Bhojwani v AG

Jurisdiction:	Jersey
Judge:	Re
Judgment Date:	10 February 2011
Neutral Citation:	[2011] JCA 34
Reported In:	[2011] JLR 249
Court:	Court of Appeal
Date:	10 February 2011

Text

Raj Arjandas Bhojwani
and
The Attorney General

[2011] JCA 34

Before:

The Hon. Michael Beloff **Q.C., President**; Dame Heather Steel, **and**; Nigel Pleming, **Q.C.**

COURT OF APPEAL

Application for leave to appeal against the conviction by the Royal Court on 5 March, 2010 and the sentence imposed by the Superior Number of the Royal Court on 25 June, 2010 on charges of:

2 counts of: Converting the proceeds of criminal conduct, contrary to Article 34(1)(b) of the Proceeds of Crime (Jersey) Law 1999.

1 count of: Removing the proceeds of criminal conduct from the jurisdiction of Jersey, contrary to Article 34(1)(b) of the Proceeds of Crime (Jersey) Law 1999.

Authorities

Proceeds of Crime (Jersey) Law 1999.

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Bhojwani v. AG [2009] JCA 115A .

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R v Chalkley [1998] 2 Cr. App. R. 79 .

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AG v Michel [2007] JRC 120 .

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R v Rimmington [2006] 1 AC 459 .

R v Monfries (2004) 2 Cr. App. R. (S) 3 .

R v Basra (2002) 1 Cr. App. R. (S) 100 .

R v Adams [2009] 1 WLR 301 .

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AG v Bhojwani [2009] JRC 207A .

M. T. Jowitt, **Esq., Crown Advocate**.

Advocate J. D. Kelleher **for the Applicant**.

The President:

Introduction

1 This is the judgment of the Court. It addresses the appeal both against conviction and against sentence.

2 On 5 March 2010 Raj Arjandas Bhojwani ("Mr Bhojwani") was convicted before the Royal Court (Commissioner Clyde-Smith ("the Commissioner") with two Jurats) on three counts of money laundering contrary to Article 34(1)(b) of the Proceeds of Crime (Jersey) Law 1999 ("PoCL 99"). On 25 June 2010 Mr Bhojwani was sentenced by the Superior Number of the Royal Court to six years' imprisonment on each count, to run concurrently. By Notice of Application for Leave to Appeal dated 24 May 2010 Mr Bhojwani appealed (or, where necessary, applied for permission to appeal) against his conviction and his sentence.

3 There were 3 counts on the Indictment. The first count is as follows:

Count 1

"Converting the proceeds of criminal conduct, contrary to Article 34(1)(b) of the Proceeds of Crime (Jersey) Law 1999.

The particulars of the offence

Raj Arjandas BHOJWANI between 1 October, 2000 and 30 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),

converted his proceeds of such criminal conduct, namely credit balances held in the name of TaTa Overseas Sales and Services Ltd and Britannic Trade Corporation at the Bank of India in Jersey, into six bankers' drafts totalling approximately US$43.9 million, for the purpose of avoiding prosecution for an offence listed in Schedule 1 to the said Law or the making or enforcement of a confiscation order against him."

4 Counts 2 and 3 refer to removing and converting the proceeds of criminal conduct, also contrary to Article 34(1)(b), and are not here separately set out.

5 The statutory provisions material to these charges are as follows:-

(i) Article 34(1)(b):-

"Concealing or transferring proceeds of criminal conduct

(1) A person is guilty of an offence if the person –

(a) conceals or disguises any property that is or in whole or in part represents the person's proceeds of criminal conduct; or

(b) converts or transfers that property or removes it from the jurisdiction ,

for the purpose of avoiding prosecution for an offence specified in Schedule 1 or the making or enforcement in the person's case of a confiscation order." (Emphasis added)

(ii) Schedule 1 provides:-

"Offences for Which Confiscation Orders May Be Made

Any offence in Jersey for which a person is liable on conviction to imprisonment for a term of one or more years (whether or not the person is also liable to any other penalty) but not being a drug trafficking offence."

(iii) Article 1(1) of the Proceeds of Crime (Jersey) Law 1999, (interpretation), provides:-

"criminal conduct" means conduct, whether occurring before or after Article 3 comes into force, that –

(a) constitutes an offence specified in Schedule 1; or

(b) if it occurs or has occurred outside Jersey, would have constituted such an offence if occurring in Jersey;"

6 The statutory provisions are not altogether easy to construe. The nature of the defendant's purpose is key. It is necessary that a defendant should have the purpose of avoiding

prosecution for a Schedule 1 offence. It is not necessary that he should in fact be guilty of such offence; that would require attribution to a defendant of knowledge of Jersey law before he could be found guilty of money laundering which the legislation could not sensibly contemplate. The natural candidate for a Schedule 1 offence in this case would be fraud even if on the facts Mr Bhojwani could not be prosecuted in Jersey for such an offence. We have in this context the benefit of previous decisions of this Court to, which we loyally adhere.

7 In *AG v. Bhojwani* [2008] JCA 188, this Court considered and ruled on what purpose had to be proven. We refer to the following extracts:-

> ***"We accept the Commissioner's reasoning, following Saik, that the purpose element is purely subjective and the submission of Advocate Jowitt set out in paragraph 87 that the statutory requirements for the criminal character of the property cannot be imported into the purpose element in this case.*** We note that both the cases of Montila and Saik were primarily concerned with the application of subsection (2) of the relevant statutes where the property converted/transferred was the property of another, and the attention of the House had been directed to the words 'knowing or having reasonable grounds to suspect' in those offences. The House considered the contrasts between that subsection and subsection (1) as we have set out in paragraph 84 above, and we consider the difference to be significant. The Crown therefore need only prove that the defendant, when he converted/ transferred his proceeds of criminal conduct, had the requisite subjective purpose to avoid prosecution for an offence specified in schedule 1, that is, a serious offence in Jersey, or the making or enforcement of a confiscation order. The Crown need not prove that he had actually committed an offence in Jersey for which he could have been prosecuted or in respect of which a confiscation order could be made." – paragraph 90
>
> ***"Having regard to the wording of Article 34 (1) – 'for the purpose of avoiding prosecution for an offence specified in schedule 1'—we accept the finding of the Commissioner that, if the defendant apprehended a risk that he might be prosecuted or have a confiscation order imposed and therefore converted/ removed his proceeds of criminal conduct, the offence is committed.*** We also accept that the defendant's state of mind must relate to a serious offence in Jersey to satisfy the Schedule 1 element. We accept that there is no requirement that the criminal conduct and the conduct which the defendant believes may put him at risk must be one and the same." – paragraph 91

8 In *Bhojwani v. AG* [2009] JCA 115A, at paragraphs 35–45 this Court further considered and ruled on the "extent of transposition". We refer to the following extracts:-

> ***"37. The extent of the transposition exercise has been considered in two House of Lords cases, to both of which the Commissioner referred at***

length. They are *Cox v Army Council* [1963] AC 48 ***and*** *Norris v Government of the United States of America* [2008] 1 AC 920 ***[an extradition case in which transposition was an essential part of the exercise]. In Cox the defendant was charged under section 70 of the Army Act, which made it an offence for anyone subject to military law to commit a civil offence in the United Kingdom or elsewhere; and a civil offence meant "any act or omission punishable by the law of England, or which, if committed in England, would be punishable by that law". The defendant was said to have driven without due care and attention on a road in Germany and his argument in essence was that the offence of driving without due care and attention contained in the Road Traffic Act 1960 could only be committed on a road in England. The House of Lords rejected that argument. Viscount Simonds said (pp68–9):-***

"It is true that in the Road Traffic Act 'road' means a road in England. But the essence of the offence lies in driving without due care and attention on a road to which the public have access. I see no difficulty in at least this degree of translation———-If the act is of its nature one that can only be committed in England the section cannot operate. I need say no more than that it is otherwise with such acts as driving without due care or, it may be dangerously on a highway or larceny from a dwelling house or an offence against the person. All such acts have, for want of a better expression, I will call a character of universality which makes it sensible to bring them within the scope of section 70, I mean the same thing whether I refer to them being done at Sundern or at Surbiton"

Lord Reid said (p70):-

"Any act or omission committed abroad was committed there and nowhere else. So the statute requires us to imagine another act committed in England. It cannot require that the other act should be precisely the same in every detail because that would be impossible. So it must require that we can imagine another act committed in England which is similar in all relevant respects. With many types of offence that is easy. For example murder and theft are the same the world over."

Lord Radcliffe, said (p 71):-

"The occurrence that is said to constitute the offence is always the actual occurrence as it took place outside England and that means importing into the hypothetical English occurrence the circumstances and conditions that prevailed at the place and time when the thing that is complained of was done or omitted. The difficult question, as I see it, is to decide in any particular case how far those circumstances and conditions are an essential element of the act which would have constituted an offence if committed in England, and how far the English offence is capable of being applied to the non-English occurrence"

38 ——-It is policy of English law (and of other systems of law) that, before there can be an extradition there should have been criminality according to the law of the requesting State and the law of England.————In Norris the defendant was accused of obstructing an American investigation into price fixing. The decision of the House of Lords on this topic is encapsulated in the following passage from the Committee's joint opinion:-

"If, then, we ignore the adventitious circumstances connected with the conduct alleged against Mr Norris in counts 2–4 of the indictment and concentrate instead on the essence of his alleged acts, the substance of the criminality charged against him is not that he obstructed the criminal investigation into price fixing in the carbon products industry being carried out by the Pennsylvania Grand jury, but that he obstructed the criminal investigation into that matter being carried out by the duly appointed body. Making the necessary changes, we would translate counts 2–4 into counts of obstructing in England a criminal investigation into price fixing in the carbon products industry being conducted by the appropriate investigatory body in this country." (para 99)

39 In reaching their decision the House placed reliance on *In re Collins (No3)* (1905) 10 CCC 80 , ***a Canadian extradition case.*** Collins was accused of perjury in making a false statement under oath in California. There was nothing in Canadian law which made it perjury to make a false deposition before a competent Californian tribunal or officer; and on that basis it was argued that Collins' conduct would not amount to a crime if it had occurred in Canada. Duff J rejected that argument; and on the basis that the approach to be applied was to conceive the defendant and the acts of the defendant transported to Canada. His words in considering the evidence of criminality included; (pp100–1)

"…… it seems to me that the fair and natural way to apply that is this—you are to fasten your attention not upon the adventitious circumstances connected with the conduct of the accused, but upon the essence of his acts, in their bearing on the charge in question. And if you find that his acts so regarded furnish the component elements of the imputed offence according to the law of this country, then that requirement of the treaty is complied with.———"

40 The House also referred with favour to a subsequent passage from the judgment of Duff J at p 103 in which he said:-

"If you are to conceive the accused as pursuing the conduct in question in this country, then along with him you are to transplant his environment; and that environment must, I apprehend, include, so far as relevant, the local institutions of the demanding country, the laws affecting the legal powers and rights, and fixing the legal character of the acts of the persons concerned, always excepting, of course, the law supplying the definition of the crime which is charged"

9 The Court of Appeal rejected Advocate Kelleher's submission that the words quoted in paragraph 40 provided strong support for his argument that the exercise of transposition required that the actions of Mr Bhojwani should be considered by reference to the context or environment in which they had occurred.

10 At paragraph 42 the Court referred to Advocate Kelleher's concession that all the suggested predicate offences had the ***"character of universality"*** referred to by Viscount Simonds in Cox. The Court then stated ***"In all cases, however, the aim is to establish what is the essence of the accused's conduct; and, although that may often require an understanding of the formal background against which the conduct took place, how the accused's acts would have been categorised or regarded in the place where they occurred will ordinarily be irrelevant."***

At paragraph 43 the Court stated that "what has to be assumed to have occurred in Jersey is the essence of the conduct that in fact occurred abroad, shorn of irrelevant or adventitious factors, which include those elements in the conduct which have reference to a place other than Jersey. In simple terms, the conduct is to be judged as though it had nothing to do with Nigeria——-"

The Court approved the Commissioner's decision to reject Advocate Kelleher's submissions in this part of the case and endorsed the Commissioner's proposed directions to the Jurats as a correct reflection of the legal position.

11 We are informed that Mr Bhojwani did not seek to appeal the judgment [2008] JCA 208 (referred to in paragraph 7 above). He did seek to appeal [2009] JCA 115A (referred to in paragraph 8 above, on the grounds: (a) that Article 7 of Schedule I to the Human Rights (Jersey) Law "no punishment without law" is infringed by the prosecution of the Appellant for offences under Article 34(l)(b) of the Proceeds of Crime (Jersey) Law 1999; and (b) that the transposition of the Appellant's conduct to Jersey for the purposes of Article l(1) of the Proceeds of Crime (Jersey) Law 1999 encompasses the ***"circumstances and conditions that prevailed at the place where and the time when the thing complained of was done or omitted"***, as per Lord Radcliff in *Cox v Army Council* [l9631 AC 48, 76 and/or that such ***"conditions and circumstances"*** include the identity of the Appellant's counterparties in the contractual negotiations as officials serving the former military dictatorship in Nigeria and the fact that the de facto Head of State approved the contracts and, in relation to the offence of misconduct in public office, the characteristics of the particular public office in question must be transposed. The Privy Council refused permission.

12 In the trial itself the essential issue in broad terms was whether property (monies in a Jersey bank account) converted in and transferred by Mr Bhojwani out from and back into Jersey represented wholly or in part his proceeds of criminal conduct and whether he moved it in those ways for the purpose of avoiding prosecution for a specified offence or the making of a confiscation order against him.

13 There were two rival versions of the inferences to be drawn from the undisputed facts that in October 2000 Mr Bhojwani removed the monies and returned them to Jersey. The prosecution's case in respect of the admitted acts of conversion was that he was alerted directly or indirectly by an article in the Financial Times in October 2000 to investigations being afoot as to the whereabouts of monies, the fruit of corruption obtained from the State of Nigeria ("the predicate conduct"), removed his funds constituted by those monies from accounts in the Bank of India in Jersey and returned them to different accounts in order to avoid prosecution in Jersey and consequent confiscation. This was epitomised by us as the "fear case". The defence case in respect of those self same acts was that he removed these funds temporarily in order to stimulate the Bank of India by threat of permanent withdrawal into lending him more monies to invest in IMDs – a unique investment opportunity offered by the Indian Government. This was, epitomised by the Commissioner as the "anger/pressure case".

14 Before addressing the various grounds of appeal, we must remind ourselves of the extent of Mr Bhojwani's rights of appeal and our jurisdiction in dealing with them.

The law of Jersey on appeal in criminal matters

The right of appeal in criminal matters

15 A convicted person's right of appeal to the Court of Appeal is set out in Article 24 of the Court of Appeal (Jersey) Law 1961 (the "1961 Law"). This provides:-

> ***"24 Right of appeal***
>
> > ***(1) A person convicted on indictment by the Royal Court, whether sitting with or without a jury, may appeal under this Part to the Court of Appeal –***
> >
> > ***(a) against the person's conviction, on any ground of appeal which involves a question of law alone;***
> >
> > ***(b) with the leave of the Court of Appeal, or upon the certificate of the judge who presided at the person's trial that it is a fit case for appeal, against the person's conviction, on any ground of appeal which involves a question of fact alone, or a question of mixed law and fact, or on any other ground which appears to the Court to be a sufficient ground of appeal; and***
> >
> > ***(c) with the leave of the Court of Appeal, against any sentence passed on the person for the offence (whether passed on his or her conviction or in subsequent proceedings), unless the sentence is one fixed by law ...."***
>
> ***(Emphasis added)***

Questions of law/Questions of fact

16 Mr Bhojwani appeals against his conviction on certain questions of law for which no leave is required. Mr Bhojwani also appeals against his conviction on certain questions of fact/mixed law and fact for which leave is required.

17 The applications for leave to appeal were placed before the Bailiff for consideration as a single judge of the Court of Appeal on 26 May, 2010. He referred the application to the full Court for the following reason:-

> ***"given that a number of the grounds of appeal raise points of law (for which no leave is required) and given the close connection between those grounds and the remaining grounds, I consider that the same Court should consider all the grounds of appeal at the same time.*** I therefore direct that the applications for leave to appeal should be placed directly before the Plenary Court to be heard at the same time as the remaining grounds where leave is not required."

18. In our view it was convenient and not unjust to give leave on all grounds for which leave was required in order to avoid elaborate argument on whether leave was or was not required for a particular ground, and whether, where it was, the threshold for leave was passed. This course assisted both the parties and ourselves to concentrate on the substantive issues. We are grateful to both Counsel Advocates Jowitt and Kelleher for their considerable assistance.

The jurisdiction of the Jersey Court of Appeal

19 The jurisdiction of the Jersey Court of Appeal in a criminal appeal is set out in Article 26 of the 1961 Law:-

> ***"26 Determination of appeals in ordinary cases***
>
> ***(1) Subject to the following provisions of this Part, on any appeal against conviction, the Court of Appeal shall allow the appeal if it thinks that the verdict should be set aside on the ground that it is unreasonable or cannot be supported having regard to the evidence, or that the judgment of the court before which the appellant was convicted should be set aside on the ground of a wrong decision of any question of law or that, on any ground, there was a miscarriage of justice, and in any other case shall dismiss the appeal*:**
>
> ***Provided that the Court may, notwithstanding that it is of opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if it considers that no substantial***

miscarriage of justice has actually occurred .

(2) Subject to the following provisions of this Part, the Court of Appeal shall, if it allows an appeal against conviction, quash the conviction, and direct a judgment and verdict of acquittal to be entered."

20 An issue was raised on behalf of Mr Bhojwani as to the latitude of our powers to reconsider the basis of the verdict. We shall return to it later at an appropriate juncture.

The Grounds of Appeal

21 The twelve Grounds of Appeal are set out in 200 paragraphs. By way of summary only we here include the first paragraph of each ground, which give a flavour of the arguments to be advanced.

Ground 1 — *"By judgment dated 8 February 2010 the learned trial judge… erred in dismissing an application made on behalf of the Applicant that there was no case to answer."*

Ground 2 – *"The verdict should be set aside on the ground that it is unreasonable or cannot be supported having regard to the evidence"*.

Ground 3 – *"In his summing up, the learned Commissioner erred in directing the Jurats as to the approach they were entitled to take in order to be satisfied that the Prosecution has discharged its burden of showing, so that they could be sure, that the Applicant's purpose was, in the words of the Article 34(1((b) offence that of "….avoiding prosecution for an offence specified in Schedule 1 or the making in the person's case of a confiscation order"*.

Ground 4 – *"The learned Commissioner erred when, in directing the Jurats as to the manner in which they could approach a finding as to the Applicant's purpose in respect of each count on the Indictment …."*

Ground 5 – "the learned Commissioner erred in his decision in October 2009 that the test for dishonesty to be applied in relation to transposed conduct, that is the predicate conduct which is transposed to Jersey for the purpose of determining if the (in this case) monies held by the Applicant at BoIJ [Bank of India, Jersey Branch] were the proceeds of crime, is that applied in *R v Ghosh* [1982] QB 1053."

Ground 6 – *"The learned Commissioner erred in his decision in October 2009 in excluding from evidence at trial certain defence expert reports directed to Nigerian cultural concepts and standards of honesty…"*

Ground 7 – *"The learned Commissioner erred in his decision in the judgment of 1 October 2008 in declining to exclude evidence adduced by the Prosecution relating to the Applicant's instructions to the London branch of BoI in 2002, requiring the transfer of certain loan facilities (and the security for those loan facilities) to the Hong Kong branch of BoI."*

Ground 8 – *"This Ground eight is intended to be taken together with and is supplemented by the matters addressed in grounds 9, 10, 11 and 12. Each ground relates to the admission into evidence of the whole or part of the Nigerian Evidence ….."*

Ground 9 – *"The learned Commissioner erred in his decision of 9 November 2009 in finding that… [identified documents could be used in the prosecution of the Applicant]"*.

Ground 10 – *"the learned Commissioner erred in his decision of 6 January 2010 in admitting into evidence the witness statements of Deputy Commissioner Gana and Colonel Bako under the provisions of Article 64(2)(b) of PPCE"*.

Ground 11 – *"The learned Commissioner erred… in declining to exclude [identified] Nigerian evidence"*.

Ground 12 – *"The learned Commissioner erred, following a voir dire, and in the terms of his judgment of 8 February 2010, in deciding to admit into evidence a statement given by the Applicant to Deputy Commissioner Gana on 11 October 2001…"*.

22 In the course of his written and oral submissions Advocate Kelleher addressed these Grounds in approximately that sequence. We find it, however, more logical to deal with them in the following order.

Grounds 8–12 —that irrespective of its merits, the prosecution should be stayed on grounds of comity or abuse of process.

Ground 1 —that the Commissioner ought to have upheld a submission that there was no case to answer.

Grounds 5 and 6 —that the Commissioner should have considered whether by Nigerian standards Mr Bhojwani's predicate criminal conduct was dishonest or thought by him to be so, and admitted evidence said to go to these issues.

Grounds 3 and 4 —being alleged mis-directions by the Commissioner by commission or omission as to the statutory test.

Ground 7 —being the wrongful admission by the Commissioner of evidence relating to certain events in 2002.

Ground 2 —being an assault on the reasonableness of the Jurats' verdict in the light of the evidence before them.

Grounds 8, 9, 10, 11 and 12

Introduction

23 Grounds 8, 9, 10, 11 and 12 concern the admission into evidence at trial of documents and witness statements obtained by the Prosecution from Nigeria, obtained pursuant to letters

of request issued by the Attorney General of Jersey under the provisions of Article 4 of the Criminal Justice (International Co-operation)(Jersey) Law 2001 ("the Co-operation Law"). The evidence in issue was adduced by the Prosecution for the purpose of proving the existence of the predicate conduct.

24 More particularly Grounds 8, 9 and 11 each concern the admission into evidence of the totality of the Nigerian Evidence. Grounds 10 and 12 concern separate and limited parts of it:-

(i) Ground 10 concerns the admission of the witness statements of Police Commissioner Peter Gana and Col. Bako at trial (under the provisions of Article 64(2)(b) of the Police Procedures and Criminal Evidence (Jersey) Law 2003 ("PPCE")) bearing on the predicate conduct on the basis that Commissioner Gana and Col. Bako were outside of Jersey and that it was not practicable to secure their attendance;

(ii) Ground 12 concerns the admission of a witness statement obtained from Mr Bhojwani in 2002 by Commissioner Gana which in turn exhibited further Nigerian documents adduced for the purpose of proving the existence of the predicate conduct.

Issues of law appealed under Grounds 8, 9 and 11

25 The distinction between Grounds 8 and 11 results from the separate pre-trial hearings in November 2009 and January 2010 at which the Commissioner had before him different facts concerning the position of the Nigerian authorities. The issues of law raised by both the November application and the January applications were, however, fundamentally the same.

26 The point of law arising in relation to ground 9 is subsidiary to (and potentially subsumed by) grounds 8 and 11, in that, although it also concerns the admission into evidence of the totality of the Nigerian Evidence, it concerns the construction and application of Article 4(4) of the Co-operation Law.

The facts in relation to Grounds 8, 9 and 11

27 It is first necessary to set out the basic facts which are relevant to these grounds of appeal.

28 Since as already indicated Mr Bhojwani has been charged with two counts of converting the proceeds of his criminal conduct and one count of removing the proceeds of his criminal conduct, the prosecution had to establish that the subject matter of the alleged money laundering was in fact the proceeds of his criminal conduct.

29 The first letter of request from the Attorney General of Jersey to the Nigerian authorities was dated 17 June, 2002 and opened with the following words:-

> *"The Competent Judicial Authority, the Federal Republic of Nigeria*
>
> *Commission Rogatoire*
>
> *Her Majesty's Attorney General for the Bailiwick of Jersey respectfully presents his compliments to the Competent Judicial Authority of the Federal Republic of Nigeria and requests that consideration be given to providing assistance as requested in this letter.*
>
> *Her Majesty's Attorney General for Jersey has commenced an investigation into the circumstances surrounding the payments into Jersey of large sums of money suspected to be connected to the late Head of State of the Federal Republic of Nigeria: General Sani Abacha.*
>
> *Her Majesty's Attorney General therefore issues this letter of request under Article 4 Criminal Justice (International Co-operation) (Jersey) Law 2001."*

30 The letter set out the facts in some detail, listed the material that would provide relevant evidence to assist in the resolution of the investigation which included a request, if appropriate, for witness statements or evidence on oath, set out the offences under investigation and identified Mr Bhojwani as its target. It listed the then indicated predicate offences, the money laundering offences (with which Mr Bhojwani was later charged) and other substantive offences.

31 The letter of request, with the ancillary request that it be transmitted to the competent authorities in Nigeria, was sent to Mr E Monfrini of the Swiss law firm of Monfrini Bottge & Associés who held a power of attorney given to him by the Attorney General of Nigeria dated 27 September, 1999, to assist and represent Nigeria for the purpose of international mutual assistance proceedings to be initiated in Switzerland and elsewhere in the world in relation to the recovery of monies looted by the late Head of State, General Sani Abacha and his family members and other public servants and other third parties who had used their position or participated as accomplices to misappropriate public funds. There was an ancillary request for a meeting with Commissioner Gana to discuss the future progress of the Jersey investigation.

32 The letter of request was also sent to the Nigerian Government's English lawyers, Kingsley Napley, with a similar ancillary request.

33 By letter dated 27 September 2002 the Nigerian National Security Adviser (Lieutenant General A Mohammed Gcon) informed the President of Nigeria of the Attorney General of Jersey's request for evidence and that Commissioner Gana had been instructed to liaise with the affected ministries to get the necessary documents. He indicated that it might be necessary for the President to talk to these ministries in order to hasten action and that he

might wish to refer the letter to the Attorney General of Nigeria for further advice. The letter appears to be annotated in the hand of the President to the affected ministries asking them to please forward all relevant documents to the National Security Adviser.

34 On 15 November 2002 a second chasing letter of request similarly addressed was sent, the Attorney General of Jersey having heard that Mr Bhojwani had been interviewed in relation to these matters.

35 By letter dated 20 November 2002 Kingsley Napley confirmed that it was being forwarded to inter alios the Attorney General of Nigeria and Commissioner Gana.

36 On 11 October, 2002, Commissioner Gana took statements from Mr Bhojwani and from a number of other persons and on 21 January 2003, he signed a States of Jersey police statement headed "Article 9 Criminal Justice (Evidence and Procedure) (Jersey) Law 1998" to which he attached those statements and the documents that had been gathered by him. He describes his role as follows:-

> *"I am the Deputy Commissioner of the Nigerian Police Force and I am also head of the Special Investigation Panel in the office of the National Security Adviser to the President of Nigeria.* I have been a police officer for the past eighteen years."

