[2013–14 Gib LR 372]

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

SUPREME COURT (Grigson, Ag. J.): November 21st, 2013

Courts—recusation—bias—test whether fair-minded and informed observer would conclude real possibility that court biased—fair-minded and informed observer (a) reserves judgment until has heard both sides; (b) not unduly sensitive or suspicious, nor complacent; but (c) should not have complainer's assumptions attributed to him unless objectively justifiable

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

In previous rulings on abuse of process and jury tampering in the fraud trial, the judge had rejected several grounds put forward in support of the abuse argument and held that false allegations had been made against a juror. As a result, he discharged the whole jury and decided to continue to hear the case alone.

The second defendant made an application that the judge should recuse himself from hearing the trial alone on the basis of (a) bias, because in the jury tampering ruling the judge had indicated that the first or second defendant had been the source of the false allegations against the juror, and that while the second defendant's legal team had been absolved of blame for the allegations, the second defendant himself had not; and (b) predetermination, as in the abuse of process ruling the judge had made adverse decisions on matters which the second defendant had intended to deploy before the jury (misconduct by the authorities, the destruction and disappearance of documents and the involvement of accountants Baker Tilly) which rendered them valueless now that the trial would be heard by the judge alone.

Held, dismissing the application:

(1) The test to be applied on determining bias was whether the fair-minded and informed observer, having considered the facts, would

conclude that there was a real possibility that the court was biased. The fair-minded and informed observer (a) reserved judgment on every point until he had heard both sides of the argument; (b) was not unduly sensitive or suspicious but neither was he complacent; and (c) should not have the complainer's assumptions attributed to him unless they could be objectively justified (paras. 4–5).

(2) No fair-minded and informed observer could or would form the view that the second defendant's credibility had been impugned in any way: (a) the judge had not, expressly or by implication, made any findings of dishonesty against the first defendant; (b) neither the first nor the second defendant was alleged to be the source, directly or indirectly, of the false allegations against the juror; and (c) there was no need for the judge to have "absolved" the second defendant as no allegations had been made against him (paras. 6–9).

(3) The ruling on abuse did not prevent the second defendant pursuing any of those grounds as a defence, and rejecting those arguments as they related to abuse did not demonstrate bias but merely reflected the merits of the arguments and the evidence (or lack thereof) offered in support: (a) any misconduct on the part of the authorities was not relevant to the guilt or innocence of the second defendant; (b) there was no bar to the second defendant raising the issue of the destruction and disappearance of documents in his defence and if, at any point, it transpired that any defendant could not have a fair trial as a result of the destruction and disappearance of documents, the court could and would stay the proceedings; and (c) there had been no predetermination of the "Baker Tilly issue" and there was no reason why the issue of which person in Marrache & Co. was responsible for Baker Tilly's activities could not be explored (paras. 12–14; para. 17; paras. 23–25).

Cases cited:
(1) *Helow* v. *Home Secy.*, [2008] 1 W.L.R. 2416; [2009] 2 All E.R. 1031; 2009 S.C. (H.L.) 1; 2008 S.L.T. 967; 2008 S.C.L.R. 830; [2008] UKHL 62, followed.
(2) *Porter* v. *Magill*, [2002] 2 A.C. 357; [2002] 2 W.L.R. 37; [2002] 1 All E.R. 465; [2002] H.R.L.R. 16; [2002] H.L.R. 16; [2002] B.L.G.R. 51; [2001] UKHL 67, followed.

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;
B. Jones for the fourth defendant.

1 **GRIGSON, Ag. J.:** Mr. Lovell-Pank, on behalf of Benjamin Marrache, has made an application that I should recuse myself from this trial.

2 The application is based on two grounds. I quote:

"(a) The judge, in his judgment on jury tampering, has made a finding of dishonesty against Isaac Marrache; and

(b) The judge, in his judgment on the abuse of process, has made findings adverse to Benjamin Marrache's case on matters which would have been deployed before the jury. Now that the judge is trying the case alone, those matters are rendered valueless to Benjamin Marrache."

3 As I understand it, the first is an allegation of bias and the second of predetermination, but as it seems to me the two overlap and the labels are unimportant.

4 The test to be applied is to be found in the speech of Lord Hope in *Porter* v. *Magill* (2) ([2002] 2 A.C. 357, at para. 103): "The question is whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased."

5 In *Helow* v. *Home Secy.* (1), Lord Hope gave further guidance ([2008] 1 W.L.R. 2416, at paras. 1–2):

"My Lords, the fair-minded and informed observer is a relative newcomer among the select group of personalities who inhabit our legal village and are available to be called upon when a problem arises that needs to be solved objectively. Like the reasonable man whose attributes have been explored so often in the context of the law of negligence, the fair-minded observer is a creature of fiction. Gender-neutral (as this is a case where the complainer and the person complained about are both women, I shall avoid using the word 'he'), she has attributes which many of us might struggle to attain to.

