A

REGINA

v.

A RESIDENT MAGISTRATE

B

ex parte **TANIELA VEITATA**

[SUPREME COURT, 1977 (Mishra Ag. C.J.) 3rd October]

Appellate Jurisdiction

C

Magistrate—bias—Magistrate's prior knowledge of accused's character and antecedents—whether sufficient to disqualify him from hearing subsequent case—circumstances in which likelihood of bias.

The applicant had been convicted a few weeks earlier with others of offences under the Trade Disputes Act 1973 by a magistrate and sentenced to a term of
D imprisonment. During the course of his judgment, whilst assessing sentence, the magistrate had commented strongly on the applicant and his co-accused's behaviour basing his comments on the evidence before him.

The applicant was again charged with offences under the Trade Disputes Act and appeared before the same magistrate. He applied for leave to move for prohibition to prevent the same magistrate from hearing the charges.

E

Held: There was no evidence to indicate that the magistrate held or had ever held any hostility towards the applicant. The fact that the magistrate was aware of the applicant's character and antecedents or that he had commented adversely on the applicant's behaviour at the earlier trial did not of themselves disqualify the magistrate from hearing the subsequent case. There must be a real likelihood of bias.

F

Per curiam: Where resources permit, efforts should be made to do not only what is strictly in keeping with the law, but also what might otherwise appear desirable in the circumstances of any particular case.

Cases referred to:

G *Metropolitan Properties Co. (F.G.C.) Ltd. v. Lannon* [1969] 1 Q.B. 577; [1968] 3 All E.R. 304.

R. v. A. Stipendiary Magistrate ex parte Gallagher & Anor 136 J.P. 79.

The King v. Commonwealth Court of Conciliation and Arbitration & Ors: ex parte Kay & Anor—reference not available.

Austin re ex parte Schoffield; Austin re ex parte Green 70 W.N. 112.

H *R. v. Rangaiya & Anor* (1977) 23 F.L.R.

Application for prohibition to go to the resident magistrate to prohibit him from hearing charges against the applicant under the Trade Disputes Act.

MISHRA Ag. C.J.: [3rd October 1977] —

The applicant applies for leave to move for prohibition to go to the resident magistrate Mr Kenneth Moore to prohibit him from continuing to hear two charges laid against the applicant under the Trade Disputes Act, 1973.

The main ground for the application is that the same resident magistrate presided over a trial a few weeks ago wherein the applicant was convicted of offences under the same provisions of the Act and sentenced to six months' imprisonment. The grounds have been formulated in the following terms:

"3. *(a)* .....

(b) That resident magistrate now has intimate knowledge of the character and the antecedent of the applicant and in sentencing the accused in the previous case on a similar charges commented as follows:

'The evidence before me in this case has been indicative of this trade union acting like a rogue elephant on the rampage. It cared not for persons outside the membership.....

In going on strike it seems to me that this Union acted in the most inward looking and self-centred way. Its actions have hurt fellow workers, but the evidence before me has been that this in no way stopped the Union following its own wilful way.....

This Union gives the impression that it is above the law. I make it clear that it is not. These offences were deliberate and determined. These offenders knew what they were doing and they did it. Such actions must be deterred if the normal standard of peace and tranquillity is to obtain in Fiji.'

(c) That because of the above mention any reasonable person would at least form a reasonable suspicion that this Applicant could not obain a fair trial of the pending charges before the same resident magistrate.

4. That not only did the resident magistrate Mr Kenneth Moore, Esquire found the applicant guilty of the similar charges the said magistrate sentenced him to a term of imprisonment and in addition made some very strong remarks concerning the applicant and his fellow Unionists' activities.

5. There is now a real likelihood that the resident magistrate would from kindred or any other cause will be biased against the applicant if he continues to hear the present case."

The main ground, therefore is that of bias. The principle on which courts act in dealing with this issue was stated by Lord Denning M. R. as follows [*Metropolitan Properties Co. (F.G.C.) Ltd. v. Lannon* 1969 1 Q.B. 577 at 599].

"It brings home this point: in considering whether there was a real likelihood of bias, the court does not look at the mind of the justice himself or at the mind of the chairman of the tribunal, or whoever it may be, who sits in a judicial capacity. It does not look to see if there was a real likelihood that he would, or did, in fact favour one side at the expense of the other. The court looks at the impression which would be given to other people. Even if

A he was as impartial as could be, nevertheless if right-minded persons would think that, in the circumstances, there was a real likelihood of bias on his part, then he should not sit."

He, however, added:

"Nevertheless there must appear to be a real likelihood of bias. Surmise or conjecture is not enough. There must be circumstances from which a reasonable man would think it likely or probable that the justice, or chairman, as the case may be, would, or did, favour one side unfairly at the expense of the other."

