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Judgment: approved by the Court for handing down | *Delivered:* **10/09/10**

*(subject to editorial corrections)**

IN THE CROWN COURT IN NORTHERN IRELAND

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Sitting at Belfast

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THE QUEEN

-v-

GARY JONES

_____

RULING NO. 1: RECUSAL

_____

McCLOSKEY J

I Introduction

[1] This ruling determines an application by the Defendant that I should recuse myself as trial judge. The application is based on my knowledge of the following information relating to the history of this prosecution:

(a) The earlier judgment of the Court of Appeal[1]

(b) A subsequent retrial of the Defendant, which was aborted and had no outcome in consequence.

Background

[2] The Defendant is charged with one count of doing an act with intent to cause an explosion and a further count of possession of an explosive substance with intent to endanger life, contrary to Sections 3(1)(a) and 3(1)(b) respectively of the Explosive Substances Act 1883 ("*the 1883 Act*"). The history of this prosecution is as follows:

[1] [2007] NICA 28.

(a) On 27th October 2006, following a trial before Morgan J, the Defendant was acquitted of attempted murder (then the first count on the indictment) and convicted of causing an explosion, contrary to Section 2 of the 1883 Act [no longer alleged] . He was sentenced to 14 years imprisonment.

(b) In a reserved judgment delivered on 5th July 2007, the Court of Appeal allowed the Defendant's appeal and ordered a retrial.

(c) Subsequently, the Defendant's first re-trial was aborted, with no outcome. As a result, this is his second re-trial.

(d) On 28th May 2010, the court (Hart J) conducted a pre-trial review. On that occasion, it was represented that there were no outstanding applications and both prosecution and defence were ready for trial. A fresh trial date in June 2010 was allocated.

(e) The scheduled retrial of the Defendant did not proceed in the event and a new retrial date of 7th September 2010 was allocated. This was later adjusted to 13 September, by virtue of the court calendar.

[3] During the intervening period, a contentious Notice of additional evidence was served by the prosecution. This came to light when the court conducted a further, routine pre-trial review, on 3rd September 2010. As a result, a preliminary hearing was convened (initially, on 7th September 2010) for the purpose of considering any application by the prosecution or the defence and ruling accordingly. On this occasion, I informed the parties of my knowledge as specified in paragraph [1] above. This became the impetus for the present application.

The Prosecution Case

[4] This is conveniently rehearsed in the judgment of Higgins LJ:

> *"[7] On 21 July 1998 a white transit van was driven into a yard and disused car park off Monaghan Street Newry, which is adjacent to Corry Square police station. A mortar device, which comprised a large gas cylinder, was launched from the rear of the van. It passed through the roof of the vehicle and landed a short distance in front of the van, but did not explode.*
>
> *[8] The white van had, before turning into the yard, struck a car which was parked on Monaghan Street. Finbar Lennon who worked in an office in Monaghan Street Newry heard the crash shortly after 4.30pm. On going outside he saw that the car had been damaged and when he looked up the yard which adjoined his office, he saw the white transit van moving across the top end of*

the yard. A bystander told him that the white van had hit the car. He next noticed a man whom he did not recognise walking towards him down the yard. He described the man as approximately 18-20 years old, 5′ 6″ to 5′ 8″, of slim build. He was wearing glasses with heavy glass, a black monkey type hat and a yellow hard hat of the type used in the construction industry. He approached him and asked him who he was, what he was doing and whether he had hit the car driving into the yard. The man did not reply to these questions, even when repeated. Mr Lennon took hold of the man's jacket as the man walked past him and a struggled ensued on the footpath in Monaghan Street. In the course of the struggle the man's jacket came off as he ran away. Inside the jacket there was also a white jumper. The yellow hard hat which the man had been wearing had come off and was lying near the entrance to the yard. Mr Lennon became concerned as to the circumstances and phoned the police. Another witness observed this man leaving the yard and described him as wearing a blue denim jacket, jeans and shoes, wearing goggles and some sort of scarf under a hard hat. He saw Mr Lennon tackle the man and struggle with him. He described the man as 5′ 9″ and skinny. Leo O'Neill also observed the van striking the car as it had turned into the yard. He saw it drive into the car park and turn right at the top. He then noticed a man wearing a yellow hard hat, jeans and a denim jacket with a light jumper or something underneath it, walking down from the back of the yard. He also saw the struggle between the man and Mr Lennon in which the man's jacket and jumper came off and his yellow hat fell off. The man ran down Monaghan Street and into Railway Avenue.

