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## SUPREME COURT OF THE AUSTRALIAN CAPITAL TERRITORY

# *R v DAINER and ORS; ex parte COOKE*

**Miles CJ**

**9, 24 September 1986 — [1986] ACTSC 308; [1986] 84 FLR 305**

**PROCEDURE – DISQUALIFICATION FOR BIAS – WHAT CONSTITUTES BIAS – DUTY OF MAGISTRATE TO HEAR CASE UNLESS VALID REASON EXISTS – GROUND FOR DISQUALIFICATION.**

Whilst hearing committal proceedings, counsel for one of the accused informed the Court that the police informant's counsel had been associating in some undefined way with some of the prosecution witnesses. Although this was denied, it was suggested that the proceedings were "tainted" and it would be preferable for the proceedings to start afresh before another magistrate. After further discussion, the magistrate disqualified himself and adjourned the proceedings before another magistrate. Upon orders nisi to review—

**HELD: Orders nisi discharged. Each party to pay own costs.**
**1. Where a magistrate embarks upon a hearing, the proceedings are to continue until their termination, unless a valid legal reason requires otherwise.**
***Sankey v Whitlam* (1977) 29 FLR 346; (1977) 21 ALR 457; [1977] 1 NSWLR 333, followed.**

**2. The requirement of natural justice that justice must not only be done but seem to be done is infringed when it is firmly established that a reasonable person – whether a party or a member of the public – might suspect that the magistrate might not bring to the resolution of the proceedings a fair and unprejudiced mind.**
***R v Watson; Ex parte Armstrong* [1976] HCA 39; (1976) 136 CLR 248; [1976] FLC 90-059; 9 ALR 551; (1976) 50 ALJR 778; (1976) 1 Fam LR 11, followed.**

**3. An application for disqualification should only be granted where there is a reasonable apprehension that the magistrate will not decide the case impartially or without prejudice rather than that the magistrate will decide the case adversely to one party.**
***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.**

**4. In the present case, there was no basis on which a reasonable person could suspect a reasonable bias on the part of the magistrate and accordingly, the magistrate lacked a proper ground on which to disqualify himself.**

**MILES CJ:** *[After setting out the facts, and whether the applicant had standing to seek mandamus, His Honour continued]*: … **[307]** I now turn to the substantial question as to whether the magistrate ought to have declined to proceed further with the hearing of the informations before him. It is not a question of whether the magistrate erred in law in so deciding on the material before him. It is a matter for this Court on the material before this Court. The principles relating to interference by an appellate court with a discretionary judgment of the court below do not apply: *Sankey v Whitlam* (1977) 29 FLR 346; (1977) 21 ALR 457; [1977] 1 NSWLR 333 at 347, per Moffitt P At 346 the President went on to say:

> "For a party, except for a valid legal reason, to have an option to change the tribunal and commence the proceedings afresh, after the proceedings are part heard, is itself productive of possible injustice, and is contrary to an essential in our legal processes that, once embarked upon, the trial or procedure will continue until its termination, unless a valid legal reason requires otherwise."

In the same case Hutley JA said at 360:
"It is clear from these old authorities that there is a duty to commence **[308]** to hear and, having begun, to hear a case, and that, when there has been a refusal to hear a mandamus issued virtually as of course to compel the justices to hear a case at the suit of any party to the proceedings before the justice who is adversely affected by their refusal. In none of these cases is there the remotest support for the contention put to this Court by counsel for the appellant magistrate that the justices had any independent discretion in the matter; that the court gives any special consideration to the

> views which they may entertain as to their fitness to proceed, or that there is any obstacle to the court itself issuing a mandamus to compel the continuation and completion of the hearing. When seized of a matter, except for good cause, the magistrate must complete it. He cannot properly resile from completing the case, because of pressure from one party."

As to good cause or valid legal reason, the only ground on which counsel before the magistrate sought his withdrawal from the case was a reliance on the principle of natural justice that justice must not only be done but be seen to be done, and that the requirement of natural justice had been denied because the proceedings before the magistrate had been "tainted" in such a way as to cause an aura of bias to descend over the magistrate if he proceeded with the further hearing.

