OFFICE OF THE ST. GEORGE WEST COUNTY
PORT OF SPAIN CORONER

RULING ON A POINT OF LAW

CITATION: Inquest into the death of Israel Sammy

TITLE OF COURT: Port of Spain's Coroner's Court

COR FILE NO(s): INQ 114 of 1998

DELIVERED ON: 14th May 2009

RULING OF: Nalini Singh
St. George West County
Port of Spain Coroner

REPRESENTATION:

Police Corporal Logan appeared to assist the Coroner

Mrs. Pamela Elder appeared for the applicant Mr. Abu Bakr

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THE NATURE OF THE LEGAL APPLICATION

I have before me an application that I should recuse myself from these proceedings on the grounds of apparent bias. Mr. Abu Bakr is the applicant and legal arguments were advanced on his behalf by Mrs. Pamela Elder S.C. to this effect on the 31st March 2009.

It is helpful to start by reminding myself of what constitutes bias.

What is Bias?

I adopt the definition of Lord Phillips MR in **Re Medicaments and Related Class of Goods (No 2) [2001] 1 WLR 700** where bias is said to describe an attitude of the mind which prevents an objective determination of the issues to be resolved. At Paragraph 37 of his judgment Lord Phillips MR says:

> "A judge may be biased because he has reason to prefer one outcome of the case to another. He may be biased because he has reason to favour one party rather than another. He may be biased not in favour of one outcome of the dispute but because of a prejudice in favour of or against a particular witness which prevents an impartial assessment of the evidence of that witness. Bias can come in many forms. It may consist of irrational prejudice or it may arise from particular circumstances which, for logical reasons, predispose a judge towards a particular view of the evidence or issues before him".

The concept of bias can therefore be said to refer to a decision maker's predisposition to decide an issue such that his or her mind is closed to persuasion to the contrary view based on evidence adduced and or submissions made in a specific case.

Decided cases on the issue of bias, draw a distinction between "actual bias" and "apparent bias".

Actual and Apparent Bias

"Actual bias" refers to the situation where a decision maker has been influenced by partiality or prejudice in reaching his decision. It is also said to refer to a situation where it has been demonstrated that a decision maker is actually prejudiced in favour of or against a party.

No accusation of actual bias has at any time been made on behalf of the applicant against the Coroner involved in these proceedings.

"Apparent bias" describes the situation where circumstances exists which give rise to a reasonable apprehension that a decision maker may have been, or may be, predisposed or prejudiced against one party's case for reasons unconnected with the merits of the issue to be determined.

Regardless of whether a case may involve actual bias or apparent bias, one thing remains constant in these types of matters. It is that the general direction the law seems to have

taken is that decision makers must apply the law as they understand it to the facts of individual cases as they find them without fear or favour, affection or ill-will, that is, without partiality or prejudice: **Locabail (UK) Ltd v. Bayfield Properties Ltd [2000] QB 451 at para. 2.** This principle is predicated on the fact that an individual is entitled to be judged by a tribunal that is both independent and impartial.

The Entitlement to Be Judged By an Independent and Impartial Tribunal

The origin of the notion of the entitlement to be judged by an independent and impartial tribunal was explained in the joint judgment of Gleeson CJ, McHugh, Gummow and Hayne JJ in **Ebner v. Official Trustee in Bankruptcy (2001) CLR 205 at pg. 337** where their Honours' said:

> "Fundamental to the common law system of adversarial trial is that it is conducted by an independent and impartial tribunal".

Perhaps the deepest historical roots of this principle can be traced to Magna Carta with its declaration that right and justice shall not be sold[1] and the United Kingdom's Act of Settlement 1700[2] with its provisions for the better securing in England of judicial independence. It is a principle which could be seen to be behind the confrontation in 1607 between Coke CJ and King James about the supremacy of law[3]. It could be seen to be applied when Bacon was stripped of office and punished for taking bribes from litigants[4]. Many other examples could be drawn from history[5]. It is unnecessary,

[1] Holdsworth, *A History of English Law*, 6th ed. (1938), vol. 1, pp 57-58.

[2] 12 and 13 Wm 3, c 2

[3] Holdsworth, *A History of English Law*, 2nd ed. (1937) vol. 5, p 430.

[4] Holdsworth, *A History of English Law*, 2nd ed. (1937) vol. 5, p 241

however, to explore the historical origins of the principle. It is sufficient to say that it is fundamental to the Trinidad and Tobago judicial system.

The notion of the entitlement to be judged by an independent and impartial tribunal in turn reflects a concern with the need to maintain public confidence in the administration of justice. This concern is expressed in the cognate principle that, not only must justice be done, but, it must also be seen to be done. In other words, the appearance of just court proceedings is as important as its actuality.

Scrutiny of the decided cases indicates that the generation of appeals where the appearance of bias is alleged, seems to have been sharply on the increase even in our tiny twin island republic. This is a clear indication that what the public was content to accept many years ago is not necessarily acceptable in our society today. Indeed the indispensible requirement of public confidence in the administration of justice requires higher standards today than was the case even a decade or two ago: **Lawal v. Northern Spirit Ltd [2003] UKHL 35 per Lord Steyn.**

It is common ground that the obligation to accord procedural fairness by avoiding the appearance of bias has been held to apply to Coroner's decisions:

Honda Australia Motorcycle & Power Equipment Pty Ltd & Ors v. Johnstone (as State Coroner) [2005] VSC 387 para 16

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[5] Ebner v. The Official Trustee in Bankruptcy [2000] HCA 63, 2000 AUST HIGHCT LEXIS 29; BC200007446.

R v. Coroner Doogan [2005] ACTSC 74 paras 16-17

Firman v. Lastry & Anor (2000) VSC 240 para 7

On this note I come now to the submissions advanced on behalf of the applicant at this inquest.

The Legal Submission

Counsel for the applicant has advanced three reasons why it is contended that there are circumstances which would lead a fair-minded and informed observer to conclude that there is a real possibility that I may be biased. They are essentially this:

1. I have labeled the applicant as the subject matter of the inquest
2. I have advised the applicant of the court's powers of arrest under section 28 of the Coroners Act Chap. 6:04 (hereinafter referred to as "the Act") and I have advised the applicant to consider retaining counsel
3. I have issued a summons for the applicant

The result, it is argued, is that to a fair-minded and informed observer, there is a real possibility that I may have been or, I may be predisposed or prejudiced against the applicant for reasons unconnected with the merits of the issue I must determine at this inquest.

The application has been developed in the following manner.

1. The labeling of the applicant as the subject matter of the inquest

In so far as the labeling of the applicant as the subject matter is complained of, it is said that of all the witnesses likely to be called, the applicant has been labeled as the subject matter of the inquest. It is submitted that this is palpably wrong because it is indicative of the Coroner's state of mind with respect to the applicant because the jurisdiction of a Coroner necessarily entails fact finding rather than pronouncing guilt.

