Trinity Term

[2015] UKPC 31

Privy Council Appeal No 0042 of 2015

JUDGMENT

Misick and others (Appellants) v The Queen (Respondent) (Turks and Caicos)

From the Court of Appeal of the Turks and Caicos Islands

before

Lord Neuberger

Lady Hale

Lord Mance

Lord Kerr

Lord Reed

Lord Hughes

Lord Toulson

JUDGMENT GIVEN ON

25 June 2015

Heard on 11 May 2015

Appellants	Respondent
James Goudie QC	Andrew Mitchell QC
Mark Fulford	Quinn Hawkins
Rupert Paines	
(Instructed by Sheridans)	(Instructed by Fulcrum Chambers Ltd)

LORD HUGHES:

1.

The appellants face prosecution in the Turks and Caicos Islands for offences of conspiracy to accept bribes in public office, conspiracy to defraud and associated money laundering. The first defendant was the Chief Minister and subsequently Premier of the Islands at the time of the alleged offences. The other defendants were either other government ministers or their associates. Two separate challenges are made to their proposed trial:

i)
the trial judge, Mr Justice Harrison, the retired former President of the Court of Appeal of Jamaica, is said to have insufficient security of tenure to maintain his independence; accordingly it is said that the appellants will not be tried, in accordance with the Constitution, by an "independent and impartial court";

ii)
the trial judge has directed trial by himself alone, without a jury, under the terms of the Trial Without a Jury Ordinance 2010 ("TWAJO"), but it is said that in arriving at that decision he erred in not directing himself in accordance with the criminal standard of proof.

2.
The background to the prosecution lies in a Constitutional crisis experienced in the Islands in 2008-2009. The Islands are a British Overseas Territory, then self-governing under a Constitution of 2006 introduced by Order in Council made under the (Westminster) West Indies Act 1962. This provided for government by a Governor, acting on the advice of the Premier and his cabinet, who were in turn appointed on demonstrating, following Island elections, that the Premier could command a majority of the elected members of the House of Assembly.

3.
Despite fast growing land development and tourism, and associated rapid increases in government revenues, the finances of several departments of State were reported by the Chief Auditor to be in serious deficit and not to be properly monitored or controlled. These and other concerns about the administration of the Islands prompted the appointment by the Governor of a Commission of Inquiry "into possible corruption or other serious dishonesty in relation to past and present elected members of the Legislature in recent years". The Commissioner was the Rt Hon Sir Robin Auld, a retired judge of the Court of Appeal of England and Wales. His report recommended (inter alia) the partial suspension of the Constitution, the creation of a special prosecution team to investigate what appeared to him to be evidence of corruption and dishonesty, and the suspension of the absolute right to trial by jury.

4.
Effect was given to Sir Robin's report by the UK government. The 2006 Constitution was suspended in part by the Turks and Caicos Islands Constitution (Interim Amendment) Order 2009 (SI 2009/701) ("the 2009 Order"), also made under the West Indies Act 1962. This provided, in effect, for temporary direct rule by the Governor. The legislature was dissolved, the cabinet ceased to exist, and the principal offices of government and legislature (Premier, Ministers, Leader of the Opposition, Speaker of the Assembly and Cabinet Secretary, amongst others) were declared vacant. In due course a Special Investigation and Prosecution Team was created and it is this which has made the decision to bring the charges which the appellants now face.

5.
After a period of just over two years' direct rule, self-government was restored by a further Order in Council made in London, once again under the West Indies Act 1962, the Turks and Caicos Islands Constitution Order 2011 (SI 2011/1681). Under this Order, a new 2011 Constitution was inaugurated, which came into force on 15 October 2012. It largely mirrored its 2006 predecessor, but there were some differences.

6.

Like the 2006 Constitution, that of 2011 tracks many of the principal provisions of the European Convention for the Protection of Human Rights and Fundamental Freedoms ("ECHR"), albeit with some local modifications. Amongst its provisions, mirroring in part those of article 6 ECHR, is section 6(1). This affords to everyone charged with a criminal offence the right to:

"a fair hearing within a reasonable time by an independent and impartial court established by law."

This is the provision upon which the present appellants' first challenge to their prosecution is based.

7.
The 2006 Constitution had provided by section 6(2)(g) for the unqualified right to jury trial upon a criminal charge brought before the Supreme Court. In accordance with the recommendation of the Commissioner, the 2009 Order suspended this provision. The Governor subsequently enacted TWAJO, providing for a judge to order trial without a jury if satisfied that the interests of justice so require. The new 2011 Constitution does not contain an equivalent to the former section 6(2)(g). The position therefore remains that whilst trial by jury is the norm, trial by judge alone may be ordered under the provisions of TWAJO. The present appellants' second challenge to their prosecution raises a question concerning the proper application of TWAJO.

The first challenge: the judge's tenure

8.
Trials for offences of the kind here charged are held before the Supreme Court. The 2006, and in due course the 2011, Constitutions provided for the appointment of judges of this court. The terms of the two Constitutions are very largely the same. The trial judge in the present case was initially appointed under the 2006 Constitution and subsequently under the 2011 Constitution.

9.
Section 77 of the 2011 Constitution provides:

"77(1) There shall be a Supreme Court for the Turks and Caicos Islands which shall have such jurisdiction and powers as may be conferred on it by this Constitution and any other law.

(2) The judges of the Supreme Court shall be a Chief Justice and such number of other judges as may be determined by the Governor, acting after consultation with the Chief Justice; but the office of a judge shall not, without the consent of that judge, be abolished during his or her continuance in office.

(3) The judges of the Supreme Court shall be persons qualified for appointment under subsection (4) and shall be appointed by the Governor, acting in accordance with section 87, by instrument under the public seal.

[(4) provides for qualification by not less than ten years' standing in suitably defined legal professions]

(5) It shall be lawful for a person qualified for appointment as a judge of the Supreme Court to be appointed (regardless of his or her age) for such term as may be specified in the instrument of appointment, and section 85 shall have effect in relation to any person so appointed as if he or she would attain the retiring age applicable to that office on the day on which the specified term expires."

The only difference between this section and its predecessor, section 73 of the 2006 Constitution, is that the former contained a limitation on the number of Supreme Court judges to two, plus the Chief Justice.

10.

