

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

ATTORNEY GENERAL'S OFFICE	
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AC 23 of 2023

[CR 173-174 of 2018]

BETWEEN 'AKOSITA LAVULAVU
Appellant

AND REX
Respondent

Court: Randerson J
Counsel: F Fa'anunu and F Afu for Appellant
Hearing: (on the papers)
Judgment:

JUDGMENT OF RANDESON J

Introduction

[1] In 2018 an indictment alleging serious fraud on the part of the appellant and her husband was filed in the Supreme Court. Their trial has been the subject of lengthy delays brought about by a variety of circumstances including their successful appeal against conviction at an earlier stage. Their retrial was due to commence in the Supreme Court on 16 October 2023 but is now delayed in consequence of this appeal filed on 27 October 2023.

[2] The appeal is against a ruling by the trial judge Acting Justice Langi, issued on 18 October 2023 in which she declined an application by the appellant for an order that she recuse herself as trial judge for alleged bias.

[3] The leave of this Court is required to appeal an interlocutory judgment.¹ An application for leave to appeal may be determined by a single judge without a hearing². I am determining the application under that rule. Similarly with an accompanying application made by the appellant for an order that the proceedings in the Supreme Court be stayed pending the determination of the appeal.

Background facts

[4] On 26 September 2023, the Director of Public Prosecutions informed counsel that the Judge had been employed at the Attorney-General's office when the investigations and prosecution of the charges against the defendants were commenced. It is common ground that the Judge was employed at the Attorney-General's office as senior counsel between the years 2016 and 2018 during the time when the investigation and prosecution of the charges against the defendants were commenced.

[5] On 10 October 2023, the Judge emailed the parties to confirm that the matter was ready to proceed on 16 October as scheduled. In the same email, she informed counsel of her employment at the Attorney-General's office. In this email, the Judge stated:

I was not assigned the file and made no legal opinion on it and had very minimal involvement with it. Given the passage of time and the limited contact I had with

¹ Section 17C(1) of the Court of Appeal Act.

² Order 7, Rule 1 of the Court of Appeal Rules.

it I do not believe there is anything that would affect me hearing this case impartially and fairly but if anyone has any objection then let me know as soon as possible.

[6] The appellant immediately applied for an order that the Judge should recuse herself. The following day, after direction by the Judge, a Crown prosecutor, Ms E Lui, swore an affidavit the contents of which may be summarised as follows:

- Ms Lui had examined the entirety of the file notes on the Attorney-General's Office internal file relating to the prosecution of the defendants.
- The Attorney-General's office received the investigation file from Tonga Police in early 2017.
- In June 2017, the assessment of the evidence commenced with a five person team (not including the Judge) headed by the former Acting Attorney-General and Director of Public Prosecutions, Mr Aminiasi Kefu.
- In January 2018, the assessment of the evidence was commenced.
- On 26 March 2018, the Judge resigned from the Attorney-General's office.
- On 28 May 2018, the matter was committed from the Magistrates Court to the Supreme Court.
- According to the records on file the Judge had never conducted, supervised or managed the assessment of the case while employed as a Crown prosecutor in the Attorney-General's office.
- Nor had she been involved in the preparation of submissions to the Court and had not appeared on behalf of the Crown in the Magistrates Court either solely or jointly with Mr Kefu in relation to the matter.

- After reviewing the file and discussing the matter with the Director of Public Prosecution it had not been possible to ascertain what the reference to the Judge's "very minimal involvement" might have entailed.

[7] It is common ground that there is no record either in the Magistrate's Court or the Supreme Court of the Judge's appearance as counsel in connection with the matter. At a late stage, counsel for the appellant produced an email from a Ms J Lafaialii stating that she was a former Crown counsel with the office of the Attorney-General between 1 July 2009 and May 2019. She stated that she recalled the Judge was one of the senior counsel at the time allocated to work on the criminal brief relating to the defendants but was not the lead counsel. She stated she was certain that the office of the Attorney-General would have records or file notes of every counsel appearing in the matter before the Magistrates Court prior to committal to the Supreme Court. Counsel for the appellant invited the Judge to have Ms Lafaialii cross-examined via AVL should the Judge consider it to be necessary. The Judge declined that request.

