

JERSEY / JUDGMENT

# LeG v Attorney General

## [2004] JRC 104 (10 June 2004)

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### JUDGMENT

THE Deputy BAILIFF: 1. This is an application by Le G:- (i) for an order, pursuant to Article 18(5) of the Magistrate's Court (Miscellaneous Provisions) (Jersey) Law 1949 ("the 1949 Law") that the Youth Court state a case in respect of its decision to accept a plea of guilty to common assault in the case of Le G's co-accused T and B but a plea of guilty to grave and criminal assault in the case of Le G, when the evidence and law, it is said, clearly indicated a joint enterprise between all three accused to a charge of grave and criminal assault; (ii) for a ruling on the case stated by the Youth Court on whether it was wrong in law to refuse a stay of the proceedings on 16 th March in view of Le G's application to the Royal Court for an order that the Youth Court be required to state a case in respect of the matter described at (i) above. The Court gave its decision at the conclusion of this hearing and now gives its reasons. The procedural history 2. The proceedings arose out of an incident which took place on 2 nd December 2003. As a result, Le G (who was aged 14 at the time) appeared in the Youth Court charged with a grave and criminal assault on J, a girl of 15. She reserved her plea and the case was adjourned on various occasions until 20 th January 2004. In the meantime, on 6 th January 2004, two other girls namely T and B (both aged 15) were also charged with grave and criminal assault on J arising out of the same incident and appeared before the Youth Court on that date. 3. At that hearing (where Le G was not present) B pleaded not guilty to grave and criminal assault but her counsel offered a plea of guilty to common assault on the basis that she had merely thrown one punch. The Centenier stated that he was willing to accept that plea. The charge sheet records simply that the plea of guilty to common assault was accepted. The Magistrate did however indicate that, if the facts turned out to be somewhat different, the matter might have to be reviewed. T reserved her plea to the charge of grave and criminal assault. 4. On 20 th January 2004 all three accused appeared before the Youth Court. Le G, through Advocate Fogarty, entered a plea of guilty to the charge of grave and criminal assault on J. Counsel for T offered a plea of guilty to common assault but the Centenier did not accept this. He stated that all three were jointly charged with grave and criminal assault. The Magistrate pointed out that, on 20 th January, the Centenier had accepted a plea to common assault from B but the Centenier said that it was his impression that that had been a provisional agreement until all three were presented together. He said that the prosecution had now concluded that all three should face the charge of grave and criminal assault. Counsel for B protested that she thought

that there had been an agreement to accept a plea to the lesser charge on the part of B and that, if the charge were to be one of grave and criminal assault, B's plea would be not guilty. The Magistrate pointed out that he too had thought that the prosecution had been willing to accept the lesser plea on that earlier occasion but that was apparently no longer the position. The case against T and B was therefore adjourned with a view to a subsequent hearing for directions for a contested trial on the charge of grave and criminal assault. The Youth Court decided that it would proceed to sentence Le G and the Centenier outlined the facts. However Advocate Fogarty then applied for a psychological report and sentence was adjourned. 5. On 3<sup>rd</sup> February J and B came back before the Court. The prosecution was now represented by the legal adviser, Mr O'Donnell. The legal adviser asserted that the Crown had effectively bound itself to accept a plea to common assault in respect of B and accordingly that plea was accepted. However he emphasised that it would not limit the basis of the facts which were put before the Court on sentence. The Magistrate added that there was a degree of overlap between common assault and grave and criminal assault. The case was adjourned to 17<sup>th</sup> February. 6. On 17<sup>th</sup> February all three accused appeared before the Youth Court and were represented by counsel. The legal adviser stated that, in respect of T, he was now willing to accept a plea of guilty to common assault. Advocate Fogarty had been forewarned of this occurrence and of the fact that B's plea to common assault had been accepted on 3<sup>rd</sup> February and she immediately lodged an application for the Youth Court to state a case as set out at the beginning of this judgment. She submitted that the Youth Court had been misled in deciding to accept the plea of guilty to common assault from T and B because the evidence made it clear that this was a joint enterprise and that the facts justified a charge of grave and criminal assault. She said that it would be unjust for her client to carry the can for the other two. The Magistrate rejected her application that the Youth Court should state a case in forceful terms on the grounds that it was frivolous because Le G had no standing to ask for a case to be stated in respect of the pleas entered by T and B. He said that the appropriate course would be for Advocate Fogarty to apply for leave to vary Le G's plea from grave and criminal assault to common assault. However, Advocate Fogarty refused to take this option on the grounds that she was of the opinion that grave and criminal was the proper charge to reflect the admitted

