[2013–14 Gib LR 406]

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

SUPREME COURT (Grigson, Ag. J.): February 21st, 2014

Criminal Procedure—abuse of process—juries—discharge of jury—decision to discharge jury because of multiple allegations amounting to jury tampering not improperly founded merely because single allegation true—not abuse of process to continue trial by judge alone after truth discovered if would still have discharged jury had truth been known at time order made

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

In a previous hearing (reported at 2013–14 Gib LR 350), the court found that there had been a deliberate and dishonest attempt by someone to attack the structure and composition of the jury after false allegations were made against two jurors, "juror H" and "juror Y." These allegations included that juror H (a) was employed at the law firm acting for the second defendant or, in the alternative, worked in the same building and might become privy to the discussions of the second defendant's legal team; (b) knew the Attorney-General; and (c) had a conviction for benefit fraud. It was also alleged against a second juror, juror Y, that she had publicly stated that she did not care what she heard at the trial because she already "knew" that the defendants were guilty. Juror Y was informed by the fourth defendant's brother of the allegations made against her. The court found that these allegations were untrue and amounted to jury tampering. It therefore dismissed the jury and ordered that the trial be continued by judge alone.

It later emerged, however, that juror H did have a spent conviction for benefit fraud, although this would not necessarily have disqualified her from serving as a juror as she had only received a suspended sentence and it had been handed down over 10 years before. It was further alleged that juror H had also had previous involvement with the Royal Gibraltar Police (RGP). In early 2006, her ex-husband, who had worked for the RGP, sent her a series of offensive and upsetting emails, about which she complained to the police. He was mistakenly charged under the Communications Act 2006, which came into force after the emails were sent, and the case was discontinued. During the course of that investigation, a search for any previous convictions which juror H might have returned no results.

After being arrested again on a separate matter, juror H's ex-husband launched a series of complaints against the RGP and the Attorney-General

until, in 2011, he commenced a civil action against the RGP. Juror H was called as a witness. Her ex-husband's legal team had been served with the document from the previous investigation stating that she had no previous convictions and asked for an updated version. The Crown Counsel conducting the defence of the case, Mr. Drago, refused on the basis that it was not relevant and no such disclosure was required in civil proceedings, and the matter was not raised again. Juror H, however, emailed Mr. Drago to say she was concerned about her previous conviction coming to light. Mr. Drago replied to say that her ex-husband's legal team would not be relying on any convictions, but did not enquire further about which conviction she was referring to.

Before that trial started, juror H was called as a juror in the present proceedings. Counsel for the first defendant raised two issues (that juror H had a previous conviction for benefit fraud and that she knew the Attorney-General) with Mr. McGuinness, counsel for the Crown, outside of court. Mr. McGuinness investigated and reported that neither allegation was true. A fresh check of the criminal records was made, under all three of juror H's possible surnames but the search was negative. The Attorney-General also confirmed that he had never met juror H. The first defendant went on to raise further allegations against juror H, namely that she worked for the second defendant's legal team or might have access to their offices, which was also untrue.

Mr. Drago and Mr. McGuinness discussed the issue as Mr. Drago recalled juror H telling him that she did have a previous conviction. However, it was suggested that she must have been mistaken as the checks of her criminal records showed none.

In the questionnaire filled in by potential jurors for the case against the present defendants, juror H had not been asked directly if she had any previous convictions, but the police vetting of jurors had again, in error, stated that she did not. In the questionnaire, she was asked if she, or any members of her close family, had been clients of Marrache & Co., or parties in proceedings in which Marrache & Co. were involved. She answered "Yes," as Marrache & Co. had been involved in proceedings against her ex-husband for sexual assault. She was also asked if she, or any of her close family, had ever worked for a list of relevant employers, including several law firms and the RGP. She did not state that her ex-husband had worked for the RGP.

The third defendant submitted that these new facts undermined the court's judgment to continue the trial by judge alone. He therefore applied to have the case stayed or, in the alternative, for a re-trial with a new jury, as allowing the prosecution to proceed would constitute an abuse of process. He submitted that (a) he had a right to trial by jury; (b) to deprive him of that right was a measure of last resort; (c) before taking such a step, the court had to have a proper factual basis of which it was certain; (d) if that factual basis were proved to be false then the judgment upon which it was based was flawed; (e) in making his judgment of October 25th, the judge had relied upon the "falsity of the allegation" which had now been

proved to be true, and that finding was a result of representations by the Crown; and (f) irrespective of bad faith, the judgment was fatally and fundamentally flawed and the trial should be stayed.

