20/06; [2006] VSC 221

SUPREME COURT OF VICTORIA

R v MOKBEL (Application by surety)

Gillard J

31 May, 2 June 2006

BIAS – ALLEGED PERCEIVED BIAS OF JUDGE – ORDER MADE BY JUDGE REFUSING TO REVOKE BAIL OF ACCUSED DURING TRIAL – ACCUSED FAILED TO ATTEND TRIAL – BAIL FORFEITED AND SURETY ORDERED TO PAY AMOUNT OF BAIL WITHIN A CERTAIN TIME – APPLICATION TO ORIGINAL JUDGE BY SURETY TO VARY OR RESCIND BAIL ORDERS – APPLICATION THAT JUDGE DISQUALIFY HIMSELF ON GROUNDS OF PERCEIVED BIAS – PRINCIPLES TO APPLY WHEN SUCH AN APPLICATION MADE – WHETHER THE REASONABLE, FAIR-MINDED OBSERVER WOULD CONCLUDE THAT THE JUDGE MIGHT NOT BRING AN IMPARTIAL AND UNPREJUDICED MIND TO THE RESOLUTION OF THE APPLICATION.

1. The test to be applied in determining whether a judge is disqualified by reason of the appearance of bias is whether a fair-minded lay observer might reasonably apprehend that the judge might not bring an impartial and unprejudiced mind to the resolution of the question the judge is required to decide. The hypothetical reasonable observer of the judge's conduct is postulated in order to emphasise that the test is objective, is founded in the need for public confidence in the judiciary, and is not based purely upon the assessment by some judges of the capacity or performance of their colleagues. At the same time, two things need to be remembered: the observer is taken to be reasonable; and the person being observed is 'a professional judge whose training, tradition and oath or affirmation require the judge to discard the irrelevant, the immaterial and the prejudicial'. Whilst the fictional observer, by reference to whom the test is formulated, is not to be assumed to have a detailed knowledge of the law, or of the character or ability of a particular judge, the reasonableness of any suggested apprehension of bias is to be considered in the context of ordinary judicial practice. The rules and conventions governing such practice are not frozen in time. They develop to take account of the exigencies of modern litigation.

***Johnson v Johnson* [2000] HCA 48; (2000) 201 CLR 488; (2000) 174 ALR 655; [2000] FLC 93-041; (2000) 74 ALJR 1380; (2000) 26 Fam LR 627; (2000) 21 Leg Rep 21, applied.**

2. In the present case the test was not whether the impartial observer may think that it was unfair that the judge refused to revoke the bail, and then refused an application to vary or rescind the order forfeiting bail and ordering the surety to pay a substantial sum of money and, in default, imprisonment. The test is that a judge should not sit to hear a case "if in all the circumstances the parties or the public might entertain a reasonable apprehension that he might not bring an impartial and unprejudiced mind to the resolution of the question involved in it". The reasonable hypothetical observer seated in the back of the Court and having the necessary knowledge of all relevant matters, would not entertain a reasonable apprehension that the judge could not bring an impartial and unprejudiced mind to the resolution of the questions involved in the application.

GILLARD J:

1. Before the Court is an application by Mrs Renate Lisa Mokbel ("Mrs Mokbel") pursuant to s6(4) of the *Crown Proceedings Act* 1958 ("the Act"), seeking an order to vary or rescind orders made by the Court on 26 April 2006.

2. On that day, the Court declared that bail granted to Antonios Sajih Mokbel ("the principal") be declared forfeited pursuant to s6(1) of the Act. The Court ordered that Mrs Mokbel, who was the surety, pay an amount of $1,000,000 to an officer of this Court within 31 days of the date of the order and, in default of payment, that the amount be obtained by seizing and selling her property and, further in default, that she serve a term of imprisonment of two years. The orders declaring the recognisance forfeited and, in default of payment, imprisonment, were in respect to two separate proceedings.

