[2013–14 Gib LR 731]

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

COURT OF APPEAL (Kennedy, P., Potter and Waller, JJ.A.):
November 13th, 2014

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

Criminal Procedure—juries—jury tampering—no definition of tampering in Supreme Court Act 1960, but wider than corrupting or seeking to corrupt juror—matter of fact for judge to resolve—includes deliberate attempt to disrupt trial process, e.g. by false allegations against or concerning jurors during trial

Criminal Procedure—juries—right to jury trial—no vested right to jury trial—Interpretation and General Clauses Act 1962, s.33(2)(c) protects rights accrued under legislation later repealed—inapplicable to right to jury trial because introduction of trial by judge alone in Criminal Procedure (Juries) Act 2010 gives additional power (with substitution and without repeal) and clearly shows intention not to preserve jury trial as exclusive mode of trial

The appellants were charged in the Supreme Court with conspiracy to defraud.

They were respectively partners (BM and IM) and finance director (SM) of a well-known firm of lawyers with offices in Gibraltar, the United Kingdom and Spain. In 2010, the firm was wound up, liquidators appointed and the appellants adjudicated bankrupt. Claims of debt from banks and unsecured creditors, including clients, staff and trade creditors, amounted to more than £40m. They were charged with offences of dishonesty, which were later modified into the present charges of conspiracy to defraud.

As the appellants were so well known and widely connected in Gibraltar, an Acting Puisne Judge from the United Kingdom was appointed to preside over the trial and challenges to the validity of his appointment subsequently failed (see 2013–14 Gib LR 520 (Supreme Court) and 2013–14 Gib LR 703 (Court of Appeal)). Elaborate steps were taken to select a jury but three days after the opening of the trial, appellant IM raised doubts about the impartiality of one of the jurors ("juror H")

because of her alleged connection with the law firm acting for BM, her working in their building, having a conviction for fraud, and personally knowing the Attorney-General.

The following week, counsel for the fourth defendant (who was subsequently found not guilty) informed the court that his client had been told by her brother-in-law that he had been anonymously informed by telephone that another juror ("juror Y") had publicly said that she was not going to listen to anything more as she believed that all the defendants were guilty. In the absence of the jury, juror Y informed the judge that this allegation was untrue. The police were unable to confirm that anyone on the list of alleged witnesses provided by the defence had heard the statement but the judge ordered that the man who was the source of the information should be cautioned for apparently giving false information for the purpose of tampering with the jury. He was subsequently arrested on suspicion of attempting to pervert the course of justice and admitted telling juror Y of the anonymous telephone call and being given a list of alleged witnesses which he had passed on to the fourth defendant's husband.

The judge regarded the matter as very serious and informed the parties that he was minded to discharge the jury because jury tampering appeared to have taken place, and allowed them to make representations, He concluded (in a judgment reported at 2013–14 Gib LR 350) that he was satisfied to the criminal standard of proof that jury tampering had in fact taken place, that under the powers given to the court by s.21E of the Supreme Court Act 1960 (as added by the Criminal Procedure (Juries) Act 2010, s.3), the whole jury should be discharged and the trial should continue with the judge alone, rather than be terminated and a retrial ordered. He was satisfied that the defendants would have a fair trial without a jury.

At the request of the appellants, the judge later revisited his decision (in a judgment reported at 2013–14 Gib LR 406) and held that it would not be an abuse of process to allow the trial to continue, even though there was some slight substance in the allegations against jurors H and Y. He held, on a re-examination of parts of the evidence, that he had been right to find that there had been deliberate and dishonest attempts to attack the structure and composition of the jury and declined to recuse himself from the further hearing for having made adverse comments about IM, which he denied having done.

BM, IM and SM were convicted (Count 1) of the misuse of clients' money and BM and SM were convicted (Count 2) of the misuse of properties beneficially owned by clients of the firm and others to provide security to a bank for their own benefit and that of the firm. IM was acquitted on Count 2 and the fourth original defendant was acquitted on both counts. The judgment of the court reaching these conclusions is reported at 2013–14 Gib LR 540.

BM was sentenced to a total of 11 years' imprisonment (8 years on Count 1 and 3 years consecutive on Count 2), SM was sentenced to 7

years' imprisonment (7 years on Count 1 and 2 years concurrent on Count 2); and IM was sentenced to 7 years imprisonment on Count 1, the only count on which he had been convicted.

On appeal against conviction, the appellants submitted that (a) at the time they were originally charged in 2010, they had an existing vested right to jury trial which was unaffected by the addition of s.21E to the Supreme Court Act (which came into force in 2011); (b) the Supreme Court's decision on jury tampering and the consequent decision to continue the trial with judge alone were wrong; and (c) the proviso to s.14(1) of the Court of Appeal Act 1969 (dismissal of appeal if no miscarriage of justice even though the point raised in the appeal might otherwise be decided in favour of the appellants) should not be applied as a matter of principle, even though relied on by the Crown. Leave to appeal on all other grounds was refused.

On appeal against sentence, IM abandoned his appeal. BM and SM both maintained that the two counts should be regarded as part of one criminal activity, and should not have attracted consecutive sentences. None of the appellants wanted their victims to lose money, as they all hoped that they would be repaid—and although BM had illegally profited by more than £2.7m., he had invested more than £3m. of his own money to repay the losses and mortgaged his homes in Gibraltar and London. He had cooperated with the liquidators and had waited a long time for trial with increasing anxiety. SM drew attention to his age and family responsibilities and to the fact that he had never been a partner and his role was not client-facing. He lived modestly and invested his own money trying to assist the firm. The judge should have had regard to the 10-year maximum sentence for conspiracy to defraud and adjusted SM's sentence to reflect the roles of the individual defendants.

Held, dismissing the appeals against conviction and sentence:

(1) The effect of the Interpretation and General Clauses Act 1962, s.33(2)(c) was not to render s.21E of the Supreme Court Act 1960 unavailable for use in this case. Unless a contrary intention appeared, s.33(2)(c) preserved existing rights, privileges, *etc.* under any Act repealed, and a statutory right to trial by jury clearly existed before the enactment of the Criminal Procedure (Juries) Act 2010 which introduced s.21E. The 2010 Act did not, however, technically "repeal" any part of the Supreme Court Act: it simply "substituted" a new Part III (which included s.21E). Moreover, the substituting provision was clearly intended to apply to all future jury trials, and this was therefore a case in which "a contrary intention appeared" and restricted the application of s.33(2)(c). It was also clear from judicial comments on the model on which the 2010 changes were based, that the power to discharge a jury and continue with the judge alone was seen as "adding to rather than replacing" the court's existing powers to deal with jury difficulties (paras. 57–59).

