IN THE HIGH COURT OF FIJI
AT SUVA
MISCELLANEOUS JURISDICTION

Criminal Misc. Application No.181 of 2013

BETWEEN	:	**MAHENDRA PAL CHAUDHRY**
		Applicant
AND	:	**STATE**
		Respondent
BEFORE	:	**HON. MR. JUSTICE PAUL K. MADIGAN**
Counsel	:	Mr. A. Singh for the Applicant
	:	Mr. M. Korovou for State
Date of Hearing	:	14, 22 August 2013, 13 September 2013
Date of Ruling	:	18 September 2013

RULING
(RECUSAL)

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[1] The Applicant makes a second application for me to recuse myself from presiding over his trial, having already made an unsuccessful similar application to another Judge previously presiding over this matter. The earlier application in this Court was made orally during an unsuccessful application for stay and it was refused with reasons given orally in Court. The applicant then requested that those reasons be handed down in a written ruling which was provided to him.

[2] He now cites the same grounds as previously relied upon but on this occasion he makes the application by way of a Notice of Motion together with accompanying affidavit.

[3] His grounds of application are that:

- the applicant is "informed" that I attended a workshop conducted by the DPP from 16 - 23 July 2010 where these proceedings were "exhaustively discussed" and where I made the suggestion that a schedule of the applicant's bank accounts be attached to the information

- the applicant "understands and believes to be common knowledge" that I have in the past "socialized" with the Prosecutor in the proceedings, one Mr. Clive Grossman, and have previously had a working relationship with Mr. Grossman's Junior Counsel, Ms. Elizabeth Yang.

The Law

[4] The test for disqualification is the perception of reasonable apprehension of bias. The test is an objective one and was set out by the Supreme Court in **Amina Koya** CAV 002/97. In that case in dealing with previously divergent tests coming from the House of Lords in **Gough**[1993] AC 646 and the Australian High Court in **Webb**(1994) 181 CLR41, the Supreme Court referred to and adopted the New Zealand position expounded in **Auckland Casino Ltd v Casino Control Authority**(1995) 1 NZLR 142: The Court said:

> *"Subsequently the New Zealand Court of Appeal, in **Auckland Casino Ltd v Casino Control Authority** (1995) 1 NZLR 142, held that it would apply the **Gough** test. In researching that conclusion, the Court of Appeal considered that there was little if any practical difference between the two tests, a view with which we agree, at least in their application to the vast majority of cases of apparent bias. That 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".*

[5] The Court of Appeal in **Pita Tokoniyaroi and another** AAU0043/2005, in following this test, added that (para 46)

> "*the reason why the Supreme Court....thought 'there is little difference if any between **Gough** and **Webb**' is because the Court investigates the actual circumstances and makes findings thereon and then imputes them to the 'reasonable and informed observer as is described in the **Webb** test.*
>
> *(para 47) It follows that the word "informed" which qualifies the word "observer" is of vital importance".*

[6] After hearing the applicant's earlier recusal application to him, on the basis of perceived prejudice or bias, Justice Goundar said (**Mahendra Pal Chaudhry** HAM 160 of 2010):

> *"This contention of the applicant miscomprehends the role of a Judge. It is almost universally recognized that Judges discharge their*

duties in accordance with the oath they take to do right to all manner of people in accordance with the laws and usages of their countries, without fear or favour, affection or ill will."

To suggest otherwise *"is an affront to the judicial oath and to the presumption of judicial impartiality."*

[7] In the case of **Muir v C.I.R.** [2007] NZCA 334, the New Zealand Court of Appeal in reviewing the case law on the test for bias said this (para12)

"*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 enquiry should be rigorous, in the sense that complainants cannot lightly throw the "bias ball" in the air. The second enquiry is to then ask whether those circumstances as established might lead to 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 his own purity will not do; he must consider how others would view his conduct".*

Discussion

[8] To have made a recusal application to the Judge previously presiding, and then to make not one but two applications to me, one seemingly "in passing" during a stay application and now this second by way of Notice of Motion on the same grounds, strongly suggests that the complainant applicant is "lightly throwing the bias ball in the air" in the words of the N.Z. Court of Appeal in **Muir.** Whether that be with the intention of delay or of "Judge shopping" would not be for me to say if I am to keep an impartial mind and not become a Judge in my own cause.

