JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO: 80/97

COR: THE HON MR JUSTICE FORTE J A
THE HON MR JUSTICE DOWNER J A
THE HON MR JUSTICE GORDON J A

BETWEEN	WILMOT PERKINS	DEFENDANT/APPELLANT
AND	NOEL B. IRVING	PLAINTIFF/RESPONDENT

Allan Wood & Ransford Braham instructed by Raymond Clough of Clough & Long for Appellant

Dennis Goffe, Q.C. & Mrs. Sandra Minott-Phillips instructed by Myers, Fletcher & Gordon for Respondent

14th, 15th & 31st July, 1997

FORTE, J A

The appellant was sued in libel by the respondent arising out of words allegedly uttered by the appellant on a programme called "Straight Talk" broadcast on a radio station "KLAS FM". In the Statement of Claim it is alleged that on January 24, 1994, the appellant, a broadcaster and journalist "spoke the following words of and concerning the plaintiff in way of his office as a Resident Magistrate and as an Attorney-at-law:

a) "... controversy surrounding sale of Holland Estate land. Various favoured persons including the Resident Magistrate in the parish of St. Elizabeth, businessmen, politicians and all kinds of other such people who are favourites of the party I suppose. Public property being made available to them at $8,000 an acre. Can you imagine that? $8,000 an acre for Holland land in St. Elizabeth ...

b) How is this Resident Magistrate going to look on the man who comes before him? If the Resident Magistrate is involved in this, I hope this story is not true, that little man who comes to him accused of stealing 2 breadfruits, what is he going to say to him?

c) ... Its being sold to some good friends of the party. One of them is an MHR another is a Resident Magistrate and so on ... Businessmen and all sorts of other people like these who have connections to the party are getting this land that taxpayer's money bought.

d) (To caller (identified as John Issa) who said 'Well I Hope it isn't so') 'Well if it is so, what is this Resident Magistrate going to say to a man who comes into Court charged with stealing 2 breadfruits?"

The matter came up for hearing before Ellis, J. on the 7th July, 1997 in the Supreme Court when an application for its adjournment was made by counsel for the appellant. A complaint as to the refusal of this application, came to us also by way of appeal, but at the commencement of the arguments, it was revealed that by reason of these proceedings the trial had been adjourned sine die by the learned judge to await these results. Consequently, counsel did not pursue the appeal in that regard. The refusal of the adjournment has retained its relevance, however, as we shall see when considering the submissions made in respect of the one remaining issue. That issue concerns an application made by the appellant's counsel to the learned judge, after his refusal of the adjournment, to disqualify himself from trying the case. It is a complaint in respect of his refusal so to do which now forms the subject of these hearings. This application was first heard in Chambers, when on the instruction of the learned judge it was referred to open Court. The basis on which the learned judge was asked to disqualify himself has its genesis in a statement allegedly made by the learned judge

some eighteen (18) years ago when he was a Senior Assistant Attorney-General. That statement was in relation to an article that had been written by the appellant and published in the newspaper. The statement was made in the context of an address then made by him in a Constitutional action then before the Court. It would be impractical here to set out in detail the content of the article in respect of which the alleged offending remark was made by the then Senior Assistant Attorney-General. The content, however referred ironically to the concession by a learned judge who had been assigned to sit in the Constitutional Court, to withdraw, as a result of allegations that he might be a blood-relation of one of the applicants. It appeared that he had done so, with the concurrence of the learned Chief Justice at the time. Here are some relevant extracts:

> "When the matter was first brought to his attention, Mr. Marsh said that, he knew of no such relationship, nor had he, so far as he knew ever set eyes on the man in his life. That being the case he decided, and the Chief Justice agreed with his decision, that there was no justification whatever for his withdrawal from the panel.
>
> It would seem to me that if that decision was correct - and there is no doubt whatever in my mind that it was - it remains correct whether the baseless allegation is repeated from a thousand roof-tops or in as many secret places. If Mr. Justice Marsh cannot be trusted to speak the truth in so trifling a matter, he presents a problem far more profound than can be solved by his sitting or not sitting ..."

And then further in the article:

> "But, if the decision was unfortunate, the reasons given, and especially the querulous explanations of the Chief Justice rambling on through more than four pages of foolscap in the transcript, was even more so. 'The burden of his complaint was that malicious persons had been at work, intent upon insidious mischief; hypocrites, 'who pay lip service ... to the Independence of the Judiciary and the high integrity which the members of the Bench bear in the

> Community but ... when it suits their interests they are the same ones who will tear down the Judiciary.'
>
> The Chief Justice lives, it seems, in a world where 'susu and rumours' are constant terrors, and the press and electronic media veritable instruments of torture. Occupying a prominent place in his mind were considerations of 'what would be said'; not only 'on the streets or on verandahs or at house corners, but in view of what happens these days it wouldn't be a matter of surprise that it would get into the press as well and it is that reason why the learned Judge has decided that the best thing for him to do in the circumstances is to withdraw from the bench."

On the day that the article appeared in the press, it evoked comments from counsel who were appearing in the hearing. It is the remarks of the learned Senior Assistant Attorney-General which after all these years now form the gravamen of the complaint by the appellant and in which he has founded the basis for the disqualification of the learned judge. The relevant words of the then Senior Assistant Attorney-General as recorded in the press at the time are as follows:

> "The attack he said was scurrilous and viperous. 'Is this being done for a particular ulterior motive?' he asked. Mr. Ellis said the judiciary stood as a last area protective of rights of everyone in the society. He said, 'When your Lordships are assailed by viperous vermins who seek to gnaw at the entrails of your integrity, your Lordships should stand firm." [Emphasis added]

The underlined words are in fact the words upon which the appellant bases his complaint of what counsel describes as demonstrating the danger of bias if the learned judge should be allowed to preside over the trial.

Before examining the merits of the complaint, it should be recorded that there has been no challenge to the allegation that the learned judge did use the words credited to him, and that he used them in the context set out above. The hearing before us proceeded on the basis that the allegations are correct.

Two issues called for determination in this matter:

1) Whether the refusal by the learned judge to withdraw from the case is an order of the Court, and therefore appealable, and

2) If it is, then was the learned judge correct in refusing to disqualify himself.

1. Was there an order of the Court?

A good starting point in the pursuit of the correct answer to this question is the recognition that a person has a constitutional right to have his litigious dispute heard and determined by an independent and impartial tribunal, which is constitutionally mandated to give him a fair hearing in a reasonable time. This right is confirmed by section 20(2) of the Jamaica Constitution which states:

> "**20.** - (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."

Section 25(1) deals with the enforcement of the protective provisions of the Constitution.

It states:

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

As the allegation of the appellant related to a real danger of bias on the part of the learned judge it implies a complaint that it was likely that his constitutional rights to

a fair hearing by an impartial tribunal might be infringed. In those circumstances, it would be incumbent upon him to seek redress by virtue of section 25 of the Constitution. There is no doubt that he could have moved the Constitutional Court for an order that the learned judge should not adjudicate upon this issue, given the history already related, and assuming that the circumstances would meet the criteria of the settled principles of law.

In my view, he could also seek to protect his constitutional rights in the context of the hearing of the matter in which his right was likely to be contravened. Indeed section 25(2) which empowers the Supreme Court to hear such actions has within it a proviso which states:

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

The appellant, based on his constitutional right, could move the Court, before the commencement of the trial to determine whether his right under section 20(2) was likely to be infringed. In those circumstances, the Court must come to a determination as to whether the alleged contravention is real, and make an order accordingly.

In the instant case, it was before the commencement of the trial, that counsel moved the Court to allow for another Judge to try the case, as the appellant contended that a real danger of bias was likely. This was not an application made during the process of trial as to a matter affecting evidence which required a ruling as to admissibility or other matters of that sort. This application affected the more fundamental question of whether the particular tribunal was competent (in the sense of likely bias (unfairness) to adjudicate upon the issues joined. In those circumstances

the learned judge was bound to determine that issue once and for all, and having done so to make an order consequential on his determination.

Counsel for the appellant relied on the case of **The Gleaner Co. Ltd. and John Hearne v. Michael Manley** SCCA 4/83 delivered 13th May, 1983 (unreported), in support of his contention that the decision of the learned judge was an order and not a ruling as contended for by counsel for the respondent. In that case, which coincidentally was a case in defamation, the defendant's counsel during the process of the hearing applied for the discharge of the foreman of the jury on the ground of bias as also the discharge of the entire jury on the ground that the foreman would have polluted their minds. The learned judge ordered that the foreman be discharged, but that the case should continue with the remaining six jurors. Before the continuance of the case, this Court granted leave to appeal, treating the learned judge's determination as an interlocutory order. Before us, Mr. Wood for the appellant drew a comparison between the two cases contending that the circumstances of this case fall squarely into that of the **Gleaner Co.** case (supra) which he relies on as authority for his contention.

