TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

CV2007-04133

IN THE MATTER OF THE DECISION OF HER WORSHIP EJENNY ESPINET MADE ON OR ABOUT THE 31ST DAY OF JULY 2007 SITTING AT THE PORT OF SPAIN MAGISTRATE'S COURT ON THE CLAIMANT'S PRELIMINARY SUBMISSION ON BIAS

BETWEEN

BASDEO PANDAY

CLAIMANT

AND

HER WORSHIP EJENNY ESPINET

DIRECTOR OF PUBLIC PROSECUTIONS

DEFENDANTS

BEFORE THE HONOURABLE MADAM JUSTICE JUDITH JONES

Appearances:

Mr. A. Beharrylal instructed by Ms. M. Panday for the Claimant

Mr. N. Byam for the First Defendant

Mr. D. Mendes SC and Mr. I. Benjamin instructed by Ms. R. Maharaj for the Second Defendant

JUDGMENT

1. In April 2006 the Claimant, the Leader of the Opposition in Parliament, was convicted of offences pursuant to section 27 of the Integrity in Public Life Act 1987. On appeal these charges were quashed and a retrial ordered.

2. At the retrial the Claimant made preliminary submission requesting that the Magistrate recuse herself. These submissions were dismissed by the Magistrate. By way of judicial review the Claimant now seeks orders preventing Magistrate Ejenny Espinet ("the Magistrate") from hearing the retrial of these offences.

3. In these proceedings the Claimant seeks an order of certiorari quashing the decision of the Magistrate not to recuse herself; a declaration that the decision of the Magistrate to dismiss the preliminary submission was illegal and or unreasonable and/or procedurally improper and an order of prohibition preventing the Magistrate from proceeding with the retrial.

4. Simply put the Claimant seeks relief on the basis that some of the evidence led in the committal is essentially the same evidence that forms the prosecution's case against him in the retrial. He submits that an adjudication of that evidence by the Magistrate in the retrial would give rise to apparent bias thereby breaching his constitutional rights to a fair trial.

5. The proceedings were initially brought against the Magistrate as the only defendant. Despite being given the opportunity to be heard on the application for leave the Magistrate declined my invitation to be heard at that stage. After hearing the submissions of Attorneys' for the Claimant leave to bring the proceedings was granted and an interim order made staying the continued hearing of the retrial until the determination of these proceedings.

6. By an order made on the 2nd July 2008 leave was given for the Director of Public Prosecution ("the DPP") to be joined as a party to these proceedings. The application was not opposed by the Claimant or the Magistrate. The Magistrate has taken no active part in these proceedings.

The Facts

7. The Claimant is charged with three offences of knowingly making a declaration which is false in some material particular contrary to section 27 of the Integrity in Public Life Act No. 8 of 1987.

8. It is not in dispute that the Magistrate presided over committal proceedings for an offence pursuant to the Corruption Act ("the committal proceedings") and heard evidence upon which she was required to decide whether there was a prima facie case of corruption and/or dishonesty against the Claimant. The specific evidence led in the committal proceedings showed that there were deposits of monies made into a NatWest bank account owned by the Claimant which deposits were subsumed into a larger sum of money in the same account. It is not disputed that this is the same evidence that the prosecution intends to lead in the retrial.

9. In the committal proceedings the prosecution alleged that these deposits of money were paid as a corrupt incentive to the Claimant with the intention of procuring favourable contracts to build the Piarco Airport. In these proceedings the prosecution made the specific allegation that with respect to his duty under the Integrity Act the

Claimant had failed to file declarations that included a reference to the account and that this failure was indicative of an intention to hide the account. It is not disputed that this is the same allegation that the prosecution will make in the retrial, which allegation the prosecution accepts is the crux of its case.

10. At the commencement of the retrial both the prosecution and the Claimant submitted that the Magistrate recuse herself on the basis that the special knowledge obtained by her in the committal proceedings about the particular payment into the bank account may very well be held to be prejudicial. In refusing the application for her recusal the Magistrate was of the view that no fair-minded and well-informed person could reasonably find bias.

