IN THE FIJI COURT OF APPEAL

AT SUVA

CRIMINAL APPEAL NO. AAU 0043/05S

(Lautoka High Court Case No. HAC 12/2001 L)

BETWEEN : 1. JOHN MILLER
2. PITA TOKONIYAROI
3. SAMUELA ROGOIVALU

Appellants

AND : THE STATE

Respondent

Coram : Byrne, J.A,
Mataitoga, J.A

Counsel : Filimoni Vosarogo (for 1st and 3rd Appellants)
2nd Appellant (In person)
A. Rayawa for the Respondent

Date of Hearing and Oral Judgment : 3rd April 2009
Date of Fuller Reasons for Judgment : 24th June 2009

JUDGMENT OF THE COURT

INTRODUCTION

1. This appeal was heard on the 3rd of April 2009 and after the Court heard submissions from Counsel and the unrepresented appellant it announced that the appeal would be upheld and a re-trial of all the appellants be heard in Lautoka before another Judge.

2. The Court directed that the appeal be called over at 2.15 pm on the 15th of April 2009 and a direction would then be given that the re-trial was to commence no later than one month after the 15th of April 2009. The appellants were remanded in custody and the court stated that it would hear applications for bail on the 15th of April 2009.

3. That date was overtaken by the abrogation of the Constitution of Fiji by His Excellency the President on the 10th of April 2009, one of the consequences of which was that the appointments of all members of the Judiciary were revoked. One of those Judges whose appointment was revoked was the Honourable Mr Justice Mataitoga.

4. Byrne, J.A the presiding Judge in the appeal was re-appointed on the 25th of May 2009. The judgment which he now has written incorporates the reasons which he gave on behalf of the Court on the 3rd of April but because of the important question of law and practice involved in the appeal, the judgment contains references to authorities some of which were not available to the court on the hearing of the appeal.

THE HIGH COURT TRIAL

5. The three appellants were charged with the offence of Murder contrary to Section 199 of the Penal Code Cap.17 on the information of the Director of Public Prosecutions.

6. They were also jointly charged with the offence of robbery with violence contrary to section 293(1)(a) of the Penal Code.

7. The trial began on the 19th of May 2004 when a Voire Dire was held and on the 3rd of June 2004, the learned trial Judge ruled that the confessions made by each appellant had been made voluntarily and were admissible in evidence against them.

8. After several adjournments the substantive trial began on the 13th of April 2005 and on the 29th of April 2005 all three appellants were found guilty as charged, of murder and of robbery with violence. They were then convicted and on the 5th of May 2005, the Learned Judge sentenced each of them to a minimum term of imprisonment of 12 years which was to run concurrently with any other sentence they might be serving.

9. Before the Voire Dire began the learned trial Judge announced to the Court that he had known one D. Elisha the father of the victim of the murder, Lalit Kishore for many years.

10. It appears that the learned Judge asked Counsel for 1st and 3rd appellants whether they had any objection to him continuing as the Trial Judge. According to the record, page 30 both counsel replied, : "No problem". There is no record of the Judge asking the 2nd Appellant whether he objected to his continuing as the Trial Judge. The Learned Judge then stated that he also knew a Mr Ash. He was referring to James Henry Ash of Ba, who was a referee with the Small Claims Tribunal and who gave evidence on behalf of the Prosecution on the Voire Dire.

11. Page 30 of the record gives the response of Counsel for the 1st and 3rd appellants as, : "no problems", and "no problem".

12. Again the 2nd Appellant was not asked by the Judge whether he objected to the Judge's knowing Mr Ash and therefore, presumably, whether he wanted the Judge to disqualify himself.

13. In this Court when the hearing began on the 3rd of April, the Court asked the 2nd Appellant whether he was ever asked by his then Counsel whether he objected to the learned Judge continuing as the Trial Judge. He said he had never been asked.

14. Mr Vosarogo, who was then the Director of Legal Aid, informed the Court that Counsel representing the three Appellants had not obtained any instructions from them as to whether they wished the trial Judge to recuse himself.

15. Counsel for the respondent did not specifically deny this but stated that the appellants should apply to this Court to lead further evidence on this question. He stated, and the court agreed, that the record on this question was silent and ambiguous.

16. The Court considered the submissions of Counsel and concluded that in all the circumstances the learned Judge should have disqualified himself and that because of his failure to do so the appeals should therefore be upheld. The Court then made the orders mentioned earlier in the judgment.