The first, second and fourth defendants adopted those submissions, also alleging abuse of process, but did not seek a re-trial, as no re-trial could be a "fair trial" given the history of the case. They submitted that (a) the judge's decision had been based on materially false and misleading information provided by the Crown; (b) the position had been reached in this trial where no court could have any confidence either in the disclosure process or in the system for the recording of people with criminal convictions; (c) there had been bad faith on behalf of the Attorney-General and/or members of his department—the system was unreliable in the extreme and dangerously flawed; (d) juror H had failed to disclose her conviction for benefit fraud both when acting as a witness in another case against the RGP and in these proceedings, thereby misleading the court in her questionnaire, and it was now impossible to say whether or not other jurors or witnesses had undisclosed convictions; and (e) the fact that she had been a witness in a civil action against the RGP should have been disclosed without enquiry having to be made. The first defendant also alleged bad faith.

Held, dismissing the application:

(1) It would not be an abuse of process to allow the trial to continue. The fact that the allegation that juror H had a previous conviction was true did not undermine the court's decision to discharge the jury and continue the trial. Juror H's conviction was old and spent and was not capable of disqualifying her as a juror. As the allegations against juror Y and the remaining allegations against juror H were all untrue, the court had been right to find that there had been deliberate and dishonest attempts to attack the structure and composition of the jury (paras. 67–70).

(2) There was no evidence of dishonesty in juror H's answers to the jury selection questionnaire. In 2013, a man she divorced in 2006 was not "close family." It was not, therefore, dishonest to claim that no members of her "close family" had worked for the RGP. Further, the first, second and fourth defendant's submission that juror H had answered the questionnaire inconsistently was unpersuasive. Although in response to the question about Marrache & Co. she had stated that the firm had been involved in proceedings against her ex-husband for sexual assault, this was in response to the second part of the question (whether she had been a party to proceedings involving Marrache & Co.) not the first (whether a close family member had been a client of Marrache & Co.) (para. 41).

(3) Juror H's suitability as a juror was not impugned by her involvement as a witness for the RGP nor was her involvement disclosable, save possibly for the evidence of her previous conviction. She was not a "leading" or "front-line" witness in the proceedings against the RGP—her evidence was not even necessary. The Attorney-General did not know

juror H, had never met her, and, at most, merely knew of her. The assumption that juror H, by virtue of having acted as a witness for the RGP, would favour the RGP and the Attorney-General who acted on their behalf was incorrect. The RGP's own ineptitude had led to juror H's complaint against her husband being summarily dismissed and it was unlikely that she would be positively predisposed towards them on the basis that they had required her to give evidence on their behalf (paras. 57–60).

(4) The fact that juror H had a previous conviction should have appeared on the list of potential jurors. That omission was not, however, attributable to anyone involved in this case. Further, it was not clear that had her conviction (which was old and did not affect her eligibility as a juror) been disclosed, she would not have been selected for the jury. Whilst it would have been sensible to make further enquiry when Mr. Drago mentioned that juror H believed she had a previous conviction, any enquiry of juror H could only have been made through the court, and counsel were entitled to rely, as Mr. McGuinness chose to do, on the exhaustive checks made on the police record. Any criticism of that decision was made with the benefit of hindsight and ignored the fact that the other allegations against juror H were false. It was not, therefore, evidence of bad faith on the Crown's behalf (paras. 61–62).

(5) These events did not reflect adversely on the process of disclosure. The fact that no one had experience of a record of conviction being lost suggested not that the system was defective but that it was efficient. While in England and Wales challenges to the accuracy of CRO material were by no means rare, the evidence was that they were rare in Gibraltar (para. 70).

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;
Ms. A. Cotcher, *Q.C.* for the fourth defendant.

1 **GRIGSON, Ag. J.:** On Monday, February 17th, 2014, at about 12.40 p.m., Mr. Finch, counsel for Solomon Marrache, served upon the court a written submission that this case be stayed as to allow the prosecution to proceed would constitute an abuse of the process of the court. Alternatively, he argued that this trial should be aborted and that I should order a re-trial with a jury.

2 On Tuesday, Mr. Cooper, Q.C., Mr. Lovell-Pank, Q.C. and Ms. Cotcher, Q.C., on behalf of the other three defendants, put forward a joint skeleton argument alleging abuse of the process. They did not seek a re-trial. They assert that no re-trial could be a "fair trial" given the history of this case. They relied upon the material supplied by Mr. Finch. Mr. McGuinness, Q.C. supplied a written response. Each counsel has made oral submissions, some longer than others.

3 These submissions arise from fresh material which, it is asserted, fatally undermines the factual basis for my judgment relating to "jury tampering" given on October 25th, 2013 (reported at 2013–14 Gib LR 350), and in particular in relation to juror H. Various quotations have been taken from that judgment. It must be read as a whole.

4 In his written submissions, Mr. Finch seeks to re-open issues as to juror Y. I have dealt with those matters already. There is nothing new.

