IN THE HIGH COURT OF FIJI

AT LAUTOKA

MISCELLANEOUS JURISDICTION

CRIMINAL MISC. NO. HAM 107 OF 2021

BETWEEN : **ASHISH ASMEET NARAYAN**

APPLICANT

A N D : **THE STATE**

RESPONDENT

Counsel : Mr. M.N.S. Khan for the Applicant.
Ms. L. Latu for the Respondent.

Dates of Hearing : 29 September, and 07 October, 2021

Date of Judgment : 11 October, 2021

JUDGMENT

BACKGROUND INFORMATION

[1] The applicant is charged in the Magistrate's Court at Ba with one count of dangerous driving occasioning death contrary to section 97(1), 2(c), 5(a),(8) and 114 of the Land Transport Act No. 35 of 1998 as per the amended charge filed in court.

[2] After trial the applicant was convicted by the learned Magistrate and on 17th August, 2020 he was sentenced to 2 ½ years imprisonment with a non-parole period of 1 year and 9 months. In addition to the imprisonment term the applicant was ordered to pay a fine of $1,000.00 with a consecutive default sentence of 3 months and 10 days. He was also disqualified from driving for a period of 1 year.

[3] Being aggrieved by the conviction and sentence the applicant through his counsel appealed to the High Court.

HIGH COURT

[4] In the High Court, Morais J after hearing the appeal on 3rd March, 2021 set aside the conviction and sentence and ordered a speedy new trial on the amended charge.

COURT OF APPEAL

[5] On 29th March, 2021 the applicant being dissatisfied with the decision of the High Court filed a timely second tier appeal in the Court of Appeal.

[6] After hearing the appeal the Acting Resident Justice of Appeal made the following orders:

"(1) Appeal (bearing No. AAU 39 of 2021) is allowed to proceed to the full court on the question of law identified in the Ruling.

(2) An order to stay criminal proceedings in Ba Magistrates court case No. 2051 of 2016 is refused.

(3) *An order to vacate the hearing date already fixed for 25 October 2021 in Ba Magistrates court case No. 2051 of 2016 is refused.*

(4) *An order that Ba Magistrates court case No. 2051 of 2016 should not be dealt with by the Resident Magistrate is refused".*

[7] It is accepted that the orders in respect of stay pending appeal and recusal of the learned Magistrate have not been decided on merits but refused due to lack of jurisdiction.

FRESH APPLICATION IN THE HIGH COURT

[8] On 14th September, 2021 by Notice of Motion and supporting affidavit of the applicant sworn on 13th September, 2021 the applicant sought the following orders.

(1) *That there be a stay of the proceedings in Ba Magistrate's Court Traffic Case No. 2051 of 2016, until the final determination of the Appeal to the Court of Appeal against the Judgment of the High Court at Lautoka in Criminal Appeal No. 52 of 2020.*

(2) *That this matter be taken off the list at the Ba Magistrate's Court until the final determination of the Appeal to the Fiji Court of Appeal or ALTERNATIVELY the matter be adjourned until the final determination of my Appeal to the Fiji Court of Appeal.*

(3) *That there be a stay of the proceedings in Ba Magistrate's Court Traffic Case No. 2051 of 2016 until the final determination of this Application.*

(4) *That the Hearing date assigned in the matter for 25th October 2021 be vacated and the matter be stayed pending the final determination of the Appeal in the matter.*

(5) *That the matter ought not to be called in any way be dealt with by the Learned Magistrate, His Worship Mr Samuela Qica in any manner whatsoever and/or howsoever and/or the matter be transferred to another Magistrate.*

(6) *That there be an interim Order with respect to Orders 1 to 5 sought hereinabove until the final determination of this Notice of Motion.*

(7) *That time for service of this Notice of Motion be abridged.*

(8) *That the earliest Hearing date be assigned for the Hearing of this Notice of Motion.*

(9) *Such further and/or other relief that this Honourable Court may seem just and proper.*

[9] The applicant's counsel submitted that this court has the jurisdiction to hear the application for stay pending appeal and for the recusal of the learned Magistrate from hearing the matter.

