R v Gough (Robert) [1993] UKHL 1 (20 May 1993)

United Kingdom House of Lords Decisions

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Regina

v.

Gough (Appellant)
(On Appeal from the Court of Appeal (Criminal Division))

JUDGMENT

Die Jovis 20° Maii 1993

Upon Report from the Appellate Committee to whom was referred the Cause Regina against Gough, That the Committee had heard Counsel as well on Wednesday the 27th as on Thursday the 28th days of January last upon the Petition and Appeal of Robert Brian Gough, praying that the matter of the Order set forth in the Schedule thereto, namely an Order of the Court of Appeal (Criminal Division) of the 2nd day of June 1992, might be reviewed before Her Majesty the Queen in Her Court of Parliament and that the said Order might be reversed, varied or altered or that the Petitioner might have such other relief in the premises as to Her Majesty the Queen in Her Court of Parliament might seem meet; as upon the case of the Director of Public Prosecutions (on behalf of Her Majesty) lodged in answer to the said Appeal; and due consideration had this day of what was offered on either side in this Cause:

It is Ordered and Adjudged, by the Lords Spiritual and Temporal in the Court of Parliament of Her Majesty the Queen assembled, That the said Order of the Court of Appeal (Criminal Division) of the 2nd day of June 1992 complained of in the said Appeal be, and the same is hereby, **Affirmed** and that the said Petition and Appeal be, and the same is hereby, dismissed this

House: And it is further Ordered. That the certified guestion be answered in accordance with the principles set out in the speech of the Lord Goff of Chieveley.

Cler: Parliamentor:

Judgment: 20 May 1993

HOUSE OF LORDS

REGINA

v.

GOUGH
(APPELLANT)

(ON APPEAL FROM THE COURT OF APPEAL)
(CRIMINAL DIVISION)

Lord Goff of Chieveley
Lord Ackner
Lord Mustill
Lord Slynn
Lord Woolf

LORD GOFF OF CHIEVELEY

On 25 April 1991, at Liverpool Crown Court, the appellant Robert Brian Gough was convicted on an indictment containing a single count of conspiracy to rob, and was sentenced to a term of 15 years imprisonment.

The indictment was based upon the commission of eight robberies in Liverpool between 13 April 1989 and 6 March 1990. The first seven robberies bore features of striking similarity. In all seven cases the premises concerned were a betting shop; the robbery was committed by two masked men, either at the beginning or at the end of the day; the men were armed, one with a shotgun and the other with a knife; and the *modus operandi* was similar. The prosecution contended that the first seven robberies had been committed by the same two men, the appellant and his brother David Stephen Gough. There was however insufficient evidence to link this brother with the eighth robbery, and the evidence against him on the other seven was weak. In the result, at the committal proceedings the prosecution applied for David Stephen Gough to be discharged on the ground that there was insufficient

evidence against him; and at the trial the appellant was indicted on a single count that between the relevant dates he conspired with David Stephen Gough to commit the robberies.

On appeal, the appellant claimed that the learned judge should on his own motion have required the prosecution to proceed on an indictment containing eight substantive counts of robbery and not on the conspiracy count. That submission was rejected by the Court of Appeal. There was however another ground of appeal, which is the subject of the present appeal to your Lordships' House. This was that, by reason of the presence on the jury of a lady who was David Stephen Gough's next door neighbour, there was a serious irregularity in the conduct of the trial and for that reason the conviction of the appellant should be quashed. That submission was also dismissed by the Court of Appeal, and the appellant now appeals to your Lordships' House from that part of the decision of the Court of Appeal, with the leave of your Lordships' House.

It was not until after the trial that it emerged that a member of the jury was David Stephen Gough's next door neighbour. In opening and in the indictment, he was referred to as David Gough; but in closing speeches he was referred to as David Stephen Gough. The defence case was based on the premise that David Stephen Gough was one of the robbers. He had a record of previous convictions, as had the appellant. During the trial, photographs of both brothers had been produced to the jury, and retained by them. Furthermore the vehicle alleged to have been used in the eighth robbery was owned by Elaine Gough, the wife of David Stephen Gough, and her statement including her address was read to the jury. The car must have been parked outside the juror's house for a number of months, and at the time at least of the eighth robbery.

After sentence was passed, David Stephen Gough, who was then present in court for the first time, started shouting; and it was at this point that the juror, Mrs Smith, recognised him. He in his turn informed the defence that one member of the jury was his next door neighbour. This was drawn to the attention of the judge, but he rightly decided that he was by then *functus officio.* However the juror was later interviewed by the police, and subsequently swore an affidavit. The effect of the affidavit was summarised by the Court of Appeal as follows:

1. When she began her service on the jury she did not recognise the name 'Gough' as she knew her neighbour as 'Steve'. Similarly she knew David's wife as Elaine during the two years that they had been her next door neighbours.

2. The name David Gough was mentioned on a number of occasions during the course of the trial.

3. She had no recollection of ever seeing the appellant before the trial; and she had no idea that he was the brother of her next door neighbour.

4. On April 24, 1991 during the trial, prosecution counsel read out a statement which contained the address, 3 Buckley Way (Mrs Smith lives at No. 2) and concerned the Capri motor car. She wondered whether Steve was David Gough but thought it could not be him as he was called Steve. She was confused.

5. The photographs of the appellant and David Gough respectively were shown to the jury during the trial of the appellant. They were police photographs colloquially known as 'mug shots'. Mrs Smith did not recognise David.

6. The fact that David Gough was her neighbour did not influence her thinking as a juror and she did not mention the matter to her fellow members of the jury.

The affidavit was and remains unchallenged.

