JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO: 41/93

COR: THE HON MR JUSTICE RATTRAY - PRESIDENT
THE HON MR JUSTICE DOWNER J A
THE HON MR JUSTICE GORDON J A

BETWEEN	**LINTON BERRY**	**APPELLANT**
AND	**DIRECTOR OF PUBLIC PROSECUTIONS**	**1ST RESPONDENT**
	THE ATTORNEY GENERAL FOR JAMAICA	**2ND RESPONDENT**

Debra Martin for the Director of Public Prosecutions

Dr. Lloyd Barnett Q.C. and Gayle Nelson for the Appellant

Lennox Campbell, Snr. Assistant Attorney General for the Attorney General

January 16, 17, 18, 19, 20 & March 20, 1995

RATTRAY, P

On the 22nd March 1988 the appellant Linton Berry was convicted in the Home Circuit Court before Wolfe J and a jury of the murder of Paulette Ziadie.

His appeal to the Court of Appeal (Carey P (Ag) Campbell and Wright JJA) hereinafter referred to by me as "the original appeal" was dismissed and a written judgment of the Court delivered by Carey P (Ag) on March 12, 1990. On June 15, 1992 the Judicial Committee of the Privy Council allowed his appeal from the decision of the Court of Appeal and in its judgment delivered by Lord Lowry the case was "remitted to the Court of Appeal with the direction that the Court should quash the conviction of the

defendant and either enter a verdict of acquittal or order a new trial, whichever course it considers proper in the interests of justice." The Board went on to state that "Their Lordships consider that this is a case in which the right course, is to rely for that purpose on the judicial discretion and experience of the Court of Appeal in Jamaica" **(Berry v. The Queen (P.C.)** [1992]3 W.L.R. 153). Between the 27th and 30th July, 1992 the Court of Appeal (Rowe, P. Carey & Wright JJA) in a hearing hereafter referred to by me as "the subsequent Reference" received submissions on the question remitted to the Court by the Judicial Committee of the Privy Council and in a written judgment on the 21st September 1992 gave its reasons for ordering a new trial. There had been no objection by the appellant's legal representatives to the constitution of the panel.

Consequent on this the appellant moved the Constitutional Court for redress under the provisions of section 25 of the Constitution of Jamaica on the ground that his constitutional rights provided by sections 13 and 20 of the Jamaica Constitution had been and are being infringed. These provisions specifically provide for a person charged with a criminal offence to be afforded a fair hearing by an impartial and independent tribunal.

The gravamen of the apellant's complaint was that two members of the panel of the Court of Appeal (Carey P (Ag) and Wright J A) which determined the question of a retrial and so ordered in the subsequent Reference had been members of the panel which heard his original appeal against conviction on the 10th October 1989. It was submitted that in view of the fact that the panel had dismissed his appeal on its merits (which was reversed by the Judicial Committee of the Privy Council) the decision of a panel of the Court of Appeal which in the subsequent Reference included three Judges of Appeal and

which in ordering a retrial had made certain pronouncements revealing that it was really reaffirming the former decision in the original appeal would create in the mind of a reasonable and fairminded person a suspicion that the applicant had not been granted a fair hearing. The Motion for Constitutional relief to quash the decision of the Court of Appeal to order a new trial was dismissed on the 23rd April 1993 by the Constitutional Court. It is this decision which is on appeal before us.

The questions for our consideration are as follows:

> 1. Did the presence of Carey P (Ag) and Wright J A as members of the panel of the Court of Appeal which dismissed the appellant's original appeal, and also as members of the panel which ordered a new trial in the subsequent Reference breach the appellant's constitutional rights to a fair hearing by an impartial and independent tribunal by reason of reasonable suspicion of bias, real likelihood of bias or real danger of bias on the part of those two judges of appeal?
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> 2. Is there anything said in the judgment of the Court of Appeal in the original appeal or in the Court's judgment ordering a new trial on the subsequent Reference which could found the basis of such suspicion, likelihood or danger?
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> 3. Did the failure of the legal representatives of the appellant to object to the constitution of the panel of the Court of Appeal which heard submissions in the subsequent Reference and ordered a retrial create a waiver by the appellant of the right to a fair hearing by an impartial and independent tribunal?

I will deal firstly with the third question.

The Question of Waiver

Counsel for the appellant, Dr. Barnett maintained before the Constitutional Court as well as before us that a person cannot waive his constitutional rights to a fair hearing by an impartial and independent tribunal. Whilst there are certain constitutional rights which may be waived the enumeration of such rights in the constitution are prefaced, Dr. Barnett urges by the words - "Except with his own consent..." Harrison J in the Constitutional Court found in his judgment as follows:

> "I am of the view that the right is absolute and cannot be waived. The applicant cannot be seen to have waived his right under section 20(1)" (of the Constitution).

I agree with his statement of the law, and his reasoning which resulted in this finding. However , this question is only relevant to and can only affect the decision of the Court of Appeal in the subsequent Reference if indeed there is found to be "reasonable suspicion of bias" a "real likelihood of bias" or "danger of bias" whatever standard is appropriate.

Their Lordships of the Privy council in allowing the appeal had held:

> (a) that the failure of the prosecution to disclose to the defence copies of statements given by the witnesses who had given evidence at the trial against the appellant and which statements contained material inconsistent with the evidence they had given constituted a material irregularity .and this affected the fairness of the trial;
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> (b) that the trial judge gave an inadequate direction in relation to the defendant's previous good character and this constituted a material misdirection;

> (c) that the trial judge withholding from the jury the assistance sought on the facts and his failure to ascertain the problem which led the jury to seek his assistance and to give the requested help constituted an irregularity which might have been material dependent on the circumstances.

In remitting the case to the Court of Appeal to determine whether to quash the conviction and enter a verdict of acquittal or order a new trial, the judgment of the Judicial Committee of the Privy Council stated:

> "The case against the defendant was indeed a strong one and for that reason their Lordships would not be prepared simply to recommend that an acquittal be ordered ..."

The appellant's submission with regard to the Constitution of the Court of Appeal per se and the inability of a Court so constituted to afford the appellant a fair hearing, was as follows:

> "The court of Appeal having decided against the Appellant on his appeal against conviction that the relevant grounds were without merit or substance, it was not proper for the Court composed of a majority of the same Judges of Appeal to decide whether or not there should be a new trial rather than an acquittal."

Could such a Court carry out its mandate of determining what was properly in the interests of justice and exercise a judicial discretion in making that determination?

The Court of Appeal had been set right by the Judicial Committee of the Privy Council on the specific points in which the Board determined the Court to be in error in its decision in the original appeal. In order for the appellant to succeed on this point it

would have to be assumed that the two judges of appeal in the subsequent Reference common to both panels were likely to be seen by the reasonable bystander to be so affected by personal pique and so offended by the correction of the Judicial Committee of the Privy council that they would have achieved a mindset so opposed to the appellant as to cause them to arrive at the decision in the exercise of their discretion most unfavourable to the appellant. Such a conclusion does not find favour with me. It defies the experience of how the Court of Appeal functions and its responses to the corrective decisions of the final Court of Appeal - The Judicial Committee of the Privy Council.

