**IN THE HIGH COURT OF FIJI**
**AT SUVA**
**CRIMINAL JURISDICTION**

**MISCELLANEIOUS CASE NO. HAM 38 OF 2021**

**BETWEEN:** **SETA SANJANA RAM** **APPLICANT**

**A N D:** **THE STATE** **RESPONDENT**

**Counsel:** Mr. M. Yunus for Applicant
Mr. C. Pryde with Ms. S. Sharma for Respondent

**Date of Hearing:** 17th March 2021

**Date of Judgment:** 29th March 2021

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# RECUSAL RULING

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1. The learned counsel for the first Accused files this Notice of Motion seeking following orders, *inter alia*;

   *(a) That the Honourable Presiding Judge recuses himself from presiding in Criminal Case No. 330 of 2018;*

(b) *That Criminal Case No. 330 of 2018 be transferred to another Judge of the High Court to hear this matter; and*

(c) *Any other Orders this Honourable Court may think just under the circumstances.*

**Background**

2. The Notice of Motion is accompanied by an affidavit of the first Accused, stating the factual ground of this application. The Prosecution decided not to file an affidavit in reply but reserved their right to file and make submissions during the hearing.

3. The first Accused and the Prosecution were directed to file their written submissions, which they filed as per directions. The hearing of this matter was done on the 17th of March 2021. The learned counsel for the first Accused and the Prosecution made their respective oral submissions. After that the parties were given further time to file further submissions if they wished to do so. The learned counsel for the first Accused filed further submissions, and the learned Director of Public Prosecution (DPP) filed the written transcript of his oral submissions made at the hearing. Having carefully considered the Notice of Motion, the affidavit of the first Accused, and the parties' respective oral and written submissions, I now proceed to pronounce my ruling as follows.

4. The first Accused has been charged with sixteen counts of Obtaining Property by Deception, contrary to Section 312 (1) of the Crimes Act, seventeen counts of Trafficking in Persons, contrary to Section 112 (4) of the Crimes Act and two counts of Money Laundering, contrary to Section 69 (3) (a) of the Proceeds of Crimes Act 1997. The Trial for this matter is set from 28th of June to 6th of August 2021.

5. The learned counsel for the first Accused submitted that the recent amendment made to the Criminal Procedure Act (Act No 2 of 2021) removing trials with assessors in the High Court had changed the role of the Judge. He stated that the assessors were the Judges of the facts

while the Judge was the Judge of the law under the previous regime, but after the removal of the assessors' system, the Judge has become the sole and final adjudicator of facts and law. Therefore, the said amendment has changed the role of the Judge. Having stated that, the learned counsel for the first Accused submitted further that the filing of disclosures in Court is a dubious act in law, and it should be stopped immediately since the Judge has now become the sole adjudicator of the facts. In respect of this matter, since the disclosures had already been filed in Court, there is a reasonable fear in the mind of the first Accused that the Trial Judge might have read the evidence in the disclosures and would not bring a fair and impartial mind in adjudicating the matter. Based on this argument, the learned counsel for the first Accused sought an order for me to recuse myself from hearing this matter.

6. The learned DPP appeared for the Prosecution and made his submissions. The learned DPP submitted that the test of apprehension of bias is rigorous. Therefore, the first Accused's counsel cannot just throw the bias ball in the air without explicitly pointing out the actual circumstances of the issue he finds as a reason to fear that the Trial Judge would not bring a fair and impartial mind to adjudicate the matter. The learned DPP urged that the recent amendment removing the assessors' system does not change the Judge's role. The Judge has always been the final adjudicator of facts and law even under the removed assessors' system.

7. Moreover, the learned DPP submitted that in an adversarial criminal justice system, the duty of disclosure is to the Defence and not to the Court. He further submitted that there is no provision, either in the Constitution or the Criminal Procedure Act, stating that the Prosecution has to file disclosures in the High Court. Neither is there any Practice Direction of the Chief Justice directing the Prosecution to file disclosures in the High Court. The learned DPP submitted that Fiji is a country that allows doing all things other than things expressly prohibited. Therefore, there is no prohibition against filing disclosures in the High Court. However, the learned DPP submitted that Prosecutors' practice of filing disclosures in the High Court has now been revoked with effect from the 8th of March 2021.

8. In view of the submissions made by the parties, there are three main issues to be determined in this application. They are that:

i) *Whether the recent amendment to the Criminal Procedure Act, which abolished the assessors system, has changed the role of the Judge.*

ii) *The legal background of filing the disclosures in the High Court.*

iii) *Whether a fair-minded lay observer would reasonably apprehend that the judge might not bring an impartial mind to the resolution of the instant case as he had access to the material contained in the disclosures.*

**Role of the Judge**

9. I first draw my attention to the first issue, which is to determine the role of the Judge during the assessors' system and in the post-assessor system.