The statement ended as follows:

> *"I produce these documents in response to a letter of request from the Attorney General for Jersey dated 17/06/02 issued under Article 4 of the Criminal Justice (International Co-operation) (Jersey) Law 2001."*

37 On 24 February 2005, Commissioner Gana executed a further States of Jersey police statement which he said was in response to the chaser letter of request of 15 November 2002, and to which he attached the statements produced earlier, together with a number of other statements and documents.

38 On 18 January 2006, the then Attorney General of Nigeria (Chief Bayo Ojo) executed a letter undertaking on behalf of Nigeria that, in the event of a trial taking place in Jersey against Mr Bhojwani for his activities in relation to funds paid by Nigeria under two vehicles supply contracts, the Federal Government of Nigeria would use its best endeavours to ensure that necessary witnesses including but not limited to Commissioner Gana and Colonel Bako would travel from Nigeria to Jersey to attend the trial.

39 On 15 February 2008, Commissioner Gana signed a further States of Jersey police statement in which he confirmed his position as a Deputy Commissioner in the Nigerian police force and attached a photocopy of his police identity documents. He explained that he was chairman of the Special Investigation Panel, being a panel of Nigerian detectives

and security operatives set up in 1998 to investigate cases of corruption involving Abacha and his family, public officers that served in his government and those who assisted them in their crimes, with responsibility for gathering evidence for prosecutions and making requests for mutual legal assistance in collaboration with the Attorney General of Nigeria. He next went into further detail as to the work that he had conducted in relation to the letter of request of 17 June 2002, which he had received on 24 September 2002. Appended to Commissioner Gana's statement were statements taken from a number of Nigerian persons, all of whom confirmed that the statements had been made for the purpose of criminal proceedings in Jersey against the applicant and following a request by the Jersey authorities under the Criminal Justice (International Co-operation)(Jersey) Law 1999 ("the Co-operation Law").

40 In September 2008 the Defence (i.e. Mr Bhojwani's advocates) gave the Prosecution notice that it had received an opinion from a retired judge of the Nigerian Supreme Court that the evidence gathered by Commissioner Gana had not been gathered lawfully, according to Nigerian law, and that it was intended to bring proceedings in Nigeria for a decision to that effect.

41 In November 2008 the Commissioner in consequence listed a hearing on Mr Bhojwani's application to decide whether:-

(i) there was illegality in gathering the Nigerian evidence; and/or

(ii) the circumstances in which Mr Bhojwani's statement was given to Commissioner Gana should lead to the exclusion of all or any of the Nigerian evidence.

42 Both the prosecution and defence had instructed experts on Nigerian law who were warned to attend the hearing and Mr Gana travelled to Jersey to give evidence. The Nigerian expert instructed by the defence gave his opinion on the basis of a version of Mr Bhojwani's statement without the signed caution page (as the Prosecution assert and the Defence deny).

43 After Mr Gana had left Nigeria to travel to Jersey, Mr Bhojwani withdrew his application.

44 Mr Gana brought a letter with him to Jersey which had been addressed by Mr Bhojwani's lawyers to the Attorney General of Nigeria inviting the Attorney General of Nigeria to persuade Mr Gana in his testimony in Jersey to make reference to the claim that the evidence he had gathered had not been gathered lawfully according to Nigerian Law.

45 In mid-2009 it was confirmed to the prosecution and the court that Mr Bhojwani was to bring proceedings in Nigeria for declaratory relief on the lawfulness of the taking of evidence in Nigeria.

46 Mr Bhojwani duly brought his proceedings in Nigeria. Mr Bhojwani's statement was put before the Nigerian judge (who was to decide, amongst other matters, whether there was any evidence that Mr Bhojwani had been properly cautioned under Nigerian law) without the signed caution page.

47 The Nigerian court also had before it an affidavit sworn by Mr Bhojwani in support of his originating summons and his answers to interrogatories that had been delivered by the Attorney General of Nigeria, who was the applicant in the Nigerian proceedings. The Nigerian court did not hear evidence from Commissioner Gana or receive his response to the answers given to the interrogatories by Mr Bhojwani.

48 Mr Bhojwani posed the following four questions for determination by the Nigerian court:-

> *"1. Whether the National Security Council, the National Security Adviser or any of its officers or agencies is empowered to continue the activities of a "Special Investigation Panel" established in 1998 for the alleged purpose of investigating "cases of corruption involving ABACHA and his family, public officers that served in his Government and their cronies"'*
>
> *2. Whether the National Security Council, the National Security Adviser or any of its officers or agencies is empowered to obtain evidence in Nigeria for the purposes of providing such evidence to the States of Jersey to use in the prosecution of the [applicant];*
>
> *3. Whether the "evidence" obtained by the "Special Investigation Panel" under the Chairmanship of Deputy Commissioner of Police Peter Gana was validly and/or lawfully obtained, having regard to the provisions of the Constitution of the Federal Republic of Nigeria; and*
>
> *4. Whether the statement obtained from the [applicant] by Deputy Commissioner of Police Peter Gana, acting as the Chairman of the "Special Investigations Panel" on October 11, 2002, was obtained lawfully and in accordance with the provisions of Nigeria law, given that:-*
>
> *(a) The [applicant] made the statement as a result of having been informed that the statement was a witness statement;*
>
> *(b) The [applicant] was not informed that the true purpose for which the statement was sought was to provide evidence for an investigation, and possible prosecution, of him by the States of Jersey;*
>
> *(c) No caution was administered to him prior to the taking and receiving of the statement dated October 11, 2002, and*
>
> *(d) The [applicant] was not advised of his right to consult a legal practitioner, or any other person of his choosing before providing any answers to the said Deputy*

Commissioner of Police Peter Gana."

49 The issues raised by the Attorney General of Nigeria in the same proceedings were very similar but expressed as follows:-

> *"(1) whether the Special Investigating Panel (SIP) is empowered to investigate the [applicant] and obtain evidence;*
>
> *(2) whether the Federal Government of Nigeria can make available to the State of Jersey on request any material evidence obtained from the [applicant] during investigation; and*
>
> *(3) whether the statement obtained by the SIP is lawful and admissible against the [applicant]."*

50 On 15 October 2009 the Federal High Court (Justice Kolawole) ruled that the evidence had not been obtained in accordance with Nigerian law. After analysis of the material before him and what he conceived to be the relevant law, he said:-

> *"In the final analysis, in relation to issue No 2 in both the [applicant's] and the [Nigerian Attorney General's] written addresses, my decision is that neither the [Nigerian Attorney General] herein nor the National Security Council, or the National Security Adviser of any of its officers or agencies including the Special Investigating Panel is by any existing law in Nigeria, empowered to obtain evidence in Nigeria for the purpose of providing such evidence for the prosecution of the [applicant] before the 'Royal Courts of Jersey'*.

51 Justice Kolawole accordingly gave the declaration sought by Mr Bhojwani in slightly amended form as follows:-

> *"A. A DECLARATION that the powers, duties, roles and functions of the National Security Council are limited to those set out in paragraph 26 of part 1 of the Third Schedule of the Constitution of the Federal Public of Nigeria, 1999*.
>
> *B. A DECLARATION that the National Security Adviser possesses no function, powers or duties under the Constitution of the Federal Public of Nigeria, 1999, other than membership of the National Security Council and, accordingly, may not conduct criminal investigations or otherwise exercise any of the powers of a law enforcement agency*.
>
> *C. A DECLARATION that the Special Investigation Panel established under office of the National Security Adviser to conduct criminal investigations in Nigeria against the [applicant] herein after May 29 1999 is unconstitutional and that all investigatory actions undertaken by the said Special Investigating Panel against the [applicant] and matters concerned in this action since May 29th 1999 are without much ado, null and*

void and lacking any valid or legal effect whatsoever."

52 The Judge then went on to make the following observations:-

> *"This Court, as one of the Superior Courts of record created and established pursuant to Section 6(5) (c) of the CFRN, 1999 in my view, has a Constitutional duty to protect the territorial integrity of the sovereign State which Section 2(1) of the CFRN, 1999 declares "to be known by the name of the Federal Republic of Nigeria" from unlawful and or unconstitutional "invasion" by a request such as was made by the Attorney General of Jersey to the [Nigerian Attorney General] for a legal assistance to gather and obtain evidence from the [applicant] for the purposes of a criminal indictment in Her Majesty's "Royal Court of Jersey and which from the facts and evidence on the record, if allowed to stand, constituted a flagrant/violent subversion of the authority of the said CFRN, 1999 and a breach of its fundamental principle of its inviolability and supremacy as Nigeria's ground norm.* (See Section 1(1) of the CFRN, 1999)."

53 We must of course accept that the judgment represents the law of Nigeria.

54 Following receipt of this judgment, Mr Bhojwani applied to the Commissioner for a ruling that it would be an abuse of process for the Prosecution to rely on the Nigerian evidence and therefore that such evidence should not be admitted.

55 In his judgment dated 9 November 2009, [2009] JRC 216 the Commissioner rejected that application for the detailed reasons there given, on the broad basis that the actions of the Attorney General of Jersey, or anyone else in Jersey, did not constitute an unlawful or unconstitutional invasion of the sovereignty of Nigeria. He held:-

> ***"Fundamentally however there is no abuse of executive power here and we do not even reach the point of the Latif balancing exercise.*** Everything that was done by the Jersey Attorney General and by Commissioner Gana in Nigeria was done in good faith (Advocate Kelleher did not seek to argue otherwise), but it now seems, following the Nigerian judgment, that Commissioner Gana may have acted or was acting under a mistake of law in Nigeria. This is not a case in which the law has been deliberately breached as in the Warren case (where notwithstanding no stay was granted). There is no possibility therefore of this Court giving the impression that it adopts the approach that the end justifies the means because all of those involved acted in good faith." [38]
>
> and
>
> ***"Furthermore, having received that evidence in good faith, and in compliance with the Co-operation Law, the Attorney General is not now debarred by the judgment of the Nigerian court from using that evidence.***

On the contrary, he is under a duty as a matter of Jersey law to seek to do so. Nor is this Court debarred by the Nigerian judgment from admitting that evidence into the Jersey proceedings." [60]

56 On 19 November 2009 the Attorney General of Nigeria (by now Chief Aondoakaa, who had apparently replaced Chief Bayo Ojo) made a request for the return of the Nigerian evidence. The text of the letter is as follows:-

"Jersey Prosecution of Raj Arjandas Bhojwani for Money Laundering

1. I refer to your letter of request Ref: No.: WJB/SB CRPR007–025 dated 2 September, 2008, and my response to same Ref: DPPA/MLAT/007/09, dated 28 April, 2009, informing you that the request is receiving attention. I further refer to your letter Ref: TJleC/SB CRPR007–25 dated the 13th day of November, 2009.

2. After a very careful scrutiny of the circumstances surrounding the case, serious controversies bordering on Functions, Powers and Duties of Public Office holders under the Constitution of the Federal republic of Nigeria, 1999 emanated from the case which led to a Judgment delivered by the Federal High Court of Nigeria.

3. In the same vein, I hereby convey to you that the Federal Republic of Nigeria is ready to co-operate with you with a view to reviewing the evidence to determine if there are sufficient grounds to enable us to commence prosecution of the accused person (RAJ ARJANDAS BHOJWANI) in Nigeria on the generality of issues and more specifically on 'money criminally obtained from the Nigerian public purse" as observed in your letter of request.

4. We confirm that there is an ENROLMENT OF JUDGMENT ORDERS (sic) issued under the seal of the Court and the hand of the Presiding Judge, Hon. Justice G. O. Kolawole on 15th day of October, 2009, SUIT NO; FHC/ABJ/CS/560/2008, in the FEDERAL HIGH COURT OF NIGERIA, HOLDEN AT ABUJA, between RAJ ARJANDAS BHOJWANI (Plaintiff) AND (I) ATTORNEY-GENERAL OF THE FEDERATION; and (ii) NATIONAL SECURITY COUNCIL (Defendants) at the instance of RAJ ARJANDAS BHOJWANI wherein the Federal High Court declared:-

'that all evidence (oral and/or documentary) obtained by Deputy Commissioner of Police Peter Gana in his capacity as the Chairman of the Special Investigation Panel, for use against the Plaintiff in criminal proceeding in the States of Jersey was unlawfully obtained.'

(The copies of the Enrolment of Judgment Orders and the Judgment are hereby attached and marked as ANNEXURES 1 AND 11).

5. Consequent of the above, I am unable to oblige your request for any

Nigerian witnesses to testify at the trial in Jersey as the crux of the matter is centred on the national interest and I have a Constitutional duty to protect the judicial integrity of the Federal Republic of Nigeria given that the judgment has become of public knowledge.

6. This is a constitutional matter and the Federal Government of Nigeria intends to vigorously pursue this matter to the Supreme Court of Nigeria for a final decision.

7. I take this opportunity to inform you that the Federal Republic of Nigeria intends to lodge a request for mutual assistance to Jersey to assist in gathering evidence and transmitting same to Nigeria. Therefore, all evidence gathered in Nigeria and transmitted to you by the said Special Investigation Panel should be returned to me.

8. In the meantime, in line with the said judgment I intend to instruct the appropriate constitutionally recognised investigative authorities to investigate the activities of RAJ ARJANDAS BHOJWANI.

9. I hereby confirm that based on the evidence that would be gathered in Nigeria by the constitutionally recognised investigative authority and any other evidence available to you that would be thus transmitted by Jersey, I would review the entire evidence obtained in view of assessing whether there is a case to answer against such persons including RAJ ARJANDAS BHOJWANI, and deciding whether it is in the Nigerian Public Interest that such a case be brought.

10 Please accept my highest consideration and esteemed regards.

CHIEF MICHAEL KAASE AONDOAKAA, SAN

Honourable Attorney-General of the Federation and Minister of Justice." (His emphasis)

57 On 9 December 2009 the Attorney General of Jersey wrote to Mr Bhojwani's Advocates giving notice that, subject to any representations which they might make to him within 14 days, he had provisionally decided to accede to the request of the Attorney General of Nigeria that he provide him with evidence for use in his criminal investigation into the conduct of the applicant in Nigeria and that certified true copies of the evidence would be forwarded to the Nigerian authorities.

58 On 17 December 2009 the Attorney General of Jersey responded to the Attorney General of Nigeria's letter of 19 November 2009 in the following terms:-

"May I also thank you for the indication of your view that it is in the Nigerian public interest to open a criminal investigation into Mr. Bhojwani.

You will appreciate that I have also considered the public interest of Jersey and

my firm view is that it is in the public interest of the Island that Mr. Bhojwani's trial here begins as soon as practicable, as I have no doubt you will readily agree.

I propose therefore to use copies of the evidence which Nigeria has provided. This is permitted under Jersey domestic law. Indeed, fairness requires that I should, so that the Jersey Court has before it the fullest possible evidence in reaching its verdicts.

I consider it of the greatest importance to Jersey that such allegations should be tried since, if proved, they amount to serious offences involving grave abuse of Jersey's banking system to conceal the proceeds of corruption, and this is to the detriment of the integrity of the Island's banking system.

Subject to considering any representations received from Mr. Bhojwani's lawyers in Jersey, as a matter of courtesy, I would propose to provide you with authenticated copies of the material Nigeria has supplied to Jersey to assist you in your investigation. As you will have realised in deciding to open an investigation into the affairs of Mr. Bhojwani, the originals of these documents are, for the most part, directly available to you from the archives of NECON/INEX, the Nigerian Ministry of Defence and the Central Bank of Nigeria."

59 In a letter dated 23 December 2009 to the Attorney General of Jersey Mr Bhojwani's Advocates contended that the Attorney General had misconstrued the letter of 19 November from the Attorney General of Nigeria and that he must, before proceeding, seek verification of the Attorney General of Nigeria's position. In particular, it was contended that, by necessary implication, the Attorney General of Nigeria's position was that the Nigerian evidence should not be used in the Jersey proceedings. They also submitted that the letter was not simply seeking copies of the Nigerian evidence, but that it was seeking the return of the original evidence.

60 On 29 December 2009, Ambassador Chike Alex Anigbo, Permanent Secretary (Political Affairs) in the Office of the Secretary to the Government of Nigeria wrote to the British High Commissioner in Abuja following a complaint it had received from one of the Mr Bhojwani's Nigerian companies. The letter detailed the importance of the commercial activities of Mr Bhojwani's companies to Nigeria, which apparently employ some 300 people and the detrimental effect upon those businesses caused by the Jersey proceedings. Having asserted twice that neither Mr Bhojwani nor any of his corporate entities had ever been investigated for any offences in Nigeria by any constitutionally recognised investigative or law enforcement agency in connection with the two contracts which are the subject of the Jersey proceedings, the letter continued:-

"It is the position of the Nigerian authorities, including the Attorney General, that the evidence provided to Jersey in clear breach of Nigerian law cannot, in these circumstances, be introduced or otherwise relied upon by the courts of Jersey.

Recognising that the United Kingdom has international responsibility for the acts of the public authorities of Jersey, including the acts of its courts, it is further the position of Nigeria that reliance in any way on such evidence by the courts of Jersey would give rise to a violation of the United Kingdom's international obligations to respect in full the sovereignty of Nigeria, as well as obligations owed by the United Kingdom to Nigeria under treaty and general international law.

I am therefore writing to you to request that you take the necessary steps to bring to the attention of the prosecuting authorities of Jersey and the courts of Jersey the concerns of the Federal Republic of Nigeria and to assist in ensuring that the courts of Jersey avoid taking any actions that might give rise to a violation of the United Kingdom's international obligations. In the first instance, I would invite you to make representations to the courts of Jersey, in accordance with the required formalities, to refrain from authorising the illegal evidence referred to above from being introduced into these proceedings or allowing any reliance to be placed upon such evidence, pending the resolution of this matter."

61 On 30 December 2009 a copy of that letter was received by the Nigerian counsel to Mr Bhojwani.

62 On 4 January 2010 Mr Bhojwani's Advocates wrote to the then Foreign Secretary, the Right Honourable David Milliband MP, drawing his attention to the above letter dated 29 December and making the following request:-

"We are, accordingly, writing to you to request that you take appropriate steps to bring to the attention of Jersey's Attorney General the significance of the issues raised by the Federal Republic of Nigeria and your concern to ensure that nothing is done which might give rise to a violation of the United Kingdom's international obligations. In the first instance, we would invite you to make representation to Jersey's Attorney General, in accordance with the required formalities, seeking his confirmation that the relevant evidence will not be relied upon by him for the purpose of the Jersey proceedings, pending resolution of the underlying issues."

63 On 5 January 2010 the Attorney General of Jersey wrote to Mr Bhojwani's Advocates declining to proceed in the manner suggested by them in their letter of 29 December:-

"Dear Advocate Sugden

Attorney General -v- Bhojwani

1. I refer to your letter dated 23 December, 2009, and the accompanying bundle of documents which I have considered.

The Evidence

2. The evidence gathered in Nigeria and transmitted to Jersey by the SIP falls, so I am advised, into three categories:-

(a) copies of pre-existing documents which form the records of the Central Bank of Nigeria, the Nigerian Ministry of Defence and the Independent National Electoral Commission ('INEC');

(b) copies of a witness statement taken by Commissioner Gana from Mr. Marwa and an original witness statement taken by Commissioner Gana from Colonel Bako;

(c) an original statement which it is accepted by Mr. Bhojwani was typed by Mr. Bhojwani and given to Commissioner Gana by him along with copies of pre-existing documents.

3. The Jersey witness statements of Mr. Bako and Mr. Gana are not covered by the Nigerian Attorney General's letter as they are not evidence gathered in Nigeria and transmitted to Jersey.

Your letter dated 23 December, 2009

4. You invite me not to accede to the Nigerian request in the manner I have foreshadowed but invite me to do the following (paragraph 37 of your letter):

(a) Write to the Nigerian Attorney General asking him to confirm that "…it is his intention and request that such evidence not be used in a Jersey prosecution of Mr. Bhojwani";

(b) Write to the Nigerian Attorney General asking:-

(i) for an estimate of the timetable for any appeal against the declaration obtained by your client and, for him to proceed with that appeal as soon as practicable; and

(ii) for an estimate of the likely date on which he will make a request for assistance from Jersey.

(c) 'In the light of the findings of the Nigerian court' decide not to use the evidence in the Jersey trial of Mr. Bhojwani unless and until the Nigerian Supreme Court finds against Mr. Bhojwani in the declaration proceedings in Nigeria;

(d) In considering any request for mutual legal assistance from Nigeria have proper regard to "fundamental fairness and the proposition that Mr. Bhojwani should not face prosecution on materially the same facts in both Jersey and"

My Decision

5 I have considered your letter carefully and I have decided to do what I originally proposed, that is to say to send certified copies of the evidence to Nigeria. Further, I have decided not to do any of the things you invite me to do in paragraph 37 of your letter.

My Reasons

6 After due consideration I do not agree with the construction which you are seeking to place on the letter from the Nigerian Attorney General's letter (sic) is the correct one. It seems to me that the Nigerian Attorney General is saying that the Nigerian Authorities wish to investigate your client and wish to consider all the available evidence with a view to deciding whether to prosecute him in Nigeria.

7 If the Nigerian Attorney General's letter were to have the meaning for which you argue I would expect it to set out that position in clear terms and give reasons for taking that position. Such a stance by a Law Officer of another Commonwealth State would be surprising as one would expect him or her to leave decisions as to the use of evidence in the Jersey courts to me and to the Royal Court.

8 My proposed response gives the Nigerian Authorities the material they require to carry out the above task:-

(a) In relation to the evidence set out at paragraph 2(a) above, there can be no objection to providing copies as I understand that the documents provided by Nigeria are themselves copies and any original documents will be available to the Nigerian investigators from the relevant Nigerian public body.

(b) In relation to the evidence set out at paragraph 2(b) there can be no objection to my providing a copy of Mr. Marwa's statement as I understand that the version received by Jersey was a copy. As to Mr. Bako's statement, its content will be clear from the copy.

(c) In relation to the evidence set out at paragraph 2(c), the content of the documents will be clear from the copies. Insofar as your client has a legitimate interest in the Nigerian Authorities having an original version of that evidence, it is within his power to provide it.

9. In any event, even were the Nigerian Attorney General's letter to bear the construction which you seek to place on it, my decision would be the same, for at least the following reasons:-

(a) The Nigerian declaration of illegality has already been considered by the Royal Court and the evidence ruled to be admissible notwithstanding that declaration. It follows that there is no Jersey legal bar to the use of that evidence.

(b) The Indictment which your client faces alleges serious acts of money laundering which occurred in Jersey. It is my view that it is in the Jersey public interest that the prosecution for that conduct proceed using the evidence that the Royal Court has declared to be admissible.

(c) International relations between Jersey's Attorney General and the Nigerian Attorney General is not, it seems to me, a matter for the Defence in a criminal case or indeed the Court seized of that case.

The steps you invite me to take

10. In relation to the request I set out at paragraph 4(a), above, I refer to paragraphs 7 to 10, above.

11. In relation to the request I set out at paragraph 4(b)(i), above, it does not seem to me to be likely that the Nigerian Supreme Court would hear this matter before Mr. Bhojwani's Jersey trial. It follows that such a letter would serve no purpose. If I am wrong about the likely timetable, your client, as the respondent to the appeal, is best placed to provide evidence that that is the case and I invite you to provide any such evidence.

12. In relation to the request I set out at paragraph 4(b)(ii), above, it is a matter for the Nigerian Authorities as to whether and when to make a request to Jersey. If and when such a request is received it will be considered in the usual way. An incoming request from Nigeria would not have any impact on Mr. Bhojwani's Jersey trial.

13. In relation to the request I set out at paragraph 4(c), above, the Royal Court has rejected the abuse of process argument you based on the Nigerian judgment and I understand that you have conceded that the illegality identified by the Nigerian Judge could not found an argument to exclude the evidence:-see paragraphs 27 and 29 to 31 of your skeleton argument in the abuse of process application. It follows that I have no reason to await the outcome of the Nigerian proceedings. In any event, you currently have a declaration of illegality from a Nigerian court. If the Nigerian Attorney General's appeal were to be successful you would no longer have such a judgment. It follows, it seems to me, that your client's position may well be weakened by any delay to await the outcome of the proceedings.

14. In relation to the request I set out at paragraph 4(d), above. I will consider any request for mutual legal assistance from Nigeria on its merits, if and when such a letter arrives.

Other matters arising from your letter

15. As to paragraphs 26 to 28, the covering letter addressed to the Bailiff is written on the letterhead of the Nigerian Director of Public Prosecutions and signed by a Senior State Counsel for the Attorney General.

It is unclear why the covering letter refers to the Court's letter, however there is nothing in the Attorney General's letter which refers to Colonel Marwa. In addition, you have not given a clear reason why, if the letter is intended to refer to the request to take evidence from Colonel Marwa, that should lead me to change my view as to my response to the Nigerian Attorney General's request.

16. As to paragraph 33c, I do not think that this contention can survive in the face of the clear words of the Nigerian Attorney General's letter. The Nigerian Attorney General says that once evidence has been gathered in Nigeria and "any other evidence available to you that would be thus transmitted by Jersey" has also been gathered, he will review the evidence and apply the evidential and public interest tests. It follows that the Nigerian Authorities are still a long way from assessing either test.

17. As there is nothing in your letter to suggest that you object to sending copies of the evidence as such, I propose to do so without further notice."

64 On the same day Mr Bhojwani's Advocates wrote to the Attorney General of Nigeria seeking clarification as to his position, the Attorney General of Jersey having earlier indicated that he had no objection to such a letter being written.

65 On 6 January 2010 [2010] JRC 002 the Commissioner ruled that the evidence of Commissioner Gana and Colonel Bako should be admitted and, subject to editing, be read to the Jurats. It was not reasonably practicable to secure their attendance at the trial and the statements were prepared for the purpose of these criminal proceedings. He held that there was nothing inherently unreliable in the statements on their face and that he would direct the Jurats as to concerns about the weight to be attached to them. The statements ought therefore to be admitted in the interests of justice.

66 On 8 January 2010, the Attorney General of Nigeria responded to the letter from Mr Bhojwani's advocate dated 5 January 2010 but declined to give further clarification of his letter of 19 November 2009.

67 On 22 January 2010 the Attorney General of Jersey received a further letter from the Attorney General of Nigeria which stated as follows:-

"RE; JERSEY PROSECUTION OF RAJ ARJANDAS BHOJWANI FOR MONEY LAUNDERING.

1. I refer to your letter of 17 December, 2009, Reference No. TJLeC/SB CRPR 007–025.

2. By my letter of 19 November, 2009, I forwarded to you a copy of a Judgment of the Federal High Court, Abuja, Nigeria declaring null and

void all evidence previously gathered in this case and forwarded to you by Special Investigation Panel (SIP) which the Court also declared an illegal body. Unequivocally, the Nigerian Federal High Court has prohibited the use of the evidence so illegally and unconstitutionally obtained by the Jersey authorities from Nigeria.