[9] Constable McInespie arrived at 4.55pm and spoke to Mr Lennon and the owner of the car which had been struck. As the constable approached the white transit van parked at the rear of the yard he heard a loud explosion from the van. Then a large mortar launched from the rear of the van and landed a few yards in front of it. It did not explode. He and other police immediately began to clear the area. He seized the yellow builder's hat, blue denim jacket and white jumper which had come off during the struggle with Mr Lennon, as well as a pen and a tissue from the denim jacket. Other police officers had attended the scene. Constable Hazlett saw the white van and noted that the back windows were covered in tin foil. He observed the roof of the van blow off and a mortar bomb shoot out in the direction of Corry Square. Constable Cullen described a sudden explosion and observed a mortar launch from the van through its roof in the direction of the police station. The mortar landed a few yards in front of the van and failed to explode. Another Reserve Constable heard a muffled explosion and the roof of the van being ripped open.

[10] Staff Sergeant Saunders of the Explosive Ordnance Disposal (EOD) Squadron of the Royal Logistic Corp arrived at the scene. He removed the mortar launch tube from the back of the van. He noted the presence of the mortar bomb, which was an improvised gas cylinder, lying approximately 3 metres in front of the van in the direction of the police station. He carried out normal EOD action. The separated components of the device were handed over to a Scenes of Crime Officer and later delivered to the Forensic Science Agency. The items were examined by a Principal Scientific Officer supported by other members of staff. They were found to consist of the components of an improvised mortar system comprising a launch frame, mortar bomb with impact type initiation fuse, explosive and booster tube, functioned propellant unit and a timing and power unit. The mortar bomb was a modified gas cylinder with an initiating fuse assembly fitted to it. The fuse assembly included a striker and a rim fire cartridge. To fire the device the gas cylinder mortar is placed in the launch tube which contains a propellant unit connected to a timer power unit (TPU). The TPU provides a time delay before the circuit is complete, whereupon the propellant is detonated. When the mortar is launched by the propellant unit a split pin is withdrawn from the initiating fuse thus arming the mortar. When launched from the rear of a van the mortar passes through the roof towards its target. Provided there is sufficient impact on landing, the striker will initiate the rim fire cartridge and the mortar will explode. The roof is usually cut on several sides so that it will give way on contact with the launched mortar. The range of the device can be affected by the nature of the propellant charge, how tightly the mortar fits into the launching tube and the contact made with the cutaway section of the roof of the van. On this occasion it appeared that the propellant charge had functioned thus launching the mortar but the mortar device itself had not exploded. It was the evidence of the scientific officer that if the mortar had exploded it would have produced a crater in the ground 3-4 metres in diameter and fatal injuries might have been received by those within 100 metres of the explosion.

[11] Forensic examination of the white jumper which had come off the man fleeing the scene, established that there was one small spot of blood on the inside left collar. DNA extracted from the blood stain matched that of the appellant. The combination of DNA characteristics observed in the blood spot would be expected to arise in fewer than one in a billion males unrelated to the appellant. (For ease of reference this is referred to as the appellant's DNA). One short brown hair was found on the denim jacket and 9 short brown and one long brown hair on the jumper. Tests were also carried out on a duvet cover and red baseball cap recovered from inside the van and the timing and power unit.

> *Twelve fine fair hairs were found in the duvet cover and 2 brown hairs in the inside of the baseball cap. There was no fingerprint examination of the interior of the van. The yellow hard hat was checked for fingerprints and 5 were found none of which matched the appellant. There was no fingerprint evidence linking the appellant to the scene of the crime. In respect of the hairs recovered, a partial DNA profile was obtained from one hair found on the jumper which did match the profile of the accused but the combination of DNA bands would be expected to occur in approximately one in 7 of the UK population. This latter finding provided limited support for the assertion that the hair originated from the appellant rather than someone other than and unrelated to him. There was no trace of explosives on the jumper and no other forensic evidence to link the appellant with the scene.*
>
> *[12] The appellant was interviewed by the police about the mortar device on 22 February 2005. In the course of the interviews he was informed that blood found on the jumper recovered at the scene matched his DNA profile. The jumper was produced to him and he was asked if it was his. He was asked to give an account of how the jumper was at the scene. He was asked if he was wearing it when he planted the mortar. He made no reply to any questions during interviews."*

At this juncture, it is appropriate to make two discrete observations:

(a) There now exits a revised indictment, in which the former count of attempted murder no longer features. Secondly, the former second count (causing an explosion, contrary to Section 2 of the 1883 Act) has been substituted by the new first count noted in paragraph [2] above. The renumbered second count was formerly the third count and is unchanged.

