IN THE HIGH COURT OF FIJI

AT SUVA

MISCELLANEOUS JURISDICTION

CRIMINAL MISCELLANEOUS CASE NO. HAM 128 OF 2013S

BETWEEN **JOELI TAWATATAU**

APPLICANT

AND **THE STATE**

RESPONDENT

Counsels	**:**	**Mr. J. Savou for Applicant**
		Mr. M. Vosawale for the State
Hearing	**:**	**3rd June, 2013**
Ruling	**:**	**3rd June, 2013**
Judgment	**:**	**7th June, 2013**

JUDGMENT

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1. In High Court Criminal Case No. 329 of 2011S, the applicant (accused) faced the following information:

Statement of Offence

RAPE Contrary to Section 207 (1) and (2) (a) of the Crimes Decree Number 44 of 2009.

Particulars of the Offence

JOELI TAWATATAU on the 22nd day of September 2011, at Newtown in the Central Division, had carnal knowledge of **J. R** without her consent.

2. I have read the court file, and to properly understand this case, I have constructed the following chronology:

Date	Events or Happenings
29.9.11	Accused first appeared in Nasinu Magistrate Court on present rape charge. Remanded in custody.
5.10.11	Second appearance in Nasinu Magistrate Court. Transferred to High Court for trial.
19.10.11	First appeared in High Court before Justice Temo. Right to Counsel given to Accused. No money to hire private counsel. Will apply for Legal Aid. If Legal Aid is refused, he will represent himself.
9.12.11	Information and disclosures filed and served. Accused confirmed receiving information and disclosures. Information put to accused. Pleads not guilty.
27.1.12	Accused awaiting Legal Aid application result.
24.2.12	Accused's Legal Aid Application was refused. He still wants a counsel. Case transferred to Justice Madigan.
9.3.12	Accused said he will get private counsel. Given time to find lawyer. Accused still remanded in custody.
16.7.12	Accused still has not found a lawyer, despite reviews on 3rd April, 25th April and 22nd June 2012.
21.9.12	Accused's Legal Aid approved.
3.10.12	Defence Counsel not objecting to admissibility of accused's caution interview statements.
27.11.12	Accused withdraws instruction from his Legal Aid counsel. Accused given time to find counsel. Accused still remanded in custody.
18.1.13	Naipote Vere appears as Accused's Counsel. He applies to withdraw as Accused's Counsel. Leave granted.
31.1.13	Accused said he want to reapply for Legal Aid. Time given to him to do so.

14.3.13	Accused's Legal Aid application not sorted out. Further time given for Legal Aid application.
28.3.13	Accused still awaiting Legal Aid application result.
18.4.13	Legal Aid Application approved. Mr. J. Savou appointed as Legal Aid Counsel. Counsel asks for fresh disclosures.
8.5.13	Court indicated trial date to be set. Defence asks for fresh disclosures. Prosecution said they will provide the same.
17.5.13	17th to 21st Trial dates not suitable to accused. Justice Madigan transfers case back to Justice Temo. Accused still remanded in custody.
21.5.13	Case comes before Justice Temo. Defence Counsel indicated they can go to trial on the first week of June 2013. Prosecution agree. Trial set from 3rd to 7th June 2013. Adjourned to 31.5.13 for Pre Trial Conference.
31.5.13	Defence indicated to court they are applying to court to recuse itself. Court directs defence to file notice of motion and affidavit in support and copies to be served on DPP before trial starts on 3.6.13. DPP to reply to the same. Defence files papers at 3.20pm.
3.6.13	Court receives prosecution's affidavit in reply and their Legal submissions. Court hears the parties. Then it dismissed the application and said it would give its written reasons later.
3.6.13	Trial proper starts. Assessors called, sworn and are seated. Information put to accused. Pleads Not Guilty. State witnesses called.

3. On 31st May, 2013, the applicant (accused) asked the court to recuse itself from presiding on the case, on the ground of bias. His grounds were itemized in his affidavit, which I reproduce below:

"...2 IN 2008 I was presented in another matter before Honourable Justice Salesi Temo whilst he was presiding as Resident Magistrate at Nasinu Magistrate Court.

3 I was convicted for shop breaking, entering and larceny on 30th July 2008 and sentenced to 4 years after a trial.

4 ON 11th June 2010 I was called before the Fiji Court of Appeal when I appealed the above-mentioned conviction through the High Court which ultimately ended with the Fiji Court of Appeal.

5 THE Honourable Justice Temo had sat in on the appeal with Justice Goundar and Justice Calanchini however he was excused upon my request.

6 IN the said appeal my sentence was reduced after appeal was heard from four (4) years to two and half (2 ½) years.

7 IN this matter the learned Honourable Justice Temo, the victim and I hail from the same island of Lakeba in Lau. Not only are our villages in close proximity but also that we are all related.

