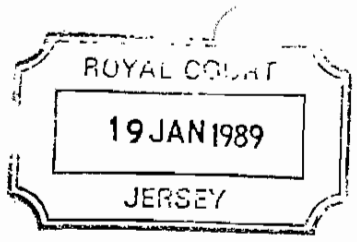
(Samedi Division)



Before Mr. V.A. Tomes, Deputy Bailiff
Jurat the Hon. J.A.G. Coutanche
Jurat D.E. Le Boutillier

In the matter of the Representation of:

Imacu Limited; and
Michael William Forrest, practising under the name and style of "Michael Forrest and Partners"; and
Johan Georges Lampaert

Advocate S.J. Habin for the Representors
Crown Advocate Miss S.C. Nicolle for the Attorney General

By Act of the 3rd April, 1987, this Court made an order in the terms of a request issued by the Investigating Judge of the Court at First Instance at Belgium, and presented by the Acting Attorney General, authorising officers of the States of Jersey Police Force and two Belgian officers to obtain written statements from responsible officers and/or representatives of Michael Forrest and Partners, Chartered Accountants, Lloyds Bank plc, and Grindlays Bank Limited, for use in a prosecution against Johan Georges Lampaert and Joel Daniel Maria De Smet. The order was made under Section 2 of the Evidence (Proceedings in Other Jurisdictions) Act 1975, as extended to Jersey by the Evidence (Proceedings in Other Jurisdictions) (Jersey) Order, 1983.

The relevant provisions of the Act, as extended, are as follows:-

"1. Where an application is made to the Royal Court for an order for evidence to be obtained in Jersey and the court is satisfied (a) that the application is made in pursuance of a request issued by or on behalf of a court or tribunal ..... exercising jurisdiction in a country or territory outside Jersey; and (b) that the evidence to which the application relates is to be obtained for the purposes of criminal proceedings which have been instituted before the requesting court, the Court shall have the powers conferred on it by the following provisions of this Act.

2 (1) ..... the Royal Court shall have power, on any such application ..... by order to make such provision for obtaining evidence in Jersey as may appear to the Court to be appropriate for the purpose of giving effect to the request in pursuance of which the application is made; ....."

On the 6th April, 1987, the representors made a representation to the Court alleging that no such criminal proceedings were pending to the knowledge of the representors; and that to the best of the knowledge, information and belief of the representors, the information sought under the order of the Court was in relation to a general enquiry rather than in relation to criminal proceedings. The representors prayed that the order should be stayed until further order; that the Attorney General should be convened and ordered to disclose to the representors all such documentation and information supplied to the Court in support of the application (sic); that the Attorney General should be convened in order to show cause why the order should not be discharged; and that the costs of and incidental to the representation be awarded to the representors. Upon reading the representation and hearing counsel for the representors the Court adjourned the further consideration of the representation until the 9th April, 1987, and ordered that a copy of the representation be served on the Attorney General and that he be summoned to appear and that in the meantime the order of the 3rd April, 1987, be stayed.

On the 9th April, 1987, the Court received affidavits from Mr Johan Georges Lampaert, one of the representors, and from Mr Hubert Vanden Bulcke, his Belgian advocate and legal representative. Mr Bulcke and Mr Bruno Bulthé, the Juge d'Instruction, gave evidence. The Court adjourned the matter to the 14th April, 1987.

On the 14th April, 1987, the Court was informed that two further affidavits (or draft affidavits) had been received by the Crown Advocate from Counsel for the representors. These were from Miss Huguette Geinger, an advocate of the Belgium Supreme Court (Cour de Cassation) and from Mr Leon Joseph Martens, an advocate at the bar in Ghent. Both Counsel agreed that it

would be necessary to hear their evidence. It was also common ground that the issues involved had not been set forth with sufficient clarity. This was the first contested application under the Evidence (Proceedings in Other Jurisdictions) Act 1975, as extended to Jersey. The procedure to be followed would no doubt set the pattern for future applications. By consent, the Court sent the matter to proof and ordered that full pleadings be filed and that all evidence already heard remain on the record; the Court would hear such further evidence as the parties might wish to adduce and the parties should meet in Chambers to fix a date for the further hearing; in the meantime the stay on the Order of the 3rd April, 1987, would remain in force.

