

THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE COURT OF APPEAL

Civil Appeal No. S 293 of 2016

Claim No. CV 2015-03128

**IN THE MATTER OF THE REPRESENTATION OF THE PEOPLE ACT,
CHAP 2:01**

AND

**IN THE MATTER OF A PARLIAMENTARY ELECTION FOR THE CONSTITUENCY OF SAN
FERNANDO WEST HELD ON THE 7TH DAY OF SEPTEMBER 2015**

AND

IN THE MATTER OF THE ELECTION PROCEEDINGS RULES, 2001

BETWEEN

DR. SHEVANAND GOPEESINGH

APPELLANT/PETITIONER

AND

FARIS AL-RAWI

FIRST RESPONDENT/FIRST RESPONDENT

AND

**THE RETURNING OFFICER FOR THE CONSTITUENCY
OF SAN FERNANDO WEST
(DEEMED TO BE A RESPONDENT BY VIRTUE OF SEC 107(2) OF THE REPRESENTATION OF
THE PEOPLE ACT)**

SECOND RESPONDENT/SECOND RESPONDENT

Panel: G. Smith J.A.

M. Mohammed J.A.

P. Rajkumar J.A.

Date of Delivery: February 06, 2020

Appearances:

Mr. R. Clayton QC, Mr. A. Ramlogan SC, Mr. G. Ramdeen, Mr. C. Dindial, Mr. D. Bayley for the Appellant

Mr. R. Armour SC, Ms. V. Gopaul, Mr. R. Nanga, Mr. M. Quamina instructed by Mrs. Z. Haynes-Soo Hon for the First Respondent

Mr. R. Martineau SC, Mrs. D. Peake SC, Mr. R. Heffes-Doon instructed by Ms. A. Bissessar for the Second Respondent

JUDGMENT

Delivered by G. Smith J.A.

1. I have had the advantage of reading in draft the reasons of Rajkumar J.A. in this matter and I am in full agreement with his reasoning and conclusion.
I merely wish to make a few observations which I think deserve reinforcement.
2. The accepted test in this jurisdiction to impugn a decision on the ground of apparent bias is as stated in **Porter and anor v Magill (2002) AC 357** and accepted in the decision of Warner J.A. in **Panday v Virgil Mag. App. No. 75 of 2006**, “**whether the fair-minded observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased.**”
3. The essence of the Applicant’s complaint of bias was amply set out in his written submissions at paragraphs 40 and 41. I set them out here as they are relevant to my observations:

“40. Accordingly, the real risk to the fair-minded and informed observer is that, either during the hearing of the petition appeals or shortly beforehand, the Honourable Chief Justice may have sought favours from the Government of the day in respect of HDC housing applications. This issue gives rise to real possibility of apparent bias and/or breaches of constitutional rights in relation to the Honourable Chief Justice’s participation in decisions affecting the election appeals. The Applicant is especially troubled about the fact that the Honourable Chief Justice wrote to the then Managing Director of the HDC on June 26, 2015- after the general election was announced to recommend persons for housing.

41. If the Peoples Partnership government did not expedite these requests to ensure that they were granted before the general election, then this could, in the Applicant’s view, have led the Honourable Chief Justice to think that the government was not as co-operative and supportive as he had hoped or expected or worse yet, that the failure to ensure that his recommendees were granted houses before the general election amounted to some form of disrespect. If the Honourable Chief Justice followed up and pursued his recommendation with the newly elected Peoples National Movement government, then the Applicant believes that there is a real risk that he could have been biased in favour of their successful candidates whose elections were the subject of challenge- via the election petitions in anticipation of a more favourable response.”

(my emphasis)

4. As Rajkumar J.A. has noted, the Applicant’s complaint as framed contains “multiple levels of speculation”. This speculation is not only as to what the “facts” may be “if” one or other scenarios were to represent contact with one governing party or the other, but it also requires speculation as to what such alternative scenarios “could” in the Applicant’s view have led the Chief Justice “to think”.

5. Further, the relevant circumstances or facts put forward in advancing these speculative assumptions, also lack the objective verification and, even more so, the cogency required to entertain a successful challenge to the decision of a judicial officer on the ground of apparent bias.

6. With respect to the objective appraisal that a court needs to adopt when examining the complaint of apparent bias, I have noted the following dicta.

