Neutral Citation Number: [2022] CA (Bda) Crim 3

Case No: Crim/2022/1

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM THE SUPREME COURT OF BERMUDA SITTING IN ITS CRIMINAL APPELLATE JURISDICTION
THE HON. MRS. JUSTICE SUBAIR WILLIAMS
CASE NUMBER 2021: No. 003
CASE NUMBER 2021: No. 004

Sessions House
Hamilton, Bermuda HM 12

Date: 18 March 2022

Before:

THE PRESIDENT, SIR CHRISTOPHER CLARKE
JUSTICE OF APPEAL GEOFFREY BELL
JUSTICE OF APPEAL ANTHONY SMELLIE

- -

Between:

THE QUEEN

Appellant

- v -

REBECCA WALLINGTON

Respondent

Mr Alan Richards (Office of the Director for Public Prosecutions) for the Appellant
Mr Mark Pettingill (Chancery Legal Ltd) for the Respondent

Hearing date: 1 March 2022

- -

JUDGMENT

CLARKE P:

1. Rebecca Wallington ("the defendant") was convicted in two different cases of possession of cannabis with intent to supply. The Supreme Court has held that these convictions should be set aside on the grounds of apparent bias arising from the fact that the same magistrate – the Worshipful Craig Attridge ("the Magistrate") - tried both cases and convicted in each, the verdict in the case which began earlier in time being given after the Magistrate had recorded a conviction in the later one.

The Cases

Information 17 CR00039

2. This Information had two counts. The first count alleged that on **15 November 2016** the defendant was in possession of 418.7 grams of cannabis which were intended for supply. The case was heard on 7 and 8 January and 10 September 2020. The judgment date was 11 January 2021. On 7 January the defendant accepted that she was in possession of the cannabis but denied that it was with intent to supply. On the same occasion she pleaded guilty to a second count of possession of 4.93g of cannabis which had been seized from her home

Information 17 CR00314

3. In this case the Crown alleged that on **23 January 2017** the defendant was in possession of 857, grams of cannabis with intent to supply. The hearing took place on 15 April 2019, and 9 and 10 September 2020. The defendant denied the charge and did not accept that she was in possession of any cannabis at all. The judgment date was 30 November 2020.

4. I set out below a summary of the evidence which formed the foundation of the Crown's case in respect of each information

Case 039

5. The Crown's case was that shortly after 9.00 pm on 15 November 2016 two police officers with their car were at the junction of Middle Road and Fort Hill in Devonshire. The officers were engaged in traffic control as a result of a collision and were redirecting motorists. One of the officers – PC De Forest Evans - observed a blue motorcar travelling west towards them pull up into a bus lay-by where its headlights were turned off. It remained there for about five minutes. The side doors on the driver's and the passenger's side were open. Two people got out of the vehicle and moved around it "*in constant movement"* for about five minutes. Eventually they got back inside the vehicle which left the lay-by and approached the location of the officers. PC Evans directed the driver to turn the car around and it turned right on to Fort Hill Road. A short while later it came back down the road, turned left and headed along Middle Road in an easterly direction. It passed out of sight. But about a minute later PC Evans saw a person walking along

the sidewalk on the western lane of Middle Road towards where he was. This was Mr Dennis Robinson. When he got to the bus lay-by Mr Robinson bent over and picked something up from the ground. The officer decided to investigate. He got into his police vehicle and drove eastwards towards Mr Robinson, who was clasping something under his right arm. Mr Robinson appeared to notice the approaching vehicle and his pace increased, as did that of the police car. Mr Robinson turned into a nearby driveway. In the light of his headlights the officer could see that Mr Robinson had a blue plastic bag in his right hand which he tossed onto the ground of the property into which he had turned. The officer got out of his vehicle, leaving its headlights on. He detained Mr Robinson and retrieved the bag which he had discarded and escorted him back to the police vehicle. The blue bag had within it a clear plastic bag which had cannabis in it.

6. Shortly thereafter the officer became aware of the blue car which he had seen earlier. It was backing out of Woodside Drive and its headlights were not on. It proceeded towards his location. He signalled for the vehicle to stop. The defendant was the driver of the vehicle and there was a young child in it.