Mr. Goffe, contends that what the learned judge did, was to rule on an application made before him, and a ruling not being a judgment or an order cannot be the subject of an appeal. For this contention, he cites the case of **Moncris Investments Ltd, Allan Deans, Reynu Deans v. Lans Efford Francis, Carol Marie Francis and The Registrar of Titles** SCCA 50/92 delivered 23rd June, 1992, (unreported) which dealt with a "purported appeal" against the learned trial judge's ruling on a matter of evidence.

In my view the circumstances of this case are very different from that in the **Moncris** case. The application here went to a more fundamental issue which really

had nothing to do with the actual conduct of the trial process, but related to the competence of the tribunal to adjudicate on the particular case. The **Gleaner Co.** case (supra) is also a case which went to the fundamental issue as to whether the jurors, having regard to the likely bias, were competent to continue the case, and in those circumstances I would agree that there was an order by the learned judge which was an appealable order.

In my judgment, the preliminary point by the appellant with the purpose of avoiding what he perceived as a danger of bias, was a motion which called for a determination which would be final as to that fundamental question, and consequently the result was an order by the learned judge that he would proceed to adjudicate on the case.

This being an order, I would rule that it is appealable.

2. Should the learned judge have disqualified himself?

The test to be applied in cases of apparent bias was settled in **R. v Gough** [1993] 2 All E R 724. After an examination and analysis of many cases on the subject Lord Goff of Chieveley in his speech in the House of Lords concluded thus at page 736:

> "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 tests 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 proability 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."

That this test also applies in cases of apparent bias by Judges was confirmed by Her Majesty's Privy Council in the case of **Linton Berry v. D.P.P and the Attorney General of Jamaica** Privy Council Appeal No. 74/95 delivered 17th October, 1996 (unreported) where Lord Goff of Chieveley in delivering the opinion of the Board stated:

> "It is against this background that their Lordships considered the allegation of bias which was advanced against two members of the Court of Appeal by Lord Gifford Q.C. on behalf of the appellant. ... The test to be applied is whether there was, in the circumstances, a real danger of bias: see **Reg. v. Gough** [1993] A.C. 646."

Lord Goff (speaking in the **Gough** case) in citing with approval the dicta of Devlin, J. in **R v Barnsley and District Licenced Victuallers Association** [1960] 2 All E R 703, pointed out that the "real likelihood" test referred to by Devlin, J. was very similar to the "real danger" test which he (Lord Goff) adumbrated. With that background I cite hereunder a part of the dicta of Devlin, J. in the **Barnsley** case (supra) with which I agree (with the qualification of the "real likelihood being the same as the "real danger" test).

> " 'Real likelihood' depends on the impression which the court gets from the circumstances in which 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." [Emphasis added]

In determining whether the test laid down by Lord Goff applies to the particular circumstances of a case, the fact that the person in whom the bias is alleged, states that he will not be, or has not been biased, does not necessarily determine the question conclusively, as the particular reason for the alleged bias may affect him unconsciously. The question for determination, therefore, is whether in the particular circumstances of this case, there is a real danger of bias or to put it another way, will there be a possibility of bias on the part of the learned judge in the sense that he may unfairly regard with disfavour the case of the appellant. Or in the words of Lord Woolf in the **Gough** case (supra) at page 737:

> "Whether there is a real danger of injustice having occurred as a result of the alleged bias."

A substantive consideration in applying the test to this case is the fact that the words of the learned judge which forms the basis of the appellant's complaint, were used in direct reference to an earlier article by the appellant which was severely critical of members of the judiciary. The case which was about to commence before the learned judge also related to words used by the appellant, this time in a radio broadcast, which is alleged to have been a libelous attack upon another member of the judiciary. Added to this is the content of the learned judge's words which no-one could contend was not a very strong attack and criticism of the appellant. Those words indicate the very low and contemptuous opinion that the Senior Assistant Attorney-

General had for the appellant at the time when they were spoken. There is nothing in the evidence to support a conclusion, that that opinion has changed, though one would suspect that with maturity and the development of judicial behaviour and the passage of time, the opinion might have receded into the unconscious mind of the learned judge. There is no guarantee, however that that unconsciousness may not be awakened by the similarity of circumstances which exists in respect of the two events. It is noticeable that no real challenge was made by Mr. Goffe, Q.C. for the respondent as to whether the factual history of the case met the test adumbrated by Lord Goff. He was content to rely on the passage of time, and argued that the allegation related to matters long forgotten by the learned judge. Instead, he argued quite strongly that the application for disqualification was lacking in bona fides. This he said was laid bare by the fact that it was not made until after the application for the adjournment of the case had been refused by the learned judge. For this proposition, he relied on certain dicta in **McBean v R** (1976) 33 W.I.R. 230. To understand the submission of learned Queen's Counsel for the respondent it is necessary to indicate that in that case there was an application to the Learned Resident Magistrate His Honour Mr. Boyd Carey to disqualify himself - this application having been made after an adjournment was refused. In chambers where he was invited to make the application, counsel for the accused stated:

> "It was that on his instructions he would be obliged to put to a Mr Levy, an assistant commissioner of police, that when Mr Levy had found the appellant in possession of a pistol loaded with six rounds of ammunition he had said to him (inter alia): 'You ah buy out police and Judge Carey down here. I want to see you buy out this case yah."

On that background the Privy Council per Viscount Dilhorne approved the following words of the Court of Appeal in which Mr. Goffe finds support:

> "The resident magistrate was entitled to consider, and no doubt did consider, whether the suggestion that he disqualify himself would have been advanced if the application for an adjournment had succeeded. At that stage, also, and in the light of what had transpired so far, it would have been surprising if questions concerning the bona fides of the suggestion did not begin to form in his mind. It was a most unusual and serious suggestion, and the judge could scarcely have avoided wondering why it had not been put at the forefront of the submissions by Mr. Atkinson. Occurring as it did in the circumstances and in the sequence described in the note, the suggestion to disqualify bears all the marks of a move made pursuant to a determination to secure the postponement of the trial despite the fact that the application for this purpose was judged to be without merit and had been refused. This determination was manifest."

It appears to me that the above conclusion arrived at in the **McBean** case (supra) was as a result of the particular circumstances that existed in that case, where it was reasonable to conclude that the application for disqualification of the learned Resident Magistrate depended on an unreliable allegation. The fact that there was no merit in the application for the adjournment obviously played an important part in the deliberations of the Judges of Appeal. In the instant case, on the matter coming on for hearing, the appellants made an application for an adjournment, which in my view was based on apparently solid grounds. There had been a change of Attorney within a few days prior to the trial. The new attorneys thereafter discovered that the Defence necessitated amendments as it was lacking in specific defences which needed to be pleaded. In any event, the allegation of lack of bona fides receded into insignificance, when it was disclosed, that counsel for the appellant having come into the case on the

week-end before the Monday of the trial, had only verbal instructions in respect of the alleged reason for the disqualification of the learned judge. Given the delicate and embarrassing nature of such an application, he chose to avoid that embarrassment by way of an application for an adjournment, which in any event was necessary for more than one reason i.e.:

(i) the change of attorney, and

(ii) the defective defence which needed to be put right.

I am able to state the above because the content was revealed during the course of the arguments before us, Mr. Goffe having conceded that he had advised Mr. Wood for the appellant to make his application for the disqualification of the learned Judge at the same time as the application for the adjournment, so that it would not appear that the application was being made solely because of the refusal of the adjournment.

Having regard to the above, it is my judgment that the evidence and argument before us do not disclose that there was lack of bona fides in relation to the request for the learned judge to remove himself from the trial of the matter.

In conclusion, I am of the view that the learned Judge's profound criticism of the appellants' article concerning members of the Judiciary, though 18 years in the past, indicates that there may be real danger of bias on his part, when he comes to decide issues which will arise out of another's complaint in respect of the appellant's alleged libellous criticism of that other, he being also a member of the judiciary. A viperous vermin he was then; unconsciously and without knowledge of his bias, the learned judge may be content this time merely to say he (the appellant) is libellous. In my view applying the test adumbrated in the case of **Gough** (supra) there would be real danger

of bias if the learned judge was to adjudicate in this case. I would allow the appeal, set aside the order of the court below, and order that Ellis, J. be disqualified from trying this case.

