

IN THE HIGH COURT OF FIJI
AT LAUTOKA
CRIMINAL JURISDICTION

Criminal Misc. No. HAC 13 of 2018

BETWEEN : **DESHWAR KISHORE DUTT**

APPLICANT

A N D : **STATE**

RESPONDENT

Counsel : Applicant in person.
: Mr. S. Seruvatu for the Respondent.

Date of Hearing : 06 September, 2022

Date of Judgment : 20 September, 2022

JUDGMENT

[On application for Recusal]

1. The applicant on 6th September, 2022 in court filed an application that I should recuse myself from hearing his matter.
2. The applicant did not file any affidavit in support but made oral submissions that his brother in law one Shiv Kumar is my friend who is not in good relationship with the applicant has threatened the applicant that he will make sure that the applicant stays incarcerated for a long time.

3. For completeness the application of the applicant is reproduced herewith:

- i) *That, my Brother-in-Law, namely, Mr Shiv Kumar of Koronubu, Ba and MY-LORD are BUDDIES, to the extent that, both of the duo (you) share the same interest – eg. In live Bands – and as a matter of fact used to, once be in a same team playing live music in Wedding and other important family functions;*
- ii) *That, currently my Brother-in-Law and myself are not in a healthy relationships due to the scar and stigma which Mr Shiv Kumar had displayed in our (my families) villages first by compelling my sister to run away with him and second by having affair with my wife after my imprisonment;*
- iii) *That, Mr. Shiv Kumar had betrayed me and sister and entire family by having extra-marital affairs with my own-wife whilst my incarceration, hence the separation of me with my wife;*
- iv) *That, on numerous occasions I had personally warned my Brother-in-Law Mr. Shiv Kumar to stay away from my family especially from my wife but to no avail; and*
- v) *That, Mr. Shiv Kumar had directly mentioned to me my sister and my wife that he (Mr. S. Kumar) and Honorable Justice Sunil Sharma are Buddies and that he (Mr. Shiv Kumar) will make certain that I stay INCARCERATED and get convicted in my pending criminal matter;*
- vi) *That, the facts revealed by Mr Shiv Kumar of the relationship between him and my Lord – not forgetting the animosity between me and him leaves to me conclude that I might not get a fair trial before a impartial*

Tribunal because it is inevitable that Mr. S. Kumar will – as he had sexual relationship with my so-called wife, had a fight with me once due to him making my sister run away with him, etc. Try his very best to somehow convince his Buddy – as he had promised to keep me incarcerated longer for his own safety;

[His Buddy – MY LORD, with Respect!]

vii) That, once, I myself had witnessed my Brother-in-Law conversing with MY LORD pertaining some of my other pending Criminal matters – when my Lord was the Director of Legal Aid, after hours, which offer and advice I had declined to take;

viii) That I reserve my Right to file further Grounds and its respective submissions, if necessary.

4. The applicant contends that he will not receive a fair trial since his brother in law Shiv Kumar is known to me and he is worried that I will be influenced by Shiv to keep the applicant incarcerated since he is not in good terms with applicant.
5. The main thrust of the applicant's argument is that there is a perception of bias which will affect fair trial and therefore this matter should be heard by another judge.

LAW

6. The test for a recusal application is two tiered:
 - a) The court must first ascertain all the circumstances which have a bearing on the suggestion that the judge was biased;

- b) 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.
7. The leading case in Fiji is the Supreme Court's judgment in *Amina Begum Koya v The State* [1998] FJSC 2. 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".
8. 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 had prejudged or might prejudice the case". The Supreme Court in *Koya's case* was of the view that there was little, if any, practical difference between the two tests.
9. In my judgment the allegation of bias stems from a dispute the applicant has with his brother in law who according to the applicant lives in Papua New Guinea. I would to state here that I knew one Shiv Kumar many years ago who used to be a musician in a musical group.
10. For many years Shiv Kumar has not contacted me and I do not know where he is residing in any event the dispute between the applicant and his brother in law has nothing to do with me. Litigation is not about individuals appearing in court but about the evidence adduced and the application of the law which leads to a determination by the court.

11. If there are any matters of concern, any aggrieved party would no doubt exercise their right to appeal to cure the errors made by the court. The legal profession is based on professionalism, criticisms are made of judicial officers “day in and day out” the judicial oath requires a judicial officer to rise above all so that justice can be served.
12. The allegation that I will be biased in this trial because I knew the applicant’s brother in law is far-fetched in absence of any evidence before this court that Shiv Kumar has contacted me and discussed about the applicant’s pending case in my court. The applicant can be rest assured that there has been no influence by anyone to pervert the course of justice and no such attempts have been made to me in any shape or form whatsoever. The attainment of justice in accordance with the evidence adduced and the law is the pillar for any judicial system which will be maintained and upheld at all times.
13. The applicant has embarked on a baseless assumption which is unfortunate.
14. This trial before me will be dealt with like any other matter. All litigants and counsel are alike and equal, each case has its own facts and circumstances and any decision of the court will be based on evidence and law nothing else. My judicial oath plays an integral part in upholding fairness and justice.
15. Based on the above, the application for recusal is dismissed as frivolous and without any merits.

16. Before I leave I would to state that a hearing date has been assigned for 1st November, 2022 which is maintained and it is important that all parties be ready.



Sunil Sharma
Judge

At Lautoka

20 September, 2022

Solicitors

Applicant in person.

Office of the Director of Public Prosecutions for the Respondent.