(2) The judge's decision to discharge the jury lay at the heart of the appeal. Whether or not there had been tampering with the jury was a

matter of fact for the judge to resolve and it was clear to the court that he had resolved it correctly to the criminal standard of proof. It was true that there was no statutory definition of "tampering" but it did not have to take the form of corrupting or seeking to corrupt one of the jurors: it could simply be, as it apparently was here, an attempt to disrupt the trial process. What had happened to juror Y had to be considered in context—and that context included in particular the allegations which had been made a few days earlier in relation to juror H, which suggested that there was a danger that other jurors might be targeted (paras. 61–62).

(3) In deciding what to do next, it was impossible to know what damage had been done. It was not appropriate to discharge juror Y who was herself entirely innocent and a general warning without any specific target would be ineffective. The judge clearly had to choose between discharging the entire jury and continuing alone, or ordering a new trial with a different jury. So far as the latter alternative was concerned, the judge would need to consider, as he had here, the delays, the continued availability of elderly witnesses, the greater difficulty of empanelling a jury after the highly publicized first trial, even the availability of the (expatriate) judge himself, and the considerable extra expense. The preferable solution was for the judge not only to discharge the jury but also continue the trial himself. Although the right to trial by jury was important, it was not sacrosanct and could be circumscribed as appropriate by statute. Although discharging an entire jury had been described as a "measure of last resort," the judge had been correct to do so and order that the trial continue before him alone (paras. 62–70).

(4) Having found no substance in the grounds of appeal against conviction in relation to which leave to appeal had been given, it was unnecessary for the court to consider the possible application of the proviso. The appeals against conviction would therefore be dismissed (para. 73).

(5) The applications of BM and SM for leave to appeal against their sentences would be refused. The sentences were neither excessive nor wrong in principle; the consecutive sentence on BM was justified because it was in respect of a count charging a distinct form of dishonest conduct; SM had played a lesser role in the conspiracy and the judge had taken that into consideration. No doubt all the appellants had hoped to be able to repay the money misappropriated, as they claimed, and eventually lost money attempting to do so but by then their attempts were rendered hopeless because of the huge sums involved (para. 77).

Cases cited:

(1) *Moakes* v. *Blackwell Colliery Co. Ltd.*, [1925] 2 K.B. 64, referred to.

(2) *R.* v. *Guthrie*, [2011] 2 Cr. App. R. 20; [2011] EWCA Crim 1338, para. 4, *dicta* of Lord Judge, C.J. referred to

(3) *R.* v. *J.*, [2011] 1 Cr. App. R. 5; [2010] EWCA Crim 1755, *dicta* of Lord Judge, C.J. applied.

(4) *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, referred to.
(5) *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; further proceedings, [2011] 1 W.L.R. 1681; [2011] 1 Cr. App. R. 29; [2011] Crim. L.R. 562; [2011] EWCA Crim 8, *dicta* of Lord Judge, C.J. applied.

Legislation construed:

Interpretation and General Clauses Act 1962, s.33(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."

Supreme Court Act 1960, s.21E(1), as substituted by the Criminal Procedure (Juries) Act 2010, s.3:

"If a judge is minded during a trial on indictment to discharge the jury because jury tampering appears to have taken place, then before taking any steps to discharge the jury, the judge must—

(a) inform the parties that he is minded to discharge the jury;
(b) inform the parties of the grounds on which he is so minded; and
(c) allow the parties to make representations."

s.21E(2), as substituted by the Criminal Procedure (Juries) Act 2010, s.3:

The relevant terms of this sub-section are set out at para. 13.

s.21E(3), as substituted by the Criminal Procedure (Juries) Act 2010, s.3:

"If the judge considers that it is necessary in the interests of justice for the trial to be terminated, he must terminate the trial."

N. Gomez for the first appellant;
I. Massias for the second appellant;
C. Finch for the third appellant;
D. Conroy for the Crown.

1 **KENNEDY, P.:**

Introduction

This case is unique. Gibraltar has a population of about 30,000, including a surprisingly large number of lawyers. Prior to 2010, Marrache & Co. was a well-known firm of lawyers with offices in Gibraltar, London and Sotogrande (Spain). The first two appellants were legally qualified partners and their brother, the third appellant, was the finance director. In this judgment we will refer to them as IM, BM and SM. IM, who was the senior partner and the founder of the firm, was based primarily at the

London office in Hanover Square, but also had an office at the firm's premises in Gibraltar, where the other two appellants were based.

2 In February 2010, BM and SM were arrested and charged with theft. In March 2010, Marrache & Co. was wound up, and liquidators were appointed. In May 2010, when he returned to Gibraltar, IM was also arrested and charged with theft. Leanne Turnbull, senior managing clerk with Marrache & Co., who was ultimately acquitted, was also arrested at this time. In November 2010, the appellants were adjudicated bankrupt. The liquidators of the firm received claims of debt from banks and unsecured creditors, including clients, staff and trade creditors, to a total of £40.63m.

3 In October 2011, the prosecution indicated that it proposed to prefer counts of conspiracy to defraud, and on November 1st, 2011 there came into force an amendment to the Gibraltar Supreme Court Act 1960, which, by s.27A, allows the Attorney-General to seek trial of certain financial offences by judge and lay assessors. In December 2011, the two charges of conspiracy to defraud were preferred, and the Stipendiary Magistrate was asked to fix a date for a full "old style" committal. It was necessary for the committal proceedings to be before a magistrate not in any way connected with the appellants, and thus the matter came before Mr. Timothy Workman in July 2012. The prosecution then sought to invoke s.27A. The defence contended that to do so would be an abuse of process, and the matter was adjourned to late October 2012.

The ruling of the magistrate

4 The magistrate gave his decision on November 1st, 2012. He rejected the attempt to strike down the amending legislation, but refused to allow the prosecution to rely upon s.27A. The reasons for that decision are of no significance at this stage. The magistrate was troubled by the "inordinate delay" but made it clear that, despite his ruling, there was no suggestion of any bad faith or dishonesty on the part of the prosecution. In due course, the trial judge dissociated himself from part of what had been said by the magistrate in relation to delay, pointing to some of the difficulties for the administration of justice in Gibraltar which were created by this case.

The start of the trial

5 Sir Geoffrey Grigson agreed to act as the trial judge, and was appointed an Acting Judge of the Supreme Court of Gibraltar. We were told that it took a week to empanel a jury of 9, with 3 additional jurors in reserve. 600 potential jurors had been summoned because it was known that there would be a long trial and that many potential jurors would have some connection with the appellants.