3. The judgment of the Federal High Court is clear and unambiguous and that all authorities in Nigeria are bound by it as provided by section 287(3) of the Constitution of the Federal Republic of Nigeria which states thus:-

"The decisions of the Federal High Court, a High Court and all other courts established by this Constitution shall be enforced in any part of the Federation by all authorities and persons, and by other courts of law with subordinate (sic) jurisdiction to that of the Federal High Court, a High Court and those other courts, respectively"

4. Indeed, under our own municipal law, that is section 132(1) of the Evidence Act, Cap. E14 Laws of the Federation of Nigeria, 2004 which provides:-

"When any judgment of any court or any other judicial or official proceedings, or any contract, or any grant or other disposition of property has been reduced to the form of a document or series of documents, no evidence may be given of such judgment or proceedings, or of the terms of such contract, grant or disposition of property except the document itself, or secondary (sic) evidence of its contents. In cases in which secondary evidence is admissible under the provisions hereinbefore contained; nor may the contents of any such document be contradicted, altered, added to or varied (sic) by oral evidence…"

So that whenever a judgment of a court is delivered and embodied in an enrolled order, no one can modify, vary or add to it, either by documentary or oral evidence.

5. As a result, I requested for the return to me of all the evidence forwarded to you by Special Investigation Panel (SIP) as I could not consent to the use of same in a foreign jurisdiction as that will be a violation of the Court order and consequently undermining Nigeria's territorial integrity which I stand to protect.

6. We trust that you will respect the judgment of the Nigeria Court as to do otherwise will constitute an affront to Nigeria's sovereignty, complete disregard for vital institution of State and existing State practice and obligations agreed under the Harare Scheme.

7. Consequent upon the said judgment nullifying all steps taken by Special Investigation Panel (SIP) and declaring the body unconstitutional, I immediately directed the appropriate Law Enforcement Agencies to investigate the matter afresh to enable me reach a determination whether

to file charges against RAJ Arjandas Bhojwani in Nigeria. I have reviewed the preliminary evidence so far gathered and have reached a decision to prosecute RAJ Arjandas Bhojwani in Nigeria for the principal offence of corruption.

8. Respectfully, you will agree with me that Article 21 of the United Nations Convention against Transnational Organised Crime (The Palermo Convention) and Article 36 of the FATF 40 recommendations makes it certain and clear beyond argument that where criminality involves two nations, the nation most proximate to the offence should prosecute, while the other nation should transfer all persons, assets and evidence to the prosecuting State. The Principal offence of corruption was committed in Nigeria and the funds in issue are public funds of Nigeria.

9. It is in line with the above international practice that I would expect your assistance and co-operation in transferring RAJ Arjandas Bhojwani to Nigeria to face his trial. We also expect that you will take steps to transfer all proceeds of his crime to Nigeria.

10. Please, note that any trial in Jersey of RAJ Arjandas Bhojwani will frustrate the trial in Nigeria for the principal offence of corruption in view of our constitutional guarantee against double jeopardy. The plea of autre fois acquit or autre fois convict will avail him.

11. We would respect our obligation in respect of expenses incurred by the Government of Jersey.

12. Please, accept the assurances of my highest regard and personal esteem.

CHIEF MICHAEL KAASE AONDOAKAA, SAN

Honourable Attorney-General of the Federation and Minister of Justice" (his emphasis)

68 As set out in paragraph 7 of that letter it now appeared (for the first time), the then Attorney General of Nigeria had decided to prosecute the applicant in Nigeria for an offence of corruption. A copy of that letter was also received by the Defence.

69 By letter dated 25 January 2010 the Attorney General of Jersey wrote to the Attorney General of Nigeria refusing to accede to his request:-

"Dear Attorney General,

Re

Re: Request for Mutual Legal Assistance: Raj Arjandas Bhojwani

Thank you for your letter of 22 January, 2009. In the light of its content I have considered again the issues that you have raised.

I understand in the light of the legal position in Nigeria that you have explained in your letter, why you have written in the terms that you have and that you, as an authority in Nigeria, are bound by the terms of the judgment of the Federal High Court.

Naturally, of course, matters of legality in Nigeria do not by themselves dispose of the question from the point of view of the admissibility of the evidence in question in Jersey although I understand your request and the reasons for it.

Just as you must pay regard to the public interest and sovereignty of Nigeria, so I must consider what is in the Jersey public interest. In particular I have to view the issues against the background that I am satisfied on advice that there is a more than sufficient case against Mr. Bhojwani under Jersey law and that, after years of investigation and preparation, the trial is due to commence this week. Equally I must also note that a court in Jersey has rejected the submission that in any way the Prosecution in Jersey has behaved improperly in sending letters of request to Nigeria. Whatever occurred in Nigeria was a situation created by the then Nigerian authorities in apparently failing to carry out proper procedures.

I have of course taken into account the decision you have made to prosecute Mr. Bhojwani in Nigeria for corruption and your request to transfer him, and the proceeds of the crimes alleged against him to Nigeria. I have also considered the other matters raised in your letter, in particular the Palermo Convention and the Harare Scheme.

Jersey has not yet signed up to the Palermo Convention, but will I understand do so in the near future. However the principles set out in the Convention have I understand, historically, without being legally binding, been taken into account in Jersey.

Article 4 (1) of the Convention provides that "State Parties" should carry out their obligations under this Convention in a manner consistent with the principles of sovereign equality and territorial integrity of States and that of non-intervention in the domestic affairs of other States. Consequently it seems to me that Jersey's wishes in this matter are entitled to equal weight with those of Nigeria and it would not be appropriate for Jersey to seek to interfere in Nigerian internal matters and, of course, vice versa.

Article 21, on which reliance is placed, states that:-

"States Parties shall consider the possibility of transferring to one another proceedings for the prosecution of an offence covered by this Convention in cases where such transfer is considered to be in the interests of the proper administration of justice, in particular where several jurisdictions are involved."

I am advised that the issue of jurisdiction and venue was considered by your

predecessors, who consistently indicated that they supported a prosecution in Jersey, as is evidenced by the consent to use the material in a Jersey prosecution. Having reflected on it I take the view that it is not in the interests of the proper administration of justice for the proceedings to be transferred to Nigeria. The trial is listed for this week; witnesses have been warned, the events which will be the focus of the trial occurred principally between 1996 and 2001. In addition, I have no power to transfer Mr. Bhojwani and the alleged proceeds of his crimes to Nigeria. Transfer would, in my view, inevitably lead to further delay.

The position is similar with the Harare Scheme. Whilst under both Conventions a State is entitled under certain circumstances to refuse to grant assistance, the fact is that your predecessors did assist and provided the material to Jersey. I note that under the Harare Scheme, under Article 21(2), the recommendation for the model scheme of legislation included this provision:-

"(2) where any document, record or property is transmitted to the requesting country in compliance with a request under this scheme, it shall be returned to the requested country when it is no longer required in connection with the criminal matter specified in the request unless the country has indicated that its return is not desired".

There is no provision for the material supplied to be returned forthwith at the request of the requested State.

As to Article 36 of the FATF 40 recommendations, it seems to me that it is in the interests of justice, as stated before, that the trial takes place in Jersey without further delay.

In the event that Mr. Bhojwani is convicted in Jersey and the assets that represent the proceeds of his crime are lawfully confiscated then I will of course consider the possibility of a legal agreement to share assets. You will be aware that Jersey has co-operated with Nigeria in that respect in the recent past.

I should also point out so that my position is clear that I do not accept that it is a breach of Nigeria's sovereignty for Mr. Bhojwani to be tried in Jersey under Jersey law for offences that fall within Jersey's criminal jurisdiction. In this regard I further cannot accept the contents of the letter from the Permanent Secretary (Political Affairs) Office of the Secretary to the Government of the Federation dated 29 December, 2009. It is, with respect, wrong for him to describe a prosecution that I and my predecessor have overseen as having been conducted in a 'vindictive and unlawful manner'. I do not propose to discuss that letter further save to reiterate that I cannot accept its characterisation of the Jersey proceedings which I can only assume were written under a misunderstanding of the correct position. Had the position been properly understood I cannot think that the letter would have been expressed in such terms.

As to the use of the material sent under the letter of request, I have referred your letter to the Royal Court in Jersey so that it may be considered and Mr. Bhojwani's defence team may make appropriate submissions to the court that under Jersey law it should not be admitted.

I will, as I have offered previously, be pleased to return notarised copies of the evidence to you to enable your own investigations to proceed in the interim and I will of course consider most carefully any request for mutual legal assistance if made.

I regret, however, for the reasons that I have set out, I cannot accede to your current request.

Please, equally, accept the assurances of my continuing regard and personal esteem."

70 On 21 January 2010 Advocate Kelleher made a pre trial application to the Commissioner for the exclusion of the evidence obtained directly or indirectly from Nigeria on the ground of breach of International law and comity; and/or for a stay of prosecution. The Commissioner reserved his decision to the 22 January 2010. On 22 January 2010 the matter was adjourned to 26 January 2010, at the request of the prosecution, pending the response of the Attorney General of Jersey to the letter from the Attorney General of Nigeria received on the 22 January 2010.

71 On 26 January 2010 the Prosecution confirmed to the Commissioner that the Attorney General of Jersey's position had not changed following receipt of the further letter from the Attorney General of Nigeria and that he intended to proceed with the prosecution relying, subject to the Commissioner's ruling on the Defence application, on the evidence obtained from Nigeria. The Commissioner was provided with a copy of the Attorney General of Jersey's letter of 25 January 2010.

72 In his judgment of 26 January 2010 —the day the trial was to commence—and for the fuller reasons given on 11 February 2010 the Commissioner refused the applications to exclude the Nigerian evidence and also ruled that it would not be an abuse of process for the Attorney General to adduce the Nigerian evidence. He also rejected an application by the defence for an adjournment pending an application for leave to judicially review the decision of the Attorney General to use the Nigerian evidence in these criminal proceedings. At paragraphs 3, 4 and 5 of his 26 January judgment the Commissioner stated:-

"3. The defendant has had recourse to all of his remedies in these criminal proceedings by applying for the Nigerian evidence to be excluded and/or for a stay. These applications have failed and there is no right of appeal .

4. It is clear from the Privy Council decision in *Sharma v Brown-Antoine*

[2007] WLR 780 ***that an application for leave to review a decision to prosecute a case is an exceptional remedy of last resort. Even more exceptional in my view is an attempt to review a decision by the Attorney General to adduce evidence that the trial judge has ruled admissible."***

5. Whilst the defendant is perfectly entitled to make an application for leave, this is no ground on which this long delayed trial can be further delayed."

73 Accordingly the trial started that morning of the 26 January 2010.

74 In his judgment of 11 February ([2010] JRC 027) giving full reasons for his decision of 26 January to refuse a stay and not to exclude the Nigerian evidence he said at para 38 "the only conduct that is now being impugned by the defence is the decision of the Attorney General to lead admissible evidence at the trial of the defendant. The relevant limb of the jurisdiction to stay proceedings is exercised in cases where there has been conduct outside the trial which the Court finds abhorrent."

75 On 10 February 2010 the Foreign and Commonwealth Office (FCO) responded to Mr Bhojwani's Advocates' letter of 4 January 2010. The three relevant paragraphs of the letter from the FCO read as follows:-

"You have requested that the Foreign Secretary "take appropriate steps to bring to the attention of Jersey's Attorney General the significance of the issues raised by the Federal Republic of Nigeria and [the Foreign Secretary's concern] to ensure that nothing is done which might give rise to a violation of the United Kingdom's international obligations."

We do not consider that there is any question of the United Kingdom being in violation of its obligations in this matter, and therefore see no need for any action on the part of the Foreign Secretary.

As you know, Jersey is not part of the United Kingdom, and is a self-governing dependency of the Crown, with its own democratically elected Parliament and its own legal system and courts of law. The question of admissibility of the evidence to which you refer is entirely a matter for the Jersey Court, which we understand has already ruled that it is admissible.

There is no basis for any intervention by the Foreign Secretary in these proceedings."

76 It appears therefore, the FCO did not consider that there is any question of the United Kingdom being in violation of its international obligations as a result of the decision of the Attorney General of Jersey.

The Appellant's Consolidated Points of Law

77 Before us Advocate Kelleher, who dealt only briefly with this part of the Appeal in his oral submissions relying expressly on his amply argued written contentions, identified 3 decisions or actions which he said constituted an abuse of executive power by the Attorney General of Jersey (paragraph 848 of the written contentions). They were:

It was also alleged that (ii) and (iii) constituted breaches of Nigerian sovereignty, international law and comity.

> (i) to use evidence with knowledge of the unlawfulness of its acquisition;
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> (ii) to retain and use evidence after Nigeria had said it did not consent to that course; and
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> (iii) to retain and use evidence after the Attorney General of Nigeria had asked for the evidence back.

78 In our view the submission, however articulated, lacked perspective.

79 The sequence of events which we have set out at paragraphs 27 to 76 above shows the essential picture to be as follows: The Attorney General of Jersey had determined that it was in the public interest of Jersey to prosecute a defendant on a serious charge of money-laundering in a jurisdiction to whose economy, the integrity of its financial institutions and the use made of them is paramount. He conducted himself in accordance with due procedures of international cooperation in criminal matters. Only when the trial was imminent, and after a plethora of interlocutory applications and appeals in Jersey, in sole consequence of a decision by a Nigerian court, resulting from an application instigated by Mr Bhojwani himself, that the provision of relevant evidence (not accepted to be critical to the prosecution case) was obtained in violation of the constitutional law of Nigeria, was the Attorney General of Jersey invited at the request of the Attorney General of Nigeria (in a volte face from the attitude of his predecessor) to desist from the Jersey prosecution

80 It is not in issue that a Court can in appropriate circumstances stay an apparently well-founded prosecution. The jurisdiction was traditionally (if rarely) exercised where the passage of time between alleged offence and date of hearing was so protracted as to put at risk the possibility of a fair trial but in the seminal case of *R v Bennett* [1994] 1 AC 42 Lord Griffiths widened its horizons – see 61H to 62C:-

> ***"Your lordships are now invited to extend the concept of abuse of process a stage further.*** In the present case there is no suggestion that the appellant cannot have a fair trial, nor could it be suggested that it would have been unfair to try him if he had been returned to this country through extradition procedures. If the court is to have the power to interfere with the prosecution in the present circumstances it must be because the judiciary accept a responsibility for the maintenance of the rule of law that embraces a willingness to oversee executive

action and to refuse to countenance behaviour that threatens either basic human rights or the rule of law. My Lords, I have no doubt that the judiciary should accept this responsibility in the field of criminal law. The great growth of administrative law during the latter part of this century has occurred because of the recognition by the judiciary and Parliament alike that it is the function of the high Court to ensure that executive action is exercised responsibly and as Parliament intended. So, also should it be in the field of criminal law and if it comes to the attention of the court that there has been a serious abuse of power it should, in my view, express its disapproval by refusing to act upon it."

81 The Court of Appeal in *R v Chalkley* [1998] 2 Cr. App. R. 79, at p.96 summarised the significance of this development:-

> ***"The determination of the fairness or otherwise of admitting evidence under section 78 is distinct from the exercise of discretion in determining whether to stay criminal proceedings as an abuse of process.*** Depending on the circumstances, the latter may require consideration, not just of the potential fairness of a trial, but also of a balance of the possibly countervailing interests of prosecuting a criminal to conviction and discouraging abuse of power. However laudable the end, it may not justify any means to achieve it. See ex p. Bennett (1994) 98 Cr. App. R. 114 , [1994] 1 A.C. 42, ***per Lord Griffiths at 127 and 61H–62C; and****R. v. Latif & Shahzad* [1996] 2 Cr. App. R. 92, [1996] 1 All E.R. 353, ***per Lord Steyn at 105 and 360g–361g."***

82 This principle has been absorbed into Jersey law. In *Warren v. Attorney General* [2008] JCA 135 ("Warren") this Court said:-

> ***"43 … The court has jurisdiction to stay proceedings in circumstances in which a fair trial is not possible.*** It has jurisdiction to stay, also, where proceedings have only been made possible by executive action done in breach of the rule of law and where, as a result of such action, it would be unfair to try the accused at all .
>
> ***The approach to be taken to the exercise of the jurisdiction to stay in any particular case***
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> ***44. In determining whether to stay proceedings where there has been an abuse of executive power, the court has to perform a balancing exercise. "Weighing countervailing considerations of policy and justice, it is for the judge in the exercise of his discretion to decide whether there has been an abuse of process"*** *(R. v. Latif (15)* [1996] 1 W.L.R. at 112). ***In reaching that decision in a case such as the present (ibid.*** at 113)—
>
> ***"the judge must weigh in the balance the public interest in ensuring that those that are charged with grave crimes should be tried and the competing public interest in not conveying the impression that the court***

will adopt the approach that the end justifies any means."

83 In addition, however, at paragraph 43 the Court of Appeal in Warren set out its conclusion as to what "underlies" the jurisdiction to stay in these terms:-

> ***"In our judgment, what underlies the court's jurisdiction to stay proceedings as an abuse of process is the court's inescapable duty to secure fair treatment for those who come before it."***

84 The Commissioner addressed the asserted abuse of executive power in his Judgment of 11 February 2010, summarising the Defence position (as to this ground of its application in this way (paragraph 29 of the Judgment):-

> ***"The Defence applied in the alternative for a stay of the prosecution on the ground that it is an abuse of the Jersey Attorney General's power to seek to adduce the Nigerian evidence in the Jersey proceedings in the face of the Nigerian Attorney General's assertion that its use constitutes a violation of Nigeria's sovereignty."***

85 The allegation, renewed before us, that the Attorney General of Jersey acted in breach of Nigerian sovereignty is not particularised at any length and is not supported by authority. It is also untenable. The Attorney General of Jersey is not purporting to interfere with Nigeria's exercise of sovereign powers. Rather any interference by the Attorney General of Nigeria in a Jersey prosecution such as was sought would be an interference by him in an aspect of Jersey's sovereignty: *Mbsango and Anor v. Logo Limited* [2007] QB 846 at paragraphs 32 and 48.

86 The allegation that there was a breach of international law is made a number of times in Mr Bhojwani's written contentions but is not particularised at any length either. It is also untenable. Breaches of international law, save in circumstances irrelevant to the present case, are not justiciable in domestic courts.

87 The comity point can be disposed of by a short citation from *Oppenheim*:-

> ***"In their intercourse with one another states observe not only legally binding rules and such rules as have the character of usages, but also rules of politeness, convenience and goodwill.*** Such rules of international conduct are **not rules of law, but of comity**." – Oppenheim's International Law (9th Ed) Vol 1, pp 50/51 – emphasis added .

88 The decision of the Court of Appeal in *R v. CII, AP and TI* [2008] EWCA Crim 3062 ("CII"), upon which Advocate Kelleher sought to rely concerned an appeal from the decision of a trial judge to exclude evidence obtained from Nigeria pursuant to a letter of request. The trial judge had held that because the mutual legal assistance treaty between the United

Kingdom and Nigeria had not been complied with the evidence was inadmissible. The treaty has not been extended to Jersey and is accordingly accepted by Advocate Kelleher to be irrelevant to the present case.

89 The root of the problem in CII was that the treaty designated the Attorney General of Nigeria as the Central Authority and gave him the right to refuse assistance in whole or in part on certain grounds. The Attorney General of Nigeria told the English court that despite his request that the documents be sent to him before they left Nigeria, that had not happened. He said that he had not therefore been able to decide whether there were grounds for refusing to accede to the request, and asked that the documents be returned to him.

90 The Court of Appeal was only concerned with the question as to whether the trial judge had correctly interpreted the treaty and it held that he had (see paragraphs 29 and 30).

91 Indeed, three aspects of the decision of the Court of Appeal are fatal to Mr Bhojwani's attempted use of it (see paragraphs 878 to 909 of his written contentions):

> *"It is, however, unnecessary for us finally to resolve the position upon the call for return of the original documents.* It seems to us that this is one of the cases in which the ordinary principles of comity of nations requires that an English court should exercise restraint and abstain from an enquiry into the question of whether a foreign sovereign State is, or is not, in breach of its treaty obligations. Those are contractual obligations between States. The enforcement of them or, more realistically, negotiation about them, is a matter for the two governments, and not for a domestic court, which is no part of the government. Delicate questions of mutual relations going well beyond any single case may be raised. Accordingly, it is enough to resolve the question before us that it is now plain that the consent of the Attorney General has not been given to the transmission to the UK of the product of LR2 and it has not, therefore, been brought here in compliance with the Treaty. The Judge's ruling to that effect was plainly right."
>
> *[The statements in the previous paragraph of the judgment cannot be said, therefore to be an adjudication]*
>
> *"34. We should record that the prosecution has given notice that it may wish to submit in the court below that even though the product of LR2 has unwittingly been brought to the UK without the consent of the Attorney General, it is nevertheless admissible at the trial. Mr Amlot says that the prosecution may wish to submit that under ordinary principles of English law evidence which has been unlawfully obtained is not thereby automatically inadmissible, as explained in the line of cases of which Sang* [1980] AC 402 and *Khan (Sultan)* [1997] AC 558*are well-known examples. There is no doubt that the evidence was gathered by the English police in good faith. The Sang contention was never raised in the court below, nor was it any part of the prosecution's appeal to us. Mr Amlot does not suggest that it arises for decision here. We can*

therefore express no opinion on it at all, save to say that if it is raised it may call for consideration of s 78 Police and Criminal Evidence Act 1984 but also of s 9 Crime (International Co-operation) Act and the principles underlying that section."

(i) insofar as the court there made findings as to the Attorney General of Nigeria's rights, duties or powers the findings were confined to the rights, duties and powers conferred by the terms of the treaty, which, as pointed out above, does not apply to the present case;

(ii) the court expressly refused to adjudicate on the Attorney General of Nigeria's request for return of the documents:-

(iii) the court expressly refused to decide whether the evidence was admissible notwithstanding the breach of the terms of the treaty:-

92 *Buttes Gas and Oil Co* [1982] AC 888 is authority for the proposition that it is inherent in the very nature of the judicial process that municipal courts will not adjudicate on the transactions of foreign states: and that when such issues were raised in private litigation, the court should exercise judicial restraint and abstain from deciding them per Lord Wilberforce 931–932. Far from encouraging the Courts to rule on questions of comity, it warns them emphatically against doing so. The dictum of Donaldson LJ in the Court of Appeal [1981] 1 QB 223 at 256 "The public interest in the maintenance of international comity is very great" has to be read in context. In reliance on that interest he would have refused disclosure of documents impressed with the seal of confidentiality by the ruler of a foreign sovereign state. It is, in our view, impossible to read into this dictum (to the extent reconcilable with the subsequent decision of the House of Lords) recognition of any power in a domestic court to prevent a prosecution, otherwise lawfully instituted, because of any view it may form that the relations between the State in which it exercises its jurisdiction, and another State will otherwise be impaired. It is not for judges to don the mantle of diplomats.

93 In short the submission that considerations of comity between Nigeria and Jersey compel the Jersey Courts to desist from hearing the case, involves a fundamental misunderstanding of the reach of that concept, which sounds in the area of international relations, not judicial proceedings. Furthermore, in principle, if evidence obtained in breach of domestic law is nonetheless admissible, a fortiori evidence allegedly tainted by so delicate a concept as comity must be so.

94 None of the decisions or actions identified by Advocate Kelleher is, in our view, capable of constituting an abuse of executive power.

95 As to (i) in paragraph 77 above it is trite law that illegally obtained evidence is admissible notwithstanding the manner of its obtaining subject to the discretion of the trial judge to

exclude it: *R v. Khan* [1997] AC 558 and *R v. Chalkley* [1998] 2 Cr. App. R. 79. The common law of England and Jersey knows no doctrine of exclusion of the fruit of the poisoned tree. If the evidence is admissible and relevant it cannot be an abuse of executive power to seek to use it, for the purposes of a prosecution. Indeed, as the Commissioner pointed out ([2009] JRC 216 at paragraph 60), the Attorney General of Jersey had a duty to seek to do so.

96 As to (ii) it is not for Nigeria to dictate to Jersey what evidence can be led in a Jersey Court: and it cannot be an abuse of executive power, still less offensive to the rule of law, for the Attorney General of Jersey to form his own view as to what evidence to lead. The sequence of events outlined shows that the Attorney General of Jersey acted with complete propriety in engaging the machinery of international co-operation; and that until the judgment of Mr Justice Kolowale, the Nigerian authorities willingly extended such co-operation. It appears that in so doing they acted on a mistaken view of Nigerian law. So be it. That cannot discolour the actions of the Attorney General of Jersey before or even after the judgment.

97 As to (iii), in the February 2010 judicial review proceedings when the Bailiff, sitting alone, considered and refused an application by Mr Bhojwani for leave to apply for judicial review, Mr Bhojwani conceded that the decision by the Attorney General of Jersey not to return the evidence was a decision which was open to him if proper account had been taken of the principles of international law and comity: *AG v Bhojwani* [2010] JRC 042 at paragraph 45. That concession is not compatible with the Attorney General's actions being a relevant abuse of executive power once international law and comity are excluded —as they must be —from the picture and it is self-evident that the concession on the basis of such exclusion was correct.

98 In short, although albeit in a reversal of their earlier position, the Nigerian authorities apparently did not wish (for whatever reason) the Jersey authorities to continue with the prosecution, we can identify no basis in law why the Jersey authorities should be obliged to accede to that wish. It would be inconceivable that Jersey with an autonomous legal system, would surrender to an external authority its right to determine whom it prosecutes for breach of its own laws, not least (but not only) where there is an obvious Jersey public interest in the prosecution.

99 We would add that it is the Attorney General's contention that a prosecution would have been brought without the Nigerian evidence which Mr Bhojwani seeks to exclude. Without the Nigerian evidence there was evidence of: (a) the false contract (and the forgeries involved); (b) the true price of the vehicles; (c) the visit to Mourant Jersey lawyers, asking for advice on the confidentiality of Jersey banks and (d) the payments to the Swiss bank accounts. Given that Mr Bhojwani did not put a positive case on the Nigerian conduct this would have been sufficient for the Jurats to be sure at least of the predicate offences of misconduct in public office and Foster fraud.

100 Advocate Kelleher acknowledged, without admitting, the prosecution contentions in this

context. Suffice it to say that, without resolving the issue, we can see the force of what Advocate Jowitt said. Were the arguments advanced by Advocate Jowitt correct, victory by Mr Bhojwani on any or all of grounds 8–12 would have been pyrrhic.

