**Michaelmas Term**
[2018] UKPC 30
**Privy Council Appeals No 0015 and 0016 of 2017 and 0098 of 2016**

# JUDGMENT

# Stubbs (Appellant) *v* The Queen (Respondent) (Bahamas)
# Davis (Appellant) *v* The Queen (Respondent) (Bahamas)
# Evans (Appellant) *v* The Queen (Respondent) (Bahamas)

## From the Court of Appeal of the Commonwealth of the Bahamas

**before**

**Lady Hale**
**Lord Wilson**
**Lord Sumption**
**Lord Hughes**
**Lord Lloyd-Jones**

## JUDGMENT GIVEN ON

## 18 October 2018

**Heard on 2 July 2018**

*Appellant (Stubbs)*
Edward Fitzgerald QC

(Instructed by Simons
Muirhead & Burton LLP)

*Respondent*
Peter Knox QC
Tom Poole
(Instructed by Charles
Russell Speechlys LLP)

*Appellant (Davis)*
Richard Thomas

(Instructed by Simons
Muirhead & Burton LLP)

*Appellant (Evans)*
Ben Cooper
Amanda Clift-Matthews
(Instructed by Simons
Muirhead & Burton LLP)

**LORD LLOYD-JONES:**

1. These appeals raise the question whether a judge who has presided at an aborted trial by jury ought to have recused himself from sitting on an appeal against conviction by the defendants following their conviction on the same charges at a further trial by jury in which he played no part.

2. On 25 July 2013, following a trial before Jones J and a jury, the three appellants, Stephen Stubbs, Andrew Davis and Clinton Evans, were each convicted on one count of the murder of Jimmy Ambrose, a police officer, and on another count of the attempted murder of Marcian Scott. Evans was also convicted on two further counts alleging firearms offences. They were each sentenced to life imprisonment for murder and ten years' imprisonment for attempted murder. Evans was also sentenced to three years' imprisonment on each firearms count. All sentences were to run concurrently.

3. This was the third trial of this matter. The first trial took place before Allen J and a jury in 2002. The appellants were convicted but their appeals against conviction were allowed and a retrial ordered. The second trial took place before Isaacs J and a jury in 2007. It was aborted on the first day of the judge's summing up.

4. The charges arose out of a shooting incident which is alleged to have occurred on 29 March 1999 outside the Club Rock nightclub in Bay Street, Nassau. In interview all three appellants admitted their presence in the vicinity of the incident. A central issue was identification. The evidence implicating Stubbs came mainly from Marcian Scott, John Campbell, both eye-witnesses, and from Officers Ryan and Duncombe. The evidence implicating Davis came mainly from Scott and Campbell. The evidence implicating Evans came mainly from Campbell and Officers Burrows and Robinson. Scott made a deposition at the preliminary inquiry and gave oral evidence at the first trial. However, he died on 29 June 2006, between the first and second trials.

5. At the second trial Isaacs J made the following rulings:

> (1) He permitted Campbell to make dock identifications of all three appellants.
>
> (2) He ruled that section 168 of the Criminal Procedural Code was constitutional and admitted in evidence Scott's deposition at the preliminary inquiry.

(3) He declined to exercise his discretion under section 178(1) of the Evidence Act to exclude Scott's deposition on grounds of unfairness.

(4) He excluded the transcript of Scott's evidence in the first trial.

(5) He ruled that Stubbs' interview was admissible and declined to edit it to exclude reference to Evans.

(6) He rejected submissions of no case to answer made by all three appellants.

6. At the third trial Jones J made the following rulings:

(1) He permitted Campbell to make dock identifications of Stubbs and Evans notwithstanding objection by their counsel that there had been no pre-trial identification of them.

(2) He ruled that the presumption of constitutionality was not displaced in respect of section 168 of the Criminal Procedure Code.

(3) Following a voir dire in respect of the admissibility of Scott's deposition and the transcript of his evidence at the first trial, he ruled that both were admissible and declined to exercise his discretion under section 178(1) of the Evidence Act to exclude them.

(4) He rejected submissions of no case to answer made on behalf of all three appellants.

7. Following their conviction at the third trial, the appellants appealed against conviction and sentence. For present purposes it is sufficient to record that the grounds of appeal included the following.

