BARBADOS

IN THE SUPREME COURT OF JUDICATURE

HIGH COURT

Civil Division

Nos. 1043, 1045 and 1062 of 2011
Civil Suit No: CV2248 of 2012

Between:

FREDERICK HAWKESWORTH	**First Applicant**
SEAN GASKIN	**Second Applicant**
JOHN WAYNE SCANTLEBURY also known as) JOHN WAYNE TROTMAN	**Third Applicant**

And

THE SUPERINTENDENT OF PRISONS	**First Respondent**
THE ATTORNEY-GENERAL	**Second Respondent**
THE DIRECTOR OF PUBLIC PROSECUTIONS	**Third Respondent**

Before: The Honorable Sir Marston C. D. Gibson, K. A., Chief Justice

2013: May 6 and 9; October 17

Mr. Ralph A. Thorne, Q.C. in association with Ms. Mechelle Forde, Attorneys-at-law for the First and Second Applicants

Mr. Hal McL. Gollop, Q.C., Attorney-at-Law for the Third Applicant

Ms. Beverley Dolores Gadsby, Q.C. of the Attorney General's Chambers, Attorney-at-Law for the Respondents

DECISION

[1] **Gibson, CJ:** Before me is an oral application seeking that I recuse myself from the hearing of *habeas corpus* proceedings filed by the Applicants in these extradition

proceedings on the ground that statements contained within a written decision that I had previously delivered on an earlier application in this same matter betrayed apparent bias or partiality against the First and Second Applicants. For the reasons which follow, the application is denied.

[2] The circumstances in which the application was made are as intriguing as the application itself. Counsel for the First and Second Applicants, Mr. Ralph Thorne, QC, indicated his intention to apply for my recusal by letter dated 3 May, 2013, hand-delivered to my chambers at about 3:00 p.m. on a Friday at the start of a weekend, and just 3 days prior to the date set for hearing, namely Monday, May 6, 2013, the same date scheduled for the hearing of the *habeas corpus* proceedings. Even more interesting, this was almost 5 months after the decision containing the allegedly offending comments in question.

[3] Mr. Gollop, QC, who appears in these proceedings on behalf of the Third Applicant, has declined any invitation to join Mr. Thorne, QC in the request for my recusal, although he has made oral submissions with respect to the recusal application. The submissions will be set out in due course.

[4] **Procedural History:**

In considering this application for recusal, it is necessary for me to begin by briefly recounting the procedural background of the matter in which this application arises, the context of which is required to appreciate the comments forming the basis of the complaint and also essential to the making of any determination as to whether those comments reasonably justify an apprehension of bias.

[5] These proceedings arise out of a formal request by the Government of the United States of America to the Government of Barbados for the extradition of Frederick Hawkesworth, Sean Jackson and John Wayne Scantlebury to answer charges of conspiracy to distribute 5 kilograms or more of cocaine intending and knowing that it would be imported into the United States and, in the case of Hawkesworth alone, to answer an additional charge of distributing 500 grams or more of cocaine intending and knowing that it would be unlawfully imported into the United States.

[6] A criminal complaint relating to the said charges was issued by the District Court for the District of Colombia on May 19, 2004. The Applicants were arrested in Barbados in that same month, on May 27, 2004, pursuant to a provisional warrant of arrest that had been issued by then Chief Magistrate Clyde Nicholls on May 26, 2004 under ***section 10(1)*** of the ***Extradition Act, Cap. 189 of the Laws of Barbados***. On their arrest they were brought before the Chief Magistrate and remanded into custody, but were subsequently released on bail.

[7] Warrants for their arrest were signed in Washington, D. C. on June 16, 2004 and on June 17, 2004, a Federal Grand Jury returned an indictment charging the Applicants with the offences for which their extradition was sought. Extradition proceedings for the committal of the Applicants then commenced, again before Chief Magistrate Nicholls, on August 4, 2004.

[8] During the committal proceedings, a number of submissions were made on behalf of the applicants. The Magistrate rejected the applicants' submissions and they sought judicial review. The applications were heard by ***Reifer J*** who dismissed them holding, *inter alia*,

that they had been made prematurely. She accordingly directed that the matter be remitted to the Chief Magistrate in order for the committal proceedings to be completed.

