IN THE HIGH COURT OF FIJI
AT SUVA
CRIMINAL JURISDICTION

Crim. Case No: HAC 227 of 2018

STATE

vs.

1. **NIKO BALEIWAIRIKI**
2. **ERONI RAIVANI**

Counsel: Ms. S. Serukai for the State
Mr. E. Koro for Accused 1
Ms. L. Manulevu with Ms. P. Mataika for Accused 2

Date of Hearing: 22nd March 2019

Date of Ruling: 25th March 2019

RULING

[On Recusal]

Introduction and Background

1. The learned counsel for the first and the second accused made an oral application, seeking an order for me to recuse myself from hearing this matter any further. This application is based upon the contention that I have dealt with the plea and the sentencing process of the first accused Mr. Waisea Motonivalu (according to the original information filed by the prosecution on the 2nd of February 2017) on the 22nd of May 2017 and 19th of December 2017 respectively.

2. The prosecution filed an information in the high court on the 2nd of February 2017, against Mr. Waisea Motonivalu, Niko Baleiwairiki and Eroni Raivani for one count of Murder, contrary to Section 237 of the Crimes Act and one count of Aggravated Robbery, contrary to Section 311 (1) (a) of the Crimes Act. The particulars of the offences are that:

FIRST COUNT

Statement of Offence

MURDER: *Contrary to Section 237 of the Crimes Act 2009.*

Particulars of Offence

WAISEA MOTONIVALU, NIKO BALEIWAIRIKI *and* ***ERONI RAIVANI*** *on the 1st day of January, 2017 at Lokia, Rewa, in the Central Division, murdered JAI PRASAD.*

SECOND COUNT

Statement of Offence

AGGRAVATED ROBBERY: *Contrary to Section 311 (1) (a) of the Crimes Act 2009.*

Particulars of Offence

WAISEA MOTONIVALU, NIKO BALEIWAIRIKI *and* ***ERONI RAIVANI*** *on the 1st day of January, 2017 at Lokia, Rewa, in the Central Division, in the company of each other robbed JAI PRASAD of a 15 Horsepower Yamaha Outboard Engine valued at $5, 950.00.*

3. Mr. Motonivalu pleaded guilty to the second count of Aggravated Robbery on the 24th of March 2017. Satisfied that his plea was voluntary and free from influenced, I sentenced him on the 22nd of May 2017 to a period of (eight) 8 years and seven (7) months imprisonment. Mr. Motonivalu then pleaded guilty to the first count of murder on the 1st of November 2107. I accordingly sentenced him on the 19th of December 2017 to a period of

life imprisonment with a minimum term of 20 years before being considered for any pardon.

4. Subsequently, the prosecution amended the information, charging Mr. Niko Baleiwairiki and Mr. Eroni Raivani with one count of Murder, contrary to Section 237 and 46 of the Crimes Act and one count of Aggravated Robbery, contrary to Section 311 (1) (a) of the Crimes Act. The particulars of the offences as charged in amended information are that:

FIRST COUNT

Statement of Offence

MURDER: *Contrary to Section 237 read with section 46 of the Crimes Act 2009.*

Particulars of Offence

NIKO BALEIWAIRIKI *and* ***ERONI RAIVANI*** *on the 1st day of January, 2017 at Lokia, Rewa, in the Central Division, murdered* ***JAI PRASAD.***

SECOND COUNT

Statement of Offence

AGGRAVATED ROBBERY: *Contrary to Section 311 (1) (a) of the Crimes Act 2009.*

Particulars of Offence

NIKO BALEIWAIRIKI *and* ***ERONI RAIVANI*** *on the 1st day of January, 2017 at Lokia, Rewa, in the Central Division, in the company of each other robbed* ***JAI PRASAD*** *of a 15 Horsepower Yamaha Outboard Engine valued at $5, 950.00.*

Submissions of the Parties

5. The learned counsel for Niko Baleiwaikiri submitted in his oral submissions, that the amended information has changed the nature of the offences. According to the initial

information, the alleged offences of murder and the aggravated robbery have been committed by three accused persons in joint enterprise. However, the amended information has now alleged that these offences of murder and aggravated robbery have been committed by two accused persons in joint enterprise. Hence, it would create a reasonable apprehension that the two accused would not receive a fair trial if the same Judge who heard the plea and sentencing process of Mr. Motonivalu, conducts this hearing. The two counsel for the defence are heavily relied on the findings of Nawana JA in **Yang Xieng Jiong v State [2019] FJCA 17; AAU0077.2015 (7 March 2019)**.

