

IN THE HIGH COURT OF FIJI
AT SUVA
CRIMINAL JURISDICTION

CRIMINAL CASE NO. HAC 53 OF 2014
CRIMINAL CASE NO. HAC 99 OF 2014
CRIMINAL CASE NO. HAC 193 OF 2014

BETWEEN: **FIJI INDEPENDENT COMMISSION AGAINST
CORRUPTION ("FICAC")**

COMPLAINANT

<u>AND:</u>	1.	ANA LAQERE	[HAC 53/99/193 OF 2014]
	2.	AMELIA VUNISEA	[HAC 53/99/193 OF 2014]
	3.	VACISEVA LAGAI	[HAC 53/99/193 OF 2014]
	4.	VILISI TUITAVUKI	[HAC 99/193 OF 2014]
	5.	LAISA HALAFI	[HAC 53/99/193 OF 2014]
	6.	TAVENISA TAVAGA	[HAC 53/99 OF 2014]
	7.	KINIVILIAME TAVIRAKI	[HAC 53/99 OF 2014]
	8.	SHALENDRA KUMAR	[HAC 53 OF 2014]
	9.	SALESH BIKASH	[HAC 99 OF 2014]
	10.	ROSHNI LATA	[HAC 99 OF 2014]
	11.	ABDUL SHARIFF	[HAC 193 OF 2014]
	12.	RAJNEIL ANITMA	[HAC 193 OF 2014]

DEFENDANTS

Counsel: Ms. A. Puleiwai, Mr. J. Work	-	For FICAC
Mr. R. Vananalagi	-	For 1 st Accused
Mr. I Khan	-	For 2 nd Accused
Mr. P. Lal	-	For 3 rd Accused
Mr. N. Mishra	-	For 4 th Accused
Ms. E. Dauvere	-	For 5 th Accused
Ms. S. Prakash	-	For 6 th Accused
Mr. A. Rayawa	-	For 7 th Accused
Mr. G. O'Driscoll	-	For 8 th Accused
Mr. A. R. Singh	-	For 9 th & 10 th Accused
Mr. M. Raza	-	For 11 th & 12 th Accused

Ruling: 15th August 2017

RULING
[Recusal]

Introduction

1. Ms. Ana Laqere, Ms. Amelia Vunisea, Ms. Vaciseva Lagai, Ms. Vilisi Tuitavuki, Ms. Laisa Halafi, Ms. Tavenisa Tavaga, Mr. Kiniviliame Taviraki, and Mr. Shalendra Kumar have been charged with seven counts of Abuse of Office, fourteen counts of Causing a Loss and one count of Obtaining a Financial Advantage in the Criminal Case No HAC 53 of 2014.
2. Ms. Ana Laqere, Ms. Amelia Vunisea, Ms. Vaciseva Lagai, Ms. Vilisi Tuitavuki, Ms. Laisa Halafi, Ms. Tavenisa Tavaga, Mr. Kiniviliame Taviraki, Mr. Salesh Bikash and Ms. Roshni Lata have been charged with seven counts of Abuse of Office, thirty three counts of Causing a Loss, two counts of Obtaining a Financial Advantage in the Criminal Case No HAC 99 of 2014.
3. In respect of HAC 193 of 2014, the Prosecution has charged Ms. Vaciseva Lagai, Ms Laisa Halafi, Ms. Amelia Vunisea, Ms. Ana Laqere, Mr. Abdul Shariff and Ms. Rajneil Anitma Wati for four counts of Abuse of Office, two counts of Causing a Loss and two counts of Obtaining a Financial Advantage.
4. The Prosecution alleges in HAC 53 of 2014 that Ms. Ana Laqere, Ms. Amelia Vunisea, Ms. Vaciseva Lagai, Ms. Vilisi Tuitavuki, Ms. Laisa Halafi, Ms. Tavenisa Tavaga, Mr. Kiniviliame Taviraki, being employed at Public Works Department, have committed these offences of Abuse of Office and Causing a Loss, while performing and discharging different duties and responsibilities at different stages, in several transactions of purchasing materials to the DECE from Professional Stationeries. The prosecution further alleges that the eight accused, being the Director of Professional Stationeries, has allegedly obtained a financial advantage of \$34,236.77.
5. In respect of HAC 99 of 2014, the Prosecution alleges that Ms. Ana Laqere, Ms. Amelia Vunisea, Ms. Vaciseva Lagai, Ms. Vilisi Tuitavuki, Ms. Laisa Halafi, Ms. Tavenisa Tavaga, Mr. Kiniviliame Taviraki, being employed at the Public Works Department, have committed these offences of Abuse of Office, Causing a Loss and Obtaining a Financial

Advantage while performing and discharging different duties and responsibilities at different stages in several transactions of purchasing materials to the DECE from Crazy Office Supplies. The Prosecution alleges that the eighth and ninth accused being the Directors of Crazy Office Supplies, have allegedly obtained a financial advantage of \$93,512.48.