10. Section 237 of the Criminal Procedure Act states that;

i) *When the case for the prosecution and the defence is closed, the Judge shall sum up and shall then require each of the assessors to state their opinion orally, and shall record each opinion.*

ii) *The Judge shall then give judgment, but in doing so shall not be bound to conform to the opinions of the assessors.*

iii) *Notwithstanding the provisions of section 142(1) and subject to subsection (2), where the Judge 's summing up of the evidence under the provisions of subsection (1) is on record, it shall not be necessary for any judgment (other than the decision of the court which shall be written down) to be given, or for any such judgment (if given)—*

*a. to be written down; or*

*b. to follow any of the procedures laid down in section 141; or*

*c. to contain or include any of the matters prescribed by section 142.*

*(v) When the Judge does not agree with the majority opinion of the assessors, the Judge shall give reasons for differing with the majority opinion, which shall be—*

*a. written down; and*

*b. pronounced in open court.*

11. According to Section 237 of the Criminal Procedure Act, the Judge is not bound by the opinion of the assessors when he makes his Judgment. The Judge is only required to give cogent reasons and write them down in the Judgment if he disagrees with the majority opinion of the assessors. However, the Judge is still required to independently assess the evidence presented in the hearing in order to determine whether to agree with the majority opinion of the assessors or not.

12. I do not wish to separately discuss Section 299 of the repealed Criminal Procedure Code as Section 237 of the Criminal Procedure Act has not brought any new changes.

13. The Privy Council in **Prasad v The Queen [1980] FJUKPC 1; [1980] UKPC 37 (17 November 1980)** had discussed the difference between the jury system in England and Scotland with the assessors' system in Fiji. Their Lordship decided that the Judge is the sole ultimate decider of the fact and the law. Lord Diplock held that:

> *"In Fiji, the mode of trial is not the same as in England or Scotland. There is no jury: the trial is before a judge and assessors to the number of not less than four in capital cases. The judge sums up to them; each then states his individual opinion as to the guilt of the accused, although permitted to consult*

*with one another they are not obliged to do so; and the ultimate decider of fact (as well as law) is the judge himself who need not conform to the opinions of the assessors, even though they be unanimous, if he thinks that their opinions are wrong. The field of comment upon evidence that is proper to a judge in summing up to a jury in a trial in which they are collectively the exclusive deciders of fact is not necessarily the same as in summing up to assessors whose function it is to help the judge in making up his own mind as the sole ultimate determiner of fact."*

14. The Supreme Court of Fiji in **Chandra v State [2015] FJSC 32; CAV21.2015 (10 December 2015)** explained the difference between "making an independent assessment of evidence" and the "giving reasons for disagreeing with the opinion of the assessors". Marsoof J found that:

*"The confusion that surfaces in paragraphs [23] and [24] of the impugned judgment of the Court of Appeal arises from a failure to distinguish between (1) the requirement of making an independent assessment of the evidence, and (2) giving reasons for disagreeing with the opinion of the assessors. In every case where a judge tries a case with assessors, the law requires the trial judge to make an independent evaluation of the evidence so that he can decide whether to agree or disagree with the opinion of the assessors. The judge is duty bound to make such an evaluation as the decision ultimately is his, and not that of the assessors, unlike in a trial by jury. Once the trial judge makes such an evaluation and decides to agree with the assessors, he is not required by law to give reasons, but he must give his reasons for disagreeing with the assessors. However, as was observed by this Court in paragraph [32] of its judgment in Mohammed v State [2014] FJSC 2; CAV02.2013 (27 February 2014),"an appellate court will be greatly assisted if a written judgment setting out the evidence upon which the judge relies when he agrees with the opinions of the assessors is delivered. This should become the practice in all trials in the High Court."*

15. In his minority decision in **Chandra v State (supra),** Keith J concurred with the view of Marsoof J, where His Lordship held that:

> *"I agree, of course, that since the trial judge is the ultimate finder of the facts, he has to evaluate the evidence for himself, and come to his own conclusion on the guilt or otherwise of the defendant. In my opinion, by far the better practice is for the judge to explain in his judgment what his reasons for his verdict are, and I urge all judges to do that.*

16. The Fiji Court of Appeal in **Raj v State [2020] FJCA 254; AAU008.2018 (16 December 2020)** found that:

> *".....Under section 237 of the Criminal Procedure Act the trial judge is required to make an independent assessment of the evidence to be satisfied that the verdict of court is supported by the evidence and is not perverse noting that if the trial judge disagrees with the unanimous or majority opinion of the assessors, "he shall give his reasons, which shall be written down and be pronounced in open court".*
>
> *His Lordship also drew a distinction between (1) the requirement of making an independent assessment of the evidence; and (2) giving reasons for disagreeing with the opinion of the assessors and said that in every case where a judge tries a case with assessors, the law requires the trial judge to make an independent evaluation of the evidence so that he can decide whether to agree or disagree with the opinion of the assessors. Justice Marsoof explained that the judge is duty bound to make such an evaluation as the decision ultimately is his, and not that of the assessors, unlike in a trial by jury. Once the trial judge makes such an evaluation and decides to agree with the assessors, he is not required by law to give reasons, but he must give his reasons for disagreeing with the assessors."*

17. The above discussed judicial precedents from the Privy Council, the Supreme Court of Fiji and the Fiji Court of Appeal have clearly distinguished the role of the Judge as the sole adjudicator of facts and law and the requirement to give reasons if he disagrees with the majority of the opinion of the assessors. Hence, the Judge has always been the sole adjudicator of facts and law, and it was never the assessors. Therefore, the removal of the assessors' system by the recent amendment to the Criminal Procedure Act has not changed the role of the Judge as the sole adjudicator of facts and law.