(1) The judge erred in failing to exclude evidence of the dock identification of Stubbs and Evans.

(2) The judge erred in admitting the deposition and transcript of Scott as this was contrary to article 20(2)(e) of the Constitution.

(3) The judge erred in failing to exclude Scott's evidence on the ground that its prejudicial effect outweighed its probative value.

(4) The judge erred in admitting Stubbs' interview and in failing to edit that interview to exclude reference to Evans.

(5) The judge erred in rejecting the submissions of no case to answer.

8. When the Court of Appeal convened on 4 May 2015 to hear the appeal, the appellants objected to Isaacs JA's sitting on the appeal because of his rulings in the second trial and invited him to recuse himself on grounds of apparent bias.

9. Following a further hearing on 28 May 2015, the Court of Appeal (Conteh, Adderley and Isaacs JJA) ruled on the application in a reserved decision dated 4 June 2015. Conteh JA considered the objection unsustainable and lacking in any merit. He emphasised the importance of an independent and impartial court system to the administration of justice and the rule of law. He was, however, satisfied that the reasonable, fair-minded and informed man or woman on Bay Street, viewing the context and circumstances of the present appeal and Isaacs JA's participation in it, would not apprehend any possible bias in him to warrant his recusal. He gave five reasons for this conclusion. First, Isaacs J had participated in an abortive trial, some seven years earlier. Secondly, he might have made some rulings on the law but there was no record of what those rulings were as the trial had been aborted. The slate had been wiped clean. More importantly, those rulings were not in issue on the present appeal. Furthermore, Isaacs JA would not be sitting alone but in a panel with two other judges. Thirdly, the length of time since the aborted trial should be sufficient to assuage any apprehension of bias. Fourthly, it could not realistically be said that his involvement in the earlier trial precluded him from approaching the appeal with an open mind. Fifthly, a court should be astute to guard against "judge-shopping" which can be a blight on the proper and due administration of justice.

10. In a separate judgment, Isaacs JA considered that the general rule is that a judge should not recuse himself unless he either considers that he genuinely cannot give one or other party a fair hearing or that a fair minded and informed observer would conclude that there was a real possibility that he would not do so. However, he referred to the length of time which had passed since the second trial and he observed that the court should not acquiesce too readily in applications for recusal because of the unnecessary delays this would cause in the administration of justice. In his view, his participation in the appeal would not give rise to a reasonable apprehension of bias.

11. The Court of Appeal (Conteh, Isaacs and Crane-Scott JJA) heard the appeal over five days in September 2015 and on 8 July 2016 dismissed the appeals. Crane-Scott JA dissented in respect of Evans's appeal against conviction.

12. On 19 July 2017 the appellants were given leave to appeal against conviction and sentence to the Judicial Committee of the Privy Council on specific grounds. At the hearing on 2 July 2018 the Board heard the parties on the issue of apparent bias which was common to all three appeals against conviction.

*Apparent bias*

13. Article 20 of the Bahamas Constitution provides:

> "If any person is charged with a criminal offence … the case shall be afforded a fair hearing within a reasonable time by an independent and impartial court established by law."

The appellants found their case on apparent bias. They rely on a basic principle of the common law that a judge should not sit to hear a case in circumstances where "the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased", a principle which is also in harmony with the jurisprudence of the European Court of Human Rights affirming the right to an independent and impartial tribunal under article 6 ECHR (*Porter v Magill* [2002] 2 AC 357 per Lord Hope at para 103). It is obvious that that principle would be violated if a judge were to sit in an appellate capacity to determine the correctness of his own earlier decisions or on an appeal against a conviction in a trial by jury in which he had presided. In England and Wales this principle is given statutory form in the context of criminal appeals. Section 56(2) Senior Courts Act 1981 provides that "[n]o judge shall sit as a member of the criminal division of the Court of Appeal on the hearing of, or shall determine any application in proceedings incidental or preliminary to, an appeal against … a conviction before himself or a court of which he was a member, or … a sentence passed by himself or such a court". Although there is no express statutory equivalent in the Bahamas, it is likely that effect would be given to this rule by section 9 of the Bahamas Court of Appeal Act under which, in the absence of specific local provision, the practice of the English court will be followed.

