[2001–02 Gib LR 252]

ROJAS v. BERLLAQUE

COURT OF APPEAL (Neill, P., Glidewell and Staughton, JJ.A.): July 12th, 2002

Civil Procedure—juries—female jurors—independent and impartial court—substantial exclusion of women from jury lists by Supreme Court Ordinance, s.19 not breach of requirement of "impartiality" in Constitution, s.8(8)—no reasonable and legitimate doubts about impartiality of all-male jury towards female claimant—requirement that jury drawn from representative cross-section of community not within ordinary meaning of "impartial"—reform a matter for legislature

Civil Procedure—juries—female jurors—non-discrimination—no discrimination against women contrary to Constitution, s.1 by Supreme Court Ordinance, s.19, as process of juror selection identical in case of male and female claimant and both equally unlikely to produce female juror

The claimant brought an action in the Supreme Court against the defendant for damages for assault and false imprisonment.

The claimant, who was female, applied for the case to be tried by jury and sought a jury drawn from a jury list on which men and women were included on an equal basis. By s.19(1) of the Supreme Court Ordinance and subject to some exemptions and disqualifications, all men between 18 and 65 were automatically placed on the jury list. Women within this age bracket could volunteer for jury service under s.19(2), but in practice few came forward. There were about 6,000 men on the jury list and between 25 and 30 women. There had not been a jury in the past six years that contained a single woman member and it was almost inevitable that the jury chosen would be all male. The defendant did not object to the claimant's application and the Attorney-General, on the request of the Supreme Court, intervened in the proceedings.

The claimant submitted that (a) a jury selected from the jury list was not "impartial," as required by s.8(8) of the Constitution, as the jurors were not drawn from a panel representative of the community; and (b) s.19 denied her the guarantee of equal protection of the law under s.1 of the Constitution, as when she considered whether to elect for trial by a jury, she had to take into account the inevitability that it would not include persons of her sex.

The Supreme Court (Schofield, C.J.) held that (a) s.19 of the Supreme Court Ordinance was contrary to s.8(8) of the Constitution, as it did not

ensure that the determination of civil rights and obligations was made by an impartial court; and (b) the parts of s.19 which offended the Constitution should be severed; the word "male" should be excluded from s.19(1) and s.19(2) disregarded.

The Supreme Court referred two matters to the Court of Appeal pursuant to s.27 of the Court of Appeal Ordinance: (a) whether it had erred in finding that s.19 offended s.8(8); and (b) whether the order to sever parts of s.19 was correct.

The Attorney-General submitted that (a) s.19 did not offend s.8(8) as there was no legitimate reason to fear that an all-male jury would lack impartiality towards a female claimant; (b) the requirement that a jury be "representative" of the community was not part of the natural and ordinary meaning of "impartial"; and (c) it was for the legislature to consider whether there was an objective justification for a different approach to men and women in relation to jury service.

The claimant repeated her submissions in the Supreme Court and added that (a) the order severing s.19 was correctly made as the tests of textual and substantial severability were satisfied; or (b) alternatively, the court had the power to make the order under s.15(2) of the Constitution.

Held, making the following ruling:

(1) Section 19 of the Supreme Court Ordinance was not contrary to s.8(8) of the Constitution, as a reasonable observer would not legitimately doubt the impartiality of an all-male jury, which would almost inevitably be chosen, towards a female claimant. The ordinary meaning of "impartial" did not require that the jury should be drawn from a representative cross-section of the community. It was not a fundamental tenet of the Constitution that the list of jurors should include all members of the community, which was evidenced by the many occupations that entitled people to be excused or rendered them ineligible. It was for the legislature to decide who should be able to serve on juries and it might in the future wish to re-examine s.19 and make the jury list representative of the community, in order to increase the litigant's and the public's confidence in the administration of justice (*per* Neill, P., at para. 48; paras. 52–54; *per* Staughton, L.J., at para. 72; paras. 74–76; para. 78; para. 81; para. 83; Glidewell, J.A., dissenting, at paras. 100–101).

(2) Moreover, s.19 did not create discrimination contrary to s.1 of the Constitution as the claimant received the same legal protection as a man. The process of juror selection was identical in the case of a male claimant and was equally unlikely to produce a female juror (paras. 55–56; para. 70; para. 102).

(3) The court had exceeded its powers in making the order as to the interpretation of s.19(1) and (2), as it was not made in accordance with the permissible principles of severance. The test of textual severability was fulfilled as s.19(1) remained grammatical and coherent if the word

"male" were deleted, but the more important test of substantial severability was not. The amendment to s.19(1) and the deletion of the whole of s.19(2) changed the substantial purpose and effect of the original provision, as it imposed the obligation of jury service on all persons. The court's power to enforce legislation modified by the principles of severance was the full extent of its powers and therefore the order was not validly made pursuant to s.15(2). The court should have limited its relief to a declaration (paras. 60–61; paras. 63–66; para. 103).

Cases cited:

(1) *Ballard* v. *United States* (1946), 329 U.S. 187; 91 L.Ed. 181, distinguished.
(2) *Bardell* v. *Pickwick*, *Pickwick Papers*, Chap. 33, 1st ed., 354, (1837), referred to.
(3) *D.P.P.* v. *Hutchinson*, [1990] 2 A.C. 783; [1990] 2 All E.R. 836, *dicta* of Lord Bridge applied.
(4) *Litster* v. *Forth Dry Dock & Engr. Co. Ltd.*, [1990] 1 A.C. 546; [1989] 1 All E.R. 1134, referred to.
(5) *Matadeen* v. *Pointu*, [1998] 3 L.R.C. 542, *dicta* of Lord Hoffmann followed.
(6) *Medicaments & Related Classes of Goods (No. 2), In re*, [2001] 1 W.L.R. 700; [2001] I.C.R. 564, *dicta* of Lord Phillips, M.R. followed.
(7) *People* v. *Wheeler* (1978), 583 P.2d 748, *dicta* of Mosk, J. distinguished.
(8) *Piersack* v. *Belgium* (1982), 5 E.H.R.R. 169, followed.
(9) *Police Commr.* v. *Davis*, [1994] 1 A.C. 283; [1993] 4 All E.R. 476, *dicta* of Lord Goff applied.
(10) *Poongavanam* v. *R.*, P.C., April 6th, 1992, unreported, *dicta* of Lord Goff applied.
(11) *R.* v. *Ford*, [1989] 3 All E.R. 445; (1989), 89 Cr. App. R. 278, referred to.
(12) *R.* v. *Gough*, [1993] A.C. 646; [1993] 2 All E.R. 724, referred to.
(13) *R.* v. *Sheffield Crown Ct., ex p. Brownlow*, [1980] Q.B. 530; [1980] 2 All E.R. 444, referred to.
(14) *Taylor* v. *Louisiana* (1975), 419 U.S. 522; 42 L.Ed.2d 690, distinguished.

Legislation construed:

Court of Appeal Ordinance (1984 Edition), s.27: The relevant terms of this section are set out at para. 18.

Supreme Court Ordinance (1984 Edition), s.19: The relevant terms of this section are set out at para. 5.

Gibraltar Constitution Order 1969 (Unnumbered S.I. 1969, p.3602), s.1: The relevant terms of this section are set out at para. 7.
s.8(8): The relevant terms of this sub-section are set out at para. 4.

Constitution of the United States, Sixth Amendment: The relevant terms of this Amendment are set out at para. 92.

Constitution of Mauritius, s.10(1): The relevant terms of this sub-section are set out at para. 27.

D. Hughes for the claimant;
A.S. MacDonald for the defendant;
A.A. Trinidad, Senior Crown Counsel, for the Crown as *amicus curiae*.

1 **NEILL, P.:**

Introduction

This matter comes before the Court of Appeal in the following circumstances.