The objective of the submissions of Dr. Barnett for the appellant is to lead to a conclusion that two Court of Appeal Judges in their determination of the question as to whether to acquit or order a new trial had an interest to serve, that interest being the upholding of the previous decision in the original appeal against conviction to which they were parties, being members of the original appellate panel. The bias which they would have had was by virtue of pre-judgment.

In R v. Cambourne Justices ex parte Pearce [1955] 1 Q B 41 at page 51 Slade J stated the right test to be that prescribed by Blackburn J in **R v Sunderland Justices** [1901] 2 K B 357 which required that "real likelihood of bias must be shown." The test of reasonable suspicion appears to have lost judicial favour in the preference to a "real likelihood" test or as in **R v Gough** a "real danger" test with reference to bias.

In **R v. Gough** [1993] 2 All E R 724 the House of Lords held that the relevant test was, as to whether having regard to the circumstances there was a real danger of bias in member of the tribunal in question in the sense that he might have unfairly regarded with

favour or disfavour the case of a party under consideration by him. Lord Goff of Chieveley in his judgment stated:

> "Finally for the avoidance of doubt I prefer to state the test in terms of real danger rather than real likelihood to ensure that the Court is thinking in terms of possibility rather than probability of bias."

The hearing of the appeal had been entrusted to the panel of appellate judges by the ordinary procedures and practice of the Court of Appeal. Are Judges of Appeal who had previously sat on a panel which upheld the conviction of the appellant disqualified from hearing a subsequent Reference from a Superior Court to determine whether the appellant should be acquitted or be ordered to have a new trial? Could a fairminded observer maintain a reasonable apprehension of bias on the basis of pre-judgment? Is there in fact in these circumstances a real likelihood or a real danger of bias? To determine the answers to these questions, it is necessary to see whether any live or significant issues have to be decided in the subsequent Reference which arose in the original appeal for decision and can be said to have been prejudged. The original appeal was concerned with whether the evidence, that is the totality of facts adduced at the trial was sufficient to establish the offence charged, the rules of fairness observed and the direction to the jury by the judge on the law and his review of the facts correct and comprehensive enough to support the jury's verdict of guilty of the offence charged.

Can it be said that the issues to be determined by the Court of Appeal in the subsequent appeal are the same as those to be determined by the Court of Appeal in the original appeal?

In **Reid v R** [1978] 27 W I R 254 Their Lordships of the Privy Council on a request for a statement of the principles which should apply in considering whether or not a new trial should be ordered identified without intending to be exhaustive the relevant factors. Their Lordships stated at page 258 of the judgment:

> "The recognition of the factors relevant to the particular case and the assessment of their relative importance are matters which call for the exercise of the collective sense of justice and common sense of the members of the Court of Appeal of Jamaica who are familiar, as their Lordships are not, with local conditions. What their Lordships now say in an endeavour to provide the assistance sought by certified question must be read with the foregoing warning in mind.
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> Their Lordships have already indicated in disposing of the instant appeal that the interest of justice that is served by the power to order a new trial is the interest of the public in Jamaica that those persons who are guilty of serious crimes should be brought to justice and not escape it merely because of some technical blunder by the judge in the conduct of the trial or in his summing-up to the jury. Save in circumstances so exceptional that their Lordships cannot readily envisage them it ought not to be exercised where, as in the instant case, a reason for setting aside the verdict is that the evidence adduced at the trial was insufficient to justify a conviction by a reasonable jury even if properly directed. It is not in the interests of justice as administered under the common law system of criminal procedure that the prosecution should be given another chance to cure evidential deficiencies in its case against the accused.
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> At the other extreme, where the evidence against the accused at the trial was so strong that any reasonable jury if properly directed would have convicted the accused, prima facie the more

appropriate course is to apply the proviso to s 14(1) and dismiss the appeal instead of incurring the expense and inconvenience to witnesses and jurors which would be involved in another trial.

In cases which fall between these two extremes there may be many factors deserving of consideration, some operating against and some in favour of the exercise of the power. The seriousness or otherwise of the offence must always be a relevant factor; so may its prevalence; and, where the previous trial was prolonged and complex, the expense and the length of time for which the court and jury would be involved in a fresh hearing may also be relevant considerations. So too is the consideration that any criminal trial is to some extent an ordeal for the accused, which the accused ought not to be condemned to undergo for a second time through no fault of his own unless the interests of justice require that he should do so. The length of time that will have elapsed between the offence and the new trial if one be ordered may vary in importance from case to case, though having regard to the onus of proof which lies upon the prosecution lapse of time may tend to operate to its disadvantage rather than to that of the accused. Nevetheless there may be cases where evidence which tended to support the defence at the first trial would not be available at the new trial and, if this were so, it would be a powerful factor against ordering a new trial.

The strength of the case presented by the prosecution at the previous trial is always one of the factors to be taken into consideration but, except in the two extreme cases that have been referred to, the weight to be attached to this factor may vary widely from case to case according to the nature of this crime, the particular circumstances, in which it was committed and the current state of public opinion in Jamaica. On the one hand there may well be cases where despite a near certainty that upon a second trial the accused would be convicted the countervailing reasons are strong enough to justify refraining from the course. On the other hand it is not necessarily a condition precedent to the ordering of a new trial that the Court of Appeal should be satisfied of the probability that it will result in a conviction. There may be cases where, even though the Court of Appeal considers that upon a fresh trial an acquittal is on balance more likely than a conviction, 'it is in the interest of the public, the complainant, and the appellant himself that the question of guilt or otherwise be determined finally by the verdict of a jury, and not left as something which

> must remain undecided by reason of a defect in legal machinery'. This was said by the Full Court of Hong Kong when ordering a new trial in **Ng Yuk Kin v Regina**. This was a case of rape, but in their Lordships' view it states a consideration that may be of wider application than to that crime alone.
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> Their Lordships in answer to the Court of Appeal's request have mentioned some of the factors that are most likely to call for consideration in the common run of cases in Jamaica in which that court is called upon to determine whether or not to exercise its power to order a new trial. They repeat that the factors that they have referred to do not pretend to constitute an exhaustive list. Save as respects insufficiency of the evidence adduced by the prosecution at the previous trial, their Lordships have deliberately refrained from giving any indication that might suggest that any one factor is necessarily more important than another. The weight to be attached to each of them in any individual case will depend not only upon its own particular facts but also upon the social environment in which criminal justice in Jamaica falls to be administered today. As their Lordships have already said, this makes the task of balancing the various factors one that is more fitly confided to appellate judges residing in the island."

The judges of the Court of Appeal in the subsequent Reference were well aware of these principles and the passage is indeed cited in the Court's judgment.