3. By reason of s6(4) of the Act, a surety is given the right to apply to the Court that made the order to vary or rescind the order "on the ground it would be unjust to require him to pay the

amount undertaken to be paid having regard to all the circumstances of the case." Mrs Mokbel has made application in respect to both proceedings, namely, the Commonwealth and State prosecutions against the principal.

4. The return date for the hearing is 20 June 2006. The Court fixed 31 May 2006 for a directions hearing, and counsel on behalf of Mrs Mokbel, Mr L. Lasry QC, applied to the Court that I should disqualify myself from hearing the application because of perceived bias. Mr Lasry disavowed any suggestion of actual bias.

5. In order to understand the submission put on behalf of the applicant, it is necessary to set out some of the background history. The principal was arrested on 24 August 2001 and charged with the offence of being knowingly concerned in the importation into Australia of a prohibited import, namely, a traffickable quantity of cocaine, which arrived in Australia on 6 November 2000, contrary to paragraph 233B(1)(d) of the *Customs Act* 1901. On arrest, he was remanded in custody. He was granted bail by a magistrate on 7 September 2000 and on 1 October 2000, Cummins J in this Court allowed the appeal and the principal was remanded in custody.

6. During 2002, the principal made a number of applications to this Court for bail and eventually, on 4 September 2002, Kellam J granted him bail subject to strict conditions. A surety of $1,000,000 was required. In addition to the Commonwealth charge, the principal was charged by State police, on 24 August 2001, with a number of serious drug charges relating to trafficking. The bail granted by Kellam J was in respect to both the Commonwealth and State charges. Mrs Mokbel was the surety in respect to both grants of bail.

7. There was an inordinate delay between 4 September 2002 and the committals. The Commonwealth committal took place in November 2004. On 26 November 2004, a magistrate committed the principal for trial and bail was granted, again subject to strict conditions. There was a requirement of one surety in the sum of $1,000,000. Mrs Mokbel on that day signed the undertaking as surety. She is the wife of the principal's brother, Milad. She swore an affidavit on that day as to her means, and a number of documents were supplied to the Registrar of the Court purporting to show that she had an interest in real estate at 11 Downs Street, Brunswick.

8. The committal in respect to the State charges occurred in 2005, and on 15 February 2005, the principal was committed for trial on three counts of trafficking in drugs. Again, the principal was released on bail with one surety of $1,000,000. Mrs Mokbel was the surety.

9. During the course of 2005, I held a number of directions hearings in respect to both sets of charges and it was agreed that the Commonwealth matter would proceed first, and that the State matter would be heard after completion of the Commonwealth prosecution. I fixed the date of the trial for 26 October 2005. That date had to be vacated and I re-fixed the trial for 1 February 2006. On 29 November 2005, application was made to the Court to extend the existing bail. On that day, I extended bail in the Commonwealth proceeding until 1 February 2006, and the principal was bailed on his own undertaking with one surety in the sum of $1,000,000. The bail in the State charges was also extended on the same conditions.

10. On 29 November 2005, the principal and the surety, Mrs Mokbel, attended before the Deputy Prothonotary of this Court and signed a document acknowledging receipt of the notice setting out the obligations of the principal concerning the conditions of his bail and the consequences of his failure to comply with the conditions. Mrs Mokbel signed an undertaking to pay to the Prothonotary the amount of bail specified in the event that the principal failed to observe a condition of bail. The undertaking was signed in relation to both the Commonwealth and State proceedings.

11. The jury was empanelled in the Commonwealth prosecution on Monday, 13 February 2006, and the trial commenced. Bail was extended, subject to the same conditions, until further order. The defence case was closed on Thursday, 16 March 2006 and the prosecutor, Mr D. Parsons SC, commenced his address.

12. On the following morning, the prosecutor informed the Court that he proposed to make an application to revoke the principal's bail later that day. The prosecutor did not complete his address on that Friday. At 3.30pm, the jury was discharged for the weekend and the Crown made

application to the Court that bail be revoked. It was submitted on behalf of the Crown that the Crown case was a strong one, and that the stage had been reached in the trial when the bail should be revoked. Other than those matters, the Crown did not draw any particular matter to the attention of the Court, and disavowed any suggestion that there was any particular matter that the Court should consider.