[10] Counsel relies on paragraph 32 of the Court of Appeal Ruling that the High Court under its inherent and supervisory jurisdiction can hear the stay application.

[11] For ease of reference the above paragraph is reproduced as follows:

"Thus, I would conclude that the appellant's application to stay proceedings in the Magistrate's Court at Ba cannot be granted by

this Court. There is sufficient authority in Fiji that the appellant could apply to the High Court under its inherent and supervisory jurisdiction for a stay of proceedings in the Magistrates' Court, if he so wishes [for example as in Nacagi v State [2014] FJCA 54; Misc. Action 0040.2011 (17 April, 2014)]".

[12] A perusal of *Nacagi's* case reveals that Mr. Nacagi and others had made an application under the inherent and supervisory jurisdiction of the High Court for a permanent stay of proceedings in the Magistrate's Court on the grounds of post charge delay.

[13] The applications were refused by the High Court, upon appeal to the Court of Appeal the Justice of Appeal dismissed the appeal on the basis that the appellants did not have a right of appeal from an interlocutory order.

[14] Both counsel filed written submissions and also made oral submissions virtually for which this court is grateful.

DETERMINATION

[15] Both counsel were obviously at a disagreement on whether paragraph 32 above also applied to stay of proceedings pending appeal.

[16] As a matter of law, the Court of Appeal presided by a single Justice of Appeal does not have the jurisdiction to consider the two applications which are now before this court.

[17] The intimation upon my reading of paragraph 32 of the Court of Appeal ruling is about permanent stay of proceedings in the lower court and not

about stay pending appeal. Furthermore, the case of *Nacagi* is a case of permanent stay of proceedings in the Magistrate's Court.

[18] The substantive appeal is before the full bench of the Court of Appeal after Morais J. had dealt with the appeal from the Magistrate's Court on its merits. Since there is no appeal before this court I am unable to assess the factors that need to be considered for stay pending appeal.

[19] There is a notable difference between an application for permanent stay of proceedings in the lower court and stay pending appeal. The factors that ought to be satisfied are also different. In respect of a permanent stay application the High Court exercises its inherent jurisdiction and/or supervisory/review jurisdiction whereas for stay pending appeal the court normally exercises its appellate jurisdiction.

[20] For permanent stay application an applicant must establish his or her allegation relating to prosecutorial misconduct or delay or abuse of process (s*ee Tevita Nalawa vs. State, Criminal Appeal No. CAV 0002 of 2009).*

[21] For stay pending appeal, an appellant has to file a petition of appeal to invoke the appellate jurisdiction of the court appealed to and must satisfy the appellate court of the following: *(see Natural Waters of Viti Ltd vs. Crystal Clear Mineral Water (Fiji) Ltd, ABU 0011 of 2004 (18 March, 2005)*:

a) If no stay is granted, the applicant's right of appeal will be rendered nugatory;
b) Whether the successful party will be injuriously affected by the stay;
c) The bona fides of the applicants as to the prosecution of the appeal;
d) The effect on third parties;

e) *The novelty and importance of questions involved;*

f) *The public interest in the proceeding;*

g) *The overall balance of convenience and the status quo.*

[22] In my view, the full bench of the Court of Appeal would be in a better position to determine the application for stay pending appeal since it has the jurisdiction to hear the substantive appeal and therefore able to decide on its merits. The learned counsel for the applicant also argued that since the matter was now before the full bench it was reason enough to say that the grounds of appeal presented by the applicant were meritorious.

[23] I disagree, the fact that the applicant's appeal is before the full bench of the Court of Appeal does not automatically mean that the appeal will be decided in favour of the applicant. In this regard this court endorses the observations made by the Justice of Appeal in his ruling at paragraphs 27 and 28:

Paragraph 27

"It is not clear what the amended charge against the appellant in the Magistrates court was; whether the appellant had effectively met the substance of the amended charge during the trial though it had not been formally read over to him and his plea not taken is also not clear. These might be some relevant factors to be considered by the full court."