14. In the present appeals, however, the issue does not arise in this stark form. The question for consideration is, rather, whether the involvement of the judge in an earlier stage of the proceedings should require him to recuse himself. Here, this issue appears in a novel form. Counsel were unable to refer us to any reported authority in any jurisdiction in which it had been argued that a judge who had presided at an earlier trial by jury which had been aborted should not sit on an appeal against a subsequent

conviction of a defendant on the same charges in a later trial in which the judge played no part.

15. The appearance of bias as a result of pre-determination or pre-judgment is a recognised ground for recusal. The appearance of bias includes a clear indication of a prematurely closed mind (*Amjad v Steadman-Byrne* [2007] EWCA Civ 625; [2007] 1 WLR 2484 per Sedley LJ at para 16). The matter was expressed by Longmore LJ in *Otkritie International Investment Management Ltd v Urumov* [2014] EWCA Civ 1315 (at para 1) in the following terms:

> "The concept of bias … extends further to any real possibility that a judge would approach a case with a closed mind or, indeed, with anything other than an objective view; a real possibility in other words that he might in some way have 'pre-judged' the case."

16. A judicial ruling necessarily involves preferring the submissions of one party over another. However, it is obviously not the case that any prior involvement by a judge in the course of litigation will require him to recuse himself from a further judicial role in respect of the same dispute. In the great majority of such cases there will simply be no basis on which it could be suggested that the judge should recuse himself, notwithstanding earlier rulings in favour of one party or another, and there will often be great advantages to the parties and to the administration of justice in securing judicial continuity. The issue will only arise at all in circumstances where prior involvement is such as might suggest to a fair-minded and informed observer that the judge's mind is closed in some respect relevant to the decision which must now be made. It is not possible to provide a comprehensive list of factors which may be relevant to this issue which will necessarily depend on the particular circumstances of each case. (See generally, *Locabail (UK) Ltd v Bayfield Properties Ltd* [2000] QB 451 per Lord Bingham of Cornhill CJ at para 25; *Livesey v The New South Wales Bar Association* [1983] 151 CLR 288 at p 299.) However, relevant factors are likely to include the nature of the previous and current issues, their proximity to each other and the terms in which the previous determinations were pronounced.

17. It is not acceptable for a judge to form, or to give the impression of having formed, a concluded view on an issue prior to hearing full argument by all parties on the point. *In re Q (Children)* [2014] EWCA Civ 918 provides a strong example. In care proceedings the judge expressed himself at a case management hearing in terms which made clear that he accepted the account given by the father and rejected the allegations made by the mother, in circumstances where the mother had not yet given evidence. The Court of Appeal allowed an appeal against an order made by the judge in a subsequent fact-finding evaluation. McFarlane LJ observed (at paras 53, 54 and 57) that there is a thin line between case management and premature adjudication. Here however, the judge had strayed beyond the case management role by engaging in an

analysis, which, by definition, could only have been one-sided, of the veracity of the evidence and the mother's general credibility. The situation was compounded by the judge giving voice to the result of his analysis in unambiguous and conclusive terms in a manner that can only have established in the mind of a fair-minded and informed observer that there was a real possibility that the judge had formed a concluded and adverse view of the mother and her allegations at a preliminary stage in the trial process. Further examples are provided by *Amjad v Steadman-Byrne (Practice Note)* [2007] EWCA Civ 625; [2007] 1 WLR 2484 and *In re K (a child)* [2014] EWCA Civ 905; [2015] 1 FLR 927.

18. Similarly, in *Mitchell v Georges (No 2)* 87 WIR 318 the interim report of a commissioner charged with inquiring into the failure of a development project was "replete … with strong and colourful language" and "used the decisive language of a concluded finding". In the opinion of the Judicial Committee of the Privy Council, the fair-minded observer would conclude that there was a real possibility that the respondent had made up his mind that the appellant was at the heart of the wrongdoing which led to the project and its collapse and would not be willing to change his mind, so that his final report would not be impartial.

