JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 159/05

BEFORE: THE HON. MR. JUSTICE HARRISON, P.
THE HON. MR. JUSTICE COOKE, J.A.
THE HON. MRS. JUSTICE McCALLA, J.A.

REGINA

V.

JOEL ANDEM

L. Jack Hines for the applicant.

Chester Crooks and Winsome Pennicooke for the Crown.

February 13, 14, 15 and June 22, 2007

COOKE, J.A.

1. On the 9th November, 2005, Joel Andem was convicted in the High Court Division of the Gun Court in Kingston on two counts of an indictment. On the first count which charged illegal possession of firearm he was sentenced to a term of 10 years imprisonment at hard labour. On the second which pertained to shooting with intent he was to be incarcerated for 20 years likewise at hard labour. Brooks, J. presided at his trial which lasted some 6 days.

2. Because of the scope of the challenge to the correctness of the convictions it is only necessary to broadly outline the circumstances which founded the verdicts of guilty. On the 27th January 2002, at about 8:15 a.m. a police party entered premises at 20 Skyline Drive in the parish of St. Andrew. They gained access from the rear through an adjoining open lot. On this premises was a split-level building. An unknown man was seen standing near to the lower section of this building. On the approach of the police party this man darted inside a room through an open door. He re-appeared instantaneously firing shots at the police party and then disappeared over a precipice which was nearby. Immediately thereafter Andem pushed his head through that same open door, looked in the direction of the police party and withdrew. Then he came out and fired at the party, after which he too successfully escaped over the same precipice over which the other man had fled. The central issue in this case was that of visual identification. There is no criticism of the approach of the learned trial judge to his assessment of the evidence of identification. There has been no challenge that his scrutiny of the identification evidence did not manifest the proper judicial attention. Further, there is no complaint that Brooks, J. did not deal fairly and adequately with the proffered alibi defence.

3. The challenge was stated thus:

> "The learned trial Judge erred in not disqualifying himself from trying the applicant when he knew or ought to have known that on an earlier occasion in the trial of one Tameka Lindsay he had made unfair,

> adverse and biased comments against him and which comments and their obvious bias and danger of bias must have prejudiced the result of the case against the applicant and breached his constitutional right to a fair hearing by an impartial judge (contrary to Section 20 (1) of the Jamaica Constitution)".

4. Section 20 (1) of the Jamaica Constitution states:

> "Whenever any person is charged with a criminal offence he shall, unless the charge is withdrawn, be afforded a fair hearing within a reasonable time by an independent and impartial court established by law".

5. The ground as framed speaks to "obvious bias and danger of bias". "Obvious bias" does not arise in this case as this pertains to actual bias which is not being suggested. Accordingly the focus of attention will be on whether or not the impugned comments were such as to establish that there was "danger of bias" resulting in the breach of Andem's constitutional right to a fair hearing by an impartial judge. That there should be such a hearing is not in doubt. In **R. v. Inner West London Coroner, Ex parte Dallaglio and Another** [1994] 4 All ER 139, Sir Thomas Bingham M.R. in the English Court of Appeal introduced his judgment with these salutary observations at p 161 g-j:

> "It has long been regarded as essential that judicial decision-makers should, so far as reasonably possible, resolve disputes coming before them on their legal and factual merits, uninfluenced by extraneous prejudice or predilection or personal interest. The qualification 'so far as reasonably possible' is necessary because judicial decision-makers are human beings upon whom multifarious experiences

> and influences inevitably leave a mark. The decision-maker should consciously shut out of his decision-making process any extraneous prejudice or predilection of which he is aware; but he cannot shut out an extraneous prejudice or predilection of which he is unaware. The name given by the law to extraneous prejudice or predilection or personal interest in this context is bias".