## facts.

The Magistrate was clearly concerned as to whether it was correct to proceed in circumstances where Le G had pleaded guilty to grave and criminal assault but the others had only pleaded guilty to common assault. The Youth Court therefore adjourned the matter so that the prosecution could consider the position. 7. The case returned to the Youth Court on 16<sup>th</sup> March. Counsel for Le G submitted that the matter was stayed automatically and that there was no jurisdiction to proceed to sentence because application had been made to the Royal Court for an order that the Youth Court should state a case on the decision to accept the lesser pleas from the two co-accused. Counsel for the co-accused opposed a stay and asked that their clients should be sentenced as soon as possible. The Youth Court held that there was no stay as a matter of law and furthermore that it would not grant a stay in its discretion. The Court therefore proceeded to sentence the accused after the legal adviser had outlined the facts and counsel had mitigated. Le

G was placed on probation for 12 months, T was sentenced to 90 hours community service and B to 60 hours community service and a 9-month probation order. The Court expressed the view that the assault to which T and B had pleaded guilty was right at the top end of the common assault level. Miss Fogarty invited the Youth Court to state a case on its refusal to adjourn sentencing. The Youth Court agreed to state a case and that is before this Court today as set out at paragraph 1(ii) of this

## judgment.

Factual background 8. It is not necessary for the purposes of our decision today to rehearse the facts in any great detail. Nevertheless a short summary is appropriate and we take this from the summary given by the legal adviser in the Youth Court on 16 th March. The victim J is a 15-year old girl. She and the three defendants all attend the same school. There appears to have been some underlying dispute. On the day in question she was walking home when a group of 10 to 15 youngsters came towards her. T appeared to be at the forefront and stood shouting at J alleging she was a grass. Others joined in. Le G then started punching J having first poked her in both cheeks. Whilst this was going on T was telling J to admit to being a grass and a slag. J agreed to do so because she was frightened. T asked the bystanders if they had all heard this. Someone had urinated in a Lucozade bottle and Le G then threw this towards J so that some of it splashed over her. Le G then dipped a piece of white shoelace into the spilt urine, flicked the string at J and then put it round the back of J's neck and pulled it together at the front. The insults and threats continued all this time. T then administered one hard punch to J's nose causing it to bleed. T asked if anyone else wanted to punch her and B came up and punched J. According to J, B punched her several times but B's plea of guilty was entered on the basis of only one punch. Other threats were uttered and in essence J was detained against her will for some 40 minutes or so. Fortunately an older girl from Beaulieu came by. She put her arm around J and told the others to leave her. She took J to her own house, cleaned her up and called J's father. In terms of injuries J suffered a black eye, a bleeding nose and bruises to her legs and neck. It was clearly a terrifying incident and J was extremely frightened. 9. The basis of the pleas by T and B was that the only physical violence which they each undertook was limited to one punch. However they accepted through their counsel that they were involved in the verbal threats and taunts and also in the detaining of J for the period of the assault. The Magistrate repeatedly said that the assault to which they had pleaded guilty could be considered as being right at the top of the common assault range. Should the Court now order the Youth Court to state a case? 10. The Court pressed Miss Fogarty with what exactly would be achieved if the Court were to order the Youth Court to state a case at this stage. What order would she be inviting the Royal Court to make on such a case stated? She accepted that she was in some difficulty. She could not now ask for this Court to make an order which affected the two co-accused given that their cases had been finally disposed of and they had been sentenced. Similarly, she could not, consistently with her refusal to agree to Le G changing her plea of guilty from grave and criminal assault to common assault, request this Court now to reduce Le G's conviction to one of common assault. She did however leave open the possibility that, even if she could not ask the Court to do so, the Court might of its own volition