It was on these facts that the question arose whether the courts should conclude that, by reason of the presence of Mrs Smith on the jury, there was such a possibility of bias on her part against the appellant that his conviction should be quashed. As I have already recorded, that question was answered by the Court of Appeal in the negative. The Court of Appeal however identified in the cases two strands of authority, revealing that differing criteria have been applied in the past when considering the question of bias. The two tests have, as will appear, themselves been variously described. The Court of Appeal identified them as being (1) whether there was a real danger of bias on the part of the person concerned, or (2) whether a reasonable person might reasonably suspect bias on his part. In the end, the court concluded that the former test was to be applied in cases concerned with jurors, and the latter in those concerned with magistrates or other inferior tribunals. The court therefore applied the real danger test in the present case and, on that basis, held that the appeal must fail, as indeed had been accepted by counsel for the appellant.

In considering the subject of the present appeal, Your Lordships have been faced with a series of authorities which are not only large in number, but bewildering in their effect. It is only too clear how great a difficulty courts of first instance, and indeed Divisional Courts and the Court of Appeal, must

face in cases which come before them; and there is a compelling need for your Lordships' House to subject the authorities to examination and analysis in the hope of being able to extract from them some readily understandable and easily applicable principles, thus obviating the necessity of conducting on each occasion a trawl through authorities which are by no means easy to reconcile. It is on that exercise that I now propose to embark.

A layman might well wonder why the function of a court in cases such as these should not simply be to conduct an inquiry into the question whether the tribunal was in fact biased. After all it is alleged that, for example, a

justice or a juryman was biased, i.e. that he was motivated by a desire unfairly to favour one side or to disfavour the other. Why does the court not simply decide whether that was in fact the case? The answer, as always, is that it is more complicated than that. First of all, there are difficulties about exploring the actual state of mind of a justice or juryman. In the case of both, such an inquiry has been thought to be undesirable; and in the case of the juryman in particular, there has long been an inhibition against, so to speak, entering the jury room and finding out what any particular juryman actually thought at the time of decision. But there is also the simple fact that bias is such an insidious thing that, even though a person may in good faith believe that he was acting impartially, his mind may unconsciously be affected by bias - a point stressed by Devlin L.J. in *Reg. v. Barnsley Licensing Justices, Ex parte Barnsley and District Licensed Victuallers' Association* [1960] 2 Q.B. 167, 187. In any event, there is an overriding public interest that there should be confidence in the integrity of the administration of justice, which is always associated with the statement of Lord Hewart C.J. in *Rex.* v. *Sussex Justices, Ex parte McCarthy* [1924] 1 KB 256, 259, that it is "of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done". I shall return to that case in a moment, for one of my tasks is to place the actual decision in that case in its proper context. At all events, the approach of the law has been (save on the very rare occasion where actual bias is proved) to look at the relevant circumstances and to consider whether there is such a degree of possibility of bias that the decision in question should not be allowed to stand.

My initial reaction to the conclusion of the Court of Appeal in the present case was one of surprise that it should be necessary to draw a distinction between cases concerned with justices and those concerned with jurymen, and to conclude that different criteria fell to be applied in investigating allegations of bias in the two categories of case. Evidently, the Court of Appeal was itself unhappy in having to reach this conclusion, which it felt bound to reach on the authorities. Of course, there are some

distinctions between the two groups of cases. For example, in the case of jurymen there is the inhibition, to which I have already referred, against investigating the state of mind of a juryman when reaching his decision in the privacy of the jury room. There is also the fact that the possibility of bias may come to light in the course of a jury trial - for example, a juryman may have unwisely indulged in conversation with a witness, or previous convictions of the accused may have accidentally been revealed to the jury. Situations such as these have to be dealt with by the judge when they arise; and he may be able to deal with the situation on the spot, for example by issuing a warning to the jury, or by discharging the particular juryman involved. And, if a verdict is challenged before the Court of Appeal on the ground of bias, the ultimate principles to be applied are to be found in section 2 of the Criminal Appeal Act 1968. But, even taking these matters into account, I am left with the feeling that there should be no reason, in principle, why the test of bias should be different in the two groups of cases - those concerned with justices and those concerned with juries. I shall however, as a matter of

convenience, submit the authorities concerning these two categories of case to separate consideration, before reaching any final conclusion on this point.

The argument before the Appellate Committee was presented on the basis that there were two rival, alternative tests for bias to be found in the authorities, and that the result in the present case depended on the choice made by your Lordships' House between them. The first test, favoured by Mr Hytner for the appellant, was whether a reasonable and fair minded person sitting in the court and knowing all the relevant facts would have had a reasonable suspicion that a fair trial by the defendant was not possible. The second test, favoured by Mr Leveson for the Crown, was whether there was a real likelihood of bias. I shall for convenience refer to these two tests respectively as the reasonable suspicion test, and the real likelihood test. It was recognised by Mr Hytner before the Appellate Committee, as before the Court of Appeal, that if the real likelihood test is to be preferred, the appeal must fail.

In fact, examination of the authorities reveals that selection of the appropriate test does not simply involve a choice between the two tests formulated by counsel in the present case. Thus, when the appropriate test in cases concerned with juries fell to be considered by your Lordships' House in *Reg. v. Spencer* [1987] AC 128, a variant of the real likelihood test, viz. whether there was a real danger of bias, was adopted, as it was by the Court of Appeal in the present case. There are also to be found in the authorities variants of the reasonable suspicion test; and sometimes the two tests seems to have been combined. At the heart of the present inquiry lies the need to

identify the precise nature of these tests, and to consider what, if any, are the differences between them. For that purpose, I propose to consider first the cases concerned with justices and other inferior tribunals, where the principal problems appear to have arisen; and then to turn to the cases concerned with juries, of which *Reg.* v. *Spencer* is of great importance.