6. The Prosecution alleges in HAC 193 of 2014 that Ms. Vaciseva Lagai, Ms. Laisa Halafi, Ms. Amelia Vunisea, Ms. Ana Laqere, being employed at Public Works Department, have committed these offences of Abuse of Office, Causing a Loss and Obtaining a Financial Advantage while performing and discharging different duties and responsibilities at different stages in several transactions of purchasing materials to the DECE from Mass Stationery Supplies Limited. Furthermore, the prosecution alleges that the fifth and sixth accused, being Directors of Mass Stationery Supplies Limited, have allegedly obtained a financial advantage of \$10,557.50.

Background

7. On 25th of May 2017, the learned counsel for the eight accused in HAC 53 of 2014, made an application, for me to recuse from hearing HAC 53 of 2014 on the ground of apparent bias. The learned counsel submitted that the public would apprehend that the accused would not receive a fair trial, as I have previously heard and determined HAC 56 of 2014, involving the same accused persons and apparently the same issues based on same evidentiary facts. The learned counsel for the other accused persons in HAC 53 of 2014, HAC 99 of 2014 and HAC 193 of 2014 adopted the same position as of the learned counsel for the eighth accused in HAC 53 of 2014. The learned counsel for the Prosecution also concurred with the position of the defence on this issue of apparent bias.
8. Having considered this application, I invited the parties to file their respective written submissions. The learned counsel for Vilisi Tuitavuki, Tavenisa Tavaga and Kiniviliame Taviraki filed their respective written submissions, so did the prosecution. The Prosecution in its written submissions has changed their earlier position which they concurred with the defence application. Having carefully perused the respective written and oral submissions

made by the respective counsel of the parties, I now proceed to pronounce my ruling as follows.

9. The learned counsel for Vilisi Tuitavuki and Tavenisa Tavaga in their written submissions stated that their application for recusal is founded on following grounds, that:

- i) *The learned Judge had presided and decided on HAC 56/14 FICAC v Ana Laqere & others, a matter of similar nature and offending, similar accused persons and possibly consisting of similar witnesses to these current matters,*
- ii) *The complainant in HAC 56/14 and these current matters is same- The Public Work Department,*
- iii) *The alleged period of offending for these current matters also coincide with HAC 56/14,*
- iv) *In HAC 56/14, the learned Judge, after considering all the evidence and witnesses' testimonies, convicted and sentenced the seven accused persons, six of whom are the same accused persons in the current matters on hand,*
- v) *There is a high likelihood for the public to perceive prejudice and partiality if the same Judicial Officer presides and decides over the current matters.*

10. In view of the submissions made by the counsel, I find the main issue in this application for recusal is founded on the apparent bias by reason of prejudgment.

The Law

11. Having briefly discussed the factual and procedural background of this application, I now proceed to discuss the applicable law pertaining to the issue of apparent bias.

12. The rule against bias is derived from one of the fundamental principles of the Common Law System, that is the conduct of adversarial trial by an independent and impartial tribunal. The rule against bias encompasses two main folds. The first is the rule against

actual bias. The second is the rule against apparent bias. This application for recusal is founded on the issue of apparent bias by reasons of prejudgment.

13. The High Court of Australia in Livesey v The New South Wales Bar Association (1983) 151 CLR 288, p 293,294 has expounded the legal approach in Australia on the issue of apparent bias, where it was held that:

"It was common ground between the parties to the present appeal that the principle to be applied in a case such as the present is that laid down in the majority judgment in Reg v Watson; Ex parte Armstrong. That principle is that a judge should not sit to hear a case if in all the circumstances the parties or the public might entertain a reasonable apprehension that he might not bring an impartial and unprejudiced mind to the resolution of the question involved in it. That principle has subsequently been applied in this court. (See e.g. Re Judge Leckie; Ex parte Felman; Reg v Shaw; Ex parte Shaw and in the Supreme Court of New South Wales (see e.g. Barton v Walker").