In the event, the Court was not convened for the further hearing of the matter until the 16th February, 1988; no reason was given to us for the delay and we make no comment upon it. In the meantime, pleadings had been filed, by the Attorney General in answer to the representation, and by the representors in support of the representation.

The pleading of the representors sought to introduce a new ground in support of the prayer of the representation, namely "that the Request issued by the Investigating Judge of the Court of First Instance at Belgium is invalid as the Request is not issued by or on behalf of a court or tribunal exercising jurisdiction in Belgium as required under the provisions of Section 5 (1) (a) (sic) of the Evidence (Proceedings in Other Jurisdictions) (Jersey) Order, 1983".

At the hearing on the 16th and 17th February, 1988, Miss Nicolle submitted an Affidavit sworn by Professor Alain de Nauw, a senior lecturer and professor in criminal law and procedure, special criminal law and comparative criminal proceedings at the Law Faculty at Vrije University, Brussels. Professor de Nauw gave evidence to amplify his Affidavit and he was cross-examined upon it. Mr Habin submitted a further Affidavit sworn by Miss Huguette Geinger, in response to that of Professor de Nauw. She gave evidence in amplification of her draft Affidavit of April, 1987, and of her further Affidavit, and was cross-examined upon them. Mr Martens gave evidence in amplification of his draft affidavit of April, 1987, and was cross-examined upon it.

When all the evidence had been heard and before legal submissions were made, Mr Habin sought leave to amend the representation, in order to insert two additional paragraphs to allege the new ground to which we have referred, i.e. that the Request by the Investigating Judge of the Court of First Instance at Belgium was not issued by or on behalf of a Court or Tribunal exercising jurisdiction in Belgium. Miss Nicolle opposed the application and the Court, having heard arguments and submissions, delivered the following decision:-

"The Court has had full regard to the arguments of both parties, and in addition has researched a number of cases cited, in summary, in the "White Book" (The Supreme Court Practice, 1988);

"With considerable reluctance, we grant leave to amend the representation in the terms of the application. We have had particular regard to the case of G L Baker Ltd - v - Medway Building and Supplies Ltd (1958) 3 All E R 540, because, although that case is quoted at p350 of the "White Book", under the heading "General Principles for Grant of leave to amend", that case does, in fact, show that leave was given during the trial or hearing and, therefore, could easily have been cited at p353 of the "White Book", under the heading "At the trial or hearing". That case also reviewed Tildesley -v- Harper (1876) 10 Ch. D.393, which contained the classic statement by Bramwell L.J., of the practice to be followed.

"Therefore, with considerable reluctance, as I have said, having regard to the delay and the careless manner in which the representors dealt with the matter, we grant leave, but we order that the representors will pay the costs of the Attorney General, of and incidental to the application for leave, on a full indemnity basis".

It follows that, having given leave, the first question that we have to decide is whether the request presented to the Court on the 3rd April, 1987, was a request "issued by or on behalf of a court or tribunal ..... exercising jurisdiction in (Belgium)".

The evidence of Mr Martens was very strong on this point. It was inconceivable, he said, that a Belgian lawyer would hold the Juge d'Instruction (Investigating Judge) to be a Tribunal. He is a member of a tribunal but when he was appointed a Juge d'Instruction by Royal Decree for a term of three years, he became totally independent of the tribunal. Mr Martens also ruled out the possibility that in this case the Juge d'Instruction was acting on behalf of the court or tribunal. He explained the circumstances in which the Juge d'Instruction might have acted on behalf of a court or tribunal; this would have been after an appeal to the 'Chambre des mises en accusation' if the Court had ordered him to take certain steps on its behalf, but this had not occurred in the instant case because the Juge d'Instruction had not refused or failed to investigate any of the involved parties. Mr Martens had studied the provisions of the Evidence (Proceedings in Other Jurisdictions) Act 1975, as extended to Jersey; he was of the definite opinion that the request that was issued by the Juge d'Instruction did not correspond with a request by a court or tribunal.

Miss Geinger, one of only sixteen Advocates at the Cour de Cassation and thus described by Mr Martens as his "eminent friend" and of "such good renomée" supported his evidence.

