IN THE HIGH COURT OF FIJI
AT SUVA

ANTI CORRUPTION DIVISION

CRIMINAL CASE NO. HACDM 007 of 2022S

RATU SULIANO MATANITOBUA

vs

FICAC

Counsels:	***Mr. Vosarogo F with***	***-***	***for Applicant***
	Ms. Qica J and Ms. Tosokiwai B		
	Mr. Aslam R and Mr. Nand A	***-***	***for Respondent***

Date of Hearing: 16.05.22
Date of Ruling: 17.05.22

RECUSAL RULING

Introduction

1. The Applicant in this matter is charged with one Count of submitting **false information to a public servant,** Contrary to **Section 201(a)** of the **Crimes Act No. 44 of 2009** and one Count of **obtaining financial advantage,** Contrary to **Section 326(i)** of the **Crimes Act No. 44 of 2009.**

2. The trial against the Applicant was due to commence yesterday, but the learned counsel for the Applicant (Accused) has filed this Notice of Motion seeking following orders from this Court;

   a) That the learned Judge recuse himself from adjudicating and hearing any further in the case of HACD 04/2022.
   b) That the learned Judge remit the case to His Lordship the Chief Justice to allocate this case for hearing and adjudication by another Judge of the Criminal Division of the High Court of Fiji.
   c) Any other orders this Court deem fit and proper in the circumstances.

3. Further, as grounds for an order prayed under 2 (a) above, the learned counsel for the Applicants state, as below:

   i) Apparent or ostensible bias by reason of pre-judgement of offending, witnesses and issues;

ii) Perception of fair trial required under the Constitution not being possible due to i) above, having dealt with a case that is of similar nature, similar offending, similar prescription of defendants and possibly, similar witnesses.

Position of the Applicant

4. In reply to the Affidavit filed by the Prosecution, by an additional Affidavit dated 12th May 2022, the Applicant states as follows:
    - That seven members of Parliament are charged by the FICAC in a series of similar offences, where the witnesses and documents are similar.
    - Same witnesses who were summoned from statutory institutions to give evidence in Nikolau Nawaikula's case will be summoned to give evidence in this matter.
    - As per the disclosures, this case will significantly base on circumstantial evidence, as in Nikolau Nawaikula's case.
    - The case theory and facts used in this case will be very much similar to what was used in Nikolau Nawaikula's case.
    - As a result of the above, in the mind of a reasonable observer, arises an apprehension of perceived biasness when I hears this case, as well.

Position of the Prosecution

5. In objecting to this application on behalf of FICAC, Mr. Vasiti Matadigo, has filed an affidavit in Court dated 11th May 2022 and stated the following:
    - The case theory that will be used by the Prosecution in this case is different to the case theory used in Nikolau Nawaikula's case.
    - Though the Prosecution relied on circumstantial evidence in Nikolau Nawaikula's case, Prosecution will depend on direct evidence in this matter.
    - Nature of the witnesses intended to be summoned in this matter are different from the witnesses summoned in Nikolau Nawaikula's matter and they are not the same witnesses.
    - In this matter, since the Accused had been residing in a rental property within 30 KM to the Parliament, Court will need to consider an entirely different approach in determining the guilt of the Accused.

6. In considering the submissions made on behalf of the Applicant, on the grounds of apparent or ostensible biasness of myself hearing this matter on having heard a similar matter and having made a determination, I wish to inform all the parties in this matter that I am mindful of the need to be devoid of any biasness in adjudicating matters of this nature as it remains as the keel of our common law judicial system. For this end, as it was famously pronounced by the **Lord Chief Justice** of England and Wales, **Lord Hewart,** in the case of ***The King v. Sussex Justices***[1]***:***

> *"... 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"*

7. Recognition of this position in our jurisdiction is clearly demonstrated by the pronouncement made by his **Lordship, Justice Goundar**, in the case of ***Chaudhry v. State***[2], as below:

[1] [1924] 1 KB 256
[2] [2010] FJHC 531

*"The right to a trial by an independent and impartial court is universally recognized and is reflected in **Article 14(1)** of **the International Covenant on Civil and Political Rights**. It is impartiality that gives legitimacy to the decisions of the courts. Public confidence in the system of administration of justice is gained by independent and impartial courts. Based on these principles, the common law provides for grounds for disqualification of a judge so that both the public perception of impartiality and public confidence in the system of justice is maintained."*

8. In this light, it is pertinent for myself to ascertain whether there could be an apparent or ostensible biasness, if I proceed to hear this matter as claimed by the Applicant. Upon applying the judicially accepted tests in this regard, if a biasness of whatever nature is noticeable, I should recuse from hearing this mater any further in the interest of justice.

