REGINA-V-RONNY CAWA, CARRADINE PITAKAKA, GEDDLY ISA, OWEN ISA AND WILLIAM HENCE

HIGH COURT OF SOLOMON ISLANDS
(Naqiolevu, J)

Criminal Case No. 315 of 2004

Hearing: *8th & 13th February 2006*
Ruling: *24th February 2006*

For the Crown Mr. Cooper and Mr. P. Bannister
Accused 1 Ms. N. Stewart
Accused 2 Ms. Swift
Accused 3 Ms. P. Fasaali
Accused 4 Mr. Benn
Accused 5 Mr. S. Lawrence

RULING

Naqiolevu J. This is an application by several accused charged with the offence of murder contrary to section 200 of the Penal Code, and Wrongful Concealing contrary to section 252 of Penal Code. The Application is for the court to disqualify itself from Presiding in the trial on the basis that it might be actuated by bias. Both Counsel for the first accused and the fifth accused provide written and oral submission to the court. Counsel for the second, third, and fourth accused supported the application.

DEFENCE APPLICATION

The Counsel for the first accused raised several factors that could create in the mind of a fair minded person the possibility of bias by the court. These are:-

1. The court has previously convicted the first accused of murder, & judgment handed down on the 28th of October 2005. Counsel submit that a fair minded person could reasonably suspect that the opinion formed by the court about the character, actions and guilt in the case could influence the judgment in respect of this case.

2. That evidence before the court in the R-v-Ronny Cawa, Owen Isa and Josses Kejoa will be put in respect of the current matter. The fair minded person could reasonably suspect that the courts opinion on this material could already be formed.

3. That the two case are inextricably linked

4. There will be an application for a Voir Dire on the admissibility of an interview containing admission by the accused, and the court has already made findings in respect of the admission in the matter.

5. The courts' knowledge of the accused criminal history could lead to perception of bias in the mind of a fair minded person.

6. The court had made comments in respect of the GLF.

Counsel for the fifth accused in support of his application raised general circumstances relevant to the application.

1. The ruling of the court in the R-v-Ronny Cawa, Kejoa and Owen Isa[1] and R-v-A Hese[2] are such that a reasonable person would apprehend the possibility of bias if the court presides in this trial.

2. The accused will raise similar issues in this trial in relation to the voluntariness of the record of interview given the Crown intends to tender the Record, and which will be challenged by the accused.

3. Given the close relationship in time and fact between the two matters the reasonable onlookers night apprehend that the court might not bring an open mind to the determination of this issue.

4. The Courts position with the RAMSI.

CROWN'S RESPONSE

The Crown objects to the application and expound on the law of actual or apprehended bias. In his oral submission and supported by written submission on the test to be considered when the suggestion of biased is raised.

The Crown submit that this is not a matter when the principle of apprehended bias operate in such a manner to lead to the conclusion that the court should disqualify itself from hearing this trial. There is no basis the Crown contends that bias is applicable in this matter, even if it were because the nature of this jurisdiction and the particular circumstance that operate within it, the principle of necessity operates in the attendant circumstances so as to permit Judges to sit in like circumstances.

ISSUE

The issue in this case is whether the court will be perceived to be biased by a reasonable onlooker.

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[1] *HC-SI CRC 320 of 2004*
[2] *HC-SI CRC 310 of 2004*

LAW

The Constitution sets out an objective requirement for the independent and impartiality of the court, Section 10(1) "if any person is charged with a Criminal offence, then, unless the charge is withdrawn, that person shall be afforded a fair hearing within a reasonable time by an independent and impartial court established by law."

The common law further has clearly established the law in relation to the issue of bias.

The Supreme Court of Canada in the case of Wewaykum Indian Band-v-Canada [3] has set out the criteria for disqualification.

"The criterion of disqualification is the reasonable apprehension of bias. 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. Would he think it is more likely than not that the Judge whether consciously as unconsciously, would not decide fairly."

In Talasasa v Paia & another [4]Daly CJ commented at page 106.

"The locus classicus is Metropolitan Properties –v-Lennon & Others[5] in which Lord Denning said at p310. "The court looks at the impression which would be given to other people. Even if he was impartial as could be, nevertheless, if right – minded persons would think that, in the circumstance, there was a likelihood of bias on his part, then he should not sit, "And if does not sit, his decision cannot stand. Nevertheless, there must appear to be a real likelihood of bias. Surmise or conjecture is not enough."