101 Additional grounds relied on in the skeleton argument were not developed in oral argument by Advocate Kelleher. We list them only for completeness and deal with them briefly.

102 It was contended that the evidence of Commissioner Gana and Colonel Bako should have been excluded for breach of Article 4(4) of the Criminal Justice (International Co-operation) (Jersey) Law 2001 which provides:-

> ***"Except with the consent of the court, tribunal or authority that supplied the evidence, evidence obtained by virtue of a letter of request shall not be used for any purpose other than that specified in that letter."***

103 The Commissioner held: ([2009] JRC 216):-

> ***"55 I too think that judging by the way in which the Nigerian authorities dealt with the request (by the provision of the Jersey Prosecution Statements and by procuring the witnesses to come and give evidence) they were in no doubt as to the use to which the evidence requested in this case would be put.*** I too find that the letter of request did sufficiently specify the purpose for which it was sought, which by necessary implication extended to criminal proceedings against the person and for the criminality specified, and that there has been no breach of the letter and spirit of the Co-operation Law."

We agree.

104 It was contended that the evidence of Commissioner Gana and Colonel Bako should have been excluded as hearsay when it was reasonably practicable to have secured their attendance, and its admission was unfair to Mr Bhojwani who, accordingly, could not cross-examine them. We note that Mr Bhojwani objected to the Commissioner's decision that he had been responsible for the absence of the two witnesses in Jersey by instructing the claim for declarations before the Nigerian Court: and Advocate Kelleher sought to explain the dilemma in which his client was placed by the possibility of prosecutions in two jurisdictions.

In our view the attribution of responsibility was a finding of fact open to the Commissioner, and the admission of hearsay evidence was a matter for his discretion which there is no basis to impugn.

105 It was contended that the evidence obtained from Mr Bhojwani by Commissioner Gana was procured on a false basis that he was to be a witness, not an accused.

In our view the Commissioner rejected this suggestion as a matter of fact, as was open to him.

106 It was contended that the same evidence should have been excluded under Article 76 Police Procedures and Criminal Evidence (Jersey) Law 2003.

We note the Commissioner's judgment of the 8 February 2010 ([2010] JRC 026) when he ruled that evidence to be admissible. The application was made on the ground that the admission of the statement would so adversely affect the fairness of the proceedings that the Court should not admit it in evidence. It was not alleged that the reliability of the statement was affected by the circumstances in which it was obtained.

It was in our view essentially a matter for the Commissioner's discretion whether or not to include it. Again there is no basis to impugn that exercise of discretion.

107 We have to remind ourselves in relation to all these overlapping grounds that, the test this Court as an appellate tribunal applies where the appeal is against the exercise of discretion is a strict one:-

> ***"45…in order to succeed in an appeal against a decision reached in the exercise of a judicial discretion, it is for the party challenging the exercise of that discretion to satisfy the court that it was fundamentally flawed or that the judge at first instance produced a determination that no judge properly directing himself could have produced*** *(R. v. Jennings (14)* (98 Cr. App. R. at 312) ; *R. v. H (12)* ([2007] 2 A.C. 270, at para. 41))."

Warren v AG [2008] JCA 135 .

Nor can we readily and without good reason depart from the Commissioners findings of fact, not least because of the breadth and depth of view of the material before him which he enjoyed and which we cannot fully share.

108 Applying this approach we have not found of the Commissioner's refusal to stay the proceedings for abuse of process and to exclude relevant evidence to be flawed in point of law or otherwise a misuse of discretion.

Ground 1 (no case to answer)

109 The relevant test is set out in *R v. Galbraith* [1981] 1 WLR 1039:-

> ***"How then should the judge approach a submission of 'no case'?*** (1) If there is no evidence that the crime alleged has been committed by the defendant, there is no difficulty. The judge will of course stop the case. (2) The difficulty arises where there is some evidence but it is of a tenuous character, for

example, because of inherent weakness or vagueness or because it is inconsistent with other evidence. a) where the judge comes to the conclusion that the prosecution evidence taken at its highest, is such that a jury could not properly convict upon it, it is his duty, upon a submission being made, to stop the case b) where however the prosecution evidence is such that its strength or weakness depends on the view to be taken of a witness's reliability, or other matters which are generally speaking within the province of the jury and where on one possible view of the facts there is evidence upon which a jury could properly come to the conclusion that the defendant is guilty then the judge should allow the matter to be tried by the jury. There will, of course, as always in this branch of the law, be borderline cases. They can safely be left to the discretion of the judge."

110 *Archbold* (2010 edition at 4–292) sets out the practice applicable to submissions of insufficient evidence, and at 4–295 states: "Where the prosecution case depends entirely on circumstantial evidence, the correct approach is to look at the evidence in the round, and ask whether, looking at all the evidence and treating it with appropriate care and scrutiny, there is a case on which a properly directed jury could convict" referring to *R v P* [2008] 2 Cr. App. R. 6 CA. This has been accepted as the correct principle by the Royal Court in *Sangan v AG* [1987–88] JLR 196 and *AG v Capuano* [2003] JRC 211, and we, as the Court of Appeal, endorse that approach.

111 Cases involving circumstantial evidence where the test in Archbold has been adopted are particularly pertinent to a case such as the present.

112 In *R v Greig* [2010] EWCA Crim 1183, a case where the prosecution rested on inferences of dishonesty available from the defendant's conduct, the Court of Appeal held that the trial judge was right to reject the submission of no case, it said:-

"13 It appeared to us that Mr Lyons' submissions were tantamount to an assertion that the learned judge was bound to allow the submission of no case unless the prosecution had by the evidence adduced excluded all other possible inferences than those sought by the prosecution. It is not the law, of course, that the prosecution must exclude all other possible inferences: see, for example , *R v Edwards* [2004] EWCA Crim 2102, ***at paragraph 84***; *R v Jabber* [2006] EWCA Crim 2694, ***at paragraph 21; and****R v P* [2007] EWCA Crim 3216, [2008] 2 Cr App R 6, ***at paragraph 23, in which Thomas LJ, delivering the judgment of the court, said this***:

23. …it seems to us that the correct approach is to look at the circumstantial evidence in the round and ask the question, no doubt employing the various tests that are suggested in some of the authorities, and ask the simple question, looking at all this evidence and treating it with the appropriate care and scrutinising it properly: is there a case on which a jury properly directed could convict? We do not think that anyone is assisted by a more refined test than

that ….”

15. As we have observed, the question for the trial judge was whether the inference sought by the prosecution was available to the jury on the evidence. On the other hand, the question for the jury was whether on the evidence they could be sure that the prosecution inference was right to the exclusion of any other…”

113 We must also be conscious again of the limits of our jurisdiction as an appellate court. In *R v Thomas and others* [2009] EWCA Crim 1682 (“Thomas”), a case in which the prosecution applied for leave to appeal the ruling of the trial judge that there was no case to answer, Hallet LJ said, at para 41:-

> ***“The test is whether the judge's decision was “reasonable”.*** The fact that we have found this a finely balanced decision makes our task straightforward. ….. It is common ground that Pitchford J applied the right test and directed himself in appropriate fashion. ….. Given the gravity of this case, the decision to rule that the accused had no case to answer is not one that he, (or indeed we) would take lightly.”

At paragraph 46 she ruled:-

> ***‘We consider that we have no alternative but to uphold the judge's ruling and dismiss the appeal” stating that it gave the Court no pleasure to reach this conclusion.”***

114 On the basis of these authorities we must therefore concentrate on the evidence adduced by the Prosecution whether circumstantial, or direct and ask ourselves whether, on the basis of that evidence the Commissioner was correct in holding that, properly directed, the Jurats could convict.

115 Indeed we have to remind ourselves that we are not the Commissioner. Our task is to decide whether the Commissioner could reasonably determine that there was a case fit to go to the Jurats, not that we ourselves might not have assessed the case in the same way; as noted above “the test is whether the judge's decision was ‘reasonable’” Thomas. The high hurdle always presented by a submission of no case to answer is doubly high at the appellate level.

116 Advocate Kelleher put his case on the basis that the evidence in support of the prosecution case was, to the extent that it existed, tenuous and inconsistent with other evidence.

117 For this purpose he identified three flaws in the prosecution case:-

We found these submissions, energetically though they were pressed, quite unsustainable.

(i) there was insufficient evidence that Mr Bhojwani read the Financial Times on the relevant dates;

(ii) there was no statement in the Financial Times if read which was capable of founding the required inference that he apprehended the risk of a criminal prosecution and/or confiscation order in Jersey.

(iii) there was no basis for inferring that he in fact apprehended such a risk and that his acts of conversion were animated by it.

118 As to (i) there was copious evidence from which the Jurats could infer that Mr Bhojwani read the relevant issue of the Financial Times:-

(i) Mr Bhojwani was in the United Kingdom on 20 October 2000. The prosecution referred to his Indian passport to prove this. In addition, the Prosecution referred in the course of its case to telephone records which showed that Mr Bhojwani s UK mobile phone was used to telephone the Bank of India in Jersey for 15 minutes and 48 seconds on the morning of 20 October 2000 and that the Bank of India telephoned his London residence for 8 $^{1}/_{2}$ minutes in the afternoon of that day. There was therefore an inference open to the Jurats that he was not only in the UK, but in London on the 20 October 2000;

(ii) Mr Belaney Diker, the office assistant at Mr Bhojwani's London office at that time gave a prosecution witness statement, which was read to the Jurats with the agreement of Mr Bhojwani. Mr Diker said that his jobs included answering the phone, opening mail, checking e mail, driving and, on one occasion, helping with the luggage on an overseas trip (pages 2 to 3). He said that he was Ethiopian (page 6) and his English was not fluent (page 8). At pages 10 to 11 he said:-

“I've been shown photocopies of a number of pages of the Financial Times from October the 20th 2000. I do not remember this newspaper being discussed in the office. Not particularly this paper. And there was, I say this, only the Marwa paper. I mean he was running for President. I've been asked whether I remember any discussions in the office about investigations into General Abacha. No. I mean the only thing I remember is it was all over the newspaper here in the UK and that everyone know about but particularly in the office, their discussion. I was aware about this. It was all over the paper here. I became aware of the $ 4 billion on the newspaper. I cannot recollect exactly which newspaper but I was aware of that. If I'm not mistaken it was on the news and it was kind of headline news. What made me notice it particularly because the office I'm working in was dealing with an office in Nigeria and I was aware that they were getting government contractors.”

(iii) The evidence of Mr Bhojwani's commercial dealings was such that it was open to the Jurats to conclude that he was the sort of person likely to read the Financial Times;

(iv) The evidence of what Mr Bhojwani did was also evidence on which it was open to the Jurats to infer that it was a reaction to reading the Financial Times. Two aspects of the articles are particularly relevant here:-

(a) The main article focuses on the 'Seuze' and 'Kaiser' accounts, two of the major accounts to which he had paid the proceeds of the fraud., information which would have been readily acertainable by the Swiss and easily trasmissible to the jersey authorities.

(b) Next to a report that a Swiss judge had frozen over US$ 600 million another article reported *'Jersey…has frozen an account it discovered on its own initiative'*.

(v) For the time he was on bail in Jersey, the Financial Times was delivered to his home. This in itself could be evidence that he was likely to read the Financial Times on a regular basis.

119 As to (ii):-

(i) The front page banner headline of the relevant issue of the Financial Times was: 'Laundering Probe Targets London' and the article is about a worldwide series of criminal money laundering investigations. This directs the reader to pages 4 and 22 of the newspaper;

120 The full page 'special report' at page 4 is headed: 'London's Dirty Money, Launderers put UK banks in a spin'.

The by-line in large font reads:-

"British banks and regulators are proud of their anti-money laundering efforts. But an FT investigation into the $ 4 bn looting of Nigeria by General Sani Abacha shows how London is now one of the money laundering capitals of the world;"

Apart from 3 paragraphs which refer, in passing, to a civil action in London, the rest of the special report is entirely concerned with international criminal money-laundering investigations. Relevant passages include:-

"…the West African state was systematically looted by a criminal organisation… repression and corruption reached new heights…one associate arrested in Heathrow…[a number of references to investigators]…the Swiss authorities introduced rules allowing bank secrecy to be lifted in cases of criminal investigations. Determination to enforce the new laws has increased…in October 1999 the attorney general of Geneva launched an investigation under Judge George Zecchin and a general alert was sent to banks to search for accounts of individuals and companies linked to the Abachas more than 130

> bank accounts were frozen, containing $ 645 million…At the same time the Federal Banking Commission, the Swiss regulator, had launched an investigation…Mr Obasanjo, elected last year believes it is important to throw the spotlight on countries that routinely lecture third world countries on the need to end corruption while profiting from laundering the proceeds. “Bankers, go-betweens and wheeler dealers gave their support to this criminal organisation says Mr Obasanjo. “No country should allow despots to use the western system to hide stolen money.”

121 The leading article at page 22 is headed: ‘London's money launderers’. It is entirely concerned with money laundering, international criminal investigations and ‘cross-border crime’

122 Below the special report on page 4 is another article, over 7 columns of the newspaper which analyses the Nigerian government's “…decision to pursue the criminal rather than the civil route…”. Far from ‘Freezing’ being a term used in civil rather than criminal investigations. This article is headed: *‘Freezing Assets…'*.

It follows that the Jurats were entitled to conclude that anyone in the Applicant's position, reading the newspaper on that day would fear a criminal investigation and proceedings/confiscation.

123 The references to Jersey are made precisely in this context of an internationally co-ordinated series of criminal money laundering investigations:-

> *“Regulators in other countries have been less reticent – Austria from where $ 11 m of the funds were diverted into Switzerland has asked investigators for help.* Lichtenstein which received $ 147 m of funds flowing out of Switzerland has asked the Nigerian ambassador in Berne for help .
>
> *Other countries to have volunteered assistance include Luxembourg and Brazil…Even Jersey, which has been attacked by the Organisation for Economic C0-operation and Development for its lack of co-operation, has frozen an account it discovered on its own initiative…”*

(Emphasis added)

> *“The British authorities have been lethargic and unhelpful to those investigating claims that London has been used to launder huge sums stolen from Nigeria.* As a Financial Times investigation shows (page 4) the lack of urgency in London is in disturbing contrast with the actions taken in Switzerland, Luxembourg, Liechtenstein and Jersey, traditional havens of banking secrecy.”

The article then criticises the UK in relation to ‘fighting crime’…'…campaign against cross-border crime…suspicions that the [London] authorities are soft on the proceeds of crime’.

(i) The first reference to Jersey is in a column next to the 'special report' and next to the description of Judge Zecchin's Swiss criminal investigation. The article is headed: *'UK Authorities Reticent Regulators React With Caution to Inquiry'*. The rest of the article is concerned with actions by authorities. The thesis of the article is that the UK authorities are not doing very much and that contrasts with the authorities in other countries. The article describes the FSA's position with respect to money laundering, it describes the Home Office position that it cannot assist without charges in Nigeria and describes the Serious Fraud Office's position on freezing assets. The article continues:-

(ii) The second reference to Jersey is in the first paragraph of the leading article, which, as pointed out above, is headed *'London's money launderers'* and is entirely concerned with criminal investigations. The paragraph reads:-

124 No doubt a lawyer in a cloistered office could dissect the articles and draw the conclusion contended for by Advocate Kelleher i.e. that it was essentially concerned with steps that might be taken by the relevant authorities in Nigeria or the United Kingdom rather than in Jersey, and (alternatively), in so far as steps were to be taken in Jersey, with steps that would be taken in a civil not a criminal context. But Mr Bhojwani was a person who was aware that in his accounts were the wages of corruption, out of which he had paid his collaborators with Swiss bank accounts their portion of the proceeds, and we consider that the Jurats would be entitled to consider that what leapt out of the pages was:-

All of which would make him concerned about whether such proceedings (and consequent confiscation order) might take place in Jersey – where after all his funds were then located.

(i) the accounts from which Mr Bhojwani had paid his bribes were named;

(ii) criminal proceedings could be anticipated in consequence of investigations now afoot; and

(iii) Jersey had already reacted [by freezing a bank account].

125 As to (iii) there was a debate about whether the money in form of bankers drafts were removed from the jurisdiction on the Monday (the first banking day) after the Financial Times article, or Tuesday (the second banking day) – the submission for the defence being that the later the conversion, the less it would be motivated by a desire, as soon as possible to cover his tracks, and prevent funds being available within the Bailiwick for confiscation. It seems to us that what the Jurats could rationally and reasonably have focussed on is when the instructions to move the money were given rather than when they were implemented. Here the reasonable inference available to be drawn from the letters in which such instructions were conveyed was that they were given before close of banking hours on Monday – because the sums to be converted took no account of transactions during the Monday. The letters (or faxes) dated Monday 23 October on their face invited action today: "Our representative shall also collect all our bank statements and advices to date. Kindly hand over the same".

126 In our view the following matters could properly be left to the Jurats as capable of giving rise to such conclusion that Mr Bhojwani's actions were animated by the fear purpose:-

(i) The request by Mr Bhojwani immediately to consolidate his accounts and issue banker's drafts for the closing balances of US$43 million;

(ii) A request not to cross/close those drafts;

(iii) The request already cited "…Thereafter you may close all our accounts with your branch…our representative shall also collect all our bank statements and advices till date. Kindly hand over the same" – a request entirely consistent with a desire to cloud the audit trail;

(iv) 5 faxes read together, the first two repeating the above instructions, the following 3 stating that banker's drafts were enclosed and asking that they be paid into other companies' accounts at the Bank of India, Jersey, which other companies were also wholly owned by Mr Bhojwani, a request which could only have had a dishonest impetus;

(v) Drafts for US$ 43 million, which had not in fact been crossed 'a/c payee only' were put in the courier from Jersey to London, with no Bank of India record and in the knowledge that the Applicant would not be there to receive them; and

(vi) Paying the drafts back into the other companies' accounts, when it was open to the Jurats to find that the original accounts remained open.

127 In so far as it was submitted that the very fact of the prosecution somehow disproves the fear purpose because it shows that there was an evidential trail, that submission must fail. Most defendants in money laundering cases have failed to obliterate an evidential trail.

128 From that starting point the Jurats would equally be entitled to ask whether the other acts of conversion, the removal of the drafts (now subdivided into six) from the jurisdiction on Wednesday 25 October, and their return not to the original accounts but to accounts in the name of three other Jersey companies Enrock, Jarrys and Mantra were not also fuelled by the same purpose.

129 The defence case had to be that the obvious chronological relationship between the movement of the monies was not indicative of a causal relationship: that it was indeed pure coincidence. In our view it was appropriate, as the Commissioner held, for the Jurats to be allowed to make up their own minds.

130 Two main matters were relied on by Advocate Kelleher as inconsistent with the prosecution case:-

(i) The first was the advice Mr Bhojwani received from Jersey lawyers in 1996 as to how safe a haven Jersey was for his ill-gotten gains. It is submitted that both question and answer focussed on possible civil claims and there was no mention of money laundering. The latter point is unremarkable: the relevant Jersey law had not yet been enacted. It is, however, notable that the Jersey lawyers did make mention of the Attorney General of Jersey's role vis a vis fraud, as appears from the evidence of David Moon, senior partner of Mourant Du Feu and Jeune at the relevant time. He told the Court that Mr Bhojwani, in the presence of his bank manager had asked about the bank secrecy laws of Jersey. He told the lawyers about his contract with the Nigerian Government and his agreement to pay commissions. He had been advised to effect the transaction outside the UK. He had examined the secrecy laws of Switzerland before coming to Jersey. He wanted to know if the Nigerian Government could trace the monies through the banks of Jersey. Mr Bhojwani was advised about the circumstances in which the Jersey courts may permit details of private bank accounts in Jersey to be disclosed and about the Investigation of Fraud Law. The advice was confirmed in writing to Mr Bhojwani setting out the advice he had been given concerning access to bank accounts in Jersey which contained a clear statement of the law of Jersey on obtaining banking documents to assist in criminal investigations by the Attorney General. We conclude that the first matter relied on is at best neutral, and certainly not destructive of the Crown's case.

(ii) The second was the alternative scenario that this was all done to persuade the Bank of India to relax its restraints on lending to him for the purpose of a potentially profitable investment in IMD. There are three stages to be considered. First, did Mr Bhojwani wish to invest in IMD with the benefit of as large a loan as he could obtain? The answer to that is ‘yes’. Second, was Mr Bhojwani concerned that the BoI would not advance him that amount of money? The answer to that is: it is at least possible. The third —and critical one —is were Mr Bhojwani's instructions to move the monies animated by a purpose of persuading the BoI to relax its constraints by threat of withholding his business from it?

131 In our view it was impossible to answer that third question ‘yes’ or to infer that alternative purpose from the documents alone: it needed additional evidence to explain how the documents fitted into that purpose. In the end Advocate Kelleher was constrained to agree that Mr Narayanan's evidence was the missing link. Mr Narayan, the Manager of BOIJ at the relevant time, was a defence witness. That being so, the submission of no case cannot be advanced by this third point.

132 In our view Advocate Kelleher's argument under this head would have had more (if any) purchase under Ground 2. As will appear we have concluded that the same counters which we have set out above, in addition to other matters which we will deal with specifically under that ground,could properly be relied on in that context by the Prosecution mutatis mutandis. As set out above, at the close of the prosecution case there was abundant evidence on which properly directed Jurats could convict, and the evidence was appropriately left for their consideration.

133 Ground 1, therefore, is dismissed.

Grounds 3 and 4

Ground 3

134 This ground of appeal concerns the discharge by the Prosecution of its burden of proving to the relevant standard that Mr Bhojwani acted in October and November 2000 to avoid one or other or both of:-

(i.e. the fear purpose)

(i) prosecution for [a serious Jersey offence] ("Limb (a)"); and/or

(ii) the making or enforcement [in Mr Bhojwani's case] of a [Jersey] confiscation order ("Limb (b)").

135 Advocate Kelleher's contention was the Commissioner diluted the statutory test.

136 The Commissioner began his summing up in the conventional way differentiating the respective roles of the Commissioner and the Jurats, law for him, facts for them, as follows:-

> *"I'll begin by explaining our different functions.* Throughout this trial the law has been my area of responsibility and I will shortly give you directions as to the law which applies to this case. When I do so, you must accept those directions and follow them. However, it is your responsibility to judge the evidence and decide the facts of this case…You will wish to take account of the arguments in the speeches you have heard but you are not bound to accept them. Equally, if I appear to express any views concerning the facts or emphasise a particular aspect of the evidence, do not adopt those views unless you agree with them…. When it comes to the facts of this case, it is your judgment that counts."

137 The essence of the Commissioner's summing up on the law (in Part 2 at paragraphs 120 to 125) was:-

> *"So, what should be your approach to this question?* Firstly, I remind you of the directions I gave at paragraphs 36 to 39 of the written directions you have before you that the test is subjective, i.e. you are concerned with what was in the defendant's mind, not whether as a matter of fact there was an offence in Jersey for which the defendant could have been prosecuted or whether, in fact, a Jersey confiscation order could have been made or enforced, or whether as a matter of fact, the transactions he undertook could or would have avoided such a prosecution or confiscation order.

The issue for you is whether you are sure that one of the purposes of each conversion and the removal of the defendant's proceeds of criminal conduct was the avoidance of a prosecution for a serious offence in Jersey or the making or enforcement of a Jersey confiscation order following a conviction for a serious offence or both. The defendant's state of mind is a matter for you to determine on the evidence before you and in the light of the inferences properly open to you to be drawn on the facts which you accept.

There is no particular fact which is to be addressed first. You must consider whether all of the facts which you accept, taken together, lead you to the sure conclusion that the avoidance of a prosecution for a serious offence in Jersey or the making of or enforcement of a Jersey confiscation order or both was one of his purposes.

Thus it is not the correct approach to take the evidence on the FT article separately and decide whether you are sure that the defendant read it. It is this third element of the offence that you have to be sure about; not each piece of evidence that may be relevant to it. The evidence in relation to the FT is part, albeit an important part, of the evidence which, when taken together with all the other evidence, may lead you to be sure as to his purpose. I say important because it is the Crown's case that the FT articles and the news they contained acted as the catalyst for the defendant's subsequent actions, but in considering the issue of the defendant's purpose you must, as I have said, have regard to all of the evidence before you.

In terms of facts which you accept, you will, if you have reached this stage in relation to the question I have given you, have concluded that the bank accounts of TOSS and BTC represented in part the defendant's proceeds of criminal conduct; essentially that he had obtained these funds dishonestly. There is no dispute about what the defendant actually did with these funds in October and November as it is clear from the documentary evidence, none of which has been challenged by the defence.

I agree that to address the question of why the defendant acted as he did, you must put his actions into context, as you find that context to be. The first task for you therefore is to establish that context based on reliable evidence before you and not on guesswork or speculation. You must then consider what the defendant did and is alleged to have said in that context."

138 The Commissioner then addressed a final proposition in the following manner (Summing-Up —Part 2, paragraph 141:-

"Finally, the Prosecution submitted that it is sufficient for you to find so that you are sure that the defendant apprehended the risk no matter how slight of a knock on the door of BoIJ by the Jersey police. The defence says that this is not enough. It is correct that this third element of the offence makes no reference to the avoiding of investigations but you may think that there can only be one

> reason why a person may apprehend an investigation by the police. The police enforce the criminal law and criminal investigations lead to criminal prosecutions. If you are sure therefore that one of the reasons for the defendant's actions in converting and removing his proceeds of criminal conduct was that he apprehended a police investigation in Jersey, you may think the Prosecution has discharged the burden upon them in relation to this element of the offence."

139 Advocate Kelleher emphasises that this direction was the last of those given by the Commissioner immediately before the Jurats retired to consider the evidence and hence would be freshest in and most potent on their minds. The Jurats were, accordingly, invited, he submits, to base a conviction of Mr Bhojwani on a finding that he apprehended the risk (no matter how slight) of "a knock on the door of Bank of India, Jersey branch by the Jersey police" or "an investigation by the Jersey police." In extending this invitation, so the argument runs, the Commissioner impaired the effect of his clear and proper directions on the ingredients of the charge by introducing (in reflection of the Prosecution's own vocabulary) ambiguous concepts such as avoidance of "investigation" and "knock on the door" which formed no part of the statutory language and could deflect the Jurats from consideration of what was agreed on all sides to be the proper focus on their consideration as to Mr Bhojwani's purpose i.e. avoidance of criminal prosecution in Jersey Court of a Schedule 1 Offence. Investigation, it is contended, could be for purposes other than preparations for a prosecution in Jersey, or indeed anywhere: a knock on the door likewise.

140 Advocate Kelleher characterises this as an error of law, the departure from the meaning of the language as used by Article 34(1)(b) of the Law which neither specified for nor allowed for the implication of the word ***"investigation"***.