DOWNER, J.A.:

Noel Irving is a Senior Resident Magistrate who has instituted proceedings for defamation against the broadcaster and journalist Wilmot Perkins. Hearings were commenced on 7th July, 1997 before Ellis J. and the specific incidents which give rise to this appeal were embodied in a Formal Order which states:

> IT IS HEREBY ORDERED THAT:
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> 1. Application for Adjournment of Suit No. C.L. 1994/I-025 Noel B. Irving v Wilmot Perkins, is refused.
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> 2. The Application for the order that the Honourable Mr. Justice Lloyd Ellis disqualify himself from hearing Suit No. C.L. 1994/I-025 Noel B. Irving v Wilmot Perkins, is refused.
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> 3. Case to proceed as listed.

I should state at the outset that the preparation to institute leave to appeal, and appeal was done in great haste. So it seems that although leave to appeal was refused, it was not embodied in the Formal Order. Paragraph 16 of the affidavit of the attorney-at-law, Raymond Clough, suggests this. It reads:

> "16. That I am also informed that Mr. Allan Wood sought the leave of the Court to appeal the orders. The Honourable Mr. Justice Lloyd Ellis refused to grant leave to appeal."

Also paragraph 7 of the affidavit of Perkins reads:

> "7. That on the 7th day of July, 1997, Mr. Raymond Clough on my behalf filed a Summons to stay the proceedings and seek the leave of the Court of Appeal to appeal against the orders of the Honourable Mr. Justice Lloyd Ellis in Suit No. C.L. 1994/I-025 made on the 7th day of July, 1997, refusing the adjournment, refusing to disqualify himself and refusing leave to appeal."

The Jurisdictional points (1) Adjournment

In view of the submissions of Mr. Dennis Goffe, Q.C., it is essential to determine whether Perkins had a right to appeal on this issue. To put the issue in context a brief reference to what happened before Ellis J. is pertinent. The appropriate starting point was July 7th, 1997 and here is how Raymond Clough the instructing attorney-at-law put it in his affidavit.

> "14. That I am informed that Mr. Allan Wood attended Court on the 7th July, 1997 to seek an adjournment of the matter. The reasons for seeking the adjournment were outlined to the Honourable Mr. Justice Lloyd Ellis, who refused the application and ordered that the trial proceed.
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> 15. That I am informed that Mr. Allan Wood made a further application that the Honourable Mr. Justice Lloyd Ellis should disqualify himself on the basis of statements made about the Defendant/Appellant when he was a Snr. Asst. Attorney General, when in response to an article written by the Defendant/Appellant, Mr. Ellis referred to the Defendant in Court as assailing the judiciary and went on to say:-
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> > 'When your Lordships are assailed by viperous vermin who seek to gnaw at the entrails of your integrity, your Lordships should stand firm'.
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> The application was refused and described as offensive. Having regard to the fact that this subject matter concerns an alleged libel against a member of the judiciary, the Learned Judge having expressed the aforesaid view about the Defendant/Appellant ought to have disqualified himself." [Emphasis supplied]

What do the authorities say of the issue of an application for adjournment. **In the Yates' Settlement Trusts** [1954] All ER 619 Sir Raymond Evershed, M.R. said:

> "There is, I think, no doubt that, if a judge adjourns a case just as if he refuses an adjournment of a case, he has performed a judicial act which can be reviewed by this court, though I need not say that an adjournment, or a refusal of an adjournment, is a matter prima facie entirely within the discretion of the judge. This court would, therefore, be very slow to interfere with such order, but, in my judgment, there is no doubt of the jurisdiction of this court to entertain appeals in such matters. Counsel for the plaintiffs referred us to **Hinckley & South Leicestershire Permanent Benefit Building Society v. Freeman** [1940] 4 All ER 212 and **Maxwell v. Keun** [1928] 1 KB 645 as authority for what I have said."

Then Romer, L.J. said at p 622.

> "I also agree, and I should like to make it clear that, so far as I am concerned, and, I think, so far as the court as a whole is concerned, we are not casting any doubt on the general principles laid down by FARWELL, J., in the **Hinckley** case. FARWELL, J., said (at p. 216):
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> > 'The proposition that this court has not power to adjourn any matter on any proper ground is new to me. No doubt the court cannot postpone the hearing of a matter indefinitely, because, if a court did so, it might thereby lead to defeating justice altogether, and a mere arbitrary refusal to hear a particular case is not a matter which, when dealing with litigation, would ever become a recognised thing. I cannot conceive any judge taking a course of that sort. However, to say that the court has not always an inherent power to direct that any matter which comes before it should stand over for a period if the court thinks that that is the proper way to deal with the matter is a proposition entirely new to me.'

> FARWELL, J., went on to point out that, if the judge took the course of adjourning a particular case, his decision to do so would be subject to appeal in the Court of Appeal. I think that that is a correct statement of procedural law, and I do not think anything has been said to cast any doubt on it.

In an earlier case **Maxwell v. Keun** (1927) All ER Rep. 335 at 336 Lord Hanworth, M.R. said at p.336:

> "An application was made to the Lord Chief Justice of England on Nov. 23 that the case should stand out of the list because it would be impossible for the plaintiff to be present, and the learned judge decided to make no order."

Then the learned M.R. continued thus:

> "The Lord Chief Justice, on Nov. 24, decided not to grant the application. The result is that this action, No. 3063, is in grave peril of coming into the list for trial at a time when the plaintiff will be quite unable to be present. In my view, and upon the materials before me, it appears that there is no possibility of the plaintiff's case being established in the absence of the plaintiff himself, and judgment would have to pass subject to certain matters which might have to be discussed and adjusted"

Then the jurisdiction to hear an appeal when there was a refusal to grant an adjournment was treated thus:

> "From that decision of the Lord Chief Justice of England an appeal is brought to this court. First of all, a preliminary objection is taken to this court hearing any such appeal, on the ground that the order which was made by the Lord Chief Justice was not of the nature of an order which is subject to appeal in this court. It is said that in fact the Lord Chief Justice determined to make no order, and that s. 27 (1) of the Supreme Court of Judicature (Consolidation) Act, 1925, which gives the Court of Appeal power to hear appeals from the order of the Lord Chief Justice directed that the costs of the application should be paid by the plaintiff to the defendants, and although it is not

> uncommon that no order should be drawn up upon that, the attachment to the order of an order as to costs makes it, in my judgment, plain that the order in fact made was one which was of a character which is embraced within s. 27 (1) of the Act of 1925. Although such an order may be appealable, it by no means follows that such appeals ought easily to be entertained, or that there is any promise of success in bringing such a matter from the court below to the Court of Appeal."

Then Atkin L.J., as he then was, acknowledged that the order was an interlocutory order and that an appeal lies, with leave of the Court of Appeal. He put it thus.

> "In this case an application was made to postpone the hearing of a case which was in the week's list, and because it was in the week's list it was made before the Lord Chief Justice, who, in accordance with practice, was in charge of the special jury list for the week. Authority to grant or refuse such an application, is given by Ord. 36, r. 34, and the Lord Chief Justice, on hearing the application, dismissed the application with costs. I need say nothing further on the first point, except to say that I am quite satisfied that that is an order of the learned judge from which an appeal lies by leave of this court."

The learned judge continued thus.

> "I will refer to one case in addition to that which was referred to my Lord; that is the case of **Jones v. S. R. Anthracite Colliers, Ltd. (2)** [1920] 90 LJKB 1315. That was a decision of the Court of Appeal in a workmen's compensation case. There the learned judge had refused to adjourn an application when the manager of the employers had on subpoena failed to produce certain documents which were said to be relevant. The applicant had applied for the adjournment, the country court judge had refused to grant it, and the court allowed the appeal. In that case LORD STERNDALE said this:

> 'I think it is rather suggested that this court has never interfered with any judge's decision in regard to granting of an adjournment. I cannot remember any specific instance of this court doing so, but my impression is that this court has interfered with the decision of even High Court judges in regard to 'adjournments' - although, as I say, I cannot remember any specific instance of that being done at the moment.'

In the same case SCRUTTON, L.J., said:

> 'I should like to say, in regard to the point as to whether the court has ever interfered with the decision of a county court judge as regards an adjournment, that my impression is the same as that of the Master of the Rolls. My impression is that this court has frequently interfered with the decisions of county court and High Court judges in regard to the question of 'adjournment', because the whole duty of this court, and of every court, should be to do justice between the parties without being prevented by technical objections.'

> I myself am certainl / of that impression. I have a definite recollection of a case where it was said that this court coul(interfere with a decision of a judge refusing to a(journ a case, if they thought that thereby a real i.njustice would be done to the parties."

Perkins changed his instructing attorneys. He also retained the services of Mr. R.N.A. Henriques Q.C. who indicated that he would not be available this term because of his schedules outside of Jamaica. However, he would be available during the Michaelmas term.