7. In due course both Mr Robinson and the defendant were taken to the police station. When she was informed that she was being arrested on suspicion of possession of a controlled substance and cautioned, the defendant replied:

> "*Dennis is innocent. He didn't know anything about it. He hasn't done anything wrong. The substance belongs to me. I use it for medical use. You can test my blood. I just had some. I use it for my back. I have chronic back pain*".

8. The defendant was interviewed on 16 and 17 November 2016. In her first interview she sought to accept responsibility for the seized cannabis. She said that Mr Robinson was an innocent party and that he knew nothing of it. She had purchased the cannabis for medicinal use. She did not know how much it was exactly but she had paid $ 1,000 for it (so it would have been about 2 oz in quantity) and had bought it "*from a person I usually get it from*". She had panicked and thrown the cannabis out of the car on seeing the police up ahead. She had not told Mr Robinson what was in it and, without knowing, he had got out of the car and gone back to fetch it. She did not think that he would find it.

9. In her second interview the defendant completely changed her account. She denied that the drugs were anything to do with her. She said that she had lied in the first interview because she was scared. She said later that she had done so because she wanted to protect Mr Robinson because he had just come out on parole, was a good person, and she did not want him to go back to jail. She said that she had not realised that it was as much as a pound of cannabis and that she had thought she could get away with it saying that it was hers. The cannabis weighed about 15 ounces and was given a valuation by a police officer of between $ 8, 850 and $ 20, 925 depending on how it was sold. It was an agreed fact that the blue plastic bag which Mr Robinson discarded contain 418.7 g cannabis.

10. The defendant gave evidence. As is apparent, she had previously given two inconsistent and contradictory accounts of her involvement, or the lack of it, with the seized cannabis. Her evidence was much closer to her first account at interview. She now said that the cannabis had been bought earlier the same day when she was in the company of a male relative. She had used the car that Mr Robinson was using to take the relative to where he said that he would be able to access 56 grams [i.e. 2oz] of cannabis. She asked him to buy 2 oz of cannabis for her and gave him $ 1,000 for it. He had purchased the cannabis, whilst she waited in the car across the street from the place where he got it. He came back to the car with a blue grocery bag. She drove the relative to his work vehicle. She said that she did not know if he got out of the car with anything, although she told him that she would pick up the cannabis later.

11. The Crown made the point that the defendant apparently did not know whether the relative would be getting some cannabis only for her or whether he would also be acquiring some himself, but she expected that he would remove all of it from the car and she would get her cannabis (two ounces) back later. Thus it would not be in the car when Mr Robinson joined her later in order to take care of her 8-9-month old daughter while the defendant, a personal trainer and life coach, was with a client. The Crown observed that, on this evidence the unnamed relative had inadvertently left several thousand dollars' worth of cannabis in the car which the defendant was using. And the defendant herself, although apparently wanting Mr Robinson not to be associated with that cannabis, had failed to ensure that when the relative left her, he took any of the cannabis with him.

12. The defendant said that, after she had finished her work, she and Mr Robinson drove to his residence in Pembroke. During the course of the journey she was trying to find her baby's bottle behind the driver's seat; but when she pulled the baby's bag from behind the driver's seat she also pulled out the blue grocery bag that her male relative had brought back to the car when he purchased the cannabis earlier in the day. Upon making this discovery she panicked because Mr Robinson was in the car and he was on parole. When they were heading up Middle Road towards the bus stop she saw the police and pulled into the lay-by where she threw the blue grocery bag out of the window. During this time Mr Robinson was asking her what was wrong but she did not want to tell him that she had cannabis. She told him to turn the car round and, as he did so, she told him that it was cannabis that she had thrown out and that, as she had just realised, she had also thrown Mr Robinson's phone with it.

13. The prosecution suggested that this was something invented late in the day in order to explain the otherwise inexplicable, namely why Mr Robinson would have gone back to the bus lay-by to retrieve the cannabis, which had somehow left the car at the lay-by, or why the defendant would have let him do so if he knew nothing of the cannabis.

