SCSL-2004-15-PT

6386

143

(6386 – 6414)

THE SPECIAL COURT FOR SIERRA LEONE

THE APPEALS CHAMBER

BEFORE: **Justice Renate Winter, Presiding**
Justice Emmanuel Ayoola
Justice George Gelaga King
Justice Raja Fernando

Registrar: **Mr Robin Vincent**

Date filed: 28th May 2004

The Prosecutor

-v-

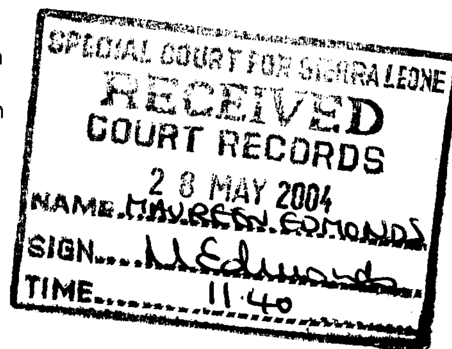
Issa Hassan Sesay

Case No: SCSL - 2004 – 15 - PT

MOTION SEEKING THE DISQUALIFICATION OF JUSTICE ROBERTSON FROM ALL JUDICIAL FUNCTIONS INVOVING THE RUF (INCLUDING THOSE EXERCISED PURSUANT TO RULE 24 OF THE RULES OF PROCEDURE AND EVIDENCE)

Office of the Prosecutor
David Crane
Desmond de Silva
Luc Cote,

Defence
Tim Clayson
Wayne Jordash
Serry Kamal
Sareta Ashraph



INTRODUCTION

1. On 27th February 2004 the defence filed a Motion in the Special Court seeking the disqualification of Justice Robertson from the Appeals Chamber on the basis that the Judge "has expressed the clearest bias against both the Revolutionary United Front (RUF) and the Armed Forces Revolutionary Front (AFRC) and thereby has displayed lack of impartiality to the accused indicted as members of these groups and their respective defences".[1]

2. On the 13th March 2004 the members of the Appeal Chamber (sitting without Justice Robertson) ruled inter alia as follows:

   (i) Any RUF indictee who may be affected one way or the other by the decisions, is entitled to bring a motion under Rule 15(A) and Rule 15(B) if he has credible evidence that a member of that panel may be biased or prejudiced, even if that applicant is not a party to the motions for which the Rulings are pending.[2]

   (ii) "The crucial and decisive question is whether an independent bystander so to speak, or the reasonable man, reading those passages[3] will have a legitimate reason to fear that Justice Robertson lacks impartiality. In other words, whether one can apprehend bias. I have no doubt that a reasonable man will apprehend bias, let alone an accused person, and I so hold.[4]

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[1] Motion, para 2.
[2] Decision para. 13
[3] Geoffrey Robertson, Crimes Against Humanity – the Struggle for Global Justice (The New Press, 2002) (Crimes Against Humanity, page 220)
[4] Decision para. 15

(iii) It follows from all I have said that I find some merit in the application to this extent: that Justice Robertson ought to be disqualified from adjudicating on the following matters:

(i) those motions involving alleged members of the RUF for which decisions are pending, in this Chamber; and

(ii) Cases involving the RUF if and when they come before the Appeals Chamber".

3. On the 20th April 2004 the defence sought clarification of the decision on the on Defence Motion seeking the Disqualification of Justice Robertson from the Appeals Chamber.

4. On the On the 25th May 2004 the Appeal Chamber dismissed the motion ruling that the Disqualification decision was clear, explicit and unambiguous in disqualifying Justice Robertson from adjudicating on the following matters:

(i) Those Motions involving alleged members of the RUF for which decisions are pending, in this Chamber; and

(ii) Cases involving the RUF if and when they come before the Appeals Chamber.

(iii) This motion is brought requesting the Appeal Chamber to disqualify Justice Robertson from any judicial function which concerns the RUF. In other words to prevent Justice Robertson from taking any part in any decision, (including decisions taken in the course of plenary sessions of the judges concerning the rules of the Special Court of Sierra Leone), insofar as any such decision relates to or concerns in any way the trials of defendants formerly members of the RUF.

5. The defence seek the disqualification only as a logical corollary of the Disqualification decision. Whilst it is in the interests of all that this issue is resolved finally and expeditiously the defence submit that the decision (and the basis for the decision) must, in the interests of justice and fairness for the accused be applied logically and with due regard for the purpose and object of the decision. It must be applied, as a matter of straightforward logic to all other judicial functions for the reasons set out below.

SUBMISSIONS

6. The defence understand that the Appeal Chambers findings:

   (i) Arise from an objective assessment of the views expressed by Justice Robertson in the book "Crimes Against Humanity – the Struggle for Global Justice"

   (ii) Concern Justice Robertson's lack of appearance of impartiality towards the accused alleged to have been members of the RUF and

   (iii) are applicable and relevant to the functions and decisions of Justice Robertson as they relate to and impact upon the cases of the defendants alleged to be members of the RUF.

7. It must be the case that this appearance of bias is indivisible as regards the numerous functions and decisions of Justice Robertson both as a judge and member of the Plenary Council of judges, insofar as they relate to and impact upon the cases of the RUF. In other words, if Justice Robertson appears to be biased with respect to cases and appeals involving members of the RUF then that appearance remains irrespective of the judicial function being then exercised by him.

8. As Lord Hewart C.J. said in R v Sussex Justices, Ex parte McCarthy: "It is not merely of some importance but it is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done". [5] This sacrosanct principle must apply to (i) all the cases involving the RUF and (ii) to all other decisions which Justice Robertson was and is empowered to make or take part in making in discharging his judicial functions (including, for example, those which he is empowered to make by Rule 24 of the Rules of Procedure and Evidence).

9. "Bias is an insidious thing that, even though a person may in good faith believe that he was acting impartially, his mind may be affected by bias… In any event, there is an overriding public interest that there should be confidence in the integrity of the **administration of justice**" (emphasis added).[6]

10. Thus it must be borne in mind that a clear and unequivocal finding that Justice Robertson appears to be biased against the RUF does not entail looking into the mind of the justice himself or whether he did (or would) "favour one side at the expense of the other. The court looks at the impression which would be given to other people. The reason is plain enough. Justice must be rooted in confidence: and confidence is destroyed when right thinking people go away thinking: "The judge was biased".[7]

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[5] R v Sussex, Ex parte McCarthy (1924) 1 K.B. at page 256.
[6] R v Gough (1993) A.C. 646 at pp 659
[7] Ibid pp 666.

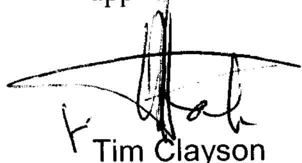
REQUEST

11. Thus the Defence submit that it is a natural and inescapable consequence of the ruling of the Appeal chamber hereinbefore referred to that:

    (i) Justice Robertson must take no part in any decision, (including decisions taken in the course of plenary sessions of the judges concerning the rules of the Special Court of Sierra Leone), insofar as any such decision relates to or concerns in any way the trials of defendants formerly members of the RUF,

    And by this motion request the Appeal Chamber to apply its decision logically to all other judicial functions exercised by Justice Robertson as they relate to or impact upon the cases of the RUF.

12. In the event that the Appeal Chamber disagrees with the defence submissions that it is logical that their Disqualification decision applies as herein asserted the defence would respectfully request an oral hearing in order to properly and transparently adjudicate upon this issue. The defence only seek, with the greatest of respect to the Appeal Chamber, to protect the interests of their client. It is submitted that this can not be achieved in the absence of a logical application of the Disqualification decision.



Tim Clayson
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Sareta Ashraph

27th May 2004

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BOOK OF AUTHORITIES

1. R v Sussex, Ex parte McCarthy (1924) 1 K.B. pp 256.
2. R v Gough (1993) A.C. 646

Source: Legal > Legal (excluding U.S.) > United Kingdom > Case Law > **UK Cases, Combined Courts**
Terms: **r v gough 1993a.c.** (Edit Search)

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[1993] AC 646

REGINA

REPONDENT

AND

GOUGH

APPELLANT

[HOUSE OF LORDS]

[1993] AC 646

HEARING-DATES: 14, 15, 22 May 1992, 27, 28, January 20 May 1993

20 May 1993

CATCHWORDS:
Crime - Jury - Bias - Juror next door neighbour of defendant's brother - Juror unaware of connection until after trial - Whether real danger of bias - Whether irregularity affecting trial

HEADNOTE:
The appellant was indicted on a single count of conspiring with his brother to commit robbery. At the trial the brother, who had been discharged on the application of the prosecution at the committal hearing, was referred to by name and a photograph of him and the appellant was shown to the jury and

a statement containing the brother's address was read to the jury. After the appellant had been convicted and sentenced the brother, who was in the court, started shouting. One of the jurors then recognised him as her next door neighbour. He then informed the defence that a member of the jury was his next door neighbour. Those facts were placed before the trial judge but he held that he was functus officio. The juror was later interviewed by the police and swore an affidavit in which she stated that she was unaware of the connection until after the jury had delivered its verdict. On appeal by the appellant on the ground that the presence of the brother's next door neighbour on the jury was a serious irregularity, the Court of Appeal (Criminal Division) held that the correct test was whether there was a real danger that the appellant might not have had a fair trial and dismissed the appeal.

