

JERSEY / JUDGMENT

AG v Bhojwani [2009]

JRC 055 (27 March 2009)

[2009] JRC 055

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JUDGMENT

THE commissioner: 1. On 18 th March 2009, I gave leave under Article 77 of the Police Procedures and Criminal Evidence (Jersey) Law 2003 ("PPCE") for the defendant to have disclosed to him by his own defence lawyers the transcripts and video recordings of the evidence of two witnesses taken on commission in India. The application was opposed by the prosecution and I now set out my reasons for giving leave. 2. The defendant 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 . His trial is due to commence on 25 th May 2009. 3. Upon an application by the defence, letters of request were issued by the Bailiff under Article 4 of the Criminal Justice (International Co-operation) (Jersey) Law 2001 and pursuant thereto the evidence of two witnesses has been taken on commission in India. The defendant's Jersey lawyers attended the commission hearings in India examining the witnesses on the defendant's behalf. The defendant's bail conditions require him to remain in Jersey and therefore the possibility of his attending the commission hearings in India did not arise. 4. As a result of their attendance at the commission hearing, the defence is aware of the evidence given by the two witnesses and now have (or will have) possession of the formal transcripts and video recordings. It may seem surprising that there should be any question of it being required to hold back this information from its own client. However, its caution arises from the provisions of Article 77 of PPCE, which is in the following terms:- "Time for taking accused evidence If at the trial of any person for an offence the defence intends to call 2 or more witnesses to the facts of the case and those witnesses include the accused, the accused shall be called before the other witness or witnesses unless the Court in its discretion otherwise directs." 5. Article 77 is taken from Section 79 of the Police and Criminal Evidence Act, 1984 which in turn merely restates the R v Smith (Joan)

[1968] 1 WLR 66 where the Court of Appeal said:- "The general rule and practice in criminal cases is that witnesses as to fact should on each side remain out of court until they are required to give their evidence. The reason for this is obvious. It is that if they are permitted to hear the evidence of other witnesses they may be tempted to trim their own evidence. It is certainly the general practice in the experience of all the members of this court that where an accused person is to give evidence he gives evidence before other witnesses who

may be called on his behalf. There are, of course, rare exceptions, such as when a formal witness, or a witness about whom there is no controversy, is interposed before the accused person with the consent of the court in the special circumstances then prevailing. In the view of this court the general practice to which I have referred is the correct practice which ought to be observed. The matter was dealt with succinctly as long ago as 1911 when, during the course of the argument in the well-known case of *Rex v Stinie Morrison*, Lord Alverstone C. J. interposed to inquire: 'How was it that you called these witnesses before you called the prisoner?' to which counsel then replied with engaging frankness: 'Before calling the appellant I wished to know myself what these witnesses had to say'. In response to that Lord Alverstone C. J. then said: 'In all cases I consider it most important for the prisoner to be called before any of his witnesses. He ought to give his evidence before he has heard the evidence and cross-examination of any witness he is going to call.' That observation was interposed in the course of argument and was obiter, but it is an authoritative statement which this court reiterates and endorses as correctly stating the law. As this is a question which is still raised from time to time in the course of criminal proceedings, with which the court is dealing only, it is hoped that the statement I have read from Lord Alverstone C. J., which is now endorsed by this court, will settle the matter and be accepted as setting out the correct procedure which ought to be followed in future cases." 6. If the defendant is allowed access to the transcripts and video evidence of the two witnesses now, he will, if he gives evidence at the trial, be aware of what they said on commission before he gives his own evidence. Thus, say the prosecution, the principle established by Smith and encapsulated in Article 77 of PPCE will be breached. The defendant would, for example, be able to trim his evidence to make it consistent with that of the two witnesses. It would be much safer for an honest defendant, say the prosecution, that he not see the evidence of the other witnesses which he is using to support his case before he gives his own. 7. In the view of the prosecution, this would not impede the ability of the defence to advise the defendant as to the wisdom of calling the evidence of the two witnesses. The defence can review the evidence and advise the defendant as to its professional judgement as to whether the evidence would be helpful or unhelpful in his case. 8. In practice, the defence would be effectively prevented from taking instructions from the defendant (by phone or other electronic means) on any points that arose during the course of the commission hearing and if, perchance, the defendant's bail terms permitted him to attend at the commission hearing he would have to be barred. 9. If the prosecution's submissions are right then, say the defence, it is put into an extremely difficult position. How can it advise the defendant as to the merits of calling the evidence of the witnesses at the trial without disclosing what that evidence is? What if something had been said by the two witnesses which impacts materially on the defence case?. How can the defence advise the defendant on the implications to the defence case without disclosing to the defendant the evidence upon which its advice is based? Fundamentally, how can the defence continue to advise the defendant when it is privy to material information which it is not allowed to reveal to the defendant? 10. The issue arose in a different context in *R v Davis* and other appeals

