IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CONSTITUTIONAL REDRESS COURT

IN MISCELLANEOUS. NO. 92 OF 1992.

CORAM: THE HONOURABLE MR. N. THEOBALDS J.

THE HONOURABLE MR. P. HARRISON J.

THE HONOURABLE MR. R. LANGRIN J.

BETWEEN	LINTON BERRY	APPLICANT
A N D	THE DIRECTOR OF PUBLIC PROSECUTION	1ST RESPONDENT
A N D	THE ATTORNEY GENERAL	2ND RESPONDENT

Dr. Lloyd Barnett & Richard Small instructed by Gayle A.V. Nelson for the Applicant.
Mr. Lloyd Hibbert Deputy Director of Public Prosecution for 1st Respondent.
Mr. Lennox Campbell Snr. Assistant Attorney General and Mr. A. Irvine instructed by Director of State Proceedings for 2nd Respondent.

HEARD - February 16, 18, March 5, April 23, 1993.

THEOBALDS J.

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

ought not to be consumed by the making of applications other than at the appropriate time. You ought not to submit to the jurisdiction and then turn around and try to properly and effectively urge that there was at most bias or at least the likelihood of bias on the part of the adjudicating tribunal. This last statement must not be construed as meaning that if we found any likelihood of bias this tribunal would shrink from its constitutional duty to grant the motion.

The issues which the second hearing was to decide upon were completely different from those dealt with previously. Indeed if one may be permitted the use of unforensic language after a "rap on the knuckles" by the Privy Council one must look carefully at the second judgment to see if there is the slightest suggestion that any likelihood of bias could be inferred. A very balanced and temperate judgment was delivered at the rehearing. The relevant case law Reid v. Regina (1978) 27 WIR 254 was discussed and the reasons and reasoning of the second judgment have been clearly and concisely set out in this judgment. It is these reasons which must now be the subject of scrutiny. Whatever errors were unearthed at the hearing cannot per se be indicative of bias or the likelihood thereof at a second hearing where the issues are separate and distinct.

Finally it cannot be accepted that statements in the first judgment are likely to influence potential jurors. The order of the Privy Council did envisage the possibility of a retrial order. That retrial would have had to take place within this jurisdiction. The presiding judge at such a retrial would in his summing up to a jury no doubt deal with this aspect under the category of extraneous considerations.

The unanimous decision of this Court is that the motion be dismissed. Costs to be taxed if not agreed are awarded to the Respondents and are to be paid by the unsuccessful Applicant.

The delay in handing down this judgment is regretted but all three judges on this panel have been separately assigned to country circuits on a continuing basis from the date the submissions were concluded. This situation continues to this day.

HARRISON, J.

This is an application by motion under rule 3(i) of the Constitutional Redress Rules, 1963, pursuant to section 25 of the Jamaica Constitution. The applicant seeks redress in that his constitutional rights provided by sections 13 and 20 of the said Constitution have been and are being infringed.

He complains that two of the three judges of appeal who comprised the panel of the court at the hearing to determine the question of re-trial from the 27th day of July to the 30th day of July 1992, had sat on the panel of judges of appeal that heard his original appeal against conviction on the 10th day of October 1989; that the said panel at the original appeal had adjudicated upon the relative weight of the cases of the prosecution and defence, ruled that there was no merit in the applicant's complaint that he had been unfairly prejudiced by the conduct of the trial judge and the prosecution at his trial, and dismissed his appeal against his conviction; that the latter decision was reversed by the Judicial Committee of the Privy Council which returned the case to the Court of Appeal for the exercise of its discretion as to whether there should be an acquittal or a re-trial; that the Court of Appeal, comprising the said two judges, in giving its reasons for ordering the re-trial, made certain pronouncements which revealed that it was re-affirming its decision at the original appeal and in all the circumstances a reasonable and fair-minded person would suspect that the Court of Appeal in making the order for re-trial did not grant to the applicant a fair hearing. The applicant sought a declaration that certain pronouncements in the reasons for judgement of the Court of Appeal for ordering the re-trial were widely disseminated and therefore the applicant will be deprived of a fair trial in contravention of his right under section 20(ii) of the said Constitution and as a consequence this Court

should order that the applicant be acquitted.

Dr. Barnett, for the applicant, referring to the affidavit of Gayle Nelson dated 9th November 1992, argued that because the Court of Appeal hearing the original appeal had held that the trial judge's failure to assist the jury when it returned and the misdirection as to character evidence were not in the appellant's favour and had described the appellant's case as being "without merit", the said two judges should not have sat on the panel to consider the question of re-trial, and in so doing they acted erroneously. The way in which the Court of Appeal expressed itself in its ruling of the re-trial and reported in the Gleaner newspaper article of the 27th day of September 1992, using terms "no question of identification .." and ... "brutal crime ..", is an expression of the guilt of the applicant, that it adhered to its original decision and reveals that the said Court of Appeal was not impartial but biased. He referred to the principles that guide the Court in determining the question of a re-trial enunciated in Reid vs. Reg [1978] 27 WIR 254, adding that other relevant factors are, the errors of the trial court which resulted in the appeal being allowed and the misconduct of the prosecution. He continued that, the firm views that the said two judges had in relation to these factors would make it difficult for a reasonable by-stander to see them as unbiased, seeing that the test of bias is not the state of mind but the appearance of fairness.