14. Devlin LJ in Reg v Barnsley Licensing Justices; Ex Parte Barnsley and District Licensed Victuallers' Association and Another (1960) 2 Q.B. 167, pg 187 has discussed the applicable test of apparent bias in United Kingdom, where his Lordship applied the test of "real likelihood of bias" that is different from the "reasonable apprehension of bias" test adopted by the High Court of Australia. Devlin LJ in **Barnsley** (*supra*) held that:

"We have not to inquire what impression might be left on the minds of the present applicants or on the minds of the public generally. We have to satisfy ourselves that there was a real likelihood of bias - not merely satisfy ourselves that there was the sort of impression that might reasonably get abroad. The term "real likelihood of bias" is not used, in my opinion, to import the principle in Rex v Success Justices to which Salmon J referred. It used to show that it is not necessary that actual bias should be proved. It

is unnecessary, and indeed, might be most undesirable, to investigate the state of mind of each individual justice. "Real likelihood" depends on the impression which the court gets from the circumstances in which the justices were sitting. Do they give rise to a real likelihood that the justice might be biased? The court might come to the conclusion that there was such a likelihood, without impinging the affidavit of a justice that he was not in fact biased. Bias is or may be an unconscious thing and a man may honestly say that he was not actually biased and did not allow his interest to affect his mind, although, nevertheless, he may have allowed it unconsciously to do so. The matter must be determined upon the probabilities to be inferred from the circumstance in which the justices sit".

15. Devlin LJ in his articulation of the applicable approach on apparent bias has not specifically stated that the court should determine the issue objectively. However, Lord Denning MR in Metropolitan Properties Co (F.G.C.) Ltd v Lannon and Others (1969) 1QB 577, pg. 599) specially adopted an objective test, where Lord Denning Held that:

"In Reg v Barnsley Licensing Justice, Ex parte Barnsley and District Licensed Victuallers' Association, Devlin J appears to have limited that principle considerably, but I would stand by it. 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 favor one side at the expense of the other. The court looks at the impression which would be given to other people. Even if 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. And if he does sit, his decision cannot stand; ...

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. The court will not inquire whether he did, in fact, favour one side unfairly. Suffice it that reasonable people might think he did. The reason is plain enough. Justice must be rooted in confidence; and confidence is destroyed when right-minded people go away thinking 'The Judge was biased'.

16. Having considered the test of "real likelihood", Edmund Davies LJ in **Lannon (supra)** has expanded the test to reasonable suspicion, where his Lordship found that:

*"With profound respect to those who have propounded the "real likelihood" test, I take the view that the requirement that justice must manifestly be done operates with undiminished force in cases where bias is alleged and that any development of the law which appears to emasculate that requirement should be strongly resisted. That the different test, even when applied to the same facts, may lead to different results is illustrate by **Re v Barnsley Licensing Justices** itself as Devlin LJ made clear in the passage I have quoted. But I cannot bring myself to hold that a decision may properly be allowed to stand even although there is reasonable suspicion of bias on the part of one or more members of the adjudicating body".*

17. Having extensively reviewed the different approaches adopted in **Barnsley (supra)** and **Lannon (supra)**, Lord Goff of Chieveley in **Reg v Gough (1993) A.C. 647, pg. 670** expounded that the court should not examine the issue of apparent bias through the eyes of a reasonable man, as the court itself personifies the reasonable man in an application of apparent bias. Moreover, Lord Goff has found that the correct test is real danger of bias and not the real likelihood of bias. Lord Goff in **Gough (supra)** held that:

"I think it unnecessary, in formulating the appropriate test, to require that the court should look at the matter through the eyes of a reasonable man, because the court in cases such as these personifies the reasonable man; and in any event the court has first to ascertain the relevant circumstances from the available evidence, knowledge of which would not necessarily be

available to an observer in court at the relevant time. Finally, for the avoidance of doubt I prefer to state the test in terms of real danger than real likelihood, to ensure that the court is thinking in term of possibility rather than probability of bias. Accordingly, having ascertained the relevant circumstances, the court should ask itself whether, having regard to those circumstances, there was a real danger of bias on the part of the relevant member of the tribunal in question, in the sense that he might unfairly regard (or have unfairly regarded) with favour, or disfavour, the case of a party to the issue under consideration by him,”

18. In view of the test enunciated in **Gough (supra)**, the court should not look at the matter of apparent bias through the eyes of a reasonable man. The court itself personifies the reasonable man and needs to ascertain all the relevant circumstances. The court should then determine whether such circumstances lead to a real danger of bias.
19. The test of “real danger” as expounded in **Gough (supra)** has been criticized by the High Court of Australia on the ground that it has given much weight to the view of the court than the public perception and confidence in the adjudicating process. Mason CJ in **Webb v R (1994) HCA 30, (1994) 181 CLR 41** held that:

“The test enunciated in R v Gough tends to emphasize the court’s view of the facts and placed inadequate emphasis on the public’s perception of irregular incident”.

