IN THE SUPREME COURT OF BERMUDA
APPELLATE JURISDICTION
CASE NO. 16/2011

BETWEEN:

LYNDON RAYNOR
(Police Constable)

Appellant

- and -

KYRIL MARSHAN BURROWS

Respondent

Mr. L. Burgess for the Appellant; and
Mr. R. Horseman for the Respondent.

JUDGMENT

1. This matter came before me on a prosecutor's appeal against an acquittal. I heard the appeal on 6th April 2011, and at the conclusion of the hearing I dismissed the appeal, and promised to give written reasons at a later date, which I now do.

2. The respondent, Mr. Burrows, was charged on an Information of 18th February 2010 with two counts alleging using a forged instrument and one count of obtaining by deception. The matter was tried before an acting Magistrate, the trial beginning on 16th September 2010, and continuing on 17th and 23rd September. On that latter date the prosecution made an application for the Magistrate to recuse herself on the grounds of apparent bias. At the time of the application the Crown had closed its case, and the defendant was being cross-examined. The matter was then adjourned to 28th September, when the Magistrate declined to step down, and gave written for not doing so. The matter then concluded, and in a further written judgment of 1st October 2010 the learned acting Magistrate held that the Crown had failed to discharge the burden on it, and acquitted the defendant on all counts. In doing so the Magistrate said that the Crown's case was wholly dependent on the evidence of its two main witnesses, which was in direct contradiction to

that of the defendant. She held that "the case presented by the Crown was unconvincing and the case presented by the Defence was enough to create much doubt about the culpability of the Accused." In other words this was a case which turned entirely upon the Court's assessment of the credibility of the respective witnesses.

3. The matter giving rise to the alleged bias was that the acting Magistrate, who is in private practice, had advised one of the main prosecution witnesses in relation to a matter concerning Mr. Burrows. When the issue first arose the record indicates that the Magistrate immediately proposed to put the matter before another Magistrate, "out of an abundance of caution", but counsel for the defence urged the magistrate to proceed. Indeed, defence counsel throughout took the position that he waived any apparent bias, and consented to the matter proceeding before that Magistrate, and it appears that everybody proceeded on the basis that any likely bias would have been directed against the defendant until the prosecution's application on the 23rd.

4. the disclosure of the Magistrate's involvement came out in dribs and drabs. On the 16th she recognized the witness, who had left the courtroom at the start of the trial, and mentioned that. Crown Counsel sought to discuss that in Chambers, which the Magistrate refused, insisting on it being done in open court. The Magistrate then disclosed that she had just advised the witness in her capacity as a private attorney, but she did not say in respect of what.

5. On the 23rd, while the witness was being cross-examined, the issue arose again. In her ruling the Magistrate recorded "Defence counsel raised a collateral issue which appeared to have some minimal linkage to the subject of the advice previously given to the Complainant". The ruling records that "the court brought this to observation to the attention of Counsel in the interest of fairness and transparency." The nature of the issue was not identified in the ruling, but the Crown has now filed affidavits from the witnesses, which make it clear that Mr. Burrows had complained to the police that the witness was harassing him. The witness then went to Ms. Subair, who intervened by telephoning the police on his behalf. The witness told Ms. Subair that he believed Mr. Burrows was making these complaints because of the charge for the forgery offence (i.e. the charge which was before the court). The witness's daughter (who herself was the other main prosecution witness) also filed an affidavit in which she expanded on her father's

account by detailing other matters in dispute between them and Mr. Burrows. Although the affidavits do not set out what happened in Court, this is dealt with in the submissions of Crown Counsel, and it appears to be uncontroverted. The Crown's case is that on the morning of the 23rd, during the evidence of the witness, the Magistrate indicated for the first time "that there appeared to be some correlation with this matter and advice she had given previously", although she again continued to hear the matter at the urging of defence counsel. At the opening of the afternoon session on that day she again seems to have had doubts, and at that point entertained the further submissions that eventually led to the adjournment and her ruling of 28th September.

6. Against that background, the Crown's Notice of Appeal is expressed as being "against the decision in law to acquit the Respondent", and it sets out only one substantive ground:

> "That the Learned Acting Magistrate erred in law when she ruled that there would be no appearance of bias rather than whether there was actual bias."

What that lacked in intelligibility is, perhaps, rectified by the Crown's skeleton argument which rephrases it as "Whether the Learned Acting Magistrate should have recused herself because of the appearance of bias."

7. The first question is whether such a ground is available to the prosecution on an appeal against conviction. A prosecutor's right of appeal from an acquittal in the Magistrates Court is created and governed by section 4 of the Criminal Appeal Act 1952, which provides:

> "**Point of law; appeal by informant**
> 4. A person who was the informant in respect of a charge of an offence heard before and determined by a court of summary jurisdiction shall have a right of appeal to the Supreme Court, in the manner provided by this Act, upon a ground which involves a question of law alone—
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> > (a) where the information was dismissed, then against any decision in law which led the court of summary jurisdiction to dismiss the information;
> > (b) . . . [*concerns sentence*]."