He argued further that a person cannot waive his constitutional rights, that the applicant did not acquiesce; that applying the appropriate test of bias - whether a real likelihood of bias or a reasonable suspicion of bias - the applicant should succeed, because where an adjudicator expresses a prior adverse opinion on certain issues he is disqualified from adjudicating subsequently on a matter involving the same issues. He relied inter alia on

Allison vs. General Medical Council [1891 - 94] All ER 768, R v. Camborne Justice, Ex parte Pearce [1954] 2 All ER 850, R v. Gooden [1971] 3 AER 20, Metropolitan Properties Co. vs. Lannon [1968] 3 All E.R. 304, Liversey vs. N.S.W. Bar Association [1985] L.R.C. (Cost.) 1107, Pittiman et al vs. Benjamin et al [1986] L.R.C. (Const.) 580, and Burridge vs. Tyler [1992] 1 All E.R. 437. Arguing for an acquittal, Dr. Barnett based this on the bias and error of the Court of Appeal, the errors of the trial judge, and the misconduct of the prosecution, which had extended the time that the applicant had in pursuing his legal processes.

Mr. Hibbert for the first respondent submitted that the Judicial Committee of the Privy Council found that the Court of Appeal was in error and allowed the appeal, because of the conduct of the prosecution in its use of the statement of one of the prosecution witnesses, the trial judge's manner of assistance to the jury and the direction character evidence describing the prosecution's case as a "strong one" and the defence as "tenuous". He referred to the guidelines in the Reid case, and said that the hearing to determine the re-trial dealt with matters not dealt with previously, at the original appeal, except for the "strength of the prosecution's case". Though the "strength of the prosecution's case", was an issue, the Court of Appeal was not using the previous decision at the appeal. There was no likelihood of or suspicion of bias, the issues were different and bias cannot be imputed merely because of the presence of the two judges who had heard of the appeal, being present at the re-trial hearing. He submitted further that an application for a declaration that the re-trial would not be fair, must be made by writ and not by motion and on that ground it ought to be refused - Constitutional Redress Rule 3(ii). Alternatively, the reasons, for judgment of the Court of Appeal as published on the 27th day of September 1992, must be read in its entirety and not in isolation - the court was not saying that the applicant was guilty of "a serious and brutal crime", but that he was charged with a serious and brutal crime

which should be resolved by a jury in Jamaica. He concluded that the Court could not order an acquittal as sought - but if it found that bias existed - a new hearing should be ordered.

Mr. Campbell for the 2nd respondent argued that the applicant's legal representatives at the re-trial hearing, knew that the said two judges had sat at the original appeal and their failure to assert his rights by objecting then meant that they acquiesced thereby amounting to a waiver of the right to object; that the strong views of the offence expressed by the judges is not indicative of the principles considered in the re-trial hearing; nor that the applicant was considered guilty before re-trial; that in practice, the Court of Appeal may dismiss an appeal and itself consider an application for leave to appeal; that the powers of the Court of Appeal in setting aside a conviction involves different issues from that of the said Court hearing the application to determine the re-trial - the Court of Appeal was mandated by the Judicial Committee of the Privy Council to quash the conviction and acquit or order a new trial. The effect of the judgment of the Judicial Committee was that the Court of Appeal was bound by its findings - stare decisis - and the issues therein determined were no longer live or amenable to adjudication by the Court of Appeal - which Court complied. Not every prior opinion expressed nor fore knowledge will disqualify and failure to object is an act of waiver. R v. Nailsworth Licensing Justices, Ex parte Bird [1953] 2 Q.B.D. 652, R v. Ruel Gordon (1969) 11 J.L.R. 229, Gibson v. R (1963) 5 WIR 450, Barker v. Wingo 407 U.S. 514, Bell vs. D.P.P. (1985) 32 WIR 317, R v. Lovegrove [1951] 1 A.E.R. 804, Nathaniel Joseph v. R (1959) 1 WIR 365, Ex parte Wilder (1902) 66 J.R. 761. Bias connotes interest - the said two judges were not shown to have any interest in the matter. Further, no affidavit in support of the motion was filed by the applicant himself - as

is required by the said (Constitutional Redress) Rules, 1963. Later, in reply Mr. Campbell submitted, certain fundamental rights, for example the right to life cannot be waived - but the right such as that provided by section 20 of the said Constitution was a privilege to the individual which may be waived.

Mr. Small for the applicant submitted that the fundamental right provided under section 20(1) protects the individual - though it is not personal to him; it is in the public interest, places a duty on the state to ensure a fair hearing and therefore the individual cannot waive that right. In contrast, the protection for privacy (section 19) may be waived, as it is introduced by the phrase "except with his own consent".

Waiver is viewed differently in considering constitutional rights - as opposed to administrative law. There was no waiver and the applicant was not afforded a fair hearing. He relied, inter alia, on Basu's, Commentary on the Constitution of India; 5th edition, The Supreme Court of Criminal Law by J.K. Soonavala, Vol. 1 Kalidas vs. State of Bombay and Behram vs. State of Bombay, page 962. He further stated that the misconduct of the prosecution and other factors are unexplained and therefore the Court of Appeal should not have ordered a re-trial until they were explained and the failure of the Court to request such an explanation from the prosecution created an unfair hearing. He added that the said misconduct, was not a new factor and should have been considered in deciding whether or not to order a new trial. He concluded that there was no provision in the Constitution nor in the Rules, requiring the applicant himself to file an affidavit, that the Court of Appeal had access to and was airing some of its prior determination, should have considered all the matters "causing disquiet" to the Privy Council and was in effect applying the proviso, in spite of the Privy Council's contrary view.