Clearly the test in my view is the appearance of bias or the impression given by the reasonable member of the public sitting in the gallery of the possible likelihood of bias.

In R-v-Liverpool City Justice, Exparte Topping[6] Ackner LJ delivering judgment of the Divisional court held,

"More recently Lord Denning MR has preferred the appearance of bias to that of actual bias, in Metropolitan properties Co (FGC) Ltd Ltd-v-Lannan[7] he said In considering whether there was a real likelihood of bias the court does not look at the mind of the justice itself or at 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 was a real likelihood that he would, or did in fact favour one side at the expense of

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[3] *(2003) SCR 259*
[4] (1980-81) SILR 93
[5] *(1983) 3 ALL ER 304*
[6] *(1983) 76 Cr APR 70*
[7] *(1969) 1.QB*

another. The court looks at the impression which would be given to other people. Even he was as impartial as could be, nevertheless if right minded person would think that in the circumstances, there was a real likelihood of bias on his part, then he should not sit. There must be circumstance 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 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 than whether there is actual bias." "We conclude that the test to be applied is, would a reasonable and fair minded person sitting in the court and knowing all the relevant facts, have a reasonable suspicion that fair trial for the applicant was not possible."

The Court has carefully considered the oral and written submission by Counsel for all the accused and the submission in response by the Crown.

The court finds, given it has convicted and made certain findings against the first and fourth accused in R-v-Cawa & others, a fair minded person could reasonably apprehend, that the opinion formed about the accused character and guilt in the case may influence the judgment in the case.

The court having considered these factors and in adopting the principle enunciated in High Court of Case of Livesey-v-The NSW Bar Association[8] is of the view that a reasonable, right minded, properly informed onlooker could apprehend that the court my prejudge the case.

The court has further carefully considered the Crown submission that it should consider the principle of necessity given the nature of the jurisdiction.

The court however must weigh these with the best interest of the administration of justice in the country and to ensure public confidence in the judicial system is maintained, which must be of paramount importance. Justice must not only be done but seen to be done.

In these circumstance the court will recuse itself from presiding in this trial. The court make a finding specifically on this issue and upon no other issue as advanced by Counsel for the accused.

The court in considering the submission on the issue of RAMSI adopt the general principles in the case of R-v-Pirimona[9] on the danger of attributing to the Hypothetical observer an **"in club"** kind of knowledge in which a judge or Barrister may have of the professional connection of the Judge.

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[8] *(1983) 151 CRLR: 288*
[9] *(1998) 7 Tas, R407*

The court said -

"As to the level of sophistication to be attributed to the "fair-minded observer", Kirby P was warning against attributing to the fair minded observer the "in club" kind of knowledge a Judge or Barrister might have of such a relationship and the ability of the Barrister on appointment as a Judge to retain objectivity in respect of his former client. His honour adhered to his view in Australian National Industries v Spedley Securities and noted the apparent acceptance of it by Toohey J in Vakauta –v-Kelly[10] In that case, Toohey J[11] said, at p 584 - 585.

"I accept the observation of McHugh JA in the Vakautas case that" in the case of a professional Judge whose training, tradition and Oath or Affirmation require him to discard the irrelevant, the immaterial and prejudicial, a conclusion that there is a reasonable apprehension that he is biased should not be drawn lightly (underlining mine). **In effect, that is what this court said in Livesey at p299. And it is true, as Clarke JA pointed out, that it is a reasonable apprehension with which the court is concerned. And, if it adds anything, it is such an apprehension in 'a fair-minded observer': Livesey, at p294. But in this regard the public perception of the judiciary is not advanced by attributing to the reasonable or fair minded observer a knowledge of the law and an awareness of the judicial process that ordinary experience suggests not to be the case."**

In the Pirimona Case the Court further said,

"In a case such as the present, a judgment as to an apprehension of bias should not proceed on the basis that the fair minded observer should be regarded as ignorant of matters with which Judge and Barristers would have more familiarity such as the practice in respect of producing copies of the Jury Panel, advance copies of photographs, proofs of evidence, and the like. If the objective facts give the appearance of bias then *"inside knowledge"* which might put a more innocent complexion on the conduct complained of, to one with that knowledge, should not be attributed to the hypothetical observer."

THE COURT

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[10] *(1992) 26 NSWLR 411*
[11] *(1989) 167 CLR 568 at 585*