[2013–14 Gib LR 350]

R. v. I. MARRACHE, B. MARRACHE, S. MARRACHE and TURNBULL

SUPREME COURT (Grigson, Ag. J.): October 25th, 2013

Criminal Procedure—juries—discharge of jury—false allegations of bias made against juror during trial—whole jury discharged though only one juror knew of allegations as court not able to prevent further such allegations

Criminal Procedure—juries—right to jury trial—no vested right to jury trial—Interpretation and General Clauses Act 1962, s.33(2) protects rights accrued under legislation later repealed, but inapplicable to right to jury trial because introduction of trial by judge alone additional power (without repeal) and intention not to preserve right to jury trial clearly shown

The defendants were charged with two counts of conspiracy to defraud.

During the course of the trial, allegations were made against two members of the jury.

It was suggested by the first defendant that one juror, "juror H," (a) was employed at the law firm acting for the second defendant; or, in the alternative, (b) worked in the same building and might become privy to the discussions of the second defendant's legal team; (c) knew the Attorney-General; and (d) had a conviction for benefit fraud. None of the allegations was true, juror H did not learn about them, and the trial continued.

The fourth defendant later reported to the court that her brother-in-law, Mr. Turnbull, had told her he had received an anonymous phone call alleging that another juror, "juror Y" had been heard, at a social club where she worked, to state that she did not care what she heard at the trial because she already believed all the defendants to be guilty. The first and third defendants suggested that (a) there might be an issue of contamination, (b) the whole jury might need to be discharged, and (c) the case be adjourned while the matter was investigated.

An investigation was ordered, but the trial was not adjourned as to do so would have meant certain witnesses would be unable to give evidence. Mr. Turnbull was interviewed, but declined to allow access to his telephone records. He was instructed (a) not to speak to juror Y; (b) to avoid the topic of the allegations if they did speak; and (c) to report to the investigating officer anything she might say to him about the allegations.

In court the next day, the fourth defendant offered the names of six people who might have overheard juror Y's remarks—names which Mr. Turnbull had given to her but not to the investigating officer. All six were interviewed but none had heard anything of the sort. One had not been at the social club and three did not even know she was on a jury. That evening, Mr. Turnbull returned to the social club and told juror Y about the allegations. He did not report this conversation to the investigating officer. The next morning, however, juror Y passed a note to the judge explaining what Mr. Turnbull had said to her and denying the allegations. Mr. Turnbull was arrested.

The judge informed the parties, in accordance with the Supreme Court Act 1960, s.21E, that (a) it appeared that jury tampering had taken place; (b) that the court was bound to consider discharging the jury; (c) that the grounds were self-evident; and (d) that he would hear submissions on the matter from all parties.

Vested right to jury trial

The first defendant submitted that by operation of the Interpretation and General Clauses Act 1962, s.33(2), which protected rights accrued under later-repealed legislation unless a contrary intention appeared, when s.21E came into force in 2011, he already had a vested right to a jury trial which was unaffected by later legislation.

The Crown submitted in reply that the Act which enacted s.21E by amendment did not repeal any part of the Supreme Court Act 1960 but only added to it, so that s.33(2) did not apply.

Jury tampering

The defendants submitted that the court could not be sure that jury tampering had taken place.

The first defendant submitted that (a) there were factors to be considered in determining whether there had been jury tampering—whether the actions suggested amounted to tampering; the circumstances of those actions; whether the consequences of those actions amounted to tampering; and whether the consequences of those actions had an effect on the will of the juror or jury in question; (b) it was not possible for the court to be sure that jury tampering had taken place as juror Y had not been subjected to any attempt to influence her verdict or been affected at all by the allegations, as her note demonstrated; and (c) the purpose of s.21E was to prevent "jury nobbling"—that is, intimidation or bribery to bring about a particular verdict, which was clearly not the case here.

The second defendant adopted the submissions of the first defendant, and further suggested that (a) the allegations could have arisen from mere "tittle-tattle" in a small community such as Gibraltar; and (b) the court should be publicly seen to protect the right to jury trial.

The third defendant submitted that (a) there was insufficient evidence to support a finding of jury tampering; (b) the investigation into the matter was incomplete; and (c) this was not a case of "jury nobbling," and it was

as yet unclear whether this was even an attempt to affect the composition of the jury.

The fourth defendant submitted that (a) this was a failed attempt at jury tampering, not actual tampering; (b) what had been proved did not satisfy the required standard of proof, as it might well be mere "tittle-tattle"; and (c) even if there had been jury tampering, it was not severe enough to warrant a judge-only trial.

The Crown submitted in reply that the court could be sure that jury tampering had taken place, and that the issues concerning juror Y must be considering in context with the issues concerning juror H.

Discharge of jury and trial by judge alone

The first defendant submitted that (a) the case could continue with the present jury, with "robust warnings and close monitoring"; or (b) in the alternative, only juror Y should be discharged; and (c) the defendants were concerned they would not have a fair trial by judge alone, as they perceived a high degree of complicity in the close-knit legal establishment of Gibraltar, and legislation (namely s.21E) had specifically been enacted with this trial in mind.

The second defendant submitted that there was no reason to discharge juror Y, or any other juror.

The third defendant submitted that to discharge the whole jury would be an unjustified overreaction, as (a) juror Y ought to have been questioned by the court alone, and in any event discharged so as not to hold up the trial; (b) she ought not to have been allowed to communicate with other members of the jury about the allegations; and (c) since jurors listen carefully to instructions from the judge, all that was required here was a slightly more robust approach on his part.

The fourth defendant submitted that neither juror Y nor the rest of the jury need be discharged as they would exercise their judgment based solely on the evidence and would not take the allegations made against juror Y as an indication of the defendant's guilt.

The Crown submitted that to discharge only juror Y would give those involved in jury tampering precisely what they wanted, and would only encourage further attacks on the structure and composition of the jury.

