HIGH COURT OF AUSTRALIA

GLEESON CJ,
KIRBY, HAYNE, CALLINAN AND HEYDON JJ

Matter No S299/2005

JOSEPH ANTOUN APPELLANT

AND

THE QUEEN RESPONDENT

Matter No S300/2005

ANTOINE ANTOUN APPELLANT

AND

THE QUEEN RESPONDENT

Antoun v The Queen
Antoun v The Queen
[2006] HCA 2
8 February 2006
S299/2005 & S300/2005

ORDER

In each matter:

1. Appeal allowed.

2. Set aside the orders of the Court of Criminal Appeal of New South Wales made on 16 August 2004 and, in their place, order that:

(a) the appeal be allowed;
(b) the conviction of the appellant is quashed; and
(c) there be a new trial.

On appeal from the Supreme Court of New South Wales

Representation:

Matter No S299/2005

C Steirn SC with B L Clark for the appellant (instructed by Ryan and Bosscher Lawyers)

G E Smith SC with S C Dowling for the respondent (instructed by Solicitor for Public Prosecutions (NSW))

Matter S300/2005

P Byrne SC with S W Wilkinson for the appellant (instructed by Ryan and Bosscher Lawyers)

G E Smith SC with S C Dowling for the respondent (instructed by Solicitor for Public Prosecutions (NSW))

CATCHWORDS

Antoun v The Queen
Antoun v The Queen

Courts and Judges – Apprehension of bias – Judge sitting alone in criminal trial – Standards of fairness and detachment required of a trial judge.

1 GLEESON CJ. The appellants were jointly charged with demanding money with menaces from Michael Savvas, with intent to steal. The trial was conducted in the District Court of New South Wales before Judge Christie, sitting without a jury. The appellants were convicted, and sentenced to terms of imprisonment. They appealed unsuccessfully to the Court of Criminal Appeal of New South Wales[1]. The sole ground of their further appeal to this Court is that the trial judge conducted himself in such a way that a fair-minded observer might reasonably apprehend that he might not bring an impartial and unprejudiced mind to the resolution of the question whether the appellants ought to be convicted. That ground is conveniently summarised as "apprehended bias". The apprehended bias is said to have arisen from two aspects of the trial judge's conduct in particular: first, the manner in which he dealt with what was described as a submission of no case to answer; secondly, his manner of raising and dealing with a question of bail.

2 The exchanges between the trial judge and counsel in relation to both matters are set out in the reasons of Callinan J. I agree that the ground of appeal succeeds. In relation to the first matter, the trial judge announced his decision, in a peremptory manner, as soon as he was informed that an application would be made on the following day, and he repeated that decision before hearing any argument. He then listened to argument on sufferance, then repeated his decision. As it happens, his decision was right. The submission was without merit. That, however, does not remove the impression created by the course that was followed. In relation to the second matter, as Hayne J has pointed out, the precise status of the appellants' bail arrangements throughout the trial is unclear. Nevertheless, the trial judge's intervention in that issue, in the manner in which it occurred, reinforced the impression earlier created. There is no need for me to add to what has been said by Callinan J and Hayne J about the subject of bail.

3 Although my conclusion that the no case to answer submission was without merit does not alter the consequence that flows from the manner in which the trial judge dealt with it, some wider issues were raised in the course of argument, and I should therefore explain my reasons for that conclusion.

4 Michael Savvas owned a nightclub at Darling Harbour. The business needed proper arrangements for security, and the nightclub licence required a certain number of guards. Security was provided by a firm unconnected with the appellants. In March 2001, Mr Savvas was approached by the second appellant, who offered security services. He said he was happy with his existing provider.

5 Mr Savvas gave evidence of a number of visits from the second appellant between March and June 2001. In the course of those visits the second appellant,

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1 *R v Joseph Antoun; R v Antoine Antoun* [2004] NSWCCA 268.

as well as drawing attention to the security services he had to offer, asserted that the existing security provider had made an arrangement with the appellants and that, under that arrangement, an amount, ultimately said to be $8,000, was owing to the appellants, who looked to Mr Savvas for payment. The tone of the conversations, as recounted by Mr Savvas, became increasingly threatening. Mr Savvas denied that he owed any money to the appellants, and said he had no need of their security services. He was told he should "consider a payout". He said he "saw that as a serious threat".

6 On 14 June 2001, a number of youths visited the premises while patrons were present, and destroyed furniture. The police were called. There was evidence of intercepted telephone conversations that were capable of being regarded as directly implicating both appellants in the event. On 15 June 2001, Mr Savvas received a telephone call from the second appellant asking whether he had received the warning.

7 On 17 June 2001, the first appellant, accompanied by a group of men, visited Mr Savvas at his nightclub. Mr Savvas had never met him before. The first appellant said: "I'm not here to fuck around, you've got the warning." He demanded a "payout".

8 Mr Savvas went to the police. On 19 June 2001, he had a meeting with the second appellant. Mr Savvas was wearing a concealed listening device. The conversation was recorded. On 22 June 2001, Mr Savvas had a meeting with the first appellant. Again, he was wearing a listening device. The conversation is set out in the reasons of Callinan J. It contains threats, and demands for money. The trial judge found, in his reasons at the conclusion of the trial, that the conversation clearly contained an intimation that future payments would be required, and that it would not be sufficient to pay the amount claimed to have been owing in the past. The trial judge concluded that the evidence revealed "an ongoing protection racket".

9 At trial, because of the recording of the conversations between Mr Savvas and the appellants, the appellants were confronted with irrefutable evidence of demands for money, and of menaces. Whatever the defence case was to be, it had to accommodate that reality. The appellants elected to be tried without a jury. Counsel for the first appellant provided the trial judge, at the commencement of the trial, with a written opening, which is set out in the reasons of Callinan J. The opening made it obvious that the appellants would seek to establish their defence "on the evidence in the Crown case" (that is to say, without the appellants going into the witness box). The defence was said to be "based on a claim of right for monies due and owing arising out of a pre-existing agreement to conduct security at [the nightclub]."

10 It was clear from the commencement of the trial that the appellants would attempt to meet the prosecution case without exposing themselves to cross-

examination. This is not unusual; although such an approach is rarely signalled quite as clearly as it was in the present case. This may explain in part why the judge reacted as he did to the no case to answer submission. It does not, however, justify the reaction.

11 The defence case, announced at the commencement of the trial, and pursued throughout the trial, was not to deny the demands for money, or the accompanying menaces, but to challenge the proposition that the demands were made in circumstances that, if successful, would amount to stealing. The basis of the challenge was said to be that the demands were made pursuant to a claim of right made in good faith, that is to say, an honest belief in a legal entitlement to what was claimed[2]. The defence was that this was a debt-collecting exercise; that, even if theirs was a method of dispute resolution not favoured by the courts, the appellants were honest business folk seeking to recover what they genuinely believed was owing to them. The prosecution case was that this was a "protection racket".

12 It is understandable that counsel for the appellants would have wanted an opportunity to argue that their defence could succeed without the benefit of support from the testimony of their clients. It is commendable that they made this clear at the commencement of the trial. Yet the nature of the defence they raised meant that this approach was optimistic in the extreme.

13 The boundaries of a defence of honest claim of right, in the circumstances of a case such as the present, were not explored in argument in this Court. The case for the appellants at trial proceeded upon an assumption that the appellants were only demanding $8,000, and if the evidence raised the possibility that the appellants had an honest belief that they were legally entitled to be paid $8,000 by Mr Savvas, then it was for the prosecution to exclude beyond reasonable doubt that possibility. Yet the evidence tendered in the prosecution case was capable of showing (and was ultimately held to show) that the appellants were demanding more than $8,000, and were making demands for ongoing payments. Furthermore, the nature of the menaces that accompanied the demands, and the events and circumstances deposed to by Mr Savvas, were capable of showing (and were ultimately held to show) that, far from being in honest pursuit of a debt, the appellants were engaged in extortion.

14 It does not cut across established principles of onus of proof in civil or criminal cases to recognise the forensic reality that there are defence cases that have little practical chance of success unless supported by the testimony of a defendant, or an accused. Here, there was ample evidence to support a

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2 *Walden v Hensler* (1987) 163 CLR 561.

conclusion that what was going on was extortion. Such a conclusion may not have been inevitable, but it was clearly open on the evidence. It was possible to find, in the evidence, statements made by one or other of the appellants that were consistent with a possibility that they were seeking to recover a debt of $8,000. That did not mean the prosecution must fail. If there was material capable of raising an issue as to whether the appellants honestly held a certain belief, it may be accepted that it was legally necessary for the prosecution to prove that no such belief was held. Even so, in the absence of evidence from the appellants, the prosecution may have had little difficulty in persuading a tribunal of fact that the onus had been discharged. In the circumstances of a given case, evidence led by the prosecution, in the absence of a plausible explanation from an accused, may give rise to a strong inference adverse to the accused. An example is to be found in the decision of this Court in *Weissensteiner v The Queen*[3]. As was pointed out by Mason CJ, Deane and Dawson JJ in that case[4], it is a question of evaluating evidence; a matter of factual judgment. When a tribunal of fact came to evaluate the evidence of Mr Savvas and the other witnesses in this case, including the evidence of the conversations between Mr Savvas and the appellants, in the absence of any explanation from the appellants, there were strong grounds for inferring that the appellants were not honestly pursuing a claim of right but were engaged in an attempt to extract payments to which they had no right.

15 The issue which Judge Christie had to decide when dealing with the no case to answer submission was not an issue of fact; it was an issue of law. That is how it was described by trial counsel; that is how it was seen by the judge; and that is how it was characterised by counsel in argument in this Court. In the course of argument in the present appeal, counsel were invited to provide further written submissions on the nature of the application that was made to Judge Christie at the conclusion of the prosecution case. It appears from those written submissions that there is no disagreement on this point.