It is clear therefore that the issues to be considered by the Appeal Court in the subsequent Reference did not coincide with the matters relevant for consideration in the original appeal. In deciding the subsequent Reference there was no issue which had been prejudged in the original appeal. Dr. Barnett for the appellant seeks to rely upon the fact that the panel in the original appeal found no merit in the grounds of appeal and were satisfied that the jury came to a correct decision on the facts. Since a factor that was relevant in respect of the decision whether or not to order a new trial was the strength of the Crown's case it was urged that this had already have prejudged by the panel in the original appeal. It is to be noted that the Judicial Committee of the Privy Council (page

169 of the judgment) had noted that "the case against the defendant was indeed a strong one and for that reason their Lordships would not be prepared simply to recommend that an acquittal be ordered." The Court of Appeal therefore could only consider the strength of the case as one of several factors, and any panel however constituted would have the view of the Judicial Committee of the Privy Council in this regard to assist it on this specific point.

The comment in the judgment of the Court of Appeal in its decision on the subsequent Reference that the appellant was charged with a serious and brutal crime and which forms also a ground of complaint cannot be interpreted as a finding of guilt. Indeed the seriousness and brutality of the crime are also relevant factors for consideration in the determination by the Court of Appeal on the issue then before the Court.

In my view therefore, there was no prior adjudication in the original appeal on any issue in the subsequent Reference or on the factors, the totality of which the Court of Appeal had to take into account in deciding whether to acquit or order a new trial.

Whether the test applied is "real likelihood" or "real danger" of bias or as Lord Woolf put it "a real danger of injustice having occurred as a result of the alleged bias" in the circumstance of two members of the panel of the Court of Appeal which dismissed the original appeal from conviction having sat to determine in the subsequent Reference the question of whether or not to acquit or order a new trial, none of the tests enumerated would have led to a disqualification of the two Judges of Appeal and the appellant would have failed to establish the alleged bias, probability of bias or appearance of bias and the

consequent injustice. There was indeed no real danger that the appellant might not have had a fair hearing.

The judgments of the Constitutional Court correctly analysed the submissions as they related to the judgment of the Court of Appeal in the original appeal and the judgment in the subsequent Reference and applied the relevant law. I agree with the reasoning and conclusions therein contained.

I would therefore dismiss the appeal and award costs to the respondents which are to be taxed if not agreed.

DOWNER J A

To appreciate the unprecedented nature of these proceedings commenced in the Constitutional Court, it is necessary to advert to the previous appeal before the Privy Council which resulted in the following order in **Linton Berry vs The Queen** [1992] 3 WLR 153 at p. 169:

> "... The case against the defendant was indeed a strong one and for that reason their Lordships would not be prepared simply to recommend that an acquittal be ordered, but they do not feel able to say that the jury would inevitably have convicted, if the defence had been furnished in advance with the three statements in question and if the jury had received the accepted direction on evidence as to character and guidance from the trial judge on the problem, whatever it was, indicated when they first returned to court.
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> Accordingly, their Lordships will humbly advise Her Majesty that the appeal should be allowed and the case remitted to the Court of Appeal with the direction that that court should quash the conviction of the defendant and either enter a verdict of acquittal or order a new trial, whichever course it considers proper in the interests of justice. Adopting as a precedent the order made by this Board in **Baksh v The Queen** [1958] AC 167, 172, their Lordships consider that this is a case in which the right course is to rely for that purpose on the judicial discretion and experience of the court in Jamaica. The Crown must in any event pay to the defendant his costs of the appeal to the Board."

When the Court of Appeal (Rowe P, Carey & Wright JJA) heard this reference from the Privy Council their reserved judgment delivered September 21 1992 ordered "a new trial to take place at the next session of the Home Circuit Court." That retrial did not take

place because the appellant was aggrieved by that order. It was then open to Berry to appeal to the Privy Council pursuant to section 35 of the Judicature (Appellate Jurisdiction) Act or by special leave to set aside the order of the Court of Appeal and enter a verdict of acquittal. That would have been the direct and appropriate course.

An equally effective relief was available before the Court of Appeal when the reference from the Privy Council was being heard. Theobalds J met the issue at the very outset of this judgment. He said:

> "... The record will indicate that from the very out-set I enquired whether or not the submissions on the question of bias or likelihood of bias had been raised at the rehearing of the issue as to whether or not a new trial should be ordered. The reply was that the applicant was not present in person and in any event one could not waive one's constitutional rights. All the cases cited before this Court indicate that where motions have been granted there has been some personal interest or cause to serve in a member of the adjudicating tribunal. There is not one case in which strong views expressed on the subjects of the alleged offence have been sufficient to constitute a ground for inferring the likelihood of bias. At the hearing the accused was competently represented. Represented indeed by Attorneys who had the handling of his defence from the inception. It is my view that it was at the second hearing, if at all, that concern over the membership of the court should have been expressed if indeed there was any geniune concern."

These words were uttered when the appellant Berry resorted to collateral proceedings by motion in the Constitutional Court. That court (Theobalds, Harrison & Langrin JJ) dismissed his motion and awarded costs to the respondents. From that order Berry has appealed to this court.

Was a direct appeal to the Privy Council an adequate measure of redress in term of the proviso to section 25(2) of the constitution?

It is a sound rule of construction that a statute or a constitution ought not to be interpreted so as to sanction absurd proceedings or results. The appellant's motion challenges the order of the Court of Appeal to order a new trial on the ground that it is a breach of his fundamental rights as enshrined in section 20 (1) of the constitution. If such a motion were sound, then an appellant in future could equally challenge a decision of the Board which simply ordered a retrial in the interests of justice by a constitutional motion. The submissions, if they were appropriate, could have contended that as no member of the Board had direct judicial experience in Jamaica the order for a retrial as the minority decision in **Robinson v R** [1985] 2 All ER 594 at 605 ordered, would not be a fair hearing as required by the constitution. On the same basis the motion could have alleged that since the judgment of their Lordship's Board commented on the strength of the Crown's case, this could prevent a fair hearing as it was an adverse judgment against the appellant before the retrial. Thus the constitutional right of the appellant would have been infringed. Such a motion could rightly have been dismissed as an abuse of process.

Although the Constitutional Court did not address directly the issue of adequate redress under other law it was raised by this court and Dr Barnett with his usual thoroughness responded with interesting written and oral submissions. These submissions must now be considered. Section 20 of the constitution sets out provisions to secure the protection of law. Since the alleged breaches relate to section 20(1) of the constitution then it is convenient to set it out. It reads:

> "20-(1) Whenever any person is charged with a criminal offence he shall, unless the charge is

> withdrawn, be afforded a fair hearing within a reasonable time by an independent and impartial court established by law."

Then section 25(1) of the constitution which provides for the enforcement of the protection reads in part:

> "25-(1) Subject to the provisions of subsection (4) of this section, if any person alleges that any of the provisions of sections 14 to 24 (inclusive) of this Constitution has been, is being or is likely to be contravened in relation to him, then, without prejudice to any other action with respect to the same matter which is lawfully available, that person may apply to the Supreme Court for redress."