14. The defendant called evidence from Dr Soares. The prosecution did not challenge his evidence. He reported that on two occasions between 1999 and 2017 the defendant had consulted him. The first time was in 2000 for sciatica. The second was in 2007 for lower back pain. The next report of back pain was in May 2017 (i.e. well after the date of the offence) when he prescribed conventional medicines. The rest of his evidence related to events from May 2017 onwards. He said that he had

never actually prescribed cannabis products but would entertain the idea of doing so if nothing else worked. He wrote to the Minister of Health on the defendant's behalf in January 2008 seeking a licence to use medicinal cannabis.

15. At the time of the trial Mr Robinson was no longer a defendant in the case. The Crown nevertheless contended that, on the evidence, this was a case of joint possession since nothing else explained the totality of his and the defendant's behaviour. Mr Robinson did not, the Crown suggested, go back to the lay-by to look for his phone nor did the defendant wait for him thereby under cover of darkness with her headlights off in case he found it. Both of them had knowledge of the drugs which formed a common pool from which both were entitled to draw. The defendant may have intended to use some of the cannabis herself but her attempt to justify as much as an ounce (the figure mentioned the first interview) or 2 ounces (second interview) on the basis of her medicinal use did not stand up to scrutiny. The significant quantity of cannabis involved in the case was wholly inconsistent with personal use by even two persons. Plainly at least some of this cannabis was intended for supply to others. Further, section 6 (3) of the Misuse of Drugs Act 1972 prohibited possession of the drug "*which is intended, whether by him or some other person, for supply*". The defendant accepted that she was in possession of the cannabis and if Mr Robinson intended that it should be supplied to another or others, then the offence was made out.

Case 314

16. On **23 January 2017** the police attended 5 Welcome Place, Southampton. They had received information that the defendant had been seen to hide a white plastic bag in the hedge line at a property on the adjoining Turtle Bay Lane. An officer searched the hedge and found a white plastic bag behind a breeze block next to bushes. This was found to contain 2 transparent heat sealed packages containing a large amount of plant material. This turned out to be 857.3 grams of cannabis with a street value of about $ 42,865. The defendant was arrested. Her account to the police was that she had found the bag on top of the garbage bin and had taken it off the bin and placed it in the hedge. She had seen the package at about 6. 00 am when it was still dark and had taken the packages to the laundry room of what was her mother's house. About 2 hours before the police arrived she had taken it from the laundry room and placed it in the hedge.

17. The defendant was interviewed under caution in the presence of her counsel between 1.25 and 2.25 pm on 24 January 2017. Much of that interview, during the course of which the defendant was very emotional, consisted of no comment answers to questions.

18. The defendant's evidence was that she had previously lived with Zenji Ingham ("Ingham"), the father of her son, who had been violent towards her; and she had separated from him after he had split her head open in one incident. At about 6.00 am on 22 January 2017 Ingham had collected her son and had packed his car next to the trash bins. On 23 January 2017 she woke up at about 5.00 a.m and prepared the baby. She took his diapers out to the trash bin and placed them on top of it. She saw a white bag hanging off the wall above the trash can: she looked into it and saw dark

material therein and picked it up to see what it was. She panicked because it looked like cannabis and it was not hers.

19. She said that she had received a What's App message from Ingham two weeks prior to this saying that "*he was going to assist Police to help me get a higher sentence to my first case*". She did not know what to do and was rushing to get to work. So she put the bag into the laundry room to deal with it later. The laundry room was the safest place. She said that she had lost faith with the police because they had not dealt with any of the issues with Ingham. When she returned at around 10.30/11 a.m she took the bag from the laundry room and threw it into the boundary hedge at the back of the property which backs on to Turtle Bay Lane. She said that she intended to throw the bag into the back of the trash truck when it came. But she never got the chance to do so because the police arrived before the truck. She said that she had showed the What's App message from Ingham to the policeman who gave evidence before Sergeant Barker. That was Detective Sergeant Saints, who had denied seeing any such message.

20. The prosecution case was that the defendant had always intended to possess the cannabis and that her conduct in taking in the cannabis to the laundry room in her parents' house, leaving it there until she took it away and then throwing it into the hedge, showed that she was in possession of what she was well aware was cannabis. The amount and value of the cannabis indicated that she could not really have intended to dispose of it for nothing; and the amount was over 42 times the quantity which attracted the deeming provision in section 27 D and Schedule 7 of the Misuse of Drugs Act 1972.