2. The advising of the applicant of the Coroner's powers of arrest and to consider retaining counsel

Issue is also taken with the fact that the Coroner advised the applicant of the Coroner's powers of arrest under section 28 of the Act. The applicant was then told that he should consider the mater of retaining counsel. Objection is taken to this as well.

3. The issuing of a witness summons to the applicant

Counsel argues that the issuance of the witness summons is first of all done without the power to do so. According to counsel, a Coroner is only entitled under **section 42 of the Summary Courts Act Chap. 4:20** to issue summons to witnesses and there is no provision made for the issuing of a summons to a person whose conduct is being called into question. Indeed it is stated that if the applicant is not called a witness then it must follow that a witness summons cannot be issued for the applicant.

Also, the effect of the witness summons is that it has served as a form of testimonial compulsion directed towards the applicant in that he now feels that he has to come to

court *and* testify at these inquest proceedings since the failure to obey a witness summons results in arrest. Additionally since he is a compellable witness he has lost his right to claim the privilege against self incrimination.

It is said that the cumulative effect of these factors is that the test of apparent bias has been established and in these circumstances the Coroner should err on the side of caution and accede to the application for recusal.

The legal issues which therefore arise for determination are whether my conduct in relation to:

1. classifying and referring to the applicant as the subject matter of the inquest,
2. advising the applicant of the court's powers of arrest and to consider retaining counsel
3. issuing a witness summons in favor of the applicant for him to appear in this inquest

would lead a fair-minded and informed observer to conclude that there is a real possibility that I may be biased.

What then is the appropriate law to be applied to this application?

THE LAW

A number of cases have emerged of late which touch and concern the issue of when apparent bias would be considered to be present in a matter. The result is that the test for the existence of apparent bias is now well established.

The Test to be Applied in the Determination of this Application

The rule as laid down by the House of Lords in **R v. Gough [1993] 2 All ER 724** and followed in **Locabail (UK) Ltd v. Bayfield Properties Ltd [2000] QB 451** has now shifted slightly to the test as laid down in **Porter v. Magill [2002] 2 AC 357** which supports the approach of Lord Phillips MR in **Re Medicaments and Related Class of Goods (No2) [2001] 1WLR 700** and as recently summarized in **AWG v. Morrison [2006] EWCA Civ 6**:

> "that having ascertained all of the circumstances bearing on the suggestion that the judge is biased, the court must itself decide whether those circumstances would lead a fair minded and informed observer to conclude that there was a real possibility that the tribunal was biased."

This current test has been applied in this jurisdiction by Archie CJ in **Basdeo Panday v. Wellington Virgil Mag. App. No. 75 of 2006 at para 5:**

> "The duty of the Court when investigating an allegation of apparent bias is to place itself in the shoes of a hypothetical observer who is both '*fair minded'* and *'informed'*. If such an observer would conclude that there is a

real possibility that the tribunal was biased, the system has failed and the proceedings are vitiated".

It seems therefore that since *Porter v. Magill (supra)* the courts have finally laid to rest the test in *R v. Gough (supra)* which is the "real danger of bias" test by endorsing (with some degree of modification) the formulation adopted by the Court of Appeal in *Re Medicaments and Related Class of Goods (No2) (supra).* So it seems that from now on the question is "whether the fair-minded observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased".

These recent developments has had the effect of bringing the law of England and Wales in line with what exists in Canada, Australia[6] and New Zealand as well as Scotland: **Meerabux v. A-G of Belize [2005] 2 AC 513.** It has also been held that these developments now mean that there is no difference between the common law test of bias and the requirement for impartiality contained in Article 6 of the Convention: *Lawal v. Northern Spirit Ltd (supra).*

Having examined the law to be applied in determining this application the question which must now be asked is, who is to judge whether an appearance of bias exists?

[6] The source of "the reasonable apprehension or suspicion" test is **Webb v. The Queen (1994) 181 CLR 41.** See further **Nwabueze v. GMC [2000] 1 WLR 1760 at 1770A**

Who Must Judge Whether an Appearance of Bias Arises

A clear answer to this question is provided in the case of **Prince Jefri Bolkiah and Others v. State of Brunei Darussalam and Another [2007] UKPC 62** where it is stated at paragraph 15 that the court must judge. Furthermore, it is to do so by having ascertained all the circumstances which bear on the suggestion that the tribunal was (or would be) biased. Then it must ask itself whether those circumstances would lead a fair-minded and informed observer to conclude that there was (or would be) a real possibility that the judge was (or would be) subject to bias.

I must therefore determine whether an appearance of bias arises from my actions in this matter.

In so doing, I am guided by the test as clearly enunciated by Archie CJ in *Basdeo Panday v. Wellington Virgil (supra)* in determining whether the fair-minded and informed observer would conclude that there is a real possibility of bias by my actions in this inquest in so far as they relate to:

1. classifying and referring to the applicant as the subject matter of the inquest,
2. advising the applicant of the Coroner's powers of arrest and that he should consider retaining counsel to appear at this inquest, and,
3. issuing a witness summons in favor of the applicant for him to appear in this inquest.

I am also guided by the principle that disqualification is the automatic consequence should the fair-minded and informed observer conclude that there is a real possibility of bias. It is not a matter of weighing the factors and exercising a discretion: **Morrison v. AWG Group Ltd [2006] 1 All ER 967 at para 6.** Mummery LJ has put matters in emphatic terms at para 29:

> "…while I fully understand the Judge's concerns… about the prejudicial effect that his withdrawal from the trial would have on the parties and on the administration of justice, those concerns are totally irrelevant to the crucial question of the real possibility of bias and automatic disqualification at trial of the judge. In terms of time, cost and listing it might well be more efficient and convenient to proceed with the trial, but efficiency and convenience are not the determinative legal values: the paramount concern of the legal system is to administer justice, which must be, and must be seen by the litigants and fair-minded members of the public to be, fair and impartial. Anything less is not worth having".

Mummery LJ's words echo those of Lord Buckmaster in **Sellar v. Highland Railway Co 1919 SC 19**:

> "The importance of preserving the administration of justice from anything which can even by remote imagination infer a bias or interest in the judge upon whom falls the solemn duty of interpreting the law is so grave that any small inconvenience experienced in its preservation may be cheerfully endured".

Before I embark on an examination of whether a fair-minded and informed observer will conclude that there is a real possibility of bias arising in relation to my actions at this inquest, I must say that I have approached my decision in this matter with great caution. I am grateful for the guidance offered by Keith J in **Natrass v. The Attorney General [1996] 1 HKC 481 at 492** that:

> "…the judge who is asked to rule on his own alleged bias is in an invidious position. He may believe himself to be wholly free from bias, but he may well not be the best person to assess whether there is a real danger of it. It is necessary, therefore, for a judge who is being asked to rule on his own alleged bias to take a step back, and to look at himself as objectively as he can."

I have endeavored in assessing this matter to take that step back.

I turn now to consider whether a fair-minded and informed observer will conclude that a real possibility of bias arises from my actions in these proceedings.

