IN THE SUPREME COURT OF NAURU
AT YAREN
CRIMINAL JURISDICTION

CRIMINAL CASE NO. 24 of 2021

BETWEEN

XAVIER NAMADUK — Applicant

AND

THE REPUBLIC — Respondent

Before: Khan, ACJ
Date of Hearing: 18 July 2023
Date of Ruling: 21 July 2023

Case to be referred to as: *Namaduk v Republic*

CATCHWORDS: Recusal application – Where the trial had commenced and complainant was giving evidence with the assistance of an interpreter – Where counsels for both parties agreed that the interpreter was not interpreting correctly – An order for fresh trial was made for the evidence to be interpreted by another interpreter – Where the defence counsel made an application for recusal – Whether the application should be granted.

APPEARANCES:

Counsel for the Applicant: R Tom
Counsel for the Respondent: F Puleiwai

RULING

INTRODUCTION

1. The defendant is charged with one count of indecent acts and one count of being found in a certain place without lawful authority or excuse.

2. The matter was set down for trial between 7 to 11 November 2022.

3. On 7 November 2022 we had issues with electricity supply and the recording device so the matter was adjourned to 8 November 2022.

4. When the trial commenced on 8 November 2022 a Nauruan interpreter was arranged to interpret the evidence of the witnesses from Nauru to English language and vice versa.

5. The first witness for the prosecution was the complainant, a 13-year-old female child who was sworn to give evidence and was assisted by the interpreter, namely, Miss Dianah Fritz. This was the first time for her to do interpretation in court.

6. Miss Puleiwai appeared for the prosecution with her co-counsel, Mr V Soriano and Mr E Soriano appeared for the defendant. Both Mr V Soriano and Mr E Soriano are Nauruans and speak the Nauruan language fluently.

7. During the course of the complainant's evidence there were many interjections by both Mr V Soriano and Mr E Soriano complaining about the adequacy of the interpretation. Both counsels agreed that there were serious flaws with the interpretation, and as a result I made an order that the trial date be vacated and made an order for a fresh trial with a more competent and experienced interpreter.

APPLICATION FOR RECUSAL

8. Upon making the order for a fresh trial, Mr E Soriano made an application for recusal and submitted that this matter should be presided over by another judge. Miss Puleiwai objected to the application. I ordered both counsels to file written submissions.

9. Mr E Soriano filed his written submissions on 14 November 2022 in which he stated that:

    a) "...retrial to come before a different judge, citing concerns with the fact that the learned judge had been predisposed to the material evidence on which the case turns upon."

    b) "...would give rise to an apprehension of bias in the mind of a 'fair minded and informed observer', or as the learned DPP put in *R v Agege*[1] 'what would the person in the street think'.

    c) In his affidavit, the defendant deposes to a discussion between the bench and the bar during which time comments in relation to the offence contrary to s.117 which the defendant faces trial on, were discussed, and in which,

and in relation to the settings in which interactions between a complainant and a defendant may give rise to indecency[1].

d) The defendant deposes to his concern that these comments show that a predetermined outcome is likely in his trial, in that the settings in which the allegations were made are exactly as described in the discussion between the bench and the bar. In other words, he (defendant) as a rightminded or reasonable observer is concerned that the language of discussions described in his affidavit showed a predetermined outcome on the basis of the evidence already lead before the Court, notwithstanding that no finding of facts had been made by the Court.

10. On 1 December 2022 Miss Puleiwai filed written submissions on behalf of the prosecution and stated as follows at [18], [19] and [20]:

[18] Having adopted the approaches of **Porter v Magill** *and* **Webb**, the Court of Appeal of New Zealand in **Muir v Commissioner of Inland Revenue (supra)** expounded a two-step enquiry in order to determine the apparent bias of a judicial officer, where it was held that:

> "In our view, the correct enquiry is a two stage one, first is necessary to establish the actual circumstances which have a direct bearing on a suggestion that the judge was or may be seen to be biased. The factual enquiry should be rigorous in the sense that complainants cannot lightly throw the 'bias' ball in the air. The second enquiry is then to ask whether those circumstances as established might lead a fair minded lay observer to reasonably apprehend that the judge might not bring an impartial mind to the resolution of the instant case. This standard emphasised to the challenged judge that the belief in her own purity will not do, she must consider how others would view her conduct."
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> "We emphasise that the touchstone is the ability to bring an impartial mind to bear on the case for resolution. That does not, however, mean that a judge needs to be pursued as operating in a sanitised vacuum."

