

IN THE HIGH COURT OF FIJI
AT SUVA

CRIMINAL JURISDICTION

CRIMINAL CASE NO.: HAC 165 OF 2007 (LTKA)

BETWEEN:

THE STATE

Applicant

AND:

- 1. PATRICK NAYACALAGILAGI**
- 2. TAIONE LUA**
- 3. ULIASI RADIKE**
- 4. EPELI RADURA**
- 5. RATUNAISA TOUTOU**
- 6. JOELI LESARUA**
- 7. JONA NAREKI**
- 8. ILAISA KURIMAVUA**
- 9. NAPOLIONI NAULIA**

Accused

Counsel: Mr. W. Kurisaqila for the State
Mr. H.A. Shah for all Accused

Date of Hearing: Thursday 19 February, 2009

Date of Ruling: Friday 20 February, 2009

RULING

[1] This is an application by the State for me to disqualify myself from hearing the trial after I had ordered a mistrial. The new trial is scheduled to commence before me on 23 February 2009. The defence opposes the application.

- [2] Initially, the State advanced two grounds for disqualification. Firstly, the State says I have heard prejudicial evidence against the Accused persons, and secondly, there is an apprehension of bias. Upon pressing the Counsel for the State to provide further particulars about the party the apprehension of bias is directed towards, the second ground was withdrawn and the application was pursued on the sole ground that I have heard prejudicial evidence. I note that the party affected by the prejudicial evidence is not supporting the State's application.
- [3] From the outset the State's application is misconceived.
- [4] There exists a presumption that judges will be true to their oath of office and act impartially, without bias, for or against any party. The principle of impartiality is contained in the Guideline Principles for Judicial Officers adopted by Fiji's judiciary, which is similar to the Canadian Ethical Principles for Judges. The Guideline Principles for Judicial Officers state:

Impartiality is essential to the proper discharge of the judicial office. It applies not only to the judicial decision itself but also to the process by which the decision is arrived at. A judicial officer shall perform judicial duties, without fear, bias or prejudice.

Application

A judicial officer should ensure that his or her conduct, both in and out of court, maintains and enhances the confidence of the public, the legal profession and litigants, in his/her impartiality and that of the judiciary.

A judicial officer should so conduct himself or herself as to minimize the occasions on which it might be necessary for the judicial officer to be disqualified from hearing or deciding cases.

A judicial officer should not make any comment that might reasonably be expected to affect the outcome of any proceedings or impair the manifest fairness of the judicial process or trial of any person.

A judicial officer should disqualify himself or herself from participating in any proceedings in which he/she is unable to decide the matter impartially or where it would appear to a reasonable informed observer that the judicial officer is unable to decide the matter impartially. Such instances include where:

The judicial officer has actual bias for or against a party or any personal knowledge of disputed evidentiary facts in the proceedings;

The judicial officer previously served as a lawyer or was a material witness in the matter in controversy;

The judicial officer, or a member of his/her family, has a financial or other close personal interest in the outcome of the proceedings.

Provided that disqualification of a judicial officer shall not be required if, because of urgent circumstances, failure to act could lead to a serious miscarriage of justice.

[5] Relevant to the above guidelines is that I as a judge have taken oath to conduct myself in accordance with the laws, without fear or favour, affection or ill will.

[6] In ***Wewaykum Indian Band v Canada*** [2003] 2 S.C.R. 259, 2003 SCC 45, McLachlin, C.J explained the importance of judicial impartially at para. 57 of the judgment:

“...public confidence in our legal system is rooted in the fundamental belief that those who adjudicate in law must always do so without bias or prejudice and must be perceived to do so.”

[7] McLachlin C.J. continued at para. 59:

“Viewed in this light, ‘impartiality is the fundamental qualification of a judge and the core attribute of the judiciary’ (Canadian Judicial Council, Ethical Principles for Judges (1998), at p.39). It is the key to our judicial process, and must be presumed.”

[8] The ability to conduct trials fairly and impartially is among the most important attributes of a judge that earn the judiciary the public respect. Fairness and impartiality must be both subjectively present and objectively demonstrated to the informed and reasonable observer because the trial will be rendered unfair if the words or actions of the presiding judge give rise to a reasonable apprehension of bias to the informed and reasonable observer. This is a well settled test for disqualification on the grounds of bias on behalf of a judge (***Koya v State*** [1998] FJSC; CAV0002.1997 (26 March 1998)).

- [9] In this case, the State submits that I have heard prejudicial evidence and therefore I will not bring an impartial verdict. I cannot accept this contention. There is no authority to my knowledge to support the contention. In fact, the authorities are to the contrary. The authorities support the proposition that unlike jury or assessors, a professional judge by his or her training and oath is required to discard irrelevant, immaterial and prejudicial information (***Vakauta v Kelly*** [1989] 1 67 CLR 568 per Toohey J). I adopt this principle because judicial experience shows that judges quite often hear prejudicial evidence about an accused in bail or *voir dire* hearings. Where admissibility of certain evidence is challenged by an accused, the judge hears the evidence in absence of the assessors and rules on its admissibility. If the evidence is held to be inadmissible, that does not mean that the judge's ability to bring an impartial verdict in the substantive matter has been completely tarnished.
- [10] Impartiality is a state of mind in which the judge is disinterested in the outcome and is open to persuasion by admissible evidence and legal submissions. On the other hand, bias denotes a state of mind that shows a predisposition to a particular result. The mere fact that I have ruled certain evidence inadmissible and ordered a mistrial is not sufficient basis for my disqualification. The State must show that I have conducted myself in a manner, which a reasonable and informed person would conclude an apprehension of bias. There is nothing in the State's application or submissions to suggest that the State has come any close to satisfying the test for bias.
- [11] For these reasons the application by the State for me to disqualify myself is refused. The trial to commence before me on 23 February 2009.

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Daniel Goundar
JUDGE

At Suva
Friday 20 February, 2009

Solicitors:

Office of the Director of Public Prosecutions, Lautoka for the State
Haroon Ali Shah Lawyers, Lautoka for the Accused