Before I do so, however, I wish to draw attention to the fact that there are certain cases in which it has been considered that the circumstances are such that they must inevitably shake public confidence in the integrity of the administration of justice if the decision is to be allowed to stand. Such cases attract the full force of Lord Hewart's requirement that justice must not only be done but must manifestly be seen to be done. These cases arise where a person sitting in a judicial capacity has a pecuniary interest in the outcome of the proceedings. In such a case, as Blackburn J. said in *Reg. v. Rand* (1866) L.R. 1 Q.B. 230, 232:

". . . any direct pecuniary interest, however small, in the subject of inquiry, does disqualify a person from acting as a judge in the matter."

The principle is expressed in the maxim that nobody may be judge in his own cause *(nemo judex in sua causa).* Perhaps the most famous case in which the principle was applied is *Dimes v. Grand Junction Canal* (1853) 3 H.L.C. 759,

in which decrees affirmed by Lord Cottenham L.C. in favour of a canal company in which he was a substantial shareholder were set aside by this House, which then proceeded to consider the matter on its merits, and in fact itself affirmed the decrees. Lord Campbell said (at p. 793):

"No one can suppose that Lord Cottenham could be, in the remotest degree, influenced by the interest that he had in this concern; but, my Lords, it is of the last importance that the maxim that no man is to be a judge in his own cause should be held sacred."

In such a case, therefore, not only is it irrelevant that there was in fact no bias on the part of the tribunal, but there is no question of investigating, from an objective point of view, whether there was any real likelihood of bias, or any reasonable suspicion of bias, on the facts of the particular case. The nature of the interest is such that public confidence in the administration justice requires that the decision should not stand.

I turn next to the broader question of bias on the part of a member of the relevant tribunal. Here it is necessary first to put on one side the very rare case where actual bias is shown to exist. Of course, if actual bias is proved, that is an end of the case; the person concerned must be disqualified.

But it is not necessary that actual bias should be proved; and in practice the enquiry is directed to the question whether there was such a degree of possibility of bias on the part of the tribunal that the court will not allow the decision to stand. Such a question may arise in a wide variety of circumstances. These include, but are by no means limited to, cases in which a member of the tribunal has an interest in the outcome of the proceedings, which falls short of a direct pecuniary interest. Such interests may vary widely in their nature, in their effect, and in their relevance to the subject matter of the proceedings; and there is no rule, as there is in the case of a pecuniary interest, that the possession of such an interest automatically disqualifies the member of the tribunal from sitting. Each case falls to be considered on its own facts.

I turn first to the authorities concerned with justices, with whom I bracket members of other inferior tribunals. Of the authorities cited to the Appellate Committee in the course of argument, the first in point of time was *Reg. v. Rand* (1866) L.R. 1 Q.B. 230, to which I have already referred, in which Blackburn J. stated the law in terms of the real likelihood test. He referred (at p. 232) to cases in which there was "a real likelihood that the judge would, for kindred or any other cause, have a bias in favour of one of the parties" in which event "it would be very wrong in him to act". That test was later approved by three members of the Appellate Committee of this House in *Frome United Breweries Co. Ltd. v. Bath Justices* [1926] A.C. 586 (a case concerned with licensing justices): see p. 591 per Viscount Cave L.C.; p. 607 per Lord Atkinson (citing *Rex. v. Sunderland Justices* [1901] 2 K.B. 357); and p. 610 per Lord Sumner (quoting from the dissenting judgment of Atkin L.J., sub nom. *Rex* v. *Bath Compensation Authority* [1925]

1 K.B. 685, 712). Furthermore Lord Shaw of Dunfermline agreed with Viscount Cave L.C.; and, although the other member of the Appellate Committee, Lord Carson, spoke simply of "a likelihood of bias" (see p. 617), there is no reason to suppose that he intended any different test.

At this stage, however, I must turn to the well known case of *Rex. v. Sussex Justices, Ex parte McCarthy* [1924] 1 KB 256. There the applicant came before magistrates charged with the offence of dangerous driving, which had involved a collision between his vehicle and another vehicle. The solicitor acting as magistrates' clerk on this occasion was also acting as solicitor for the other driver in civil proceedings against the applicant arising out of the collision. At the conclusion of the evidence before the magistrates, the acting clerk retired with them in case his help should be needed on a point of law; but in fact the magistrates did not consult him, and he himself abstained from referring to the case. The magistrates convicted the applicant,

but his conviction was quashed by a Divisional Court. This is of course the case in which Lord Hewart C.J. let fall his much-quoted dictum, to which I have already referred. I think it helpful, however, to quote from his judgment in *extenso* (see pp. 258-9):

"It is said, and, no doubt, truly, that when that gentleman retired in the usual way with the justices, taking with him the notes of the evidence in case the justice might desire to consult him, the justices came to a conclusion without consulting him, and that he scrupulously abstained from referring to the case in any way. But while that is so, a long line of cases shows that it is not merely of some importance but is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done. The question therefore is not whether in this case the deputy clerk made any observation or offered any criticism which he might not properly have made or offered; the question is whether he was so related to the case in its civil aspect as to be unfit to act as clerk to the justices in the criminal matter. The answer to that question depends not upon what actually was done but upon what might appear to be done. Nothing is to be done which creates even a suspicion that there has been an improper interference with the course of justice. Speaking for myself, I accept the statements contained in the justices' affidavit, but they show very clearly that the deputy clerk was connected with the case in a capacity which made it right that he should scrupulously abstain from referring to the matter in any way, although he retired with the justices; in other words, his one position was such that he could not, if he had been required to do so, discharge the duties which his other position involved. His twofold position was a manifest contradiction. In those circumstances I am satisfied that this conviction must be quashed, . . ."