141 The argument has a narrow focus. Advocate Kelleher accepts that proof of a defendant's apprehension or risk of an investigation may be capable of evidencing a reason why a defendant might apprehend prosecution, but apprehension of a risk of investigation by the police in Jersey alone i.e. without the added apprehension of risk of a consequent prosecution would be inadequate.

142 In our view the passage complained of was not, if read in context, ambiguous at all, and certainly could not outweigh the combined impact of all the references from the Commissioner, and indeed from Advocates for both parties, to the proper test.

143 In our view Advocate Jowitt's counter analysis has compelling force. Three matters stand out. First the direction complained of was a direction relating to fact, properly and provisionally phrased, since the Commissioner had already given the standard direction that the facts were for the Jurats. It was a statement to a professional fact finding tribunal as to a factual conclusion which was open to them i.e. that Jersey police carrying out an investigation in Jersey might (not would necessarily) be found to be so doing as a first step towards a Jersey prosecution. Secondly, it had a domestic criminal focus. A lawyer might

conceivably note that the Jersey police could act on behalf of overseas national authorities to assist in their prosecution: but that would not be an obvious reading of the passage. Third, in any event there were copious references elsewhere to the correct test: in the Defendant's own case, in the Crown's case, as well as (crucially) in the Commissioner's directions on law when he states unequivocally that the purpose must relate to a Jersey prosecution and/or confiscation order.

144 We remind ourselves of the following passage from the judgment of the Court of Appeal in *Snooks v. Attorney General* [1997] JLR 253 at 261:-

> ***"In summing up to the jurats, the presiding judge is entitled to construct his directions against the background of the knowledge and experience of the jurats and to take that into account.*** In many cases, in most cases even, directions on how to approach the evidence and how to evaluate it will be unnecessary. If, however, the presiding judge does refer to the facts, he must obviously do so in an even-handed way. If he refers to the evidence which supports the prosecution case, he must clearly direct attention equally to the evidence for the defence. As with any summing up, the keynote is fairness .
>
> ***In summary, we answer the second question by stating that while the presiding judge should direct the jurats fully on the law, it is not necessary that he should so direct them on the facts as if they were a jury.***'"

145 We consider that the Commissioner did no more than he was entitled to do.

146 We remind ourselves too of the observations of the Court of Appeal in *R v Stoddart* 2 Cr. App. R. 217, Lord Alverstone C.J.:-

> ***"Probably no summing up, and certainly none that attempts to deal with the incidents as to which the evidence has extended over a period of twenty days, would fail to be open to some objection.*** … Every summing-up must be regarded in the light of the conduct of the trial and the questions which have been raised by the counsel for the prosecution and for the defence respectively. This Court does not sit to consider whether this or that phrase was the best that might have been chosen, or whether a direction which has been attacked might have been fuller or more conveniently expressed, or whether other topics which might have been dealt with on other occasions should be introduced. This Court sits here to administer justice and to deal with valid objections to matters which may have led to a miscarriage of justice" (at pp. 245–246) .

This warns us against too nice a dissection of the Commissioner's direction.

147 In short the Commissioner did not make the statement of law alleged by the defence. His direction on the facts cannot be impeached. In addition, even were he to have been wrong

to direct as he did there was abundant evidence of the Appellant's criminal purpose and any misdirection would have had no material effect on the outcome of the case.

148 Ground 3, therefore, is dismissed.

Ground 4

Introduction

149 Advocate Kelleher argues that the prosecution case was that the evidence showed that the Mr Bhojwani only had one purpose in carrying out the transactions set out in the indictment. It was therefore an error of law to direct the Jurats that the offence charged only required them to be sure that the criminal purpose alleged by the prosecution was one of his purposes in carrying out the transactions.

150 The Commissioner's direction, the subject of the complaint was as follows:-

> *"I now turn to the third element of the money-laundering offences for the purpose of avoiding prosecution for a serious offence or the making or enforcement of a Confiscation Order or both.* The prosecution or Confiscation Orders referred to, under this element, are Jersey prosecutions or confiscations which must predate the money laundering offences charged in the Indictment. The test is subjective. You are concerned with what was in the Defendant's mind not whether, as a matter of fact, there was an offence in Jersey for which the Defendant could have been prosecuted or whether in fact a Jersey Confiscation Order could have been made or enforced or whether, as a matter of fact, the transactions he undertook could or would have avoided such a prosecution or Confiscation Order. The issue for you is whether you are sure that one of the purposes of each conversion and the removal of the Defendant's proceeds of criminal conduct was the avoidance of a prosecution for a serious offence in Jersey or the making or enforcement of a Jersey Confiscation Order or both."

151 The ruling was impeccable as a matter of law. The real complaint is that it was gratuitous because the prosecution case was founded on a single purpose basis i.e. fear, and that, by concluding the ruling in the context of a discussion of the two vital reasons i.e. "fear" versus "anger/pressure" the Commissioner was inviting the Jurats to consider the possibility of the co-existence of the two purposes without at the same time reminding them that if they accepted that the "anger/pressure" version was possibly true, that might undermine their acceptance of the "fear" version of which they had to be sure. The Commissioner's error was accordingly said to be one of omission rather than of commission.

152 We do not consider that this complaint can succeed. In presenting the relevant evidence at trial, both the Prosecution and Defence were well aware of the potential for dual purposes as a matter of law. The subjective co-existence of a licit and illicit "purpose" was

the subject matter of a preparatory hearing and a judgment by the Commissioner dated 1 October 2008, *Attorney General v Bhojwani* [2008] JRC 172A.

153 The Commissioner had earlier said in a judgment from which there has been and is no appeal *AG v. Bhojwani* [2008] JRC 172A.-

> ***"The contentions of the prosecution are in my view conceptually correct and are supported by authority.*** I conclude therefore that the proposed direction, namely that the Jurats have to be sure that one of the defendant's purposes was a purpose set out in Article 34 of the 1999 Law, is correct."

154 The Commissioner had correctly directed the Jurats on several occasions that as a matter of law they had to be sure that the "avoidance of prosecution", (or "fear" in our vocabulary) purpose was the explanation for the various conversions. The Commissioner had equally correctly directed in the passage complained of that as a matter of law they could find that Mr Bhojwani had purposes other than such purpose but still convict him if they were sure that he also had the "avoidance of prosecution"(or "fear") purpose.

155 But for the Commissioner to dwell on what he would have perceived to be the unlikely coincidence involved in such dual purpose scenario and how that might impact, one way or the other, on the prosecution case would have been to stray into territory that was the Jurats', not his own. In short, as long as the Jurats had well in mind, cognisant of and faithful to his directions, the need for the fear purpose to be established beyond reasonable doubt, whether they accepted a single purpose or whether, indeed, they were able sensibly to accommodate a dual purpose scenario was quintessentially a matter for them.

156 Moreover the direction might well have been relevant if the Jurats had in mind the possibility that Mr Bhojwani had a plurality of purposes over and above the avoidance of prosecution purpose, some of which (whether licit or not in a broad sense) would be licit in terms of POCA Article 34 e.g.: to avoid prosecution in Nigeria or to protect his monies from civil recovery proceedings, all of which had been canvassed in argument by Advocate Kelleher.

157 But even accepting, as we do, that the Commissioner's Direction in the context in which it was given juxtaposed only the anger/pressure purpose (and not any other licit proposal) with the fear purpose, it was a question of fact for the Jurats as to what choice they made between these purposes, or whether they held that they could co-exist. The Commissioner had made clear throughout that the Jurats were the masters of fact. For our part we find it difficult to conjure up a credible scenario in which the anger/pressure purpose could sensibly co-exist with fear, purpose i.e. that there were two birds to be killed with a single stone —but that was a matter for the Jurats and is not a matter for us.

158 Advocate Kelleher associated this submission with a complaint about the direction as to circumstantial evidence. This seemed to us somewhat opaque as the circumstantial

evidence direction given, was unimpeachable, following as it did the Judicial Studies Board model direction(thus absolving us from the need to quote it), which is, in any event and as conceded by Advocate Kelleher not compulsory.

159 In a case founded, as this case was, on circumstantial evidence, the Jurats will have had to ask themselves the question: does the circumstantial evidence taken together makes us sure that one of the defendant's purposes was avoiding a Jersey prosecution or a Jersey confiscation order?

160 To direct the Jurats the Commissioner had:-

This is exactly what the Commissioner did.

(i) to tell them what the law requires them to be sure about on each element of the offence; and

(ii) if the evidence on one element of the offence is circumstantial evidence, how to approach circumstantial evidence; and

(iii) to inform them that they are the judges of fact.

161 No further or more elaborate direction by him was required. He committed no error of law.

162 Ground 4, therefore, is dismissed.

Grounds 5 and 6

Ground 5

163 Advocate Kelleher contends that the Commissioner erred in his decision in October 2009 when he held that the test for dishonesty to be applied in relation to transposed conduct, that is the predicate conduct transposed to Jersey for the purpose of determining if the monies held by Mr Bhojwani at BoIJ were the proceeds of crime, is that applied in *R v Ghosh* [1982] QB 1053, at 1064: (“the Ghosh test”)

164 The Ghosh test states in determining whether the prosecution has proved that the defendant was acting dishonestly, a jury must first of all decide whether according to the ordinary standards of reasonable and honest people what was done was dishonest. If it was not dishonest by those standards, that is the end of the matter and the prosecution fails:-

“If it was dishonest by those standards, then the jury must consider whether the defendant himself must have realised that what he was doing

was by those standards dishonest. In most cases, where the actions are obviously dishonest by ordinary standards, there will be no doubt about it. It will be obvious that the defendant himself knew that he was acting dishonestly. It is dishonest for a defendant to act in a way which he knows ordinary people consider to be dishonest, even if he asserts or genuinely believes that he is morally justified in acting as he did. For example, Robin Hood or those ardent anti-vivisectionists who remove animals from vivisection laboratories are acting dishonestly, even though they may consider themselves to be morally justified in doing what they do, because they know that ordinary people would consider these actions to be dishonest."

165 In paragraph 10 of his November 2009 judgment ([2009] JRC 207A) the Commissioner said:-

"Mr Kelleher agreed that the defence contentions are properly reflected if the Ghosh test is amended to read as follows –

'In determining whether the prosecution has proved that the defendant was acting dishonestly, the Jurats must first of all decide whether according to the ordinary standards of reasonable and honest people in Nigeria what was done was dishonest. If it was not dishonest by those Nigerian standards, that is the end of the matter and the prosecution fails. If it was dishonest by those Nigerian standards, then the Jurats must consider whether the defendant himself must have realised that what he was doing was by those Nigerian standards dishonest'."

166 Advocate Kelleher contended that the Jurats must find the existence of "dishonest conduct" by reference to the ordinary standards prevailing in Nigeria in 1996 and 1997 and not by Jersey standards.

167 The Commissioner rejected that submission and concluded:-

(i) the test set out in Ghosh is the settled test for dishonesty in Jersey criminal law (paragraph 15);

(ii) the Ghosh test should not be modified for the purpose of Article 34(1)(b) offences when dealing with conduct outside Jersey (paragraph 15);

(iii) there is a universality in the concept of dishonesty: "…a dishonest person is one who lies, cheats or steals or who practices deceit." And a person who conducts himself in that way will everywhere be viewed by honest people as dishonest (paragraph 17);

(iv) the PoCL 1999 provided for a single criminality test, namely the criminal law of Jersey is to be applied to the conduct, and thus offences under the former were to be treated no differently from other offences under the latter (paragraph 16);

(v) if the Defence was correct in the formulation of the dishonesty test it would render cases like Mr Bhojwani's untriable, because the Prosecution would have to prove, through expert evidence, the ordinary standards of reasonable and honest people in the foreign jurisdiction concerned and that was not a matter susceptible of expert evidence (paragraphs 19 and 26); and

(vi) in determining dishonesty under Article 34(1)(b) the Jurats would determine the ordinary standards of reasonable and honest people. It was open to Mr Bhojwani under the second limb of Ghosh to say that he did not realise that what he was doing was dishonest by the ordinary standards of reasonable people (paragraphs 16 and 20).

168 We consider that the Commissioner's approach was correct and that Advocate Kelleher's submissions mis-characterise the transposition process.

169 The steps which the Jurats were directed to take when carrying out the transposition exercise were set out, as we have already noted, in an earlier judgment by the Commissioner: *AG v. Bhojwani* [2008] JRC 172AA. paragraph 24 and approved by the Court of Appeal in *Bhojwani v. AG* [2009] JCA 115A at paragraph 45.

170 The Commissioner's judgment as approved by this Court read:-

"24. In my view and in principle, the Jurats should be directed to approach the second element of the offence in the following manner and this in respect of each count:–

(i) The first stage, which is evidential, is for the Jurats to determine whether they are sure that the conduct set out in each of the sub-paragraphs of the particulars in the count took place. If they are not sure that any of the conduct particularised took place, then they will acquit. If they are sure that some, if not all, of the conduct set out in the particulars took place, then they will move on to the second stage .

(ii) The second stage, also evidential, is for the Jurats to determine whether they are sure that "the property" referred to in the count represents the defendant's proceeds of such conduct, to the extent proved. If they are sure, then they will move on to the third stage. If not sure they will acquit .

(iii) The third stage is the process of transposition of the conduct, to the extent proved, to Jersey, which in this case can be achieved with very little substitution of the circumstances (as referred to in the extract of Lord Millett's judgment cited in paragraph 95 of Norris). Assuming, for the sake of argument, all of the particulars of the alleged conduct in count one are proved, that conduct can be transposed to Jersey

by making the following limited amendments to the particulars (the amendments are underlined):–

> ***"(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"***
>
> ***I will refer to this as "the transposed conduct"*** .
>
> ***(iv) The fourth stage is the process by which the elements of the Jersey offences are applied to the transposed conduct.*** It is only if all the elements in respect of at least one of the Jersey offences are found by the Jurats to be present in the transposed conduct, that the conduct is constituted "criminal conduct". They will be directed as to the elements of the Jersey offences. If they find that all the elements of at least one Jersey offence are present in the transposed conduct then the second element of the offence charged in the count is proved. If not they will acquit."

171 It is necessary, in our view, to separate out:-

(i) the facts that have to be proved: the acts and Mr Bhojwani's state of mind while carrying out the acts;

(ii) the legal test for what are sufficient acts to constitute the actus reus of the offence and what is a sufficient state of mind to constitute the mens rea of the offence.

(iii) In the transposition process referred to above, the prosecution had to prove (a), the facts (including Mr Bhojwani's actual state of mind) at the first stage. The legal test, (b), however, did not arise for application until the fourth stage where the Ghosh test is properly engaged since (bearing in mind the statutory definition of criminal conduct) the question at the fourth stage is whether if the facts (both the acts and the state of mind) found at stage 1 (i.e. what occurred in Nigeria) had occurred in Jersey they would have satisfied the Jersey test for dishonesty.

172 The Jersey test for dishonesty is the Ghosh test. To modify the Ghosh test would in truth be to disapply Article 2(1) of the 1999 Law.

173 In our view, applying Ghosh, the Jurats would have to have had a reasonable doubt as to whether Mr Bhojwani's conduct in Nigeria, transposed in Jersey, would have been regarded by the standards of reasonably honest Jersey men as honest, or whether he believed such conduct in Jersey to be dishonest. Once the predicate conduct had notionally to be transposed into Jersey, in our view it follows inevitably that whether what was done was or was not objectively dishonest had to be judged by Jersey standards.

174 The Commissioner also pointed out in his October 2009 decision:-

> ***"20. The second limb of the Ghosh test contains a subjective element and it is therefore open to the defendant to say that he did not realise that what he was doing was by the ordinary standards of reasonable honest people, dishonest. The defendant might say that he did not know that his conduct was dishonest by those standards because he lived in a community in which such conduct would not have been regarded as dishonest by reasonable and honest people. It follows from this, as conceded by the prosecution, that the defendant could lead evidence which gives credence to his own evidence on this point."***

175 Advocate Kelleher did not suggest that Mr Bhojwani would satisfy that second limb. In any event for Mr Bhojwani to show that he did would have required him to give (or adduce) evidence as to his own state of mind, which he did not do.

176 In any event we do not consider that standards of honesty can be treated as a variable — see *Cox v Army Council Respondents* [1963] AC 48, Viscount Simonds at 68H:-

> ***"If the act is of its nature one that can only be committed in England the section cannot operate.*** I need say no more than that it is otherwise with such acts as driving without due care or, it may be, dangerously on a highway or larceny from a dwelling-house or an offence against the person. All such acts have what, for want of a better expression, I will call a character of universality which makes it sensible to bring them within the scope of section 70. I mean the same thing whether I refer to them being done at Sundern or at Surbiton."

177 Indeed even if we adopted Advocate Kelleher's analysis and had for the purposes of the transposition exercise to consider how reasonable and honest persons in Nigeria would view acts such as those alleged against Mr Bhojwani we would reach the same conclusion. The issue, so phrased, after all is not whether corruption (including the taking of bribes) is endemic in Nigeria or indeed regarded as acceptable by the majority of the population (on neither of which hypotheses can or do we pronounce) but whether reasonable and honest persons in Nigeria would regard such corruption as dishonest. To this there can be but one answer.

178 Ground 5, therefore, is dismissed.

Ground 6

Introduction

179 Advocate Kelleher expressly accepted that this ground of appeal is an adjunct to the issue addressed in Ground 5, and only arises if he succeeds on Ground 5. It is therefore in the light of our conclusion on Ground 5 moot and we address it only briefly.

180 This ground of appeal is concerned with the admissibility of the expert reports to prove “the ordinary standards of honest and reasonable people in Nigeria” (paragraph 731 of Mr Bhjowani's written contentions).

181 Advocate Kelleher sought to adduce at trial the written Reports of three expert witnesses, Professor Femi Odekunle, (“Professor Odekunle”), Mr Anthony Goldman (“Mr Goldman”) and Mrs Ayo Obe (“Mrs Obe”) (together the “Nigerian Experts”) being a Professor of sociology, a lawyer, and a journalist with extensive knowledge of Nigeria.

182 It is said that the Commissioner wrongly excluded the evidence of the Nigerian Experts to the prejudice of a fair trial for Mr Bhojwani.

183 There are a number of independent reasons why this ground should not succeed.

184 First, the standards of reasonable and honest people on a matter such as the perception of dishonesty are not a matter for experts at all — *R v. Turner* [1975] 1 QB 834, Lawton LJ at 841:-

> ***“An expert's opinion is admissible to furnish the Court with scientific information which is likely to be outside the experience and knowledge of a judge or jury.*** If on the proven facts a judge or jury can form their own conclusions without help, then the opinion of an expert is unnecessary. In such a case, if it is given dressed up in scientific jargon, it may make judgment more

difficult. The fact that an expert witness has impressive scientific qualifications does not by that fact alone make his opinion on matters of human nature and behaviour within the limits of normality, any more helpful than that of the jurors themselves; but there is a danger that they may think it does."

185 Secondly, the "experts" relied on were not qualified as experts in the subject which they were invited to address i.e. the standards of honesty in Nigeria, even (if it were a subject for expert evidence at all).

186 Advocate Kelleher said (in his written contentions):-

> *"In submission before the learned Commissioner, the defence submitted that it sought to rely on the evidence of the three Nigerian Experts when viewed together in totality.* The deliberate choice of a Professor of sociology, a lawyer, and a journalist with extensive knowledge of Nigeria was intended to address the proposition that no single person could be found with a body of knowledge and experience which covered all three areas of expertise. Taking the curriculum vitae of each expert it is contended that, in relation to the threshold preliminary question of competency, each of the Nigerian Experts was prima facie competent."

187 However, he does not challenge in terms the Commissioner's finding at paragraph 23 of his October 2009 judgment that the experts, in so far as they were being put forward as going to the issue of the "…ordinary standards of honest and reasonable people…" were not asked about and did not opine on that issue. The Commissioner said, inter alia:

> *"I will set out most of the individual questions put to the Nigerian experts below but centrally they are directed to the views of the "average Nigerian citizen" as to the alleged conduct of the defendant and whether he or she would regard the same as honest or dishonest.* There are a number of difficulties with this:
>
> > *(i) The wrong question was asked.* We are not concerned with the views of the average Nigerian citizen, but the "ordinary standards of reasonable and honest people" in Nigeria…"

188 Advocate Kelleher once again even on his own premise fails to distinguish between two distinct matters: first whether bribery of public officials is prevalent in Nigeria; second whether, even if it is so, reasonable honest people in Nigeria would regard such bribery as proper. The evidence sought to be adduced was both inadmissible and irrelevant.

189 Ground 6, therefore, is dismissed

Ground 7

Introduction

190 This ground of appeal relates to the admission into evidence at trial of certain documents relating to and recording events at Bank of India, London branch in or around early December 2002 suggesting an intended movement of monies to Hong Kong to avoid investigation by the FSA into the source of the funds. There was a preparatory hearing, the judgment in relation to which on 1 October 2008, is reported at [2008] JRC 172A in which the Commissioner ruled at paragraph 44 that the evidence "relates to the defendant's handling of the very same proceeds of criminal conduct (allegedly) which form the subject matter of the indictment, which in my view invests it with a sufficient degree of probative value (for the purposes tendered by the prosecution) to outweigh the prejudicial effect it may have, if any". There was no appeal against that ruling despite the profusion of interlocutory appeals.

191 The reliance by the Prosecution on the relevant documents was also the subject matter of a direction by the Commissioner at the trial, where in his written summing up he directed the Jurats as follows:-

> *"Now, you are entitled to consider whether the evidence of the Defendant's letter to Bank of India, London, supports the case against him in the sense that it shows guilty knowledge as to the origin of the funds, which will be relevant to this question, and a consistency of conduct in relation to his proceeds from the Nigerian contracts, by which it might be inferred that one of the purposes in the conversion and removal of funds in October and November 2000 was to avoid a prosecution or Confiscation Order, and that would be relevant to the last question you have to address, which is question 6, which we have yet to come to.*
>
> *In this regard, you should consider 3 questions.*
>
> ….
>
> *If you are sure, then you must go on to the third question, which is, why did the Defendant instruct the transfer of the accounts of these 2 companies to Hong Kong?* He may have done so for many reasons and they may be innocent ones in the sense that they do not denote guilt. In his letter of the ninth of December, the Defendant himself gave an explanation, namely that it was the result of advanced tax planning by the beneficial owners of the company, who might take up residence in the UK in the near future, based on advice given by their tax consultant. Furthermore, by this time, the investigations into monies allegedly looted by the Abacha regime were well and truly in the public domain, and of course the Defendant had just given his statement, if you accept he did, to Commissioner Gana. If you think there is or may be an innocent explanation for the Defendant seeking a transfer of these accounts, then you should take no notice of this evidence. It is only if you are sure that he did not instruct the transfer for an innocent reason that this evidence can be regarded by you as

evidence supporting the Crown's case in the 2 senses I have described."

192 We note *en passant* that no objection was taken to this part of the Commissioner's summing up any more than to the interlocutory ruling as we have already described. These facts cause us to assess the alleged significance of the issues now raised with some caution. Again it is useful to set the point in its forensic context.

193 Advocate Kelleher:-

(i) Accepts that the evidence was admissible as evidence of Mr Bhojwani's guilty knowledge as to the criminal origins of the IMD funds ;

(ii) Accepts that the evidence was admissible to rebut the suggestion that Mr Bhojwani thought he had done nothing wrong in negotiating the contracts in Nigeria; but

(iii) Submits however that the evidence was not admissible as evidence of purpose and there should have been a direction "requiring [the Jurats] not to draw any adverse inference from any perceived similarity in circumstances between the matters in December 2002 and the events in issue in October/November 2000"; and

(iv) Submits that if the evidence was admitted as evidence of purpose the Jurats should have been directed about unfair prejudice.

194 The fact that Advocate Kelleher accepted —indeed, in our view, had to accept—that the 2002 episode was relevant to show that Mr Bhojwani was aware that the IMDs were, in part, if not wholly, the fruit of the proceeds, of criminal conduct, and to show guilty knowledge and was hence admissible, makes it difficult to see how it could be said that in the exercise of his discretion the Commissioner should have declined to put the evidence before the Jurats because, in terms of establishing that he was animated by the fear purpose in 2000, it was irrelevant. A direction seeking to draw the fine line indicated by Advocate Kelleher's submission might have been conducive to confusion rather than to clarity.

195 In our view the evidence was relevant to establishing the fear purpose. This was not a case of "similar fact" evidence in the strict sense i.e. as might have been the case if it had shown Mr Bhojwani to use identical or similar money-laundering techniques in respect of a different proceeds of criminal conduct. It was concerned not with discrete episodes of behaviour, but with connected episodes each of which was identified by features closely akin to each other and hence admissible because it went beyond the establishment of mere propensity. It was concerned with the same proceeds of corruption, albeit by now mutated into a different form.

196 The evidence was introduced in short to show that, whenever alerted to interest by public

authorities whose inquiries might result in criminal charges and confiscation orders Mr Bhojwani was swift to move the relevant assets out of the relevant jurisdiction. In our view it was capable of illuminating whether Mr Bhojwani was animated by the fear purpose in 2000: whether it did so, and with what force, was a matter for the Jurats.

197 Advocate Kelleher suggested that the context in 2002 was entirely different in that Mr Bhojwani was already aware of actual interest by the Jersey authorities as distinct from the apprehension of such interest said to have been stimulated by the FT articles in 2000. That seems to us to be a matter of weight, not admissibility.

198 Advocate Kelleher disavowed any submission that the probative value of the evidence was outweighed by its prejudicial effect. He said that the question of preponderant prejudice simply did not arise. He was wise to confine his submission in that way since the only prejudicial effect arose only from its potentially probative effect-an argument not capable of being seriously advanced.

199 The evidence relating to 2002 was admissible as going to the issue of purpose. The learned Commissioner's directions were appropriate to the facts of this case.

200 Ground 7, therefore, is dismissed.

Ground 2

The Test

201 Mr Bhojwani applies for leave to appeal on the ground that the verdict of the Jurats (if, contrary to his submissions on ground 1 the case should have been left to them at all) was "unreasonable or cannot be supported having regard to the evidence" (paragraph 120 of the Applicant's written contentions). At this juncture the parties were divided on the nature of the test to be applied, but each had, for the purposes of their respective views resort to the decision of the Privy Council in *AG v. Edmond-O'Brien* [2006] JLR 133 ("O'Brien"). In that case the Court of Appeal had overturned a decision of Jurats in a money laundering trial after it had itself examined the evidence led at the trial. The Privy Council restored the conviction. Lord Hoffman, giving the opinion of the Board, said:-

> ***"12… The Court of Appeal acknowledged (at paragraph 40) that the prosecution had sought to rely "on an inference to be drawn from the totality of the evidence before the Jurats" but then proceeded to analyse "those particular circumstances on which the prosecution relied".*** The court then went seriatim through the various items of evidence adduced by the prosecution and considered what inferences might be drawn from them. But in each case their account of the prosecution evidence was supplemented by lengthy extracts from the evidence of Mrs O'Brien, which they appeared to weigh against that of the

prosecution and at one point (paragraph 58) went so far as to say that it "[had] to be accepted" .