6. Guidance as to the proper approach to the issue of "danger of bias" is provided by the House of Lords in **R. v. Gough** [1993] A.C. 646. In **Berry (Linton) v. Director of Public Prosecution and Another** (1996) 50 W.I.R. 381 at 385 j. the Judicial Committee of the Privy Council approved the conceptual exposition in **Gough**. In **Gough** the leading speech was delivered by Lord Goff of Chieveley. Two passages are worthy of reproduction. The first is at p. 659 – 660 D – A:

> "A layman might well wonder why the function of a court in cases such as these should not simply be to conduct an inquiry into the question whether the tribunal was in fact biased. After all it is alleged that, for example, a justice or a juryman was biased, i.e. that he was motivated by a desire unfairly to favour one side or to disfavour the other. Why does the court not simply decide whether that was in fact the case? The answer, as always, is that it is more complicated than that. First of all, there are difficulties about exploring the actual state of mind of a justice or juryman. In the case of both, such an inquiry has been thought to be undesirable; and in the case of the juryman in particular, there has long been an inhibition against, so to speak, entering the jury room and finding out what any particular juryman actually thought at the time of decision. But there is also the simple fact that bias is such an insidious thing that, even though a person may in

> good faith believe that he was acting impartially, his mind may unconsciously be affected by bias — a point stressed by Devlin L.J. in Reg. v. Barnsley Licensing Justices, Ex parte Barnsley and District Licensed Victuallers' Association [1960] 2 Q.B. 167, 187. In any event, there is an overriding public interest that there should be confidence in the integrity of the administration of justice, which is always associated with the statement of Lord Hewart C.J. in Rex v. Sussex Justices, Ex parte McCarthy [1924] 1 K.B. 256, 259, that it is "of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done." I shall return to that case in a moment, for one of my tasks is to place the actual decision in that case in its proper context. At all events, the approach of the law has been (save on the very rare occasion where actual bias is proved) to look at the relevant circumstances and to consider whether there is such a degree of possibility of bias that the decision in question should not be allowed to stand". (Emphasis supplied)

The second is at p. 670 D — F:

> "Furthermore I think it unnecessary, in formulating the appropriate test, to require that the court should look at the matter through the eyes of a reasonable man, because the court in cases such as these personifies the reasonable man; and in any event the court has first to ascertain the relevant circumstances from the available evidence, knowledge of which would not necessarily be available to an observer in court at the relevant time. Finally, for the avoidance of doubt, I prefer to state the test in terms of real danger rather than real likelihood, to ensure that the court is thinking in terms of possibility rather than probability of bias. Accordingly, having ascertained the relevant circumstances, the court should ask itself whether, having regard to those circumstances, there was a real danger of bias on the part of the relevant member of the tribunal in question, in the sense that he might unfairly regard (or have unfairly regarded) with favour, or disfavour, the case of a party to the

> issue under consideration by "him"; (Emphasis supplied)

In **Dallaglio** (supra) Simon Brown L.J. at p. 151 in his consideration of **Gough** said:

> "The question upon which the court must reach its own factual conclusion is this: is there a real danger of injustice having occurred as a result of bias? By 'real' is meant not without substance. A real danger clearly involves more than a minimal risk, less than a probability".

7. Attention is now directed to the relevant circumstances which ground the complaint that Brooks, J. "had made unfair, adverse and biased comments" against Andem. On the 29th November 2002, Tameka Lindsay was convicted of illegal possession of ammunition in respect of 10 "RP" .380 unexpended firearm cartridges. The trial judge was Brooks, J. At the sentencing stage the antecedent report of Lindsay was reproduced to the court. Under "Marital Status" it was stated that:

> "Tameka shares a common-law relationship with Joel Andem, for whom she bore a child. She is the mother of three children ages 9 years, 7 years and 5 months".

At the conclusion of the reading of the antecedent report the record reveals that the following took place:

" HIS LORDSHIP:	Any application?
MR. SHECKLEFORD:	She shares a relationship, I just wish to ask the officer about that aspect of

it, I would like to ask the officer.

DET/CONS. BLACKWOOD: I wasn't the one who prepared the report.

MR. SHECKLEFORD: She said she told no one that she shared a common law relationship, I smelt it and smell the mischief.

HIS LORDSHIP: Officer, that matter mentioned there, is this the person, notorious Andem being bandied about in public media?