13. After hearing submissions, the Court stated that the bail would be revoked at the end of counsel's addresses, which was anticipated to occur on the following Tuesday. On the morning of Monday, 20 March 2006, the Court was informed at 10.30am that the principal was missing and had not been seen since 5.00pm the previous evening, when he reported to the South Melbourne Police Station.

14. On that day, a warrant to arrest the prisoner was issued by the Court. The trial continued and on 28 March 2006, the jury brought in a verdict of guilty. On 31 March 2006, the Court sentenced the principal to 12 years' gaol and fixed a period of nine years before he was eligible for parole.[1]

15. The Crown in the right of the Commonwealth applied for a declaration and orders pursuant to s6(1) of the Act. On 29 March 2006, the Crown in the right of the State of Victoria filed a presentment in the Court in relation to the three State charges, and the Court ordered that a warrant be issued for the apprehension of the principal. In addition, the Crown sought an order against the surety pursuant to s6(1) of the Act.

16. The Commonwealth and State applications came on before me. On 26 April 2006, in respect to each application, the Court declared that the bail be forfeited and ordered that Mrs Mokbel pay the sum of $1,000,000 within 31 days; that in default of payment, the amount be obtained by seizing and selling her property; and that in default of seizure and sale, she be imprisoned for a period of two years. The orders further provided, to put beyond any doubt, that they had a joint operation in respect to both sets of charges and that, in total, Mrs Mokbel was liable in the sum of $1,000,000 and, in the ultimate default, was to be imprisoned for a period of two years.[2] On 15 May 2006, Mrs Mokbel applied, pursuant to s6(4), for an order to vary or rescind the orders made on 26 April 2006, and on 26 May 2006, I ordered a stay of those orders.

17. Mr Lasry, on behalf of Mrs Mokbel, submits that I should disqualify myself from hearing the proceeding on the ground of perceived bias. Mr Parsons, on behalf of both Crowns, submitted that there was no basis for me disqualifying myself from hearing the applications.

18. The perceived bias was said to arise out of the events which occurred on Friday, 17 March 2006. This was the 28th day of the trial. The principal had strictly complied with all conditions of the various grants of bail going back some three and a half years. Mr Lasry submitted that evidence would be given that Mrs Mokbel was either present on that day, or was made aware of the Crown's application to revoke bail, and the Court's refusal to do so, and the intimation by the Court that bail would be revoked after counsel's addresses. He informed the Court that a submission would be put that his client was to some extent comforted by the fact that the trial judge had not revoked bail that day. He then submitted that there may be some criticism made of the Court's refusal to revoke bail that day and that this would reflect upon me, and that the reasonable person may conclude that the judge could not bring an impartial mind to the issues in the application.

19. I observe that the fact that the Court did not revoke bail may be a relevant factor on the application. If so, then it is the fact of the refusal to revoke and the reason or reasons that were given for refusing the application that day, but not whether the reason or reasons were appropriate or correct, which may be relevant to the issues in the application.

20. Mr Lasry submitted that the fair minded person may think that it was unfair that in the event of the application being dismissed, the judge who did not revoke the bail nevertheless was prepared to, in effect, punish the surety for failing to ensure that the principal attended Court on the Monday.

21. Mr Lasry expressed the concern in this way: "Your Honour, if I can simply put the perception this way. At the end of these proceedings the question for the fair minded person sitting at the

back of the Court is, if your Honour were to make an order resisting our client's application to vary or set aside the order which you have already made, whether there is a significant risk that a fair minded observer might think 'well in effect that's a bit tough, she's lost her house, million dollar house, because she is said to have failed in her duty as a surety', and yet the judge who imposed that order three days earlier had declined the request by the Crown to revoke Mr Mokbel's bail. How can that be fair and how can that be consistent? That is, in the bluntest of terms, the kind of perception that we say is relevant for your Honour to consider in this application."