5 Mr. Finch asserts that in making the judgment of October 25th, the court relied upon "serious factual errors and misinformation from the Crown, together with a failure to fully and frankly disclose relevant matters within its knowledge. The circumstances, it is submitted, constitute a serious irregularity in the trial."

6 The joint application asserts:

> "3 The judge's decision has now been shown to have been based on materially false and misleading information provided by the Crown.
>
> 4 Not only have the court and counsel been misled, but the position in this trial has been reached where no court could, on any logical or sensible basis, have any confidence either in the disclosure process or in the system for the recording of people with criminal convictions.
>
> 5 These applicants assert that there has been bad faith on behalf of the Attorney-General himself and/or members of his department. They do not accept that the failure of the police records in respect of juror H is 'unique.' On the contrary, the evidence adduced on February 18th, 2014—some four months after the jury was discharged—shows the system to be unreliable in the extreme and dangerously flawed.
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> 6 Juror H appears never to have disclosed her conviction for benefit fraud during her involvement as a witness in civil proceedings against the Royal Gibraltar Police (RGP). She never did so in these proceedings. She has misled the court in answers given in her questionnaire. It is now impossible to say whether or not other jurors and/or witnesses had undisclosed convictions . . .
>
> 11 On any view, that fact [that she was a witness in the civil action] was disclosable to the defence without enquiry having to be made. It was even more incumbent on the Crown to disclose this information given that the defence had raised the issue."

7 In my judgment, these submissions present a classic example of hyperbole. They are nonetheless very serious allegations and were accompanied by demands that the prosecution or the court call the Attorney-General. It is not the first time in this trial that allegations of bad faith have

been made against the Attorney-General as well as against Mr. Tunbridge, the officer in charge of the case.

8 I have now heard evidence from Her Majesty's Attorney-General for Gibraltar, Mr. Rhoda, Q.C., from Mr. Kerrin Drago, Crown Counsel, and from juror H. I shall refer to their evidence later in this judgment. It is important to state immediately and unequivocally that not only is there no evidence of any act of bad faith by the Attorney-General but no suggestion of any act of bad faith was put to him by any defence counsel. Further, there is no substance in any allegation of bad faith against Mr. Drago. As far as juror H is concerned, she did disclose her previous conviction to Mr. Drago, who had conduct of the civil action in which she was to be a witness. In these proceedings, at no material time was she ever asked if she had a previous conviction. She did not mislead the court in her answers to the questionnaire.

9 The names and addresses of citizens to be called for jury service are supplied by the Registrar of the Supreme Court to the Attorney-General's Chambers, who in turn supply them to the Criminal Records Department of the Royal Gibraltar Police. Each name is checked. If a potential juror has a criminal conviction, the letter "Y" for "Yes" will be put by her name. If the search is negative then the letter "N" for "No" is entered.

10 By virtue of Schedule 2, Part 2 of the Supreme Court Act, a previous conviction only disqualifies a citizen from jury service if she has been sentenced to life imprisonment or equivalent, a custodial sentence of 5 years or more, or if she has at any time within the last 10 years served any part of a custodial sentence or had passed on her a suspended custodial sentence.

11 The intention of the legislature is that persons who had received a suspended sentence of imprisonment at least 10 years prior to their summons should serve on juries, other things being equal.

12 The lists of potential jurors with the Y or N inserts are available for all counsel to inspect.

13 In 1994, juror H pleaded guilty in the Magistrates' Court here in Gibraltar to one offence of benefit fraud. The offence was committed between February 4th, 1992 and November 2nd, 1992. A sentence of three months' imprisonment was imposed, albeit suspended for two years.

14 On the same day, in the same court, a charge of assisting juror H in benefit fraud, made against a Mr. S, was dismissed. They had been living together. She was pregnant with his child. They married and she became Mrs. S. They had other children.

15 In November 2003, Mr. S and juror H separated. In February 2006, they were divorced. Juror H subsequently married a Mr. H.

16 In March and April of 2006, Mr. S sent a number of emails to his ex-wife. I am not going to try to find adjectives to describe the content. Their nature and perhaps that of Mr. S is best illustrated by quotation. On April 9th, 2006, he sent this:

> "If you demonic witch boyfriend. Your boyfriend id an evil demonic person. Boy you have been blinded by satan. It is a demonic artefact designed to be a conduit for the demons. You will find out in time. By the way, one of the definitions of a whore is a prostitute—a woman who offers herself to indiscriminate sexual intercourse for money—to degrade by improper use and a whore is any unchaste woman or one who carries on unlawful sexual intercourse: idolatry. You became one when you went with [Mr. H] and he gave you gifts and money and then the several other men you have had this past two years.
>
> Like I said unless [L] drops her allegations I am going to tell the SS [Social Services] everything I did not tell them when I defended you against them. The only difference is you got away with it."