It is clear that by conferring original jurisdiction on the Supreme Court, the framers of the constitution envisaged that there were and will continue to be concurrent actions available to a person under the common law or statute for alleged breaches of his or her rights stipulated in section 14 to 24 inclusive. Further section 25(2) reads:

> "(2) The Supreme Court shall have original jurisdiction to hear and determine any application made by any person in pursuance of subsection (1) of this section and may make such orders, issue such writs and give such directions as it may consider appropriate for the purpose of enforcing, or securing the enforcement of, any of the provisions of the said sections 14 to 24 (inclusive) to the protection of which the person concerned is entitled:"

This subsection delineates the comprehensive redress available to any person under the constitution. There were common law rights in public law for which no redress was provided. These were known as rights of imperfect obligation and **Maharaj v Attorney General** (No 2) Trinidad [1978] 30 WIR 310 is a classic example. In that case the state was obliged to compensate Maharaj for the failure of the judicial organs to recognize his right to be heard, which breach resulted in his wrongful imprisonment.

It is against this background that the rights at common law and statute are to be considered against the mandatory provisions of the proviso. The proviso reads:

> "Provided that the Supreme Court shall not exercise its powers under this subsection if it is satisfied that adequate means of redress for the contravention alleged are or have been available to the person concerned under any other law."

The purpose is clear. If remedies for breaches of section 14 to 24 inclusive of the constitution also exist at common law or by statute, then the common law and statutory remedies are adequate to the legal system. They are not to be regarded as inadequate because leave would have to be sought pursuant to section 35 of the Judicature (Appellate Jurisdiction) Act or special leave would have to be sought before their Lordships Board. Every right must have limitations if abuse of process is to be prevented. Lord Diplock states this well in **Maharaj (No 2)** (supra) where he said at p. 321:

> " In the first place, no human right or fundamental freedom recognised by Chapter I of the Constitution is contravened by a judgment or order that is wrong and liable to be set aside on appeal for an error of fact or substantive law, even where the error has resulted in a person's serving a sentence of imprisonment. The remedy for errors of these kinds is to appeal to a higher court. When there is no higher court to appeal to then none can say that there was error. The fundamental human-rights is not to a legal system that is infallible but to one that is fair. It is only errors in procedure that are capable of constituting infringements of the rights protected by s 1(a), and no mere irregularity in procedure is enough, even though it goes to jurisdiction; the error must amount to a failure to observe one of the fundamental rules of natural justice. Their Lordships do not believe that this can be any-thing but a very rare event."

Then in **Chokolingo v The Attorney General** [1980] 32 WIR 354 he reiterated this stance where he said at p. 359:

> " Acceptance of the applicant's argument would have the consequence that in every criminal case in which a person who had been convicted alleged that the judge had made any error of substantive law as to the necessary characteristics of the offence, there would be parallel remedies available to him; one by appeal to the Court of Appeal, the other by originating application under section 6(1) of the Constitution to the High Court with further rights of appeal to the Court of Appeal and to the Judicial Committee. These parallel remedies would be also cumulative since the right to apply for redress under section 6(1) as stated to be 'without prejudice to any other action with respect to the same matter which is lawfully available.' The convicted person having exercised unsuccessfully his right to appeal to a higher court, the Court of Appeal, he could nevertheless launch a collateral attack (it may be years later) upon a judgment that the Court of Appeal had upheld, by making an application for redress under section 6(1) to a court of co-ordinate jurisdiction, the High Court. To give Chapter I of the Constitution an interpretation which would lead to this result would, in their Lordships view, be quite irrational and subversive of the rule of law which it is a declared purpose of the Constitution to enshrine."

These words were used in a constitution without a proviso. Yet judicial restraint, the common law method of interpreting the constitution so as to minimize direct resort to the constitution was applied with salutary results in Trinidad and Tobago and the United States of America and I dare say other jurisdictions which follow the course of the common law.

Regarding remedies under other law, Dr Barnett contended that it was not clear what remedies the Privy Council would grant if an appeal was instituted and was successful. There is no need for doubts in that regard as it would either be to affirm the order for a new trial or enter a verdict of acquittal which was a remedy sought in this

motion. Then regarding the claim that the appellant's right was infringed by publication of the judgment of the Court of Appeal, as Langrin J aptly pointed out in his judgment that Lord Diplock in **Grant v Director of Public Prosecution et al** [1980] 30 WIR 301 at 304 refused to grant constitutional declarations sought for pretrial publicity since the common law remedies were adequate and available. Although it was not expressly mentioned in the judgment, this was an application of the proviso. In short the tenor of section 25 and its proviso enjoins the Constitutional Court and this Court on appeal to examine the adequacy of the common law and statute law in the first instance in resolving issues of fundamental rights before resorting to sections 14 to 24 inclusive of the constitution.

Against this background, I would have dismissed this appeal as to allow it, would be "irrational and subversive of the rule of law". However, it is pertinent to examine the merits of the case since they were argued. Further such an examination will demonstrate further the adequacy of the remedies under other law.

Was the panel of the Court of Appeal which heard the reference from the Privy Council properly constituted?

In resolving normal appeals against conviction and sentence, this court conducts a rehearing on the pattern followed by the Court of Chancery. The Lord Chancellor frequently reheard appeals from his own decrees. The following extract from **Thellusson v Rendlesham**[1858-59] VII HLC 429 at p 430 is pertinent:

> "When these Appeals were called on, Lord St. Leonards took the opportunity of observing that he had been counsel in various branches of this cause on different occasions; in 1825, on the question of the right of presentation to the advowson, and again in 1831, when he argued a point which was not now in dispute; he mentioned these facts, but as he did not

conceive that they absolved him from doing his duty in giving advice to their Lordships in the Appeal now to be heard, he intended to take part in the hearing.

The Lord Chancellor (Lord Chelmsford) said, there could be no doubt about the propriety of the course adopted by his noble and learned friend, but he felt himself to be in a different position. While at the bar, he was counsel in the very case, the decision in which was now the subject of Appeal, and he should therefore take no part in the judgment upon it. He should merely sit as Lord Chancellor, but should not deliver any opinion.

Lord Brougham trusted that it would not be assumed that the having been counsel in a cause operated as a dis-[431]-qualification to prevent the same person, when raised to the Bench, from taking part in the decision of that cause; for, if that was the rule, it might, under certain circumstances, produce terrible delay and expense to the suitor, and even an absolute denial of justice, especially if applied to a Judge of the Court of Chancery. It so happened, that shortly after he became Lord Chancellor, the case of Tatham v Wright, in which he had been counsel on the Northern circuit, came before him in Chancery, on a matter which involved the exercise of the Judge's discretion, namely, an application for a new trial. He could not have refused to hear it without causing great expense and delay, and almost a denial of justice to the suitor; he therefore heard it; and what he did to satisfy his own mind was this, he obtained the assistance of two learned Judges, Lord Chief Justice Tindal and Mr. Baron Alderson, and having done that, he himself took part in pronouncing the decision.