On appeal by the appellant: -

Held, dismissing the appeal, that the test to be applied in all cases of apparent bias was the same, whether concerning justices, members of inferior tribunals, arbitrators or jurors, and, in cases involving jurors, whether being applied by the judge during the trial or by the Court of Appeal when considering the matter on appeal, namely, whether, in all the circumstances of the case, there appeared to be a real danger of bias, concerning the member of the tribunal in question so that justice required that the decision should not stand; that, accordingly, the Court of Appeal, in dismissing the appeal, applied the correct test (post, pp. 660D-E, 670C-F, H-671B, 673G).

Reg. v. Spencer [1987] A.C. 128, H.L.(E.) applied.

Rex v. Sussex Justices, Ex parte McCarthy [1924] 1 K.B. 256, D.C.;Reg. v. Barnsley Licensing Justices, Ex parte Barnsley and District Licensed Victuallers' Association [1960] 2 Q.B. 167, C.A. and Metropolitan Properties Co. (F.G.C.) Ltd. v. Lannon [1969] 1 Q.B. 577, C.A. considered.

Dimes v. Proprietors of Grand Junction Canal (1852) 3 H.L.Cas. 759, H.L.(E.) and Reg. v. Box [1964] 1 Q.B. 430, C.C.A. distinguished.

Per curiam. (i) That in the case of alleged bias on the part of a justices' clerk, the court, having considered whether there was a real danger of bias, should go on to consider whether the clerk had been invited to give the justices advice and, if so, whether it should infer that there was a real danger of the clerk's bias having infected the views of the justices adversely to the applicant (post, pp. 670F-G, H-671B).

(ii) There is only one established special category where the law assumes bias and that exists where the tribunal has a pecuniary or proprietary interest in the subject matter of the proceedings. The courts should hesitate long before creating any other special category (post, pp. 664E-F, 670H-671B,673F).

Decision of the Court of Appeal (Criminal Division), post, pp. 649 et seq.; [1992] 4 All E.R. 481 affirmed.

INTRODUCTION:
APPEAL against conviction.

The appellant, Robert Brian **Gough,** was convicted in the Crown Court at Liverpool, before Judge Lynch and a jury, of conspiracy to rob. He was sentenced to 15 years' imprisonment. He appealed against conviction on the ground, inter alia, that there was a material irregularity in the conduct of the trial in that one of the jurors was the next-door neighbour of his brother, David **Gough.**

The facts are stated in the judgment.

The defendant appealed by leave of the Appeal Committee of the House of Lords (Lord Keith of Kinkel, Lord Browne-Wilkinson and Lord Mustill) granted on 20 July 1992.

COUNSEL:
Benet Hytner Q.C. and David Boulton (assigned by the Registrar of Criminal Appeals) for the appellant.

Andrew Moran and Andrew Downie for the Crown.

Cur. adv. vult.

22 May.

Benet Hytner Q.C. and David Boulton for the appellant. Two tests have been applied when considering whether a conviction should be quashed on the ground of bias: (a) was there a real danger that the defendant may not have had a fair trial ("the real danger test") and

(b) would a reasonable and fair minded person sitting in the court and knowing all the relevant facts have had a reasonable suspicion that a fair trial of the defendant was not possible ("the reasonable observer test")?

The real danger test has its genesis in Reg. v. Box [1964] 1 Q.B. 430 and is supported by Rex v. Twiss (1918) 13 Cr.App.R. 177. The other authorities on that test include Reg. v. Sawyer (1980) 71 Cr.App.R. 283; Reg. v. Spencer [1987] A.C. 128; Reg. v. Pennington (1985) 81 Cr.App.R. 217 and Reg. v. Putnam (1991) 93 Cr.App.R. 281.

The reasonable observer test is based on the old and well established principle that justice should not only be done but should manifestly and undoubtedly be seen to be done: Rex v. Sussex Justices, Ex parte McCarthy [1924] 1 K.B. 256, 259. [Reference was also made to Reg. v. Uxbridge Justices, Ex parte Burbridge, The Times, 21 June 1972; Reg. v. McLean, Ex parte Aikens (1974) 139 J.P. 261; Reg. v. Altrincham Justices, Ex parte N. Pennington [1975] Q.B. 549; Reg. v. Liverpool City Justices, Ex parte Topping [1983] 1 W.L.R. 119 and Reg. v. Morris (orse. Williams) (1990) 93 Cr.App.R. 102.] The reasonable observer test has its genesis in a line of authorities stating two apparently conflicting tests: was there a real likelihood of danger of bias (see Reg. v. Rand (1986) L.R. 1 Q.B. 230; Frome United Breweries Co. Ltd. v. Bath Justices [1926] A.C. 586 and Reg. v. Camborne Justices, Ex parte Pearce [1955] 1 Q.B. 41) and was there a reasonable suspicion of bias? The apparent conflict was reconciled in Metropolitan Properties Co. (F.G.C.) Ltd. v. Lannon[1969] 1 Q.B. 577, 599. [Reference was also made to Reg. v. Barnsley Licensing Justices, Ex parte Barnsley and District Licensed Victuallers' Association [1960] 2 Q.B. 167.]

The real danger test was developed in isolation from the reasonable observer test. In none of the real danger cases was any of the reasonable observer cases ever cited in argument. The reasonable observer test is to be preferred because it is more soundly based in jurisprudence. There is no justification for applying a different test to magistrates, members of inferior tribunals or arbitrators: see Ardahalian v. Unifert International S.A. (The Elissar) [1984] 2 Lloyd's Rep. 84 and Bremer Handelsgesellschaft m.b.H. v. Ets. Soules et Cie. [1985] 1 Lloyd's Rep. 160; [1985] 2 Lloyd's Rep. 199.

Brian Leveson Q.C. and Andrew Moran for the Crown. The concept of bias covers a wide range of activity, so the first task of the court is to establish the facts. If there is no underlying substance to the allegation, that is the end of the matter: Rex v. Sussex Justices, Ex parte McCarthy [1924] 1 K.B. 256, 258.

The test in relation to bias, other than in respect of pecuniary or proprietary interest, has been propounded in two different ways: (a) is there a real likelihood of bias (see Reg. v. Rand, L.R. 1 Q.B. 230; Reg. v. Camborne Justices, Ex parte Pearce [1955] 1 Q.B. 41; Ardahalian v. Unifert International S.A. (The Elissar) [1984] 2 Lloyd's Rep. 84 and Bremer Handelsgesellschaft m.b.H. v. Ets. Soules et Cie. [1985] 1 Lloyd's Rep. 160; [1985] 2 Lloyd's Rep. 199) and (b) is there a reasonable suspicion of bias? Recently the distinction has become less evident: see Metropolitan Properties Co. (F.G.C.) Ltd. v. Lannon [1969] 1 Q.B. 577 and Hannam v. Bradford Corporation [1970] 1 W.L.R. 937, but the

correct interpretation of the predominant principle is that the test should be whether the court should conclude objectively from all the facts that there was a real likelihood that the relevant tribunal was in fact prejudiced in some operative way. The test is objective: Reg. v. Liverpool City Justices, Ex parte Topping [1983] 1 W.L.R. 119; Reg. v. Uxbridge Justices, Ex parte Burbridge, The Times, 21 June 1972 and Reg. v. McLean, Ex parte Aikens, 139 J.P. 261.

In relation to the knowledge and conduct of a juror in a criminal trial the test of "real danger of prejudice" has been consistently applied. That is the equivalent of the objective real likelihood test (see Rex v. Twiss, 13 Cr.App.R. 177; Reg. v. Box [1964] 1 Q.B. 430; Reg v. Spencer [1987] A.C. 128 and Reg. v. Putnam, 93 Cr.App.R. 281) and is in keeping with the exercise of parallel jurisdiction in other areas of criminal procedure. [Reference was made to Reg. v. Weaver [1986] 1 Q.B. 353 and Reg. v. Chapman (William) (1976) 63 Cr.App.R. 75.]

Hytner Q.C. replied.

Their Lordships took time for consideration.

20 May.

PANEL: Farquharson L.J., Alliott and CazaletJJ Lord Goff of Chieveley,Lord Ackner, Lord Mustill, Lord Slynnof Hadley and Lord Woolf

JUDGMENTBY-1: FARQUHARSON L.J

JUDGMENT-1:
FARQUHARSON L.J: read the following judgment of the court. On 25 April 1991 at Liverpool Crown Court the appellant was convicted on an indictment containing a single count of conspiracy to rob and was sentenced to a term of 15 years' imprisonment. The indictment was based on the commission of eight robberies which had taken place in Liverpool between 13 April 1989 and 6 March 1990. The first seven robberies bore features of striking similarity such that the prosecution contended they had all been committed by the same two men.

On each occasion the two men were masked, generally with a full face balaclava or a stocking. The premises which were being attacked were betting shops. The robberies were committed at a time, at the beginning or end of the day, when a large amount of money would be in the till. Besides being masked the two robbers were also armed, one with a sawn-off shotgun and the other with a large knife. The technique was usually for the former to vault over the counter and security screen, threaten the staff and demand money while the latter stood by the door keeping guard against anyone coming in or a customer going out. Sometimes the guard carried the shotgun.

The first, second and sixth robberies were committed at the same premises, the robbers using the same escape route along a railway embankment on each occasion. One member of the staff of the betting shop, a Mr. Mooney, was sure that it was the same two men on each occasion by reason of their movements, build and general behaviour. Similarly another witness, Mr. Forman, who worked at a betting shop which was the subject of the fourth and fifth robberies concluded that the same men were responsible on both occasions. A Mrs. Hunter was confident that the same two men were responsible for the fourth and seventh robberies of another betting shop. There was also evidence linking the offenders who committed robberies three and four by the garments one of them was wearing. In short the prosecution were able to present a strong case that each of the first seven robberies were committed by the same two men. It was the case for the Crown that the two responsible were the appellant and his brother, David Stephen **Gough.**

After the sixth robbery the two robbers were seen to conceal something in the undergrowth of the railway embankment. The witness who observed this reported what he had seen to the police. There were found a sawn-off double barrelled shotgun, with a cartridge in both barrels, a bag containing gloves and masks and two pairs of blue jeans. The shotgun, which was of a somewhat antique design, was identified by witnesses as having been used in the third, fourth and sixth robberies, while others described a similar weapon being used on some of the other robberies. A significant piece of evidence was a set of four keys which were discovered in the pocket of one of the pairs of jeans. It was found that these keys fitted the main door of the block of flats where the appellant's father lived, as well as the flat itself. Another key fitted the front door lock of the house of the appellant's sister.

