

Jersey & Guernsey Law Review – February 2011
SHORTER ARTICLES
ATT GEN V BHOJWANI: REFLECTIONS ON THE EVOLVING ROLE OF
THE CHIEF MINISTER

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1 Readers of this journal will be aware that it takes a keen interest in the constitutional arrangements of Jersey and Guernsey and the possibilities of independent status for the Islands. The *Review* recently hosted a conference on “Sovereignty” and previously has carried a number of articles on related topics. A key aspect of nation status is dealing with the outside world, with foreign states and their representatives. A key indicator of a state’s maturity in this regard is its prowess in dealing with contentious inter-state issues. A particular aspect of the *Att Gen v Bhojwani* prosecution, which concluded with a conviction in March 2010, sheds some light on the Jersey Government’s willingness, let alone prowess, to engage in dealing with such contentious issues.

2 In that case, the Attorney General of Jersey sought and obtained, *via* letters of request issued pursuant to Criminal Justice (International Cooperation) (Jersey) Law 2001, evidence from the State of Nigeria to be used in the Jersey prosecution of Mr Bhojwani. The response from Mr Bhojwani was the issue of proceedings in Nigeria seeking declarations that as a matter of Nigerian law the evidence gathering process undertaken pursuant to the letters of request (including the legal standing of the parties who gathered the evidence) and the transmission of the evidence outside the sovereign state of Nigeria were unlawful. By judgment dated 15 October 2009, the Nigerian High Court ruled in his favour on both points.

3 From the point of view of the Jersey prosecution, two consequences flowed from this decision. Firstly, in a series of letters addressed to both the Jersey authorities and the British High Commissioner in Nigeria, the State of Nigeria sought the return of the evidence that had been provided and made clear that its use in the Jersey prosecution of Mr Bhojwani would be viewed as a breach of Nigerian sovereignty. Secondly, Mr Bhojwani applied to the Jersey courts for relief arising from the findings of the Nigerian High Court. That relief comprised applications to stay the prosecution on the grounds of abuse and/or to exclude the Nigerian evidence from the trial and, finally, an application for leave for the judicial review of the Attorney General’s decision to adduce the evidence in the criminal trial and to refuse the request of Nigeria for the immediate return of the evidence. Those applications did not succeed.

4 From the point of view of potential future sovereignty, one particular aspect of these events bears recounting. That aspect arises from the fact that the State of Nigeria was expressing at state level its concerns as to the proposed use of the evidence. It alleged that its sovereignty was being breached by the actions of the Jersey authorities. How did the state of Jersey respond?

5 Before answering that question, some background will assist. In what may one day be viewed as a pivotal statement in the Island's constitutional evolution, the preamble to the States of Jersey Law 2005, approved by the Crown in Council, recognises Jersey's autonomous capacity in domestic affairs and that "there is an increasing need for Jersey to participate in matters of international affairs". No doubt in recognition of that objective, art 18 of that statute indicates that the functions of Jersey's Chief Minister include "conducting external relations in accordance with the common policy agreed by the Council of Ministers". In other words, the Chief Minister is also the Island's "Minister for Foreign Affairs".

6 Given his status, unsurprisingly, Mr Bhojwani's Jersey representatives alerted the Chief Minister to Nigeria's expressed concerns as to the breach of its sovereignty. One assumes that he had been separately alerted in any event by the Jersey Attorney General, given the subject matter of the concern, and by the UK authorities following the letter from Nigeria to the British High Commissioner. The Chief Minister's response to a 9-page letter (with 133 pages of enclosures) from Mr Bhojwani's representatives outlining what had occurred, ran to only four lines. The response could have been plucked straight from the script of the BBC television comedy series *Yes Minister*. It read:

"We are naturally committed to both the effective implementation of our own domestic law, including the Proceeds of Crime (Jersey) Law 1999, and to meeting our obligations under international law. If these commitments do not appear to be in accord with one another in a particular case, then of course the Courts are where such matters should be resolved."

As implied in these words, the Chief Minister took no action at all. He simply did not get involved.

7 To a point, one might understand the Chief Minister's reticence. The Criminal Justice (International Cooperation) (Jersey) Law 2001 casts no role for him in the obtaining and deployment of evidence from foreign jurisdictions. Unlike England and Wales, where the relevant Secretary of State plays a key role in dealing with foreign states in this respect, in Jersey the decision process is left to the Attorney General. Ultimately, admissibility of evidence is a matter for the Royal Court. The Bailiff appears to have had this in mind in the application for leave to seek judicial review where it observed that the 2001 Law makes no mention whatsoever of the Chief Minister.¹ However whilst the 2001 Law does indeed reserve to the Attorney General certain specific responsibilities in relation to letters of request, that does not mean that the Chief Minister has no role to play. In the courts of England and Wales it is commonplace where issues of inter-state relations arise in

¹ See para 59 of the judgment, [2010] JRC 042.

proceedings for the UK government's position to be sought, articulated and paid heed to: see for example, *R v CII*.²

8 Taken to its logical conclusion, the Bailiff's view would mean that in the context of the 2001 Law the Jersey prosecuting authorities could provoke a major diplomatic row with another state and leave Jersey's elected representatives with no role to play. Inter-state dealings often necessitate a difficult balancing act between competing interests. It cannot be right for Jersey to leave such decisions to an officer who is not democratically appointed, has no accountability to the States and has no responsibility for Jersey's international relations. Furthermore, it places the Attorney General in a position of conflict between his duty to prosecute a crime and concerns as to Jersey's relations with a sovereign state.

9 If Jersey is to be taken seriously at an international level, the Island's elected officials must play a full and proper part in our international relations. Hiding behind words carefully crafted by Sir Humphrey as a means of ignoring an inter-state issue will win Jersey no respect abroad, let alone any friends.

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² [2008] EWCA 3062.