- (1993) 2 AER 643. That case involved disclosure of documents which were subject to public interest immunity of such a sensitive nature that it was suggested that defence counsel could only attend the application on an undertaking not to disclose what took place either to the defendants or to their solicitors. Lord Taylor said this:- "Before us, Mr Mansfield submitted first that, where the court has to consider disclosure, it cannot be right to require counsel for the defence to give an undertaking not to reveal what passes in court to his instructing-solicitors and client. Nor should he, as happened here, voluntarily absent himself. We agree. It would wholly undermine counsel's relationship with his client if he were privy to issues in court but could reveal neither the discussion nor even the issues to his client. There would also be practical difficulties, as Mr Bevan pointed out. Counsel might have different views as to whether they would give such an undertaking; there might be a change of counsel and therefore a change of view, where several defendants were concerned their counsel might differ about giving undertakings. Accordingly, whatever happens in court with defending counsel present would, in our view, have to be disclosable to his clients." 11. If prior to the trial evidence of witnesses is taken on commission in Jersey before either the Viscount or the Judicial Greffier pursuant to Article 66 of the Loi
- (1864) réglant la procédure criminelle ("the 1864 law"), the position is put beyond doubt by Article 70 which is in the following terms:- "L'accusé sera présent à toute déposition prise devant le Vicomte ou le Greffier Judiciaire ; il lui sera donné un avertissement, ainsi qu'à son défenseur, de 24 heures pour le moins." 12. Mr Jowitt submitted that there was a strong argument that the rules of statutory interpretation would require that Article 70 of the 1864 Law be read down in such a situation because Article 77 of PPCE has impliedly amended it. He referred me to Bennion Statutory Interpretation 4th edition at page 243 as follows:- "Section 80. Implied Amendment Where a later enactment does not expressly amend (whether textually or indirectly) an earlier enactment which it has power to override, but the provisions of the later enactment are inconsistent with those of the earlier, the later by implication amends the earlier so far as is necessary to remove the inconsistency between them ." 13. I disagree that Article 70 of the 1864 Law should be "read down" so that what is a long established and clear mandatory provision is in effect removed by implication. In my view Article 77 of PPCE is concerned with the order of play at the trial proper and was not intended to apply to the obtaining of evidence on commission prior to the trial. We thus have the anomalous position that if evidence is taken on commission in Jersey the defendant is required to be present but if it is taken outside Jersey, then, if the prosecution are right, the defendant should be barred from attending. 14. It is true that obtaining evidence on commission prior to the trial has its disadvantages. The main disadvantage is that the jury or Jurats do not see and hear the witness giving evidence before them, although this is somewhat ameliorated by video recording the evidence. It does give a defendant an opportunity to trim his or her evidence to make it consistent with the witness. At the same time, as pointed out by the defence, it enables the prosecution to have knowledge in advance of what a defence witness will say.

These disadvantages are outweighed, however, by the overall interests of justice in having the evidence of witnesses who either cannot attend or who are not compellable placed before the trial court. 15. In my view and respectfully adopting the words of Lord Taylor, it would wholly undermine the relationship between the defence and the defendant in this case if it cannot reveal to him what transpired at the commission hearings in India. 16. I doubt whether leave is required under Article 77 of PPCE for the defence to disclose this information to the defendant, but to avoid any doubt I granted leave. Authorities Police Procedures and Criminal Evidence (Jersey) Law 2003. Proceeds of Crime (Jersey) Law 1999. Criminal Justice (International Co-operation) (Jersey) Law 2001. R v Smith (Joan) [1968] 1 WLR 66. R v Davis and other appeals (1993) 2 AER 643. Loi (1864) réglant la procédure criminelle. Page Last Updated: 26 Jun 2015 BAILII: Copyright Policy | Disclaimers | Privacy Policy | Feedback | Donate to BAILII

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Prepared on 28 October 2026 · Esheria