The eighth robbery followed a different pattern from the first seven; although two masked men were involved, they were not armed, and the premises concerned was an off-licence rather than a betting shop. There was no evidence from the scene of the robbery which

implicated the appellant. However, some 10 minutes after the robbery took place, a Mrs. Maher was walking along a road about a quarter of a mile from the off-licence when she saw an old Ford Capri motor car with a beige vinyl roof pull up in the middle of the road. As she watched she saw a man running from the direction of the road where the off-licence was situated and get into the front passenger seat of the vehicle. The car was driven away. After the appellant's arrest Mrs. Maher picked him out on an identification parade as the man she had seen running to the car. Furthermore she was taken by the police to a car park where there were a large number of vehicles and identified a Capri as being the vehicle she had seen. It transpired that the Capri belonged to David **Gough's** wife, Elaine, and up to the preceding January had been owned by the appellant.

Both the appellant and David **Gough** were arrested on 22 March 1990. They had been kept under observation by the police and were seen to arrive at the block of flats, where their father lived, in the same Ford Capri with David **Gough** driving. The appellant went into the flats and was later joined by his brother. When they emerged the appellant was carrying two jackets, one a light grey tweed and the other dark grey. They were arrested when they got back into the car. The appellant had in his pocket a set of keys, two of which again operated the main door to the block of flats and his father's flat respectively. Witnesses who were present at the robberies later identified the tweed jacket as being worn by one of the robbers in the third and fourth robberies, and the dark grey jacket in the fifth.

The father's flat was searched by the police, who found a suitcase containing some of the appellant's clothing and correspondence, together with his cheque-book and cheque card. Hidden at the back of a cupboard in the kitchen the police discovered four shotgun cartridges. Microscopic examination subsequently revealed that one of these cartridges had at some time been loaded into the shotgun found on the railway embankment after the sixth robbery.

Both the appellant and David **Gough** were charged with the robberies. At the committal proceedings the prosecution applied for David **Gough**

to be discharged on the grounds that there was insufficient evidence against him. We have not been concerned with the merits of this decision.

At the trial the appellant was indicted on a single count that between the relevant dates he conspired with David **Gough** to commit robberies. By his notice of appeal the appellant claims that the judge of his own motion should have required the prosecution to proceed on an indictment containing eight substantive counts of robbery and not on the conspiracy count. Mr. Hytner, for the appellant, has argued that on principle a defendant should not be tried on a conspiracy count when substantive counts are available. Apart from the artificiality of a situation like the present where the alleged co-conspirator has been discharged, it is unfair for a defendant to have to meet a global charge of this nature instead of counts which he can meet or attempt to meet individually.

Furthermore if a jury convicts on a conspiracy count based on eight overt acts, that is the individual robberies, it is not possible to say which overt acts have been proved to the jury's satisfaction. In this case the evidence was very weak on some counts.

The prosecution have contended that the facts of the present case are an exception to the general principle in that the criminality of the enterprise is not sufficiently contained in an allegation of eight individual robberies. The range and number of these crimes are such that a conspiracy count is more appropriate.

At the trial counsel for the appellant indicated at the outset to the judge that he would be challenging the conspiracy count in the indictment. However, for whatever reason, he did not in the result do so. We are clearly of the opinion that in such a situation it is not for the judge

to order an amendment of the indictment. It is for counsel to say whether it is in his client's best interest to seek such an amendment. Mr. Hytner recognises that he cannot really sustain this ground of appeal before this court in the absence of an application to amend in the court below.

Although David **Gough** was not tried with the appellant, he was referred to by name with some frequency during the proceedings. The court does not know how often David **Gough** attended his brother's trial but on an occasion when he was present he recognised one of the jurors as his next door neighbour. He did not draw this to the attention of those representing the appellant during the trial. After the appellant had been sentenced David **Gough** started shouting and it was at this point that the juror, Mrs. Smith, recognised him. The facts were placed before the judge who decided, correctly in our view, that he had no jurisdiction to take any action, the appellant having been convicted.

However, a statement was taken from Mrs. Smith which was verified by affidavit. In this statement Mrs. Smith said (1) when she began her service on the jury she did not recognise the name "**Gough**" as she knew her neighbour as "Steve." Similarly she knew David's wife as Elaine during the two years that they had been her next door neighbours. (2) The name David **Gough** was mentioned on a number of occasions during the course of the trial. (3) She had no recollection of ever seeing the appellant before the trial; and had no idea he was the brother of her next door neighbour. (4) On 24 April 1991 during the trial, prosecution counsel read out a statement which contained the address, 3, Buckley

Way - Mrs. Smith lives at no. 2 - and concerned the Capri motor car. She wondered whether Steve was David **Gough** but thought it could not be him as he was called Steve. She was confused. (5) The photographs of the appellant and David **Gough** respectively were shown to the jury during the trial of the appellant. They were police photographs colloquially known as "mug shots." Mrs. Smith did not recognise David. (6) The fact that David **Gough** was her neighbour did not influence her thinking as a juror and she did not mention the matter to her fellow members of the jury.

Another matter raised by Mrs. Smith in her statement was that her son-in-law's brother was married to the sister of the **Goughs.** Although she knew the sister by her Christian name, Valerie, she was unaware of the connection.

Before us Mr. Hytner argues that the presence of Mrs. Smith on the jury constituted a serious irregularity in the conduct of the trial and for that reason the conviction of the appellant should be quashed. He has demonstrated that there are two conflicting lines of authority on the question of bias, or the appearance of bias, in criminal proceedings.

The test, according to the first line of authorities, when considering whether a conviction should be quashed on the grounds of bias is posed in the following question: was there a real danger that the accused may not have had a fair trial? If this be the correct question Mr. Hytner concedes that he cannot disturb this verdict, because the circumstances of the case are such that there was not such a danger. He contends however that the proper test is: would a reasonable and fair-minded person sitting in the court and knowing all the relevant facts have a reasonable suspicion that a fair trial of the defendant was not possible?

Mr. Hytner submits, applying that test, that the fair-minded observer would suspect in the present case that a fair trial was not possible. In this case Mrs. Smith in her affidavit evidence has stated that she was unaware of the relevant facts connecting her to the appellant until after the jury had delivered its verdict. This evidence was unchallenged. Accordingly this can be distinguished from the various authorities which have been cited to us in that in these latter cases the relevant "connecting" facts giving rise to the alleged bias have already been known to the particular member of the tribunal, against whom bias has been raised, throughout the trial in question. This did not apply in the present case. If the

fact that Mrs. Smith was not aware of the relevant facts connecting her to the appellant had been known to the fair-minded observer, then surely the observer would, in those circumstances, have regarded the trial as having been a fair one. Should we impute knowledge of Mrs. Smith's particular state of mind to the fair-minded observer? Mr. Hytner submits that such an observer would be bound to conclude that Mrs. Smith must have realised who the case concerned when she heard the address referred to in the statement and also when she saw David **Gough's** photograph. Her claim of ignorance would be unacceptable to a fair-minded observer. We think there is force in this contention. Accordingly we do not seek to distinguish the instant case by imputing to the fair-minded observer actual knowledge of Mrs. Smith's unawareness of the relevant facts until after the verdict had been delivered.

Mr. Moran contends that the first of the two tests referred to above is the correct one to apply, at all events when one is dealing with a juror. If that be right the appeal fails ex concessis, but Mr. Moran claims that even if one applies the second test the question must be decided against the appellant. There was no prejudice real or apparent to the appellant by the presence of Mrs. Smith on the jury and no risk of an unfair trial. Furthermore, if there was any bias on the part of Mrs. Smith it was likely to have been exercised in favour of the appellant rather than against him, since, according to her statement, her relations with David **Gough** were friendly.

We have been referred to a considerable number of authorities by counsel on both sides. In Reg. v. Box [1964] 1 Q.B. 430 a five-judge division of the Court of Criminal Appeal declined to disturb a conviction where the foreman of the jury knew that the appellants were villains, that they were ex-burglars and were associates of prostitutes. Counsel had argued that even if a fair trial had been possible justice had not manifestly been seen to be done, but the court took the view that there was no proof that the foreman was unable to do what he had sworn to do by his oath. Plainly the Court of Criminal Appeal were applying the "real danger test" rather than that of the independent observer, as on those facts it could hardly be said that the latter would not have had a suspicion that a fair trial was not possible.

The same approach was taken by this court in Reg. v. Sawyer (1980) 71 Cr.App.R. 283. During the trial the chief prosecution witness and another witness spoke to three jurors in the court canteen. The judge investigated the matter and found that the witnesses had done little more than pass the time of day. In rejecting the appeal Lord Lane C.J., giving the judgment of the court, said, at p. 285:

"Upon those facts the judge had to decide whether or not there was a real danger that the appellant's position had been compromised by what had happened. Was there a real danger that she was or might have been prejudiced by what had gone on? The discretion which he undoubtedly had to stop the trial had of course to be exercised judicially and had to be exercised upon the facts as he knew them. It seems to us that what he principally had to decide was whether there was any danger from anything done or said that the jury might have been prejudiced against the appellant. In our judgment there was no such danger."

