RATU INOKE TAKIVEIKATA v STATE (AAU0065 of 2004)

COURT OF APPEAL — APPELLATE JURISDICTION

WARD P, MCPHERSON and FORD JJA

16, 23 March 2007

Evidence — fresh evidence — application for leave to adduce further evidence — applying the threefold test used in *Mudaliar's* case — whether comments made by judge formed strong basis for disqualification — whether credibility of affidavits executed affected because of delay — Court of Appeal Act s 23(1).

The Appellant was convicted of three counts of inciting mutiny and one count of aiding soldiers in an act of mutiny. The Appellant was sentenced to concurrent sentences of life imprisonment on each of the counts of inciting mutiny and 18 months' imprisonment concurrent on the count of aiding soldiers in an act of mutiny. The judge concurred with assessors' opinions and acquitted the Appellant on the fourth count of incitement but convicted him on the remaining counts. The judgment conformed to the majority of the assessors' opinions on two counts. The Appellant filed a formal application for leave to adduce further evidence. The Appellant challenged the judge's findings of fact and claimed that the judge had made alleged remarks prior to the trial which suggested that the judge had pre-judged the Appellant's guilt which constituted apprehended bias. The Appellant claimed that the remarks were made at a social function attended by Mr Brodie and the judge. Mr Brodie and his wife executed sworn affidavits.

Held — (1) Applying the threefold test in *Mudaliar v State* [2007] FJCA 16 to the present case, the court was satisfied that the Appellant's application should succeed.

(2) The Appellant's sentencing occurred on 24 November 2004. The sworn affidavits executed by Mr Brodie and his wife were deposed on 25 November 2004 as new evidence and was made available only after the Appellant's sentencing.

(3) There was no argument that if the alleged comments of the judge were indeed made then the Appellant would have formed a strong basis for a disqualification application and the judge would have disqualified himself because of apprehended bias.

(4) The delay of over 4 months before Mr Brodie and his wife reported the alleged conversation was directly relevant to the issue of credibility of the evidence. The new evidence in the form of a sworn affidavit must be tested through cross-examination before the court could reject the new evidence as not "apparently credible".

Application granted.

Cases referred to

Mudaliar v State Crim App No AAU0032/2006; [2007] FJCA 16; *Seniloli v State* Crim App AAUOO41/2004S; [2004] FJHC 41, applied.

Amina Koya v State CAV 0002/1997; [1998] FJSC 2; *Loganandan Pillay v Subhash Chand and Anor* Civ App ABU 64/96S; [1998] FJCA 35; *Swadesh Singh v State* [2005] CAV 7/05; *Waisake Tuimereke and Anor v State* [1998] Crim App AAU 11/97; [1998] FJCA 30, cited.

Antoun v R (2006) 224 ALR 51; 80 ALJR 497; 159 A Crim R 513; [2006] HCA 2; *Auckland Casino Ltd v Casino Control Authority* [1995] 1 NZLR 142; *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337; 176 ALR 644; 63 ALD 577; [2000] HCA 63, considered.

S. T. Kaiwaimaro for the Appellant

A. Prasad for the Respondent

C. B. Young for the Interim Attorney-General

Ward P, Mcpherson and Ford JJA.

Background

[1] The Appellant has appealed against his conviction and sentence. Recently he filed a formal application for leave to adduce further evidence. The appeal itself has now been adjourned until the next session of the court. This judgment relates only to the application for leave to adduce further evidence.

[2] The evidence in question has been presented in the form of sworn affidavits from a Mr Donald Brodie and his wife, Margaretha Brodie. They depose that at a social function prior to the Appellant's trial, the trial judge, Gates J, made a remark to the couple in reference to the Appellant along the lines that, "I am going to put him away".