6 The trial began with a submission by counsel for all three appellants, alleging that the trial should be stayed as an abuse of process. As can be seen from the judge's ruling of October 14th, 2013, many grounds were relied upon, including delay. The judge examined the evidence, and accepted that, although the period from February 2010 to October 2013 is a long one, it was not shown to be caused by any institutional prosecution misconduct, nor were there any exceptional circumstances such as to make a fair trial impossible. The judge received, considered and rejected allegations of misconduct and incompetence in the investigation of Marrache & Co. by all of those involved, and allegations of conflict of interest. The judge also considered allegations about allegedly inadequate defence funding, and an allegation by counsel for BM that two partners in the firm of accountants which acted for Marrache & Co. should be named as co-conspirators in the indictment which, by October 2013, contained simply the two counts of conspiracy to defraud. As the judge pointed out, subject to court supervision, the contents of an indictment are a matter for the prosecution. It was alleged that important documents were missing, or had been destroyed. Some had apparently been destroyed because they were damaged and illegible. The judge was at a loss to understand how the destruction of illegible documents could support an application for a stay. He was also asked by all three appellants to have regard to adverse publicity which, it was claimed, was such as to render a fair trial impossible. As he pointed out, careful steps, including the use of a questionnaire, had been taken to try to ensure an open-minded jury, and the appellants themselves had declined the opportunity to be tried by a judge with two lay assessors.

7 On Monday, October 14th, 2013, after the judge had given his decision in relation to the allegations of abuse of process, the prosecution opened the case to the jury.

Concern about juror H

8 Three days later, on Thursday, October 17th, 2013, counsel for IM, Mr. John Cooper, Q.C., in the absence of the jury, raised with the judge his concerns about one of the female jurors, referred to as juror H. Mr. Cooper had, it seems, been informed that she worked for Charles Gomez & Co., who were solicitors acting for BM. Mr. Cooper had spoken to counsel for BM, Mr. Lovell-Pank, Q.C., who had made enquiries and advised Mr. Cooper that she did not work for Charles Gomez & Co., but worked in the same building. Mr. Cooper was apparently not content with that, and wanted the judge to pursue the matter. He also wanted the Attorney-General's assurance that all jurors had been checked for previous convictions (which was, it seems, part of the role of the Attorney-General's office in this case). Mr. Cooper wanted an assurance that juror H did not have a conviction for fraud. Mr. Lovell-Pank explained in court that the

juror worked for a company which leased an office in the same building as Charles Gomez & Co., and that her employers paid rent to Charles Gomez & Co. As Mr. Lovell-Pank put it, "in this town geographical connections are inevitable." Mr. Cooper then enquired whether she might have access to the offices of Charles Gomez & Co. so as to become privy to a discussion between members of the legal team of BM. Mr. Lovell-Pank, having taken further instructions, explained that she worked on the second floor of the building "which has nothing to do with Gomez & Co." Having made enquiries, Mr. McGuinness, Q.C., counsel for the Crown, told Mr. Cooper that the juror did not have a conviction for fraud nor had she met the Attorney-General. The suggestion that she might have met the Attorney-General had also been made by Mr. Cooper, but the judge was not made aware of that suggestion at this stage.

Concern about juror Y

9 On the following Monday, October 21st, 2013, Mr. Evans, Q.C., counsel for Leanne Turnbull, informed the judge, in the absence of the jury, that his client had been spoken to by her brother-in-law, William Turnbull, about another female juror, referred to as juror Y, who worked at a social club. According to William Turnbull, a member of that club told him that on the previous Saturday evening, October 19th, 2013, she had said to those present that she was not going to listen to anything else because, as far as she was concerned, they were all guilty. After some discussion about whether or not to hear the next witness, the judge ordered an investigation by a senior police officer, and the witness was then heard. The next day, Tuesday, October 22nd, 2013, again in the absence of the jury, Insp. Field gave evidence about what he had been able to discover. He said that he had been able to speak on the previous afternoon to William Turnbull, who said that on Sunday afternoon he had been telephoned, on his landline, by someone who claimed to be a friend of his, but whose voice he did not recognize, and who did not identify himself. That person claimed to have heard juror Y say that she did not have to hear anything more, that they were all guilty. William Turnbull said that he could not say when this was supposed to have happened. It could have been Friday or Saturday night in the club. The inspector asked for authority to access telephone records, to try to identify the caller's number, but William Turnbull refused, saying he did not want to expose his caller. William Turnbull said that he was going to the club that same evening, and would try to find out. The inspector warned him not to approach the juror. They discussed what he should do if the juror approached him, and the inspector gave William Turnbull his mobile phone number. The inspector was given by defence counsel a list of names of persons alleged to have been present at the club when the alleged comments were made, and he was authorized to contact those individuals.

The jury was then brought back to court and another prosecution witness was called.

10 That same afternoon, Tuesday, October 22nd, 2013, in the absence of the jury, the judge told counsel that he had received a note from juror Y which 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 those words come out of my mouth so I thought would be best to inform you."

At that stage, Mr. McGuinness, for the Crown, was able to tell the judge that Insp. Field had seen and taken statements from all of those on the list provided by the defence, and that no one had heard the alleged comment by juror Y. The judge directed that when William Turnbull was seen again he should be cautioned, because he appeared to have given untrue information for the purpose of tampering with the jury. The judge later said that he had used the word "tampering" deliberately, because of the provisions in the Supreme Court Act which enabled him to take steps to discharge the jury altogether, and to proceed to try the case alone. That notice having been given, the jury returned and the trial continued.

11 On Wednesday, October 23rd, 2013, Insp. Field was again available to give evidence in the absence of the jury about his enquiries. He said that those named to him had all denied hearing any untoward comment made by the juror. William Turnbull had by then been arrested on suspicion of attempting to pervert the course of justice, and he had been interviewed under caution. He told the officer that on Sunday, when he received the anonymous phone call, the caller had given him the list of names which he gave to his brother, the husband of Leanne Turnbull, but not to the police. He said that after seeing the inspector previously he had gone to the club, and spoken to juror Y, telling her of receiving an anonymous phone call and being given a list of names. Despite the warning he had received, he had not reported back to the officer because it was sort of small talk. The officer said that he had found nothing to question the credibility of the juror.

12 The judge then informed counsel that he regarded the incident as extremely serious, that he was conscious of his power to discharge the jury and to order a re-trial. He pointed out that where a judge is minded to discharge the jury because jury tampering appears to have taken place, he must, before taking any steps to discharge the jury, inform the parties of what he is minded to do, of the grounds on which he is so minded, and

allow them an opportunity to make representations (see s.21E(1) of the Supreme Court Act 1960, as amended). In this appeal it is accepted that the judge complied with that requirement. The judge heard submissions from counsel on Wednesday, October 23rd, 2013 and Thursday, October 24th, 2013, and on Friday, October 25th, 2013 he gave his decision.