The Law

6. The rule against bias is derived from one of the fundamental principles of the Common Law System that is the conduct of adversarial trial by an independent and impartial tribunal. The rule against bias encompasses two main folds. The first is the rule against actual bias. If the Judge is directly or indirectly a party to the proceedings or has direct or indirect interest in the matter, he should not preside the matter on the ground of actual bias. The second is the rule against apparent bias. The apparent bias is present where a Judge is not a party to a matter or does not have a direct or indirect interest in the matter, but through his conduct or behaviours gives rise to a suspicion that he is not impartial. This application for recusal is founded on the ground of apparent bias by reasons of prejudgment.

7. The High Court of Australia in **Livesey v The New South Wales Bar Association [1983] HCA 17; (1983) 151 CLR 288, p 293,294)** has expounded the legal approach in Australia on the issue of apparent bias, where it was held that:

> *"It was common ground between the parties to the present appeal that the principle to be applied in a case such as the present is that laid down in the majority judgment in Reg v Watson; Ex party Armstrong. That principle is that a judge should not sit to hear a case if in all the circumstances the parties or the public might entertain a reasonable*

apprehension that he might not bring an impartial and unprejudiced mind to the resolution of the question involved in it. That principle has subsequently been applied in this court. (See e.g. Re Judge Leckie; Exparte Felman; Reg v Shaw; Ex party Shaw and in the Supreme Court of New South Wales (see e.g. Barton v Walker."

8. According to **Livesey (supra)** the approach in Australia is founded on the test of reasonable apprehension of bias. The approach of the United Kingdom was not similar to the approach adopted in Australia.

9. Lord Goff of Chieveley in **Reg v Gough (1993) A.C. 647, pg. 670)** expounded that the court should not examine the issue of apparent bias through the eyes of a reasonable man, as the court itself personifies the reasonable man in an application of apparent bias. Moreover, Lord Goff has found that the correct test is real danger of bias and not the reasonable apprehension of bias. Lord Goff in **Gough (supra)** held that:

"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 than real likelihood, to ensure that the court is thinking in term of possibility rather than probability of bias. Accordingly, having ascertained the relevant circumstances, the court should ask itself whether, having regard to those circumstances, there was a real danger of bias on the part of the relevant member of the tribunal in question, in the sense that he might unfairly regard (or have unfairly regarded) with favour, or disfavour, the case of a party to the issue under consideration by him."

10. According to the test enunciated in **Gough (supra),** the court should not look at the matter of apparent bias through the eyes of a reasonable man. The court itself personifies the reasonable man and needs to ascertain all the relevant circumstances. The court should then determine whether such circumstances lead to a real danger of bias.

11. The Court of Appeal of New Zealand in **Auckland Casino Ltd v Casino Control Authority (1995) 1 NZLR 142, pg. 149)** found there is little practical difference between the two tests adopted in United Kingdom and Australia. Having concluded as such, the Court of Appeal of New Zealand accepted the real danger test as enunciated by **Gough (supra).** Cook P held that:

> *"The approach that has been adopted in this court in recent years, however, has been to emphasise that there is little if any practical difference between the tests. See E H Cochrame Ltd v Ministry of Transport (1987) 1 NZLR 146,153, R v Te Pos (1992) 1 NZLR 522,527; Matua Finance Ltd v Equiti corp Industries Group Ltd (1993) 3 NZLR 650, 654, Reference to earlier New Zealand cases will be found in the three cases cited. In some of them the possibility of a genuine distinction has been recognised. But once it is granted that the hypothetical reasonable observe must be informed, so that as indicated by the House of Lords in Gough at pp 664 and 673 R v Sussex Justices Ex parte McMathy (1924) 1 KB 256 is a dubious authority, the distinction become very thin. If a reasonable person knowing all the material facts would not consider that there was a real danger of bias, it would seem strained to say that nevertheless he or she would reasonably suspect bias. One must query whether the law should countenance such refinements. In result, we accept the real danger test as satisfactory."*