In Reg. v. Bliss (1986) 84 Cr.App.R. 1 this court followed Reg. v. Box as well as Reg. v. Sawyer, 71 Cr.App.R. 283, Garland J. saying, at p. 6:

"It appears to us that the principle which emerges from these cases is that this court will not interfere with the verdict of a jury unless there is either evidence pointing directly to the fact or evidence from which a proper inference may be drawn that the defendant may have been prejudiced or may not . . . have received a fair trial."

Reg. v. Sawyer was approved by the House of Lords in Reg. v. Spencer [1987] A.C. 128. The facts need not be repeated here but in his speech Lord Ackner said, at p. 144:

"The correct test is the one stated in Reg. v. Sawyer (1980) 71 Cr.App.R. 283, 285 namely, whether there was a 'real danger' that the appellants' position had been prejudiced in the circumstances . . ."

From the other line of cases we turn first to Reg. v. Altrincham Justices, Ex parte N. Pennington [1975] Q.B. 549. In a case where a greengrocer was being prosecuted under the weights and measures legislation for giving short weight, the purchaser of the vegetables being a county council school, it was revealed that the chairman of the bench was on the education committee. Lord Widgery C.J. said, at p. 552:

"There is no better known rule of natural justice than the one that a man shall not be a judge in his own cause. In its simplest form this means that a man shall not judge an issue in which he has a direct pecuniary interest, but the rule has been extended far beyond such crude examples and now covers cases in which the judge has such an interest in the parties or the matters in dispute as to make it difficult for him to approach the trial with the impartiality and detachment which the judicial function requires. Accordingly, application may be made to set aside a judgment on the so-called ground of bias without showing any direct pecuniary or proprietary interest in the judicial officer concerned. When an application is made to set aside a decision on the ground of bias, it is of course not necessary to prove that the judicial officer in question was biased. It is enough to show that there is a real likelihood of bias, or at all events that a reasonable person advised of the circumstances might reasonably suspect that the judicial officer was incapable of producing the impartiality and detachment to which I have referred."

In Reg. v. Liverpool City Justices, Ex parte Topping [1983] 1 W.L.R. 119 the applicant was charged with criminal damage. The justices who were to try the case had been given sheets from the court register produced through a computer. These revealed that there were seven further charges pending against the applicant. Despite protests from the defending solicitors the bench decided to hear the charge. On an application for judicial review the Divisional Court held, at p. 123:

"the test to be applied can conveniently be expressed by slightly adapting the words of Lord Widgery C.J. in a test which he laid down in Reg. v. Uxbridge Justices, Ex parte Burbridge, The Times, 20 June 1972 . . . Would 'a reasonable and fair-minded person sitting in court and' knowing all the relevant facts have a 'reasonable suspicion that a fair trial for' the applicant 'was not possible'?"

The application was granted on those facts.

That test was applied in Reg. v. Mulvihill [1990] 1 W.L.R. 438 when a judge tried a robbery case where the loser was a bank in which he held shares, the court distinguishing between the role of the judge and the jury. The Topping test, if one can use that abbreviation, was also applied in Reg. v. Morris (orse. Williams) (1990) 93 Cr.App.R. 102 by this court. During a trial on indictment for theft from Marks and Spencer Plc. it emerged that one of the jurors was an employee of that organisation though working at a different branch. In quashing the conviction the court held that the judge when asked to discharge the juror had not gone into the question of "the appearance of bias."

It is difficult to discover any basis on which these two lines of authority can live together. Mr. Moran has submitted that a distinction

can be drawn between the test to be applied in jury cases and that which is appropriate for magistrates' courts or other inferior tribunals entrusted with fact finding responsibilities. We feel we must accept this distinction because there is no other way of reconciling most of the authorities, though it is difficult to understand why the test of bias should be any different in considering the position of a magistrate compared with that of a juror. The only case which

cannot be fitted into this dichotomy is the one last cited, namely Reg. v. Morris (orse. Williams), in which giving the judgment of the court I applied the Topping test [1983] 1 W.L.R. 119 to the position of a juror. The decision in Reg. v. Morris (orse. Williams), 93 Cr.App.R. 102 cannot stand with that of the five-judge court in Reg. v. Box [1964] 1 Q.B. 430; and, having regard to the decision of the House of Lords in Reg. v. Spencer [1987] A.C. 128, Reg. v. Morris (orse. Williams) should not be followed to the extent that it applies the Topping test to trials on indictment.

Accordingly, the appeal fails on this point because of the application of the "real danger" test to jury trials in cases of bias. It is therefore not necessary to decide whether (a) the application of the Toppingtest would have caused a different result, or (b) whether there was in fact any bias.

A further ground of appeal alleging inconsistency of verdicts based on Reg. v. Longman (1981) 72 Cr.App.R. 121 was not pursued and could not in our view have assisted the appellant.

The appeal against conviction is dismissed.

JUDGMENTBY-2: LORD GOFF OF CHIEVELEY

JUDGMENT-2:
LORD GOFF OF CHIEVELEY: On 25 April 1991, at Liverpool Crown Court, the appellant Robert Brian **Gough** was convicted on an indictment containing a single count of conspiracy to rob, and was sentenced to a term of 15 years' imprisonment.

The indictment was based upon the commission of eight robberies in Liverpool between 13 April 1989 and 6 March 1990. The first seven robberies bore features of striking similarity. In all seven cases the premises concerned were a betting shop; the robbery was committed by two masked men, either at the beginning or at the end of the day; the men were armed, one with a shotgun and the other with a knife; and the modus operandi was similar. The prosecution contended that the first seven robberies had been committed by the same two men, the appellant and his brother David Stephen **Gough.** There was however insufficient evidence to link this brother with the eighth robbery, and the evidence against him on the other seven was weak. In the result, at the committal proceedings the prosecution applied for David Stephen **Gough** to be discharged on the ground that there was insufficient evidence against him; and at the trial the appellant was indicted on a single count that between the relevant dates he conspired with David Stephen **Gough** to commit the robberies.

On appeal, the appellant claimed that the judge should on his own motion have required the prosecution to proceed on an indictment containing eight substantive counts of robbery and not on the conspiracy count. That submission was rejected by the Court of Appeal. There was however another ground of appeal, which is the subject of the present appeal to your Lordships' House. This was that, by reason of the presence on the jury of a lady who was David Stephen **Gough's** next door neighbour, there was a serious irregularity in the conduct of the trial and for that reason the conviction of the appellant should be quashed. That submission was also dismissed by the Court of Appeal, and the appellant now appeals to your Lordships' House from that part

of the decision of the Court of Appeal, with the leave of your Lordships' House.

It was not until after the trial that it emerged that a member of the jury was David Stephen **Gough's** next door neighbour. In opening and in the indictment, he was referred to as David **Gough;** but in closing speeches he was referred to as David Stephen **Gough.** The defence case was based on the premise that David Stephen **Gough** was one of the robbers. He had a

record of previous convictions, as had the appellant. During the trial, photographs of both brothers had been produced to the jury, and retained by them. Furthermore the vehicle alleged to have been used in the eighth robbery was owned by Elaine **Gough,** the wife of David Stephen **Gough,** and her statement including her address was read to the jury. The car must have been parked outside the juror's house for a number of months, and at the time at least of the eighth robbery.

After sentence was passed, David Stephen **Gough,** who was then present in court for the first time, started shouting; and it was at this point that the juror, Mrs. Smith, recognised him. He in his turn informed the defence that one member of the jury was his next door neighbour. This was drawn to the attention of the judge, but he rightly decided that he was by then functus officio. However the juror was later interviewed by the police, and subsequently swore an affidavit. The effect of the affidavit was summarised by the Court of Appeal, ante, pp. 651-652:

"(1) when she began her service on the jury she did not recognise the name '**Gough**' as she knew her neighbour as 'Steve.' Similarly she knew David's wife as Elaine during the two years that they had been her next door neighbours. (2) The name David **Gough** was mentioned on a number of occasions during the course of the trial. (3) She had no recollection of ever seeing the appellant before the trial; and she had no idea that he was the brother of her next door neighbour. (4) On 24 April 1991 during the trial, prosecution counsel read out a statement which contained the address, 3, Buckley Way - Mrs. Smith lives at no. 2 - and concerned the Capri motor car. She wondered whether Steve was David **Gough** but thought it could not be him as he was called Steve. She was confused. (5) The photographs of the appellant and David **Gough** respectively were shown to the jury during the trial of the appellant. They were police photographs colloquially known as 'mug shots.' Mrs. Smith did not recognise David. (6) The fact that David **Gough** was her neighbour did not influence her thinking as a juror and she did not mention the matter to her fellow members of the jury."

The affidavit was and remains unchallenged.

It was on these facts that the question arose whether the courts should conclude that, by reason of the presence of Mrs. Smith on the jury, there was such a possibility of bias on her part against the appellant that his conviction should be quashed. As I have already recorded, that question was answered by the Court of Appeal in the negative. The Court of Appeal however identified in the cases two strands of authority, revealing

that differing criteria have been applied in the past when considering the question of bias. The two tests have, as will appear, themselves been variously described. The Court of Appeal identified them as being (1) whether there was a real danger of bias on the part of the person concerned, or (2) whether a reasonable person might reasonably suspect bias on his part. In the end, the court concluded that the former test was to be applied in cases concerned with jurors, and the latter in those concerned with magistrates or other inferior tribunals. The court therefore applied the real danger test in the present case and, on that basis, held that the appeal must fail, as indeed had been accepted by counsel for the appellant.