9. In addressing the concern of possible biasness of the Applicant, I need to emphasise that as categorically mentioned and echoed throughout the Judgement in the case of **FICAC v. Nikolau Nawaikula**, I had to consider the facts and circumstances applicable to that matter very subjectively in determining the guilt of the accused. In that matter, though there was a need to provide a definition to the word "Permanent Residency" in line with Common Law judicial precedence in the absence of a definition in Fijian judicial literature, facts pertaining to the particular case was suggested to be applied subjectively. However, in view of the contention of the Applicant, I need to identify a judicially approved test in Common Law jurisdictions that could be utilised in making the determination in relation to this application of apparent biasness.

10. As a starting point, I intend to refer to the case of ***R v Gough***[3]**,** where in formulating an appropriate test to consider "apparent bias" **Lord Goff of Chieveley** of the House of Lords of England and Wales, pronounced, as below:

"I think it possible, and desirable, that the same test should be applicable in all cases of apparent bias, whether concerned with justices or members of other inferior tribunals, or with jurors, or with arbitrators. ……. Furthermore, I think it unnecessary, in formulating the appropriate test, to require that the court should look at the matter through the eyes of a reasonable man, because the court in cases such as these personifies the reasonable man; and in any event the court has first to ascertain the relevant circumstances from the available evidence, knowledge of which would not necessarily be available to an observer in court at the relevant time. Finally, for the avoidance of doubt, I prefer to state the test in terms of real danger rather than real likelihood, to ensure that the court is thinking in terms of possibility rather than probability of bias."

11. The above test for "apparent bias" has been approved with little modification by the full-bench of House of Lords of United Kingdom in the case of ***Porter v Magill***[4]. In this regard, **Lord Hope of Craighead** has stated, as below**:**

"*I respectfully suggest that your Lordships should now approve the modest adjustment of the test in **R v Gough** ..... It expresses in clear and simple language a test which is in harmony with the objective test which the Strasbourg court applies when it is considering whether the circumstances give rise to a reasonable apprehension of bias……. I would however delete from it the reference*

[3] [1993] 2 All ER 724
[4] [2001] UKHL 67

to "a real danger". Those words no longer serve a useful purpose here, and they are not used in the jurisprudence of the Strasbourg court. ***The question is whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased****."*

12. In taking credence and guidance from the developments that took place in the United Kingdom in relation to the test for "apparent bias", especially in the case of ***Porter v Magill***[5]**,** the Court of Appeal of New Zealand in ***Muir v Commissioner of Inland Revenue***[6] expounded a two-step inquiry in order to determine the apprehension of bias of a judicial officer, where it was held that:

> *"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 emphasised to the challenged judge that a belief in her own purity will not do, she must consider how others would view her conduct."*

13. In this matter, in the same tone of sentiment, **Hammond J** has espoused the following:

> *"We emphasize 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 perceived as operating in a sanitized vacuum."*

14. Coming to our jurisdiction, in the case of ***Seta Sanjana Ram v The State***[7], **His Lordship Justice Rajasinghe** elaborates the position adopted in relation to "apprehension of bias" in Fiji, as below:

> *"The Courts in Fiji have found the approaches in* ***Porter v Magill*** *and* ***Muir v Commissioner of Inland*** *more preferable in order to determine the issue of apprehension of bias (vide Mahendra Pal Chaudhry v The State (2010) FJHC 531 HAM160.2010 (19 November 2010), Mahendra Mothibhai Patel and another v The Fiji Independent Commission Against Corruption (Crim App No AAU 0039 of 2011), State v Citizens Constitutional Forum Ltd, ex parte Attorney-General [(2013] FJHC 220; HBC195.2012 (3 May 2013) and Chief Registrar v Khan [(2016] FJSC 14; CBV0011.2014 (22 April 2016)"*