The facts relevant to the matter are not in dispute. The

applicant was convicted on 22nd March, 1988 of shooting to death Paulette Zaide on the 11th day of January, 1987. His appeal was dismissed by the Court of Appeal on the 10th day of November, 1989 and his conviction affirmed. By an appeal by special leave the Judicial Committee of the Privy Council on the 15th day of June 1992, advised that his appeal be allowed and the case,

> ".....remitted to the Court of Appeal with the direction that that Court should quash the conviction of the appellant and either enter a verdict of acquittal or order a new trial, which-ever course it considers proper in the interest of justice ...."

The said Court of Appeal on the 21st day of September, 1992 in obedience to the order of the said Judicial Committee heard arguments from the applicant, refrained from calling upon the prosecution in reply and ordered that a new trial be held.

In its judgment the said Judicial Committe concluded that, with respect to the grounds of appeal that the trial judge failed to leave the issue of provocation to the jury, excluded evidence of the drug addiction of the deceased, failed to correct crown counsel's treatment of the appellant's right to silence and failed to give a warning about the evidence of prosecution witnesses Zaide and Matadial as one gives when dealing with accomplices, in the circumstance of the case, the trial judge could not be faulted. Their Lordships were not however satisfied with the said trial judge's direction with regard to the applicant's good character and the said judge's assistance to the jury on their return to court before arriving at their verdict. Their Lordships further said that, ".... by far the most important ground of appeal was the contention that written statements made by Zadie and Matadial to the police and not disclosed before nor during the trial

had been wrongly witheld from the appellant and his advisers." Their Lordships, referred to, "the rule of practice under which crown counsel owes a duty to inform the defence of any material descrepancy between the contents of a witness's statement and the evidence given by that witness at the trial," then to, section 17 of the Evidence Act (Jamaica), and the guideline cases on the subject in Jamaica, namely R v. Purvis and Hughes (1968) 13 WIR 507, R v. Barrett (1970) 12 JLR 179 and R v. Lindel Grant et al (1971) 12 JLR 585. Their Lordships found the said cases "consistent with paragraph 1374 of Archbold 36th (1966) edition ... and paragraph 4-179 of the 41st (1982) edition", referred to the Attorney General's Guidelines - applicable to England and Wales - published in (1981) 74 Cr. App. Rep. 302 for the disclosure of unused material, the Northern Ireland case of R v. Foxford [1974] N.I. 181 at page 200, a judgment of the Supreme Court of Canada and another from the Court of Appeals of New York - the latter two dealing with the prosecution's duty to give to the defence all the previous statements of the prosecution witnesses. The judgment then continued,

> "...Having examined the practice in different common law jurisdictions, their Lordships consider that the principles endorsed by the Jamaican Court of Appeal, particularly with regard to inconsistent previous statements, represent what will normally be an acceptable way of achieving fairness to the accused and they take the opportunity of saying that in a civilised community the most suitable way of achieving such fairness (which should not be immutable and required to be re-considered from time to time) are best left to, and devised by, the legislature, the executive and the judiciary which serve that community and are familiar with its problems..."
>
> "...their Lordships, while not feeling bound to accept in relation to Jamaica the comprehensive principles, almost amounting to criminal discovery, which the appellant has attempted to rely on, recognise that the Purvis-

> Barrett principles do not cover every situation in which fairness may demand that the prosecution make available material to the defence.
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> Since the defence must be given a copy of the statement of a proposed witness who has not made a deposition, it must follow that, if a crown witness's evidence is intended to depart significantly from his deposition and to be based on his statement to the police it is the duty of the Crown to give the defence a copy of that statement in advance of the hearing."

Their Lordships then enumerated the discrepancies existing between Zaide's statement of the 12th day of January, 1987, his deposition and his evidence at the trial, Matadial's statement of the said date, her deposition and her evidence, and also an "addendum" dated the 9th day of May 1987. Reference was then made to crown counsel - Mr. Pantry's affidavit, in this way,

> "Their Lordships are both surprised and disappointed that, right up to the time when this appeal was heard by the Board, no information has been forthcoming to explain how the addendum came into existence and came to be typed, or whether this further statement was sought by the investigating authority or volunteered by the witness. This is a most unsatisfactory state of affairs which, in the absence of an explanation, reflects, no credit on the prosecuting authority".

Section 20 of the Constitution of Jamaica provides that a person who is "charged with a criminal offence, shall be afforded a fair hearing within a reasonable time by an independent and impartial court established by law". This is one of the fundamental rights of the individual. Where such an individual complains that his fundamental right "has been or is being" infringed, he may apply to Supreme Court for redress - vide section 25 of the said Constitution. Rule 3(i) of the Judicature (Constitutional Redress) Rules 1963 requires a person seeking such redress to apply by motion supported by affidavit. If, of course, his complaint is that his right "is likely to be" infringed,

he is required to proceed by writ of summons for redress-vide Rule 3(ii).