Delay

Case 314

21. The delay between the dates of these offences and the convictions therefor is lamentable. In Case 314 much of it seems to have been due to the apparent unavailability of counsel, followed by almost a year in which one or other of prosecuting counsel or the Magistrate were unable to appear on account of being required in the Supreme Court or on account of bereavement leave, followed by the listing problems produced by the pandemic.

Case 039

22. In Case 039 Mr Robinson and the defendant were tried before Magistrate Warner in the Magistrates' Court. But, after evidence was heard and closing submissions made the Magistrate advised that he had become aware of a conflict and recused himself from the proceedings. The case was then listed for trial before the Senior Magistrate. The defendant and Mr Robinson then contended that their constitutional rights to a fair hearing within a reasonable time had been infringed, On 13 September 2019 Duncan AJ held that Mr Robinson's constitutional rights had been infringed and that the prejudice he had suffered could not be mitigated by a reduction in sentence, since in November 2016 he was already on parole in respect of his sentence for a different

offence, which parole had then been revoked, as a result of which he had been in custody for two years and ten months, and had encountered two years four months of prejudicial delay, which was more than any sentence that could be expected upon his being convicted in Case 039. Accordingly, he stayed the proceedings against Mr Robinson. He found that the defendant's constitutional right had, also, been infringed but that such prejudice as she had suffered could be mitigated by a reduction in any sentences, since she had not been remanded in custody pending the trial. The retrial of the case against her was, accordingly, allowed to continue and she was convicted.

23. One of the grounds upon which the defendant sought to overturn her conviction in that case was that the delay since the decision of Duncan AJ had further deprived her of her right to a fair trial within a reasonable time because she had not been tried until a year had elapsed since his decision. Subair Williams J rejected that ground of complaint on the ground that the extra delay had not negated the opportunity to mitigate the damage which the defendant had suffered from the delay by a reduction in sentence. There has been no appeal from that decision.

24. The second ground on which the defendant sought to set aside the convictions was that the Magistrate should have recused himself from hearing the trial against the accused "*given that he was the trial Judge in another case against the [defendant] alleging the same type of offence*": para [22] of the judgment. It is not entirely clear when the judge thought that the Magistrate should have recused himself.

25. Before the judge counsel for the Crown submitted that the two cases qualified for trial joinder, as a result of which the objection of bias could not withstand the reality that it would have been legally proper for the Magistrate to deal with both cases at the same time.

26. Section 480 of the Criminal Code provides:

> ***"Joinder of charges in indictment***
>
> *(1) A charge or charges for any indictable offence may be joined in the same indictment with any other such charge or charges or with a charge or charges for any summary offence which may lawfully be included in that indictment by virtue of section 13 and of the proviso to section 485(2)*
>
> *(a) if those charges are founded on the same act or omission; or*
>
> *(b) if those charges are founded on separate acts or omissions which together constitute a series of acts done or omitted to be done in the prosecution of a single purpose; or*
>
> ***(c) if those charges are founded on separate acts or omissions which together constitute a series of offences of the same or of a similar character,***

but shall not otherwise be so joined:

Provided that no one count of an indictment shall charge an accused person with having committed two or more separate offences.

(2) Notwithstanding anything in subsection (1), where it appears to the Court that an accused person is likely to be prejudiced by any joinder of charges against him, the Court

(a) may require the prosecutor to elect upon which one of the several charges he will proceed; or

(b) may direct that the trial of the accused person be had separately upon each or any of the charges."

[Bold added]

27. The judge held that an order of joinder could only have been made under 480 (1) (c) and could have been met with the opposing argument that the defendant would have been prejudiced by the joinder. The judge regarded it as wrong for the Supreme Court, as an appellate court, to impose its view as to whether a joinder application would have been successful or not; and accepted the argument of Mr Pettingill that belatedly treating the two cases as having been properly joined would unfairly deprive the defendant of the *"opportunity and advantage of deciding how and whether she wishes to state her evidence in respect of both charges on the same and one occasion*" [26]. For that reason, the judge rejected the Crown's invitation for her to suppose that the two cases had been formally joined.