[19] The Court of Appeal in **Muir v Commissioner of Inland Revenue (supra)** emphasised the need of rigorous inquiry about the actual circumstances that has a direct connection to the suggested apparent bias. This two-step inquiry is founded on two conflicting fundamentals, on one hand the principle of fair trial and the universally accepted principle of impartiality and independence of the judiciary on the other. The judges are trained and capable of discharging their duties, in accordance with the oath they take to do right to all kinds of people, without fear, favour, affection or ill-will, in accordance to the laws and usages of their respective jurisdictions. They are trained and experienced to depart from

[1] Page 4 of the written submissions filed on 14 November 2022

the irrelevant, the immaterial and the prejudice in adjudicating matters before them.

[20] Gleeson CJ in **Ebner v Official Trustee in Bankruptcy**[2] has discussed the appropriate steps in determining the issue of apparent bias, where His Lordship held:

> "The application of the test of apparent bias requires two steps. First it requires to identification of what is said might lead a judge (or juror) to decide a case other than on its legal and factual merits. The second step is no less important. There must be an articulation of the logical connection between the matter and the feared deviation from the course of deciding the case on merit. The bare assertion that a judge (or juror) has an interest in litigation or an interest in party to it, will be of no assistance until the nature of the interest and the assertive connection with the possibility of departure from impartial decision is articulated."

11. On 25 January 2023 written submissions were filed in reply by Mr Tom (the new counsel) for the applicant.

AFFIDAVIT

12. On 25 March 2023 I raised with Mr Tom as to why Mr E Soriano made reference to an affidavit in his written submissions when none was filed on behalf of the applicant. He sought leave to file an affidavit which was objected to by Miss Puleiwai but I granted him leave to do so. He filed the affidavit on the same day and in which it is stated at [9], [10], [11], [12] and [13] that:

> [9] I found this quite alarming and raised that concern with my lawyer.
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> [10] In addition, I recall remarks made during discussions between the judge and the lawyers about the circumstances that a court would look at in considering whether an interaction was indecent. The remarks were along the lines of "if the touching took place inside a private area, then it gives rises to indecency". I don't remember exactly the words used but the context of the discussions were along those lines.
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> [11] Then after much discussion with my lawyer, I told my lawyer that I want to have my case heard before a different judge.
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> [12] The evidence lead by the Prosecution at the stage of where the trial had reached, was pretty much along the lines of the allegations. Alleging that I touched VA while she lay in the room.
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> [13] Given the discussion between the judge and the lawyers, together with how the interpretations by Mr. Soriano in Prosecution seemed to be accepted as correct, I am worried that the Court may have formed an outcome that is prejudicial to me, regardless that the judge has not made a finding of fact.

TRANSCRIPT

13. On 23 March 2023 I ordered that the transcript of the proceedings on 8 November 2022, and in particular to the exchange between the bench and the counsels be made available to both parties. On 4 April 2023 copies of the transcript were made available to both counsels.

14. On 18 April 2023 prosecution filed an affidavit of Inspector Ratabwiy in which she stated at [6] as follows:

> [6] There in reply to paragraph 10] of the Accused Affidavit, it is properly outlined in the Transcript in the last line, 5th paragraph from the bottom whereby the Court had stated:
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> "...yes I mean for indecent assault as you know and of course, Ive encountered that in many cases, including the case of Hartman; the context of indecent act, I mean if I'm walking past we could touch each other accidentally, that's not indecent, but if I were, if you were in the room and if I touch you inappropriately that would be indecent and of course, you said, ... I'm not jumping to conclusions but obviously the line of questioning was ... because ... I mean we are really handicapped that we don't have experts who can give evidence or who can sort of say if you sniff that amount of butane, that is what will be likely result, I mean how the evidence is unfolded is that he asked ... he took that butane in ... that's not what she told in examination in chief, it was very different right? Anyways lets not discuss that, should the case come before me but all I'm saying is the context, that's all I'm saying so you agree with a re-trial? I think it's fair isn't it? If we going to get a new interpreter.

15. Mr Tom asked for leave to file an affidavit in reply and it was granted. On 2 May 2023 he asked for a further transcript and additional transcripts were made available to him. On 2 June 2023, having perused the transcripts, he stated that he will not be filing an affidavit in reply.

POWER TO RECUSE

16. S.22 of the Supreme Court Act 2018 provides:

> a) Where a Judge has a conflict of interest, he or she shall declare such interest and shall recuse himself or herself from adjudicating in the cause or matter as a single Judge or as a member of the full Supreme Court.
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> b) A party to any cause or matter may seek the recusal of a Judge from adjudicating in the cause or matter.
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> c) The Chief Justice shall develop and publish guidelines on recusal to assist Judges to properly effect the recusals in a cause or matter.