THE DETERMINATION OF WHETHER AN APPEARANCE OF BIAS ARISES IN THE INSTANT MATTER

The case of *Prince Jefri Bolkiah and Others v. State of Brunei Darussalam and Another (supra)* suggests that I begin my consideration of whether a fair-minded and informed observer will conclude that a real possibility of bias arises from my actions in these proceedings, by first ascertaining all the circumstances bearing on the suggestion that I was biased. Having done so, I must then look at the characteristics or qualities of the

fair-minded observer to see whether the circumstances as ascertained would lead such an individual to conclude that there is a real possibility that I was biased.

What then are the circumstances bearing on this suggestion that I was biased?

An Appreciation of the Circumstances Alleged to have Given Rise to the Appearance of Bias

1. The labeling of the applicant as the subject matter of the inquest

Technically there are no parties to an inquest: **R v. South London Coroner; ex parte Thompson (1982) 126 SJ 625** per Lord Lane CJ. Modern common law and statutory law however provide that persons with "a sufficient interest" have a right to be represented at inquests where, they may be permitted to call, examine and cross examine witnesses and make submissions.

Who then is a person with "a sufficient interest" in an inquest? Guidance on this issue can be had from the case of **Barci v. Heffey [1995] SC Vic 4306 (Unreported, 10 February 1995)** where Beach J. defines such a person as such once there exists in relation to that individual, a reasonable prospect that the Coroner may make a finding adverse to his or her interests.

Legislation from this jurisdiction is silent on the question of who is to be classified as an interested party at inquest proceedings. Guidance on the issue of the right of appearance

at an inquest therefore comes from the common law. With this in mind the applicable law would therefore be that any person, in relation to whom there exists a reasonable prospect that a Coroner may make a finding adverse to his or her interests, is a person who is entitled to appear at an inquest: *Barci v. Heffey (supra).*

After conducting a preliminary investigation of the material forwarded to the Coroner's Office pertaining to the death of Israel Sammy pursuant to **sections 10 and 10 A** of the Act, this Court formed the view that the applicant was in fact a person in respect of whom a finding could have been made which was adverse to his interests. Admittedly he was not labeled as a person with "a sufficient interest" in the inquest. Instead he was referred to as the "subject matter" of the inquest. How did this come about?

The practice of referring to persons with "a sufficient interest" in inquests as the "subject matter" of that inquest is a practice which has been employed by previous Coroners in this jurisdiction. Such is the legal landscape or the legal culture which confronted this Court as presently constituted, in December 2008 upon being assigned to serve as Coroner for the County of St. George West. As such the applicant was erroneously labeled the "subject matter" of the inquest rather than a person with "a sufficient interest" in that inquest.

I say that the applicant was erroneously labeled as the "subject matter" of this inquest because the subject matter of an inquest can only refer to the deceased person whose death has formed the basis of the inquest or, the subject matter of the inquest: **New South**

Wales Coroners Act 1980 No. 27 section 32. It follows that the term "subject matter" is an incorrect or at the very least, an unsuitable term for a person in respect of whom there is a reasonable prospect that the Coroner may make a finding which is adverse to his or her interests. Put simply the description of such an individual as the "subject matter" of an inquest is a misnomer. A review of decided cases and legislation suggests that such an individual ought to be referred to as a person with "a sufficient interest" in the inquest.

Where then does this leave the applicant? Well, one thing remains certain. It is the fact that whether the applicant was referred to as the "subject matter" of the inquest or as a person with "a sufficient interest" in the inquest, the law confers upon him a right of appearance at this inquest and this Court would be remiss in not initiating that process of bringing such a person before the court, by first seeking to identifying the applicant as such a person. In these circumstances the label ascribed to him is immaterial in the scheme of things as the pressing concern of any court should really be in ensuring such an individual is before a court to avail him-self of his right of appearance.

This initial identifying process is something which admittedly requires a certain degree of pre-judgment or predisposition but this is separate and distinct from predetermination or a pronouncement of guilt.

The difference between predisposition and predetermination is explained by Richards LJ in National Assembly for **Wales v. Condron [2006] EWCA Civ 1573 at para 43**:

> "We were referred to various cases in which the distinction has been drawn between a legitimate predisposition towards a particular outcome (for example, as a result of a manifesto commitment by the ruing party or some other policy statement) and an illegitimate predetermination of the outcome (for example, because of a decision already reached or a determination to reach a particular decision). The former is consistent with a preparedness to consider and weigh relevant factors in reaching the final decision; the latter involves a mind that is closed to the consideration and weighing of relevant factors. The cases include R v. Secretary of State for the Environment, ex p Kirkstall Valley Campaign Ltd. [1996] 3 All ER 304 at 320-321, Bovis Homes Ltd v. New Forest Plc [2002] EWHC 483 (Admin) at paras 111-113, and R (Island Farm Development Ltd) v. Bridgend County Borough Council [2006] EWHC 2189 (ADMIN) at paras 25-32. I do not propose to quote from them, since I regard the general nature of the distinction as being clear enough".

It must also be borne in mind that whilst it is expected that decision makers such as judges or in this case Coroners, will be open minded this is not to say that they are expected to have an empty mind. According to Mason P. in **Barbosa v. Di Meglio [1999] NSWCA 307 at pg. 3**

> "…the litigant's right is to have a tribunal that is free of prejudgment. The litigant is not entitled to a tribunal that is predisposed to accept or reject

any particular proposition. An open mind is not an empty one. (To my knowledge, the distinction between an open and an empty mind derives from a speech of Bertrand Russell to the first meeting of members of a War Crimes Tribunal convened to investigate aspects of the United States' war in Vietnam. Russell also called for rejection of "the view that only indifferent men are impartial men)"[7].

In the **Queen v. Commonwealth Conciliation and Arbitration Commission; Ex parte Angliss Group (1969) 122 CLR 546 at 553-554** the High Court reminds us that:

> "... requirements of natural justice are not infringed by a mere lack of nicety but only when it is firmly established that a suspicion may reasonably be engendered in the minds of those who come before the tribunal or in the minds of the public that the tribunal or a member or members of it may not bring to the resolution of the questions arising before the tribunal fair and unprejudiced minds. Such a mind is not necessarily a mind which has not given thought to the subject matter or one which, having thought about it, has not formed any views or inclination of mind upon or with respect to it".