The Governor is thus required, by section 77(3), to make appointments in accordance with section 87. That section, together with section 86, once again reproducing the 2006 Constitution, provides for a Judicial Service Commission ("JSC") as an independent body responsible for judicial appointments. Section 86 creates the JSC and requires that it have three members. By section 86(2) the chairman is to be appointed by the Governor, acting in his discretion, whilst the other two members are to be appointed by the Governor, acting after consultation with the Premier and the Leader of the Opposition, from among persons who hold or have held high judicial office. There is thus a guaranteed majority of judges or former judges on the Commission. By section 87(8) the JSC and its members "shall not be subject to the direction or control of any other person or authority". Then, by section 87:

"(1) Power –

to make appointments to the offices of judge of the Supreme Court, judge of the Court of Appeal, magistrate, registrar and deputy registrar;

…

is vested in the Governor, acting in accordance with the advice of the Judicial Service Commission, unless the Governor is instructed by Her Majesty through a Secretary of State to do otherwise."

11.
It follows that appointments to the Supreme Court are made in effect by the independent JSC, save in the exceptional case of instructions from London (not the Islands government) at the level of Secretary of State. That exception has no application to the present case. The Constitution gives the JSC similar responsibility, subject only to the same exception, for the terms and conditions of judicial service (section 84(3)), which moreover may not under any circumstances be altered to a judge's disadvantage whilst he or she remains in office (section 84(2)). Section 87(3) further allocates to the JSC responsibility for the disciplinary code applicable to judges and for the procedure for dealing with complaints relating to the judiciary.

12.
The 2006 Constitution had contained identical provisions for the JSC. When that Constitution was suspended in 2009, the offices of the two judicial members of the JSC were amongst those vacated by the 2009 Order. But the Governor subsequently re-appointed the same two judges who had held those offices. One was still in post, together with a second judge more recently made a commissioner, when the present trial judge, Harrison J, was appointed.

13.
Section 85 of the 2011 Constitution contains provisions as to the tenure of (inter alia) Supreme Court judges. It provides:

"85(1) Subject to this section a judge of the Supreme Court shall vacate his or her office when he or she attains the age of 65 years; but -

(a) the Governor may permit a judge who attains the age of 65 years to continue in office until he or she has attained such later age, not exceeding the age of 70 years, as may have been agreed between the Governor and that judge; and

(b) [contains provision for the completion of cases current on attainment of the retirement age]."

There follow in subsections 85(5) to (10) provisions for removal of judges, including those of the Supreme Court. Judges and magistrates can be removed only for incapacity or misbehaviour, and only

by this Board's advice to Her Majesty. If such removal is in question, there must first be an investigation by an independent tribunal of inquiry and that tribunal's recommendation for reference to this Board, which alone can make the decision.

14.
In relation to judges appointed for a specific term under section 77(5) (set out supra at para 9), these provisions of section 85 are modified by that subsection. Such judges are treated as attaining retirement age on the expiry of the specified term of their appointment. That means that a specific term appointment is effective as such, subject to any renewal or re-appointment. This is now the provision applicable to the present trial judge, as initially its predecessor section 73(5) of the 2006 Constitution was.

15.
There is provision in section 78 for the appointment of Acting Judges of the Supreme Court during either a vacancy or the incapacity of a serving judge. Such appointments also require the Governor to act in accordance with the recommendations of the JSC, but are not in issue in the present case.

16.
The 2011 Constitution contains a specific guarantee of judicial independence in section 83:

"83(1) The judges and magistrates appointed to preside or sit in any court of the Turks and Caicos Islands shall exercise their judicial functions independently from the legislative and executive branches of government.

(2) The Legislature and the Cabinet shall uphold the rule of law and judicial independence and shall ensure that adequate funds are provided to support the judicial administration in the Islands."

17.
By section 84 the remuneration and allowances of judges of the Supreme Court are charged upon the Consolidated Fund. They and the terms and conditions of a judge's appointment are determined by the Governor on the advice of the JSC. As shown above, they cannot be altered to the disadvantage of the judge during his or her continuance in office. These provisions in sections 83 and 84 were newly introduced by the 2011 Constitution.

18.
The trial judge in the present case, the Hon Mr Justice Paul Harrison, is a retired judge of distinction in his mid-seventies. He served as a puisne judge in the Supreme Court of Jamaica, and then as a judge of its Court of Appeal, of which he was the president until his retirement. He was initially appointed by the Governor on 21 June 2012 as a judge of the Supreme Court, for the period 10 July 2012 to 30 June 2014. That appointment was made under the terms of the 2006 Constitution, as provided for by section 77(5), the then equivalent of section 77(5), set out above, and was expressly made on the advice of the JSC. A few days after this appointment was announced and before the judge was sworn, the Chief Justice announced on 29 June 2012 that he had assigned to Harrison J the criminal trials arising out of Sir Robin Auld's Commission of Inquiry. Those were, the present cases, which were then approaching a plea and directions hearing due the following month. When the initial term of the judge's appointment approached expiry with the trial still not begun, the Governor, again on the advice of the JSC, continued it. First, the judge was re-appointed on 19 December 2013 under the 2011 Constitution for the period 1 July 2014 to 31 December 2014. On 20 November 2014 that appointment was extended for a further period. Then, on 26 February 2015, the Governor made the current appointment of Harrison J in the following terms:

“I, Peter Beckingham, Governor of the Turks and Caicos Islands, in exercise of the powers conferred on me by section 87(1)(a) of the Constitution, and acting in accordance with the advice of the Judicial Service Commission, do hereby extend the appointment of Hon Justice Paul Harrison as a Judge of the Supreme Court to preside over the criminal trials arising out of the Commission of Inquiry (including the consideration of any post trial orders, if any) which have been designated to him by the Chief Justice, namely R v Michael Eugene Misick and others and any severed or related matter as the Chief Justice may direct, with effect from January 1, 2015 for a period of three years.”

19.

It is transparently clear that Harrison J has been appointed ad hoc for the specific purpose of presiding over these cases, whether they turn out to be a single trial or more than one. They are, on any view, very exceptional trials for the very small courts system of the Turks and Caicos Islands. They have already been pending for over two years. They are likely to last several months. A special courthouse has had to be constructed on one of the principal islands to hear them. Almost all the leading advocates appear to have been recruited from outside the Islands, many of them from as far away as England and Wales. The impending trial of prominent local politicians has generated a good deal of controversy in the Islands. Plainly, the view was taken that it was sensible to appoint an ad hoc judge of considerable experience, from a larger jurisdiction and from outside the Islands. The Islands have a population of approximately 34,000; of whom only about 6000 comprise the enfranchised electorate of belongers; that of Jamaica is about 2.8m. The Supreme Court of the Islands has two judges plus the Chief Justice; that of Jamaica comprises up to 40 judges and its Court of Appeal is composed of the President and six others.

20.

