendant, now scheduled to take place on 25 th May, 2009. 2. As Mr Kelleher conceded at the outset of the application, it was premature in the sense that the defence do not as yet have available a statement in writing of any finding or opinions of an expert to produce to the Court and to the prosecution. 3. Article 3 of the Expert Evidence Rules is in the following terms:- "Notice of expert evidence in the Royal Court

- (1) A party to criminal proceedings who wishes to adduce expert evidence shall give each other party, as soon as practicable, a statement in writing of any finding or opinion that the party proposes to adduce by way of such evidence. 4. By letter dated 9 th July, 2008, addressed to the prosecution, the defence gave notice that it than anticipated expert evidence being given on behalf of the defence on a number of issues, including:- (i) The nature, mercantile usage of and operational treatment of, bankers' drafts in international banking and industry standard practices and procedures for the collection, payment and cancellation of such drafts. (ii) The norms and more of Nigerian society in doing business in Nigeria within the Nigerian state in 1996 and 1997, together with the political and economic circumstances and conditions prevalent in Nigeria in 1996 and 1997 under the military dictatorship of General Sani Abacha. 5. The defence made it clear in its letter that the scope of the expert evidence in relation to the norms and more of Nigerian society would in large measure follow the judgment of the Court on the role and subject matter of transposition in relation to the operation of the single criminality test. 6. At a hearing on 11 th July, 2008, the prosecution expressed its concern that the issue of expert evidence could delay the trial, then scheduled to take place on 20 th October, 2008, and that if the defence was in possession of expert reports on which they were minded to rely then they should serve them then and there, but if not, they should be given a tight deadline to put them into appropriate form and serve them. The defence proposed that it should have until the end of August 2008 to provide the expert evidence upon which it was intending to rely but reiterated that in relation to norms and more in Nigerian society, that evidence would be dependent on the Court's ruling on transposition. 7. The Court therefore directed the defence in the following terms:- "That

defence counsel, by 1 st September, 2008, do comply with the provisions of Article 3 of the Criminal Procedure (Notice of Expert Evidence) Rules 2000 in relation to all expert evidence the defence intends to seek to adduce at trial." 8. As it transpired, the trial date of 20 th October, 2008, was vacated to accommodate appeals under the preparatory hearings regime of the Police Procedures and Criminal Evidence (Jersey) Law 2003 . The main transposition argument took place on 16 th September, 2008, with judgment being issued on 1 st October, 2008, and a further transposition argument in relation to misconduct in public office took place in on 12 th January, 2009, with judgment being issued on 28 th January, 2009. Both judgments are currently subject to appeal, scheduled to be heard before the Court of Appeal shortly. There have been two further adjournments of the trial which is now scheduled to take place on 25 th May, 2008. 9. The defence no longer intends to adduce expert evidence on bankers' drafts because the prosecution will not itself be adducing expert evidence, relying on submissions of law to be made at the trial. The defence will also make submissions of law and it may be argued that agreement on the law in relation to bankers' drafts can be reached. 10. In relation to the norms and more of Nigerian society, the defence did not, for the reasons indicated, seek to instruct an expert until the Court's judgment of the 1 st October, 2008, since when they have sought and have only very recently identified a potential expert for this purpose. 11. The defence has also indicated that it may wish to adduce expert evidence on the constitutional standing of General Sani Abacha and his regime, for which it has again only recently identified an expert to assist on the issue. Mr Kelleher informed the Court that the defence would be meeting the experts in the next two weeks but pointed out the Court of Appeal hearings that would take place during that period. 12. Thus the defence submits that the direction of th July, 2008, has not been disregarded but it had been unable to comply with it until the transposition argument had been delivered and even then has had difficulty in identifying experts in the relevant fields. 13. The prosecution found all these submissions astonishing. No real explanation had been put forward for the failure to comply with the Court's order and no apology proffered. No explanation has been given to the Court evidencing the efforts made to locate experts. Mr Jowitt asked the Court to be more probing as to what the defence has been doing over the intervening months. Whilst reserving the prosecution's position as to the admissibility of any expert evidence proposed by the defence, he submitted that a firm date should be fixed for the production of further expert evidence, namely Friday 27 th March, 2009, at the very latest. Anything beyond that point would give insufficient time for the prosecution to adduce expert evidence in response. 14. The position as I see it is this. The defence has been required to comply with its obligations under Article 3 of the Expert Evidence Rules and has not done so. Article 6 therefore now applies:- "6 Restriction on adducing expert evidence without notice A party who is required to comply with Rule 3 in respect of expert evidence but fails to do so shall not adduce that evidence without the leave of the Court." 15. Accordingly the defence cannot now adduce expert evidence without leave and no application can be made until the written opinion of the expert is available. It has given notice that it intends to seek leave but as yet cannot pursue the application. I can sympathise with the concerns of the prosecution which fears that this process may bring about a yet

further adjournment of the trial. It wants the defence directed to make its application within a week, presumably with the intent that the door to further applications will be closed. 16. In my view a trial judge cannot properly direct either party to bring an application it isn't ready to bring and, indeed, which it may not ultimately wish to bring and thereafter seek to shut the door to further applications. It is up to the parties what applications they wish to bring and every application that is made has to be considered on its merits at the time it is made and cannot be prejudged. 17. What I can say is this. As Mr Kelleher acknowledged, in the position the defence is in, there is a risk that leave may not be granted and the closer to the trial we get and the less time the prosecution would have to seek expert evidence in response, the greater that risk will be. 18. The current application of the defence, being unsupported by expert opinions, is therefore dismissed. If the defence wishes to secure expert evidence for the trial then it must give the matter priority, obtain the expert opinions and make the application for leave as a matter of some urgency. It is now on notice that the prosecution say any application beyond 27 th March, 2009, will give it insufficient time to seek expert evidence in response. 19. The Court will sit on Tuesday 7 th April, 2009, at 10 am to review the position. 20. There is a further issue on expert evidence namely whether the defence have put questions to Mr Narayanan on commission in India as an expert on banking in addition to questions as to fact. Mr Kelleher says it has not done so. Mr Jowitt says Mr Narayanan did give expert evidence which the prosecution made clear at the time but have received no notice that the defence intend to rely on it. The transcript of that evidence has now been received. The evidence of a further witness Mr Ramakrishnan has been taken on commission and the transcript is awaited. I direct:- (i) The prosecution to notify the Court and the defence within 21 days of the receipt of the audio visual recording of the evidence of Mr Narayanan the extent to which, if any, it intends to challenge the admissibility of Mr Narayanan's evidence. (ii) The prosecution to notify the Court and the defence within 14 days of the receipt of the audio visual recording of the evidence of Mr Ramakrishnan the extent to which, if any, it intends to challenge the admissibility of Mr Ramakrishnan's evidence. 21. There shall be liberty to apply. Authorities Criminal Procedure (Notice of Expert Evidence) Rules 2000. Police Procedures and Criminal Evidence (Jersey) Law 2003. Page Last Updated: 15 Jun 2015 BAILII: Copyright Policy | Disclaimers | Privacy Policy | Feedback | Donate to BAILII

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