19. The degree of proximity between the subject matter of the earlier decision and the later decision can clearly have an important bearing on the appearance of bias. In *Hauschildt v Denmark* (Application No 10486/83), 24 May 1989, the applicant was charged with fraud and tax evasion. As a result of successive decisions, a number of which were taken by Judge Larsen, he was remanded in custody pending his trial. The trial at first instance took place before Judge Larsen and two lay judges and the applicant was convicted. Pending an appeal, he was again remanded in custody, all such decisions with a few exceptions being taken by the same judges who heard the appeal. The European Court of Human Rights in plenary session observed (at para 50) that the mere fact that a trial judge or an appeal judge, in a system like the Danish, has also made pre-trial decisions in the case, including those concerning detention on remand, could not be held as in itself justifying fears as to his impartiality. However, special circumstances might in a given case warrant a different conclusion. Here the court (at paras 51-53) attached particular importance to the fact that in nine of the decisions continuing the applicant's detention on remand Judge Larsen had relied specifically on section 762(2) of the Administration of Justice Act. Similarly, the judges who later sat on the appeal had relied specifically on this provision in a number of their decisions remanding him in custody. The Strasbourg court noted that this section requires that the judge be satisfied that there is a particularly confirmed suspicion that the accused has committed the crimes with which he is charged. The wording had been explained officially as meaning that the judge has to be convinced that there is a very high degree of clarity as to the question of guilt. The Strasbourg court noted that, as a result, the difference between the issue the judge had to settle when applying this section and the issue he had to settle when giving judgment became tenuous. It therefore concluded that the impartiality of the tribunals was capable of appearing to be open to doubt and that the

applicant's fears in this respect could be considered objectively justified. On this basis it held that there had been a violation of article 6(1) ECHR.

20. In *Livesey v The New South Wales Bar Association* [1983] 151 CLR 288 two members of the court hearing professional misconduct proceedings against a barrister had earlier sat in similar proceedings involving the fitness of another person to be admitted to the Bar. The same factual issue featured large in both sets of proceedings. The High Court of Australia held that the judges should have recused themselves from sitting in the second case because of the appearance of prejudgment.

> "It is, however, apparent that, in a case such as the present where it is not suggested that there is any overriding consideration of necessity, special circumstances or consent of the parties, a fair-minded observer might entertain a reasonable apprehension of bias by reason of prejudgment if a judge sits to hear a case at first instance after he has, in a previous case, expressed clear views either about a question of fact which constitutes a live and significant issue in the subsequent case or about the credit of a witness whose evidence is of significance on such a question of fact. The consideration that the relevant question of fact may be conceded or that the relevant person may not be called as a witness if the particular judge sits would not, of course, avoid the appearance of bias. To the contrary, it would underline the need for the judge to refrain from sitting." (at p 300)

21. On behalf of the respondent Mr Peter Knox QC placed considerable reliance on the decision of the Court of Appeal of England and Wales in *Sengupta v General Medical Council* [2002] EWCA Civ 1104 in which *Hauschildt* and *Livesey* were not followed. Under the then current procedure, applications for permission to appeal to the Court of Appeal were made initially in writing and considered by a single Lord Justice and, if refused, could be renewed at an oral hearing before two Lord Justices. In *Sengupta*, Laws LJ had refused an application on paper which was subsequently granted on renewal by two other Lord Justices. At the hearing of the substantive appeal, the appellant submitted that Laws LJ should recuse himself on grounds of prejudgment. The Court of Appeal unanimously dismissed the appeal. Laws LJ observed (at para 35) that on the paper application he had not had to resolve the case's factual merits, nor had he expressed himself incontinently. All that he had done was to conclude on the material before him that the result arrived at in the court below appeared correct. He had done so, moreover, in the knowledge that, at the option of the applicant, his view could be reconsidered at an oral hearing. Furthermore, with regard to the hearing of the substantive appeal, he noted (at para 38) that the fact that judges change their minds under the influence of oral argument is at the centre of our legal system and knowledge of this should be attributed to the fair-minded and informed observer. In these circumstances he did not consider that there was a reasonable basis for supposing that

he may not bring an open mind to bear on the substantive appeal. Keene LJ concluded (at paras 45-47) that the nature of the decision being made by the single Lord Justice on a paper application was sufficiently different from that required on the hearing of the substantive appeal for any allegation of an appearance of bias to be seen as unfounded. When making a decision on the papers whether or not to grant permission to appeal, the single Lord Justice was well aware that, although his decision may prove to be final, there existed the opportunity for the applicant to renew his application orally in open court. It was, therefore, potentially a provisional decision. This, he considered, was borne out by the fact that none of the parties had suggested that the same judge should not hear the oral argument on any renewed application for permission to appeal. This was a recognition that he was to be seen objectively as still having a sufficiently open mind at that stage to be able to act impartially. In addition, the fact that a decision on an initial application was decided on the papers without the benefit of oral argument was a further distinction between that decision and one made on the substantive appeal.