Held, discharging the jury and continuing the trial by judge alone:

Vested right to jury trial

(1) The Supreme Court Act 1960, s.21E(2) was now in force and the defendants had no vested right to a jury trial. The Interpretation and General Clauses Act 1962, s.33(2) did not apply as the amendment introducing s.21E had not repealed any other sections of the Act, and in any event, if s.33(2) did in fact apply, then this was a case where a contrary intention clearly did appear (paras. 6–7).

Jury tampering

(2) The court was satisfied that jury tampering had taken place (in the terms of the Supreme Court Act 1960, s.21E(2)(a)), as the evidence

proved a deliberate and dishonest attempt to attack the structure and composition of the jury: (a) there was no definition of jury tampering in the Act, but such a definition was unnecessary as the meaning was clear—jury tampering included threats and bribes, but was also much wider; (b) the Act was not designed or intended to prevent jury tampering or "nobbling"—it provided measures to deal with the situation only after jury tampering had taken place; (c) Mr. Turnbull's actions had to be seen in context, but that context included the false allegations against juror H, and it was difficult to see how these allegations could have been made as the result of an honest mistake; (d) Mr. Turnbull's actions may also have remained just an attempt at jury tampering, but only until he chose to discuss the allegations with juror Y; and (e) the fact that the investigation was incomplete was no bar to finding that jury tampering had taken place (paras. 28–32).

Discharge of jury and trial by judge alone

(3) The only proper and available course was to discharge the entire jury as there were no practical steps that could be taken to prevent this sort of attack: (a) since none of the defendants claimed to be guilty of jury tampering, it was unclear at whom "robust warnings" should be directed; (b) close monitoring was an impractical option as it would not prevent further false allegations being made, it would require a very large number of police, and such steps often generated complaints of prejudice against the defendants and allegations of inappropriate conduct by jurors and/or police officers; (c) remanding all the defendants in custody would at best make further jury tampering more difficult, but would also make it more difficult for the defendants and counsel to conduct their defence effectively and was potentially unfair, as it was unclear who was responsible for the jury tampering; (d) it would have been inappropriate to question juror Y on the basis of an anonymous allegation—it might have been better to adjourn the trial and sequester juror Y but this had not been done because it had not been anticipated that Mr. Turnbull would disobey the instructions from the police and tell her about the allegations; (e) to discharge only juror Y would reward the attempt at jury tampering; (f) juror Y could reasonably have concluded that one of the defendants had intended to secure her discharge, and shared her conclusion with the other jurors; (g) she could also have reasonably inferred that the attempt to disrupt the trial was indicative of guilt; (h) if the defendants were found guilty with juror Y on the jury, it would present a very good ground of appeal; (i) the jurors should not be put under the further strain of being made targets—or being concerned they might be made targets—of similar attacks in future; and (j) to sever the fourth defendant from the indictment would be inappropriate and render her untriable (para. 34; paras. 36–37; para. 40; paras. 44–55; para. 60).

(4) Having discharged the jury, the trial would continue by judge alone. It was not appropriate to terminate the trial and order re-trial, and the defendants would have a fair trial by judge alone (in accordance with the

Supreme Court Act 1960, s.21E(2)(b)). There were practical disadvantages to ordering a re-trial: (a) no re-trial would be possible until January the following year; (b) the defendants had already complained of delays; (c) empanelling the existing jury had proved difficult, and those difficulties would only be exacerbated a second time around; (d) the judge and certain witnesses might not still be available; and (e) great expense would be incurred. There were also no unusual circumstances militating in favour of re-trial with a new jury rather than continuing with the judge alone. In cases where a jury trial was likely to be abused or subverted, dispensing with the jury and continuing by judge alone was not, by not being a jury trial, an unfair trial. Further, the judge was (a) not a member of the Gibraltar community or legal establishment; (b) unaffected by any animus towards the defendants; (c) sufficiently experienced to be immune from press comment; (d) well-used to ignoring irrelevant or inadmissible material; and (e) not biased against the defendants by virtue of having made legal decisions against them. Finally, s.21E had not been enacted specifically with this trial in mind; it was part of the process of bringing Gibraltar criminal procedure and practice into line with that of England, and no one could have foreseen these events at the time the legislation was enacted (para. 62–67; paras. 70–71).

Cases cited:

(1) *R.* v. *Comerford*, [1998] 1 W.L.R. 191; [1998] 1 All E.R. 823; [1998] 1 Cr. App. R. 235; [1998] Crim. L.R. 285, considered.

(2) *R.* v. *S*, [2010] 1 W.L.R. 2511; [2010] 1 All E.R. 1084; [2010] 1 Cr. App. R. 20; [2010] Crim. L.R. 643; [2009] EWCA Crim 2377, considered.

(3) *R.* v. *Twomey*, [2010] 1 W.L.R. 630; [2009] 3 All E.R. 1002; [2009] 2 Cr. App. R. 25; [2010] Crim. L.R. 82; [2009] EWCA Crim 1035, applied.

Legislation construed:

Interpretation and General Clauses Act 1962, s.33(2): The relevant terms of this sub-section are set out at para. 18.

Supreme Court Act 1960, s.21E(2), as substituted by the Criminal Procedure (Juries) Act 2010: The relevant terms of this sub-section are set out at para. 21.

s.21E(3): The relevant terms of this sub-section are set out at para. 21.

J. McGuinness, *Q.C.* for the Crown;
J. Cooper, *Q.C.* for the first defendant;
D. Lovell-Pank, *Q.C.* for the second defendant;
C. Finch for the third defendant;
D. Evans, Q.C. for the fourth defendant.

