STATE v SAHADAT ATAI KHAN and Anor

HIGH COURT — CRIMINAL JURISDICTION

GATES J

16, 25 September, 12 December 2003

[2003] FJHC 55

Practice and procedure — abuse of process — appeal — whether court has jurisdiction during trial to order legal practitioner to cease appearing as counsel for accused — right to counsel of choice — counsel's duty to withdraw — court's inherent jurisdiction to control representation of parties — court's intervention — Code of Ethics 1984 r 4.3, 6.6, 6.10, 6.13 — Constitution s 28(1)(d), 29, 43(1), 43(2), 120(6) — Criminal Procedure Code ss 188, 308(8) — Penal Code s 106(a).

Appellant sought an appeal against an order made in the Magistrates Court during the trial of 1st Respondent. The appeal, pursuant to the court's powers under s 308(8) of the Criminal Procedure Code was brought prior to the conclusion of the proceedings. Appellant sought the exercise also of the High Court's supervisory powers of a subordinate court in criminal proceedings pursuant to s 120(6) of the Constitution.

Held — No material was advanced by the 2nd Respondent to show that exceptional circumstances were relevant to make it proper for him to continue to act for his client 1st Respondent. The right to counsel of choice was not absolute, nor is the duty to act and to accept instructions. The withdrawal of counsel here would jeopardise the client's interest. Competent senior counsel was available to take over the case and he did do so.

Appeal allowed.

Cases referred to

Abse v Smith [1986] QB 536; *Arbuthnot Leasing International Ltd v Havelet Leasing Ltd* [1991] 1 All ER 591; *E H Cochrane Ltd v Ministry of Transport* [1987] 1 NZLR 146; *Minister of Foreign Affairs v Benipal* [1984] 1 NZLR 758; *R v Burney* [1989] 1 NZLR 732; *R v Hall* [1987] 1 NZLR 616; *R v Racz* [1961] NZLR 227; *R v Sussex Justices; Ex parte McCarthy* [1924] 1 KB 256; *R v Visitors to the Inns of Court; Ex parte Calder* [1992] 3 WLR 994; *Re GJ Mannix Ltd* [1984] 1 NZLR 309; *State v Abhay Singh* Crim Case No 1606 of 2003; *State v Sahadat Atai Khan* Crim Case No 588 of 2003; *Taylor v Attorney-General* [1975] 2 NZLR 675; *Wells v Wellington District Law Society* [1997] 1 NZLR 660; *Yamaji v Westpac Banking Corporation (No 1)* (1993) 42 FCR 431; 115 ALR 235; [1993] FCA 253, cited.

Black v Taylor [1993] 3 NZLR 403; *Chapman v Rogers; Ex parte Chapman* [1984] 1 Qd R 542; *Everingham v Ontario* (1992) 88 DLR (4th) 755; *Faria Shabana Shah v PC Verma Nand* HAM 18 of 2003S; *Jeffrey v Associated National Insurance Co Ltd* [1984] 1 Qd R 238; *New Brunswick & Canada Railway Co v Conybeare* (1862) 9 HL Cas 711; *Rex v Secretary of State for India in Council; Ex parte Ezekiel* [1941] 2 KB 169, considered.

Gokul Singh v Reginam [1975] 21 FLR 50, disapproved.

The 1st Respondent appeared in person.

W. Kurisaqila and *A. Prasad* for the Applicant.

A. K. Singh for the 2nd Respondent.

T. Waqanika for the Fiji Law Society (interested party).

Gates J. Accused's right to counsel of choice s 28(1)(d) Constitution; right to be represented s 188 CPC; right to practice s 50 Legal Practitioners Act; officer of the court s 51; court's inherent jurisdiction to prevent abuse of its process; Code of Ethics; Rules of professional conduct and practice, relationship with the court r 3.04; advocates not to be witnesses in the same proceedings; Jeopardy to client's interest 3.04(iv);

Introduction

[1] This case is concerned with whether a court has jurisdiction during a trial to order a legal practitioner to cease appearing as counsel for an Accused person.