17 The reference to "[L]" and "allegations," is, as I understand it, to an allegation made against Mr. S of sexual abuse, an offence for which he was prosecuted, convicted and sentenced to 16 months in prison in 2008. The Attorney-General conducted the prosecution. Juror H was not a witness.

18 More important, perhaps, than that email, for the purposes of this trial at least, is that on April 6th he sent his ex-wife this email:

> "You have a cheek. You have a business and you are making lots of money. You are also claiming social security another criminal offence, you were convicted once before for that, remember, and you ask me for more money. You kick me out, you force me into debt, you support [L] against me, and you cause Christodoulides to drop me as a client because you support the bitch against me. I will oppose you in every way I can because of the evil you are perpetrating against me. I am making full disclosure to the SS about you and they will be given everything shortly before [L] and her allegations come to court. I will have the children taken away from you and you will go to jail. You are an evil bitch and deserve to be punished. You want to punish me, then you will see what I do to you. Go to hell whore. I have done nothing to you, despite your allegations about [M]. You are an adulterer, and I will not give you any money to feed your smoking habit. You have abandoned Jehovah. You will pay for the wickedness you have caused me, you almost killed me last year, you will not kill me this year. I will not roll over for you. My turn and Jehovah's will come, and it will not be late.

> You have only one choice, back off, and convince [L] to back off or you will be both be the loser, as things are right now, I care nothing for me, but the children will lose out, because of you. They will lose because of you."

He signs it "Your ex soul mate."

19 Juror H denied that there was any truth in the various allegations made by Mr. S. She found his emails offensive and upsetting. She blocked his email address on her computer. This meant that the emails went straight to the junk email box. If she did not read them, they were automatically deleted. She read some but kept no copies.

20 In July 2006, she went to the police station at New Mole House. She took with her hard copies of the emails sent by Mr. S in March and April 2006. She made a witness statement, setting out her complaints, and asking the police to take action to stop these activities of Mr. S. She heard nothing more about it.

21 In August 2006, at about 9.35 a.m., police officers arrested Mr. S at his home. At the police station, he was interviewed. He admitted writing and sending the emails in March and April 2006. The transcript of the interview is less than clear and to describe the interview as unstructured is to do it an injustice.

22 Mr. S was not asked about emails alleged to have been sent between the end of April and July 27th. Subsequently, he denied sending any in that period. At about 10.45 a.m. that day, he was bailed to return to the police station in October.

23 On September 22nd, as part of the investigation, Det. Const. Perez made a search of the criminal records for any convictions against juror H. The result, recorded on the docket, was "no trace."

24 Mr. Finch has argued that the absence of juror H's conviction from the record can only have occurred as a result of "fault." I agree. Either the conviction was never entered or, if it was, it has somehow been erased. Either act could be due to negligence or done deliberately. There is no evidence as to how it occurred or who was responsible. It is safe to say that it must have occurred before September 22nd, 2006 and that it can have had nothing to do with this case.

25 In October, Mr. S was charged with an offence of improper use of a public electronic communications network pursuant to s.45(1)(a) of the Communications Act 2006. The particulars of the offence referred only to emails sent in March and April 2006. He was bailed to appear at the Magistrates' Court the next day.

26 On the next day, the prosecution discontinued the case against Mr. S. The Communications Act 2006 came into force on June 5th of that year, a

fact that Mr. S brought to the attention of the court and to the attention of Crown Counsel. No further action was taken against Mr. S by the Royal Gibraltar Police. In short terms, the case against him had been botched.

27 Coincidentally, in July 2006 a search warrant had been executed on the home of Mr. S. He was arrested. This investigation had nothing to do with juror H's complaint. She had not then made it. Among the documents seized were hard copies of the emails sent by Mr. S to his ex-wife in March and April. The reporting officer was Mr. Tunbridge, then a detective constable. His only role in the subsequent case against Mr. S was to produce the emails he had found, about which there was no dispute.

28 Mr. S then launched a series of complaints against the Royal Gibraltar Police. He complained to the Police Complaints Board, the Gibraltar Police Authority and the Ombudsman. He achieved some limited success.

29 He was a prolific and enthusiastic letter writer. He engaged in correspondence with the Attorney-General, not only about what he alleged was his wrongful arrest and false imprisonment, but also about the failure of the Royal Gibraltar Police to act on various complaints he had made against a Mr. A and Mr. H. Mr. H is, as I understand it, the man juror H had married after her divorce from Mr. S. On occasions the Attorney-General replied. Mr. S also instructed Hassans to act for him. They wrote letters to the Attorney-General as well.