The court must be unbiased. Any pecuniary or proprietary interest which a member of the court has in the matter being heard opreates as an automatic disqualification. Short of such interest the applicant needs to show a real likelihood of bias in the judicial tribunal R v. Camborne Justice , Ex parte Pearce (1954) 2 AER 850.

As to bias, the court looks at the appearance, not the fact of whether the judicial officer favours one side to the disadvantange of the other, "Even if he was as impartial as would be, nevertheless if a right-minded person would think that, in the circumstances there was a real likelihood of bias on his part then he should not sit", Lord Denning in Metropolitan Properties Co. vs. Lannon et al supra, at page 310.

Mere fore-knowledge of an issue is insufficient to constitute bias, it must be accompanied by a prior adjudication on the same issue. In Livesey vs. New South Wales Bar Association, supra, the court said, at page 1115:

> "... each case must be determined by reference to its, particular circumstances ... a fair-minded observer might entertain a reasonable apprehension of bias by reason of pre-judgment if a judge sits to hear a case at first instance after he has in a previous case expressed clear views either about a question of fact which constitutes a live and significant issue in the subsequent case or about the conduct of a witness whose evidence is of significance on such a question of fact ..."

In that case two of three members of the Court of Appeal who had previously held, in a case rejecting the application of a law student for admission to the Bar, that the said student lacked credit and that the appellant knew of her conduct in a corrupt agreement, were asked to disqualify themselves, from hearing an application for an order to strike the appellant's

name from the roll of barristers; the said law student was a potential witness in the said hearing. The court comprising the said two judges rejected the application and the appellant was dishonoured. The appeal was allowed on the ground of potential bias.

In Pittiman et al vs. Benjamin et al, supra, the first respondent was appointed a Judge Advocate to preside at a court material. He was a serving member of the Department of Director of Public Prosecutions. The prosecuting counsel were also members of the said Department. On appeal from a refusal of an order of prohibition, the appeal was allowed on the ground of his bias, using the reasonable suspicion test, which test the court held was not a subjective one; Joseph v. R, supra was distinguished.

When bias or the likelihood of bias exists in the tribunal, an accused person cannot be seen to have a fair trial and therefore it would amount to a contravention of his fundamental right as guaranteed by the said section 20(i). Some fundamental rights, enacted principally for the protection of the individual cannot be waived. Waiver is a rule of law. The enlightened thinking in India on its constitution embraces two views; the view that fundamental rights created for the benefit of individuals can be waived; the minority view in both, Behram vs. State of Bombay (1955) 1 S.C.R. 615 and Bashesar vs. Commissioner of I.T. (1959) S.C. 149 which accords with the American approach, and the view that such rights though for the benefit of the individual is for the protection of the public at large - therefore placing an obligation on the state and cannot waive. This was the majority view in the said latter cases - vide Basu's, Commentary on the Constitution of India, 5th edition. Section 20(i) of the Jamaican Constitution is unqualified. As counsel for the applicant, Mr. Small correctly submitted a contrast is provided by the wording of section 19(i) where in detailing the "protection

for privacy ..", it commences with the words "Except with his own consent ..", a clear indication that that fundamental right may be waived by the individual. Affording a fair trial to the individual is in the public interest and is the prime obligation of the state. I am of the view that that right is absolute and cannot be waived. The applicant cannot be seen to have waived hsi right, under section 20(i). See also Tellis et al v. Bombay Municipal Corp. et al [1987] L.R.C. (Const.) 351.

I am also of the view that there does not seem to be a requirement in the Constitution nor the Rules, that the applicant himself file an affidavit.

In the instant case the bias complained of is the adjudication of the two judges who were common to both the appeal and the re-trial hearing. At the hearing of the appeal, the Court examined the facts and the proceeding of the trial, heard the arguments and made a final determination dismissing the appeal.

The Privy Council reversed the Court of Appeal's decision giving its reasons. The Court of Appeal's previous decision was thereby extinguished, the said Court regarded itself as bound by the finding of the Privy Council - a court higher in the curial order. The public would regard the Court of Appeal's finding as no longer existing. The Privy Council's view were thereby interposed between the appeal hearing and the hearing in order to determine re-trial or otherwise. Nowhere in the judgment of the Court of Appeal delivered on the 21st day of September, 1992, did that Court state or intimate that it reverted to its prior-held views. On the contrary, the said judgment recited, in the first paragraph, the fact that the appeal had been allowed, quoting the Privy Council,

> "... their Lordships will humbly advise Her Majesty that the appeal should be allowed and the case remitted to the Court of Appeal with the direction that that Court .. quash the conviction ... and either enter

> a verdict of acquittal or order a new trial.'",

referred to the consequent Order in Council, and concluded,

> "We now act in obedience to that order"

The Court then proceeded to apply the principles laid down in Reid vs. Reg., supra, mindful of the factors to be considered relevant, "... some of which were enumerated by the Learned Law Lord ..", Carey, J.A. at page 4. In order to determine whether it should order a re-trial or an acquittal, the Court addressed it mind to,

> "... the factors relevant to the circumstances of the instant case and .. their relative importance in the light of our sense of justice and common-sense."

The said Court referred to the seriousness of the offence - "The appellant was charged with a serious and brutal crime"; the high incidence of crime; the fact that - "The case in our view cannot be described as complex ... The Crown's case .. essentially simple .. The defence ... the Privy Council described as 'tenuous' suggests nothing remotely complex ..."; the question of ordeal, - "... it will inevitably be an ordeal for the appellant to endure a second trial"; and the length of time ".. five years have elapsed since the events occurred of which the witness will speak. In our view, however, there is little to forget."