In considering the subject of the present appeal, your Lordships have been faced with a series of authorities which are not only large in number, but bewildering in their effect. It is only too clear how great a difficulty courts of first instance, and indeed Divisional Courts and the Court of Appeal, must face in cases which come before them; and there is a compelling need for your Lordships' House to subject the authorities to examination and analysis in the hope of being able to extract from them some readily understandable and easily applicable principles, thus obviating the necessity of conducting on each occasion a trawl through authorities which are by no means easy to reconcile. It is on that exercise that I now propose to embark.

A layman might well wonder why the function of a court in cases such as these should not simply be to conduct an inquiry into the question whether the tribunal was in fact biased. After all it is alleged that, for example, a justice or a juryman was biased, i.e. that he was motivated by a desire unfairly to favour one side or to disfavour the other. Why does the court not simply decide whether that was in fact the case? The answer, as always, is that it is more complicated than that. First of all, there are difficulties about exploring the actual state of mind of a justice or juryman. In the case of both, such an inquiry has been thought to be undesirable; and in the case of the juryman in particular, there has long been an inhibition against, so to speak, entering the jury room and finding out what any particular juryman actually thought at the time of decision. But there is also the simple fact that bias is such an insidious thing that, even though a person may in good faith believe that he was acting impartially, his mind may unconsciously be affected by bias - a point stressed by Devlin L.J. in Reg. v. Barnsley Licensing Justices, Ex parte Barnsley and District Licensed Victuallers' Association [1960] 2 Q.B. 167, 187. In any event, there is an overriding public interest that there should be confidence in the integrity of the administration of justice, which is always associated with the statement of Lord Hewart C.J. in Rex v. Sussex Justices, Ex parte McCarthy [1924] 1 K.B. 256, 259, that it is "of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done." I shall return to that case in a moment, for one of my tasks is to place the actual decision in that case in its proper context. At all events, the approach of the law has been (save on the very rare occasion where actual bias is proved) to look at the relevant circumstances and to consider whether

there is such a degree of possibility of bias that the decision in question should not be allowed to stand.

My initial reaction to the conclusion of the Court of Appeal in the present case was one of surprise that it should be necessary to draw a distinction between cases concerned with justices and those concerned with jurymen, and to conclude that different criteria fell to be applied in investigating allegations of bias in the two categories of case. Evidently, the Court of Appeal was itself unhappy in having to reach this conclusion, which it felt bound to reach on the authorities. Of course, there are some distinctions between the two groups of cases. For example, in the case of jurymen there is the inhibition, to which I have already referred, against investigating the state of mind of a juryman when reaching his decision in the privacy of the jury room. There is also the fact that the possibility of bias may come to light in the course of a jury trial - for example, a juryman may have unwisely indulged in conversation with a witness, or previous convictions of the accused may have accidentally been revealed to the jury. Situations such as these have to be dealt with by the judge when they arise; and he may be able to deal with the situation on the spot, for example by issuing a warning to the jury, or by discharging the particular juryman involved. And, if a verdict is challenged before the Court of Appeal on the ground of bias, the ultimate principles to be applied are to be found in section 2 of the Criminal Appeal Act 1968. But, even taking these matters into account, I am left with the feeling that there should be no reason, in principle, why the test of bias should be different in the two groups of cases - those concerned with justices and those concerned with juries. I shall however, as a matter of convenience, submit the authorities concerning these two categories of case to separate consideration, before reaching any final conclusion on this point.

The argument before the Appellate Committee was presented on the basis that there were two rival, alternative tests for bias to be found in the authorities, and that the result in the present case depended on the choice made by your Lordships' House between them. The first test, favoured by Mr. Hytner for the appellant, was whether a reasonable and fair minded person sitting in the court and knowing all the relevant facts would have had a reasonable suspicion that a fair trial by the defendant was not possible. The second test, favoured by Mr. Leveson for the Crown, was whether there was a real likelihood of bias. I shall for

convenience refer to these two tests respectively as the reasonable suspicion test, and the real likelihood test. It was recognised by Mr. Hytner before the Appellate Committee, as before the Court of Appeal, that if the real likelihood test is to be preferred, the appeal must fail.

In fact, examination of the authorities reveals that selection of the appropriate test does not simply involve a choice between the two tests formulated by counsel in the present case. Thus, when the appropriate test in cases concerned with juries fell to be considered by your Lordships' House in Reg. v. Spencer [1987] A.C. 128, a variant of the real likelihood test, viz. whether there was a real danger of bias, was adopted, as it was by the Court of Appeal in the present case. There are also to be found in the authorities variants of the reasonable suspicion

test; and sometimes the two tests seem to have been combined. At the heart of the present inquiry lies the need to identify the precise nature of these tests, and to consider what, if any, are the differences between them. For that purpose, I propose to consider first the cases concerned with justices and other inferior tribunals, where the principal problems appear to have arisen; and then to turn to the cases concerned with juries, of which Reg. v. Spencer is of great importance.

Before I do so, however, I wish to draw attention to the fact that there are certain cases in which it has been considered that the circumstances are such that they must inevitably shake public confidence in the integrity of the administration of justice if the decision is to be allowed to stand. Such cases attract the full force of Lord Hewart C.J.'s requirement that justice must not only be done but must manifestly be seen to be done. These cases arise where a person sitting in a judicial capacity has a pecuniary interest in the outcome of the proceedings. In such a case, as Blackburn J. said in Reg. v. Rand (1866) L.R. 1 Q.B. 230, 232: "any direct pecuniary interest, however small, in the subject of inquiry, does disqualify a person from acting as a judge in the matter." The principle is expressed in the maxim that nobody may be judge in his own cause (nemo judex in sua causa). Perhaps the most famous case in which the principle was applied is Dimes v. Proprietors of Grand Junction Canal (1852) 3 H.L.Cas. 759, in which decrees affirmed by Lord Cottenham L.C. in favour of a canal company in which he was a substantial shareholder were set aside by this House, which then proceeded to consider the matter on its merits, and in fact itself affirmed the decrees. Lord Campbell said, at p. 793:

"No one can suppose that Lord Cottenham could be, in the remotest degree, influenced by the interest that he had in this concern; but, my Lords, it is of the last importance that the maxim that no man is to be a judge in his own cause should be held sacred."

In such a case, therefore, not only is it irrelevant that there was in fact no bias on the part of the tribunal, but there is no question of investigating, from an objective point of view, whether there was any real likelihood of bias, or any reasonable suspicion of bias, on the facts of the particular case. The nature of the interest is such that public confidence in the administration of justice requires that the decision should not stand.

I turn next to the broader question of bias on the part of a member of the relevant tribunal. Here it is necessary first to put on one side the very rare case where actual bias is shown to exist. Of course, if actual bias is proved, that is an end of the case; the person concerned must be disqualified. But it is not necessary that actual bias should be proved; and in practice the inquiry is directed to the question whether there was such a degree of possibility of bias on the part of the tribunal that the court will not allow the decision to stand. Such a question may arise in a wide variety of circumstances. These include, but are by no means limited to, cases in which a member of the tribunal has an interest in the outcome of the proceedings, which falls short of a direct pecuniary interest. Such interests may vary widely in their nature, in their effect,

and in their relevance to the subject matter of the proceedings; and there is no rule, as there is in the case of a pecuniary interest, that the possession of such an interest automatically disqualifies the member of the tribunal from sitting. Each case falls to be considered on its own facts.

I turn first to the authorities concerned with justices, with whom I bracket members of other inferior tribunals. Of the authorities cited to the Appellate Committee in the course of argument, the first in point of time was Reg. v. Rand, L.R. 1 Q.B. 230, to which I have already referred, in which Blackburn J. stated the law in terms of the real likelihood test. He referred, at p. 233, to cases in which there was "a real likelihood that the judge would, from kindred or any other cause, have a bias in favour of one of the parties" in which event "it would be very wrong in him to act." That test was later approved by three members of the Appellate Committee of this House in Frome United Breweries Co. Ltd. v. Bath Justices [1926] A.C. 586 (a case concerned with licensing justices): see p. 591, per Viscount Cave L.C., p. 607, perLord Atkinson (citing Rex v. Sunderland Justices [1901] 2 K.B. 357), and p. 610, per Lord Sumner (quoting from the dissenting judgment of Atkin L.J., sub nom. Rex v. Bath Compensation Authority [1925] 1 K.B. 685, 712). Furthermore Lord Shaw of Dunfermline agreed with Viscount Cave L.C.; and, although the other member of the Appellate Committee, Lord Carson, spoke simply of "a likelihood of bias" (see p. 617), there is no reason to suppose that he intended any different test.