take such a course. 11. This Court can only intervene on a case stated where there has been an error of law or an excess of jurisdiction. We can discern no error of law in Le G having pleaded guilty to grave and criminal assault in respect of her admitted part in this incident. The Court could not therefore properly reduce her charge to common assault on a case stated. It follows that there would be no purpose in ordering the Youth Court at this stage to state a case, because there would be no practical benefit in so doing. Accordingly we decline to order the Youth Court to state a case as requested by Miss Fogarty. 12. However, that is not to say that the proceedings before the Youth court ended very satisfactorily. On the prosecution case, there was strong evidence of a joint venture between the three co-accused. It therefore seems inherently unsatisfactory that the case has ended up in the position where one of the co-accused has pleaded guilty to grave and criminal assault but the others only to common assault. It has not made any difference to sentence as all counsel were agreed that the same sentences would have been passed whatever the label of the offence to which the particular offender had pleaded guilty because the Youth Court sentenced each offender on what she had admitted to doing. Nevertheless one could understand the comment made by the legal adviser to the Youth Court on 16 th March that it was unfortunate that the prosecution had proceeded in the way that it had. Miss Fogarty has raised a number of issues and, in case it is of any assistance for the future, we will proffer our opinion upon some of them. The Legal Adviser and the Centenier 13. The Centenier had accepted a plea of guilty to common assault on the part of B at the hearing on 6 th January. Although no formal verdict of not guilty was entered in respect of the charge of grave and criminal assault, it was clear from the transcript that the Centenier was content to proceed on the basis of a plea of guilty only to common assault, although the Magistrate very sensibly entered a note of caution. 14. On 20 th January the Centenier reversed his position. He asserted that all three must face the charge of grave and criminal assault and that his acceptance of B's plea of guilty to the lesser offence on 6 th January had been 'provisional'. 15. On 3 rd February the legal adviser appeared for the first time. When there is a legal adviser, the position of the Magistrate is of course very different to where a Centenier appears. In the former case he and his colleagues revert purely to a judicial role whereas, in the latter case, the Magistrate also has a role in connection with extracting the necessary evidence and so forth. The legal adviser referred to some correspondence which had taken place (which we have not seen) and said that effectively the Crown had bound itself to accept a plea to common assault. We understand from Miss Fogarty that, by this, he meant that he felt bound by the decision of the Centenier made before the Youth Court on 6 th January. Miss Fogarty submits that the legal adviser was mistaken in thinking that he was so bound and referred to the case of AG -v- Devonshire Hotels Limited [1987-88] JLR 577. 16. We would emphasise that we have not heard from the legal adviser and cannot therefore be certain as to what he meant by the expression which he used on 3 rd February to the effect that the Crown had bound itself to accept a plea to common assault. Furthermore we accept that the prosecution will often be in possession of information which is not in the possession of the Court and which will affect decisions on the acceptability of pleas. Nevertheless we would offer the following observations:- (i) We think that it was ill advised of the Centenier to take a decision on whether to accept the lesser plea tendered by B on 6 th January. He should have reserved his position. The Crown's evidence clearly pointed towards a joint