Turning to the circumstances which gave rise to the application for an adjournment it is necessary to refer to the initial affidavit of Wilmot Perkins. Here are the relevant paragraphs:

> "2. Up to the 30th June, 1997, the firm of Wong Ken & Company appeared on my behalf. The matter came up for trial on 2nd June, 1997, before Mr. Justice Ellis when an adjournment was sought as my attorneys were not ready and I was not satisfied with the Defence which had been prepared, which failed to raise the defence of qualified privilege and the defence under the Constitution of Jamaica which entitles comment on public officials and the conduct of such officials while holding public office. Further, the Defence failed to raise fair comment in response of all the publications, the subject matter of the Plaintiff's claim.
>
> 3. On the matter coming before the Court on 2nd June, 1997, the Judge, Mr. Justice Ellis granted an adjournment until 7th July, 1997 and ordered that the matter would proceed on today's date irrespective of whether (additional) counsel was available on my behalf. [Emphasis supplied]

Here an error crept into the learned judge's ruling. He proposed to fetter his discretion. Perkins continued thus:

> "4. As a consequence of my dissatisfaction with the conduct of my Defence, I spoke with Mr. Raymond Clough on Sunday, 29th June, 1997, and he agreed to appear on my behalf and entered a Notice of Change of Attorneys. Further, Mr. Clough made contact with Mr. R.N.A. Henriques, Q.C., who agreed to appear on my behalf, but indicated that he would not be available on the 7th July, 1997 as he would be off the island. Mr. Henriques indicated dates for the coming term when he would be available.
>
> 5. "In addition, Mr. Clough, my instructing attorney was not able to attend Court on 7th July, 1997, as he was subpoenaed to give evidence in a criminal prosecution against his former clients, Mr. & Mrs. Donald Panton and I exhibit and annex hereto, marked with the letters "WP 2" a copy of this Subpoena.
>
> 6 As neither my counsel nor my instructing attorney could be available to represent me on the 7th July, 1997, Mr. Allan Wood was requested by

> Mr. Raymond Clough on 4th July, 1997 to attend Court to seek an adjournment.
>
> 7. Upon the making of the application for an adjournment, the Learned Judge refused the application for an adjournment and refused leave to appeal in circumstances where my case has not been prepared and I am not properly represented. In addition, I am legally blind and I am unable to drive nor can I read without the aid of an electronic machine and I would not be able to read documents in Court and I am therefore at a disadvantage if I am required to represent myself."

It is now necessary to examine **Moncris Investment Ltd. et al v Lans Efford France** (unreported) S.C.C.A. 50/92 delivered 23rd June, 1992. In emphasising that an appealable order or judgment must be interlocutory or final, I said at page 4:

> "But section 579 which deals with judgments or orders expressly mentions final or interlocutory orders only, and a ruling on the admissibility of evidence does not come under any of these two orders. It is clear therefore, that the learned judge had no jurisdiction to make the formal order based on a ruling during the course of a trial on the admissibility of evidence. It is appropriate to set out section 579 (1) of the Civil Procedure Code to demonstrate that judgments or orders are specifically limited to final or interlocutory judgments. It reads:
>
> > "579.(1) A minute of every judgment or order, whether final or interlocutory, shall be made by the Registrar at the time when the judgment is given or the order is made and shall be approved by the Court or the Judge."

Another useful illustration of a ruling during the course of a hearing not being an appealable order occurred in **WEA Records Ltd. V. Visions Channel 4 Ltd.** [1983] 2 All E.R. 589 at 593. Sir John Donaldson, M.R. said at p. 593:

> "Whilst on the subject of jurisdiction, it should also be said that there is no power enabling a judge of the High Court to adjourn a dispute to the Court of Appeal which, in effect, is what Peter Gibson J seems to have done. The Court of Appeal hears appeals from orders and judgments."

Recourse must now be had to Section 10 of Judicature (Appellate Jurisdiction) Act. That section reads:

> "Subject to the provisions of this Act and to rules of court, the Court shall have jurisdiction to hear and determine appeals from any judgment or order of the Supreme Court in all civil proceedings, and for all purposes of and incidental to the hearing and determination of any appeal, and the amendment, execution and enforcement of any judgment or order made thereon, the Court shall subject as aforesaid have all the power, authority and jurisdiction of the former Supreme Court prior to the commencement of the Federal Supreme Court Regulations, 1958."

It has already been demonstrated that Section 579 of the Judicature (Civil Procedure Code) Law confines judgments and orders to interlocutory and final judgments and orders. The order for or granting an adjournment is undoubtedly interlocutory. It is intermediate and does not conclude the issue to be determined whether or not Irving was libelled. It was in these circumstances that I made the following order in Chambers, which reads:

> "IT IS HEREBY ORDERED THAT:
>
> (1) The Registrar treat the summons as a motion and list it for hearing on Monday, the 14th day of July, 1997;
>
> (2) Costs to be costs in the cause."

Having regard to the circumstances outlined in the uncontradicted affidavit evidence, if the trial were allowed to proceed then Perkins would have

had to defend himself. He was unable to do this in the light of his disabilities. Libel trials are not that frequent in this jurisdiction. They require skilled and experienced counsel. This is especially so when the real issues are the reputation of a Resident Magistrate on the one hand and whether statements attributed to Perkins were permissible pursuant to the evolving common law of libel. Further, in this jurisdiction the common law of libel has to conform to the constitutional guarantee of freedom of expression.

The power to grant adjournments is part of the inherent jurisdiction of the court to control its own procedure. This is recognised in Section 355 of the Civil Procedure Code. The unfettered discretion conferred on a trial judge is stated thus:

> "The judge may, if he thinks it expedient for the interests of justice, postpone or adjourn a trial for such time and to such place, and upon such terms, if any, as he shall think fit."

It would seem that that learned judge was mindful of the previous statement on 2nd July that the trial would proceed on the 7th irrespective of whether leading counsel appeared for Perkins. The headnote in ***Boyle v. Ford Motor Co. Ltd.*** [1992] 1 WLR 476 is a useful guide. It reads:

> "*Held*, granting the applications and allowing three of the appeals, that justice, although impeded by delay, might be defeated if administered on the basis of partially prepared cases; that the court's task was to confront avoidable delay by rigorous control of applications for postponements, but that where justice could not be done if a hearing date was maintained, the matter had to be postponed and the consequent delay was unavoidable; and that, accordingly, since a short extension of time was necessary for the preparation of the expert evidence, the three cases listed for March would be remitted to the county court for new dates to be fixed."

Since the learned judge did not take into account the circumstances put forward by Mr. Wood, his discretion was therefore exercised on the wrong principle. I would, therefore, grant leave to appeal, allow the appeal and set aside the order refusing an adjournment and direct that the trial be commenced before a different judge.

The jurisdictional point (2) Disqualification

Allan Wood and Ransford Braham were retained specifically to seek an adjournment. Subsequently they were instructed to make an application for Ellis J to disqualify himself from the trial. It was a delicate situation. Counsel sought audience in Chambers after the adjournment was refused and the learned judge intimated that he was not minded to accede to such a request. When the application was made in open Court it was refused and then Perkins applied by summons to seek leave to appeal the decision of Ellis J. It is now appropriate to refer to words attributed to Ellis J. while he was Senior Assistant Attorney General in the constitutional motion, which reached the Privy Council as **Grant v The Director of Public Prosecutions** [1982] 2 A.C. 190. The case is generally referred to as the "Green Bay Case". It is useful to refer to the affidavit of Clough once again. It reads:

> "15. That I am informed that Mr. Allan Wood made a further application that the Honourable Mr. Justice Lloyd Ellis should disqualify himself on the basis of statements made about the Defendant/Appellant when he was a Senior Attorney General, when in response to an article written by the Defendant/Appellant, Mr. Ellis referred to the Defendant in Court as assailing the judiciary and went on to say:-
>
> > 'When your Lordships are assailed by viperous vermin who seek to gnaw at the

> entrails of your integrity, your Lordships should stand firm'.
>
> The application was refused and described as offensive. Having regard to the fact that this subject matter concerns an alleged libel against a member of the judiciary, the Learned Judge having expressed the aforesaid view about the Defendant/Appellant ought to have disqualified himself.'

Apart from being a delicate application, it also was a difficult decision for the learned judge and in the circumstances one can sympathise with his immediate reaction that the application was offensive.