At this stage, however, I must turn to the well known case of Rex v. Sussex Justices, Ex parte McCarthy [1924] 1 K.B. 256. There the applicant came before justices charged with the offence of dangerous driving, which had involved a collision between his vehicle and another vehicle. The solicitor acting as magistrates' clerk on this occasion was also acting as solicitor for the other driver in civil proceedings against the applicant arising out of the collision. At the conclusion of the evidence before the magistrates, the acting clerk retired with them in case his help should be needed on a point of law; but in fact the magistrates did not consult him, and he himself abstained from referring to the case. The magistrates convicted the applicant, but his conviction was quashed by a Divisional Court. This is of course the case in which Lord Hewart C.J. let fall his much-quoted dictum, to which I have already referred. I think it helpful, however, to quote from his judgment in extenso, see pp. 258-259:

"It is said, and, no doubt, truly, that when that gentleman retired in the usual way with the justices, taking with him the notes of the evidence in case the justices might desire to consult him, the justices came to a conclusion without consulting him, and that he scrupulously abstained from referring to the case in any way. But while that is so, a long line of cases shows that it is not merely of some importance but is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done. The question therefore is not whether in this case the deputy clerk made any observation or offered any criticism which he might not properly have made or offered; the question is whether he was

so related to the case in its civil aspect as to be unfit to act as clerk to the justices in the criminal matter. The answer to that question depends not upon what actually was done but upon what might appear to be done. Nothing is to be done which creates even a suspicion that there has been an improper interference with the course of justice. Speaking for myself, I accept the statements contained in the justices' affidavit, but they show very clearly that the deputy clerk was connected with the case in a capacity which made it right that he should scrupulously abstain from referring to the matter in any way, although he retired with the justices; in other words, his one position was such that he could not, if he had been required to do so, discharge the duties which his other position involved. His twofold position was a manifest contradiction. In those circumstances I am satisfied that this conviction must be quashed . . . "

The case was therefore concerned with the possibility that the acting magistrates' clerk, who plainly had such an interest in the outcome of the civil proceedings that he might well be biased against the applicant in the proceedings before the magistrates, might influence the decision of the magistrates adversely to the applicant. Lord Hewart C.J. clearly thought that the acting magistrates' clerk's involvement in the civil proceedings was such that he should never have participated in the hearing before the magistrates, and went so far as to indicate that "even a suspicion that there had been an improper interference with the course of justice" is enough to vitiate the proceedings, an observation which has been invoked as the origin of the reasonable suspicion test. Indeed, following the Sussex Justices case, there developed a tendency for courts to invoke a test requiring no more than a suspicion of bias.

However in a later case, also concerned with alleged bias on the part of a magistrates' clerk, Reg. v. Camborne Justices, Ex parte Pearce[1955] 1 Q.B. 41, a Divisional Court, having received the assistance of the Solicitor-General as amicus curiae, approached the question on the basis that a real likelihood of bias must be established. In that case, the applicant was convicted of an offence under the Food and Drugs Act 1938. The information alleging the offence had been laid by a sampling officer, for the Cornwall County Council. The justices' clerk, who in the course of the hearing was invited into the justices' private room in order to advise them, was a member of the county council (though not of the relevant committee of the council, the Public Health and Housing Committee). For this reason, the applicant alleged that a reasonable suspicion of bias might arise, and that his conviction should be quashed. The court dismissed the application, holding that in the circumstances there was no real likelihood of bias on the part of the justices' clerk. Moreover the court was at pains to reject any suggestion that mere suspicion of bias was sufficient; and, while endorsing and fully maintaining the integrity of the principle reasserted by Lord Hewart C.J. in the Sussex Justices case, nevertheless deplored the principle

"being urged as a warrant for quashing convictions or invalidating orders upon quite unsubstantial grounds and, indeed, in some cases upon the flimsiest pretexts of bias:" see pp. 51-52, per curiam.

In the Sussex Justices case [1924] 1 K.B. 256 it must have been plain that there was a real likelihood of bias on the part of the acting magistrates' clerk; and the court went on to hold that, despite the fact that there had been no discussion about the case between the magistrates and the clerk, nevertheless the decision of the magistrates must be quashed, because nothing may be done which creates even a suspicion that there has been a wrongful interference with the course of justice. It appears that this decision was later used to suggest that a mere suspicion of bias on the part of a person involved in the process of adjudication is enough to require that the decision should be quashed. That approach was rejected in the Camborne Justices case [1955] 1 Q.B. 41, in which it was held that, since there was no real likelihood of bias on the part of the justices' clerk, there was no ground for quashing the justices' decision. The cases can therefore be distinguished on the facts. But the question remains whether, in a case involving a justices' clerk, it is enough to show that there was a real likelihood of bias on the part of the clerk, or whether it must also be shown that, by reason of his participating in the decision-making process, there was a real likelihood that he "would impose his influence on the justices or give them wrong legal advice:" see p. 46, per Sir Reginald Manningham-Buller Q.C., S.-G., arguendo as amicus curiae. In my opinion, the latter view is to be preferred. Of course, nowadays a justices' clerk will not withdraw with the justices, but will only join them if invited to advise them on a question of law. If the clerk is not so invited, any bias on his part will ordinarily have no influence on the outcome of the proceedings; though if he has any interest in the outcome, it is obviously undesirable that he should be acting at all in the capacity of clerk in relation to those proceedings, in case his advice is called for. If however he is invited to give the justices advice, it is open to the court to infer that, having regard to the insidious nature of bias, there is a real likelihood of the clerk's bias infecting the views of the justices adversely to the applicant.

I have had the opportunity of reading in draft the speech of my noble and learned friend, Lord Woolf, and it follows from what I have said that I am in agreement with his conclusions both about the effect of the Sussex Justices and Camborne Justices cases, and that the only special category of case, in which it is unnecesary to inquire whether there was any real likelihood of bias, relates to circumstances where a person acting in a judicial capacity has a direct pecuniary interest in the outcome of the proceedings.

In Reg. v. Barnsley Licensing Justices, Ex parte Barnsley and District Licensed Victuallers' Association [1960] 2 Q.B. 167, 187, Devlin L.J. also preferred the real likelihood test, considering that the term "real likelihood of bias" is not used to import the principle in Rex v. Sussex Justices, Ex parte McCarthy, which had been invoked by Salmon J. at first instance [1959] 2 Q.B. 276, 286. It is, I think, desirable that I should quote the relevant passage from the judgment of Devlin L.J. in full, at pp. 186-187:

"Here is an application by the co-operative society and there is sitting to decide it a bench which is wholly composed of members of the society and one woman whose husband was a member of the

society, presided over by a chairman who had interested himself actively in the conduct of the affairs of the society or was desirous of doing so. Is there, in those circumstances, a real likelihood of bias? I am not quite sure what test Salmon J. applied. If he applied the test based on the principle that justice must not only be done but manifestly be seen to be done, I think he came to the right conclusion on that test. I cannot imagine anything more unsatisfactory from the public point of view than applications of this sort being dealt with by a bench which was so composed, and, indeed, it is conceded that steps will have to be taken to rectify the position. But, in my judgment, it is not the test. We have not to inquire what impression might be left on the minds of the present applicants or on the minds of the public generally. We have to satisfy ourselves that there was a real likelihood of bias - not merely satisfy ourselves that that was the sort of impression that might reasonably get abroad. The term 'real likelihood of bias' is not used, in my opinion, to import the principle in Rex v. Sussex Justices to which Salmon J. referred. It is used to show that it is not necessary that actual bias should be proved. It is unnecessary, and, indeed, might be most undesirable, to investigate the state of mind of each individual justice. 'Real likelihood' depends on the impression which the court gets from the circumstances in which the justices were sitting. Do they give rise to a real likelihood that the justices might be biased? The court might come to the conclusion that there was such a likelihood, without impugning the affidavit of a justice that he was not in fact biased. Bias is or may be an unconscious thing and a man may honestly say that he was not actually biased and did not allow his interest to affect his mind, although, nevertheless, he may have allowed it unconsciously to do so. The matter must be determined upon the probabilities to be inferred from the circumstances in which the justices sit."

It is plain from this passage that Devlin L.J. was concerned to get away from any test founded simply upon suspicion - "the sort of impression that might reasonably get abroad" - and to focus upon the actual circumstances of the case in order to decide whether there was in those circumstances a real likelihood of bias. His question - do the circumstances give rise to a real, likelihood that the justices might be biased? - suggests that he was thinking of likelihood as meaning not probability, but possibility; the noun probability is not aptly qualified by the adjective "real," and the verb "might" connotes possibility rather than probability. Such a reading makes the real likelihood test very similar to a test requiring a real danger of bias. It is true that, at the conclusion of the passage which I have quoted, Devlin L.J. stated that the matter must be determined "upon the probabilities." I do not however think that he meant "on the balance of probabilities," but rather that he was emphasising that the question was to be answered by reference to the relevant circumstances.

However nine years later, in Metropolitan Properties Co. (F.G.C.) Ltd. v. Lannon [1969] 1 Q.B. 577, the law took a different turn. The

case was concerned with a decision by a rent assessment committee, when determining fair rents for a block of flats in London. The rent so determined was substantially below the rent suggested even by the expert called by the tenants. The landlord sought to quash the decision on the ground that the chairman of the committee was a solicitor who had been concerned with advising tenants of flats in another comparable block of flats. The Court of Appeal, allowing the appeal from a Divisional Court, held that the facts were such as to give rise to an appearance of bias on the part of the chairman, and on that ground they quashed the decision of the committee, even though there was no actual bias on his part. In so holding, the court rejected the argument of counsel for the committee, who invited the court to proceed on the basis of the real likelihood test. Lord Denning M.R. and Edmund Davies L.J. both invoked the much quoted dictum of Lord Hewart C.J. in Rex v. Sussex Justices, and declined to follow Devlin L.J.'s approach in Reg. v. Barnsley Licensing Justices. Lord Denning M.R. stated the law as follows, at p. 599:

"In Reg. v. Barnsley Licensing Justices, Ex parte Barnsley and District Licensed Victuallers' Association, Devlin L.J. appears to have limited that principle considerably, but I would stand by it. It brings home this point: in considering whether there was a real likelihood of bias, the court does not look at the mind of the justice himself or at the mind of the chairman of the tribunal, or whoever it may be, who sits in a judicial capacity. It does not look to see if there was a real likelihood that he would, or did, in fact favour one side at the expense of the other. The court looks at the impression which would be given to other people. Even if he was as impartial as could be, nevertheless if right-minded persons would think that, in the circumstances, there was a real likelihood of bias on his part, then he should not sit. And if he does sit, his decision cannot stand: see Reg. v. Huggins [1895] 1 Q.B. 563 and Rex v. Sunderland Justices, per Vaughan Williams L.J. [1901] 2 K.B. 357, 373. Nevertheless there must appear to be a real likelihood of bias. Surmise or conjecture is not enough: see Reg. v. Camborne Justices, Ex parte Pearce [1955] 1 Q.B. 41, 48-51 and Reg. v. Nailsworth Licensing Justices, Ex parte Bird [1953] 1 W.L.R. 1046. There must be circumstances from which a reasonable man would think it likely or probable that the justice, or chairman, as the case may be, would, or did, favour one side unfairly at the expense of the other. The court will not inquire whether he did, in fact, favour one side unfairly. Suffice it that reasonable people might think he did. The reason is plain enough. Justice must be rooted in confidence: and confidence is destroyed when right-minded people go away thinking: 'The judge was biased.'"