The judgment of October 25th, 2013

13 The 23-page judgment of October 25th, 2013 (reported at 2013–14 Gib LR 350) is at the heart of this appeal. The statutory provision which the judge had to consider is s.23E(2), which provides that if the judge, after considering the representations envisaged by s.21E(1), discharges the jury—

> "he may 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."

Sub-section (3) goes on to provide:

> "If the judge considers that it is necessary in the interests of justice for the trial to be terminated, he must terminate the trial."

14 Section 23E of the 1960 Act appears in Part III of that Act which was substituted for the previous Part III by s.3 of the Criminal Procedure (Juries) Act 2010 with effect from January 1st, 2011 (see L.N. 183 of 2010). Section 23E reflects provisions to be found in s.46 of Part 7 of the Criminal Justice Act 2003, which applies to England and Wales, but s.46 also contains a provision allowing a trial judge to order a new trial without a jury. There is no such provision in Gibraltar legislation.

15 It is unnecessary for us to set out here in any detail the submissions which were made to the judge on October 24th, 2013 because we can deal with them later, when considering the submissions made to us. The judge had been given written skeleton arguments, and received oral submissions, of which we have a transcript. In essence all four defence counsel were submitting that there was not sufficient evidence of jury tampering, and that the trial should proceed with the jury as then constituted, including juror Y. It was during the course of these submissions that the judge first became aware of Mr. Cooper's earlier suggestion that juror H had met the Attorney-General, and Mr. Finch, for SM, drew attention to ss. 32 and 33 of the Interpretation and General Clauses Act 1962, in order to submit that when s.23E of the Supreme Court Act 1960 came into force his client already had a vested right to jury trial, which was not impaired by the new legislation. It was pointed out that whether or not there had been

tampering was a question of fact for the judge to decide, and that in order to find that it had taken place he had to apply the criminal standard of proof.

16 In his judgment, the judge set out the background to the case and how the jury panel was brought into existence and vetted for previous convictions; each juror completed a questionnaire and eventually, after about 100 citizens had been processed on each of 5 days, a panel of about 40 remained. It then emerged that of the 40 a number had good reason to disqualify themselves, but a jury of 12 was formed, 9 jurors and 3 additional jurors. The judge recalled that at that stage it had been submitted on behalf of the Marrache brothers that the case should be stayed because to allow it to continue would be an abuse of process.

17 The judge then turned to the history of the trial. He referred to what had been said by Mr. Cooper in relation to juror H, beginning with the suggestion that she worked as an accounts clerk for Charles Gomez & Co. and including the suggestion, made to the prosecution, that she knew the Attorney-General, and had been convicted of benefit fraud. As the judge said, the Crown investigated, and, he continued: "Neither allegation was true, consequently those matters were not raised before me until yesterday." In relation to juror H the judge said (*ibid.*, at para. 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 (a) that 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."

The judge was wrong when he said that there was specific mention of Gomez & Co. in the questionnaire (which we have seen), but no one seems to have noticed that error at the time.

18 The judge then turned to juror Y and to the events of the previous four days, which we have set out above, before concluding that part of his narrative thus (*ibid.*, at paras. 14–15):

> "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."

19 The judge then considered and rejected the submission of Mr. Finch as to the impact of s.21E on his client's existing right to trial by jury, before turning to the words of s.21E(2). As he said (*ibid.*, at para. 22): "The first question is 'Am I satisfied as to be sure that jury tampering has taken place?'" The judge summarized the submissions of counsel, including the submission that the note from juror Y showed her to be unaffected by her experience.

20 As the judge observed (*ibid.*, at para. 28), there is no definition of "tampering" in the Supreme Court Act. He then commented that "such a definition is unnecessary, we all know what the word means." The judge rejected the suggestion that the essence of the legislation is to prevent jury nobbling. As he said, the Act (or at least the section with which he was concerned) provides measures to deal with the situation after jury tampering has taken place. In his conclusion, the judge rejected the submissions of defence counsel, and continued (*ibid.*, at paras. 30–32):

> "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. William 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 William 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."

21 The judge then went on to consider what should be done, saying (*ibid.*, at para. 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."

The judge considered the submissions of counsel that the trial should continue with all 12 jurors. He pointed out that warnings would be impracticable because there was really no one to warn, and close monitoring of the jury was, for the reasons he explained, not a sensible option. He referred to *R.* v. *S* (4) in which Lord Judge, C.J. referred to the statutory power to discharge the jury as "a matter of last resort" and agreed with Mr.

McGuinness that to discharge juror Y would be to reward those responsible for tampering with the jury by giving them exactly what they intended to achieve, which "could only encourage further attempts to attack the structure and composition of the jury." The judge also agreed with Mr. McGuinness 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, which, to some extent, had been achieved, because valuable time had been lost, and expense and inconvenience had been incurred.

22 The judge then identified what he described as "other important considerations," the first being the impact of what had happened on juror Y. She had grounds for believing that Leanne Turnbull, or someone acting on her behalf, had made a deliberate and dishonest attempt to vilify her, and secure her discharge as a juror. The judge said that if that had happened to him he would be indignant, and upset. It was wholly reasonable to infer that it had been done to disrupt the trial, and it could be taken by juror Y to indicate guilt. Juror Y might share her feelings with other jurors, and it would not be appropriate to conduct an inquiry, but if the judge were to continue with juror Y in the jury, if Leanne Turnbull were to be convicted, she would have a very good ground of appeal.

23 The judge went on to say that juror Y would be wholly justified if she was concerned that something like this might happen again, and any other juror who knew what had happened would be bound to worry whether he or she might be the subject of the next attack. The fact that there had been two such attacks in the space of two weeks suggested to the judge that this was "just the beginning of a campaign to disrupt the process of trial by jury." In his judgment, there were no practical steps which the court could take to avoid discharging the whole jury, and no measure that he could order to prevent this sort of attack.

24 The judge was aware that in the cases brought to his attention the jury had retired when the problem arose, but he decided that in the present case "there is no alternative remedy available even at this stage of the trial."

25 The judge then turned to the question of whether he should continue the trial without a jury, or order a re-trial with a jury. He said that realistically no re-trial would be possible until January 2014, which would add to the delay of which the Marrache brothers had complained. The difficulty of empanelling a jury would be exacerbated, the judge himself might not be available "which would open the door for further abuse arguments," some Crown witnesses were old and infirm, and a re-trial would involve very substantial expense.