The case for the appellants is that security of tenure is an integral part of judicial independence and is here insufficient. They point, first, to the limited term of Harrison J’s appointment(s), and to the fact that it appears to be the general practice to appoint ordinary puisne judges of the Supreme Court in the Islands for an initial term of (usually) three years, extendable by mutual agreement. Thus, they say, Harrison J has, like the other judges, not been afforded the security necessary to demonstrate, publicly, his independence. This submission was duly advanced to the judge himself, but he disagreed. It was similarly rejected by the Court of Appeal, when repeated there. Before the Board, Mr Goudie QC, who did not appear in either court below, renews it, but also mounts an additional argument, founded upon the general practice. That, says Mr Goudie, amounts to a systemic failure to guarantee judicial independence. And, he submits, even if, contrary to his principal contention, Harrison J himself is, because appointed ad hoc, not deprived of the necessary independence simply by the limited term of his own appointment, nevertheless the Turks and Caicos judicial system as a whole, in which the appellants are to be tried, does not demonstrate such necessary independence. Moreover, he submits, the insecurity of the other judges is likely to infect the trial judge, because of the informal contacts which judges sitting in the same system are likely to have.

21.

There is no doubt about the importance of the principle enshrined in section 6(1) of the 2011 Constitution, as it is in article 6(1) ECHR and in many other constitutional instruments. Courts must be both independent and impartial. The two requirements are closely linked, as the Strasbourg court specifically held in the course of its classic statement of principle in Findlay v United Kingdom (1997) 24 EHRR 221, para 73, which has been oft repeated ever since. Part of the significance of independence is that it ensures a public perception of impartiality: – see its treatment by Lamer CJ in the Canadian case of R v Lippé [1991] 2 SCR 114. But, as Lord Carswell pointed out in Kearney v HM

Advocate [2005] UKPC D1; 2006 SC 1, paras 57–62, independence has a separate significance, apart from ensuring impartiality between the parties to the cause, for it is also required to protect the judge from dependence upon, and against interference by, the Executive, whether the latter is a party to the litigation or not. The same point is underlined in the Bangalore Principles of Judicial Conduct, adopted by the international Judicial Integrity Group. Here it is stated that independence "connotes not merely a state of mind or attitude in the actual exercise of judicial functions but a status or relationship to others, particularly to the Executive branch of government, that rests on objective conditions or guarantees". The complementary requirements of independence and impartiality both import, moreover, not merely the absence of actual dependence or partiality but the public appearance of such absence. The test is whether a reasonable objective observer would be confident in the independence and impartiality of the judge.

22.
The importance of security of tenure to the objectively perceived independence of the judge is well illustrated by the Scottish case of Starrs v Ruxton 2000 JC 208. Under consideration there was the office of Temporary Sheriff. Such temporary trial judges were appointed by the Secretary of State on the advice of the Lord Advocate, himself also a member of the Executive. They were appointed for one year at a time. There was a power to terminate ("recall") the appointment during its currency, but this power was scarcely used. The occasion for it did not arise because the temporary sheriffs depended on annual renewal. Although the appointment was renewable, and generally was renewed, there was no certainty that it would be. It was a matter for the discretion of the Executive; moreover there were circumstances, such as age or sitting with less than expected frequency, in which renewal routinely did not occur. It was also possible that a temporary sheriff might simply not be called upon to sit, thus in effect being "sidelined". These arrangements were held to be inconsistent with the security of tenure necessary to guarantee the independence of the judges in question. The objective observer would see a real risk that the judge might be affected, consciously or unconsciously, by the control maintained by the Executive. The judge would be dependent upon the good regard of the Executive not only for renewal but also for the permanent appointment to which he might well aspire. The brevity of the term of appointment was therefore a critical part of the flaw in the system.

23.
Section 11(d) of the Canadian Charter contains wording identical to section 6(1) of the 2011 Constitution here under consideration. In Valente v The Queen [1985] 2 SCR 673, several different features of the position of Provincial Judges were tested against its requirement for an independent and impartial court. One related to the term of appointment. A substantial cadre of such judges continued to serve after reaching statutory retirement age, in part because pension provision might be significantly more advantageous if they did. However, after retirement, continued appointment was at Executive pleasure. Unlike pre-retirement judges, those who had retired could have their appointment terminated for any reason or none. This maintenance of two kinds of tenure, one for pre-retirement judges and one for those who had passed retirement age, was held to be inconsistent, in the case of the latter, with the requirement for objectively perceived independence. The decision underlines the importance of security of tenure.

24.
It is to be observed, however, that the court in Valente held that a subsequent change in the legislation to make renewal of appointment dependent on the approval of the Chief Judge of the relevant court, rather than simply a matter of Executive discretion, was sufficient to cure the flaw. That conforms to the principle to be extracted from the jurisprudence, both national and international.

A critical reason why short-term appointments may betoken lack of independence is if it is the Executive which is in control. The risk to independence is far less when control is in the hands of the judiciary or an independent Commission. See the analysis of Lord Carswell in Kearney, cited at para 21 above.

25.
Mr Goudie relied on the observation of Lord Justice-Clerk Cullen in Starrs v Ruxton (at 228) to the effect that any temporal limit upon a judicial appointment raises a question about independence. Whilst that may well be, the cases show that, once raised, such a question may receive the answer that there is no objective perception of lack of independence. Temporary or ad hoc appointments are not uncommon and need not necessarily involve any lack of independence. Temporary and part-time appointments of practitioners as (in effect) deputy judges of the Outer House of the Court of Session were what fell for consideration in Kearney. The practitioner in question was Queen's Counsel. He had been appointed for three years, and subsequently his appointment had been renewed for a further similar period. Although part time, he was in fact substantially dependent on his role as a judge for his income. However, two safeguards were held to demonstrate his independence. Firstly, he was held to have the same security of tenure during his appointment as did full-time judges, in that he could not be removed except for cause shown. Secondly, his appointment, and its renewal, lay in the hands not of the Executive but of the Lord President, and for subsequent practitioners in a comparable position lay with the independent Judicial Appointments Board.

26.
The position of a judge appointed ad hoc is yet clearer. If he has genuinely accepted appointment for a specific task, then, at least in the absence of some special factor, he will have no expectation of renewal or of further appointment. No objective observer would fear that he would be unable independently to discharge his duty as a judge because he was in place for a limited period; indeed his ad hoc position often strengthens his independence. His case is quite unlike that of the temporary sheriff in Starrs v Ruxton. In that case, both Lord Prosser (at 233) and Lord Reed (at 242) adverted to the different case of a judge accepting ad hoc appointment. Lord Reed, in identifying the potential problems caused by temporary appointments, added that they were particularly apt to arise "where the duration of the appointment is **not** fixed so as to expire upon the completion of a particular task or upon the cessation of particular state of affairs" (emphasis supplied). Lord Prosser said this:

"If a person is appointed to judicial office ad hoc, for a particular purpose, the length of his tenure may be of no significance: he will go, and go only, when he is functus. Equally, length of tenure may be of little importance when the office is not a step in a career, but is something done out of a sense of duty, or at the end of a career." [And he then contrasted the case of temporary sheriffs.]