[9] On the Applicants' appeal, the decision of ***Reifer J*** was upheld by the Court of Appeal who dismissed their appeal. Leave was, however, given to appeal to the Caribbean Court of Justice ("CCJ") upon two conditions, namely, (i) the payment of security for costs in the amount of $15,000.00 within 60 days of the Order; and (ii) the filing of a list of documents to be included in the record of appeal within 90 days of the Order. The Applicants failed to satisfy both of these conditions and the Registrar of the High Court therefore issued a certificate of non-compliance. The Applicants' application to the Court of Appeal for leave to appeal "in *forma pauperis*" was dismissed as was their subsequent application to the CCJ for special leave to appeal.

[10] Pursuant to the directions of ***Reifer J*** and the Court of Appeal, committal proceedings were resumed in January, 2011 and on June 9, 2011 Chief Magistrate Nicholls, satisfied that the evidence before him justified the committal of the Applicants to stand trial on the charges against them in the United States, committed the Applicants to Her Majesty's Prison Dodds.

[11] Before the conclusion of the committal proceedings, however, the Applicants filed proceedings in the High Court alleging that their legal and constitutional rights had been breached because of the manner in which the committal proceedings before Chief Magistrate Nicholls were being conducted. The committal proceedings concluded before this application came on for hearing.

[12] On conclusion of the committal proceedings, counsel for the Applicants also filed *habeas corpus* proceedings on June 15, 2011 seeking bail. This application came on for

hearing before ***Alleyne J*** (then acting) but its hearing could not be concluded before his tenure as acting judge came to an end. Pursuant to **Rule 2.4(4)(a)** of the ***Barbados Supreme Court (Civil Procedure) Rules, 2008***, I therefore assigned the matter to myself and proceeded to hear the bail application. A written decision on the bail application was delivered on December 27, 2012 and in that decision I concluded that, given all of the circumstances of the case, bail should not be granted to the Applicants.

[13] Towards the end of my written decision on the bail application, I made the following observations:

> [52] If I may add another, closing, observation, it is my view that this judgment ought to signal the end or, in the words of that celebrated wartime Prime Minister of Great Britain, Sir Winston Churchill, "the beginning of the end" and not "the end of the beginning" of the litigation saga of this case and these applicants. The **Extradition Act** only affords an applicant one of two options after committal by a magistrate, namely, an application for leave to appeal or apply for a writ of habeas corpus…
>
> [53] The applicants have opted to seek habeas corpus and these applications have been granted and, in the case of applicant Hawkesworth, granted twice to the limited extent that the applicants have been produced for hearing in this Court. Despite the robust statement of Hawkesworth in para 9 of his Affidavit in Support of the second habeas corpus application that he "intend(s) to continue to contest the said extradition proceedings to the full extent of the recourse that is available to me", it is my considered view that the recourse has run its course. If, as he and his co-applicants assert, they are innocent of all charges and the CS' evidence has been entirely discredited, that determination ought to be made in the US District Court in the District of Colombia, and not by serial applications in the Barbadian Courts which seek, not a determination of their guilt or innocence, but a hope of discharge by dint of attrition. This further stretches already stretched judicial resources when the final chapter in this saga should be written not here, but elsewhere. This is also true "bearing in mind that it rests largely with [the applicants themselves] how long [they are] detained before [they are] sent abroad, and that, when [they are] sent abroad, [they] can apply there to be admitted to bail" (per Lord Russell of Killowen CJ in **Spilsbury,** supra at 623).

[14] Counsel for the First and Second Applicants took exception to those concluding comments above and the oral application for my recusal ensued.

[15] **Submissions**:

As I noted at the start of this decision, the application for recusal was made orally on the date scheduled for the hearing of the *habeas corpus* application, more than five months after my decision on bail had been delivered. Mr. Thorne, QC asserted that it was only after very recent consultations with his clients that they expressed some disquiet about the comments, and that was why he waited until five months had elapsed before filing the application, on a Friday afternoon prior to the *habeas corpus* hearing which was to occur the following Monday. During the course of the hearing, legal submissions were made by Counsel for the First and Second Applicants. To these submissions, Counsel for the Third Applicant and Counsel for the Respondents briefly responded.