(b) Bearing in mind that this is a retrial, I make no assumption that the prosecution case will *now* mirror its predecessor. In this respect, I have been informed that a fresh trial bundle has been prepared and I have given effect to the parties' joint suggestion that this should not be considered by the court at this stage.

Higgins LJ introduced his outline of the prosecution case with the following observation:

> "*The background facts were not in dispute and the issue before the learned trial judge was whether the facts agreed or proved established that the appellant was guilty of any count in the indictment."*

The Present Application

[5] It appears to me that the only point of potential substance which this application raises is that contained in the Defendant's skeleton argument in the following terms:

> *"4. Gillen J, formerly the interlocutory judge in the instant trial, had expressly directed that he could not hear the trial by reason of his knowledge of particular legal applications made before the Court. He further observed, in the course of an ex tempore ruling ,that having considered the judgment of the trial judge at first instance , 'it would be better if the judge hearing the case does not have the judgment come to his attention'. Significant aspects of the first instance judgment are recited within the passages of the appellate court of which this court was inadvertently furnished."*

It will be noted that this earlier judicial pronouncement, invoked by the Defendant, while worthy of due respect, has the status of a mere observation . Moreover, it is couched in limited terms, was made *ex tempore* and belongs to the context in which it was made.

Governing Principles

[6] While the importance of judge and jury being entirely impartial is a longstanding feature of the common law, it has been reinforced by Article 6 ECHR, in an era of sophisticated technology and mass communication. In the contemporary setting, the modern jury is in some ways the antithesis of its predecessor of several centuries ago, as highlighted by Campbell LJ in ***Regina –v- Fegan and Others*** [unreported]. See also ***Regina –v- McParland*** [2007] NICC 40, paragraph [20] especially. I consider that the modern law differs in no material respect from the pronouncement of Maloney CJ almost a century ago, in ***Regina –v- Maher*** [1920] IR 440:

> "*The rule of law does not require it to be alleged that either A or B or any number of jurors are so affected, or will be so affected; but if they are placed under circumstances which make it reasonable to presume or apprehend that they may be actuated by prejudice or partiality, the court will not, either on behalf of the prosecutor or traverser, allow the trial to take place in that county … **It is a wise and jealous rule of law to guard the purity of justice that it should be above all suspicion***".

[Emphasis added].

Thus *perceptions* are all important : the terms of the immutable rule that justice should not only be done but should manifestly and undoubtedly be seen to be done

are familiar to all practitioners. These principles apply to both trial by judge and jury and trial by judge alone.

[7] In considering whether the composition of any court or tribunal poses any threat to the fairness of a given trial, the test to be applied is that of apparent bias, as articulated by the House of Lords in ***Porter –v- Magill*** [2002] 2 AC 357 : would a fair-minded and informed observer conclude that, having regard to the particular factual matrix, there was a real possibility of bias? In ***Regina –v- Mirza*** [2004] 1 AC 1118, the question formulated by Lord Hope was whether a juror had "*knowledge or characteristics which made it inappropriate for that person to serve on the jury*": see paragraph [107]. Bias, in my view, connotes an unfair predisposition or prejudice on the part of the court or tribunal, an inclination to be swayed by something other than evidence and merits.

[8] Practitioners in this field will also be familiar with the exposition of the correct doctrinal approach contained in the judgment of Hart J in ***Regina –v- Grew and Others*** [2008] NICC 6, paragraphs [45] – [50] especially. Other Northern Ireland decisions belonging to this sphere include ***Regina –v- Mackle and Others*** [2007] NIQB 107 and ***Regina –v- Lewis and Others*** [2008] NICC 16. In England, there is a noteworthy contribution to this subject in ***The Queen –v- Weston Justices, ex parte Shaw*** [1987] 1 All ER 255 and [1987] QB 640, where the complaint was that the Defendant had been convicted by magistrates who had knowledge that there were six other outstanding charges against him. The Defendant's legal challenge took the form of an application for judicial review, seeking an order of certiorari quashing his conviction. The Divisional Court dismissed his application, rejecting the complaint of ostensible bias. While the governing test has, of course, evolved subsequently I believe that this decision would be no different today.

