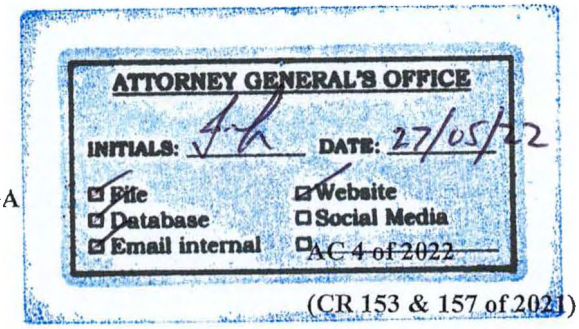


IN THE COURT OF APPEAL OF TONGA
CRIMINAL JURISDICTION
NUKU'ALOFA REGISTRY

(CR 153 & 157 of 2021)

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| BETWEEN | IAN ROBIN COX<br>BRENDA COX<br>**Appellants** |
| AND | ATTORNEY-GENERAL<br>**Respondent** |

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| Court: | Whitten P<br>Hansen J<br>Randerson J |
| Counsel: | Ms HC Stuart for the Appellants<br>Mr S Lutui for the Respondent |
| Hearing: | 17 May 2022 |
| Judgment: | 23 May 2022 |

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## JUDGMENT OF THE COURT

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## Introduction

[1] The appellants, husband and wife, are charged with possession of cocaine. Mr Cox also faces charges of unlawful possession of ammunition and of possessing a utensil contrary to the *Illicit Drugs Control Act*. They have been remanded for trial before Cooper J.

[2] By memorandum dated 14 March 2022, the appellants applied for Cooper J to disqualify himself on the grounds of apparent bias. They seek leave to appeal out of time against his refusal to grant their application.

## Background

[3] The Police located cocaine weighing 87.83 grams in the course of a search of the appellants' home at Vava'u on 2 August 2021. A further 1.839 kilograms was found the following day at Mr Cox's work premises. There were two packages, referred to as 'bricks' in submissions, one weighing a little over one kilo, the other 837.18 grams. Three pipes alleged to be used for smoking cannabis and a small quantity of ammunition was also found at the work premises.

[4] The Crown case is that the appellants were given two bricks of cocaine, each weighing one kilo, by a co-accused. They are said to have been among a larger quantity of bricks found washed up on a beach at Vava'u.

## Application to recuse

[5] The application to recuse was made following what were described in counsel's memorandum in support as 'multiple incidents' of unfair treatment of the defendants and conduct/decision-making unfairly favouring the prosecution. These incidents were fourfold.

(a) **Bail decision**

When the appellants were arraigned before Cooper J on 4 October 2021, they had been on bail since first appearing before the Court on 19 August. There had been no breaches. The Crown did not oppose bail; indeed, it consented to a relaxation of bail conditions to enable Mr Cox to travel to Tongatapu for business purposes. However, after further remanding the appellants to 8 October, bail was refused. The Judge perceived a substantial risk that the appellants would offend while on bail. He saw it as likely that they were in possession of a further quantity of cocaine that had not been located during

searches and that they must have been of 'dubious reputation' for the cocaine to have been left with them. He accordingly found a significant risk that they would re-offend while on bail.

The appellants successfully appealed against the decision. The Lord Chief Justice found that the Judge had relied on unproven allegations and unsubstantiated inferences and had failed to have regard to relevant considerations including the absence of previous convictions and the age and health of the appellants.

(b) **Callover 12 October 2021**

During a callover on 12 October 2021, counsel were provided with an agenda prepared by Cooper J which included the following directions:

- The mobile telephone for each defendant to be investigated for text messages/social media messages 2nd November 2021 1600 hrs written response what was looked at and what results.
- All seized electronic devices for each defendant internet history to be reviewed 2nd November 2021 1600 hrs written response what was looked at what results.

