

IN THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE COURT OF APPEAL

Civil Appeal No. P018 of 2014

BETWEEN

THE ATTORNEY GENERAL OF TRINIDAD AND TOBAGO

APPELLANT

AND

DR. WAYNE KUBLALSINGH AND OTHERS

RESPONDENTS

PANEL: **A. Mendonça, J.A.**
 G. Smith, J.A.
 M. Rajnauth-Lee, J.A

APPEARANCES: **Ms. D. Peake, S.C., Mr. G. Ramdeen, Mr. S. Roberts and**
 Ms. K. Ramkissoon for the Appellant.
 Mr. R. Maharaj S.C., Mr. F. Hosein S.C., Mr. R. Dass and
 Mr. A. Maraj for the Respondents.

DATE OF DELIVERY: February 19th, 2014

JUDGMENT

Delivered by A. Mendonça, J.A.

1. This is an appeal from the Judge's (Aboud. J) refusal of the Appellant's application to recuse himself. The application was grounded on apparent bias.
2. The test for apparent bias in this jurisdiction is that as stated in **Porter v Magill** [2002] 2 AC 357. 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 (see **Porter v Magill** at para. 103).
3. It has been pointed out that the test incorporates the words "real possibility" as opposed to "real probability." In other words, the burden on the person alleging apparent bias is not as onerous as the burden of proving that it is more likely than not that the tribunal is biased (see Civil Appeal No. 145 of 2009 **Sadiq Baksh and ors. v Magistrate Ejenny Espinet and others** per Narine, J.A. at para. 65). On the other hand, mere suspicion of bias is not enough. A real possibility must be demonstrated on the available evidence.
4. The test is an objective one. In essence it requires the Court to ascertain the view of the public, through the eyes of a fair-minded informed observer, whether the Judge was or would be biased. The test therefore acknowledges and gives effect to a critical requirement that justice must not only be done but must be seen to be done. It is the "public perception of the possibility of unconscious bias" that is the key (see **Lawal v Northern Spirit Ltd.** [2003] UKHL 35 at para. 14).
5. Bias is an attribute of the mind which prevents the Judge from making an objective and impartial determination of the issues he has to resolve. (see **In re Medicaments and Related Classes of Goods (No. 2)** [2001] 1 WLR 700 para. 87). A Judge may therefore be biased because he has reason, unrelated to the facts and the law, to prefer one outcome of the case to the other, or he may be biased because he has reason, again unrelated to the facts and the law, to favour one party rather than the other.

6. It is important to emphasize that we are not dealing with actual bias but the appearance of bias. If the fair-minded and well informed observer were to conclude that the Judge is disqualified by the appearance of bias, it would not amount to a finding that he is actually biased. The test recognizes that bias might be subconscious and does not examine the state of mind of the Judge. Statements by the Judge, therefore, that he can bring an impartial mind to the matter, have no relevance. On the other hand a statement that the Judge feels personally embarrassed to hear the matter cannot be ignored if based on solid grounds.
7. A judge, of course, should not lightly recuse himself. He has a duty to sit. When he has to decide an issue of self recusal, he has to do a balancing exercise. On the one hand the Judge must consider that recusal aims at maintaining the appearance of impartiality and instilling public confidence in the administration of justice. On the other hand, the Judge has a duty to sit on the cases assigned to him, and may only refuse to hear a case for good reason (see Nelson, J. on **Judicial Recusal**, April 2012). Where the ground is apparent bias good reason would satisfy the test of apparent bias.
8. Among the attributes of the fair-minded and informed observer are:
 - a) Being fair-minded, he always reserves judgment on every point unless he has seen and fully understood both sides of the argument. He will therefore not come to hasty conclusions. He is not to be confused with the person who makes the complaint. The assumptions the complainant make are not to be attributed to the observer unless they can be justified objectively.
 - b) He is informed. He can distinguish between what matters are relevant and what are irrelevant. He will take the time to inform himself on all matters that are relevant. He is also able to determine what weight should be given to facts that are relevant. He is able to put whatever he has read or seen into its overall context and will appreciate that context forms an important part of the material which he must consider.

