POLICE v. VA'AFUSUAGA ERIKA

HIGH COURT. Apia. 1956. 13, 28, June. MARSACK C.J.

Prosecution for perjury in High Court - charge of perjury arising from proceedings before Land and Titles Court - President of Land and Titles Court also Chief Justice presiding in High Court - whether Chief Justice, as President, disqualified from hearing charge in High Court - whether there was "bias".

This was a prosecution for perjury arising out of proceedings before the Land and Titles Court. The Chief Justice is the only person who can preside over sittings of the Land and Titles Court and is also the only person with jurisdiction to try a charge of perjury. At the conclusion of the case for the prosecution, counsel for the accused submitted that the Chief Justice, as President of the Land and Titles Court, was disqualified from sitting in the High Court having made himself a party to the proceedings by associating himself with their institution.

Held: 1. That the submission was not supported by the facts.

R. v. Henley (1892) 1 Q.B. 504; R. v. Pwllheli Justices /1948/ 2 All E.R. 815 and R. v. Calman 2 J.R.N.S. Sc. 261 referred to.

2. That disqualification of a Justice in a case of this character must be based on bias.

R. v. Cheshire Licensing Justices (1906) 1 Q.B. 362; Franklin v. Minister of Town and Country Planning /1948/ A.C. 87; Brookes v. Rivers (1668) Hard. 503 and R. v. Camborne Justices /1954/ 2 All E.R. 850 referred to.

3. That there was no reasonable evidence of a real likelihood of bias; and that no reasonable man would have grounds for believing that in the High Court he would not receive a fair and impartial trial.

R. v. Camborne Justices followed:

Accused convicted.

Phillips, for accused.
Sub-Inspector Schmidt, for Police.

Cur. adv. vult.

MARSACK C.J.: At the conclusion of the case for the prosecution Mr Phillips asked that the proceedings be set aside on the ground that the Court was not properly constituted, in that I, as President of the Land and Titles Court had (to use the phrase employed in R. v. Henley (1892) 1 Q.B. 504 made myself a party to the proceedings by associating myself with their institution. Mr Phillips also referred to R. v. London County Council (1894) 71 L.T. 638 and to the old New Zealand case of R. v. Calman 2 J.R.N.S. Sc. 261.

In my view this application should have been made at the commencement of the proceedings, and I so informed Mr Phillips at the time. R. v. Byles ex parte Hollidge (1912) 77 J.P. 40 appears to be authority for the proposition that the Court will refuse to grant an order quashing a conviction on this ground if the applicant or his solicitor knew the position of the Justice concerned, and raised no objection to his sitting until after the merits of the case has been examined. I, however, intimated that I would consider counsel's application on its merits as if it had been made at the proper time. The point was reserved, and after the defence had been heard the

assessors unanimously found the accused guilty of perjury.

The facts are briefly these. At a sitting of the Land and Titles Court, which is a judicial proceeding, on the 19th March, 1956, evidence on oath was given by a woman named Taumaia concerning an assault alleged to have been committed on her by Va'afusuaga Erika; this was denied on oath by Va'afusuaga who further stated that the evidence of Taumaia on the subject was lies. The members of the Court - 3 Samoan Judges and a European assessor - suspected that one party or the other was committing perjury and that the case was a proper one for investigation by the Police. They recommended that I should see Inspector Philipp and ask him to investigate the matter. Accordingly at the conclusion of the case I sent for Inspector Philipp and told him of the sharp conflict of evidence between that given by Taumaia and that given by Va'afusuaga, and suggested that the matter was worthy of Police investigation. Although the names of both Taumaia and Va'afusuaga were mentioned in the course of my conversation with Inspector Philipp, as it was the evidence of these two persons which was in question, I gave no intimation to the Inspector that in my opinion either was guilty of perjury, and certainly gave nothing amounting to a direction or even a suggestion that there should be a prosecution. Once I had drawn his attention to the great conflict of evidence the question of enquiry, and possible prosecution of one or other witness, was a matter entirely for the discretion of the Police.

The Chief Judge of Western Samoa is the only person who can preside over the sittings of the Land and Titles Court, and he is also the only person in Western Samoa who normally has jurisdiction to try a charge of perjury. Although it is not required that a Court should be constituted with assessors to try a charge of perjury, it is my invariable practice to order assessors where the perjury complained of is alleged to have been committed at a hearing before the Land and Titles Court. The reason for this is to remove from the mind of the accused any feeling that I might pre-judge the matter because the evidence which forms the basis of the charge was given before me in another Court.