Although there are many cases in which a limited term of judicial appointment has been tested against the requirement for sufficient security of tenure to demonstrate independence, none was cited to the Board where an ad hoc appointment had been held to fail such challenge.

27.
In the present case, applying these principles, the Board has not the slightest doubt that any objective observer would see no danger of any lack of independence in Harrison J as the trial judge. The following aspects of his position are not in doubt:

(i)
the Constitutional guarantee of judicial independence in section 83(1) (see para 16 above) applies to him as it does to any other judge;

(ii)
so too does section 84 guaranteeing his remuneration, allowances and terms of service: see para 17 above;

(iii)
he has been appointed on the recommendation of the independent (and, as to the majority, judicial) JSC;

(iv)
he is undoubtedly guaranteed security of tenure during his appointment, except in the case of cause shown to this Board under the provisions of section 85 (see para 13 above);

28.
That leaves the limited term of his appointment. Although he holds office for a defined period, his position is a country mile from that of the temporary sheriff with hopes of continued appointment and possible preferment. His position is much more akin to that of the Chief Justice of Brunei, considered in Prince Jefri Bolkiah v The State of Brunei Darussalam [2007] UKPC 62. There, the contention under consideration was the allied one of objective perception of bias, given the interest of the Sultan in the litigation. Lord Bingham at para 21, rejecting such contention as fanciful, remarked of the Chief Justice, aged 74 at the material time, that he came to the office then held at the end of a long and distinguished judicial career, after retiring from the bench in Hong Kong, and already in receipt of what he described as a "reasonably adequate pension". He could only be seen as "a man for whom all ambition was spent, save that of retiring with the highest judicial reputation". The possibility that Harrison J might entertain any sense of lack of independence in a trial or trials which he has been specifically asked to take on, outside his home territory and in his retirement, is equally out of the question, as any reasonable objective observer could not but see. The reality is that his temporary appointment, far from carrying a danger of lack of independence, has very clearly been made precisely in order to bring to locally highly controversial cases an independent outsider. The case is, in other words, the exact reverse of one raising a risk of failure of independence.

29.
For his alternative submission, Mr Goudie relies upon observations in Valente as to the significance of institutional or systemic independence. Giving the judgment of the court, Le Dain J said this at para 20:

"It is generally agreed that judicial independence involves both individual and institutional relationships: the individual independence of a judge, as reflected in such matters as security of tenure, and the institutional independence of the court or tribunal over which he or she presides, as reflected in its institutional or administrative relationships to the executive and legislative branches of government."

30.
In that case the court was asked to examine not only security of tenure but also many other features of the establishment of the Provincial judiciary, such as pension conditions, the absence of a charge for remuneration on the consolidated fund, leave for illness, leave of absence, rules for extra-judicial activity and regulations relating to inspection and destruction of judicial books and papers. The court observed, as is undoubtedly the case, that practice reasonably differs between systems in relation to such matters, and indeed to budgetary control of the courts' service and the appointment of judicial support staff. It concluded that judicial independence required judicial control of core matters such as

the assignment of judges to cases, the sittings of courts, and the listing of court business but that on other issues, there was room for legitimate difference of practice.

31.
It may be that if core matters central to the discharge of the adjudicative function of courts are not in judicial hands, the system as a whole could, on careful inspection, lack sufficient general independence and if so that this might impact on the independence of the particular adjudication which is in question. No such considerations are, however, here in issue. It does not follow from the treatment of institutional independence in Valente, or from any consideration of principle, that insufficiency of security of tenure for one group of judges will impact on the independence of others whose position is different. The cases suggest otherwise. There was no suggestion in Valente that the insufficient security of tenure of the retired judges meant that their younger colleagues who were short of retirement age also lacked independence; the complaint was about the difference between the two groups. Similarly, it was not and could not be suggested in Starrs v Ruxton that the insufficient security of tenure of the temporary sheriffs meant that those with permanent appointments were also not independent. It is very hard to see how such a proposition could ever be justified. Judges of course enjoy informal contacts with their colleagues and may well exchange opinions about points of law or practice which crop up in their cases. If there are anxieties as to the security held by others, they may learn about them. But the whole basis of the judicial function is the duty to make up one's own mind, according to the law, as one has solemnly sworn to do. Judges are daily attuned to the necessity to form and to hold to their own conclusions, however useful general discussion with others may be. There is no sensible prospect that a judge who enjoys sufficient security of tenure to maintain his independence might lose it on the grounds that others lack his advantages; if anything an appreciation of any insecurity of others is likely to have the opposite effect.

32.
It follows that even if there were any basis for doubting the security of tenure and independence of other Supreme Court judges in the Islands, this could not possibly have any impact on the independence of Harrison J, who has been brought in ad hoc from outside. The Board does not need to express a concluded view about the position of other Supreme Court judges. Perhaps because the general submission was not developed in the same way in the courts below, it has not seen all the evidence which might be relevant. It has evidence that appointments to the Supreme Court are routinely made for an initial period of (usually) three years, and then renewed. This, whilst not the UK model for full time appointments, is not uncommon practice in several jurisdictions. Initial appointments and, it would appear from section 77(3), re-appointments by way of renewal, must be made on the advice of the JSC rather than as a matter of Executive discretion. The Board does not have evidence of the considerations of availability or otherwise which give rise to this practice, nor to any reasons why appointments are not made until retirement age, nor as to the practice actually adopted at renewal stage.

33.
For these reasons, the appellants' first challenge fails.

The second challenge: the order for trial by judge alone

34.
Section 4 of TWAJO applies to criminal trials before the Supreme Court. It provides:

"4(1) Notwithstanding anything to the contrary in any other law, a judge may order that a trial be conducted without a jury if he is satisfied that the interests of justice so require.

(2) An order under subsection (l) may be made on the application of any party to the trial or by the judge of his own volition.