1 **GRIGSON, Ag. J.:** I start this judgment by referring to the background of the case. During the first week of the trial, the court was occupied by two matters. The first was the identification of a panel of

potential jurors who were (a) available, and (b) not disqualified by reason of prior knowledge of the defendants or of witnesses or connection with various legal, accountancy or Governmental organizations. Each potential juror was required to complete a comprehensive questionnaire. Each was vetted by the Attorney-General's Department so that anyone with previous convictions would be removed. Approximately 100 citizens on each of five days were thus processed. Eventually, a panel of about 40 was achieved. As the swearing of the jurors began, it appeared that, of the 40, a number had found apparently good reason to disqualify themselves. In the end, a jury of 12 was formed—9 jurors, plus 3 additional jurors. Whilst that process was going on, I heard submissions from counsel on behalf of each of the Marrache brothers that this case should be stayed, as to allow it to continue would constitute an abuse of process. I refused the application for the reasons given in my judgment.

The facts

2 On October 17th, Mr. Cooper, Q.C., on behalf of Isaac Marrache, raised a concern with me about a particular juror, to whom I shall refer as H. What was suggested, based on instructions from his client, was that H was employed as an accounts clerk by Charles Gomez & Co., the firm of solicitors acting for Benjamin Marrache. Potentially, there is a cut-throat defence between these two brothers. In the alternative, it was suggested that if not actually employed by Gomez & Co., H worked in the same building as Gomez & Co. for a firm that rented their offices from Gomez & Co., and that she might have access to the offices of Gomez & Co. and might become privy to discussions of Benjamin Marrache's legal team. This latter suggestion I found fanciful, but it was nonetheless made. Prior to the raising of this issue, Mr. Cooper had told the Crown that his information was that (a) the juror knew the Attorney-General; and (b) that she had been convicted of benefit fraud. The Crown investigated. Neither allegation was true, and consequently these matters were not raised before me until yesterday.

3 Mr. Cooper requested that the juror be questioned. I refused that request. Mr. Lovell-Pank, Q.C., who is instructed by Gomez & Co., was able to assure the court that she did not work for Gomez & Co. and did not have access to their offices, nor to Benjamin Marrache's legal team. She was employed by a firm on the floor above Gomez & Co.'s offices.

4 The juror H knew nothing of these allegations and the trial continued with her remaining on the jury.

5 To summarize, three serious allegations were made, each aimed at impugning H's ability to exercise her duties as a juror properly. Each allegation was false. It was a necessary implication that (a) H had been dishonest when completing the questionnaire—there was specific mention

of Gomez & Co. in the questionnaire; and (b) Charles Gomez, who had attended court when the jury were present on occasions, was complicit in that dishonesty.

6 On October 21st, Mr. Evans, Q.C., who appears on behalf of Mrs. Leanne Turnbull, raised concerns about another juror, Y. He said that his client had been given information by her brother-in-law, Mr. William Turnbull. That information was that Y worked as a barmaid at a social club. William Turnbull had been told by a member of that club that on the previous Saturday night, October 19th, Y had said to members present that she was not going to listen to anything else because as far as she was concerned they were all guilty. He said that, apparently, the member who reported these facts to Mr. Turnbull was willing to identify himself in chambers, but not in open court. As a matter of record, the court was sitting in chambers as was entirely proper and necessary. It is to state the obvious that if the allegation were true, Y would have to be discharged. Mr. Finch and Mr. Cooper raised the possibility of contamination and the possible necessity to discharge the whole jury. It was submitted that the case be adjourned for investigation to take place. That would have meant losing the evidence of the witness, Mr. Burrow, who was not available thereafter. I ordered the matter be investigated by a senior police officer not involved in the Marrache investigation, and that the trial continue with the witness, Mr. Burrow, and Y on the jury. I said that if the allegation were proved I would (a) discharge the juror; (b) tell the remaining jurors why she had been discharged; and (c) instruct the jury to ignore anything she might have said or any opinion she might have expressed. Mr. Cooper made it clear that if the allegation were true, he would apply for the whole jury to be discharged, on the basis of possible contamination.

7 On October 22nd, Insp. Field gave his first report. He had interviewed Mr. Turnbull who told him that between 4.00 p.m. and 4.30 p.m. he had been called on his landline by someone who said he was a friend. Mr. Turnbull did not recognize the voice. The "friend," who did not give a name, told Mr. Turnbull that Y, in the social club, had made a comment to the effect that she did not need to hear any more, that they were all guilty. Mr. Turnbull did not know when Y had said these things, but speculated that it was Friday or Saturday night. He declined to give Insp. Field permission to access his telephone records as to do so might expose the "friend," but said that he would further consider the officer's request. He added that he was going to the social club that night. The officer told him not to approach the juror, and that if she approached him, he should avoid this topic. If she did say anything, Mr. Turnbull was to report it to the officer. After Insp. Field had given evidence, Mr. Evans offered to supply the names of six club members who it was alleged had heard Y's remarks. It was Mr. Turnbull who had supplied the names. This was not information Mr. Turnbull had given to Insp. Field.

8 That afternoon, Insp. Field traced and interviewed, or caused to be interviewed, all six. None had heard Y say anything of the sort alleged against her. One was not at the club on either Friday or Saturday. Three did not even know she was on a jury. One said that he had heard her say she was on a jury and that his response was to say: how could she, as she was a woman? He declined to make a witness statement, perhaps wisely in the circumstances. That evening Mr. Turnbull did go to the club. He told Y of the contents of the telephone call. He did not report this conversation to Insp. Field.

9 The next morning, Tuesday, when the jury came into court, I was given a note from Y. It read as follows:

> "Yesterday evening, I was in a meeting at my job, and after this I was approached by Billy Turnbull when to my surprise was told that he is Leanne's brother-in-law. He told me that he had got an anonymous call saying that I had mentioned that the defendants were guilty, so he told Leanne. A policeman got in contact with Billy asking him if he wanted to investigate, and he said 'No.' I just wanted to bring this to your attention because in no circumstances have these words come out of my mouth so I thought it would be best to inform you.
>
> [Signed Y]"

William Turnbull was arrested at 7.30 p.m. on Tuesday evening and interviewed under caution.