18. In view of the above findings, I find the contention of the learned counsel for the first Accused that the Judge has now subsumed the role of the assessors and has become the sole adjudicator of facts and law consequent to the abolishment of the assessors' system is reprehensibly misguided and misconceived; thus making the basis of this recusal application wrong and imprudent.

**Legal background of Filing the Disclosure in Court.**

19. I now turn to the second issue: the legal background of filing disclosures in the High Court.

20. The learned counsel for the First Accused submitted that Section 198 of the Criminal Procedure Act does not require the DPP to file disclosures with the Information; hence, the filing of disclosures with the Information is dubious by law and should be stopped immediately.

21. The learned DPP, in his submission, highlighted that neither the Constitution nor the Criminal Procedure Act requires the Prosecution to file disclosures in Court. Moreover, there are no Practice Directions issued by the Chief Justice to that effect. Hence, the reasons for the practice of filing disclosures in Court are now lost in time. Having submitted that, the learned DPP further stated that in Fiji, it allows doing things other than things expressly prohibited. Hence, there is no prohibition in filing disclosures in Court.

22. In order to untangle this mystery, I must first look at the common law duty of disclosure. Steyn LJ in **R v Brown (1995) 1 Cr. App. R 191 p 198)** has meticulously articulated the framework of the common law duty of disclosures, where it was held that:

> *"It is to the common law that the criminal justice system must turn to provide the framework of the rules which governs disclosures by the Crown. It is, however, necessary to place the common law rules in their proper context. The objective of the criminal justice system is the control of crime, but in a civilised society that objective cannot be pursued in disregard of other values. That everybody who comes before our courts is entitled to a fair trial in axiomatic. Lord Wilberforce states in Raymond v Honey (1983) A.C. 1, 13 A, that the right of every citizen to unimpeded access to a court is a basic right. Similarly, the right of every accused to a fair trial is a basis or fundamental right. That means that under our unwritten constitution those rights are regarded as deserving of special protection by the courts. However, in our adversarial system, in which the police and prosecution control the investigatory process, an accused's right to fair disclosure is an inseparable part of his right to a fair trial. That is the framework in which the development of common law rules about disclosure by the Crown must be seen."*

23. Upholding the above observation of Steyn LJ, the House of Lords in **R v Brown (1998) A.C 367 p374 )** enunciated the common law duty of disclosure further, where Lord Hope held that:

> *"The rules of disclosure which have been develop by the common law owe their origin to the elementary right of every defendant to a fair trial. If a defendant is to have a fair trial he must have adequate notice of the case which is to be made against him. Fairness also requires that the rules of natural justice must be observed. In this context, as Lord Taylor of Gosforth CJ observed in Reg v Keane (1994) 1 W.L.R. 746, 750g, the great principle is that of open justice. It would be contrary to that principle for the prosecution*

*to withhold from the defendant material which might undermine their case against him or which might assist his defence."*

24. The above two scrupulous dictums find the common law duty of disclosure is an indispensable and inseparable component of a fair trial. It requires the Prosecution to disclose the case that is made against an Accused and also include the material in the Prosecution's possession, which may assist the Accused in his defence.

25. Lord Hope in **R v Brown (1998) A.C. 367 p377)** further expounded the scope of the disclosability, where His Lordship found that:

> *"The common law rules are concerned essentially with the disclosure of material which has been gathered by the police and the prosecution in the course of the investigation process for use in the case to be made for the Crown. In the course of that process issues of fact will have been identified which may assist or undermine the Crown case. The prosecution is not obliged to lead evidence which may undermine the Crown case, but fairness requires that material in its possession which may undermine the Crown case is disclosed to the defence. The investigation process will also require an inquiry into material which may affect the credibility of potential Crown witnesses. Here again, the prosecution is not obliged to lead the evidence of witnesses who are likely in its opinion to be regarded by the judge or jury as incredible or unreliable. Yet, fairness requires that material in its possession which may cast doubt on the credibility or reliability of those witnesses whom it chooses to lead must be disclosed."*

26. Accordingly, the Prosecution is required to disclose the Defence material which is relevant or could possibly be relevant to an issue in the matter. It is a vital aspect of a fair trial.

27. The learned DPP, in his submissions, stated that Section 14 (2) (e) of the Constitution only requires the Prosecution to inform or give reasonable access to the accused, in advance, the

evidence that the Prosecution intends to rely on. However, the scope of the duty of disclosure under the common law is broader than informing the Accused of the evidence that the Prosecution intends to rely on. Therefore, the duty of disclosure is not limited to the right, as stated under Section 14 (2) (e) of the Constitution. As stated above, the duty of disclosure is an inseparable aspect of a fair trial. Section 15 (1) of the Constitution of Fiji has stipulated that every person charged with an offence has the right to a fair trial before a court of law. Hence, the common law duty of disclosure is codified under Section 15 (1) of the Constitution.