- c) He is not complacent. He knows that fairness requires that a Judge must be seen to be unbiased. He however knows that Judges have their weaknesses and therefore will not shrink from the conclusion, if it can be justified objectively, that things Judges may have said or done or associations they may have formed may make it difficult to judge the case before them impartially. He will note that the oath a judge takes is a factor to be considered, but not treat it as a guarantee of impartiality.
- d) He is a member of the community in which the case arose and will possess an awareness of local issues, and social and political reality that forms the backdrop to the case gained from the experience of having lived in that society.
- e) He will assume that the judge by virtue of his or her office is intelligent and will be able to form his or her own views and be capable of detaching his or her own mind from things that he or she does not agree with, and is aware of the legal traditions and culture of this jurisdiction and that that culture played an important role in ensuring the high standards of integrity on the part of the Judiciary.
- f) He is not an insider. He is not a party to the action, and is not unduly sensitive or suspicious.

(see Civil Appeal 250 of 2009 **Basdeo and Oma Panday v Her Worship Ms. Ejenny Espinet and anor.** at paras. 32-37).

9. The question, therefore, is whether the fair minded and informed observer, having considered all the facts, would conclude that there is a real possibility that the judge is biased. A two-step approach has been advocated (see **In re Medicaments** (supra) at para. 85). The Court must first ascertain all the circumstances which have a bearing on the suggestion that the Judge is or would be biased. It must then ask whether those circumstances would lead a fair-minded and informed observer to conclude that there is a real possibility that the Judge is or would be biased.

10. The matter before the Judge concerns the construction of the Mon Desir to Debe segment of the extension of the Solomon Hochoy Highway. The Respondents are members of the Highway Reroute Movement (HRM). They claim that the decision to commence and continue construction of the segment of the highway contravenes certain rights guaranteed to them by the Constitution. They claim that the decision to commence or to continue construction of the segment was undertaken in breach of assurances and representations given by the Prime Minister that construction would be halted, and/or would not commence or continue until a technical review of the project was undertaken.
11. They say that consistent with those representations the review should have been undertaken fairly and with adequate consultation. They claim that it was not and thus the decision to continue with the segment was arrived at in violation of certain rights guaranteed to them under the Constitution. They further claim that after the promise that construction of the highway would be halted, and/or not commenced, they and other members of the HRM established a protest camp which included prayer rooms. This camp was a legitimate and bona fide expression of their rights to, *inter alia*, freedom of conscience, religion, thought and expression and was erected with permission of the relevant authorities.
12. The camp was demolished and Dr. Kublalsingh and the other Respondents were arrested and detained, allegedly by, members of the Defence Force under the direction of Ministers of Government. They claim that the demolition of the camp and the arrest and detention were unlawful and in breach of certain of their constitutional rights.
13. Then there is Gary Aboud, around whom the allegation of apparent bias revolves. He is the brother of the Judge (Aboud J). He is also the secretary of the Fishermen and Friends of the Seas (FFOS). He is described by the Appellant as the vocal leader or de facto leader of FFOS. They are an environmental group and are advocates for environmental issues. Their focus is primarily on marine ecology. FFOS are currently protesting against a seismic survey being conducted by the Petroleum Company of Trinidad and Tobago Limited (Petrotrin) in the waters of the Gulf of Paria. FFOS are contending that the

seismic bombing associated with the survey by Petrotrin has a harmful effect on marine life.