These factors in keeping with the guidelines in Reid's case were not adjudicated on previously by the said Court. They would not have arisen for consideration at the hearing of the appeal. These factors would have been irrelevant and prejudicial to the appellant. I agree with Mr. Hibbert for the first respondent that these were new issues before the Court. The said Court also referred to, "The strength or weakness of the Crown's case ...". It then observed that, "Their Lordships expressed the opinion that the Crown's case was indeed a strong one ...", but did not direct an

acquittal or invoke the proviso, and concluded that "The case thus falls somewhere between these two boundaries." The Court was not here re-examining the evidence, but merely re-iterating a pre-determined fact in the finding of the Privy Council, thereby further proclaiming that it regarded itself bound by the latter's decision. The strength of the prosecution's case was therefore not a live issue at the hearing to determine whether or not there should be a re-trial.

The applicant's further argument is, that in relation to,

> " (i) the trial Judge's and the Prosecution's refusal to make witness statements available to the defence.
>
> (ii) the trial Judge's failure to provide the jury with adequate assistance.
>
> (iii) the trial Judge's misdirection on character evidence",

the Court of Appeal had ruled in the original appeal that there was no merit in his complaint that he was prejudiced by these factors, the Privy Council reversed the Court of Appeal, and consequently when in its reasons of the 21st day of September, 1992, it used the phrase, ".. serious and brutal crime", it was, thereby re-affirming the,

> " determination which had been previously made by the original panel of the Court .... and was further declaring that the Crown's case was correct. This amounts to a declaration on the final issue and amounts to a rejection of the accused's defence."

I am of the view that the words did not have that effect.

The Privy Council had specifically dealt with these three issues. It said,

> " The case against the appellant was indeed a strong one and for that reason their Lordship would not be prepared simply to recommend that an acquittal be ordered, but they do not feel able to say that the jury would inevitably have convicted, <u>if the defence had been furnished in advance with the</u>

> three statements in question and if the jury had received the accepted direction as to character and guidance from the trial judge on the problem, whatever it was, indicated when they first returned to court". (emphasis added)

The Court of Appeal could not have and never attempted to contravert these findings, it regarded itself as bound thereby and acted in obedience to the directions. The applicant is seeking to resurrect issues to which the Court of Appeal had carefully resigned itself, as having erred and bound by the Privy Council,

> "... with the direction that that court should quash the conviction of the appellant and either enter a verdict of acquittal or order a new trial which-ever course it considers proper in the interest of justice."
>
> The Court of Appeal complied.

It should be noted that, the Court of Appeal was here proceeding under the provisions of section 14(2) of the Judicature (Appellate Jurisdiction) Act, to "... quash ... conviction ... new trial if ... interest of justice ... requires". In the ordinary case, the same bench of the Court of Appeal having quashed a conviction may consider whether or not to order a re-trial.

The use of the verb "charged, in the phrase "The appellant was charged with a serious and brutal crime" connotes the presumption of innocence before trial. Not withstanding the use of the word 'crime', the phrase cannot attract a meaning of guilt. The phrase must be read in the context in which it appears. Similarly, the phrase, "The vexed and difficult question of identification evidence does not arise for consideration," must be read in context. However, juxtaposed, as the applicant sought to place both phrases, it cannot be elevated to an understanding of guilt. On the contrary, the Court of Appeal conclusively showed that it entertained the presumption of innocence with respect to the applicant when it stated,

"It is in the interest of the public and the appellant himself that the question of his guilt be not left as something which must remain undecided because the prosecuting authority was held guitly of some irregularities."

In adddition, the Court of Appeal was here acknowleging the fact of the guilty conduct of the prosecution at the trial in relation to the statements of the prosecution witnessess. The Privy Council in dealing with this aspect of the case said,

> "A comparison of the statement with the evidence of the two important witnesses reveals a small but not insignificant number of discrepancies only one of which was disclosed by the Crown to the defence. What their Lordships find still more important in this case is that important evidence was adduced which had not been foreshadowed in the depositions. They consider that it was the Crown's clear duty to give advance warning of that evidence by <u>furnishing the three statements of the defence</u>. Failure to do this was in their Lordships' view a material irregularity: <u>Reg. vs. Maguire</u> [1992] 2 W.L.R. 767, 782". (emphasis added)

The Privy Council considering whether or not to invoke the proviso under Section 14(i) of the said Act, again adverted to the inability to predict the inevitability of a conviction,

> "<u>if the defence had been furnished in advance with the three statements</u> in question." (emphasis added)

The Privy Council thus provided adequate directions on the manner in which the prosecution should deal with the said statements. There was no necessity, for the Court of Appeal, having taken the matter into consideration, to re-open that issue.

The Court of Appeal in considering the question of the re-trial, advised itself, inter alia, of the necessity for, "the

exercise of the collective sense of justice and common sense of the members of the Court of the Appeal of Jamaica who are familiar ... with local conditions ..." It was not an opportunity to give the prosecution "another chance to cure evidential deficiencies in its case against the accused." It did not consider matters on which it had previously adjudicated.

