

IN THE HIGH COURT OF FIJI
AT SUVA
CRIMINAL JURISDICTION

Criminal Case No: HAC 105/2006

STATE

v.

PENIASI TIRIKULA

Hearing: 9th February 2009

Ruling: 9th February 2009

Counsel: Mr. A. Rayawa for State
Ms M. Savou for Accused

RULING ON BIAS

[1] The Accused person through his counsel makes an application for me to disqualify myself from hearing this trial because I have dealt with his cases before. Upon enquiry it transpires that I have heard two of his appeals against sentence from the Magistrates' Courts (both of which I allowed and in relation to which I reduced his sentence), and two pre-trial applications in this case. The first application was made by the State for consolidation of Information. I refused consolidation of the Accused's charge with the Accused's alleged co-accused because the bulk of the case against the Accused appeared to come from the caution interviews of his alleged co-accused and because I was unable to find any admissible evidence against the Accused. I ordered separate trial, and asked the State why I should not quash the Information against the Accused.

[2] The trials were listed before Mr. Justice Goundar (who has convicted and sentenced the alleged co-accused) and Mr. Justice Mataitoga who commenced the trial, only to disqualify one of the assessors during the trial. A re-trial was ordered and is due to commence today.

[3] The fourth matter involving the Accused which was heard by me was an application for permanent stay. Mr. Justice Mataitoga asked me to hear it because he was concerned that the application might disclose matters which required a determination of the credibility of the witnesses, counsel or the accused and which “might affect the perceived fairness of the proceedings.” (pages 1-2 of the Ruling HAM 029 of 2008).

[4] I then agreed to hear the stay application. The application was made on the following grounds:

1. Abuse of process based on prosecutorial misconduct.
2. The proceedings would therefore amount to an unfair trial.

[5] The complaint was that while the alleged co-accused Iliesa Vakaloloma was still represented by the Legal Aid Commission, the State had taken a witness statement from him without informing the Commission, and had granted him immunity. This would lead to defence counsel who represented all the accused, withdrawing as counsel for this Accused because she could not cross-examine a former client. This would lead to prejudice to the Accused.

[6] In the Ruling on the 17th of April 2008, I specifically said that the facts of the case had no relevance to the stay application. Indeed the only relevant issues in that case were the conduct of State counsel, the representation of the Accused, and any prejudice to him. The questions are summarized at page 10 of the Ruling. They are:

1. Has the prosecution manipulated or abused the process in offering immunity to Vakaloloma?
2. Has there been prosecutorial misconduct in that there is evidence of malice or bad faith?
3. As a result of the grant of immunity about which counsel had no knowledge, are the proceedings against the Applicant oppressive and vexatious?
4. Is this a clear case in which a stay is justified?

[7] The only reference to the evidence is that at the time of the filing of Information I found the evidence so “nebulous” that it might not have survived a no case submission. I then considered whether the State had acted improperly in the way it set out to get more evidence. My findings were that there was no evidence of prosecutorial bad faith, only evidence of bad management by the DPP’s Office. I found that there was no evidence of prejudice to the Accused especially when there was always a possibility of co-accused giving evidence against him. I refused the application for stay.

[8] During the application and ruling I did not refer to the Applicant’s credibility. Nor did I prejudge the evidence. Nor did I give an impression of prejudging it except to suggest that the evidence against the Accused might not have survived a no case submission. That was a comment favourable to the Accused. I have no knowledge of the contents of the statement of Iliesa Vakaloloma. Whether or not the State’s case is stronger since immunity was granted, I do not know.

[9] I believe that an informed observer would not have any apprehension of bias, knowing the facts of the matter. Furthermore with only 3 criminal judges, all of whom have handled the Accused’s case in one form or another, there are non-existent choices for trial before a judge who has never handled the Accused’s cases. As a matter of fact, most pre-trial stay applications are heard by the trial judge himself or herself. Hearing a stay application (even if it involves a ventilation of some of the

evidence) does not disqualify the judge. Examples are State v. Ballu Khan & Others HAM39/08 (HAC9/08); State v. Peceli Vuniwa and Others HAC 31 of 2005 and State v. Isireli Leweniqila HAM 031D.04S. Indeed it is preferable that the trial judge handles interlocutory pre-trial applications also because it is he or she who will run the trial within the limits as it were, of those decisions. Justice Mataitoga referred the Accused's application to me out of a sense of caution. However in the course of hearing the case, I did not need to consider the evidence at all. The only issue was the conduct of counsel and the effect on the Accused.

[10] Finally it is now trite law that a court is not disqualified simply because the Accused's other cases have been handled by the same tribunal of fact. (see Re: Cau Juan Wen HBM 73 of 2002S (per Scott J, and R v. Resident Magistrate ex parte Veitata (1977) 23 FLR 172). In Cau Juan Wen Scott J said, at page 6 of his Ruling:

“It is perhaps also worth repeating that in a small jurisdiction like Fiji it frequently occurs that a Judge or Magistrate is aware of facts detrimental to a party appearing before him. That is no ground for his removal for bias (see R v. Resident Magistrate ex parte Veitata (1977) 23 FLR 172).”

[11] In this case, HAC 105/2006, I am the only criminal judge available to take this trial this week, and I have not heard any of the evidence which may or may not implicate him.

[12] I dismiss this application.

Nazhat Shameem
JUDGE

At Suva

9th February 2009