DET/CONS. BLACKWOOD: Yes. M'Lord.

HIS LORDSHIP: Any other question?

MR. SHECKLEFORD: Nothing further, M'Lord.

HIS LORDSHIP: Do you wish her to give any evidence in this regard, Mr. Sheckleford?

MR. SHECKLEFORD: I don't know if it will be necessary.

HIS LORDSHIP: I don't want hearsay before me, I don't know how to deal with it. The officer read and signed the information.

MR. SHECKLEFORD: I wouldn't take it any further. I spoke to her and she tells me nothing of the sort; I wouldn't ask her any questions, sir. What I would however say I will say in address when

I am ready to address Your Lordship.

HIS LORDSHIP: One second please, Mr. Sheckleford.

REGISTRAR: Tameka Lindsay, please stand.

HIS LORDSHIP: Not yet. I would like to have the social enquiry report.

MR. SHECKLEFORD: I am grateful to you. So in the circumstances I wonder if perhaps Your Lordship has a date in mind; I will be guided. I will be in court on Wednesday.

HIS LORDSHIP: I understand Mr. Sheckleford that it takes two (2) weeks.

MR. SHECKLEFORD: The 13th of December I hear my colleagues mentioned sir, if it is convenient to the court I would ask for that date. The Registrar frowns sir and she says Friday and I think I understand her.

HIS LORDSHIP: I won't be in this court at...

MR. SHECKLEFORD: When Your Lordship's tenure finishes in this court?

HIS LORDSHIP: Friday the 8th, if it can be produced for that time I

will do it in the Circuit court.

MR. SHECKLEFORD: Friday the 13th if that is convenient to you. The children are young, I know they should think about them before doing wrong, I know of that saying and criticism. I know her enough to know that there is no one in a position now to see to them; the youngest one is five months, one is nine years and one is seven. Although it did not come out in the trial there are even times things happen to them, very unfortunate things. I can assure this court sir, and I rarely give these assurances to court because what is happening here, I am sticking out, I don't ordinarily do this to any court.

HIS LORDSHIP: Thank you. Miss Lindsay, please stand.
(Tameka Lindsay stands)
I am going to order an investigation to be done in your circumstances; however, it takes two (2) weeks for that report to be produced. The date is set for the 13th of December. Your attorney has made a plea on your behalf and I am going to take a chance with you and offer you bail to return on the 13th December. She is offered

bail in the sum of One hundred thousand dollars with one or two sureties. You return to court on the 13th of December". (Emphasis supplied)

8. On the 13th December the social inquiry report previously ordered by the learned trial judge was tendered to the court. During the plea in mitigation by Mr. Sheckleford on behalf of Lindsay, the learned trial judge interjected as follows:

"HIS LORDSHIP: My major concern right now is the association with a notorious young man.

MR. SHECKLEFORD: I understand, sir.

HIS LORDSHIP: That is the concern I have and if it is that she is storing ammunition, then it is a major consideration of the court". (Emphasis supplied)

Before pronouncing sentence Brooks, J. made this enquiry of Mr. Harris who was responsible for the social enquiry report:

"HIS LORDSHIP: What sort of supervision would you recommend in the context of the intervention that you...

MR. HARRIS: Your Honour, it could be suspended sentence with supervision, which to me

has a little more teeth. If the lady should re-offend within that time, then Your Lordship knows what can happen or a Probation Order would suffice".

In delivering his decision on the sentence of the court Brooks, J. said:

"HIS LORDSHIP: Miss Lindsay, please stand. It has not been an easy decision for the court in coming to sentence for you. The reason for that is the fact that it is clear that you are an enterprising person, that you're trying to make a better life for yourself and for your children. It is also of concern that you have young children that are depending on you for support. It seems however that an ambition to go ahead has perhaps led you along the wrong path. The court is minded to allow you to redeem yourself, to make a new start and allow you to take care of your children. In the circumstances, although our society is one where the gun is now one of our major concerns, where Government has to be spending money and putting policemen on the road to try and get back guns, instead of spending money to school children and to provide health care,