10 He told the officer that—

(1) the anonymous phone call on Sunday not only made the allegations about Y, but had also contained the names of the six witnesses;

(2) he did not disclose the names of the witnesses to Leanne, but to her brother Brian; and

(3) he had subsequently attended a committee meeting at the social club, and had told Y of the phone call, and that Leanne Turnbull was his sister-in-law.

11 He was released on police bail, pending the completion of the investigation and a decision as to whether he should be charged.

12 I gave warning to the court that I had in mind the provisions of the Supreme Court Act 1960 relating to jury tampering, and on Wednesday I informed the parties that it appeared that jury tampering had taken place, that I was bound to consider discharging the jury, that the grounds were self-evident, and that I would hear representations on Thursday. This complied with the requirements of s.21E(1) of the Act.

13 I have now heard representations from all parties.

14 The allegation made against juror Y was a direct attack upon her. It was patently false. I do not blame counsel; counsel act on instructions, and counsel have a duty to their clients. They also have a duty to the court, recognized by Mr. Cooper when he said, in relation to juror H, that he had "road tested" the information before raising the matter in court.

15 To describe either of these matters as arising from mere tittle-tattle is, in my judgment, a gross misdescription.

16 I turn to the law.

The law

17 Mr. Finch, who acts on behalf of Solomon Marrache, submits that, by reason of the operation of s.33(2) of the Interpretation and General Clauses Act 1962, the relevant provision, s.21E of the Supreme Court Act 1960, is not in force.

18 Section 33(2) reads:

> "(2) Where any Act repeals in whole or in part any other Act, then, unless the contrary intention appears, the repeal shall not . . .
>
> (c) affect any right, privilege, obligation or liability acquired, accrued or incurred under any Act so repealed."

19 Mr. McGuinness pointed out that the Act which brought in the amendment by the introduction of s.21D and s.21E to the Supreme Court Act 1960 did not repeal any section of that Act. It follows that s.33(2) has no application. As it seems to me, that submission must be right.

20 I think it is likely, in any event, that the words "unless the contrary intention appears" would also prove fatal to Mr. Finch's argument.

Section 21E(2)

21 Section 21E(2) of the Supreme Court Act 1960, as substituted by the Criminal Procedure (Juries) Act 2010, reads:

> "If the judge, after considering any such representations discharges the jury, he may, subject to subsection (4), order that the trial is to continue without a jury if he is satisfied that—
>
> (a) jury tampering has taken place; and
>
> (b) to continue the trial without a jury would be fair to the defendant or defendants."

Section 21E(3) states that "if the judge considers that it is necessary in the interests of justice for the trial to be terminated, he must terminate the trial."

22 The first question is "Am I satisfied as to be sure that jury tampering has taken place?"

Submissions

23 Mr. Cooper submits that there are four factors to be considered:

(a) the events that are suggested to amount to jury tampering;

(b) the circumstances in which those events arose;

(c) the consequence of those events, and whether in fact it can be safely concluded that they amount to jury tampering; and

(d) whether the consequences of those events has had a bearing upon the will of either the juror or the jury as a whole.

He submits that it is not possible for me to be sure that jury tampering has taken place; the juror has not been threatened, nor has she been the subject of any attempt to influence her eventual verdict. He asserts that from the note it is possible to deduce that Y is unaffected by her experience. He states that the essence of the legislation is to prevent jurors being "nobbled"—that is, intimated or bribed into returning a particular verdict.

24 Mr. Lovell-Pank, Q.C. adopts Mr. Cooper's submissions, and suggests that these allegations could have arisen from "tittle-tattle" in a small community. He asserts that the court ought to be seen publicly to protect the right of trial by jury.

25 Mr. Finch submits that—

(a) the evidence is insufficient to support a finding of jury tampering;

(b) the investigation is incomplete; and

(c) this is not jury nobbling, and that the suggestion that there was an attempt to interfere with the composition of the jury can only be described as a preliminary reaction.

26 Mr. Evans submits that this was a failed attempt to tamper with the jury, and that what has been proved does not satisfy the standard of proof and might be the "mere conveyance of 'tittle-tattle' which often arises in a small community such as Gibraltar." There is a secondary submission that even if this does amount to jury tampering, it is not of sufficient weight or gravity to warrant the draconian action of invoking the provisions of s.21E.

27 Mr. McGuinness, Q.C., on behalf of the Crown, submits that the court can be sure that jury tampering has taken place. He submits that the events concerning juror Y must be considered in the context which includes the attempt to remove H.

28 I note:

(1) there is no definition of "tampering" in the Act. I comment that such a definition is unnecessary, we all know what the word means; and

(2) there is nothing to support Mr. Cooper's submission that the essence of the legislation is to prevent jury nobbling. In fact the Act does nothing to prevent tampering with juries, or nobbling them. The Act provides measures to deal with the situation after jury tampering has taken place.

Conclusion

29 With great respect to defence counsel I regard these submissions as untenable.

30 What the evidence proves is a deliberate and thoroughly dishonest attempt to attack the structure and composition of the jury. That is self-evidently tampering. Tampering would of course include threats and bribery, but it is a much broader term. It might have remained an attempt until Mr. Turnbull chose to tell juror Y what had been alleged against her, although I am inclined to view that the very raising of the issue constitutes tampering.

31 I accept Mr. Cooper's submission that the actions of Mr. Turnbull and what flowed from his actions must be seen in context. That does not help him when the context includes an attempt to discredit juror H with material which was false. It is difficult to see how these allegations could be the result of an honest mistake. They constitute deliberate disinformation.

32 That the investigation is not complete is no bar to my finding that jury tampering has taken place. I am satisfied so as to be sure that it has.

33 The next step is to decide whether this deliberate and dishonest conduct necessitates the discharge of juror Y or of the whole jury, or whether the trial can continue with all 12 jurors.