20. According to the above discussed judicial precedents, it appears that the United Kingdom and Australia have adopted two different approaches in “real danger of bias” and “reasonable apprehension of bias”. Unlike the Gough test, Australia has specifically adopted an objective test in order to emphasize the perception of the public confidence in adjudicating process.
21. The Court of Appeal of New Zealand in **Auckland Casino Ltd v Casino Control Authority (1995) 1 NZLR 142, pg. 149** found there is little practical difference between

the two tests adopted in United Kingdom and Australia. Having concluded as such, the Court of Appeal of New Zealand accepted the real danger test. Cook P held that:

*"The approach that has been adopted in this court in recent years, however, has been to emphasize that there is little if any practical difference between the tests. See **E H Cochrane Ltd v Ministry of Transport** (1987) 1 NZLR 146,153, **R v Te Pos** (1992) 1 NZLR 522,527; **Matua Finance Ltd v Equiticorp Industries Group Ltd** (1993) 3 NZLR 650, 654, Reference to earlier New Zealand cases will be found in the three cases cited. In some of them the possibility of a genuine distinction has been recognized. But once it is granted that the hypothetical reasonable observer must be informed, so that as indicated by the House of Lords in **Gough** at pp 664 and 673 **R v Sussex Justices Ex parte McMathy** (1924) 1 KB 256 is a dubious authority, the distinction become very thin. If a reasonable person knowing all the material facts would not consider that there was a real danger of bias, it would seem strained to say that nevertheless he or she would reasonably suspect bias. One must query whether the law should countenance such refinements. In result, we accept the real danger test as satisfactory".*

22. The Supreme Court of Fiji in **Amina Koya v State** (1998) FJSC 2; CAV0002.1997 (2 March 1998) concurred with the approach adopted in **Auckland Casino Ltd** (Supra) where the Supreme Court found that there is little, if any difference between the two tests. The Supreme Court held that:

*"Subsequently, the New Zealand Court of Appeal, in **Auckland Casino Ltd v Casino Control Authority** (1995) 1 NZLR 142, held that it would apply the **Gough** test. In reaching that conclusion, the Court of Appeal considered that there was little if any practical difference between the two tests, a view with which we agree, at least in their application to the vast majority of cases of apparent bias. That is because there is little if any difference between asking whether a reasonable and informed person would consider*

there was a real danger of bias and asking whether a reasonable and informed observer would reasonably apprehend or suspect bias."

23. Nearly ten years after the formulation of Gough test, the House of Lords in **Porter v Magill (2002) 2 AC 357, p 493, 494** found that the approaches adopted by Australia, Scotland, Strasbourg Court and many Common Law Jurisdictions are founded on "the reasonable apprehension of bias test". Lord Hope of Craighead in **Porter v Magill (supra)** conceded that the English Courts have been reluctant to depart from the test formulated in Gough. However, his Lordship found, though the two tests are described differently, both of them actually lead to similar results with indistinguishable differences. Having apprehended the similarity of the results produced by two tests, Lord Hope in **Porter v Magill (supra)** went on making more conciliatory adjustments to the test formulated in Gough, where his Lordship held that:

*"In my opinion however, it is now possible to set this debate to rest. The Court of Appeal took the opportunity in **In re Medicaments and Related Classes of Goods (No. 2) [2001] 1 WLR 700** to reconsider the whole question. Lord Phillips of Worth Matravers MR, giving the judgment of the court, observed, at p 711 A-B, that the precise test to be applied when determining whether a decision should be set aside on account of bias had given rise to difficulty, reflected in judicial decisions that had appeared in conflict, and that the attempt to resolve that conflict in *R v Gough* had not commanded universal approval. At p 711 B-C he said that, as the alternative test had been thought to be more closely in line with Strasbourg jurisprudence which since 2 October 2000 the English courts were required to take into account, the occasion should now be taken to review *R v Gough* to see whether the test it lays down is, indeed, in conflict with Strasbourg jurisprudence. Having conducted that review he summarized the court's conclusions, at pp 726–727:*

“When the Strasbourg jurisprudence is taken into account, we believe that a modest adjustment of the test in R v Gough is called for, which makes it plain that it is, in effect, no different from the test applied in most of the Commonwealth and in Scotland. The court must first ascertain all the circumstances which have a bearing on the suggestion that the judge was biased. 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.”