2 In 2000 Ms. Rojas brought proceedings claiming damages against Mr. Berllaque. These proceedings included a claim for damages for false imprisonment. In these circumstances the claimant was entitled to ask that the action should be tried by a jury: see s.69 of the Supreme Court Act 1981, as applied in this jurisdiction pursuant to s.15 of the Supreme Court Ordinance.

3 By an application notice dated January 7th, 2002, the claimant applied for an order that the case should be listed for trial by jury and that the jury should be drawn from a list of potential jurors on which males and females were included on an equal basis and without distinction by reason of sex. The application notice continued as follows:

> "[A]s the claim includes a claim for false imprisonment, the claimant has the right to ask that her case be tried by a jury.
>
> The provisions of the Supreme Court Ordinance that result in jurors being all male in practice are unconstitutional, and/or have been implicitly repealed by the Constitution."

4 In order to understand the basis of the claimant's application, it is necessary to set out the relevant statutory provisions. Section 8(8) of the Gibraltar Constitution Order 1969 provides as follows: "Any court or other authority required or empowered by law to determine the existence or extent of any civil right or obligation shall be established by law and shall be independent and impartial . . ." It may be noted that the provision for an "impartial" court or other authority is to the same effect as the provision in art. 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms that stipulates an "impartial tribunal."

5 Section 19 of the Supreme Court Ordinance is concerned with liability to jury service. It is in the following terms:

"(1) Subject to the exemptions and disqualifications hereinafter contained every male person between the ages of eighteen and sixty-five years resident in Gibraltar having a competent knowledge of the English language shall be liable to serve as a juror at any trial held by the Supreme Court in Gibraltar.

(2) Any woman between the ages of eighteen and sixty-five may volunteer for service as a juror, and may apply to the Registrar to be included among persons liable for jury service, and the Registrar if satisfied that she has the necessary qualifications for a juror, shall include her name in his jury lists accordingly."

6 The effect of s.19 of the Supreme Court Ordinance is that men who meet the relevant qualifications are automatically placed on the jury list. Women who are so qualified may volunteer for jury service and go through a sifting process conducted by the Registrar. It is common ground that the present position is that there are some 6,000 men on the jury list and between 25 and 30 women.

7 The claimant also relied on the following provision in s.1 of the Gibraltar Constitution Order:

"It is hereby recognised and declared that in Gibraltar there have existed and shall continue to exist without discrimination by reason of race, place of origin, political opinions, colour, creed or sex . . . each and all of the following human rights and fundamental freedoms, namely—

(a) the right of the individual to . . . the protection of the law."

8 Before the application came on for the substantive hearing, the Chief Justice ordered that in view of the nature of the application the Attorney-General should be represented to assist the court.

9 It was argued before the Chief Justice in support of the application that the provisions contained in s.19 of the Supreme Court Ordinance were contrary to the Constitution. In the alternative, it was argued that s.19 must be taken to have been impliedly repealed by the Constitution. It was said that the trial of the claimant's action before an all-male jury would deny her right to the protection of the law and also deny her a court that was independent and impartial. It was not argued that an all-male jury would necessarily be subjectively partial, but that such a jury would not be seen to be impartial because the jury would not be drawn from "a fair cross-section of the community."

The decision of the Chief Justice

10 The Chief Justice heard argument by Mr. Hughes for the claimant, by Mr. MacDonald for the defendant and by Mr. Trinidad, Senior Crown

Counsel, as *amicus curiae*. Mr. MacDonald took only a very small part in the hearing before the Chief Justice. He expressed the view that the defendant saw nothing wrong in a jury being selected from a cross-section of the whole community and he supported the claimant's position in that respect. Mr. Trinidad, however, as *amicus* put forward submissions challenging those made on behalf of the claimant. Mr. Trinidad argued that there was no evidence that a jury comprised of nine Gibraltarian men could not exercise their functions as jurors properly simply because of the gender of the claimant in the case.

11 In the course of the argument before the Chief Justice, he was referred to a number of cases in the United States in which the question of impartiality had been examined in the context of the Sixth Amendment to the United States Constitution. The Chief Justice referred to a number of these cases in his judgment dated May 17th, 2002. He cited passages from the judgment of the Supreme Court in *Taylor* v. *Louisiana* (14) and said:

> "The decision of *Taylor* v. *Louisiana* . . . is particularly interesting for three reasons. First, the jury system under review was similar to that in Gibraltar, in that although women were not disqualified for jury service, the system operated so that very few women, grossly disproportionate to the number in the community, were actually called for jury service. Secondly, that the decision of the court was based on the court's consideration of the guarantee of a hearing before an impartial jury provided for by the Sixth Amendment to the United States Constitution. Thirdly, that the defendant was a man claiming that a jury which would not contain women would not provide him with a constitutional guarantee of a hearing before an impartial jury. In finding that the system of jury selection in Louisiana offended the Constitution, the Supreme Court had this to say (419 U.S. at 530):
>
> > 'We accept the fair-cross-section requirement as fundamental to the jury trial guaranteed by the Sixth Amendment and are convinced that the requirement has solid foundation. The purpose of a jury is to guard against the exercise of arbitrary power—to make available the commonsense judgment of the community as a hedge against the overzealous or mistaken prosecutor and in preference to the professional or perhaps overconditioned or biased response of a judge . . . This prophylactic vehicle is not provided if the jury pool is made up of only special segments of the populace or if large, distinctive groups are excluded from the pool. Community participation in the administration of the criminal law, moreover, is not only consistent with our democratic heritage but is also critical to

> public confidence in the fairness of the criminal justice system. Restricting jury service to only special groups or excluding identifiable segments playing major roles in the community cannot be squared with the constitutional concept of jury trial.'
>
> Although this was said in the context of a criminal trial, the principles of impartiality and confidence in the judicial system are equally relevant to civil proceedings."

12 Later in his judgment the Chief Justice continued:

> "It is acknowledged that the decisions cited are from a jurisdiction different to our own. There are few English authorities to test the American authorities against because the evolution of the jury system has a different history in England and, of course, there is no written and overriding constitution there. It may well be that if such decisions had been before English judges there would have been differences in emphasis and perhaps less mention of the democratic nature of the jury system and more emphasis on the importance of randomness in jury selection.
>
> . . .
>
> What is clear from the English system of jury selection is that there is an attempt to ensure that there is random selection of jurors from a representative cross-section of the community. Whatever the differences between England and the United States in the means by which an impartial jury is selected, there is sufficient commonality between the English and Gibraltar jury systems and that of the United States, in terms of the reasons behind the retention of trial by jury and the principles of impartiality and equality before the law, for me to find the reasoning in the United States' decisions to be compelling. That reasoning answers every objection to the claimant's application which has been made by Mr. Trinidad. There must be a direct relation between the constitution of the jury list and the public's perception of the impartiality of the jury system. If a jury system is to be considered impartial, it is wrong for it to effectively exclude something like half of the eligible members of the community from the jury list by reason of their sex. The impugned provision does not invest our jury system with the necessary character of impartiality as required by the Constitution. I find that s.19 of the Ordinance, so far as it creates a distinction between the sexes in liability to jury service, offends s.8(8) of the Constitution."

13 The Chief Justice then considered what orders he should make. It had been suggested that the problem in the present case could be solved by allowing the jury panel to include the 25 to 30 women who had

volunteered for jury duty as well as the same number of men. The Chief Justice concluded, however, that such a solution would be unsatisfactory because it would not deal with future jury trials.

14 He then turned to consider whether he could sever parts of s.19 so as to exclude those parts which offended the Constitution. On this issue, the Chief Justice was referred to decisions in three Commonwealth courts and also to the decision of the House of Lords in *Litster* v. *Forth Dry Dock & Engr. Co. Ltd.* (4).