30 Mr. Finch provided a selection of that correspondence. He relies on this material to show how the Attorney-General had at least some knowledge of Mr. S and juror H then; it is a point of some validity. It is important to note that in none of this material does Mr. S refer to his ex-wife's conviction. Even if he had, no sensible person would accept such an assertion without independent evidence. To give a further flavour of his style, I give two examples, the first from September 20th, 2011:

> "My personal opinion is that you [*i.e*. the Attorney-General], Liam Yeates [Liam Yeats was then Crown Counsel] and any number of unknown individuals are probably corrupt and are covering up serious crimes committed by members of the judiciary and the Police and you will and are doing anything you can to prevent this case from coming to court. You have not even made an offer for compensation when it is clear that I have been wronged and the police and your judiciary have acted unlawfully and unconstitutionally.
>
> I have attached copy of the letter Fabian sent to you [Fabian being a solicitor then employed with Hassans], which you have denied receiving and have hand delivered it so that there is no mistake, and when it comes to court, you will be exposed as a corrupt or

> incompetent official along with others who deserve to see the inside of our lovely new prison.
>
> It is a pity that the old Moorish Castle is no longer in operation. I spent 10 months in that prison due to your prosecution of me and the perjury committed by [certain individuals] in another case in 2008 and one in which I am convinced you knew you had no case, and as no evidence was ever presented of my guilt, and I was not allowed to present evidence of my innocence by an incompetent lawyer your prosecution of me was a vindictive and malicious prosecution and not justice."

On November 11th, 2011, he wrote this:

> "But as we are living in a seriously corrupt society, it is unlikely that anything I say will get a hearing which is why you were able to put me in jail for 10 months in 2008 because of the perjured testimony of two witnesses [he names them].
>
> That along with the fact that no evidence was ever presented against me, and the incompetence, deliberate or otherwise of Ms. Sasha Wass and Tony Christodoulides of the corrupt law firm, Marraches, worked against me. In addition, the most important two witnesses present on the night of the alleged allegations and admission of guilt, which was never uttered, were, astonishingly never interviewed, neither was [another person's names] husband who was also outside the house that night who could have corroborated his testimony, or mine, but was never interviewed."

31 In February, Hassans sent a letter before action to the Attorney-General, and in June 2012 they issued proceedings against the Royal Gibraltar Police and the Commissioner of the Royal Gibraltar Police claiming damages for the unlawful arrest and imprisonment of Mr. S. The Attorney-General conducts the defence of such actions. As appears from the papers, Liam Yeats was responsible for the conduct of the defence, and drafted the defence to the particulars of claim. Mr. Yeats was appointed Registrar of the Supreme Court on February 1st, 2013, and another Crown Counsel, Kerrin Drago, took his place. In April 2013, the Attorney-General attended a case management conference at the Supreme Court. Mr. Drago was on leave. The hearing lasted 10 minutes and resulted in a consent order. Shortly afterwards, juror H attended the Attorney-General's Chambers so that Mr. Drago could take a witness statement from her. The meeting was very short and the witness statement was not completed. There followed an email exchange relating to the witness statement.

32 In June 2013, Julian Santos of Hassans requested of Mr. Drago an updated copy of the convictions of juror H. Among the documents served by the defence on the claimant's solicitor were the docket from September

2006 in respect of juror H and copies of the emails sent to her in March and April of that year.

33 Mr. Drago refused, saying that he did not see "the relevance of [juror H's] previous convictions (if any) to this claim, other than to attempt to discredit her or to impeach her character in some way." He said that there was no docket setting out the up-to-date position. He denied that such disclosure was required in civil proceedings. In his evidence before me, he confirmed this view. Credit was not in issue. That she may have had a conviction was, in his words, a non-issue. Mr. Santos replied that he would consider that response. In the event, it does not appear that the matter was ever raised by Hassans again.

34 I comment that an update would in fact have revealed nothing.

35 On August 13th, juror H sent an email to Mr. Drago. It reads as follows:

> "Hopefully, you are now back at work. [Mr. S] has informed me that he or his lawyer has put in a request for my previous conviction back in 1993 so that it will be brought into the court case.
>
> I was under the belief that perhaps this conviction has been expunged under the rehabilitation offenders act. I do not want this conviction to come out since it is now 20 years old and in the job that I currently do . . . would cause me serious distress. Also, as a side thing, since I was involved with [Mr. S] at the time and pregnant with my daughter I was told to plead guilty, which I did."

36 Mr. Drago telephoned juror H and told her that Hassans had not told him that they were seeking to rely upon her conviction. He made no enquiry of her for details of any possible conviction. In evidence, juror H confirmed Mr. Drago's account. Mr. Drago had no interest in her conviction. He had not read the emails of April 6th and 9th, 2006. He had no need to do so. On August 22nd, 2013, he wrote to juror H notifying her of the trial date which had by then been fixed for December. She replied the next day asking for confirmation that the previous conviction would not be disclosed. He replied in these terms: "As to the previous convictions; at present, it is unclear whether the claimant's representatives will attempt to introduce them. They have not made any further requests for disclosure."