[2] At first the Director of Public Prosecutions filed a notice of motion with supporting affidavit alone. But the application was in reality an appeal. It was an appeal against the magistrate's decision declining to adjourn and deciding that he did not have jurisdiction to order the removal of counsel from the case; *State v Ilikimi Naitini* (unreported Suva High Court Crim App No HAA93 of 2000S, 4 January 2001). Accordingly an amended notice of motion was filed on 17 September 2003 together with a Petition of Appeal.

[3] The motion sought two orders. They were:

> (a) An Order prohibiting the 2nd Repondent, Abhay Kumar Singh, from continuing as counsel for the defendant Sahadat Atai Khan in Magistrate's Court Criminal Case No. 588 of 2003 upon the ground of breach of professional, ethical conduct;
>
> (b) In the alternative, an Order staying temporarily further proceedings in the Magistrate's Court, Suva in the case of *State v Sahadat Atai Khan*, Criminal Case No. 588 of 2003 until the resolution of proceedings in *State v Abhay Singh* Criminal Case No. 1606 of 2003, also before the Magistrate's Court."

[4] In this court the matter was fully argued on 2 days and the appeal can be disposed of together with the motion seeking orders of prohibition and stay. This was an appeal against an order made in the Suva Magistrates Court during the trial of Sahadat Atai Khan [1st Respondent]. The appeal, pursuant to the court's powers under s 308(8) of the Criminal Procedure Code [as amended in Act No 37 of 1998] is brought prior to the conclusion of the proceedings. The Appellant seeks the exercise also of the High Court's supervisory powers of a subordinate court in criminal proceedings pursuant to s 120(6) of the Constitution.

[5] The director swore an affidavit in support of the motion and the 1st Respondent swore and filed an affidavit in opposition on behalf of himself and his lawyer Mr AK Singh [2nd Respondent].

[6] Mr Singh very properly agreed on 25 September 2003 to an interim stay on his representation of the 1st Respondent in the Magistrates Court trial pending this decision. He informed the court that he had arranged for Mr Mehboob Raza to take over the defence of his client.

The dispute

[7] The 1st Respondent is employed by the Land Transport Authority. He was charged with one count of official corruption contrary to s 106(a) of the Penal Code. The complainant in that case was one Rajendra Narayan. Both Rajendra Narayan and the 1st Respondent have used Mr Abhay Singh as their personal lawyer.

[8] Rajendra Narayan alleges that Abhay Singh [the 2nd Respondent] asked him to change part of his story in his statement in the case against the 1st Respondent. On a subsequent meeting at the LTA's office Rajendra says the

2nd Respondent was more specific in suggesting ways in which he could assist him with the 1st Respondent's case. None of them were proper. There was a further conversation on another occasion which Rajendra tape recorded.

[9] As a result of all of this, the 2nd Respondent was charged with three counts of attempting to pervert the course of justice, conduct alleged to have occurred during the months of June and July 2003.

[10] Meanwhile the hearing of the 1st Respondent's case was due to start on 25 August 2003. Accordingly the Director of Public Prosecutions wrote to the 2nd Respondent on 22 August 2003 and concluded his letter by writing:

> We have not been informed whether you will continue as counsel for the defendant. In the event you will, we kindly ask that you reconsider in view of the proceedings against you as a result of the allegations made by the complainant.

[11] In his first affidavit the director explained why he wrote and said:

> I did so on the basis of what appeared to me a clear situation of a conflict of interest between the said Abhay Singh's role as counsel acting for a defendant and as a defendant himself in a related case, and which raised in my mind an issue of appropriate ethical and professional conduct when the complaint Rajendra Narayan s/o the Suruj Narayan was bound to be cross examined vigorously by Abhay Kumar Singh in the trial against Sahadat Attai Khan. I verily believed as well that any attempt to challenge the credibility and integrity of the said Rajendra Narayan's testimony could necessitate reference to the alleged interference by Abhay Kumar Singh, a matter that could embarrass him as counsel.

[12] State counsel Mr Navinesh Nand withdrew as prosecuting counsel from the 1st Respondent's case on 25 August 2003, since he was to be a witness in the case against the 2nd Respondent.