13. Although the Board does not sit as a second Court of Appeal, it considers that this approach was wrong in principle. Questions of credibility are a matter for the Jurats. It is not the function of the Court of Appeal to say that the evidence of the accused should have been accepted .

…

[See, also, paragraph 20]

23 Their Lordships were told that no other case had been found since the establishment of the Court of Appeal in Jersey in which a verdict of the Jurats had been set aside solely on this ground. In *Aladesuru v The Queen* [1956] AC 49 , ***54–55 Lord Tucker, speaking of a Nigerian statute in similar terms to the Jersey Law, said that it conferred only the right to —"a limited appeal which precludes the court from reviewing the evidence and making its own valuation thereof" and added that the cases in England in which a verdict had been set aside "as one which no reasonable tribunal could have found" were exceptional.*** As Lord Goddard CJ said in*R v Hopkins-Husson* (1949) 34 Cr App R 47, 49:

"[T]he fact that some members or all the members of [this] court think that they themselves would have returned a different verdict is…no ground for refusing to accept the verdict of the jury, which is the constitutional method of trial in this country. If there is evidence to go to the jury, and there has been no misdirection, and it cannot be said that the verdict is one which a reasonable jury could not arrive at, this court will not set aside the verdict of guilty which has been found by the jury."

24 The reason why such an event in Jersey appears to have been not merely exceptional but previously unknown may be because the Jurats, unlike an English jury, are not chosen at random. As the European Court of Human Rights recorded in *Snooks and Dowse v United Kingdom* [2002] JLR 475, 484 -

"Jurats are…elected by a special electoral college whose members include the bailiff, the Jurats, advocates and solicitors of the Royal Court and members of Jersey's legislature, the States Assembly. Jurats do not necessarily have a legal qualification, but are usually individuals with a known history of sound judgment and integrity, which has been consistently demonstrated throughout a lengthy professional, business or civic life."

25. In England the test laid down in R v Hopkins-Husson was found to be somewhat too restricted and was replaced (by section 2 of the Criminal Appeal Act 1968) with a duty to allow an appeal "under all the circumstances of the case [the verdict] is unsafe or unsatisfactory". No

such change has been made in Jersey, but their Lordships would not exclude the possibility of a more liberal interpretation of the old statutory language .

…

26…If the Court of Appeal was (as its references to Mrs O'Brien's evidence suggest) looking at the matter after all the evidence, their Lordships consider that the Court of Appeal simply usurped the function of the Jurats. They tried the case on the written record and allowed the appeal because, on their own somewhat imperfect understanding of the prosecution's case, they would not have convicted. Although they said that they had reviewed the evidence "separately and together", there is little indication that they had regard to the cumulative weight of the various items of evidence, to each of which they had, sometimes not altogether plausibly, assigned a possible innocent explanation. It is in the nature of circumstantial evidence that single items of evidence may each be capable of an innocent explanation but, taken together, establish guilt beyond reasonable doubt. The Jurats also had the opportunity to see Mr and Mrs O'Brien and the police witnesses give evidence. They disbelieved Mr and Mrs O'Brien. The Court of Appeal did not have the same advantages and their Lordships consider that they were not entitled to disturb the verdict: compare *Barlow Clowes International Ltd (In Liquidation) v Eurotrust International Ltd* [2006] 1 All ER 333 .

202 It is common ground that the governing Jersey statute, the terms of which are set out in paragraph (19) above differ from those of the modern, but not the original, English statute. Advocate Kelleher invited us to recognise that Lord Hoffman's obiter dictum in paragraph 25 "Their Lordships would not exclude the possibility of a more liberal interpretation of the old statutory language" was an offer to this Court which we could not refuse.

203 We however reject this invitation for a number of reasons:

204 This Court has consistently and recently approached its role in a way which recognises the difference between the Jersey and the English statute: e.g. *Hall v AG* [1995] JLR 102 (notably it has been observed that the ***"unsafe and unsatisfactory verdict"*** is no part of Jersey Law, and *Baylis v AG* [2004] JLR 409.

205 The position under Jersey law as to a criminal appeal was described by this Court in *Barette v AG* [2006] JLR 407 as "more robust in regard to the upholding of a jury's verdict than the law which now exists on the mainland". [Ibid, page 842 paragraph 87 of the case] Observing that the language of the relevant provisions of the Jersey statute is ***"not altogether happily drafted"***, [Ibid paragraph 88] the Court defined the appeal threshold by reference to the proviso in Article 26(1): "notwithstanding some error in the conduct of the trial, a verdict will only be set aside if the miscarriage of justice consequent upon that error can properly be described as "substantial"." [Ibid paragraph 88]

206 In *Styles v AG* [2006] JLR 210 this Court emphasised that Lord Hoffman's discussion emphasised present limits, even while suggesting potentially wider vistas. It said:-

We agree

> ***"33…Lord Hoffmann's remarks are a salutary reminder that we must not stray beyond our limited role…***
>
> ***34 Mr. Tremoceiro drew our attention to 20 respects in which he contended that the prosecution evidence was weak, flawed or inconsistent.*** In our view, in the light of *Att.* Gen. v. Edmond-O'Brien ***it would not be appropriate for us to sift through those points and attempt to evaluate them.***."

207 In *Hamilton v AG* [2010] JCA 136A this Court once again noted at para 51:-

> ***"In [O'Brien] the Privy Council emphasised the limitations in the scope of this court's function in appeals against conviction in criminal cases.*** Lord Hoffmann made it clear that in considering whether the verdict "cannot be supported having regard to the evidence" we must be careful not to usurp the function of the Jurats and he quoted, with apparent approval, the passage in the judgment of Lord Goddard CJ in *R v Hopkins-Husson* [1949] 34 Cr. App. R. 47 ***("Hopkins-Husson") at 40:-***
>
> ***"the fact that some members or all the members of [this] court think that they themselves would have returned a different verdict is … no ground for refusing to accept the verdict of the jury, which is the constitutional method of trial in this country.*** If there is evidence to go to the jury, and there has been no misdirection, and it cannot be said that the verdict is one which a reasonable jury could not arrive at, this court will not set aside the verdict of guilty which has been found by the jury."

See also: *Waite v. AG* [2007] JCA 170 at paragraph 2 and *Barton v. AG* [2007] JCA 172 at paragraph 41. We note that the traditional approach is adopted in the Guernsey Court of Appeal) *Taylor v Law Offices of the Crown GLR 2007/8 207* ("Taylor").

208 In principle, the difference in statutory language ought rationally to lead to different results and ought sensibly to be respected. If the States wished to align Jersey to mainland law in this area, they could have done so. Our researches suggest that the issue of reform has never been seriously raised: the record shows that, even if it had been raised, it was rejected.

209 Lord Hoffmann's dictum was obiter and provisional: (***"would not exclude the possibility"***) and fell far short of a direction to this Court to abandon its long standing jurisprudence. Nor did Lord Hoffmann clarify precisely what liberal interpretation he would adopt.

210 The main thrust of Lord Hoffmann's remarks were to prevent this Court embarking on an exercise of evidential valuation which was for the Jurats alone (once the trial Judge had decided that there was a case to answer).

211 We recognise the depth of the research into Commonwealth jurisprudence (from Australia, New Zealand and Canada) undertaken by the defence team but do not need to draw any conclusions from it as to where the redrawn boundary for this Court would lie.

212 We would only observe that the varying language deployed by distinguished judges in other jurisdictions (sometimes by reference to statutory provisions distinct from those that obtain in Jersey) did not plot any clear and consistent line.

213 Even if a 'lurking doubt' test were appropriate in this jurisdiction we should emphasise that nothing in the documentation or submissions has stimulated in us any such a lurking doubt. The argument for a more liberal test, though interesting, was in the event academic.

214 Moreover the present is not a suitable case to review the above test. The Applicant does not identify in terms a particular or peculiar feature of the present case which gives rise to the need to review it. In addition the verdict in question is one reached by Jurats, who have all the attributes identified by Lord Hoffman in *O'Brien* and Beloff JA in *Taylor* (supra 217).

215 Indeed the test Advocate Kelleher wishes the court to apply as set out at paragraphs 101 and 102 of his skeleton argument:-

Appears to be almost the same, if not precisely the same, as the test formulated by Lord Goddard in *Hopkins – Husson* and consistently applied in Jersey and Guernsey.

> *"101…It is…not enough to disturb a verdict simply because the appellate court disagrees with the verdict; reasonable minds may disagree.* Rather it must be that a verdict shall be disturbed if the court concludes that no jury, acting reasonably, ought not to have had a reasonable doubt…
>
> *102…The proper test on the first ground ought to be: a verdict of guilty will be unreasonable where it is a verdict that, having regard to all of the evidence, no jury could reasonably have reached it to the standard of beyond reasonable doubt.* The words "cannot be supported having regard to the evidence" ought to be interpreted as representing the extreme end of unreasonable."

216 The difference appears to be (paragraph 101 to 102) that Advocate Kelleher seeks to say that the Court of Appeal must review, analyse and weigh the evidence and that, with two exceptions, "it is hard to see how a doubt experienced by the appellate court will not result in a conclusion that a reasonable jury ought also to have experienced that doubt and

therefore cannot have been sure as to the defendant's guile'". This is with respect not necessarily so.

217 We therefore direct ourselves by reference to the following propositions and principles, as set out in *Taylor*:-

> ***"15. In an appeal against conviction it is necessary to bear in mind at all times the following matters*:**
>
> > ***(i) The jurisdiction of this court is defined by the 1961 Law (the material parts of which we have already recited)*** .
> >
> > ***(ii) The powers of this court are therefore more limited than those currently enjoyed by the Court of Appeal (Criminal Division) in England and Wales, which incorporates the concept of an "unsafe" verdict, and, by judicial gloss, that of a lurking doubt*** .
> >
> > ***(iii) Where an appeal is from the verdict of Jurats, who are not "speaking," i.e. do not disclose the reasons upon which the verdict is based, "if the summing up is sound the court may well not able to interfere unless the verdict is obviously wrong"*** *(Guest v. Law Officers (3))* .
> >
> > …
> >
> > ***(vii) In assessing the rightness or wrongness of the verdict, the Court of Appeal must at all times bear in mind that the function of fact finding has been left to the lower court and that, particularly where credibility is in issue, the lower court notoriously has the advantage, denied to the Court of Appeal, of seeing and hearing the witnesses, including, most importantly, the defendant*** .
> >
> > ***(viii) Furthermore, as Le Quesne, J.A. observed in*** *Tilley v. Law Officers (10)* , *"… the Jurats are holders of judicial office and are far more experienced in the affairs of law and legal procedure than the normal juryman in the United Kingdom."* A challenge to their verdict as unreasonable is especially difficult to make good."
>
> ***(emphasis added)***

218 See also *Snooks* [1997] JLR 253, paragraph 144. And *Snooks v UK* at paragraph 201 herein

219 Ground 2 turns on whether the Jurats were entitled to accept the fear purpose or to conclude that the anger/pressure purpose may be true. We must note at the outset that the best evidence of purpose would be that of Mr Bhojwani himself. He was, of course, entitled

not to give evidence: and no finding of guilt could be based on his decision not to do so. But by the same token his decision, after the conventional warning by the Commissioner, deprived him of the opportunity to explain facts which the Jurats could reasonably consider cried out for explanation or to persuade them of the plausibility, probability or even possibility of his version of events. The Jurats here heard nothing from Mr Bhojwani to explain, contradict or undermine the prosecution case.

220 For the purposes of this Ground 2, Advocate Kelleher advanced argument on the following assumptions:-

(i) the monies held in accounts in the names of Tata Overseas Sales and Services Ltd ("TOSS and Britannic Trade Corporation ("BTC") at Bank of India Jersey ("BoIJ") in October 2000 were the proceeds of crime for the purposes of Article 34(1)(b) of PoCL 1999;

(ii) these proceeds had derived from payments by the Nigerian Government pursuant to the contracts dated 1996 and 1997 between TOSS and the Nigerian Government;

(iii) the contract prices set out in the contracts dated 1996 and 1997 had been increased to include commissions which were payable to or on behalf of Nigerian public officers;

(iv) commissions were paid to or on behalf of Nigerian public officers by TOSS and BTC from the monies received from the Nigerian Government pursuant to the 1996 and 1997 contracts into accounts in the names of TOSS and BTC at BoIJ. These included payments to the accounts known as 'Kaiser' and 'Seuze' in Switzerland;

(v) Mr Bhojwani was at all material times the controlling mind behind TOSS and BTC.

221 Even in the absence of evidence of a quite different and credible explanation for Mr Bhojwani's conduct, Advocate Kelleher strenuously argues that the Prosecution's case on purpose defies reasonable belief. It is common ground that the Prosecution case depended on inference. There was no direct evidence of Mr Bhojwani's purpose. Advocate Kelleher submitted that the Jurats could not reasonably have been driven to the conclusions put forward by the Prosecution. There was no credible basis for the Prosecution's analysis that the Financial Times article (even if drawn to his attention) would have given Mr Bhojwani any cause to fear an investigation by the States of Jersey police, let alone a criminal prosecution or confiscation in Jersey as required by Article 34(1)(b) of PoCL 1999. On the Prosecution's own case, the predicate conduct was committed in Nigeria with the state of Nigeria as victim. Even if the Prosecution had been able to prove Mr Bhojwani had read the Financial Times, that it had caused him concern and he had reacted to it, protecting his monies against a civil tracing and seizure on behalf of the Nigerian government (in respect of which he had sought Jersey legal advice before paying monies into Bank of India (Jersey) from the 1996 contract) the Defence argue it was infinitely more likely than protection against criminal investigation or prosecution in Jersey. Even if a possible criminal prosecution arising from the 1996 and 1997 contracts had been a concern for Mr.

Bhojwani, it would have been a possible criminal prosecution in Nigeria, not in Jersey. The anger/pressure defence was a more probable, but certainly possible, explanation of Mr Bhojwani's activities in the critical days.

222 These submissions reflected in essence those advanced at the conclusion of the prosecution case in the context of the submission of no case to answer and were (correctly in our view) rejected by the Commissioner. The only significant evidence then introduced by the defence was that of the Indian bankers, Mr Ramakinshnan and Mr Narayanan. Only Mr Narayanan, who was the Manager of BOIJ from May 1997 to July 2001, actually gave evidence of the so-called anger/pressure defence, and he was only essentially repeating what Mr Bhojwani had told him. As Advocate Jowitt pointed out, the Jurats, in reaching their verdict, might have disbelieved Mr Narayanan: but, might equally have believed him truthfully to be telling them what Mr Bhojwani untruthfully told him.

223 We interpolate to note that Advocate Kelleher said that if we acceded to his submission to adopt a more liberal interpretation of our powers, we would necessarily have to watch 6 days of the Indian evidence on DVD. Apart from the consideration that this casts doubt on, if not the virtues of a more liberal interpretation, at least its dimensions, we find it difficult to understand, having had the benefit of perusal of the transcript, how sight and sound of the Indian witnesses could have persuaded us that in rejecting their evidence, the Jurats must have acted unacceptably when the written words did not..

224 In Advocate Kelleher's submission two matters were said to constitute particular obstacles to the Prosecution's case.

225 First, if the Prosecution was correct as to Mr Bhojwani's purpose, then his actions make no sense as a means to achieving that purpose:-

(i) because of the time it took from Friday 20 October to Wednesday 25 October to remove the Bankers' Drafts and hence the monies from the clutches of the Jersey authorities;

(ii) because the Drafts were returned within a week;

(iii) because at all material times the monies stayed in Jersey, as did all of the relevant banking documentation; and

(iv) because nothing Mr Bhojwani did during this period made it harder for the Jersey authorities to prosecute him or make or enforce a confiscation order.

226 Second, the Prosecution presented no sensible answer to the question, how likely was it that someone (i) who lived and worked in Nigeria; (ii) whose underlying conduct was said to be involved in two large frauds on the Nigerian state; (iii) whose links with Jersey were limited to holding and operating bank accounts there from afar, would have given thought to

the possibility that any of his actions in relation to the Nigerian contracts of 1996 and 1997 amounted to Jersey criminal offences. The evidence was that he had taken Jersey legal advice in 1996, about the confidentiality of his accounts in Jersey; he used to pay commissions to people in Government in Nigeria from contract proceeds; and he had neither sought nor received advice about any possible Jersey criminal offence that may be committed.

227 Advocate Kelleher submitted that Mr Bhojwani was not charged with converting or removing proceeds of criminal conduct in Nigeria for the purpose of avoiding prosecution for that Nigerian conduct; instead he was charged with converting or removing the proceeds of the criminal conduct in that other place for the purpose of avoiding a prosecution for a serious offence in Jersey and/or the making or enforcement of a Jersey confiscation order. Nor would it be sufficient to show that he acted so as to avoid their seizure at some future date to satisfy a civil claim. That we accept.

228 Advocate Kelleher added that in fact nothing Mr Bhojwani did made a Jersey prosecution/confiscation any more difficult or any less likely. Whilst moving the monies around within the same branch at Bank of India Jersey might, possibly, have placed a layer of difficulty in the way of a civil tracing order, it did nothing whatsoever to thwart a prosecution or a confiscation. All of the evidence remained in Jersey at that Bank. Advocate Kelleher submitted that if conduct is unlikely to have certain consequences, it must be a reasonable inference that the actor did not have those consequences as his purpose when he committed the conduct. We repeat that the logical conclusion of this argument is that any person accused of money laundering would by definition be innocent since the very fact that he had (after investigation) been charged proves that he could not have intended to conceal it. We reject as baseless the notion that a money launderer could not be incompetent.

229 In response Advocate Jowitt's forensic exercise (which was conducted throughout with exemplary skill) had two parts: first to indicate the basis upon which the Jurats could properly have accepted the prosecution version of events, and second, why Mr Bhojwani's version was unsustainable.

230 In relation to the first he traced the ins and outs of the various funds. We have already commented on the sequence of events on Monday 23 October. An account which had been in static locations for 4 years was to be converted under mobile banker's drafts. (We note en passant that the fact that Mr Bhojwani habitually used banker's drafts for various ordinary purposes, a point stressed by Advocate Kelleher, does not diminish the unusual feature of the conversion of those monies in those accounts into those instruments). The errors in initial quantification of the funds could be the hallmark of haste. On Tuesday 24 October he had a change of heart. The BTC account was now to be divided into 4, not 2 banker's drafts: the TOSS account into 2: and instructions given to pay those into accounts in JME accounts: the letters falsely stating that the Bankers drafts were enclosed. The instructions repeated the need to deliver up all TOSS/BTC documents, so seeking to swap any connection between the old accounts and the new, and to create an illusion that the monies

in the BTC account were fresh untainted monies. This exercise in the event unconsummated (and hence not the subject of any charge), Advocate Jowitt characterised as a half way house – keeping the money in Jersey (earning interest and available for use in connection with IMDs) but disguising its origins.

231 On Wednesday 25 October 2000 the instructions were raised, the banker's drafts were to be collected by courier, and spirited away, so avoiding the possibility of confiscation. This was the substance of Count 2.

232 Finally, when, in particular, further stories in the FT suggested that the focus of any investigation into looted Nigerian monies had switched to the UK, Mr Bhojwani took a calculated risk to return the money to the main branch but not into their original accounts, but into Jarrys Mantra and Enrock (referred to as “JME”). This was the subject of Count 3.

233 Advocate Jowitt observed that all of those various money movements, set in the context of the first FT articles, could (and should) be interpreted as the actions of someone, concerned to ensure that his ill-gotten gains would elude confiscation consequent upon any Jersey prosecution, but with fluctuating views as to how best to achieve this aim, and moved by a concurrent desire to be able to retain monies in Jersey at his disposal.

234 As to the defence version Advocate Jowitt made a number of points:-

(i) First, the suggestion that Mr Bhojwani's movement of monies was triggered by knowledge of a BOI Board meeting on 20 October 2000 in which the limits of what they could offer their customers in connection with IMD were set out, and an angry reaction to it, was undermined by the fact that contemporary documents showed him to be well aware of those limits at the latest several days earlier.

(ii) Second, Mr Bhojwani was aware that those limits were not the product of Bank of India spontaneous policy but the consequence of restrictions by RBI which he himself described in consequence as “technical”.

(iii) Third, in such circumstances there was no reason for Mr Bhojwani to be angry with BOI.

(iv) Fourth, (in any event) there was no trace in the BOI documentation (letter, memo, file note) of any indication that Mr Bhojwani was angry with the BOI.

(v) Fifth, that a letter of 27 October 2000 from Mr Bhojwani to BOI indicating satisfaction with the position by them achieved in terms of his funding for IMD was not followed by prompt return of the funds to their original accounts (or indeed to Jersey) as would have been the natural reaction once the spasm of anger had passed. Rather for several days the banker's drafts remained at large so that Mr Bhojwani was losing the benefit of interest.

(vi) Sixth, if indeed Mr Bhojwani's motive had been only to force BOI into a more liberal position by threatening to withdraw his custom there were far simpler ways of doing so. The complex manoeuvres which he in fact engineered were unnecessary for such a simple objective.

235 It is only necessary to highlight the key elements of the prosecution case to appreciate that the Jurats had ample material on which to convict:-

(i) The totality of Mr Bhojwani's conduct in Nigeria had to be taken into account. He plainly knew that the proceeds of criminal offences had been transferred to the TOSS and BTC accounts in Jersey.

(ii) Mr Bhojwani had, prior to the money being transferred to Jersey, sought legal advice in Jersey as to whether a new Government in Nigeria could make a claim in Jersey on the money. He was thus plainly concerned about secrecy – Switzerland was apparently not regarded as safe enough.

(iii) The coincidence of timing between what Mr Bhojwani did on the 23 October 2000 (i.e. close accounts into which as it happened the proceeds of criminal conduct had been paid and demanded the balances in banker's drafts which were fully negotiable) and the appearance of articles in the Financial Times on 20 October 2000 (a Friday) showing criminal investigations under way in a number of jurisdictions. On Mr Bhojwani's case his acts would have been entirely unrelated to the articles in the Financial Times.

(iv) The way in which the bankers drafts were in fact used to pay money into the accounts of Enrock, Jarrys and Mantra, as opposed to by way of simple bank transfer.

(v) That one of his purposes was plainly to avoid a prosecution is confirmed by the stance he took in 2002 when approached by Commissioner Gana in Nigeria. He produced a written statement that was a pack of lies and handed over carefully doctored copy documents. This was entirely consistent with someone who was seeking to avoid a prosecution by concealing evidence [e.g. what was actually contained on his lap top computer]. Documents later found (2007) on that computer showed his statement was entirely untruthful.

236 The inferences that the Jurats drew from the evidence overall were again quintessentially a matter for them.

237 The prosecution case was indeed, Advocate Jowitt submitted with force, enhanced rather than weakened by the defence evidence. For example the following extract from the cross-examination of Mr Narayanan states no more than a commonsensical conclusion:-

"Q: If Swiss had discovered Kaiser and Seuze they'd quickly discover your branch had paid money into them?

A: Yes, obviously.

Q: And if they shared that info with Jersey police what might have happened?

A: The police might have come knocking on the door of BOIJ."

238 The prosecution case was that the fact of and the manner of use of banker's drafts without the 'a/c payee' crossing was evidence of Mr Bhojwani's purpose in carrying out the transactions in question.

239 The essence of Advocate Kelleher's submission is to be found in paragraph 195 of his written contentions '…the use of banker's drafts could never make the proceeds of the TOSS and BTC accounts untraceable and Mr Bhojwani could not have sensibly have concluded any differently unless he was a financial ingénue which he clearly was not on the evidence.'

240 Mr Narayanan's evidence directly contradicted the statements made by Mr Bhojwani. In examination in chief, Mr Narayanan said:-

"A: When the draft gets paid we get either a direct communication or telephone or telex…

Q: What would that information tell you, what would it contain?

A: The information would say, would give the number of the draft, date of issuance, and the name of the payee, and the amount of the draft. With the value date of debit.

Q: What would happen to the original of the draft if it was paid?

A: The original draft once it gets paid is retained at the drawee branch as their record.

Q: What would know at BOIJ about who received the money?

A: BOIJ would not come to know as to how the draft has been paid or to whom it has been paid."

(Emphasis added)

241 In light of the last answer it is clear that the reference to 'payee' in the second answer is to the original payee as appears on the face of the draft, not the person to whom the monies were paid.

242 This evidence was repeated in cross-examination:-

"Q: these drafts, nothing between the tramlines.

A: yes

Q: means B could endorse them payable to anyone anywhere in the world

A: yes

Q: once drafts left your bank there'd be no easy way for you to know where they'd gone?

A: yes

…

Q: I could if I wanted to endorse it payable to someone else

A: yes

Q: and in turn he if he wanted could endorse it to a third person

A: yes

Q: or a fourth or a fifth or sixth

A: possible

Q: it's a freely negotiable commercial instrument isn't it?

A: It's a freely negotiable instrument."

On being asked in cross examination 'can you think of any honest reason why anyone would make an internal transfer using banker's drafts?' Mr Naryan answered' no'.

243 Turning to the banking documents the only notation on the bank statements is that the balance was debited 'To issuing DD fvg self'. The carbon copies of the drafts issued do not give any further information. There is nothing in the TOSS or BTC account records at BOIJ to show that the monies were paid on to Enrock, Jarrys and Mantra. It follows that if the drafts had left Jersey for good, there would have been no record in Jersey as to where the money had gone. The Jurats were therefore entitled to be sure that at the very least one of the reasons for using bankers drafts in the way Mr Bhojwani used them was to avoid a Jersey prosecution or confiscation order.

244 The prosecution accepts that the evidence of Mr Nair, Mr Bhojwani's Deputy General Manager in Nigeria as to Mr Bhojwani's timely visit to Nigeria on October 25th —2000, when the bankers drafts were to be delivered to London was not contradicted. The Jurats were nonetheless left considering a man who instructed that US$ 43 million in bank drafts without an a/c payee crossing be put in the hands of a courier to a destination (London), where he was not going to be to receive them. Such is sufficiently unusual for the Jurats, in

our view, legitimately to have taken it into account when considering whether Mr Bhojwani's purpose in carrying out the transactions alleged in the indictment was to avoid a Jersey prosecution or confiscation order.

245 To the extent that we have not made reference to them under Ground 2, the very matters which we considered were apposite for consideration and assessment by the Jurats in dealing with Ground 1 were equally in our judgment capable, applying the traditional test, of justifying their overall conclusion.