11. In coming to this conclusion the Magistrate gave the following reasons:

(i) The fact that no allegation of impropriety in the course of her exercise of her duty had been made against her distinguished the present circumstances from those outlined in the authorities cited;

(ii) The heavy workload of the Court made it inevitable that a magistrate would be called upon to adjudicate upon more that one matter for which a litigant is charged;

(iii) In the course of proceedings a magistrate may be called upon to rule on the admissibility of a document or oral statements. Should the document or statement be held to be inadmissible the magistrate is required to disabuse her mind of the contents of that document or statement;

(iv) Similarly under the Bail Act magistrates are required to examine the criminal record of the litigant yet the magistrate usually adjudicates upon the matter for which the litigant is charged;

(v) The issues in both proceedings are not the same, in one the prosecution is only required to establish a prima facie case, in the other the prosecution has to prove the case beyond a reasonable doubt.

The Law

12. The Claimant alleges apparent bias.

> "Bias can come in many forms it may consist of an irrational prejudice or it may arise from particular circumstances which, for logical reasons, predispose a judge towards a particular view of the evidence or the issues before him": per Lord Phillips in **Re Medicaments and Related Classes of Goods (No.2) [2001] 1 WLR 700**.

13. No allegation of improper behaviour on the part of the Magistrate has been made. Indeed on the authorities relied on by both parties it is clear that the Magistrate's actual state of mind is irrelevant for the purpose of ascertaining whether there is a likelihood of apparent bias.

14. The issue here is the public perception as to whether, given her earlier determination, the Magistrate would be able to bring to the retrial the required impartiality.

> "Impartiality calls for a state of mind which is free from any influences extraneous to the merits of the particular case, which is capable of a dispassionate inquiry and an objective judgment, and which is not turned aside by any motivation to favour one side as against the other. But the actual state of the person's mind is not always readily discoverable and absolute perfection may not be readily attainable. More subtly the decision-maker may be influenced quite unconsciously in the one direction or the other by extraneous considerations in ways which may be evident to or suspected by others but of which he is unaware. The insidious nature of bias makes its identification elusive. The law does what it can by recognising that bias may be apparent as well as actual. Thus proof of an appearance of bias may be as fatal as proof of a state of mind which is actually partial……The apparent position is then as important as the reality and may be effective regardless of the reality. The confidence of the parties in the decision to be pronounced in their dispute and the confidence of the public in the processes of justice demand no less": per Lord Clyde in **Dr. John Roylance v The General Medical Council Privy Council Appeal No. 49 of 1998**.

15. According to Archie JA in **Basdeo Panday v Wellington Virgil (Senior Superintendant of Police) Mag. App. No 75 of 2006**:

> "If the integrity of the judicial system and public confidence in the administration of justice is to be maintained, then fairness and impartiality must be subjectively present and objectively demonstrated to the informed and reasonable observer. The duty of the Court when investigating an allegation of apparent bias is to place itself in the shoes of a hypothetical observer who is both 'fair-minded' and 'informed'. If such an observer would conclude that there is a real possibility that the tribunal was biased, the system has failed and the proceedings are vitiated.": page 3 at paragraph 5.

16. What then are the attributes of this fair minded and informed observer? According to Archie JA in the same case, 'the fair minded observer is not complacent nor unduly sensitive or suspicious when he examines the facts that he can look at'. Neither is he an insider. 'While he will have a general appreciation of the culture and norms of the legal profession he may not so readily take for granted a judicial officer's ability to compartmentalise his mind and ignore extraneous information or circumstances.' The test therefore is of the hypothetical fair minded and informed member of the public.

17. The DPP submits that our fair minded and informed observer would not consider that there was a real possibility of bias because the Magistrate was aware of evidence prejudicial to the Claimant which may or may not be admitted or admissible at the retrial

because that hypothetical observer would know that magistrates are frequently exposed to evidence which is prejudicial to the accused which is ruled inadmissible and in such a case that magistrate is still capable of adjudicating fairly. This submission reflects the Magistrate's thinking as shown in the second and third reasons advanced by her.

18. It cannot be disputed that the fact of a limited number of magistrates and the resultant heavy workload of each may, of necessity, result in a situation where a magistrate is required to adjudicate in more than one matter for which a litigant is charged or adjudicate on a matter in circumstances where that magistrate at some earlier stage had been required to examine the criminal record of the litigant for the purpose of the granting or refusal of bail. In such a case it may very well be that necessity would demand that the magistrate proceed to hear the case.

19. In my opinion the situation where a magistrate is required to rule on the admissibility of evidence and still continue to hear the case is not on all fours with the circumstances presented in the instant case. Firstly the requirement that the sitting magistrate deal with the admissibility of evidence arises from the fact that evidence is being led before that magistrate. Of necessity a determination as to the admissibility of evidence must be made by the tribunal hearing the evidence. If it were otherwise chaos would ensue and the work of the courts would come to an abrupt stop. In any event in such a situation the magistrate is not called upon to assess the evidence but rather to objectively deal with whether there is an evidential basis for its admission.