venture and clearly raised a serious issue as to whether this was a grave and criminal assault rather than a common assault. He should not therefore have accepted a lesser plea from only one co-accused before he knew the intentions of the other accused. All the subsequent problems in this case arose from that error on the part of the Centenier. (ii) If, when he addressed the Youth Court on 3 rd February, the legal adviser was expressing the view that he was legally bound by the decision of the Centenier to accept the lesser plea, he was wrong. Devonshire Hotels Limited makes it clear that the Attorney General (in whose chambers the legal adviser works) can overrule a decision of a Centenier not to charge. The principle is equally applicable to the decision by a Centenier not to proceed with a more serious charge, although clearly the Attorney General can no longer intervene once the court has proceeded to sentence on the lesser offence; but that was not the situation on 3 rd February. If, on the other hand, the legal adviser was not saying that he was legally bound by the Centenier's decision but merely that he ought, in fairness, not to reverse the Centenier's decision, that is more difficult. However, as Devonshire Hotels Limited makes clear, it will invariably be the case that, where the Attorney General overrides the decision of a Centenier, someone who thought he was not being charged will find later that he is being charged. Given the circumstance of this case and the knock-on effect of accepting the lesser plea from B, we think that the legal adviser was wrong to conclude that he should accept the lesser plea. He ought to have continued the stance which the Centenier himself had adopted on 20 th January, namely that all three should face the charge of grave and criminal assault. (iii) In relation to T, the legal adviser was not directly affected by any earlier decision of the Centenier because T had reserved her plea until the legal adviser became involved. We think his decision to accept the lesser plea from T was similarly unfortunate, although he may have felt that the decision to accept the lesser plea from B meant that he could not reasonably refuse to do so in respect of T, given that she also was admitting only to one punch in terms of actual violence albeit that, like B, her assault also included the serious factor of detaining J in the presence of a mob, coupled with threats and insults. The approach of defence counsel 17. Having concluded that it was unfortunate that the prosecution accepted the lesser pleas in respect of the two co-accused, we turn to the position taken by defence counsel. It is clear that, on 17 th February, the Magistrate became a little uneasy at what had occurred and invited Miss Fogarty to apply to change Le G's guilty plea from grave and criminal assault to assault. Miss Fogarty refused. She did so on the basis that, in her judgment, the facts disclosed a grave and criminal assault and therefore her professional obligation to the Court meant that she could not properly agree to enter a lesser plea on behalf of her client. 18. We fully understand the laudable motives which led Miss Fogarty to take this course. Nothing which we say is intended in any way to derogate from the overriding duty of an advocate to the Court as summarised in the advocate's oath and, for example, in paragraphs 2 and 17(1) of the Law Society of Jersey Code of Conduct. The latter states:- "A member shall bear in mind that whilst an advocate's primary function is to present the case for a client to its best advantage, there is no requirement to win the case at all costs. The fundamental principle to guide the member is that an advocate's function is to assist the Court to reach a just decision on the facts properly adduced before it in accordance with a correct interpretation of the law." 19. Nevertheless we conclude that, in this case, she applied those principles in an over strict manner and did not distinguish adequately between her opinion as to

the legal position and that which others might reasonably conclude. Let us give a simple example. An advocate may well believe that the correct legal position is X. If he were the judge he would so rule. However, it is of course very often the case that his client's interests require him to advance the argument that the legal position is Y. Provided that there are reasonable grounds for such a submission, it does not matter that this conflicts with the advocate's own opinion as to what the law is or should be. Of course there are limits to this and an advocate may only submit that the law is Y if there are reasonable grounds for doing so and he must of course cite any authority which goes against his submission. 20. That was really the position here. Le G had admitted carrying out various acts which, in the opinion of Advocate Fogarty, were sufficiently grave to amount to a grave and criminal assault. But was it so obviously a grave and criminal assault that it would not have been proper for her to submit that her client's actions amounted only to a common assault? In our judgment the position was not as clearcut as Advocate Fogarty seems to have thought. The two traditional ways in which an assault becomes a grave and criminal assault are if the severity of the injuries or the severity of the assault causes it to become a grave assault. Thus a single punch which leads to a fracture or other serious injury is a grave and criminal assault even though a single punch leading only to minor injuries is a common assault. Conversely an assault with a weapon (e.g. with a knife) is invariably regarded as a grave and criminal assault even if no injury is caused because the nature of the assault is grave; or an assault may become grave because of the severity or ferocity of the attack even though no weapon is used. So, if Le G in this case had stabbed J with a knife, Advocate Fogarty would have been quite correct in refusing to enter a plea to common assault because it would have been unarguable that the facts of the case did not amount to a grave and criminal assault. However here the position was rather different. The injuries were minor. Accordingly the assault was not a grave and criminal assault because of the severity of the injuries. Nor was a weapon used. Accordingly it did not become a grave and criminal assault because of the use of a weapon. What was said by the Crown was that it became a grave and criminal assault because of the length of the assault, the number of people around, the degree of intimidation etc. In our judgment it would have been perfectly open to the Youth Court or a jury to find that these various factors did indeed cross the threshold and turn this assault into a grave and criminal assault. Indeed, had we been sitting ourselves, on the basis of the facts as outlined to us, we would have agreed that it should be treated as a grave and criminal assault. But the contrary is not unarguable. We can imagine the possibility of another tribunal taking the view that, whilst this was clearly right at the top end of the common assault scale, it remained a common assault because of the lack of injuries and the lack of a weapon. 21. It would therefore not have been professionally improper for Miss Fogarty to conclude that, although her personal opinion was that the facts disclosed a grave and criminal assault, it was arguable that the facts only amounted to a common assault, in which event she would have been acting perfectly properly in putting that submission forward on behalf of her client. In other words, when proffered the opportunity by the Magistrate to change Le G's plea from one of grave and criminal assault to assault, she should have accepted the invitation. Had she done so, all the problems in this case would have disappeared and there would not have been the risk of a lingering sense of unfairness on the part of her client because she had pleaded guilty to a more serious assault than her two co-accused and this will remain on