For the above reasons I find that the fact that the said two judges sat on both panels of the court, there was no bias nor any reasonable likelihood of bias and consequently no contravention of Section 20(i) as it relates to the complaint of the applicant that his fundamental right to a fair hearing was infringed. I would dismiss the motion.

LANGRIN, J.

As a consequence of an incident on January 11, 1987 the applicant was charged with the murder of his former lover, Paulette Zaidie. He was convicted on the 22nd March, 1988 in the Home Circuit Court for this murder. On the 10th November, 1989, the Court of Appeal comprised of Carey P. Ag., Campbell and Wright JJ.A dismissed the defendant's appeal against his Conviction. By way of Special Leave of Her Majesty in Privy Council granted on 24th July, 1990 - the Judicial Committee of the Privy Council on June 15, 1992, in a written judgment concluded as follows:-

> "Their Lordships will humbly advise Her Majesty that the appeal should be allowed and the Case remitted to the Court of Appeal with direction that the Court should quash the conviction of the appellant and either enter a verdict of acquittal or order a new trial, whichever course it considers proper in the interest of justice".

Following this direction, a panel comprised of Rowe P., Carey and Wright JJ.A between 27th of July, 1992 to the 30th July, 1992, heard arguments from the appellant's attorney as to whether or not a re-trial should be ordered.

On the 21st September, 1992 in a judgment delivered by Carey J.A., he concluded as follows:-

> "In our opinion no factors have been shown, which would incline us to enter a verdict and judgment of acquittal. It was for those reasons that we ordered a new trial to take place at the next session of the Home Circuit Court."

By section 25(1) of the Constitution, if any person alleges a contravention of his fundamental rights then without prejudice to any other action with respect to the same matter which is lawfully available that person may apply to the Supreme Court for redress. By section 25(2) the Supreme Court shall have original jurisdiction to hear and determine any application and make such orders, issue such writs and give such directions as it may consider appropriate for the purpose of enforcing or securing the enforcement of any of the fundamental rights to which the person concerned

is entitled.

By a Notice of Motion dated 13th January, 1993 the appellant applied to the Supreme Court for the following declarations.

"1. A declaration that at the hearing by the Court of Appeal of Jamaica between the 27th day of July 1992 and the 30th day of July, 1992 as to whether or not there should be a retrial, the applicant was not afforded a fair hearing by an independent and impartial Court by reasons of the following:-

(a) The Court of Appeal as constituted from the 27th day of July, 1992 to the 30th day of July, 1992 which heard the arguments as to whether or not there should be a re-trial consisted of two of the three judges of Appeal who had heard and dismissed the Applicant's original appeal against his conviction in this matter on the 10th day of November 1989.

That the said panel which heard and dismissed the original appeal to the Court of Appeal had already determined and ruled that there was no merit in the applicant's complaint that he was unfairly prejudiced by the conduct of the trial Judge and the prosecution at his trial, in particular in relation to:

(i) the Trial Judge's and the prosecution's refusal to make witness' statements available to the defence.

(ii) the Trial Judge's failure to provide the jury with adequate assistance.

(iii) the Trial Judge's misdirection on character evidence.

(b) That the said panel which heard and dismissed the original appeal had adjudicated upon and determined the relative weight of the contending cases of the prosecution and defence.

(c) The said panel arrived at these determinations at the close of the arguments on the 10th November, 1989.

(d) These prior determinations made by the Court of Appeal, and which were reversed by the Judicial Committee of the Privy Council affect matters which bore directly on the exercise of the Court of Appeal's discretion as to whether or not there should be an order for a re-trial.

(e) The Court of Appeal in giving its reasons for ordering a re-trial referred to the circumstances in which the deceased died as a "serious and brutal ..... crime."

The Court was thereby re-affirming the determination which had been previously made by the original panel of the Court of Appeal and was further declaring that the Crown's case was correct. This also amounts to a declaration on the final issue and amounts to a rejection of the accused's defence.

(f) The conduct of the Court of Appeal in the circumstances would cause a reasonable and fair minded person to suspect that the applicant has not had a fair hearing and that the Order of the Court of Appeal and its reasons for ordering a re-trial were not fairly arrived at.

2. A declaration that the applicant's constitutional rights enshrined in section 20(1) of the Constitution has been contravened, in that, in making the order for a new trial, the Court of Appeal published and made available for wide

dissemination its reason for judgment which incorporated the statement referred to in 1(e) above thereby depriving the applicant of his rights to a fair trial.

3. An order that a verdict of acquittal be entered ...."

Section 13 of the Constitution of Jamaica provides that:

"Every person in Jamaica is entitled to the fundamental rights and freedoms of the Individual", including "the protection of the Law" but "subject to respect for the rights and freedoms of others and for the public interest".

Section 20 sets out the provision which by section 13 are afforded to secure the protection of law and provides inter alia:-

"1. Whenever any person is charged with a Criminal offence he shall, unless the charged is withdrawn be afforded a fair-hearing within a reasonable time by an independent and impartial Court established by law.

2. Any Court or other authority prescribed by law for the determination of the existence or the extent of civil rights or obligations shall be independent and impartial, and where proceedings for such a determination are instituted by any person before such a Court or other authority, the case shall be given a fair hearing within a reasonable time".

In the present case, in determining whether the applicant was afforded a fair hearing by an independent and impartial court established by law the practice and procedure of the Courts established by law prior to the Constitution must be respected.