15 Having cited passages from these decisions, the Chief Justice concluded his judgment as follows:

> "In my judgment, I should read s.19 of the Ordinance so as to give effect to the intention of the legislature so far as is consistent with the Constitution. I can do so without affecting the intention of the legislature as to residential qualifications, ineligibility and disqualifications of jurors. The preparation of the jury list and a possible revision of the jurors rules could also be effected without any unacceptable exercise of re-drafting and without doing violence to the intention of the legislature except, of course, to bring s.19 into conformity with the provisions of the Constitution. The alternative would be simply to declare s.19 unconstitutional. This would create a totally unacceptable situation. It would create a lacuna and bring the conduct of trials by jury to a halt.
>
> The claimant will have her orders."

16 As I understand the matter, no formal orders have been drawn up following the decision of the Chief Justice. Having examined the judgment, however, and the draft order attached to the application notice and the skeleton argument of the claimant, I am satisfied that the Chief Justice reached the following conclusions:

(1) Section 19 of the Supreme Court Ordinance was contrary to the provisions in s.8(8) of the Constitution, in that it did not ensure that the determination of civil rights and obligations was made by a court that was impartial.

(2) It was possible to give effect to the intention of the legislature by excluding the word "male" in s.19(1) and by disregarding the offending provisions in s.19(2). So read, s.19 would then provide:

> "Subject to the exemptions and disqualifications hereinafter contained every person between the ages of eighteen and sixty-five years resident in Gibraltar having a competent knowledge of the English language shall be liable to serve as a juror at any trial held by the Supreme Court in Gibraltar."

(3) Accordingly, the Registrar should draw up a fresh jury list containing the names of both men and women eligible and qualified for jury service by the criteria set out in the other provisions of the Supreme Court Ordinance.

17 It seems to me to be clear that the Chief Justice reached no conclusion in relation to s.1 of the Constitution.

The nature of the proceedings in the Court of Appeal

18 I have already referred to the fact that before the Chief Justice no opposition to the claimant's application was advanced on behalf of the defendant. Nevertheless, the Chief Justice thought it right that the matter should be tested in this court. The Chief Justice therefore exercised his jurisdiction under s.27 of the Court of Appeal Ordinance which provides:

> "In addition and without prejudice to the right of appeal conferred by the Constitution, the Chief Justice may, if he thinks fit, reserve for consideration by the Court of Appeal, on a case to be stated by him, any question of law which may arise on the trial of any civil cause or matter, and may give any judgment in such cause or matter subject to the opinion of the Court of Appeal, and the Court of Appeal shall have power to hear and determine every such question."

19 Accordingly, on May 28th, 2002, the Chief Justice gave the following ruling:

> "This matter is referred to the Court of Appeal pursuant to s.27 of the Court of Appeal Ordinance.
>
> The questions on which the court's opinion is requested are:
>
> (1) Whether the Chief Justice erred in finding that the provisions of s.19 of the Supreme Court Ordinance offend s.8(8) of the Gibraltar Constitution Order 1969.
>
> (2) If not, whether the orders made by the Chief Justice on his findings were the proper orders to make."

20 Having regard to the terms of the second question posed for this court, I considered whether it was necessary for formal orders to be drawn up by the court below. I am satisfied, however, that the conclusions of the Chief Justice are sufficiently clear and that this court can proceed to hear and determine the questions addressed to us.

The submissions as to the validity of s.19

21 In this court, Mr. MacDonald for the defendant adopted the same stance as he did in the court below. He did not seek to advance any

arguments to us and accordingly, at his request, we gave permission for him to be released from the hearing until judgment was given. In these circumstances, the submissions to us have been confined to those of the Attorney-General, seeking to disturb the decision of the Chief Justice, and of Mr. Hughes, seeking to uphold it.

22 The court is grateful to counsel and to the parties for the written submissions, supported by authorities, that were sent to the members of the court in England. Our preparation in advance of the hearing has therefore enabled us to deal with the matter quite expeditiously.

23 In the course of the argument, the Attorney-General referred us to the decision of the European Court of Human Rights in *Piersack* v. *Belgium* (8). In that case, the court drew attention to the two aspects of impartiality. The court must consider not only a subjective approach which involves endeavouring to ascertain the personal convictions of the judge in the case, but also an objective approach that involves determining whether there is any legitimate reason to fear a lack of impartiality. The court emphasized that what is at stake is the confidence which the courts must inspire in the public in a democratic society.

24 The Attorney-General also drew our attention to the recent decision in the English Court of Appeal in *In re Medicaments & Related Classes of Goods (No. 2)* (6). In giving the judgment of the court, Lord Phillips, M.R. summarized the relevant authorities relating to impartiality and stated the conclusion of the court as follows ([2001] 1 W.L.R. 700, at para. 83):

> "We would summarise the principles to be derived from this line of cases as follows. (1) If a judge is shown to have been influenced by actual bias, his decision must be set aside. (2) Where actual bias has not been established the personal impartiality of the judge is to be presumed. (3) The court then has to decide whether, on an objective appraisal, the material facts give rise to a legitimate fear that the judge might not have been impartial. If they do the decision of the judge must be set aside. (4) The material facts are not limited to those which were apparent to the applicant. They are those which are ascertained upon investigation by the court. (5) An important consideration in making an objective appraisal of the facts is the desirability that the public should remain confident in the administration of justice."

25 With this introduction, the Attorney-General then took us to the main authority on which he relied—the unreported decision of the Privy Council in *Poongavanam* v. *R.* (10) dated April 6th, 1992. The appellant in that case had been convicted of murder in Mauritius. He had been tried before a judge and a jury of nine men and had been convicted by the

unanimous verdict of the jury. He appealed to the Court of Criminal Appeal of Mauritius, the grounds of his appeal relating to a number of alleged misdirections and other failures on the part of the trial judge. That appeal was dismissed in July 1987 in Mauritius. The appellant then appealed to the Privy Council relying on a point that had not been argued below, namely, that his conviction should be quashed because his trial was unconstitutional having regard to the constitution of the jury.

26 At the time of the appellant's trial, women were excluded from jury service in Mauritius, although by an amending Act in 1990 women became eligible for jury service on a voluntary basis.

27 The arguments before the Privy Council were particularly concerned with the provisions of s.10(1) of the Constitution of Mauritius, which provided: "Where any person is charged with a criminal offence, then, unless the charge is withdrawn, the case shall be afforded a fair hearing within a reasonable time by an independent and impartial court established by law." It will be noted that these provisions are similar to those contained in s.8(8) of the Gibraltar Constitution.

28 The Privy Council was referred to some American authorities, including the decision of the Supreme Court in *Taylor* v. *Louisiana* (14).