12. The Supreme Court of Fiji in **Amina Koya v State (1998) FJSC 2; CAV0002.1997 (2 March 1998)** concurred with the approach adopted in **Auckland Casino Ltd (Supra)**

where the Supreme Court found that there is little, if any difference between the two tests. The Supreme Court held that:

> *"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."*

13. The House of Lords in **Porter v Magill (2002) 2 AC 357, p 493, 494)** found that the approaches adopted by Australia, Scotland, Strasbourg Court of Human Rights and many Common Law Jurisdictions are founded on test of reasonable apprehension of bias. Lord Hope of Craighead in **Porter v Magill (supra)** conceded that the English Courts have been reluctant to depart from the test formulated in Gough. However, his Lordship found, though the two tests are described differently, both of them actually lead to similar results with indistinguishable differences. Having apprehended the similarity of the results produced by two tests, Lord Hope in **Porter v Magill (supra)** went on making more conciliatory adjustments to the test formulated in Gough, where his Lordship held that:

> *"In my opinion however, it is now possible to set this debate to rest. The Court of Appeal took the opportunity in In re Medicaments and Related Classes of Goods (No. 2)* [2001] 1 WLR 700 *to reconsider the whole question. Lord Phillips of Worth Matravers MR, giving the judgment of the court, observed, at p 711 A-B, that the precise test to be applied when determining whether a decision should be set aside on account of bias had given rise to difficulty, reflected in judicial decisions that had*

appeared in conflict, and that the attempt to resolve that conflict in R v Gough had not commanded universal approval. At p 711 B-C he said that, as the alternative test had been thought to be more closely in line with Strasbourg jurisprudence which since 2 October 2000 the English courts were required to take into account, the occasion should now be taken to review R v Gough to see whether the test it lays down is, indeed, in conflict with Strasbourg jurisprudence. Having conducted that review he summarised the court's conclusions, at pp 726–727:

> *"When the Strasbourg jurisprudence is taken into account, we believe that a modest adjustment of the test in R v Gough is called for, which makes it plain that it is, in effect, no different from the test applied in most of the Commonwealth and in Scotland. The court must first ascertain all the circumstances which have a bearing on the suggestion that the judge was biased. It must then ask whether those circumstances would lead a fair-minded and informed observer to conclude that there was a real possibility, or a real danger, the two being the same, that the tribunal was biased."*

I respectfully suggest that your Lordships should now approve the modest adjustment of the test in R v Gough set out in that paragraph. 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. It removes any possible conflict with the test which is now applied in most Commonwealth countries and in Scotland. I would however delete from it the reference 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."

14. The Court of Appeal of New Zealand in **Muir v Commissioner of Inland Revenue (2007) 3 NZLR 495, p 508, 509)** found that the approach articulated by **Porter v Magill (supra)** is more preferable. Accordingly, the Court of Appeal of New Zealand departed from the test of **Gough (supra)**, where it was held that:

"We think that it is time to extinguish the tenuous hold on existence the Gough test has had in New Zealand. In general, we prefer the approach in Porter v Magill and Webb because of the way in which it confirmed the appropriate "window" through which the relevant conduct is to be viewed; that is, it emphasises how something might reasonably be regarded by the public, in the form of the reasonable informed observer."

15. Having adopted the approaches of **Porter v Magill** and **Webb,** the Court of Appeal of New Zealand in **Muir v Commissioner of Inland Revenue (supra)** expounded a two-step inquiry in order to determine the apparent 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."

"We emphasise 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 sanitised vacuum."

16. The Court of Appeal of New Zealand in **Muir v Commissioner of Inland Revenue (supra)** emphasised the need of rigorous inquiry about the actual circumstances that has a direct connection to the suggested apparent bias. This two-step inquiry is founded on two conflicting fundamentals, on one hand the principle of fair trial and the universally accepted principle of impartiality and independence of judiciary on the other hand. The judges are trained and capable of discharging their duties, in accordance with the oath they take to do right to all kinds of people, without fear, favour, affection or ill will, in accordance to the laws and usages of their respective jurisdictions. They are trained and experience to depart from the irrelevant, the immaterial and the prejudicial in adjudicating the matters before them.