Paragraph 28

"Since it cannot be ascertained from the impugned judgment of the High Court as to what considerations, legal and otherwise, had persuaded the High Court judge to order a retrial, it is not possible to determine at this

stage whether the judge had applied the correct legal principles in arriving at his decision. This would amount to a question of law which can proceed to the full court. Other legal issues identified earlier could be considered in the same context."

[24] In *Ratu Orisi Bokini vs. The State, Criminal Appeal No. AAU001 of 1999S*, the Court of Appeal said that where an appeal has been validly brought, the High Court had the power to order a stay pending appeal. The court in this regard stated as follows:

> *"The High Court has inherent power to control its own process and to ensure that holding measures are taken pending the hearing of the appeal to enable the exercise of its appellate jurisdiction to be meaningful. See for example, in the context of a statutory right of appeal Pinson v Pinson (1991) 5 P. R. NZ 177. There Smellie J granted a stay of execution pending the hearing of an appeal from the Family Court to the High Court of New Zealand.*

[25] In view of the above, there is no valid or substantive appeal before this court to enable me to consider an application for stay pending appeal.

RECUSAL APPLICATION

[26] The applicant's counsel also submitted that when the retrial was ordered by this court the same learned Magistrate, who heard the matter previously refused to transfer the file to another Magistrate and has assigned a hearing date for 25th October, 2021.

[27] It is unfortunate that the applicant did not file a formal application for recusal despite being asked by the learned Magistrate to do so. Had this been done a much clear picture would have emerged in respect of this

issue. In my view, it is for the learned Magistrate concerned to decide whether he would recuse himself or not guided by the established principles of law. Be that as it may, this court wishes to bring to the attention of the learned Magistrate paragraphs 35 and 36 of the Court of Appeal ruling which is noteworthy:

Paragraph 35

It may be pertinent for the Resident Magistrate ex mero motu (of his own motion) or on an application by the appellant to carefully consider the observations and apply the principles expressed by the High Court of Australia in ***LIVESEY v. NEW SOUTH WALES BAR ASSOCIATION*** *(1983) 151 CLR 288 20 May 1983 in this regard.*

'7. 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 parte Armstrong (1976) 136 CLR 248, at pp 258-263 . 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; Ex parte Felman (1977) 52 ALJR 155, at p 158 ; Reg. v. Shaw; Ex parte Shaw (1980) 55 ALJR 12, at pp 14, 16) and in the Supreme Court of New South Wales (see, e.g., Barton v. Walker (1979) 2 NSWLR 740, at pp 748-749 . Although statements of the principle commonly speak of "suspicion of bias", we prefer to avoid the use of that phrase because it sometimes conveys unintended nuances of meaning. (at p294)

8. In a case such as the present where there is no allegation of actual bias, the question whether a judge who is confident of his own ability to determine the case before him fairly and impartially on the evidence

should refrain from sitting because of a suggestion that the views which he has expressed in his judgment in some previous case may result in an appearance of pre-judgment can be a difficult one involving matters "of degree and particular circumstances may strike different minds in different ways" (per Aickin J. in Shaw (1980) 55 ALJR, at p 16). If a judge at first instance considers that there is any real possibility that his participation in a case might lead to a reasonable apprehension of pre-judgment or bias, he should, of course, refrain from sitting. On the other hand, it would be an abdication of judicial function and an encouragement of procedural abuse for a judge to adopt the approach that he should automatically disqualify himself whenever he was requested by one party so to do on the grounds of a possible appearance of pre-judgment or bias, regardless of whether the other party desired that the matter be dealt with by him as the judge to whom the hearing of the case had been entrusted by the ordinary procedures and practice of the particular court. Once it is accepted that a judge should not automatically stand aside whenever he is requested so to do, it is inevitable that appellate courts, removed from the pressure of a possible need for immediate decision and enjoying the advantages both of hindsight and, conceivably, further material and information, will on occasion conclude that a decision of a judge at first instance that he should sit was mistaken and has resulted in a situation where one of the parties or a fair-minded observer might entertain a reasonable apprehension of bias or prejudgment. Such a conclusion does not involve any personal criticism of the judge at first instance or any assessment of his qualities or of his ability to have dealt with the case before him fairly and without pre-judgment or bias. It is simply an instance of the ordinary working of the appellate process in which the views of the judges who constitute the appellate court prevail over the views of the judge or judges who constituted the court from which the appeal is brought. (at p295).'