28. The Fiji Court of Appeal in **Kumar v State [2017] FJCA 62; AAU0016.2013 (26 May 2017)** adopted the common law duty of disclosure as a component of a fair trial. In that matter, the Appellant contended that his conviction was unsafe as he was not disclosed the previous convictions of the complainant in advance. The Prosecution had disclosed the previous conviction of the complainant at the end of the Prosecution's case. The Appellant had requested to recall the complainant, which the Trial Judge denied. The Court of Appeal inquired whether the non-disclosure of the said previous convictions of the Complainant had affected the Appellant's right to have a fair trial.

29. The Supreme Court of Fiji in **Chand v State [2012] FJSC 6; CAV0014.2010 (9 May 2012)** found the common law duty of disclosure covers the disclosures of all material which is relevant to the case relied on by the Prosecution, whether that material has the capacity of strengthening or weakening the Prosecution case or helping the case of the defence. The Supreme Court further found that the Prosecutor's duty to disclose is one of the components of the Prosecution's obligation to act fairly. This would enhance the administration of criminal justice by ensuring the accused have a fair trial.

30. The common law right to a fair trial was first integrated into the written law of Fiji by the Constitution (Amendment) Act of 1997 *(vide Dakuidreketi v Fiji Independent Commission Against Corruption [2011] FJHC 359; HAM038.2011 (24 June 2011))*. As stated afore, the right to a fair trial has been incorporated into the Bill of Rights Chapter of Fiji's present Constitution. During his oral submissions, the learned DPP tendered a copy of the 1998

Guidelines on Disclosure issued by the then DPP Ms. Nazhat Shameem (as Her Ladyship then was) pursuant to Section 76 of the Criminal Procedure Code. Paragraph 7 of the said Guidelines states that:

> *"These guidelines exist in addition to the duties of prosecutors under the common law to disclose."*

31. Hence, it appears that the then DPP had recognized the common law duty of disclosure by the Prosecution in the 1998 Guidelines on Disclosure. Accordingly, the said Guidelines must be applied by the Prosecutors in addition to their duty of disclosure under the common law.

32. As a consequence of the aforementioned judicial precedents of the Fiji Court of Appeal and the Supreme Court of Fiji, and also the 1998 Guideline of Disclosure issued by the then DPP, it is clear that the common law duty of disclosure by the Prosecution has been accepted in Fiji as one of the inseparable elements of a fair trial.

33. The learned DPP submitted that in an adversarial criminal justice system, the Prosecution's duty of disclosure is to the Defence and not to the Court *(vide para 28 of the Submissions)*. I now draw my attention to determine whether the Prosecutor's duty of disclosure is to the Defence or the Court.

34. Lawton L.J. in **Hennessy (1979) 68 Cr. App. R 419 p 426)** expounded that the Prosecution owes a duty to the Court to ensure that all relevant evidence that could assist the accused either be presented by the Prosecution or make it available to the accused. As Lord Hope outlined in R v Brown (supra) in our adversarial system of criminal justice, the Police and the Prosecution, during the investigation, gather the materials that the Prosecution could use in the case against the accused. Besides that, they would gather and find facts and materials relevant to the case, which can also undermine or weaken the Prosecution's case. Diplock L J in **Dallison v Caffery (1965) 1 QB, 348 p 375-376** held there is no duty on the Prosecution to adduce or use such facts and material that can potentially undermine or weakening the

Prosecution case. The Prosecution's task is to prosecute and not to defend. However, there is a duty on the Prosecution to disclose those facts and materials to the Defence because they are also relevant or possibly relevant to the issues of the case.

35. Lord Hope in **R v Brown (supra)** has outlined that a fair trial requires to observe the rules of natural justice. As I discussed in paragraph 29 above, the common law duty of disclosure by the Prosecution must be seen within the framework of the adversarial system. In the adversarial system, the Police and Prosecutor control the investigatory and the Prosecution process, thus making the Prosecution having a competing interest against the Accused. In addition to that, in exercising its duty of disclosure, the Prosecution has the discretion to withhold certain facts or materials from the Defence on the grounds of public immunity, public interest or the protection of informers, *etc*.

36. The Supreme Court of Canada in **R. v Stinchcombe ([1991] 3 SCR 326)** had observed that the obligation to disclose is not absolute. It is subject to the discretion of the Prosecution. The limits of this discretion extend not only to the withholding of information but also to the timing of disclosure. However, the Prosecution must exercise this discretion within the realm of "Prosecution's obligation to prosecute fairly to ensure the accused has a fair trial. Any dispute about the exercise of this discretion by the Prosecution must be decided by the Court *(vide: Section 291 (1) of the Criminal Procedure Act).*

37. Gidewell L.J. in **R v Ward (1993) 1 WLR 619 )** held that the Court has the authority to decide on disputed issues regarding disclosability of materials and any other legal issues regarding the withholding of materials and fact relevant to the case. Accordingly, **R v Ward (supra)** held that the Court is the arbiter to this important branch of the law on a fair trial. If the Prosecution is allowed to act as the Judge in deciding such disputes, it will amount to the Prosecution becoming the judge of their own cause in the Prosecution. This would undoubtedly breach one of the two main pillars of natural justice: the principle of *nemo judex in causa sua*. (no one is a judge in his own cause).