26 The judge referred to *R.* v. *Twomey* (5) in which Lord Judge, C.J. had said ([2010] 1 W.L.R. 630, at para. 20), that save in unusual circumstances a judge faced with the problem of jury tampering "should order not only

the discharge of the jury but that he should continue the trial." Before us, Mr. Lovell-Pank criticized the reasoning of the trial judge as being "limp" and "scraping the bottom of the barrel to keep this case on the road." We do not agree.

27 As to whether it would be fair to proceed alone, the judge quoted from para. 18 in the same case, *R.* v. *Twomey*, where the Lord Chief Justice said that it 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. In the present case, as the trial judge pointed out, he was not part of the Gibraltarian community, he was unaffected by any *animus* towards the Marrache brothers, he was sufficiently experienced to be immune from press comment, and he was well used to ignoring irrelevant or inadmissible evidence. The fact that he had made decisions against the defendants simply reflected his judgment as to the law and its application to the facts. It was not evidence of prejudice or bias. The judge then said (*ibid.*, at para. 67):

> "I am satisfied 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."

28 The judge then dealt with a matter ventilated by Mr. Cooper, on behalf of his client, that there was a concern in some quarters to obtain convictions at all costs, and that the law had been changed in Gibraltar with this case in mind to try to remove the right to jury trial. As the judge pointed out, the changes made in Gibraltar mirrored changes made in England and Wales. When they came into effect no one could have foreseen the events of the present case, and defence perceptions could not be a sufficient reason for a judge not to take the course he had chosen. Before us, both Mr. Cooper and Mr. Lovell-Pank expressly accepted that their clients did receive a fair trial.

The submission of October 28th, 2013

29 On Monday, October 28th, Mr. Cooper, on behalf of IM, supported by Mr. Lovell-Pank for BM, sought to persuade the judge to revisit and revise the judgment which he had given on Friday, October 25th, or that the judge should recuse himself from hearing the trial further, because he had made a finding of dishonesty against IM. It was said that the judge had been significantly influenced by and misinterpreted the events concerning juror H, which did not amount to jury tampering. The judge responded to these submissions in the "Reasons for judgment" which he gave on October 31st, 2013. Those reasons make it clear that the judge had not misunderstood the position in relation to juror H. He understood that IM had received information from some undisclosed source that she

worked for Charles Gomez & Co. There was no evidential basis for any finding that IM was anything other than a conduit, and the judge made no such finding. It must have been obvious to all concerned that the information as to her employment had to be raised in court and, said the judge (*ibid.*, at para. 79):

> "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."

30 Mr. Cooper had submitted that juror H be questioned. The judge could see no benefit in that course. As he said: "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." The judge rejected the submission that he had come to an adverse finding as to the honesty of IM. Such a conclusion did not follow from his findings in relation to juror H, and, we can add, that is obvious upon reading the transcript. The misunderstanding as to the name of Charles Gomez & Co. having appeared on the questionnaire completed by juror H was repeated, but nothing seems to turn on that. By October 31st, it had become clear that the employers of juror H were on the floor below Charles Gomez & Co. so that, as the judge said, she would be unlikely to pass their offices. It had also become clear that William Turnbull's phone records showed no call received on his landline between 4.00 p.m. and 4.30 p.m. as he had alleged.

31 The judge declined to revisit or revise his judgment of the previous Friday, or to recuse himself, and ordered that his "Reasons for judgment" of October 31st, 2013 be attached as an addendum to his earlier "jury tampering" judgment.

Outline of grounds of appeal

32 Each appellant submitted separate grounds of appeal in relation to conviction and sentence, and all of the applications for leave to appeal were referred by the Chief Justice to the full court. When the appeal was called on, we gave leave to appeal in relation to those grounds of appeal which sought to impugn the judge's judgment of October 25th, 2013. We then heard oral submissions from leading counsel for all three appellants, which can be summarized as follows:

(1) Mr. Arlidge, Q.C., for SM, developed the submission made by Mr. Finch to the trial judge that when s.21E of the 1960 Act came into force it did not impact upon the existing vested right of the appellants to jury trial. That submission was adopted by other counsel.

(2) Mr. Cooper and Mr. Lovell-Pank concentrated on the judge's decision of October 25th, 2013, but their submissions extended to the reconsideration of that decision in February 2014, which resulted in the judge's decision of February 21st, 2014.

(3) The Crown having indicated in its skeleton argument an intention to rely if necessary upon the proviso to s.14(1) of the Court of Appeal Act 1969 (which enables this court to dismiss an appeal even if we are of the opinion that the point raised in the appeal might be decided in favour of the appellant where we consider that no miscarriage of justice has actually occurred), it was submitted on behalf of all three appellants that the proviso should not be applied as a matter of principle, and Mr. Arlidge further submitted that in the case of his client the evidence against him was not sufficient to justify the application of the proviso.

33 After we had heard from counsel for the appellants, we extended our grant of leave to appeal to include the reconsideration of the decision of October 25th, 2013 which took place in February 2014, but refused leave to appeal in relation to all other grounds. We therefore only heard from the Crown in relation to the judge's decisions of October 25th, 2013 and February 21st, 2014, and in relation to Mr. Arlidge's submissions as to the application of the proviso.

After October 31st, 2013

34 After the judge had given his "Reasons for judgment" on October 31st, the trial continued. In late November, Mr. Lovell-Pank, on behalf of BM, made another application that the judge should recuse himself, which the judge considered in his judgment of November 21st, 2013. The application was based upon two grounds:

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

We do not need to dwell on this episode, because it does not feature in any surviving ground of appeal, so it is sufficient to say that the judge found no basis for the argument that he should recuse himself.

35 An issue as to admissibility then arose when the prosecution proposed to introduce into evidence tape recordings of a telephone call apparently made in December 2009 by Rebecca Marrache when she complained to her brothers BM and SM that, without her authority, they had used her real property to obtain funds. On December 16th, 2013, the

judge ruled that the evidence, which included evidence as to who was speaking, should be admitted. In SM's ground of appeal he did challenge the admissibility of the Rebecca tapes, but that ground of appeal was not developed in oral argument, and we did not give leave to appeal in relation to it.

36 In January 2104, at the conclusion of the Crown case, counsel for IM and BM, and counsel for Leanne Turnbull, made submissions of no case to answer. Those submissions were rejected by the judge in his judgment of January 27th, 2014. No issue now arises in relation to that judgment.