8. In other words, the ground of appeal has to involve a question of law alone, and in the case of an acquittal, the decision concerned has to have 'led' the court to dismiss the information. This

very restrictive approach reflects the traditional respect for acquittals. As the Privy Council, when construing the similar provisions of section 17(2) of the Court of Appeal Act 1964[1], said in Smith v. The Queen (Bermuda) [2000] UKPC 6 (28th February, 2000)**:**

> "25. This view is further reinforced by the consideration that section 17(2), - unlike the provision in the *Attorney-General's Reference* - makes an inroad on the cardinal principle of double jeopardy. In *Green v. United States of America* (1957) 355 U.S. 184, 2 L. ed. 2nd, 199, Black J. in the Supreme Court of the United States stated the principle as follows (at p. 204):-
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> > "The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense ..."
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> 26. The present case is not one in which the prosecution are seeking on a retrial to bolster its case against the appellant. But their Lordships have to consider the spectrum of cases which may arise if the Crown's submissions are adopted. And such a construction would permit a prosecution, bent on presenting a better case at a second trial in order to secure a conviction, to appeal successfully against a discharge of a defendant on a no case submission under section 17(2). In any event, it is a settled principle of English law that an acquittal recorded by a court of competent jurisdiction, although erroneous in point of fact, cannot generally be questioned before any other court. An acquittal is final. The legislature may abolish or qualify this principle. In order to be effective such a legislative inroad on the principle requires clear and specific language. As authority for these elementary propositions their Lordships need only cite the decision of the House of Lords in *Benson v. Northern Ireland Road Transport Board* [1942] A.C. 520, at 526, and the decision of the Australian High Court in *Davern v. Messel* 155 C.L.R. 21. As was observed in *Davern v. Messel* (1984), at page 32, this is "a rule to which it may be assumed the parliamentary draftsmen have had regard in framing legislation". This is a further factor ruling out an extensive construction of section 17(2). For all these reasons their Lordships are of the opinion that the operative words of section 17(2) cover only a pure question of law."

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[1] Section 17(2) of the Court of Appeal Act 1964 provides:
"(2) Where –
(a) an accused person tried on indictment is discharged or acquitted or is convicted of an offence other than the one with which he was charged; or
(b) an accused person tried before a court of summary jurisdiction is acquitted and an appeal to the Supreme Court by the informant has not been allowed; or
(c) an accused person whose appeal to the Supreme Court against conviction by a court of summary jurisdiction has been allowed,
the Attorney-General or the informant, as the case may be, may appeal to the Court of Appeal against the judgment of the Supreme Court on any ground of appeal which involves a question of law alone."

9. In view of the terms of the Criminal Appeal Act, this appeal falls at the first hurdle, because it does not involve a point of law alone. Whether or not the circumstances gave rise to an appearance of bias is, in my judgment, necessarily a question of mixed fact and law, and so is not a "point of law alone" within the meaning of the section..

10. Were I wrong on that, the Act introduces a further safeguard: the wrong decision in law must have led to the acquittal: i.e. there must be a direct causative link between the error and the acquittal. The Crown could never demonstrate that where they allege *apparent* bias only. An *appearance* of bias could never lead to an acquittal: there can be no causative link. It might be different if they alleged actual bias, and produced cogent evidence to demonstrate that there was real bias which indeed led to the acquittal, but, very wisely, they do not attempt to embark on such a course here.

11. In view of that, I do not think it necessary, nor indeed appropriate, for me to embark upon a consideration of whether the learned acting Magistrate should have recused herself in this case. I am, however, asked to give guidance as to the procedure when such an issue arises.

12. The law on bias is now quite clear. The modern test is that set out by Lord Hope in Porter v Magill [2002] 2 AC 357 at 494 H:

> "The question is whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased."

The test is framed in that way partly to avoid the difficult task of ascertaining whether the judge was in fact biased, and partly because appearances can matter as much as substance, and justice must not only be done but must be seen to be done. As a result, it does not avail that the court was not in fact biased, or otherwise approached the matter in a fair and balanced way. The Bermuda case of T. Smith v The Queen [2007] CA (Bda) 15 Crim (29 November 2007) demonstrates just how rigorously the test will be applied. In applying the test I do not think that the court is likely to be much helped by a consideration of its evolution or the facts of earlier cases. The court's function is to take the test as propounded by the House of Lords and apply it to the circumstances of the particular case which it has to consider.