The evidence of Professor Nauw, very persuasive on the question whether criminal proceedings had been instituted, was not persuasive on this first question of the status of the Juge d'Instruction as a court or tribunal. He restricted himself to saying that the Juge d'Instruction is a member of the judiciary, that he is a member of a tribunal and that the term "tribunal" is used for all "juridictions" but he would not go so far as to say that the Juge d'Instruction when carrying out his investigation, albeit with the assistance of a Greffier, himself constitutes a court or tribunal.

At the end of the hearing on the 17th February, 1988, the matter was adjourned until the 24th February, 1988, for the submissions of Counsel to be made. During that hearing, we asked whether there was not some body in Belgium, equivalent perhaps to the Lord Chancellor's office in England, which

could provide some authoritative and definitive statement as to the judicial system in Belgium and the status of the several courts there and, in particular, the status of the Juge d'Instruction. By consent, the matter was again adjourned in order that Counsel might make enquiries.

We sat again on the 12th December, 1988; again, no reason was given to us for the delay and we make no comment upon it. But we were informed that, apparently, it would be constitutionally improper for a member of the Ministere de Justice to give such evidence before a foreign court where the status of a member of the Belgian judiciary was in question. Therefore, we have to decide the matter on the evidence heard and the authorities put before us.

Foreign law is not judicially noticed but must be proved as a fact by skilled witnesses. Experts on the subject may refer to Codes and precedents in support of their views; and the passages cited must then be treated as part of their testimony. Where the evidence of the witnesses is conflicting or obscure, the court may go a step further and examine and construe the passages cited for itself in order to arrive at a satisfactory conclusion. But, being a question of fact, the question of fact must be decided on evidence and not on authority, the authority being tendered as evidence of that law. (See Phipson on Evidence 13th edition paras 2-11, 27-40 et seq)

Miss Nicolle cited an interesting case heard in the Hong Kong High Court by Power J - The Adhiguna Meranti (1986) LRC (Comm) 138, but there the evidence was given wholly by affidavit and the court did not have the benefit of the cross-examination of the experts. It does not add a great deal to the general statement that we have made in the preceding paragraph. But at page 149, we find the following:-

"It is correct that the courts will apply English law if there is insufficient evidence of foreign law, that is however certainly not the case where the evidence is simply conflicting".

It is arguable that in the instant case there is no direct conflict of evidence because Professor Nauw failed to assert that the Juge d'Instruction, sitting in that capacity as an Investigating Judge, is a court or tribunal. Nevertheless, we have examined the Codes, text book extracts, decisions and other sources put before us and we find, as a finding of fact, that the preponderance of authority is in favour of the evidence given by Mr Martens.

There was some discussion also as to whether Belgian law, alone, had to be decided by us as a question of fact, or whether we had to apply Jersey law also.

Miss Nicolle submitted that the Court must first ask itself what the term "court or tribunal" in the Evidence (Proceedings in other jurisdictions) Act, 1975, means; and that the Court must then ask itself whether the Juge d'Instruction falls within that definition. In his opening address on the 16th February, 1988, Mr. Habin submitted that the Court, before making an order, had to consider whether the request had been made by a court or tribunal 1) under Belgian law, and 2) under Jersey law. When he addressed us on the 12th December, 1988, he put the emphasis on a court or tribunal "exercising jurisdiction" in Belgium and submitted that the requirement was for a court or tribunal exercising jurisdiction under the law of that country.

Mr. Habin referred us to In re State of Norway's application (1987) 1 Q.B. 433 C.A. where the Court of Appeal held that the question whether proceedings in the requesting court were "proceedings in any civil or commercial matter" had to be determined by reference both to the law of the requesting court and English law, and it was open to the English court to refuse to comply with a request where the proceedings, although categorised as proceedings in a civil or commercial matter according to the law of the requesting court, were plainly not so categorised in English law. At p.488 Glidewell, L.J. said that:-

"While primarily concerned to inquire whether the proceedings concern a civil or commercial matter under the law of the requesting court, the English court would only comply with the application if the proceedings were also 'civil proceedings' in the English sense. But this point may be largely, if not entirely, theoretical. We have no evidence that there is any jurisdiction in which proceedings in a 'civil or commercial matter' would not be regarded as civil proceedings in the English sense."