22. It is noted that Mr Lasry is emphasising that the fair minded observer may come to the view that it would be unfair and inconsistent if the judge who declined to revoke bail nevertheless took the view that there was a strict obligation resting upon the surety, and the application failed.

23. The principles that guide a court on an application for disqualification are well settled. Mr Lasry frankly conceded that there was no case which was similar to the present application. Indeed, most of the cases dealing with this issue in recent times have been concerned with a judicial officer making comments or observations during the course of a trial which demonstrated a predetermination, or with evidence of a pre-existing relationship with a party or someone connected with a party.

24. Before stating the principles concerning perceived bias, it is appropriate to say something about the desirability of the judge, who had dealt with the absence of the principal leading to the issue of a warrant of arrest and the order forfeiting the recognisance, dealing with any subsequent application. It has been the practice in this Court for many years for the judge who was seized with the original matter to deal with an application to vary or rescind the orders which flowed from the declaration of the forfeiture. I was allocated as the judge to hear the trials against the principal in mid-2005. I thereafter managed the interlocutory steps and presided at the Commonwealth trial. In the course of performing those duties, I obtained information about the principal and his involvement in the criminal activities.

25. In my view, I am in an excellent position to fully understand the facts. In *Re Condon*,[3] Crockett J, a very experienced common lawyer, made an order for the payment of the amount of the recognisance by a surety. He made the order when the principal, being the accused person, failed to answer a charge of armed robbery. His Honour then heard the application to vary or rescind the order. His Honour referred to the desirability of the judge who made the order forfeiting the recognisance hearing the application to vary or rescind, and said: [4]

> "The application came to me by reference from the judge sitting in chambers pursuant to a practice which, I understand, has now been followed for some time. The provision to which I have just referred allows the application to be made to a judge of the Court and the practice in the Supreme Court (but not the County Court where the matter is sent directly to the judge who first dealt with the matter) has been for the hearing of the application to be set down before the judge in chambers in the first instance to be followed by a reference, as I have indicated, to the judge who made the declaration that the recognisance in question be forfeited. The practice undoubtedly has much to commend it because the judge making such declaration does so with a knowledge of the background of the trial and the circumstances of the non-attendance of the bailed person that may be difficult for another judge to capture and yet such knowledge may be of great assistance in determining the matter. Indeed, on the hearing of this application it was plain from the submissions of both counsel that they had relied on much of which I was aware by reason of my association with the trial that was to have taken place and in respect of which the principal failed to appear."

26. Although that is the desirable practice, from time to time the practice must give way to dictating circumstances. For example, in *Re Wilkinson*,[5] the practice was not followed.[6] However, in my view, the general practice should be followed and it is appropriate that I should entertain the application because of my detailed knowledge and understanding of all the circumstances. In making that observation, I am not saying that that is an answer to the present application. It plainly is not. I must consider and determine this application to disqualify on the merits, without taking into account the general practice.

27. The High Court, on a number of occasions, has considered the principles of the apprehension of bias and the disqualification of a trial judge sitting alone, and their application to particular sets of facts.

28. The most recent High Court case is *Antoun v The Queen*.[7] In that case, a judge sitting alone informed the accused's counsel, before any submission was made, that a no case to answer submission would fail. He repeated that observation on two other occasions. This was a case of a judge pre-judging a matter and making that very clear to the parties before they had an opportunity of addressing him. This was a straightforward example of pre-judgment and the High Court held that the judge should have disqualified himself.

29. The principles to apply in an application such as the present are not in doubt. In *Johnson v Johnson*,[8] five judges of the High Court said:[9]

> "It is not contended that Anderson J was affected by actual bias. It has been established by a series of decisions of this Court that the test to be applied in Australia in determining whether a judge is disqualified by reason of the appearance of bias (which, in the present case, was said to take the form of pre-judgment), is whether a fair-minded lay observer might reasonably apprehend that the judge might not bring an impartial and unprejudiced mind to the resolution of the question the judge is required to decide."