[16] Mr. Thorne, QC submitted that there was no better authority on bias than the administrative law textbook, ***Commonwealth Caribbean Public Law (Third Edition)*** written by ***Professor Albert Fiadjoe***, a former Dean of the Faculty of Law at the Cave Hill Campus of the University of the West Indies. Mr. Thorne referred to page 255 where ***Professor Fiadjoe*** had quite rightly asserted that the right to a fair hearing enshrined under Commonwealth Caribbean constitutions would be "*very hollow*" unless the hearing was conducted without bias.

[17] Mr. Thorne, QC described his application as one seeking the Court's recusal owing to the fact that portions of its judgment on bail disclosed bias that manifested itself by way of prejudgment. Mr. Thorne, QC explained that the First and Second Applicants sought a new umpire because paragraphs 52 and 53 of the Court's written decision on bail

demonstrated that the Court had pre-judged the issues in the pending *habeas corpus* proceedings.

[18] Mr. Thorne, QC indicated that the language of the Court's decision on bail did not make the First and Second Applicants feel that the Court could and would dispense with their application fairly and solely on its merits. The Court had instead displayed a particular disposition towards the future conduct of the matter. In its written decision, argued Mr. Thorne, QC, the Court had essentially informed the Applicants that the matter was now at an end. It also seemed to pour scorn on the Applicants using words such as "*dint of attrition*" and "*serial applications*". He contended that the decision had been used as an opportunity to condemn the applicants, rather unfairly, for prolonging the matter, suggesting that the matter should now be concluded swiftly.

[19] Mr. Thorne, QC, was careful to stress that the application was not a challenge to the personal integrity of the Court and did not attempt to fix any malice by the Court onto the First and Second Applicants. He also firmly denied that his clients were using this application as an attempt to engage in forum shopping.

[20] With respect to the relevant law, the learned Queen's Counsel submitted that what the Court had to consider was whether enough has been said or done to cause apprehension on the part of the public that the Court could not conduct the matter without bias. He contended that in the mind of the public and in the mind of the fictitious fair-minded bystander, paragraphs 52 and 53 of the judgment demonstrated that the matter had been prejudged by the Court and that there was reasonable apprehension of bias.

[21] In his concluding remarks, Mr. Thorne, QC noted that the judgment was a written judgment that formed part of the record of the matter and the comments therein may

therefore be treated differently from oral remarks made during the course of a hearing. He also pointed out that the comments were, at least according to him, not *obiter dicta* but part of the *ratio*.

[22] Although Mr. Gollop, QC was not party to the application before the Court, he offered some brief submissions grounded upon his observations of the submissions of Mr. Thorne, Q.C. In his submissions, he directed the Court to the case of ***R. v Bow Street Metropolitan Stipendiary Magistrates and Ors ex parte Pinochet Ugarte (No. 2) [1999] 1 All ER 577*** in which a member of the House of Lords had been asked to recuse himself on the basis of his own, as well as his wife's, involvement with a charity. He submitted that, unlike the ***Pinochet*** case, the question of whether there was apparent bias in this matter because of the comments I had made was not as obvious. He pointed out, however, that while the applicable test had, since the decision of the Privy Council in ***Meerabux v Attorney-General of Belize [2005] 2 AC 513*** and the House of Lords in ***Porter v Magill [2002] 2 AC 357***, evolved from one of real danger of bias to the real possibility of bias, it had essentially remained the same.

[23] Mr. Gollop, Q.C. submitted that given the circumstances of this case it was reasonable to allege that there was a real possibility of bias evident from the comments. However, he also recognized the validity of the point made by the ***Honorable Justice Hayton*** in his article entitled "***Recusing yourself from Hearing a Case***" about the effect of the passage of time on an allegation of bias. It was therefore his observation that there was also good scope to argue that any bias that may have existed had since dissipated. Mr. Gollop, Q.C. was careful to stress, however, that pursuant to the judgment of the English Court

of Appeal in ***Locabil (UK) Ltd. v Bayfield Properties Ltd. [2000] QB 451,*** if there was any real doubt as to whether there was bias, it should be resolved in favor of recusal.