[13] The 2nd Respondent filed papers for constitutional redress in connection with the police investigation that had resulted in his own prosecution, and joined two state prosecutors in those proceedings.

[14] There being no sign that the 2nd Respondent would relinquish carriage of the defence of the 1st Respondent, the director instructed Ms Asishna Prasad to apply for a court order barring the 2nd Respondent from appearing in the 1st Respondent's case. Ms Prasad submitted to the magistrate that the Accused's right to counsel of his choice was not an absolute right and that it had to be weighed with those of justice and fairness towards the complainant, the witness who would be cross-examined by the 2nd Respondent and against whom the witness had made serious allegations.

[15] The magistrate ruled against the state's application. He observed that Mr Singh had a valid practicing certificate, was not disbarred, and found that the court did not possess a jurisdiction to order removal from the case of counsel of the accused's choice. The magistrate refused an adjournment and ordered the commencement of the trial that day at 2.15 pm.

[16] At 2.15 pm state counsel was instructed to renew the application. The court refused again. Prosecuting counsel upon instruction then sought an adjournment so as to make appeal to the High Court. This application was refused.

[17] In his affidavit Mr Khan said that after his counsel Mr Singh was charged that he and Mr Singh discussed whether Mr Singh should continue to act for him. He said he gave Mr Singh instructions for him to continue. He later confirmed those instructions in writing.

[18] Much of the remainder of Mr Khan's affidavit was in the form of a submission rather than a statement of facts upon which counsel could rely in argument, and so added nothing further.

Right to counsel of choice

[19] The starting point is the right to counsel of his or her choice for a person who is charged with an offence and who seeks to defend himself. That right is enshrined in the Bill of Rights of the Constitution [s 28(1)(d)].

[20] In interpreting such a provision the court must seek for:

> (a) a construction that would promote the purpose or object underlying the provision, taking into account the spirit of this Constitution as a whole, is to be preferred to a construction that would not promote that purpose or object; [Section 3(a) of the Constitution.]

[21] The court must also bear in mind the interpretative guidance of s 43(1) and (2) which provides:

> 43. (1) The specification in this Chapter of rights and freedoms is not to be construed as denying or limiting other rights and freedoms recognised or conferred by common law, customary law or legislation to the extent that they are not inconsistent with this Chapter.
> (2) In interpreting the provisions of this Chapter, the courts must promote the values that underlie a democratic society based on freedom and equality and must, if relevant, have regard to public international law applicable to the protection of the rights set out in this Chapter.

[22] Section 29 of the Constitution is also relevant:

> Any person charged with an offence has the right to a fair trial before a court of law.

[23] Of course the law is not a one-sided concept. The Constitution recognises the Accused as underdog and accords the protection of a fair trial, a fundamental right, upon that person. It is trite to comment that the right of a fair trial is a right granted also to the prosecution, the State, in bringing the charge and in conducting the case on behalf of the public. Such a right extends to civil litigants, and no doubt to aggrieved witnesses and counsel who might claim protection under the same umbrella.

[24] The Criminal Procedure Code provides that any person accused of an offence before any criminal court "may of right be defended by a barrister and solicitor": s 188. That section does not go further and provide for a right of choice in the matter. But it cannot be doubted that all courts will strive to see that an Accused person, so far as is possible and reasonable in achieving a fair trial, obtains the services of counsel of his choice. This is not an absolute right however. Rather it is one which must be weighed along with other often competing rights.

Did counsel have a duty to withdraw?

[25] The schedule to the Act, said to be made pursuant to s 102(8) [a typographical error for s 101(8)] is headed Rules of Professional Conduct and Practice. Chapter 3 is entitled "Relationship with the Court".

[26] Rule 3.04 within that chapter provides:

> 3.04 A practitioner shall not, save in exceptional circumstances, continue to act for a client in a matter in which the practitioner is likely to be a witness unless:—
> (i) the practitioner's evidence relates solely to an uncontested matter;
> (ii) the practitioner's evidence relates solely to formal matters;

(iii) the practitioner's evidence will relate solely to the nature and value of legal services rendered;

(iv) refusal to act or withdrawal from the matter will jeopardise the client's interest.