Miss Nicolle correctly pointed out that the question in that case was a totally different one. Nevertheless we have no evidence that a court or tribunal regarded as such under Belgian law would not be regarded as a court or tribunal in the Jersey sense.

Mr. Habin also referred us to Rio Tinto Zinc Corporation and others -v- Westinghouse Electric Corporation et e contra (1978) 1 All E.R. 434 H.L. At p.447 Lord Wilberforce said:-

"Secondly, the evidence, as the letters (rogatory) explicitly state, is sought for the purpose of a grand jury investigation which may lead to criminal proceedings. Now s.5 of the 1975 Act provides for the obtaining of evidence for criminal proceedings but expressly the section only applies to proceedings which have been instituted (none have been instituted) and, impliedly, to a request by the court in which the proceedings have been instituted. The case is therefore not within s.5, and the procedure is an attempt to get the evidence in spite of that fact."

Miss Nicolle relied on Heerema and others -v- Heerema (J.J. 18 April 1986, unreported). At p.2 the Court said this:-

"It was argued by Advocate P. Mourant, for the defendant, that the Preliminary Witness Hearing, which is an institution peculiar to Holland, does not constitute 'legal proceedings'. This argument was supported by an Affidavit of Law given by Professor Cornelis Venema, an expert in Dutch and Anglo-American law, and was supported by Dr. H.P.J. Ophoff, the Defendant's

legal adviser. However, it is for this Court to interpret the meaning of the term "legal proceedings" and determine whether or not the interpretation would embrace the "Preliminary Witness Hearing", the nature of which has been described to us."

Whilst we do not dissent from the view expressed in the Heerema case, on its particular subject matter, we believe that the test to be applied here is similar to that in the State of Norway and Rio Tinto Zinc Corporation cases, particularly because the word "tribunal" has not, like the word "court" an ascertainable meaning in English, and equally in Jersey, law. (See Royal Aquarium & Summer & Winter Garden Society Ltd. -v- Parkinson (1892) 1 Q.B. 431 C.A. per Fry L.J. at p.446).

We are primarily concerned to enquire whether the Juge d'Instruction constitutes a court or tribunal under the law of the requesting country but we would comply with the application only if we were satisfied that the Juge d'Instruction was also a court or tribunal in the Jersey sense. But the question would be largely, if not entirely, theoretical.

Also the Court must not lose sight of the intentions of the legislature. In the case of civil proceedings the Court may make an order for evidence to be obtained if it is satisfied (a) that the application is made in pursuance of a request issued by or on behalf of a court or tribunal exercising jurisdiction in a country or territory outside Jersey and (b) that the evidence is to be obtained for the purpose of civil proceedings which either have been instituted before the requesting court or whose institution before that court is contemplated. In the case of criminal proceedings, however, the Court may make an order for evidence to be obtained if it is satisfied (a) that the application is made in pursuance of a request issued by or on behalf of a court or tribunal exercising jurisdiction in a country or territory outside Jersey and (b) that the evidence is to be obtained only for the purpose of criminal proceedings which have been instituted.

Thus, the intention of the legislature to be drawn from the wording of the Act is that in the case of civil proceedings evidence may be obtained for pre-trial purposes but in the case of criminal proceedings evidence is not to be obtained for pre-trial purposes.

The Supreme Court Practice 1988 (The White Book) contains several references to this distinction. At page 1070, under Order 70/1 - 6/2, it says that:-

"It should be noted that the Act of 1975 applies to civil proceedings which are either pending or contemplated (s.1(b)) but it applies to criminal proceedings only if they have actually been instituted (s.5(1)(b)).

And at 70/1 - 6/3:-

"The general principle which is followed in England in relation to a request from a foreign court for assistance in obtaining evidence for the purpose of proceedings in that court is that the English court will ordinarily give effect to such a request so far as is proper and practicable and to the extent that it is permissible under English law. This principle reflects judicial and international comity....and it conforms with the spirit of the Hague Convention...."

"In dealing with a request for evidence from a foreign court, the English court has first to decide whether it has jurisdiction to make the order to give effect to the request, and secondly, if it has, whether as a matter of discretion it ought to make or refuse to make such an order."