16 In *Doney v The Queen*[5], this Court held that, at a criminal trial before a judge and jury, if at the end of a prosecution case there is evidence that is capable of supporting a verdict of guilty then the trial judge may not direct a verdict of not guilty, but must leave the matter to the jury for its decision. This Court affirmed the New South Wales decision in *R v R*[6], the South Australian decision in *R v Prasad*[7], and the Victorian decision in *Attorney-General's Reference (No 1*

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3 (1993) 178 CLR 217.

4 (1993) 178 CLR 217 at 225.

5 (1990) 171 CLR 207 at 214-215.

6 (1989) 18 NSWLR 74.

7 (1979) 23 SASR 161.

of 1983)[8]. No challenge was made to the correctness of *Doney*. The question whether there is evidence capable of supporting a verdict at a civil or criminal trial by jury is a question of law. As was explained in *Doney*[9], this is a different question from whether a jury ought to be warned about the probative value of evidence. It is different from the question whether a trial judge might properly inform a jury, at any time after the close of the prosecution case, of its power to acquit[10]. And it is different from the question which confronts an appellate court when it has to decide whether a conviction is unreasonable. There is no advantage to be gained by blurring these differences. Keeping them in mind helps to avoid confusion.

17 In *Haw Tua Tau v Public Prosecutor*[11], an appeal to the Privy Council from Singapore, Lord Diplock gave the reasons of the Judicial Committee. Trial by jury had been abolished in Singapore. His Lordship said[12]:

> "It is well established that in a jury trial at the conclusion of the prosecution's case it is the judge's function to decide for himself whether evidence has been adduced which, *if it were to be accepted by the jury as accurate*, would establish each essential element in the alleged offence: for what are the essential elements in any criminal offence is a question of law ...
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> In their Lordships' view the same principle applies to criminal trials where the combined roles of decider of law and decider of fact are vested in a single judge (or in two judges trying capital cases). At the conclusion of the prosecution's case what has to be decided remains a question of law only. As decider of law, the judge must consider whether there is some evidence (not inherently incredible) which, if he were to accept it as accurate, would establish each essential element in the alleged offence." (Emphasis in original)

His Lordship's references to the accuracy of evidence over-simplifies the nature of issues of fact that may arise at a trial, civil or criminal. Questions concerning the weight of evidence, or the inferences to be drawn from it, or, in

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8 [1983] 2 VR 410.

9 (1990) 171 CLR 207 at 214.

10 cf *R v Prasad* (1979) 23 SASR 161.

11 [1982] AC 136.

12 [1982] AC 136 at 151.

circumstantial cases, the reasonably available hypotheses, may also arise. The present case provides an example. There was no room for argument about what was said at the meeting of 22 June 2001. There was room for argument about the inferences to be drawn from what was said. But in deciding, as a matter of law, whether there was evidence which could establish the prosecution case, the trial judge was concerned with inferences that were available. He was not, at that stage, concerned to decide what inferences he would ultimately draw.

18 In the same case, Lord Diplock said[13]:

> "Whoever has the function of deciding facts on the trial of a criminal offence should keep an open mind about the veracity and accuracy of recollection of any individual witness, whether called for the prosecution or the defence, until after all the evidence … has been heard and it is possible to assess to what extent (if any) that witness's evidence has been confirmed, explained or contradicted by the evidence of other witnesses."

19 If a submission of no case to answer is understood as raising a question of law about whether there is evidence capable of supporting a finding of guilt, that warning presents no problem. It would be otherwise if a judge were invited to embark upon a factual evaluation of the evidence called up to a particular stage of the trial, and give a ruling based on the weight of that evidence. No such problem arose in the present case. Counsel for the first appellant, who had the carriage of the argument, made both written and oral submissions in support of his argument that there was no case to answer. Those submissions were consistent with the principles stated above. Counsel said: "I accept for the purposes of my submission that I must take the Crown case at its highest". The trial judge, in giving reasons for his later refusal to disqualify himself because of what had happened in connection with the "no case" submission, said that he had formed "a very, very firm view" that the submission must fail "as a matter of law".

20 As a matter of law, there was a case to answer. On the evidence, it was open to the trial judge to interpret the demands made by the appellants as demands for ongoing protection payments, extending beyond the sum of $8,000. It was also open to the trial judge to conclude, in the light of the menacing words and conduct of the appellants, that, far from pursuing a genuinely held belief in their right to be paid $8,000, they were pursuing a campaign of extortion. When counsel for the first appellant acknowledged, as he was bound to do, that the judge had to take the prosecution case at its highest, implicit in that was an acknowledgment that the prosecution evidence was being examined, for its sufficiency of proof, without any testimony from the appellants in explanation of

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13 [1982] AC 136 at 150-151.

their conduct; in a context where the central issue concerned the existence and honesty of their belief in the legitimacy of their claims. At the time of the trial judge's ruling, they had not said they held such a belief; and there was ample evidence to sustain a conclusion that they did not hold such a belief.

21 The terms of the written opening handed up by counsel for the first appellant suggest that, from the beginning, the trial judge would have been anticipating a no case to answer submission. He would have been thinking about the argument foreshadowed in the opening. If he had surmised that it would be very difficult to sustain, he would have been correct. Nevertheless, his peremptory announcement, as soon as the application was mentioned, that he would dismiss it, was a departure from the standards of fairness and detachment required of a trial judge.

22 Judges do not have to devote unlimited time to listening to unmeritorious arguments. Sometimes, a brief hearing will suffice. Judges may anticipate events at trial, and foresee lines of argument that may be developed. Here, the appellants made it clear from the outset that they hoped to be able to secure acquittal without giving evidence themselves. Perhaps the judge felt indignant about the conduct disclosed by the evidence, or about the tactics adopted by the appellants. Indignation is a natural reaction to some facts that are disclosed, or some events that occur, at a criminal trial or, for that matter, on an appeal. It should never be permitted to compromise the appearance of impartiality that is required of judges.

23 It appears from the remarks on sentence that the first appellant has a serious criminal record for offences including armed robbery. It further appears from comments made by the judge that he found the demeanour of the first appellant during the trial to be menacing. The judge regarded this as a strong case of extortion. He formed the view, with good reason, that the no case to answer submission was likely to be implausible. Yet he should not have decided to reject it without giving counsel an opportunity to put the argument. In the circumstances, that would not have required much time. The way in which the judge dealt with the no case argument, and later with the question of bail, gave rise to an appearance of lack of impartiality. Strong as the case against the appellants appeared to be, they were entitled to a fair hearing.

24 The appeals should be allowed. The orders of the Court of Criminal Appeal should be set aside. The convictions and sentences should be quashed and there should be a new trial of each appellant.

25 KIRBY J. I agree with the conclusion of Callinan J that these appeals must be allowed.

Differences with the Court of Criminal Appeal

26 The Court of Criminal Appeal of New South Wales, from which this appeal comes, reached the opposite conclusion unanimously. As I read the reasons of that Court, four considerations appear to have influenced their Honours' opinion that the appellants were not entitled to relief. I put aside a fifth suggested consideration, namely the conclusion earlier reached by Sully J on the question of bail pending appeal[14]. Although the reasons on that question were strongly expressed by a judge of much experience (and are, in a sense, paralleled by the outcome of the appeal to this Court), they did not bind the Court of Criminal Appeal. Sully J's reasons were given in an interlocutory decision. It remained for the Court of Criminal Appeal, exercising the separate powers reposed in it[15], to reach its own conclusions and not to forfeit those conclusions to the opinion expressed by another judge. In this, I agree with Callinan J[16]. However, that left four considerations that appear to have led the court below to its different conclusion:

(1) That the trial judge's expression of views was "forthright" and "strong" but not sufficiently excessive to require disqualification[17];

(2) That it is preferable, particularly in the case of a judge having the responsibility of deciding factual inferences in a trial, to express reactions to submissions, or foreshadowed submissions, so that they might be dealt with by the parties rather than that the judge remain silent whilst experiencing such feelings and reactions, leaving them unrevealed[18];

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14 See reasons of Sully J extracted in the reasons of Callinan J at [75]. These were noted in the Court of Criminal Appeal in the reasons of Dowd J: *R v Antoun* [2004] NSWCCA 268 at [59]-[61].

15 By the *Criminal Appeal Act* 1912 (NSW), s 5.

16 Reasons of Callinan J at [89].

17 See reasons of Smart AJ (Hislop J concurring) in [2004] NSWCCA 268 at [307] noted in reasons of Callinan J at [79].

18 [2004] NSWCCA 268 at [307] noted in reasons of Callinan J at [79].

(3) That judges on appeal or review are enjoined by this Court[19] against too readily submitting to demands for disqualification of the judge of trial. Ordinarily, it may be expected that trial judges will discharge their functions properly and do so lawfully and fairly[20]; and

(4) That given the mode of trial elected by the appellants, and the strength of the evidence against them on the substantive charges, the trial was not ultimately unfair and their conviction was properly based on the evidence[21].

Forthright expression crosses the line

27 So far as the first point is concerned, it is certainly true that the trial judge's remarks were strong and forthright. In some circumstances, that will be a permissible expression to adopt, especially where the trial judge is conducting a trial as the sole judge of fact and law and the parties are legally represented by counsel able to respond with clarity and forthrightness. Judicial indignation at a particular course of action, or proposed action, may on occasion be understandable[22]. Couched appropriately, at the proper time and in due sequence, it may give rise to no reasonable apprehension of bias. For centuries in courts of our tradition, judges have been telling parties and their lawyers, sometimes in quite robust terms, that they consider that a particular submission or course of action is hopeless, a waste of the court's time or doomed to fail. I would not want to say anything that needlessly mollycoddled candid judicial speech addressed to trained advocates.