The case was therefore concerned with the possibility that the acting magistrates' clerk, who plainly had such an interest in the outcome of the civil

proceedings that he might well be biased against the applicant in the proceedings before the magistrates, might influence the decision of the magistrates adversely to the applicant. Lord Hewart C.J. clearly thought that the acting magistrates' clerk's involvement in the civil proceedings was such that he should never have participated in the hearing before the magistrates, and went so far as to indicate that "even a suspicion that there had been an improper interference with the course of justice" is enough to vitiate the proceedings, an observation which has been invoked as the origin of the

reasonable suspicion test. Indeed, following the *Sussex Justices* case, there developed a tendency for courts to invoke a test requiring no more than a suspicion of bias.

However in a later case, also concerned with alleged bias on the part of a magistrates' clerk, *Reg. v. Camborne Justices, Ex parte Pearce* [1955] 1 Q.B. 41, a Divisional Court, having received the assistance of the Solicitor-General as *amicus curiae,* approached the question on the basis that a real likelihood of bias must be established. In that case, the applicant was convicted of an offence under the Food and Drugs Act 1938. The information alleging the offence had been laid by a sampling officer, for the Cornwall County Council. The magistrates' clerk, who in the course of the hearing was invited into the magistrates' private room in order to advise them, was a member of the County Council (though not of the relevant committee of the Council, the Public Health and Housing Committee). For this reason, the applicant alleged that a reasonable suspicion of bias might arise, and that his conviction should be quashed. The court dismissed the application, holding that in the circumstances there was no real likelihood of bias on the part of the magistrates' clerk. Moreover the court was at pains to reject any suggestion that mere suspicion of bias was sufficient; and, while endorsing and fully maintaining the integrity of the principle reasserted by Lord Hewart C.J. in the *Sussex Justices* case, nevertheless deplored the principle "being urged as a warrant for quashing convictions or invalidating orders upon quite unsubstantial grounds and, indeed, in some cases, upon the flimsiest pretext of bias" (see pp. 51-52, *per curiam).*

In the *Sussex Justices* case it must have been plain that there was a real likelihood of bias on the part of the acting magistrates' clerk; and the court went on to hold that, despite the fact that there had been no discussion about the case between the magistrates and the clerk, nevertheless the decision of the magistrates must be quashed, because nothing may be done which creates even a suspicion that there has been a wrongful interference with the course of justice. It appears that this decision was later used to suggest that a mere suspicion of bias on the part of a person involved in the process of adjudication is enough to require that the decision should be quashed. That approach was rejected in the *Camborne Justices* case, in which it was held that, since there was no real likelihood of bias on the part of the magistrates' clerk, there was no ground for quashing the magistrates' decision. The cases can therefore be distinguished on the facts. But the question remains whether, in a case involving a magistrates' clerk, it is enough to show that

there was a real likelihood of bias on the part of the clerk, or whether it must also be shown that, by reason of his participating in the decision-making process, there was a real likelihood that "he would impose his influence on the justices or give them wrong legal advice" (see [1955] 1 Q.B. 41, 46, per Sir Reginald Manningham-Buller Q.C., S.G., arguendo as amicus curiae). In my opinion, the latter view is to be preferred. Of course, nowadays a magistrates' clerk will not withdraw with the justices, but will only join them if invited to advise them on a question of law. If the clerk is not so invited, any bias on his part will ordinarily have no influence on the outcome of the proceedings; though if he has any interest in the outcome, it is obviously undesirable that he should be acting at all in the capacity of clerk in relation to those proceedings, in case his advice is called for. If however he is invited to give the magistrates advice, it is open to the court to infer that, having regard to the insidious nature of bias, there is a real likelihood of the clerk's bias infecting the views of the magistrates adversely to the applicant.

I have had the opportunity of reading in draft the speech of my noble and learned Lord Woolf, and it follows from what I have said that I am in agreement with his conclusions both about the effect of the *Sussex Justices* and *Camborne Justices* cases, and that the only special category of case, in which it is unnecesary to enquire whether there was any real likelihood of bias, relates to circumstances where a person acting in a judicial capacity has a direct pecuniary interest in the outcome of the proceedings.

In *Reg. v. Barnsley Licensing Justices* [1960] 2 Q.B. 167 at p. 187, Devlin L.J. also preferred the real likelihood test, considering that the term "real likelihood of bias" is not used to import the principle in *Rex.* v. *Sussex Justices,* which had been invoked by Salmon J. at first instance [1959] 2 Q.B. 276, 286. It is, I think, desirable that I should quote the relevant passage from the judgment of Devlin L.J. in full (see pp. 186-187):

"Here is an application by the co-operative society and there is sitting to decide it a bench which is wholly composed of members of the society and one woman whose husband was a member of the society, presided over by a chairman who had interested himself actively in the conduct of the affairs of the society or was desirous of doing so. Is there, in those circumstances, a real likelihood of bias? I am not quite sure what test Salmon J. applied. If he applied the test based on the principle that justice must not only be done but manifestly be seen to be done, I think he came to the right conclusion on that test. I cannot imagine anything more unsatisfactory from the public point of view than applications of this sort being dealt with by a bench which was so composed, and, indeed, it is conceded that steps will have to be taken to rectify the position. But, in my judgment, it is not the test. We have not to inquire what impression might be left on the minds of the

present applicants or on the minds of the public generally. We have to satisfy ourselves that there was a real likelihood of bias - not merely satisfy ourselves that that was the sort of impression that might

reasonably get abroad. The term 'real likelihood of bias' is not used, in my opinion, to import the principle in *Rex* v. *Sussex Justices* to which Salmon J. referred. It is used to show that it is not necessary that actual bias should be proved. It is unnecessary, and, indeed, might be most undesirable, to investigate the state of mind of each individual justice. 'Real likelihood' depends on the impression which the court gets from the circumstances in which the justices were sitting. Do they give rise to a real likelihood that the justices might be biased? The court might come to the conclusion that there was such a likelihood, without impugning the affidavit of a justice that he was not in fact biased. Bias is or may be an unconscious thing and a man may honestly say that he was not actually biased and did not allow his interest to affect his mind, although, nevertheless, he may have allowed it unconsciously to do so. The matter must be determined upon the probabilities to be inferred from the circumstances in which the justices sit."

