IN THE HIGH COURT OF FIJI

AT SUVA

MISCELLANEOUS JURISDICTION

CRIMINAL MISCELLANEOUS CASE NO. HAM 075 OF 2014S

BETWEEN: **VILIAME QATIVI**

APPLICANT

AND: **THE STATE**

RESPONDENT

Counsels	:	Applicant in Person
		Mr. T. Qalinauci for Respondent
Hearing	:	2 May, 2014
Ruling	:	2 May, 2014
Written Reasons:		23 May, 2014

WRITTEN REASON FOR DISMISSING APPLICANT'S RECUSAL APPLICATION

1. In Suva High Court Criminal Case No. HAC 094 of 2013S, the applicant faced two "aggravated burglary" charges, contrary to section 313 (1)(a) of the Crimes Decree 2009 [ie. Counts No. 1 and 3], and two "theft" charges, contrary to section 291 (1) of the Crimes Decree 2009 [ie. counts no. 2 and 4]. The allegations were that, he with others, broke into the two complainants' house, as trespassers with intent to commit theft, and stole properties therefrom, in January 2013.

2. The above case will be tried from 16 to 27 June 2014. In other words, the trial is approximately 3 weeks away. He had been remanded in custody since 1 March, 2013. He had been in custody for approximately 1 year 3 months, awaiting trial. He had applied for bail on three previous occasions – see HAM 69 of 2013S; HAM 148 of 2013S and HAM 256 of 2013S. On all those bail applications, bail was refused, and written reasons were given, on each occasion, on why bail was refused. Because of the above bail refusals, the applicant wrote "a letter" to the court, asking that I recuse myself from hearing Suva High Court Criminal Case No. HAC 094 of 2013S.

3. The law on the recusal of judges is well settled in Fiji. I quote with approval what His Lordship Justice Paul Madigan said in **Mahendra Pal Chaudhry** v **The State**, Criminal Miscellaneous Case No. HAM 181 of 2013, High Court, Suva, wherein His Lordship said:

"...[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 reaching 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…"

4. We will now apply the above law to the facts of this case. First of all, an application to disqualify a sitting judge from a criminal case is a very serious matter. The application must be properly made. The proper procedure must be adopted ie. the application must be made by notice of motion, with supporting affidavits, including written legal submissions. The fact that an applicant is remanded in custody or otherwise, is no excuse not to follow the proper procedure. A letter will not do. Legal assistance are now available through the Legal Aid Commission. The applicant should have

applied for Legal Aid, and have the legal aid lawyers assist him, in making a proper application. A letter is not a statement of fact, and is not a substitute for an affidavit. On this ground alone, I dismiss the applicant's application.

5. Assuming that the proper application was made, the ground on which the applicant applied, cannot be allowed, as a ground for the recusal of a judge. Pre-trial decisions had to be made in preparing a case for trial. This includes bail matters and other pre-trial applications. To allow the applicant to succeed will allow litigants to "judge shop", and consequently, the system will breakdown. On this ground alone, the applicant's application had to be dismissed.

6. On the two stage tests discussed in **Muir** v **C.I.R** (supra), given what is said in paragraph 5 above, I find that a refusal of bail to the applicant cannot be a ground to suggest a Judge is biased. The applicant consequently failed in the first test of establishing bias.

7. Given the above, I dismissed the applicant's recusal application on 2 May 2014, and the above are my reasons.

HIGH COURT OF FIJI
SUVA

Salesi Temo
JUDGE

Solicitor for Applicant : **Applicant in Person**
Solicitor for the State : **Office of the Director of Public Prosecution, Suva.**