[3] The following passage from a ruling by the President of this court given on 11 January 2005 in response to a bail application by the same Appellant, summarises the relevant historical background:

> The applicant was convicted in the High Court on three counts of inciting mutiny and one of aiding soldiers in an act of mutiny and acquitted on one count of inciting mutiny. He was sentenced on 24 November 2004 to concurrent sentences of life imprisonment on each of the counts of inciting mutiny and 18 months imprisonment concurrent on the count of aiding soldiers in an act of mutiny.
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> At the trial the assessors' opinions were 4 to 1 and 3 to 2 respectively in favour of acquittal on the first two counts of inciting mutiny, 3 to 2 in favour of conviction on the third count of that offence and unanimously in favour of acquittal on both the count of aiding soldiers in an act of mutiny and the fourth count of inciting mutiny. In his judgment, the trial judge concurred with their opinions and acquitted the applicant on the fourth count of incitement but convicted him on the remaining counts. Thus his judgment conformed to the majority of the assessors' opinions on two counts and did not on the other three.
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> The applicant appeals against conviction and sentence. Four of the seven grounds of appeal against conviction relate to the fact the learned judge's verdict differed from the opinions of the assessors. Two others challenge the judge's findings of fact and one refers to remarks alleged to have been made by the judge in a conversation prior to the trial which would suggest he had pre-judged the question of the applicant's guilt.

[4] The remarks attributed to the trial judge were allegedly made at a social function at the French embassy in Suva on 14 July 2004 (Bastille Day). At that time the Appellant's trial was scheduled to commence on 27 July 2004. As it turned out, that fixture was subsequently vacated and the trial proper did not get underway until 1 November 2004. With some breaks, the trial then ran for 14 days concluding on 23 November. After a short retirement over the luncheon break, the assessors delivered their opinions as set out above. Sentencing occurred on 24 November 2004. The record shows that sentencing concluded and the court finally adjourned at 6.30 pm.

The application

[5] In his sworn affidavit dated 25 November 2004, Mr Brodie deposed that on 25 November 2004 at approximately 8.45 am he telephoned the Appellant's solicitor's office and informed counsel of his conversation with Justice Gates back in July. At approximately 11.30 am that same day he attended the lawyer's office and made his affidavit.

[6] In the opening part of his affidavit, Mr Brodie disclosed that he had had "a professional/business relationship" with the Appellant over the previous 12 months in relation to the "Hydro-Electric capacity in Natasiri/Namosi area".

He also disclosed that for some 3 months, the Appellant had been living at an address in the same street as he and his wife in Toorak, Suva.

[7] In relation to the conversation in question, Mr Brodie deposed:

6. That as best I'm able to remember my wife and I encounter (sic) Justice Gates at the social function held at the French ambassador's residence. It was about 9:30 pm and he was by himself. I recalled that we greeted each other. I have previously been acquainted with Justice Gates as he had undertaken legal work for me when he was in private practice as a lawyer.
7. As best I remember the conversation proceeded by Justice Gates asking me "how is business?" I replied words to the effect: "it's been slow". I then remarked obviously that business was not slow for him as he had to deal with many court cases.
8. I am not now able to recall how the topic of Ratu Inoke's case came up in a conversation but I recall that Justice Gates remarked that Ratu's lawyers were attempting to delay or postponed (sic) the trial. The judge, to the best of my recollection also remarked that Ratu Inoke was seeking to have a form of traditional Fijian trial. The judge further remarked that this was "nonsense" or words to that effect.
9. The part of the conversation I distinctly remember was when Justice Gates said words to the effect that he would ensure that Ratu Inoke would be "put away". My wife was present during the entirety of this conversation. I recall turning to look at my wife's face as we both looked at each other in amazement at hearing those words by the judge. At this point our conversation was interrupted by a guest who then left in the company of Justice Gates.

[8] In an affidavit sworn on the same day, Mrs Brodie deposed:

1. I am the wife of Donald Ross Brodie.
2. I remember attending Bastille Day celebrations at the residence of the French ambassador on Ratu Sukuna Road, Suva. This was in the evening on the 14th of July 2004.
3. I attended the function in the company of my husband and arrived there between 6:30 pm and 7 pm.
4. During the function at the ambassador's residence, my husband and I happened to meet Justice Gates. I am acquainted with Justice Gates but only on a superficial level, that is, I have met him in the street at the supermarket and at other social functions over the years. My husband has also in the past instructed him as his lawyer when Justice Gates was in private practice.
5. When my husband and I met Justice Gates at the social function I recall that we exchanged greetings and Justice Gates asked my husband about his business. As best I recall during the conversation my husband described to the judge about a hydro project he was involved in and how Ratu Inoke, the Qaranivalu, was of assistance in obtaining signatures of consent from various landowners in respect of the project. Further to the best of my recollection, Justice Gates said "they were trying to drag the case out". At the time I did not understand what the judge was talking about. The judge further remarked words to the effect that "they were trying to obtain a local Fijian traditional trial".
6. What I clearly remember of the conversation between my husband and Justice Gates was that Justice Gates said referring to Ratu Inoke that "I am going to put him away". When I heard this I reacted in astonishment and both my husband and I looked at each other after this was said by the judge.
7. Following this, a person approached Justice Gates and left our company with the judge.