Edmund Davies L.J. said, at p. 606, that it was enough if "there is reasonablesuspicion of bias on the part of one or more members of the adjudicating body;" and the third member of the court, Danckwerts L.J., appears to have, proceeded, despite some doubt, upon a similar basis, at pp. 601-602.

I shall return to this case in a moment, but I have to say that it left a legacy of some confusion behind it. In two cases, Reg. v. Uxbridge Justices, Ex parte Burbridge, The Times, 21 June 1972, and Reg. v. McLean, Ex parte Aikens (1974) 139 J.P. 261, Lord Widgery C.J. was prepared to proceed on the basis of the reasonable suspicion test, though in neither case was the choice of test decisive. However, in Reg. v. Altrincham Justices, Ex parte N. Pennington [1975] Q.B. 549, Lord Widgery C.J. did not feel able to decide whether the real likelihood test or the reasonable suspicion test was appropriate. In that case the appellants were convicted of offences of having sold vegetables by weight and having delivered a lesser weight to two county schools. The presiding justice at the trial was a member of the education committee, and was a governor of two schools, though not of those in question. A Divisional Court quashed the convictions on the ground that the presiding justice should have disqualified herself from hearing a case where she had an active interest in the schools which were the victims of the offence. In so holding, Lord Widgery C.J. referred to both the real

likelihood test and the reasonable suspicion test. However it was not clear to him from Lannon which of those tests fell to be applied. Furthermore, in Reg. v. Liverpool City Justices, Ex parte Topping [1983] 1 W.L.R. 119, in which justices became aware of other unrelated charges against the defendant whose case they were about to consider, the Divisional Court applied a form of the reasonable suspicion test derived from the judgment of Lord Widgery C.J. in Ex parte Burbridge; but they prefaced their choice of this test with the observation that, in agreement with a view expressed by Cross L.J. in Hannam v. Bradford Corporation [1970] 1 W.L.R. 937, 949, there was little if any difference between the real likelihood test and the reasonable suspicion test, because if a reasonable person with the relevant knowledge thinks that there might well be bias, then there is in his opinion a real likelihood of bias - a view which appears to assume that real likelihood of bias means no more than a real possibility of bias.

I have already quoted passages from the judgments of Lord Denning M.R. and Edmund Davies L.J. in Metropolitan Properties (F.G.C.) Ltd. v. Lannon [1969] 1 Q.B. 577, 599, 606, which show that they did not in fact state the same test, Lord Denning's test being really no more than an adaptation of the real likelihood test, and only Edmund Davies L.J. enunciating a test founded upon reasonable suspicion of bias. Furthermore Lord Denning M.R., while purporting to differ from Devlin L.J. in the Barnsley Licensing Justices case [1960] 2 Q.B. 167, in fact differed very little from him. Thus, both considered that it was not necessary that actual bias should be proved, the court having therefore to proceed upon an impression derived from the circumstances; and that the question is whether such an impression reveals a real likelihood of bias. The only difference between them seems to have been that, whereas Devlin L.J. spoke of the impression which the court gets from the circumstances, Lord Denning M.R. looked at the circumstances from the point of view of a reasonable man, stating that there must be circumstances from which a reasonable man would think it likely or probable that the justice, or chairman, was biased. Since however the court investigates the actual circumstances, knowledge of such

circumstances as are found by the court must be imputed to the reasonable man; and in the result it is difficult to see what difference there is between the impression derived by a reasonable man to whom such knowledge has been imputed, and the impression derived by the court, here personifying the reasonable man. It is true that Lord Denning M.R. expressed the test as being whether a reasonable man would think it "likely or probable" that the justice or chairman was biased. If it is a correct reading of his judgment (and it is by no means clear on the point) that it is necessary to establish bias on a balance of probabilities, I for my part would regard him as having laid down too rigorous a test. In my opinion, if, in the circumstances of the case (as ascertained by the court), it appears that there was a real likelihood, in the sense of a real possibility, of bias on the part of a justice or other member of an inferior tribunal, justice requires that the decision should not be allowed to stand. I am by no means persuaded that, in its original form, the real likelihood test required that any more rigorous criterion should be applied. Furthermore the test as so stated gives sufficient effect, in cases of apparent bias, to the principle that justice must manifestly be seen to be done, and it is unnecessary, in my opinion, to have recourse to a test based on mere suspicion, or even reasonable suspicion, for that purpose. Finally there is, so far as I can see, no practical distinction between the test as I have stated it, and a test which requires a real danger of bias, as stated in Reg. v. Spencer [1987] A.C. 128. In this way, therefore, it may be possible to achieve a reconciliation between the test to be applied in cases concerned with justices and other members of inferior tribunals, and cases concerned with jurors.

I turn therefore to the cases concerned with jurors; and here the relevant authorities support the view which I have just expressed. It is true that, after the Lannon case, there were cases in which the reasonable suspicion test was adopted: see, e.g., Reg. v. Pennington(1985) 81 Cr.App.R. 217. However, it is appropriate to turn straight to the leading authority, which is the decision of your Lordships' House in Reg. v. Spencer [1987] A.C. 128. In that case the defendants, who were members of the nursing staff at a secure hospital, were convicted in

two separate trials of ill treating patients at the hospital, contrary to section 126 of the Mental Health Act 1959. On appeal, the principal issue was one of corroboration. But in addition a question arose with regard to one of the jurors at the first trial. He had clearly demonstrated in the course of the trial that he was biased against the defendants. At first the judge, having consulted counsel, decided to take no action. However, it then transpired that the juror's wife worked at another mental hospital which figured in the evidence at the trial. The judge, fearing that the juror might have heard things from his wife which it would be better if he had not heard, decided to discharge him; but, discovering that the juror was in the habit of giving three other members of the jury a lift home, warned the members of the jury that they should not discuss the case further with him. On the following morning, however, defence counsel submitted that the remainder of the jury should be discharged; but the judge decided, in the exercise of his

discretion, not to do so. Counsel for the prosecution had submitted that the test which the judge should apply was that the jury should not be discharged unless it could be shown that there was a very high risk that the apparently biased jury had influenced any of his fellow jurors. Lord Ackner (with whom Lord Brandon of Oakbrook and Lord Mackay of Clashfern agreed) however held that the correct test was that stated by the Court of Appeal in Reg. v. Sawyer (1980) 71 Cr.App.R. 283, 285, viz., whether there was a real danger that the appellant's position had been prejudiced in the circumstances. This was the test which had in fact been applied by the Court of Appeal, but they had concluded that there was no realistic chance that the three jurors who had travelled in the car had been prejudiced or biased by what they had heard. On this point, however, Lord Ackner found himself unable totally to dismiss that possibility, and he concluded, with the remainder of the Appellate Committee, that the verdict was unsafe and the appeal must be allowed [1987] A.C. 128, 146. Subsequently, the test so established in Reg. v. Spencer was applied by the Court of Appeal in Reg. v. Putnam (1991) 93 Cr.App.R. 281. I should add that in Reg. v. Morris (orse. Williams) (1990) 93 Cr.App.R. 102, in which the reasonable suspicion test was applied, it appears that Reg. v. Spencer was not cited to the court. In the light of the conclusion which I have reached, I do not think that it is necessary for me to consider any more of the earlier cases concerned with allegation of bias on the part of jurors. I only wish to say that Reg. v. Box [1964] 1 Q.B. 430, to which some criticism was directed in the course of argument, appears to have been concerned primarily with an allegation of actual bias, and to have reasserted the principle that knowledge by a juror of a defendant's character or previous convictions is not an automatic disqualification.

There are however two features of jury cases to which I will briefly draw attention. The first is that the possibility of bias on the part of a juror may, as in Reg. v. Spencer itself, come to the attention of the judge in the course of the trial. In such circumstances the judge, in deciding whether to exercise his discretion to discharge one or more members of the jury, should apply the same test as falls to be applied on appeal by the Court of Appeal, viz., whether there is a real danger of bias affecting the mind of the relevant juror or jurors. Even if the judge decides that it is unnecessary to do more than issue a warning to the jury or to a particular juror, and thereby isolate and neutralise any bias that might otherwise occur, the effect of his warning is not merely to ensure that the jurors do not allow any possible bias to affect their minds, but also to prevent any lack of public confidence in the integrity of the jury. It is unnecessary for me to say any more on this subject, to which no argument was addressed in the present case. Second, if any question of bias on the part of a juror arises on appeal, the Court of Appeal, having applied the real danger test, will then proceed in the light of its conclusion on that test to exercise its powers under section 2 of the Criminal Appeal Act 1968, in the normal way, as was done by your Lordships' House in Spencer.

