ANTHONY FREDERICK STEPHENS

v.

THE ATTORNEY GENERAL

[HIGH COURT, 1998 (Scott J) 13 May]

Civil Jurisdiction

Courts- bias- grounds for disqualification of tribunal.

Application was made to the Judge to disqualify himself on the ground of bias. After referring to the governing principles the High Court examined the relevant facts and dismissed the application.

Cases cited:

Amina Koya v. The State (CAV 0002/97)
Arab Monetary Fund v. Hashim & Others (No. 8) (The Times 4 May 1993)
Auckland Casino Ltd v. Casino Control Authority [1995] 1 NZLR 142
Grassby v. The Queen [1989] 168 CLR 1
Livesey v. NSW Bar Association [1983] 151 CLR 288
R v. Gough [1993] AC 646
R v. Russell ex parte Reid (1984) 35 SASR
R v. Simpson ex parte Morrison (1984) 154 CLR 101

Interlocutory application in the High Court.

K. Vuetaki for the Plaintiff
D. Singh for the Defendant

Scott J:

These two actions are quite distinct and have not been consolidated; there is however in each a similar application and since similar grounds are advanced in support and similar principles are raised it is convenient to deliver one Decision dealing with both applications which are that I should disqualify myself from presiding further.

The law relating to bias has just very recently been considered by the Supreme Court of Fiji in Amina Koya v. The State (CAV 0002/97). The Court pointed out that although the House of Lords and the New Zealand Court of Appeal on the one hand applied "the real likelihood" test while the High Court of Australia on the other applied the "reasonable suspicion" test there was very little practical difference between the two approaches: "this is because there is little if any difference between asking whether a reasonable and informed person would consider there was a real danger of bias and asking whether a reasonable and informed observer would reasonably apprehend or suspect

bias" (op cit p. 13).

The Australian test:

> "has been clearly laid down. It is whether in all the circumstances the parties or the public might entertain a *reasonable* apprehension that the Judge might not bring an impartial and unprejudiced mind to the resolution of the matter before him ... If so, then the Judge ought not to proceed to hear the matter"..... (Grassby v. The Queen [1989] 168 CLR 1, 20)(emphasis added)

The English and New Zealand test which is to be found in R v. Gough [1993] AC 646 (approved in Auckland Casino Ltd v. Casino Control Authority [1995] 1 NZLR 142) is (the court having ascertained the relevant circumstances):

> "Whether there is a real danger of injustice having occurred as a result of the alleged bias"
>
> (See Gough 670 E - F; 671 C).

This test:

> ".. Should be applicable in all cases of apparent bias, whether concerned with justices (sic) or members of other inferior tribunals, or with jurors or with arbitrators"
>
> (Gough 670C).

The two actions now before me have reached different stages. The first, 34/89, was commenced by writ issued on 26 January 1989. On 29 July 1997 at the instance of the Defendant I dismissed it for want of prosecution. On 3 April 1998 the Plaintiff filed a motion, which has yet to be heard, seeking to have the August 1997 Order set aside and to have the action reinstated. The first effect of the present application on the action, if granted, would be to transfer the hearing of the April 1998 motion to another Judge.

The second action 134/91, was commenced by Writ on 22 February 1991. A summons issued by the defendant on 17 February 1997 seeks to have the action struck out for want of prosecution. The summons is yet to be heard.

Two affidavits were sworn by the Plaintiff in support of his applications. There are also two affidavits in support sworn by Anil Prasad, litigation clerk.

In the first action 34/89 the Plaintiff's affidavit refers to the fact that in 1986, when Director of Public Prosecutions, I appeared in the Fiji Court of Appeal to oppose an application by him for bail pending an appeal against his conviction entered and sentence of imprisonment imposed by the High Court (then known as the Supreme Court) following trial. This fact, the Plaintiff avers, taken together with my Judgment against him in another Civil Action 472/92 (the subject of unsuccessful appeals both to the Fiji Court of Appeal and to the Supreme Court - CBV 0002/96) and my striking out of 34/89

leaves him "not comfortable" with my continuing to handle the matter. He states that given the "insinuations" against him in the criminal matter and my Judgment in 472/92 he had "gone away ... with the feeling [that I] may prejudge this case if [I] were to continue with it". He adds that he had raised this matter of my previous appearance in the bail application before I had even begun to hear 472/92 but that his then Solicitors had refused to raise the objection as instructed.