[9] A sworn affidavit dated 21 December 2004 has been filed by Gates J. The judge deposed:

> 1. I have been shown copies of the affidavits of Donald Ross Brodie and Margaretha Helene Brodie, filed in these proceedings.
> 2. I remember meeting both deponents at the Bastille Day celebrations held at the residence of the French Ambassador.
> 3. As I was leaving the party I stopped briefly to talk to Mr & Mrs Brodie as Mr Brodie had been my client when I had been in private practice.
> 4. We exchanged pleasantries, the details of which I do not now recollect. I did not say anything about the conduct to date of the case by the defence, nor about any pending applications. Nor did I express a view on "a form of traditional Fijian trial" or as to any punishment I was minded to pass in the event that Rt Inoke were to be convicted.
> 5. If "a form of traditional Fijian trial" refers to a trial by assessors exclusively of paramount chiefly rank, this issue did not get raised in court till 15 September 2004, some two months later, the first day of the pre-trial conference, when Rt Inoke's new counsel Mr Wendler mentioned he would be requesting such a trial.
> 6. It was Mr Brodie who raised the topic of Rt Inoke's trial. He asked whether the charges Rt Inoke faced were serious. I said he faced several different charges but the courts had in the past considered such offences as serious. Much would depend upon the facts of the case and how the evidence unfolded I said. I then left.
> 7. Mr Brodie revealed nothing about his own business involvement with Ratu Inoke, or that he knew him, or that he lived in the same street as Ratu Inoke.

Legal principles

[10] The authorities and legal principles applicable to applications to adduce fresh evidence were reviewed recently by this court in *Mudaliar v State* Crim App No AAU0032/2006; [2007] FJCA 16 (*Mudaliar*). In that case the court referred to the provisions of s 28 of the Court of Appeal Act and r 22(2) of the Court of Appeal Rules which give the Court of Appeal full discretionary power to receive further evidence upon questions of fact subject to the following proviso:

> Provided that in the case of an appeal from a judgment after trial or hearing of any cause or matter on the merits, no such further evidence (other than evidence as to matters which have occurred after the date of the trial or hearing) shall be admitted except on special grounds.

[11] In *Mudaliar* the court adopted the threefold test for satisfying the proviso as stated in its earlier decision of *Loganandan Pillay v Subhash Chand and Anor* Civ App ABU 64/96S; [1998] FJCA 35:

> (a) The evidence must be fresh evidence in the sense that it could not have been obtained prior to the trial by reasonable diligence;
> (b) It must be such as could have been a substantial influence on the result;
> (c) It must be apparently credible.

[12] The court also accepted the further qualification noted in *Waisake Tuimereke and Anor v State* [1998] Crim App AAU 11/97; [1998] FJCA 30 of the requirement under s 23 (1) of the Court of Appeal Act for the court to be satisfied that there has been a "miscarriage of justice". The Supreme Court in *Swadesh Singh v State* [2005] CAV 7/05, accepted that cogent fresh evidence would satisfy the miscarriage of justice requirement.

[13] Clearly there is a difficulty in applying the second limb of the above test to a case such as the present where the fresh evidence raises issues of apprehended bias. In such cases, therefore, the second limb should be restated in these terms:

> (b) The fresh evidence, if known at the time, must have provided sound legal grounds to support any application to have the trial judge disqualified for apprehended bias.