28 One of the advantages of a judge-alone trial is that it permits greater efficiency in the isolation of the real issues that will determine the case. Nevertheless, normally at least, it is essential that the judge give parties or their representatives at least some time to advance their submissions. This is because, however abbreviated proceedings may become by reason of pre-trial procedures, the tender of written submissions and other innovations, in a trial (particularly a criminal trial where liberty is at risk) the process conducted in public has its own significance and purpose. The manifest observance of fair procedures is necessary to satisfy the requirements not only of fairness to the accused but also

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19 See *Re JRL; Ex parte CJL* (1986) 161 CLR 342 at 352 per Mason J; cf *Masters* (1992) 59 A Crim R 445 at 464-465; *S & M Motor Repairs Pty Ltd v Caltex Oil (Australia) Pty Ltd* (1988) 12 NSWLR 358 at 378, cf at 372.

20 [2004] NSWCCA 268 at [64]-[65] per Dowd J.

21 [2004] NSWCCA 268 at [307].

22 cf reasons of Gleeson CJ at [22].

of justice before the public so that they may be satisfied, by attendance or from the record, that the process has followed lines observing basic rules of fairness. Excessively telescoping the procedures in such cases can lead to a sense of disquiet on the part of the accused, and of objective observers whose attitudes, where relevant, must be represented, and given effect, by appellate courts.

29 A line is drawn between forthright and robust indications of a trial judge's tentative views on a point of importance in a trial and an impermissible indication of prejudgment that has the effect of disqualifying the judge from further conduct of the proceedings[23]. Sometimes, that line will be hard to discern. But, in this case, I agree with the other members of this Court that the trial judge crossed it.

30 The most powerful evidence that he did so appears from the record. He expressed his conclusion as to the outcome of a submission before hearing any argument from the appellants, whether on the facts or the law. Every judge of experience knows that pertinent facts can be forgotten or mistaken. As well, the law can be misunderstood or an aspect of it overlooked. Some opportunity should therefore have been given to counsel to develop their submissions, if necessary in writing, prepared overnight. The repeated insistence that any submissions would not bear fruit and the later unrequested, unargued revocation (or non-continuance) of bail reinforced the conclusion initially given. The line was crossed. The trial judge thereby disqualified himself.

Expressing tentative views tentatively

31 I certainly agree with Smart AJ that it is preferable (at least in a trial by judge alone without a jury[24]) that the judge should express tentative or preliminary views to the parties so that they might address the judge on such matters. This Court had said as much. In *Vakauta v Kelly*[25], Brennan, Deane and Gaudron JJ observed[26]:

> "[A] trial judge who made necessary rulings but otherwise sat completely silent throughout a non-jury trial with the result that his or her views about the issues, problems and technical difficulties involved in the case

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23 *Vakauta v Kelly* (1989) 167 CLR 568 at 571.

24 As to which see *Fleming v The Queen* (1998) 197 CLR 250 at 261-264 [23]-[33].

25 (1989) 167 CLR 568.

26 (1989) 167 CLR 568 at 571; cf *Johnson v Johnson* (2000) 201 CLR 488 at 493 [13], 504-505 [46].

remained unknown until they emerged as final conclusions in his or her judgment would not represent a model to be emulated."

32 In this, the approach of this Court has now travelled beyond the apparent approbation of judicial silence expressed in *R v Watson; Ex parte Armstrong*[27]. In the United States of America, such silence has been held, on occasion, to constitute a denial of due process[28]. It deprives the party who will ultimately be affected by judicial conclusions of the "opportunity, before judgment, to be heard to correct and to persuade"[29]. Just as the judge should, to a proper extent, listen, so the judge should, to a proper extent, express any tentative views.

33 However, the problem in the present case was that the views, as expressed, and re-expressed were not tentative, or not apparently so. They were stated peremptorily, repeated emphatically and given force by later remarks and actions, including the unrequested decision as to bail.

Impartial hearings and over-ready disqualification

34 It is true that, in the oft-repeated and oft-applied words of Mason J in *Re JRL; Ex parte CJL*[30], this Court has "loudly and clearly" expressed a corrective against any view that a judge should too readily accept recusal because a party has demanded it. In the administration of justice in Australia, the parties do not (at least normally) have an entitlement to choose amongst the judicial officers who will conduct the trial[31]. This principle has been reasserted and applied in many cases[32]. It was not questioned in this appeal.

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27 (1976) 136 CLR 248 at 294 per Jacobs J.

28 Shapiro, "In Defense of Judicial Candor", (1987) 100 *Harvard Law Review* 731 at 737; cf *Stead v State Government Insurance Commission* (1986) 161 CLR 141 at 145.

29 *Galea v Galea* (1990) 19 NSWLR 263 at 279.

30 (1986) 161 CLR 342 at 352.

31 cf *Fingleton v The Queen* (2005) 79 ALJR 1250 at 1284 [176]; 216 ALR 474 at 519.

32 See eg *Johnson v Johnson* (2000) 201 CLR 488 at 504 [45], 518 [80]; *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337 at 344 [6], 380 [137]; *Re Minister for Immigration and Multicultural Affairs; Ex parte Epeabaka* (2001) 206 CLR 128 at 136 [21].

35 The duty to discharge judicial functions is necessarily subject to any disqualifying conduct on the part of the judge subject to a recusal submission. The observations in *Re JRL* are a corrective to over-ready disqualification. But they are not a blanket that smothers the effect of disqualification where it has already arisen.

36 That is the case here. Once the line was crossed, as I have held it to have been, it was not repositioned by the fact that the trial judge, seemingly acting under sufferance because he was obliged to, submitted to the procedure of hearing the no case arguments and then (as he had predicted and repeated) rejected them immediately[33].

37 A consideration that shows why this must be so is the increasing recognition of the fact that the entitlement to an impartial tribunal is one of the most important human rights and fundamental freedoms recognised by international law. It is stated in Art 14.1 of the *International Covenant on Civil and Political Rights*. Australia is a party to that Covenant and also to the First Optional Protocol that renders Australia accountable to the Human Rights Committee of the United Nations, upon communications alleging infractions[34]. Although the Covenant is not, as such, part of Australia's municipal law, the ratification of the First Optional Protocol, and national accountability to the treaty body, inevitably produce an impact on the content and understanding of the Australian common law[35]. The common law principle was already strong. Now it is reinforced by a rule of international law which expresses the entitlement to an impartial tribunal as a fundamental right of the individual concerned. It is not simply an aspiration or guideline of good judicial practice. It is a basic *right* which the appellants in this case have asserted.

38 In the course of disposing of communications to it, the Human Rights Committee has upheld alleged violations of the right to a fair trial where a

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33 In some cases, the subsequent conduct of the decision-maker may cure an earlier failure to observe fair procedures; but that conclusion will be reached more commonly in administrative rather than judicial hearings and even then will require a clear correction: *Ridge v Baldwin* [1964] AC 40 at 79 per Lord Reid.

34 [1980] *Australian Treaty Series* 23. The First Optional Protocol is [1991] *Australian Treaty Series* 39. Article 14.1 of the ICCPR states, relevantly: "All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him … everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law".

35 *Mabo v Queensland (No 2)* (1992) 175 CLR 1 at 42; *Minister for Immigration and Multicultural and Indigenous Affairs v B* (2004) 219 CLR 365 at 418 [148].

national supreme court, referred to the issue, has failed to afford relief. One such instance involved the failure of the municipal court specifically to address complaints about the hostile atmosphere and pressure imposed by the conduct of the trial which effectively made it impossible for defence counsel to present the accused's defence[36].

39 It is not every complaint that engages the attention of the Human Rights Committee[37]. That body has recognised the different standards that will be required in different cases having regard to the importance of their respective outcomes to the life and liberty of the accused[38]. Nevertheless, the Committee has strongly emphasised the centrality of the manifest impartiality of court proceedings which "implies that judges must not harbour preconceptions about the matter put before them, and that they must not act in ways that promote the interests of one of the parties"[39]. If the judge is disqualified on such grounds by domestic law, the trial is flawed and "cannot normally be considered to be fair or impartial within the meaning of article 14"[40].

40 The jurisprudence of the European Court of Human Rights, giving effect to Art 6(1) of the *European Convention for the Protection of Human Rights and Fundamental Freedoms*[41], expressed in similar terms, is to like effect. The right

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36 *Gridin v Russian Federation* (Case No 770/97) at [3.5], [8.2]. See Joseph, Schultz and Castan (eds), *The International Covenant on Civil and Political Rights: Cases, Materials, and Commentary*, 2nd ed (2005) at 414 [14.47].

37 See eg *JK v Canada* (Case No 174/84) at [7.2]; *RM v Finland* (Case No 301/88); *van Meurs v The Netherlands* (Case No 215/86), noted in Joseph, Schultz and Castan (eds), *The International Covenant on Civil and Political Rights: Cases, Materials, and Commentary*, 2nd ed (2005) at 416 [14.50].

38 *Pinto v Trinidad and Tobago* (Case No 232/87) at [12.3], noted in Joseph, Schultz and Castan (eds), *The International Covenant on Civil and Political Rights: Cases, Materials, and Commentary*, 2nd ed (2005) at 416 [14.50].

39 *Karttunen v Finland* (Case No 387/89) at [7.2], noted in Joseph, Schultz and Castan (eds), *The International Covenant on Civil and Political Rights: Cases, Materials, and Commentary*, 2nd ed (2005) at 417-418 [14.53]. See also *Johnson v Johnson* (2000) 201 CLR 488 at 501 [38].

40 *Karttunen v Finland* (Case No 387/89) at [7.2].