[9] The judgment of Lowry LCJ in ***The Queen –v- Campbell and Others*** [1985] NI 354 contains a passage of some significance, in the present context. One of the questions which arose in that appeal was whether, against the background of a successful appeal against conviction resulting in an order for retrial, this history should be known to the court of retrial. The Lord Chief Justice, having recorded the argument that the trial judge (who sat without a jury) "*… had before him a copy of the judgment of the Court of Appeal which directed the new trial*" [at p. 380G], stated:

> *"Whether the judge ought not to be told that he is engaged in a second trial of the accused involves different considerations. If that alone were the extent of his information, there could be no ground of objection. But a second trial may be preceded by a decision of the Court of Appeal, and, if that trial is with a jury, not only would there seem to be no objection to his being appraised of the terms of the judgment of the Court of Appeal, but it may be very desirable that he should know its reasoning. By observing its directions in matters of law, the judge on the second trial may be able to avoid an error which was held to have occurred during the first trial and which led to the appeal and re-trial. If the Court of Appeal is*

> *minded to direct a new trial, it is obviously undesirable that it should express any opinion as to the credibility of evidence or as to how any factual issue should or might be resolved, and in practice that restraint is carefully observed. So long as that is done and, where the ground of appeal is that the verdict was unsafe or unsatisfactory, the judgment of the Court is confined to an analysis of the evidence and a conclusion as to whether such evidence as was accepted as credible pointed towards guilt, there seems to be no possible basis for denying the judge in the new trial access to that judgment. This would appear to be so, even where that trial is conducted by the court without a jury, as in the case of a trial in accordance with section 7 of the Northern Ireland (Emergency Provisions) Act 1978, or where the trial is by a magistrate following an application for judicial review which has led to a direction under Order 53 Rule 9(3) that he reconsider it and reach a decision in accordance with the ruling of the court. Judgments are delivered in open court and their terms are available to the public through the press and also to the profession. It would therefore in practice be virtually impossible to ensure that the judge on a new trial had not read, in whole or in part, the judgment of the court directing that trial; but, if it should in any case appear that he had done so and* ***if that judgment were to contain matter seriously prejudicial to a fair re-trial*** *there is no reason why appropriate steps could not be taken to safeguard the accused."*.

[my emphasis]

Thus the test formulated by the Lord Chief Justice was whether the judgment of the Court of Appeal, where known to the trial judge, *contains anything seriously prejudicial to a fair retrial.* If the judgment contains such offending matter, the next question is *whether appropriate steps can be taken to safeguard the accused.* In a non-jury prosecution, it would appear that, where this stage is reached, it would ordinarily be appropriate to assign a substitute trial judge.

[10] The topic of apparent judicial bias is the subject of an extensive treatise in ***Locabail v Bayfield Properties*** [2000] 1 ALL ER 65. There, the English Court of Appeal formulated the fundamental right in play in the following terms:

> "[2] *In the determination of their rights and liabilities, civil or criminal, everyone is entitled to a fair hearing by an impartial tribunal. That right, guaranteed by* [Article 6 ECHR], *is properly described as fundamental. The reason is obvious. All legal arbiters are bound to apply the law as they understand it to the facts of individual cases as they find them. They must do so without fear or favour, affection or ill will, that is without partiality or prejudice.*

Justice is portrayed as blind not because she ignores the facts and circumstances of individual cases but because she shuts her eyes to all considerations extraneous to the particular case.

[3] *Any judge (… to embrace every judicial decision maker, whether judge, lay justice or juror) who allows any judicial decision to be influenced by partiality or prejudice deprives the litigant of the important right to which we have referred and violates one of the most fundamental principles underlying the administration of justice …*

The policy of the common law is to protect litigants who can discharge the lesser burden of showing a real danger of bias without requiring them to show that such bias actually exists".