It must also be said that if one has regard to the Act, it is immediately apparent that a certain degree of predisposition is not just sanctioned in local Coronial proceedings but, it is a necessary feature of the system. Indeed, **section 10** of the Act requires the Coroner

[7] The Autobiography of Bertrand Russell vol. III p216

to peruse the documents relating to a reportable death and decide whether an inquest is warranted in the circumstances –and this is to be done without ever hearing any evidence in court. At this stage then, the Coroner would be acting on documents which can be documents containing hearsay material as well since a Coroner can consider and act upon hearsay: **R v. Attorney-General for Northern Ireland, ex p. Devine [1992] 1 W.L.R. 262 H.L.**

So it seems that preliminary predisposition is an inherent feature of this system but it must be said that this can not be equated with predetermination. Again regard to the Act confirms this; because notwithstanding the fact that **section 10** of the Act calls for a preliminary predisposition on the part of the Coroner, **section 31** makes it clear that if at the conclusion of an inquest the Coroner is of the opinion that there is no ground for suspecting that anyone is guilty of an indictable offence in respect of the matter enquired into, he shall certify his opinion to that effect and transmit the proceedings to the Director of Public Prosecutions. It follows that the mere identification of a person as a person whose interest might be affected by an adverse finding by a Coroner –by whatever name he is called, does not necessarily mean that the Coroner will ultimately exercise its discretion under **section 28** of the Act and issue a warrant for the apprehension of that person. And in this regard the case of **Sun Honest Development Ltd v. Appeal Tribunal (Buildings) [2002 - 04] 10 HKPLR 1018** is instructive because it clearly states that in deciding whether there had been an appearance of bias, the whole circumstance of the case, including the entire statutory scheme has to be looked at.

In fact the law appears to be that the courts are prepared to allow tribunals to not only have a certain predisposition in a matter but, allowance is made for such a tribunal to make robust comments pertaining to the view they may initially have of such a matter. This can be seen in the case of **Barbosa v. Di Meglio [1999] NSWCA 307** for instance, where the trial judge had been invited to read three reports of an expert witness as an aid to understanding the issues raised by the objection to their admissibility. Perusal of the reports led to strong remarks from the bench about their admissibility and cogency. Indeed at one point the trial judge expressed the view that the reports of an expert witness were "nonsense" in an evidentiary sense because they contained findings relating to the ultimate issues. Sinclair DCJ rejected an application that he disqualify himself. A conviction was secured in the matter and the appellant appealed on the ground that the trial judge should have disqualified himself for apprehended bias.

Mason P acknowledged the view that there was an "ill-defined line beyond which the expression of a trial judge of preconceived views about the reliability of particular witnesses could threaten the appearance of impartial justice, Mason P nevertheless went on to dismiss the appeal by holding that the trial Judge did not err in rejecting the application that he disqualify himself for apprehended bias. He felt that minds will inevitably differ as to how robust a judge may be before bias is apprehended. However on the material particular to this case, it was concluded that his Honour's conduct was not enough to generate a reasonable apprehension of bias.

Now if these are the parameters which an appellate court has established as permissible, this court is unable to appreciate how it could be contended with any degree of conviction that where a court classifies a witness as the subject matter of an inquest this must necessarily attract censure.

Of particular interest is what Mason P. had to say at pg. 4 of **Barbosa v. Di Meglio [1999] NSWCA 307**:

> "The trial judge who sits in stony silence without exposing his or her views is not to be emulated, if silence impedes genuine engagement and debate about critical issues (Vakauta v Kelly (1989) 167 CLR 568 at 571, Galea v Galea (1990) 19 NSWLR 263, Johnson v IPEC Transport Group (1993) 9 NSWCCR 427 at 442). The dialectical exchanges between bench and bar will often involve overstatement, response, modification and accommodation. The vigour of the primary judge's early expressed reaction to the report may not be a model of judicial behaviour, but it did not have the effect of driving his Honour from the judgment seat".

So it seems that not only can preliminary opinions be held by a trial judge but, it appears that the forceful expression of those views to counsel during the course of a trial will not have the effect of substantiating apparent bias.

This is on an entirely different footing with a situation where a tribunal refers to relatives of a deceased person as unhinged and mentally unwell. The facts of the case of **R v. HM Coroner for Inner London West District Ex p. Dallaglio [1994] 4 All E.R. 139** -which

is a case relied upon by counsel for the applicant in support of her submissions, make this point an obvious one. In the case the inquests, after the Marchioness disaster, were adjourned pending the outcome of criminal proceedings. The Coroner was reported as describing some of the relatives of the deceased as "unhinged" *and* "mentally unwell". After the criminal proceedings the Coroner sought the views of the deceased's families as to the resumption of the inquests. He refused to move himself on the ground of apparent bias or to resume the inquests. The application for judicial review hearing was refused and the families appealed.

The appeal was allowed. The court held that the applicants had to show only that there was a real danger of bias that affected the decision albeit unconsciously. On the facts, the use of the expressions "unhinged" and "mentally unwell" indicated a real possibility of unconscious bias. The Coroner's decision was quashed and the matter remitted to a different Coroner for a fresh decision on whether to resume the inquests.

In essence these are the circumstances surrounding the labeling of the applicant as the "subject matter" of the inquest.

It is clearly important to have regard to the context of the relevant decision-making process. This is because, as Woolf J pointed out in **R v. Amber Valley District Council, ex p Jackson [1984] 3 All ER 501 at 509**:

> "The rules of fairness or natural justice cannot be regarded as rigid. They must alter in accordance with the context".

In so far as the labeling of the applicant as the "subject matter of the inquest" goes, the circumstances which bear on the allegation of apparent bias are in summary:

1. Persons with a sufficient interest have a right to appear at an inquest
2. A person with a sufficient interest is someone in respect of whom the Coroner may make a finding adverse to his or her interests.
3. There has been a practice in this jurisdiction of referring to persons with a sufficient interest in an inquest as the subject matter of that inquest.
4. This is a misnomer.
5. Whether a person is called the "subject matter" of an inquest or he is referred to as a person with "a sufficient interest" in an inquest, if he is a person, in relation to whom there exists a reasonable prospect that a Coroner may make a finding adverse to his or her interests, then he is entitled to appear at an inquest.
6. It is necessary that there be some level of predisposition on the part of the Coroner if such a person is to be identified.
7. This predisposition can be formed from a perusal of hearsay evidence.
8. This level of predisposition is not to be equated with a predetermination or a pronouncement of guilt.
9. Accordingly there is a clear distinction to be drawn between the labeling of the applicant as the "subject matter" of an inquest and the labeling of a party to an inquest as "unhinged" *and* "mentally unstable".

I come now to a consideration of the circumstances surrounding the advising of the applicant of the Coroner's powers of arrest

2. The advising of the applicant of the Coroner's powers of arrest and to consider retaining counsel

The applicant received a witness summons and he duly entered an appearance at this inquest pursuant to that summons. When the applicant first appeared at this inquest, he was informed that the Coroner had information before her that linked him to the commission of a murder. In these circumstances the applicant was then advised to consider retaining counsel because the implications for the applicant in so far as the inquest was concerned was that he could be arrested for an indictable offence; namely murder once sufficient grounds were disclosed for making a charge on indictment in accordance with section 28 of the Act.

Mr. Bakr heeded the advice of the Coroner and on the very next occasion, Mr. Sturge was before the court appearing for the applicant. Mr. Sturge was then informed of the stage at which the inquest had progressed to and arrangements were made to have a copy of the court file copied and delivered to Mr. Sturge. Mr. Sturge was also told that if upon a perusal of the file he required any witnesses to be recalled for cross-examination, this would be arranged. Mr Sturge then addressed the Coroner on some matters of law he wished to raise at a later stage and the matter was accordingly adjourned.