15. In this matter, **Justice Rajasinghe** further elaborates, *"accordingly, the Court has to first ascertain the actual circumstances that directly impact the suggestions that the Judge was or may be seen to be biased. Then the Court has to determine whether such circumstances as established might lead a fair-minded, informed lay observer to reasonably apprehend that the Judge might not bring an impartial mind to the resolution of the matter."*

16. When considering the first step enunciated above in relation to the current matter, as per the submissions made by the counsel for the Applicant, I can identify the following grounds:

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[5] Supra, 4
[6] [2007] 3 NZLR 495 at 508
[7] HAM 38 0f 2021

a) The charges arise consequent to the Applicant and Nikolau Nawaikula being Parliamentarians and both of them submitting claims, thus the witnesses in Nawaikula's matter and the Applicant's matter will be the same.
b) Since the Court has already provided a definition to "Permeant Residence", applicant will not have a chance to challenge that definition.
c) Elements of Nawaikula's case and the Applicant case will be the same, and as the judge, I would have pre-judged them.
d) Scheme of prosecution will be the same.
e) Factual and evidential value of witnesses in both cases will be the same.
f) Court would have already pre-determined the credibility of witnesses.

Now I shall address these concerns one by one to ascertain whether there is any justification in the apparent biasness if I hear this trial, as claimed by the Applicant.

17. In relation to **a)** though the witnesses who would give evidence representing the Parliament in both matters could be the same, their evidence would be in relation to their interaction with the individual accused and the suspected modus operandi of that particular accused. In fact, as stated by witnesses representing the Parliament, Mr. Nikolau Nawaikula was not suspected in the first instance. Applicant will have the right to cross-examine these witnesses and challenge their evidence, where there is no danger of the Court adopting the evidence led in the previous case. Thus this contention is without merit.

18. With regard to **b)**, I have formulated a definition for the word "Permanent Residency" in line with Common Law authorities, since there was no definition in the Fijian judicial literature. However, in relation to this definition I have categorically mentioned that it is only a proposed definition and the facts of every case needs to be applied subjectively in reaching the final determination. Since circumstances in relation to residency differs from one person to another, this definition will be applied subjectively and will be open to any challenge. Therefore, this contention lacks cogent justification.

19. By **c)**, Applicant claims that the elements of the offence he is charged with and the elements of Nikolau Nawaikula's case are the same. Surely, if you are charged with the same offence in a particular jurisdiction, you have to expect the elements to be the same no matter if you are a Fijian or a Russian. Thus, this claim is devoid of any merit.

20. In **d)** Applicant claims that the scheme of the prosecution would be the same in his matter as the already adjudicated matter. In relation to this submission, it needs to be mentioned that the scheme of the prosecution is entirely up to the prosecution and it is not a matter for the Court of the Applicant to formulate. Since this trial has not yet commenced, only the prosecution is aware of their scheme and nobody else.

21. In relation to factual and evidential value of the witnesses being the same, as claimed by **e)**, I find that it is contingent on the interactions the Applicant had with the witnesses. Apart from the few official witnesses representing Parliament, I am unaware of the evidence expected from other witnesses to be lead in this case. In Nikolau Nawaikula's case, prosecution lead 4 witnesses from the Parliament and 15 other witnesses, which I had to consider in coming to the final determination. Thus this claim lacks cogent reasoning.

22. With regard to the credibility of the witnesses, as claimed in **f)** above, as the counsel of the Applicant is very much aware with his years of practice in the legal profession, the credibility of a witness can be challenged and displaced by proper cross-examination on behalf of the Applicant. As a judicial officer, I evaluate every witness as per the demeanor and deportment and veracity and tenacity of the witness in Court on that particular day and nothing else.