37 In his judgment of February 3rd, 2014 the judge dealt with and rejected further submissions, made on behalf of all four defendants, that the trial should be stopped because to allow it to proceed would constitute an abuse of process. Nothing now turns on that ruling, but the transcript shows that by then the Crown had decided not to proceed further against William Turnbull, juror Y having declined to assist in the enquiry. Mr. Cooper submitted that the judge should re-visit his decision to discharge the jury, but the judge declined to do so, saying that "there is nothing to suggest that the evidential basis for my decision has been impugned in any way."

The final attempt to re-visit the decision of October 25th, 2013

38 On Monday, February 17th, 2014, Mr. Finch served on the court a written submission that the case be stayed, as to allow the prosecution to proceed would be an abuse of process. Alternatively, the trial should be aborted, and the judge should order a re-trial with a jury.

39 On Tuesday, February 18th, 2014, counsel for the other three defendants submitted a joint skeleton argument alleging abuse of process, but not seeking a re-trial. They asserted that no re-trial could be a fair trial, given the history of the case.

40 The defence submissions arose from fresh material which, it was asserted, fatally undermined the factual basis of the judge's decision of October 25th, 2013, in particular in relation to juror H, in respect of whom it had emerged that she did in fact have a previous conviction. Mr. Finch also sought to re-open issues in relation to juror Y, but there the judge found nothing new.

41 In his judgment of February 21st, 2014 (reported at 2013–14 Gib LR 406), the judge quotes from the joint application submissions which he describes (*ibid.*, at para. 7) as "a classic example of hyperbole." They included an allegation of bad faith on the part of the Attorney-General and/or members of his Department. The result was that the court heard live evidence from the Attorney-General, from Kerrin Drago (Crown

Counsel) and from juror H. As to their evidence the judge said this (*ibid.*, at para. 8):

> "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."

42 The judge then goes on to describe the procedure used in Gibraltar to check whether prospective jurors have criminal convictions. It involves the Attorney-General's Department and the Criminal Records Department of the Royal Gibraltar Police. Under the Supreme Court Act, a citizen is only disqualified from jury service if he or she has at any time been sentenced to life imprisonment, a custodial sentence of 5 years or more, or has, within the last 10 years, served any part of a custodial sentence, or had passed on him or her a suspended custodial sentence. In February 2014, it had come to light that in July 1994 juror H had pleaded guilty to one offence of benefit fraud, committed two years earlier, and had received a sentence of three months' imprisonment suspended for two years. She subsequently married her partner, Mr. S, but they parted in 2003 and in February 2006 they were divorced. She then married Mr. H. Soon after the divorce, Mr. S began to send abusive emails to his former wife. She consulted the police, and in August 2006 Mr. S was arrested. In September 2006, a police officer checked to see if juror H had any previous convictions. He found no trace of any. In October 2006, Mr. S was charged with an offence under the Communications Act 2006. However, it soon emerged that the Act only came into force after the emails had been sent, so the prosecution was discontinued. Mr. S then began to make extravagant complaints against the police, and in June 2012 solicitors acting on his behalf issued proceedings against the police claiming damages for unlawful arrest. In practice, the Attorney-General conducts the defence of such actions, but one lawyer in his office drafted the defence and subsequently another lawyer, Kerrin Drago, took over the preparation of the case. On April 17th, 2013, 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 statement was not completed. Twelve days later, on April 29th, 2013, when Mr. Drago was on leave, the Attorney-General attended a case management conference in this civil action at the Supreme Court. The hearing lasted 10 minutes, and resulted in a consent

order. In June 2013, the civil trial was set down for the first available date after November 1st, 2013.

43 In July 2013, the solicitors acting for Mr. S asked Mr. Drago for details of juror H's previous convictions. Mr. S was aware of the conviction, because he had been living with her in 1994, and had referred to her conviction in his offensive emails. Mr. Drago refused to make enquiries about any previous convictions because they seemed to have no relevance to the civil action, in which credit was not in issue.

44 On August 13th, 2013, juror H sent an email to Mr. Drago. She was concerned because she had heard from Mr. S that her 20-year-old conviction would be referred to in the civil case. Mr. Drago telephoned her to tell her that Mr. S's solicitors had not told him that they were seeking to rely on her conviction, but he made no further enquiries about it. On August 22nd, 2013 Mr. Drago wrote to juror H to tell her that the trial date would be December 9th, 2013. She immediately replied seeking confirmation that her previous conviction would not be disclosed. Mr. Drago replied as follows: "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."

45 At the beginning of October 2013, juror H was summoned as a potential juror. As already made clear, she was not asked about previous convictions, and the standard check in relation to previous convictions revealed nothing. When completing the questionnaire, she revealed that Marrache & Co. had once acted for Mr. S, but not that he had once worked for the Royal Gibraltar Police. As the judge said, that was not surprising. She had been divorced from him for a turbulent seven years, so, from her point of view, he was no longer close family. Before she was sworn as a juror she was questioned by the judge about the Marrache connection, and about some care proceedings in which the Attorney-General's Chambers had represented the social services.

46 On October 16th, 2013, the Attorney-General telephoned the solicitor acting for Mr. S to tell him that one of his witnesses for the civil trial, juror H, was serving as a juror in the Marrache trial, so the civil action would have to be adjourned. The hearing was fixed for December 9th, 2013, but a settlement was agreed shortly before that date.

47 On October 17th, 2013, Mr. Cooper informed Mr. McGuinness that he had instructions that juror H had a previous conviction for benefit fraud, and that she knew the Attorney-General. The source of that information has never been disclosed. Mr. McGuinness made enquiries. The officer in the case checked criminal records and found nothing, and the Attorney-General said that he had never met juror H, which they both eventually confirmed in oral evidence. The name meant nothing to him.

So Mr. McGuinness gave a negative answer to both of Mr. Cooper's enquiries.

48 Later on October 17th, 2013, Mr. Cooper raised in open court the suggestion that juror H worked as an accounts clerk for Charles Gomez & Co. It was not until problems arose with juror Y that the judge was told about Mr. Cooper's other enquiries.

49 One afternoon between October 16th and 25th, 2013, Mr. McGuinness and others were in the Attorney General's Chambers discussing juror H's alleged conviction. Mr. Drago joined in, and told Mr. McGuinness and Ms. Armstrong that juror H had told him that she had a previous conviction. The reply was that it had been checked and that she had no previous convictions. Mr. Drago checked his file in the civil case and found the docket showing that in September 2006 no previous conviction was recorded. He told Mr. McGuinness and Ms. Armstrong what he had found and thought no more about it. At some later stage Mr. Finch instigated a search of the paper records at the Magistrates' Court, and juror H's 1994 conviction was found.

