IN THE HIGH COURT OF THE SUPREME COURT OF JUDICATURE OF GUYANA

CRIMINAL JURISDICTION

COUNTY OF BERBICE

CASE NO. 2025/36-HC-IND-BER-CRIM

THE STATE

- and -

1. JOEL GITTENS called "Bolo"

2. CHARLES SCOTT called "Bucko"

3. GLASTON HENRY called "Gladwin Henry" or "Soldierman"

BEFORE: THE HONOURABLE JUSTICE PRISCILLA CHANDRA-HANIF

Dated this 4th September, 2026.

Appearances:
Mr. Belfield, Ms. Seeraj for the State;
Mr. C A Nigel Hughes, Ms. Kiswana Jefford for the 1st, and 3rd accused; and
Dr. Dexter Todd, Mr. Dexter Smartt, Mr. Eden Corbin and Ms. Keona Higgins for the 2nd accused.

Criminal Law — Practice and Procedure — Recusal — Apparent Bias — Alleged Prejudgment — Prior Severance Ruling — Trial by Judge and Jury — Judicial Assessment of Evidence on Interlocutory Application — Distinction between Provisional Assessment and Determination of Credibility or Guilt — Admissibility of Caution Statements — Jury Directions — Case Management — Prosecutorial Independence — Powers of Director of Public Prosecutions — Whether Adverse Ruling or Alleged Error of Law gives rise to Apparent Bias — Fair-minded and Informed Observer — Porter v Magill Test.

RULING ON THE STATE'S APPLICATION FOR RECUSAL

INTRODUCTION

1. ***"Recusal – an odd word, signifying withdrawal, originating in the religious concept of a recusant – is both an assurance of the impartiality of justice and a field of opportunity for manipulation."*** [The Foreword written by **Sir Stephen Sedley** in **Judicial Recusal Principles, Process and Problems** by **Grant Hammond**]

2. As proffered by the learned **Justice David Jayton**, Judge of the Caribbean Court of Justice in his article **"Recusing yourself from a case"** [published on 4th May 2010] at page 22:

   "A judge needs to be firm-minded in recusing himself or herself where there is an objection of substance and in not recusing himself where the objection is fanciful." [**Panday v Virgil** Mag App 75 of 2006 per Archie JA]

   As emphasized by **Mason J** in the High Court of Australia in **Re JRL ex p CJL** (1986) CLR 342 and endorsed in **Locabail (UK) Ltd v Bayfield Properties Ltd** [2000] QB 415:

   'Although it is important that justice must be seen to be done, it is equally important that judicial officers discharge their duty to sit and do not, by acceding too readily to suggestions

of appearance of bias, encourage parties to believe that by seeking the disqualification of the judge, they will have their case tried by someone thought to be more likely to decide the case in their favour."

3. It is the State's application, in this matter, that I recuse myself from all further conduct of these criminal proceedings. This recusal includes a determination of the State's repeated application to recall and set aside my ruling of 24 August 2026 (which I have refused to recall) and that the matter be placed before another judge for further case management and trial.

4. The application arises principally from my ruling of 24 August 2026 ("the Severance Ruling"), by which severance was granted to the Second, Third and Fourth Accused. The State does not allege actual bad faith or personal animus. Its case is one of apparent bias by alleged prejudgment: that a fair-minded and informed observer, considering the reasoning in the Severance Ruling together with certain case-management decisions and remarks, would conclude that there is a real possibility that issues remaining for trial have already been prejudged.

5. The State acknowledges that recusal is not lightly sought; that mere disagreement with a judicial ruling is ordinarily corrected by appeal, review or recall rather than recusal; and that a judge deciding severance must necessarily characterise, at least provisionally, the material said to create prejudice. The State nevertheless contends that the specificity of the Court's reasoning crossed the line from legitimate judicial analysis into apparent prejudgment.

6. The application therefore requires a careful separation of three matters which must not be conflated: first, whether the Severance Ruling was legally correct; second, whether the Court's management of the proceedings was procedurally fair; and third, whether the objective test for apparent bias is satisfied. This ruling concerns the third question. A recusal application is not an appeal from the Severance Ruling.

7. The principles surrounding the test to be applied in determining whether a judge should recuse himself or herself were identified in the Supreme Court of Canada in Committee for **Justice and Liberty v National Energy Board** [1978] 1 SCR 369 394 approved in **Valente v The Queen** [1985] 2 SCR 673 and reiterated in **Wewaykum Indian Band Cojocaru v BC Women's Hospital [2013] 2 SCR 357 par 31 and 36.** The principles were summarised by Donald JA in **Taylor Ventures Ltd (Trustees of) v Taylo**r [2005] BCCA 350 (CanLII) para. 7 and reaffirmed and applied by the CCJ in the case of **Timonthy Walsh v Stephen Ward** [2015] CCJ 14 (AJ) as follows:

(*a) A judge's impartiality is presumed.*

(b) A party arguing for disqualification must establish that the circumstances justify a finding that the judge must be disqualified.

(c) The criterion for disqualification is the reasonable apprehension of bias.

(d) The question is what would an informed, reasonable and right-minded person, viewing the matter realistically and practically, and having thought the matter through, conclude.

(e)The test for disqualification is not satisfied unless it is proved that the informed, reasonable and right-minded person would think that it is more likely than not that the judge, whether consciously or unconsciously, would not decide fairly.

(f) The test requires demonstration of serious grounds on which to base the apprehension.

(g) Each case must be examined contextually, and the inquiry is fact specific [***Bossé v Lavigne [****2015] NBCA 54 (CanLII) para 7.*

THE STATE'S SUBMISSIONS

8. The State relies first on paragraphs 65-71 and 108 of the Severance Ruling. It says the Court contrasted the alibi evidence of Patricia Henry and Claudeth Kurtzious, neither yet cross-examined at trial, with the assumed contents of the statement attributed to

Anderson, and described the latter as capable of altering the jury's assessment of the disputed identification and alibi evidence "in a profound way". It also relies on the description of the contrast in Henry's case as "stark". The State submits that these passages amount to an assessment of the comparative persuasive force of contested evidence reserved for the jury.