I respectfully suggest that your Lordships should now approve the modest adjustment of the test in R v Gough set out in that paragraph. It expresses in clear and simple language a test which is in harmony with the objective test which the Strasbourg court applies when it is considering whether the circumstances give rise to a reasonable apprehension of bias. It removes any possible conflict with the test which is now applied in most Commonwealth countries and in Scotland. I would however delete from it the reference to “a real danger”. Those words no longer serve a useful purpose here, and they are not used in the jurisprudence of the Strasbourg court. The question is whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased”

24. Accordingly, it appears that Lord Hope in **Porter v Magill (supra)** has formulated a more harmonized approach focusing on the similarity of the expected results from the two tests, than on the different nature of the literal meanings of the words, thereby ending the conflict approaches of “real likelihood of bias” and “reasonable apprehension of bias”.
25. The Court of Appeal of New Zealand in **Muir v Commissioner of Inland Revenue (2007) 3 NZLR 495, p 508, 509** found that the approaches articulated in **Porter v Magill (supra)** and **Webb (supra)** are more preferable. Accordingly, the Court of Appeal of New Zealand departed from the test of **Gough (supra)**, where it was held that:

"We think that it is time to extinguish the tenuous hold on existence the Gough test has had in New Zealand. In general, we prefer the approach in Porter v Magill and Webb because of the way in which it confirmed the appropriate "window" through which the relevant conduct is to be viewed; that is, it emphasizes how something might reasonably be regarded by the public, in the form of the reasonable informed observer".

26. Having adopted the approaches of **Porter v Magill** and **Webb**, the Court of Appeal of New Zealand in **Muir v Commissioner of Inland Revenue (supra)** expounded a two-step inquiry in order to determine the apparent bias of a judicial officer, where it was held that:

"In our view, the correct enquiry is a two stage one, first it is necessary to establish the actual circumstances which have a direct bearing on a suggestion that the judge was or may be seen to be biased. This factual inquiry should be rigorous in the sense that complainants cannot lightly throw the "bias" ball in the air. The second inquiry is to then ask whether those circumstances as established might lead a fair minded lay observer to reasonably apprehend that the judge might not bring an impartial mind to the resolution of the instant case. This standard emphasized to the challenged judge that a belief in her own purity will not do, she must consider how others would view her conduct".

"We emphasize that the touchstone is the ability to bring an impartial mind to bear on the case for resolution. That does not, however, mean that a judge needs to be perceived as operating in a sanitized vacuum".

27. The Court of Appeal of New Zealand in **Muir v Commissioner of Inland Revenue (supra)** emphasized the need of rigorous inquiry about the actual circumstances that has a direct connection to the suggested apparent bias. This two-step inquiry is founded on the conflicting fundamentals of fair trial on one hand and the universally accepted principle of impartiality and independence of judiciary on the other hand. The judges are trained and

capable of discharging their duties, in accordance with the oath they take to do right to all kinds of people, without fear, favour, affection or ill will, in accordance to the laws and usages of their countries. They are trained and experience to depart from the irrelevant, the immaterial and the prejudicial in adjudicating the matters before them.

28. Having recognized the existence of two conflicting fundamentals on the issue of recusal of judicial officer on the ground of apparent bias, Glesson CJ in **Ebner v Official Trustee in Bankruptcy (2000) 205 CLR 337, 176 ALR 644** held that:

"The application of the test of apparent bias requires two steps. First it requires to identification of what it is said might lead a judge (or Juror) to decide a case other than on its legal and factual merits. The second step is no less important. There must be an articulation of the logical connection between the matter and the feared deviation from the course of deciding the case on merits. The bare assertion that a judge (or juror) has an interest in litigation or an interest in party to it, will be of no assistance until the nature of the interest and the asserted connection with the possibility of departure from impartial decision making is articulate".