On the next occasion that this inquest was called Ms. Elder appeared for the applicant and this application for recusal was made soon thereafter.

According to the 1971 Broderick Committee[8] (a Government inquiry into death certification and coroners) which identified certain public interests which a Coroner at an inquest should serve, it was stated that the Coroner is expected to preserve the legal interests of interested parties at an inquest. This report has been endorsed as recently as the year 1994 in the case of **R v. HM Coroner for W District of East Sussex ex parte Homberg (1994) 158 JP 357** and then in 2000 in the case of **Morris v. Dublin City Coroner 2000 3 IR 592** where the guidance offered by the Committee was cited with approval. The Court as presently constituted is aware that the standard witness summons which was issued to the applicant would have simply stated that it appeared to the Coroner that the applicant was likely to give material evidence at the inquest into the cause and circumstances of the death of Israel Sammy and that he was to attend court at an appointed time and date to testify as to what he knew concerning the said matter. On the face of this standard document the applicant would not have known that there was information which linked him to the commission of any offence and he certainly would not have known that he could be charged with same should sufficient grounds be disclosed.

This Coroner felt that it was the right of the applicant to be informed of these salient facts so that he could appreciate the nature of the proceedings he was summoned to attend,

[8] United Kingdom, *Report of the Committee on Death Certification and Coroners,* Cmnd 4810 (22 September 1971), chaired by N Broderick QC.

moreover, he would appreciate the implications these proceeding could have for his interest. Indeed the Court as presently constituted would have been shirking its responsibility to have done anything other than what was done in light of the guidance coming from the Broderick Committee. As previously stated, one such public interest a Coroner is expected to preserve is the legal interest of an interested party. I have endeavored preserve the legal interests of the applicant. This is how the applicant came to be advised of the Coroners powers of arrest at an inquest and, that he should consider retaining counsel.

It is interesting to note that in Hong Kong, a Coroner is formally empowered to conduct a "pre-inquest review" into a death for the purpose of determining, insofar as it is practicable, how the inquest may be disposed of in a just and expeditious manner: **Coroners Ordinance (HK) section 11(1)**. At the review, notice may be given to interested persons to attend and consideration must be given to whether the conduct of the person likely to be called at the inquest is likely to be called into question. If so, the Coroner may recommend that the person seek legal advice: **Coroners Ordinance (HK) section 11(2) – (4)**. Similar procedures are employed in other jurisdictions, sometimes in pre-inquest hearings (as in Victoria, for instance) and sometimes in open court at the commencement of the inquest, but without the formal authorization present in the Hong Kong Coroners Ordinance.

A similar practice can be seen to exist in England where depending on the circumstances, it may be appropriate for the Coroner to write to the person whose conduct is likely to be

called into question at the inquest, with a specific notification to this effect and this is done to ensure that they understand the gravity of the situation and have ample time to seek legal advice[9].

This therefore illustrates that the normal procedure in terms of Coronial practice whether it is set in legislation or not, is that is that everything is done to ensure that interested persons are fully cognizant of their position at an inquest.

In so far as advising the applicant of the Coroner's powers of arrest and the fact that he should consider retaining counsel, the circumstances which bear on the allegation of apparent bias are in summary:

1. A Coroner is expected to preserve the legal interest of interested parties at an inquest
2. This practice has been cited with approval in the common law.
3. The Coroner endeavored to do this by ensuring that the applicant knew why he was in court and the implication that could flow from these proceedings and what in turn could be done by the applicant in the interim.
4. The practice of ensuring that interested persons are fully cognizant of their position at an inquest and what action they can take is a practice which has developed in numerous jurisdictions and it is immaterial whether the practice is cast in legislation or not. It just is Coronial practice.

[9] Dorries, C, *Coroner's Courts A Guide To law And Practice* (2nd ed.) Oxford University Press, New York, 2004 at para 6.09.

I come now to a consideration of the circumstances surrounding the issuing of a witness summons to the applicant.

3. The issuing of a witness summons to the applicant

The case of **Re Reid and Wigle 29 O.R. (2d) 633** sheds light on the principles by which a Coroner should be guided in determining whether to issue a witness summons for an individual to appear at an inquest. In this case the Coroner refused to issue witness summons in blank. This led to an application for judicial review in which an order of prohibition was sought against the Coroner on the ground of reasonable apprehension of bias. It was held that the application should be dismissed. The court felt that the Coroner has jurisdiction to refuse to issue a summons when the prospective witness is not named and the substance of the proposed testimony has not been disclosed. Now what is particularly instructive in this case is the dicta of Pennell J who had this to say at pg. 646:

> "…the mere assertion that the proposed evidence may have some bearing is not enough. There ought to be something presented to the coroner, either verbally or in writing, to indicate generally the nexus between the evidence of the prospective witness and the purpose of the inquiry".

If this is taken to its natural conclusion then it would seem that once there is some nexus between material before a Coroner and an identifiable individual, then the Coroner is well within his rights to issue a summons for that individual. There is such a nexus in this case between the material before the Coroner and the applicant and a witness summons was accordingly issued to the applicant under the hand of the Coroner.

This underscores the point made in Jervis on Coroners[10] at para.12-61 that at common law every person who is able to give evidence is bound to attend at the Coroner's court and the practice has been that one of the ways of securing the attendance of the relevant witness is by a formal summons.

Counsel for the applicant has made the point that the applicant is not a witness and therefore the Coroner who only has power to issue a summons to witnesses cannot issue a summons to the applicant as he is a person with a sufficient interest in this inquest. This argument lacks merit. The cases of **Wakley v. Cooke (1847) 4 Ex. 511** and **Boyle v. Wiseman (1855) 10 Ex. 647** clearly establish that a person cannot refuse to be a witness merely because he might subsequently be charged with an offence arising out of or connected with the death which forms the subject matter of the inquest.

Counsel for the applicant also makes the point that the service of the summons on the applicant operates as a form of testimonial compulsion because the applicant has now found himself in a situation where he is compelled to testify and in so doing he will therefore loose his privilege against self incrimination. I am unable to agree with this logic.

The law is that the privilege against self incrimination is not a general immunity from being asked any questions at all: **R v. HM Coroner for Lincolnshire ex parte Hay (1999) 163 JP 666.** Furthermore, the privilege against self incrimination is certainly not

[10] Matthews, P and Foreman, J *Jervis On The Office And Duties Of Coroners With Forms And Precedents* (11th ed.) Sweet & Maxwell, London, 1993 p 213.

something that can operate to prevent questions from being asked in the first place: **R v. Derby Coroner ex parte Hart (2000) 164 JP 429.** The procedure where a witness is summoned and claims a privilege against self incrimination is this: such a witness attends court upon being served with a formal witness summons. He then goes into the witness box as he cannot refuse to go into the witness box on the ground that he might incriminate himself. He can then claim the privilege after he is sworn and the question is put since he must first pledge his oath that he honestly believes that that answer will, or may tend to incriminate him: **Webb v. East (1880) 5 Ex.D. 108** and **Lamb v. Munster (1883) 10 Q.B.D. 110.** In short, a witness does not loose his right to self incrimination if he enters an appearance in answer to a summons. He must go into the witness box, bind his conscience to speak the truth, questions are posed and then he can rely on the privilege.

