

IN THE HIGH COURT OF FIJI
AT LAUTOKA
MISCELLANEOUS JURISDICTION

Criminal Miscellaneous Case No. HAM 200 of 2017

- 1. MATAIASI ULUI**
- 2. MAIKELI LOKO**
- 3. RAKESH KUMAR**

Applicants

THE STATE

Respondent

Date of Hearing: 15 January 2018
Date of Ruling: 15 January 2018

RULING

By way of Notice of Motion and accompanying Affidavit , the Applicants make application FIRST that their trial listed to begin hearing on today's date be vacated and SECONDLY that Mr. Justice Madigan , the Judge appointed to hear the trial, recuse himself from hearing the matter on grounds relied upon in the attached affidavit of Mataiasi Ului.

The application in respect of vacation of trial date was heard and deliberated on by Aluthge J. and in a Ruling delivered and published on the 14th December 2017 the learned Judge refused the Application to vacate the trial which is to commence on the instant date. In that Ruling, Aluthge J. quite properly left the recusal application to be heard and determined by me, being in full knowledge of the facts surrounding the application and being best in a position to

give weight to those relevant facts in accordance with all legal principles pertaining.

The grounds for recusal are two-fold.

- That I am to be a State witness in a Suva Magistrates Court criminal matter against one Afrana Nisha Rahiman (Cr.356/15), which accused is to be defended by Mr. Iqbal Khan, Counsel for two of the accused in the present trial. The applicant deposes that as a State witness I will be “cross examined at length” (by Mr Khan) “and this may affect our case”.
- The applicant further deposes that whilst serving as Commissioner for the Independent Legal Services Commission, I had suspended his Counsel (Mr. I. Khan) and on appeal against this decision to the Court of Appeal and to the Supreme Court, Mr. Khan had criticized me which would therefore lead to the “apprehension of bias against our Counsel and would result in an unfair trial”.

The Law

The definitive two part test for recusal in Fiji was established by the Supreme Court in **Chief Registrar v I. Khan** [2016] FJSC 14; CBV0011.14, (22 April 2016) when Keith J. adopted the test expounded by the House of Lords in **Porter v Magill** [2002]2AC357 where it was said:

“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 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 Supreme Court added in **Khan**, following the English Court of Appeal in **Locabail (UK) Ltd v Bayfield Properties Ltd** [2002] 2WLR 870:

“The greater the passage of time between the event relied on as showing a danger of bias and the case in which the objection is raised, the weaker (other things being equal) the objection will be”.

It is therefore my duty, in following these principles to determine first the underlying circumstances which might give rise to a perception of bias and secondly whether those facts and/or circumstances would cause a fair-minded and informed observer to conclude that there was a danger of my being biased (my emphasis).

The First Ground.

At the time that I was in the role of Commissioner of Independent Legal Services, Ms. Afrana Nisha was the Commission’s sole Secretary and Accountant.

For reasons irrelevant to this application I suspected that Ms. Nisha had defrauded the Commission and I made allegations to the authorities accordingly. I made a witness statement to the Fiji Independent Commission against Corruption (“FICAC”) a copy of which statement has been attached to the applicant’s affidavit in support.

FICAC has indeed launched a prosecution against Ms. Nisha and the matter is before the Magistrates Court in Suva. Mr. Khan, who is appearing for two of the accused persons in the present trial, is indeed the Counsel instructed by Ms. Nisha. I am not aware of any hearing date for the trial, nor have I been informed that I will be needed to give evidence in the matter.

If I do in fact give evidence and if in fact I will be cross-examined by Mr. Khan, it will be at a time subsequent to this trial.

It can never be said that hypothetical events in the future can lead to the suggestion of bias on the part of a tribunal in the present.

The first limb of the test expounded by the Supreme Court in **Khan** (supra) is not satisfied.

This ground is frivolous and it is dismissed.

The Second Ground

The applicant is correct when he deposes that as the Commissioner of Independent Legal Services, I did indeed find allegations of professional misconduct against Counsel Khan established and in consequence suspended him from legal practice for a period of 15 months.

It is remarkable that the hearing in the Commission was in October 2013 and the decision and sanction pronounced in December 2013.

Counsel Khan then applied unsuccessfully to the Court of Appeal to have the sanction stayed and he prosecuted an appeal against the Commission's findings in both the Court of Appeal and the Supreme Court.

As the Counsel pleads in this present application, he did in fact make criticisms of my (as Commissioner) deliberations and findings – in fact in the stay application listing 17 perceived faults on my part. (**Iqbal Khan v Chief Registrar** [2004] FJCA 60; ABU 68.2013; (23 May 2014). In that decision the President of the Court found that none of the 17 complaints had an exceptional chance of succeeding on appeal to warrant a stay being ordered.

Counsel's appeal to the Court of Appeal was partially successful in that one of the findings of professional misconduct was reduced to unsatisfactory misconduct but in coming to that Judgment no criticism was made of the Commissioner's conduct despite the complaints of Counsel (**Khan v Chief Registrar** [2014] FJCA 160 (25 September 2014).

Counsel's appeal to the Supreme Court on the Court of Appeal's finding of unsatisfactory professional conduct was unsuccessful (**Khan v Chief Registrar** CBV0011.2014 (22 April 2016).

The point of taking time to outline the progress of these appeals is that despite Counsel Khan's criticism of my (as Commissioner's) conduct before the Appellate Courts, none of those criticisms were validated with the consequence that no fair-minded and informed observer would ever perceive that I would be biased against Counsel Khan some four years later.

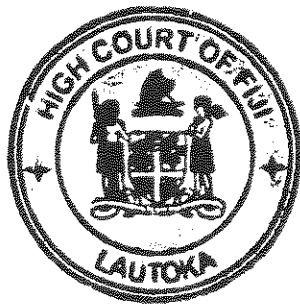
Any informed observer would also know that criticisms of Judges are daily made to Appellate Courts – in fact it is something that goes *pari passu* with the work of a judicial officer. Should such an officer take umbrage at such criticism resulting in bias against the counsel making such allegations then that officer could not possibly perform his duties in a court of first instance.

The claim of unfairness of trial

The instant trial against Counsel Khan's clients and two others is for the allegation of murder.

Counsel Khan is not on trial nor is it expected he will give evidence on the general issue. Even were it suspected that this Court would harbour a bias against Counsel Khan (and for the foregoing reasons no such suspicion could be founded), there are no issues of credibility to be decided upon in respect of the Counsel. As such his clients cannot possibly be prejudiced by my presiding over the case.

For all of these reasons, the application for recusal is dismissed and the trial will commence before me immediately.



**Paul K. Madigan
Judge**