15/88

SUPREME COURT OF NEW SOUTH WALES — COURT OF CRIMINAL APPEAL

R v GEORGE and ORS

Street CJ, Yeldham and Finlay JJ

27 May, 19 June 1987 — (1987) 9 NSWLR 527; (1987) 29 A Crim R 380

JUDICIAL OFFICERS – DISQUALIFICATION FOR BIAS – TEST FOR REASONABLE APPREHENSION OF BIAS – "REASONABLE" – WARRANT ISSUED FOR USE OF LISTENING DEVICE – PERSON LATER ARRAIGNED IN RESPECT OF ANOTHER MATTER – WHETHER DISQUALIFICATION APPROPRIATE.

1. A judicial officer should not too readily respond to protests of bias and should not disqualify himself unless there is a reasonable apprehension apparent to or entertained by a reasonable person with a full comprehension of the circumstances of the case, that the judicial officer will not decide the case with an impartial and unprejudiced mind.

***Re JRL; Ex parte CJL* [1986] HCA 39; (1986) 161 CLR 342; [1986] FLC 91-738; 66 ALR 239; (1986) 60 ALJR 528; (1986) 10 Fam LR 917; (1986) 10 ALN N184, followed.**

2. Where a judge issued a warrant authorising the use of a listening device in relation to a person subsequently arraigned before the judge in respect of another matter no actual bias nor a reasonable apprehension of bias was shown on the part of the judge.

STREET CJ: (with whom Yeldham and Finlay JJ agreed.) *[After considering a matter not relevant to this report, His Honour continued] ...* **[534]** A further ground of challenge advanced is that the Judge ought to have disqualified himself from further proceeding with the trial when it emerged during the course of the summing-up that his Honour had at some stage **[535]** before the trial exercised the power conferred by the *Listening Devices Act* 1984 of authorising the use of a listening device in relation to Hilton. It is to be emphasised that the particular matter before his Honour under the *Listening Devices Act* did not involve anything to do with the present charges. Likewise there was no suggestion that the fact of his Honour having issued such a warrant led to any actual bias. The contention simply is that it had been ascertained that his Honour granted a warrant under the *Listening Devices Act* in relation to a matter involving the appellant Hilton and he should, even at the stage of being part-way advanced through his summing-up, have disqualified himself from further involvement in the trial and discharged the jury.

In evaluating this submission it is, I believe, relevant to state again that there was no suggestion that, whatever this matter was, it had anything to do with the present trial. The contention advanced by Mr Roberts, who put the matter forcefully but fairly, was that a casual observer might well entertain some reasonable apprehension of bias on the part of the trial judge. In the course of argument on this point reference was made to the judgment of Mason J in *Re JRL; Ex Parte CJL* reported at [1986] HCA 39; (1986) 161 CLR 342; [1986] FLC 91-738; 66 ALR 239; (1986) 60 ALJR 528; (1986) 10 Fam LR 917; (1986) 10 ALN N184, His Honour said at ALR 245-246:

> "As McInerney J pointed out, the receipt by a judge of a private communication seeking to influence the outcome of litigation before him places the integrity of the judicial process at risk. A failure to disclose that communication will seriously compromise the integrity of that process. On the other hand, although the terms of a subsequent disclosure by the judge of the communication and a statement of its effect in some, perhaps many, situations will be sufficient to dispel any reasonable apprehension that he might be influenced improperly in some way or other, subsequent disclosure will not always have this result. The circumstances of each case are all important. They will include the nature of the communication, the situation in which it took place, its relationship to the issues for determination and the nature of the disclosure made by the judge. The problem is governed by the principle that a judge should disqualify himself from hearing, or continuing to hear, the matter if the parties or the public entertain a reasonable apprehension that he might not bring an impartial and unprejudiced mind to the resolution of the issues: (*R v Watson; Ex parte Armstrong* [1976] HCA 39; (1976) 136 CLR 248 at 258-63; [1976] FLC 90-059; 9 ALR 551; (1976) 50 ALJR 778; (1976) 1 Fam LR 11; *Livesey v New South Wales Bar Association* [1983] HCA 17; (1983) 151 CLR 288 at