38. Lord Taylor in **Davis and Others (1993) 97 Cr App R 110 p 114 )** outlined the impact of the decision of Ward (supra) in the following manner:

> *"The effect of Ward is to give the court the role of monitoring the views of the prosecution as to what material should or should not be disclosed and it is for the court to decide. Thus, the procedure described as unsatisfactory in Ward, of the prosecution being judge in their own cause, has been superseded by requiring the application to the court."*

39. Having discussed the leading case authorities in England in relation to the common law duty of disclosure by the Prosecution, the Supreme Court in **Chand (supra)** found that it is the responsibility of the Court to ensure that an accused has a fair trial. To ensure a fair trial, the Court must enforce practices of the proceedings, such as the presentment of documents and materials, thus preventing abuse of the Court process. The Supreme Court held that:

> *"The prosecutor's duty to disclose, is just one aspect of what is sometimes called the "prosecutor's obligation to act fairly". The rules of practice, which are calculated to enhance the administration of criminal justice by ensuring that accused persons have a "fair trial", are collected in the speech of Lord Devlin in Connelly v. Director of Public Prosecutions [1964] A.C 1254 at 1347. As his Lordship noted, it is the court itself which carries the responsibility of ensuring that an accused has a "fair trial", and, to that end, will enforce practices such as those which extend to controlling the form of presentment or indictment to prevent abuses of the court's process which involve unfairness to the accused."*

40. The Supreme Court in **Chand (supra)** had gone further in discussing the common law position in Australia and found that Chernov J's judgment in **Cannon & Rochford v Tahche** reflects the best statement about the scope of the prosecutor's duty in Australia. The Supreme Court held that:

*"In Australia, although the principles of common law are generally applicable, there are differences in the law in the various jurisdictions within the country, as explained in the New South Wales Law Commission Report of 2000. However, the best statement of the ambit of the prosecutor's duty in the Australian context is to be found in the judgment of Chernov, J in Cannon & Rochford v Tahche & Ors* [2002] VSCA 84 *(13 June 2002) at paragraph 57, which is quoted below-*

*"The prosecutor's '**duty of disclosure**' has been the subject of much debate in appellate courts over the years. But, as it seems to us, authority suggests that, whatever the nature and extent of the "duty", it is a duty owed to the court and not a duty, enforceable at law at the instance of the accused. This, we think, is made apparent when the so-called "duty" is described (correctly in our view) as a discretionary responsibility exercisable according to the circumstances as the prosecutor perceives them to be. The responsibility is, thus, dependent for its content upon what the prosecutor perceives, in the light of the facts known to him or her, that fairness in the trial process requires."*

41. Accordingly, it is clear that the duty of disclosure by the Prosecution is a part of a fair trial and the Prosecution has to exercise that duty as part of their duty to conduct the Prosecution fairly. The Court has the responsibility to ensure that the parties, including the Prosecution, conduct the proceedings fairly in order to provide a fair trial to the accused. Hence, the Prosecution owes a duty of disclosure to the Court to ensure a fair trial.

42. I now turn to discuss the manner of discharging this duty of disclosure by the Prosecution in Fiji.

43. The then DPP issued the 1998 Guidelines on Disclosure as there was no statutory provision governing the duty of disclosure besides the codification of the right to a fair trial in the Constitution (Amendment) Act 1997. According to Section 76 of the Criminal Procedure Code, the DPP's directions bind the Prosecutors. The Guidelines issued pursuant to Section

76 of the Criminal Procedure Code are not law and are only guidelines issued to the Prosecutors regarding their duty of disclosure.

44. Steyn LJ in **R v Brown (supra)** expressed the following remarks regarding the legality of the Attorney-General's Guidelines on Duty of Disclosure 1981, which I find would assist to properly comprehend the legal position of the Guidelines issued by the then DPP under Section 76 of the Criminal Procedure Code. (Section 37 is the corresponding section in the Criminal Procedure Act). Steyn LJ said that:

> *"Judged simply as a set of instructions to prosecutors, the guidelines would be unobjectionable if they exactly matched the contours of the common law duty of non-disclosure. If they set higher standards of disclosure than the common law, that would equally be unobjectionable. But if the guidelines, judges by the standards of today, reduce the common law duties of the Crown and thus abridge the common law rights of a defendant, they must be pro tanto unlawful."*

45. The 1998 Guidelines on Disclosure are in perfect harmony with the common law duty of disclosure and followed by the Prosecutors in uniformity. Paragraph 10 of the 1998 Guideline states that these guidelines apply to all the offences under all statutes, thus extended the duty of disclosure to all the Courts in this jurisdiction. However, these guidelines do not require the Prosecution to file disclosures in the High Court.