22. *Sengupta* was applied in a criminal context by the Court of Final Appeal of the Hong Kong Special Administrative Region in *Hksar v Hossain*, FACC No 16 of 2016, 16 December 2016. There Macrae JA had sat as a single Justice of Appeal on an application for leave to appeal against conviction and sentence which he refused. He later sat as one member of a court of three judges which considered the renewed application for leave to appeal. The Court of Final Appeal rejected the submission that there was apparent bias on grounds of pre-determination or structural lack of impartiality. Mr Justice Fok PJ, with whom the other members of the court agreed, observed (at para 39) that while it was true that the issue before the single judge was the same issue as that on the renewed application before the full court, namely whether to grant leave to appeal, the issue on the renewed application was a reconsideration of the initial and necessarily provisional refusal of leave by the single judge and could involve additional grounds and, if admissible, new evidence. The single judge was not bound by any views previously expressed and could change his mind as to the outcome. The decision by the Court of Appeal on the rehearing was a fresh and final determination of the leave application. The submission that the participation of the same single judge in the Court of Appeal would give the appearance of a closed mind was rejected (at para 41) on the basis that it ignored the important fact that the consideration by the fair-minded and impartial observer is necessarily informed by objective appreciation of the qualities of a judge and the essential characteristics of the judicial function and process.

*Discussion*

23. Mr Knox is correct in his submission that the fact that a judge has previously made a decision adverse to the interests of a litigant is not, of itself, sufficient to establish the appearance of bias. As Floyd LJ observed in *Zuma's Choice Pet Products Ltd v Azumi Ltd* [2017] EWCA Civ 2133 (at paras 29, 30), the fair-minded and informed observer does not assume that because a judge has taken an adverse view of a previous

application or applications, he or she will have pre-judged, or will not deal fairly with, all future applications by the same litigant. However, different considerations apply when the occasions for further rulings do not arise in the same proceedings, but in a separate appeal.

24. In the present case, during the second trial of the appellants Isaacs J had made rulings on issues of mixed questions of fact and law or involving the exercise of judicial discretion. In particular, first he had ruled against a submission of no case to answer. In doing so he had necessarily concluded that there was sufficient evidence on which a reasonable jury properly directed could convict the appellants. Secondly, he had ruled that Scott's deposition should be admitted in evidence. In doing so he held that the statutory provision under which the application was made was not unconstitutional, that Scott's evidence was sufficiently reliable for it to be in the interests of justice to admit it and that, in the exercise of his discretion, it was fair to admit it. Thirdly, in a further exercise of judicial discretion, he permitted dock identifications of all three appellants. These were concluded rulings on intermediate issues of major significance in the proceedings.

25. The Board is conscious that the application for Isaacs JA to recuse himself seems to have arisen unexpectedly, perhaps because those organising the listing had had no reason to be aware of his prior connection with the case. Moreover, the judgment of Conteh JA suggests that it may well not have been clear at the time of the Court of Appeal's ruling upon recusal that the issues on which Isaacs J. had had to rule at the second trial were to some extent revisited in the grounds of appeal. But it is now apparent that as a member of the appellate court he was required to address essentially the same issues on which he had ruled at the second trial. So far as concerns the issue whether there was a case which could properly be left to the jury, it is of course the case that the appeal involved an examination of the evidence given at the third trial which would not have been identical to that given at the second trial. Nevertheless, the prosecution evidence is accepted to have been in substance the same at the second and third trials, the issues for decision on appeal remained essentially the same as those decided by Isaacs J at the second trial and the submissions advanced by the parties were very similar.