[9] The applicant deposes that he is "informed" that I attended a workshop held by the Director of Public Prosecutions ("DPP") with counsel from that office, but with no defence counsel present at which (he is "informed" that) his charges were discussed and at which I suggested that a schedule of the applicant's bank accounts be annexed to the information. He then goes on to say that these "**facts**" have been confirmed to him by a former senior member of the DPP's office.

[10] It is unfortunate that these hearsay allegations are not supported by evidence, for example by an affidavit of the "former senior member" of staff. The reason why, undoubtedly, is that the allegations are mendacious, perfidious and malicious and s/he would not want to perjure h/self. I have never discussed the applicant's charges with any member of the office of the DPP outside of the Courtroom, let alone made suggestions as to the composition of the Information, which would be unthinkable for a criminal Judge.

[11] This mischievous allegation does not even satisfy the first test expounded by the N.Z. Court of Appeal in **Muir** so it becomes unnecessary for me to add that Judges do from time to time assist all practitioners in workshops be they for prosecutors in the DPP's office, defence counsel with the Legal Aid Commission or private practitioners under the auspices of the Independent Legal Services Commission. The reasonable informed observer would see no harm in that given that never are any "live" cases discussed at any of those fora.

[12] The second limb of the applicant's complaint is that I have differing relationships with the proposed prosecutor and his Junior Counsel; Mr. Clive Grossman Q.C., S.C. and Ms. Elizabeth Yang respectively.

[13] In the late 1980s and early 1990s Mr. Grossman and I were colleagues in the Hong Kong Attorney General's Chambers (later to be styled the Department of Justice). He then left those Chambers and established himself in private practice as a Barrister-at- Law in a "set" with several others. I remained in the Department of Justice until retirement in year 2004. Mr. Grossman and I were social acquaintances but not close friends and we were brought together by a love of the card game "Bridge". We had played with other colleagues within the A.G.'s Chambers during lunch hours and from time to time in Bridge Clubs outside Chambers with some degree of success.

[14] It should be noted that my social relationship with Mr. Grossman was a long time before I ever became a Judge in this jurisdiction and that since becoming a Judge I have been most particular about not socializing with him neither on my annual visits to Hong Kong nor on his reported visits to Fiji. What is important in this context is not what might have occurred in the years before I was appointed to the Bench but what has been seen to have occurred since appointment and especially during the time that I have been seized of the conduct of this case in the knowledge that he might perhaps be the prosecutor. Although we may have been seen to be friends but not close friends at one time, in the five years since sitting as a Judge and more particularly during the time I have been presiding over these proceedings, I have had nothing to do with Mr. Grossman.

[15] Both Ms. Yang and I were working in private practice as Barristers-at-Law in Chambers in Hong Kong from the years 2006 until I moved to Fiji in 2008. We were no more than friendly colleagues and our social relationship extended no further than Chambers' dinners, lunches and parties. We were each briefed separately to come to Fiji to work together to investigate and then prepare a case for impeachment of the then Chief Justice of Fiji, Justice Fatiaki. Our relationship while in Fiji remained the same; that of friendly professional colleagues. As with Mr. Grossman, I have been particularly careful not to have had social contact with Ms. Yang since becoming a Judge whether in Hong Kong or in Fiji. A reasonable informed observer in knowledge of these facts could not apprehend that I would approach these proceedings with a biased mind.

[16] As Marshall J.A. said in **Pita Tokoniyaroi** (supra) (at para 21)

> *"The administration of criminal justice in common law jurisdictions has always faced up to and dealt with the problem of close knit communities in which justice must be done and seen to be done. In such communities the policemen who investigate crime, the Judges who try criminal cases, the prosecutors and defenders, the alleged wrong doers, the victims and their close families and the witnesses are known to each other. Many are on speaking terms. Many more speak to the same people very frequently in the course of their work or their professional duty. But only close friendship and reasonably close blood and family relationship in the view of the common law raise a question to be asked and answered in respect of possible bias*".

[17] In the past 24 months, as Commissioner for the Independent Legal Services Commission, I have had social contact over lunches and teas with more than 250 defence counsel and prosecutors. If the applicant's complaints were to have any validity then I would have to recuse myself from any trial or hearing in which any of these practitioners were to be appearing. Such a proposition is derisory. No reasonable observer properly informed would ever think in these circumstances that professional friendship and contact would lead to the perception of a Judge being biased.

[18] The application for recusal is refused.

Paul K. Madigan
JUDGE

At Suva
18 September 2013