46. Subsequent to the removal of the preliminary inquiries and committal proceedings by the Criminal Procedure Code (Amendment) Act 2003, the then Chief Justice of Fiji had issued Practice Direction No. 1 of 2003 as follows:

> *"The Criminal Procedure (Amendment) Act No. 13 of 2003, which came into effect on 13th October 2003 has made significant changes to the administration of criminal justice in the Magistrates' Court and High Court. It has become necessary to make administrative directions to ensure that the*

*process of change is uniform and smooth. Accordingly the following directions are made:*

i) *A transfer order under section 223 of the Amendment Act must be made for a date to be called in the High Court. A date on any Friday (not being a public holiday) within 28 days is to be entered on the order, where the accused is on bail. A copy of the transfer order is to be provided to the accused and his bail extended to the assigned date.*

ii) *Where the accused is in custody, the date on which the case is fixed to be called in the High Court, must be within 14 days of the transfer order. A production order should be issued for the assigned date.*

iii) *Disclosure of all prosecution statements and exhibits must be completed within 28 days after the case is transferred to the High Court.*

iv) *The order for transfer must be accompanied by a copy of the charge. The order must be sent to the Chief Registrar and the DPP and must be in the form attached. Where the transfer order is for the purpose of sentencing under section 222 (1) of the Amendment Act, a certified typed copy of the court record must be submitted with the transfer order.*

v) *A set of all disclosed prosecution statements and photographs or photocopies of all exhibits must be given to the High Court by the State at the time the information is filed.*

vi) *The Amendment Act applies only to criminal charges filed after the 13th of October 2003. Those accused persons whose charges were filed prior to that date are still entitled to the old Preliminary Inquiry procedures.*

47. According to Direction No. 5 of the Practice Direction No. 1 of 2003, the Prosecution is directed to file in the High Court a set of all disclosed Prosecution statements, photographs or photocopies of all exhibits at the time the information is filed.

48. Gates CJ issued a Practice Direction No. 2 of 2016 regarding Video Recorded Police Statements. According to Practice Direction No. 2 of 2016, the transcript of the video-recorded statement of the accused and the video recording of the statement are considered disclosable material under the duty of disclosure. In pursuant of Directions 5 and 6 of the Practice Direction, a copy of the CD of the video recording and the transcript of the statement must be given to the Court.

49. Accordingly, Practice Direction No. 1 of 2003 and Practice Direction No. 2 of 2016 have directed the Prosecution to file disclosures in the High Court. The Judge of the High Court has powers to determine the practice of the High Court. In doing so, he or she shall act following any Practice Directions issued from time to time by the Chief Justice. Section 202 of the Criminal Procedure Act states:

i) *The practice of the High Court shall be applied as determined by a Judge hearing any criminal proceeding or trial, and shall be as is—*

a) *prescribed by the provisions of this Act, and any Regulations made under this Act;*

b) *prescribed by the provisions of any Act relating to the administration and jurisdiction of the High Court;*

c) *provided for in any Practice Direction issued from time to time by the Chief Justice.*

ii) *Subject to subsection (1), the practice of the High Court in its criminal jurisdiction shall be as nearly as circumstances will admit to the practice of High Court of Justice in England, and the inherent powers of the High Court of Justice shall be deemed to be the inherent powers exercisable by the Judges of the High Court in Fiji.*

50. The common law duty of disclosure by the Prosecution is an inseparable aspect of the right to have a fair trial before a Court of law which has now been codified under Section 15 (1) of the Constitution, thus making it a law of the country. The duty of disclosure is owed to the Court and not to Defence according to the principles of natural justice. The procedure of discharging that duty of disclosure has been expounded by Practice Direction No. 1 of 2003 and Practice Direction No. 2 of 2016 issued by the Chief Justice. Therefore, the filing of disclosures in the High Court is a legal and procedural requirement as per the Constitution and the provisions of the Criminal Procedure Act in order to ensure the right of the accused to have a fair trial.

51. The above conclusion confirms that the filing of disclosures in the High Court has no connection to the abolished assessors' system.

52. Therefore, the submission of the learned Counsel for the first Accused that the filing of disclosures is a dubious law is misguided and misconceived. Moreover, the contention of the learned DPP that neither the Constitution nor the Criminal Procedure Act requires the Prosecution to file disclosures in Court has no merits. Furthermore, the submissions of the learned DPP that there are no Practice Directions issued by the Chief Justice directing the Prosecution to file disclosures in Court is wrong. In addition to that, the Court finds the submissions of the learned DPP that the duty of disclosure is to the Defence and not to the Court is wrong and misconceived.

53. The learned counsel for the first Accused in his submissions contended that there is no requirement to file disclosures in the Magistrate's Court proceedings: hence, the filing of disclosures in High Court infringes the Accused's right to equal protection and treatment before the law.

54. In dealing with this issue, I do not wish to distinguish the different procedures adopted in summary trials in the Magistrates' Court and trials in the High Court in details. The Magistrates' Court has summary jurisdiction to deal with summary offences and other offences falling within its jurisdiction. Hence, the procedure in the Magistrates' Court is different to the procedure in High Court in many aspects such as filing and framing of charges, taking of plea, the test of no case to answer, *etc*.

55. The common law duty of disclosure by the Prosecution as one of the aspects of the right to have a fair trial is a substantive law that creates a duty and obligation. In contrast, the filing of disclosures in the High Court is a procedural direction that provides the mode of exercising or discharging the said duty in High Court proceedings. There is a different procedure to discharge the duty of disclosure in the Magistrates' Court proceedings. However, the substantive principle of duty of disclosure within the context of the right to have a fair trial applies in both the Magistrates' and the High Court proceedings, though two different procedures have been stipulated in discharging the said duty. Therefore, the learned Counsel's above contention for the first Accused that the Accused's right to equal protection before the law has been infringed is also a misguided and misconceived submission.