Referring to counsel's contention that I "made myself a party to the proceedings by associating myself with their institution", I do not think that this submission is well founded. In R. v. Henley (supra) a justice was a member of the Board of Conservators of a fishery district and was present at a meeting of the Board when a unanimous resolution was passed that proceedings should be taken against a named person for violation of certain provisions of the Salmon Fishery Act; and the same justice later sat as a member of the Court before which that person was prosecuted. The case is considered in R. v. Pwllheli Justices /1948/ 2 All E.R. 815 where Lord Goddard, C.J. indicates that the reason why the Court in Henley's case quashed the conviction was clearly that the justice had not only been present but he had also been a party to the resolution which directed the prosecution. In that case it could, I think, be said quite properly that the justice in question had "associated himself with the institution of the proceedings". In this present case that is not so; not only did I not direct the Inspector to prosecute Va'afusuaga, but I did not even suggest to him that a prosecution should be instituted against anyone. I merely reported that the matter was one which called for investigation; and it was entirely for the Police to say if any prosecution was to be brought, and, if so, against whom.

In Calman's case (supra) it was the duty of the principal officer of Customs to initiate proceedings by way of inquiry into a wreck. He later presided over the inquiry in his capacity as a resident Magistrate, and it was held that the Court of Inquiry was not legally constituted as the officer of Customs was virtually a prosecutor and he could not act as prosecutor and Judge in the one Court. The facts in Calman's case also differ very materially from those in the present matter. It cannot I think be said that I am in any sense the "virtual prosecutor" in the present proceedings. In R. v. Cheshire Licensing Justices (1906) 1 Q.B. 362, the Justice was not disqualified on the ground of bias from sitting as a member of the Compensation Authority merely because he was one of the Justices who referred the licence to the authority.

The disqualification of the justice in cases of this character must be based on bias. Within the limits of the very inadequate library facilities available in Apia I have examined the reports of all the cases which I have been able to find bearing on the subject of disqualification of a Judicial Officer on account of bias. Practically all these cases concern the disqualification of justices, who are in general laymen. I have not been able to find any case where the Court has been held to have been illegally constituted on the ground of bias of the Judge. In fact in Brookes v. Rivers (1668) Hard. 503 it was held that the fact that the defendant was the Judge's brother-in-law could not disqualify the Judge from hearing the case, "for favour shall not be presumed in a Judge".

The word "bias" is defined by Lord Thankerton in Franklin v. Minister of Town and Country Planning /1948/ A.C. 87:

> "I could wish that the use of the word 'bias' should be confined to its proper sphere. Its proper significance, in my opinion, is to denote a departure from the standard of even-handed justice which the law requires from those who occupy judicial office, or those who are commonly regarded as holding a quasi-judicial office, such as an arbitrator. The reason for this clearly is that, having to adjudicate as between two or more parties, he must come to his adjudication with an independent mind, without any inclination or bias towards one side or other in the dispute."

It cannot in my opinion be suggested with any validity that in the present case I could be said to have departed from the standard of even-handed justice which the law requires, by having presided over both tribunals and by having passed the file to the Police for investigation. Not, let me repeat, an investigation as to the possibility of bringing a perjury charge against Va'afusuaga, but an investigation which might result in action being taken by the Police against one or other of the witnesses.

Mr Phillips laid some emphasis on the well known principle which is stated in its most forthright manner by Lord Hewart C.J. in R. v. Sussex Justices /1924/ 1 Q.B. 259:

> "It is of fundamental importance that justice should not only be done but should manifestly and undoubtedly be seen to be done."

Counsel's contention amounts to saying that even if my mind was not biassed - and I do not understand him to suggest that there was in fact any bias present or that I came to the adjudication with other than an independent mind - it would appear to the Samoan understanding that I was biassed, and that this in itself would be sufficient to vitiate the High Court proceedings. As Bucknill, J. says in Cottle v. Cottle /1939/ 2 All E.R. 535 at page 541:

> "I attach, as everybody must attach, the greatest importance to the fact that every litigant in a British Court of Justice should be satisfied that he is having an absolutely impartial trial and that there should be no suspicion of any undue interference."