29. Justice Goundar in **Mahendra Pal Chaudhry v The State (2010) FJHC 531 HAM160.2010 (19 November 2010)** having discussed the position of other common law jurisdictions and the Bangalore Principles of Judicial Conduct which the Fiji Judiciary adopted in 2001, adopted the test enunciated in **Muir v Commissioner of Inland (supra)**. The approach adopted by his Lordship Justice Goundar is further upheld and affirmed by Justice Chithrasiri JA in **Mahendra Mothibhai Patel and another v The Fiji Independent Commission Against Corruption (Crim App No AAU 0039 of 2011)**.
30. Justice Calanchini in **State v Citizens Constitutional Forum Ltd, ex parte Attorney General [2013] FJHC 220; HBC195.2012 (3 May 2013)** found that:

*"The test was subsequently slightly adjusted by the House of Lords in **Porter -v- Magill [2002] 2 WLR 37** at pages 83 – 84. As a result the*

approach to be taken is that the court must first ascertain all the circumstances which have a bearing on the suggestion that the judge was biased. It must then ask whether those circumstances would lead a fair-minded and informed observer to conclude that there was a real possibility, that the tribunal was biased.

In my judgment this approach is to be preferred to either a purely subjective test or the reasonable apprehension of bias test. A purely subjective test considers the concerns of a particular litigant and would as a result allow any litigant to successfully challenge any judge assigned to a case whenever that litigant perceived that the judge might be prejudiced.

The reasonable apprehension of bias test raises an issue relating to the knowledge to be imputed to the hypothetical member of the public. What kind and what depth of knowledge is to be imputed to the hypothetical member of the public? Does the imputation of such knowledge mean that the hypothetical person with that imputed knowledge is no longer an average or typical adult? The artificial nature of this exercise surely leads to a wide variance in its application by courts. (See: The Australian Judiciary – Enid Campbell and H P Lee, Cambridge University Press 2001 at pages 133 – 136).

Consistent with the decision in Porter –v- Magill (supra) the Court of Appeal in Patel and Mau –v- Fiji Independent Commission Against Corruption (unreported criminal appeal AAU 39 and 40 of 2011 delivered 12 September 2011) adopted a two stage enquiry. The first stage involved establishing the actual circumstances which have a direct bearing on a suggestion that the judge was or may be seen to be biased. This factual inquiry should be rigorous, in the sense that complainants cannot lightly throw the "bias" ball in the air. The second stage is to determine whether those circumstances as established might lead a fair-minded lay-observer to reasonably apprehend that the judge might not bring an impartial mind to the resolution of the case. This involves an objective determination in the

sense that it requires an enquiry as to how others would view the judge's position.

31. Having extensively reviewed the judicial precedents of Fiji and other Common Law Jurisdictions, Justice Kamal Kumar in Padayachi v Gounder [2017] FJHC 486; HBC228.2016 (23 June 2017) adopted the approach that was taken into consideration by Justice Goundar in Chaudhry (supra).
32. The Supreme Court of Fiji in Chief Registrar v Khan [2016] FJSC 14; CBV0011.2014 (22 April 2016) found that the test formulated in Porter v Magill (supra) represents the law of Fiji in relation to recusal application founded on the ground of apparent bias, where Keith J held that:

"The law in this area has become settled over the years. The leading case in Fiji is the Supreme Court's judgment in Koya v The State [1998] FJSC 2. Ironically the suggestion that the judge in that case might have been impartial came from Mr. Khan! 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". 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 has prejudged or might prejudice the case". The Court in Koya thought that there was little, if any, practical difference between the two tests.

Having said that, the problem with the Gough test which Webb identified was that it placed "inadequate emphasis on the public perception of the irregular conduct". It was "the court's view of the public's view, not the court's own view, which [was] determinative". That persuaded the Court of Appeal in England in Re Medicaments and Related Classes of Goods (No 2) [2001] 1 WLR 700 to say at [85]

" ... that a modest adjustment of the test in Gough is called for, which makes it plain that it is, in effect, no different from the test applied in most of the Commonwealth and in Scotland. The court must first ascertain all the circumstances which have a bearing on the suggestion that the Judge was biased. 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."

The House of Lords in Porter v Magill [2002] 2 AC 357 approved that statement of principle, and in my view, that test should represent the law in Fiji. On a fair reading of the Commissioner's ruling, that is the test he applied"

33. Having considered the above discussed judicial precedents of main Common Law jurisdictions and Fiji on the issue of apparent bias, it appears that the courts in Fiji have found the approaches in **Porter v Magill (supra)** and **Muir v Commissioner of Inland (supra)** more preferable in order to determine the issue of apparent bias.
34. As expounded by Lord Denning MR in **Lannon (supra)** the litmus test on the issue of apparent bias is to preserve the legitimacy and public confidence in the Judicial System. It is a cardinal responsibility of the judicial officer to maintain and uphold the independence and impartiality in the decision making process, which would certainly attract public confidence and legitimacy, cultivating the impression in public, that the Judiciary is both legitimate and moral.