The Lord Chancellor feared that he had been somewhat mistaken. He did not suggest that he laboured under any disqualification, for that would be putting the matter much too strongly. If he had been the only Judge having the authority to hear the cause, he should have been in the situation in which Lord Brougham had been in the case of Tatham v Wright, and should have acted in the same way. Here there were noble and learned Lords who had not been counsel in the case and could hear and decide it, and therefore as a matter of personal feeling he should abstain from taking any part in it.

The argument then proceeded."

When appeal courts were created on the common law side, they adopted the chancery procedures. See rule 12 [1962] Court of Appeal Rules. Langrin J grasped this in his judgment and cited a useful passage which states:

> " In R.E. Megarry Miscellany at Law: the distinguished author dealt with the situation at p. 314 when he said: 'In R. V. Beard [1919] 14 Cr. App. R Lord Reading C.J. delivered the judgment of the Court of Criminal Appeal, quashing a conviction for murder and substituting a verdict of Manslaughter. The prosecution appealed, and Lord Reading rather surprisingly sat in the House of Lords to hear the appeal, as one of the distinguished gathering of eight law lords. In the event, he concurred in the unanimous reversal of his judgment in the Court of Criminal Appeal and the restoration of the conviction for murder. This perhaps exemplifies the views once expressed by Branson J. 'There is nothing which makes it improper for a judge to sit in view upon his judgments. If he is what a judge ought to be wise enough to know that he is fallible, and therefore ever ready to learn; great and honest enough to discard all mere pride of opinion, and follow truth wherever it may lead; and courageous enough to acknowledge his errors - he is then the very best man to sit in review upon his own judgments. He will have the benefit of a double discussion. If right at the first, he will be confirmed in his opinion; and if wrong he will be quite likely to find it out as anyone else.' "

The issue was adverted in **R v Lovegrove** [1951] 1 All ER 804 where Lord Goddard said at p. 805:

> " This matter was considered many years ago, and it was pointed out that in civil cases before the Supreme Court of Judicature Act, 1873, when there was no Court of Appeal and appeals were heard by judges of the three common law courts in banc, it was quite a common practice for the judge before whom the trial had taken place, and whose ruling, indeed, might be impugned, to sit as a member of the court, even, in some cases, where he had sealed the bill of

> exceptions. This matter was considered in R. v Sharman (alias Sutherland) where an application for an adjournment was made on behalf of the appellant on the ground that Ridley, J., who had tried the case, was presiding in the Court of Criminal Appeal. Darling, J., giving the judgment of the court, said [9 Cr. App. Rep. 130]:
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> 'I think this application ought not to be granted. After the assizes, appeals come from all parts of the country; and if appellants are to be allowed to select the judges who shall hear their appeals, the business of the court could not be carried on. Before the days of the Judicature Act, when the Courts of Queen's Bench, Common Pleas and Exchequer sat in court to hear appeals (of course, not criminal appeals), it was the usual practice for the judge who tried the case to be present.'
>
> The matter was considered again the same year in R. v. Bennett, R. v. Newton. The report states that, on an application that the sentence might run from the date of conviction, Darling, J., said that (9 Cr. App. Rep. 157):
>
> '... the case was in the list, but defendants wished it to be postponed because the trial judge was then a member of the court. There was, of course, no statutory objection to the judge sitting, and it would almost be impracticable to prohibit this unless there were more judges in that Division. There was always an investigation by a single judge before a case came into that court, and there must be at least two other judges with the trial judge. It was a great mistake to suppose that the trial judge would be inclined to set up his view against the opinions of his brethren or 'to fight for his own hand.' The trial judge in this case at once assented to the adjournment. Lord Alverstone had always strongly objected to such applications being granted as matters of course.' "

It may be added that even before the Court of Criminal Appeal was set up, the Court of Crown Cases Reserved followed the example of the common law courts by sitting in banc and the trial judge was present. It was in the light of such declaration of law that Rule 54(2) of the 1962 Court of Appeal Rules was instituted.

It must be recognized that the issues to be determined when the merits of a retrial were canvassed before (Rowe P, Carey & Wright JJA) were different from the appeal against conviction (Carey P(ag) Campbell, Wright JJA). In the reference from Their Lordships' Board the court had to consider whether an acquittal or an order for retrial was appropriate in the interests of justice. The issues before (Carey P (ag), Campbell & Wright JJA) were whether the grounds of appeal argued on behalf of the appellant Berry entitled him to set aside the conviction and enter a verdict of acquittal, order a new trial or affirm the conviction and sentence.

In considering the reference from their Lordships' Board this court had the benefit of authoritative principles expounded in **Reid v R** [1978] 27 WIR 25 and **Au Pui-Kuen v Attorney General of Hong Kong** [1980] AC and the court applied these principles to the facts of the instant case. In the light of the foregoing, the challenge to the composition of the panel of this court fails and attention must now be directed to whether there was a real danger of bias in respect of the appellant Berry.

Was the decision to order a retrial vitiated because of a real danger of bias?

In determining whether the Court of Appeal's (Rowe P, Carey & Wright JJA) decision to order a retrial was tainted by bias, it is necessary to examine its judgment. The crucial issue to be decided was whether the court was precluded from the proper exercise of its discretion to enter a verdict of acquittal or order a new trial because two of its members were part of the panel which had affirmed the conviction and sentence of the appellant Berry. The court recognized that their original decision was set aside. They heard submissions from counsel for the appellant for over four days. It is pertinent to note that the court acknowledged that the guidance adumbrated by Lord Diplock in **Reid v R** (supra) was applicable, so the crucial question was whether there was an

application of those principles to the circumstances of the case. Extracts from a passage from that judgment pertinent to the issue before this court were cited at page 2 of the judgment. The first extract reads:

> "... 'The recognition of the factors relevant to the particular case and the assessment of their relative importance are matters which call for the exercise of the collective sense of justice and common sense of the members of the Court of Appeal of Jamaica who are familiar, as their Lordships are not, with local conditions. What their Lordships now say in an endeavour to provide the assistance sought by certified question (4) must be read with the foregoing warning in mind.' "

In recognition of the importance of this reference, the President and his two senior judges presided. Then there followed the following passage which is relevant:

> " ' Their Lordships have already indicated in disposing of the instant appeal that the interests of justice that is served by the power to order a new trial is the interest of the public in Jamaica that those persons who are guilty of serious crimes should be brought to justice and not escape it merely because of some technical blunder by the judge in the conduct of the trial or in his summing-up to the jury. ..' "

After explaining the concept of "in the interests of justice" the Privy Council stressed the role of the strength of the Crown's case as a factor in ordering a new trial. Here is how it was put:

> " The strength of the case presented by the prosecution at the previous trial is always one of the factors to be taken into consideration but, except in the two extreme cases that have been referred to, the weight to be attached to this factor may vary widely from case to case according to the nature of this crime, the particular circumstances in which it was committed and the current state of public opinion in Jamaica."