(3) In making a determination as to whether the interests of justice require that the trial be conducted without a jury, the judge shall have regard to all the circumstances prevailing, including any or all of the following-

(a) the nature of the charges;

(b) the complexity of the issues or matter to be determined, and any steps which might reasonably be taken to reduce the complexity of the trial;

(c) the length of the trial, and any steps which might reasonably be taken to reduce the length of the trial;

(d) the likelihood that, if a jury were selected, pre-trial publicity may influence its decision;

(e) or if there is any information tending to suggest that jury tampering may arise."

35.
Before Harrison J, and again before the Court of Appeal, the submission advanced on behalf of the appellants was that the decision which fell to be made under section 4(1) was, because made in the context of a criminal trial, one which had to be made on the basis of the criminal standard of proof. That was a contention that before he could order trial without jury, the judge had to be "satisfied" so that he was sure, or beyond reasonable doubt, that the interests of justice so required. Both the judge and the Court of Appeal held that the exercise called for by section 4(1) is essentially a balancing of factors, to be distinguished from the determination of fact or decision whether a criminal offence has been proved and that, accordingly, it was not susceptible of analysis in terms of proof beyond reasonable doubt. Before the Board, the argument for the appellants has been significantly refined. Mr Goudie additionally submits that whatever may be the position when it comes to the balancing exercise involved in assessing where the interests of justice lie, the determination of the precedent facts which are to be fed into that exercise requires the judge to direct himself in accordance with the well-established criminal standard of proof, and this he did not do.

36.
There is no doubt about two propositions. In the determination of the guilt or innocence of a defendant charged with a crime, the burden of proof lies on the Crown unless specifically otherwise provided and the Crown must prove him guilty to the criminal standard; that includes disproving a defendants' positive case, for example made by way of alibi or contention of self defence. Where exceptionally there is any burden of proof of fact upon the defendant, he must discharge it to the lesser standard of the balance of probabilities; examples include insanity, diminished responsibility and some statutes which enable a defendant to advance an excuse or exception particularly within his own knowledge.

37.
The general principle, that the standard of proof required of the Crown in proving the guilt of a defendant in a criminal case is to make the decision maker sure, is applied by analogy to decisions of fact if they have to be made by the judge on the application of the Crown in the course of trial as pre-conditions for the admissibility of evidence to be relied on against the defendant. The classic example is the rule that a defendant's own confession (whether true or not) is not to be admitted against him on the application of the Crown unless the judge is sure that it was voluntary; that was the long-

standing rule at common law (see for example Director of Public Prosecutions v Ping Lin [1976] AC 574), now codified in England and Wales in section 76 of the Police and Criminal Evidence Act 1984, and in similar statutes elsewhere. At the time of R v Ewing [1983] QB 1039 the admissibility of a handwriting comparison depended upon the control sample being "proved to the satisfaction of the judge to be genuine" (section 8 of the Criminal Procedure Act 1865). The Court of Appeal held that this meant that the judge had to apply the criminal standard of proof to the question. It is easy to see why. That is the standard which the jury would in due course have to apply in deciding whether the disputed handwriting had indeed been written by the accused. The fact which the judge had to decide went to the admissibility of evidence relied on as proof of guilt. For similar reasons, the Board opined in Nyron Smith v The Queen [2008] UKPC 34, para 21, that where section 31D(e) of the Jamaican Evidence Act made hearsay evidence admissible "if it is proved to the satisfaction of the court that such person … (e) is kept away from the proceedings by threats of bodily harm …"; that meant that the statutory pre-condition of fact must be shown to the criminal standard to exist; the statute there was couched in the language of proof, and how far the point was argued is unclear. A similar assertion was made, without argument, in R v Minors and Harper [1989] 1 WLR 441 in relation to the then required factual conditions for the admissibility of computer records contained in section 68 of the Police and Criminal Evidence Act 1984. The current English legislation on hearsay contains, in section 116(2) of the Criminal Justice Act 2003 examples of similar factual pre-conditions for admissibility, for example that the maker of the statement is dead or unfit to give evidence.

38.
It does not in the least follow that every decision which has to be made by the judge during or in preparation for a criminal trial is susceptible to analysis in terms of burden and standard of proof. Many are plainly not, but are decisions which involve weighing competing factors and exercising judgment. Such decisions may nevertheless be of crucial importance to the parties and to the trial. A simple example is a decision upon severance of charges or defendants. Another is a decision upon whether a witness is eligible for, and should be permitted, special measures to assist his or her evidence, on the grounds that the judge considers that without them the quality of evidence is likely to be diminished by identified factors (see in England and Wales Part II of the Youth Justice and Criminal Evidence Act 1999): see for example R v Brown and Grant [2004] EWCA Crim 1620, para 16, albeit the point does not seem there to have been the subject of much argument.

39.
Other examples may well include some decisions relating to the admissibility of evidence. The trial judge has power to exclude evidence tendered by the Crown if he concludes that the effect of its admission would be unfair to the defendant. The ancient formulation of this power is expressed as a power to exclude evidence where its prejudicial (ie unfairly prejudicial) effect outweighs its probative value: see for example Noor Mohamed v The King [1949] AC 182, 192. In England and Wales the power is now given statutory expression in section 78 of the Police and Criminal Evidence Act 1984 as a power to exclude evidence tendered by the Crown if its admission would have such an adverse effect on the fairness of the trial that it ought not to be admitted. Whilst often loosely referred to as conferring a judicial discretion, what this power actually calls for is not simple discretion but an exercise of judgment after weighing all relevant factors. It is plain that its exercise cannot be analysed in terms of a standard of proof.

40.
Similarly, in the context of the admissibility of hearsay, the English statute now contains not only section 116, considered above in para 37, but also section 114(1)(d) which confers a residual power to

admit hearsay where “the court is satisfied that it is in the interests of justice for it to be admissible”. Section 114(2) then goes on to require the judge, in making the decision under subsection (1)(d) to have regard to listed factors and to any others which he considers relevant. Thus this residual power does not depend on the proof of an antecedent fact as a statutory pre-condition for admissibility. Rather it requires of the judge an evaluative exercise of judgment, weighing the significance of all relevant factors, including those listed. Many of the listed factors are themselves evaluative, such as for example “(c) how important the evidence is in the context of the case as a whole” and “(e) how reliable the maker of the statement appears to be”, whilst others involve consideration of facts, such as “(d) the circumstances in which the statement was made”. This exercise in judgment does not require the judge to reach a specific conclusion in relation to each listed factor seriatim; rather it requires him to exercise his overall judgment in the light of them, to consider them and any other relevant ones, and to assess their relative significance and weight: R v Taylor [2006] EWCA Crim 260; [2006] 2 Cr App R 14 at 222. This likewise is not an exercise which can be analysed in terms of standard of proof, as the establishment of a specific factual condition for admissibility can be.