Proceedings in the Court of Appeal

It must be reiterated that the preparation by Allan Wood and Ransford Braham for the relevant applications was done in great haste. After the refusal of Ellis J. to grant the adjournment and to disqualify himself they invoked the jurisdiction of this court and the hearings began at 3:30 p.m. to seek leave to appeal the decision of Ellis J. The application came before me and I will refer to the note I made. It reads:

> "It is clear that the applicant, Wilmot Perkins, in seeking to appeal the decision of Ellis, J., during the course of a trial, attempted to invoke the jurisdiction of this court by summons pursuant to rule 33 of the Court of Appeal Rules, 1962.
>
> The proper course was to seek leave to appeal pursuant to rule 22. Consequently, I will follow the principle laid down by Lord Templeman in **Eldemire v. Eldemire** {1990} 38 W.I.R. 234 at 238. It runs thus:
>
> > '...the modern practice is to save expense without taking technical objection, unless it is necessary to do so in order to produce fairness and clarification'."

To my mind there are three circumstances by which an aggrieved party can approach the Court of Appeal from a decision of the Supreme Court. Firstly, where there is a final judgment or order. Secondly, where there is an interlocutory judgment or order. The relevant provisions are to be found in Sections 10, 11 of the Judicature (Appellate Jurisdiction) Act. Thirdly, there is also a special provision pursuant to Section 41 of the Judicature (Supreme Court) Act which empowers a Supreme Court Judge to reserve any case or any point in a case for the consideration of the Court of Appeal. This is a wide ranging provision and encompasses judgments, orders or rulings made by a judge in the course of a trial.

Was the order of Ellis, J. refusing to disqualify himself appealable?

The third method of invoking the jurisdiction of this court is irrelevant in this case although it could have been used. The issue therefore is whether this order was interlocutory or final or a mere ruling during the course of a trial.

It is important to grasp that both the application for an adjournment and the application for Ellis J. to disqualify himself were taken before Mr. Goffe, Q.C. opened his case on behalf of Irving. It was in the light of the refusal by the learned trial judge to give a favourable response to the appellants prayer that Mr. Goffe opened the case. Here is how Perkins records the sequence:

> "7. Upon the making of the application for an adjournment, the Learned Judge refused the application for an adjournment and refused leave in circumstances where my case has not been prepared and I am not properly represented. In addition, I am legally blind and I am unable to drive nor can I read without the aid of an electronic

> machine and I would not be able to read documents in Court and I am therefore at a disadvantage if I am required to represent myself.
>
> 8. In addition, the Learned Judge, Mr. Justice Ellis was also asked on 7th July, 1997 to disqualify himself on the basis of statements made about me when he was Senior Attorney General, when in response to an article which I wrote concerning the then Chief Justice, Mr. Ellis referred to me in court as assailing the judiciary and went on to say:
>
> > 'When your Lordships are assailed by viperous vermin who seek to gnaw at the entrails of your integrity, your Lordships should stand firm.
>
> The statements were published in the Daily Gleaner newspaper on 24th April, 1979, a copy of which is "WP 3" hereto. The Learned Judge refused to disqualify himself and refused leave to appeal on that ground as well. Having regard to the fact that the subject matter, concerns an alleged libel against a member of the judiciary, the Learned Judge having expressed the aforesaid view concerning me ought to have disqualified himself."

These circumstances are markedly different from the circumstances in **McBean v. The Queen** [1976] 33 W.I.R.p. 230 on which Mr. Goffe, Q.C. relied. The following passage from the opinion of Viscount Dilhorn at p. 232 illustrates the difference:

> "On that day Mr Ramsay did not appear and Mr Atkinson applied for a further adjournment. That was refused. Mr Atkinson then said that the court as constituted would be asked to disqualify itself on the ground that the judge sitting ought not to be a judge in his own cause. At this point Mr Atkinson made no disclosure of the reasons on which he based his contention. As the Court of Appeal later pointed out:
>
> > 'The resident magistrate was entitled to consider, and no doubt did consider, whether the suggestion that he disqualify

> himself would have been advanced if the application for an adjournment had succeeded. At that stage, also, and in the light of what had transpired so far, it would have been surprising if questions concerning the bona fides of the suggestion did not begin to form in his mind. It was a most unusual and serious suggestion, and the judge could scarcely have avoided wondering why it had not been put at the forefront of the submissions by Mr Atkinson. Occurring as it did in the circumstances and in the sequence described in the note, the suggestion to disqualify bears all the marks of a move made pursuant to a determination to secure the postponement of the trial despite the fact that the application for this purpose was judged to be without merit and had been refused. This determination was manifest...'

This statement having been made by Mr. Atkinson the resident magistrate suggested that counsel should state in chambers the basis on which the application that he should disqualify himself was made.

The record states that the court adjourned into chambers. Counsel for the appellant does not appear to have made any objection to this nor is there any record that he asked that the appellant should be present or that the appellant was excluded. In chambers Mr Atkinson disclosed the ground on which he suggested that the resident magistrate should disqualify himself. It was that on his instructions he would be obliged to put to a Mr Levy, an assistant commissioner of police, that when Mr. Levy had found the appellant in possession of a pistol loaded with six rounds of ammunition he had said to him (inter alia): 'You ah buy out police and Judge Carey down here. I want to see you buy out this a case yah.' Mr Boyd Carey, as the Court of Appeal said, was satisfied that from what he had been told it had not been shown that in the course of the trial he would be forced to be a judge in his own cause, for after referring to **Morales v Morales** (1962) 5 WIR 235 he ruled that the case should proceed."

Be it noted that in the **McBean** case both the application for an adjournment and the application for disqualification were without merit. The circumstances in this case are different.

The graphic phraseology of Ellis as counsel was an adaptation of the cross-examination by Sir Edward Coke in the famous treason trial of Sir Walter Raleigh. Two passages from **The Law Officers of the Crown** by Edwards the authority on this branch of constitutional law will suffice to demonstrate that the conduct and words of Sir Edward Coke as counsel ought not to have been followed. To rely on them indicates approval of his brutal methods. Moreover, Sir Walter was being tried for treason! All Perkins had done was to write and publish an article* entitled ***The real tragedy of the* nation,** criticising the Chief Justice and Mr. Justice Marsh. He was exercising his constitutional right of freedom of expression. If words in the article were impermissible, the appropriate authority could have instituted proceeding for contempt of court. Any court adjudication on that issue would have to take into account the celebrated words of Lord Atkin in ***Ambard v. The Attorney General of Trinidad and Tobago*** [1936] A.C. 322 or [1936] 1 All E.R. 704 at 709, which runs thus:

> "But whether the authority and position of an individual judge or the due administration of justice is concerned, no wrong is committed by any member of the public who exercises the ordinary right of criticising in good faith in private or public the public act done in the seat of justice. The path of criticism is a public way: the wrong headed are permitted to err therein: provided that members of the public abstain from imputing improper motives to those taking part in the administration of justice, and are genuinely exercising a right of criticism and not acting in malice or attempting to impair the administration of justice, they are immune. Justice is not a cloistered virtue: she must be allowed to

* In the Gleaner dated 22nd of April, 1979

> suffer the scrutiny and respectful even though outspoken comments of ordinary men.'

Then, in closing Lord Atkin said at page 710:

> "Their Lordships have discussed this case at some length because in one aspect it concerns the liberty of the press which is no more than the liberty of any member of the public to criticise temperately and fairly but freely any episode in the administration of justice. They have come to the conclusion that there is no evidence upon which the court could find that the appellant has exceeded this right, or that he acted with untruth of malice, or with the direct object of bringing the administration of justice into disrepute. They are satisfied that the Supreme Court took the course they did with a desire to uphold the dignity and authority of the law as administered in Trinidad; there nevertheless seems to their Lordships to have been a misconception of the doctrine of contempt of court as applied to public criticism. A jurisdiction of a very necessary and useful kind was applied in a case to which it was not properly applicable, and this in the view of their Lordships has resulted in a substantial miscarriage of justice. Acting, therefore, on the principles enumerated in the first part of this judgment as applicable to appeals from convictions for contempt of court, their Lordships will humbly advise His Majesty that this appeal be allowed and that the order of the Supreme Court dated Sept. 5, 1934, be set aside.'

The first passage from the Law Officers of the Crown, page 39 reads:

> "It is only necessary, for example, to mention the state trials of the sixteenth and seventeenth centuries, in which Sir Edward Coke at the trials of Sir Walter Raleigh and the Earl of Essex played so inglorious a part, to observe the Law Officers acting as counsel for the Crown in prosecutions for high treason before the House of Lords."