28. I agree with the judge's decision that we cannot now treat the two cases as if they had been joined, although I recognise that there was a strong case for doing so.

29. The judge then referred to the abundance of case law on the question of judicial bias. As to that she said this:

"Established legal principle requires me to consider in this case whether an informed and fair-minded observer would find that there is a real risk of bias in the same magistrate dealing with these similar offences in the space of one year. In both Case 039 and Case 314, the magistrate was required to determine whether the legal presumption of an intention to supply the cannabis in Ms. Wallington's possession was effectively, or sufficiently rebutted. To some real extent, this judicial exercise necessitated independent assessments of Ms. Wallington's credibility as a witness. [27]".

30. She then cited from two passages in the written judgments of 30 November 2020 and 11 January 2021. The quote from the former (Case 314) was from paragraph [93]:

"*Ultimately, this Court has had the opportunity to assess the Defendant, and to consider her demeanour as she gave her evidence, and, in all the circumstances, I do not find the defendant to be an honest or credible witness. On the contrary, I agree with the submission of prosecuting counsel that the explanation that she has provided in respect of being set up is, in the court's view, both implausible and incredible- Ms. Wallington was not, in the view of this court, a witness of truth in that regard,.*"

31. The quote from the latter (Case 039) was from paragraph [85]:

> *"This Court has had the opportunity, ultimately, to assess the defendant, and to consider her demeanour as she gave her evidence, and, having regard to that and the evidence she gave in this case, as well as the prior versions provided in her police interviews, and in all the circumstances, I do not find the defendant to be an honest or credible witness. She was not a witness of truth."*

32. The judge then concluded that:

> *"It is to be noted that the issue of credibility was not wholly determinative of the magistrate's final decision. Notwithstanding, it was a significant, if not pivotal, issue. In my judgment, an informed and fair-minded observer would surely find that there is a real risk that the magistrate would have been partial to his earlier opinion of Ms. Wallington's lack of honesty and credibility in one case when assessing the question of her truthfulness and credibility in the latter case."*

For that reason, this ground of appeal succeeded.

The test

33. It is undoubtedly the case that the test for recusal is the one set out in *Porter v Magill* **[**2001] UKHL 67, namely "*whether a fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility of bias".* Guidance as to the characteristics of this notional observer is to be found in *Helow v Home Secretary* [2008] UKHL 62 where Lord Hope of Craighead pointed out [2] that the fair-minded observer:

> "*is the sort of person who always reserves judgment on every point until she has seen and fully understood both sides of the argument. She is not unduly sensitive or suspicious… Her approach must not be confused with that of the person who has brought the complaint. The "real possibility" test ensures that there is this measure of detachment*."

And [3]

"Then there is the attribute that the observer is informed. It makes the point they, before she takes a balanced approach to any information she is given she will take the trouble to inform herself on all matters that are relevant,"

34. Further in *Saxmere Company Limited et al v Wool Board Disestablishemnt Company Limited* [2009] NZSC 72 Blanchard J, speaking for the New Zealand Supreme Court, observed:

> "*The observer must also be taken to understand three matters relating to the conduct of judges. The first is that a judge is expected to be independent in decision-making and has taken the judicial oath to "do right to all manner of people after the laws and usages of New Zealand without fear or favour, affection or ill will". Secondly, a judge has an obligation to sit on any case allocated to the judge unless grounds for disqualification exist. Judges are not entitled to pick and choose their cases, which are randomly allocated… Thirdly, our judicial system functions on the basis of deciding between litigants irrespective of the merits or demerits of their counsel."*

What is bias?

35. A judge who tries a case, whether civil or criminal, must do so with an open and independent mind. That means that he must, in relation to any particular count in an information, consider the evidence which is relevant to that count and whether in the light of that evidence and regardless of what decision he has made in relation to any different charge, the charge is made out. He must ignore any extraneous considerations, prejudices and predilections - to use the language of Lord Bingham of Cornhill in *Locabail (UK) Ltd v Bayfield Properties Ltd* [2000] QB 45. A judge is, as the *Saxmere Company* case confirms, expected to be independent in his decision making. He is to be regarded as biased if he allows extraneous considerations to govern or influence his conclusions; and his judgment may be set aside if there was a real risk that he would do so. That these are the duties of a professional judge is something of which the well-informed observer would be well aware, and which, absent some indication to the contrary, he would expect that the judge could, and would, fulfil.