17. Glesson CJ in **Ebner v Official Trustee in Bankruptcy [2000] HCA 63; (2000) 205 CLR 337, 176 ALR 644)** has discussed the appropriate steps in determining the issue of apparent bias, where his lordship held that:

"The application of the test of apparent bias requires two steps. First it requires to identification of what it is said might lead a judge (or Juror) to decide a case other than on its legal and factual merits. The second step is no less important. There must be an articulation of the logical connection between the matter and the feared deviation from the course of deciding the case on merits. The bare assertion that a judge (or juror) has an interest in litigation or an interest in party to it, will be of no assistance until the nature of the interest and the asserted connection with the possibility of departure from impartial decision making is articulate."

18. Justice Goundar in **Mahendra Pal Chaudhry v The State (2010) FJHC 531 HAM160.2010 (19 November 2010)** having discussed the position of other common law jurisdictions and the Bangalore Principles of Judicial Conduct which the Fiji Judiciary has adopted in 2001, adopted the test enunciated in **Muir v Commissioner of Inland (supra).**

19. The approach adopted by Goundar J in **Mahendra Pal Chaudhry v The State (supra)** is further upheld and affirmed by Chithrasiri JA in **Mahendra Mothibhai Patel and another v The Fiji Independent Commission Against Corruption (Crim App No AAU 0039 of 2011).**

20. Justice Calanchini in **State v Citizens Constitutional Forum Ltd, ex parte Attorney General** [2013] FJHC 220**; HBC195.2012 (3 May 2013)** has adopted the test of **Porter v Magill** ,where Calanchini J found that:

> *"The test was subsequently slightly adjusted by the House of Lords in Porter –v- Magill* [2002] 2 WLR 37 *at pages 83 – 84. As a result the approach to be taken is that the court must first ascertain all the circumstances which have a bearing on the suggestion that the judge was biased. It must then ask whether those circumstances would lead a fair-minded and informed observer to conclude that there was a real possibility, that the tribunal was biased.*
>
> *In my judgment this approach is to be preferred to either a purely subjective test or the reasonable apprehension of bias test. A purely subjective test considers the concerns of a particular litigant and would as a result allow any litigant to successfully challenge any judge assigned to a case whenever that litigant perceived that the judge might be prejudiced.*
>
> *The reasonable apprehension of bias test raises an issue relating to the knowledge to be imputed to the hypothetical member of the public. What*

kind and what depth of knowledge is to be imputed to the hypothetical member of the public? Does the imputation of such knowledge mean that the hypothetical person with that imputed knowledge is no longer an average or typical adult? The artificial nature of this exercise surely leads to a wide variance in its application by courts. (See: The Australian Judiciary – Enid Campbell and H P Lee, Cambridge University Press 2001 at pages 133 – 136).

Consistent with the decision in Porter –v- Magill (supra) the Court of Appeal in Patel and Mau –v- Fiji Independent Commission Against Corruption (unreported criminal appeal AAU 39 and 40 of 2011 delivered 12 September 2011) adopted a two stage enquiry. The first stage involved establishing 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 stage is to determine 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 case. This involves an objective determination in the sense that it requires an enquiry as to how others would view the judge's position."

21. The Supreme Court of Fiji in **Chief Registrar v Khan** [2016] FJSC 14**; CBV0011.2014 (22 April 2016)** found that the test formulated in **Porter v Magill (supra)** represents the law of Fiji in relation to recusal application founded on the ground of apparent bias, where Keith J held that:

"The law in this area has become settled over the years. The leading case in Fiji is the Supreme Court's judgment in Koya v The State [1998] FJSC 2*. Ironically the suggestion that the judge in that case might have been impartial came from Mr. Khan! The court noted that there were two*

schools of thought. In R v Gough [1993] AC 646*, the House of Lords had held that the test to be applied was whether there was "a real danger or real likelihood, in the sense of possibility, of bias". On the other hand, in Webb v The Queen* [1994] HCA 30*, the High Court of Australia had held that the test to be applied was whether "a fair-minded but informed observer might reasonably apprehend or suspect that the judge has prejudged or might prejudge the case". The Court in Koya thought that there was little, if any, practical difference between the two tests.*