[24] On behalf of the Respondents, Ms. Gadsby, QC submitted that the appropriate test to be applied by Courts in the Commonwealth Caribbean when considering whether or not to recuse themselves from the hearing of a matter was, as indicated by ***Justice Hayton*** in his article on the subject, not whether there was a real danger of bias but whether there was a real possibility of bias. The Court, she submitted, had to consider whether any fear expressed by the Applicants was objectively justified on the facts of the case.

[25] According to Ms. Gadsby, QC the appropriate question to be asked by the Court applying this test was whether the comments in the decision were such as to preclude an adjudicator from analyzing evidence now put before him and whether a fair-minded observer would conclude that the Court could not deal with the matter in an unbiased manner. She submitted that in the circumstances and given the lapse of time, one can reasonably conclude that a dispassionate and objective hearing of arguments could be done by the adjudicator in the matter. There could, therefore, be no perception of bias by the fair-minded and informed observer and the Court should, accordingly, not recuse itself from the proceedings.

[26] **Discussion:**

There is no contention by counsel for the First and Second Applicants that the Court is actually biased. Their Learned Counsel has instead alleged that, given the conduct of the Court in the form of comments made in its written judgment on bail, the Applicants possess a reasonable apprehension of bias if the proceedings were to continue before me. Apparent bias, which is what is more commonly alleged, and which is being alleged

here, is, however, no less serious an allegation than one of actual bias. Indeed, ***Lord Devlin*** has remarked in relation to actual and apparent bias that "*in truth…the appearance is the more important of the two*": ***See, Patrick Devlin, The Judge at p. 3***.

[27] An allegation that an applicant believes the hearing of a particular matter before a particular judge to be tainted by the reasonable apprehension of bias is an allegation of the utmost gravity, for such an allegation calls into question the impartiality of the Court and its ability to fulfill its constitutional duty to render justice in accordance with the law. It is expected that counsel at the bar will never make such allegations lightly and each allegation, including the one in this matter, will therefore be treated seriously and considered very carefully.

[28] A judge faced with a request for him to recuse himself from proceedings is required to conduct what may sometimes be a delicate balancing exercise. Such a judge must, on the one hand, remind himself that recusal is neither a mark on his record nor a shameful exercise, but may be a necessary action to maintain the appearance of judicial independence and impartiality and instill public confidence in the administration of justice. A judge, on the other hand, must never forget that he has a concomitant obligation to discharge his duty to sit in the cases assigned to him and should not lightly make a decision to recuse himself. Accordingly, a decision to recuse should only be made where a sound reason exists, for to do otherwise would be to permit applications for recusal to be used as a litigation tactic by shrewd attorneys: ***Muir and Others v Commissioner of Inland Revenue [2007] 3 NZLR 495.***

[29] The test for apparent bias has been authoritatively and conclusively determined in a number of cases including the judgment of the House of Lords in ***Porter v Magill [2002]***

2 AC 357 and the decision of the Privy Council in the Belizean case of ***Meerabux v Attorney-General of Belize [2005] 2 AC 513.*** It is well-settled from these and other decisions that the test of apparent bias in the common law of England (and the Commonwealth Caribbean) is whether a fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the Court would be unable to provide the complainant, the First and Second Applicant in this case, with an impartial hearing should the *habeus corpus* proceedings challenging the constitutionality and legality of the committal proceedings before ***Chief Magistrate Nicholls*** continue before it.

[30] The applicable test consists of two steps. A judge who is considering whether to recuse himself should first ascertain all of the facts or circumstances that may have a bearing on the suggestion that he was biased and, second, consider whether a fair-minded and informed observer would, given these facts or circumstances, conclude that there was a real possibility, or a real danger, that the judge would be biased: ***Re Medicaments and Related Class of Goods (No 2) [2001] 1 WLR 700 at para 85 per Lord Phillips, MR.***

[31] **<u>The relevant facts and circumstances</u>**

The relevant facts and circumstances that will be known by the fair-minded and informed observer are all "facts that are capable of being known by members of the public generally": ***Gillies v Secretary of State for Work and Pensions [2006] 1 WLR 781 at [17], per Lord Hope.*** The relevant facts and circumstances do not therefore include the viewpoint of the Court but does extend to the legal background of the matter and the context in which the circumstances of bias arise.