Analysis

35. This application for recusal is founded on the ground of apparent bias by reasons of prejudgment.

36. Ms. Ana Laqere, Ms. Amelia Vunisea, Ms. Vaciseva Lagai, Ms. Vilisi Tuitavuki, Ms. Laisa Halafi, Ms. Tavenisa Tavaga, Mr. Kiniviliame Taviraki had been charged in HAC 56 of 2014 for the following offences, that:
 - i) Ms. Ana Laqere: 1 count of Abuse of Office and 35 counts of Causing a Loss,
 - ii) Tavenisa Tavaga: 1 count of Abuse of Office and 6 counts of Causing a Loss,
 - iii) Ms. Amelia Vunisea: 1 count of Abuse of Office and 34 counts of Causing a Loss,
 - iv) Ms. Laisa Halafi: 1 count of Abuse of Office, 13 counts of Causing a Loss and 1 count of Obtaining a Financial Advantage,
 - v) Ms. Vaciseva Lagai: 1 count of Abuse of Office and 9 counts of Causing a Loss,
 - vi) Ms. Vilisi Tuitavuki: 1 count of Abuse of Office and 5 counts of Causing a Loss,
 - vii) Mr. Kiniviliame Taviraki: 1 count of Abuse of Office and 2 counts of Causing a Loss.
37. The prosecution alleged that these seven accused persons, being employed at Public Works Department, have committed these offences of Abuse of Office, Causing a Loss and Obtaining a Financial Advantage, while performing and discharging different duties and responsibilities at different stages in one hundred and one (101) transactions of purchasing stationery and hardware materials to the DECE. These seven accused, while violating and breaching the financial and procurement procedures of the Government, have falsely raised and paid several cheques to two fake companies owned by Mr. Shalveen Narayan.
38. The hearing of the above case commenced on the 23rd of February 2017 and concluded on the 13th of April 2017. The second accused was acquitted pursuant to Section 231 (1) of the Criminal Procedure Act. At the conclusion of the hearing, the five assessors in their respective opinions unanimously found the six accused were guilty for these offences. I accordingly convicted and sentenced them on the 10th of May 2017.

39. The Prosecution alleges that the same seven accused persons have allegedly violated and breached the financial and procurements procedures of the government by raising and paying false cheques to three difference companies in relation to these three current proceedings. The defence and the prosecution admit that, these three transactions involved in these three proceedings are similar to the transactions involved in HAC 56 of 2014. Hence, the prosecution and the defence are expecting to rely on virtually the same witnesses and the evidence as adduced in HAC 56 of 2014, in order to prove the charges in these three proceedings.
40. Justice Goundar in **Chaudhry v State (supra)** has discussed the issue of apparent bias founded on the ground of prejudgment, where his Lordship found that:

“In criminal cases, judges have to make pre-trial rulings and decisions during the trial. Not all rulings that a judge makes may be favourable to the accused. The mere fact that a judge has ruled against the interest of an accused is not a ground for disqualification. To do so will set a dangerous precedent because as soon as a judge makes an unfavourable decision he or she is disqualified from trying the accused and no case will ever be heard. The result will be contrary to the public interest to see all those who are charged with criminal offences are tried in accordance with the law.

41. The Fiji Court of Appeal in **Balaggan v State [2011] FJCA 43; Miscellaneous Case 31.2011 (15 September 2011)** found that:

“A judge whether in the High Court or in the Court of Appeal will frequently be addressed on the strength or weakness of the underlying criminal case during a bail application. In his judgment, reasons for his decision have to be given. He may choose to explain why it seems to him that there is a strong prima facie case or a weak prima facie case. Such reasons may relate to flight risk, or to other frequent matters arising in bail applications. Judges and Magistrates in common law jurisdictions have always been required to assess the strength and weakness of the underlying

criminal case. If they do so and find that it is a strong prima facie prosecution case, it has never been the situation that a Judge or Magistrate has to recuse himself in respect of hearing the substantive criminal trial on account of apparent bias. The "apparent bias" test stresses that the observer has to be an "informed observer". An informed observer would know the above stated rules. An informed observer would also know that assessments for the purposes of bail application are untested as there is no oral evidence or cross-examination and prior rulings on bail applications do not mean that the Judge or Magistrate is unable to conduct a fair contested hearing at trial in respect of the substantive underlying criminal charges. Findings of fact on bail applications are necessarily prima facie findings of a tentative nature on limited material. The common law expects Judges, who are bound by their judicial oath, to adjudicate on the facts properly and fairly on trial paying no heed to whatever tentative prima facie findings they may have been required to make upon the hearing of an earlier bail application in the same matter.