**Apprehension of Bias**

56. I now turn to the last issue, which is based on the contention of the learned Counsel for the first Accused that a fair-minded and informed lay observer would reasonably apprehend that the Judge might not bring an impartial mind to the resolution of the instant case because he had access to the disclosures filed by the prosecution.

57. The rule against bias is derived from one of the fundamental principles of the common law: the conduct of the adversarial trial by an independent and impartial tribunal. The rule against bias encompasses two main components. The first is the rule against actual bias. If the Judge is directly or indirectly a party to the proceedings or has a direct or indirect interest in the matter, he should not preside over the matter on the ground of actual bias. The second is the rule against apprehension of bias. The apprehension of 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 behaviour gives rise to a suspicion that he is not impartial. This application for recusal is founded on the ground of apprehension of bias by reasons of prejudgment.

58. The House of Lords in **Porter v Magill (2002) 2 AC 357, p 493, 494)** outlined the applicable test of determining the apprehension of bias, where it was held that:

> *"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."*

59. Taking into consideration the approach outlined in **Porter v Magill** (supra), the Court of Appeal of New Zealand in **Muir v Commissioner of Inland Revenue (2007) 3 NZLR 495, p 508, 509)** expounded a two-step inquiry in order to determine the apprehension of 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."*

60. 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 apprehension of bias *(vide Mahendra Pal Chaudhry v The State (2010) FJHC 531 HAM160.2010 (19 November 2010, Mahendra Mothibhai Patel and another v The Fiji Independent Commission Against Corruption (Crim App No AAU 0039 of 2011), State v Citizens Constitutional Forum Ltd. ex parte Attorney-General* [2013] FJHC 220; *HBC195.2012 (3 May 2013) and Chief Registrar v Khan* [2016] FJSC 14; *CBV0011.2014 (22 April 2016)*

61. Accordingly, the Court has first to ascertain the actual circumstances that directly impact 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.

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

63. The contention of the learned Counsel of the first Accused is that the Judge may have access to the materials contained in the disclosures filed by the prosecution; hence, he may have prejudiced or predetermined the disputed issues in this matter. Therefore, the Judge may not bring an impartial mind to the resolution of the dispute.

64. "The Commentary on the Bangalore Principle of Judicial Conduct", published by the United Nations Office of Drugs and Crimes, defines the impartiality as:

> *"The concepts of "independence" and "impartiality" are very closely related, yet separate and distinct. "Impartiality" refers to a state of mind or attitude of the tribunal in relation to the issues and the parties in a particular case. The word "impartial" connotes absence of bias, actual or perceived."*

65. The perceived bias focuses on the mind and attitude of the Judge based on his conduct or behaviour. Therefore, it relates to the inner aspect of Judicial impartiality. The Court of Appeal of New Zealand in **Muir v Commissioner of Inland Revenue (supra)** said that the impartial mind does not connote that the judicial mind works in a space entirely devoid of matters and facts. It was held in **Muir v Commissioner of Inland Revenue (supra)** that:

> *"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."*

66. Justice Mr. Jerome Frank, one of the pioneers of the realistic decision-making approach, **In Re J.P. Linahan (138, F 2d, 650 (1943)** held that:

> *"Democracy must, indeed, fail unless our courts try cases fairly, and there can be no fair trial before a judge lacking impartiality and disinterestedness. If, however, "bias" and "partiality" is defined to mean the total absence of preconceptions in the mind of the judge, then no one has ever had a fair trial and no one ever will. The human mind, even at infancy, is no blank piece of paper. We are born with predispositions; and the process of education – formal and informal – creates attitudes in all men which affect them in judging situations, attitudes which precede reasoning in particular instances and which, therefore, by definition, are prejudicial."*

67. Justice Frank in **Linahan (supra)** had gone further and explained the requirement of judicial awareness of such prejudices, where Justice Frank outlined that:

> *"Frankly to recognise the existence of such prejudices is the part of wisdom. The conscientious judge will, as far as possible, make himself aware of his biases of this character, and, by that very self-knowledge, nullify their effect. Much harm is done by the myth that, merely by putting on a black robe and taking the oath of office as a judge, a man ceases to be human and strips himself of all predilections, becomes a passionless thinking machine."*

68. These judicial precedents acknowledge that the Judges are not mere machines without feelings and prejudices inherent to any human being. However, the judicial oath, the judicial training and procedural requirements, and the wisdom of his conscious awareness rescind such fear of apprehension of bias. 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."*

69. The Judge has to discuss and then determine the scope of the triable issues in the case, the strength and the weakness of the prosecution case, and the admissibility of certain evidential materials in evidence during the pre-trial stage of the proceedings. In order to determine bail, the Judge needs to assess the strength of the Prosecution case and give his reasons for it if he refuses bail. If the accused challenges the admissibility of the confession made in the caution interview in evidence, the Judge is required to conduct a *voir dire* hearing. During that hearing, he has to evaluate the evidence of the parties. If the Judge rules that the confession is inadmissible in evidence, he has already had access to the incriminating material in the caution interview during the *voir dire* hearing. Section 289 and 290 of the

Criminal Procedure Act gives the Court the power to conduct pre-trial hearings to clarify triable issues in the proceedings and the length of the hearing. The clarification of the triable problems and the length of the hearing is imperative to the right of the accused to have the case determined within a reasonable time *(vide Section 15 (3) of the Constitution)*. The filing of disclosures in the High Court is one of such pre-trial requirements that the Prosecution is required to follow by law as explained before.