I wish to add that in cases concerned with allegations of bias on the part of an arbitrator, the test adopted, derived from Ex parte Topping

[1983] 1 W.L.R. 119, has been whether the circumstances were such that a reasonable man

would think that there was a real likelihood that the arbitrator would not fairly determine the issue on the basis of the evidence and arguments adduced before him: see Ardahalian v. Unifert International S.A. (The Elissar) [1984] 2 Lloyd's Rep. 84, and Bremer Handelsgesellschaft m.b.H. v. Ets. Soules et Cie.[1985] 1 Lloyd's Rep. 160; [1985] 2 Lloyd's Rep. 199. Such a test is, subject to the introduction of the reasonable man, consistent with the conclusion which I have reached, provided that the expression "real likelihood" is understood in the sense I have described, i.e. as meaning that there is a real possibility or, as I would prefer to put it, a real danger of bias. It would appear to have been so understood by Mustill J. in the Bremer case [1985] 1 Lloyd's Rep. 160, 164, where he referred to "an evident risk" of bias.

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 unnecessary, 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 in cases such as these personifies the reasonable man; and in any event 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, the court should ask itself whether, having regard to those 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; though, in a case concerned with bias on the part of a justices' clerk, the court should go on to consider whether the clerk has been invited to give the justices advice and, if so, whether it should infer that there was a real danger of the clerk's bias having infected the views of the justices adversely to the applicant.

It follows from what I have said that the Court of Appeal applied the correct test in the present case. On that test, it was accepted by Mr. Hytner that there was no ground for disturbing the jury's verdict. I would therefore dismiss the appeal.

JUDGMENTBY-3: LORD ACKNER

JUDGMENT-3:
LORD ACKNER: My Lords, I have had the advantage of reading in draft the speech prepared by my noble and learned friend, Lord Goff of Chieveley, and for the reasons he gives, I, too, would dismiss the appeal.

JUDGMENTBY-4: LORD MUSTILL

JUDGMENT-4:
LORD MUSTILL: My Lords, I have had the advantage of reading in draft the speech prepared by my noble and learned friend, Lord Goff of Chieveley, and for the reasons he gives, I, too, would dismiss the appeal.

JUDGMENTBY-5: LORD SLYNN OF HADLEY

JUDGMENT-5:
LORD SLYNN OF HADLEY: My Lords, I have had the advantage of reading in draft the speech prepared by my noble and learned friend, Lord Goff of Chieveley, and for the reasons he

gives, I, too, would dismiss the appeal.

JUDGMENTBY-6: LORD WOOLF

JUDGMENT-6:
LORD WOOLF: 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.

The test to be applied in each case has as its source the maxim that nobody may be a judge in his own cause. No distinction arises in the application of the test because it is the clerk to the justices rather than the justices themselves who are alleged to be biased. A clerk to the justices is part of the judicial process in the magistrates' court. This is accepted by Lord Hewart C.J., when he said in his judgment in Rex v. Sussex Justices, Ex parte McCarthy [1924] 1 K.B. 256, 259, that the clerk's position "was such that he could not, if he had been required to do so, discharge the duties which his other position involved. His twofold position was a manifest contradiction." (The other position, being a member of the firm of solicitors acting for the other driver who was involved in the accident which gave rise to the prosecution.)

This is also made clear in the judgment in Reg. v. Camborne Justices, Ex parte Pearce[1955] 1 Q.B. 41, where the facts were very similar to those in the Sussex Justices case. The Camborne Justices case also involved a justices' clerk. The proceedings before the justices were the result of an information under the Food and Drugs Act 1938 laid on behalf of the county council. The clerk to the justices was at the time a member of the council, but not a member of the council's health committee responsible for laying the information. At the hearing he was sent for to advise the justices on a point of law, but according to the evidence put before the Divisional Court he did not discuss the facts of the case and having given his advice returned to the court. Unlike the Sussex Justices case, where the argument appears to have been limited (the applicant was not called upon to address the court) and the judgment was not reserved, in the Camborne Justices case the matter was fully argued, Sir Reginald Manningham-Buller Q.C., S.-G. and J. P. Ashworth appearing as amici curiae and a reserve judgment of the court was given by Slade J. on behalf of a Divisional Court which was presided over by Lord Goddard C.J. That judgment described the question which the court had to decide, at p. 47, as being:

"What interest in a judicial or quasi-judicial proceeding does the law regard as sufficient to incapacitate a person from adjudicating or assisting in adjudicating on it upon the ground of bias or appearance of bias?"

To that question the court gave the answer, at p. 51:

"that to disqualify a person from acting in a judicial or quasi-judicial capacity upon the ground of interest (other than pecuniary or proprietary) in the subject matter of the proceeding, a real likelihood of bias must be shown."

As the court concluded on the facts that there was no real likelihood of bias the application was dismissed. However, for present purposes the importance of the case is that the court did not consider they were dealing with a special category of case and applied a test which I regard as being the equivalent of the real danger test.

The problem created by the Sussex Justices case [1924] 1 K.B. 256 arises because Lord Hewart C.J. preceded his celebrated remark, at p. 259: "it is not merely of some importance but is of fundamental importance that justice should not only be done, but should manifestly

and undoubtedly be seen to be done," with the comment, at pp. 258-259:

"It is said, and, no doubt, truly, that when that gentleman retired in the usual way with the justices, taking with him the notes of the evidence in case the justices might desire to consult him, the justices came to a conclusion without consulting him, and that he scrupulously abstained from referring to the case in any way."

and later added: "speaking for myself, I accept the statements contained in the justices' affidavit." If these passages in his judgment are taken at face value, then they are consistent with the court in the Sussex Justices case coming to the conclusion that there was no risk of actual bias and the court was therefore applying some different test from the real danger test when deciding that the decision had to be quashed. A similar situation arises in relation to the comment of Lord Campbell in Dimes v. Proprietors of Grand Junction Canal, 3 H.L.Cas. 759, 793, when he, alone among the members of the House of Lords, said:

"No one can suppose that Lord Cottenham could be, in the remotest degree, influenced by the interest that he had in this concern; but, my Lords, it is of the last importance that the maxim that no man is to be a judge in his own cause should be held sacred."

It could well be that too much attention should not be attached to the remarks made as to the bona fides of Lord Cottenham L.C. in the Dimescase and the justices' clerk in the Sussex Justices case, although, no doubt the Lord Chancellor and the clerk respectively found them comforting. It must be remembered that except in the rare case where actual bias is alleged, the court is not concerned to investigate whether or not bias has been established. Whether it is a judge, a member of the jury, justices or their clerk, who is alleged to be biased, the courts do not regard it as being desirable or useful to inquire into the individual's state of mind. It is not desirable because of the confidential nature of the judicial decision making, process. It is not useful because the courts have long recognised that bias operates in such an insidious manner that the person alleged to be biased may be quite unconscious of its effect.

It is because the court in the majority of cases does not inquire whether actual bias exists that the maxim that justice must not only be done but seen to be done applies. When considering whether there is a real danger of injustice, the court gives effect to the maxim, but does so by examining all the material available and giving its conclusion on that material. If the court having done so is satisfied there is no danger of the alleged bias having created injustice, then the application to quash the decision should be dismissed. This, therefore, should have been the result in the Sussex Justices case if Lord Hewart C.J.'s remarks are to be taken at face value and are to be treated as a finding, and not merely an assumption, that there was no danger of the justices' decision being contaminated by the possible bias of the clerk.

The Dimes case, 3 H.L.Cas. 759, is different because it involved direct pecuniary or proprietary interest on the part of Lord Cottenham L.C. in the subject matter of the proceedings and this creates a special situation, as was pointed out at the beginning of the judgment in the Camborne Justices case [1955] 1 Q.B. 41, 47:

"any direct pecuniary or proprietary interest in the subject matter of a proceeding, however small, operates as an automatic disqualification. In such a case the law assumes bias."

It was because Lord Hewart C.J.'s judgment in the Sussex Justices case [1924] 1 K.B. 256, 258-259, has created difficulties that in the Camborne Justices case [1955] 1 Q.B. 41, where exactly the same issue was involved, the court warned against the misuse of Lord Hewart's judgment since it was being "urged as a warrant for quashing convictions or invalidating orders upon quite unsubstantial grounds and, indeed, in some cases upon the flimsiest pretexts of bias:" see pp. 51-52. As the court pointed out the continued citation of Lord

Hewart's maxim may lead to the erroneous impression that "it is more important that justice should appear to be done than that it should, in fact, be done."

I therefore suggest that the Sussex Justices case [1924] 1 K.B. 256 neither creates, nor should it be placed in, a separate category. The proper test which Lord Goff has identified should have been applied in that case as it was in the Camborne Justices case [1955] 1 Q.B. 41. There is only one established special category and that exists where the tribunal has a pecuniary or proprietary interest in the subject matter of the proceedings as in Dimes v. Proprietors of Grand Junction Canal, 3 H.L.Cas. 759. The courts should hesitate long before creating any other special category since this will immediately create uncertainty as to what are the parameters of that category and what is the test to be applied in the case of that category. 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.

[Reported by MRS. CLARE BARSBY, Barrister]

A. R.

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DISPOSITION:
Appeal dismissed.

Certificate under section 33(2) of the Criminal Appeal Act 1968 that a point of law of general public importance was involved in the decision, namely, "Where a complaint is made after the conclusion of a trial that a juror may have been biased against the defendant what is the proper test for the Court of Appeal to apply in deciding whether or not to order a retrial?"

Leave to appeal refused.

Appeal dismissed.

SOLICITORS:
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