8 HIS Lordship is well aware of my background in the criminal justice system whilst he was a Magistrate which I feel may prejudice me if my matter is heard by him.

9 IN this matter when I appeared on 21st May 2013 for the first time after my matter was transferred by the Honourable Justice Madigan, a trial date was hastily set to begin on the first week of June 2013 which was only 21 days away.

10 THE mention date given was 31st May 2013 wherein it was listed for PTC, however since I am now legally represented the requirements for proposed agreed facts should have been offered but it was not.

11 IN court today (31st May 2013) the State stated that they would be calling eight (8) witnesses, however confirmation on who exactly will be called is not known since neither my counsel nor I have been given a list of witnesses that the State intends to call.

12 I feel since the trial date was rushed into and in light of paragraphs 9, 10 and 11 above-herein I verily believe I shall be prejudiced in preparing/presenting my Defence, hence I may be denied a fair trial**..."**

4. The State replied with an affidavit from the police investigating officer, Mr. Alvin Kumar, on 3rd June 2013. It also filed a written submission. I have carefully read and considered both parties affidavits and submissions.

5. On the law on the disqualification of a judge in presiding over a criminal matter on the ground of bias, I agree with His Lordship Mr. Justice Daniel Goundar, when His Lordship said the following in **Mahendra Pal Chaudhary v The State**, Criminal Miscellaneous Case No. HAM 160 of 2010, High Court, Suva:

"...[7] In Canada, the reasonable apprehension of bias test is well established. In ***Wewaykum Indian Band v Canada****, 2003 SCC 45 (CanLII), the Canadian Supreme Court held:*

> "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. A judge's impartiality is presumed and a party arguing for disqualification must establish that the circumstances justify a finding that the judge must be disqualified. 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 that it is more likely than not that the judge, whether consciously or unconsciously, would not decide fairly?"

[8] In ***Liteky v United States*** 510 US 540 (1994) the United States Supreme Court endorsed the apprehension of bias test for federal law purposes and said:

> "Disqualification is required if an objective observer would entertain reasonable questions about the judge's impartiality. If a judge's attitude or state of mind leads a detached observer to conclude that a fair and impartial hearing is unlikely, the judge must be disqualified".

[9] In Fiji, the Supreme Court in ***Amina Koya v State*** [1998] FJSC 2, confirmed its agreement with the view stated by the New Zealand Court of Appeal in ***Auckland Casino Ltd. v. Casino Control Authority*** *[1995]* 1 NZLR 142, that:

> "There was little if any difference between the Australian test of whether a fair-minded observer might reasonably apprehend or suspect that the judge had prejudged and the English test of whether there is a real danger or real likelihood, in the sense of possibility of bias".

[10] More recently in ***Muir v Commissioner of Inland Revenue and Another*** *[2007] NZCA* 334 (7 August 2007) the New Zealand Court of Appeal reviewed the case authorities on apprehension of bias test in common law jurisdictions and said (p12):

> "In our view, the correct enquiry is a two stage one. First, it 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. This factual inquiry should be rigorous, in the sense that complainants cannot lightly throw the "bias" ball in the air. The second inquiry is to then 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 emphasizes to the challenged judge that a belief in her own purity will not do; she must consider how others would view her conduct..." (pages 2 to 3).

6. In applying the two stage test mentioned in **Muir v Commissioner of Inland Revenue & Another** (supra), which was also applied by the Fiji Court of Appeal in **Mahendra Motibhai Patel & Tevita Peni Mau v FICAC**, Criminal Appeal No. AAU 0039 of 2011 & AAU 0040 of 2011, to the facts of this case, I will separate the applicant's complaint into three categories:

(i) Grounds Nos 2, 3, 4, 5, 6 and 8, as mentioned in paragraphs 3 hereof;

(ii) Ground No. 7, as mentioned in paragraph 3 hereof;

(iii) Grounds Nos. 9, 10, 11 and 12, as mentioned in paragraph 3 hereof.

7. First, I will deal with "the actual circumstances which have a direct bearing on a suggestion that I was or may be seen to be biased". I will now deal with Grounds Nos, 2, 3, 4, 5, 6 and 8 of the applicant's complaint (category 1). I recalled I had presided over the applicant's case in the Nasinu Magistrate Court, as a Resident Magistrate, in a "shop breaking, entering and larceny case", possibly in 2008. I don't recall the actual sentence, but in any event, the matter went through the normal appeal process through the High Court and onto the Court of Appeal, possibly in 2010. I was assigned to sit in the Court of Appeal panel; however, I asked to be excused since I decided the matter, at the Magistrate Court level. This is law since a judge cannot sit as an appellate judge in a matter he or she previously decided. It is not true for the applicant to say that I stood down as a result of his request. I recalled forewarning the other panel judges of my intention to stand down, given the above.