It is to be noted however that in that same case Merriman P. makes the test the effect on the mind of a reasonable man and not necessarily of a particular litigant.

The whole question of bias as a ground for disqualification in Court proceedings is examined fully in the recent case of R. v. Camborne Justices /1954/ 2 All E.R. 850 in which a bench consisting of Lord Goddard, C.J. Cassels and Slade JJ. discussed many of the leading authorities on the subject, and approved the test specified by Blackburn J. in R. v. Rand (1866) L.R. 1 Q.B. 230:

"A real likelihood of bias must be proved to exist before proceedings will be vitiated on the ground that a person who had taken part or assisted in adjudicating them was in law incapacitated by interest from doing so."

It is there pointed out that the words of Blackburn J. in R. v. Rand were quoted with approval by Lord O'Brien, C.J. in the Irish case of R. v. County Court Justices (1910) 2 I.R. 275:

"By 'bias' I understand a real likelihood of an operative prejudice, whether conscious or unconscious. There must, in my opinion, be reasonable evidence to satisfy us that there was a real likelihood of bias. I do not think that the mere vague suspicions of whimsical, capricious, and unreasonable people should be made a standard to regulate out action here. It might be a different matter if suspicion rested on reasonable grounds - was reasonably generated - but certainly mere flimsy, elusive, morbid suspicions should not be permitted to form a ground of decision."

In R. v. Camborne Justices, Slade J. says at page 855:

"In the judgment of this Court the right test is that prescribed by Blackburn, J. (L.R. 1 Q.B. 233) in R. v. Rand, namely, that to disqualify a person from acting in a judicial or quasi-judicial capacity on the ground of interest (other than pecuniary or proprietary) in the subject-matter of the proceeding, a real likelihood of bias must be shown. This Court is, further, of opinion that a real likelihood of bias must be made to appear not only from the materials in fact ascertained by the party complaining, but from such further facts as he might readily have ascertained and easily verified in the course of his inquiries."

The Court proceeds further to consider the well-known statement of Lord Hewart in R. v. Sussex Justices, which has already been quoted in this judgment, and Slade J. goes on to say:

"The frequency with which allegations of bias have come before the Courts in recent times seems to indicate that the reminder of Lord Hewart, C.J. in R. v. Sussex JJ. that it is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done, is being urged as a warrant for quashing convictions or invalidating orders on quite unsubstantial grounds and, indeed, in some cases, on the flimsiest pretexts of bias. While indorsing and fully maintaining the integrity of the principle reasserted by Lord Hewart, C.J. this Court feels that the continued citation of it in cases to which it is not applicable may lead to the erroneous impression that it is more important that justice should appear to be done than that it should in fact be done."

Applying these principles to the facts of the present case I conclude that there is no reasonable evidence of a real likelihood of bias; and that no reasonable man would have grounds for believing that in this Court he would not receive a fair and impartial trial. For these reasons I dismiss the application to set aside the proceedings. As the assessors unanimously found the accused guilty of perjury, and I concur with their decision, the verdict of guilty must stand.

From a practical point of view, great difficulties would arise if I should be disqualified, in the circumstances disclosed, from sitting in the High Court to hear a charge of perjury. As I have already pointed out, no other person than the Chief Judge can preside over a hearing in

the Land and Titles Court and only the Chief Judge normally has jurisdiction, sitting either with or without assessors, to hear a charge of perjury in the High Court. If counsel's submission as to my disqualification were well founded it would appear that any person could commit perjury in the Land and Titles Court with impunity. It may perhaps be said that the Registrar could have notified the Police instead of myself personally; but this would not materially alter the position as the Registrar could take these steps only on my instructions, and would be speaking as the official representative of the President of the Land and Titles Court. The position which would then arise would be in some slight degree analogous to that referred to by Stout C.J. in Holland v. McCarthy 22 N.Z.L.R. 914:

> "If it were held that the issue of a search warrant by a Magistrate on evidence would debar him from thereafter hearing the case the administration of Justice could not be carried on."

I must not be considered as saying that because of the peculiar conditions existing in this small community, when the Chief Judge has exclusive jurisdiction in a wide variety of matters, the normal rules regarding impartiality and the appearance of impartiality should be suspended. Practical difficulties alone should not be allowed to override basic principles of justice. My decision in this case is based on what I conceive to be the legal principles of this very important branch of law, as laid down by the authority of the Courts.

Accused convicted.