It is plain from this passage that Devlin L.J. was concerned to get away from any test founded simply upon suspicion - "the sort of impression that might reasonably get abroad" - and to focus upon the actual circumstances of the case in order to decide whether there was in those circumstances a real likelihood of bias. His question - do the circumstances give rise to a real likelihood that the justices might be biased? - suggests that he was thinking of likelihood as meaning not probability, but possibility; the noun probability is not aptly qualified by the adjective "real", and the verb "might" connotes possibility rather than probability. Such a reading makes the real likelihood test very similar to a test requiring a real danger of bias. It is true that, at the conclusion of the passage which I have quoted, Devlin L.J. stated that the matter must be determined "upon the probabilities". I do not however think that he meant "on the balance of probabilities", but rather that he was emphasising that the question was to be answered by reference to the relevant circumstances.

However nine years later, in *Metropolitan Properties Co. (F.G.C.) Ltd. v. Lannon* [1969] 1 QB 577, the law took a different turn. The case was concerned with a decision by a rent assessment committee, when determining fair rents for a block of flats in London. The rent so determined was substantially below the rent suggested even by the expert called by the tenants. The landlord sought to quash the decision on the ground that the

chairman of the committee was a solicitor who had been concerned with advising tenants of flats in another comparable block of flats. The Court of Appeal, allowing the appeal from a Divisional Court, held that the facts were such as to give rise to an appearance of bias on the part of the chairman, and on that ground they quashed the decision of the committee, even though there was no actual bias on his part. In so holding, the court rejected the argument of counsel for the committee, who invited the court to proceed on the basis of the real likelihood test. Lord Denning M.R. and Edmund Davies L.J. both invoked the much quoted dictum of Lord Hewart C.J. in *Rex. v. Sussex*

Justices, and declined to follow Devlin L.J.'s approach in *Reg. v. Barnsley Licensing Justices.* Lord Denning M.R. stated the law as follows (at p. 599):

"In Reg. v. Barnsley Licensing Justices, Ex parte Barnsley and District Licensed Victuallers' Association, Devlin L.J. appears to have limited that principle considerably, but I would stand by it. It brings home this point: in considering whether there was a real likelihood of bias, the court does not look at the mind of the justice himself or at the mind of the chairman of the tribunal, or whoever it may be, who sits in a judicial capacity. It does not look to see if there was a real likelihood that he would, or did, in fact favour one side at the expense of the other. The court looks at the impression which would be given to other people. Even if he was as impartial as could be, nevertheless if right-minded persons would think that, in the circumstances, there was a real likelihood of bias on his part, then he should not sit. And if he does sit, his decision cannot stand: see *Reg v. Huggins* [1895] 1 Q.B. 563 and *Rex v. Sunderland Justices, per* Vaughan Williams L.J. [1901] 2 KB 357, 373. Nevertheless there must appear to be a real likelihood of bias. Surmise or conjecture is not enough: see *Reg. v. Camborne Justices, Ex. parte Pearce* [1955] 1 Q.B. 41, 48-51 and *Reg. v. Nailsworth Licensing Justices, Ex parte Bird* [1953] 1 W.L.R. 1046. There must be circumstances from which a reasonable man would think it likely or probable that the justice, or chairman, as the case may be, would, or did, favour one side unfairly at the expense of the other. The court will not inquire whether he did, in fact, favour one side unfairly. Suffice it that reasonable people might think he did. The reason is plain enough. Justice must be rooted in confidence: and confidence is destroyed when right-minded people go away thinking: 'The judge was biased.'"

Edmund Davies L.J. said (at p. 606) that it was enough if "there is *reasonable* suspicion of bias on the part of one or more members of the adjudicating body"; and the third member of the court, Danckwerts L.J., appears to have

proceeded, despite some doubt, upon a similar basis (at pp. 601-602).

I shall return to this case in a moment, but I have to say that it left a legacy of some confusion behind it. In two cases, *Reg. v. Uxbridge Justices, Ex parte Burbridge,* The Times, 21 June 1972, and *Reg. v. McLean, Ex parte Aikens* (1974) 139 L.G.Rev. 261, Lord Widgery C.J. was prepared to proceed on the basis of the reasonable suspicion test, though in neither case was the choice of test decisive. However, in *Reg. v. Altrincham Justices, Ex parte N. Pennington* [1975] Q.B. 549, Lord Widgery did not feel able to decide whether the real likelihood test or the reasonable suspicion test was appropriate. In that case the appellants were convicted of offences of having sold vegetables by weight and having delivered a lesser weight to two county schools. The presiding justice at the trial was a member of the education committee, and was a governor of two schools, though not of those in

question. A Divisional Court quashed the convictions on the ground that the presiding justice should have disqualified herself from hearing a case where she had an active interest in the schools which were the victims of the offence. In so holding, Lord Widgery referred to both the real likelihood test and the reasonable suspicion test. However it was not clear to him from *Lannon* which of those tests fell to be applied. Furthermore, in *Reg.* v. *Liverpool City Justices, Ex parte Topping* [1983] 1 W.L.R. 119, in which justices became aware of other unrelated charges against the defendant whose case they were about to consider, the Divisional Court applied a form of the reasonable suspicion test derived from the judgment of Lord Widgery in *Ex parte Burbridge;* but they prefaced their choice of this test with the observation that, in agreement with a view expressed by Cross L.J. in *Hannam v. Bradford City Council* [1970] 1 W.L.R. 937, 949, there was little if any difference between the real likelihood test and the reasonable suspicion test, because if a reasonable person with the relevant knowledge thinks that there might well be bias, then there is in his opinion a real likelihood of bias - a view which appears to assume that real likelihood of bias means no more than a real possibility of bias.