Paragraph 36

*In **Verma v State** [2021] FJCA 17; AAU166.2016 (14 January 2021) the complaint of the appellants was that the Magistrate also presided over the civil proceedings that involved similar facts and evidence and therefore should have recused him of the criminal trial against the appellants. The Court of Appeal referred to the following decisions in the Ruling which too may be relevant to the Resident Magistrate in dealing with the appellants' situation.*

*'[18] Therefore, following **Tokoniyaroi v State** [2014] FJSC 9; CAV4.2013 (9 May 2014) and **Koya v State** [1998] FJSC 2; CAV0002.1997 (26 March 1998) and **Patel v Fiji Independent Commission Against Corruption** [2013] FJSC 7; CAV 0007 of 2011 (26 August 2013) the High Court judge had approached the appellants' ground of appeal on the 'non-recusal' of the Magistrate taken-up for the first time in appeal.*

*[19] In **Tokoniyaroi** the Supreme Court stated:*

'[44] The two cases are indistinguishable on the basis that the issue of bias has been raised on appeal after the trial. It is on this basis that the decision of the Supreme Court in Koya was binding on the Court of Appeal in the present case. The Supreme Court decided that when a trial in the High Court has taken place and an appellate court is determining an appeal where bias is raised, the appellate court looks at the record of the trial showing how it was conducted by the trial Judge. If the record demonstrates that the trial judge conducted the trial impeccably, it would be difficult to establish that there was a miscarriage of justice arising from non-recusal.'

[20] *In **Koya** (supra) where bias on the part of the trial judge was raised for the first time in appeal the Supreme Court laid down the approach of the appellate court should take as follows:*

'Here we are concerned with a trial which has actually taken place and with the question whether there has been a miscarriage of justice on the ground that there was a real danger of bias or a reasonable apprehension or suspicion of bias. In the determination of that ground, the record of the trial, showing how it was conducted by the trial judge, is of fundamental importance. Generally speaking, if the record were to demonstrate that a judge sitting with a jury conducted a trial impeccably, it would be difficult to establish that there was a real danger that the trial was vitiated by apparent bias or that a fair-minded observer, knowing the facts, would reasonably apprehend or suspect that such was the case.

[21] *In **Patel** the Supreme Court stated:*

'[33] The real danger of bias test was explained by Lord Goff in R –v- Gough (supra) at 670 in this way:

"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 have been 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 rather than real likelihood, to ensure that the court is thinking 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 having unfairly regarded) with favour or disfavour, the case of a party to the issue under consideration by him _ _ _."

[34] 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.*

'[35] 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.'

[22] The Supreme Court in ***Chief Registrar v Khan*** *[2016] FJSC 14; CBV0011.2014 (22 April 2016) which the appellants have cited stated:*

'39. 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.*

40. *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.'*

[28] Furthermore, the Bangalore principles are also self-explanatory in this regard.

CONCLUSION

[29] For the above reasons, this court rules that the orders sought by the applicant cannot be granted since this court does not have the jurisdiction to do so.

ORDERS

1. The Notice of Motion filed herein is dismissed due to lack to jurisdiction.

2. The High Court registry is directed to forward a copy of this judgment to the Magistrate's Court at Ba.

3. 30 days to appeal to the Court of Appeal.

Sunil Sharma
Judge

At Lautoka

11th October, 2021

Solicitors

Messrs. Nazeem Lawyers for the Applicant.

Office of the Director of Public Prosecutions for the Respondent.