41.

The Board does not agree that the decision of the English Court of Appeal in R v D [2002] EWCA Crim 990; [2003] QB 90 provides any authority to the contrary. There, the admissibility of a video recording of a complainant’s account of events depended upon the then sections 23 and 26 of the Criminal Justice Act 1988. The relevant statutory factual pre-condition for admissibility was that the witness was unfit by reason of bodily or mental condition to attend court. If that condition was satisfied, the next question was whether the statement ought to be admitted in the interests of justice. The judge asked himself additionally whether the complainant appeared to have been competent at the time of the recorded statement. The court held that this was not a statutory factual pre-condition to admissibility, although it was a relevant factor when considering the second question of where the interests of justice lay. True it is that in dealing with one part of the appellant’s submissions, that the judge had not directed himself on the question of competence in accordance with the criminal standard of proof, the court briefly rejected that argument on the grounds that it had been common ground at trial that such standard should be applied and the judge appeared to have applied it. But the real question in the case was whether the judge had reached a demonstrably wrong conclusion that the complainant had sufficient understanding for it to be in the interests of justice for the statement to be admitted, given that its reliability would then be tested in the light of medical evidence as to the maker’s condition and evaluated by the jury. The court held that the test of competence, as it would be applied to a witness in court, could not simply be transposed as determinative of this question. The apparent ability of the complainant to give a satisfactory account of herself was a very relevant factor but so was her right to have her account put before the jury and the ability of the defendant to challenge her reliability. Thus the exercise required of the judge was, it is plain, an evaluative and balancing one, once the statutory factual condition of unfitness to attend had been established. Except in relation to that statutory factual condition, questions of standard of proof did not in truth arise.

42.

In the present case, the judge concluded that the decision required of him by section 4(1) of TWAJO was of the evaluative and balancing kind and not susceptible of analysis in terms of the standard of proof. The Court of Appeal took the same view.

43.

Both the judge and the Court of Appeal relied in part on the similar conclusion of the New Zealand Court of Appeal in R v Iti [2011] NZCA 114 concerning legislation in the same field. Section 361B-E of the Crimes Act 1961 empowered the judge to order trial by judge alone in three situations. One was upon the application of the defendant. A second was where there were reasonable grounds to believe that jury intimidation had occurred, was occurring or might occur. The third was upon a prosecution application in a complex case. Section 361D provided that the judge could make such an order in that third kind of case only after hearing argument and only if:

"(3) … following such hearing, the judge is satisfied -

(a) that all reasonable procedural orders (if any), and all other reasonable arrangements (if any), to facilitate the shortening of the trial, have been made, but the duration of the trial still seems likely to exceed 20 days; and

(b) that, in the circumstances of the case, the accused person's right to trial by jury is outweighed by the likelihood that potential jurors will not be able to perform their duties effectively.

(4) In considering, for the purposes of subsection (3)(b), the circumstances of the case, the judge must take into account the following matters:

(a) the number and nature of the offences with which the accused person is charged;

(b) the nature of the issues likely to be involved:

(c) the volume of evidence likely to be presented:

(d) the imposition on potential jurors of sitting for the likely duration of the trial:

(e) any other matters the judge considers relevant."

The New Zealand Court of Appeal concluded that the decision thus required evaluation of all relevant factors rather than being amenable to analysis in terms of standard of proof. It adopted the description of the task which it had itself given in its earlier decision in R v A [2009] NZCA 380.

44.

In contending that these conclusions are wrong in law, the present appellants rely on observations by the English Court of Appeal in R v Twomey [2009] EWCA Crim 1035; [2010] 1 WLR 630. The case was the first occasion for consideration of section 44 of the Criminal Justice Act 2003. This provided for a prosecution application for trial by judge alone if jury tampering was in prospect. The material provisions were:

"(3) If an application under subsection (2) is made and the judge is satisfied that both of the following two conditions are fulfilled, he must make an order that the trial is to be conducted without a jury; but if he is not so satisfied he must refuse the application.

(4) The first condition is that there is evidence of a real and present danger that jury tampering would take place.

(5) The second condition is that, notwithstanding any steps (including the provision of police protection) which might reasonably be taken to prevent jury tampering, the likelihood that it would take place would be so substantial as to make it necessary in the interests of justice for the trial to be conducted without a jury.

(6) The following are examples of cases where there may be evidence of a real and present danger that jury tampering would take place -

(a) a case where the trial is a retrial and the jury in the previous trial was discharged because jury tampering had taken place,

(b) a case where jury tampering has taken place in previous criminal proceedings involving the defendant or any of the defendants,

(c) a case where there has been intimidation, or attempted intimidation, of any person who is likely to be a witness in the trial."

45.
In Twomey there had already been three trials for a professionally planned armed robbery. The first had been aborted when the defendant became unwell. The second had lasted more than six months and had been aborted in circumstances which plainly suggested the possibility of jury intimidation. The third also lasted six months and came to an end with the discharge of the jury after reports of improper approaches being made to jurors. On application under section 44 the judge at the Central Criminal Court concluded that a serious attempt at jury tampering had actually taken place at the most recent trial and that there was a real and present danger that it would happen again. On the renewed application to the circuit's Presiding Judge for trial by judge alone, and on the interlocutory appeal which ensued, the first issue was whether the judge could take into account evidence of the risk of jury tampering which could not in the public interest be disclosed to the defendant. The second issue was whether sufficient jury protection measures could be taken for jury trial nevertheless to take place. As to the first, the Court of Appeal concluded that consideration of evidence which could not all be disclosed to the defendant was unavoidable, both on the issue of risk of tampering and on the nature of jury protection which might be provided. As to the second, it concluded, differing from the Presiding Judge, that the kind of jury protection which would be required might yet not be sufficient to deal with the risk of interference through jurors' families, and that even if it would, it would be so burdensome on the jurors, as well as expensive in time and police manpower, that trial by judge alone was "necessary in the interests of justice". The court also dealt with what the practice should be in the handling of future cases in which the possibility of trial by judge alone arose.

46.
In the course of judgment, Lord Judge CJ said this of the approach to the statute:

"16 This legislation is unequivocal and unambiguous. Its meaning is not clarified by reference to the pre-enactment parliamentary debate. The judge is required to make the order if the conditions in section 44(4)(5) are fulfilled. There was some discussion in argument before us about the standard of proof. It was agreed by both sides that as these were criminal proceedings the criminal standard should apply and that the application made by the prosecution should not be granted unless the judge is sure that both statutory conditions are fulfilled. It is unnecessary to involve ourselves in this debate. We take the same view. The right to trial by jury is so deeply entrenched in our constitution that, unless express statutory language indicates otherwise, the highest possible forensic standard of proof is required to be established before the right is removed. That is the criminal standard.