Having said that, the problem with the Gough test which Webb identified was that it placed "inadequate emphasis on the public perception of the irregular conduct". It was "the court's view of the public's view, not the court's own view, which [was] determinative". That persuaded the Court of Appeal in England in Re Medicaments and Related Classes of Goods (No 2) [2001] 1 WLR 700 *to say at [85]*

" ... that a modest adjustment of the test in Gough is called for, which makes it plain that it is, in effect, no different from the test applied in most of the Commonwealth and in Scotland. The court must first ascertain all the circumstances which have a bearing on the suggestion that the Judge was biased. It must then ask whether those circumstances would lead a fair-minded and informed observer to conclude that there was a real possibility, or a real danger, the two being the same, that the tribunal was biased."

The House of Lords in Porter v Magill [2002] 2 AC 357 *approved that statement of principle, and in my view, that test should represent the law in Fiji. On a fair reading of the Commissioner's ruling, that is the test he applied."*

22. Having considered the above discussed judicial precedents of main Common Law jurisdictions and Fiji on the issue of apparent bias, it appears that the courts in Fiji have found the approaches in **Porter v Magill (supra)** and **Muir v Commissioner of Inland (supra)** more preferable in order to determine the issue of apparent bias.

23. Accordingly, the court has to first ascertain the actual circumstances which have a direct bearing on 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.

24. In view of the above discussed judicial precedents, such a complaint of apparent bias should not be raised lightly without establishing the actual circumstances and the logical connection between such circumstances and the feared deviation from impartiality of the Judge. (**Muir v Commissioner of Inland Revenue (supra)**, **Ebner v Official Trustee in Bankruptcy (supra)**, **Mahendra Pal Chaudhry v The State (supra)**)

Analysis

25. In this case, the defence alleges that a fair minded and informed observer might reasonably apprehend that I might not bring an impartial mind in adjudicating the charges against the two accused as I have already dealt with the plea and sentencing process of Mr. Motonivalu. The learned counsel for the defence submitted that the above contention of apparent bias is based upon the ground that I have already heard the factual circumstances of the two offences during the sentencing process of Mr. Motonivalu.

26. The defence mainly relies on the paragraphs 58 and 59 of the **Yang Xieng Jiong v State (supra),** where the Fiji Court of Appeal has stated that:

> *58. Learned counsel, in the circumstances, complained that the learned*

trial judge should have brought the matter to the notice of the appellant to verify whether there was any objection against the learned judge presiding the case against the appellant. It was further contended by the learned counsel, in his written submissions dated 18 February 2019, that the decision of the learned judge to proceed with the case with the full set of facts at the back of his mind constituted a conflict of interest and resulted in a miscarriage of justice.

59. Having regard to the contents of the summing-up in its entirety, some of which are already excerpted for the purposes of this judgment, I am persuaded to accept the contention of the learned counsel as being valid. In my considered opinion, the learned trial judge should have disclosed his participation at the proceedings against the two other accused connected to the incident and recused himself from hearing the case to ensure the expected objectivity in the trial against the appellant. I observe that the learned state counsel, too, was under a duty to have brought this matter to the notice of the learned judge as the fact of same judge hearing the two cases was obviously within his knowledge. In my opinion, the learned state counsel, too, had been at remiss.

27. In **Yang Xieng Jiong (supra)** the Appellant had been charged in the High Court with one count of Murder. He was found guilty after the hearing and then sentenced. In the appeal, the Appellant argued that the remark made by the learned trial Judge in his summing up, stating that the two friends of the appellant who were with him at the time of that offence took place were later charged and sentenced for the murdering of the same deceased, has caused a great prejudice to the Appellant. The Fiji Court of Appeal found that those two friends were initially charged in a separate proceedings for murdering the same deceased. They were charged on the principle of joint enterprise. Subsequently, they were found guilty and sentenced. Sometimes after the said proceedings, the Appellant was arrested and

charged for murdering the same deceased. The prosecution in the later proceedings has alleged that the appellant had murdered the deceased alone. He was not charged on the ground of joint liability with two others. But charged him on the ground of single liability.