Lannon's case involved rent assessment where Lannon's own father with whom Lannon was living had differences over rent with the person whose rent Lannon had been asked to assess. It was held that Lannon should not have presided over the hearing. In tribunals dealing with rents, liquor licences and other similar matters the issue of bias is comparatively easily discernible where the person whose decision is impugned can be shown to have an ostensible interest in the matter before him. This is anything but easy in ordinary criminal courts where the magistrate generally is a permanent judicial officer with hardly any personal interest in the outcome of any hearing. As the learned author says in *Judicial Review of Administrative Action* (3rd Edn. p. 212):

"There can be no doubt that in the ordinary courts strong personal animosity towards a party disqualifies a judge from adjudicating if it gives rise to a real likelihood of bias ..... But the evidence must be compelling; the courts are reluctant to conclude that any judicial officer's judgment is likely to be warped by personal feeling."

In the present case, there is nothing in the papers filed to show any altecation between the applicant and the resident magistrate either during the trial or off the bench. There is no suggestion that the resident magistrate had ever met him except in his judicial capacity during the trial, or that he made any adverse comment on any evidence given by the applicant, that is, if the applicant did give evidence at the first trial. No reference is made to anything in the resident magistrate's judgment which could be regarded as showing hostility to the applicant. The passage quoted in the application contain the magistrate's comments while he was assessing an appropriate sentence and even there he did not in any way single out the applicant from the rest of the defendants and he took particular care to draw his inferences from what he described as "the evidence before me in this case". The comments were no doubtstrong but he seems to have based them entirely on the evidence before him of whose nature this Court is not aware. It would be strange indeed if the principle relating to bias could be so construed as to disqualify this magistrate from ever trying any official of this trade union for any similar offence.

As the for magistrate's knowledge of the applicant's character and antecedents, it is not at all uncommon in a small community like ours for a magistrate to have a person before him several times in the same year to face different criminal charges. To disqualify him from dealing with such charges would be to place an unbearable burden on the meagre machinery of our judicial administration. The law may not regard such a situation as desirable but it certainly does not brand it as being contrary to any legal principle.

As Lord Widgery C. J. said in *R. v. A. Stipendiary Magistrate. ex parte Gallagher and Another* (136 J.P. 79):

> **"It is a commonplace that in magistrates' courts the court may have knowledge of the accused's previous record simply by virtue of the fact that the court may have sat to determine previous charges against him. It is not doubt desirable in many instances that an accused person should come before a magistrate who does not have an intimate knowledge of his record. But that desirability cannot be elevated to a proposition of law sufficient to deprive the magistrate of jurisdiction and thus to justify an order of prohibition going in a case of this kind."**

This view represents high legal authority and I adopt it with respect.

Learned counsel cited some Australian cases of which two relate directly to prohibition. The first *The King v. The Commonwealth Court of Conciliation and Arbitration and Others; Ex parte Kay and Another* (reference not given) was a case concerned with contempt of court where the members of an inferior court who complained of contempt were, themselves, going to adjudicate on the matter. The High Court of Australia sent an order of prohibition preventing them from hearing it. In Fiji a case of this nature would generally be dealt with by the Supreme Court itself and procedure relating to contempt of court has some special features. The principle stated in the case, however, accords fully with Lord Denning's dictum in *Lannon's* case *(supra)*. In Fiji prohibition will certainly go to a magistrate who insists on hearing a case in which he himself has the role of the "accuser" or the "prosecutor". There is no suggestion of that nature against the resident magistrate in the present case.

The second case was *ex parte Schoffield; re Austin and ex parte Green; re Austin* (70 Weekly Notes 112) in which a policeman had issued summonses against the two applicants alleging offensive behaviour and hindering him in the execution of his duty. Relating to the same incident, the two applicants had taken out summonses against the policeman alleging assault. The magistrate heard the policeman's summons first and convicted the applicants. In doing so, he called them "perjurers" and their evidence "a pack of lies". He then proceeded to hear the applicants' summonses against the policeman creating a situation where he would have had to adjudicate largely on the evidence he had already heard and on which he had already formed strong views. The court disapproved of the course taken by the magistrate in insisting on hearing the second set of summonses. In a similar situation Magistrates in Fiji have often disqualified themselves without any application from the parties. See for instance the recent case of *R. v. Rangaiya and Another* (Criminal Case 162 of 1977). In the present case, however, the charges do not arise out of the facts of the first case heard by the resident magistrate. The offences are quite distinct from those in the other case and were committed entirely on a different occasion.

An additional ground mentioned in the statement filed by the applicant alleges that the hearing of charges against him involved consideration of possible contravention of the provisions of the Constitution of Fiji and that the resident magistrate refused to refer the matter to the Supreme Court as required by section 17(3) of the Constitution. Learned counsel, however, conceded at the hearing that, while this might be a valid ground for some other remedy, it does not constitute a ground on which prohibition would go.

The application, therefore fails.

A By way of general comment I might add that our courts will do well to keep in mind the dictum of Lord Widgery C. J. in the case of *Gallagher and another (supra)* quoted earlier in this judgment and endeavour, where resources permit, to do not only what is strictly in keeping with the law but also what might otherwise appear desirable in the circumstances of any particular case.

B *Application refused.*