37 At the beginning of October 2013, the process of selecting jurors—or at least a panel of eligible and available jurors for this trial—was begun. Juror H's name appeared on the list of potential jurors and was submitted for vetting. It was returned with an "N" against her name.

38 She attended court and completed the questionnaire. Question 6 asked: "Have you or any member of your close family, ever been clients of Marrache & Co., or been involved as parties in legal proceedings in which

Marrache & Co. have been instructed on behalf of other parties?" She replied, in the box, "ex husband was charged with 5 counts of sexual assault. Custodial sentence given of 16 months. Marrache & Co. were defendant's lawyers, namely Tony Christodulides." The ex-husband referred to was, of course, Mr. S.

39 Question 7 asked: "Have you or any of your close family, ever worked for the following . . ." A list of names followed, which included the Royal Gibraltar Police. Juror H did not tick the box for the Royal Gibraltar Police, although she did disclose that she had worked for Triay & Triay, albeit in 1988.

40 It is suggested that this is evidence of dishonesty in that she did not disclose that her ex-husband, Mr. S, had worked for the Royal Gibraltar Police.

41 I cannot see how, in October 2013, the man she divorced in 2006 could be described as "close family," particularly given the history between them. Mr. Finch's response to that was to say that she did regard him as close family when answering question 6. In my judgment, she was responding to the second part of the question, not the first. I do not regard this as any evidence of dishonesty.

42 At an early stage, I believe before she was sworn, a query had been raised as to her suitability to serve as a juror because of her answer to question 6, and also because there was some suggestion that she had been involved in care proceedings relating to her children where someone from the Attorney-General's Chambers had represented Social Services. I questioned her in court. She asserted her ability to try the case fairly and I accepted her evidence.

43 On October 17th, 2013, outside court, Mr. Cooper raised two matters with Mr. McGuinness. He had instructions (a) that juror H had a previous conviction for benefit fraud; and (b) that she knew the Attorney-General. The source of this information has never been disclosed. Mr. McGuinness made enquiry and responded that the answer to both was "no." Mr. Cooper accepted those answers. As to the first, Mr. Tunbridge had made a fresh check of the criminal records—as I understand his evidence, not only under her current surname, but also under other names. The search was negative and he so informed Mr. McGuinness. As to the second, enquiry was made of the Attorney-General. He replied that he had never met juror H. In evidence he confirmed that he had never met her, a fact confirmed by her. Although in correspondence he had referred to her by her new surname, he told the court that if he thought of her at all it was as her old surname. At no material time did he know that she had a previous conviction. When asked if he knew her he said the name meant nothing to him. Juror H confirmed that she had never met Mr. Rhoda. The only

person she had had dealings with at the Attorney-General's Chambers was Kerrin Drago.

44 On October 17th, Mr. Cooper raised two matters in open court. It had been suggested, he said, that juror H was employed as an accounts clerk by Charles Gomez & Co., the solicitors acting for Benjamin Marrache. In the alternative, it was suggested that she worked in the same building as Gomez & Co. for a firm who rented their offices from them and that she might have access to the offices of Gomez & Co. and somehow become privy to discussions among Benjamin Marrache's legal team. After a short adjournment, Mr. Lovell-Pank was able to assure the court that she did not work for his instructing solicitors, that she did work for a firm on the floor below Gomez & Co.'s offices (not, as I had said in the judgment of October 25th, on the floor above), and that she did not have access to the offices of Gomez & Co.

45 It was only after the problem with juror Y arose, and after I had said I was considering the issue of jury tampering, that I was informed of Mr. Cooper's first two enquiries of Mr. McGuinness. On October 25th (it may have been a day or two thereafter), I discharged the jury for the reasons given in my judgment of that date.

46 Mr. Finch, in his skeleton argument, asserts that I "castigated the defence" and that I accused "the defence of attacks upon the jury." I did no such thing. I recognized that it was the duty of counsel to bring these matters to the attention of the court. It is those originally responsible for supplying the "false" information to whom dishonesty is attributed. The identity of those responsible has never been revealed.

47 On June 28th, 2013, a further order was made in Mr. S's case against the RGP by consent. The trial was set down for the first available date after November 1st, with an estimated length of two days.

48 As I understand it, John Restano of Hassans was to lead for the claimant. The Attorney-General was to lead Mr. Drago for the defence. On October 16th, the Attorney-General telephoned John Restano. He told him that one of his witnesses, juror H, was serving as a juror on the Marrache trial, and he would have to seek an adjournment.