The Crown advised that it had already undertaken a search of electronic devices so no directions of that nature were required. However, for the appellants, it is submitted that it was not for the Court to suggest how the prosecution should run its case and the proposed directions were indicative of a bias in favour of the prosecution.

(c) **Record of Mention 14 December 2021**

There were 19 defendants in all. Five, including the appellants, had elected trial by Judge alone. It was accepted that those who had elected trial by jury could not be accommodated in one trial; two trials would be required. The order in which the three trials would take place then fell to be determined. Initially, Cooper J directed that the two jury trials should take place first. This was in accordance with the usual practice in such cases. Mr Lutui advised that, in order to minimise the risk of inconsistent verdicts, it was customary for the same Judge to conduct both modes of trial and for the Judge alone trial to follow.

The order of trials was revisited after the Judge sought submissions from counsel

in relation to suppression orders. After hearing counsel, on 14 December 2021 he made a blanket suppression order and confirmed that he would preside over all trials. However, he reversed his earlier direction as to the order of trials, ruling that the Judge alone trial should take place first. He explained his reasoning in the following passage of the Record of Mention which recorded his decision:

> 7. Having one Judge conducting the proceedings will help reduce inconsistencies. That one Judge will know exactly what was said and how. He will know the demeanour of witnesses and have heard all of the evidence and understand all the rulings; in short he will know the whole case hitherto.
>
> 8. To do otherwise would cause a great deal of work to be duplicated, at the expense of a lot of time there could remain uncertainties and there would be an inconsistent approach to the evidence as a whole.
>
> 9. Plainly, as far as possible, it must be the same Judge hearing all the trials throughout.
>
> 10. To have the Judge only first achieves two fundamental aims (i) the first defendants are tried before the last; the defendants at and towards the top of the indictment should not be giving their evidence after the last defendant on the indictment, and (ii) the judge not being prejudiced by hearing evidence in the jury trials he may have to rule upon in the Judge only trial.

In counsel's memorandum seeking recusal, the Judge's comments in this passage of his decision were said to give rise to serious concerns regarding 'matters of impartiality', in particular, the suggestion that the Judge may be prejudiced by the evidence heard in earlier trials. Counsel's concerns in this regard had been elaborated in a memorandum of 22 December 2021 filed following receipt of the Record of Mention.

(d) **Callover 2 March 2022**

In the course of the next callover on 2 March 2022, while discussing with Ms Stuart the time she would need to obtain instructions and prepare for trial the Judge, summarising the case against the appellants said, 'well it's (sic) not a great deal to that is there?'. This was said to exacerbate a concern that the Judge appeared to be 'still operating under the assumption that the defendants are guilty.'

The application concluded by referring to publicity in the Tonga media regarding a 'War on Drugs' and references to the Judge's appointment which, it was said,

appeared to link the two and to lead to fears that the Judge considered it his mandate to address drug offending harshly. Counsel voiced a fear that there would be a 'loss of objectivity' and 'a failure to properly consider the need to treat fairly' those facing charges.

**Judge's Decision**

[6] In his ruling on the application to recuse dated 25 March 2022, the Judge considered each of the incidents relied on by the appellants.

[7] He provided a detailed explanation for, and a spirited defence of, his bail decision. He maintained that the inferences he drew were realistically supported by the Crown's summary.[1] He said that, while concerns as to Mr Cox's age and health were 'in my mind' they both 'fell away' against those findings.[2]

[8] The Judge likewise defended the directions he had proposed to make at the callover on 12 October as a legitimate use of the power of the Court under section 5(2) of the *Supreme Court Act* 'to ensure that all reasonably obtainable evidence is available to the court'. He said the proposed directions were intended to give effect to that power and to provide the 'clearest picture before the Court of the evidence that was available'.[3] He added that, as he had the statutory power to make the orders which were to help the Court make the best informed decisions on the allegations, his proposal could not be said to be unfair or biased.[4]

[9] The Judge rejected concerns raised in relation to the order of trials and associated suppression orders. He said the key point was that the defence had not put forward 'a single ground' why the order of trials would prejudice the appellant.[5]

[10] As to his comments at the 2 March callover, the Judge reiterated his view that the case was straightforward and noted that no counsel had sought to argue otherwise.