[32] As it has been submitted that the sole evidence of bias in this application is the written comments made in my decision on bail, the relevant circumstances and facts in this matter necessarily include the said comments, which have been reproduced at paragraph 13 above, as well as the procedural background of the matter, which has also been concisely set out above from paragraphs 4 to paragraph 14.

[33] The fair-minded and informed observer will no doubt also be aware that although applications for recusal raise matters of grave concern to the parties, as well as the judiciary and members of public, and should therefore be raised at the earliest possible opportunity, notice of this particular recusal application was given on the eve of the hearing, while the application itself was made orally on the date scheduled for the hearing of the matter, some five months after the written decision had been issued.

[34] The fair-minded and informed observer

The duty of a Court considering an allegation of apparent bias is to place itself in the shoes of a hypothetical observer who is not only fair-minded but informed. The fact that the Court believes that it can conduct further hearings in the matter impartially is of little consequence. It is not the perspective of the judge that is determinative, for as ***Lord Hewart, CJ*** famously declared in ***R v Sussex Justices ex parte McCarthy [1924] 1 KB 256 at 259*** it is important that "justice should not only be done but should be manifestly and undoubtedly be seen to be done". It is therefore the perspective of the observer who is representative of the society from which the case stems and which the judicial system serves that is paramount.

[35] While the fair minded and informed observer is not to be equated with the judicial officer who is asked to recuse himself or any other judicial officer for that matter, he is

also not to be confused with the complainant. The complainant is a litigant with an interest in the outcome of the matter; his perspective will hardly be the same as that of an observer and the assumptions made by the complainant are not to be attributed to the observer unless such assumptions can be objectively justified: ***Helow v Secretary of State for the Home Department [2008] 1 WLR 2416, per Lord Hope at p 2419***.

[36] So, who then is this fair-minded and informed observer from whose perspective the test for apparent bias is to be conducted and, more importantly, what characteristics may be imputed to him? The fair-minded and informed observer is a judicial construct described by ***Lord Hope*** as "a creature of fiction" possessing attributes that most ordinary persons struggle to ever attain: ***Helow ibid at p. 2419***. His characteristics have been judicially considered in a number of cases.

[37] ***Kirby J***, for example, in the Australian case of ***Johnson v Johnson [2000] 201 CLR 488*** cited both by ***Justice Hayton*** in his article on recusal as well as by the House of Lords in a number of its decisions, described the fair-minded and informed observer in the following manner:

> Such a person is not a lawyer. Yet neither is he or she a person wholly uninformed and uninstructed about the law in general or the issue to be decided. Being reasonable and fair-minded the bystander, before making a decision important to the parties and to the community, would ordinarily be taken to have sought to be informed on at least the most basic considerations relevant to arriving at a conclusion founded on a fair understanding of all the relevant circumstances. The bystander would be taken to know commonplace things, such as the fact that the adjudicators sometimes say, or do, things that they might later wish they had not, without necessarily disqualifying themselves from continuing to exercise their powers… Acting reasonably the fictitious bystander would not reach a hasty conclusion based on the appearance evoked by an isolated episode of temper or remarks to parties or their representatives, which has been taken out of context.

[38] It is clear from the dictum of ***Kirby J*** that the fair-minded characteristic of the observer means that he does not arrive at hasty conclusions but reserves judgment until he hears, considers and understands both sides. He is not, to quote ***Kirby J*** once more, "unduly sensitive or suspicious", but he is also not naïve or complacent: ***Helow per Lord Hope at para 2***.