28. Nawana JA in paragraphs 58 and 59 of his judgment in **Yang Xieng Jiong (supra)** found that the ground of appeal of the Appellant where he contended that the remarks made by the learned trial Judge in his summing up regarding the two friends as a valid ground. His Lordship has then gone further and made his opinion that under such circumstances the learned trial Judge should have disclosed his participation at the proceedings against the two friends of the appellant and recused himself from hearing the case to ensure the expected objectivity in the trial against the appellant.

29. Paragraph 58 of the judgment contains only the reproduction of the contentions and submissions made by the learned Counsel for the Appellant during the hearing in the Fiji Court of Appeal.

30. According to the grounds of appeal, the main issues that have been determined in **Yang Xieng Jiong (supra)** are:

i) The learned High Court Judge erred in law and fact by failing to give reasons on why he failed to accept during the voir dire as well as the trial proper that the appellant's confession had been obtained unfairly as a result of the following:

(a) The appellant was kept in custody for seven days under oppressive circumstances during the caution interview without any application by the State to extend the 48-hour allowable period;

(b) The appellant's interview was recorded in English, which was a language that the appellant could not read [.] [H]owever, the

oppressive circumstances of his custody led him to sign something he did not understand.

ii) *The learned trial judge's directions on the elements of murder at paragraphs 11, 31 and 32 of his summing-up lacked fairness and objectivity when he used examples that fitted the prosecutor's case.*

iii) *The learned trial judge caused the trial to miscarry when he unfairly commented at paragraph 18 of the summing-up that the appellant had admitted the offence in the following manner:*

> *Mr. Fong later rushed to hospital and he died at approximately 1.40 a.m. on 08 April 2012. A police investigation was carried-out. The two friends who were with the appellant were later arrested. They were tried and later imprisoned. The appellant was arrested on 30 May 2013 while awaiting a flight to China at Nadi Airport. He was caution-interviewed by police. In the interview, he admitted the offence. Later, he was taken to court and charged for the murder of Mr. Robert Fong. Because of the above, the prosecution is asking you, as assessors and judges of fact, to find the accused guilty as charged. That was case for the case for the prosecution.*

ix) *The learned trial judge caused the trial to miscarry when he commended at paragraph 29 of the summing-up that the appellant was aiding and abetting the commission of murder despite the appellant being the only person in the information.*

31. The Fiji Court of Appeal in **Yang Xieng Jiong (supra)** has not considered whether the failure of the learned trial Judge in recusing himself has led to a fair minded and informed

lay observer to reasonably apprehend that the learned trial Judge has not brought an impartial mind to the determination of the charge against the Appellant. Therefore, I find the opinion of Nawana JA in paragraph 59 of the judgment is *an Obiter dictum* and not a *ratio decidend* of the said judgment.

32. Moreover, the circumstances of the **Yang Xieng Jiong (supra)** is distinguish from this matter. In **Yang Xieng Jiong (supra)**, the two friends of the Appellant have been charged and prosecuted in a separate criminal proceeding on the principle of joint liability. The Appellant was subsequently charged and prosecuted in another proceeding for murdering of the same deceased on the principle of single liability. Hence, the prosecution in the subsequent proceedings had to prove beyond reasonable doubt that the Appellant had murdered the deceased by himself alone. The court of appeal found that the learned trial Judge in his summing up have discussed the role of the two friends of the Appellant and their subsequent convictions. Having found that remark of the learned trial Judge, the Fiji Court of Appeal held that such remarks have caused great prejudice to the Appellant. Having taken into consideration the said circumstances, Nawana JA has expressed his opinion in paragraph 59, that the learned trial judge should have recused himself from hearing the charge of the Appellant.

33. In this case, Mr. Waisea Motonivalu, Mr, Niko Baleiwairiki and Mr. Eroni Raivani have been charged in the same proceedings of HAC 013 of 2017. Section 46 of the Crimes Act deals with the principle of joint enterprise, where it states that:

> *"When two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of such purpose an offence is committed of such a nature that its commission was a probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence."*

34. Section 60 of the Criminal Procedure Act stipulates the circumstances where the prosecution is allowed to join several offenders in one charge or information, where it states that:

> *The following persons may be joined in one charge or information and may be tried together —*
>
> *(i) persons accused of the same offence committed in the course of the same transaction;*
> *(ii) persons accused of an offence and persons accused of –*
> *(iii) aiding or abetting the commission of the offence; or*
> *(iv) attempting to commit the offence;*
> *(v) persons accused of different offences provided that all offences are founded on the same facts, or form or are part of a series of offences of the same or a similar character; and*
> *(vi) persons accused of different offences committed in the course of the same transaction.*

35. In this matter, the prosecution has initially charged the three accused for one count of Murder of Jai Prasad and one count of Aggravated Robbery on the principle of joint enterprise. Subsequently, Mr. Motonivalu pleaded guilty to the two offences and the court proceeded with his sentence. The prosecution then amended the information. The learned Counsel for the prosecution informed the court that the prosecution is contemplating to amend the amended information.