[11] The Judge concluded that the appellants 'had not demonstrated bias nor the possible appearance of bias that would concern any fair-minded observer'.[6]

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[1] At [63].
[2] At [64].
[3] At [69].
[4] At [72].
[5] At [81].
[6] At 105.

**Grounds of Appeal**

[12] The eight enumerated grounds of appeal essentially contend that the Judge erred in finding that the concerns raised by the appellants did not demonstrate apparent bias. There is also a challenge to his reliance on section 5(2) of the *Supreme Court Act*. Ms Stuart submits that it could not be invoked to make the orders proposed by the Judge.

**Respondent's position**

[13] For the Crown, it is submitted that none of the matters relied on by the appellants provide evidence of bias. Mr Lutui argues that the factual findings made by Cooper J when considering bail were 'simply an error in his assessment' which a fair-minded observer, fully apprised of the circumstances, would not see as demonstrating bias. Those circumstances relevantly included the Judge making the same assessment in relation to other defendants; bail for all but three was revoked.

[14] Counsel contends that the Judge was right to rely on section 5(2) of the *Supreme Court Act* to propose the direction to examine defendant's cellphone records. It is said to be analogous to the power of a judge to question a witness under section 162 of the *Evidence Act*. The Crown submits the proposed directions would be seen as appropriate to the discharge of the judicial function; 'a matter of procedural housekeeping' as Mr Lutui described it.

[15] The Crown endorses the Judge's finding that the directions as to the order of trials and the process by which they were made are unobjectionable and, if anything, favourable to the appellant. The comments made during the 2 March callover, when read in context, are similarly said to give no cause for concern. The Judge's assessment of the case against the appellants was said to be in order to 'gauge from counsel' the difficulties of obtaining instructions.

**Discussion**

[16] The application falls to be considered under rule 4(1) order 6 of the Tongan Judicial Code of Conduct Rules 2010 which provides:

> A Judge is disqualified from sitting if the circumstances are such that they would lead a reasonable, fair-minded and well-informed observer to conclude that there is a real possibility that the Judge would be biased.

[17] Rule 4(1) captures the conventional common law test for apparent bias, helpfully

elaborated by the then Lord Chief Justice Paulsen in *Fa-oliu v Public Service Commission*.[7] As he said:[8]

> Whether or not a decision maker is biased does not depend upon that decision maker's personal opinion but is to be assessed objectively. I adopt as the test that a judge/decision maker is disqualified if the circumstances are such that a fair-minded lay observer might reasonably apprehend that the judge/decision maker might not bring an impartial mind to the resolution of the question that the judge or decision maker has to decide (*Ebner v Official Trustee in Bankruptcy* [2000] HCA63; *Porter v Magill* [2001] UKHL 67, *O'Neill No.2 v Her Majesty's Advocate* [2013] UKSC 36, *Saxmere Co Ltd v Wool Board Disestablishment Co Ltd* [2009] NZSC 72 and *Joseph* (supra) at 25.5(2)). It is the possibility not the probability of bias that is important. But the existence of bias is not to be lightly inferred. The functions of a decision maker cannot depend upon the suspicions of the ultra-sensitive, paranoid or cynical person *(S & M Motor Repairs Pty Ltd v Caltex Oil (Australia) Pty Ltd* (1988) 12 NSWLR 358, 374). For this reason the examination of an allegation of bias must be rigorous.

[18] As submitted by Ms Stuart, the circumstances relied on in this case are to be found in the way in which the Judge conducted himself. They fall within the second of four categories of apparent bias discussed by Deane J in *Webb v R*[9].