[39] The fair-minded observer is also informed, in that he is not only aware of all relevant matters, but will be aware as to what matter is relevant and what is not. He is thus aware of the relevant legal traditions and culture: ***Lawal v Northern Spirits Ltd. [2004] 1 All ER 187, per Lord Steyn at para 22***. He also understands what ***Archie JA*** (as he then was) termed "the social (and political) reality that forms the backdrop to the case": ***Panday v Virgil (unreported), Trinidad and Tobago Court of Appeal, Magisterial Appeal No. 75 of 2006, Decision of April 4, 2007 at para 11.***

[40] **Presumption of Impartiality**

A fair-minded and impartial observer would certainly be aware that the judges of the Barbados Supreme Court form part of an independent and impartial judiciary. Pursuant to ***section 83*** of the ***Constitution of Barbados***, all Supreme Court judges are required, before assuming office, to swear an oath to conduct the duties of their office "without fear or favor, affection or ill-will." Judges are very carefully selected and are selected for their office by virtue of their legal training and legal experience, as well as their intellect and integrity. They are, as ***Ward LJ*** noted in ***Jones v. Das Legal Expenses Insurance Co. Ltd. and Others [2003] EWCA Civ 1071, at para 28***, trained to judge and to do so objectively and dispassionately. The law rightfully then assumes that they can

disabuse their minds of any irrelevant personal beliefs or predispositions and decide a case dispassionately and solely on the evidence proffered: ***Ibid***.

[41] The presumption of impartiality accorded to a judge does not undermine the need for constant vigilance of judges; the presumption is rebuttable. However, the presumption "carries considerable weight" and the threshold for displacement is high and requires cogent and persuasive evidence ensuring that the office is accorded the respect that it entails and deserves: ***R v S (RD) [1997] 3 SCR at para 32 per L'Heureux-Dubé and McLachlin, JJ***. Mere suspicion is certainly not in itself sufficient: ***Panday v Virgil (unreported), Trinidad and Tobago Court of Appeal, Magisterial Appeal No. 75 of 2006, Decision of April 4, 2007, per Archie J.A. (as he then was) at para 9***.

[42] **Critical comments**

Although ***Howell v Les Millais [2007] EWCA Civ 720*** concerned actual bias rather than apparent bias, the observation at paragraph 8 of ***Sir Anthony Clarke, MR***, who gave the judgment of the Court, remains equally relevant for either situation. ***Sir Anthony Clarke, MR*** pointed out in that paragraph of his judgment that:

> The mere fact that a judge has decided a case adversely to a party or criticized the conduct of a party or his lawyers will rarely if ever be a ground for recusal.

[43] One case in which a judge was asked to recuse himself because of comments made during the course of proceedings was the English case of ***El-Farargy v El-Farargy et al [2007] EWCA Civ. 1149,*** which was not cited before me but of which I took judicial notice. In this case, a trial judge had made comments during the pre-trial review of a highly contentious application for ancillary relief in matrimonial proceedings involving a Muslim couple in which the husband was Arab. The appellant, who was also Arab and

had appeared in the matter as an intervener, had asked the judge to recuse himself, arguing that the comments made by the judge revealed apparent bias towards the Appellant. The judge's refusal to do so was appealed to the English Court of Appeal, which was then required to consider whether he should have acceded to the recusal application.

[44] The comments about which the Appellant in ***El-Farargy*** complained were categorized by the Court of Appeal into 2 groups. While the second group were described by the Court of Appeal as "thoroughly bad jokes" that could rightly be perceived as racially offensive and which the Court found mocked and disparaged the nationality, ethnic origins or faith of the Appellant (See ***El-Farargy ibid at para 30),*** it is the first group which are more relevant to the facts of this case.

[45] The first group of comments related to the *prima facie* opinion of the case which the trial judge had expressed in open court that he had formed of the matter. The judge had firstly indicated that he "had formed a view of the case" and then stated that he "may be persuaded out of the near conviction" he had formed of the matter. The Appellant contended that these comments by the judge demonstrated that he had formed a strong opinion in favor of the case put forward by the wife and had closed his mind to that of the husband and the Appellant.