Later passages in this seminal judgment serve as a reminder that every recusal application must have a proper, concrete foundation and should, therefore, be scrutinised with appropriate care:

"22. We also find great persuasive force in three extracts from Australian authority. In ***Re JRL, ex p CJL*** *(1986) 161 CLR 342 at 352 Mason J, sitting in the High Court of Australia, said:*

'Although it is important that justice must be seen to be done, it is equally important that judicial officers discharge their duty to sit and do not, by acceding too readily to suggestions of appearance of bias, encourage parties to believe that by seeking the disqualification of a judge, they will have their case tried by someone thought to be more likely to decide the case in their favour.'

23. In ***Re Ebner, Ebner v Official Trustee in Bankruptcy*** *(1999) 161 ALR 557 at 568 (para 37) the Federal Court asked:*

'Why is it to be assumed that the confidence of fair-minded people in the administration of justice would be shaken by the existence of a direct pecuniary interest of no tangible value, but not by the waste of resources and the delays brought about by setting aside a judgment on the ground that the judge is disqualified for having such an interest?'

24. In the ***Clenae*** *case [1999] VSCA 35 Callaway JA observed (para 89(e)):*

'As a general rule, it is the duty of a judicial officer to hear and determine the cases allocated to him or her by his or her head of jurisdiction. Subject to certain limited exceptions, a judge or magistrate should not accede to an unfounded disqualification application.'"

The heart of the judgment is contained in the following passage, which bears repetition in full:

"25. 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 textbooks, 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".*

I have the impression that, in daily practice, the sentiments and guidance contained in the above passages might not always receive sufficient emphasis and attention. Furthermore, it is possible that three decades of non-jury trials in terrorist cases in this jurisdiction have, imperceptibly and progressively, spawned a certain culture. Irrespective of this, there will always be a risk in every litigation context that some recusal applications are made on flimsy , though superficially attractive, grounds and are granted without rigorous scrutiny by an overly sensitive and defensive tribunal.

[10] It is trite that where an application of this kind is made, an asserted risk to the fairness of the trial which is flimsy or fanciful will not suffice. However, the converse proposition applies with equal force. The court is required to make an evaluative judgment based on all the information available. This requires, in the words of Lord Mustill, the formation of "*what is essentially an intuitive judgment*" (***Doody –v- Secretary of State for the Home Department*** [1993] 3 All ER 92, p. 106e). In making this judgment, the court will apply good sense and practical wisdom. Ultimately, the court's sense of fairness, as this concept has been explained above, and its grasp of realities and perceptions will be determinative.

Conclusions

[11] I shall address firstly the second source of the knowledge available to me, as specified in paragraph [1] above. I consider that my knowledge that the Defendant was convicted originally, followed by a successful appeal and an aborted retrial does not, without more, disqualify me from trying him, applying the principles set out above. In my view, this knowledge would not impel a fair-minded and informed observer to conclude that there exists a real possibility of bias.

[12] The gravamen of this application is that the court of retrial should not be aware of the contents of the judgment of the original court of trial. I have neither seen nor read this judgment. Thus, as recorded in paragraph [5] above, this

submission is based on those portions of the initial judgment that are reproduced within the judgment of the Court of Appeal. The latter records, in paragraph [5], that the written statements of most prosecution witnesses, including transcripts of cross-examination of certain witnesses at the committal stage, were read to the court by agreement between prosecution and defence. I interpose here the observation that, at a pre-trial review hearing, it was represented to me that the estimated duration of the Defendant's forthcoming second retrial has been calculated on the basis that much of the prosecution evidence will, again, be presented in agreed form.

[13] As I have already noted, Higgins LJ further observed – in paragraph [6] – that the background facts were not in dispute and the issue was whether the facts agreed or proved established the Defendant's guilt as a matter of law. In paragraph [12], it is recorded that the Defendant was silent during police interviews. In paragraph [14], it is noted that he did not testify on his own behalf. In paragraphs [15] – [17], there are reproduced paragraphs [24] and [26] – [28] of the judgment of the original trial judge. The contents of these passages concern the DNA analysis of a white jumper worn by a fleeing male whom the judge found was the Defendant; the evidence of a witness called on the Defendant's behalf at the trial relating to his former employment and raising the possibility of a purely innocent explanation for his contact with this item of clothing; the judge's finding that the Defendant was wearing the jumper at the material time; and his adverse inference to the effect that the possibility of an innocent explanation had no substance. Having made these findings, the judge convicted the Defendant of causing an explosion contrary to Section 2 of the 1883 Act.