9. Second, the State relies on paragraphs 81-87 of the Severance Ruling, in which the Court addressed the capacity of jurors to compartmentalise prejudicial material and stated that even the clearest and most carefully crafted limiting direction could not confidently eliminate the identified risk. The State says this moved beyond legal analysis of the adequacy of directions and conveyed a settled view about jurors' psychological capacities.

10. Third, the State contends that the Court treated the contents of Anderson's caution statement as sufficiently established to support severance notwithstanding that admissibility remained undetermined. It invokes **The State v Dookeran (Vernon) et al** (1966) 51 WIR 314 and argues that the Court erred by considering material which, in the State's submission, could not be relied upon before a *voir dire* had determined admissibility.

11. Fourth, the State relies on remarks made when the Severance Ruling was delivered concerning the transfer of this case from the Berbice Assizes and its impact on the Demerara criminal list. It submits that the remarks were capable of suggesting that hearing the trial was regarded as an inconvenience.

12. Fifth, the State complains of the time allowed to respond to written submissions filed on behalf of accused persons on 25 August 2026, including submissions filed on a national holiday and late at night. It says the timetable severely prejudiced the prosecution and its right to a fair trial.

13. Sixth, the State relies on an exchange concerning the constitutional and statutory role of the Director of Public Prosecutions in presenting an indictment. It says the Court asserted that it was the Court, rather than the DPP, which decides which indictment may be presented, contrary to section 95 of the **Criminal Law (Procedure) Act, Cap 10:01**. It also relies on the Court's comment that it would be "very happy with this matter having a final resolution all the way "because a practice over the years had caused concern to the judiciary".

14. At the outset, in regard to the sixth submission, the court takes guidance from the dicta of **President Justice Adrian Saunders in <u>Marcus Bisram v DPP</u>** [2022] CCJ 7 AJ (GY) at page 20 in looking at the constitutional and legal ambit of the DPP's powers:

> ***"Even if the office in issue were that of the Chancellor of the Judiciary it will still be a pertinent question whether the parliament can validly authorise that high official to instruct a judicial officer hearing a particular proceeding requiring the exercise of that hearing officer's discretion on how that matter should be decided…"***
>
> ***Article 122A must be interpreted as a safeguard to guarantee the basic independence, integrity and autonomy of all courts…***
>
> ***Indeed, we underestimate at our peril the importance and seriousness of the work of such courts and their need to be suitably independent.***
>
> ***By rendering a judicial officer's professional decision-making subject to the dictates of another official [DPP] cuts straight through Art 122A emphatically entrenches the principle of judicial independence."***

15. The State puts these matters cumulatively. It accepts the high threshold for recusal and accepts that judicial reasoning will commonly involve provisional assessment of evidence. Its narrower contention is that the degree of specificity in this case, combined with the procedural matters and remarks identified, creates the objective appearance that matters reserved for trial have been prejudged.

16. The relief sought is recusal from all further conduct of the matter, including the recall application; transfer to another High Court judge for case management and trial; and such further orders as are just. The State records that this recusal application is the

more cautious of its applications arising from the Severance Ruling and that its primary position remains its application to recall/set aside and its related application for administrative orders/judicial review.

SUBMISSIONS ON BEHALF OF THE THIRD ACCUSED, CHARLES SCOTT

17. The Third Accused, Charles Scott, opposes the State's application and submits that it should be dismissed. The Defence contends that the application identifies no personal interest, relationship, hostility, extraneous consideration or other circumstance capable of objectively giving rise to a real possibility of bias against the State or in favour of any accused. Instead, it is said to rest overwhelmingly upon the Court's reasoned determination of severance, its management of the proceedings and comments made while addressing the conduct and sequencing of proceedings.

18. The Defence places particular emphasis on the State's acknowledgment that disagreement with a ruling is ordinarily pursued by recall or appeal rather than recusal, and upon the State's statement that its primary and more confidently advanced position remains its application to recall and set aside the Severance Ruling. It characterises the recusal application as, in substance, a collateral challenge to an adverse interlocutory ruling and submits that an alleged error of law cannot be converted into apparent bias merely because the ruling was strongly adverse to the State's position.

19. The Defence accepts **Porter v Magill** [2002] 2 AC 357 as supplying the governing test and relies additionally upon **Lesage v The Mauritius Commercial Bank Ltd** [2012] UKPC 41 and **Locabail (UK) Ltd v Bayfield Properties Ltd** [2000] QB 451. It submits that the fair-minded and informed observer is taken to understand the judicial function: judges must determine interlocutory applications, give reasons, assess the nature and potential effect of evidence when deciding severance and prejudice, and may make adverse rulings without thereby demonstrating personal bias.

20. In relation to the Severance Ruling itself, the Defence stresses that it was a detailed reasoned decision which recorded the competing positions, recognised the public-interest considerations favouring joint trials, the risks of duplication and inconsistent verdicts, and the possible safeguards of redaction and judicial directions. The Defence submits that the Court's conclusion that those safeguards were insufficient in the particular circumstances was the very evaluative exercise which a severance application required.

21. The Defence further relies upon the express reservations contained in the Severance Ruling. It submits that the Court did not determine whether Anderson made the alleged statements, whether they were voluntary, whether they would be admissible, whether they were truthful or reliable, or what ultimate weight they should receive. The Defence points particularly to the Court's express reservation of admissibility and voluntariness and submits that a fair-minded observer would give effect to, rather than disregard, those reservations.

22. As to the State's reliance upon paragraphs 65-71 and 108 of the Severance Ruling, the Defence submits that the Court did not find Patricia Henry or Claudeth Kurtzious credible, nor direct that their evidence should be accepted. Rather, the Court considered whether an alleged eyewitness accusation that Henry personally struck the deceased was capable of altering the evidential landscape and thereby prejudicing the jury's assessment of disputed identification and alibi evidence in a joint trial. The Defence draws a distinction between deciding whether an alibi is true and assessing whether exposure to particular material may affect the jury's evaluation of that alibi.