30. Their Honours went on to observe:[10]

> "The hypothetical reasonable observer of the judge's conduct is postulated in order to emphasise that the test is objective, is founded in the need for public confidence in the judiciary, and is not based purely upon the assessment by some judges of the capacity or performance of their colleagues. At the same time, two things need to be remembered: the observer is taken to be reasonable; and the person being observed is 'a professional judge whose training, tradition and oath or affirmation require [the judge] to discard the irrelevant, the immaterial and the prejudicial'."

31. It is important to determine what the fictional observer needs to know and understand. In relation to this point their Honours said:[11]

> "Whilst the fictional observer, by reference to whom the test is formulated, is not to be assumed to have a detailed knowledge of the law, or of the character or ability of a particular judge, the reasonableness of any suggested apprehension of bias is to be considered in the context of ordinary judicial practice. The rules and conventions governing such practice are not frozen in time. They develop to take account of the exigencies of modern litigation."

32. To this must be added what one expects the reasonable, fair minded observer to know. In *Webb v R*,[12] Deane J said:[13]

> "The fair minded observer is a hypothetical figure. While the question is not settled by any decision of the Court, it appears to me that the knowledge to be attributed to him or her is a broad knowledge of the material objective facts as ascertained by the appellate court, as distinct from a detailed knowledge of the law or knowledge of the character or ability of the members of the relevant court. The material objective facts include, of course, any published statement, whether prior, contemporaneous or subsequent, of the person concerned. If, in the particular case, the proper conclusion is that a fair-minded lay observer with a broad knowledge of those facts would not entertain a reasonable apprehension of bias, that is the end of the issue of disqualification by reason of an appearance of bias."

33. His Honour's observations were referred to with approval by the High Court in *Johnson v Johnson*.[14]

34. One other matter must be stated and emphasised. That is that a judge should not too readily accept recusal because one of the parties to the matter requested it. In *Re JRL; Ex parte CJL*,[15] Mason J said:[16]

> "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. <u>It needs to be said loudly 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</u>."

(Emphasis added).

35. His Honour's observations have often been stated and applied in the cases. One of the reasons for his Honour's observations is that in the administration of law in this country, as a general proposition, no party has any entitlement to choose which judicial officer will conduct the trial. This observation has been applied often.[17] Kirby J said in *Johnson v Johnson*:[18]

> "Such considerations lay behind the salutary warning given in *Re JRL; Ex parte JRL* that judicial officers in Australia were obliged to discharge their professional duties unless disqualified by law. They were told not to accede too readily to suggestions of an appearance of bias, lest parties be encouraged to seek such disqualification without justification. Applications of that kind might sometimes be made in the hope of securing an adjudicator more sympathetic to a party's cause. Or they might be made because of the strategic advantage that may thereby be secured, especially the interruption of lengthy proceedings and the delays consequent upon obtaining a fresh start in a busy court or tribunal."

36. In respect to the warning by the High Court not to readily accede to such applications, I refer to the decision of the High Court in *Re Polites; Ex parte Hoyts Corporation Pty Ltd (No. 2)*.[19] In that case, Deputy President Polites and others were sitting as a Full Bench of the Australian Industrial Relations Commission hearing a number of matters relating to the terms and conditions of employment of employees of the Hoyts Corporation Pty Ltd. Mr Polites, when he was a solicitor, had advised Hoyts and he acceded to an application that he should disqualify himself from sitting. On appeal, the High Court held that he should not have disqualified himself.

37. It is not said that I have said anything or done anything which could conceivably amount to pre-judgment of any of the issues in this application. It is not said that I have any association with any of the parties and accordingly could not bring an impartial mind to the resolution of the issues. It is not said that I have some bias through interest in any of the issues. It is put that the reasonable fair-minded observer sitting in the back of the Court would think it unfair if I refused the application, taking into account that on the Friday before the principal disappeared, I had refused to revoke bail. It is said that the surety would rely upon the fact, namely, that the judge refused to revoke the bail, as a form of comfort and security to her that the principal would honour his bail. That may or may not be so and that may be a fact relevant to the issues.