14. FFOS, including Gary Aboud, called for an independent inquiry into the safety of seismic bombing on marine life and for a halt to it until that was done. The line Minister proposed a committee to review the literature on seismic bombing. FFOS objected to the composition of the committee and threatened direct and continued action to put a stop to the bombing. They also complained of lack of consultation.
15. On November 12, 2013 protest action was staged outside the Parliament building, now located (temporarily) in an area known as the Waterfront. The protest included the presence of fishing pirogues in the Gulf of Paria, which adjoins the Parliament building. That protest was broken up by the police and Gary Aboud and others were arrested and charged with certain offences, namely; holding a public meeting without the appropriate permission, and failing to disband when called upon to do so. Gary Aboud alleged that he was wrongfully arrested.
16. Like the HRM, FFOS and Gary Aboud called for the intervention of the Prime Minister and vowed to continue protest action and have threatened legal action.
17. Gary Aboud has also made statements sympathetic to the HRM. He has also referred to Dr. Kublalsingh as a beloved brother.
18. After the arrest of Gary Aboud, the attorneys in the matter before the Judge requested a meeting with the Judge. That meeting took place on November 13, 2013 in a conference room, which according to the Judge was used by him instead of his Chambers which were not large enough to accommodate everyone. At that meeting the attorneys for the Appellant requested the Judge to recuse himself. Certain comments were made by the Judge. In essence they amount to his saying that Gary Aboud's behavior might prove embarrassing to him and that the Appellant's attorneys might be disconcerted. The Appellant has relied on those comments in support of his application that the Judge

should recuse himself. The Appellant has also placed reliance on certain comments in his written judgment on the recusal application to which we will refer later.

19. The Appellant draws reference to the similarities between the claimants in this action, particularly Dr. Kublalsingh, with Gary Aboud. The Appellant submitted that the basis of the application was informed by material in the public domain, namely, like Dr. Kublalsingh the learned Judge's brother, Gary Aboud:

- a. is the vocal leader, or the de facto leader, of FFOS, which have been publicly lobbying against decisions of the Environmental Management Authority (EMA) and/or Government on environmental issues and are calling upon the Government to take immediate action;
- b. has called for a committee to be appointed to review decisions of the EMA and/or the Government which are alleged to have serious environmental impacts;
- c. has rejected the Government's proposed review committee on the ground of its composition and alleged that it is heavily weighted against the interest which he presents;
- d. has engaged in widely publicized protest action calling on the Government to take action;
- e. has called publicly for the direct intervention of the Prime Minister,
- f. has called for the highway to be stopped;
- g. has been arrested by the police arm of the State in the course of pursuing his widely publicised protest action alleged to be peaceful in nature;
- h. has alleged that he has suffered injury (a suspected broken rib) arising out of the arrest by officers of the State;

- i. has expressed the view that the police action in breaking up his protest contravened his constitutional rights and that his arrest was unlawful;
- j. has expressed the view that the police action was an excessive use of force and unlawful, and that he has sustained personal injury; and
- k. intends to institute legal proceedings to vindicate his rights.

20. The Appellant further says that from the material in the public domain, the cause in which Gary Aboud is involved is similar in the following respects with this case; (a) the highly charged setting with protestors, media and the police in tow; (b) claims of wrongful arrest and excessive force by the police authorities, (c) claims of constitutional rights being infringed, (d) claims of battery, (e) the fervent call for the Prime Minister's intervention in issues which affect the environment, (f) the call for a (scientific) review, (g) allegations that a Minister promised to set up a committee to review, (h) objections to the composition of a committee set up by the Minister, (i) allegations of environmental concerns and lack of an environmental impact assessment, (j) allegations of lack of consultation, (k) allegations that the EMA did not properly consider all matters. In addition, the Appellant submits that Gary Aboud has identified himself with Dr. Kublalsingh in the Respondents' and HRM's cause and has issued public statements to that effect. And they further say that these matters fall to be considered cumulatively and have referred to the **Locabail v Bayfield Properties Limited**. [2000] Q 13 451 case for that proposition.