41 The position of the Convention in English law, its effect in Commonwealth countries and its interrelationship with the international law of human rights is described in Lester and Pannick (eds), *Human Rights Law and Practice*, 2nd ed (2004) at 1-12.

to an impartial tribunal has been held to denote an absence of prejudice or bias on the part of the person constituting the tribunal[42]. Whilst the perception of an accused that the court or tribunal is not impartial is relevant and is taken into account, it is not decisive. The question is always whether any doubt as to impartiality can be justified objectively[43]. The accused is entitled to the benefit of any legitimate doubt as to impartiality[44].

41 The common law of Australia is not different from, but is reinforced by, these approaches to the expression of human rights and fundamental freedoms. The added element which this reflection on international law provides is that it gives emphasis to the basic entitlement of an accused person in a criminal trial to an impartial tribunal. In issue is not simply the outcome of the trial, the strength of the prosecution case presented against the accused or the observance of minimum judicial procedures. To the extent that the tribunal is shown not to have been impartial, a basic departure has occurred in the observance of fundamental rights inhering in the accused as a human being. The consideration of such rights is important and helpful in determining the common law of Australia applicable to an appeal such as the present.

The weight of the evidence against the accused

42 Not least is this last consideration significant for the final factor that appears to have weighed with the Court of Criminal Appeal, namely the role of the trial judge as decision-maker on fact as well as law and the weight of the evidence in the case presented against the appellants. It was this evidence that, according to Smart AJ (with whom Hislop J agreed), afforded "the real difficulties" for the appellants[45].

43 Upon one reading, it appears that at least a majority of the Court of Criminal Appeal disposed of the appeal to it by reference to considerations mentioned in the proviso governing criminal appeals in New South Wales[46]. At the end of his reasons, after stating that the real difficulties facing the appellants "lay in the evidence", Smart AJ held that there had been "no miscarriage of

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42 Lester and Pannick (eds), *Human Rights Law and Practice*, 2nd ed (2004) at 239.

43 *Ferrantelli and Santangelo v Italy* (1996) 23 EHRR 288 at 309 [55]-[56]; *Incal v Turkey* (1998) 29 EHRR 449 at 470 [65].

44 *Hauschildt v Denmark* (1989) 12 EHRR 266 at 279 [46]-[48].

45 [2004] NSWCCA 268 at [307].

46 *Criminal Appeal Act* 1912 (NSW), s 6(1).

justice" (the language of the proviso). He therefore concluded that each appeal against conviction should be dismissed[47].

44 As Hayne J has pointed out[48], neither in this Court nor in the Court of Criminal Appeal did the respondent raise a specific issue for decision, addressed to the application of the proviso. Nevertheless, the reasons of Gleeson CJ[49] and of Callinan J[50] show that, when the evidence as it was left at the end of the trial is examined, there is (particularly in the absence of oral evidence from the appellants) strong evidence from which it would ordinarily have been open to the trial judge to draw inferences and to conclude that the prosecution had negatived the suggested claim of legal right which was the appellants' common propounded defence.

45 In these circumstances, should this Court treat the preliminary skirmishes between the trial judge and counsel for the appellants as a storm in a litigious teacup? Did they represent an event that sometimes blows up in a trial but settles down and is overtaken by the substance of the trial and the evidence adduced? There is no doubt that this is the way, in part, that the respondent pressed its case upon this Court. True, it did not file, or seek leave to file, a notice of contention specifically relying on the proviso in the criminal appeal statute. But it did lay strong emphasis upon the strength of the prosecution case[51], a matter only relevant to the issues before this Court as it might be thought to attract the operation of the proviso.

Conclusion: a retrial must be ordered

46 Whilst I regard the prosecution case, on the record, as powerful, supporting in that sense a conclusion that the outcome in the conviction and sentencing of the appellants did not involve any ultimate miscarriage, for three reasons I join in the conclusion that a retrial should be had.

47 First, by the common law, it is every person's right to have a trial conducted in accordance with law. The trial judge here was disqualified because

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47 [2004] NSWCCA 268 at [308]-[309]. See also at [292].

48 Reasons of Hayne J at [58]-[60].

49 Reasons of Gleeson CJ at [4]-[14].

50 Reasons of Callinan J at [63]-[64].

51 Reasons of Hayne J at [58]. See also [2005] HCATrans 823 at 3291-3300, 3315-3330, 3340 and 3396.

he crossed the line. The trial did not conform to law. I would repeat the words I used in *Goktas v GIO of NSW*[52]:

> "Our system of justice must do better. This Court must accept its obligation to ensure against wrongs which can be proved and then corrected. At stake is something greater even than the interests of the parties to the case. At stake is the integrity of our system of law and justice".

48 Secondly, and reinforcing this conclusion, is the recollection that the entitlement of the appellants to an impartial tribunal is not simply one afforded in disposing of appeals under Australian law. It reflects a human right and fundamental freedom that belonged to the appellants of which, by the way their trial was conducted, the trial judge deprived them. In a sense, the stronger the prosecution case against the appellants, the more important it was for the judge of trial to listen for a time to the submissions put on their behalf. No case is judged hopeless in our courts before a party has had a reasonable opportunity, by evidence and argument, to advance its case and contentions to the independent judge[53].

49 Thirdly, if the respondent truly had wished to rely upon argument based on the proviso governing criminal appeals, its proper course was to make that statutory provision a specific issue in the appeal. Then the argument before this Court would have taken a different course. The Court would have been obliged to address the question whether the "proviso" applied to a case of this kind, involving alleged disqualification and fundamental error[54]. Moreover, the Court would have had to examine more closely the evidence in the trial relevant to the question of whether a conclusion should affirmatively be reached that "no substantial miscarriage of justice has actually occurred"[55]. Without more, it may be a sufficient miscarriage of justice, in a case of this kind, to have denied the appellants the chance to have their propositions argued by their counsel *before* and not *after* they were rejected by the judge specially empowered to make all decisions of fact and law in their prosecution.

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52 (1993) 31 NSWLR 684 at 690-691.

53 *Jones v National Coal Board* [1957] 2 QB 55 at 67 per Denning LJ.

54 *Weiss v The Queen* [2005] HCA 81 at [46] referring to *Wilde v The Queen* (1988) 164 CLR 365 at 373 and *Conway v The Queen* (2002) 209 CLR 203 at 241 [103].

55 *Criminal Appeal Act* 1912 (NSW), s 6(1).

Orders

50 I agree in the orders proposed by Gleeson CJ.

51 HAYNE J. The principle to be applied in determining these appeals is not in doubt. If "a fair-minded lay observer might reasonably apprehend that the judge might not bring an impartial and unprejudiced mind to the resolution of the question the judge is required to decide"[56], the judge is disqualified from trying the case. The qualifications to that principle, relating to waiver or necessity, are not presently relevant.

52 The facts and circumstances of the case are set out in the reasons of Callinan J. I do not repeat them. I agree that, for the reasons his Honour gives, each appeal should be allowed and consequential orders made including an order that a new trial be had.

53 A trial judge, sitting without a jury, will inevitably form impressions of the strength of a party's case as the hearing proceeds. Preliminary assessments are made of the evidence. Always the judge will be trying to relate what is happening in the courtroom during the trial not only to the final decision that will have to be made, disposing of the case, but also to questions that the judge may be called on to decide in the course of running. Precepts of efficiency and economy will require the trial judge to be astute to keep the focus of the trial upon relevant issues. If a party makes an application during the trial, the trial judge should deal with it as swiftly and decisively as the application permits. But there is a line to be drawn between deciding cases efficiently and economically and appearing to prejudge what has to be decided.

54 Behind what happened when counsel for the appellants indicated an intention to submit that there was no case to answer may lie difficult questions about when and how such an application may be made in a criminal trial by judge alone. None of these questions was explored in argument in the present appeal but they should be recognised. Much of the argument in the appeal to this Court proceeded on the assumption that the no case submission which the appellants wished to make at trial was a submission that would have no relevant difference from the submissions that could be made at a trial by judge and jury[57]. That assumption is not self-evidently true. In particular, it is an assumption that appears to confine a submission that there is no case to answer to the submission that the prosecution's proof of the charge is deficient because there is *no* evidence that, if accepted, would establish the elements of the offence. But as Fullagar J pointed out in *The Union Bank of Australia Ltd v Puddy*[58], in a civil trial by judge

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56 *Johnson v Johnson* (2000) 201 CLR 488 at 492 [11] per Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ; *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337 at 344 [6] per Gleeson CJ, McHugh, Gummow and Hayne JJ.

57 cf *Haw Tua Tau v Public Prosecutor* [1982] AC 136 at 151.

58 [1949] VLR 242 at 244.

alone, a submission of no case to answer may take the form of submitting that the evidence that has been led, when finally assessed, would not suffice to establish the charge to the requisite standard of proof.

55 It must then be recognised that to permit the latter kind of submission (that the proof tendered should not be accepted) would require the trial judge to express an opinion about the evidence that has been called without knowing whether the accused will go into evidence. That may suggest, it may even require, the conclusion that in a criminal trial by judge alone, the judge, as the tribunal of fact, should not be asked to express a preliminary, if tentative, view of the evidence[59]. If that were so, it would follow that a submission of no case to answer because the proof tendered is said to be insufficient to satisfy the requisite standard of proof should not (or should not ordinarily) be entertained. But none of these questions was explored in the hearing of this appeal.

56 For the moment, what is determinatively significant is that the trial judge said that a submission of no case to answer would be rejected without knowing what form that submission would take and without knowing in even the broadest outline what was said to be its basis. And having said that the submission would be rejected, the trial judge, after the case had been adjourned overnight, went out of his way when the case resumed to emphasise to counsel that he had meant what he had said. It was inevitable that a fair-minded lay observer might reasonably apprehend in this case that the judge might not bring an impartial mind to the resolution of the question that the judge was required to decide on the no case submission. And without knowing whether the no case submission would take the form of pointing to some alleged deficiency in the prosecution proofs or instead be directed to the weight of the evidence advanced by the prosecution, it was inevitable that the fair-minded lay observer might reasonably apprehend that the judge might not bring an impartial mind to the resolution of the final questions that the judge was called on to decide in the trial.