[14] As appears from the judgment of the Court of Appeal, there were essentially four grounds of appeal. The first three grounds related to asserted errors of law and misdirections by the trial judge .These were all dismissed. The fourth ground, which succeeded, embodied the contention that there was no or insufficient evidence that any explosion **or** any explosion likely to endanger life or cause serious injury to property had occurred. In addressing this ground, the Court of Appeal evaluated the evidence of the bomb disposal officer and the forensic scientist relating to the presence of explosive within the mortar device. Having rehearsed the judge's findings in paragraph [29] of his judgment, Higgins LJ concluded:

> *"[44] It is an offence contrary to Section 2 … to cause an explosion of a nature likely to endanger life or cause serious injury to property …*
>
> *The essential ingredient is that the explosion caused is of a nature likely to endanger life or cause serious injury to property. The fact that the mortar device would have had the consequences stated, if it had exploded, does not render the explosion by which it was propelled one likely to endanger life or cause serious injury to property".*

The Court found that this ground of appeal was substantiated, thereby rendering the Defendant's conviction unsafe. The conviction was quashed accordingly.

[15] As the above résumé demonstrates, the judgment of the Court of Appeal reproduces excerpts from the judgment of the first trial judge, contains references to various significant aspects of the evidence adduced at the first trial and documents certain material findings and conclusions of the trial judge. It also expresses the appellate court's view of the sufficiency of the evidence in two particular respects, namely whether there was an explosion and whether same was likely to endanger life or cause serious injury to property. The latter was the issue on which the appeal succeeded and was undeniably an issue of central importance. The judgment of the Court of Appeal favoured the Defendant on this issue, overriding the contrary conclusions of the trial judge. As the newly constituted tribunal of law and fact, I am privy to both.

[16] In my view, the judgment of the Court of Appeal is to be considered in the following way. It records that much of the evidence formerly adduced against the Defendant was non-contentious. It then rehearses material aspects of the evidence adduced, followed by the original trial judge's findings, reasoning and conclusions. Properly analysed, it differs from the trial judge in the appellate court's application of the law to the evidential matrix. Thus the trial judge was found to have committed an error of law. The appeal was allowed on this basis. Bearing in mind the strictures of Lowry LCJ in ***Campbell***, the Court of Appeal's expresses no opinion on either the credibility of any evidence or on how any factual issue should be resolved. Rather, it corrects an error of law.

[17] In every context, the test for apparent bias requires consideration of *a possibility*, applying the information known to and attributes of the hypothetical observer. Some reflection on the attributes of this spectator is appropriate. It is well established that the hypothetical observer is properly informed of all material facts, is of balanced and fair mind, is not unduly sensitive and is of a sensible and realistic disposition. Such an observer would, in my view, readily discriminate between a once in a lifetime jury and a professional judge. The former lacks the training and experience of the latter and is conventionally acknowledged to be more susceptible to extraneous factors and influences. Moreover, absent *actual* bias (a rare phenomenon), the proposition that a judge will, *presumptively*, decide every case dispassionately and solely in accordance with the evidence seems to me unexceptional and harmonious with the policy of the common law.

[18] To the above matrix and analysis the ***Porter v Magill*** test falls to be applied. I must first address the decision in ***Campbell,*** which enshrines the overarching test of whether the appellate court's judgment contains any matter seriously prejudicial to the Defendant's fair re-trial. This is the *ratio decidendi* of this part of the ***Campbell*** judgment, which is binding on this court but must now be applied in a manner harmonious with the ***Porter*** test, having regard to the doctrine of precedent. The two adjustments required, in my view, are the importation of (a) the independent

observer and (b) the real possibility of bias test. The formulation by Lowry LCJ of "*matter seriously prejudicial to a fair retrial*" is to be considered in this sense. I would add that both tests focus attention on practical realities and concrete concerns, to be contrasted with bare assertion or mere conjecture, consistent with the philosophy contained in paragraphs [22] – [24] of ***Locabail***.

[19] Approached through the doctrinal prism thus outlined , I pose the question: what would the hypothetical observer, possessed of the specified information and endowed with the attributes discussed above, make of the present case? In my view, this independent spectator would not entertain the kind of reservation or misgiving necessary to satisfy the ***Porter*** test. Rather, he would conclude that the requisite cloud of concern does not exist, answering the ***Campbell*** question, as adjusted above, in the negative.

[18] Accordingly, I reject the Defendant's application.