The second runs thus at page 55:

> 'The singling out of Sir Edward Coke in his diatribe, for his conduct when he was Attorney-General, has served to perpetuate the sense of ignominy felt by the legal profession at large for

> generations afterwards on account of Coke's astonishing behaviour towards Sir Walter Raleigh on the latter's trial in 1603 for complicity in a plot to place the Lady Arabella Stuart on the throne. With some justification it has been said that no counsel in modern times, even did he feel so disposed, would be allowed to apostrophise any party to a trial in the terms Coke addressed to Raleigh. Examples of the Attorney-General's style on that occasion are well known: "Thou art a monster; thou hast an English face, but a Spanish heart... You (sic) are the absolutest traitor that ever was...protest before God, I never knew a clearer Treason. Thou art the most vile and execrable Traitor that ever lived. . . . Well, I will now make it appear to the world that there never lived a viler viper upon the face of the earth than thou."

Another learned author Anthony Mockler in **Lions Under The Throne** at page 11 states:

> "The trial of Sir Walter Raleigh is one of the most notorious treason trials of England's history. It was presided over by the Lord Chief Justice, Sir John Popham, and a tribunal that included Raleigh's two greatest personal enemies, Robert Cecil and the venomous Henry Howard. The prosecution was conducted by the Attorney General, Edward Coke. It was Coke's brutality towards the accused, of which the following is a mere example, that has given the trial its notoriety.
>
> > *Coke*: Thou are a monster; thou hast an English face but a Spanish heart...thou art the most vile and execrate traitor that ever lived.
> >
> > *Raleigh*: You speak indiscreetly, barbarously and uncivilly.
> >
> > *Coke*: I want words sufficient to express thy viperous treasons.
> >
> > *Raleigh*: I think you want words indeed, for you have spoken one thing half a dozen times.

> *Coke*: Thou art an odious fellow; thy name is hateful to all the realm of England for thy pride.
>
> *Raleigh*: It will go near to prove a measuring cast between you and me, Mr. Attorney."

The following passage Vol. 2 **State Trials** (1603-1627) page 26-27 demonstrates the hectoring manner of Sir Edward:

> "*Lord Cecil.* Be not so impatient, good Mr. Attorney, give him leave to speak.
>
> *Att.* If I may not be patiently heard, you will encourage Traitors, and discourage us. I am the king's sworn servant, and must speak; If he be guilty, he is a Traitor; if not, deliver him.
>
> *Note*, Here Mr. Attorney sat down in a chafe, and would speak no more, until the Commissioners urged and intreated him. After much ado, he went on, and made a long repetition of all the Evidence, for the direction of the Jury; and at the repeating of some things, Sir Walter Raleigh interrupted him, and said, he did him wrong.

Then the passage above followed and concluded:

> *"Att.* Well, I will now make it appear to the world, that there never lived a viler viper upon the face of the earth than thou."

The issue in this case was whether there was a real likelihood of bias by a tribunal presided over by Ellis J because some eighteen years ago when he was a senior and influential counsel in the Attorney General's Chambers, he used the words complained of to describe Perkins. Before embarking on that analysis it is appropriate to return to the progress of the case and how it reached to this court. Here is the answer from Perkins:

> "3. That at the said continuation of the trial at 2:00 p.m. on Monday, the 7th July, 1997, Mr.

> Raymond Clough, the instructing attorney-at-law, attended Court and informed His Lordship Mr. Ellis that he was retained as instructing attorney-at-law in the matter on Sunday, the 29th June, 1997, and that he was not at this point competent to present my matter as he had not had sufficient time to adequately prepare himself as to the facts and circumstances of the matter or as to the law involved.
>
> 4. That I informed the Learned Judge that none of my attorneys-at-law were in fact immediately acquainted with the case, and at this point I now had no choice but to defend myself.
>
> 5. That Mr. Dennis Goffe, Q.C., appearing for the Plaintiff handed me a copy of his Written Submissions, whereupon I then informed the Learned Judge further that I am visually impaired and would be unable to read documents pertaining to my defence without the appropriate electronic equipment and would therefore be at a disadvantage."

It is clear that some quick decisions were taken during the luncheon adjournment. So the narrative continues thus:

> "6. That the Learned Judge proceeded with the trial and he invited the Plaintiff's attorney-at-law, Mr. Dennis Goffe, Q.C. to make his opening submissions.
>
> 7. That on the 7th day of July, 1997, Mr. Raymond Clough on my behalf filed a Summons to stay the proceedings and seek the leave of the Court of Appeal to appeal against the orders of the Honourable Mr. Justice Lloyd Ellis in Suit No. C.L. 1994/I-025 made on the 7th day of July, 1997, refusing the adjournment, refusing to disqualify himself and refusing leave to appeal.
>
> 8. That on the 7th day of July, 1997, The Honourable Mr. Justice Downer of the Court of Appeal consented to hear the Summons in Chambers at 2:00 p.m., seeking leave to appeal against the orders of the Honourable Mr. Justice Ellis refusing to grant an adjournment, refusing to disqualify himself and refusing leave to appeal.

> 9. That the trial of the said suit on the 7th day of July 1997 was adjourned at approximately 2:00 p.m. by the Learned Judge until the 8th day of July, 1997 at the request of the Plaintiff's attorney-at-law, Mr. Dennis Goffe, Q.C., to afford him an opportunity to represent the Plaintiff in the Court of Appeal hearing of the Summons.
>
> 10. That the Plaintiff's attorney-at-law, Mr. Dennis Goffe, Q.C. made a preliminary objection before The Honourable Mr. Justice Downer. The Learned Judge indicated that he would reserve judgment on preliminary objections at this point but would proceed with the substantive issue. At this point the matter was adjourned until 2:00 p.m. on the 8th day of July, 1997."

In the meantime Ellis J adjourned the case and the evidence emerges thus:

> "That on the 8th day of July, 1997, The Honourable Mr. Justice Lloyd Ellis resumed the trial. The Learned Judge was informed of the hearing in the Court of Appeal scheduled to resume at 2:00 p.m. The Court was then adjourned until the 9th day of July, 1997.
>
> That at 2:00 p.m. on the 8th day of July, 1997, The Honourable Mr. Justice Downer made an order on the Summons before him, directing the Registrar to treat the Summons as a Motion and list it for hearing on Monday , the 14th day of July, 1997 before the Full Court of the Court of Appeal."

The Disqualification issue on appeal

The issues which emerged on this aspect of the case illustrate the interplay between the common law and the constitutional principles in Section 20(2) of the Constitution which enshrines the important civil right that any person has an entitlement to adjudication by an independent and impartial tribunal established by law. The common law aspect is the discretion of a trial

judge to control the proceedings in his court subject to control by the Court of Appeal. The constitution enacts general principles. However, it is common law and statutory provisions in both their procedural and substantive provisions and the inherent jurisdiction of the courts which invariably determine our rights. It is only when these provisions fail to match the constitutional principles that resort to the constitution is necessary. Recourse to the constitution is a last resort. This mode of construction had its origin in the United States and has been adhered to in countries with a written constitution which follow the course of the common law. The principle is known to constitutional lawyers as judicial restraint. In this jurisdiction so far as Chapter (111) of the Constitution is concerned it is a mandatory rule pursuant to the proviso to section 25(2) of the Constitution. In other sections of the Constitution the general mode of construction is adhered to. So it is appropriate to turn to the of common law and the statutory rights of appeal to determine whether the claims for disqualification were tenable.

Firstly, it seems to have escaped the notice of everyone in the Supreme Court that Mr. Wood's objection on the aspect of the case was in the nature of a preliminary objection on a point of law and as such the decision of the Supreme Court was a final order. In such circumstances section 10 of the Judicature (Appellate Jurisdiction) Act gives him an appeal as of right. Once his motion was filed in this court, there would have been a pending appeal and he would have the right to go before a judge in Chambers and apply for a conservatory order pursuant to Rule 33, of the Court of Appeal Rules, 1962, to stay proceedings in the court below pending the determination of the appeal.

These provisions made it clear that Mr. Goffe's charge that Perkins and his counsel were judge-shopping, were unfounded. Its best to set out Rule 33. It reads:

> 33. (1) In any cause or matter pending before the Court, a single Judge of the Court may, upon application, make orders for -
>
> (a) giving security for costs to be occasioned by any appeal;
>
> (b) leave to appeal in forma pauperis;
>
> (c) a stay of execution on any judgment appealed from pending the determination of such appeal;
>
> (d) an injunction restraining the defendant in the action from disposing or parting with the possession of the subject matter of the appeal pending the determination thereof;
>
> (e) extension of time;
>
> and may hear, determine and make orders on any other interlocutory application (Emphasis supplied).

Rule 34 is also important demonstrating the flexibility of the rules to achieve justice and save time. The material part reads:

> 34. (1) An application for leave to appeal in *forma pauperis* may be made ex parte by affidavit containing the grounds of application and the order asked for.
>
> (2) Any other application under rule 33 shall be made by way of summons or motion on notice. Such application shall be supported by affidavit, a copy of which shall be served with the summons or notice of motion.