26. In the same way, the decisions at the second and third trials on the admissibility of Mr Scott's evidence were not identical. Isaacs J ruled at the second trial that the deposition of Mr Scott was admissible but not the transcript of his evidence at the first trial in May 2001, whereas in the third trial Jones J held both admissible. Furthermore, the Court of Appeal recorded in its judgment of 8 July 2016 that the objections against the admissibility of the deposition and the transcript of Mr Scott's evidence at the first trial "have now in the instant appeals morphed into a constitutional challenge". However, the point made on behalf of Stubbs and Davis at the second trial and on the appeal was essentially the same: that by virtue of article 20(2)(e) of the Constitution, a defendant has an entrenched right to cross-examine those persons who come to give

evidence against them as the prosecution's witnesses. That submission was rejected by Isaacs J at the second trial and by the Court of Appeal. Moreover, the Court of Appeal in dismissing this ground also found that Jones J was correct to have admitted in evidence both the deposition and the transcript of evidence. As a result, the issues for decision were substantially the same.

27. Similarly, the issue of whether a dock identification should have been permitted or should have been refused (given what had occurred at the preliminary enquiry and the first trial), arose both in the second trial and before the Court of Appeal, albeit in the latter case only in the grounds of appeal of Stubbs and Evans.

28. In addition, the admissibility of Stubbs' interview and the issue whether it should be edited to exclude reference to Evans arose both in the second trial and before the Court of Appeal.

29. The proximity of these issues and the arguments advanced by the parties would weigh heavily in the mind of the fair-minded and independent observer.

30. Mr Knox submits that the strength of the prosecution case against these appellants was such that it is hardly surprising that both Isaacs J and Jones J rejected the submissions of no case to answer and that none of Isaacs J's other rulings involved any conclusive imputation or finding against the appellants. The first part of this submission misses the point that we are here concerned not with the merits of the substantive case for the prosecution but with apparent bias. The appellants were entitled to a hearing before an independent and impartial tribunal and the possibility, even probability, that such a tribunal might have come to the same conclusions, if that were the case, is irrelevant (*Millar v Dickson* [2002] 1 WLR 1615 per Lord Bingham at para 16). The second part is also flawed. The rulings made by Isaacs J in the second trial were on intermediate issues but they were not provisional in character nor were they subject to any procedure for review. On the contrary they were final rulings made after full oral argument and were subject only to the possibility of an appeal in the event of a conviction. Moreover, they governed the subsequent course of the trial. Accordingly, *Sengupta* and *Hksar v Hossain* are unable to assist the Crown in the circumstances of this case.

31. In the course of his submissions Mr Knox placed great emphasis on the fact that if a retrial had taken place following the discharge of the jury in the second trial, there could have been no objection to Isaacs J sitting as the trial judge at that re-trial. This is correct. Indeed, it is often the case that, following an aborted trial, a retrial takes place before the same judge and a different jury. However, this does not assist the respondent. While this process may involve the same judge revisiting the rulings he made at the first trial, this is essentially a repetition of one stage of the judicial process in circumstances

where the earlier rulings were rendered of no effect by the aborted trial. There is no prejudice to a defendant in these circumstances. If a previous ruling against the defendant is repeated at the re-trial the defendant is in no worse a position and, if there are good grounds, he will be able to appeal the ruling to an independent and impartial appellate tribunal. On the other hand, where, as here, one is concerned with an appeal, very different considerations apply. An appellant is entitled to be heard by an independent and impartial appeal tribunal without any appearance of bias by way of pre-determination or pre-judgment. For the same reason, the common case of a judge who has to make successive rulings in the same proceedings (see para 16 above) is not analogous to the present case. In the former the high desirability of judicial continuity is an important factor, whereas in the present case this consideration is entirely absent.

32. The respondent also relied upon the observation of Lord Bingham in *Locabail* (at para 25) that the greater the passage of time between the event relied on as showing a danger of bias and the case in which the objection is raised, the weaker (other things being equal) the objection will be. A similar point was made by Conteh JA in the Court of Appeal in the present case. He noted that seven years had passed since the aborted trial and stated that "[t]his length of time should be sufficient to assuage any apprehension of bias in the informed and critical but reasonable observer". In the same way Isaacs JA considered the passage of time to be relevant to the objections to his sitting on the appeal. The Board considers, however, that in the context of this case, the passage of time could have done little to diminish the concern which would legitimately be created in the mind of a fair-minded and informed observer in relation to the participation of Isaacs JA in the appeal. This was a notorious and memorable case. Nothing occurred in the interim period to alter the situation. Moreover, even if at the time of the recusal hearing memory was faint or obscure, the appeal hearing would inevitably bring back to the judge a full recollection of his part in the second trial and the rulings he made on that occasion.