The closing section of the extract of Lord Diplock's opinion, illustrated the interests to take into account and it was put thus at p. 4:

> "...'There may be cases where, even though the Court of Appeal considers that upon a fresh trial an acquittal is on balance more likely than a conviction, it is in the interest of the public, the complainant, and the appellant himself that the question of guilt or otherwise be determined finally by the verdict of a jury, and not left as something which must remain undecided by reason of a defect in legal machinery.' "

The other case from which this court derived assistance was **Au Pui-Kuen v A.G. of Hong Kong** [1980] AC 356 and the following passage was cited at p. 5 which runs thus:

> "...The power to order a new trial must always be exercised judicially. Any criminal trial is to some degree an ordeal for the accused, it goes without saying that no judge exercising his discretion judicially would require a person who had undergone this ordeal once to endure it for a second time unless the interests of justice required it."...

It is now necessary to cite two passages from the court's judgment to demonstrate that the principles adumbrated by the Privy Council were not only cited but applied by the court in exercising its discretion to order a new trial. Further in the light of these passages, it cannot be said that the court, because of its previous decision to affirm the conviction of the appellant, was tainted by bias. It was Carey JA who delivered the judgment of the court and the first passage reads thus:

> " We have mentioned the fact that it will inevitably be an ordeal for the applicant to ensure a second trial. But in our judgment, it is in the interests of the Jamaican public that so serious and brutal a crime should be resolved in a Court of Law. It is in the interest of the public and the appellant himself that the question of his guilt be not left as something which must remain undecided because the prosecuting authority was held guilty of some irregularities."

The second passage answers the submission that the court was influenced by its previous decision. This passage at the very end of the judgment, shows that the court's mind was concentrated on the issue of the reference by the Privy Council. It states:

> " Mr. Small argued that a new trial would be different from the first and argued that as a factor militating against ordering a retrial. In our view, how the second trial will proceed is a matter of the merest speculation. Every retrial is, in some way different from the first but that is largely due to the fact that the defence makes it so. There is always the possibility of fresh discrepancies and inconsistencies emerging thus providing the defence with further material for cross-examination. In our view, the issue which fall to be determined by the jury will remain what it was at the first trial viz, in what circumstances did the late Mrs. Paulette Zaidie meet her death."

There is nothing in the reasoning of the judgment which suggests that the decision to order a new trial was a wrong exercise of the court's discretion especially since the court in exercising its discretion, took the relevant factors into account. It is the practice of this court that the same panel which allows an appeal and in the interests of justice, orders a new trial does so at the same sitting. It has never occurred to counsel on these occasions to contend that the court should reconvene with different panel to consider the issue of retrial or acquittal. It is against this background that the present application could well be regarded as an abuse of process.

What is the appropriate test to determine where apparent bias is alleged? This issue has been clarified for jurisdictions which follow English common law in the important case of **R v Gough** [1973] 2 All ER 724. Since Australian cases seem to

follow the older common law test, it is appropriate to cite the words of Their Lordships in that case. Lord Woolf in his conclusion of **Gough** at p. 740 said:

> "... The real danger test is quite capable of producing the right answer and ensure that the purity of justice is maintained across the range of situations where bias may exist."

At the commencement of his judgment, Lord Woolf said:

> "My Lords, I have had the advantage of reading in draft the speech of Lord Goff of Chieveley and I agree that this appeal should be dismissed for the reasons which he gives. In particular, I agree that the correct test to adopt in deciding whether a decision should be set aside on the grounds of alleged bias is that given by Lord Goff, namely whether there is a real danger of injustice having occurred as a result of the alleged bias."

So we must turn to the judgment of Lord Goff to ascertain how he stated the test at p.738:

> " In conclusion, I wish to express my understanding of the law as follows. I think it possible, and desirable, that the same test should be applicable in all cases of apparent bias, whether concerned with justices or members of other inferior tribunals, or with jurors, or with arbitrators. Likewise,I consider that, in cases concerned with jurors, the same test should be applied by a judge to whose attention the possibility of bias on the part of a juror has been drawn in the course of a trial, and by the Court of Appeal when it considers such a question on appeal. Furthermore, I think it necessary, in formulating the appropriate test, to require that the court should look at the matter through the eyes of a reasonable man, because the court has first to ascertain the relevant circumstances from the available evidence, knowledge of which would not necessarily be available to an observer in court at the relevant time. Finally, for the avoidance of doubt, I prefer to state the test in terms of real danger rather than real likelihood, to ensure that the court is thinking in terms of possibility rather than probability of bias. Accordingly, having ascertained the relevant circumstances, there was a real danger of bias on the

> part of the relevant member of the tribunal in question, in the sense that he might unfairly regard (or have unfairly regarded) with favour, or disfavour, the case of a party to the issue under consideration by him."

It was the apparent bias of a juror which was in issue in this case but the principle also applies to judges of superior courts. Dr Barnett cited cases of apparent bias or prejudgment by judges of superior courts. The first was **Livesey v New South Wales Bar Association** [1985] LRC Court 1107. The following circumstance is of importance in understanding the decision. At p. 1107 it was stated:

> "... In chambers before the hearing counsel for the appellant submitted that Moffitt P and Reynolds, J.A. should not sit because of their previous participation in determining the application of Ms Bacon who, it was indicated might be called as a witness. The submission was opposed by the Bar Association and rejected by the court. The submission was renewed, and again rejected during the hearing. Ms Bacon had been called as a witness by the appellant."

Since relief is sought by an applicant or his counsel who is aware of the real danger of bias against him, he must raise the issue at the outset or at court early in the proceedings. In **R v Gough** Lord Goff included this ingredient in his statement of the law. Theobalds J recognized and approved the principle in the Supreme Court, but Harrison J seemed to have had a contrary view on this issue. The approach of Theobalds J is to be preferred. Section 20(1) of the Constitution makes it mandatory for the state to provide for independent and impartial judges for the superior courts of record. However, since Berry had alleged that his fundamental rights had been breached on the ground of apparent bias by two members of the court, then it was the duty of counsel who appeared to take the point especially since they had represented Berry on all previous occasions.

The headnote of **Livesey** at p 1107 reads:

> "Held: Appeal allowed. The appellant or a fair-minded observer might reasonably have apprehended that the views which the two members of the court had formed in the previous case on a question of fact which was a live issue in the hearing, or on the credit of a witness whose evidence was significant on that question, might result in the proceedings being affected by bias by reason of pre-judgment."

In the instant case there was no pre-judgment of any fact which would disqualify Carey & Wright JJA from exercising their discretion fairly to order a retrial or acquit. The judges were aware that their previous decision on substantive appeal was set aside by the Privy Council. So the issue of pre-judgment did not arise.