49 The Attorney-General's recollection is that, albeit with reluctance, Mr. Restano agreed to an adjournment. Other evidence suggests that there was a hearing date fixed for December 2013, but that the defendants made a Part 36 offer and shortly after that a settlement was agreed.

50 Mr. Drago has given evidence that on one afternoon, on a date he cannot now remember but which must have been between October 16th and 25th, 2013, he went to one of the larger offices on the ground floor of the Attorney-General's Chambers. Because of its size, it is used for informal gatherings of Crown Counsel in the afternoon. Ms. Armstrong

was one of the occupants of that room. She was present, as was Mr. McGuinness. Others were present, but Mr. Drago cannot recall who they were. As it happened, Mr. McGuinness and Ms. Armstrong were discussing the issue of juror H's conviction. He joined in the conversation. He told Mr. McGuinness and Ms. Armstrong that juror H had told him that she had a previous conviction. The response was that it had been checked and that she had no previous convictions. Mr. Drago then returned to his room and consulted the file for the civil case. He found the docket showing that juror H had been checked in 2006 and that there was no previous conviction recorded. He returned to Ms. Armstrong's office and told Mr. McGuinness and Ms. Armstrong what he had found. His recollection is that Mr. McGuinness said that juror H must be mistaken. Mr. Drago thought no more about it. It remained his view that this was a non-issue. Consequently, he did not inform the Attorney-General. It was he who subsequently advised the Royal Gibraltar Police on liability and quantum in the civil action, advice which led to the Part 36 offer and the eventual settlement.

51 In October, juror H had made some attempt to contact Mr. Drago. He declined to speak to her as he knew she was a serving juror. He asked a member of staff to tell her that they had asked for the trial to be adjourned.

52 As this trial proceeded, Mr. Finch, presumably acting on new information, instigated a search of the records at the Magistrates' Court. Mr. Turnock, the Clerk to the Justices, told this court that whilst records from 2004 or 2005 (he was not sure which year) had been stored electronically, prior to that convictions were recorded on paper. Mr. Finch asked for a search for the years 1992, 1993 and 1994. He gave three possible surnames. Eventually, the record of juror H's conviction was found, and, on February 11th, Mr. Turnock signed the certificate of conviction.

53 Mr. Finch also acquired the agreed bundles prepared for the civil action by Mr. S against the Royal Gibraltar Police, and various other material which he has put before the court.

54 When this material was served on the Crown, Mr. Tunbridge, with the assistance of Ms. Pau, who is in charge of criminal records of the Royal Gibraltar Police, ran an exhaustive check on all the criminal records—that is, those stored electronically and those stored on card indices and against all three surnames. Juror H's conviction was not there.

55 The issue raised by Mr. Cooper was whether the Attorney-General knew juror H. In his written submissions, Mr. Finch makes a rather obvious attempt to move the goal posts. I quote:

> "28 We submit that the court was positively misled by the Crown about the true circumstances surrounding juror H. Juror H was

known to the Attorney-General, actually being involved in continuing proceedings at the time, and she did have a previous conviction for benefit fraud known by the Crown . . .

29 Juror H was not only well known by the Attorney-General, but was actually a frontline witness for the RGP and the Commissioner of the RGP, in substantial civil proceedings being conducted by the Attorney-General during the time of this trial . . .

35 The involvement of juror H as a witness for the Crown in both the criminal, and thereafter the civil, proceedings demonstrates that she was known not only to the RGP but also the Attorney-General. The full extent and nature of her contact with the Crown is not known by the defence, but as the leading witness for the Crown it suggests that it is more than a passing acquaintance."

56 Mr. Cooper put the matter rather more subtly. He argued that the enquiry should have put the Crown on notice that any substantial connection between juror H and the Attorney-General was of concern to the defence, and was disclosable and should have been disclosed, an argument adopted by others.

57 I make these comments:

(1) Juror H was not a "front line witness" nor a "leading witness." On analysis of the issues pleaded in the civil case, her evidence was not necessary at all. It was not the truth of her complaint that was in issue. The issue was whether the police acted reasonably and lawfully in response to that complaint. Her credibility was not an issue. In argument Mr. Finch suggested that her evidence might have been relevant to damages. I doubt it, but even if it were, the real issue was liability. The amount of damages was always going to be small—as proved to be the case.

(2) The Attorney-General did not know juror H. He had never met her. The source of the allegation that he had remains a mystery. None of the material produced by Mr. Finch shows that he knew her. At its highest, it shows that he knew of her. The position remains that the allegation that juror H knew the Attorney-General was false.