23. The Defence similarly rejects the contention that the Court's treatment of Anderson's alleged statement amounted to a finding as to its weight or reliability. It submits that the content of the alleged statement was relevant to the anterior question of prejudice, while admissibility, voluntariness, truthfulness and reliability remain separate questions for determination at the proper stage. Those enquiries, it says, should not be conflated.

24. In response to the State's complaint about the time afforded for written responses, the Defence characterises the matter as one of case management rather than bias. It submits that the State was able to make written submissions and that its arguments were recorded and considered in the Severance Ruling. A disagreement with the timetable, or with the ultimate rejection of the State's submissions, is said not to establish partiality.

25. The Defence also addresses the exchange concerning indictments and the functions of the Director of Public Prosecutions. It does not dispute the constitutional and statutory authority of the DPP to institute, undertake, continue and discontinue criminal proceedings, nor the DPP's statutory role in presenting indictments. Its submission is that, in this case, the indictment had already been presented, the cause had been called before the Court, and the Court had thereafter exercised judicial power to order severance. Questions about the practical conduct and sequencing of the severed proceedings were therefore said to fall within the Court's case-management function.

26. On that basis, the Defence distinguishes prosecutorial authority over the institution and continuation of criminal proceedings from judicial control over proceedings already before the Court. It submits that even if the Court expressed the boundary between those functions too broadly, the complaint would at its highest disclose an arguable error of law, not apparent bias. The fair-minded observer, it is argued, would distinguish an assertion of judicial case-management authority from hostility towards the prosecution.

27. The Defence makes an additional submission specific to Charles Scott. It says that the Severance Ruling did not determine Scott's guilt or innocence and, instead, preserved his individual evidential issues. The Court directed the prosecution to clarify whether it proposed to rely upon Scott's alleged oral statement and in what form, leaving severance, redaction and other safeguards open. The Defence notes that the Court did not determine the admissibility or truth of Scott's alleged oral statement, the truth of

Ruth Douglas's evidence, whether Scott's alleged statement that he 'turn back' was true, or whether he knowingly participated in a common enterprise.

28. Finally, the Defence invokes the institutional importance of judicial independence. It submits that judges must be free to determine applications and give reasons without an affected party being able, merely by identifying robust passages in an unfavourable ruling, to secure the judge's removal. It contends that accepting the State's approach would create a dangerous precedent by permitting substantial interlocutory rulings themselves to become the foundation for recusal applications. The Third Accused accordingly asks that the State's application be dismissed and that this Court continue to preside.

SUBMISSIONS ON BEHALF OF THE SECOND AND FOURTH ACCUSED, JOEL GITTENS AND GLASTON HENRY

29. The Second Accused, Joel Gittens, and the Fourth Accused, Glaston Henry, also oppose the State's application. They submit that the State's central complaint is without foundation because the Severance Ruling applied the framework mandated by the Caribbean Court of Justice in **Small v The Director of Public Prosecutions; Gopaul v The Director of Public Prosecutions** [2022] CCJ 14 (AJ) GY. In their submission, each ground advanced by the State is either a complaint that the Court performed the analytical exercise required by Small, a disagreement with the merits of the Severance Ruling properly belonging to appeal or recall, or a case-management complaint falling well short of the threshold for recusal.

30. They adopt the **Porter v Magill** [2002] 2 AC 357 test and rely on **Lesage v The Mauritius Commercial Bank Ltd** [2012] UKPC 41, **Minister of Home Affairs v Nazar Mohamed & Azruddin Mohamed** [2026] CCJ 11 (AJ) GY, **Helow v Secretary of State for the Home Department** [2008] UKHL 62, **Saxmere Company Ltd v Wool Board Disestablishment Company Ltd** [2010] 1 NZLR 35, **Locabail (UK) Ltd v Bayfield Properties Ltd** [2000] QB 451 and **In re Pinochet** (No 2) [2000] 1 AC 119. They emphasise that the fair-minded observer is neither complacent nor unduly

suspicious, understands the judicial function, and knows that judges routinely make provisional assessments on interlocutory applications without thereby becoming disqualified.

31. Gittens and Henry submit that the nature of a severance application necessarily requires an assessment of the evidential landscape. They rely on the Small/Middis framework: whether the evidence against the applicant is significantly weaker than and different from that against the co-accused; whether the co-accused's case contains material highly prejudicial to the applicant although inadmissible against him; and whether there is a real risk that the weaker case will be made immeasurably stronger by that material. They contend that a court cannot answer those questions without examining the prosecution case, comparing the evidence, identifying prejudicial material and evaluating whether jury directions can realistically cure the prejudice.

32. They place particular reliance on the State's own concession that a judge deciding severance cannot avoid characterising, at least provisionally, the material said to give rise to prejudice. In their submission, it is self-defeating for the State to invite the Court to perform the Small analysis and then rely upon the resulting analysis as proof of prejudgment.

33. In answer to the complaint concerning paragraphs 65-71 and 108 of the Severance Ruling, Gittens and Henry submit that the expressions 'capable of altering the jury's assessment ... in a profound way' and 'stark' described the prejudicial capacity of Anderson's alleged accusation when compared with the admissible case. They were not findings that the alibi witnesses were credible, that Anderson's account was true, or that Henry or Gittens was guilty. The comparative assessment was, they submit, precisely what the second and third limbs of Small required.

34. As to juror compartmentalisation, they rely upon the Small concept of material which is 'legally inadmissible but cognitively unignorable'. They stress that the Severance Ruling expressly stated that the Court did not assume jurors were unwilling or

incapable of following directions and did not proceed from any general distrust of the jury system. The finding was case-specific: the alleged graphic eyewitness attribution of fatal blows to Gittens and Henry created a particular spill-over risk which the Court concluded could not confidently be cured by directions.