I have already quoted passages from the judgments of Lord Denning M.R. and Edmund Davies L.J. in *Lannon* [1969] 1 QB 577, 599, 606, which show that they did not in fact state the same test, Lord Denning's test being really no more than an adaptation of the real likelihood test, and only Edmund Davies L.J. enunciating a test founded upon real suspicion of bias. Furthermore Lord Denning, while purporting to differ from Devlin L.J. in the *Barnsley Licensing Justices* case [1960] 2 Q.B. 167, in fact differed very little from him. Thus, both considered that it was not necessary that actual bias should be proved, the court having therefore to proceed upon an impression

derived from the circumstances; and that the question is whether such an impression reveals a real likelihood of bias. The only difference between them seems to have been that, whereas Devlin L.J. spoke of the impression which the court gets from the circumstances, Lord Denning looked at the circumstances from the point of view of a reasonable man, stating that there must be circumstances from which a reasonable man would think it likely or probable that the justice, or chairman, was biased. Since however the court investigates the actual circumstances, knowledge of such circumstances as are found by the court must be imputed to the reasonable man; and in the result it is difficult to see what difference there is between the impression derived by a reasonable man to whom such knowledge has been imputed, and the impression derived by the court, here personifying the reasonable man. It is true that Lord Denning expressed the test as being whether a reasonable man would think it "likely or probable" that the justice or chairman was biased. If it is a correct reading of his judgment (and it is by no means clear on the point) that it is necessary to establish bias on a balance of probabilities, I for my part would regard him as having laid down too rigorous a test. In my opinion, if, in the circumstances of the case (as ascertained by the court), it appears that there was a real likelihood, in the sense of a real possibility, of

bias on the part of a justice or other member of an inferior tribunal, justice requires that the decision should not be allowed to stand. I am by no means persuaded that, in its original form, the real likelihood test required that any more rigorous criterion should be applied. Furthermore the test as so stated gives sufficient effect, in cases of apparent bias, to the principle that justice must manifestly be seen to be done, and it is unnecessary, in my opinion, to have recourse to a test based on mere suspicion, or even reasonable suspicion, for that purpose. Finally there is, so far as I can see, no practical distinction between the test as I have stated it, and a test which requires a real danger of bias, as stated in *Reg. v. Spencer* [1987] AC 128. In this way, therefore, it may be possible to achieve a reconciliation between the test to be applied in cases concerned with justices and other members of inferior tribunals, and cases concerned with jurors.

I turn therefore to the cases concerned with jurors; and here the relevant authorities support the view which I have just expressed. It is true that, after *Lannon,* there were cases in which the reasonable suspicion test was adopted (see e.g., *Reg.* v. *Pennington* [1985] 81 Cr. App. R. 217). However, it is appropriate to turn straight to the leading authority, which is the decision of your Lordships' House in *Reg. v. Spencer* [1987] AC 128. In that case the defendants, who were members of the nursing staff at a secure hospital, were convicted in two separate trials of ill treating patients at the hospital,

contrary to section 126 of the Mental Health Act 1959. On appeal, the principle issue was one of corroboration. But in addition a question arose with regard to one of the jurors at the first trial. He had clearly demonstrated in the course of the trial that he was biased against the defendants. At first the judge, having consulted counsel, decided to take no action. However, it then transpired that the juror's wife worked at another mental hospital which figured in the evidence at the trial. The judge, fearing that the juror might have heard things from his wife which it would be better if he had not heard, decided to discharge him; but, discovering that the juror was in the habit of giving three other members of the jury a lift home, warned the members of the jury that they should not discuss the case further with him. On the following morning, however, defence counsel submitted that the remainder of the jury should be discharged; but the judge decided, in the exercise of his discretion, not to do so. Counsel for the prosecution had submitted that the test which the judge should apply was that the jury should not be discharged unless it could be shown that there was a very high risk that the apparently biased jury had influenced any of his fellow jurors. Lord Ackner (with whom Lord Brandon of Oakbrook and Lord Mackay of Clashfern agreed) however held that the correct test was that stated by the Court of Appeal in *Reg.* v. *Sawyer* [1980] 71 Cr. App. R. 283, 285, viz. whether there was a real danger that the appellant's position had been prejudiced in the circumstances. This was the test which had in fact been applied by the Court of Appeal, but they had concluded that there was no realistic chance that the three jurors who had travelled in the car had been prejudiced or biased by what they had heard. On this point, however, Lord Ackner found himself unable totally to dismiss that possibility, and he concluded, with the remainder of the Appellate Committee,

that the verdict was unsafe and the appeal must be allowed [1987] AC 128, 146. Subsequently, the test so established in *Reg. v. Spencer* was applied by the Court of Appeal in *Reg. v. Putnam* (1990) 93 Cr. App. R. 281. I should add that in *Reg. v. Morris (Otherwise Williams)* (1990) 93 Cr. App. R. 102, in which the reasonable suspicion test was applied, it appears that *Reg. v. Spencer* was not cited to the court. In the light of the conclusion which I have reached, I do not think that it is necessary for me to consider any more of the earlier cases concerned with allegation of bias on the part of jurors. I only wish to say that *Reg.* v. *Box* [1964] 1 Q.B. 430, to which some criticism was directed in the course of argument, appears to have been concerned primarily with an allegation of actual bias, and to have reasserted the principle that knowledge by a juror of a defendant's character or previous convictions is not an automatic disqualification.