her record. The locus to apply for a case stated 22. The Magistrate expressed the strong view during the course of Miss Fogarty's submissions on both 17 th February and 16 th March that an accused person did not have any locus or standing to apply for a case stated in respect of the correctness of the pleas entered by her co-accused and accepted by the prosecution. We can well understand that instinctive reaction and the Magistrate did not have the advantage of any detailed legal submissions on the point. 23. However counsel for the Attorney General argues with Miss Fogarty that Le G did have the necessary standing to make an application for a case stated in respect of decisions relating to T and B. Their reasoning is as follows. In the first place the wording of Article 18(1) of the 1949 Law itself suggests that this must be so. The relevant wording is as follows:- "Any person who was a party to any proceeding before the Magistrate's Court or is aggrieved by the conviction, order, determination or other proceeding of the Magistrate's Court, may question the proceeding on the ground that it is wrong in law or is in excess of jurisdiction by applying to the Magistrate to state a case for the opinion of the Royal Court on the question of law or jurisdiction involved.....". [Emphasis added] By Article 15(2) of the Criminal Justice (Young Offenders) (Jersey) Law 1994 , the provisions of Part IV of the 1949 Law apply mutatis mutandis to appeals from the Youth Court. 24. This wording suggests two categories of person who may appeal by way of case stated. The first category is a party to the proceedings and the second is a person aggrieved. The second alternative must go beyond someone who was a party. 25. Furthermore, this interpretation is supported by the fact that the equivalent provision in England (where the wording is for all practical purposes identical) has been held to confer a right on a person other than the prosecution or the particular defendant to appeal by way of case stated. Thus Taylor on Appeals (2000 Ed'n) has the following passage on this point at page 54:- "Any person who was a party 3-018 This phrase makes it clear that both the prosecution and defence have a right of appeal by way of case stated. This is regardless of whether the applicant was unsuccessful or is aggrieved at the partial nature of his success. A person 'aggrieved' 3-019 This phrase establishes that any other person or party who is 'aggrieved' by the decision in question has a right of appeal by way of case stated. The term 'person aggrieved' appears to have been equated generally by the courts with the test of 'sufficient interest' in the judicial review sphere. In Attorney-General of Gambia -v- N'Jie the Judicial Committee of the Privy Council stated: "The words 'person aggrieved' are of wide import and should not be subjected to a restrictive interpretation. They do not include, of course, a mere busybody who is interfering in things that do not concern him; but they do include a person who has a legitimate grievance because an order has been made which prejudicially affects his interests." The tests are not identical but have a common base which suggests that a substantive remedy will not be denied, solely on the basis of insufficient locus , to any person who reasonably wishes to bring proceedings in question. Accordingly, if a third party has a sufficient interest in the outcome of the magistrates' court proceedings and their case is a potentially meritorious one, they are likely to be allowed to seek to have a case stated. A person aggrieved has been said to be one whose legal rights are directly affected." 26. It follows that, in our judgment, Le G, being a co-accused and not simply a busybody, had the necessary locus to apply for a case stated in respect of rulings concerning her co-accused. However the question then becomes one of discretion for the Youth Court. We think that the occasions on which it would be right to allow one accused to proceed by case stated in