35. They further submit that, following severance, the precise question decided on that application will not recur at the separate trial. Anderson's inadmissible statement will not be before the jury trying Gittens, Scott and Henry. The issue at severance was whether directions could cure the prejudice arising from exposure to that statement in a joint trial; the issues concerning directions in the separate trial will therefore be materially different.

36. In relation to Anderson's statement, Gittens and Henry rely on the Court's express reservations in paragraphs 44, 112 and 113 of the Severance Ruling contending that the Court did not determine whether Anderson made the statements, whether they were voluntary or admissible, or the guilt or innocence of any accused. They submit that the Court was necessarily required to ask hypothetically what prejudicial capacity the material would have if admitted in a joint trial. That exercise did not decide truth, reliability, voluntariness or ultimate weight.

37. The Defence rejects the State's reliance on the Demerara-list observation. It characterises the remark as a routine factual observation about the scheduling consequences of transferring a complex four-accused murder trial between assizes. A fair-minded observer, it submits, would not convert a statement about workload and judicial scheduling into hostility toward the prosecution or the case.

38. As to the compressed timetable for submissions, Gittens and Henry submit that fixing deadlines is quintessential case management. They further say that if the State considered the time inadequate it could have sought an adjournment or extension, but no such application was made. In any event, a procedural timetable, even if unduly compressed, would be amenable to correction and would not without more demonstrate bias.

39. Concerning the exchange about indictments and the DPP, they submit that even if the Court's interpretation of **section 95 of the Criminal Law (Procedure) Act** were incorrect, the matter would disclose an error of law for appellate correction rather than apparent bias. They similarly characterised the Court's desire for 'final resolution' as a proper concern with efficiently resolving a murder prosecution pending since 2020, rather than evidence of partiality.

40. They answer the State's reliance upon **The State v Dookeran (Vernon) et al (1966**) 51 WIR 314 by submitting, first, that the complaint is on its face a ground of appeal; and, second, that Small necessarily requires consideration of the prosecution's case as disclosed, including potentially inadmissible material whose prejudicial effect is the very reason severance may be necessary. They submit that requiring a *voir dire* on every contested item before severance could be considered and would make the severance jurisdiction impracticable.

41. Gittens and Henry also rely heavily on what they describe as the State's concessions: that recusal is not lightly sought; that legal error is ordinarily addressed by appeal or recall; that the threshold is high; that provisional characterisation is unavoidable on severance; and that the State itself describes recall/set-aside as its primary and more confidently advanced challenge. They submit that those concessions materially undermine the recusal application.

42. Finally, they rely on their own interests and the public interest. They say the Severance Ruling was made to protect their constitutional right to a fair trial from the alleged spill-over effect of Anderson's statements. They have awaited trial for more than six years since the alleged offence of 9th September 2020. Recusal would require a new judge to become familiar with voluminous material and would occasion further delay. They further contend that allowing recusal merely because a judge gave full and robust reasons on severance would chill transparent judicial reasoning.

43. They accordingly ask that the State's recusal application be dismissed, that the matter continue before this Court as presently constituted, and that costs be awarded to the Second and Fourth Accused.

THE GOVERNING TEST

44. The modern common-law test is that as stated **in Porter v Magill** [2002] 2 AC 357: whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased. The observer is neither unduly suspicious nor complacent, is informed of the relevant procedural context, and is taken to understand the ordinary division of functions within a criminal trial.

45. The test is objective. The judge's own confidence in his or her impartiality is not decisive. Equally, the apprehension of the party seeking recusal is not decisive. The law protects public confidence in the administration of justice, while also recognising a judicial duty not to yield to tenuous or tactical objections.

46. **Locabail (UK) Ltd v Bayfield Properties Ltd** [2000] QB 451 remains important for the proposition that adverse rulings, robust case management and judicial expressions properly made in the course of adjudication do not, without more, establish apparent bias. Legal error is ordinarily corrected by the appellate or review process. These principles were reaffirmed and followed by the CCJ in the recent judgment of **Attorney General of Guyana v Azad Meerza [**2026] CCJ 3 (AJ) GY where it was stated at paragraph 28 that:

"In Guyana, Article 144 guarantees a fair hearing by an 'independent and impartial' court or tribunal for the determination of both criminal and civil matters. These values are the sine qua non for true justice, and more broadly they promote the legitimacy of the system and ultimately even the Rule of Law…

[39] As useful as Locabail is, however, there obviously can be no exhaustive list of situations giving rise to apparent bias, and allegations that it exists must be resolved with regard to the facts and circumstances of the case, evaluated according to the principles described and from the perspective of the notional 'fair-minded observer'. This, therefore, is the framework in which to consider the scenario presented in this case – namely, whether the fact of having sat before in the same dispute, on a previous arbitral panel, raises the possibility of apparent bias thereby precluding an arbitrator from sitting in the same matter again?"

47. As proffered by **Kokaram J** in Indar **Singh v Kisundaya Soogrim** (Trinidad CV2018-00103), a case within the civil jurisdiction but which rationale on the current issue is apt:

"Administratively, of course, nothing could be simpler than to recuse from a case. A form is signed. The file re-assigned randomly to another civil Judge. Committed and dedicated as they are, the newly assigned Judge would, without demur, manage the claim and if necessary, conduct the trial. Another file would come to my desk. ***But the fact that a recusal can be accommodated easily administratively does not mean that a Judge must eagerly abdicate his constitutional function and responsibility and the duty to manage cases to give effect to the overriding objective. The Judge has a "duty to sit" and ought not to recuse for trivial reasons, worse to encourage "forum shopping" by litigants.***

This is not to say I am insensitive to the question asked by the Claimant. Far from it. His application strikes at the heart of a fundamental pillar of procedural justice: Impartiality. With impartiality one builds trust in the judicial system. ***The litigant is guaranteed a voice. He feels respected. These four pillars of Voice, Respect, Impartiality and Trust are the cornerstones of procedural justice. Even further, it is an important question for me in the discharge of my judicial function as our judicial system must be seen through the therapeutic*** *lens as being sensitive to the impact the law has on the lives of litigants such as both the Claimant and Defendant in this claim. I am of the view that the fundamental question of trust which comes from the impartiality of the Judge can only be attained if the system is properly explained to the Claimant which I will do in this judgment…"*