> we need to send a message to people, to gunmen, to women who associate with gunmen that it is wrong and that we are not going to get ahead by that. The court is going to order that you be placed on probation for two years. Condition of the order is that you remain under the supervision of the Probation Officer and he will make contact with you before you go as to the details and also, I am organizing as a condition of your order, that you are not to associate with Joel Andem". (Emphasis supplied)

10. The ground of appeal was supported by an affidavit of Andem dated 13th February, 2007. As the complaints in this affidavit foreshadowed the submissions which were made on his behalf in this Court, the relevant contents are set out hereunder:

> "5.That I know one Tamika Lindsay and I am the father of her child, Tamoya Andem both [sic] on the 17th November, 2001.
>
> 6. That to my knowledge Tamika Lindsay was found guilty of Illegal Possession of Ammunition on or about the 28th November, 2002 and was sentenced on the 13th December, 2002.
>
> 7. That she was represented at her trial by Mr. Lloyd Sheckleford of Counsel.

8. That I have seen the Notes of Evidence (the transcript) and have seen the comments of the learned Judge during the sentencing of the said Tameka Lindsay which comments were particularly unfair, biased and adverse towards me during the sentencing phase of the trial.

9. Among his comments and or questions was finally a question asked of the police officer and I quote from the interchange of the antecedent report.

Mr. Sheckleford:	She shares a relationship, I just wish to ask the officer about that aspect of it, I would like to ask the officer.
Det/Con Blackwood:	I wasn't the one who prepared the report.
Mr. Sheckleford:	She said she told no one that she shared a common law Relationship, I smelt it and smell the mischief.
His Lordship:	Officer, that matter mentioned there, is this the person, Notorious Andem being bandied about in public in public [sic] Media?
Det/Con Blackwood:	Yes, M'Lord

This question was asked after it was stated in the report that Tameka Lindsay had a relationship with me. (Please see page 2 and 3 of the antecedent report.)

10. The learned Judge went on to state when the Social Enquiry was read that his major concern was Tameka Lindsay's association with a notorious

young man. When he stated this I realized he was not just curious. He had a bad opinion of me. That I was notorious as a dangerous criminal with whom a young lady should not be associated (please see page 7 of the Social Enquiry Report).

11. It was also clear that the notorious young man he was referring to was me.

12. Then in addressing Tameka Lindsay in particular before imposing the sentence, he stated that "we need to send a message to people, to gunmen, to woman [sic] who associate with gunmen that it is wrong and that we are not going to get ahead with that". It was now clear that he was not only speaking about associating with gunmen in general, but he was clearly referring to me as a gunman and to her association with me — my being her baby father.

13. In case there was a shadow of a doubt who he was speaking about as a notorious gunman in this and all of his previous comments that shadow, disappeared when to cap it all he sentenced her to probation for two years and made a condition of the Order and I quote (page 9) of the Sentencing Exercise: "and also I am organizing as a condition of your order that you are not to associate with Joel Andem" That is me.

14. That had I known that this same Judge had tried Tameka and made such biased comments against me and had following these comments imposed a condition of an order in December, 2002 that she was not to associate with me obviously — a notorious gunmen" [sic] was now trying my case in 2005. I would have instructed my Attorneys-at-Law, Mr. Berthan McCauley Q.C., Miss Janet Nosworthy and Mr. Lloyd Sheckleford of my strongest objection to his trying me and I would ask that my case be transferred to another court to be heard by another judge.

15. That if they insisted on trying my case before Mr. Justice Brooks I would have told the judge in court that the proper thing for him to do was to transfer the case to another judge in light of his biased comments, pointing out to him that he not oniy thought that I was notorious gunman but felt so strongly about it that he said it in open court and had gone on to underline this [sic] his opinion by making a condition of the probation order in the sentence of Tameka Lindsay that she should not associate with me obviously (a notorious gunman).

16. When I heard after the trial that the judge who made a condition of the Order that she should not associate with me — was this same Judge that had just tried me, I had no doubt whatever that I did not get a fair trial before an impartial judge as it is stated, I was entitled to get in our Jamaican Constitution and as is my right, protection, and privilege.