In another case from **Australia - Grassby v R** [1991] LRC 32 the headnote at p. 33 reads:

> "Where the parties or a member of the public might entertain a reasonable apprehension that a judge might not bring an impartial and unprejudiced mind to the resolution of the case, then the judge should disqualify himself. In Waterhouse v Gilmore [1988] 12 NSWLR 270 at 288 Hunt J, in seeking to make a distinction between prosecutions for criminal defamation serving private interests and those justifying use of the criminal law because they had a public aspect, had necessarily spoken of the prosecution of the applicant in terms of approbation at a time when the evidence against him had not been heard. The comment was in a considered judgment and involved an element of prejudgment in emphatic terms which must surely have justified apprehension on the part of the applicant that the judge's attitude towards his prosecution might not be impartial. The fact that the comment was made in an unrelated case was so unusual as to add significance. Accordingly, the applicant or a member might have entertained a reasonable apprehension of bias and the judge should have disqualified himself. If the applicant was committed for trial and any application for stay made, the views of the Court of Criminal Appeal on the matter should be disregarded (see p 47 post) Livesey v New South Wales Bar Assn [1985] LRC (Const) 1107 and R v Watson, ex p Armstrong [1976] 136 CLR 248

> applied. [Editors' note: section 41(6) of the Justices Act 1902 (NSW) is set out at pp 35-36, post."

Here again quite apart from the test which this court no longer follows, the facts of the instant case differs. There was no out of turn comments by either judge in the instant case and the findings of this court had been set aside on appeal.

The right of fair hearing before an impartial tribunal was recognized by the common law before the fundamental rights provision was enshrined in the constitution. It is not necessary to decide the broad question of whether this right as enshrined can be waived. The pertinent issue is whether counsel on behalf of the appellant who drafted the notice of appeal, and argued the case, can now complain of apparent bias without raising that objection before the commencement of the hearing. To my mind, as Mr Campbell submitted, he cannot so do on behalf of the appellant. He cannot because the principle expressed by Theobalds J supra is part of the common law remedy which is adequate to ensure a right to a fair hearing before the independent and impartial judges of the Court of Appeal. So the principle of waiver is applicable to the circumstances of this case. It also applied in **Robinson v R** [1985] 2 All ER 594 at 600 where Lord Roskill said:

> " In the present case the absence of legal representation was due not only to the conduct of counsel but to the failure of the appellant, after his decision not to seek legal aid, to ensure that those by whom he wished to be represented were put in funds within a reasonable time before the trial or, if such funds were not forthcoming, to apply in advance for legal aid. If a defendant faced with a trial for murder, or the date of which the appellant had had ample notice, does not take reasonable steps to ensure that he is represented at the trial, whether on legal aid or otherwise, he cannot reasonably claim that the lack of legal representation resulted from a deprivation of his constitutional rights."

This statement was made in the context of section 20(6) of the Constitution which reads:

> "20(6) Every person who is charged with a criminal offence -
>
> ...
>
> © shall be permitted to defend himself in person or by a legal representative of his own choice..."

So this is a clear instance of a waiver.

There were doubts expressed as to whether it was open to this court to follow the Australian test in cases of apparent bias. So it is important to refer to Lord Diplock's judgment in **deLasala v deLasala** [1980] AC 546 at 557 - 558 and the subsequent judgment of Lord Scarman in **Tai Hing Ltd v Lin Chong Hing Bank** [1986] 1 AC 80 at p. 108. It reads:

> " It was suggested, though only faintly, that even if English courts are bound to follow the decision in **Macmillan's** case the Judicial Committee is not so constrained. This is a misapprehension. Once it is accepted, as in this case it is, that the applicable law is English, their Lordships of the Judicial Committee will follow a House of Lords' decision which covers the point in issue. The Judicial Committee is not the final judicial authority for the determination of English law. That is the responsibility of the House of Lords in its judicial capacity. Though the Judicial Committee enjoys a greater freedom from the binding effect of precedent than does the House of Lords, it is in no position on a question of English law to invoke the Practice Statement (Judicial Precedent) [1966] W.L.R. 1234 of July 1966 pursuant to which the House has assumed the power to depart in certain circumstances from a previous decision of the House. And their Lordships note, in passing, the Statement's warning against the danger of disturbing retrospectively the basis on which contracts have been entered into. It is, of course, open to the Judicial Committee to depart from a House of Lords' decision in a case where by reason of custom, statute, or for other reasons peculiar to the jurisdiction where the matter in dispute arose, the Judicial Committee is required to determine whether English law should or should not apply. Only if it be decided or accepted (as in this case) that English law is the law to be applied will the Judicial Committee consider itself bound to follow a House of Lords' decision. An illustration of the principle in operation is afforded by the

> recent New Zealand appeal **Hart v O'Connor** [1985] A.C. 1000, in which the Board reversed a very learned judgment of the New Zealand Court of Appeal as to the contractual capacity of a mentally disabled person, holding that because English law applied, the duty of the New Zealand Court of Appeal was not to depart from what the Board was satisfied was the settled principle of that law."
>
> **Was there evidence of pre-trial publicity which would preclude a fair hearing within the intendment of section 20(1) of the constitution?**

The only evidence tendered of pre-trial publicity was the report of the publication in the Sunday Gleaner of September 27 1992 of the judgment of the Court of Appeal on the issue of a retrial. It is questionable whether this could ever be regarded as adverse pre-trial publicity which could deny an appellant of a fair hearing. But if it were to be so contended at the trial, then the judge could conduct the case in accordance with the guidelines for the jury adverted to by this court in **Grant v DPP** [1980] 31 WIR 246 and approved by Lord Diplock at 304 - 305.

Conclusion

In the light of the foregoing, I am persuaded that the appellant Berry did not make out a case either under the Constitution or common or statute law, that his right to a fair hearing was breached because of the composition of the Court of Appeal or that there was a real danger of bias in the judges who heard the reference from the Privy Council. Moreover, the single publication of extracts of the judgment in the Sunday Gleaner could never amount to adverse pre-trial publicity so as to deny the appellant a fair hearing in accordance with section 20(1) of the Constitution. Consequently, the order of the Constitutional Court is affirmed and the appellant must pay the agreed or taxed costs of this appeal.

GORDON, J.A.:

I have read the draft judgments of Rattray, P. and Downer, J.A. I agree with the conclusions that the appeal should be dismissed. I endorse the reasons advanced by Downer, J.A.