48. Accordingly he goes on to note that the following salient principles can be culled from *Stubbs* in whether a Judge should recuse on the ground of pre-disposition or pre-determination:

a) The fact that ***a Judge has previously made a decision adverse to the interests of a litigant is not, of itself, sufficient to establish the appearance of bias. See Zuma's Choice Pet Products Ltd v Azumi Ltd*** *[2017] EWCA Civ 2133 where Flyod LJ observed that the fair-minded and informed observer does not assume that because a Judge has taken an adverse view of a previous application or applications, he or she will have pre-judged, or will not deal fairly with, all future applications by the same litigant.*

b) The appearance of bias as a result of pre-determination or pre-judgment is a recognised ground for recusal. The appearance of bias includes a clear indication of a prematurely closed mind. See Amjad v Steadman-Byrne [2007] EWCA Civ 625; [2007] 1 WLR 2484 and Otkritie International Investment Management Ltd v Urumov [2014] EWCA Civ 1315. In Otkritie Longmore LJ observed at paragraph one:

"The concept of bias … extends further to any real possibility that a judge would approach a case with a closed mind or, indeed, with anything other than an objective view; a real possibility in other words that he might in some way have 'pre-judged' the case."

c) It is not acceptable for a Judge to form or to give the impression of having formed a concluded view on an issue prior to hearing full argument by all parties on the point. See Re Q (Children) [2014] EWCA Civ 918 where a Judge, at a case management hearing made it clear that he accepted the account given by the father and rejected the allegations made by the mother even though the mother had not given her evidence. McFarlane LJ observed that there is a thin line between case management and premature adjudication. The Judge had strayed beyond the case managing role and had stated his analysis in unambiguous and conclusive terms that could have only have established in the mind of a fair-minded and informed observer that there was a real possibility that the Judge had formed a concluded and adverse view of the mother.

d) The degree of proximity between the subject matter of the earlier decision and the later decision can clearly have an important bearing on the appearance of bias. See Livesey v The New South Wales Bar Association [1983] 151 CLR 288 where the appellant applied for the recusal of two Judges from hearing professional misconduct proceedings against him. The two Judges had *earlier sat in similar proceedings involving the fitness of another person to be admitted to the Bar who might have been a witness in the appellant's case. The High Court of Australia held that the Judges should have recused themselves from sitting in the second case because of the appearance of pre-judgment.*

"It is, however, apparent that, in a case such as the present where it is not suggested that there is any overriding consideration of necessity, special circumstances or consent of the parties, a fair-minded observer might entertain a reasonable apprehension of bias by reason of prejudgment if a judge sits to hear a case at first instance after he has, in a previous case, expressed clear views either about a question of fact which constitutes a live and significant issue in the subsequent case or about the credit of a witness whose evidence is of significance on such a question of fact. The consideration that the relevant question of fact may be conceded or that the relevant person may not be called as a witness if the particular judge sits would not, of course, avoid the appearance of bias. To the contrary, it would underline the need for the judge to refrain from sitting."

See also Sengupta v General Medical Council [2002] EWCA Civ 1104 it was submitted that Laws LJ should recuse himself on the grounds of pre-judgment. The Court of Appeal dismissed the appeal. Laws LJ observed at paragraph 35:

***"[35]** But the ordinary case is far from those instances. It is of the kind that has happened here: the judge in question has not himself had to resolve the case's factual merits, and has not expressed himself incontinently. All he has done is to conclude on the material before him that the result arrived at in the court below was correct. And he has done so in the knowledge that, at the option of the applicant, his view may be reconsidered at an oral hearing. In such a case is there a reasonable basis for supposing that he may not bring an open mind to bear on the substantive appeal if, after permission granted by another judge, he is a member of the court constituted to deal with it?*

***[38]** This I think is important, because oral argument is perhaps the most powerful force there is, in our legal process, to promote a change of mind by a judge. That judges in fact change their minds under the influence of oral argument is not an arcane feature of the system; it is at the centre of it. Knowledge of it should, in my judgment, be attributed to the fair-minded and informed observer; otherwise the test for apparent bias is too far distant from reality. It is a commonplace for a hearing to start with a clear expression of view by the judge or judges, which may strongly favour one side; it would not cross the mind of counsel on the other side then to* *suggest that the judge should recuse himself; rather, he knows where he is, and the position he has to meet. He often meets it."*

49. **Mendonca J.A** in the Court of Appeal decision of **The Attorney General of Trinidad and Tobago v Dr. Wayne Kublalsingh and others** Civil Appeal No. P018 of 2014 stated that the test incorporates the words "real possibility" as opposed to "real probability." Therefore "the burden on the person alleging apparent bias is not as onerous as the burden of proving that it is more likely than not that the tribunal is biased." He further went on to say:

"The test is an objective one. In essence it requires the Court to ascertain the view of the public, through the eyes of a fair-minded informed observer, whether the Judge was or would be biased. The test therefore acknowledges and gives effect to a critical requirement that justice must not only be done but must be seen to be done. It is the "public perception of the possibility of unconscious bias" that is the key (see Lawal v Northern Spirit Ltd. [2003] UKHL 35 at para. 14)."

50. **Mendonca JA** usefully set out the attributes a fair minded and informed observer should possess while also reiterating that a Judge should not lightly recuse himself from a matter since he has a duty to sit:

"7. A judge, of course, should not lightly recuse himself. He has a duty to sit. When he has to decide an issue of self recusal, he has to do a balancing exercise. On the one hand the Judge must consider that recusal aims at maintaining the appearance of impartiality and instilling public confidence in the administration of justice. On the other hand, the Judge has a duty to sit on the cases assigned to him, and may only refuse to hear a case for good reason (see Nelson, J. on Judicial Recusal, April 2012). Where the ground is apparent bias good reason would satisfy the test of apparent bias.