29 The judgment of the Privy Council was delivered by Lord Goff. This court has been provided with a transcript of the judgment. It is right to point out that this decision has come to light as a result of researches made on behalf of the Attorney-General since the hearing before the Chief Justice. It was not cited in argument to the Chief Justice. Lord Goff said that the cases in the United States appeared to show that a principle was well recognized in the United States that the jury must be drawn from a list which is representative of society. A little later he continued:

> "Where there has been a breach of that principle, convictions have been quashed on the motion of appellants who have invoked the Sixth and Fourteenth Amendments to the Constitution of the United States. Furthermore, in the years since the 1939–45 war, it has become established that the exclusion of women from jury lists will mean that the lists are not representative in this sense. This development appears to have culminated in the decision of the Supreme Court in *Taylor* v. *State of Louisiana*, 419 U.S. 522 (1975).
>
> Whether any such broad principle can be derived from s.10(1) of the Constitution of Mauritius depends on the construction to be placed upon the word 'impartial' in that section. In the natural reading of the words of the section, the provision is directed towards the actual tribunal before which the case is heard, and the hearing before that tribunal; and the introduction of the word 'impartial' is designed to ensure that the members of that tribunal are not only

> free from actual bias towards the accused but also, as the European jurisprudence shows, manifestly so in the eyes of the accused. The American principle, however, transcends such requirements. It is directed not to impartiality in the ordinary meaning of that word, but to the representative character of the list from which the jury is to be drawn. The effect is therefore that, however impartial the actual jury may in fact have been, the principle may nevertheless be offended against if those from whom the jury are selected are not representative of society.
>
> Furthermore, the principle is not directed towards the constitution of the particular jury in question. It is recognised that it is impossible to achieve, by the process of random selection, a representative jury; indeed if the aim was to achieve a representative jury, this could only be done by interference with the process of random selection which itself would not only be open to abuse, but however fairly done could be suspected of abuse, and could never in fact achieve a jury truly representative of all sections of society. This is no doubt why the American principle looks rather to the lists from which individual juries are drawn, and requires that those lists shall be compiled from a fair cross-section of society. This makes it all the more difficult to derive the principle from a provision such as s.10(1) of the Constitution of Mauritius, which is concerned rather with the actual tribunal by which the case is tried and with the impartiality of that tribunal. Whether the jurisprudence of art. 6(1) of the European Convention of Human Rights is likely to develop in that direction, it is very difficult to foresee; but any such development would require a substantial piece of creative interpretation which has the effect of expanding the meaning of the words of art. 6(1) beyond their ordinary meaning.
>
> Their Lordships have, however, come to the conclusion that, in the present case, it is unnecessary for them to answer that question of interpretation in relation to s.10(1) of the Constitution of Mauritius."

30 Lord Goff then proceeded to examine the alternative argument that even if the American principle should be applied in the construction of s.10(1), the exclusion of women from jury service could be objectively justified having regard to the social circumstances prevailing in Mauritius in March 1987. The conclusion of the Privy Council was that the exclusion of women could be objectively justified and they cited passages from judgments of the Court of Criminal Appeal in Mauritius that defended the exclusion of women on social grounds.

31 In the present case, the Attorney-General relied on the decision in *Poongavanam* (10) in two ways. First, he submitted that, though Lord

Goff's *dicta* as to the meaning of the word "impartiality" in the Constitution were strictly *obiter*, they provided clear guidance from the highest tribunal as to the approach that this court should adopt in construing s.8(8) of the Gibraltar Constitution. Secondly, the Attorney-General relied on the actual decision in the Privy Council as establishing the proposition that the treatment of one section of the population differently from another section could sometimes be objectively justified.

32 The Attorney-General did not suggest that the conditions of women in Gibraltar were in any way comparable with those in Mauritius in 1987, but he advanced the general proposition that the question of whether or not there is an objective justification for a different approach to men and women in relation to jury service is a matter more appropriate for consideration by the local legislature rather than by the court. In support of this proposition, the Attorney-General referred us to the more recent decision of the Privy Council in *Matadeen* v. *Pointu* (5). This was another case involving an appeal from Mauritius. The case concerned fundamental rights in regard to the provision of education. It is not necessary for the purposes of the present case to refer to this decision in detail, but I should mention two passages on which the Attorney-General placed reliance. In giving the judgment of the Board, Lord Hoffmann said ([1998] 3 L.R.C. at 552): "A self-confident democracy may feel that it can give the last word, even in respect of the most fundamental rights, to the popularly elected organs of its Constitution."

33 Later, Lord Hoffmann added (*ibid*., at 553):

> "Their Lordships think that the framers of a democratic Constitution could reasonably take the view that they should entrench the protection of the individual against discrimination only on a limited number of grounds and leave the decision as to whether legitimate justification exists for other forms of discrimination or classification to majority decision in Parliament."

34 The Attorney-General therefore submitted that even if we rejected his main argument that s.19 did not on any view offend s.8(8) of the Constitution, the court should not interfere with a form of differentiation between the sexes that had been specifically chosen by the legislature. In this context it is to be noted that the provision whereby women in Gibraltar could volunteer for jury service, that had been first introduced by s.26 of the Supreme Court Ordinance 1960, was reaffirmed, though in slightly different language, in the amending legislation introduced in 1972, three years after the date of the Gibraltar Constitution.

35 Mr. Hughes on behalf of the claimant submitted that the Chief Justice was clearly correct to follow the principle established by the American authorities. It was true that the Chief Justice had not had the

benefit of being referred to the 1992 decision of the Privy Council in *Poongavanam* (10), but that decision did not upset the overwhelming logic of the American approach.

36 Mr. Hughes pointed to the similarity in language between the Sixth Amendment to the Constitution of the United States, art. 6 of the European Convention for the Protection of Human Rights and s.8(8) of the Gibraltar Constitution. All these provisions were concerned with the right of a litigant to an impartial tribunal. In construing the provisions, a uniform approach should be adopted.

37 In the course of his written and oral submissions, Mr. Hughes drew our attention to a number of American authorities that supported the two propositions:

(a) to be impartial, a tribunal had to be truly representative of the community;

(b) to be truly representative of the community, the tribunal had to be drawn from a panel that contained all the various groups within the community. In addition to other authorities and the authorities to which the Chief Justice made specific reference in his judgment, Mr. Hughes cited the decision of the Supreme Court in *Ballard* v. *United States* (1). The court there said (329 U.S. at 193):

> "It is said, however, that an all male panel drawn from the various groups within a community will be as truly representative as if women were included. The thought is that the factors which tend to influence the action of women are the same as those which influence the action of men—personality, background, economic status—and not sex. Yet it is not enough to say that women when sitting as jurors neither act nor tend to act as a class. Men likewise do not act as a class. But if the shoe were on the other foot, who would claim that a jury was truly representative of the community if all men were intentionally and systematically excluded from the panel? The truth is that the two sexes are not fungible; a community made up exclusively of one is different from a community composed of both; the subtle interplay of influence one on the other is among the imponderables. To insulate the courtroom from either may not in a given case make an iota of difference. Yet a flavour, a distinct quality is lost if either sex is excluded. The exclusion of one may indeed make the jury less representative of the community than would be true if an economic or racial group were excluded."

38 American law, said Mr. Hughes, pays attention to the panel from which the jury is drawn because of the objective test of impartiality. It was concerned with public confidence in the administration of justice. Moreover, the American approach accorded with common sense and with most people's expectations.

39 Having referred us to the American authorities, Mr. Hughes then turned his attention to a decision of the Privy Council in *Poongavanam* (10). He submitted that the Privy Council's failure to follow the principle enunciated in the American authorities was based on a misunderstanding of what the American courts had decided. In addition, he suggested that the Privy Council may not have been referred to all the relevant American authorities including *Ballard* (1). It was wrong, said Mr. Hughes, to treat the American focus on the representative character of the list from which the jury is to be called as being separate from an investigation of impartiality. The establishment of a representative cross-section of the community, for the purpose of the panel from which the jury was to be drawn, was the first stage in the selection process of an impartial jury. In other words, the representative panel was a necessary preliminary to the selection of an impartial jury.

40 In addition, Mr. Hughes re-affirmed his submissions to the Chief Justice to the effect that s.19 also offended s.1 of the Constitution. Section 19 did not secure to a woman the equal protection of the law because, unlike a man, a woman in considering whether to elect for trial by a jury would be faced with the fact that it was almost inevitable that the trial would be before a jury that excluded any persons of her own sex.

The answer to the first question

41 Section 8(8) of the Gibraltar Constitution provides: "Any court or other authority required or empowered by law to determine the existence or extent of any civil right or obligation shall be established by law and shall be independent and impartial . . ."