50 In relation to those facts, somewhat extravagant submissions were addressed to the trial judge. We do not need to refer to them. As he said (*ibid.*, at para. 60):

> "[N]one 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."

Obviously the fact that she had a previous conviction should have been recorded and disclosed, but, as the judge found, the error was not attributable to anyone concerned in this case, and (*ibid.*, at para. 61) "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."

51 As the judge found, there was no evidence of bad faith. He defined the real issue (*ibid.*, at para. 67) as being "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?"

52 The judge answered that question thus (*ibid.*, at paras. 68–70):

"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;

(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."

The judge then dealt briefly with the process of disclosure of convictions which he found to be efficient.

The end of the trial

53 After February 21st, 2014, the trial continued. By then the Crown case had closed, and the first defendant was giving evidence. BM also gave evidence, but SM did not give evidence. On July 2nd, 2014, the trial judge gave judgment. In that 117-page judgment he carefully considered all of the issues which remained to be decided, and examined the position of each defendant in relation to the two counts of conspiracy to defraud in the indictment.

54 Count 1 alleged, in essence, misuse of clients' moneys, including the moneys in clients' accounts, over the period from July 1st, 2004 to February 9th, 2010, and Count 2 alleged misuse of properties beneficially owned by clients of the firm and others to provide security to Jyske Bank in the period between January 1st, 2009 and February 9th, 2010. IM, BM and SM were convicted on Count 1, and BM and SM were convicted on Count 2. IM was acquitted on Count 2, and Leanne Turnbull was acquitted on both counts.

55 On July 4th, 2014, BM was sentenced to 8 years' imprisonment on Count 1 and 3 years' imprisonment consecutive on Count 2, making 11 years in all. SM was sentenced to 7 years' imprisonment on Count 1 and 2 years' imprisonment on Count 2, those sentences to run concurrently, making 7 years in all. IM was sentenced to 7 years' imprisonment on Count 1, the only count on which he was convicted.

Vested right to jury trial?

56 We turn now to the surviving grounds of appeal against conviction, and begin with the submission of Mr. Arlidge that the effect of s.33(2) of the Gibraltar Interpretation and General Clauses Act 1962 was to render s.21E of the Supreme Court Act 1960 unavailable for use in this case. We refused leave to appeal in relation to this ground, but, as we received oral submissions in relation to it, we now indicate briefly why we refused leave.

57 As we have already said, s.21E appears in Part III of the 1960 Act, which was substituted for the original Part III by s.3 of the Criminal Procedure (Juries) Act 2010, with effect from January 1st, 2011. By then all three appellants had been arrested and charged with offences of dishonesty, albeit not the offences of conspiracy to defraud. For the purposes of this submission it is contended on their behalf that the proceedings against them began when they were first charged, and s.33(2) of the Interpretation Act, so far as relevant, provides as follows:

> "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 . . ."

58 It is submitted that trial by jury is an existing right, entrenched in Gibraltar by statute, and within the scope of s.33(2)(c), to which the appellants were entitled, and although the amending Act did not purport to repeal, but only to substitute, the court should look at the reality of what happened, as the English Court of Appeal did in *Moakes* v. *Blackwell Colliery Co. Ltd.* (1).

59 Before the trial judge it was submitted, on behalf of the Crown, that the substituting provisions did not amount to a repeal, and that, in any event, the substituted provisions were clearly intended to apply to all future jury trials, so that, for the purposes of s.32(2), this is a case where "the contrary intention appears" to restrict the application of s.32(2)(c). The judge accepted that submission and in our judgment he was right to do so. It is also worth remembering that, as was emphasized by Lord Judge, C.J. in *R.* v. *Guthrie* (2) ([2011] 2 Cr. App. R. 20, at para. 4) the new statutory power to discharge a jury and continue alone "adds to rather than replaces the court's existing powers to deal with . . . jury difficulties." It therefore helps to safeguard the integrity of jury trial.

The decision to discharge the jury

60 We return therefore to the judge's decision of October 25th, 2013 to discharge the jury and proceed alone, which, as we have said, is at the heart of this appeal. The statutory provision is clear. If the judge is minded to discharge the jury because jury tampering appears to have taken place he must first tell the parties what he is minded to do, and give them an opportunity to make representations. It is accepted that the judge did that and considered the representations made. His position then was that he might order that the trial continue without a jury if he was satisfied that jury tampering had taken place, and that to continue without a jury would be fair to the defendants.

61 Whether or not tampering had taken place was an issue of fact which, on October 25th, 2013, the judge had to resolve, applying the criminal standard of proof, and it is clear to us that he did that. In his judgment of that date, which we have summarized, he set out his reasoning, and it seems to us to be unassailable. The facts speak for themselves. As he said, there is no statutory definition of tampering, but it does not have to take the form of corrupting, or seeking to corrupt, one or more jurors. It can be, as apparently it was here, an attempt to disrupt the trial process. What happened to juror Y had to be considered in context, and that context included, in particular, the allegations made a few days earlier in relation to juror H. That is why we have found it necessary to set out the chronology in some detail in this judgment.

Authorities

62 Once the judge was satisfied that there had been jury tampering, he had to consider what to do next. Clearly, in the circumstances of this case, he could not simply do nothing. It was impossible to know precisely what damage had been done, and the danger of other jurors being targeted was obvious. It was, as he explained, not appropriate to discharge juror Y, who was herself entirely innocent, and a general warning without any specific target would not be likely to be effective. Clearly the judge had power to discharge the entire jury and then either continue alone or order a new trial with a jury.

63 Much of what was said to us on behalf of the appellants emphasized the entrenched right to jury trial, but, as can be seen from the English authorities referred to below, there are balances to be struck.

64 In *R.* v. *Twomey* (5) the Court of Appeal was considering an application for trial on indictment without a jury, but the Lord Chief Justice turned to the situation where tampering appeared to have taken place, and said ([2010] 1 W.L.R. 630, at para. 20):

> "[G]iven 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 re-trial, 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."

65 In *R.* v. *S* (4), evidence of jury tampering had emerged after the jury began to deliberate, the jury was discharged and the judge continued. The Lord Chief Justice said ([2010] 1 Cr. App. R. 20, at para. 9):

> "[P]ossible alternative solutions which might have been appropriate if jury tampering had been established at an earlier stage in the trial could not be adopted. At that stage of the proceedings, no remedy other than the discharge of the jury was available or appropriate."

Counsel before us drew attention to that passage, and to the passage where the Lord Chief Justice (*ibid.*, at para. 14), described discharge of the entire jury as "a measure of last resort."