13. Because the test is an objective one, it matters not whether the court honestly believes itself to be without bias and capable of judging the matter fairly and impartially. Nor, as Mummery LJ noted in Morrison v AWG Group Ltd. [2006] EWCA Civ 6, is it discretionary or susceptible to considerations of practicality or cost:

> "[20] As already indicated, however, I do not think that disqualification of a judge for apparent bias is a discretionary matter. There was either a real possibility of bias, in which case the judge was disqualified by the principle of judicial impartiality, or there was not, in which case there was no valid objection to trial by him.
> . . .
> [29] Sixthly, while I fully understand the judge's concerns (see para 15 of his judgment quoted above) about the prejudicial effect that his withdrawal from the trial would have on the parties and on the administration of justice, those concerns are totally irrelevant to the crucial question of the real possibility of bias and automatic disqualification of the judge. In terms of time, cost and listing it might well be more efficient and convenient to proceed with the trial, but efficiency and convenience are not the determinative legal values: the paramount concern of the legal system is to administer justice, which must be, and must be seen by the litigants and fair-minded members of the public to be, fair and impartial. Anything less is not worth having."

14. I do, however, have considerable sympathy with the Magistrate's unwillingness to recuse herself at the stage at which the Crown eventually made its application, because if she had then acceded to it that would not only have aborted the trial at a very late stage, but it would also have afforded the Crown an opportunity to present its case again, before a different tribunal, and possibly making good any deficits in it. In such a situation it may be necessary to balance the competing rights and interests of the parties, but such a situation can usually be avoided by following the practice outlined below.

15. As to the procedure to be followed, the most important thing is that it is incumbent upon a judicial officer to disclose any facts or circumstances which may give rise to an appearance of bias as contemplated by Porter v Magill. That disclosure should be given at the earliest opportunity and it should be full and frank. The disclosure should not be given piecemeal, but should include all the circumstances whether the judicial officer considers them relevant or not – because there may be things which effect the issue which he or she does not know but which are known to the parties.

16. In this case when the matter first arose, Crown Counsel invited the court to adjourn into Chambers, but the learned acting Magistrate refused, noting that it was a criminal case and that she would prefer if all discussions take place in the presence of the defendant. I think that she was right in that approach. Unless there is some compelling reason which makes it necessary to go into Chambers such matters should be dealt with in the course of the trial in open court. However, that fact should not deter the court from expressing itself fully frankly, and if it is going to then it may be best to go into Chambers, but in that case the defendant should also be present.

17. Ideally any disclosure by the court should be given in advance of the hearing, to allow the parties to consider their position and come armed with submissions, or indeed to allow another judge to be substituted. Where, however, the issue arises (as here) at the outset of the hearing, the judge should give the parties a proper opportunity to consider the disclosure given and to take instructions on it. That implies an adjournment, which may be a short break or may involve putting the matter off to another day, depending on the circumstances. No hard and fast rule can be framed, but any adjournment should be sufficient to allow both parties to consider their position in the light of the Judge's disclosure and advise themselves properly on it.

18. Beyond that, judicial officers should seek guidance on such matters in the "Guidelines for Judicial Conduct" published as Circular No. 11 of 2006[2]. The Guidelines have this to say on the subject:

> **"Circumstances in which Judge should consider disqualification**
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> [78] The most important circumstances in which the Judge should consider disqualification include the following situations:
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> (i) It is impossible to be categorical about relationships which give rise to disqualification but a Judge should always disqualify himself or herself whenever a party, lawyer or witness of disputed facts is a close blood relative or domestic partner of the Judge or a close relative of the Judge, or where such person is a close friend or business associate of the Judge.

[2] These can be found on the Judiciary's website.

(ii) It is a good rule of thumb for a Judge to consider disqualification in cases where a witness of disputed facts is someone known to the Judge and about whom he or she has opinions. Former clients may well be people about whom the Judge has formed a view in the past. Friendship or past professional association with lawyers engaged in the case is generally insufficient to result in disqualification.

(iii) Although a Judge may be disqualified for strong views publicly expressed on a matter in issue, the case would have to be extreme before a reasonable observer would think the Judge not able to have an open mind. An expression of opinion in an earlier case is not a ground for disqualification.

(iv) In cases of uncertainty it may be desirable for the Judge to discuss the matter with the Chief Justice or another Judge. Where the Judge is uncertain as to whether disqualification is appropriate it will usually be necessary for the parties to be given an opportunity to make submissions on the point after full disclosure of the circumstances giving rise to the question of disqualification. The consent of the parties is not determinative. The Judge must decide whether disqualification is appropriate. Disclosure of any matter which might give rise to objection should always be undertaken even if the Judge has formed the view that there is no basis for disqualification. There may be circumstances not known to the Judge which may be raised by the parties consequentially upon such disclosure."

Dated this 20th day of April 2011

Richard Ground
Chief Justice