33. Finally, contrary to the view of the Court of Appeal, the fact that Isaacs JA was not sitting alone to hear the appeal cannot assist the respondent. The whole point of the appeal was that three judges should consider the issues afresh and without any pre-determination or pre-judgment. If there were valid grounds requiring Isaacs JA to recuse himself, they apply with equal force whether he sat alone or in company. Each member of the Court of Appeal will have played a full part in the deliberation and resolution of the issues raised on the appeal. The mutual influence of each member of the court over the others necessarily means that if any of them was affected by apparent bias the whole decision would have to be set aside (*In re Medicaments and Related Classes of Goods (No 2)* [2001] 1 WLR 700 per Lord Phillips MR at para 99).

34. In the present case the Court of Appeal was clearly concerned that submissions based on apparent bias should not be accepted too readily. It may well be that the members of the court were influenced by their experience of wholly unmeritorious applications for recusal in other cases. In this regard, we note that one ground of appeal

advanced by Evans before the Court of Appeal in the present case was that the trial judge should have recused himself "after sharing emails with the Crown with reference to the trial to the exclusion of the appellant and/or his counsel". It appears from the judgment of the Court of Appeal that this refers to no more than one unsolicited email sent by prosecuting counsel to the judge containing a list of authorities he proposed to cite the next day which had not been copied to the other parties, and for which the prosecutor was duly reprimanded when it was brought to the judge's attention. The Board wholeheartedly agrees with the Court of Appeal that a judge should not recuse himself unless there is a sound reason for recusal, lest unmeritorious applications for recusal become the norm and result in damage to the administration of justice. In particular, it is necessary to stand firm against illegitimate attempts to influence which judge shall sit in a particular case. The Board is also conscious that the limited size of the Court of Appeal in some jurisdictions, such as the Bahamas, can make it difficult to avoid accidental listings before judges who have had some prior involvement with parties or with earlier stages in the proceedings. However, for the reasons stated above, the Board is of the clear view that the complaint made by the appellants is well founded. In its view, the decisions of Isaacs J made during the second trial would lead a fair-minded and informed observer to conclude that there was a real possibility that he had pre-judged issues which fell for consideration on the appeal to the Court of Appeal and that the appellants did not have the appearance of a fresh tribunal of three judges to consider their appeals. In reaching this conclusion, the Board has not been influenced by the decision of the High Court of Australia in *Livesey* and expresses no view on whether that decision should be followed.

*Disposal*

35. Having heard argument from all parties on the apparent bias ground, the Board came to the unanimous view that the appeal should be allowed and the decision of the Court of Appeal set aside on that ground. The Board invited further submissions from all parties as to the future conduct of the appeal. Counsel for all three appellants told us, on instructions, that it was the wish of the appellants that the Board should proceed to decide the appeals on the substantive grounds. In doing so, however, they very properly accepted the difficulties the Board might face in following that course. It would, in principle, be open to the Board to exercise the powers of the Court of Appeal of the Commonwealth of the Bahamas. The Board is mindful of the extraordinary delays which have occurred in these proceedings, which continue some 19 years after the offences are alleged to have been committed, and of the understandable anxiety of the appellants that they should be brought to a conclusion as soon as possible. However, the Board considers it inappropriate to address the further grounds of appeal in circumstances where the decision of the Court of Appeal dismissing the appeals is of no force or effect. Furthermore, the appellants' counsel were without instructions to waive those grounds of appeal which had been refused leave below. Accordingly, the Board proposes humbly to advise Her Majesty that the appeals should be allowed on this ground, the decision of the Court of Appeal quashed and that the case be remitted to the Court of Appeal for the appeals to be reheard. In order to assist the making of

arrangements for that rehearing, at the conclusion of the oral hearing the Board indicated the advice it proposes to tender. Nothing in the Board's conclusions on the present issue involves any assessment, even of a preliminary nature, of whether any of the other grounds of appeal relied upon has substance.