42 It is clearly established by the authorities that, in order to examine the question of impartiality, one must apply both a subjective and an objective test. It is not enough that the judge or other tribunal is free from any actual bias. The objective test of impartiality requires an investigation of all relevant circumstances, so as to exclude any legitimate doubt about the judge's or tribunal's impartiality. The objective test is applied both to preserve confidence in the courts and tribunals and to reassure those who appear before the courts.

43 In the present case we are concerned with the impartiality of a jury. Any system of jury selection is likely to involve a three-stage process. First, the establishment of a pool of eligible jurors from the area served by the court. Secondly, the selection of a panel from which the jurors in a particular case are to be drawn. Finally, at the third stage there is the selection of the actual jurors who are to try the case. It is the impartiality of those who are selected at the third stage that is of crucial importance.

44 Sometimes it is necessary to put questions to potential jurors to find out whether they have preconceived notions about a particular type of

case. Steps are also taken so as to exclude as far as possible any possibility of the selection of a juror who is acquainted with the parties in the case or with the judge.

45 Another feature of the selection of juries is that the selection should be at random. This matter was emphasized by Lord Denning, M.R. in *R.* v. *Sheffield Crown Ct., ex p. Brownlow* (13), where he said ([1980] Q.B. at 541):

> "Our philosophy is that the jury should be selected at random—from a panel of persons who are nominated at random. We believe that 12 persons selected at random are likely to be a cross-section of the people as a whole—and thus represent the views of the common man."

46 As I have already mentioned, Mr. Hughes for the claimant drew the attention of the court to a number of cases decided in the United States of America. These cases culminate in the decision of the Supreme Court in *Taylor* v. *Louisiana* (14), where White, J., delivering the opinion of the court, said (419 U.S. at 527):

> "Both in the course of exercising its supervisory powers over trial in federal courts and in the constitutional context, the court has unambiguously declared that the American concept of the jury trial contemplates a jury drawn from a fair cross-section of the community."

47 Furthermore, it is clear that in the American cases all three stages of the process of jury selection are examined to make certain that the jury is drawn from a fair cross-section of the community. White, J. said in *Taylor* (*ibid*., at 526):

> "Our enquiry is whether the presence of a fair cross-section of the community on venires, panels, or lists from which petit juries are drawn is essential to the fulfilment of the Sixth Amendment's guarantee of an impartial jury trial in criminal prosecutions."

The conclusion reached in the United States is that a fair cross-section must be represented in the pools and lists from which the juries are drawn.

48 For my part, I see great force in the argument that to increase the confidence of litigants and indeed the wider public in the administration of justice, a jury should be drawn from a fair cross-section of the community as a whole. Indeed, I venture to think that in the year 2002 a jury list should be made up of persons who are representative of the community as a whole and that no group or section of a community should be excluded on, for example, the grounds of sex or race. Thus, it may be that the legislature in Gibraltar will at a convenient time wish to re-examine the provisions of s.19 of the Supreme Court Ordinance.

49 However, the question that I have to consider is whether s.19 in its present form offends s.8(8) of the Constitution. In answering this question I now have the guidance of the Privy Council in *Poongavanam* v. *R.* (10), decided in 1992. In that case, the Privy Council was considering the right to a fair hearing by an independent and impartial court established by law in the context of the Constitution of Mauritius. Lord Goff, who delivered the judgment of the Privy Council, clearly had in mind the American cases, including *Taylor* (14), and that both the subjective and objective tests of impartiality had to be satisfied.

50 In the light of the careful and valuable submissions made by Mr. Hughes, I should cite again a passage from Lord Goff's judgment. He said:

> "[T]he introduction of the word 'impartial' is designed to ensure that the members of that tribunal are not only free from actual bias towards the accused but also, as the European jurisprudence shows, manifestly so in the eyes of the accused. The American principle, however, transcends such requirements. It is directed not to impartiality in the ordinary meaning of that word, but to the representative character of the list from which the jury is to be drawn. The effect is therefore that, however impartial the actual jury may in fact have been, the principle may nevertheless be offended against if those from whom the jury are selected are not representative of society.
>
> Furthermore, the principle is not directed towards the constitution of a particular jury in question. It is recognised that it is impossible to achieve, by the process of random selection, a representative jury; indeed if the aim was to achieve a representative jury, this could only be done by interference with the process of random selection which itself would not only be open to abuse, but however fairly done could be suspected of abuse, and could never in fact achieve a jury truly representative of all sections of society. This is no doubt why the American principle looks rather to the lists from which the individual juries are drawn and requires that those lists should be compiled from a fair cross-section of society."

51 The history of what has been called the "representative cross-section rule" has been discussed in a number of articles in the United States. Moreover, the basis for the rule was referred to in *People* v. *Wheeler* (7) in the Supreme Court of California, where Mosk, J. said (583 P.2d at 754):

> "The rationale of these decisions, often unstated, is that in our heterogeneous society jurors will inevitably belong to diverse and often overlapping groups defined by race, religion, ethnic or national

> origin, sex, age, education, occupation, economic condition, place of residence, and political affiliation; that it is unrealistic to expect jurors to be devoid of opinions, preconceptions, or even deep-rooted biases derived from their life experiences in such groups; and hence that the only practical way to achieve an overall impartiality is to encourage the representation of a variety of such groups on the jury so that the respective biases of their members, to the extent they are antagonistic, will tend to cancel each other out."

52 It will be seen, therefore, that the American emphasis on the need at the first stage of the selection process for a representative cross-section is designed to achieve impartiality in a heterogeneous society. But, as a matter of language, the requirement that the actual tribunal should be impartial does not necessarily mean that the pool of potential jurors established at the first stage has to be drawn from a representative cross-section of the community. As I understand it, this is the distinction that Lord Goff was making in the judgment of the Privy Council. In my judgment, this court should follow the guidance, albeit *obiter*, provided by the Privy Council.

53 The right to an impartial tribunal enshrined in s.8(8) of the Constitution means that a litigant is entitled to be assured that there is no actual bias present in any of the jurors and that, on an objective appraisal, there is no legitimate fear that the tribunal will not be impartial. I can well understand that there will be cases, of which this appears to be one, where a person of one sex would feel more content if persons of the same sex were present on the jury. It is for that reason that I have ventured to suggest that the legislature, looking at the circumstances in the present century, might want to reconsider the present provisions in s.19, but, in the light of the European and English authorities to which we were referred, I am not satisfied that the fact that the jury is almost certain to be composed entirely of men creates any legitimate fear that the jury will not be impartial.

54 I have, therefore, come to the conclusion that s.19 of the Supreme Court Ordinance does not offend s.8(8) of the Constitution. I would, therefore, answer the first question accordingly.

55 It will be remembered that Mr. Hughes also addressed the court on s.1. This section is not involved in the questions addressed to us. Nevertheless, I think it is right that I should express my conclusion on Mr. Hughes's submissions.

56 I have set out earlier the way in which Mr. Hughes advanced his argument under this heading. He accepted, however, that his case under s.1 was closely allied with his case under s.8(8). In view of the conclusion that I have reached on s.8(8), I do not consider that the present provisions of s.19 deny the claimant the protection of the law.

The second question: the orders made by the Chief Justice

57 In the light of the conclusion that I have reached on the first question, it is strictly speaking unnecessary to deal with this question. Nevertheless, it may be helpful to say something about the orders made by the Chief Justice.

58 Mr. Hughes argued that the Chief Justice's power under s.15(2) of the Constitution was a very wide power and analogous to the powers conferred in the case of legislation that had come into existence before the 1969 Constitution. He therefore submitted that—

(a) if one applied the conventional test of severance in respect of parts of legislation that were invalid, the course taken by the Chief Justice was permissible because both the tests of textual and substantial severability could be satisfied;

(b) even if these tests could not be satisfied, the powers under s.15(2) were wide enough to enable the Chief Justice to make the order that he did.