57 What happened at a later point in the trial in connection with what was then said to be the revocation of the appellants' bail would not have allayed the fair-minded lay observer's apprehensions. Whether, standing alone, what happened in connection with that subject would have been sufficient to engender an apprehension of the requisite possibility of bias is a question that need not be decided. Again, however, lest it be overlooked, it should be noted that the arguments advanced in this Court on the hearing of the appeal, and in the courts below, about the powers of the trial judge to revoke bail were arguments that proceeded from certain assumptions about the conditions of the appellants' bail at the time the judge revoked it. The parties later sought to explore the validity of these assumptions in written submissions provided, with leave, after the

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59 *May v O'Sullivan* (1955) 92 CLR 654 at 658.

conclusion of oral argument. It may well be that the better view is that the appellants were not on bail when the judge purported to revoke it and that, rather, what was done amounted to a refusal to release the appellants on bail at the next adjournment of the Court. It is not, however, necessary to go further into that aspect of the matter beyond saying that it will always be of the first importance, when considering any question of bail, to consider both what power is being exercised and what bail conditions are being allowed, varied or revoked. Those are questions that will require much closer attention to the relevant statutory provisions (here the *Bail Act* 1978 (NSW)) than was given at first instance or in subsequent argument about this aspect of the matter.

58 On the appeals to this Court the respondent filed no Notice of Contention that the decisions of the Court of Criminal Appeal should be upheld on the ground that the proviso to s 6(1) of the *Criminal Appeal Act* 1912 (NSW) should be held to apply. And although there was reference made, in the course of oral argument of the appeals in this Court, to the strength of the prosecution case against the appellants, it was not submitted that the proviso was engaged.

59 At the hearing of the appeals, the parties were given leave to make further written submissions about a number of matters, including the matter of bail mentioned earlier. The respondent did not seek, and was not given leave, to file a Notice of Contention that the orders of the Court of Appeal should be upheld on the ground that the proviso applied. Yet the respondent submitted, in its supplementary written submissions, that, if it was found that there was a reasonable apprehension of bias, "it would still be appropriate to consider the application of the proviso". It was accepted, however, that "on an assessment of the significance of the irregularity in the context of the strong Crown case, this Court may conclude that a substantial miscarriage has occurred".

60 There being no Notice of Contention, it is neither necessary nor appropriate to decide these questions about the proviso's possible application in these cases. It is, therefore, neither necessary nor appropriate to consider whether the evidence adduced at trial proved beyond reasonable doubt that the appellants were guilty of the offence charged. Nor is it necessary or appropriate to consider whether, if guilt was proved, these are cases in which the appeals should be allowed. That latter question would require examination of matters not explored in argument (beyond what was said in the later written submissions of the parties) which may include, but not be limited to, what importance should be attached to ensuring the maintenance of proper trial procedures and what difficulties, if any, may be encountered if a retrial is ordered.

61 CALLINAN J. The question in these appeals is whether a judge hearing a criminal trial without a jury so conducted himself as to give rise to a reasonable apprehension of bias.

Facts

62 The appellants, who are brothers, were jointly charged on a single count of demanding money with menaces contrary to s 99 of the *Crimes Act* 1900 (NSW). The case against them was that they had attempted to "stand over" the proprietor of a nightclub in Sydney: that they did this by making threats and demands for money, and that they sent some young men to the nightclub to cause a disturbance, and to damage the furniture there as a further intimidatory act or menace to the proprietor. Their defence was that they had an honest claim of right for the money demanded. They claimed that it was owed to them, or to a person for whom they worked, for the provision of security guards, engaged and made available to the proprietor of the nightclub.

63 The case for the prosecution was a very strong one. Central and persuasive components of it were recorded statements made by one of the appellants to the proprietor who had been equipped by the police with a concealed tape recorder. It would not be inaccurate to describe the evidence in support of the defence as being on the flimsy side.

64 I set out some potentially inculpatory extracts from the transcript of a tape recording of a conversation between one of the appellants, the proprietor, Michael Savvas, and some other people on 22 June 2001:

"Tony Raciti:	How are you, Michael?
Michael Savvas:	Stressed today.
Tony Raciti:	You're stressed?
Michael Savvas:	Yeah.
Tony Raciti:	Couldn't be stressed as what I am.
Michael Savvas:	I'm very stressed. I just got a phone call, the kitchen's bloody caught fire.
Tony Raciti:	Yeah?
Michael Savvas:	Can we sort this out?
Joseph Antoun:	Tony, can I talk to you in the lounge, please? Is it all right if we do it here? Thank you.

Michael Savvas: Do you sit at the boss's chair?

Joseph Antoun: Wherever I sit, that's the boss's chair, mate.

Michael Savvas: OK.

Joseph Antoun: OK. Before we go any further, [inaudible]. The last thing I want is a tape recording.

Michael Savvas: Yeah. I wouldn't do that to you.

Joseph Antoun: Just in case, give me your wallet. Give me your wallet. You haven't got ah, what we need?

Michael Savvas: I've got what you need, don't worry.

Joseph Antoun: OK. This is just till we work this out. Now, I think I explained to you what is [inaudible].

Michael Savvas: Yeah, I, I'm equally upset too, Joe.

Joseph Antoun: That is good.

Michael Savvas: OK. I'm a, I'm a family man - - -

Joseph Antoun: Mmm.

Michael Savvas: - - - I've done nothing wrong here, as far as I'm concerned, I just want to run my business.

Joseph Antoun: Fine, OK.

Michael Savvas: I'm, I understand what you said on Saturday night, I'm happy to pay you something, but I want assurance that basically, that you don't come to me again.

Joseph Antoun: Listen. If I was standing over you, you would've felt something different. I tell you what happened, so you know exactly what's going on. When that place had trouble, I was invited to solve it.

Michael Savvas: By who?

Joseph Antoun: Doesn't matter.

Michael Savvas: OK. All right.

Joseph Antoun: The place had trouble. Is that true?

Michael Savvas: Yep.

Joseph Antoun: All right.

Michael Savvas: Well, OK, yeah.

Joseph Antoun: There were assurances made to me on behalf of the business, now, when we protected that place, we didn't protect the doorman, we didn't protect, we protected the business. When it became a smooth sail for you people, I didn't even get the courtesy of a - - - whatever - - -

Michael Savvas: But you never had any dealings with me, Joe. If we had a business transaction going, then yes, I, I'd - - -

Joseph Antoun: *Indirectly. Indirectly*.

Michael Savvas: Yeah, but there was never involved with me.

Joseph Antoun: Did you bring the money today?

Michael Savvas: I brought you some money.

Joseph Antoun: Where is it?

Michael Savvas: In my pocket.

Joseph Antoun: Show me. What's some money eh?

Michael Savvas: Sorry?

Joseph Antoun: What is some money?

Michael Savvas: Six thousand.

Joseph Antoun: The deal was eight.

Michael Savvas: I'll give you eight, Joe, but you've got to give me assurance - - -

Joseph Antoun: No, no, no, I won't. I'll tell you why, I don't. Do you know why, I don't?

Michael Savvas: No.

Joseph Antoun: Do you know why I don't?

Michael Savvas: No.

Joseph Antoun: Right. If you add up what wasn't paid, up to date, plus what it cost us to set that up Saturday, it works out to eight. Now broth, I won't ... you around, now, you are even.

Michael Savvas: So, you give me your word?

Joseph Antoun: No, no, no. You are even. Now, what we want to do, you want to solve this?

Michael Savvas: Yeah.

Joseph Antoun: Now we can talk.

...

Joseph Antoun: So, what's this here? Six or eight?

Michael Savvas: There's eight there.

Joseph Antoun: There's eight?

Michael Savvas: Yeah, there's eight.

Joseph Antoun: Oh, OK.

Michael Savvas: Count it if you don't trust me.

Joseph Antoun: No, no, no.

Michael Savvas: Look, Joe, OK. I understand what you're saying. Just, we'll talk about, let me - - -

Joseph Antoun: Let me solve it for you - - -

Michael Savvas: Alright. I've done what you asked me to do - - -

Joseph Antoun: This brings you up to date, all right.

Michael Savvas: All right.

Joseph Antoun: And depending how you treated me today, was gunna depend on how I go from here - - -

Michael Savvas: Oh - - -

Joseph Antoun: *- - - I was gunna hit you for a hundred grand or keep attacking you there, until it's worth nothing, or I was gunna give the courtesy of sayin', forget it. What I'll*

do, you've done well today, only the way you treated me - - -

Michael Savvas: I told you, I'm treating you with respect - - -

Joseph Antoun: No, no, no - - -

Michael Savvas: - - - but I expect that back.

Joseph Antoun: - - - you treated me very well. No, no, no.

Michael Savvas: We're in business.

Joseph Antoun: I treat with courtesy, mate.

Michael Savvas: Yeah, I know. I know.

Joseph Antoun: I did my job. You don't take your car to a mechanic, get him to do a job, and say, no, I can't pay you.

Michael Savvas: Yeah. Right. I understand that. I understand.

Joseph Antoun: I did my job. I got people I looked after to take care of this job. You know what I'm sayin'?

Michael Savvas: Yeah.