Subrules (i)–(iii) are not relevant to this case. Arguably no prejudice could attract to the client by counsel withdrawing from representation and for another counsel to step in, as indeed happened here. Subrule (iv) is of only marginal relevance.

[27] The Fiji Law Society adopted a Code of Ethics in 1984. The final part was taken from a short form code of the International Bar Association. This International Code of Ethics was adopted at Oslo in 1956 and amended at Mexico City in 1964. The following are worthy of consideration in the present proceedings. They are:

6.6 A lawyer shall without fear defend the interests of his client and without regard to any unpleasant consequences to himself or to any other person.

6.10 A lawyer should only withdraw from a case during its course for good cause, and if possible in such a manner that the client's interests are not adversely affected.

6.13 A lawyer should never represent conflicting interests in litigation.

[28] The code was introduced with this admonition:

0.1 It is the duty of all members of the Fiji Law Society to make themselves familiar with the contents of this Code of Ethics, and to observe the rules not only in the letter but also in the spirit.

[29] In the same paragraph it stated who were to be the beneficiaries of such a duty:

The standards that this Code is designed to maintain are for the benefit of the public in general and the client in particular, and for the maintenance of fair and honourable conduct between practitioners and on their part towards the courts.

[30] More specifically it dealt with the duty arising when a practitioner could be faced with dual functions in a trial. Rule 4.3 provided:

4.3 PRACTITIONER APPEARING AS COUNSEL IN MATTER IN WHICH HE HAD MADE AN AFFIDAVIT

(1) Subject possibly to very exceptional cases, the nature of which it is difficult and inadvisable to attempt to lay down, it is improper for a practitioner to act as both counsel and witness in the same matter.

(2) If a practitioner knows, or has any reason to think, that he may be required as a witness he should not appear as counsel, and if he decides in such circumstances to act as counsel he should not afterwards tender himself as a witness.

(3) The same general principles apply to affidavits in contentious matters as to oral evidence. It is not proper that a practitioner should appear in any proceeding in which he has made and filed an affidavit on any facts in dispute. If having commenced to act as counsel, he finds it necessary to make and file an affidavit in respect of any such matter he should retire from his position as counsel.

(4) The fact that in Fiji a practitioner may be acting as both solicitor and counsel makes no difference. The above principles nevertheless apply.

(5) It has never been considered objectionable for a practitioner to appear in a matter in respect of which he has made and filed an affidavit as to a formal or non-contentious fact, nor is there any objection to that practice. Nevertheless, it is desirable that even that practice should not be adopted where it is possible for the affidavit to me made by some clerk or other person than the practitioner himself.

[31] Boulton in his *"Conduct and Etiquette at the Bar"*, 5th ed, 1971 said at p 36:

> A barrister should not accept a retainer in a case in which he has reason to believe he will be a witness, and if being engaged in a case it becomes apparent that he is a witness on a material question of fact he ought not to continue to appear as counsel if he can retire without jeopardising his client's interests.

He added that if the barrister continues in the case and his client calls him as a witness "there is no rule of professional ethics which debars him from going into the witness box and being cross-examined." But counsel who had appeared as a witness in the lower court could not appear as counsel to argue an appeal. That principle of separation of roles has a link with *New Brunswick and Canada Railway v Conybeare* (1862) 9 HL Cas 711 where Lord Westbury LC refused to allow the Respondent who was also a barrister to appear as junior counsel in the House of Lords. Lord Westbury said

> The Respondent must elect to argue in person or not. There cannot be mixture of the two characters.