I wish to address the issue of bias as raised by the appellant in submissions. Their Lordships of the Privy Council in determining the issues that arose for consideration in the appeal had to consider the application of the law extant in Jamaica and in referring the case to this court, they said:

> " The case against the appellant was indeed a strong one and for that reasontheirLordships would not be prepared simply to recommend that an acquittal be ordered, but they do not feel able to say that the jury would inevitably have convicted, if the defence had been furnished in advance with the three statements in question and if the jury had received the accepted direction on evidence as to character and guidance from the trial judge on the problem, whatever it was, indicated when they first returned to court.
>
> Accordingly, their Lordships will humbly advise Her Majesty that the appeal should be allowed and the case remitted to the Court of Appeal with the direction that that court should quash the conviction of the appellant and either enter a verdict of acquittal or order a new trial, whichever course it considers proper in the interests of justice."
> ([1992] 3 All ER 896 f-g)

In doing this, their Lordships were invoking the provisions of section 14(2) of the Judicature (Appellate Jurisdiction) Act. The Court of appeal had to do as mandated according to law and the factors the court had to consider in their determination of

whether to acquit or order a re-trial were dictated by the said Privy Council in **Reid v. R** [1978] 27 WIR 254. The court in their judgment showed that they relied on and applied principles enunciated in **Reid v R. (**supra). The Court of Appeal had a duty to ensure that the interests of justice should be served and to this end their Lordships considered " that this is a case in which the right course is to rely for that purpose on the judicial discretion and experience of the court in Jamaica."

Their Lordships of the Privy Council had before them the judgment of the Court of Appeal, of November 10, 1989 the reasons for which were handed down on March 12, 1990. They had considered it and had seen the passages referred to by the appellant in these proceedings as supportive of his claim for bias. They nevertheless remitted the case, having allowed the appeal, to the said Court of Appeal for the determination of the future course of proceedings. Their Lordships would have known that the court would know of its judgments. They would also appreciate that the panel that sat to make the determination of the referral could include a judge or judges who heard the appeal.

In **R v. Gough** [1993] AC 646, The House of Lords, held --

> " Except where a person acting in a judicial capacity had a direct pecuniary interest in the outcome of the proceedings, when the court would assume bias and automatically disqualify him from adjudication, the test to be applied in all cases of apparent bias, whether concerned with justices, members of other inferior tribunals, jurors or arbitrators, was whether, having regard to the relevant circumstances, there was a real danger of bias on the part of the relevant member of the tribunal in question, in the sense that he might unfairly regard or have

> unfairly regarded with favour or disfavour the case of a party to the issue under consideration by him. Where the case was concerned with bias on the part of a justice's clerk, the court should go on to consider whether the clerk was invited to give the justices advice and, if so, whether it should infer that there was a real danger that the clerk's bias infected the views of the justices adversely to the applicant."

In **R. v. Lovegrove** [1951] 1 All ER 804, no issue was joined but the court discussed whether a judge who tried the case could sit on the appeal. It was held that as a general rule, he could.

Most of the authorities relied on in support of submissions on bias related to decisions of justices and inferior tribunals. I now turn to a decision of the Privy Council in **Rees, Corbin, et al v. Richard Alfred Crane** - Privy Council Appeal No. 13 of 1993, judgment delivered on 14th February, 1994.

The respondent /appellant Richard Alfred Crane was the Senior Puisne Judge of Trinidad and Tobago. He was prohibited from sitting as such by the Chief Justice and this prohibition was confirmed by the Judicial Service Commission who represented to the President that a tribunal be appointed to investigate the question of removing him from office.

The Court of Appeal by a majority reversed much of the Judgment of Blackman, J in proceedings in the High Court for judicial review and by way of motion. They held:

> "The decisions -
>
> (a) of the Chief Justice and/or the Commission to prohibit the respondent from presiding in court; and

(b) of the Commission to represent to the President that the question of removing the respondents from office ought to be investigated, being ultra vires, should be quashed and that the Commission be prohibited from representing to the President that such question ought to be investigated"

The Privy Council dismissed the appeal thus confirming the majority judgment of the Court of Appeal. On the Constitutional motion (CA No. 59 of 1991) they held --

"(a) that the first three appellants be prohibited from proceedings as a Tribunal to enquire into the question of removing the respondent as a judge of the High Court;

(b) that damages be assessed by a judge in Chambers.

The respondent asked the Court of Appeal to find that there was actual bias on the part of the Chief Justice and that the Commission was biased in considering whether the question referred to above should be represented to the President for investigation."

Two judges of the Court of Appeal were divided in their determination of this issue and the other judge found it unnecessary to decide the question. The respondent cross-appealed.

There were eight appellants consisting of :

(a) The first three - the appointees to the tribunal to enquire into the question of removing the respondent as a judge of the High Court.

(b) The fourth - the Chief Justice of Trinidad and Tobago and Chairman of the Judicial Service Commission.

(c) The fifth to eighth - members of the Judicial Service Commission.

(d) The Attorney General of Trinidad and Tobago.

On the issue of bias their Lordships of the Privy Council said; per Lord Slynn of Hadley:

> " The allegation is in two parts. In the first place it is contended that there was personal animosity on the part of the Chief Justice which predisposed him against the respondent. There is certainly evidence of an acrimonious relationship between the two men and if the respondent's account (which was not challenged or answered) is accepted, the Chief Justice showed from time to time between 1986 and 1990 hostility towards the respondent. It is indeed unsatisfactory that the respondent was not told by the Chief Justice of his decision to suspend the respondent and to raise with the Commission the question of referring the matter to a tribunal. It is also curious to say the least that the respondent on his return had such difficulty in seeing the Chief Justice.
>
> On the other hand it is to be assumed that the Chief Justice either accepted that the complaints made to him were sufficiently established, or that, at any rate, he considered that they were sufficiently serious to warrant reference to the Commission. If he so thought, he was entitled to refer the matter to the Commission. He had, even if in a hostile way, given the respondent and opportunity to deal with earlier complaints. The Chief Justice must have realised the seriousness of these complaints for the respondent and even if he failed to deal fairly with the respondent, by giving him notice of them and a chance to

> deal with them, it is not lightly to be assumed that he would allow personal hostility to colour his decision to suspend the respondent or to recommend to the Commission that the matter be referred to a tribunal. Having considered all the material before them, including the judgments of Blackman J, and the Court of Appeal, and despite the forthright views expressed by Davis J., their Lordships are not satisfied that 'a real danger' of bias has been established (R.v.Gough [1993]A.C. 646)."

On bias in the Commission their Lordships found:

> " The Commission ensured that the Chief Justice did not continue as Chairman and there is no reason to assume that this was a charade. They also spent time in considering whether there should be a representation. Their professional backgrounds are such that an assumption of bias should not lightly be made, and the fact that they had agreed to the suspension does not mean that,on an investigation of fuller material, they were not capable of looking at the question of a representation afresh and fairly. Nor is it to be assumed that the Chief Justice unduly influenced them even though his view must have had considerable weight. In the absence of personal malice on his part there is no real evidence that they were improperly influenced. In all the circumstances their Lordships are not satisfied that the allegation of bias is made out. The cross-appeal therefore fails."
>
> [Emphasis supplied]

The integrity of the office he holds and the high standard of professionalism he is required to display require any judge who finds he is unable to dispassionately address

any issue to withdraw from adjudication thereof. A charge of bias if made without proof of a pecuniary interest or actual malice cannot be entertained.