Joseph Antoun: At the end of the day, I never went down there with a bunch of guys to intimidate your business. I never did that. When I'd go down, I'd sneak in, sneak out. Make sure everything's cool. All the work gets done outside the premises, not in there." (Emphasis added)

65 After the respondent had opened the case for the prosecution the appellants availed themselves of an opportunity to present openings also. Joseph Antoun's opening was brief and in writing:

> "In essence the Defence case is the Crown case. Some essential facts are not in dispute. The defence is based on a claim of right for monies due and owing arising out of a pre-existing agreement to conduct security at the Daintree Nightclub Cafe. *This will be established on the evidence in the Crown case.*
>
> The claim of right will be established on two bases:
>
> Firstly, by reference to the conversation between the principal Crown witness Mr Savvas and the accused, Joe Anton [sic] at the meeting on 22 June 2001. It is common ground that Joe Anton [sic] was not aware that

> the conversation he had with Savvas was being recorded. The state of his mind in relation to his claim of right in relation to the $8000 is made explicit from their conversations at a time when he was unaware he was being recorded.
>
> Secondly, the alleged victim, Savvas, admitted in cross-examination at the committal proceedings (which will become evidence in this Trial) that the $8000 was not for protection but by way of payment for arrears due in and owing. This amount was in relation to a previous agreement between four parties, the alleged victim, Savvas, the principals of Big Time Promotions, one of which is Anthony Raciti; initially with a person by the name of Alex Shalala, (now in gaol); and upon Shalala going to gaol, the two accused. This will be established by the evidence in the Crown case.
>
> The Law
>
> The existence of a claim of right when genuinely held will constitute an answer to a crime in which the means used to take the property even when it involves a threat, assault or the use of arms. The relevant issue being whether the accused had a genuine belief in the legal right to the property rather than a belief in a legal right to employ the means in question to recover it. See *R v Fuge*[60], where the cases are collected." (Emphasis added)

66 The trial proceeded, and both of the appellants were convicted. Antoine Antoun was sentenced to three years and six months imprisonment with a non-parole period of two years and six months. Joseph Antoun was sentenced to six years imprisonment with a non-parole period of four years and six months.

67 During the course of the trial three applications were made by counsel for the appellants, who were separately represented, to the trial judge (Judge Christie QC) that he disqualify himself for apprehended bias. Each was refused.

The first two applications to disqualify

68 The first of the applications was made after Senior Counsel for Joseph Antoun (Mr Steirn SC) foreshadowed that he would make an application for a directed verdict of acquittal at the close of the Crown case on the basis that there was no case to answer. Counsel for Antoine Antoun (Mr Wilkinson) indicated that he intended to join in the application. The following exchange between Mr Steirn and the trial judge took place following a question from the latter about the likely length of the defence case:

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60 (2001) 123 A Crim R 310 at 314-315 [24].

"Mr Steirn: Well your Honour there will be an application tomorrow for no case to answer.

His Honour: I see, well that application will be refused. So how long then will the defence case take?

Mr Steirn: How can your Honour possibly come to that view without having heard one word from either me or Mr Wilkinson?

His Honour: Because I've closed the Crown case, and I have just said it.

Mr Steirn: But you've heard not one word of any submission by either of us upon either the law or the fact.

His Honour: No, I'm simply telling you the application will be refused. I perceive what's in the Crown case, I perceive there's a case to answer. Whether it be answered or not is entirely for - - -

Mr Steirn: Might I ask your Honour to stay your Honour's judicial hand - - -

His Honour: All right - - -

Mr Steirn: - - - until such time – and please let me finish. Until such time as you've heard submissions by both defence counsel.

His Honour: Right, now when I've heard those submissions will you be in a position to proceed with the defence case?

Mr Steirn: Does that mean by that comment your Honour that your Honour has already considered the position without a word of submissions by - - -

His Honour: I'll consider any submission you put. I'm obliged to consider any position you put."

69 The Court then adjourned. The next morning both appellants asked the trial judge to disqualify himself by reason of the exchange I have extracted above. Written submissions were provided by the appellants. The respondent opposed the applications, submitting that the trial judge had "clearly indicated to both defence counsel that [he] would hear their submissions in relation to their application of no case to answer".

70 The trial judge summarily rejected the application:

"I simply point out in relation to whatever application is about to be made in relation to a no case that I have a very, very firm view that as a matter of law, and I am after all in this tribunal not only the tribunal of fact but the tribunal of law, that as a matter of law an application for a no case cannot succeed in this particular trial.

I shall make that clear in the fullness of time, although I could make it clear now. I shall make it clear however at the conclusion of the submissions.

It is said by both accused that by reason of my having said that the application will not be successful I have exhibited some bias in relation to this trial. That is simply not the case and I again draw the distinction between the tribunal of fact and the tribunal of law, because in a judge alone trial the judge is obliged to become in the jury's place the tribunal of fact.

... an application of that description in my considered view on the law is doomed to failure."

71 Following delivery of those reasons counsel for Joseph Antoun made a further submission:

"Mr Steirn: Your Honour I don't wish to be pedantic, but what just fell from your Honour's lips allows me, in my respectful submission, to make a further submission that your Honour should disqualify yourself based on - - -

His Honour: Mr Steirn I'll just say this and then I'll hear you out. All I have done is restate what I said yesterday. I do not deny what I said yesterday. I have simply restated it to be perfectly clear about it. I have simply restated it as a question of law and not a question of fact. Now, I am obliged to hear what other submission you wish to say in relation to my disqualifying myself, and if that's the submission you now wish to make please proceed.

Mr Steirn: No. What I was about to say your Honour – this is a fresh application based specifically on what your Honour just said in using the words a no case to answer submission 'cannot succeed'. That's what your Honour.

His Honour: That's exactly what I said.

Mr Steirn: Your Honour has said that again without hearing from either of the accused.

His Honour: Precisely. That's what I said yesterday. So now I'm in a position to hear your submission as to no case.

Mr Steirn: My submission is that if your Honour is of that view still then it would be pointless in making a no case submission at this stage.

His Honour: It's entirely a matter for you Mr Steirn.

Mr Steirn: Because you've already said it cannot succeed.

His Honour: In my view it cannot. If you dissuade me from it you'll be the first to know.

Mr Steirn: Without hearing argument.

His Honour: I realise that. That's what I said yesterday.

Mr Steirn: As I say, I don't want to be pedantic. Your Honour has again said such a submission cannot succeed. My submission is how can your Honour say that without hearing submissions from either counsel for the accused and taking your Honour to the relevant law and the evidence which has now been adduced in the Crown case?

His Honour: That's what you said yesterday.

Mr Steirn: Yes. I don't wish to labour the point, but you have said it again, again without hearing submissions, and that is my concern.

His Honour: Okay. I realise it's your concern, but why don't you make the submission.

Mr Steirn: So therefore I make a second application for your Honour to disqualify yourself given what your Honour has just said, that we cannot succeed in any submissions we make before you.

His Honour: No, I didn't say that. I said you cannot succeed in a submission as to a no case. Am I entitled to assume Mr Wilkinson you join in this second application?

Mr Wilkinson: Yes your Honour.

His Honour: I don't wish to hear you Ms Crown and I shan't disqualify myself. Yes Mr Steirn?"

72 A submission of no case, in writing, was then made by Mr Steirn and Mr Wilkinson. The trial judge adjourned to consider the submissions and to allow the respondent time to prepare a response to them. When the trial judge returned, he rejected the application.

The third application to disqualify

73 Antoine Antoun gave evidence in his defence. At the conclusion of it, but before the defence case had closed, the trial judge said that he had formed:

> "a very strong preliminary view in this case, very, very strong, to a stage where I am considering, indeed have almost made up my mind of my own motion, to revoke bail".

74 It was entirely the initiative of the trial judge that the revocation of bail be considered. The respondent declined to make any submission about it. Mr Steirn submitted that his Honour would not be acting in compliance with the *Bail Act* 1978 (NSW) and that he would be denying the appellants natural justice if he were to do as he proposed. In order properly to understand the context of this further complaint of bias it is necessary to set out the relevant portions of the transcript:

"His Honour: I would be less than honest if I didn't say it, that having heard both of the accused I presently hold a very, very strong preliminary view. They're the words I used.

Mr Steirn: Yes, but with respect, your Honour you haven't heard the rest of the case by way of evidence - - -

...

His Honour: I haven't.

Mr Steirn: Or me taking you to the submissions, other than this piecemeal fashion – I've done so at your Honour's request.

His Honour: I understand all of that. I have had the benefit of your submissions as to the no case, which to some extent, of course, canvassed the Crown case.

Mr Steirn: Yes.

His Honour: But otherwise I agree with you entirely. I have not heard any submission from you or the Crown.

Mr Steirn: Well, your Honour, I'd ask your Honour to stay your Honour's hand in relation to the liberty of the subject until your Honour has taken, has listened to all of the evidence and all of the arguments. These people have been on bail for some years, and there's nothing in their record to indicate - - -

His Honour: I know nothing of their record. I know nothing of how long they've been on bail, it's none of my business to know either of those things.

Mr Steirn: Nor is there anything before your Honour which would allow your Honour to come to a view that they intend to absent themselves from this trial.

His Honour: I propose, however, to revoke bail on the basis of what I perceive to be the strength of the Crown case at this stage.

Mr Steirn: Your Honour, with great respect, your Honour would be falling into appealable error.

His Honour: That's possibly correct, it's a risk I'll run.

Mr Steirn: Your Honour, it's quite, your Honour - - -

His Honour: It's a very, very unusual step, Mr Steirn - - -

Mr Steirn: It's extremely unusual.

His Honour: You would not need to convince me of that. It's a very, very unusual step.

Mr Steirn: Especially when your Honour has not heard the rest of the Crown case, and especially when - - -

His Honour: The rest of the accuseds' case. And I understand what is in the rest of the accuseds' case and it's not meeting the concerns that I presently face. The rest of the accuseds' case relates to the issue as to when – I'm sorry, if and when the Antouns met Mr Savvas prior to March 2001. That's the issue I perceive those witnesses will go to.

Mr Steirn: Yes. But if that – can I just address you on that your Honour. If that be the issue, and your Honour has a doubt about the veracity of Mr Savvas, then the whole Crown case falls in a heap.