For myself I find it quite impossible to see how any question of a denial of natural justice arose. The test as to whether there has been a denial of natural justice in the sense mentioned was confirmed by the High Court in *R v Watson; Ex parte Armstrong* [1976] HCA 39; (1976) 136 CLR 248 at 262; [1976] FLC 90-059; 9 ALR 551; (1976) 50 ALJR 778; (1976) 1 Fam LR 11 as that discussed in *R v Commonwealth Conciliation & Arbitration Commission* [1969] HCA 10; (1969) 122 CLR 546 at 553-554, in the following terms:

> "Those requirements of natural justice are not infringed by a rare lack of nicety but only when it is firmly established that a suspicion may reasonably be engendered in the minds of those who came before the tribunal or in the minds of the public that the tribunal or a member or members of it may not bring to the resolution of the question arising before the tribunal fair and unprejudiced minds. Such a mind is not necessarily a mind which has not given thought to the subject matter or one which, having thought about it, has not formed any views or inclination of mind upon or with respect to it."

It is plain that the suggestion before the magistrate, put from the Bar table, that counsel for the informant had been associated in some undefined way with prosecution witnesses, could in no way lead to a conclusion that a reasonable person, whether a party or a member of the public, might suspect that the magistrate might not bring a fair and unprejudiced mind to bear on the issues before him. It was suggested in this Court by counsel for the third respondent that his client entertained a belief that he was being persecuted as the victim of a conspiracy and that that belief was strengthened in that the proceedings in this Court were oppressive and an abuse of process, but that suggestion adds nothing. I adopt the words of Moffitt P in *Sankey v Whitlam supra*, at 350 that there is just no basis upon which a reasonable person could suspect on this basis or any other basis a reasonable bias on the part of the magistrate.

The fact that the magistrate lacked a proper ground upon which to disqualify himself, and the fact that the respondents lacked grounds in asking him to do so, does not mean that a prerogative writ will automatically lie. A **[309]** discretion still rests in this Court. There may be some superficial attraction in the argument that this Court should not concern itself in the internal administration of the Magistrates' Court by making orders which would have the effect of compelling one magistrate rather than another to hear a particular case. Indeed it was put on behalf of the third respondent that the applicant in this Court and those responsible for the prosecution in the Magistrates' Court had some ulterior motive in seeking to keep the matter before the same magistrate.

An emphatic reason for making the order is furnished in the recent words of Mason J in *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 where His Honour said:

> "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. 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 553-554; 43 ALJR 150; *R v Watson; Ex parte Armstrong* [1976] HCA 39; (1976) 136 CLR 248 at 262; [1986] FLC 91-738; 66 ALR 239; (1986) 60 ALJR 528; (1986) 10 Fam LR 917; (1986) 10 ALN N184; *Re Lusink; Ex parte Shaw* [1980] FLC 90-884; 32 ALR 47; (1980) 55 ALJR 12 at 14; 6 Fam LR 230). Although it is important that justice 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."

The factor which persuaded me to decline to make an order absolute was one relating to the cost of and delay in the litigation. There has been a delay in the time taken for the hearing of the application for the order absolute in this Court. That delay has meant that by the time of the hearing before me the arrangements for the disposal of business in the Magistrates' Court were, so I was told from the Bar table, such that the resumption of the proceedings before the magistrate could not take place for some substantial although unspecified period of time. Accordingly, I decided that it was in the best interests of all parties not to make the order absolute and to allow the fresh hearing to commence on 24 September 1986 before another magistrate as arranged.

I should add in deference to the submissions put on behalf of counsel for the fourth respondent, that it was submitted that the magistrate had not made a decision that he disqualify himself at all, but had merely given an indication of what he thought the preferable course might be. As I have already indicated, I reject that submission. What the magistrate is recorded **[310]** as having said, in my view, amounts to a decision, and it is a decision that he will take no further part in the proceedings.

Counsel for the respondents in this Court applied for costs of the proceedings in this Court. The grounds of the application were that the proceedings in this Court have failed on discretionary grounds relating to costs and delay and that costs should follow the event. It was submitted that once it became known to counsel for the informant, whenever that was, that the magistrate had commitments which precluded him for a substantial time from resuming the further hearing of the committal proceedings, then the applicant in this Court should have taken some steps to terminate the application in this Court.

The question as to when counsel for the informant learned of the magistrate's commitments, or should have learned of them, or when the respondents learned of those commitments, or should have learned of them, is not the subject of evidence. Counsel for the magistrate was excused at the commencement of the hearing before me and has not been able to assist the Court. The proceedings in this Court were properly commenced and I am not satisfied that they should have been abandoned. In my view the real cause of the need to commence the proceedings in this Court was the conduct of counsel then appearing for the respondents in the Magistrates' Court and I do not think that the present applicant should be responsible for any of the costs incurred by the respondents as a result of that conduct. The appropriate order for costs is that all parties should hear their own costs. For the foregoing reasons I ordered that the order nisi of 29 May 1986 be discharged. I order that each of the parties pay his own costs.

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