The Judge's decision

[8] The Judge extensively reviewed relevant authorities relating to recusal principles which are now well settled as we refer to below. In response to a submission by the appellant's counsel as to the Judge's reference about "minimal involvement" in the matter while she was employed by the Attorney-General's office, the Judge stated:

To answer the concerns of Mrs Fa'anunu, my use of the words "minimal involvement" meant that I was aware of the allegations against both accused persons as it was highly publicised by the media even before their matter was referred to the Attorney-General's office. I was also aware that when their files were referred to the Attorney-General's office, the then Director of Public Prosecutions, Mr Aminiasi Kefu, had assigned a team to assess the evidence that had been collected by the Police. From memory, this case was sensitive and the AGO procedure at the time was that only the team of prosecutors assigned dealt with the prosecution. If I did receive any information about the Accused persons, it was only at a general level from passing conversations and nothing to remain with me all these years to form an opinion.

[9] In response to the email provided by Ms Lafaialii, the Judge said:

This email by Ms Lafaiali is in stark contrast with the sworn affidavit filed by Mrs Elisiva Lui of the AGO and the Court records from both the Magistrate's Court and the Supreme Court. Mrs Fa'anunu seeks an opportunity for

Ms Lafaialii to be cross-examined via AVL. Without any supporting evidence other than her claim to remember that I was part of the prosecuting team and the late stage at which this has been submitted, I do not see any need for Ms Lafaialii to be cross-examined. I take note of her email and her recollection of events. And I also take note that her recollection of events is contrary to the affidavits of Mrs Lui of the AGO and court records from both the Magistrate's Court and the Supreme Court.

My own personal recollection is that I was not part of the prosecution team assigned to review the evidence against the accused persons. And the suggestion that I may have been involved in the investigations of the accused person is erroneous as it was the Police who carried out investigations and not the prosecutor. Briefing of progress of investigation was only to the prosecution team assigned to deal with the case.

[10] The Judge concluded that there was no factual basis for the apprehension that a fully informed observer might decide the case other than on its merits other than the fact of her employment at the Attorney-General's office when the investigation files were received on or about 2017. There was, the Judge said, no logical connection between those circumstances and the feared deviation that she might decide the case other than on its merits. There was, the Judge added, no objective basis for an informed independent observer to conclude that by reason of her employment at the AGO some six years before that she would be biased against the defendants.

Consideration

[11] The principles applicable to disqualification for bias are well settled by a number of decisions of this Court and do not require further consideration. They were summarised recently in *'Atenisi Institute Incorporated v Tonga National Qualifications and Accreditation Board*³ and in *Vunipola v Tongatapu Rugby Football Sub-Union and Ors*.⁴

[12] Applying these principles, the Judge correctly applied the two-stage test:

- What is it that might possibly lead to a reasonable apprehension by a fully informed observer that the Judge might decide the case other than on its merits;

³ *'Atenisi Institute Incorporated v Tonga National Qualifications and Accreditation Board* [2023] TOCA 11; AC 27 of 2022 at paras [36] and [37].

⁴ *Vunipola v Tongatapu Rugby Football Sub-Union and Ors* [2023] AC 28/2022 at paras [18] and [19].

- Whether there is a logical and sufficient connection between those circumstances and that apprehension.

[13] A rigorous examination of an allegation of bias is required. Judges have a duty to sit unless there is good reason not to do so. As noted in *'Atenisi'*⁵ a Judge should not accede too readily to suggestions of bias and should be mindful of the burden that passes to other Judges if the Judge stands aside unnecessarily. In a small jurisdiction with limited judicial resources, these principles are of particular importance.

[14] I have no hesitation in concluding that this appeal has no merit and leave should be declined accordingly. I cannot improve on the reasons given by the Judge in declining the application. There is nothing in the evidence before the Judge to suggest any more than a passing knowledge of the case at the time of her employment which ended more than five years ago. The suggestion that she had any greater prior connection with the case is purely speculative and has no evidentiary basis. The Judge was right to reject further consideration of the late email from Ms Lafaialii. It was not admissible and was shown to be wrong in material respects.

[15] In short, there is nothing to suggest the Judge will not deal with the case fairly, objectively and in accordance with her judicial oath.

Result

[16] The application for leave to appeal is refused. It follows that the application for a stay of proceedings must also be declined.



Randerson J

⁵ Supra at para [37].