23. On the above analysis, there does not appear to be an iota of justification or cogent reasoning of the claim made by the Applicant of apparent biasness if I hear this matter. Therefore, as per the above clarification, there are no circumstances in this matter that directly impact the suggestions that I may be seen to be bias, if I hear this case. Therefore, this matter is devoid of circumstances that could lead a fair-minded, informed lay observer to reasonably apprehend that I might not bring an impartial mind to the resolution of the matter

24. This position was compendiously explained in the Canadian Supreme Court judgement in the case of ***Wewaykum Indian Band v Canada***[8]**,** which was brought to our attention by **His Lordship Justice Goundar** in the case of ***Chaudry v State***[9], as below:

> *"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?"*

25. In this light, when making any allegation in relation to the existing apparatus in our country, the Applicant has to be mindful that such an allegation should not be a passing adjunct, since we live in a democracy, where independent bodies are in existence for the Executive, Legislature and the Judiciary with the necessary checks and balances for the proper operation in place. I have become a judge in the **Republic of Fiji** after taking an oath before His Excellency the President of Fiji to function in accordance with the **Constitution** of **the Republic of Fiji**, where I am bound by **Section 97 (2)** of the **Constitution**, which reads as follows:

> *"The courts and all judicial officers are independent of the legislative and executive branches of Government, and are subject only to this Constitution and the law, which they must apply without fear, favour or prejudice."*

26. Therefore, when I am entrusted with a responsibility under the Constitution, it will be shunning from my professional duties, if I denounce of my responsibility on a mere suspicion of bias in the absence of cogent reasons. This position was recognized by **His Lordship Kamal Kumar** as a **High Court Judge (as he was then**) in the case of ***Padayachi & Reddy v Gounder & Others,***[10] where he made reference to a pronouncement in the case of ***Livesey v New South Wales Bar Association***[11], as below:

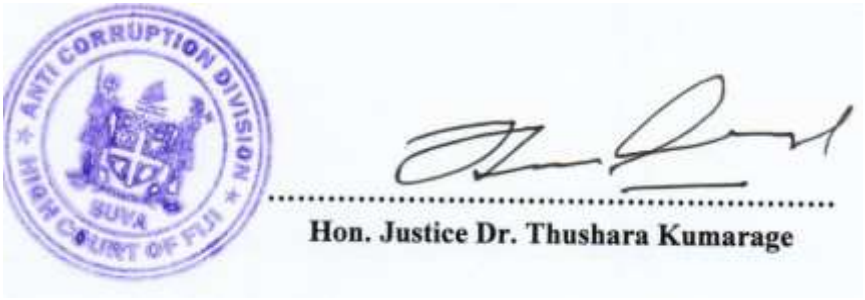
> *"In a case such as the present where there is no allegation of actual bias, the question whether a judge who is confident of his own ability to determine the case before him fairly and impartially on the evidence should refrain from sitting because of a suggestion that the views which he has expressed in his judgment in some previous cases may result in an appearance of pre-judgment can be a difficult one involving matters "of degree and particular circumstances may strike different minds in different ways" (per Ackin J in Shar (1980) 55 FLR page 16) If a Judge at first instance considers that there is any real possibility that his participation in a case*

[8] [2003] SSC 45 (CanLII)
[9] Supra, 2
[10] [2016] HBC 228
[11] [1983] 151 CLR 288

might lead to a reasonable apprehension of pre-judgment or bias, he should of course refrain from sitting. On the other hand, it would be an abdication of judicial function and an encouragement of procedural abuse for a Judge to adopt the approach that he should automatically disqualify himself whenever he was requested by one party so to do on the grounds of a possible appearance of one pre-judgment or bias, regardless of whether the other party desired that the matter be dealt with by him as the judge to whom the hearing of the case had been entrusted by the ordinary procedures and practice of the particular Court."

27. In the current matter, in the first instance, I do not consider that there is any real possibility that my adjudication will lead to a reasonable apprehension of pre-judgement or bias. Therefore, in view of the above analysis of facts and circumstances applicable to this case, I refuse and dismiss this application for recusal.

28. Since this is an interim order, you could appeal to the Court of Appeal of Fiji at any time.



Hon. Justice Dr. Thushara Kumarage

At Suva
Tuesday 17th of May 2022