His Honour: I will hear your submissions about that in due course, and I will maintain an open mind as to what view I take about the totality of Mr Savvas' evidence, believe me I will. But I propose to - - -

Mr Steirn: I'd ask your Honour not to consider revoking bail at this stage.

His Honour: I propose to revoke forthwith – and I don't seek any submission from the Crown, I make it perfectly clear I do so on my own motion.

Mr Steirn: Well your Honour, can I just say this, your Honour with great respect should not take a man's liberty just like that in a case such as this, given what's required pursuant to section 32 of the *Bail Act*. Your Honour has to have some information before you, especially in an adversarial situation where the Crown has not put to you any submission where your Honour should revoke bail.

His Honour: I'm not inviting the Crown to put – not inviting. There are two things and I've alerted you to one of them, the strength of the Crown case *and the demeanour of the second accused and I propose to revoke bail, now it's as simple as that.* I realise - - -

Mr Steirn: The demeanour?

His Honour: Yes, I just said it, the demeanour of the second accused who just left the witness box. Now Mr Steirn I don't propose to debate it, I shall, if you wish accept full responsibility for what I'm doing. I don't mind recording, I've never done it before and I'm not sure I've ever heard of anybody doing it before but I propose to do it on this occasion.

Mr Steirn: Well your Honour, given your Honour's views, given the way with great respect to your Honour, your Honour has conducted yourself in this trial and given what has fallen from your Honour's lips immediately before I make this submission, I respectfully ask your

Honour yet again to disqualify yourself from the hearing - - -

His Honour: I realise - - -

Mr Steirn: Let me finish please, from hearing the rest of this trial because in my respectful submission it is now turning into a travesty.

His Honour: Very well.

Mr Steirn: I haven't finished. Before the adjournment, with great respect to your Honour, your Honour was under the misapprehension, if I understood your Honour correctly, that the person 'Tony' referred to was Tony Raciti.

His Honour: I was under that misapprehension for less than a couple of minutes and I wasn't under a misapprehension, I was not certain which Tony they were referring [to] which is precisely why I asked the question I asked.

Mr Steirn: Your Honour to revoke bail halfway through the defence case, which means it makes it that much difficult for both Mr Wilkinson and I to obtain further instructions at a crucial point in the defence case, in my submission is one of the reasons your Honour should not revoke bail because what the authorities do say is that one of the reasons a person should be at large is to prepare his case, that must mean a fortiori, when he's on trial, he should have immediate access to his counsel during the adjournments. Now your Honour would appreciate the logistics of having to go to the cells on each occasion that I speak to my client and Mr Wilkinson to his. Can I address your Honour on the demeanour. Has your Honour considered for a moment, even for a nanosecond, given that your Honour hasn't made up your Honour's mind that the Crown has not proved their case beyond reasonable doubt, has your Honour also considered, given the objective evidence before this court in the Crown case that Savvas is demonstrably lying to you, that my client could just possibly, just possibly be innocent on the basis that he does have a genuine claim of right and if he does have a genuine claim of right and Mr Savvas has set him up he's entitled to be

angry and if he's angry and being asked questions in cross-examination because he is genuinely innocent he's entitled to be a little bit upset and if that develops into a demeanour which your Honour does not find pleasing to your Honour, then that's with great respect, just bad luck. If a man is innocent he'd therefore be entitled to be upset, he'd be entitled to know that Savvas has lied about him because he knows that Savvas has lied but your Honour has accepted Savvas up to this stage without hearing submissions by me or by me taking you to the evidence and that's the unfairness. They're my submissions your Honour, I'd ask your Honour to disqualify yourself, with great respect.

Mr Wilkinson: Your Honour I join in that application and further your Honour the demeanour of that particular accused which you've made reference to in no way impinged upon the demeanour of my client.

His Honour: I agree with that totally.

Mr Wilkinson: Having regard to that I'd ask your Honour to grant bail for the very reasons that Mr Steirn has said, the difficulties experienced in preparing his case during the course of the trial.

His Honour: Do you wish to be heard Ms Crown?

Crown: Your Honour the Crown opposes the application for your Honour to disqualify yourself in relation to either of the two accused.

His Honour: Do you wish to be heard on bail?

Crown: No your Honour.

His Honour: I propose to revoke bail for both accused. I shall adjourn this trial till about twenty past two to give you time if you wish to seek any further instructions." (Emphasis added)

75 The appellants appealed to the Court of Appeal of New South Wales. They also made an application for bail pending the determination of those

appeals. That application came on for hearing before Sully J. His Honour allowed it[61]:

> "I do not think that it could be contended sensibly that the learned trial Judge approached the question of the revocation of bail with anything like the particularity required by what is explained in the passages quoted from the judgment of the Court of Criminal Appeal in *Winningham v The Queen*[62]. A reasonable coupling of what is there said with the way in which the matter was dealt with in the High Court[63] seems to me to lead as a matter of course to the conclusion that the deficiencies in the way in which the learned trial Judge dealt with the bail revocation question did entail that a fair minded observer might reasonably have apprehended or suspected that his Honour had prejudged, or might prejudge, the cases then before him."

His Honour ultimately found[64]:

> "In all of those circumstances, I think that the foreshadowed ground of appeal to the Court of Criminal Appeal has such evident prospects of success as would bring it within the category of '*special or exceptional circumstances*' as referred to in s 30AA [of the *Bail Act* 1978 (NSW)]. It should be remembered throughout, in my opinion, that what was at stake in connection with any proposal to revoke bail was not some trifling or insubstantial procedural consideration, but a matter touching in the most direct and adverse way upon the liberty of the subject." (Original emphasis)

76 All of the grounds of the appellants' appeals to the Court of Criminal Appeal (Dowd and Hislop JJ and Smart AJ) were rejected. Only one of them is in contention in this Court, that the trial judge should have disqualified himself by reason of apprehended bias. In relation to it, Dowd J said[65]:

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61 *R v Joseph Antoun; R v Antoine Antoun*, unreported, New South Wales Supreme Court, 28 August 2003 at 18-19.

62 Unreported, New South Wales Court of Criminal Appeal, 10 May 1995.

63 *Winningham v The Queen* (1995) 69 ALJR 775.

64 *R v Joseph Antoun; R v Antoine Antoun*, unreported, New South Wales Supreme Court, 28 August 2003 at 19-20.

65 *R v Joseph Antoun; R v Antoine Antoun* [2004] NSWCCA 268 at [70]-[71].

"I do not consider that his Honour had considered the matter, but having heard the evidence, had a very strong view at that stage. A judge who is hearing a matter as judge and jury has a more critical view of the evidence than a judge who sits with a jury. His Honour did not prevent submissions being made, and his judgment shows that he had formed a view of the Crown case at that stage, which, on examination of the evidence, was not an unreasonable view. The exchange had occurred whilst the parties were considering the mechanics of the length of the trial, not at the time when the application had in fact been made.

I can see no basis, on examination of the law in *Masters, Richards and Wunderlich*[66], that there was anything in the nature of bias in the way in which his Honour determined the matter. That is not to say that the expression used by his Honour was the most felicitous way of expressing his view at that stage in relation to the application about to be made. It was Mr Steirn SC and Mr Wilkinson, for the parties, who declined to make further application. As observed above, his Honour gave reasons for convicting the appellants, it being clear from those reasons, that he held a strong view in relation to the Crown case, as he was entitled to do by the close of the Crown case, for the purposes of the application that the appellants had no case to answer."

77 Of the trial judge's refusal to disqualify himself following his revocation of bail of his own motion Dowd J said[67]:

"In relation to the bail application, it is clear that his Honour's course of action is uncommon, but the function performed in a bail application is performed in a large number of trials, both jury matters and non-jury matters, in all Courts. A determination under the *Bail Act* is a discreet application on a civil onus, notwithstanding that there may be higher standards set for the decisions made, such as under s 30AA of the *Bail Act.* Determinations are made all the time which are adverse to one party or another, unless made by consent.

In *Masters, Richards and Wunderlich*[68], the Court of Criminal Appeal held that the mere fact that another judge disagreed with the judge's finding is incapable of supporting any reasonable apprehension of bias. Persuasive though the views may be of a senior judge such as Sully J ... all that Sully J was doing was in fact determining a bail

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66 (1992) 59 A Crim R 445.

67 *R v Joseph Antoun; R v Antoine Antoun* [2004] NSWCCA 268 at [73]-[74].

68 (1992) 59 A Crim R 445.

application, not performing the function of the Court of Criminal Appeal. His Honour's views are not relevant to the determination of this Court, and there is thus no light to be shed on the issue of apprehension of bias."

78 Smart AJ (with whom Hislop J agreed) was of the same view regarding the submission of no case[69]:

"The judge then heard oral submissions at considerable length from Senior Counsel for Joseph in support of the no case to answer application. During the course of his submissions Senior Counsel confirmed that it was not in dispute that a demand was made and that it was associated with some sort of menace. The judge said, 'The only matter this whole litigation centres around, is whether there is a genuine claim of right.' Senior Counsel replied, 'Whether there's a stealing, yeah.'

It is apparent from the transcript that the judge was attentive to Senior Counsel's submissions and allowed them to be developed fully. Counsel for Antoine adopted those submissions. The prosecutor did not wish to add to her written submissions. The judge then ruled:

'I remain of the view, more greatly enforced than earlier, that there is a case to answer. I propose to publish some reasons …'

It would be discouraging for Senior Counsel to be told at the outset that the submission of no case to answer could not succeed. However, despite his firmly stated views the judge gave Senior Counsel the fullest opportunity to put his submissions and attended to them. Senior Counsel at least knew the difficulties which he faced. The biggest hurdle which the appellants faced was that the no case to answer application could not succeed in view of the evidence which had been led. In most cases trial judges have a view about whether there is a case to answer at the close of the Crown case. It is a matter to which a trial judge directs his attention as the trial proceeds. Such applications are usually dealt with quite briefly and the judge usually indicates a view at an early stage, but often not in terms as emphatic as those used by the judge in the present case.