At page 1072, under 70/1 - 6/6, the White Book states, in relation to evidence for civil proceedings:-

"In relation to legal systems that do not recognize the distinction between the stages of pre-trial and trial, as in the case of many European Continental systems, it seems that the English court may have to give effect to

the request of the foreign court, since all the material which such a court gathers in the way of evidence forms part of the material on which that court makes its final adjudication, so that the evidence is the equivalent of testimony at the trial."

Therefore, we have to try to reconcile judicial and international comity and the difficulties of the Belgian legal system on the one hand with the clear intention of the legislature that in the case of criminal proceedings evidence is not to be obtained for pre-trial purposes. In our judgment where there is conflict the intention of the legislature must prevail and we can only make an Order if we are satisfied that the request is made by a court or tribunal to obtain evidence for trial purposes. If the 'body' making the request is not a court or tribunal, then we do not have the jurisdiction to make the order to give effect to the request. We therefore proceed to consider further whether the Juge d'Instruction is a court or tribunal under Belgian law, as a matter of fact, and whether he is a court or tribunal under Jersey law.

The Code d'Instruction Criminelle, Book 1 (De la Police Judiciaire et des Officiers de Police qui l'exercent) Chapter 1 (de la Police Judiciaire) Article 9, provides that:-

"La Police judiciaire sera exercée....et par les juges d'instruction".

Thus the juge d'instruction is one of the officers of the Police Judiciaire.

Professor Nauw stressed that the juge d'instruction is an officer of the "police judiciaire" and not a member, and the other witnesses did not dispute this.

However, Article 8 of the same Chapter provides that:-

"La police judiciaire recherche les crimes, les délits et les contraventions, en rassemble les preuves, et en livre les auteurs aux tribunaux chargés de les punir."

"Recherche" means search or pursuit; "rechercher" means to search for, search into, inquire into; "rechercher l'auteur d'un crime" means to try to trace, identify, seek out, search for the author of a crime.

It is in that sense that we perceive the functions of the juge d'instruction. He is conducting an enquiry with a view to reporting to the Chambre du Conseil which is the body with the power of committal.

Article 22 of Chapter 4 (Des Procureurs du Roi et de leurs substituts) Section 1 (De la compétence des procureurs du Roi, relativement à la police judiciaire) is as follows:-

"Les procureurs du Roi sont chargés de la recherche et de la poursuite de tous les délits dont la connaissance appartient aux tribunaux correctionnels ou aux cours d'assises".

It is relevant to note that the procureur is charged with "la recherche et la poursuite", whereas the juge d'instruction, as an officer of the "police judiciaire" is charged only with "recherche".

In a judgment of the Cour de Cassation of the 24th September, 1986, in re Collin, juge d'instruction, and Salik, we find the following:-

"Attendu qu'il importe de relever que le juge d'instruction jouit d'une entière indépendance dans l'accomplissement de sa tâche, qu'il n'a pas la qualité de partie à l'action publique et ne constitue pas un instrument de la poursuite, que son instruction consiste à rechercher les éléments de preuve tant à charge qu'à décharge en tenant la balance égale entre l'accusation et la défense dès lors qu'il ne cesse pas d'être un juge, qu'il ne décide pas du renvoi de l'intéressé en jugement et qu'il se borne à présenter à la chambre de conseil, dont il n'est pas membre, des rapports objectifs relatant la marche et l'état de l'instruction...."

Article 96 of the Belgian Constitution (French text) provides that:-

"Les audiences des tribunaux sont publiques, à moins que cette publicité ne soit dangereuse pour l'ordre ou les moeurs; et dans ce cas, le tribunal le déclare par un jugement".

The proceedings before the Juge d'Instruction on the other hand are never public, but are held in camera. The Juge d'Instruction is thus not a tribunal within the meaning of the term used in Article 96 of the Constitution. We accept, of course, that Article 96 is not exhaustive as to who or what may constitute a tribunal under Belgian law.