Let me first consider the question of whether or not the Appellate Court which determined the issue of the re-trial was improperly constituted having regard to the fact that two members of that Court had previously sat on the appeal.

The general rule is that it was contrary to natural justice for an adjudicator to take part in the determination of an appeal against one of

his own decisions. Superior Judges have declined to apply such a principle to the exercise of their own appellate functions. Natural Justice had to be applied by statute. In any event the relevant statute does not disqualify the Judges of the Court of Appeal in Jamaica from sitting on a Re-trial Hearing although they had sat on the panel dealing with the appeal. The Law in its wisdom will not presume the possibility of bias or favour in a judge who is already sworn to administer impartial justice and whose authority greatly depends on that presumption.

Some guidance is provided in the following authorities:

In R.E. Megarry Miscellany at Law: the distinguished author dealt with the situation at p.314 when he said:

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

A similar situation occurred in the case of R.V. Lovegrove (1951) 1 AER 804. The appellant was convicted on two charges of receiving property knowing it to be stolen and was sentenced to five years imprisonment. The Trial Judge was now a member of the Court of Criminal Appeal and the question was whether in the circumstances he should sit while the application

was being heard. It was held that on an application or appeal to the Court of Criminal Appeal there is as a general rule, no objection to the Trial Judge sitting as a member of the Court to hear the application on Appeal.

The Court of Appeal for the Windward and Leeward Islands in a decision supplies another illustration of the principle of previous participation in ones own decision. In Nathaniel Joseph v. R. 1959 1 WIR 365 the appellant was committed for trial by a Magistrate who, before assuming that office, had been legal assistant to the Attorney General. The legal assistant had advised further investigations in the circumstances which formed the basis of the charge against the appellant for murder. He appealed against his conviction on the ground that the indictment on which he was convicted was a nullity and that the examining magistrate was disqualified in law from sitting at the preliminary hearing. It was held that mere knowledge of or previous participation in a matter will not disqualify in law and in the circumstances the Magistrate was not disqualified for sitting as examining magistrate at the preliminary hearing.

The problem is not merely one of strict law it is also one of public policy. An appellate judge who if he were subject to disqualification by previous participation may be forced to sit if a panel could not be formed without him. The doctrine of necessity would be applied to prevent a failure of justice. If proceedings were brought against all the Supreme Court Judges they would have to sit as Judge in their own cause. What would happen if all the members of the Court of Appeal had dealt with some aspect of this case, whether interlocutory or otherwise. Would they not have to sit on the re-trial hearing?

Similarly judges are required ex-necessitate to pass judgment upon the constitutionality of legislation rendering them to pay income tax on their salaries. Even in matters of pension affecting the judiciary, judges are called upon to adjudicate. A case in point is the unreported judgment, William Swaby vs. Permanent Secretary of the Public Service & Another. Heard June 19, 1991 Suit M63/79 in which a retired member of the judiciary sought a construction on the Judiciary Act in which Judges themselves are affected.

I accept the submission by Mr. Lennox Campbell on the behalf of the Attorney General that a party may waive his objection to adjudication by persons subject to such disqualifications by previous participation. Objection is generally deemed to have been waived if the party or his legal representative knew of the disqualification and acquiesced in the proceedings by failing to take objection at the earliest practicable opportunity. A waiver is regarded as the abandonment of a right by one party, so that afterwards he is estopped from claiming it.

On the broader question of whether the fundamental right to a fair hearing under section 20 of the Constitution can be waived, it is my view that such question does not arise on the facts presented in this case. Accordingly, I do not feel called upon to answer what is now an entirely academic question upon the hypothesis that there was evidence upon which such a right could have been waived. I can well understand the anxiety upon which an authoritative answer upon such an important question is sought and while I am grateful to both sides for their helpful submissions the point at this stage remains academic.

Let me now turn to the second and more important question of whether or not there was a Real Likelihood of Bias or Reasonable Suspicion of Bias on the part of the appellate judges who had participated in the re-trial hearing.

It cannot be gainsaid that utter impartiality is required of professional judges and those who are called upon to sit in judgment over others. This is derived from the well known principle of Natural Justice which is often expressed in the maxim, nemo judex in causa sua designed to promote the feeling of confidence in the administration of justice which is essential to social order and security. This requirement of impartiality is intended to prohibit a person from deciding a matter in which he has pecuniary or other type of interest. Such other interest may be inferred from his conduct or utterances during the hearing of the matter.

A real likelihood of bias means at least a substantial possibility of bias. The court will judge of the matter as a reasonable man would judge of any matter in the conduct of his own business. The test of reasonable

likelihood of bias which has been applied in a number of leading cases in magisterial and liquor licensing law and helpfully cited to us is based on the reasonable apprehension of a reasonable man fully apprised of the facts. While it is no doubt desirable that all judges like Caesar's wife should be above suspicion it would be hopeless to think that a Court would quash decisions on the strength of the suspicions of capricious and unreasonable people.