59 As I have already stated, it seems clear that the Chief Justice concluded that the claimant was entitled to a declaration that s.19 as presently framed was incompatible with s.8(8) of the Constitution. The Chief Justice went further and ordered that hereafter s.19 could be read as though the word "male" were excluded from s.19(1) and that s.19(2) should be treated as deleted, or at any rate could be ignored.

60 I am clearly of the opinion that even if the Chief Justice was justified in concluding that s.19 offended against s.8(8) of the Constitution, he should have limited the relief to a declaration.

61 The question arises not infrequently as to whether a court can enforce one part of subordinate legislation even though other parts may have been *ultra vires*. This matter was examined by the House of Lords in *D.P.P.* v. *Hutchinson* (3), where the House was concerned with certain by-laws made under s.14 of the Military Lands Act 1892. The question arose whether certain parts of by-law 2 could be enforced notwithstanding that other parts were *ultra vires*. Lord Bridge examined the basis of the jurisdiction to sever. He said ([1990] 2 A.C. at 804):

> "When a legislative instrument made by a law-maker with limited powers is challenged, the only function of the court is to determine whether there has been a valid exercise of that limited legislative power in relation to the matter which is the subject of disputed enforcement. If a law-maker has validly exercised his power, the court may give effect to the law validly made. But if the court sees only an invalid law made in excess of the law-maker's power, it has no jurisdiction to modify or adapt the law to bring it within the

scope of the law-maker's power. These, I believe, are the basic principles which have always to be borne in mind in deciding whether legislative provisions which on their face exceed the law-maker's power may be severed so as to be upheld and enforced in part.

The application of these principles leads naturally and logically to what has traditionally been regarded as the test of severability. It is often referred to inelegantly as the 'blue pencil' test. Taking the simplest case of a single legislative instrument containing a number of separate clauses of which one exceeds the law-maker's power, if the remaining clauses enact free-standing provisions which were intended to operate and are capable of operating independently of the offending clause, there is no reason why those clauses should not be upheld and enforced. The law-maker has validly exercised his power by making the valid clauses. The invalid clause may be disregarded as unrelated to, and having no effect upon, the operation of the valid clauses, which accordingly may be allowed to take effect without the necessity of any modification or adaptation by the court. What is involved is in truth a double test. I shall refer to the two aspects of the test as textual severability and substantial severability. A legislative instrument is textually severable if a clause, a sentence, a phrase or a single word may be disregarded, as exceeding the law-maker's power, and what remains of the text is still grammatical and coherent. A legislative instrument is substantially severable if the substance of what remains after severance is essentially unchanged in its legislative purpose, operation and effect."

62 In *Police (Commr.)* v. *Davis* (9) the Privy Council considered and applied the decision in *Hutchinson* (3) in the context of the Constitution of the Bahamas. In delivering the judgment of the Board, Lord Goff said ([1994] 1 A.C. at 299): "[W]hen the court must modify the text in order to achieve severance, this can only be done 'when the court is satisfied that it is effecting no change in the substantial purpose and effect of the impugned provision.'" The passage cited by Lord Goff was from the speech of Lord Bridge in *Hutchinson*.

63 It is, therefore, quite clear that even though the test of textual severability can be satisfied, severance is not permissible unless the more important test of substantial severability can be satisfied also. In the present case, the question therefore arises whether s.19 as modified by the Chief Justice by the deletion of the word "male" in s.19(1) and by the deletion of the whole of s.19(2), can be said to have effected no change in the substantial purpose and effect of the original provision. For my part, I feel bound to give a negative answer to this question. It seems to me that

a provision that, subject to certain specified exemptions, imposes an obligation of jury service on all persons in Gibraltar who satisfy certain conditions is quite different from a provision that imposes that obligation only on male persons and gives women an option whether or not to volunteer.

64 Accordingly, in my judgment, the Chief Justice was in error in treating s.19 as though the good could be severed from the bad.

65 Finally, I should refer to Mr. Hughes's alternative argument that even if the conventional tests on severability cannot be satisfied, s.15(2) confers sufficient powers on the Chief Justice. In my opinion, however, the court's power to enforce legislation that has been modified by the permissible principles of severance is the full extent of the power that the court possesses. If one seeks to go further, one is trespassing on the authority and the function of the legislature.

Conclusion

66 In these circumstances, I would allow the appeal and set aside the orders made by the Chief Justice. I do not want to part from the case, however, without paying tribute to the careful and valuable judgment of the Chief Justice. I have already referred to the fact that he was not shown the decision of the Privy Council in *Poongavanam* (10). I should also wish to record my appreciation of the careful submissions both of the Attorney-General and of Mr. Hughes, that have enabled this court to reach its conclusions before the members of the court leave the jurisdiction.

67 **STAUGHTON, J.A.:** The legislature of Gibraltar enacted many years ago that no woman should be called for jury service unless she had previously offered to be listed as a person willing to undertake that task. As a result, there are only some 25 or 30 women available to serve as jurors, compared with 6,000 men. This is a cause of discontent for Miss Rojas, the claimant in this action. It is most unlikely that even one woman will be among the nine jurors who sit to hear her civil suit against Mr. Berllaque, let alone a representative cross-section of the population.

68 We are not aware of any other jurisdiction in Western Europe which has a similar law. In England and Wales women have been called for jury service since 1921, which to the best of my recollection is about the time when women were first admitted as barristers. There may not have been a high proportion of women jurors at first, as there was a property qualification until 1972.

69 The cause of discontent for the claimant can only be remedied if it involves a breach of the Constitution. This is said to be established by

Chapter I of the Constitution, and in particular by either s.1(a) or s.8(8). Neill, P. has set out those sections and I do not repeat them.

70 Section 1(a) requires the protection of the law for everyone without discrimination on the ground of, amongst other things, sex. I do not see that there is any such discrimination in the case of Miss Rojas. She will receive precisely the same protection as a man would in a similar case; in particular, the jurors will be selected by precisely the same process. It is true that the process is very unlikely to produce any female jurors. But the same would happen in the case of a male claimant.

71 So I turn to the real substance of this appeal, which is to be found in s.8(8) of the Constitution. It requires that a court which tries a civil case "shall be independent and impartial." There is guidance to be found in the jurisprudence of the European Court of Human Rights in *Piersack* v. *Belgium* (8) on the meaning of the word impartial where it is found in art. 6 of the Convention. In that case, the head of a division which dealt with the prosecution of M. Piersack later became a judge and was appointed to try that very case. It was held that he was not impartial.

72 The requirement of impartiality was there held to have two elements: by the first, which was called the subjective element, the judge must not in fact be affected by bias of any kind for or against a party to the suit. Secondly, it must not appear to a reasonable observer that there is any legitimate doubt as to the impartiality of the judge. This second element is described as objective. The distinction between those two elements is often found in the common law. It is necessary because judges who are affected by actual bias do not always disclose it and it may not be detectable by other means. The second, objective, element is thus generally more important than the first. It may well be that M. Piersack's prosecutor and judge was as free from bias as any judge could possibly be. He might have passed the first test if his deepest thoughts had been revealed, but that is not practical in the ordinary way and he failed the second test. No doubt the way that the second test is framed is designed to secure public confidence and the confidence of the parties to the suit as well. But those are not, in my view, the primary aims; the requirement of art. 6 is an impartial court which will provide a fair trial.

73 In the *Piersack* case (8) (5 E.H.R.R. 169, at para. 30), it is said that the judge under consideration must have "offered guarantees sufficient to exclude any legitimate doubt." This at first sight appears to place the burden of proof on those who seek to uphold the impartiality of a judge when it is challenged. But in the *Piersack* case there was from the start a reason for questioning the judge's impartiality. In those circumstances, the burden was on those seeking to uphold the judge's impartiality to put forward circumstances which amounted to "sufficient guarantees."