58 These submissions assert and assume that the Crown was under a duty to disclose the fact that juror H was to be a witness on behalf of the Royal Gibraltar Police in proceedings where the Attorney-General was acting as counsel for them. The underlying assumption is that this makes juror H ineligible as a juror in the Marrache trial because she would favour the Royal Gibraltar Police and the Attorney-General who prosecutes on their behalf and defends in civil actions.

59 These assumptions are simply wrong. It was the Royal Gibraltar Police and a member of the Attorney-General's Chambers whose ineptitude led to her complaint against Mr. S being summarily dismissed. Not only that, but, to add insult to injury, she was then being required to give evidence on behalf of these very people. Giving evidence in court is not an experience that most people relish. On the contrary, most would rather avoid having to do so. Here, the prospect would have been especially daunting. She would face cross-examination by counsel acting on behalf of her ex-husband.

60 In my judgment, none of the material relating to juror H's status as a witness for the Royal Gibraltar Police in any way impugned her suitability as a juror. It was not disclosable, save possibly as evidence of her previous conviction.

Juror H's previous convictions

61 There is no doubt that this information, or at least the information that she had had a previous conviction, should have appeared on the list of potential jurors. That it did not do so is not attributable to anyone concerned in this case. Had it been disclosed, it is possible she would not have been selected as a juror, but it is by no means certain. Her conviction was old, it was spent and it did not affect her eligibility as a juror. It is possible that I would have "stood her by," but equally possible, given that the pool of potential jurors was shrinking rapidly, that she would have been selected.

62 It is argued that when Mr. Drago told Mr. McGuinness and Ms. Armstrong of juror H's belief that she had a previous conviction, the appropriate response would have been to make further enquiry. Looking at the civil file would have not shown anything more than that she believed she had been convicted in 1993. Any enquiry of juror H herself could only have been made through the court. The Attorney-General accepted in evidence that it would have been a sensible course to make further enquiry. With that view I agree, but he also expressed the view that counsel was entitled to rely on the exhaustive checks made on the police record. That is what Mr. McGuinness chose to do. In my judgment, criticism of that decision is made with the benefit of hindsight and ignores the fact that the other allegations against juror H were untrue. When the initial decision not to disclose the fact that juror H was a witness in civil proceedings was made, no one appreciated there was material that suggested she might have had a previous conviction. The decision thereafter to rely upon the police records was not unreasonable. It is not evidence of bad faith. The prosecution had made a thorough check in 2013. They also had evidence of a negative result in 2006.

63 Mr. Lovell-Pank, Q.C. submits that—

(a) the defendant has a right to trial by jury;

(b) to deprive a defendant of that right is a measure of last resort;

(c) before taking such a step the court must have a proper factual basis of which it is certain;

(d) if that factual basis is proved to be false then the judgment upon which it is based is flawed;

(e) in making my judgment of October 25th, I relied upon the "falsity of the allegation" which has now proved to be true. That finding was a result of representations by the Crown; and

(f) irrespective of bad faith, the judgment is fatally and fundamentally flawed and consequently this trial should be stayed.

64 Mr. Cooper, Mr. Finch and Ms. Cotcher adopt these submissions, save that Mr. Cooper persists in alleging bad faith, although it is not plain to me exactly what it is that he relies upon.

65 Mr. Finch does not allege bad faith. He asserts that the prosecution must be taken as one whole unit—the Attorney-General, Crown Counsel, prosecuting counsel and the police. He argues that here the failure to record the conviction of juror H, the failure to disclose the civil case file, and the supply to the court of false information have resulted in Solomon Marrache being deprived of his right to trial by jury. That, he asserts, is so unfair that this trial should be stayed.

66 What is the relevance of the allegation of bad faith? Where a fair trial is possible, absent evidence of bad faith on the part of the prosecution or the executive, to stay a prosecution as an abuse is very exceptional. I have already made it clear that in my judgment these defendants can, and indeed are, having a fair trial, albeit not a trial by jury. Here there is no evidence of bad faith.

67 What then is the real issue? It is whether, had I known that the allegation that juror H had a previous conviction was true, I would have made the decision to discharge the jury.

68 The position would have been this:

(a) as to juror Y, exactly the same;

(b) as to juror H, the allegation that she worked with Gomez & Co. or somehow had access to their office was and remains false; and

(c) the allegation that she knew the Attorney-General was, and remains, false.

69 While she had a previous conviction, it was old, spent, and did not disqualify her as a juror.

70 I have considered this matter carefully. I am quite satisfied that my decision would have been the same.

71 What has happened does not in my judgment reflect adversely on the process of disclosure. That no one had experience of a record of conviction going missing suggests, not that the system is defective but that it is efficient. In my experience both as counsel and as a judge in England and Wales, challenges to the accuracy of CRO material are by no means rare. The evidence here is that they are rare in Gibraltar. In 14 years Insp. Tunbridge had never come across such an instance.

Application dismissed.