> (3) Where an application is made *ex parte* under paragraph (1), an order may be made requiring any party affected to be served with notice of the application.
>
> (4) Where an application is made by summons, an order may be made adjourning the hearing into open court.
>
> (5) Where an application made by summons is heard by the Court, it shall be treated as if it were a motion, and it shall be heard in open court."

It was in the light of Rule 34(4) & (5) and Lord Templeman's sage words (supra) that I directed that the matter be heard in open court.

It is now necessary to turn to the important case of **White v Brunton** (1984) 2 All ER 600, helpfully adduced by Mr. Goffe, Q.C. In that case the Court of Appeal had to consider the appropriate test to decide whether an order of the court was interlocutory or final for the purpose of an appeal. If an order is final there is a right of appeal. If it is interlocutory leave to appeal is necessary. See also **Olasemo v Barnett Estate Ltd.** SCCA 163/1994 delivered 30th December, 1995.

The modern test is the application approach in contrast to the order approach. Here is how Sir John Donaldson M.R. put it at p.607:

> "In *Salaman v Warner* [1891] 1 QB 734, in which *Shurbrook's* case does not appear to have been cited, a Court of Appeal consisting of Lord Esher MR, Fry and Lopes LJJ held that a final order is one made on such an application or proceeding that, for whichever side the decision is given, it will, if it stands, finally determine the matter in litigation. Thus the issue of final or interlocutory depended on the nature of the application or proceedings giving rise to the order and not on the order itself. I refer to this as the application approach."

Even so to state the test is easy, the application is difficult. The learned Master of the Rolls continued thus:

> "The next occasion on which the problem was looked at on broad lines of principle was in *Salter Rex & Co v Gosh* [1971] All ER 865, [1971] 2 QB 597, where Lord Denning MR, with the agreement of Edmund Davies and Stamp LJJ, considered and contrasted the judgment of Lord Alverstone CJ in *Bozson's* case with that of Lord Esher MR in *Salaman v Warner,* Lord Denning MR said [1971] 2 All ER 865, [1971]2 QB 597 at 601):
>
> > 'Lord Alverstone CJ was right in logic but Lord Esher MR was right in experience. Lord Esher MR's test has always been applied in practice ... I would apply Lord Esher MR's test to an order refusing a new trial. I look to the application for a new trial and not to the order made. If the application for a new trial were granted, it would clearly be interlocutory. So equally when it is refused, it is interlocutory ...This question of "final" or "interlocutory" is so uncertain, that the only thing for practitioners to do is to look up the practice books and see what has been decided on the point. Most orders have now been the subject of decision. If a new case should arise, we must do the best we can with it. There is no other way.'

Then the learned M.R. continued thus:

> "I would therefore hold that, where there is a split trial or more accurately, in relation to a non-jury case, a split hearing, any party may appeal without leave against an order made at the end of one part if he could have appealed against such an order without leave if both parts had been heard together and the order had been made at the end of the complete hearing"

How are these principles to be applied to the issue before Ellis J? The issue of whether Ellis J ought to have been disqualified was a separate issue

and had it been formally set down to be tried as a preliminary issue on a point of law there would have been a split hearing between the issue of disqualification and the issue of libel. Mr. Wood told this court and we accepted it that it was only when he was on the way to court that Perkins showed him the words attributed to Ellis J when he was Counsel in the Attorney-general's Chambers. It is clear that the strategy was that counsel should seek an adjournment because of the unavoidable absence of Mr. Henriques Q.C. or indeed any counsel to conduct the appeal for Perkins. So the issue of disqualification would not have arisen had the adjournment been granted, as unless Ellis, J was specifically assigned to do this case it would be most likely listed before another judge at a subsequent sitting. At this preliminary hearing on disqualification, a final order was made refusing the application for disqualification on appeal as of right. This court has the power to reverse the order and substitute an order for disqualification. Once the appellant Perkins establishes that there was a real danger of bias if Ellis, J. continued to preside over the libel trial, at which he was the defendant, then the order for disqualification must follow.

In the tense atmosphere which existed, misunderstandings arose and strong language was used, fundamental principles and authorities were forgotten and errors were made by all parties. But the learned and experienced judge ought to be corrected not unduly criticised. Had he the benefit of the able submissions which were made in this court and the time in which to consider them, together with the collective knowledge of this court, he would have made the correct decision.

The authorities on bias

In Linton Berry v The Director of Public Prosecutions & The Attorney General of Jamaica No. 2 Privy Council Appeal 74 of 1995 delivered 17th October, 1996 **Lord Goffe** at p 4 when dealing with the allegation of apparent bias of two members of the Court of Appeal said:

> "It is against this background that their Lordships considered the allegation of bias which was advanced against two members of the Court of Appeal by Lord Gifford Q.C. on behalf of the appellant. Their Lordships were grateful to him for his helpful and lucid submissions; but they nevertheless concluded that there was no substance in his argument. The test to be applied is whether there was, in the circumstances, a real danger of bias: see **Reg. v. Gough** [1993] A.C. 646 and (1993) 2 All ER 725."

So we must turn to that case to ascertain how the principle was stated. At p 737 Lord Goffe concludes thus:

> "In conclusion, I wish to express my understanding of the law as follows. I think it possible, and desirable, that the same test should be applicable in all cases of apparent bias, whether concerned with justices or members of other inferior tribunals, or with jurors, or with arbitrators. Likewise, I consider that, in cases concerned with jurors, the same test should be applied by a judge to whose attention the possibility of bias on the part of a juror has been drawn in the course of a trial, and by the Court of Appeal when it considers such a question on appeal. Furthermore, I think it necessary, in formulating the appropriate test, to require that the court should look at the matter through the eyes of a reasonable man, because the court 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 magistrates' clerk, the court should go on to consider whether the clerk has been invited to give the magistrates 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 magistrates adversely to the applicant"

Then Lord Woolf on the insidious nature of bias put his contribution thus:

> "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 individuals 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 be 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 CJ'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." [Emphasis supplied]

R v Inner West London Coroner ex parte Dallaglio and another

[1994] 4 All ER 139, the head note illustrates how prejudicial words used by the Coroner resulted in the quashing of the inquest. The head notes reads:

> "**Held** - (1) Where a decision was impugned on the ground of apparent bias the court seised of the challenge had to consider all the evidence for itself so as to reach its own conclusion as to whether there was a real danger, meaning a real risk or real possibility, of injustice having occurred as a result of bias in the sense that the decision-maker, either consciously or not was pre-disposed or prejudiced against one party's case for reasons unconnected with the merits of the issue. In cases where the applicant expressly disavowed any suggestion of actual bias, the court had necessarily to consider whether there was a real danger that the decision-maker was unconsciously biased and, by the time the legal challenge came to be resolved, the court was no longer concerned strictly with the appearance of bias but rather with establishing the possibility that there was actual although unconscious bias. The applicant accordingly had to demonstrate not a real possibility that the coroner's decision would have been different but for the bias, but that the real danger of bias, had affected the decision in the sense of having caused the decision-maker, albeit unconsciously to weigh the competing contentions and so decide the merits unfairly. On the facts, expressions used by the coroner that one of the relatives of the disaster victims was 'unhinged' and some others were 'mentally unwell' indicated a real possibility that he had unconsciously allowed himself to be influenced against the applicants and other members of the action group by a feeling of hostility towards them and that he had undervalued their case that the inquest should be resumed (see p 151 *f* to p 152 *d*, p 153 *h j*, p 160 *b to e*, p *162 h* and *p 163 e f h*, post); **R v Gough** [1993] 2 All ER 724 applied."

Turning to the circumstances of this case to determine if there was apparent bias. There was the refusal to grant an adjournment where the basis

for granting it was clearly established. Secondly there was the undeniable evidence that Ellis J, while counsel for the crown used an adaptation of the words of Sir Edward Coke to describe Perkins. Mr. Goffe stressed that the words were improperly used as far back as 1977. The appropriate reply was that the similar words were previously used in 1603 in a treason trial and it was thought proper to reiterate them in circumstances where the appellant was exercising his constitutional right of freedom of expression. Thirdly, there was evidence that the learned judge thought the application offensive, and Mr. Goffe helpfully informed this court that at the resumed hearing on 9th July when Allan Wood and Ransford Braham of counsel were absent, the learned judge commented that they had allowed themselves to be manipulated. Was the manipulation by a viperous vermin? As was explained earlier Mr. Wood stated that it was on the morning of the 7th that he was aware of the words attributed to the Senior Asst. Attorney General and it was at that time that he received instructions on the issue of disqualification. These circumstances to my mind establish that there was a real danger of bias if this case were to be presided over by Ellis J.