17. <u>This is especially so in the Gun Court where the Judge is both Judge and Jury.</u>

18. If Mr. Justice Brooks had insisted on trying me and my lawyer had gone against my instructions and had agreed that he should try me instead of transferring my case to another court, I would have dismissed my lawyers and would have taken no part in this trial, where the judge is both judge and jury.

19. I consider that if in a case a juror is called to judge the evidence and had such an opinion of the accused man as the learned Judge had of me, then in good conscience the juror should ask that [sic] he or she be excused, especially if he or she had had the opportunity as the learned judge in the case of Tameka Lindsay had of imposing the condition which he [sic] judge imposed ..... (i.e.) ordering that a young woman should not associate with me. How much more should it be plainly obvious to the learned judge that he should have

disqualified himself especially in a Gun Court case where he is both judge and jury.

20. It was after the trial that it was told to me that it was the same Mr. Brooks to whom my Attorney-at-law had written asking him to vary the condition of the Order, in July, 2004, which order still had but a few months to run, so as to permit Tameka to visit me in jail and having read that letter he flatly refused to do so, which meant that his opinion of me had not changed in any way.

21. Mr. Sheckleford has admitted to me that it was a mistake on his part in not telling me in time it was ask [sic] an error of judgment. I still respect him as a man, for we all make mistakes. But this does not take away from the fact that in the interests of justice, the Judge by himself should have withdrawn from my case and had a duty to do so.

22. That I am aware that the judge states at the trial that his consideration does not take into account any reputation I may have (this was in sentencing me) and also that my being on the wanted list is not evidence of my participation in this crime, but I find it strange as when he said these things it was at the end of the trial and he had already decided the case against me. These comments suggested to me that he had also remembered his comments in the Tameka Lindsay's [sic] case.

23. There is nothing on the evidence at the trial to show that his bad opinion of me has changed or was not in operation on his mind. [sic] That he was trying me for a gun court matter, (for shooting with intent) and I was still in his view undoubtedly as it was three years before that I was a notorious gunman. That there was still bias or the danger or likelihood of bias in a case where he was both judge and jury and I repeat that he should have transferred the case to another judge for trial for me to get a fair trial which I did not".

11. Mr. Sheckleford who represented Lindsay at her trial stated in paragraphs 28 and 29 of his affidavit as follows:

> "28. That at the time of the trial of Joel Andem I did not recall the comments referred to above made by the Trial Judge which comments speak for themself [sic] and were such that if I had recalled them at the commencement or during the trial would have had certainly made an application to the Trial Judge to recuse himself and would feel obliged and duty bound to inform Joel Andem to give him advise and take his instructions as to the applications to make to the court.
>
> 29. That not withstanding my failure to inform Joel Andem about the Judge's comments about him in Tamika Lindsay's trial and the absence of an application from the defence to the Judge to disqualify himself, that the Judge should of his own volition disqualify himself and was duty bound so [sic] do in all the circumstances".

12. Mr. Hines in his submissions, in effect reiterated the concerns expressed by Andem in his affidavit. This court was asked to say that the comments by Brooks, J., the condition he imposed as part of the probation order as well as his refusal to vary that order were circumstances which were sufficient to establish that consciously or unconsciously there was an inherent bias which precluded a fair trial of Andem. The circumstances, it was argued demonstrated a real danger of bias.