Pertaining to the issuing by the Coroner of a summons for the applicant, the circumstances which bear on the allegation of apparent bias are in summary:

1. There must be some nexus between material before a Coroner and an identifiable individual, before the Coroner can issue a summons for that individual. That nexus exists in this matter.
2. This reflects the general principle that every person who is able to give evidence is bound to attend at the Coroner's court and one of the ways of securing the attendance of any relevant witness is by a formal summons.

3. A person cannot refuse to be a witness merely because he might subsequently be charged with an offence arising out of or connected with the death which forms the subject matter of the inquest.
4. The appearance at an inquest pursuant to the service of a summons does not divest an individual of his privilege against self incrimination.

Having ascertained the relevant circumstances bearing on the matter of apparent bias in this case I move now to a consideration of the characteristics of the fair-minded observer.

What Are The Characteristics of The Fair-Minded and Informed Observer?

In **Helow v. Secretary of State for the Home Department [2008] UKHL 62** Lord Hope spoke of the "fair minded and informed observer" as follows:

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

> judgment on every point until she has seen and fully understood both sides of the argument. She is not unduly sensitive or suspicious, as Kirby J. observed in Johnson v. Johnson (2000) 201 CLR 488, 509, para. 53. Her approach must not be confused with that of the person who has brought the complaint. The "real possibility" test ensures that there is this measure of detachment. The assumptions that the complainer makes are not to be attributed to the observer unless they can be justified objectively. But she is not complacent either. She knows that fairness requires that a judge must be, and must be seen to be, unbiased. She knows that judges, like anybody else, have their weaknesses. She will not shrink from the conclusion, if it can be justified objectively, that things that they have said or done or associations that they have formed may make it difficult for them to judge the case before them impartially".

That said I turn to an examination of some specific characteristics of the fair-minded informed observer. They are as follows:

1. A Working Knowledge of the Law

Kirby J makes it clear in the High Court of Australia decision of **Johnson v. Johnson (2000) 201 CLR 488 at pp.508-509, para 53** that although the fair-minded informed observer is not a lawyer:

> "Yet neither is he or she a person wholly uninformed and uninstructed about the law in general or the issue to be decided".

On a similar note is the dicta by Brooking JA in **Victoria v. Psaila (by his litigation guardian Psaila); Victoria v. Lamb (by her litigation guardian Robertson) [1999] VSCA 193**:

> "The test, when expressed fully, requires the observer to be informed, not with the knowledge of Queen's Counsel, but at least with sufficient knowledge as to make an informed appreciation of questions such as impartiality and want of prejudice".

The case of **Hart and another v. Relentless Records Ltd and others [2002] EWHC 1984 (Ch)** illustrates the point. The facts of this case are as follows. In January 1995 the first claimant and a friend formed a company intended to be a record company called Relentless Recordings Ltd. The company never traded but it attempted to start a business by making and distributing small quantities of records containing single tracks principally to DJs to try out playing in clubs. No interest was shown and they were flops. The defendant company was formed in December 1999, its founders having launched a record which was an immediate success with national radio support. The first defendant applied to register the word "Relentless" as a trade mark in February 2000 in five classes of goods and services and those registrations were granted. An action for passing off was commenced in the first claimant's name. The defendants responded by counterclaiming for infringement of registered trade mark and passing off. A week before trial the company was added as claimant. During the course of the trial the judge granted the defendants security for costs upon an application made after the first claimant had given evidence and he gave judgment against the first claimant personally. The defendants

applied for summary judgment on their counterclaim for trade mark infringement, the claim in passing off having been dropped.

The validity of the registration was attacked on three grounds: (i) under s 5(4)(a) of the Trade Marks Act 1994 which provided that a trade mark should not be registered by virtue of any rule of law (in particular, the law of passing off) protecting an unregistered trade mark or other sign used in the course of trade; (ii) that the application was made in bad faith and (iii) under s 11(3) of the Act which provided that a registered trade mark was not infringed by the use in the course of trade in a particular locality of an earlier right which applied only in that locality.

At the outset the claimant applied for the judge to recuse himself on the grounds of apparent bias in respect of six incidents. Those incidents included the observation by the judge that the defendants were in a position to apply for security for costs, the suggestion by the judge after the trial commenced that there should be settlement discussions, the calling of counsel into the judge's corridor with a view to indicating where the judge thought the case stood and suggesting that the parties should re-consider settlement and remarks made about the claimant's further witness statements. The application was dismissed with reasons to be given later.

The court ruled that the question to be asked in respect of the recusal application was whether a fair minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased. In the

circumstances the incidents relied upon did not amount to apparent bias, whether taken singly or collectively.

Of particular interest is what is said by Jacob J at para. 28-30 concerning the submission in relation to some of the incidents relied upon that the informed observer would not have adequate knowledge of either the law of passing off or security for costs to understand what was going on:

> "It boils down to this: that the observer is not only fair-minded but informed. He is taken to understand the underlying facts relating to an incident said to require recusal and their significance. This means he has to have been informed as to the relevant substantive and procedural rules. Thus, taking this case, he… must be taken to know what the case was about, namely, so far as relevant here, passing off. He must be taken to know that what either claimant had to prove is that it had a goodwill in the name "Relentless", that the use by the defendant amounted to a misrepresentation, and that there was resulting damage. I do not think he would have to know much about the technicalities of trade mark law other than it can be complicated: the alleged irregularities do not relate to that. He would just need to know that whether the defendants could succeed on their counterclaim involved a number of technical arguments. He would have to understand the rules as to security for costs, however. Otherwise he simply would not be "informed". No fair-minded observer would form

an opinion as to bias or not if he was working on a basis of ignorance of the point under discussion".

2. An Awareness of The legal Culture

In the case of **Lawal v. Northern Spirit Limited [2002] EWCA Civ 1218 at para. 18**, it is said by Mummery LJ that:

"…the fair-minded and informed observer must be taken to possess "some knowledge of legal culture".