[32] Clearly it is an embarrassment for counsel to have to be called as a witness both to counsel appearing as advocate, to the court, to the public, and it saps public confidence in the administration of justice. A subsequent raising of the standard is noticeable in the Code of Conduct of the Bar of England and Wales 1991 which relevantly provides:

> PART II — FUNDAMENTAL PRINCIPLES
>
> Applicable to all barristers
>
> 201 A barrister must have regard to paragraph 102 and must not:
>
> (a) engage in conduct whether in pursuit of his profession or otherwise which is:
>
> (i) dishonest or otherwise discreditable to a barrister;
>
> (ii) prejudicial to the administration of justice; or
>
> (iii) likely to diminish public confidence in the legal profession or the administration of justice or otherwise bring the legal profession into disrepute;

[33] In dealing with acceptance of briefs that code further provides:

> PART V — BRIEFS AND INSTRUCTIONSTO PRACTISING BARRISTERS
>
> Applicable to all barristers
>
> Acceptance of briefs and instructions andapplication of the "Cab-rank rule"
>
> 501 A practising barrister must not accept any brief or instructions if to do so would cause him to be professionally embarrassed and for this purpose a barrister will be professionally embarrassed:
>
> …
>
> (d) if the matter is one in which he has reason to believe that he is likely to be a witness or in which whether by reason of any connection of his with the client or with the Court or a member of it or otherwise it will be difficult for him to maintain professional independence or the administration of justice might be or appear to be prejudiced.

[34] In *Gokul Singh v Reginam* [1975] 21 FLR 50 at 51E, Grant CJ disapproved the lower court's criticism of defence counsel for not simultaneously giving evidence for his client of special reasons for not disqualifying. Grant CJ said:

> With regard to the trial Magistrate's reference to counsel not having given evidence as to the telephone conversation in question, that counsel may well have found himself in

a quandary, as he was the same counsel who had appeared for the appellant on the prior appeal and could hardly have been a witness before the trial Magistrate as to what took place between himself and his client.

[35] In a footnote to the law report of *Rex v Secretary of State for India in Council; Ex parte Ezekiel* [1941] 2 KB 169 at 175 Humphreys J speaking for the court said:

> It was brought to the attention of the court that, on the hearing at Bow Street police court, junior counsel on one side was called as a witness to prove certain aspects of Indian law and continued thereafter to act as counsel in the case. No objection was taken to this by counsel on the other side. We think it right to point out that this is irregular and contrary to practice. A barrister may be briefed as counsel in a case or he may be a witness in a case. He should not act as counsel and witness in the same case.

[36] In *Jeffrey v Associated National Insurance Co Ltd* [1984] 1 Qd R 238, the court had to decide whether or not a fishing vessel had been scuttled. A solicitor on record gave evidence which bore on this crucial issue. Thomas J commented unfavourably (at 245):

> My task in assessing the evidence in this subsidiary area was not made easier by the fact that the solicitor concerned remained on the record at all times as solicitor for the defendant, even after delivering a defence specifically relying upon the conversation between Mr. Bryan and Mr. Jeffery, when he knew that Mr. Bryan was unlikely to come forward to verify the incident, and when he should have foreseen that he was likely to be personally involved in a controversial area. No doubt he did not think the matter through. In any case where a solicitor has reason to believe that he may be required to give evidence of a controversial kind in a proceeding, he should arrange for an independent solicitor to take over the matter so that his objectivity cannot be questioned when he gives evidence.

[37] Halsbury summed up the position:

> Counsel or solicitors who are appearing as advocates in a case should not also act in the same case as witnesses, but if they tender evidence their evidence is not inadmissible. [Laws of England, 4th Edit. Vol. 17 para 233]

[38] The Queensland Law Society's position has been very similar to the English and Fiji position: see Solicitors Handbook 1983, *"Guide to Professional Conduct"* para (1)(v) and (vi). Even though a solicitor, who is to be witness, hands over the case to another solicitor in his firm, such situation is unacceptable. In *Chapman v Rogers; Ex parte Chapman* [1984] 1 Qd R 542 at 545 per Campbell CJ said:

> However, for the reason that it is desirable to avoid any suggestion of real or apparent conflict between the duty to the court and the obligation to the client, I consider that it is generally unwise for a solicitor, who is not himself appearing as advocate or as instructing solicitor in court but who is aware that it is likely that he will be called as a material witness (other than in relation to formal or non-contentious issues), to continue, either personally or through his firm, to represent the client if this can be reasonably avoided.