In **Panday v Virgil**, Warner J.A. at paragraph 59 (viii) stated, **“This Court had to decide whether, on an objective appraisal, the material facts gave rise to a legitimate fear that the Chief Magistrate might not have been impartial.”**

In **Panday and anor v Her Worship Ms. Ejenny Espinet and anor Civ. App. No. 250 of 2009**, Mendonça JA stated at paragraph 40, **“What is decisive is whether the fear of the complainant that the tribunal is or would be biased is objectively justified.”**

In **Helow v Secretary of State for the Home Department and another [2008] 1 WLR 2416**, Lord Hope stated expansively at paragraph 2:

“The observer who is fair-minded is the sort of person who always reserves judgment on every point until she has seen and fully understood both sides of the argument. She is not unduly sensitive or suspicious, as Kirby J observed in *Johnson v Johnson* (2000) 201 CLR 488, 509, para 53. Her approach must not be confused with that of the person who has brought the complaint. The “real possibility” test ensures that there is this measure of detachment. The assumptions that the complainer makes are not to be attributed to the observer unless they can be justified objectively. But she is not complacent either. She knows that fairness requires that a judge must be, and must be seen to be, unbiased. She knows that judges, like anybody else, have their weaknesses. She will not shrink from the conclusion, if it can be justified objectively, that things that they have said or done or associations that they have formed may make it difficult for them to judge the case before them impartially.” (my emphasis)

7. With respect to the cogency required to dislodge the presumption of impartiality of judges, I note the following.

In **Panday v Virgil** at paragraphs 59 (i), (ii) and (iii), Warner J.A. stated:

“(i) Ill-founded challenges to the bench are not to be entertained.

(ii) Courts must be assiduous in upholding the impartiality of judges; the onus of establishing bias lies with the appellant.

(iii) The impartiality of the decision maker [the Chief Magistrate] is to be presumed, but this presumption can be dislodged by cogent evidence.” (my emphasis)

In **Sadiq Baksh and anor v Espinet and anor Civ. App. No. 145 of 2009**, Jamadar J.A. stated this as follows:

“10. Where the application is for a magistrate to recuse herself the starting point is always the assumed independence and impartiality of professional judges and judicial officers: embodied symbolically in the judicial oath. Hence the evidence to support arguability is often described as required to be cogent.” (my emphasis)

8. I respectfully endorse the analysis of the evidence and the observations of Rajkumar J.A. from paragraphs 29 et seq. of his reasons. I would add that on an objective appraisal of the material presented at this stage, the fair-minded and informed observer cannot come to the conclusion that at, around, or after the election, the Chief Justice had engaged in any or any active lobbying of the HDC officials or the Prime Minister, such as would raise a case of apparent bias in the eyes of that fair-minded and informed observer, when the Chief Justice sat on the appeals.
9. A fortiori, the material advanced to support the multiple levels of speculation involved in the Applicant’s case does not rise to the level of cogency required to dislodge the presumption of impartiality of the Chief Justice when he sat on the appeals.

10. The Applicant also advanced a case of apparent bias based on the alleged failure of the Chief Justice to follow guidelines for judicial conduct. I fully endorse the observation of Rajkumar J.A. that **“We are not required to make a determination”** on this issue, **“We are required to consider that issue only in the context of the test for apparent bias.”**

11. I wish to add that the case that has been put by the Applicant on this issue is that the Chief Justice “...failed, in particular, to comply with the Statement of Principle and Guidelines for Judicial Conduct...which states that a judge “should disclose anything which might support a plausible argument in favour of disqualification.”¹

However, as has been demonstrated in the opinion of Rajkumar JA which I fully endorse, the HDC allegations which are the source of the complaint with respect to apparent bias, would not give rise to the real possibility of bias by the Chief Justice when he sat on the appeals in the eyes of the fair-minded and informed observer. Therefore, the Chief Justice’s alleged failure to disclose the HDC allegations would have no impact on the question of apparent bias.

Further, as has been demonstrated at paragraphs 64 to 67 of Rajkumar J.A.’s reasons, now that all the relevant facts have been provided to the reasonable, fair-minded observer, allegations of inadequate disclosure would no longer be relevant.

12. In any event, whether or not the Chief Justice transgressed any of the said guidelines, we have held that the HDC allegations do not at this stage give rise to the real possibility of bias by the Chief Justice when he sat on the appeals, in the eyes of the fair-minded and informed observer.

Therefore, any alleged transgressions of the Guidelines do not at this stage, have any impact on the case of apparent bias.

¹ See paragraph 6 of the Applicant’s Written Submissions in Reply and see also, lines 44 to 50, page 32 and lines 1 to 9, page 33 of the transcript of the hearing dated 25 November, 2019.

13. I too agree that this application should be dismissed.

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G. Smith

Justice of Appeal