21. They contend, therefore, that put shortly, the cause for concern for the fair-minded, informed observer would be that like the first Respondent, Dr. Kublalsingh, in the matter before the learned Judge for determination, the learned Judge's brother is passionately involved in a cause relating to the protection of the environment, and was arrested by officers of the State in the course of what was alleged to be a peaceful protest. The arguments advanced are and will be similar in material respects: the learned Judge runs the risk of possibly ruling against his brother's interest. Further the informed observer would be alive to the fact that the two cases treat with the same defendant, the Attorney

General. The target is, therefore, the same as his brother's cause, namely, the State, which would be liable for police officers, the actions of the Prime Minister, the Ministers and other agents of the State.

22. It is relevant to note that there is no allegation or evidence that the Judge is a member of FFOS. There is no allegation that the Judge subscribes or endorses or espouses the views of that group or of Gary Aboud. There is no suggestion that he said or did anything which associated him with the views or philosophy of FFOS or Gary Aboud. Not only is there no suggestion of those facts, there is no evidence of them. Nor is there any evidence that the Judge is influenced by the views expressed by Gary Aboud or agrees or adopts or sympathizes with those views, or the course taken by FFOS, either generally, or on the day of the protest action giving rise to the arrest of Gary Aboud, or for that matter, with any environmental cause. In those circumstances the fact that Gary Aboud and FFOS may support Dr. Kublalsing and HRM cannot suggest or give the appearance that the Judge would be biased in their favour. And as this Court has recently decided, the well informed fair-minded observer will not on the basis of biological connection alone assume that the Judge will share the views or philosophy of his brother or the group of which he may be the leader (see **Sadiq Baksh and ors v Magistrate Ejenny Espinet (supra)**).
23. The fact, therefore, that FFOS and Gary Aboud might have expressed views supportive of the HRM, or taken protest action in support of it, will not persuade the fair-minded and informed observer that there is an appearance of bias on the part of the Judge in deciding this case.
24. Without anything showing that the Judge adopted, espoused or associated himself with the views of the FFOS and Gary Aboud, the fact that his protests action calls for the same remedies, is of no relevance to the Judge deciding HRM's cause impartiality. The same applies whether FFOS's' claims are pressed by court action instead of protest action. Unless there is something to indicate an adoption or an association with the views or philosophy or cause of the FFOS and Gary Aboud, the relevance of that would be lost on

the well informed and fair-minded observer. He would know that the Judge is capable of dismissing, from his mind, things with which he is not in agreement.

25. It is, however, submitted by the Appellant, that what makes all the difference in this case is the arrest of Gary Aboud, an incident which was well publicized in the print and electronic media. It was submitted that the arrest was very graphic. The brother, Gary Aboud was in tears. The circumstances of the arrest were similar to those of Dr. Kublalsingh and the other claimants before the Judge. This they submit is to be taken into account, together with the other similarities including the similarity of the demands or positions taken by both FFOS and HRM. The well informed, fair-minded observer cannot avoid thinking that the Judge would be biased. In a sense, it was submitted, the Judge would be virtually trying his brother's case. The comments of the Judge made at the meeting in the conference room, it was contended, support the Appellant's claim. It was also submitted that the comments of the Judge in his judgment support the Appellant's claim that he should have recused himself.

26. The similarities between the arrest of Gary Aboud and Dr. Kublalsingh appear to be that they were both arrested in the course of a peaceful protest to publicize their cause and force their demands on the relevant authorities. That is hardly a sufficient reason to say that the Judge by trying the Respondent's case would be trying his brother's case. It seems to us that stripped to its bare essence the Appellant's submissions amount to the proposition that where a Judge's sibling or other close relative has been arrested in circumstances which he may claim to be wrongful, a Judge would be biased in trying any other wrongful arrest case. This only has to be stated to be rejected. What the well informed observer is asked to say is that the brother's allegation of wrongful arrest would persuade the Judge to say that Dr. Kublalsingh's arrest is unlawful. That is simply illogical. The well informed fair-minded observer would know that a Judge by his training oath, and qualifications, is capable of deciding a case on its own facts and circumstances. It would be overly suspicious and anything but well informed or fair-minded, for the observer to say that because the Judge's sibling might have been arrested in circumstances that are wrongful, that every other arrest would be.