36. In view of the above discussed reasons, it is my considered opinion that a complaint of apparent bias cannot be raised, merely on the ground that the learned Judge or the learned Magistrate has dealt with the plea and sentencing process of one of the accused persons in a criminal proceeding that involved with two or more accused persons.

37. In order to advance such a complaint of apparent bias, the party making such a complaint must establish that any conduct, behaviour or any circumstances of the learned Judge in his dealing with the plea and subsequent sentencing process of the accused has a capacity in suggesting that the Judge is or may be seen to be biased. In doing that, that party must take into consideration, not only the principle of fair hearing, but also the principle of judicial independence. Thereafter, the party has to establish a logical connection that the said conduct, behaviour or the circumstances might lead a fair minded and informed observer to reasonably apprehend that the Judge might not bring an impartial mind in adjudicating the matter.

38. As discussed above, a judicial officer is required to deal with criminal matters involved with two or multiple accused persons as it is permissible under the Section 60 of the Criminal Procedure Act. Section 217 and 221 of the Criminal Procedure Act deal with the procedure of taking plea of the accused in the High Court. According to section 221 of the Criminal Procedure Act, if the accused pleads guilty to the offence, the court may proceed with entering the conviction. Division 8 of Part XIV of the Criminal Procedure Act deals with the procedure of passing sentences in the High Court. Accordingly it is a judicial function of a Judge to deal with an early plea and the subsequent sentencing process of an accused in a proceeding involved with two or multiple accused persons. Hence, a Judge is not required to recuse himself from hearing the charges against the remaining accused persons on the ground that he has exercised his judicial function as stipulated under the Criminal Procedure Act in respect of the accused who entered an early plea of guilty.

39. Madigan J in **State v Anand Kumar Prasad and others (Criminal Case No 24 of 2010)** held that:

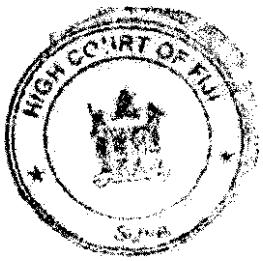
> *"It is of course relevant that any judicial officer, despite "perception", is able to divorce himself from other matters he may have dealt with on another occasion. As was said in VaKatuta v Kelly* (1989) 67 CLR 568*; a professional judge who has taken a judicial oath and who had experience*

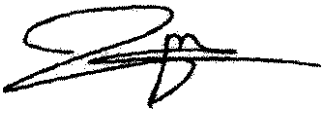
in all types of cases is trained to 'discard the irrelevant, the immaterial and the prejudicial."

40. In this case, the learned counsel for the defence raised this complaint of apparent bias on the ground that I dealt with the plea and the sentencing process of Mr. Motonivalu. Apart from that, the learned counsel for the defence did not specify any conduct, behaviour or any circumstances that have a direct bearing to suggest that I may be seen to be biased by a fair minded and informed lay observer.

41. Accordingly, I do not find that the *obiter dictum* that has been expounded in paragraph 59 of the judgment of **Yang Xieng Jiong (supra)** has established a binding legal precedent, requiring all the Judges and Magistrates to recuse themselves from conducting the hearing of a proceedings which involved with two or multiple accused, if the learned Judge or the learned Magistrate dealt with the plea and the sentence process of one of the accused persons who pleaded guilty at the initial stages of the proceedings.

42. Accordingly, I refuse and dismiss this application of recusal.





R.D.R.T. Rajasinghe
Judge

At Suva
25th March 2019

Solicitors
Office of the Director of Public Prosecutions for the State.
Koroi Law for the 1st Accused.
Office of the Legal Aid Commission for the 2nd Accused.