42. Both **Chaudhry (supra)** and **Balaggan (supra)** dealt with the issues of pre-trial rulings and how such findings affect final determination of the substantive issue in the case. In this matter, the issue is not about the pre-trial determinations, but the final judgment that I made, in relation to some other similar false transactions, in another case involving the same accused persons. The factual and evidentiary issues pertaining to the previously concluded hearing and these three current proceedings are similar in nature. Hence, I do not find much assistance in **Chaudhry (supra)** and **Balaggan (supra)** for this application for recusal.
43. In **Livesey v The New South Wales Bar Association (supra)**, proceedings were instituted against the Appellant in the Court of Appeal Division of the Supreme Court of New South Wales, seeking an order to strike off the Appellant's name from the roll of counsels, on the grounds of professional misconduct. During the course of the said proceedings, the court had to determine certain matters of fact and to hear evidence from a witness in relation to them. In another previous proceedings, in which the Appellant had been neither a party nor

a witness, two of the Judges of the court, had expressed adverse opinions about those matters and the credibility of the said witness. The Appellant had taken up objection to those two Judges, to recuse themselves from the hearing. However, the Judges refused the objections and proceeded with the hearing. At the conclusion of the hearing, the court found the Appellant was guilty for professional misconduct and ordered to strike him off as a barrister. In the appeal, the High Court of Australia found, a fair minded observer might entertain apprehension of bias, by reasons of the prejudgment of the issues or the credibility of a witness. Hence, the High Court concluded that the order of the court could not stand. The High Court of Australia in **Livesey (supra)** held that:

“In a case such as the present where there is no allegation of actual bias, the question whether a judge who is confident of his own ability to determine the case before him fairly and impartiality on the evidence should refrain from sitting because of a suggestion that the views which he has expressed in his judgment in some previous case may result in an appearance of pre-judgment can be a difficult one involving matters “of degree and particular circumstances may stoke difference minds in different ways” (per Atkin J in Shaw). If a Judge at first instance considers that there is any real possibility that his participation in a case might lead to a reasonable apprehension of pre-judgment or bias, he should, of course, refrain from sitting”.

44. Unlike **Livesey (supra)**, the seven of the accused persons who are involved in these three proceedings were also involved as accused in the previous proceedings which I heard and determined. The Prosecution expects to adduce in these three current proceedings, the same evidence that had been adduced in the previous hearing, in order to establish the financial and procurement procedures and regulations of the government. If that is so, they have to then establish that these seven accused persons have violated or breached those procedures and regulations by abusing the offices which they have held in the Public Works Department.

45. In HAC 56 of 2014, I have accepted the evidence presented by the prosecution and refused to accept the evidence given by the defence on the same issue of violation and breaching of financial procedures and regulations, concluding that the six of these seven accused persons were guilty for the offences as charged in HAC 56 of 2014. Accordingly, it is my opinion that I have already determined the credibility and reliability of main witnesses and their evidence that the prosecution expects to rely on these three current proceedings.

Conclusion

46. In view of these reasons, if I continue to hear these three proceedings, I certainly have to determine the credibility and reliability of the same witnesses and their evidence on the same issues which I have already determined in HAC 56 of 2014. Hence, it is apparent, that an informed reasonable fair minded person undoubtedly apprehends that there is a real likelihood or reasonable likelihood of pre-judgment of the witnesses and their evidence by the Judge. Therefore, I am of the view that there is a logical connection between the circumstances and the feared deviation of impartial and fair hearing.
47. Accordingly, it is my considered opinion that this case is a rare, but a fitting instance for me to recuse myself of hearing on the ground of apparent bias by reasons of pre-judgment. I accordingly recuse myself from hearing these three cases of HAC 53 of 2014, HAC 99 of 2014 and HAC 193 of 2014.




R.D.R.T. Ragasinghe
Judge

At Suva

15th August 2017

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