Application of principles

[14] Dealing first with the reformulated second limb, the Supreme Court in *Amina Koya v State* CAV 0002/1997; [1998] FJSC 2, confirmed its agreement with the view stated by the New Zealand Court of Appeal in *Auckland Casino Ltd v Casino Control Authority* [1995] 1 NZLR 142, that:

> There was little if any difference between the Australian test of whether a fair-minded observer might reasonably apprehend or suspect that the judge had prejudged and the English test of whether there is a real danger or real likelihood, in the sense of possibility of bias.

[15] In *Seniloli v State* Crim App AAUOO41/2004S; [2004] FJHC 41, this court applied the test adopted in *Koya* and noted:

> Any allegation of bias is of fundamental importance because it is in the public interest that there should be total confidence in the integrity of the system of administration of justice. If there was a real danger or likelihood of bias, it must follow that there has been a miscarriage of justice and the conviction cannot stand.

[16] In the recent decision of *Antoun v R* (2006) 224 ALR 51; 80 ALJR 497; 159 A Crim R 513; [2006] HCA 2, the High Court of Australia had before it an appeal in a case of alleged apprehended bias on the part of the trial judge in dealing with a submission of no case to answer and with a question of bail. The High Court allowed the appeal and ordered a new trial. Hayne J stated (at [51]):

> The principle to be applied in determining these appeals is not in doubt. If a fair-minded lay observer might reasonably apprehend that the judge might not bring an impartial and unprejudiced mind to the resolution of the question the judge is required to decide, the judge is disqualified from trying the case.

[17] In his judgment, Callinen J said (at [82]):

> The test of apprehended bias is not in doubt. It was stated by Gleeson CJ, McHugh, Gummow and Hayne JJ in *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337; 176 ALR 644; 63 ALD 577; [2000] HCA 63 at [7]:
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>> The apprehension of bias principle may be thought to find its justification in the importance of the basic principle, that the tribunal be independent and impartial. So important is the principle that even the appearance of departure from it is prohibited least the integrity of the judicial system be undermined. There are, however, some other aspects of the apprehension of bias principle which should be recognised. Deciding whether a judicial officer (or juror) might not bring an impartial mind to the resolution of a question that has not been determined requires no prediction about how the judge or juror will in fact approach the matter. The question is one of possibility (real and not remote), not probability. Similarly, if the matter has already been decided, the test is one which requires no conclusion about what factors actually influenced the outcome. No attempt need be made to inquire into the actual thought processes of the judge or juror.

> It should be noted that the test as stated emphasises that a possibility, that is relevantly to say, the appearance of a possibility of an absence of an impartial mind on the part of the judge, may lead to disqualification.

Submissions

[18] Referring to the first limb of the threefold test in *Mudaliar*, counsel for the State submitted that, as the conversation in question took place several months before the trial, it could not be said that the evidence was not available at the date of the trial. While strictly speaking that was indeed the position, the test is whether the evidence was available to the Accused or his counsel or legal advisers or whether it could have been obtained by them through reasonable diligence. The affidavit evidence satisfies us that that was not the position in the present case.

[19] In relation to the second limb as restated, counsel for the State, quite correctly, did not attempt to downplay the seriousness of the allegation of apprehended bias. There can be no argument that if the alleged comments were made then they would have formed a strong basis for a disqualification application and the trial judge ought to have disqualified himself.

[20] The third limb of the test is whether the evidence is credible. Counsel for the State made forceful submissions on this point and invited the court to focus on the delay of over 4 months on the part of the Brodies in reporting the alleged conversation to either the Appellant himself (he lived in the same street) or to his legal counsel or advisers.

[21] Obviously, the submission made by counsel calls for an answer and it is directly relevant to the issue of credibility but it is not a matter that we are able to determine simply on the papers before us. The topic will need to be canvassed through oral evidence tested in the usual way by cross-examination.

[22] The requirement in the third limb of the test for the evidence to be "apparently credible" means exactly that — credible on the face of it. It would need to be an exceptional situation before the court could reject evidence tendered in the form of a sworn affidavit as being not "apparently credible".

Conclusion

[23] For the reasons stated, we are satisfied that the Appellant's application to call further evidence must succeed and we make an order accordingly. Counsel will be contacted by the registrar to fix a hearing before a single judge for further directions.

Application granted.