Conclusion

Because of the great haste with which these proceedings were conducted before Ellis J, there was no time for the citation of authorities, or for reflection which are so necessary for a correct judicial decision. So the application for leave was refused and in the end the case was adjourned sine die. That adjournment was commendable having regard to the pending appeal. The appeal against adjournment is allowed. On the issue of disqualification the

appeal must also be allowed and the matter heard by another judge of the Supreme Court. The respondent Irving must pay the taxed or agreed costs of the hearing in this court.

GORDON, J A (DISSENTING)

This matter came before this court on a motion in the form following:

> "TAKE NOTICE THAT the Court of Appeal will be moved on Monday, the 14th day of July, 1997 or as soon as Counsel may be heard on behalf of the Defendant/Appellant for the following orders:
>
> 1) That the Defendant/Appellant be granted leave to appeal the undermentioned orders of the Honourable Mr. Justice Lloyd Ellis made on the 7th day of July, 1997 as follows:
>
> a) That application for adjournment of Suit No. C.L. of 1994/I-025, Noel B. Irving v. Wilmot Perkins, is refused;
>
> b) That the application for an order that the Honourable Mr. Justice Lloyd Ellis disqualify himself from hearing Suit No. C.L. 1994/I-025, Noel B. Irving v. Wilmot Perkins, is refused.
>
> 2) That all proceedings before the Honourable Mr. Justice Lloyd Ellis be stayed pending the hearing of the appeal in this matter.
>
> 3) Costs of this application be costs in the cause.
>
> 4) That the hearing of this application for leave be treated as the hearing of the appeal.
>
> Dated the 8th day of July, 1997"

The application first came before Downer, J.A. on 7th July, 1997 and on the 8th he made the following order:

> 1) The Registrar treat the summons as a motion and list it for hearing on Monday the 14th day of July, 1997.
>
> 2) Costs to be costs in the cause.

No submissions were made on paragraph 1(a) of the motion as the adjournment of the suit had been effected by the route adopted. It now remains for the Registrar to set a date for trial.

The chronology of events giving rise to Clause 1(b) of the motion is contained in affidavits filed in the matter.

The defendant deposed that the suit was brought on 30th April, 1997 (sic) and he was represented by Wong Ken & Co. up to 30th June, 1997. The matter came on for trial on 2nd June, 1997 and an application for an adjournment made on his behalf was successful. Ellis, J. who presided fixed the 7th July, 1997 as the new trial date declaring the trial would proceed "irrespective of whether counsel was available on my behalf." He was dissatisfied with the conduct of his defence so he spoke to Mr. Raymond Clough attorney-at-law on 29th June, 1997 who agreed to represent him. Contact was made with Mr. R. N. A. Henriques, Q.C. who agreed to appear on his behalf but indicated he could not be in Court on 7th July, 1997 because he would then be out of the jurisdiction.

On 7th July, 1997 Mr. Allan Wood who had been retained by Mr. Clough on 4th July, 1997 appeared on the defendant's behalf and applied as instructed for an adjournment. Ellis, J. refused this application and rejected an application for leave to appeal.

The trial commenced with Mr. Goffe embarking on his opening address. The court adjourned to Chambers, then resumed. The defence asked the judge to disqualify himself on the basis of the statements he made when he was senior Crown Counsel. Ellis, J. refused to disqualify himself and also refused leave to appeal.

The words complained of were spoken in court by Mr. Ellis of counsel in April 1979 in commenting on an article under the pen of the appellant which appeared in an

issue of the "Daily Gleaner" shortly before the 24th April, 1979. What Mr. Ellis, then Senior Assistant Attorney-General said was: "When your Lordships are assailed by viperous vermin who seek to gnaw at the entrails of your integrity, your Lordships should stand firm."

The order made by Ellis, J. was presented to this Court in this form:

> "IT IS HEREBY ORDERED THAT:
>
> 1. Application for adjournment of Suit No. C.L. 1994/I025 Noel B. Irving vs. Wilmot Perkins, is refused.
>
> 2. The application for the order that the Honourable Mr. Justice Lloyd Ellis disqualify himself from hearing Suit No. C.L. 1994/I-025 Noel Irving v. Wilmot Perkins, is refused.
>
> Case to proceed as listed."

This Court is only enabled to hear appeals from any judgment or order of the Supreme Court. The first question therefore for consideration is whether the decisions complained of are orders or rulings, and if Orders, whether they are final or interlocutory. The proper basis for distinguishing what is an order or a ruling is whether it is determinative of the rights of a party. In that they are determinative of the right of the plaintiff:

(a) to an adjournment

(b) to be tried by a court differently constituted

they are orders, and being interlocutory, leave to appeal is required.

It is now of mere academic interest that I should deal with order (a), but it is trite to say that a party who applies for an adjournment may be, and often is if successful required to pay the costs of the opponent. This sometimes ensures that frivolous applications are not indulged in.

I now turn to a consideration of the second order which was argued when the court granted leave in terms sought.

Mr. Wood for the appellant submitted that the Judge should recluse himself from the case in the light of the words he used as given above. Those words were said by him when there was a perceived journalistic attack by the defendant on the judiciary and that in the instant case, the action is in libel brought by a member of the judiciary against the defendant. What was apprehended was that the bias expressed by the young attorney then, would continue to be harboured by him, now that he will be presiding as Judge. The bias would be against the defendant.

It was agreed on both sides that the proper test to be applied is that pronounced in **R. v. Gough** [1993] 2 All ER page 724 thus:

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

This test was affirmed in **Linton Berry vs. D.P.P. and The Attorney-General** P.C. Appeal 74/95 delivered 17th October, 1996.

The application to Ellis, J. to disqualify himself was made after the application for adjournment was rejected. The sequence calls to mind that which was employed in **McBean v. R** (1996) 33 W.I.R. 230. There the Magistrate refused an application for an adjournment. Thereafter the Resident Magistrate was asked to disqualify himself on the ground that he was sitting as Judge in his own cause. After adjourning to

Chambers the Court resumed and the record read "Court rules that case will proceed". The defendant was convicted and he appealed. The Privy Council quoted with approval from the judgment of the Court of Appeal at page 232:

"As the Court of Appeal pointed out:

> The resident magistrate was entitled to consider, and no doubt did consider, whether the suggestion that he disqualify himself would have been advanced if the application for an adjournment had succeeded. At that stage, also, and in the light of what had transpired so far, it would have been surprising if questions concerning the bona fides of the suggestion did not begin to form in his mind. It was a most unusual and serious suggestion, and the judge could scarcely have avoided wondering why it had not been put at the forefront of the submissions by Mr. Atkinson. Occurring as it did in the circumstances and in the sequence described in the note, the suggestion to disqualify bears all the marks of a move made pursuant to a determination to secure the postponement of the trial despite the fact that the application for this purpose was judged to be without merit and had been refused. This determination was manifest. ..."

In the above case Mr. Boyd Carey was the Resident Magistrate and his refusal to withdraw from the trial was taken before the Full Court of the High Court on a Writ of Prohibition. At the hearing of this writ the Resident Magistrate was represented by counsel from the Attorney-General's Department, briefed as the practice then was by the Crown Solicitor. The writ was thrown out. Before us no one represented Ellis, J. and

Mr. Goffe en passant made brief reference to it. The question that has to be addressed is, is there a "real danger of bias" on the part of Ellis, J?

Ellis, J. spoke as counsel at the bar eighteen (18) years ago, commenting on the authorship of an article in the press that disturbed those present in Court. Other

counsel in Court, including one who is now a Judge, voiced their objection to the article. They dealt with what presented an attack on the judiciary.

That counsel has since served as a Resident Magistrate and for the past 16 years as a judge of the High Court. Would a reasonable and fair minded person knowing the relevant facts have come to the conclusion that there was a real danger that a fair trial of the defendant by Ellis, J. was not possible?

Ellis, as counsel, spoke eighteen (18) years ago in a flush of poetic eloquence not to be outdone by eminent counsel who had spoken before him. He uttered words not original but recorded in Edwards Law Officers of the Crown.

Rhetoric is a facility in the armoury of counsel and in all probability the incident was long forgotten by the speaker. I am not persuaded that an experienced Judge would embark on a trial knowing that he was biased. I would answer both questions posed in the negative and in so doing I dismiss the appeal and order that costs be costs in the cause.

ORDER

By a majority (Forte & Downer JJA)

(1) Appeal allowed.

(2) Order of Ellis, J. set aside.

(3) Trial to be heard in Supreme Court by another judge.

(4) Costs of appeal to the appellant to be agreed or taxed.