20. With respect to applications for bail, it does not necessarily follow that the fact that under the Bail Act magistrates are required to examine the criminal record of the litigant means that it is that magistrate who will adjudicate on the matter for which the litigant is charged or that the fact that it may be done necessarily means that it is acceptable in every situation. Each case depends on its particular facts. Considerations as to the nature of the charges or the proximity of one hearing to the other, for example, may be of some relevance.

21. In all these examples however the doctrine of necessity may arise. It must be noted that there has been no suggestion in these proceedings that the doctrine of necessity arises. Neither has the Magistrate, in her reasons, sought to rely on such a doctrine. Indeed in my view one would be hard put to imagine the operation of such a doctrine given the particular facts of this case.

22. The issue here is not simply that the Magistrate had previously adjudicated on a case in which the Claimant was involved. Neither is it that the Magistrate had knowledge of similar or other charges of corruption against the Claimant. The key element here is that the evidence upon which the prosecution relies is the exact evidence that the Magistrate has already adjudicated upon and had already determined was sufficient to commit the Claimant to stand trial on other charges of corruption.

23. The DPP submits that the onus is on the Claimant to establish clearly that the Magistrate will hold fast to the views expressed in the committal proceedings. In support of this submission the DPP relies on statements made in the case of **Laws v Australian**

Broadcasting Tribunal (1990) 170 CLR 70 at pages 99-100 to the effect that where there a suspected prejudgment of an issue is relied upon to disqualify a decision- maker "what must fairly be established is a reasonable fear that the decision-maker's mind is so prejudiced in favour of the conclusion already formed that he or she will not alter that conclusion irrespective of the arguments presented to him or her": per **Gaudron and McHugh JJ**.

24. While not challenging the correctness of this statement in must be borne in mind that this statement was made in the context of the 'suspected prejudgment' arising from assertions made on behalf of the members of a tribunal in a pleading. While accepting that the rules of natural justice would only require disqualification if a reasonable bystander would entertain a reasonable fear that the decision-maker was incapable of bringing 'a fair and unprejudiced mind to the inquiry'. The judges were of the view that on the particular facts of that case a reasonable bystander would not come to such a conclusion. In that particular case no doubt the judges were influenced by the fact that what was involved was an assertion in a pleading.

25. In like manner the statements made **Liversey v New South Wales Bar Association (1983) 151 CLR 288,** relied on by the DPP, were statements made with reference to the particular facts of that case. In that case the judge had in fact in an earlier case expressing clear views on the credibility of a witness common to both proceedings and on a question of fact which was a live issue in the subsequent case. In my view the judgment cannot be interpreted to mean that it is only where a judge expresses clear views on common evidence that a conclusion of reasonable bias is possible. Indeed the

one principle that can be extracted from all the cases cited is that each case must be dealt with on its particular facts.

26. It would seem to me that what is of significance in the instant case is the fact that the role of the Magistrate in the committal proceedings was not the same as the role of the Magistrate in the retrial. With respect to the committal proceedings, **section 23** of the **Indictable Offences (Preliminary Enquiry) Act Chap. 12:01** provides that:

> (1) When all the witnesses on the part of the prosecutor and of the accused person, if any, have been heard, the Magistrate shall, if, upon the whole of the evidence, he is of the opinion that no prima facie case of any indictable offence is made out discharge him; ….
>
> (2) Where the Magistrate is of the opinion, on consideration of the evidence and of any statement of the accused, that there is sufficient evidence to put the accused on trial for any indictable offence the Magistrate shall commit the accused for trial….."

27. With respect to the retrial, **section 27** of the **Integrity in Public life Act 1987 Act No. 8 of 1987** states that a person who knowingly makes a declaration that is false in some material particular is guilty of an offence and liable on summary conviction to the penalties prescribed in the section.

28. The Magistrate in the committal proceedings therefore was required to satisfy herself that there was sufficient evidence to put the accused on trial for an indictable offence. In other words she was required to satisfy herself that there was a prima facie

case made out against the Claimant. The retrial on the other hand required the Magistrate to determine whether or not to convict the Claimant of the charges. In the retrial therefore, unlike the committal proceedings, the Magistrate was required to determine whether the Claimant was guilty of the offences of which he was charged.