[39] No material has been advanced by the 2nd Respondent to show that exceptional circumstances were relevant to make it proper for him to continue to act for his client Mr Khan. The right to counsel of choice is not absolute, nor is the duty to act and to accept instructions: *Wells v Wellington District Law Society* [1997] 1 NZLR 660. Nor do I find any reason for concluding that the withdrawal of counsel here would jeopardise the client's interest [Sch r 3.04(iv)]. Competent senior counsel was available to take over the case and did do so.

[40] The right to practice provided by s 50 of the Act is to be read with the duties of being an officer of the court [s 51] and with the professional standards provided in the schedule and in the common law. As was said in *Wells* (above at 663):

Has the court an inherent jurisdiction to control the representation of parties?

[41] This question has been settled authoritatively in the judgment of the New Zealand Court of Appeal, and in particular in the judgment of Cooke P in *Black v Taylor* [1993] 3 NZLR 403 where his lordship said (at 406.25):

> As to those who may be allowed to represent parties to argue cases, the Courts have an inherent jurisdiction: see *Re GJ Mannix Ltd* [1984] 1 NZLR 309; *Abse v Smith* [1986] QB 536; *Arbuthnot Leasing International Ltd v Havelet Leasing Ltd* [1991] 1 All ER 591; and *R v Visitors to Lincoln's Inn; Ex parte Calder* [1992] 3 WLR 994 at 1007. The jurisdiction extends to the propriety of a representative appearing in a particular case: it is not then a question of the right of practice generally, which is governed in New Zealand by statute, but a question concerning what is needed or may be permitted to ensure in a particular case both justice and the appearance of justice. Obviously it is a jurisdiction to be exercised with circumspection. But when this case is judged by that standard, it is clear in my opinion that the practitioner cannot act.

[42] Richardson J said of the due administration of justice in this regard (at 408.30):

> The High Court has an inherent jurisdiction to control its own jurisdiction it determines which persons should be permitted to appear before it as advocates. In determining what categories of person may appear it does so in accordance with established usage and with what is required in the public interest for the efficient and effective administration of justice (3(1) Halsbury's Laws of England (4th ed) para 396).

and further on (at 409.50):

> 50 I would hold that in principle where it is satisfied that the interests of justice so require the High Court has an inherent jurisdiction to restrain a barrister from continuing to act as counsel for a particular party in proceedings before the Court.

[43] Inherent jurisdiction has been described as being "part, not of the substantive but of the procedural law" per Woodhouse J in *Taylor v Attorney-General* [1975] 2 NZLR 675. McKay J in *Black v Taylor* (above at 418.30) said:

> It is essential to the functioning of the Court as a Court of justice that it must be able to prevent a barrister acting as counsel in a matter in which he has a conflict of interest, or in which he appears to have a conflict of interest such that justice will not be seen to be done. The fact that a barrister who so acted would be subject to the disciplinary powers contained in Part VII of the Law Practitioners Act 1982 does not in any way diminish the inherent jurisdiction of the Court to control proceedings before it in such a way as to enable justice to be done and to be seen to be done.

[44] A similar view was expressed in the Divisional Court of Ontario in *Everingham v Ontario* (1992) 88 DLR (4th) 755 at p 761 cited with approval in *Black v Taylor*:

> It is within the inherent jurisdiction of a superior court to deny the right of audience to counsel when the interests of justice so require by reason of conflict or otherwise. This power does not depend on the rules of professional conduct made by the legal profession and is not limited to cases where the rules are breached.

Should the court intervene here?

[45] The rule that counsel must not continue with a case where there was a real risk of being called as a witness is not a rule simply for the sake of neatness. It has been developed over many years and is a rule of long standing.

[46] As an officer of the court, counsel is robbed of that quality of distance from the factual events of the case in hand and of the professional independence that the court rightly expects from its advocates, when he steps into the witness box.