Nowhere is this principle more aptly demonstrated than in the case of **Taylor and another v. Lawrence and another [2002] EWCA Civ 90.** The facts of this case follow. At the trial of a boundary dispute, the judge informed the parties that he had been a client of the claimants' solicitors but that it had been many years since he had instructed them. Nobody objected to his continuing to hear the trial. After judgment was given for the claimants, the defendants appealed on the ground, inter alia, that there was an appearance of bias because of the judge's relationship with the claimants' solicitors. Before the hearing of the appeal, it was disclosed to the defendants that the judge and his wife had used the services of the solicitors to amend their wills the night before he had delivered judgment. The appeal was dismissed in January 2001. Subsequently, the defendants learned that the judge had not paid for the services of the solicitors. The defendants applied to reopen the appeal on the basis that the judge had received a financial benefit from the solicitors which he had failed to disclose, and that the earlier appeal had been dismissed in ignorance of that fact. On the application, the Court of Appeal had to

consider whether the circumstances that were capable of giving rise to the possibility of bias on the part of a judge.

It was held that for the purpose of applying the test for apparent bias, namely whether in all the circumstances a fair-minded and informed observer would be led to conclude that there was a real possibility that the tribunal was biased, the informed observer could be expected to be aware of the legal traditions and culture of the (English) jurisdiction, and accordingly he would be aware that in the ordinary way contacts between the judiciary and the legal profession should not be regarded as giving rise to a possibility of bias.
At para 61 of that judgment Lord Woolf CJ says:

> "The fact that the observer has to be "fair-minded and informed" is important. The informed observer can be expected to be aware of the legal traditions and culture of this jurisdiction. Those legal traditions and that culture have played an important role in ensuring the high standards of integrity on the part of both the judiciary and the profession which happily still exist in this jurisdiction".

Later on at para 63 he says this:

> "The informed observer will therefore be aware that in the ordinary way contacts between the judiciary and the profession should not be regarded as giving rise to a possibility of bias. On the contrary, they promote an atmosphere which is totally inimical to the existence of bias. What is true

of social relationships is equally true of normal professional relationships between a judge and the lawyers he may instruct in a private capacity".

3. Knowledge of the Procedures and Practices of the Court

This point is brought out in the case of **Berg v. IML London Ltd [2002] 4 All ER 87** where a judge was asked to recuse himself on the grounds that he had seen "without prejudice" correspondence. It was said by Stanley Burnton J at para 24 that:

> "The informed observer will know not merely of the traditions of judicial independence and impartiality, but will know of the procedures of the court, of the practices of the court and the facts of the case in question". (emphasis mine)

Australia's most important decision on whether the conduct of a Coroner during an inquest should lead to disqualification for bias is the decision of the Full Court of Australian Capital Territory Supreme Court in **R v. Coroner Doogan; ex parte Lucas-Smith [2005] ACTSC 74** where it was contended on a number of grounds that the Coroner had exhibited bias. These included the conduct of a viewing of the scene of the bushfire into which the coroner was enquiring, her use of expert witnesses, attitudes which she was said to have taken in questioning witnesses and the role she permitted counsel assisting to perform. The Full Court held that the hypothetical lay observer, in the context of evaluating appearance of bias, must be taken to be aware of the process by which the coroner operates and in the circumstances it would include the requisite knowledge of the Coroner making extensive inquiries prior to the inquest.

I move now to an examination of how these characteristics of the fair-minded informed observer could be brought to bear on the circumstances surrounding the allegation of apparent bias in this inquest.

Analysis

What is the fair-minded informed observer to make of the circumstances surrounding the allegations of apparent bias in this inquest?

1. The labeling of the applicant as the subject matter of the inquest

The fair-minded informed observer who has a working knowledge of the law would know that persons with a sufficient interest have a right to appear at an inquest. He will also be aware of the fact that a person with a sufficient interest is someone in respect of whom the Coroner may make a finding adverse to his or her interests.

Being an individual who is aware of the legal culture as it exists in the Coroners Court in this jurisdiction, this fair-minded informed observer will appreciate that there has been a practice in this jurisdiction of referring to persons with a sufficient interest in an inquest as the subject matter of that inquest but it is clearly a misnomer.

Again being a person who has a grasp of the law, the fair-minded informed observer would understand that whether a person is called the "subject matter" of an inquest or he is referred to as a person with "a sufficient interest" in an inquest, he is a person, in relation to whom there exists a reasonable prospect that a Coroner may make a finding

adverse to his or her interests, and as such this person (whether he is labeled as the "subject matter" or a person with "a sufficient interest") is entitled to appear at that inquest.

With his broad knowledge of the law, the fair-minded informed observer will know that it is necessary that there must be some level of predisposition on the part of the Coroner if such a person with "a sufficient interest" in an inquest is to be identified in the first place as this is mandated by statute. In this regard he will also be aware of the fact that this predisposition is can be formed from a perusal of hearsay evidence.

Finally, being cognizant of the law he will see that this level of predisposition is not to be equated with a predetermination or a pronouncement of guilt and as such there is a clear distinction to be drawn between the erroneous labeling of the applicant as the "subject matter" of an inquest and the labeling of a party to an inquest by acerbic terms such as "unhinged" *and* "mentally unstable".

Having looked at the circumstances surrounding the allegation of apparent bias which was raised in so far as it concerns the labeling of the applicant as the subject matter of the inquest, the fair-minded informed observer would not conclude that there is a real possibility that I may be biased.

2. The advising of the applicant of the Coroner's powers of arrest and to consider retaining counsel

The fair-minded informed observer armed with a working knowledge of the law and an understanding of the practices which operate at the Coroners Court would be in a position to understand that a Coroner is expected to preserve the legal interest of interested parties at an inquest. This individual will also see that this was what the Coroner in this case endeavored to do by ensuring that the applicant knew why he was in court, and the implications that could flow from these proceedings and what in turn could be done by the applicant in the interim.

Having looked at the circumstances surrounding the allegation of apparent bias which was raised in so far as it concerns the advising of the applicant of the Coroner's powers of arrest as well as the prudence in retaining counsel, the fair-minded informed observer would not conclude that there is a real possibility that I may be biased.

3. The issuing of a witness summons to the applicant

Finally, in respect of the issuing by the Coroner of a summons for the applicant, the fair-minded and informed observer who has some knowledge about the law will appreciate that there must be some nexus between material before a Coroner and an identifiable individual, before the Coroner can issue a summons for that individual. He will understand that nexus exists in this matter. He will also be taken to appreciate that this principle is really a reflection of the general principle that every person who is able to

give evidence is bound to attend at the Coroner's court and one of the ways of securing the attendance of any relevant witness is by a formal summons.

Additionally, the fair-minded and informed observer would know that a person cannot refuse to be a witness merely because he might subsequently be charged with an offence arising out of or connected with the death which forms the subject matter of the inquest.

More importantly, he will be able to see that the appearance at an inquest pursuant to the service of a summons does not divest an individual of his privilege against self incrimination.

Having looked at the circumstances surrounding the allegation of apparent bias which was raised in so far as it concerns the issuing of a witness summons for the applicant, the fair-minded informed observer would not conclude that there is a real possibility that I may be biased.

THE PRACTICE OF NOT BEING FORARMED WITH GROUNDS FOR RECUSAL

Before I conclude this ruling, it would be remiss of me if I did not say that I was troubled by counsel's posing of questions to the court and prefacing same by stating that depending on the answers received further grounds would be advanced in support of the application for recusal. This occurred on two occasions during the course of legal arguments.