74 Although art. 6 of the European Convention on Human Rights and the jurisprudence of the European Court of Human Rights are not part of the law prevailing in Gibraltar, I consider that the tests to be found in the *Piersack* decision should be adopted as applicable to s.8(8) of the Constitution. There is no material difference between the two enactments for present purposes. Recent English decisions, where art. 6 is now directly applicable, have adopted similar tests in *R.* v. *Gough* (12) and *In re Medicaments & Related Classes of Goods (No. 2)* (6).

75 How then stands the argument that the nine men of Gibraltar who (in all probability) are to try the case of Miss Rojas will lack impartiality? I can only conclude that they will do so whether individually or collectively, if it be the fact that men of Gibraltar have a tendency when acting as jurors to be unfair to women. I asked Mr. Hughes in terms whether that was his case, and he said that it was not. But it is, in my opinion, the unspoken premise of those who assert that women will not have a fair trial. I do not for myself assert that men as jurors tend to be fair to women; I merely say that I have no reason to suppose that they have a tendency to be unfair. There are no doubt circumstances peculiar to women which in some cases need to be taken into account, for example in a case of infanticide. I do not see that this will be remedied by adopting a system which may—but not necessarily—result in one or more women being members of a jury and so able to inform the others. Without professing to any experience of such cases, I consider that the problems are better dealt with by expert evidence.

76 I therefore conclude that the requirement of impartiality in s.8(8) of the Constitution does not override s.19(1) and (2) of the Supreme Court Act.

77 Thence, I must turn to the material which, wholly or mainly, persuaded the Chief Justice to reach a different conclusion. This is the American cases which support the proposition that the list of eligible jurors must be representative of the community as a whole. This is supported by impressive authority in the United States. Of course it may or may not be reflected in the actual composition of any particular jury; all one can say is that an average of all panels will reflect the composition of the community; and an average figure is of little consolation to a defendant who meets a jury that he wholly dislikes.

78 It is not, in my judgment, a fundamental tenet of the Constitution, either in England or Gibraltar, that the list of jurors should include all members of the community. Both in Gibraltar and in England and Wales there are significant numbers of people excluded from jury service. Thus, in Gibraltar a person over the age of 65 may not serve as a juror; in England, a person over the age of 70. In Gibraltar, a person who is an alien must have resided in Gibraltar for a period of 10 years to qualify as

a juror; in England, a person must have been ordinarily resident in the United Kingdom, the Channel Islands or the Isle of Man for a period of at least five years since attaining the age of 13. In Gibraltar, the Supreme Court Ordinance has an express requirement in s.19(1) that a juror must have a competent knowledge of the English language; the Juries Act 1974 for England and Wales provides in s.10 that a person who appears not to have a sufficient understanding of English may be brought before a judge who shall determine whether or not the person should act as a juror.

79 There are also many occupations which entitle people to be excused if they wish or render them ineligible or disqualified, both in Gibraltar and in England. For the most part, the exclusions or exemptions fall into two classes: the first is those whose occupations are of such importance to the community that they cannot be spared for jury service, such as members of the House of Commons, doctors, dentists, nurses and chemists; the second, people who have knowledge of the law such as barristers, solicitors and their clerks. Presumably, lawyers are excluded because it is thought that they might exercise too much influence on the other members of a jury. In parenthesis, the exemption of pharmaceutical chemists may be of later origin. In the case of *Bardell* v. *Pickwick* (2) Dickens wrote of a chemist who sought to be excused from jury duty on the ground that his shop had been left in charge of an ignorant boy, and death by misadventure might ensue if he were not released. The application was summarily refused.

80 I appreciate that the various classes of excluded or exempt occupations do not come near in volume to the number of women who in practice do not choose to be jurors in Gibraltar. But they do go some way to confirm my view that the principle of jury service for all is not regarded as fundamentally important. I do not suppose that a single eyebrow was raised when members and employees of the Criminal Cases Review Commission were added to those rendered ineligible by the Juries Act 1974. And as late as the 1960s it was possible, as I happen to know, to apply for a special jury of merchants in the City of London to try a commercial case.

81 I can see that there is a case for including a larger rather than a smaller part of the population in order to serve on juries. But it is for the legislature in Gibraltar to decide who shall be included and who not, unless the provision made be unconstitutional. The Chief Justice held that s.19 of the Supreme Court Ordinance was unconstitutional, on the authority of the American cases. He evidently concluded that exclusion of women from compulsory jury service was contrary to the requirement of impartiality in the Sixth Amendment to the American Constitution, and therefore in art. 6 of the European Human Rights Convention and s.8(8) of the Constitution of Gibraltar.

82 Unfortunately, the Chief Justice was not referred to the decision of the Privy Council on appeal from Mauritius in *Poongavanam* v. *R.* (10). Lord Goff of Chieveley, delivering the advice of the Board, said: "United States cases cited to their Lordships in the course of argument appear to show that a principle is well recognised in the United States that the jury must be drawn from a list which is representative of society."

83 In a passage which has already been cited by Neill, P., Lord Goff went on to say that the American principle was directed, "not to impartiality in the ordinary meaning of that word, but to the representative character of the list from which the jury is to be drawn." In other words, it would seem that the American courts regarded the Sixth Amendment as allowing them to look at a wider scene, whilst the *Piersack* case (8) (to which Lord Goff had referred) did not. The plain implication of his reasoning was that impartiality in art. 6 of the European Human Rights Convention was not concerned with the composition of the list from which jurors were drawn, but with the members of the jury who were chosen for the case in question. He applied that to s.10(1) of the Constitution of Mauritius, which so far as material was in the same terms as s.8 of the Constitution of Gibraltar.

84 Although the appeal was dismissed on another ground and the passages referred to above were *obiter*, they are powerful authority for this present case and for what it is worth I wholly agree with them. However, I should point out that there is a cloud on the horizon so far as our decision is concerned. Lord Goff said that it was very difficult to see whether the jurisprudence on art. 6 was likely to develop so as to hold that impartiality would be infringed by a breach of the American principle of a jury list which is representative of society. He added: "Any such development would require a substantial piece of creative interpretation which has the effect of expanding the meaning of the words of art. 6(1) beyond their ordinary meaning."

85 Creative interpretation, in the sense of altering the meaning of a European legislative instrument by judges, is not unknown, perhaps because there is no democratic way of altering it. If and when there is an alteration of the meaning of an impartial tribunal as used in art. 6 of the European Human Rights Convention, it may be necessary to consider whether the meaning of s.8(8) in the Constitution of Gibraltar has likewise altered. But that is for another day.

86 I say nothing on the subject of remedy if s.19 had been invalid. I would allow this appeal, if such it be.

87 **GLIDEWELL, J.A.:** I have had the opportunity to read in draft the judgment of Neill, P. On the first and main issue, whether the provisions of s.19 of the Supreme Court Ordinance conflict with s.8(8) of the

Gibraltar Constitution Order, I have the misfortune to disagree with him. I agree with the judgment of the Chief Justice on this issue, and, except for considering the effect of the judgment of the Judicial Committee of the Privy Council in *Poongavanam* (10) which I shall do later, it is tempting to say no more. However, I think it right that I should set out my own views on the matter, albeit briefly.

88 The Chief Justice said in his judgment that:

> "Neither the puisne judge nor I can recall sitting with a jury containing a single woman member in the last six years. The Registry staff have a recollection of three occasions in their working history in which a woman has sat on a jury. The chances of this claimant, a woman who is seeking damages in respect of allegations involving domestic violence, being tried by a jury containing even a single woman are remote to say the least."

This conclusion is accepted by the Attorney-General.