17 Both conditions in section 44(4)(5) are predictive. The first condition addresses the risk that jury-tampering may take place at any stage of the trial before the jury has returned their verdict. The real and present danger to be addressed therefore relates to the entire trial process. Where the court is

sure that there is a real and present danger that the right to jury trial will be abused or misused by jury-tampering, the first condition is established.

…

19 The second condition requires that, after making due allowance for any reasonable steps which might address and minimise the danger of jury-tampering, the judge should be sure that there would be a sufficiently high likelihood of jury-tampering to make a judge alone trial necessary."

47.

In R v JS and M [2010] EWCA Crim 1755; [2011] 1 Cr App R 42 Lord Judge CJ used similar language, referring to the criminal standard of proof and to the necessity for the court to be "sure (not that it entertains doubts, suspicions or reservations) that the statutory conditions are fulfilled". To order trial by judge alone was described as a decision of last resort. In that case a real and present danger of jury tampering was present, apparently on the basis of past activity, but for a two week trial the necessary precautions were held not to be an unacceptable burden upon the jurors and would not inhibit them in returning a true verdict. A similar conclusion was arrived at in R v S(K) (No 2) [2010] EWCA Crim 1756; [2011] 1 Cr App R 46, heard more or less contemporaneously, but without further reference to analysis of the decision-making process; there the jury tampering was held to have been of a relatively casual kind and the precautions necessary to avoid a similar opportunity in future were simple.

48.

It is apparent from what was said in those cases that in none of them did the court have the benefit of any argument as to whether analysis in terms of proof and its standard was or was not appropriate to predictive conditions which involve a weighing of different factors and a judgment as to necessity. The New Zealand cases were not before it; Iti was decided later. The English legislation requires, as the first condition for an order for trial without jury, a conclusion that there exists a real and present danger of jury tampering. That is likely in most cases to be demonstrated by past history of such tampering, as section 44(6) specifically recognises. The second condition is entirely a matter of weighing the competing considerations of (i) the extent of the risk of tampering, (ii) the practicability and reasonableness of jury protection measures and (iii) the necessity for departure from the norm of jury trial. To the extent that the first condition depends on proof of past events, it is not difficult to see why the court was presented with agreement that the criminal standard of proof was appropriate. Whether the same would have been said of the predictive part of the first condition, or of the balancing second condition, had the point been debated, is less clear.

49.

What is quite apparent is that the court in Twomey, and in the other English cases, was concerned to ensure that there was no departure from trial by jury unless the necessity for it was clearly established. That is not, as Lord Judge himself made clear in Twomey, because trial by jury is the only form of fair trial of a criminal charge. That is plainly not the case. If it were, every criminal trial in legal systems which do not know juries would be unfair, not to mention the tens of thousands of such trials before magistrates, lay or professional, which take place each year in common law countries where jury trial **is** the norm for serious offences. The entrenched position of jury trial in those latter countries is attributable, rather, to the special value given to it as a system, notably by those who have most experience of its daily practice, but most of all by the general public. There is no doubt that its involvement of essentially anonymous and disinterested members of the public, chosen at random, engaged for no more than a single or a very few cases, and free from any suggested establishment or

professional dependency, generates a special public confidence. In common law countries, any suggested curtailment of trial by jury is met by the greatest caution at the level of parliamentary and public debate. Lord Devlin's famous description of jury trial as "the lamp which shows that freedom lives" is not mere hyperbole: see Trial by Jury (1956) p 164.

50.
But the preservation of jury trial as the norm, or default position, to be departed from only where clear necessity to do so is shown, does not depend on the analysis of the decision in terms of standard of proof. In Iti the New Zealand court, having held that such analysis was not appropriate to the statute before it, went on to consider submissions on the meaning in section 361D(3)(b) of "likelihood that potential jurors will not be able to perform their duties effectively". It said this:

"36. Departure from the statutory language itself can lead to problems. In one sense, all that results is the substitution of one synonym for another. That said, we do not consider we need to resolve the position here. That is because, as both Wenzel and R v A make plain, what is required by s 361D(3)(b) is a balancing exercise. Obviously, if there is no likelihood the jury will not function effectively, that will be the end of the matter. But even if there is a likelihood that the jury may not be able to function effectively, if that likelihood is at the low end of scale, it will be outweighed by the right to a jury trial. It follows that "likelihood" is not an absolute standard but rather a matter which, must be balanced against the right to trial by jury. The "likelihood" that the jury may not be able to function effectively therefore has to be assessed in each case.

37. Given the statutory recognition of the importance of a right to a fair trial, we accept the thrust of the appellants' submissions that it would be a concern if a right to trial by jury was lightly departed from. But that is not what has occurred here. We accept that, initially, the judge cites R v A and uses varying language to describe the level of risk. But it is clear from her analysis that the judge considered the likelihood that the jury would not function effectively as being high. which means that it was a strong case for a judge alone trial. On any articulation of the test the judge must have concluded that the risk was significant. As the judge made the point, the case was not a finely balanced one."

51.
In the present case, the test for departure from jury trial imposed by section 4 of TWAJO is that the judge be "satisfied that the interests of justice so require". There is no statutory pre-condition of fact for such an order. The judge is required to have regard to all the circumstances, including, but not only, those listed. Whilst of course some of those circumstances which are listed involve consideration of factual matters, they scarcely pose questions of disputed fact, still less factual pre-conditions for an order. Some, such as the nature of the charges (factor (a)) will not be capable of dispute. Others, such as the complexity of the case and what might be done to reduce it (factor b), the length of the trial (factor (c) or the likelihood of publicity impacting upon jurors so as to influence their decision (factor (d)) are themselves principally matters of degree, for evaluation, rather than matters of fact for proof. Factor (e), information tending to suggest a risk of jury tampering, might involve the determination of past fact, but will also boil down principally to questions of prediction, likelihood and the practicability of precautions, weighing each in the light of the other. Moreover, the inappropriate nature of a standard of proof analysis is illustrated by the fact that the test imposed by TWAJO is the same whether the application for trial by judge alone is made by the Crown, or by the defendant(s) or raised by the judge of his own motion. If one defendant were to seek trial by judge alone, and a co-defendant were to resist it, and severance were not a realistic option, what standard of proof ought the judge to apply? Although Mr Goudie suggested that it should still be the criminal standard, it is difficult to see

the answer to the contention that a defendant is never, as a matter of principle, required to satisfy such a standard. The Board has no doubt, whatever may be the position in relation to other legislation in other jurisdictions, that the decision required by TWAJO is not susceptible of analysis in terms of proof or the standard of it. The judge and the Court of Appeal reached the correct conclusion.