29. In this regard some considerable assistance is obtained from the case of **Hauschildt v Denmark (1990) EHRR 266**. In this case, arising out of Denmark, the European Court of Human Rights had to determine whether there was a breach of Article 6 of the European Convention which guarantees the right to a fair trial by an impartial tribunal within a reasonable time. At issue was the impartiality of the tribunal and how that affected that applicant's right to a fair trial.

30. The applicant was charged with fraud and tax evasion. Pursuant to Danish law he was kept in custody for three days. Thereafter, after hearing the prosecution and the defence, the court held that the charges were not ill-founded and remanded the applicant into solitary confinement. As a result of successive decisions, a number of which were taken by a tribunal, which included the judge in question sitting with two lay judges, the applicant remained in custody until the trial.

31. The applicant while not objecting in principle to the system such as that existed whereby a judge is entrusted with a supervisory role in the investigation process criticised it in so far that, in his case, the very same judge was then expected to conduct the trial with a mind entirely free from prejudice. While there was no allegation that the judge would conduct himself with a personal bias, the applicant argued that the kind of

decisions that the judge was called upon to make at the pre-trial stage would require that judge under the law to assess the strength of the evidence and the character of the accused, thereby inevitably colouring his appreciation of the evidence and issues at the subsequent trial.

32. In dealing with the submissions the court was of the view that for the purpose of Article 6 the existence of impartiality must be determined in accordance with both a subjective and an objective test. As to the subjective test there was no allegation that the judges concerned had a personal bias against the applicant. In any event the court was of the opinion that the personal impartiality of a judge must be presumed until there was proof to the contrary. It is however their observations on the objective test that are of assistance.

33. With respect to the objective test the court was of the view that what must be determined was:

> "….whether, quite apart from the judge's personal conduct, there are ascertainable facts which may raise doubts as to his impartiality. In this respect even appearances may be of a certain importance. What is at stake is the confidence which the courts in a democratic society must inspire in the public and above all, as far as criminal proceedings are concerned, in the accused. Accordingly any judge in respect of whom there is a legitimate reason to fear a lack of impartiality must withdraw": paragraph 48.

34. In that case the court accepted that in Denmark at the pre-trial stage the judge's functions were those of an independent judge who was not responsible for preparing the case for trial or deciding whether the accused should be brought to trial. The questions which the judge had to answer when taking such pre-trial decisions were not the same as those which are decisive for his final judgment.

35. According to the court:

> "When taking a decision on detention on remand and other pre-trial decisions of this kind the judge summarily assesses the available data in order to ascertain whether prima facie the police have grounds for their suspicion; when giving judgment at the conclusion of a trial he must assess whether the evidence that has been produced and debated in court suffices for finding the accused guilty. Suspicion and a formal finding of guilt are not to be treated as being the same": paragraph 50.

36. While accepting that in normal circumstances such findings by the pre-trial judge will not justify fears of impartiality the court was of the opinion however that special circumstances in a given case may warrant a different conclusion. In that case in nine of the decisions continuing the applicant's detention on remand the judge in question relied specifically on a section which allowed the continued detention in circumstances "where there is a particularly confirmed suspicion that the accused committed an offence which is subject to public prosecution and which may under the law result in imprisonment for six years or more and when respect for the public interest according to the information received about the gravity of the case is judged to require that the suspect should not be at

liberty." The court expressed concern over the applicability of the words 'particularly confirmed suspicion'.

37. In the circumstances of the particular section the court was of the view that "the difference between the issue that the judge has to settle when applying this section and the issue he will have to settle when giving judgment at the trial becomes tenuous.": paragraph 52. Accordingly the court was of the opinion that in these circumstances the impartiality of the said tribunal was capable of appearing to be open to doubt thereby justifying the applicant's fears in this regard. The court therefore concluded that on the particular facts there were special circumstances which warranted a different conclusion and found that there had been a violation of the applicant's right to an impartial trial pursuant to Article 6 of the Convention.

38. It would seem to me therefore that there may be certain procedures inherent in the system which may involve an interaction between the accused and a magistrate or judge which are acceptable. In certain instances however there may be special circumstances that, despite these systemic procedures, require that a particular case be treated differently. The question is whether this case presents such special circumstances.

39. As in the Hauschildt case I accept that suspicion and guilt are not to be considered the same. However in the instant case it may very well be that a determination by the Magistrate that the evidence led in the committal proceedings was sufficient to put the Claimant on trial and the fact that this is the very evidence which the prosecution

intends to rely on in the retrial is a special circumstance which takes this case out of the norm.