8. Among the attributes of the fair-minded and informed observer are:

a) Being fair-minded, he always reserves judgment on every point unless he has seen and fully understood both sides of the argument. He will therefore not come to hasty conclusions. He is not *to be confused with the person who makes the complaint. The assumptions the complainant make are not to be attributed to the observer unless they can be justified objectively.*

b) He is informed. He can distinguish between what matters are relevant and what are irrelevant. He will take the time to inform himself on all matters that are relevant. He is also able to determine what weight should be given to facts that are relevant. He is able to put whatever he has read or seen into its overall context and will appreciate that context forms an important part of the material which he must consider.

c) He is not complacent. He knows that fairness requires that a Judge must be seen to be unbiased. He however knows that Judges have their weaknesses and therefore will not shrink from the conclusion, if it can be justified objectively, that things Judges may have said or done or associations they may have formed may make it difficult to judge the case before them impartially. He will note that the oath a judge takes is a factor to be considered, but not treat it as a guarantee of impartiality.

d) He is a member of the community in which the case arose and will possess an awareness of local issues, and social and political reality that forms the backdrop to the case gained from the experience of having lived in that society.

e) He will assume that the judge by virtue of his or her office is intelligent and will be able to form his or her own views and be capable of detaching his or her own mind from things that he or she does not agree with, and is aware of the legal traditions and culture of this jurisdiction and that that culture played an important role in ensuring the high standards of integrity on the part of the Judiciary.

f) He is not an insider. He is not a party to the action, and is not unduly sensitive or suspicious. (see Civil Appeal 250 of 2009 Basdeo and Oma Panday v Her Worship Ms. Ejenny Espinet and anor. at paras. 32–37).

*9**. The question, therefore, is whether the fair minded and informed observer, having considered all the facts, would conclude that there is a real possibility that the judge is biased. A two-step approach has been advocated (see In re Medicaments (supra) at para. 85). The Court must first ascertain all the circumstances which have a bearing on the suggestion that the Judge is or would be biased. It must then ask whether those circumstances***

would lead a fair-minded and informed observer to conclude that there is a real possibility that the Judge is or would be biased."

CRIMINAL JUDGMENTS

51. The criminal authorities refine the inquiry where the allegation is prejudgment arising from earlier judicial involvement. **Hauschildt v Denmark** (1989) 12 EHRR 266 held that the mere fact that a trial judge has made pre-trial decisions does not itself justify fears as to impartiality. Special circumstances may, however, do so where the preliminary decision required the judge effectively to determine substantially the same issue as guilt. There, the statutory remand test required a "very high degree" of clarity as to guilt, making the difference between the preliminary and final questions unusually tenuous.

52. **Nortier v Netherlands** (1993) 17 EHRR 273 and the related Strasbourg jurisprudence reinforce that what matters is the scope and nature of the earlier decision. Detailed knowledge of the case, or a preliminary assessment for a limited procedural purpose, does not itself amount to prejudgment. **Depiets v France** (2006) 43 EHRR 55 similarly directs attention to whether the issues earlier determined are analogous to those later to be decided.

53. **JSC BTA Bank v Ablyazov (Recusal)** [2012] EWCA Civ 1551, drawing together the Strasbourg cases, emphasised that prior decisions and detailed knowledge do not themselves disqualify a judge; nor does a preliminary assessment of available material necessarily prejudge the final assessment. The crucial question is whether the judge is later required to decide the same or an analogous question already determined.

CARIBBEAN CRIMINAL AUTHORITIES

54. In **Hernan Manzanero v The Queen** [2020] CCJ 17 (AJ) BZ, the CCJ dealt directly with a *voir dire* and an allegation of prejudgment in a non-jury murder trial. The trial judge had made an adverse credibility finding concerning the accused during the *voir*

dire, excluded the second caution statement, and then continued as the sole tribunal of fact. The significance of Manzanero lies in that structural feature: the same judicial officer who had assessed the accused's credibility on the *voir dire* later had to determine credibility and guilt as fact-finder.

55. Manzanero must therefore be applied with care to a trial by judge and jury. In a jury trial the judge determines questions of law and admissibility; the jury determines disputed facts, credibility and guilt. That distinction does not render judicial bias impossible, but it materially affects the objective assessment of whether a preliminary judicial evaluation can reasonably be regarded as a prejudgment of the ultimate issue.

56. **The Queen v Lewis**, CCJ Appeal No CR 1 of 2006, arose from a Barbados murder trial before judge and jury. The recusal objection itself was not pursued in the Court of Appeal; the material concern became prejudice occasioned by the airing of matters in the presence of prospective jurors. The case illustrates the centrality of the jury's independent fact-finding role and the distinct question whether anything done by the judge has contaminated that role.

57. **Stubbs v The Queen** [2018] UKPC 30 (Bahamas) is a valuable Caribbean criminal authority on prejudgment. A judge who had presided over an aborted jury trial later sat on the appeal from convictions at a further jury trial. The Privy Council recognised prejudgment as a possible basis for recusal but examined the nature of the judge's prior involvement rather than treating prior participation as automatic disqualification. The focus remained whether the earlier involvement objectively demonstrated a closed mind on the issue later to be decided.

58. **Andre Penn v DPP**, BVIHCR2009/0031, another regional criminal recusal applies the objective apparent-bias test and the countervailing principle that a judge should not recuse merely because an allegation is made. The integrity of the judicial process

requires recusal where the legal test is met, but equally requires judges to discharge their assigned functions where it is not.

COMPARATIVE JURY AND PREJUDGMENT AUTHORITIES

59. **Murphy v Director of Public Prosecutions [**2021] IESC 73 is especially instructive. The accused's first jury trial involved an eight-day *voir dire* concerning admissibility. The judge made findings relevant to the evidence; the jury failed to agree; and the accused sought the judge's recusal from the retrial. The Irish Supreme Court rejected any automatic rule of disqualification. Prior judicial determination of issues in the first trial did not, without more, establish objective bias in the retrial. The case strongly supports attention to the limited purpose for which earlier findings were made and to the continuing role of the jury.