In the second action 134/91 the Plaintiff's affidavit and the affidavit of Anil Prasad are in identical terms to those filed in action 34/89.

As has been seen the two overseas leading authorities and Amina Koya's case which sanctions the application of both tests by an appellate court do not explicitly deal with the form of test to be applied at first instance. Some further guidance may however be had from other authorities.

In R v. Simpson *ex parte* Morrison (1984) 154 CLR 101 Gibbs C.J. pointed out that the mere expression of the apprehension of bias does not establish that it is reasonably held; that is a matter which must be determined objectively.

In Livesey v. NSW Bar Association [1983] 151 CLR 288 at 294 the High Court of Australia expressed the view that:

> "It would be an abdication of judicial function and an encouragement to procedural abuse for a Judge to adopt the approach that he should automatically disqualify himself whenever he was requested by one party to do so on the grounds of a possible appearance of pre-judgment or bias, regardless of whether the other party desired the matter to be dealt with him as the Judge to whom the hearing of the matter had been entrusted by the ordinary procedures and practice of a particular court".

In R v. Russell *ex parte* Reid (1984) 35 SASR (the full report is not unfortunately available) it was held, according to the Australian Digest that:

> "Simply because a member of a small industrial Bar had identified himself in his professional duties as a barrister with the interests of a particular employer in a matter of industrial disputation does not provide reasonable grounds for apprehending that, on his appointment to judicial office in the Industrial Court, he would be unable to bring a fair and unprejudiced mind to the decision of matters involving the party for whom he has previously acted".

In a Circular addressed to all Judges in 1993 the Chief Justice of Fiji wrote:

> "Given the small size of our judiciary, disqualifications should, if at all possible be avoided and especially by a Judge who is already seized of a matter."

In Arab Monetary Fund v. Hashim & Others (No. 8) (The Times 4 May 1993) the English Court of Appeal emphasised that:

A

> "A client's instructions were never themselves sufficient to justify an application for the removal of a judge on the ground of bias or apparent bias. Such an application should only be made where counsel was satisfied that there was material on which it could properly be brought".

B In my opinion having applied what I find to be the relevant principles these two applications are without merit. Merely having once briefly appeared in an adjourned bail application for the Crown does not in my view give rise to a reasonable risk or apprehension of bias in civil proceeding heard 12 years later especially when it is appreciated that the fact that the Plaintiff is a convicted criminal awaiting two trials in the High Court for further alleged C serious offences is, in the small society that is Fiji, a matter of notoriety.

In action 472/92 my Judgment in proceedings begun by originating summons was, insofar at it depended on the acceptance of facts, based on facts which were not in dispute. My order for striking out of 34/89 was made after hearing submissions on the law and again after accepting facts which were D not in dispute. The application now pending to set aside that order does not involve the evaluation of any new factual matters in issue. The pending application in 134/89 will not involve the resolution of factual as opposed to legal issues. At no time, in other words, have I ever had cause to examine, question or doubt the Plaintiff's credibility as a witness. It is a pity that the Plaintiff does not understand that the duty of a High Court Judge is to E administer Civil Justice according to law and irrespective of a party's character.

Both applications fail and are dismissed.

It will have been seen from the above that three Civil Actions involving the Plaintiff have been allocated to me. One, 472/92 has been finally disposed of, one 34/89 has been substantially dealt with by me and indeed stands F dismissed. One, 134/91 has been dormant from April 1991 to February 1997. It has not been the subject of any judicial ruling other than the present. So far as possible and reasonable the Court aims to allocate multiple actions by one plaintiff to more than one Judge. Under cover of this Decision I will ask the Chief Registrar whether 134/91 can conveniently be reallocated.

G *(Applications dismissed.)*