34 I start with Mr. Evans because, as I said to him in the course of submissions, juror Y could reasonably take the view that someone acting on his client's behalf had made a deliberate and dishonest attempt to have her removed from the jury.

35 Mr. Evans is, as it seems to me, unconcerned that this might be the case. He is confident that juror Y and the other 11 will exercise their judgment based solely on the evidence. He makes no application to discharge anyone.

36 Mr. Cooper submits the case could continue with the present jury "with robust warnings and close monitoring." I am not sure who it is he

suggesting I warn, given that he asserts that his client is innocent in relation to these matters, as do the other defendants, by implication if not directly. Close monitoring of the jury is not a sensible option. First, it would not prevent this sort of allegation being made. Secondly, I doubt that there are sufficient officers in the Royal Gibraltar Police to maintain jury protection and my experience of cases involving jury protection is that such steps generate (a) complaints that it causes prejudice against the defendants; and (b) allegations of inappropriate conduct by the jury, by police officers, or both.

37 As I have said, I could remand all the defendants into custody, but that would not stop jury tampering, although it might make it marginally more difficult. It might be perceived as unfair, given that there is no clear evidence as to who was directly responsible for this attempted and completed jury tampering. It would make it difficult for these defendants and their counsel to conduct their defence properly. I say difficult but not impossible, and this remains an option if a situation were to develop that made it necessary.

38 Mr. Cooper does suggest that, as an alternative, juror Y alone could be discharged.

39 Mr. Finch submits that to discharge the whole jury would be to overreact, and would be unjustified. He argues that—

(1) juror Y ought to have been seen by the court alone, and questioned, and in any event discharged because the investigation is still continuing and the trial ought not be held up;

(2) she should not have been allowed to communicate what had allegedly occurred to other members of the jury.

40 I comment that in my view, it would have been wholly inappropriate to question the juror on the basis of an allegation from an anonymous source. Whilst, with the benefit of hindsight, it might have been better to adjourn the trial and sequester juror Y, I did not anticipate that Mr. Turnbull would deliberately disobey the order given him by Inspector Field and tell juror Y of the allegations of which, until he did, she had been ignorant.

41 Mr. Lovell-Pank submits there is no reason to discharge juror Y, or any other juror.

42 Other than from Mr. Finch, the issue of contamination seems to have disappeared.

43 Mr. McGuinness has referred to the case of *R.* v. *S* (2). It is a case also relied on by Mr. Cooper. Lord Judge, C.J., giving the judgment of the court, said this ([2010] 1 W.L.R. 2511, at para. 14):

> "The first ground of appeal is that the judge should have considered alternative methods of resolving the situation before utilising the relevant provisions of the 2003 Act. We agree that he should, and that is what he did. Once the trial has started before the jury the objective is that it should be completed before that jury. The power to discharge the jury on the grounds of jury-tampering is a new, additional measure to deal with the problem which adds to rather than diminishes the court's ability to protect the integrity of any trial. In short, the relevant statutory provisions in the Juries Act 1974 and the broad, discretionary but well understood common law principles which enable the judge to discharge the entire jury or an individual juror at any time for good and sufficient grounds are neither extinguished nor reduced. The new statutory provisions underline that the jury is not to be discharged unless the judge is "minded" to discharge it, and no judge, properly exercising his responsibilities, would discharge the entire jury from giving a verdict, unless satisfied that the problem was incapable of remedy by any other means, including, for example, the discharge of an individual juror. In short, we acknowledge and emphasise that this is always a measure of last resort. However once the jury has been in retirement it would usually be impossible for the judge to make any informed decision about the impact a suborned juror might already have had on the deliberations of the jury as a whole: no realistic alternative to the discharge of the entire jury would normally be available. None was available in this case."

44 Mr. McGuinness submits that to discharge juror Y would be to reward those responsible for tampering with the jury by giving them the exact result that they intended to achieve. I agree. It could only encourage further attempts to attack the structure and composition of the jury.

45 He submits that the purpose of those responsible was not to persuade a juror or jurors to a verdict of not guilty but to disrupt the trial process. To an extent that has been achieved. We have lost valuable time at the expense and inconvenience of the Crown and witnesses. I agree with that submission also.

46 In my judgment, there are other important considerations. I take the view that juror Y does have reasonable grounds for believing that Mrs. Turnbull, or someone acting on her behalf, has made a deliberate and dishonest attempt to vilify her and secure her discharge as a juror. If that had happened to me, at the very least I should be indignant and upset. Further, it is a wholly reasonable inference that (a) this was done to disrupt the trial; and (b) that it was done affords evidence of guilt—why else would it have happened?

47 It would be equally reasonable for juror Y to share her feelings with the other jurors, who might well share the conclusions I have just outlined.

48 I do not know how juror Y feels. I do not know if she has shared her experience with other members of the jury. It would be wholly wrong to conduct an inquiry now and, in any event, probably pointless.

49 The real point is this: should I continue with juror Y and not discharge her? Should Mrs. Turnbull be convicted, in my judgment she would have a very good ground of appeal. That would not be a ground Mr. Evans could rely on, given his stance here. However, it is increasingly common for those convicted to change their legal representation, and to supplement whatever other grounds of appeal there may be by alleging failings against previous legal advisers.

50 In fact, this ground would be available to all the defendants if they were convicted.

51 Further, juror Y would be wholly justified if she were concerned that something like this might happen again. Any other juror who knew of what had happened would be bound to worry as to whether he or she might be the subject of the next attack.

52 Trying a long case of this nature puts a great burden on jurors. That burden should not be made greater by this sort of anxiety. That there have been two such attacks in the space of two weeks suggests to me that this is just the beginning of a campaign to disrupt the process of trial by jury. Jurors are citizens exercising an important public duty. They should be given every assistance in that task, and not made the targets of deliberate and dishonest attacks on their probity.