293-4; 47 ALR 45; (1983) 57 ALJR 420). This principle, which has evolved from the fundamental rule of natural justice that a judicial officer should be free from bias, reflects a concern with the need to maintain public confidence in the administration of justice. This concern is expressed in the cognate principle that, not only must justice be done, it must be seen to be done. It seems that the acceptance by this court of the test of reasonable apprehension of bias in such cases as *Watson* and *Livesey* has led to an increase in the frequency of applications by litigants that judicial officers should disqualify themselves from sitting in particular cases on account of their participation in other proceedings involving one of the litigants or on account of conduct during the litigation. It needs to be said loudly **[536]** and clearly that the ground of disqualification is a reasonable apprehension that the judicial officer will not decide the case impartially or without prejudice; rather than that he will decide the case adversely to one party. There may be many situations in which previous decisions of a judicial officer on issues of fact and law may generate an expectation that he is likely to decide issues in a particular case adversely to one of the parties. But this does not mean either that he will approach the issues in that case otherwise than with an impartial and unprejudiced mind in the sense in which that expression is used in the authorities or that his previous decisions provide an acceptable basis for inferring that there is a reasonable apprehension that he will approach the issues in this way. In cases of this kind, disqualification is only made out by showing that there is a reasonable apprehension of bias by reason of prejudgment and this must be 'firmly established' (*R v Commonwealth Conciliation and Arbitration Commission; Ex parte Angliss Group* [1969] HCA 10; (1969) 122 CLR 546 at 553-4; 43 ALJR 150; *Watson* at 262; *Re Lusink; Ex parte Shaw* [1980] FLC 90-884; 32 ALR 47 at 50-1; (1980) 55 ALJR 12 at 14; 6 Fam LR 230). Although it is important that justice must be seen to be done, it is equally important that judicial officers discharge their duty to sit and do not, by acceding too readily to suggestions of appearance of bias, encourage parties to believe that by seeking the disqualification of a judge, they will have their case tried by someone thought to be more likely to decide the case in their favour."

It is plain from the law as stated in this passage that the circumstances of each case are all important and that judges should not too readily respond to protests advanced on the basis that they may not be able to discharge their judicial duties properly in a particular matter coming before them. The reasonable apprehension of bias, which is the core of the test, turns very much upon the adjective, "reasonable". It is not enough that there be some apprehension to some uninformed and uninstructed person. It must be a reasonable apprehension and it must be an apprehension which would be apparent to or entertained by a reasonable person with a full comprehension of the circumstances of each case.

A judge presiding at a trial – albeit, as Mr Roberts emphasised, that he is called upon to make rulings during the course of the trial which can affect the course of its progress and hence affect directly the accused person – is not the ultimate decider of facts on the matter of guilt. If judges who are presiding at trials were to be insulated from all other activities involving the administration of the criminal law and associated fields, the administration of justice would be placed in wholly unnecessary watertight compartments. For example, bail applications are commonly heard by judges involved in trials. Indeed, during the course of a trial, particularly a lengthy trial such as this, the trial judge quite frequently considers whether bail should be allowed during the course of a trial, and in the course of considering a matter of that sort in the absence of the jury all sorts of prejudicial material is properly made known to him.

In the course of *voir dire* proceedings in trials material not proper to put before a jury is, without the faintest suggestion of concern regarding inducing unfair prejudice on the part of the judge, placed before the judge. When evaluated in its entirety and with particular reference to the absence of any association with this particular case an the absence of any suggestion **[537]** of actual bias, I find this ground not to be one that has been made out. Indeed, the whole of the period of this trial was, in my view, characterised by manifest concern by the judge to ensure fairness by all concerned. There is not the slightest indication anywhere in the case of his Honour having been unfairly prejudiced against any of the accused persons.

[His Honour then considered the remaining grounds of appeal in a manner not calling for report and concluded:] In my view, the whole of the challenges made by the appellants to the conviction should fail and, in due course, the appeals against conviction should be dismissed.
