

**IN THE INDEPENDENT  
LEGAL SERVICES COMMISSION**

**NO. 001/2010**

**BETWEEN: CHIEF REGISTRAR**

*Applicant*

**A N D: HAROON ALI SHAH**

*Respondent*

**Applicant: Ms V. Lidise & Mr A. Chand**

**Respondent: Ms N Khan**

**Date of Hearing: 15 September 2010**

**Date of Ruling: 15 September 2010**

**EXTEMPORE RULING  
ON APPLICATION TO DISQUALIFY FOR BIAS**

1. This matter came before the Commission today for hearing. Prior to the matter proceeding application was made on behalf of the Respondent that I recuse myself on the basis that the conviction, the substance of the allegation, was a conviction consequent upon a hearing in the Magistrate's Court Lautoka before then Resident Magistrate Ms Lisa Gowing who was and is my wife.
2. The complaint before the Commission is that the Respondent has committed professional misconduct Contrary to section 83(1)(d)(i) of the Legal Practitioners Decree which is particularised as follows:  
  
*"Haroon Ali Shah a legal practitioner, on the 6th of June 2005 was convicted for the criminal offences of assault occasioning actual bodily harm and damaging property at the Lautoka Magistrates Court in the proceedings State v Haroon Ali Shah Criminal Case No. 227 of 2005, which conduct involved a substantial failure to reach a reasonable standard of competence and diligence."*
3. The documents now filed with this Commission show that the matter was heard in the Magistrate's Court Lautoka on the 9<sup>th</sup> of May 2005 and judgment was delivered on the 6<sup>th</sup> of June 2005.
4. In that judgment the Resident Magistrate in the last paragraph found the Respondent guilty of one count of assault occasioning actual body harm and one count of damaging property.

5. On that same day by separate judgment the Respondent was sentenced where a fine of \$1,000 was imposed with respect to the charge of assault occasioning actual bodily harm and a fine of \$500 was imposed with respect to the 2<sup>nd</sup> count.
6. The material then indicates that the matter proceeded by way of appeal to the High Court.
7. That appeal was an appeal as to conviction and sentence and was heard on the 13<sup>th</sup> October 2006 with judgment being delivered on the 20<sup>th</sup> October 2006 by Mr Justice Winter.
8. His lordship concluded that the appeals against conviction and sentence be dismissed.
9. It is acknowledged that before this Commission the fact of the conviction cannot and is not being challenged but it is further acknowledged that before this Commission it is appropriate for the Respondent to cause the Commission to further consider or to consider the circumstances surrounding the commission of the assault.
10. The submission now being made on behalf of the Respondent is that I would be required or perhaps more correctly would be urged to make a finding of fact with respect to the surrounding circumstances that may differ from the findings of fact made by the Resident Magistrate.
11. That is the basis or the fundamental basis of the application for recusal.
12. The test for bias in Fiji is as expressed by the Supreme Court in Fiji in Amina Koya v The State Criminal Appeal No CAV 002 of 1997 where at page 12 the court said:

*"There is some controversy about the formulation of the principle to be applied in cases in which it is alleged that a judge is or might be actuated by bias. In Australia, the test is whether a fair-minded but informed observer might reasonably apprehend or suspect that the judge has prejudged or might prejudice the case. In England, however, the House of Lords, in R v Gough (1993) AC 646, decided that the test to be applied in all cases of apparent bias involving Justices, tribunal members, arbitrators or jurors is whether in all the circumstances of the case there is a real danger or real likelihood, in the sense of possibility, of bias. In a later case, Webb v the Queen [1994] 181 CLR 41, which concerned a juror, the High Court of Australia, despite Gough, decided that it would continue to apply the reasonable apprehension or suspicion of bias test, and held that in the circumstances of the case a fair-minded but informed observer would not have apprehended that the juror or the jury would not have discharged their task impartially."*

13. The judiciary of Fiji in 2004 or there about adopted what is described as Guideline Principles for Judicial Officers. Under the heading "Impartiality" at 2.4 those principles state:

***"A judicial officer should disqualify himself or herself from participating in any proceedings in which he/she is unable to decide the matter impartially or where it would appear to a reasonable informed observer that the judicial officer is unable to decide the matter impartially. Such instances include where;***

***2.4.1 the judicial officer has actual bias for or against the party or any personal knowledge of disputed evidentiary facts in the proceedings;***

***2.4.2 the judicial officer previously served as a lawyer or was a material witness in the matter in controversy;***

***2.4.3 the judicial officer, or a member of his/her family, has a financial or other close personal interest in the outcome of the proceedings.***

***Provided that disqualification of a judicial officer shall not be required if, because of urgent circumstance, failure to act could lead to a serious miscarriage of justice."***

14. The High Court of Australia counsels, judges not to disqualify themselves too readily and in Re JRL Ex parte CJL (1986) 161 CLR 342 at 352 said:

***"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 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."***

15. There is in Australia a code of a type similar to that earlier referred to that exists in Fiji and that is the Australian Institute of Judicial Administration Guide to Judicial conduct.

16. That guide sets forth the following principle:

***"Whether an appearance of bias or a possible conflict of interest is sufficient to disqualify a judge from hearing a case is to be judged by the perception of a reasonable well-informed observer. Disqualification on trivial grounds creates an unnecessary burden on colleagues, parties and their legal advisers."***

17. It has been said that there is an exception to the general principle in the case of necessity and it was held in England as far back as 1430 that recusal is not required if there is no other way the case can be decided.

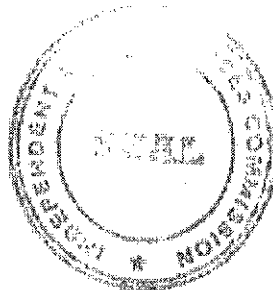
18. That decision being the first reported application of this pragmatic rule related to the Chancellor of Oxford who although a party in a case could preside over it as a judge because there was no way to appoint another jurist to hear the matter.

19. It is therefore in my opinion a relevant although not decisive consideration that this tribunal has only one member.
20. It is, I think, most relevant that it is not the fact of the conviction that is in issue in this application but merely a consideration of the circumstance surrounding the commission of the offence.
21. The circumstances surrounding the commission of the offence have as detailed earlier been considered on appeal by the High Court.
22. In any event I see no reason why I, if convinced to do so by counsel, could not find differently from the Resident Magistrate with respect to the facts surrounding the commission of the offence.
23. It would appear to me in the light of the judgment on sentence of the Magistrate and the decision of the High Court that there was little dispute that the offence was considered to be at the lower end of the scale and that there had been significant provocation.
24. In the circumstance therefore and applying the principles that I have referred to above and for the reasons that I have outlined above I do not think that it is necessary or appropriate for me to recuse myself and accordingly the application is dismissed.

#### ORDERS

1. Application dismissed.

  
**JOHN CONNORS**  
**COMMISSIONER**



**15 SEPTEMBER 2010**