53 In my judgment, there are no practical steps that this court can take to avoid discharging the whole jury. In fact, there are no measures I could order which would prevent this sort of attack.

54 I have noted and understood Mr. Cooper's point that in all the examples evidenced by the authorities provided by the Crown, that the decision to discharge was made at a late stage—after the jury had retired. That makes it impossible to effect any alternative remedy. Here, I have decided that there is no alternative remedy available even at this stage of the trial.

55 To sever Mrs. Turnbull from the indictment would (a) be inappropriate; and (b) make her untriable.

56 Mr. Finch, in his skeleton argument submits:

> "Further, it is a severe indictment of the people of Gibraltar that they are not to be trusted to return a true verdict according to the evidence. These things sometimes happen in a small jurisdiction, and

it is something not to be beyond the power and discretion of the court to deal with in the ordinary trial process."

In his skeleton argument on abuse he made this submission:

"In the event, charging two overreaching conspiracies effectively overloads the indictment, makes it very difficult for a jury to follow the different issues involved because of the mass of evidence they are being asked to contemplate on a single sitting, in a trial that will last for months. It is submitted that the prosecution has now given the jury a Herculean task, and even without the submissions made hereafter, it is entirely doubtful whether these defendants or any of them would receive the fair trial to which they are entitled. No matter how diligently the court tries to regulate and control the issues, the sheer volume of materials served and relied upon by the Crown probably makes the court's task just as difficult, if not fairly impossible. It is a matter that has always concerned those representing the applicant, because the mentality of the prosecution appears to be that it can succeed by advancing a 'tsunami of evidence' to entirely overwhelm the reasoning and organizational abilities of the ordinary juror, so in the end they just stop trying to make head or tail of it all and conclude that so much material must amount to something, and thus equate it with guilt. And how are they to discern the case for each individual in respect of each charge where both counts in the indictment are overreaching conspiracies supported by tens of thousands of documents? Can a juror on a single hearing really be expected to look at each defendant individually and weigh the evidence discretely? Before the latest developments, it is submitted that this danger was self-evident, but taking into account these recent developments, the problem now becomes wholly intractable."

57 In Mr. Cooper's skeleton argument, he said this:

"Not only is this trial unique in its location, it is the largest and most publicized case to have been in Gibraltar. It is reported daily and appears on the TV news daily. Consequently, the largest and most publicized trial in the smallest of locations is bound to create debate and interest amongst such a small population. The likelihood for comment is rife. This, though, should not worry the court. Jurors, we know, listen carefully to the robust directions of a judge, this case merely requires a more robust approach. Practice and procedure in England is helpful, however, carte blanche adoption should be undertaken with care."

58 In Mr. Lovell-Pank's skeleton argument on abuse, the following paragraph appears:

> "In a little town, in a case of this notoriety, no amount of judicial directions or warnings can be begin to counter or reverse the effect of the jury's observation of years of persistent adverse comment.
>
> The history of this case and the almost certain tainting of the jury's perception of the Marrache family make it impossible for [Benjamin Marrache] to have a fair trial."

59 Mr. Cooper's skeleton on abuse adopted some of Mr. Lovell-Pank's arguments. I did not see that he dissented from that proposition. I did not accept the submissions in the abuse argument as correct. I do not do so now, but I am bound to say that this change of attitude is unlikely to be the result of some Damascene conversion.

60 In my judgment, the only proper and available course is to discharge the whole jury.

61 The next question is whether I should continue the trial without the jury, or order a re-trial with a jury.

62 Realistically, no re-trial would be possible until January of next year. The Marrache brothers individually have all complained of delay as part of their argument on abuse. This will add to it. It is to state the obvious that, given the difficulties experienced in empanelling this jury, those difficulties would be exacerbated. It is by no means certain that I would be available, which would open the door for renewed abuse arguments, causing yet further delay and difficulty. Some of the Crown witnesses are old and infirm. Their condition is unlikely to improve. That course would involve very substantial expense. These are practical disadvantages.

63 In *R.* v. *Twomey* (3), Lord Judge, C.J. referred to the judgment of Lord Bingham in the case of *R.* v. *Comerford* (1). He said this ([2010] 1 W.L.R. 630, at para. 11):

> "In summary any attempt at interference with the jury constitutes an abuse or misuse of the process. *R.* v. *Comerford* suggested that one possible response would be to dispense with a jury altogether in a case where an attempt to nobble the jury was apprehended. In such a case, the outcome would be a judge sitting alone. However, as Lord Bingham of Cornhill, C.J. explained at the time when *R.* v. *Comerford* was decided, that solution had not then been adopted. Now it has."

Further on in the same case, Lord Judge, C.J. said (*ibid.*, at para. 11):

> "As we have narrated, in this case Judge Roberts, Q.C. brought the trial to an end. We understand his reasons, and what follows is not intended to be seen as a criticism of the decision. However, given that one of the purposes of this legislation is to discourage jury-tampering, and given also the huge inconvenience and expense for

> everyone involved in a retrial, and simultaneously to reduce any possible advantage accruing to those who are responsible for jury-tampering or for whose perceived benefit it has been arranged by others, and to ensure that trials should proceed to verdict rather than end abruptly in the discharge of the jury, save in unusual circumstances, the judge faced with this problem should order not only the discharge of the jury but that he should continue the trial. The fact that he has been invited to consider material covered by PII principles, whether during the trial, or in the course of considering the application, should not normally lead to self-disqualification."

64 I should stress that no question arises from my having to consider public interest immunity material. In my judgment there are no unusual circumstances here which would support a decision to terminate this trial and order a re-trial with a jury.

