IN THE HIGH COURT OF FIJI
AT SUVA
CRIMINAL JURISDICTION

HAM 216 of 2013
(HAC 137 of 2010)

BETWEEN : **MAHENDRA PAL CHAUDHRY**

AND : **THE STATE**

BEFORE : **HON. MR. JUSTICE PAUL MADIGAN**

Counsel : Mr. P. Bodor Q.C. with Mr. M. Hutchings for the applicant
Mr. C. Grossman S.C, Q.C. with Ms. E. Yang & Mr. M. Korovou for the State

Dates of hearing : 31st March 2014
Date of Ruling : 31st March 2014

RULING

(Recusal)

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1. The applicant applies for me to recuse myself from presiding over his imminent trial on the basis that I have made findings of fact which would lead a fair minded observer to perceive that he would not be able to receive a fair trial

2. This is the fourth application for recusal made by the applicant in these proceedings : one having been made to Goundar J, and three before me.

3. The grounds of the application in this instance are that, in an interlocutory ruling I made on 6 March 2014, I said:

"no matter how the applicant may regard his funds in Australia and no matter what their provenance the fact is that they represent foreign exchange held by a Fijian resident and as such are caught by the terms of the Act".

"Mr. Reynold's Q.C. submissions were well researched, novel and ingenious but unfortunately they are misconceived. The funds being held abroad, the legislation provides the "nexus" and this limb of the applicant's argument has no merit".

4. The applicant submits that I have prejudged matters of fact which are for the assessors to decide thereby leading to the perception of bias.

5. In the previous three applications where the *"bias ball has been tossed in the air"* I have dealt in some detail with the law involved and counsel for the applicant appears to be well acquainted with the legal principles involved. (see HAM 181.2013). I refer to my earlier ruling in stating that the Court of Appeal has said (in **Pita Tokoniyaroi &**

another AAU 0043/2005) that the test is to be in the eyes of the *"reasonable and informed observer"*.

6. In all the interlocutory applications made in these proceedings and there have been many, there has never been ever a suggestion that there were no funds in Australia or that the applicant is not a resident in Fiji. Every application has been predicated on the fact that he holds monies abroad in Australia and New Zealand and the applications have been whether those funds come within the purview of the Exchange Control Act *("ECA")* or not. In the latest application (HAM 239/13), the applicant's counsel Mr. Reynolds Q.C. adopted as the main thrust of his argument that those funds had no nexus with Fiji or with Fijian currency and that therefore the ECA provisions are inapplicable to him and his circumstances.

7. In submissions made to the Court dated 1st November 2013 signed by the solicitor for the applicant, Mr. Anand Singh, paragraphs 13 & 14 provide background facts to an application to quash the information filed against the applicant. Those paragraphs read:

"13. Those funds were collected between 2000 and 2002 in New Delhi and other parts of India, including non resident Indians (sic) to assist the applicant and his family members to establish residence in another country following the political upheaval in Fiji in May 2000.

14. The donated funds, totaling approximately AUD 1.5 million were deposited by the Indian Consul General in Sydney into the personal bank account held by the applicant in Australia. The Applicant retained the funds in Australia. In 2004 he disclosed the income generated from interest on the funds, amending his tax returns and

paid outstanding taxes to the Fiji Islands Revenue and Customs Authority".

8. Furthermore, the applicant himself swore an affidavit on 10 February 2011 in support of a stay application. In that affidavit he repeated the factual background referred to in paragraph 6 hereof and from paragraph 27 to 33 of his affidavit, the applicant personally deposed to the fact that he received those funds and kept them in Australia.

9. It is hardly surprising that any Judge having heard these applications and read the documents relied upon would come to the incontrovertible conclusion that the applicant held funds in Australia.

10. There is no evidence before the Court that the funds are held in Fijian dollar accounts and it has always been the position of the applicant that because they are not in Fijian dollars, they are no business of the Reserve Bank of Fiji.

11. As the then counsel for the applicant said at the hearing of HAM 236/239 of 2013 that it will be a matter of construction of statute law whether the funds held are caught by the ECA, and the *"nexus"* question is therefore a matter of fact and law to be decided by the assessors after direction from the Judge.

12. How then would the reasonable and informed observer regard these proceedings and the findings made by this Court? To have found that there are funds abroad and the owner of the funds is resident in Fiji are indisputable facts given the materials that have been placed before the Court. That informed observer would also understand that a Judge in his different roles is able to put such found facts to one side when it comes to trial if those facts are to become issues at trial.

13. In the case of **Balaggan v. State** (HAM 31 of 2011) Marshall J.A. said in the Court of Appeal:

"Findings of fact (on bail applications) are necessarily prima facie findings of a tentative nature on limited material. The common law expects Judges, who are bound by their judicial oath, to adjudicate on the facts properly and fairly on trial paying no heed to whatever tentative prima facie findings they may have been required to make upon the hearing of an earlier ...application in the same matter"

In **Chaudhry v. State** (HAM 160.2010) Goundar J. said (at para 26):

"In criminal case Judges have to make pre-trial rulings and decisions during the trial. Not all rulings that a judge makes may be favourable to the accused. The mere fact that a Judge has ruled against the interest of an accused is not a ground for disqualification. To do so will set a dangerous precedent because as soon as a Judge makes an unfavourable decision, he or she is disqualified from trying the accused and no case will even be heard. The result will be contrary to the public interest to see all those who are charged with criminal offences are tried in accordance with the law".

14. I endorse those dicta and apply them to the present application.

15. The issue of whether funds are caught by the ECA will be an issue of fact and law to be decided by the assessors and the Court on the evidence and on directions of law in due course.

16. The application is refused.

17. This application is frivolous and the third application to me for recusal (one already having been made to Goundar J). None of the applications has had any merit and as a result, I ask counsel to address me on costs.

18. Question of costs reserved.

P.K. Madigan
Judge

At Suva
31 March 2014