There are however two features of jury cases to which I will briefly draw attention. The first is that the possibility of bias on the part of a juror may, as in the case of *Spencer* itself, come to the attention of the judge in the course of the trial. In such circumstances the judge, in deciding whether to exercise his discretion to discharge one or more members of the jury, should apply the same test as falls to be applied on appeal by the Court of Appeal, viz. whether there is a real danger of bias affecting the mind of the relevant juror or jurors. Even if the judge decides that it is unnecessary to do more than issue a warning to the jury or to a particular juror, and thereby isolate and neutralise any bias that might otherwise occur, the effect of his warning is not merely to ensure that the jurors do not allow any possible bias to affect their minds, but also to prevent any lack of public confidence in the integrity of the jury. It is unnecessary for me to say any more on this subject, to which no argument was addressed in the present case. Second, if any question of bias on the part of a juror arises on appeal, the Court of Appeal, having applied the real danger test, will then proceed in the light of its conclusion on that test to exercise its powers under section 2 of the Criminal Appeal Act 1968, in the normal way, as was done by your Lordships' House in *Spencer.*

I wish to add that in cases concerned with allegations of bias on the part of an arbitrator, the test adopted, derived from *Ex parte Topping* [1983] 1 W.L.R. 119, has been whether the circumstances were such that a reasonable man would think that there was a real likelihood that the arbitrator would not fairly determine the issue on the basis of the evidence and arguments adduced before him (see *Ardahalian* v. *Unifert International S.A. (The Elissar)* [1984] 2 Lloyd's Rep. 84, and *Bremer Handelsgesellschaft m.b.H.* v. *Ets. Soules et Cie.* [1985] 1 Lloyd's Rep. 160, [1985] 2 Lloyd's Rep. 199). Such a test is, subject to the introduction of the reasonable man, consistent with the conclusion which I have reached, provided that the expression "real likelihood" is understood in the sense I have described, i.e. as meaning that there is a real possibility or, as I would prefer to put it, a real danger of bias. It would appear to have been so understood by Mustill J. (as

he then was) in *Bremer* [1985] 1 Lloyd's Rep. 160, 164, where he referred to "an evident risk" of bias.

In conclusion, I wish to express my understanding of the law as follows. I think it possible, and desirable, that the same test should be applicable in all cases of apparent bias, whether concerned with justices or members of other inferior tribunals, or with jurors, or with arbitrators. Likewise I consider that, in cases concerned with jurors, the same test should be applied by a judge to whose attention the possibility of bias on the part of

a juror has been drawn in the course of a trial, and by the Court of Appeal when it considers such a question on appeal. Furthermore, I think it unnecessary, in formulating the appropriate test, to require that the court should look at the matter through the eyes of a reasonable man, because the court in cases such as these personifies the reasonable man; and in any event the court has first to ascertain the relevant circumstances from the available evidence, knowledge of which would not necessarily be available to an observer in court at the relevant time. Finally, for the avoidance of doubt, I prefer to state the test in terms of real danger rather than real likelihood, to ensure that the court is thinking in terms of possibility rather than probability of bias. Accordingly, having ascertained the relevant circumstances, the court should ask itself whether, having regard to those circumstances, there was a real danger of bias on the part of the relevant member of the tribunal in question, in the sense that he might unfairly regard (or have unfairly regarded) with favour, or disfavour, the case of a party to the issue under consideration by him; though, in a case concerned with bias on the pan of a magistrates' clerk, the court should go on to consider whether the clerk has been invited to give the magistrates advice and, if so, whether it should infer that there was a real danger of the clerk's bias having infected the views of the magistrates adversely to the applicant.

It follows from what I have said that the Court of Appeal applied the correct test in the present case. On that test, it was accepted by Mr Hytner that there was no ground for disturbing the jury's verdict. I would therefore dismiss the appeal.

LORD ACKNER

My Lords,

I have had the advantage of reading in draft the speech prepared by my noble and learned friend Lord Goff of Chieveley, and for the reasons he gives, I, too, would dismiss the appeal.

LORD MUSTILL

My Lords,

I have had the advantage of reading in draft the speech prepared by my noble and learned friend Lord Goff of Chieveley, and for the reasons he gives, I, too, would dismiss the appeal.

LORD SLYNN OF HADLEY
My Lords,

I have had the advantage of reading in draft the speech prepared by my noble and learned friend Lord Goff of Chieveley, and for the reasons he gives, I, too, would dismiss the appeal.

LORD WOOLF

My Lords,

I have had the advantage of reading in draft the speech of Lord Goff of Chieveley and I agree that this appeal should be dismissed for the reasons which he gives. In particular, I agree that the correct test to adopt in deciding whether a decision should be set aside on the grounds of alleged bias is that given by Lord Goff, namely, whether there is a real danger of injustice having occurred as a result of the alleged bias.

The test to be applied in each case has as its source the maxim that nobody may be judge in his own cause. No distinction arises in the application of the test because it is the clerk to the justices rather than the justices themselves who are alleged to be biased. A clerk to the justices is part of the judicial process in the magistrates court. This is accepted by Lord Hewart C.J., when he said in his judgment in the *Rex. v. Sussex Justices, Ex parte McCarthy* [1924] 1 KB 256, 259, that the clerk's position "was such that he could not, if he had been required to do so, discharge the duties which his other position involved. His twofold position was a manifest contradiction." (The other position, being a member of the firm of solicitors acting for the other driver who was involved in the accident which gave rise to the prosecution.)