246 The defence case on anger/pressure always faced two major obstacles. The first was chronological. For it to be viable a Procrustean operation would be necessary lopping off segments of time each end. Mr Bhojwani was aware —the correspondence shows —of the inability of BOI to match his loan demands earlier than October 20th (an inability incidentally which was none of their making since it reflected State Bank policy); so if animated by anger/pressure he would have been likely to have acted earlier than he did. By October 27th, the correspondence also shows, BOI were in a position to satisfy his outstanding demands; yet he took no action to repatriate his monies in Jersey until after 2 November, the date when a further Financial Times article suggested that the heat had gone out of the chase. So for a period of several days his money, in the form of banker's drafts, was not gaining the interest that a businessman acting rationally, and purged of his anger/pressure motive would have wished it to do. The second was substantive. If indeed he was animated by the anger/pressure motive, he could simply have transferred or threatened to transfer his entire accounts elsewhere without the need for such elaborate manoeuvres as he in fact indulged in.

247 Finally, when dealing with the particular aspects of Advocate Kelleher's contentions it is apposite to bear in mind the observations of Lord Hoffmann on circumstantial evidence in *O'Brien* (paragraph 2526):-

"It is in the nature of circumstantial evidence that single items of evidence may each be capable of an innocent explanation, but taken together establish guilt beyond reasonable doubt" .

248 This reflected what had been colourfully said more than a century earlier in the case of *R v. Exall* (1866) 176 ER 850:-

> ***"It has been said that circumstantial evidence is to be considered as a chain, and each piece of evidence as a link in the chain, but that is not so, for then if any link broke, the chain would fall.*** It is more like the case of a rope composed of several cords. One strand of the cord might be insufficient to sustain the weight, but those stranded together may be of quite sufficient strength" .

249 We can in short see no basis at all for impugning the Jurats' verdict.

250 The appeal against the finding of guilt must therefore be dismissed.

251 We turn accordingly to the question of sentence.

Sentence

252 To recapitulate on 5 March 2010, Mr Bhojwani was convicted of two counts of converting and one count of removing the proceeds of his own criminal conduct contrary to Article 34(1)(b) of the Proceeds of Crime (Jersey) Law 1999 (the "PoCL 99").

253 On 25 June 2010, Mr Bhojwani was sentenced by the Superior Number of the Royal Court to 6 years' imprisonment on each count, to be served concurrently.

Facts for the sentence appeal

254 Mr Bhojwani is an Indian national, aged 53 years, with no previous convictions. The facts are fully rehearsed in the conviction judgment set out above and not here repeated, save to mention a few central points such as are required to make our reasoning intelligible.

255 In 1996 and 1997 Mr Bhojwani engaged in conduct in Nigeria, which, had it occurred in Jersey, would have constituted criminal conduct as defined in the PoCL 99 – i.e. the predicate conduct. Through a Panamanian shelf company named Tata Overseas Sales and Services (TOSS) he sold vehicles to the Nigerian Government under two separate contracts in which the true price of the vehicles was inflated by between 400 and 500%. The consideration was approximately $184 million for vehicles worth less than $40 million. These transactions were undertaken with the country's then military dictator, the late President Abacha and the country's Defence Adviser to the United Nations, Colonel Marwa.

256 The proceeds were paid to accounts controlled by Mr Bhojwani in Jersey, out of which approximately $100 million was paid to accounts in Switzerland connected with President Abacha and Colonel Marwa. Mr Bhojwani's share was $40 million which he retained in accounts in Jersey. Of that sum he asserts that approximately $25 million represented the true profit to him.

257 The Proceeds of Crime Law offences took place in October/November 2000. As we have already recorded in the Conviction judgment on 20 October 2000 the Financial Times published an expose on the late President Abacha's corruption. The articles revealed that the Swiss authorities had identified the accounts connected with President Abacha into which millions of dollars from Nigerian corruption had flowed, and which Mr Bhojwani would have known received sums paid through his company. It was reported that whilst

London was lagging behind the game in combating money laundering, several offshore jurisdictions were, by contrast, being highly proactive and that even Jersey had frozen an account discovered on its own initiative. That claim and news was published in the Jersey Evening Post the same day.

258 On the next working day, 23 October, Mr Bhojwani converted all the proceeds of two accounts that he held at the Bank of India Jersey, totalling $43.9 million, into freely negotiable drafts (count 1) which he then had delivered to London (count 2). $34 million, being 78% of that sum, was traceable to the two contracts in 1996 and 1997. That equates to some £20 million, applying the exchange rate applicable in 2007. The sums remained out of the banking system for about twelve days before being delivered back to Jersey to be credited to accounts in the names of different companies controlled by Mr Bhojwani (count 3).

The Sentencing Hearing

259 On 24 June 2010, before the Commissioner and five Jurats, comprehensive submissions were made by Advocate Jowitt and Advocate Kelleher. Advocate Jowitt recited the facts of the offences. On the one hand there were mitigating features. The offence related mitigation was that the offences were not professional money laundering, but a spontaneous reaction to breaking news and were committed over a short period of time. The personal mitigation was that these were Mr Bhojwani's first convictions, that he had a record of charitable works in the Third World and that many referees spoke well of him.

260 On the other hand there were aggravating features namely the underlying criminality, which was substantial corruption of government to the detriment of a Third World country and its impoverished people; the fact that Mr Bhojwani had targeted Jersey to receive his proceeds of that corruption, to conceal it and ultimately to launder it when the opportunity arose; and the importance to Jersey of its finance industry and its reputation which made money laundering offences more serious. The Crown invited a sentence which would send a clear deterrent signal.

261 Advocate Jowitt identified a starting point of 12 years' imprisonment and moved for sentences of 9 years concurrent for each offence.

262 On 25 June 2010 the Court gave full reasons, adopted a starting point of 8 years, reduced that sentence to reflect the mitigation to 6 years' imprisonment concurrent for each offence. Mr Bhojwani was sentenced accordingly.

263 Mr Bhojwani seeks leave to appeal the sentence (*AG v Bhojwani* [2010] JRC 116) on the following grounds of mixed fact and law:-

(i) The Commissioner erred in his decision on 28 May 2010 in ruling that because whether or not Mr Bhojwani's conduct in Nigeria was criminal was reflected in the indictment so that the sentencing court must have regard to it, and the sentencing court in consequence erred in finding that it was entitled to have regard to the criminal conduct in order to determine the gravity of the offence ("Sentencing —Ground 1");

(ii) in light of his ruling (if correct) that the sentencing Court could have regard to the predicate criminal conduct in order to determine the gravity of the offences, the Commissioner ought to have given directions to the Jurats to identify the manner in which predicate criminal conduct was relevant to sentencing and/or the weight it should be given in determining Mr Bhojwani's sentence. The Commissioner in consequence further erred in failing either to give directions to the Jurats or, if directions were given, to give such directions in open Court during the sentencing hearing on 24 and 25 June 2010 ("Sentencing —Ground 2");

(iii) the Commissioner erred in finding that in relation to sentencing for the offences charged and as a matter of law there was no distinction in the criminality of laundering the proceeds of one's own criminal conduct and the laundering of the proceeds of a third-party's criminal conduct ("Sentencing —Ground 3");

(iv) alternatively to (iii) above, the sentencing Court erred in failing in the event to distinguish the gravity of the offences in *AG v Michel* [2007] JRC 120 ("Michel") from the offences in Mr Bhojwani's case] ("Sentencing —Ground 4"); and

(v) the sentencing Court erred in failing to take sufficient recognition of the personal mitigation put forward by Mr Bhojwani by way of an appropriate reduction in his sentence ("Sentencing —Ground 5").

264 We considered the written and oral submissions made on behalf of Mr Bhojwani and granted leave to appeal on each of the five grounds.

The law applicable to an appeal against sentence in Jersey

265 Article 26(3) of the Court of Appeal (Jersey) Law 1961 states:-

"On any appeal against sentence, the Court of Appeal shall, if it thinks that a different sentence should have been passed on the Appellant in the proceedings from which the appeal is brought, quash the sentence and pass such other sentence warranted in law by the verdict (whether more or less severe) in substitution therefore as it thinks ought to have been passed, and in any other case shall dismiss the appeal."

266 The principles which apply and are followed in Jersey are set out in the judgment in *Harrison v AG* [2004] JLR 111 ("Harrison").

267 Paragraph 29 of the Harrison judgment refers to the statement in *Att.* Gen. v Sampson (9) (1965) JJ at 499)("Sampson") that:-

> ***"the Court will not alter a sentence merely because members of the Court might have passed a somewhat different sentence."***

Paragraph 30 of Harrison states:-

> ***"30. In** Att. Gen. v Gorvel **(3) this approach was further refined by reference to the English authorities. The judgment contains this passage** (1973 J.J. at 2511) **"The practice of this court in considering appeals against sentence is to change a sentence only if it is satisfied that it is either manifestly excessive, in the circumstances of the case, or for some reason wrong in principle." The adoption of this approach rather than the literal construction of the English statute or the Jersey law has been of considerable benefit in excluding unmeritorious applications for leave to appeal in both jurisdictions, and the importance of the principle has frequently been asserted by this court, most recently in** Morgan v Att . **Gen.(25): "It is not the function of this court to tinker with sentences which were well within the range open to the sentencing court simply because we might ourselves have fixed a lower level of imprisonment."** The approach was also re-emphasised in*Hunt v Att.* Gen. **(21) and we endorse it."***

268 Paragraph 31 of Harrison sets out the position also presaged in Sampson and adopted in the jurisdiction of Jersey with reference to the summary in Archbold, Criminal Pleading, Evidence & Practice (2003 ed.) para 7–136 at 966:-

> ***"In broad terms, it is submitted that the court will interfere; (a) where the sentence is not justified by the law, in which case it will interfere not as a matter of discretion but of law; (b) where sentence has been passed on the wrong factual basis; (c) where some matter has been improperly taken into account or there is some fresh matter to be taken into account; or (d) where the sentence was wrong in principle or manifestly excessive."***

This is the basic point from which the Court of Appeal starts its analysis of a Royal Court sentencing decision."

269 The Harrison judgment identifies the two significant differences between a Crown Court in England and the Royal Court in Jersey. The first is that by Article 13 (3) of the Royal Court (Jersey) Law 1948:-

> ***"In all criminal and mixed causes, the Jurats shall determine the sentence, fine or other sanction to be pronounced or imposed"***

270 The second is that the Crown enjoys an enhanced role in the sentencing process which "necessarily results in a detailed investigation and enquiry into what is the appropriate

sentence".

271 At paragraph 38 the judgment of Neill JA, now Lord Neill of Bladen Q.C. in *Att.Gen.* v Paget (7) ((1984) JJ at 64–65) was quoted regarding these differences:-

> ***"—-By long tradition, it is the accepted role of Crown counsel to give guidance and help on this matter and to represent the public interest.*** There is nothing comparable in England. Secondly, the sentence in this case was arrived at by the learned Deputy Bailiff sitting with ten Jurats. To this extent, the sentence represents a much broader spectrum of judicial opinion than a sentence imposed by a single judge in England—-These and many other features indicate that the systems have different traditions and different modalities. Over and beyond this is the point where the Royal Court sitting in Jersey will be aware of current attitudes here to sentencing and will know, in particular, what sort of crimes are prevalent and for what crimes it is desirable to retain a severe deterrent sentence."

Sentencing —Ground 1

272 In May 2010 the Commissioner was invited to rule, in the absence of the Jurats, on two issues prior to sentencing.

273 This ground concerns only one of those issues; whether as a matter of law the sentencing Court can have regard to the predicate conduct for the purpose of sentence.

274 In his judgment of 28 May 2010, the Commissioner ruled that:-

> ***"13. One of the ingredients of the offence, therefore, is whether the conversion/removal involved the defendant's proceeds of criminal conduct. That conduct is particularised in each count (and it is the same particulars for each count). The first task of the Jurats at the trial (as made clear in the directions given to them) was to consider whether that conduct particularised in each count took place in Nigeria (the predicate conduct) and if so whether (following the process of transposition) it would have constituted a serious offence if it had occurred in Jersey*** .
>
> ***14. The defendant's conduct in Nigeria is therefore reflected in the indictment and in my view the sentencing court must be entitled to have regard to it for the purpose of sentencing."***
>
> ***15. However, that does not mean that the defendant is to be sentenced for that predicate conduct. Defendants are not sentenced for the individual ingredients of an offence but for the offence as a whole. The sentencing court may have regard to the predicate conduct (amongst other considerations) in order to***

assist it in determining the gravity of the money laundering offences for which the defendant is to be sentenced. It is an obvious question that a sentencing court would wish to address—what sort of criminal activity does this money laundering relate to and what is the defendant's knowledge of it? Nor does it mean the defendant's predicate conduct is the sole consideration for the sentencing court to take into account in determining the gravity of the offences. Although it will be a matter for the sentencing court, it will no doubt wish to have regard to the scale, sophistication and duration of the money laundering."

275 The sentencing court's judgment *AG v Bhojwani* [2010] JRC 116 records the May finding as follows:-

"30. Whether or not there has been criminal conduct, as defined in the Proceeds of Crime Law is an ingredient of the offence and is therefore reflected in the indictment. In our view the court is entitled to have regard to it in order to determine the gravity of the money laundering offences. But, as the Court of Appeal in this case made clear , ([2009] JCA 115A, ***at paragraph 34) the defendant is not being prosecuted for his actions in Nigeria in 1996 and 1997, and it follows that he should not be sentenced for those actions as if he had been prosecuted for them. We agree, therefore, with Advocate Kelleher that our focus is upon the money laundering offences in October and November 2000, for which he has been found guilty."***

276 Advocate Kelleher here submits that in this case, the predicate conduct was particularised in the Indictment in order that, in relation to the predicate conduct to be transposed, Mr Bhojwani would know the case against him in sufficient detail. Mr Bhojwani was not on trial for that conduct and could not be found guilty of any offence other than the money laundering offences with which he was charged. The Commissioner therefore erred in treating the particularisation in the Indictment as justification for having regard to the predicate criminal conduct thus particularised in the sentencing exercise.

277 In his May judgment the Commissioner implicitly distinguished the case of *R v O'Prey* [1999] 2 Cr. App. R. (S) 83 ("O'Prey") in which the Court-as it was held on appeal incorrectly—sentenced the appellant for conduct for which he was not charged and not on trial and, in consequence, not particularised in the indictment. Advocate Kelleher contended that he was wrong to do so.

278 In O'Prey, the defendant pleaded guilty to i) doing an act tending to pervert the course of justice ii) driving whilst disqualified iii) possession of cannabis resin and iv) driving whilst unfit through drugs. Nevertheless, the Court imposed a sentence which reflected the dangerous manner in the defendant had been driving although he had not been charged with dangerous driving itself. On appeal, Thomas J stated at page 87:-

"What, however, was not permissible was for the judge to sentence this

appellant for the criminality not reflected in the indictment, and to which the appellant had therefore not pleaded…

and after quoting from Lawrence 1983 5 Cr App R(S) 220 .

concluded"

"The learned judge in the present case was, therefore, not entitled to sentence this appellant on the basis that he was guilty of dangerous driving."

279 The Court also there stated:-

"The learned judge should, in our view, have sentenced the appellant on the basis that the criminality relating to the use of the cannabis and driving was in the actual offence which was before the court the offence of driving whilst unfit through drugs."

280 At trial in the present case, the Jurats found the existence of the "proceeds of criminal conduct" through the process of transposition. The existence of such proceeds is a condition precedent-it is common ground—of the offence with which Mr Bhojwani was charged but, Advocate Kelleher submits,that uncontroversial proposition does nothing to derogate from the hypothetical manner in which the criminalisation of the proceeds is achieved,. It is accordingly contended by him that the process of transposition cannot and does not criminalise the conduct itself and, in consequence, cannot, consistently with the principle in *O'Prey*, properly or fairly result in punishment by a sentence which is passed having regard to or "on account of" such conduct.

281 This Court previously found (*Bhojwani v Attorney General* [2009] JCA 115A) that the principle of legal certainty, as prescribed in Article 7 of the European Convention on Human Rights, brought into Jersey law through Schedule 1 of the Human Rights (Jersey) Law 2000, is not engaged in this case because:-

"34. He [Mr Bhojwani] is not being prosecuted for his actions in Nigeria in 1996 and 1997: he is being prosecuted for his actions in Jersey in 2000, those actions being alleged to be the conversion or removal of the proceeds of criminal conduct. When the conversion or removal is said to have occurred, the Jersey statute was in force and clearly identified the elements of the offence. One such element is that the money should be the proceeds of conduct that would have constituted an offence in Jersey had it occurred there. The prosecution must therefore prove that what the applicant did in Nigeria in 1996 and 1997 would have amounted to an offence in Jersey if the applicant had done it there in 1996 and 1997."

282 Echoing this proposition, the Commissioner's summing-up at trial reiterated that Mr Bhojwani was not on trial for the alleged conduct in Nigeria, notwithstanding the critical

characterisation of that conduct by the Prosecution. Advocate Kelleher submits that this approach was sound so far as it went but that it did not go far enough.

283 Advocate Kelleher drew attention to the language of Article 7(1) of the European Convention on Human Rights which provides:-

> ***"No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed.*** Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed." (Emphasis added)

284 284. Advocate Kelleher submitted that the words ***"…on account of…"*** in Article 7 have no different meaning from the words used by the Commissioner and the sentencing court, that is to ***"…have regard to…"*** ….. above) and should lead to the opposite conclusion to that reached by the Commissioner. Article 7,he submits, rules out any reliance on the predicate conduct-not being the subject matter of the charge

285 Advocate Kelleher sought to derive support for this submission from *R v Rimmington* [2006] 1 AC 459 ("Rimmington"), where in discussing Article 7, Lord Bingham stated:-

> ***"33. There are two guiding principles: no one should be punished under law unless it is sufficiently clear and certain to enable him to know what conduct is forbidden before he does it; and no one should be punished for any act which was not clearly and ascertainably punishable when the act was done." (Emphasis added)***

286 Advocate Kelleher contends that the use of the term ***"punished"*** in the case of *Rimmington* is a natural extension of the words ***"held guilty"*** in Article 7(1). If there is no finding of guilt, the Court cannot punish that conduct. Both reflect "criminality" in the sense of an offence charged and for which the defendant has been found guilty.

287 Thus in the process of transposition a distinction, Advocate Kelleher argues, must be drawn between the "bare conduct" shorn of its Nigerian context (and accordingly any criminality) and the same conduct once transposed and measured by reference to one or more Jersey offences existing at the relevant time. This measuring of the conduct by reference to Jersey offences produces as legal fiction of deemed criminality for the purpose exclusively of allowing the Court to find that the property alleged to be the subject of the laundering represents ***"proceeds of criminal conduct"*** within the meaning of PoCL 99, but, he further argues, for no more extended purpose.

288 It is contended by Advocate Kelleher that for the purposes of Article 7 no "criminality" can be attached to the conduct itself either (a) on an assumed application of Nigerian law, or (b) on the hypothetical application of Jersey law, since in neither case has there been any

finding of “guilt” in relation to an offence. The conduct must therefore be wholly excluded from the sentencing exercise.

289 Advocate Jowitt accepts—obviously rightly—that a defendant should only be punished for conduct for which he has been prosecuted and convicted but meets Advocate Kelleher's points in the following way.

290 First *O'Prey* can be distinguished. In *O'Prey* the indictment did not reflect the whole of the criminality shown by the evidence, and it was held not to be open to a sentencing judge to sentence for the additional criminality not so reflected. In the present case the indictment does reflect such criminality. which accordingly can affect the sentence

291 Second the answer to Advocate Kelleher's submissions about the particularisation of the indictment and Article 7(1) ECHR lies likewise in the fact that the character of the assets being laundered is an element of the offences. Mr Bhojwani has not been punished for the predicate offending but for laundering assets produced by the predicate offending of the nature of which the Jurats found proved.

292 Advocate Jowitt also cited the English Court of Appeal decision in *R v Monfries* (2004) 2 Cr. App. R. (S) 3 (“Monfries”), a case concerning assisting another person to retain the benefit of criminal conduct, where it was held, in paragraph 7, that the relevant considerations for the purposes of sentencing in a case of that type are as follows:-

> ***"(1) The circumstances of assisting another to retain the benefit of drug trafficking and/or criminal conduct vary so widely that this Court has not to date provided detailed guidelines*** .
>
> ***(2) There is not necessarily a direct relationship between the sentence for the laundering offence and the original antecedent offence.*** Where, however, the particular antecedent offence can be identified, some regard will be had to the appropriate sentence for that offence, when considering the appropriate sentence for the laundering offence .
>
> ***(3) The criminality in laundering is the assistance, support and encouragement it provides to criminal conduct*** .
>
> ***(4) Regard should be had to the extent of the launderer's knowledge of the antecedent offence*** .
>
> ***(5) The amount of money laundered is a relevant factor”*** .

293 We were also referred to the English Court of Appeal decision in *R v Basra* (2002) 1 Cr. App. R. (S) 100(“Basra”), a case also involving assisting another to retain the benefit of criminal conduct. The judgment of Cooke J states at paragraph 13 that:-

"money laundering is a stand alone offence where the constituent elements may be many and varied.";

and at

"15. It seems to us, therefore, that there is no necessarily direct relationship between the sentence for the laundering offence and the original antecedent offence. The criminality in laundering arises from the encouragement and nourishment it gives to crime in general. Without it many crimes would be rendered much less fruitful and perhaps more difficult to perpetrate."

and at

"16. Nonetheless, the sentence for money laundering cannot be wholly disproportionate to the sentence for the original antecedent offence, where the offence is that of being involved in an arrangement whereby the retention or control of the proceeds of criminal conduct, here the evasion of £215,000 of V.A.T. is facilitated by the offender. He is assisting in the original crime, whether with knowledge of it, or, some other known or unknown criminality."

294 Advocate Jowitt submits that in a money laundering prosecution under Article 34 (1)(b) of the Proceeds of Crime Law a convicted defendant is to be sentenced for laundering assets of a particular character. The character of the assets (whether that be the proceeds of, of a parking ticket scam or of drug trafficking is an element of the offence and has to be alleged and proved by the Crown. The gravity of a money laundering offence is determined at least in part by the underlying criminality which generated the proceeds (the predicate conduct). To disregard the predicate conduct would be to ask the sentencing court to consider the matter in a factual vacuum.

295 This is indeed, Advocate Jowitt submitted, the approach taken by the English Court of Appeal. Monfries was quoted as relevant in *R v Adams* [2009] 1 WLR 301, where the launderer and predicate criminal were the same person and where the principles set out in Monfries were repeated at paragraph 14 (and in *R v Sarmiento* [2003] 2 Cr. App. R. (S) 9 it was held that the amount of money laundered was relevant.)

296 This attention paid to predicate conduct is also consistent with the approach taken in other classes of offending

297 In cases involving handling stolen goods, the nature of the 'predicate offence' is taken into account; *R v Webbe and Ors* (2002) 1 Cr. App. R. (S) 22 paragraphs 4, 15and 20. At paragraph 17 Rose LJ said:-

"There is an obvious difference, for example, between the gravity of

receiving in a public house £100 worth of stolen television sets, and the gravity of receiving £100 in cash from the proceeds of a robbery which has taken place in the receiver's presence."

298 In cases involving offences against justice the substantive offence or allegation is also regarded as being relevant; *R v Rayworth* (2004) 1 Cr. App. R. (S) 75, is a case where the Appellant pleaded guilty to a single count of doing an act tending and intended to pervert the course of justice. At paragraph 14 of the judgment, the Court of Appeal said:-

> ***"—-a case such as the present cannot be compared to cases involving driving where, for example, a defendant lies as to the identity of the driver.*** The principal offences here, the armed robberies were much more serious. The conduct of the Appellant was persisted in—-"

299 It follows that the approach taken by the Commissioner in paragraphs 13 to 15 of the May judgment, cited at 274, and by the Royal Court in sentencing at paragraph 30 of [2010] JRC 116, at paragraph 275 above was correct.

300 The attention of the Court was further drawn to the sentencing remarks of Thomas LJ in *R v Innospec* 26 March 2010 which concerned the approach to sentence in corruption cases and which includes at paragraph 31 the words "The courts have a duty to impose penalties appropriate to the serious level of criminality that are characteristic of this offence—-."

Conclusion on Sentencing Ground One

301 We reject Advocate Kelleher's submission that the Commissioner erred in directing the Jurats that they should have regard to the predicate conduct in their sentencing while not sentencing Mr Bhojwani for it for essentially the reasons advanced by Advocate Jowitt.

302 We hold that the Commissioner correctly applied the approach indicated by decision of the English Courts to which we have referred, albeit that they concerned laundering for the benefit of others not the launderer, a distinction which, in this context, is irrelevant. His reasoning also has the virtue of rationality and common sense; it would be counterintuitive to disregarded the nature of the predicate conduct is determining the gravity of the money laundering.

303 We reject in particular the submission that Advocate Kelleher is assisted by Article 7(1) of the ECHR in arguing for the predicate conduct to be excluded from consideration in the sentencing exercise. Consistently with that Article, and as previously held by this Court, Mr Bhojwani stood to be sentenced only for the offences of which he was convicted. To that extent Mr Bhojwani can rely on Article 7(1). However on each Count the Crown had to prove—and successfully proved (as the Jurats verdict showed) —that the money laundered was Mr Bhojwani's proceeds of his criminal conduct. Nothing in Article 7(1) outlaws

consideration of that matter in the sentencing exercise for the money laundering offence.

304 We note before leaving this ground that in the course of his submissions to the Royal Court on 24 June that Advocate Kelleher appeared to concede that 'at the trial of this matter, the conduct prior to October and November 2000 "was relevant to the offence being made out because an ingredient of the offence is that the property in question has to be the proceeds of crime." Later he said *"we accept that the conduct found to have taken place in Nigeria is relevant to the offence. It is relevant to sentence, in that it assists the Court, as this Court has found, in determining the gravity of the conduct and the gravity of the money laundering and the extent of Mr Bhojwani's knowledge of it."* He submitted too that the events of 1996 and 1997 had *"a strictly limited role to play in assessing the criminality of which Mr Bhojwani has been convicted. However, we do accept that the conduct may inform you in terms of the gravity of the offences of which Mr Bhojwani has been convicted."* His submission to us suggests a considerable change of direction. In our view his first thoughts were his better thoughts.

305 We therefore endorse the Commissioner's ruling which discloses no error of law.

306 For these reasons Sentencing Ground of Appeal 1 is dismissed.

Sentencing —Ground 2

307 Failing persuading us to the more extreme position contended for in Ground 1 Advocate Kelleher contends more moderately that directions to the Jurats were required to identify the manner in which the predicate criminal conduct was relevant to sentencing and/or the weight it should be given in determining Mr Bhojwani's sentence. It is not known whether any directions were given but, he submits, in any event such directions ought to have been given to the Jurats in open Court during the sentencing hearing on the 24 and 25 June 2010.