52.
For the same reasons, Mr Goudie's refined submission cannot be accepted. The decision making process stipulated for by TWAJO cannot be analysed in terms of first finding disputed facts according to a particular standard of proof and then evaluating the interests of justice in the light of those findings. There were, in the judge's evaluation of the interests of justice, no significant disputed primary facts. To the extent that factors (a) to (c) involved primary facts they were incapable of dispute. The evaluation of matters of degree cannot be characterised as a matter of fact for proof. The extent of publicity thus far was no doubt a fact, but was not seriously capable of dispute. There was certainly a dispute on the affidavit evidence before the judge as to whether one could be confident that a jury could be found which would have no personal knowledge or interest in the background facts of the trial and which could be safely immunised from any influence other than the evidence led at the trial, and on that issue the judge preferred the Crown's evidence to that adduced by the appellants, however reputable and well-meaning the author of the latter. But that dispute was not of primary fact; it was a dispute between rival arguments as to the future practicabilities of a trial by a jury of belongers. As to factor (e), the judge did not advert to any information tending to suggest future jury tampering, as distinct from the difficulty of finding jurors who would have no prior knowledge of the personalities and perhaps of the transactions which would be involved in the trial, together with the impact of relentless publicity and unrestrained comment both in favour of the defendants and against them.

53.
It should be emphasised that the possibility of trial by judge alone, provided for by TWAJO, is an exceptional departure from the normal mode of trial for serious offences before the Supreme Court of the Islands which is, by section 3(1) of the Criminal Procedure Ordinance, trial by judge and jury. Just as under the differently worded English and New Zealand legislation, departure must be justified. An order for trial by judge alone can be made only where the interests of justice **require** it, just as in England it can be made only where it is **necessary**. Under both statutory tests, the evaluative exercise mandated for departure from jury trial incorporates the considerable weight of the value of such trial. They incorporate the proposition that trial by jury for serious offences is a valuable right of both the defendant and the public and is, in common law countries, the norm on which criminal justice is based. Departure from it must be confined to whatever classes of case or circumstance for which the legislation provides, and must be plainly justified. Neither formulation permits an order to be made simply because it is more convenient, or marginally preferable.

54.
The judge adopted this approach. He directed himself that jury trial was "the cornerstone of the assurance of fairness and justice in the criminal law system" and reminded himself of Lord Devlin's famous description of it, adopted by Lord Steyn in the House of Lords in R v Mirza [2004] 1 AC 1118, as well as of similar remarks by Sir Igor Judge P in R v B [2006] EWCA Crim 2692; [2007] HRLR 1. Having done so, he approached his decision upon the basis that

"Trial by jury is undoubtedly the tried and tested means of achieving fairness in serious criminal trials, unless its efficacy is likely to be undermined."

Having so directed himself the judge worked through the relevant factors seriatim and concluded that the interests of justice did indeed require, in this very unusual case, trial by judge alone. The Board has no doubt that he was entitled so to conclude.

55.
The trial issues were complex. There might have been an ultimate question which could be simply expressed, namely whether the receipt of millions of dollars, if established, was corrupt or honest, but to answer that question was going to involve examining the detail of multiple transactions which had led to the case papers exceeding 15,000 pages. The trial was estimated to last about 3-4 months. A jury in the Islands must be drawn from approximately 6000 belongers, and in practice from the smaller pool of those of that number who live on either Providenciales or Grand Turk. Seven jurors would be required; verdicts may be reached by a majority of 5.2. Although as a matter of history it may have been a feature of mediaeval juries that they brought to their determinations prior knowledge of the facts, in modern times a cardinal virtue of the jury system lies in its ability to produce fact finders who are entirely unconnected with the events under examination, and wholly disinterested. Our systems demand of jurors that they are free from being influenced by anything other than the evidence adduced in court. Another common feature, also directed to this end, is that they should be essentially anonymous, whereas in the Islands the usual practice is that the names of jurors are circulated to the parties in advance of the trial. In the present case, the transactions which are to be in question have involved very large sums, and the judge found there to be counter-claims of pervasive benefit or disadvantage to large numbers of belongers. There has already been relentless publicity, both in favour of and against the defendants, and there seems no sign of it stopping, whether or not the proceedings are pending. This case is so unusual, and the background to it so controversial, that it can readily be seen that it would probably be impracticable to find a jury composed of those with no prior knowledge of, or opinion upon, the issues at stake, and that even if such were possible, the identity of jurors would inevitably become known, thus exposing them to inevitable extra-evidential opinions and/or information, whether innocently communicated or not.

56.
The judge's conclusion was powerfully reinforced by the pleas made to Sir Robin Auld, as Commissioner, on behalf of these very appellants. The principal appellants were represented before him, Mr Michael Misick by leading counsel of great experience from London. His case, as made to Sir Robin, was that if criminal investigations of the allegations against him were to be recommended, then:

"there is absolutely no prospect that the Premier could receive a fair trial in the light of the adverse media publicity surrounding this case and the contamination of any potential jurors by rumour, by comment and by the public disclosure of inadmissible evidence"

That submission was expressly endorsed by counsel appearing for all those acting for ministers, members of the Assembly and others whose conduct was under scrutiny. They also told Sir Robin that at the time of an earlier Commission of Enquiry by Sir Louis Blom-Cooper QC in 1986, he had reached a similar conclusion. It is clear from Sir Robin's report that these submissions contributed strongly to his recommendation that trial of any corruption prosecution which might be brought should be by judge alone, and thus to the consequent change in section 6 of the Constitution and promulgation of TWAJO. Before the judge it was suggested that the submissions made to Sir Robin had meant no more than that no change in the process of trial should be recommended. It may well be that the appellants did not then want the process altered, but what matters is their argument that such process could not in their cases result in a fair trial. The present attempt to put the submissions made to Sir Robin into

dramatic reverse is most kindly to be described as a change of strategy, or perhaps as a changed appraisal of currents of press or public opinion. In either event, it can only support the judge's conclusion.

57.
In these circumstances the Board is satisfied that even if, contrary to its view expressed above, the judge was required somehow to apply the criminal standard of proof to his task, he could not realistically have reached any conclusion other than he did.

58.
For all these reasons the Board announced at the conclusion of the hearing that it would humbly advise Her Majesty that these appeals ought to be dismissed.