This is also made clear in the judgment in *Reg. v. Camborne Justices, Ex parte Pearce* [1955] 1 Q.B. 41, where the facts were very similar to those

in the *Sussex Justices* case. The *Camborne Justices* case also involved a justice's clerk. The proceedings before the justices were the result of an information under the Food and Drugs Act 1938 laid on behalf of the County Council. The clerk to the justices was at the time a member of the council, but not a member of the council's health committee responsible for laying the information. At the hearing he was sent for to advise the justices on a point of law, but according to the evidence put before the Divisional Court he did not discuss the facts of the case and having given his advice returned to the Court. Unlike the *Sussex Justices* case, where the argument appears to have been limited (the applicant was not called upon to address the court) and the judgment was not reserved, in the *Camborne Justices* case the matter was fully argued, Sir Reginald Manningham-Buller Q.C., S.-G. and J.P. Ashworth appearing as amici curiae and a reserve judgment of the court was given by

Slade J. on behalf of a Divisional Court which was presided over by Lord Goddard C.J. That judgment described the question which the court had to decide, at p. 47, as being:

"What interest in a judicial or quasi judicial proceeding does the law regard as sufficient to incapacitate a person from adjudicating or assisting in adjudicating on it upon the ground of bias or appearance of bias?"

To that question the court gave the answer (at p. 51):

"that to disqualify a person from acting in a judicial or quasi judicial capacity upon the ground of interest (other than pecuniary or proprietary) in the subject matter of the proceeding, a real likelihood of bias must be shown."

As the court concluded on the facts, that there was no real likelihood of bias application was dismissed. However, for present purposes the importance of the case is that the court did not consider they were dealing with a special category of case and applied a test which I regard as being the equivalent of the real danger test.

The problem created by the *Sussex Justices* case [1924] 1 KB 256 arises because Lord Hewart preceded his celebrated remark, at p. 259: "it is not merely of some importance but is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done", with the comment, at pp. 258-259:

"It is said, and, no doubt, truly, that when that gentleman retired in the usual way with the justices, taking with him the notes of the evidence in case the justices might desire to consult him, the justices came to a conclusion without consulting him, and that he scrupulously abstained from referring to the case in any way."

and later added: "speaking for myself, I accept the statements contained in the justices' affidavit". If these passages in his judgment are taken at face value, then they are consistent with the court in the *Sussex Justices* case coming to the conclusion that there was no risk of actual bias and the court was therefore applying some different test from the real danger test when deciding that the decision had to be quashed. A similar situation arises in relation to the comment of Lord Campbell in the *Dimes v. Grand Junction Canal* (1853) 3 H.L. Cas. 759, 793, case when he, alone among the members of the House of Lords:

"No one can suppose that Lord Cottenham could be, in the remotest degree, influenced by the interest that he had in this concern; but, my Lords, it is of the last importance that the maxim that no man is to be a judge in his own cause should be held sacred."

It could well be that too much attention should not be attached to the remarks made as to the bona fides of the Lord Chancellor in the *Dimes* case and the justices' clerk in the *Sussex Justices* case, although, no doubt the Lord Chancellor and the clerk respectively found them comforting. It must be remembered that except in the rare case where actual bias is alleged, the court is not concerned to investigate whether or not bias has been established. Whether it is a judge, a member of the jury, justices or their clerk, who is alleged to be biased, the courts do not regard it as being desirable or useful to inquire into the individual's state of mind. It is not desirable because of the confidential nature of the judicial decision making process. It is not useful because the courts have long recognised that bias operates in such an insidious manner that the person alleged to be biased may be quite unconscious of its effect.

It is because the court in the majority of cases does not inquire whether actual bias exists that the maxim that justice must not only be done but seen to be done applies. When considering whether there is a real danger of injustice, the court gives effect to the maxim, but does so by examining all the material available and giving its conclusion on that material. If the court having done so is satisfied there is no danger of the alleged bias having created injustice, then the application to quash the decision should be dismissed. This, therefore, should have been the result in the *Sussex Justices* case if Lord Hewart's remarks are to be taken at face value and are to be treated as a finding, and not merely an assumption, that there was no danger of the justices' decision being contaminated by the possible bias of the clerk.

The *Dimes* case, 3 H.L. Cas. 759, is different because it involved direct pecuniary or proprietary interest on the part of the Lord Chancellor in the subject matter of the proceedings and this creates a special situation, as was pointed out at the beginning of the judgment in the *Camborne Justices* case [1955] 1 Q.B. 41,47:

"... any direct pecuniary or proprietary interest in the subject matter of proceeding, however small, operates as an automatic disqualification. In such a case the law assumes bias."

It was because Lord Hewart C.J's judgment in the *Sussex Justices* case [1924] 1 KB 256, 258-259, has created difficulties that in the *Camborne Justices* case, where exactly the same issue was involved, the court warned

against the misuse of Lord Hewart's judgment since it was being "urged as a warrant for quashing convictions or invalidating orders upon quite unsubstantial grounds and, indeed, in some cases upon the flimsiest pretext of bias", (pp. 51-52). As the court pointed out the continued citation of Lord Hewart's maxim may lead to the erroneous impression that "it is more important that justice should appear to be done than that it should, in fact, be done."

I therefore suggest that the *Sussex Justices* case [1924] 1 KB 256 neither creates nor should it be placed in a separate category. The proper test which Lord Goff has identified should have been applied in that case as it was in the *Camborne Justices* case [1955] 1 Q.B. 41. There is only one established special category and that exists where the tribunal has a pecuniary or proprietary interest in the subject matter of the proceedings as in *Dimes,* 3 H.L. Cas. 759. The courts should hesitate long before creating any other special category since this will immediately create uncertainty as to what are the parameters of that category and what is the test to be applied in the case of that category. The real danger test is quite capable of producing the right answer and ensure that the purity of justice is maintained across the range of situations where bias may exist.