8. In any event, on the above matter, I entirely agree with the observations made by the then Chief Justice, His Lordship, Mr Justice Sir Clifford Grant in **Taniela Veitata vs Reginam**, Fiji Law Report,

Volume 23, 1977, page 294, when an accused repeatedly made a recusal application against the trial Magistrate. His Lordship said, **"...That the trial Magistrate had heard a previous charge against the appellant of contravening the Trade Disputes Act in no way debarred him from proceeding with this trial, nor did the fact that he was aware of the appellant's record; and the fact that he knew an appeal was pending in respect of the first trial is neither here nor there. It has been held (in Scotland) that where a judge hears a second trial, even if a number of witnesses are the same as in the first trial at which he made up his mind about their credibility, there is no oppression so long as he deals with each case on its own merits (*Stirling v. Herron (1976)* S. L. T. (Notes) 2). And it is long established law that "a judge is in a very different position to a juryman. Though in no sense superhuman, he has by his training no difficulty in putting out of his mind matters which are not evidence in the case. This, indeed, happens daily to judges on assize" (per Lord Parker, C.J. in *R. v Duffy (1960)* 3 W.L.R. 320 at 325). It also happens, although not necessarily daily, to the Resident Magistrates of Fiji, and it is common knowledge that they are professional Magistrates. As a consequence of the very wide criminal, and civil, jurisdiction of the Fiji Resident Magistrates, it is a condition precedent to appointment that they have been admitted as barristers or solicitors in England, Northern Ireland or the Republic of Ireland, or as advocates or law agents in Scotland, or as barristers or solicitors in Australia or New Zealand; and that they have had not less than five years post-admission experience..."** In the proposed constitution of Fiji, you must have held high judicial office or have practised for more than 15 years to be appointed a judge, and/or 10 years to be appointed a Magistrate.

9. On Ground 7 (Category 2) of the applicant's complaint, I say as follows. It is true that I come from Tubou Village, on Lakeba Island, in the Lau Group. However, to the best of my knowledge and belief, I do not personally know and/or are related to either the accused or the complainant. I do not know either parties to this proceeding. For the record, in the nature of my job as a former Resident Magistrate and now a High Court Judge of the Republic of Fiji, I have dealt with countless people from Lakeba and Lau, and have dealt with them according to law. If they have violated the criminal law and deserved a prison sentence, I have previously sentenced them accordingly. In my view, the applicant cannot use ground 7, as a means to "judge shop" in the High Court of Fiji.

Whether or not, I come from Lau, Viti Levu or Vanua Levu, the applicant will be dealt with in accordance with the law.

10. On Grounds Nos. 9, 10, 11 and 12 (Category 3) of the applicant's complaint, I say as follows. As shown in the chronology in paragraph 2 hereof, the applicant had been waiting for trial since 19th October, 2011, that is, 1 year 7 months 14 days ago. As a matter of law, the applicant was entitled to trial within a reasonable time. In my view, 1 year 7 months 14 days was enough time for both the prosecution and defence to prepare for trial. All the judges' trial schedules are busy in Suva. In my case, my trial schedules are full until the third week of July 2014. I have six weeks left for emergency cases only. I was able to take on the applicant's case, because the Chinese murder case Suva High Court HAC 139 of 2012, which was fixed for 8 weeks trial from 6th May to 28th June, 2013, was resolved with a guilty plea on 6th May, 2013. Consequently, I had 7 weeks free from 13th May to 28th June, 2013, which had to be filled in with pending cases. Three rape cases were re-scheduled for the above free weeks, that is, HAC 238 of 2011, HAC 159 of 2012 and the applicant's case. The trial was not rushed, as claimed by the applicant. In fact, he had to be tried to comply with "his right to trial within a reasonable time".

11. If the applicant had not prepared himself within the 1 year 7 months 14 days given to him, he had no-one to blame, but himself. Looking at the chronology on paragraph 2 hereof, he spent approximately 1 ½ year sorting out the issue concerning his counsel. He was given his disclosures on 9th December, 2011, but lost the same, and was re-issued with a new set on 8th May, 2013. In fact, he had been aware of the prosecution's case when he was given his disclosures on 9th December, 2011. Consequently, he had ample time to prepare himself. In my view, complaining about a "rushed trial" was a lame excuse designed to further prolong the case, and deliberately frustrate the course of justice.

12. Looking at the applicant's total grounds of complaint as itemized in paragraph 3 hereof, and applying stage one of the enquiry, as directed in **Muir v Commissioner of Inland Revenue and Another** (supra), the factual circumstance that were alleged by the applicant to have existed, and which would have a direct bearing on whether or not I'm biased, does not exist. The matter therefore cannot proceed to the second stage of the enquiry. Given the above, I dismissed the

applicant's application on 3rd June, 2013, and said I would give my reasons later. The above are my written reasons.

Salesi Temo
Judge

Solicitor for Applicant : Legal Aid Commission, Suva.
Solicitor for Respondent : Office of the Director of Public Prosecution, Suva.