308 It is contended that directions were required to address, at least:-

(i) the right as a matter of law of the Jurats to take account of, or have regard to the predicate conduct and the basis in law for so doing;

(ii) the precise quality or character to be given to the predicate conduct for the purposes of having regard to it, and in particular, the notice, if any, which the Jurats should take of the extreme characterisation given by the Prosecution to the conduct; and

(iii) the weight to be given to the predicate conduct in relative terms in a sentencing process in which, in the terms of the sentencing judgment the "focus" is to be the money laundering offences.

309 As to the contention that such directions should be given in open court, Advocate Kelleher notes that in *MacKenzie v AG* [1995] JLR 9, it was held to be desirable for directions on issues of law (in that case, in Newton hearings) to be given to the Jurats in open Court, notwithstanding the fact that to give such directions in private was not unlawful. (In addition to the desirability that directions be given in open court, it was held in Harrison that this Court does have the jurisdiction to consider the overall procedural fairness of the Royal Court in reaching its decision on the sentencing of a defendant. In particular, it held at paragraph 33 that:-

> ***"By procedural fairness in a sentencing context, we would include a sufficient explanation on the basic reasons which had lead to the court to impose its final sentence, taking into account all of the circumstances of the case."***

310 The need for directions in this case, and the prospect of procedural unfairness in the absence of appropriate guidance to the Jurats was, Advocate Kelleher submits, exacerbated by the manner in which the Prosecution advanced its reasoning in support of the Attorney General's starting point and/or sentencing recommendation. In its Statement of Facts and Conclusions which was read to the sentencing Court, the Prosecution characterised Mr Bhojwani's predicate conduct as "corruption" (on 15 separate occasions); "payment of bribes" (on 8 separate occasions); "fraud" (on 9 separate occasions) as well as "fraudulent", "having defrauded" and finally "theft from the public purse…on a grand scale".

311 A reading of the Statement of Facts and Conclusions leaves no doubt, submitted Advocate Kelleher, that the Attorney General's sentencing conclusions invited in the clearest terms sentencing "on account of", if not for, the predicate offending and he contends that in the absence of any directions from the Commissioner with regard to the weight to be attached to the predicate conduct when determining sentence, there is a real risk that the Jurats were improperly influenced by the Prosecutions characterisation of the predicate conduct.

312 Advocate Kelleher submits that, the Commissioner should have repeated his direction set out in paragraph 15 of his May judgment see above para 274 and given a direction in accordance with paragraph 30 of his sentencing judgment see above para 275 to the Jurats in open court.

313 Advocate Jowitt submits on the other hand that the only question in this case is whether the Jurats correctly applied the law. The Court clearly complied with the quotation from Harrison regarding procedural fairness as set out in paragraph 309 above. The Royal Court considered careful and lengthy oral and written submissions from both the Crown and the defence in which all the relevant matters of law, including copious case law, and fact were fully rehearsed and amply exposed its reasoning for the sentence finally imposed.

314 In sentencing the Appellant the Commissioner rightly, Advocate Jowitt submits, followed, and emphasised in paragraph 30 of the Royal Court judgment, the approach laid down by the Court of Appeal in [2009] JCA 115A. He concluded with the words: “We agree therefore with Advocate Kelleher that our focus is upon the money laundering offences in October and November 2000, for which he has been found guilty”

Conclusion on Sentencing Ground two

315 Again we find ourselves in substantial agreement with Advocate Jowitt. The specific Harrison requirement of due process i.e. an explanation for conclusions reached was clearly complied with in the judgments of (specify). The process was completely transparent.

316 We reject the submission that the manner in which the Crown advanced its reasoning in support of the Attorney General's starting point and/or sentencing recommendation was such as to require guidance in the form of a direction from the Commissioner.

317 There was no particular issue of law arising in that context which required such a direction. The relative weight to be given to the constituent elements of the offences was a matter for the Jurats who had had all the information relevant to their sentencing decision and to have given a direction as to that relative weight would have been to trespass on their function.

318 We do not accept that the task here faced by the Jurats can be equated to that which existed in MacKenzie where it was held to be ‘desirable,’ in a Newton hearing, for the Jurats to be directed as to the law in open court. In the present case the facts of the offences were already established by the verdicts of the Jurats and in sentencing, the Jurats were concerned only with the weight, in accordance with the stated law, to be given to the various proved facts which comprised the verdicts and to assess the relative aggravating and mitigating features, together with all the other matters which were the subject of the submissions. This was not then a case where any direction was required in open court nor was there any risk in its absence that the Jurats were improperly influenced by the characterisation of the predicate conduct by the prosecution. Indeed their decision clearly indicates that they were not so influenced.

319 For these reasons we dismiss sentencing ground of appeal 2.

Sentencing —Ground 3

320 It is contended by Advocate Kelleher in Ground 3 that the sentencing Court erred in failing to take sufficient account of a proper distinction to be drawn as a matter of law between the laundering of one's own proceeds of crime-the counts on which Mr Bhojwani was convicted

—and the laundering of a third party's proceeds of crime.

321 Advocate Kelleher submits that Article 34 of the PoCL 99 itself recognises this distinction. as integral to the offences created. Article 34(1) deals with a person who conceals, disguises, converts, transfers or removes the proceeds of his own criminal conduct, a proposition to be contrasted with Article 34(2) which deals with a person who conceals, disguises, converts, transfers or removes the proceeds of another's criminal conduct.

322 The case law, it is said, also recognizes a distinction which is rooted both in the inherent nature of the offences and in their intended and actual consequences. Advocate Kelleher referred the Court to authorities which are said to draw such a distinction.

323 In *R v Linden Mangena* [2009] EWCA 2535 (“Mangena”) the defendant was convicted of fraudulent trading, money laundering and the carrying on of unauthorised investment business. The money laundering conviction related directly to the proceeds of the conviction for fraudulent trading.

324 The Court of Appeal altered the sentence which had made the sentence for the money laundering consecutive to the sentence for the fraud to one which made the sentences concurrent saying:-

“At the end of the day, however, we agree with the submission that the gravamen of this offending has to be found under the fraud count and not under the money laundering count. In truth the money laundering was the spending by the fraudster of his company's ill-gotten gains and although no doubt that aggravates the fraud, it is in truth part and parcel of the fraud.”

325 The Court of Appeal treated the “offending” as the aggregate of the predicate offending and the money laundering; and found the gravamen to be in the predicate offence.

326 Advocate Kelleher contends that the approach in Mangena reflects the reality that first-party money laundering offences will in all but wholly exceptional cases involve or follow a charge and conviction for the relevant predicate offending and points to a perceived distinction between first-party and third-party money laundering offences for the purpose of sentencing in treating the first-party money laundering offence as ancillary and secondary to the predicate offending, By contrast he argues, in third-party money laundering offences the gravamen is, by contrast, the encouragement and nourishment of criminality.

327 Advocate Kelleher has to accept that Mr Bhojwani's case is one of first party money laundering in which the predicate offending is not charged but says that the reason is exceptional i.e. that the conduct relied upon is conduct taking place exclusively outside of the jurisdiction of the Royal Court and does not alter the fundamentally ancillary and derivative nature of first party money-laundering.

328 Advocate Kelleher further suggests that, as a matter of policy, the judicial approach to sentencing in this area should not permit the Prosecution to conclude that it can, in the case of first-party money laundering offences, choose for whatever reason to charge a money laundering offence alone and by so doing nevertheless recommend and secure a sentence which would have applied had it charged and proved, as it should, the predicate or (applying Mangena) “gravamen” offence..

329 Advocate Kelleher accepted that Adams was a case in which, in an English prosecution, the first-party money laundering offence was charged alone. He noted, however that involved the Defendant pleading guilty in a manner which made it clear that the existence of predicate offending was not in issue: his concern was to ensure by way of mitigation that the court was aware that his predicate offending had long ceased prior to the money laundering. Therefore the Court was in a position to proceed on the basis of admitted “guilt” in respect of predicate offending.

330 In *Basra* the English Court of Appeal recognised, Advocate Kelleher observed, that the criminality lay in the laundering of a third party's proceeds of crime. It is explicable, Advocate Kelleher argues, that the Court of Appeal, in such a third-party laundering case, recorded that there is no direct link between the laundering offence and the antecedent offence and that it focused instead on what is identified as the gravamen of the laundering offence itself: "…the encouragement and nourishment it gives to crime in general.” In first-party money laundering there is, by contrast, a direct link between the predicate conduct and the laundering but it is contended that such a link must be addressed in the manner identified in Mangena which however depends upon the predicate offence being charged.

331 Advocate Jowitt responds that in money laundering cases the English courts have taken the fact sensitive approach set out by Cooke J in paragraphs 13–16 of *Basra* which we have cited above at paragraph 293.

332 The Royal Court adopted an consistent approach. At paragraph 29 of the sentencing judgment the Commissioner said:-

“The purpose of the legislation is to forestall, prevent and detect money laundering, and it seems to us that no distinction under the law or in principle is to be drawn in terms of criminality between a person assisting a criminal to launder the proceeds of his crime and a criminal laundering his own proceeds. Each case will depend on its own facts.”

333 Advocate Kelleher's submission that there is a distinction to be drawn as a matter of law between the laundering of one's own proceeds of crime and a third party's proceeds cannot succeed for at least three reasons:-

(i) The legislature made no distinction between laundering one's own proceeds and laundering a third party's proceeds when setting the maximum sentence for money laundering offences. The maximum sentence for the ‘own proceeds’ offence is the same as for all the other money laundering offences: 14 years imprisonment.

(ii) Under Article 34(1) ‘own proceeds’ money laundering is committed if transactions are carried out with the purpose of avoiding a prosecution or the making or enforcement of a confiscation order. Under Article 34 (2) ‘third party proceeds’ money laundering is committed if transactions are carried out with the purpose of assisting any person to avoid prosecution or a confiscation order. The Crown contends that it would be absurd to lay down a rule which stated that avoiding a prosecution of oneself or avoiding one's own assets being confiscated is to be regarded as less serious than assisting another to avoid a prosecution or confiscation order.

(iii) There is, Advocate Jowitt says. no such rule, nor any guideline in support of any distinction rendering ‘third party’ money laundering more serious than ‘own proceeds’ money laundering or of any such principle. The circumstances vary so widely that each case must depend on its own facts.

334 Manenga, it is submitted, certainly does not support Advocate Kelleher's approach. On the facts of that case the gravamen of the offending was the fraudulent trading, the subject of a conviction. The money laundering was the spending of the ill gotten gains. It is difficult to see how this reasoning can be used to found a submission that ‘own proceeds’ money laundering is less serious than ‘third party’ money laundering.

335 Adams, which followed a guilty plea does not assist Advocate Kelleher's submission either, says Advocate Jowitt. In Adams the predicate conduct was proved by the guilty plea, in the present case by the Jurats’ verdicts.

336 Advocate Jowitt responds to Advocate Kelleher's submission that Mr Bhojwani's conduct would not encourage others or nourish crime as identified in *Monfries*, with the assertion that by his participation in the Nigerian contracts Mr Bhojwani encouraged the corrupt government to betray the nation's trust. He encouraged the offenders by assisting in taking the proceeds offshore to be distributed and to avoid the attentions of the investigating authorities. Further his conduct was such as to encourage others that they might use Jersey as an offshore jurisdiction for similar purposes. A person commits an acquisitive crime in order to profit from it. He is thus more likely to commit that crime if he knows he can launder and keep the proceeds.

Conclusion on sentencing ground 3

337 Again we conclude that Advocate Jowitt has the better of the argument. We reject Advocate Kelleher's submission that the ‘case authority’ shows recognition of a proper distinction as a matter of law to be drawn between ‘own proceeds’ and ‘third party’ money

laundering which lies in the inherent nature of the offences and their actual and intended consequences. We are unable to identify any such principle from the authorities before the court. Each case depended on its own facts. As in cases of theft/handling, the circumstances and respective criminality are infinitely various.

338 The statute law notably makes no such distinction in the maximum sentences for the two offences which comprise Article 34.

339 The Royal Court in paragraph 5 of the sentencing judgment [2010] JRC 116, correctly recognized the absence of guidelines, stemming, in our view, from the diversity of situations embraced under the rubric of criminal money laundering. It stated:-

> ***"There have been two previous substantial money laundering cases in Jersey*** *. AG v O'Brien and others* [2003] JRC 137A***and****AG v Michel* 2007] JRC 120***but neither dealt with sentencing guidelines.*** The circumstances of money laundering offences can differ so widely that it would be difficult for guidelines to be provided, as made clear by the English Court of Appeal in the case of*R v Monfries* [2004] 2 Cr App R (S) 3, ***a case concerning the laundering of another persons' criminal proceeds, in which the following principles were set out."***

The Commissioner then set out the relevant principles from that case as in paragraph 292 above.

340 Mr Bhojwani's offences were serious offence one involving substantial sums, and we are satisfied that the criteria set out in *Monfries* were properly considered and applied to the facts of this case.

341 For these reasons Sentencing Ground 3 of Appeal is dismissed

Sentencing —Ground 4

342 Under ground 4 and assuming-contrary to his submissions under Ground 3 no distinction in law between first and third-party money laundering offences, Advocate Kelleher contends that sentencing must nonetheless recognise an essential difference in the inherent criminality of third-party money laundering, marking it out as an offence attracting, as a starting point, a greater sentence. It is contended that the sentencing Court had no regard to this proposition when it failed to recognise in the starting point that it fixed and the sentence that it passed the proper distinction to be made between this case and the case of Michel.

343 In Michel the Court fixed a starting point of 8 years and sentenced Mr Michel to 6 years' imprisonment on each of 10 counts of money laundering to run concurrently. Mr Michel was, it is stressed by Advocate Kelleher, a professional moneylender unlike Mr Bhojwani.

344 In *R v Mehta* [2008] EWCA 1491 ("Mehta"), when considering the culpability of the defendant for the purpose of sentencing (where the defendant was charged with both the antecedent offence of carousel fraud and the money laundering offence) Hughes, LJ stated:-

> ***"We have also looked at a number of cases of more general money laundering.*** We say no more about them than that we take the view that the Judge in this case was entitled to treat the money laundering as having been very close to the fraud. What it was not, however, was an example of the general money-laundering service offered to numerous criminals, of the kind exemplified by a number of bureau de change or hawala banking operators. Whilst each case will depend on its own facts, it may often be true that such general launderers are not merely as culpable as the criminals generating the money but not infrequently more so, and often more culpable than are those who engage in the handling of the proceeds of a particular fraud, as here." Para 9 .

345 *Mehta* is thus authority, submits Advocate Kelleher, for the contention that to provide a ***"professional money laundering service"*** (to others) is, in terms of criminality, more serious than the laundering of the proceeds of a one-off fraud.

346 The Commissioner described Mr Bhojwani's criminality in the sentencing judgment (*AG v Bhojwani* [2010] JRC 116 in the following way-

> ***"…and it is not asserted by the prosecution that the defendant is a professional money launderer.*** He acted dishonestly in two transactions in 1996 and 1997, and in October and November 2000 undertook these money laundering transactions to safeguard his proceeds of that dishonesty. The money laundering took place over a very short period."

347 At paragraph 19, the Commissioner stated "The defendant is a business man whose involvement was one of dishonesty, not involving breach of trust". The Commissioner continued at paragraph 31:-

> ***"In the case of AG v Michel the defendant, who was a chartered accountant, for many years offered a money laundering service.*** He set up and administered trusts and companies on behalf of clients who had been guilty of criminal conduct, particularly tax evasion. He took in substantial quantities of cash and also delivered cash to clients. The sums laundered were apparently between £20-£30 million. Michel's methodology involved lies to authorities, fake invoicing and forgery. He was in effect a professional money launderer offering a sophisticated money laundering service from the Island. Such activity is certainly harmful to the reputation of the Islands finance industry, and yet the court determined, apparently without any authority being cited to it ***that 8 years***

was the correct starting point as against 10 years being sought by the Crown."

He continued at paragraph 32:-

"In the case before us the defendant has been found guilty of laundering his own proceeds through a Jersey based bank in an admittedly large amount, but in a manner which the prosecution accept was neither skilled nor professional; it has been described by the prosecution as a knee-jerk reaction to breaking news. The laundering took place over a period of 11 days and involved the same proceeds."

348 By material contrast, in Michel, Commissioner Nice described Mr Michel's conduct in the following way :-

"These are serious cases. Offences were committed as the law in Jersey was known to be changing, and within the offices of Peter Michel offences were being committed of a kind that was specifically being outlawed. Various methods were employed for the commission of these crimes, frequently allowing but brief encounters between the clients engaged in criminal conduct and Peter Michel" .

349 Advocate Kelleher draws attention to other differences between the two cases, Mr Michel was a professional man operating a business based in Jersey. Mr Bhojwani, by contrast, had no connection with Jersey save for the bank accounts with the Bank of India, Jersey Branch, a branch of the Bank of India with which his family had banked since the 1970s. Mr Michel offered a money laundering service over a material period of time: Mr Bhojwani offered no such service and merely reacted to events over a matter of days. Mr Michel's offending involved a significant number of counts representative of variations in the money laundering service offered. The three counts of which Mr Bhojwani was convicted can fairly be said to represent, on the Prosecution's case, a single course of conduct. Furthermore in the light of advice received from Jersey lawyers in 1996 Mr Bhojwani had no reason believe that paying monies into jersey involved any criminal offence or to anticipate the consequences of POCL 1999

350 Fundamentally, Mr Bhojwani's conduct was, on the Prosecution's case and evidence, a failed inept attempt to avoid an investigation of his affairs in Jersey. Mr Michel's conduct was a deliberate provision of nourishment and encouragement to others to commit crime.

351 It is contended by Advocate Kelleher that it is clearly the case that the criminality reflected in Michel exceeds by all material measures that existing in Mr Bhojwani's case. The sentencing Court in this case could not reasonably and having proper regard to proportionality, impose an outcome on Mr Bhojwani which is identical as to both starting point and sentence in Michel if regard was had only to the gravamen of the money laundering in issue.

352 Michel, Advocate Kelleher submits is consistent both with Basra (paragraph 293 above) and Mehta

353 Advocate Jowitt submitted that the judgment in Mehta, in particular paragraph 9, actually recognized that not infrequently money launderers are as culpable as the criminals generating the money. He also referred us to the Crown's statement of facts and conclusions and to its contention that the authorities which were not cited in Michel would lead to a higher starting point than in Michel.

354 It was Advocate Jowitt's further or alternative submission that in any event Michel does not set any precedent. There was particular mitigation available to Mr Michel which did not apply to Mr Bhojwani.

355 We were referred again to the whole sentencing judgment and conclusions in the present case and to the fact that each case of money laundering has its own particularities.

Conclusion on sentencing ground 4

356 Ground 4 has been linked with Ground 3 which we have dismissed. Just as we can find no reliable authority to support a distinction as a matter of law between the laundering of first and third party proceeds of crime so we can find no reliable authority for the contention that to provide a professional money laundering service to others is, in terms of criminality, more serious than the laundering of the proceeds of a one off fraud. It may be. We note the words of Hughes LJ in Mehta that ***"each case will depend on its own facts."*** which appears to be the only relevant principle.

357 In our view the Royal Court was entirely correct to focus on the particular facts of the case before it and to reject Michel as constituting some kind of precedent. As it said in paragraph 34 of the judgment of 25 June 2010 ([2010] JRC 116):-

> ***"Money laundering activity will vary widely, and whilst accepting the inherent limitations in referring to previous decisions of the court, which turn on their own particular facts and do not purport to establish guidelines, we find it difficult to understand how this defendant's activities can be placed at the higher end of the range for the gravamen of money laundering offences than the activities of Michel.*** We are not therefore persuaded by the distinctions which the Crown seeks to draw between the two cases. It needs to be borne in mind, however, that reports of previous cases never recite all of the considerations before the sentencing court, and we therefore have approached the sentence in this case on the facts that are before us."

358 We note the wise words of Rose LJ in *R v Lyon* (2005) The Times 19 May 2005, that:-

"on an appeal against sentence, earlier decisions of the Court of Appeal which were neither guideline cases nor cases expressed to be of general application in sentencing, were unlikely to be a reliable guide to sentencing brackets for particular offences since the facts and circumstances of cases varied infinitely."

359 It has repeatedly been emphasised by this Court that there is a danger in trying to compare two cases, whose resolution is so fact sensitive, and where the Court is ordinarily handicapped by lack of full knowledge of the alleged comparable case.

360 Mr Bhojwani was, in our judgment, appropriately sentenced on all the information available to the Court relevant both to offences and offender.

361 For these reasons we dismiss sentencing ground of appeal 4.

Sentencing —Ground 5

362 Advocate Kelleher contends that an insufficient reduction in sentence was given to Mr Bhojwani in mitigation, as a man of previous good character, and, to use the Commissioner's own words, a man who undertook "…very laudable charitable activities… so eloquently and fully described in his lengthy letter to us. We note also his expressions of remorse and regret and his apology." As to Mr Bhojwani's character he noted that, the sentencing Court was provided with no less than 43 character references from a broad and diverse section of society including "a former Deputy Prime Minister of India. A member of the Legislative Assembly of the Gujarat State in India an Ambassador, among others."

363 Advocate Kelleher contends that Mr Bhojwani co-operated fully with the authorities in connection with investigation into the issues which surround the foundation of the offences with which he has been convicted, an investigation that was ongoing for a period of several years before the Appellant's arrest in 2007. The sentencing Court held:-

"We accept that the defendant did cooperate with the authorities in voluntarily coming to the Island to be interviewed and by providing substantial amounts of documentation."

(However Advocate Jowitt takes issue with Mr Bhojwani as to the extent of his co-operation with the authorities in that he failed to disclose the incriminating documents recovered from his computer).

364 It is contended by Advocate Kelleher that the facts of Mr Bhojwani's case do not fairly allow for the application of deterrent sentencing not least as he did not, as was contended for by the Prosecution, "target Jersey" for the offending in issue for the purpose of sentencing, that is the money laundering of October and November 2000. Once again, he

submits, the Prosecution's contention serves only to underscore its false sentencing premise as being the predicate conduct. Mr Bhojwani was a man caught by the changes in Jersey's law in 1999, a change which exposed him to a risk of money laundering which did not prior to that date exist.

365 It is also said to be material that, as the sentencing court recognised, Mr Bhojwani suffered materially as a consequence of his restriction on bail to the Island. His attempts to vary bail were, despite his previous good character and despite sureties in excess of $63 million vigorously opposed by the Prosecution on the grounds that he represented a flight risk. In fact, and as his conduct when required to travel for medical reasons showed immediately prior to trial, he acted entirely properly and consistently with his obligation to attend at his trial. In the practical and real sense he was subject to a deprivation of liberty for a period in excess of three years prior to the commencement of his trial. That deprivation cost him his family business, deprived him of the ability to practice his religion fully and freely and had a significantly prejudicial effect on his family.

366 Advocate Kelleher submits that that while the sentencing court recognised these facts it cannot have given appropriate discount against sentence not least on the basis that, in its Statement of Facts and Conclusions, the Prosecution proposed a reduction of 3 years to take into account the Mr Bhojwani's personal mitigation. The sentencing Court allowed only 2 years for his personal mitigation.

367 In countering these arguments Advocate Jowitt reminded the Court of the passages from Harrison: which we have quoted above (paragraphs 266–268) and which we need not repeat as to the limits of this Courts powers in an appeal against sentence.

368 Advocate Jowitt submits that taking all relevant matters into account the sentence was not manifestly excessive nor wrong in principle.

Sentencing Ground Five —Conclusion

369 Paragraph 35 of the sentencing judgment reads:-

> ***"Therefore, in the absence of any guidelines, and having regard to the facts of this case, and the money laundering offences for which the defendant stands to be sentenced, we conclude as follows.*** Firstly this is a case of serious criminality. Secondly it involves money laundering undertaken over a short period in an unplanned reaction to breaking news, but for a very substantial sum and this in order to hide wealth created by the defendant's own criminal conduct (as defined by the Proceeds of Crime Law). That, in our judgment, has to be reflected in a significant sentence of imprisonment, both as a matter of punishment and as a deterrent. The defendant receives no credit for his plea, but he is entitled to his credit for his good character and all of the

mitigation which has been put forward on his behalf. In our view, and on the facts of this case, the correct starting point is 8 years, which we will reduce to 6 years to allow for the mitigation."

370 In our view the Court gave credit where credit was due; to Mr Bhojwani's good character; to his charitable deeds; to his co-operation with the authorities (which they assessed more favourably than did the Crown);to his domestic situation and the ill health of himself and his mother; and to the consequence of his bail restrictions in Jersey)and indeed to his performance of the two contracts of 1996 and 1997 in Nigeria.

371 In that context, the Court carefully assessed all the material relevant to sentence, including, of course, that on the other side of the ledger, and gave reasons for having reduced the 12 year starting point invited by the Crown. Allowing for mitigation the Crown had moved for a sentence of 9 years.

372 While Advocate Kelleher submits that a starting point of 8 years reduced to 6 to reflect the mitigation was inadequate and the reduction should have been 3 years as contended for by the Crown. We do not accept that submission. The 2 year reduction more than adequately represents the mitigation in this case in the context of the reduced starting point.

373 For these reasons we dismiss Sentencing Ground of appeal 5

Conclusion

374 In summary Advocate Kelleher contends that the sentencing Court erred in passing a sentence of 6 years concurrent on the three counts on the indictment and that the sentence passed should be substituted by this Court for a lesser sentence and one which represents Mr Bhojwani's actual culpability in respect of the offences with which he has been convicted, which takes sufficient account of the substantial mitigation laid before the sentencing Court and which ignores as irrelevant the need for deterrence.

375 Advocate Kelleher does not in reality submit to this Court that the sentence is wrong in principle. His submission is that the sentence is manifestly excessive.

376 We cannot agree. The six year sentence is entirely appropriate for the serious offences of which Mr Bhojwani was convicted. All his mitigation was most carefully considered and is reflected in that sentence. We endorse the Royal Court decision that the circumstances of the offences and the interests of Jersey as a financial centre justified an element of deterrence. The money laundering may indeed have been undertaken over a short period as an unplanned reaction to breaking news, but it was of a very substantial sum and its purpose was to hide wealth created by Mr Bhojwani's own criminal conduct. A significant sentence was inevitable both as a matter of punishment and as a deterrent.

377 There was no error of law in the Commissioner's rulings, nor in the approach taken by the Court. The sentence is not wrong in principle and it is not manifestly excessive

378 The sentence appeal is dismissed.