[47] Nor is it in the interests of justice that a witness be confronted by one of the protagonists to the events about which he is to testify. There is a real risk here that if the 2nd Respondent cross-examines the witness in Mr Khan's case, who is the complainant also in the case against the 2nd Respondent, that counsel's own conduct will come into issue. With an unrepresented accused avoidance of embarrassment and unseemly confrontation is not possible, for the accused must of necessity cross-examine the witness himself. This can be extremely awkward for instance when the accused himself cross-examines the victim in a rape trial. With counsel's intervention this need not happen, unless as here, counsel has become, at least on one view, entangled with the events surrounding the allegations against his client.

[48] It is not in the interests of justice that this should happen. Court process is to be conducted as far as possible in a seemly manner. Such confrontations are unseemly and in this case, unnecessarily so. The alternative remedy is counsel's withdrawal. An independent observer armed with all the facts would consider the dual role of counsel as advocate and witness not in the interests of justice. There can be no doubt here that there is a real risk of Mr Singh being called to give evidence in Mr Khan's trial. This is not merely speculative or vague as in *Yamaji v Westpac* (1993) 42 FCR 431; 115 ALR 235; [1993] FCA 253.

[49] In F*aria Shabana Shah v PC Verma Nand* (unreported Suva High Court Miscellaneous Jurisdiction No HAM0018.03S; 30 April 2003) Shameem J declined orders on interlocutory appeal of disclosure, subpoenas, and transfer as an exercise of inherent jurisdiction observing at 6:

> It is in very rare circumstances that a court should exercise its inherent jurisdiction to interfere with the conduct of a trial in the lower court.

[50] Richardson J in *Black v Taylor* (above at 408.35) referred to jurisdiction to control proceedings and of the basic need "to preserve confidence in the judicial system." He concluded:

> The right to a fair hearing in the Courts is an elementary but fundamental principle of British justice. It reflects the historical insistence of the common law that disputes be settled in a fair, open and even-handed way. It has been a mainspring of the development of administrative law over the past 40 years. Its fundamental importance has been emphasised in a number of recent decisions of this Court, including *Minister of Foreign Affairs v Benipal* [1984] 1 NZLR 758; *E H Cochrane Ltd v Ministry of Transport* [1987] 1 NZLR 146 and *R v Hall* [1987] 1 NZLR 616.
>
> An associated consideration is the fundamental concern that justice should not only be done but should manifestly and undoubtedly be seen to be done (*R v Sussex Justices; Ex parte McCarth* [1924] 1 KB 256 at 259 per Lord Hewart CJ; see also *R v Racz* [1961] NZLR 227 and *R v Burney* [1989] 1 NZLR 732).
>
> The integrity of our system of justice depends on its meeting those standards.

[51] To allow counsel to continue as advocate would compromise the right of jthe parties to a fair trial. The rights of all litigants to the proceedings are to be taken into account when deciding whether there could be a fair trial.

[52] The charges hanging over counsel's head might rob him of the necessary independence to advise his client objectively and similarly to conduct his defence vigorously and without regard to whether such defence might reflect disadvantageously on counsel's own position. Lastly the raising of issues with the witness concerning counsel and the witness might prejudice consciously or unconsciously the case of the client.

[53] For all of these reasons I believe it is correct that the court should have intervened to prevent potential abuse of its process. I do not believe such a set of circumstances will occur very often. As was said by McKay J in *Black v Taylor* (above at 420.35):

> … the barrister may misjudge the situation, and the Court must where necessary intervene.

[54] Most practitioners:

> would disqualify themselves without waiting for the point to be taken by the former client or his solicitors. In doing so, they would not be acting from any excess of scruples, but from a correct appreciation of a barrister's duty to the Court in such a situation.

(above at 420.45)

Counsel should have reflected on his position in the circumstances then facing him as advocate, and withdrawn.

[55] In the result, the appeal succeeds. The decision not to order removal of Mr Singh as counsel for the defence is quashed. In substitution Mr Singh [2nd Respondent] is debarred from appearing as counsel for Mr Khan in the lower court trial. No order is required on the motion for stay. Counsel for the director did not apply for costs and I therefore make no order. My decision might have been otherwise had a request been made, since I find counsel should have realised the obvious conflict immediately.

Appeal allowed.