36. Bias may take many forms. It may arise from some connection (either amicable or hostile) of the judge, or those close to or connected to him, to one of the parties, or to a witness, or because of his membership of some organisation or devotion to some cause. These are some of the classic forms of bias. In the present case the bias, the risk of which is relied upon, is that because the judge finds the defendant's evidence in respect of one charge not credible or worthy of belief he would find, or incline to find, her evidence on another charge incredible as well.

37. If a judge tries two cases against the same defendant, and finds his evidence in each case incredible, he is not to be regarded as biased because he took the same view of the defendant's credibility in the second case as he did in the first; nor is the risk that he might take the same view a grounds for recusal. The position would be different if there was a real possibility that the judge would not, or did not, properly and fully consider and evaluate the evidence in the second case in order to

determine whether the evidence of the defendant in that case was not worthy of belief but, rather, decided the second case against the defendant because or largely because he had not believed him in the first.

38. If it were otherwise it is difficult to see how, if two cases were heard together pursuant to section 480 of the Criminal Code on the grounds that together they constituted a series of offences of the same or of a similar character, the judge could avoid recusal, since, in such a scenario there must always be a possibility, in some cases a very strong possibility, that the judge will find the defendant's evidence incredible on all counts

39. The position is clarified with his characteristic lucidity by Lord Bingham in *Locabail* where he said:

> "*It would be dangerous and futile to attempt to define or list the factors which may or may not give rise to a real danger of bias. Everything will depend on the facts, which may include the nature of the issue to be decided. We cannot, however, conceive of circumstances in which an objection could be soundly based on the religion, ethnic or national origin, gender, age, class, means or sexual orientation of the judge. Nor, at any rate ordinarily, could an objection be soundly based on the judge's social or educational or service or employment background or history, nor that of any member of the judge's family; or previous political associations; or membership of social or sporting or charitable bodies; or Masonic associations; or previous judicial decisions; or extra-curricular utterances (whether in text books, lectures, speeches, articles, interviews, reports or responses to consultation papers); or previous receipt of instructions to act for or against any party, solicitor or advocate engaged in a case before him; or membership of the same Inn, circuit, local Law Society or chambers (KFTCIC v. Icori Estero SpA (Court of Appeal of Paris, 28 June 1991, International Arbitration Report. Vol. 6 #8 8/91)). By contrast, a real danger of bias might well be thought to arise if there were personal friendship or animosity between the judge and any member of the public involved in the case; or if the judge were closely acquainted with any member of the public involved in the case, particularly if the credibility of that individual could be significant in the decision of the case****; or if, in a case where the credibility of any individual were an issue to be decided by the judge, he had in a previous case rejected the evidence of that person in such outspoken terms as to throw doubt on his ability to approach such person's evidence with an open mind on any later occasion;*** *or if on any question at issue in the proceedings before him the judge had expressed views, particularly in the course of the hearing, in such extreme and unbalanced terms as to throw doubt on his ability to try the issue with an objective judicial mind (see Vakauta v. Kelly (1989) 167 CLR 568); or if, for any other reason, there were real ground for doubting the ability of the judge to ignore extraneous considerations, prejudices and predilections and bring an objective judgment to bear on the issues before him****. The mere fact that a judge, earlier in the same case or in a previous case, had commented adversely on a party or witness, or found the evidence of a***

> ***party or witness to be unreliable, would not without more found a sustainable objection.*** *In most cases, we think, the answer, one way or the other, will be obvious. But if in any case there is real ground for doubt, that doubt should be resolved in favour of recusal. We repeat: every application must be decided on the facts and circumstances of the individual case. 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."*
>
> [Bold added]