40. In this particular case the Magistrate had already been required to make some assessment as to the bona fides of the exact evidence. In other words the Magistrate had already come to the conclusion that the evidence was sufficiently credible to commit the Claimant to stand trial. It seems to me that this is not a case as in **Vakauta v Kelly (1984) 167 CLR 568** where it was accepted that it was unavoidable that a judge would form some view of a party regularly appearing before him. The issue here is whether a view has already been formed with respect to the particular evidence. Unlike in **Sengupta v General Medical Council [2002] EWCA Civ. 1104** this was not a paper application in which the Judge had been asked to determine whether in law permission should be granted to appeal. Here the Magistrate had been required to determine whether the evidence formed a prima facie case against the Claimant.

41. What I think on this matter however is not of any real significance. My duty is to place myself in the shoes of the hypothetical observer referred to earlier. Were the test otherwise the statement of Mason J. in the case of **Re JLR ex parte CJL (1896) 161 CLR 342** at paragraph 5 and adopted by Laws LJ in the Sengupta case at paragraph 25 that:

> "Although it is important that justice must be seen to be done, it is equally important that judicial officers discharge their duty to sit and do not, by acceding too readily to suggestions of appearance of bias, encourage parties to believe that by seeking a disqualification of a judge, they will

have their case tried by someone thought to be more likely to decide the case in their favour."

may have had some bearing on my conclusions.

42. The real question for my determination is whether the distinction between the finding of a prima facie case and a finding of guilt would be apparent to or appreciated by our hypothetical, fair minded and informed observer. The DPP submits that the fair minded observer would know that a prima facie ruling on guilt is qualitatively different from a final judgement and would appreciate that a trained judge would be open to persuasion on the basis of the evidence led and the arguments made during the course of the trial.

43. In my view a fair minded observer, informed but not a member of the legal profession, on ascertaining that the evidence upon which the Magistrate had to assess the guilt or innocence of the Claimant is the same evidence which the Magistrate had already determined was credible enough to found the basis for committal would be hard pressed to make any distinction with respect to the differences between the two procedures. In my opinion this hypothetical observer would have concluded that there was a real possibility that by accepting that in one case the evidence was sufficient to put the Claimant on trial, the same Magistrate would not be in a position to approach the evidence in the retrial with the required impartiality. In my view it would be highly likely that this hypothetical observer would come to the conclusion that the Magistrate would be predisposed to a particular view of the evidence before her.

44. Would a determination of the retrial by the Magistrate amount to a breach of the Claimant's right to a fair hearing? The answer to this question can be found squarely in the judgment of Archie JA in Basdeo Panday v Wellington Virgil. Where there is bias there is a presumption of lack of due process.

45. Finally there remains one issue which, although not raised by either party, in the light of the decision of the Judicial Committee of the Privy Council in **The Honourable Satnarine Sharma v Carla Brown-Antoine and Others Privy Council Appeal No 75 of 2006** requires some examination. It is the question of whether judicial review proceedings are appropriate in circumstances such as this or ought the Claimant to have awaited a determination of the retrial by the Magistrate and taken the point on appeal if necessary? In other words are these submissions which ought properly to be made in the retrial proceedings only or is the Claimant justified in commencing new proceedings for seeking judicial review.

46. In my opinion, for more than one reason, it is not appropriate for the Claimant to await the determination of the retrial by the Magistrate and if necessary take the point on appeal. In the first place the bias is alleged against the very tribunal that is vested with the power to convict. These proceedings apart the only option open to the Claimant would be an appeal in the event of a conviction by the Magistrate. In my opinion this can not be regarded as a suitable remedy in the circumstances. In any event what is at stake here is public confidence in the integrity of judicial system and the effect a determination of the retrial by the Magistrate would have on that confidence.

47. In the light of this the inconvenience of having two parallel proceedings is in my view of no moment.

> "The importance of preserving the administration of justice from anything which can even by remote imagination infer a bias of interest in the judge upon whom falls the solemn duty of interpreting the law is so grave that any small inconvenience experienced in its preservation may be cheerfully endured."

48. In all the circumstances of the case therefore I am of the opinion that the Claimant is entitled to the declaration sought, an order of certiorari quashing the decision of the Magistrate and an order of prohibition preventing the Magistrate from hearing the retrial

Dated this 24th day of November, 2009.

…….
Judith A. D. Jones
Judge