60. **R v Mohammad & Ors** [2024] EWCA Crim 34 provides an even stronger illustration of the capacity of a professional judge to separate judicial functions. After a long jury fraud trial, the jury was discharged for tampering. The same judge, who had heard the evidence and rejected no-case submissions, was permitted to continue as the tribunal of fact. The Court of Appeal held that assessment of credibility is an ordinary part of a judge's duty and that the judge who has made earlier rulings is not thereby precluded from deciding the case. If prior exposure and interlocutory rulings do not automatically disqualify a judge who subsequently becomes fact-finder, a fortiori they do not ordinarily establish prejudgment where the ultimate facts and guilt remain for a jury.

61. **R v Twomey** [2009] EWCA Crim 1035 and R v S(K) [2009] EWCA Crim 2377 form part of the same line. They demonstrate that extensive prior judicial involvement does not of itself create apparent bias; what is required is a case-specific feature showing a disqualifying perception of prejudgment.

62. **Antoun v The Queen** [2006] HCA 2 is sometimes invoked in this area but must be accurately characterised: it was a judge-alone criminal trial, not a jury trial. The High

Court of Australia found apprehended bias because the judge announced, in emphatic terms and before hearing argument, that a foreshadowed no-case application could not succeed, and later raised revocation of bail in a manner reinforcing the appearance of a closed mind. Antoun therefore marks the boundary: ***robust or provisional judicial views are permissible, but a judge must not appear to decide an application before hearing it.***

63. The contrast with the present application is important. The Severance Ruling was delivered after submissions and was the product of the Court's adjudicative obligation to decide whether joint trial created an unacceptable risk of prejudice. The impugned observations were reasons for that decision, not an announcement that any accused was guilty, that any witness was truthful, or that the jury must accept or reject any evidence.

64. Significantly to note in this trial is that this application and ruling was made before the jury is empanelled and therefore in its absence. The Court therefore rejects the contention that the reasoning employed in determining the severance applications amounted to a prejudgment of the guilt or innocence of any accused. This is, fundamentally, a **trial by judge and jury**, and the ultimate determination of the facts, the credibility and reliability of the witnesses, the weight to be attached to the admissible evidence, and ultimately whether the prosecution has proved the guilt of each accused beyond reasonable doubt are matters **exclusively for the jury**. The trial judge is not the arbiter of fact and does not determine guilt. The judge acts as the **arbiter of the law**, determining questions of law and admissibility, managing the proceedings, directing the jury on the applicable legal principles, and ensuring that the trial is conducted fairly. Accordingly, when determining the applications for severance, the Court was necessarily required to examine the evidential landscape and to make provisional assessments concerning the nature and potential prejudicial effect of the material placed before it. Such an exercise could not constitute a determination of guilt because **the Court neither possessed nor purported to exercise the jury's fact-finding function**. Indeed, the very premise of the Severance Ruling was that it was for a properly constituted jury, at the eventual trial and upon admissible evidence alone, to determine the guilt or innocence of each accused. **<u>The fair-minded and informed observer, fully acquainted with this fundamental division of functions between judge and jury, could not reasonably interpret the Court's assessment of potential prejudice for the limited purpose of severance as a concluded determination of matters which the law expressly reserves for the jury.</u>**

65. American authorities similarly distinguish judicial knowledge and opinions formed in the course of proceedings from extrajudicial bias. **<u>United States v Grinnell Corp</u>**, 384 US 563 (1966), and the later recusal jurisprudence recognise that opinions formed on the basis of facts introduced or events occurring in current or prior proceedings do not ordinarily constitute disqualifying bias unless they display a deep-seated antagonism or a degree of fixed judgment incompatible with fair adjudication. That comparative principle is consistent with the Commonwealth authorities, though the applicable test in Guyana remains the Porter formulation.

APPLICATION OF THE LAW

66. The fair-minded and informed observer would begin with the nature of the application which generated the Severance Ruling. Severance is not decided in an evidential vacuum. The judge must identify the material said to create prejudice, understand how it may operate in a joint trial, consider whether limiting directions can adequately protect the accused, and determine whether the interests of justice require separate trials. That exercise necessarily involves a provisional evaluation of the potential effect of evidence. The State itself expressly acknowledges this. This exercise is therefore aligned with ensuring the safeguard of the accused’s constitutional rights, fair hearing and the protection safeguards of the process of the criminal justice system.

67. The words "capable of altering the jury's assessment" and the description of an evidential contrast as "stark" must therefore be read in context. They were directed to the potential prejudicial effect of materials in a joint trial and to the efficacy of safeguards. They did not purport to find that the statement was true, that the alibi witnesses were false, that identification evidence was reliable, or that any accused was

guilty. A fair-minded observer reading the judgment as a whole and in the context of the procedural setting in which it was given, will not be swayed into the belief of the presence of bias. Mounting an argument on bias based on a collection of isolated words or phrases, without context, only stands to dilute the true meaning and create unnecessary theatrics.

68. **Most importantly, the ultimate assessment of identification evidence, alibi evidence, witness credibility and guilt in the contemplated trial is not of the judge. It belongs to the jury. This is the structural distinction from Manzanero and Antoun, both of which concerned judge-alone trials. The jury will hear the admissible evidence, observe the witnesses, receive submissions, be directed on the law, and independently determine the facts. Nothing in the Severance Ruling directs or binds that jury on credibility or guilt.**

69. The State's complaint about the Court's discussion of limiting directions does not establish prejudgment. The very issue on severance is whether directions and other trial-management measures can sufficiently cure the risk of prejudice in a joint trial. A judge cannot decide that question without evaluating the practical efficacy of directions in the circumstances. A conclusion that a direction may not confidently cure a particular spill-over risk is a conclusion about trial fairness and case structure; it is not a finding that future jurors are incapable of obeying directions generally, nor a determination of guilt.