40. In her judgment the judge drew particular attention to two paragraphs in the judgments in the two cases, which I have already cited. In the light of the guidance in *Locabail* it does not seem to me that the fair minded and well informed observer would conclude that there was a real possibility of bias because the judge had said in each of the cases that he had the opportunity to assess the defendant and to consider her demeanour, and that in the light of that he did not find her to be an honest and credible witness. What he said he had done was what judges are supposed to do in each case, often expressing themselves in similar terms to those used by the Magistrate. In addition, in those paragraphs he explained, in the case of Case no 314, that her explanation in respect of being set up was both implausible and incredible and that she was not a witness of truth *in that regard*; and in Case 039 he referred specifically to the evidence that she had given and its prior versions in the police interviews which caused him not to regard her as a witness of truth.

41. In short, a consideration of the similar language used in conclusionary paragraphs 93 and 85 of the two rulings does not, in my judgment, justify a conclusion that there was a real possibility of bias. Mr Pettingill submitted to us that the contents of the paragraph from Case 314 cited by the judge constituted a rejection of the defendant's evidence in such outspoken terms as to throw doubt on the Magistrate's ability to approach her evidence with an open mind on any later occasion. I cannot regard what was said as in any way outspoken; and, if that was how it should be characterised, I am at a loss to see in what terms the Magistrate could have expressed his conclusion which would not, also, have merited the "outspoken" epithet.

42. And if one ventures further into the judgments of the Magistrate, an exercise which the learned judge did not perform, it is apparent that his analysis of the evidence, including that of the defendant, was extremely detailed and rigorous. In the course of it he gave himself a number of appropriate warnings or self-directions e.g. as to the burden of proof, the significance of lies, the significance or otherwise of something not being put to a prosecution witness, the correct approach to expert evidence, the fact that the onus of proof did not alter because the defendant chose to give evidence, and the fact that, even if he rejected her version, that did not mean that there should be an automatic finding of guilt.

43. In Case 314 his analysis of the defendant's evidence extends from paragraphs 56 to 81, and in Case 039 from paragraph 25-67 i.e. considerably further than the summary I have set out above, which summary I have given so as to indicate that a full consideration of the Magistrate's rulings shows that there was ample basis upon which he could reach his conclusions. These summaries

were then followed by extensive reasoning explaining how and why he reached the verdicts that he did. Nothing that he said in either case comes close, in my judgment, to the sort of observation, or content, that throws any doubt on his ability to approach her evidence in the other case with an open mind.

44. The judge did not refer to *Locabail,* or the passage from it that I have cited, in her judgment; and it does not appear that she considered the critical passages in the judgment of Lord Bingham that I have highlighted above. The paragraphs in the judgments to which she referred do not, as I have said, fall into the "outspoken" category. Further any determination as to whether there was a real possibility of bias falls to be made, absent perhaps some egregious expression by the judge which indicated that he would not approach another case with an open mind (e.g. "her evidence was so blatantly untrue that no one could ever believe a word she said on any occasion"), by examining the entire process of reasoning of the Magistrate.

45. Mr Pettingill submitted that the way in which the two cases had been progressed was a "mess" and that one part of the problem was that they had not been heard separately, with hearings and verdict in one case, followed by hearings and verdict in another. This, he submitted, was unfair. He drew attention to the following chronology of events:

2016	
15 November	Events leading to Information 039
2017	
23 January	Events leading to Information 314
2019	
15 April	Hearing begins in **314**. Crown evidence
2020	
7 January	Hearing begins in **039**. Pleas taken. The defendant pleads guilty to count 2 and admits possession, but not possession with intent to supply, on count 1.
8 January	Day 2 of **039.** The only evidence remaining to be heard was that of Dr Soares.
9 September	Day 2 of **314**

10 September	Day 3 of **314.** Dr Soares gives evidence in the morning in 039 and 314 then resumed.
30 November	Judgment in **314**
2021	
11 January	Judgment in **039**

46. No application was made by trial counsel to the Magistrate to recuse himself in either case at any stage. Mr Pettingill, who was not trial counsel, submitted that counsel should have made such an application. When we asked him when that should have occurred and in what case he told us that, if he had been trial counsel, he would have invited the Magistrate to recuse himself on 7 January 2020 in Case 039 before any plea had been taken, and would have done so indicating that the circumstances were such that it was inappropriate for the Magistrate to hear the case in 039 because a question of bias might arise in 314, but without indicating the nature of the plea that was to be made. The reason for this timing (invitation to recuse before plea) was to avoid the situation where the Magistrate learnt that the defendant pled guilty to possession of the small amount of cannabis in Count 2 of 039 and admitted possession (but not intent to supply) in Count 1 when that knowledge might incline him against the defendant in Case 314.