For the applicant to succeed in my view, he would have to prove that the judges of the Court of Appeal in the retrial hearing had not fairly considered his case and had made up their minds to refuse the order for a retrial before they heard the application. Additionally that they failed to consider the merits of the application for reasons of personal interest and bias. It is reasonable for the law as well as public policy to require a greater measure of suspicion from reasonable men in dealing with appellate judges than justices in licensing authority cases. As was pointed out by Lord Denning M.R. in Metropolitan Properties v. Lannon 1968 3 AER p.304 at 310 'mere suspicion or conjecture is not enough'. There has to be a real likelihood of bias and it is not every act or expression of a judge that can lead to such a conclusion. It stands to reason that the conduct complained of must be such that it evinces some personal animosity on the part of the judge. Allegations amounting to the Judge's misconstruction of the law will not suffice for it is not every error in law that imports bias.

I do not accept the submission on behalf of the applicant that a previous adverse opinion arrived at by a person disqualifies him from taking part in a subsequent adjudication in which the issues on which a prior opinion was formulated are relevant to the question to be determined. In my view that submission is based on a false assumption that the judicial mind once activated in a certain direction must continue in that same direction irrespective of the changed circumstances. How could this be so when during a trial a judge is called upon to make various rulings favouring one side or the other. The question of bail is but one example which immediately comes

to mind.

Considerable reliance has been placed by the applicant upon the Australian case of Livesey v. New South Wales Bar Association 1985 LRC (Const.) p.1108. The appellant, a member of the New South Wales Bar appealed by special leave from the judgment of the New South Wales Court of Appeal ordering that he should be disbarred. Miss Wendy Bacon then a law student had agreed in the appellant's presence to act as surety for Stephen Sellars who was charged with Criminal Conspiracy. She lodged a cash surety of $10,000 which was forfeited when Sellers failed to appear in Court to answer charge. The Barristers Admission Board rejected Miss Bacon's application for admission to the Bar. A similar order was rejected by the Court of Appeal. After she had given evidence each member of the Court strongly indicated his view that she lacked credit. Before the hearing, counsel for the appellant submitted in Chambers that two judges should not sit because of their previous participation in determining the application. In allowing the appeal the Court held that the appellant or a fair minded observer might reasonably have apprehended that the views which the two members of the court had formed in the previous case on a question of fact which was a live issue in the hearing or on the credit of a witness whose evidence was significant on that question, might result in the proceedings being affected by bias by reason of prejudment.

This case is easily distinguished from the instant case which is not concerned with any live issue such as the credit of a witness in a previous hearing whom the party intended to call in the subsequent hearing before the same panel.

Turning again to the present case, could the two Appellate Judges be reasonably or substantially suspected of bias? The question depends in each case upon the relation of the Judges who are impugned to the matters which they have to adjudicate upon. The situation which existed at the commencement of the retrial hearing can be shortly summarised:-

The central reasons on which the appeal was allowed by the Judicial Committee of the Privy Council were as follows:-

(1) The Trial Judge's and the Prosecution's refusal to make witnesses' statements available to the defence.

(2) The Trial Judge's failure to provide the jury with guidance on the problem, "whatever it was" indicated when they first returned to Court.

(3) The Trial Judge's misdirection on character evidence.

The issues which were determined by the Court of Appeal and resulted in the dismissal of the appeal were substantially different to those considered by the Court of Appeal as to whether or not there should be a retrial.

The Judicial Committee by its judgment mandated the Court of Appeal to quash the conviction of applicant and either enter an acquittal or order a new trial. The effect of the judgment of the Privy Council was to conclusively state the law in relation to the issues raised and accordingly the Court of Appeal was bound to those findings. They were no longer live issues amenable to adjudication by the Court of Appeal.

The written judgment of Carey J.A. (Retrial) puts it beyond a shadow of a doubt that the Court was acting in obedience to the order of the Privy Council in discharging its obligations in the balancing and resolution of the principles as to whether or not a new trial should be ordered in the public interest. The determination in the retrial matter was substantially different and based on wholly different facts.

In any event the words complained of were part of a judgment delivered by the Court and when examined within the context of the constitutional provision it could only mean that the accused was charged with a brutal crime.

The judges at the retrial hearing must be taken to have disabused their minds of any knowledge they may have gained from the previous hearing and must be taken to have applied themselves to the issues presented to them in the hearing for a retrial.

The Court of Appeal and in particular the Ag. President, Carey J.A. correctly interpreted the function of the Court. The question which he had to determine was whether the Court would exercise its discretion in order to acquit the applicant or order a new trial. The Court in my view exercised its discretion in a judicial manner and there was material before it on which

they could reasonably have exercised their discretion in the way they did. Having carefully considered the affidavit evidence I find that it was not established that there was any real likelihood of bias on the part of the two appellate Judges who comprised the retrial hearing.

In the circumstances this Court cannot say a breach of Section 20(1) of the Constitution had occurred.

It is now appropriate to deal with the second declaration.

The applicant in choosing to proceed by way of originating motion instead of by writ have found himself in the procedural difficulty that under the Judicature (Constitutional Redress) (No.2) Rules 1963 complaints that constitutional rights are likely to be contravened must be made by writ and not by motion. A declaration in the form requested could not be granted since none can say at this stage that applicant's constitutional right to a fair hearing has been infringed. It is not sufficient for the applicant to establish that there has been adverse publicity and dissemination of a judgment which is likely to have a prejudicial effect on the minds of potential jurors. In the light of the common law remedial measures referred to and approved by Lord Diplock in Grant v. DPP AC 1982, 90 this Court would refuse to grant such a declaration.

For these reasons I conclude that the motion was misconceived and therefore the application must fail.