65 As to whether a trial by judge alone would be fair, I rely on what Lord Judge, C.J. said in the same case (*ibid*., at para. 18):

> "Perhaps however it is important to emphasise that, although the right to trial by jury is entrenched in the way we have indicated, the process of dispensing with a jury in a case where it is established that a jury trial is likely to be abused or subverted, the end result is not an unfair trial, but a trial by judge alone, where the necessary procedural safeguards available in a trial by jury are and remain available to the defendant. It therefore does not follow from the hallowed principle of trial by jury that trial by judge alone, when ordered, would be unfair or improperly prejudicial to the defendant. The trial would take place before an independent tribunal and, as it seems to us, for the purposes of article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, it is irrelevant whether the tribunal is judge and jury or judge alone."

I have expressed my views on trial by judge alone or trial by judge with lay assessors in my judgment on abuse. I shall not repeat it here.

66 I am not part of the Gibraltar community. I am unaffected by any animus to the Marrache brothers. I am sufficiently experienced to be immune to Press comment. I am well used to ignoring irrelevant or inadmissible evidence. That I have made decisions against the defendants reflects my judgment as to the law and how the law applies to the facts. It is not evidence of prejudice or bias.

67 I am satisfied so as to be sure that: (i) jury tampering has taken place; (ii) this jury must be discharged; (iii) it is not appropriate to terminate this trial and order a re-trial; (iv) this trial should continue with judge alone; and (v) the defendants will have a fair trial.

68 In his skeleton, Mr. Cooper said this:

> "There is significant concern on behalf of the defendants of a high degree of complicity in this close-knit legal establishment to unduly obtain convictions of these defendants at all costs. Whether or not this is a true perception is irrelevant, but when one can argue, as one can, that the legislation in Gibraltar has specifically been enacted with this trial in mind, and in particular the perceived attempt [which failed] to remove the right of a jury trial for the defendants."

69 I am not part of the Gibraltarian legal establishment in the sense meant here. In one sense, my position is no different to Mr. Cooper's, that is to say, we are both hired guns brought in for the purposes of this case.

70 These provisions closely mirror provisions in the United Kingdom. One can see that in the Criminal Procedure and Evidence Act 2011 and in the Crime Act 2011, the Gibraltar legislation has been bringing Gibraltar's criminal law and procedure into line with the law and procedure in the United Kingdom. Section 21E is really part of that process.

71 No one could have foreseen these events at the time the legislation was passed.

72 In the light of my findings, the perception of the Marrache brothers cannot provide sufficient reason not to take the course I have chosen.

Order accordingly.

[*October 31st, 2013: The first and second defendants asked the court to revisit and revise the judgment as there were new facts which, had the court known them, would have led to a different decision as to jury tampering, or, in the alternative, that the judge recuse himself from hearing the trial further as he had made a finding of dishonesty against the first defendant. The court delivered the following further judgment:*]

73 On Friday, October 25th, I gave judgment on the issue of "jury tampering." This judgment is to be read in conjunction with that judgment.

74 On Monday, October 28th, in the morning, Mr. Cooper, Q.C., who represents Mr. Isaac Marrache, sought to persuade me to revisit and revise that judgment. After time for thought, Mr. Lovell-Pank, Q.C., who represents Mr. Benjamin Marrache, supported that application.

75 As an alternative, it was submitted by both that I should recuse myself from hearing this trial further because I had made a finding of dishonesty against Mr. Isaac Marrache.

76 Mr. Cooper submits that there are new facts which, had the court known them, would have led to a different decision on jury tampering. He relies on these matters:

(i) Matters concerning juror H "significantly influenced the learned trial judge."

(ii) The trial judge was unduly influenced by these matters and misinterpreted them.

(iii) What happened in respect of juror H was not jury tampering.

77 Mr. Cooper goes on to make assertions about matters of evidence.

(i) Mr. Isaac Marrache, a trained barrister and member of the Inner Temple, brought to the attention of his legal team (barristers and solicitors) information that might impugn a member of the jury.

(ii) Mr. Isaac Marrache did not reveal this information to anyone else.

(iii) Mr. Isaac Marrache made no suggestion as to what use might be made of this material.

(iv) It was the decision of his legal advisers to deploy the information as was done on October 17th (see para. 2).

(v) Mr. Isaac Marrache did not assert to his legal team that the allegations were true.

78 These are not new facts. They are untested assertions. As to para. 77(i), I know this, as Mr. Cooper had told me. I quote from my judgment (at para. 2), "what was suggested, based on instructions from his client, was that H was employed as an accounts clerk by Charles Gomez & Co. . . ."

79 As to para. 77(iv), I have always assumed that how the information provided by Mr. Isaac Marrache was deployed was as a result of decisions taken ultimately by Mr. Cooper and the other members of Mr. Isaac Marrache's legal team. Mr. Isaac Marrache would have been perfectly entitled to express his opinion as to what should be done. Mr. Cooper would have been entitled to ask for his client's opinion. What must have been obvious to all concerned was that the allegation that juror H worked for Charles Gomez & Co. had to be raised in court and that, if it were true, juror H would have to be discharged. No possible criticism attaches to Mr. Isaac Marrache for raising these issues. Once he had been given the information he was bound to bring it to the attention of his legal advisers. Nor can any criticism be made of the actions of his legal advisers.

80 The assertions at paras. 77(ii), (iii) and (v) are irrelevant. If it is suggested that my decision as to jury tampering was based upon some

finding of fact or facts which contradicts those assertions, there is no basis for such a suggestion.

81 The phrase "based on instructions from his client" plainly means no more than that Mr. Isaac Marrache was the conduit by which the information was provided to his legal advisers. His position is similar to that of Mrs. Turnbull, but distinguishable in that Mrs. Turnbull was close to the source of the information about juror Y. It was her brother-in-law. I made it plain to Mr. Evans that I was not prepared to make the "easy assumption" in her case. The source of Mr. Isaac Marrache's information was and remains undisclosed. There was no evidential basis for any finding that he was anything other than a conduit. I made no such finding.