HEARING OF THE APPLICATION

17. Mr Tom after having perused the transcript conceded that there was no pre-judgement of the outcome of the case by me and he also agreed to have [10] of the applicant's affidavit expunged from the record – but he nonetheless maintained that since that I heard some of the evidence of the complainant I should not continue to hear the case and should recuse myself. He relied on *Metropolitan Properties Co (FGC) Ltd v Lannon*[2] where Lord Dennings stated:

> "In *Regina v Barnsley Licensing Justices [1962] 2 Q.B. 187* Lord Justice Devlin appears to have limited that the principle considerably, but I will stand by it. It brings home this point: in considering whether there was a real likelihood of bias; the Court does not look at the mind of the Justice himself or the mind of the Chairman of the Tribunal, or whoever it may be, 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."

18. Miss Puleiwai in her submissions relied on many case authorities and in particular she relied on the case of *Koya v State*[3]. In this case the trial judge (Justice Lyons before he was appointed a judge of the High Court of Fiji) was a barrister (Mr Lyons in Brisbane) and had discussed the Koya case with Mr Iqbal Khan, a solicitor in Brisbane, on a number of occasions. Mr Lyons in his discussions with Mr Khan played devil's advocate according to the version given by Mr Khan and both of them reached a consensus that the case against the petitioner (Mrs Koya) was inherently weak.

19. Later Mr Lyons was appointed as a judge of the High Court of Fiji and presided over the case of *Koya v State* and it is stated at page 7 of the judgment of the Supreme Court of Fiji as follows:

> "The Court of Appeal pointed out that the witness statements become part of the record of the Magistrate's Court which was made available to the trial judge before the trial and that normal practice in Fiji is for the trial judge to read the record of the Magistrate's Court before the trial. See *Rajend Kumar v The State* (Court of Appeal, 5 May 1997 at p.5). The trial judge followed that practice in the present case. There is no suggestion that the trial judge obtained from Mr Khan any information which was not contained in the witness statements which became a matter of public record. Indeed, what the judge learned from Mr Khan was something less than the contents of those statements.

20. It was further stated at p.7 of *Koya v State* as follows:

> Reliance was placed on a passage in the joint judgement of Brennan, Gaudron and McHugh JJ in *Re Polites; Ex Parte Hoyts Corporation Pty Ltd.* (1992) 173 CLR 78 where their Honours said at [88] –

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[2] [1968] EWCA Civ 5

[3] [1998] FJSC 2; CAV 0002.1997 (26 March 1998)

> "If the correctness … of advice given to the client is a live issue for determination … the erstwhile legal advisor should not sit. A fortiori if the advice has gone beyond an exposition of the law and advises the adoption of a cause of conduct to advance the client's interest, the erstwhile legal advisor should not sit in a proceeding in which it is necessary to decide whether the cause of conduct taken by the client was legally effective, wise, reasonable or appropriate."

The passage quoted has no application to the present case. The trial did not call for a determination of the correctness of the advice given to Mr Khan or the appropriateness of the course of conduct suggested by His Lordship. The making of the submission to the Magistrate was simply an exercise of the petitioner's rights and stood outside the conduct of the trial. In the course of the trial, his Lordship was not called upon to form any view as to the quality or correctness of the views he had expressed to Mr Khan. That, in our view, is a powerful, if not a decisive, consideration.

21. Judge Lyons concurred with the opinion of the assessors and convicted the petitioner and sentenced her to 3 years imprisonment. The Supreme Court of Fiji stated at page 7 as follows:

> "In all the circumstances, it cannot be said that there was a danger that the trial was affected by bias or that a fair minded observer, knowing the facts, would apprehend or suspect that the trial was affected by bias. And, at the end of the day, we have a trial which appears in all respects to have been conducted fairly and impartially."

22. In this matter prior to the trial I had read all the witness statements as it is also the practice in Nauru. The complainant gave evidence in chief and was under cross examination and the trial was aborted because of the inadequacy of the interpretation. I do not see as to how that can be used as a ground or basis for raising bias on my part and as to how a fair minded observer would apprehend bias.

23. In the circumstances the application for recusal is refused.

DATED this 21 day of July 2023

SUPREME COURT OF NAURU

Mohammed Shafiullah Khan
Acting Chief Justice