The observer who is fair-minded is the sort of person who always reserves judgment on every point until she has seen and fully understood both sides of the argument. She is not unduly sensitive or suspicious . . . Her approach must not be confused with that of the person who has brought the complaint. The 'real possibility' test ensures that there is this measure of detachment. The assumptions that the complainer makes are not to be attributed to the observer unless they can be justified objectively. But she is not complacent either. She knows that fairness requires that a judge must be, and must be seen to be, unbiased. She knows that judges, like anybody else, have their weaknesses. She will not shrink from the conclusion, if it can be justified objectively, that things that they have said or done or associations that they have formed may make it difficult for them to judge the case before them impartially."

6 I can deal with the first ground shortly. There was no finding, either express or by necessary or reasonable implication, of dishonesty against Isaac Marrache.

7 I quote from Mr. Lovell-Pank's written submissions (at para. 7):

> "From Benjamin Marrache's standpoint, the finger is clearly pointed at Isaac Marrache as the 'source.' Alternatively, he fears that if Isaac Marrache did have a 'source,' then it has to be someone with some knowledge of the workings of Charles Gomez & Co., and the layout of the various offices in the building which his firm occupies.
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> Who?
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> In his reasons for judgment, the judge deals with counsel for Benjamin Marrache's suggestion that the allegation against juror H was a reference to the whole of Benjamin Marrache's team. The judge absolves each one of the legal team.
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> Benjamin Marrache does not feel that the judge has absolved him. It is submitted that taken together, the import of both judgment and the reasons leaves a distinct impression that the attempt to impugn juror H came from either Isaac Marrache himself or indirectly from Benjamin Marrache."

8 Benjamin Marrache is the complainer, to adopt Lord Hope's term. His feelings as expressed cannot be objectively justified.

9 There was no need to "absolve" him. No allegation of any kind was made against him. There is no basis for the suggestion that the attempt to impugn juror H came indirectly from him. No objective observer would or could form the view that Benjamin Marrache's credibility was impugned in any way.

The ruling on abuse

10 The arguments on abuse were not based upon evidence called and tested by cross-examination. There were many assertions made which were wholly unsupported by evidence. I shall decide the issues in this case upon the evidence given before me in the course of the trial. To make it absolutely plain, that is the evidence called since the end of the prosecution opening to the jury.

11 As Mr. Lovell-Pank asserts, he relied upon seven overlapping grounds in support of his abuse argument. I rejected each of them. That of itself is not evidence of bias. It reflects the merits of the arguments and such evidence as there was, or lack thereof.

12 No ruling I have made precludes Mr. Benjamin Marrache from pursuing any of those grounds in so far as is relevant to his defence and

the evidence is admissible. In his written submissions, Mr. Lovell-Pank says this (at para. 19):

> "Had the trial continued with the jury, Benjamin Marrache would have wished to deploy in evidence a number of topics upon which the abuse submission was based. They include:
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> - Misconduct by the authorities
> - Baker Tilly
> - Destruction and disappearance of documents."

13 As to the alleged misconduct of the authorities, whilst that was obviously relevant to an abuse argument it is not relevant to the guilt or innocence of this defendant. The court has to decide whether the prosecution has proved to the criminal standard each element of the offence charged and being considered.

14 As to the destruction and disappearance of documents, this is an issue still being explored. Mr. Hyde was cross-examined by Mr. Cooper about just that matter. There is no bar to Mr. Lovell-Pank pursuing the issue as well. If it transpires that any defendant cannot have a fair trial as a result of the destruction or disappearance of documents, the court can and would stay the proceedings. The power to stay can be exercised at any time

15 I turn to Baker Tilly. In the abuse argument, what Mr. Lovell-Pank submitted was this. It is para. 9 and I read it all.

> "9.1 The Crown's case is that the conspiracies were covered up by Baker Tilly, Marrache and Co.'s accountants.
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> 9.2 The two principal people involved at Baker Tilly were Ken Robinson and Ian Wood. Ian was seen by police shortly after the arrest of Benjamin Marrache and Solomon Marrache on August 9th, 2010. [I think that is actually a misprint. It should be February.] Notes of their conversation are attached at Appendix 5. The hard drive of Ken Robinson's computer was seized, however the prosecution have failed, to date, to disclose Ian Wood's hard drive despite him being Marrache and Co.'s designated accounts manager.
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> 9.3 It was not until May of 2013 that Robinson and Wood were arrested on suspicion of false accounting and interviewed. Since then, they have remained on bail. On August 29th, 2013, Mr. John McGuinness informed Grigson, Ag. J. that the Attorney-General, on counsel's advice, will be deciding if these two men are to be charged.
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> 9.4 On any view of the Crown's case, Robinson and Wood are co-conspirators of the current four defendants, and should have been charged and indicted as such. No explanation has been given [to the

Attorney-General] as to the delay in arresting Robinson and Wood nor as to his decision not to try them together [or with others].

9.5 There has been no responsible investigation into Baker Tilly's role in the alleged fraud. That lack of investigation is not from negligence or oversight. Only a decision by the Attorney-General not to investigate can account for the lack of action. It is submitted that to arrest Robinson and Wood in May 2013 and for them to remain on bail so close to the start of the trial is mere window-dressing.