Firstly, at the inception of legal submissions in this matter, counsel for the applicant enquired from the court whether the court as constituted had assisted in any way with any of the applicant's previous criminal trials in its previous capacity as Prosecutor. It was stated that if such assistance was in fact rendered, then this too would be another ground relied upon for recusal.

The court entertained counsel's question and provided an answer to counsel and this potential ground was abandoned.

I wish to refer counsel's attention to the following.

According to Pennell J at pg 639 of **Re Reid and Wigle 29 O.R. (2d) 633**,

> "The distinctive circumstances of a particular case determine whether there is a reasonable apprehension of the presiding officer being biased. To repeat the words I have already stated from the judgment of Mr. Justice Dubin in Re Evans et al. and Milton et al.; 'What first must be determined is the nature of the complaint made'."

It follows that there must be a complaint leveled against the Coroner to found any recusal argument on the basis of apprehended bias. This court therefore expects that when counsel rises to make such an application, counsel would already be forearmed with specific grounds and evidence of those grounds upon which he wishes to rely to found such an application in the first place. Consequently, the practice of making enquiries

from a court and indicating that depending on the answer given, a basis for recusal could be advanced, is a practice which ought to be deprecated and ought not to be done by responsible counsel.

The second occasion I refer to is when an enquiry was made of the Coroner during legal arguments as to whether the Court as presently constituted, discussed the matter with anyone at the Hugh Wooding Law School. Counsel was not specific in that no indication was given of whether she was contemplating discussions being had with someone at the Hugh Wooding Law School who was a fellow judicial officer or not.

In any event the Court again entertained Counsel's question and answered same in the negative.

On this point, I will say that I find the dicta of Chief Justice Mr. Ivor Archie in **Basdeo Panday v. Wellington Virgil Mag. App. No. 75 of 2006** to be particularly useful. The matter of engaging in discussions about evidence in an ongoing trial with fellow judicial officers and/or assistants was dealt with at pgs. 29 to 31 of his reasons. According to his Lordship:

> "Judicial officers must exercise their individual discretion in deciding whether or not a conversation strays beyond permissible boundaries and be vigilant to preserve their individual independence and impartiality.

No judicial officer comes to the bench with the same degree of proficiency in every area of the law. One of the main advantages of a diverse bench is the large pool of collective experience from which judges and magistrates are able to draw. In this and other jurisdictions, judicial officers who encounter novel or challenging problems frequently turn to their colleagues who may save them much time by directing them to potentially productive lines of research or may serve as sounding boards to test their reasoning processes.

In recent years, the practice has also arisen of providing judges with research assistants who provide valuable help in research and refinement of judgments. A necessary part of this process is a discussion of the relevant legal principles, which is of limited value outside of the factual context in which they must be applied.

There is nothing wrong with discussing an ongoing matter with a judicial colleague or assistant provided that the decision maker does not abdicate the responsibility to make the decision on his own. General discussion is permissible. Allowing someone to tell him how to decide is not.

The position is more complicated when the parties to the discussion are at different levels in the judicial hierarchy. It will generally be unacceptable to discuss evidence in a specific case with anyone who has a real

> possibility of becoming a member of a panel that will hear an appeal from a decision in that case. Even though the expression of a preliminary view does not bind the appellate judge to rule in a particular way if the matter later came before him for review, the mere knowledge that the person consulted might exercise a review power could create a subconscious desire to ensure his approval". (emphasis mine).

Additionally the somewhat vaguely worded question posed to the court seems to suggest that contact between the bench and the bar can give rise to an appearance of bias if the person was a member of the bar and not a fellow judicial officer. If this was in fact subsumed in counsel's arguments I find the dicta in **Taylor v. Lawrence** to be particularly instructive:

> "For the purpose of applying the test for apparent bias, namely whether in all the circumstances a fair-minded and informed observer would be led to conclude that there was a real possibility that the tribunal was biased, the informed observer could be expected to be aware of the legal traditions and culture of the English jurisdiction, and accordingly he would be aware that in the ordinary way contacts between the judiciary and the legal profession should not be regarded as giving rise to a possibility of bias".

As stated previously, I say that this practice has troubled me. Whilst the court must be assiduous to uphold its impartiality, it can not allow a ceaseless and aimless search to go on and on for material to support what could amount to an objection. Fairness dictates

that there must be some finality to avoid a party becoming obsessed with such a search. So that whilst parties and the court are entitled to know all the material facts which would affect the fair minded informed observer, in every case a time will come when enough is enough and for this principle I have referred myself to the case of **Jones v. DAS Legal Expenses Insurance Co Ltd. [2003] EWCA Civ 1071 at para. 38.**

It is important to avoid the Christopher Columbus school of advocacy at inquests. Christopher Columbus set sail across an ocean he did not know. When he arrived, he did not know where he was, and when he returned, he could not say where he had been. Yet the entire voyage was undertaken on the basis of being paid to do so. Indeed the role of counsel representing an individual at an inquest is to promote his client's position, not to engage in an open-ended, unstructured questioning process. To do so would be to abandon instructions and the obligation to function as a legal representative. It may even constitute unprofessional conduct[11].

CONCLUSION

I have looked at the matters canvassed by counsel through the lens of the fair-minded and informed observer and I emerge from this consideration with the belief that they cannot give rise to a reasonable apprehension of bias. I am wholly unable to see that the fair-minded and informed observer would conclude from the various matters raised by counsel that this is a case in which there has been an appearance of bias. Indeed I find that the grounds advanced for recusal are tenuous and I would be wrong to yield to it. I

[11] Freckelton, I and Ranson, D *Death Investigation and the Coroner's Inquest.* Oxford University Press, New York, 2006 at p 541.

make this ruling bearing in mind the dicta of Burton J in **Ansar v. Lloyds TSB Banl Plc. [2006] EWCA Civ 1462** where the following approach was endorsed:

> "1. The test to be applied in determining bias is whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased.
>
> 2. If an objection of bias is then made, it will be the duty of the chairman to consider the objection and exercise his judgment upon it. He would be as wrong to yield to a tenuous or frivolous objection as he would be to ignore an objection of substance.
>
> 3. Although it is important that justice must be seen to be done, it is equally important that judicial officers discharge their duty to sit and do not, by acceding too readily to suggestions of appearance of bias, encourage parties to believe that by seeking the disqualification of a judge, they will have their case tried by someone thought to be likely to decide the case in their favour.
>
> 4. It is the duty of a judicial officer to hear and determine the cases allocated to him or her by their head of jurisdiction. Subject to certain limited exceptions, a judge should not accede to an unfounded disqualification application"[12].

[12] [2006] UKEAT 0609 05 1407 at para 13; repeated in CA

In the circumstances, I refuse the application for recusal.

……..…

Her Worship Ms. Nalini Singh

Coroner

St. George West County