27. If the reference by Counsel for the Appellant to the graphic nature of the arrest is a reference to force used by the police authorities, we fail to see the relevance of it. The well informed, fair-minded observer would know that force is sometimes necessary to effect a lawful arrest.
28. In our judgment the fact of the arrest of Gary Aboud and the circumstances of it viewed by themselves or together with the other factors make no difference.
29. In any event, there is no case brought by the FFOS or Gary Aboud, arising out of the arrest or claiming any relief that it was the aim of their protest action to achieve. It is too speculative to conclude that a claim would be brought at this stage, and if so, that it would be based on similar grounds as the claimants' case before the Judge. There are after all striking differences between the two.
30. As regards the comments made by the Judge in his Chambers, what exactly they are is in dispute. But the Judge does not deny that at some point he thought that Gary Aboud's behaviour might prove embarrassing to him and that the Appellant's Attorneys might be disconcerted. It does not, however, appear that the Judge at any point conceded that he should recuse himself. According to him, the comments made were on incomplete information and were expressions of thoughts that occurred to him while driving to work that morning. He said that he told the attorneys at the meeting that the facts would need to be discovered and analysed before any decision on the recusal application could be made.
31. The well informed and fair-minded observer would know that a judge often expresses views from which he may resile by the end of the matter. He is therefore free to change his mind and at times does so after mature and full consideration and reflection. The comments made by the Judge should be treated no higher than that, and would in our view be so treated by a well informed and fair-minded observer.
32. The Appellant also relied on comments made by the Judge in his judgment. These comments are essentially that the meeting with the parties' attorneys in the conference room was not for the purpose of gathering information to make out a case for recusal in

open Court, which might suggest that the Judge thought that was the Appellant's purpose of the meeting, that the application for recusal may be seen as forum shopping and that the application is representative of an overly suspicious mind; an example of "small island paranoia".

33. These comments are unfortunate and perhaps represent some frustration on the part of the Judge, as three previous Judges to whom the matter was assigned had recused themselves. We, however, do not think that they crossed the line so as to disqualify the Judge. The observer would not conclude that because of these comments the Judge could not bring an impartial mind to the matter if he decided that "the buck stopped with him." It was certainly not the submission that the comments of the Judge showed that he was actually biased.
34. In the circumstances in our judgment, the matters relied on viewed by themselves or cumulatively do not satisfy the test of apparent bias. We therefore dismiss the appeal.
35. It should be noted that the Respondents had submitted that the Appellant had waived his right to object to the Judge hearing this matter on the basis of apparent bias or alternatively that the issue was *res judicata*. The basis of this submission was that some time before the present application for recusal there was a request by letter for the Judge to recuse himself on the same ground as the present application. The Judge refused to do so but no application was filed for an order that the Judge recuse himself and the matter proceeded before him. However, as we have decided this appeal on the substantive ground of apparent bias, we see no need to address this submission and we do not do so.
36. On the question of costs we are of the view that unless the Court is of the mind that an application for recusal is frivolous or lacking in *bona fides*, by which we mean that it is motivated by some cause other than the interest of the administration of justice, there should be no order as to costs on the hearing before the Judge. The position is however different on appeal. In the case of an appeal the unsuccessful party should as a general pay the costs of the successful party.

37. In this case we are not of the view that the application was frivolous or lacking in bona fides. We therefore set aside the order for costs which was made by the Judge against the Appellant and make no order as to costs. As regards the costs of the appeal we see no reason that the general rule should not apply and we therefore order that the Appellant pay the Respondents' costs of the appeal; such costs are certified fit for one senior and one junior Counsel and are to be assessed by the Registrar.

A. Mendonça,
Justice of Appeal

G. Smith,
Justice of Appeal

M. Rajnauth-Lee,
Justice of Appeal