89 Mr. Hughes, for Miss Rojas, submits, and it is common ground, that the requirement in s.8(8) of the Constitution that the jury shall be impartial is to be considered both subjectively and objectively. The objective test, in relation to this case, can be expressed as follows. Lord Phillips, M.R. said in *In re Medicaments & Related Classes of Goods (No. 2)* (6) ([2001] 1 W.L.R. at 727):

> "The court must first ascertain all the circumstances which have a bearing on the suggestion that [the jury would be] biased. It must then ask whether those circumstances would lead a fair minded and informed observer to conclude that there was a real possibility, or a real danger, the two being the same, that the tribunal [would be] biased."

90 I conclude that in this case, in which a woman is suing a man for assault and false imprisonment, wishes her action to be tried by a jury as is her right, but will almost inevitably find that the jury if drawn from the present list consists entirely of men, the fair minded and objective observer would answer that question, "Yes, there is a real danger that the jury will be biased." If, instead of a civil action, this were a criminal trial of a woman for murder of her husband or lover with a defence of provocation, I believe the objective observer would answer the question in the same way but perhaps more emphatically. This is putting in other words the argument of Mr. Hughes, which the Chief Justice summarized in his judgment and which he described as "compelling."

91 The Chief Justice, in his summary of this part of Mr. Hughes's argument, referred to the jury which would hear the claimant's claim as one "from which women are systematically excluded." That systematic

exclusion is the result of the wording of s.19 of the Supreme Court Ordinance. If the Chief Justice's acceptance of this argument by Mr. Hughes was correct, as in my view it was, then this without more, and in particular without reference to any American authorities, would have entitled him to conclude that it is s.19 of the Supreme Court Ordinance which produces the result that the trial jury would not be objectively impartial, and thus that s.19 conflicts with s.8(8) of the Gibraltar Constitution.

92 However, the American authorities were and are a major part of Mr. Hughes's arguments. There is no English authority directly in point, because, for at least 65 years, the jury lists in England and Wales have comprised both men and women. Neill, P. has rehearsed the main American authorities and it is unnecessary for me to do so, though like the Chief Justice I note that the circumstances in *Taylor* v. *Louisiana* (14) were very similar to those at present in Gibraltar. The effect of those authorities can, in my view, be summarized as follows:

(i) The Sixth Amendment to the Constitution of the United States provides in part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed . . ."

(ii) The means by which an impartial jury is to be obtained is by random selection from a jury list (in American terms, venire) containing the names of a representative cross-section of the relevant community.

(iii) Thus, it is essential to the Sixth Amendment's requirement of an impartial jury that the jury list should be a representative cross-section of the community.

(iv) A list which contained the names of no, or only a restricted number of, women is not a representative cross-section, and thus any jury chosen from it would not comply with the Sixth Amendment.

93 The Chief Justice quoted a passage from the judgment of Lord Denning, M.R. in *R.* v. *Sheffield Crown Ct., ex p. Brownlow* (13) ([1980] Q.B at 541):

> "Our philosophy is that the jury should be selected at random—from a panel of persons who are nominated at random. We believe that 12 persons selected at random are likely to be a cross-section of the people as a whole—and thus represent the views of the common man."

94 The Chief Justice then commented:

> "What is clear from the English system of jury selection is that there is an attempt to ensure that there is a random selection of jurors from

> a representative cross-section of the community. Whatever the differences between England and the United States in the means by which an impartial jury is selected, there is sufficient commonality between the English and Gibraltar jury systems and that of the United States, in terms of the reasons behind the retention of trial by jury and the principle of impartiality and equality before the law, for me to find the reasoning in the United States decisions to be compelling."

95 He thus concluded that s.19 of the Ordinance conflicted with s.8(8) of the Constitution on this ground also.

96 The Chief Justice was not referred to, and so reached his decision on this issue without considering the effect of, the decision of the Privy Council in *Poongavanam* v. *R.* (10), given on April 6th, 1992. We have therefore been required to consider whether the *dicta* in that case relating to the American authorities must lead us to conclude that the Chief Justice was wrong to rely on and follow those decisions.

97 Neill, P. has set out in his judgment the relevant passages from the judgment of the Judicial Committee in *Poongavanam*, delivered by Lord Goff. I therefore need not repeat them. They were *obiter* because the members of the Judicial Committee expressly said that they were not deciding the question. Nevertheless, it was an opinion expressed by a powerfully constituted Judicial Committee.

98 I confess that I do not fully understand the passage in the judgment of Lord Goff where he said:

> "Furthermore, the principle is not directed towards the constitution of the particular jury in question . . . the American principle looks rather to the lists from which individual juries are drawn, and requires that those lists shall be compiled from a fair cross-section of society. This makes it all the more difficult to derive the principle from a provision such as s.10(1) of the Constitution of Mauritius, which is concerned rather with the actual tribunal by which the case is tried, and with the impartiality of that tribunal."

My lack of understanding of that passage stems from my belief that the Sixth Amendment requirement of impartiality is directed at the particular jury which is to try the case, and that the courts of that country have developed the doctrine that it is necessary to consider whether the jury list is drawn from a fair cross-section of society because, if it is, that will suffice to answer any appearance of partiality in the composition of the particular jury.

99 I have noted, however, the way in which the submission made on behalf of *Poongavanam* (10) was summarized by Lord Goff, which was in these words:

> "It appears to their Lordships that the strongest way in which the point could be put in favour of the appellant is that, where the trial takes the form of a trial by jury, for the court to constitute an impartial court within the section it is not enough that the court should be free of actual bias or even the appearance of bias; it must also be a jury which is drawn from a list which provides the accused with a fair possibility of obtaining a jury which constitutes a representative cross-section of the community."

I agree that, where the particular jury is free both of actual bias and of the appearance of bias, neither the law of Gibraltar nor England requires an investigation of the composition of the jury list.

100 However, the way in which the point was argued in *Poongavanam* is not the argument advanced by Mr. Hughes. His argument is that where, as in this case, a fair-minded and informed observer would conclude that, because there would almost certainly be no women on the jury, there is a real danger that the jury would be biased, it is necessary to consider the composition of the jury list. If the jury list is composed of a representative cross-section of the community, both male and female, then the appearance of bias is satisfactorily explained; that is the effect of the decision of the Court of Appeal, Criminal Division in *R.* v. *Ford* (11). But in Gibraltar the jury list, by reason of the wording of s.19 of the Supreme Court Ordinance, is not composed of a representative cross-section of the community because it does not contain the names of the vast majority of otherwise eligible women. The appearance of bias therefore persists. The composition of the particular jury will, therefore, not comply with s.8(8) of the Constitution, and since this is the result of the wording of s.19 of the Supreme Court Ordinance, that section offends against s.8(8).

101 Without considering further the proper interpretation of the American authorities, I conclude that this argument advanced by Mr. Hughes is correct. Since the argument advanced before the Judicial Committee in *Poongavanam* (10) was different in a vital respect, we are in my opinion not bound to adopt the view expressed in that judgment. For these reasons, I would dismiss the appeal in relation to the Chief Justice's conclusion that s.19 of the Supreme Court Ordinance offends against s.8(8) of the Constitution.

102 Mr. Hughes advanced an alternative argument based on the wording of s.1 of the Constitution. If, which I doubt, it is open to us to consider this argument on this reference, I agree with Neill, P. that it fails.

103 I have also had the advantage of reading the judgment of Staughton, J.A. He agrees with Neill, P. that the appeal on the main issue, whether s.19 of the Supreme Court Ordinance offends against the Constitution, should be allowed. It is not, therefore, necessary to consider

whether the orders made by the Chief Justice were appropriate. It is sufficient for me to say that, if my view on the main issue had prevailed, I agree with Neill, P. as to the nature of the order which should have been made.

Ruling accordingly.