9.6 If Robinson and Wood are charged, their trial will be a repeat of the Marrache trial at considerable expense. That trial will take place years after the events concerned, and in the wake of extensive and adverse publicity which will flow from the first trial. The chances of their standing trial are negligible. Anyone considering charging them at this late stage will know that.

9.7 The absence of any coherent explanation for this state of affairs points to bad faith on the part of the Attorney-General's department. In the absence of the other two men, the jury will be denied a full and proper picture of their role in the case and will be denied returning verdicts in respect of them.

9.8 Crucially for Benjamin Marrache, he will be prevented from putting his case in its best possible light whilst Robinson and Wood are absent from the dock."

I comment that those two gentlemen have been charged. I think as a matter of record, Mr. McGuinness was advising the Royal Gibraltar Police and not the Attorney-General.

16 I am not going to read the whole of my judgment on the abuse arguments, but the selected passages relied upon by Mr. Lovell-Pank have to be read in context and should this matter go further no doubt they will be.

17 The assertion that Benjamin Marrache would be prevented from putting his case in the best possible light whilst Robinson and Wood were absent from the dock was unsupported by detail.

18 In Mr. Lovell-Pank's written submissions, he says (at para. 21):

"A judge's and a jury's assessment of evidence are entirely different matters. It is unnecessary to rehearse in this skeleton what Benjamin Marrache and his legal team consider to be the evidential value of the Baker Tilly angle. It is largely set out in the Benjamin Marrache skeleton on abuse at para. 9.

> It is submitted that this pre-determination of the Baker Tilly issue, expressed in the terms that it has closed an important avenue of defence that Benjamin Marrache would have had before a jury."

19 In Mr. McGuinness, Q.C.'s written submission in response, he says (at para. 9): "The Crown is at a complete loss as to how 'misconduct of the authorities' and 'Baker Tilly' provide Benjamin Marrache with lines of defence and his skeleton fails to illuminate."

20 It was only yesterday in his oral submissions that Mr. Lovell-Pank revealed that Benjamin Marrache seeks to identify his brother Isaac as the instigator of the Baker Tilly false accounting—the mirror image of the case for Isaac Marrache.

21 I comment that this is not an issue about which I have expressed any view. Until yesterday I did not know that that was Benjamin Marrache's case.

22 I did appreciate that Mr. Isaac Marrache might seek to blame those in Gibraltar for Baker Tilly's activities but made it clear in that judgment that that was a matter for Mr. Cooper.

23 There is no reason why the issue of who in Marrache & Co. was responsible for Baker Tilly's activities cannot be explored. To an extent, it is already being explored, but that issue has to be seen in the context of the other evidence and against Benjamin Marrache and indeed the other defendants. I make it plain that that is not an expression of any finding against anybody. I have not even begun the process of making judgment. It simply recognizes the evidence that has already been given. I do not know and cannot know at this stage whether the issue of who instigated the Baker Tilly activities will be central to any decision that I make. It may not be necessary for me to decide the issue at all. It is not necessarily an important part of the Crown case. It may be more important between the two brothers.

24 In the course of the oral argument, I made the point to Mr. Lovell-Pank that I have made no ruling which prevented him from pursuing any legitimate line of defence. He accepted that that was the case but, as I understood him, his argument was not as appears in his written submission (that I quoted at the beginning of this judgment), but that Benjamin Marrache believed that there was no point in him pursuing these matters.

25 In my judgment, that is no basis for the argument that I should recuse myself. The test to be applied is whether a fair-minded and informed observer would conclude there was a real possibility of bias. Such an observer would appreciate (a) that any judge determines issues on the evidence—what was before me on the abuse argument is not evidence in the trial; and (b) that in respect of abuse, the judge has a continuing duty to consider those matters. The stay can be granted at any stage of the trial,

as I have already said, should evidence emerge which would justify such a course. In the circumstances the application is refused.

Mrs. Turnbull

26 I have great sympathy for Mrs. Turnbull. She has lost two leading counsel through no fault of her own. And I have sympathy for Mr. Jones, who finds himself without a solicitor and without a leader, and I am not ruling out the possibility of severance.

27 It seems to me it would be premature to do so. But there is a real public interest in one tribunal trying all those charged with an offence or with offences and it seems to me that, if the court adopts the revised prosecution schedule, then leading counsel can be instructed and briefed so that he will be able to cross-examine the relevant witnesses. Of course, there is a danger that one of the other witnesses may say something about Mrs. Turnbull, but if that happens Mr. Jones can deal with it as he did with Mr. Tavares yesterday. I think in more robust times he would have been simply been told get on with it, but I think we are not there anymore. I do not see at the moment any need for counsel to have transcripts. If there is a crucial witness, then he can apply and I can order a transcript of the relevant evidence.

28 If it transpires that no suitable counsel can be found within the time scale, or when that counsel is instructed he submits and I accede to the submission that she cannot have a fair trial in the circumstances, then I will reconsider the position.

29 Mr. Jones mentioned yesterday that Mr. Evans is still instructed. That is actually a matter for Mrs. Turnbull, is it not? He is not available until January 21st, but the reality is that unless she is severed she will have to instruct new counsel.

Orders accordingly.