70. The challenge based on the use of Anderson's statement raises, at its highest, a question of law as to what material may properly be considered on severance before admissibility has been finally determined. The State says Dookeran establishes that only admissible evidence may be considered and that the Court misapplied the law. Whether that proposition is correct in its full breadth, and whether the Severance Ruling was legally right, are matters capable of being pursued by the mechanisms the State itself has invoked. An alleged legal error does not morph into or constitute apparent bias.

71. Further, the Severance Ruling expressly preserved the question of admissibility. A reservation of the admissibility issue is inconsistent with the proposition that the Court had finally determined it. The fair-minded observer is taken to understand that judges routinely consider material conditionally or provisionally for procedural purposes while leaving admissibility and ultimate weight for later determination.

72. The complaints concerning response times are also properly characterised as case-management complaints. A demanding timetable may be and, where necessary, adjusted. But without more it does not demonstrate hostility to the prosecution or a closed mind on any issue. The application identifies no refusal to receive the State's position because its source was the prosecution, and no finding of guilt or credibility flowing from the timetable.

73. The remarks concerning the transfer from Berbice and the impact upon the Demerara list must likewise be read in context. Judicial case management necessarily includes concern with listing, delay, use of court time and final resolution of criminal proceedings. An expression of concern that a long-running procedural practice should receive final resolution is not, objectively, a desire that the prosecution lose, that any accused be acquitted, or that the Court avoid its judicial duty.

74. The dispute concerning who determines the indictment raises an important question about the respective constitutional and statutory responsibilities of the DPP and the Court. But disagreement, even emphatic disagreement, as to the legal boundary between prosecutorial independence and judicial case-management power is not proof of bias. The fair-minded observer would distinguish a jurisdictional or legal controversy from personal partiality. If the Court's legal position is wrong, the remedy lies in the appropriate corrective jurisdiction.

75. I have considered the matters cumulatively, as the State invoked. Cumulative consideration does not mean that a collection of matters which are each ordinary incidents of adjudication automatically becomes bias by aggregation. **The question remains whether, viewed together and in context, they reveal a real possibility that the Court cannot bring an impartial mind to the judicial functions that remain for it.**

76. They do not. The core allegation of prejudgment is substantially answered by the distinction between a provisional assessment necessary to determine severance and the jury's exclusive responsibility for determining disputed facts and guilt. The remaining complaints concern alleged legal error, listing and response-time case management, and a dispute about the respective functions of Court and prosecutor. They may be important issues in their own right, but they do not objectively establish a closed mind or partiality.

77. The comparative authorities support that conclusion. Hauschildt and Depiets require attention to whether the earlier and later issues are effectively the same. They are not. Murphy rejects automatic recusal following extensive *voir dire* findings before a jury retrial. Stubbs rejects automatic disqualification from prior judicial involvement. Mohammad goes further by recognising that, in appropriate circumstances, a judge who has heard evidence and made interlocutory rulings may subsequently assume the fact-finding role without apparent bias. Manzanero identifies the heightened concern where a judge-alone tribunal makes an adverse credibility finding on a *voir dire* and later decides guilt; that is not the structure of this trial.

78. The Court is also mindful that recusal has consequences for the administration of justice. The duty to preserve public confidence requires withdrawal where the test is met, but public confidence is not served by treating every strongly contested ruling as disqualification. Judges are required to decide difficult applications, sometimes adversely to one party, and to give intelligible reasons. If the giving of reasons on a severance application were itself sufficient to disqualify the judge from the trial, ordinary criminal case management would become unworkable.

DISPOSITION

79. For these reasons, I am not satisfied that the fair-minded and informed observer, having considered all the facts and the proper procedural context, would conclude that there is a real possibility that this Court is biased or has prejudged the issues reserved for trial. As pellucidly proffered by **Justice Kokram** in **Singh v Sugrim** (Ibid)

    "It is not then simply a matter that a Judge should recuse because of a previous adverse finding made by the Judge. A previous decision may generate an expectation that the Judge is likely to decide the case adversely but to result in a recusal it must be demonstrated objectively that the manner in which the Judge made such a determination demonstrates an approach to the issues which fall for consideration with a closed mind and other than an impartial and unprejudiced mind. While justice must be seen to be done it is equally important that judicial officers do not too readily accede to suggestions of apparent bias encouraging parties to believe that they will have their case tried by someone thought to be more likely to decide the case in their favour."

80. As stated by **Lord Clyde** in the Privy Council case of **Panton v Minister of Finance (No 2),** [2001] UKPC 33, (2001) 59 WIR 418 (JM):

    'It is not to be thought that a judge will have such mental allegiance to his earlier views or such lack of integrity as to be unable to approach the question with an open mind or to be embarrassed at the prospect of revising or rejecting the view which he had earlier expressed ["Lord Clyde put it this way: 'It is not to be thought that a judge will have such mental allegiance to his earlier views or such lack of integrity as to be unable to approach the question with an open mind or to be embarrassed at the prospect of revising or rejecting the view which he had earlier expressed."

81. For all of the reasons proffered above, and in keeping with **Justice Bulkan's** wise observation in the relation to the law of recusal on the ground of bias in **Attorney General of Guyana v Azad Meerza** [2026] CCJ 3 at paragraph 45:

    "I do not interpret any of these statements as suggesting that judicial officers are like Caesar's wife, above suspicion or clothed in impermeable armour. Rather, their training and

experience are continually highlighted to demonstrate the ability they necessarily develop and hone to decide cases dispassionately, justifying in turn the high bar to attain in order to infer apparent bias."

82. The State's application for recusal is therefore refused.

83. This ruling determines only the recusal application. Nothing in this ruling diminishes the constitutional independence of the Director of Public Prosecutions or the Court's corresponding duty to ensure a fair trial and to manage proceedings according to law. Those institutional responsibilities coexist. Any disagreement as to their precise legal boundary must be resolved by legal principle and, where appropriate, appellate process, not by converting the disagreement itself into an inference of bias.

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Justice Priscilla Chandra-Hanif

Puisne Judge