38. But in considering that fact in the application, in my view, it does not involve any question of criticism of the reasons why the judge refused to revoke the bail. The fact was that I did so on the material before me. It is said that I may be seen to be punishing the surety because later events showed that the refusal to revoke the bail was wrong, and this would be seen to be unfair.

39. However, in my view, that is not the test. It is not whether the impartial observer may think that it was unfair that the judge refused to revoke the bail, and then refused an application to vary or rescind the order forfeiting bail and ordering the surety to pay a substantial sum of money and, in default, imprisonment. The test is that a judge should not sit to hear a case "if in all the circumstances the parties or the public might entertain a reasonable apprehension that he might not bring an impartial and unprejudiced mind to the resolution of the question involved in it".[20]

40. Mr Lasry disavowed any suggestion of actual bias. I can say categorically that I will have no difficulty in considering and determining the issues raised in this application in accordance with the law and the facts as I find them, and I am not in any way embarrassed in performing my judicial function by reason of the fact that later events showed that my failure to revoke bail was wrong.

41. In my view, the reasonable hypothetical observer seated in the back of the Court and having the necessary knowledge of all relevant matters, would not entertain a reasonable apprehension that I could not bring an impartial and unprejudiced mind to the resolution of the questions involved in this application. If the application is refused and that is the outcome of it, it does not follow that it would be unfair. In my view, it would not be viewed as unfair by the fair-minded observer with knowledge of the material objective facts. The fact is that the bail was not revoked, and the surety seeks to rely upon that fact in the present application. On the basis that it is relevant to an issue in the application, she is entitled to do so. It does not appear to me to be relevant to any issue in this application that the reasons given by the judge turned out to be wrong. If she was aware of the reasons given then she may be able to rely upon them. No doubt she can rely upon

them, if relevant, to show that the judge did not see any concern about the principal's attendance at Court the following week.

42. In my opinion, the reasonable, fair minded observer would not conclude that in the circumstances, I might not bring an impartial and unprejudiced mind to the resolution of the issues in the application. Accordingly, I reject the application and the matter will proceed before me.

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[1] See [2006] VSC 119.
[2] See [2006] VSC 158; 199 FLR 176.
[3] [1973] VR 427.
[4] at p429.
[5] [1983] VicRp 85; [1983] 2 VR 250.
[6] See observations at p251 per Crockett J.
[7] [2006] HCA 2; (2006) 224 ALR 51; (2006) 80 ALJR 497; (2006) 159 A Crim R 513.
[8] [2000] HCA 48; (2000) 201 CLR 488 at paragraph 11; (2000) 174 ALR 655; [2000] FLC 93-041; (2000) 74 ALJR 1380; (2000) 26 Fam LR 627; (2000) 21 Leg Rep 21.
[9] At paragraph 11.
[10] At paragraph 12.
[11] At paragraph 13.
[12] [1994] HCA 30; (1994) 181 CLR 41; (1994) 122 ALR 41; (1994) 68 ALJR 582; 73 A Crim R 258.
[13] At p73.
[14] *Supra* at p493.
[15] [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.
[16] At p352.
[17] See *Johnson v Johnson*, *supra* at paragraphs 45 and 48.
[18] At paragraph 45.
[19] [1991] HCA 25; (1991) 173 CLR 78; (1991) 100 ALR 634; 65 ALJR 445; (1991) 38 IR 114.
[20] Per the High Court in *Livesey v New South Wales Bar Association* [1983] HCA 17; (1983) 151 CLR 288 at 293-4; 47 ALR 45; (1983) 57 ALJR 420.

APPEARANCES: For the Crown (Commonwealth of Australia and State of Victoria): Mr D Parsons SC, counsel. Commonwealth Director of Public Prosecutions and Office of Public Prosecutions (Victoria). For the surety Renate Mokbel: Mr L Lasry QC, counsel. Chiodo & Madafferi, solicitors.