13. For a number of years prior to the trial of Lindsay, it is a fact that Andem had acquired a reputation of notoriety as the leader of an armed criminal gang. He was on the "most wanted list" which was published from time to time by the police. One of our local television stations in a widely publicised programme carried video footage of Andem and other members of his gang somewhere in the hills of Jamaica bearing illegal firearms. His alleged criminal exploits were prominently carried in the press. It is not therefore surprising that the learned trial judge asked "Is this the person notorious Andem being bandied about in the public media?" Obviously the question in the context in which it was asked did not strike Mr. Sheckleford as exceptional, hence, at Andem's trial "he did not recall that or the subsequent comments" of the learned trial judge. It is well to recognise that in the sentencing exercise the focus of the attention of Brooks, J. was as to the proper treatment of Lindsay. He did not on the day of the conviction pronounce the sentence of the court. He ordered a social enquiry report and postponed the hearing. During the period of postponement Brooks, J. granted her bail. One of the factors the judge took into consideration was Lindsay's "association with a notorious youngman". Another concern he expressed was "if it is that she is storing ammunition". After reviewing what he regarded as relevant factors Lindsay was put on two years probation with a condition that she was "not to associate with Joel Andem". This order was reflective of what the learned trial judge had determined was in the best interest of Lindsay. His refusal to lift that condition was consistent with the view that it

was not wise for Lindsay to associate with Andem, an unquestionably notorious person. The notoriety of Andem and Lindsay's relationship with him was a relevant factor to which the learned trial judge was obliged to give his attention.

14. Mr. Hines in his submissions relied 'largely on the authority" of **Wilmot Perkins v. Noel B. Irving** (SCCA No. 80/97 delivered on 31st July, 1997). In this case the respondent who was then a Resident Magistrate for the parish of St. Elizabeth instituted proceedings in defamation against the appellant. The gist of the complaint of Irving was that on a radio programme called "Straight Talk" the appellant had defamed him by stating that he was among "the favoured persons" of the ruling political party who had benefited from the generous sale price of "Holland Estate land". The action came up for hearing on the 7th July 1997. Firstly the appellant sought an adjournment. Ellis, J. who was presiding refused this application. It was after this refusal that there was a further application for the learned judge to disqualify himself. This he also refused. It is the second refusal which moved the appellant to challenge that ruling in this Court. The factual background is set out in the judgment of Forte, J.A.. This is now reproduced:

> "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 of 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".

15. By a majority (Forte & Downer, JJA), this court held that Ellis, J. should be disqualified from trying the case. Forte, J.A. expressed himself thus:

> "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. was of a like view. He found that because of the words used by Ellis, J. there was a real danger of bias if he presided over the case. Gordon, J.A. who dissented said:

> "The question that has to be addressed is, is there a "real danger of bias" on the part of Ellis, J? [sic] 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".

In this case, the Court of Appeal followed the test adumbrated in **Gough.** (supra)

16. There is a significant distinction between the **Perkins** case and this one. In the **Perkins** case the pejorative "viperous vermin" classification originated from the lips of the speaker. It was his opinion of the appellant which was articulated. In this case, Brooks, J. did not from his own assessment or inclination or predisposition, depict Andem as being notorious. This depiction had long existed and was of the widest currency. As stated earlier the initial enquiry of the learned trial judge was as to the identification of the Joel Andem mentioned in the antecedent report. Thereafter the Andem factor was a consideration (and only that) as to the determination of the proper sentence to be imposed on Lindsay.

17. From time to time judges have to preside over cases where the accused has a national unsavory reputation of which a trial judge would obviously be aware. It cannot be that such awareness of an accused person's notoriety would automatically lead to a conclusion that there would be a real "danger of bias" in respect of that trial judge. If mere awareness was a criterion this would be tantamount to advising those of the criminal bent to seek notoriety and thereafter seek the disqualification of a judge for an expressed or implied awareness. There must be circumstances, other than mere awareness, which on analysis within the guidelines of the **Gough** test indicated the existence of a "real danger of bias". There must be some behaviour by the trial judge whether by acts or words or otherwise which indicated that he or she would be motivated albeit unconsciously to unfairly disfavour the notorious accused. In this case all the circumstances demonstrated is that Brooks, J. was aware (like almost everyone in Jamaica) that Joel Andem had a notorious reputation. This ground of appeal fails.

18. This was a renewed application for leave to appeal the single judge having refused leave. The grounds on which leave to appeal were first sought were abandoned and the applicant relied on the supplementary ground which has been the subject of debate. We treated the hearing as the hearing of the appeal. The appeal is dismissed. The convictions and sentences are affirmed. The sentences are to commence on the 9th February, 2006.