[19] Applying the test to the conduct of the proceeding by Cooper J, we have concluded that a fair-minded lay observer would conclude that there is a real possibility that the Judge would be biased. For this purpose, our concerns relate primarily to the way in which he dealt with the bail application and the directions proposed in relation to the cell phones.

[20] The ways in which the Judge erred in relation to the bail issue are set out fully in the decision of the Court of Appeal[10] and need not be repeated. For present purposes, the most important are his apparent acceptance of the Crown's allegations as matters of fact; his belief that the appellants were in possession of additional quantities of cocaine; and his finding that the appellants were of dubious reputation.

[21] As Mr Lutui said, for a Judge to err is not to show that he or she is biased. At the same time, depending on the nature of the error and the circumstances, it may present as evidence of that possibility. Here, the errors involved findings critically adverse to the appellants which were no part of the Crown case and unsupported by evidence. They were compounded by an apparent disregard for highly relevant mitigating circumstances. It is the nature, importance and magnitude of the errors, not the fact that errors were made, that we accept could reasonably give rise to an apprehension of bias. They not

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[7] [2017] TOSC 32 at [44] – [47].
[8] At [46].
[9] (1994) 181 CLR 41 at 74.
[10] *Cox v R* [2021] TOCA 23; AC 25 of 2021 (29 October 2021).

only imply an uncritical acceptance of the Crown case as proven fact but suggest the appellants may be guilty of undetected further offending that is not part of the Crown case. The Judge's finding that they are of dubious reputation was without foundation.

[22] We consider the directions proposed by the Judge in advance of the 12 October callover were apt to amplify concerns of a bias in favour of the prosecution. In our view, they went some distance beyond the steps a Judge might properly initiate for the purpose of the efficient management of a criminal proceeding. While undoubtedly well-intentioned, they would inevitably convey the impression that the Judge was assisting the prosecution.

[23] These concerns are not allayed by invoking section 5(2) of the *Supreme Court Act* which provides:

> The powers of the Supreme Court referred to in this section include, subject to any other applicable law to the contrary, all powers that the court considers necessary or desirable to enable it to give effect to and enforce the judgments and orders of the Court and to ensure that all reasonably obtainable evidence is available to the court; and, without derogating from the generality of the forefoing...

We are not persuaded that section 5(2) is intended to apply to the exercise by the Court of its criminal jurisdiction. But we do not need to determine that issue for, even if there were such power, derived from section 5(2) or some other legislative provision, we consider its exercise in the way proposed by the Judge exceeded accepted boundaries. An apprehension that he was favouring the prosecution inevitably follows.

[24] We do not find the remaining steps relied on by the appellants to add materially to the case for recusal. Their concerns in relation to the order of trials were mischaracterized in the decision appealed from and in Crown submissions; they did not object to the orders but to the way in which the Judge justified them. The focus was on paragraph 10 (ii) of the Record of Mention which the appellants interpreted as an acknowledgment by the Judge that he could be influenced by extraneous evidence.

[25] A literal reading of what he said might support that interpretation, and it is understandable that the appellants would be further disquieted when he went on to reiterate the point later in his decision,[11] but we tend to think that, viewed objectively, he was merely seeking to underline the perceived risk rather than accepting it as reality. And we find nothing in the remarks the Judge made at the 2 March callover as giving rise to a concern that he

[11] Record of Mention at [22].

had prejudged the case against the appellant.

[26] The earlier actions of the Judge, however, are in a very different category and, for the reasons we have given, would have conveyed to a fair-minded lay observer that the Judge might not be impartial in considering the case against them. We are satisfied that he should have disqualified himself.

**Result**

[27] The delay in filing the appeal having been satisfactorily explained, leave to appeal out of time is granted and the appeal is allowed. The Judge's decision not to recuse himself is quashed. We order that he is disqualified from sitting on the trial of the appellants.

Whitten P

Hansen J

Randerson J

COURT OF APPEAL TONGA