Annexed to the affidavit of Professor de Nauw was an extract of a judgment of the Cour de Cassation of the 4th May, 1982, in the case of Vandekerckhove -v- Vandevoorde and others, in which objection was taken to the fact that the judge who had sat as Juge d'Instruction also sat as a member of the court of first instance which dealt with the case. In the judgment, we find the following:-

"Attendu que le juge d'instruction 'fait partie d'un tribunal établi par la loi'; qu'en effet il est un juge du tribunal de première instance bien qu'en vertu de la loi il soit spécialement chargé des instructions judiciaires en matière répressive; qu'en application de l'article 79 du Code judiciaire il peut, par ailleurs, continuer à siéger à son rang pour le jugement des affaires soumises au tribunal de première instance; que c'est précisément pour cette raison qu'en dépit de l'interdiction de cumul des fonctions judiciaires, contenue dans l'article 292 du même code, il 'reste', aux termes des travaux préparatoires de cet article, compétent pour connaître de la cause qu'il a instruite, lorsque le tribunal en a été saisi;

"Attendu que le juge d'instruction, a comme juge indépendant pour mission et pour devoir de faire l'instruction judiciaire tant à charge qu'à décharge.

"Qu'il s'ensuit que - sauf le cas où le juge d'instruction a, par des déclarations ou de quelque autre manière, fait preuve de préjugé au cours de l'exercice de ses fonctions en cette qualité spéciale, de manière à ne plus offrir les garanties d'impartialité nécessaires, ce qui en l'espèce n'a jamais été invoqué dans le cours de la procédure - aucune disposition légale n'interdit au magistrat qui rempli daus une affaire les fonctions du juge d'instruction, de siéger en la cause comme membre du tribunal correctionnel;

"Attendu que, partant, le droit du demandeur à une instruction équitable de sa cause par un tribunal indépendant et impartial n'a pas été violé en raison de la seule circonstance qu'un juge, ayant auparavant fait fonctions de juge d'instruction en la même cause, faisait partie du tribunal correctionnel; que, la procédure suivie en première instance n'étant entachée d'aucune nullité de ce chef, la cour d'appel ne s'est pas approprié une nullité résultant de la procédure suivie en première instance;

"Que le moyen manque en droit".

Although the french version from which we have cited is itself a translation and although a number of translations produced to us have been of doubtful quality and the cause of some concern to us, we think that the inevitable conclusion to be drawn from it, is that the magistrate, whilst carrying out the duties of examining magistrate is carrying out a preparatory investigation of the case, both in favour of and against the accused and is not sitting as a court or tribunal; thus he is able to form part of the "tribunal correctionnel" which is the court or tribunal of first instance. On the one hand he "fait fonctions de juge d'instruction"; on the other hand he "siège en la cause comme membre du tribunal de première instance". Therefore, although since 1919 he has been unable to sit as a member of the Chambre du Conseil which decides on committal on the basis of his report, that committal having been made he is eligible to sit on the 'tribunal correctionnel' which is the judging court at first instance.

In the same and other cases, the relevant provisions of the European Convention on Human Rights have been held to have no application to proceedings before the Juge d'Instruction.

In certain cases, including the instant case, the Juge d'Instruction is required to investigate complaints against unknown persons; when he reports to the Chamber of Counsel, (Raadkamer) that tribunal can discharge from prosecution, under Article 128 of the Code d'Instruction Criminelle, cases where the offender could not be identified by the Juge d'Instruction. For our part, we cannot contemplate a Court or judicial tribunal hearing proceedings against unknown persons, certainly not under Jersey law, and this serves to strengthen our view that the Juge d'Instruction is carrying out an investigative process and is not sitting as a court or tribunal.

We were referred to that part of the Code d'Instruction Criminelle which deals with the functions of the juge d'instruction - Chapitre VI Des Juges D'Instruction - Section II Fonctions du Juge d'Instruction.

Article 73 is in the following terms (french text):

"Ils (les témoins) seront entendus séparément, et hors de la présence de l'inculpé, par le juge d'instruction, assisté de son greffier".

It is clear from this and other authorities that we have examined that the "inculpé" (whether suspect or accused) is excluded from the proceedings before the juge d'instruction except for that period during which he is himself being interrogated by the juge d'instruction and his statement taken. All other witnesses are seen separately and their depositions taken. These, it seems to us, are more akin to a statement of accused under caution and proofs of evidence than to depositions as we know them. It is abhorrent to our concept of justice that an accused person should not be present "à tous les débats" and the procedure we have described strengthens our view that the juge d'instruction

does not constitute a court or tribunal but is an investigating officer - almost a charging officer - interposed between the police and the court of first instance, at the instigation of the "procureur du Roi".