70. The Fiji Court of Appeal in **Balaggan v State [2011] FJCA 43; Miscellaneous Case 31.2011 (15 September 2011)** held that the Judge's dealings in pre-trial matters do not require him to recuse himself in hearing the substantive matter. The Fiji Court of Appeal held that:

> *"In the High Court or in the Court of Appeal will frequently be addressed on the strength or weakness of the underlying criminal case during a bail application. In his judgment, reasons for his decision have to be given. He may choose to explain why it seems to him that there is a strong prima facie case or a weak prima facie case. Such reasons may relate to flight risk, or to other frequent matters arising in bail applications. Judges and magistrates in common law jurisdictions have always been required to assess the strength and weakness of the underlying criminal case. If they do so and find that it is a strong prima facie prosecution case, it has never been the situation that a judge or magistrate has to recuse himself in respect of hearing the substantive criminal trial on account of apparent bias."*

71. The material in the disclosures is untested material and facts, unlike evidence. The evidence is the testimonies given by witnesses during the trial or any documents or material tendered through a witness during the trial. The opposing party tests these evidence during the cross-examination and re-examination.

72. Section 142 (1) of the Criminal Procedure Act states that every judgment delivered by a Judge or a Magistrate must contain the point or points required to be determined and the

decision and the reasons for such decision. The Supreme Court of Fiji in **Pal v Regina [1974] FLR 1; [1974] 20 FLR 1 (17 January 1974)** has given a descriptive and precise guideline in formulating judgments in the Magistrates' Court, which I find it as a great assistance to the Judges of High Court as well. Grant CJ in **Pal v Regina (supra)** had outlined that:

> *"I would take the opportunity, as the judgment of the lower court in this case is a clear example, of drawing attention to what appears to be a trend on the part of some Magistrates to set out in a judgment a summary of the evidence of the witnesses in the order in which they were called regardless of the fact that this bears no relationship to the sequence of events which is the subject matter of the trial; and a tendency to omit reasons for the decision reached.*
>
> *Witnesses very often give evidence out of order, but one does not expect a Magistrate to simply restate same seriatim in his judgment. In order to arrive at a proper conclusion the Magistrate must have considered the matter in its logical progression, and have formulated reasons for his ultimate conclusion, and the judgment should be expressed accordingly.*
>
> *As a general rule, the judgment should commence with a description of the charge, followed by the relevant events and the material evidence set out in correct sequence in narrative form, the identifying number of each pertinent witness being incorporated at the appropriate places, after which the Magistrate should state what witnesses he believes and whose evidence he accepts or rejects, and should proceed to make his findings of fact, apply the appropriate law to those facts, and give his reasoned decision; bearing in mind throughout the provisions of Section 154 (1) of the Criminal Procedure Code.*
>
> *If these considerations are kept in view, not only will it make the task of an appellate court easier, it might well lead to fewer decisions being upset."*

73. In view of the guideline as expounded in **Pal v Regina (supra),** the Judge must state what witnesses he believes and what evidence he accepts or rejects. In doing that, he should give reasons for believing the witness and accepting or rejecting the evidence. To do that, the Trial Judge must properly evaluate the evidence and the witnesses presented in the hearing. Determination of the reliability and credibility of the evidence is one of the main factors in this process. It would help the Court to finally determine which evidence to accept or what part of the evidence to refuse *(vide State v Hannan Wang [2021] FJHC 111; HAA30.2019 (19 February 2021).*

74. Principle 2.5. 1. of the Bangalore Principles of Judicial Conduct states that:

> *"A judge shall disqualify himself or herself from participating in any proceedings in which the judge is unable to decide the matter impartially or in which it may appear to a reasonable observer that the judge is unable to decide the matter impartially. Such proceedings include, but are not limited to, instances where*
>
> *i) the judge has actual bias or prejudice concerning a party or personal knowledge of disputed evidentiary facts concerning the proceedings;*

75. The personal knowledge of disputed evidentiary facts as referred to under principle 2.5.1 means the information gained before the case is assigned to the Judge, as well as knowledge acquired from an extra-judicial source or personal inspection by the Judge while the case is ongoing *(vide page 75 Commentary on the Bangalore Principle of Judicial Conduct published by UNDOC).* Hence, the Bangalore Principles of Judicial Conduct finds the knowledge of the materials of the case acquired by the Judge during the pre-trial proceedings is not a ground to recuse himself in hearing the substantial matter.

76. The apprehension of bias is an objective test. It is tested through the eyes of an informed and fair-minded lay observer. Such hypothetical informed and fair-minded observer would know such pre-trial steps, procedures and rules. He also knows the requirement of section 142 of the Criminal Procedure Act. Therefore, such a fair-minded and informed lay observer would not find that the Trial Judge in this matter would not bring an impartial, fair mind in the determination of the case due to the filing of disclosures in Court.

77. In view of these reasons, as mentioned above, I refuse and dismiss this application for recusal.


**Hon. Mr. Justice R.D.R.T. Rajasinghe**

**At Suva**
29th March 2021

**Solicitors**
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