[46] ***Ward LJ*** giving the decision of the Court of Appeal held that the trial judge had been correct not to recuse himself on the ground that a fair-minded and objective observer would conclude from those comments that he had already made a determination of the matter. He held that a trial judge was entitled to form a preliminary view of a matter before trial or before conclusion of trial proceedings, observing at para 29 that:

> A person may at an intermediate stage legitimately reach a prima facie view of greater or less strength, which in either event can be dispelled at the final hearing on dispassionate assessment of the evidence then produced.

[47] In making this observation, he pointed out earlier at para 26 of his judgment that:

> A fair-minded observer would know, however, that judges are trained to have an open mind and that judges frequently do change their minds during the course of any hearing. The business of this court would not be done if we were to recuse ourselves for entering the court having formed a preliminary view of the prospects of success of the appeal before us.

[48] The observations of ***Ward LJ*** are instructive. These observations echo the comments of his brother in the English Court of Appeal, ***Laws LJ***, who had earlier asserted in ***Sengupta v Holmes [2002] EWCA Civ 1104*** that:

> Absent special circumstances a readiness to change one's mind upon some issue, whether upon new information or simply on further reflection, and to change it from a previously declared position, is a capacity possessed by anyone prepared and able to engage with the issue on a reasonable and intelligent basis. It is surely a commonplace of all the professions, indeed of the experience of all thinking men and women.

[49] In ***Locabail v Bayfield Properties Ltd, [2000] QB 451, at [25]***, an English Court, described by ***Justice Hayton*** as "the strongest possible Court of Appeal (comprising the LCJ, the MR and the V-C)" opined as follows:

> [A] real danger of bias might well be thought to arise. . . if, in a case where the credibility of an 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 grounds 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.

[50] Hence, much closer to home, in the Privy Council decision in ***Berry v DPP, [1996] UKPC 37, (1996) 50 WIR 385***, the Judicial Committee of the Privy Council had remitted a case to the Jamaican Court of Appeal with a direction to quash the appellant's conviction, and to determine whether to acquit him or to order a new trial. The Court of Appeal panel deciding on the remittitur included two members who had sat on the original panel that had originally dismissed the appellant's appeal against conviction and had, in the process, expressed some strong and outspoken views as to the correctness of the jury's verdict. The Privy Council held that there was no real danger of bias.

[51] **<u>Application</u>**

The fair minded and objective observer, cognizant of the nature of the judicial function, will certainly not conclude that the mere fact I have ruled adversely against the First and Second Applicant in the proceedings on bail demonstrates apparent bias against the Applicants.

[52] As to the comments within the written decision, it cannot be forgotten or ignored that the comments of which the First and Second Applicants complain were made in the context of extradition proceedings that extended for 7 years before a committal was made and that these proceedings lasted for this length of time because of applications and appeals made by Counsel for the Applicants during the course of the committal proceedings before the Chief Magistrate. A fair minded and informed observer, already aware of the pressures on the nature of extradition proceedings and the pressures on judicial time, can surely appreciate the context that led to the making of these comments by the Court. The comments relate to the conduct of these proceedings by counsel for the First and Second Applicants and/or the First and Second Applicants themselves. Nevertheless,

such an observer will, in my opinion, conclude that there is nothing in the comments complained of which remotely suggests that the Court has prejudged the issues which are alive in the *habeas corpus* proceedings still pending before it, especially given that the record is still to be developed on this issue.

[53] Having ascertained all of the circumstances which have a bearing on the allegation that there is a reasonable apprehension of bias on the part of the First and Second Applicants and having considered whether a fair minded observer informed of all of these circumstances would conclude that the apprehension of bias by me was reasonable, the only conclusion at which I am able to arrive is that an objective, fair-minded and informed observer would not regard the comments complained of, whether examined in isolation or combination, as pre-judgmental or as a basis on which to ***reasonably*** fear bias on my part. Accordingly, I find that the allegation of apparent bias by the First and Second Applicants has not been substantiated and cannot justify my recusal from the hearing of this matter. The Application is, accordingly, denied.

[54] In the premises, I make no orders as to the cost of the applications.

[55] The parties are directed to appear before me for the continued hearing in the *habeas corpus* application on 20 November, 2013.

Chief Justice