Not only is the "inculpé" excluded from the proceedings before the juge d'instruction, but there was exhibited to the Court a judgment of the Cour de Cassation of the 27th March, 1985 (Jurisprudence de Belgique No 456) which upheld the principle of the secrecy of the preparatory inquiry or investigation by the juge d'instruction in a case involving avoidance of both income tax and value added tax to such an extent that the juge d'instruction was entitled to carry out his investigation in the presence of employees or officials of the Ministry of Finance (wrongly referred to as magistrates of the Ministry of Finance in the very poor translation made available to us) who were not themselves officers of the "police judiciaire". The judgment admits that the "instruction préparatoire" is both secret and inquisitorial. Both interrogations and a house search were carried out by officers of the judicial police, to whom the tasks were delegated by the juge d'instruction, in the presence of officials of the Ministry of Finance, but otherwise in secret and excluding the "inculpé".

Further evidence of the inferior status of the juge d'instruction, whilst acting in that capacity, because he otherwise continues as a judge, is to be found in Article 127 which provides that:

"Le juge d'instruction sera tenu de rendre compte, au moins une fois par semaine, des affaires dont l'instruction lui est dévolue.

"Le compte sera rendu à la chambre du conseil, composée de trois juges au moins, y compris le juge d'instruction; communication préalablement donnée au procureur du Roi, pour être par lui requis ce qui'il appartiendra."

One cannot imagine a Jersey court or tribunal or indeed any court or tribunal having to report periodically to its superiors on the progress of a case, and the fact that the juge d'instruction himself is included in the Chamber to

which he reports indicates that he is merely the investigating member of that Chamber and not a separate court or tribunal. Moreover, he has to report previously to the "procureur" who required him to carry out the investigation in the first place, so that the "procureur" is able to make representations as to the further conduct of the investigation.

In the same way, Article 61 provides that:-

"Hors de flagrant délit, le juge d'instruction ne fera aucun acte d'instruction et de poursuite qu'il n'ait donné communication de la procédure au procureur du Roi."

This is a further indication of the subordinate status, in that capacity, albeit always a judge, of the juge d'instruction. Not only does he have to report at least once weekly to his superiors but he has to inform the "procureur du Roi" of each step in his investigation before he carries it out. However, we note that the words "et de poursuite" indicate an involvement not merely in investigation but in the prosecution process, contrary to what we have said earlier about "recherche."

Miss Nicolle, who urged us to give a very wide meaning to the word "tribunal", and thus to find that the juge d'instruction is a court or tribunal, referred us to Stroud's Judicial Dictionary, 5th Edition, Volume 5, where, in addition to the reference to Royal Aquarium -v- Parkinson (supra) the learned author says this:-

"A bishop's commission of inquiry, under s.77, Pluralities Act 1838 (c.106), (as amended by s.3 Act of 1885 (c.54), is a judicial tribunal, and a witness therein is privileged from an action for slander in respect of the evidence given by him (Barratt -v- Kearns (1905) 1 K.B. 504))".

However, we have looked at the full report of that case; we find that notice had been given to the incumbent of the bishop's intention to issue a commission of enquiry and notice was given by the commission of the place of

and the production of such documents, evidences, and writings as might be necessary. But all this was done in the presence of the incumbent. The tribunal had similar attributes to a court of justice. The very important difference between that case and the investigation by the juge d'instruction is that the incumbent was entitled to be present throughout and to examine the witnesses - he could be present "à tous les débats".

The Court has examined a number of other cases, i.e. Dawkins -v- Lord Rokeby L.R. 8 Q.B. 255; L.R. 7 H.L. concerning a military court of inquiry; Addis -v- Crocker (1961) 1 Q.B. 11 concerning the Disciplinary Committee of the Law Society; Shell Company of Australia Limited -v- Federal Commissioner of Taxation (1931) A.C. 275, 47 T.L.R. 115 P.C. concerning decisions of Commissioners of Taxation; Trapp -v- Mackie (1979) 1 W.L.R. 377 H.L., a Scottish case concerning an inquiry conducted under the Education (Scotland) Act 1946; and Lincoln -v- Daniels (1962) 1 Q.B. 237. But all these cases, as Barrett and Kearns, are concerned with the question of absolute or qualified privilege.