From the transcript it does not appear that the judge treated the appellants' submissions as a formality, or that he had a closed mind. At the end of them his initial views were reinforced. Lack of delicacy in expression and expressing views forcefully are not sufficient to amount to an apprehension of bias if attention is paid to the submission that there was no case to answer. That submission failed on the merits. The Crown

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69 *R v Joseph Antoun; R v Antoine Antoun* [2004] NSWCCA 268 at [289]-[292].

case had to be taken at its highest. There has been no miscarriage of justice."

79 Smart AJ also thought the trial judge's conduct in revoking bail of his own motion did not give rise to a reasonable apprehension of bias, saying[70]:

"It would have been unnerving to the appellants and their counsel that the judge, of his own motion rather than the Crown, raised the question of revocation of bail. The judge had been following the evidence closely and obviously thought that it was time to act. The judge heard full submissions from the appellants as to the proposed revocation of bail. The continuance or revocation of bail is a matter for the trial judge. Even if the judge made an incorrect determination as to bail, this does not mean that he was biased or that what had occurred gave rise to a reasonable apprehension of bias.

It was submitted that the judge had failed to distinguish the roles of Antoine and Joseph when considering the question of bail and treated them as being in the same boat. While the evidence showed that Joseph was the dominant member of the enterprise and the principal decision maker, the two brothers acted in close liaison. Even if there were substance in the complaint this does not give grounds for a reasonable apprehension of bias, especially as counsel for Antoine did not submit that he stood in a different position from Joseph.

In *Masters, Richards and Wunderlich*[71] this Court held that where prior to the commencement of a trial the judge who was to preside revoked the bail of one of the accused and, in the course of doing so found he was an unsatisfactory witness, that judge was not acting in a way amounting to pre-judgment requiring him to disqualify himself to avoid apprehension of bias. This was so even though that judge had no power to revoke bail.

The appellants submitted that this Court should look at the conduct of the judge overall. I agree. That was urged on the last application to the judge. The real difficulties facing the appellants lay in the evidence. Given the evidence and the mode of trial selected by the appellants, to which the Crown agreed, I am not persuaded that there was a reasonable apprehension of bias on the part of the trial judge. The judge was forthright and expressed his views strongly but he heard submissions in opposition to the opinions which he had expressed and then gave a final

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70 *R v Joseph Antoun; R v Antoine Antoun* [2004] NSWCCA 268 at [304]-[307].

71 (1992) 59 A Crim R 445.

ruling. If a judge, having heard the evidence of the principals holds certain views it is better for him to tell the parties so that they can address him on such matters."

The appeals to this Court

80 There are some obvious but significant practical differences between a criminal trial before a judge and jury, and a trial before a judge alone. In the latter, all issues, factual and legal, are determined by the judge. Facts and matters from which a jury, as the finders of fact and arbiters of guilt or innocence are isolated, will inevitably be within the knowledge of a judge sitting alone. The judge, unlike the jury who are excluded during legal argument, hears every submission. Included in such matters may be, as here, the criminal records of the accused. The trial judge may need to know these in order to decide whether bail should be granted.

81 Judges, unlike juries, are bound to give reasons for their verdicts. It may also be expected that a judge sitting alone might conduct the trial with a little less formality than if a jury were present, and might also express himself more directly in that event. Counsel too, may choose in such a case to frame both their questions and submissions differently, and to a more expeditious and expedient end in those circumstances. Judges are, unlike jurors, schooled by legal education and practice, to separate the facts from the law applicable to them, even though the latter may not be able to erase the law from the mind of the judge when he decides the facts. Judges can and do form preliminary views, sometimes quite strong ones. They should understand however that those views must not be fixed ones. From the first day of a prospective lawyer's education, and throughout a practitioner's and a judge's professional life, the importance of actual and apparent fairness, and the need for actual and apparent abstention from prejudgment are repeatedly stressed. The aphorism, that justice must not only be done, but also must be seen to be done, remains true.

82 The test of apprehended bias is not in doubt. It was stated by Gleeson CJ, McHugh, Gummow and Hayne JJ in *Ebner v Official Trustee in Bankruptcy*[72]:

> "The apprehension of bias principle may be thought to find its justification in the importance of the basic principle, that the tribunal be independent and impartial. So important is the principle that even the appearance of departure from it is prohibited lest the integrity of the judicial system be undermined. There are, however, some other aspects of the apprehension of bias principle which should be recognised. Deciding whether a judicial officer (or juror) *might* not bring an impartial mind to

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72 (2000) 205 CLR 337 at 345 [7].

> the resolution of a question that has not been determined requires no prediction about how the judge or juror will in fact approach the matter. The question is one of possibility (real and not remote), not probability. Similarly, if the matter has already been decided, the test is one which requires no conclusion about what factors *actually* influenced the outcome. No attempt need be made to inquire into the actual thought processes of the judge or juror."

83 It should be noted that the test as stated emphasises that a possibility, that is relevantly to say, the appearance of a possibility of an absence of an impartial mind on the part of the judge, may lead to disqualification. Their Honours also make it clear that the test does not involve, or require an inquiry into the facts or matters which brought the apprehended state of mind of the judge to one of apparent bias. It follows that the fact that the case may not only at the time, but also in retrospect, seem to be a strong one, indeed a very strong one, does not absolve the judge from giving it a fair hearing, and attending carefully and open-mindedly to the submissions of the parties made at appropriate times.

84 It does not follow that a trial judge in a criminal trial sitting alone, or with a jury, is obliged to give reasons for rejecting a "no case" submission, although in the former, on occasions, it might not be inappropriate for the judge to state briefly why that course has been adopted.

85 It seems to me that in this case the trial judge's conduct did present an appearance, indeed an unmistakable one, of prejudgment. As the passage from *Ebner* makes clear, when conduct of that kind occurs, it is not relevant to the inquiry as to whether an apprehension of bias has arisen that the strength of one party's case may have brought the judge to the point of making the remarks that he did.

86 It follows that the apparent strength of the respondent's case, and the weaknesses of the appellants' defence cannot be used as justification or excuse for the trial judge's expressions of a determination to reject submissions foreshadowed, but not yet made and developed. This will be so, even though, when a submission of "no case" is made, the trial judge asks the question whether there is evidence of each of the elements necessary to prove a conviction[73], and not whether there is other evidence which, if accepted by the jury, would refute, or raise a reasonable doubt about the evidence for the prosecution. In the present case, for example, the trial judge in answering that question, after his attention had been drawn to some arguably exculpatory evidence in the case for the prosecution, would have been bound to hold that there was evidence of all of the necessary elements of the offence, and that therefore the trial should proceed.

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73 *R v R* (1989) 18 NSWLR 74 at 81 per Gleeson CJ.

This, on current authority would have been the situation, even if that evidence had been tenuous or inherently weak or vague[74].

87 Nonetheless the trial judge was bound to follow the proper process of considering submissions and applications without apparently prejudging them. This clearly he did not do, even though, after stating that they would fail, he said that he would hear them. In view of the dogmatism and asperity of the trial judge's expressions, the latter was hardly likely to instil any confidence in either an innocent bystander, or the appellants. Indeed, it had the ring, more of a protestation, than an assurance of impartiality, of the kind referred to by Aickin J in *Re Lusink; Ex parte Shaw*[75] and was likely therefore to have reinforced, rather than dispelled, the apprehension of bias which must by then have arisen.

88 The apprehension of bias which must have arisen as a result of his Honour's statements with respect to the appellants' foreshadowing of their "no case" submission could only have been further increased by his Honour's threatened revocation of bail in the absence, not only of any application in that regard by the respondent, but also of any reference to the considerations to which he was bound to have regard under the *Bail Act*. The demeanour of one only of the appellants in the witness box could provide little foundation, let alone any sound substitute, for the statutory considerations relevant to a grant or a revocation of bail in respect of both of them.

89 The other ground urged by the appellants, that in some way the decision of Sully J sitting alone on the bail application preceding the appeals, bound the

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74 See *Doney v The Queen* (1990) 171 CLR 207. In that case, this Court rejected the more robust approach to the contrary that has been adopted in the United Kingdom and which is allowed to Magistrates in committal proceedings in New South Wales by s 66 of the *Criminal Procedure Act* 1986 (NSW) which provides as follows:

> "If the Magistrate is not of the opinion that there is a reasonable prospect that a reasonable jury, properly instructed, would convict the accused person of an indictable offence, the Magistrate must immediately order the accused person to be discharged in relation to the offence."

It is seriously open to question, in my opinion, whether it is in the public interest, having regard to the expense of criminal proceedings and the jeopardy to an accused, of permitting a tenuous, inherently weak or vague case to go to a jury, and whether, in view of the grant to Magistrates, but not to judges, of a power to end a criminal case before the time when a jury is to decide it, the approach in the United Kingdom or some like approach ought not to be adopted in this country.

75 (1980) 55 ALJR 12 at 16; 32 ALR 47 at 55. See also *Johnson v Johnson* (2000) 201 CLR 488 at 519 [85].

Court of Criminal Appeal, has no substance. His Honour at that stage was not entertaining the appeals. His decision was of an interlocutory kind only. It could not in any event bind the fully constituted Court of Criminal Appeal.

90 The appeals must however be allowed for the reasons that I have given. The orders of the Court of Criminal Appeal made on 16 August 2004 should be set aside and in place thereof it should be ordered that the convictions of both appellants be quashed and that there be an order for a retrial of them.

91 HEYDON J. I agree with the reasons of, and orders proposed by, Callinan J, and the additional remarks of Hayne J. I would, however, reserve to some occasion when it is necessary to decide it the question whether *Doney v The Queen*[76] should be reversed.

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76 (1990) 171 CLR 207.