82 I shall not deal with para. 14 of Mr. Cooper's skeleton argument other than to say that if Mr. Cooper had wanted to develop his suggestion of "closely monitoring the situation," it was a matter for him, not for me. If what he meant was that "further events of the trial should be closely monitored as to whether any palpable instances of jury interference might manifest themselves," it is a statement of the obvious and does not suggest any means of protecting the jurors from interference.

83 Mr. Cooper asserts that—

(i) My interpretation of the "juror H scenario" is misconceived and wrong. I disagree, and nothing has been raised which causes me to doubt the correctness of my judgment.

(ii) The misjudgment of the juror H scenario was central to my judgment. It was not a misjudgment, and it was not central to my judgment. It formed part and an important part of the context in which the court had to consider what happened in respect of juror Y.

(iii) Somehow he was taken by surprise by the importance attached to the juror H incident. That incident was specifically referred to and relied on by the Crown in their skeleton argument.

84 In his skeleton, Mr. Cooper asserts that there has been no police or forensic investigation of the juror H scenario, in contradiction to the juror Y scenario. He argues that this goes as to the weight to be attached to the juror H situation. He submits that is not jury tampering and the facts are not proved to the criminal burden of proof. In oral argument, he asserted there should be further investigation. When I suggested that the only further investigation would be to enquire of his client the source of his information, his reply was to repeat the suggestion made when the matter was first raised, that juror H be questioned.

85 I can see no benefit to this course. Juror H is hardly likely to admit that she works for Charles Gomez & Co. when she does not do so, nor that she has a conviction for benefit fraud when she is of good character. Were

she to be brought into court and questioned about these allegations, it would put her in exactly the same position as juror Y—that is, knowing that false allegations had been made against her in an attempt to remove her from the jury. On October 17th, Mr. Cooper appeared to be content with the answers provided by the Crown and with the assurances from Mr. Charles Gomez. I do not see how the situation has changed.

86 He asserts that the court came to an adverse finding as to the honesty of Mr. Isaac Marrache. He asserts that this must follow from my findings in relation to juror H. This is simply wrong. At no point did I make any such finding.

87 In my judgment I said (at para. 5):

> ". . . [T]hree serious allegations were made, each aimed at impugning H's ability to exercise properly her duties as a juror. Each allegation was false. It was a necessary implication that (a) H had been dishonest when completing the questionnaire—there was specific mention of Gomez & Co. in the questionnaire; and (b) Charles Gomez, who had attended court when the jury were present on occasions, was complicit in that dishonesty."

88 Further on, I say (at para. 30): "What the evidence proves is a deliberate and thoroughly dishonest attempt to attack the structure and composition of the jury." And, later (at para. 31): "It is difficult to see how these allegations could be the result of an honest mistake."

89 Nowhere is there a finding that Mr. Isaac Marrache was a party to that dishonesty. As far as the evidence is concerned, there is no evidence that Mr. Isaac Marrache was anything other than an innocent conduit. It is my experience, and it is certainly my practice, that if a judge is making a finding of dishonesty against anyone, he says so in terms.

90 The application that I recuse myself is refused. I decline to alter or vary my judgment. I remain satisfied as to be sure that there is evidence of jury tampering as set out in my earlier judgment.

91 In oral argument, Mr. Lovell-Pank, referring to the passage I have quoted above relating to juror H and her alleged employment with Gomez & Co., seemed to suggest that this was a reference to the whole Benjamin Marrache legal team. I had thought the wording was quite clear. For the avoidance of any possible doubt I shall try to make it clearer.

(i) If juror H worked for Charles Gomez & Co., she did not declare it on the questionnaire. Gomez & Co. is one of the legal or accounting firms specifically named in the questionnaire. She could hardly have missed it. She did declare association with Marrache & Co., and with another firm. Her questionnaire was certainly seen by Miss Manley and was available to

all. Juror H was actually questioned about her connection with Marrache & Co. by me, the matter being raised by the Crown.

(ii) When Mr. Lovell-Pank informed the court that she did not work for Charles Gomez & Co., he said that Charles Gomez had seen juror H on occasions in the building (the building which houses his offices and those of other employees) and that the rest of the staff did not seem to know who juror H was.

92 This was the assurance accepted by Mr. Cooper and by the court.

93 If Juror H had deliberately failed to disclose that she was employed by Charles Gomez and Co., she was being dishonest. If Charles Gomez knew that she was employed by his firm and failed to take steps to bring that information to the attention of the court, he would have been complicit in her dishonesty.

94 Juror H was not dishonest. There is no question of Charles Gomez being complicit. No question arose as to any involvement by Miss Manley or Mr. Lovell-Pank, if only because neither could be expected to recognize each and every member of the staff of Charles Gomez & Co. Had any such implication arisen I would have given them, and indeed Mr. Charles Gomez, the opportunity to address me. In any event, I have known Mr. Lovell-Pank long enough to know that had he had the slightest inkling of this he would have raised it with me.

95 I recognize the difficult position of Mr. Evans and his client. I simply say that, in my judgment, it would be quite wrong for Mrs. Turnbull to be required to give any undertaking of the sort suggested.

96 I am grateful for Mr. Finch's contribution. He will, I hope, forgive me for taking the view that his representations were not central to this issue.

97 I add, by way of postscript, that—

(i) the firm which employs juror H has premises below those of Charles Gomez & Co., and not, as I had thought, above them. On the face of it, she is unlikely to pass Charles Gomez & Co.'s offices;

(ii) investigation of Mr. William Turnbull's phone records reveal that he received no call on his landline between 4.00 p.m. and 4.30 p.m. as he had alleged.

98 That is the judgment of the court. I order that this judgment be attached as an addendum to the "jury tampering" judgment.

99 In the event of any application to the Privy Council, I suggest that that court would be assisted by having copies of the skeleton argument put before me.

100 I order that each party provide such copies to this court so they may be attached to the judgment, together with a copy of the jury questionnaire.

Orders accordingly.