Nevertheless, the Court's consideration of them has satisfied it that "court or tribunal" in the Evidence (Proceedings in Other Jurisdictions) Act 1975, means "court or similar tribunal". The same term is used by the legislature in relation to both civil and criminal proceedings. The tribunal, although not a court of justice, must be one which acts in a manner similar to that in which courts of justice act. It must have "similar attributes" to a court. It must act in a manner as nearly as possible similar to that in which a court of justice acts in respect of an inquiry before it.

It is not necessary that the tribunal should have all the attributes of a court; for example it may sit in private because courts do, in certain cases, sit in camera. And the term "tribunal" as used in the Act is not capable of very precise limitation. Each case will fall on one or other side of a line.

But the juge d'instruction holds all his proceedings in camera; his duties are wholly investigatory; he decides nothing 'sur le fonds'; he investigates

unidentified persons; the potential accused is not present except when being interrogated; there is no cross-examination on his behalf; the juge d'instruction is not bound by any rules of evidence; and he has to report regularly to his superiors. Thus the juge d'instruction, in our judgment, is substantially lacking in the attributes of a court of justice. The fact that he has the power to summon witnesses before him and to fine them in the event of non-appearance and to order their arrest to compel them to appear in order to testify (Chapter VI, section 1, article 80); that the witnesses are heard under oath (Idem, Article 75); that the juge d'instruction can order the provisional arrest and detention of the 'inculpé' after his interrogation (Article 1 of the Loi relative à la détention préventive of 20 April 1874); or in the event of his non-appearance when required for any stage of the proceedings and his re-arrest in the event of new and serious facts being disclosed (Article 8 of the same Law); (these provisions appear to be repeated in Chapter VII of the Code d'Instruction Criminelle); are cumulatively insufficient to overcome all those factors to which we have referred in which the juge d'instruction is substantially lacking in the attributes of a court of justice.

Finally, Miss Nicolle also referred us to Attorney General -v- Kelly, Ferguson and others (1982) J.J. 275. At page 278, the functions of the Police Court are described thus:-

"The Attorney General argued.....(that) In Jersey in criminal matters the Magistrate had three quite separate functions. The first was as a Juge d'Instruction or examining Magistrate. At the start of every case before him he sat in that capacity to examine the matter in order to decide whether the case was fit to proceed further into the judicial process and if so in what way. If the matter was fit to proceed the Magistrate had then to decide whether he would deal with the case himself as a Magistrate of summary jurisdiction or whether to sit as a Juge d'Instruction for the purpose of remanding the defendant for trial at the Royal Court if a prima facie case had been found. As a Juge d'Instruction the Magistrate could not pronounce on guilt or innocence, such a pronouncement could only be made by the Magistrate sitting

as a Magistrate of summary jurisdiction or of course by the Royal Court. When the charge against Ferguson was dismissed the Assistant Magistrate was sitting as a Juge d'Instruction. No evidence was offered and therefore the case never got to the stage where the Assistant Magistrate became seized of the issue of guilt or innocence. It followed that Ferguson was never in jeopardy and that, therefore, the dismissal of the charge was not an acquittal. We believe that argument to be correct".

In the Court's opinion that decision does not assist the application. Although there is no direct analogy, in Belgian law it is the Chambre de Conseil which has to examine the matter, on the basis of the Juge d'Instruction's report, and decide whether the case is fit to proceed further into the judicial process. The Chambre de Conseil can discharge the action as can the Juge d'Instruction in Jersey. If the matter is to proceed, then the Chambre de Conseil commits the matter to the Tribunal Correctionnel (the judging Court of first instance). The fact that the Police Court in Jersey, which has all the attributes of a court of justice, combines the powers and responsibilities of both the Chambre de Conseil and the tribunal of first instance does nothing to invest the juge d'instruction in Belgium with analagous attributes of a court of justice.

This Court, therefore, arrives at the inevitable conclusion that the Juge d'Instruction in Belgium is not a court or tribunal, that, accordingly, we have no jurisdiction to make the order sought and that, without deciding whether or not the proceedings are criminal proceedings, which having regard to our finding it is unnecessary for us to decide, the order of the 3rd April, 1987, must be discharged.

The Order of the 3rd April, 1987, is discharged.

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