17. The only ground of appeal on which the court heard submissions was that the learned Judge should have recused himself, given his knowledge of the father of the victim and Mr Ash and that therefore the convictions and sentences of all the appellants were unsafe and should be quashed. It was also submitted that at least in the case of the second Appellant he failed to ask him whether he objected.

THE DUTY OF COUNSEL

18. Before discussing the law on Bias it is necessary to refer to the duty of Counsel in a criminal trial.

19. In Halsbury's Laws of England (4th edition volume 3) at paragraph 1140, the learned Author says this of the duty of counsel in a criminal trial : "What a barrister defending a client on a criminal charge may legitimately do in the course of the defence is nowhere laid down but he is not entitled wantonly or recklessly to attribute to another person the crime with which his client is charged, and he should not make such an imputation unless there are facts or circumstances, or rational inferences to be drawn from them, which at the least raise a not unreasonable suspicion that the suggested person committed the crime.

20. The client must decide on his plea, his line of defence, and whether or not he is to give evidence himself. Counsel may of course properly advise on these matters, in strong terms if need be, but it is the client who must make the decisions: it is not for counsel to manufacture a line of defence. If the accused person instructs counsel that he is not guilty but decides not to give evidence, it is nevertheless counsel's duty to put the defence before the court to the extent, if necessary, of making positive suggestions to other witnesses".

21. It is implicit in the 2nd paragraph that Counsel must consult with his or her client on any question which might have a vital bearing on the conduct of the trial. This clearly includes a duty to take instructions from a client as to whether he wishes the Trial Judge to continue as the Trial Judge.

22. The Court was satisfied in this case that this was not done and therefore constituted a fatal flaw in the trial. The question of whether a Judge should disqualify himself or herself is not to be answered by counsel who may himself have no objection to the Judge continuing. That decision lies entirely with the accused and counsel is bound by it.

23. Much jurisprudence has developed in recent years on whether or not trial judges in certain circumstances should disqualify themselves on the ground of possible bias. I begin with probably the most famous aphorism of all, that of Lord Hewart CJ in R.v. Sussex Justices ex parte McCarthy (1924) 1KB 256 :
"A long line of cases shows that it is not merely of some importance but is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done".

24. In **Webb v. The Queen** (1994) 68 ALJR 582 at 586 Mason C.J. and McHugh .J, said : ".....that a judge should not sit to hear a case if in all the circumstance the parties or the public might entertain a reasonable apprehension that he might not bring an impartial and unprejudiced mind to the resolution of the question involved in it".

25. At p.605 Toohey.J following Livesey v. NSW Bar Association (1993) 151 CLR at 293-294 said: "The principle is that a Judge should not sit to hear a case if in all the circumstances the parties or the public might entertain a reasonable apprehension that he might not bring an impartial and unprejudiced mind to the resolution of the question involved in it".

26. In similar vein Brennan,J , at 589 said :"It is a valid ground of objection to the continued sitting of a Judge or Juror in a criminal trial that a fair-minded and informed member of the public would entertain a reasonable apprehension that the Judge or Juror will not discharge his or her duty impartially".

27. He then quoted with approval Lord Devlin, extolling the virtues of the system of administering justice in the presence of the parties, who said: "This is why impartiality and the appearance of it are the supreme judicial virtues. It is the verdict that matters, and if it is incorrupt, it is acceptable. To be incorrupt it must bear the stamp of a fair trial. The judge who does not appear impartial is as useless to the process as an umpire who allows the trial by battle to be fouled or an augurer who tampers with the entrails". The statement appears in Lord Devlin's book: The Judge (1979) at p.4.

28. It seems to this Court that that is as good a statement of the law on bias, untrammelled by any reference to case law, as one is likely to find.

29. How then does this bear on the question before the Court? In our judgment, apart from the fact that counsel did not obtain instructions certainly from the 2nd appellant and, it would seem from the other two appellants, on the known facts we consider the learned judge should have disqualified himself on the ground that he knew the father of the victim and Mr James Henry Ash. Mr Ash said on the Voire Dire that the 2nd appellant had complained that he had been punched in the jaw and ribs while in police custody but had not named the officer responsible.

30. In the Court's judgment a fair-minded and informed member of the public would entertain a reasonable apprehension that the Judge would not discharge his duty impartially and he should therefore have recused himself. For this reason also the Court upholds the appeal.

FIJI COURT OF APPEAL

John E. Byrne
Judge of Appeal

24th June 2009