



IN THE SUPREME COURT OF NAURU
AT YAREN
CRIMINAL JURISDICTION

CRIMINAL CASE NO. 20 OF 2020

BETWEEN

THE REPUBLIC

AND

JON FIJ AGEGE

First Accused

AND

BILLY KAKIOUEA

Second Accused

AND

LACHLAN BRECHTEFELD

Third Accused

AND

MASON TANNANG

Fourth Accused

AND

NAZON HUBERT

Fifth Accused

AND

ROBSON TEMAKI

Sixth Accused

Before: Khan, ACJ
Date of Hearing: 8 January 2021
Date of Ruling: 13 January 2021

Case to be referred to as: Republic v Kakiouea and Others

CATCHWORDS: Recusal from hearing – as the complainant a police officer was the judge's personal driver before and after the charges were filed.

APPEARANCES:

Counsel for the Republic:	R Talasasa (DPP)
Counsel for the First, Second, Fourth and Sixth Accused:	R Tagivakatini
Counsel for the Third and Fifth Accused:	E Soriano

RULING

INTRODUCTION

1. All the defendants are charged with a series of offences under the Crimes Act 2016 which allegedly took place on 1 November 2020. The charges are:
 - a) Count 1 of intimidating or threatening a police officer – in respect of this count the allegation is that Christopher Amwano, a police officer, was pushed whilst he was trying to make an arrest.
 - b) Count 2 of causing harm to a police officer and obstructing a police officer.
 - c) Count 3 of breach of bail – against accused 1.
2. All accused appeared before the District Court on 3 November 2020 when this case was transferred to this Court and all were remanded in custody and are still in custody as bail cannot be granted under section 4(B) of the Bail (Amendment) Act 2020 (the Act) unless the accused are able to establish that “exceptional circumstances” exists – see section 4(B)(1) of the Act.
3. All accused except accused 1 have made bail applications.
4. On 22 December 2020 I raised with the counsels that I find myself in an embarrassing position as Christopher Amwano, the complainant in respect of count 1, was my official police driver for the period from 30 October 2020 to 26 November 2020 who was allocated by the Nauru Police Force. Miss Akubor who appeared on behalf of accused 1, 2, 4 and 6 and Mr Soriano who appeared for accused 3 and 5 stated that they understand my position and have no objection to me continuing to hear this matter, however, the DPP’s stated that bias is an objective test – as to what would the person in the street think.
5. Having raised this issue, I asked all counsels to file written submissions. Mr Tangivakatini states in his written submissions filed on 4 January 2021 that he as a counsel has no objection to me continuing to hear this matter, but he states at [4.1] of his submissions that: “It is crucial that public confidence in the Court system is to maintained and this declaration of a conflict of interest is a great reflection that justice must be seen to be done.”; the DPP in his submissions filed on 6 January 2021 states that there is common understanding amongst all counsels that they have no objection to me continuing to hear the bail application, but he adds that despite that: “...the test is not what lawyers perceive

of impartiality of the presiding judicial officer but what a lay observer view that.”; and Mr Soriano submits that it is entirely a matter for the Court to determine as to whether it can continue to hear the case.

CONSIDERATION

6. The guidelines for bias and disqualification were set out in the case of *Locabail (UK) Ltd v Bayfield Properties Ltd and Another*¹ and it is stated at page 66 at [3] that:

“A judge must recuse himself from a case before any objection is made if the circumstances give rise to automatic disqualification or he feels personally embarrassed in hearing the case.”

7. In *Grant v The Teacher’s Appeals Tribunal and Anor (Jamaica)*² it is stated at [37] and [38] as follows:

[37] The Court of Appeal in the earlier case of *Locabail (UK) Ltd v Bayfield Properties Ltd* [2000] QB 451 gave consideration to the circumstances in which a judge should recuse himself on the ground that bias of this type might be thought by the fair-minded and informed observer to exist. In paragraph 25 of his judgment Lord Bingham of Cornhill CJ pointed out that it would be dangerous and futile to attempt to define or list the factors which may or may not give rise to a real danger of bias, as everything will depend on the facts, which will include the nature of the issue to be decided. He did, however, go on to point to some factors which were unlikely and others which were likely to give rise to a soundly based objection. Among the latter he enumerated personal friendship between the judge and any member of the public involved in the case, or if the judge were closely acquainted with any member of the public involved in the case.

[38] It is necessary to bear in mind that these remarks of Lord Bingham were intended as guidelines for judges in other cases and not as a comprehensive definition of the circumstances in which bias might properly be thought to exist. The facts of each case are of prime importance, as he pointed out. Their Lordships are mindful of the problems which may face judges in a community of the size and type of Jamaica and other comparable common law jurisdictions. In such communities it is commonly found that many of the parties and witnesses who are concerned in cases in the courts are known, and not infrequently well known, to the judge assigned to sit. It is incumbent on the judge to apply a careful and sensitive judgment to the question whether he is a close enough friend of the person concerned to make it undesirable for him to sit on the case. If he errs on the side of caution by too much, he may make it impracticable for him to carry out his judicial duties as effectively as he should. If, on the other hand, he is not ready enough to recuse himself, however unbiased and impartial his approach may in fact be, he will leave himself open to the suggestion of bias and damage the reputation of the judiciary for independence and impartiality. In this connection it is relevant to take into account the issues in the proceedings. As Lord Bingham pointed out in the *Locabail* case, if the credibility of the judge’s friend

¹ [2000]1 All ER 65

² [2006] UKPC 59 (7 December 2006) – Privy Council Appeal No. 45 of 2005

or acquaintance is an issue to be decided by him, he should be readier to recuse himself.

8. I am the only judge on the island at present and my recusal would mean that the application for bail cannot be heard until Chief Justice designate Justice Fatiaki arrives. He is due to come to Nauru on 22 January 2021, and given that we are in the midst of the COVID-19 pandemic the hearing of the bail application would be further delayed for his honour to comply with the mandatory quarantine requirements.
9. Faced with this situation which is indeed very unfortunate and embarrassing I recuse myself in this matter.

DATED this 13 day of January 2021



Mohammed Shafiullah Khan
Acting Chief Justice