66 In *R.* v. *J* (3), the Court of Appeal was again concerned with an interlocutory appeal against an order for trial by judge alone. The appeal was allowed and the Lord Chief Justice said ([2011] 1 Cr. App. R. 5, at para. 9):

> "If during the course of this, or indeed, any trial, attempts are made to tamper with the jury to the extent that the judge feels it necessary to discharge the entire jury, it should be clearly understood that the judge may continue with the trial and deliver a judgment and verdict on his own. The principle of trial by jury is precious, but in the end any defendant who is responsible for abusing this principle by attempting to subvert the process has no justified complaint that he has been deprived of a right which, by his own actions, he himself has spurned."

As was said to us, in the present case there is no evidence of any appellant attempting to subvert the process.

67 In *R.* v. *Twomey* (5), the Lord Chief Justice said ([2011] 1 W.L.R. 1681, at para. 34):

> "Trial by jury is described as a 'right' in order to emphasise the importance that is attached to it, but it is a right which can be and from time to time is circumscribed by statute."

As he went on to explain, the provisions we have to consider do not stand alone. In that case it was argued by the appellants that the order for trial by judge alone should not apply to a defendant against whom jury tampering was not proved. That was rejected. The Lord Chief Justice continued (*ibid.*, at para. 57):

> "[T]he argument fails to recognise that findings in relation to jury tampering may be made without it being possible for the court to ascribe responsibility to any particular individual defendant . . . [T]he legislation relating to trial by judge alone is directed to the trial process rather than to individual defendants where there is more than one . . ."

That, of course, is the situation in the present case.

68 In *R.* v. *Guthrie* (2), evidence of tampering again emerged when the jury was in retirement and after some verdicts had been delivered. The Recorder discharged the jury and concluded the trial alone. Her decision was upheld, and the Lord Chief Justice said ([2011] 2 Cr. App. R. 20, at para. 29):

> "Naturally, if it were to emerge that an outside party unconnected with any of the defendants was responsible for jury tampering, without the consent, acquiescence or involvement of any defendant, we agree that it might very well be harsh for the defendants, each one of them wholly innocent and uninvolved in the process of jury tampering to be deprived of trial by jury. However, that is an unlikely event or series of events . . ."

Even if a judge is dealing with the unlikely scenario of an outside party, for reasons which cannot be established, disrupting the trial by tampering with the jury, the judge must have a discretion to discharge the jury and continue to try the case alone if he or she is satisfied as to the statutory requirements set out in s.21E(2) of the Supreme Court Act 1960, as amended.

69 The authorities also contain passages pointing out that a trial by judge alone can be a fair trial, as seems to have been the situation in the present case. The judge considered his own position carefully as a non-Gibraltarian who had heard nothing (*e.g.* PII material) which a jury would not have heard. He was fully alive to the fact that on October 25th, 2013 the trial had not progressed very far, the prosecution having only just begun to call evidence. However, as the judge explained, the arguments against ordering a re-trial were formidable. Realistically, there would be a delay of a couple of months to add to the existing delay. Even assuming that the judge was available, it would have been even more difficult to empanel a jury, older witnesses might no longer be available, history indicated that attempts to disrupt the trial process might well occur again, and there would be considerable additional expense.

70 In our judgment the judge was right to do as he did when he discharged the jury and ordered that the trial continue before him alone.

The February 2014 reconsideration

71 What happened in February 2014, when the defence case had begun, seems to us to have been an attempt to make bricks without much straw. The misunderstanding in relation to the previous conviction of juror H was unfortunate but it was in no sense critical, and when investigations were made it became clear that the allegations of misconduct were unfounded. The idea that at that stage the trial should be stopped because of what had emerged was fanciful. If there had been evidence of serious misconduct the position might well have been different, but the reality was that the

decision of the judge in October 2013 was, as we have found, clearly correct on the evidence available to him, and the judge was right, for the reasons which he gave, not to interfere with that decision.

72 Finally, the judge was entitled to conclude, as he did, that he would have come to the same conclusion even if he had known in October 2013 all that later emerged. However, even if that were not so, his decision in October 2013 was clearly correct on the evidence then available to him and, since there was no evidence of any abuse of process by the prosecution, it would have been wrong in February 2014 to stop the trial without ordering a new trial (as some appellants were contending) or to have stopped the trial and ordered a re-trial with a jury, given the delay and vast extra expense that would have entailed.

Conclusion and proviso

73 Having found no substance in the grounds of appeal against conviction in relation to which we gave leave to appeal, it is unnecessary for us to consider the possible application of the proviso. The appeals against conviction are therefore dismissed.

Appeals against sentence

74 IM abandoned his appeal against sentence, save that Mr. Cooper invited us to consider his position if it could be affected by our decision in relation to BM or SM.

75 On behalf of BM, Mr. Lovell-Pank invited us to look upon the two counts in the indictment as one criminal activity which should not have attracted consecutive sentences. He pointed out that in his final judgment the judge accepted that no defendant wanted any victim to lose his or her money, and all defendants hoped that those defrauded would be repaid, so, it is submitted, they should not be treated as thieves, but as men who put the money of others at risk. Mr. Lovell-Pank accepted that BM had taken out £2.77m., but said that he had invested £3.2m. of his own money, and had mortgaged homes in London and Gibraltar. He had cooperated with the liquidators and had waited a long time to face trial, with some anxiety whether there would be funding available to enable him to be properly represented. Mr. Lovell-Pank accepted that BM was, as the judge said, the central figure in both conspiracies, but submitted that the judge should not have distinguished between BM and SM as he did.

76 On behalf of SM, Mr. Arlidge drew attention to his client's age and family responsibilities. He pointed out that SM never was a partner, and his role, it was submitted, should not be equated with that of IM, the senior partner and founder of the firm. The role of SM was not client-facing, he lived modestly, and invested his own money trying to assist the firm to meet client demands. He and his trial counsel did nothing to delay

the progress of the trial. When sentencing, the judge should have had regard to the 10-year maximum sentence for conspiracy to defraud, should have treated the two counts of conspiracy as different aspects of the same criminal conduct, and should have adjusted his sentence to reflect the roles of the individual defendants.

77 In our judgment the sentences imposed by the judge were neither excessive nor wrong in principle. The judge imposed a consecutive sentence on BM in relation to Count 2 because that count represented a distinct form of dishonest conduct. No doubt the appellants did hope to be able to repay, and eventually lost money attempting to do so, but by then their attempts were hopeless because of the huge sums put at risk. We accept that SM played a lesser role, and the judge allowed for that, so the applications of BM and SM for leave to appeal against sentence are refused.

78 **POTTER** and **WALLER, JJ.A.** concurred.

Applications for leave to appeal dismissed.