47. It seems to me that the Magistrate would have found the basis of such an application made before plea opaque. If, as would seem to me highly likely, he had declined to recuse himself in 039, then, Mr Pettingill said, he would have invited the Magistrate to recuse himself in 314 on account of his having now acquired knowledge of the plea to possession under count 2 and the acceptance of possession under count 1 in 039.[1]

48. If the Magistrate did not recuse himself in 039 then, Mr Pettingill said, he should have recused himself in 314 because his knowledge of the stance taken by the defendant in 039 created a real possibility of bias in 314. It might be thought that on that basis there was no need for a recusal in 039 since, whilst knowledge of the stance taken by the defendant in 039 might disqualify the judge in 314 it is difficult to see why that should mean that he could not continue in 039. But, Mr Pettingill submitted, the Magistrate should have recused himself in 039 as well because knowledge of what was being said in 314 might appear to incline the Magistrate to decide against the defendant in 039.

49. It may be that, if Mr Pettingill had been the trial counsel, he would have adopted this course. But if he had done so it would not have been incumbent on the Magistrate to recuse himself in either case. The fact that the same judge is to determine whether the defendant was guilty of possession of drugs with intent to supply on two different occasions (and in markedly different circumstances)

[1] The suggestion that the Magistrate should have recused himself in 314 because he had learnt of the plea under count 2 and the acceptance of possession under count 1 in 039 is difficult to reconcile with the fact that, as part of her evidence in 314, the defendant had revealed that her former boyfriend had, supposedly, said that "*he was going to assist Police to help me get a higher sentence to my first case*"

does not. ordinarily speaking, mean that, to the well informed observer, there is a real possibility of bias; and the fact that the same judge may find, or that he has found, the evidence of the defendant to be unreliable in one case does not, without more, found the basis of a valid claim of apparent bias in the other. As support for such standard propositions, one needs look no further than the practice in the criminal courts of calling upon lay jurors (and not only experienced lawyers such as the Magistrate) regularly to try different counts on the same indictment, based upon different, even if related, factual circumstances. Further, whilst it was desirable that the cases should be heard one after the other, and not interposed to the extent set out above, the fact that they were heard in the order in which they were is not something that would cause the fair-minded and informed observer to think that there might be bias.

50. In those circumstances the learned judge was, in my view, wrong to conclude that there was a real possibility of bias in either case. I am fortified in that conclusion by the fact that at no stage until the appeal to the Supreme Court did experienced counsel for the defendant, whom I would regard as an acceptable proxy for the informed and fair minded observer, ever suggest that the Magistrate should recuse himself.

51. If this was a civil case the defendant would be taken to have waived any right to complain of apparent bias. A defendant, who knows the facts that are said to give rise to an appearance of bias, cannot sit through a civil trial without inviting the judge to recuse himself, and then, having lost, submit that he should have done so. The position may be different in crime but, even if that is so, which I do not decide, the failure to make any application must be a strong indicator that no sound basis for doing so exists.

52. In those circumstances the appeal of the Crown should be allowed and the convictions restored.

BELL JA:

53. I agree, and would just wish to add that there seems to be an increasing tendency in this jurisdiction on the part of certain counsel to call for recusal when the underlying circumstances do not justify such a course, on occasion with a view to securing some advantage in litigation. As Lord Bingham said in *Locabail*, set out by the President at paragraph 39 supra, but using the words of *Porter v Magill* rather than those in *R v Gough*, "*it would be dangerous and futile to define the factors which may or may not give rise to a real possibility of bias*". Practitioners would be well advised to read this case carefully before making an unjustified assertion that a particular judge is someone in respect of whom there is an appearance of bias.

SMELLIE JA:

54. I agree