35/83

QUEEN'S BENCH DIVISION (ENGLAND)

R v LIVERPOOL CITY JUSTICES: ex parte TOPPING

Ackner LJ and Webster J

8, 12 November 1982 — (1983) 1 WLR 119; (1983) 1 All ER 490

MAGISTRATES – BIAS – KNOWLEDGE OF OTHER CHARGES PENDING AGAINST DEFENDANT – TEST OF BIAS – WHETHER MAGISTRATES DISQUALIFIED FROM HEARING CASE.

T. was charged before the Justices with criminal damage to a door. When T. appeared, the Court register sheets showed that he was also charged with 7 other offences – 6 of failing to answer bail and one of being found drunk. T's solicitor submitted that the Bench should not continue to hear the charge as they might be prejudiced by their knowledge of the charges pending. The Justices neither considered nor adjudicated upon this submission due to advice they received from their Court clerk that it was not prejudicial for the Justices to be informed of charges pending. The trial continued and T. was convicted. On application for judicial review—

HELD: Application granted.
(1) It was for the Justices to determine whether there would be the appearance of bias if they continued to hear and determine the charge following disclosure of the pending charges.

(2) In exercising that discretion, the test to be applied by the Justices was whether in the circumstances there would be the appearance of bias on their part, rather than actual bias, if they proceeded to hear the charge.

(3) The way in which the test was to be applied depended on whether a reasonable and fair-minded person sitting in Court with knowledge of all the relevant facts would reasonably think that it would be impossible for the defendant to have a fair trial of the charge by the Bench as it was then constituted.

(4) Since the Justices never exercised their discretion as to whether they should continue with the hearing, the Court granted an order of *certiorari* to quash the conviction.

ACKNER LJ: *[In reading the judgment of the Court, His Honour set out the facts and indicated that the conviction would be quashed as the Justices never embarked upon the exercise of their discretion. His Honour then referred to a fundamental question raised by the application namely, "what should be the proper approach of the Justices, having learned of previous convictions and/or outstanding charges, to an application made to them not to try the case?"]:* ... **[122 WLR; 493 All ER]** As regards the appropriate test, as far back as *Allinson v General Council of Medical Education and Registration* (1894) 1 QB 750, 758, there was authority that the test of actual bias, as distinct from the appearance of bias, is inappropriate:

> "The question is not, whether in fact he was or was not biased. The court cannot enquire into that ... In the administration of justice whether by a recognised legal Court or by persons who, although not a legal public Court, are acting in a similar capacity, public policy requires that, in order that there should be no doubt about the purity of the administration, any person who is to take part in it should not be in such a position that he might he suspected of being biased" (per Lord Esher MR).

More recently Lord Denning MR has preferred the test of the appearance of bias to that of actual bias. In *Metropolitan Properties Co (FGC) Ltd v Lannon* [1968] EWCA Civ 5; [1969] 1 QB 577, 599; [1968] 3 All ER 304; [1968] RVR 490; [1968] 3 WLR 694; (1968) 19 P & CR 856,he said:

> "In considering whether there was a real likelihood of bias, the Court does not look at the mind of the justice himself or at the mind of the chairman of the tribunal, or whoever it may he, who sits in a judicial capacity. It does not look to see if there was a real likelihood that he would, or did, in fact favour one side at the expense of the other. The Court looks at the impression which would be given to other people. Even if he was as impartial as could be, nevertheless if right-minded persons would think that, in the circumstances, there was a real likelihood of bias on his part, then he should not sit .... There must be circumstances from which a reasonable man would think it likely or probable that, the justice, or chairman, as the case may be, would, or did favour one side unfairly at the expense of the other. The Court will not inquire whether he did, in fact, favour one side unfairly. Suffice it that reasonable people might think he did. The reason is plain enough. Justice must be

> rooted in confidence: and confidence is destroyed when right-minded people go away thinking: 'The judge was biased.'"

In our view therefore, the correct test to apply is whether there is the appearance of bias rather is whether there is actual bias. In the past there has also been a conflict of view as to the way in which that test should be applied. Must there appear to be a real likelihood of bias? Or is it enough if there appears to be a reasonable suspicion of bias? (For a discussion on the cases see de Smith's *Judicial Review of Administrative Action*, 4th ed (1980), pp262-264 and Wade, *Administrative Law*, 5th ed (1982), pp430-432.) We accept the view of Cross LJ expressed in *Hannam v Bradford Corporation* (1970) 2 All ER 690; (1970) 1 WLR 937, 949 that there is really little, if any, difference between the two tests:

> "If a reasonable person who has no knowledge of the matter beyond knowledge of the relationship which subsists between some members of the tribunal and one of the parties would think that there might well be bias, then there is in his opinion a real likelihood of bias. Of course, someone else with inside knowledge of the characters of the members in question might say: 'Although things don't look very well, in fact there is no real likelihood of bias.' That, however, would be beside the point, because the question is not whether the tribunal will in fact be biased, but whether a reasonable man with no inside knowledge might well think that it might be biased."

We conclude that the test to be applied can conveniently be expressed by slightly adapting the words of Lord Widgery CJ in a test which he laid down in *R v Uxbridge Justices, ex parte Burbridge*, apparently only reported in *The Times*, 20 June 1972, but referred to by him in *R v McLean, Ex parte Aitkens* (1974) 139 JP 261, 266: Would "a reasonable and fair-minded person sitting in Court and knowing all the relevant facts have a reasonable suspicion that a fair trial for the applicant was not possible?" Assuming therefore, that the justices had applied the test advised by Mr Pearson – do I feel prejudiced? – then they would have applied the wrong test, exercised their discretion on the wrong principle and the same result, namely, the quashing of the conviction would follow.