respect of a decision taken concerning a co-accused would be extremely rare. Indeed this case illustrates why. The purpose of Le G's application was not to change any order which the Youth Court had made in relation to her; it was to seek to change decisions of the prosecution and the Youth Court in relation to her co-accused. It would on any view therefore be necessary to bring the two co-accused before the Royal Court on the hearing of any case stated in order that they might be heard in relation to a matter which was directed towards them. 27. Although the Youth Court did not purport to exercise a discretion - because it held that Le G had no locus to apply - we would not have been surprised had the Youth Court exercised its discretion so as to refuse to state a case for the reason to which we have referred earlier, namely that such a discretion should be exercised extremely rarely and that the remedy lay entirely in the hands of the defence in that they could and should have accepted the Court's invitation to change Le G's plea so as to plead guilty to the lesser charge. The refusal to stay the proceedings 28. Before the Youth Court Miss Fogarty submitted that her application to the Royal Court for an order under Article 18(5) of the 1949 Law (that the Youth Court be required to state a case) had the effect of staying the proceedings in the Youth Court by necessary implication. 29. We were not entirely clear whether Miss Fogarty maintained that submission before us. But in case she did, we rule that it is not correct. There is nothing in the 1949 Law to suggest that the proceedings in the lower court are stayed automatically in the event of an appeal by way of case stated, still less by a mere application to the Royal Court for an order under Article 18(5). Miss Fogarty sought to draw some support from the position in civil cases but, in our judgment, these point in the opposite direction. It is clear that, unless the court below specifically orders a stay, the fact that there is an appeal does not operate as a stay of any judgment of the court below in civil matters (see Rule 15 of the Court of Appeal (Civil) (Jersey) Rules ). 30. In our judgment it is a matter of discretion on the part of the court below as to whether it should grant a stay in the event of an application to the Royal Court for an order under Article 18(5). In many circumstances it might well be appropriate to grant a stay, particularly if the effect of continuing would be to nullify the effect of any case stated. Alternatively, in the event of a refusal to stay proceedings on the part of the court below, an application for a stay could be made to the Royal Court. But it is ultimately a matter of discretion and will depend upon the circumstances of the case. 31. In this case all the defendants were aged 14 or 15. There is clearly a strong imperative to complete matters as soon as possible where defendants are so young. Furthermore, in the case of the one of the co-accused, she was taking GCSE examinations and was suspended from school pending completion of the court process. There was therefore real prejudice to her by delaying matters. Counsel for both co-accused urged the Youth Court to proceed to sentence them immediately. It is agreed by all parties that the actual sentence was never going to be affected by the label of the offence to which a particular offender pleaded guilty. In those circumstances we entirely understand the decision of the Youth Court not to stay the proceedings and we find no criticism to make of that court for so doing. Summary 32. We therefore decline to require the Youth Court to state a case on the issues raised by Advocate Fogarty and we make no order on the case stated by the Youth Court in relation to its decision to proceed to sentencing notwithstanding Miss Fogarty's application to this Court for an order under Article 18(5). We have indicated the areas where we feel that the prosecution were mistaken and did not take full account of the nature of the case which they

were presenting. Similarly we have indicated where we think defence counsel should have proceeded differently with a view to avoiding the difficulties which have arisen in this case. Postscript 33. At one stage during the hearing Miss Fogarty began to develop the argument that the case stated procedure under Article 18 of the 1949 Law was not confined to being brought after conviction and sentence but could also be brought in respect of interlocutory orders prior to conviction and sentence. She did not need to proceed with this argument because Advocate Hawgood, on behalf of the Attorney General, conceded that this was so. The Court therefore makes no ruling on this but one can well understand the argument that the wording of Article 18 itself does not rule out a case stated on an interlocutory matter. 34. However our attention was not drawn to Article 15(2) of the Criminal Justice (Young Offenders) (Jersey) Law 1994 which applies Part IV of the 1949 Law *mutatis mutandis* to appeals from the Youth Court to the Youth Appeal Court. In preparing this judgment we have noted that the terms of Article 15(2) are as follows:- "A person convicted by the Youth Court may appeal to the Youth Appeal Court and the provisions of Part IV of the Magistrate's Court (Miscellaneous Provisions) (Jersey) Law shall apply *mutatis mutandis* to any such appeal." [Emphasis added]. In view of the emphasised wording it would appear that appeals by way of case stated from the Youth Court (as opposed to the Magistrate's Court) may only be brought by a person after conviction. However the matter was not the subject of argument and we make no final decision on the point. Authorities AG-v-Devonshire Hotels, Ltd. [1987-1988] JLR 577. Magistrate's Court (Miscellaneous Provisions) (Jersey) Law 1949: Article 18 Criminal Justice (Young Offenders) (Jersey) Law 1994: Article 15(2). Taylor on Appeals (2000 Ed'n): p.54. Court of Appeal (Civil)(Jersey) Rules, 1964: Rule 15. Page Last Updated: 24 Mar 2017 BAILII: Copyright Policy | Disclaimers | Privacy Policy | Feedback | Donate to BAILII

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