HIGH COURT OF SOLOMON ISLANDS

REGINA -V- GEORGE MOEA KILATU

Criminal Case No. 229 of 2002

At Auki:

Date of Hearing: 31st October – 4 November 2005
Date of Verdict: 4th November 2005.

Henry Kausimae with M. McColm for DPP
S. Lawrence for Public Solicitor

(1) Rape
(2) Defilement

Judges- bias – apprehended bias as a result of judges pre-trial conference - e-mails passing between proper authorities tasked with administrative arrangements for a trial in an outlying province.
Judges – bias - Judge to decide- Crown in position to proceed

Application to disqualify on basis of Judges Bias- Preliminary application before trial.

Reasons for decision refusing defence application.

Brown PJ: Mr. Kausimae is happy for me to decide the question without arguing, whether I should disqualify myself or not. That doesn't help the trial Judge but perhaps in matters of this type the Crown should address the issues for fear of an apprehended acquiescence in the defence argument.

Mr. Lawrence says no submission of actual bias is alleged. I must say my comments at the first pre-trial conference check list that "this is going to be a very nasty case" probably were ill advised although perhaps a fair minded community might join with me in that objective view. It certainly cannot be seen as a likely apprehension in the same community that I had taken a stance on those comments alone.

Ms. Kershaw's file notes relate to her perception and recollection, albeit contemporaneously taken. Frankly I was offended by her comments in the first conference that I should remind myself of the presumption of innocence, when I was endeavouring, to carry out, what I had designed; an administrative function to try and ensure the trial process was not to be derailed at the last minute, in this instance, at great cost to the State. I said nothing at the time. A chartered ship was organised to carry witnesses and the accused from Sikaiana to Auki and return them after the trial. They would be accommodated for a week in Auki and the costs of this trial, deserved a proper approach by all concerned. My comments may be seen in the light of these considerations. The trial, in a small community deserves a most detailed and careful

preparation. My suggestion that counsel travel on the vessel was with that in mind, for since neither counsel had had the benefit of actually seeing witnesses or the accused, it would avail them do to so and if necessary, other witnesses might be identified, of benefit then, to both parties.

When I received an e-mail from the DPP concerning the process necessary to ensure the accused's attendance at Auki, with Ms. Kershaw's apparent view that a fresh summons was necessary to ensure her clients attendance on his trial, I was concerned that the hearing may be put in jeopardy for none of this had been raised by her at the pre-trial conference. I wrote to the Director of Public Prosecutions by e-mail, of the process which I had directed the Registrar to follow in terms of the Criminal Procedure Code and with the hope of heading off any attempts to delay the trial through ignorance or misadventure on the various participants part, at Sikaiana, I determined to travel on the vessel. In fact, even today Mr. Kausimae's intention to call an additional witness; additional to the list on the information will be the cause of argument, on fairness, since insufficient notice may have been given. My pre-trial conference made plain that any such witnesses and their proof need be disclosed at once at Sikaiana.

The steps I have taken on a view of Ms. Kershaw's acts in relation to summons cannot be construed as illustrating a perception of bias against this accused. My actions leading up to this application have been solely directed to having this trial proceed and not "fall over" on the last day, as it would seem, has happened to some most serious trials in Honiara. Mr. Lawrence refers me to Australian Law on the topic of bias, I'm relying on my experience here and in PNG (and the increasing practice and acceptance in the Australian jurisdictions) to emphasise the administrative role of the judge in ensuring the public need for orderly and fair hearings to actually proceed and happen when listed.

Mr. Lawrence addresses the question of e-mails by referring to Lilydale's case (Ross on Crime at 2.1970). Those e-mails are hardly "private representations on behalf of a party or from a stranger with reference to a case which the judge has to decide".

Mr. Lawrence read from the judgment another passage of principle which is illustrated by my quote above, so that, my e-mails dealing with the management of the trial process and a correction of what may have become a misguided practice in the past in relation to the summonsing of an accused committed for his trial at the High Court, does not, in my determination amount to a breach of principle in Lilydale. Nor could a reasonable person in the circumstances apprehend bias on these facts.

As I say what view Ms. Kershaw has taken of her file notes and subsequent e-mails, transmuted, mediated upon, lit differently and then purportedly related to the question of this judge's bias, cannot stand as proper reasons in an application of this nature. It cannot amount to material relevant to, nor become evidence of, apprehended bias against her former client. For here defence has sought to translate its view back into its own terms.

Whilst not necessary, I should say I have not nor do I, read the committal depositions before trial.

The comment in my e-mail about a pre-sentence report follows my directions at the conclusion of a trial at Gizo when both defence and prosecution counsel concurred with my view that where an accused came from further out lying areas, a pre-sentence report should be prepared at that place, so that the trial Judge has, if a conviction is recorded, some idea of the background and antecedents of the accused instead, as has often happened, had to accept inanities from the bar table, on sentences. So while Mr. Lawrence says, pre-sentence reports are not used in this jurisdiction, it is high time they or something similar were.

Clearly Mr. Lawrence has had the opportunity of speaking with the Public Solicitor about this. I must seriously consider all the matters Mr. Lawrence has raised.

The point Lord Denning makes however, is that "Justice must be rooted in confidence and confidence is destroyed when right-minded people go away thinking the Judge was biased."

Frankly this imbroglio over Ms. Kershaw perceptions and the need to assure the actual hearing by administrative means happens in this most difficult of circumstances cannot be material on which a reasonable observer might presume bias in the judge.

For here again on the very morning of the trial, when all are seated, defence seeks to abort the hearing.

I'm not satisfied any reasonable on-looker, appraised of the facts, (for the e-mails passed between the proper authorities tasked to facilitate the hearing) would apprehend, as a possibility, bias.

The trial shall commence.

THE COURT.