PAUL MAENU'U V GABRIEL LAMANI

High Court of Solomon Islands

(Palmer J.)

Land Appeal Case No. 2 of 1992

Hearing: 3 December 1992

Judgment: 22 December 1992

A. Nori for Appellant

R. Teutao for the Respondent

PALMER J: This is an appeal by Paul Maenu'u (Appellant) against the decision of the customary Land Appeal Court of Malaita inrespect of Su'uwalu or Lolo Land delivered on the 12th November 1990 which decision went in favour of the Gabriel Lamani (the Respondent).

The relief sought is for an Order to quash the decision of the CLAC (M) and the case to be remitted to the CLAC (M) for a re-hearing excluding Justice George Wate and Daka.

The grounds relied on are as follows:

1. The Court was biased in its decision in that

   (a) Justice Daka was married to the true sister of one Jimmy Ratu who was a Principal witness for the Respondent during the survey of the land in dispute;

   (b) The name of Justice Daka was not included in the list of justices selected to hear the case and which was sent to the Appellant herein by notice dated 4th September, 1990 and that the said Appellant could not have objected in writing.

2. The Court acted unfairly and unreasonably in that during it's survey of the Land herein it only surveyed the tambu and sacred sites of the Respondent and not the Appellant.

3. During the survey referred to herein witness Jimmy Ratu was seen whispering to Justice Daka.

There was also a ground (1)(c), but this was abandoned before hearing.

This appeal raises an interesting point of Law as to the general principles on bias.

The allegation of bias was raised it seems as a result of what transpired during the survey that the CLAC (M) did on the tambu sites and the boundaries of land of the parties.

The facts as to the exercise of the rights of the parties to object to any member of the CLAC (M) are contained in the CLAC (M) record of proceedings.

At page 1 of the transcript it read:

"President	*Joseph Kaia*
Members	*Michael Daka*
	Mathias Sanau
	Daniel Baetalua
Clerk	*R.D. Chetwynd*

President explains procedures of court and introduces members - invites objections

Appellant :	*No Objections*
Respondent :	*Object to George Wate told in writing.*
President :	*Objection is accepted R.D. Chetwynd now member of CLAC.*
Appellant :	*No objections*
Respondent :	*No objections. "*

I find as clear fact that at the beginning of the proceedings in the CLAC (M) the parties were given an opportunity to object to any members of the CLAC.

I am not convinced that the Appellant did not and was not given the opportunity to object to Justice Daka before commencement of the CLAC proceedings.

It is a well established practice of the Customary Land Appeal Courts to give opportunity, before commencement of the hearing to the parties, to raise any objections and for such objections to be noted and dealt with by the Customary Land Appeal Court and to have the objection recorded.

There is no such record contained in the transcript that the Appellant raised any objections to Justice Daka. There is in the records an objection to George Wate but it was noted as having been made in writing.

The point raised about the notices sent out by letter prior to the Customary Land Appeal Court hearings which contained a list of names of the sitting justices and inviting objections is a practice of convenience. It is done to assist the court in selecting justices that both parties will accept, and that the CLAC hearing will proceed on the day scheduled. It costs money to bring the justices together and to maintain them for the week of hearings and so to avoid wasting time and money the clerks to the Civil Land Appeal Courts usually send out such notices. Sometimes what the courts do is to have 2 or 3 justices on standby during the scheduled week of hearings. It is for the same reasons that the residing Magistrates, are always available to be called upon as Customary Land Appeal Court justices.

In this particular case, the Principal Magistrate of Malaita was included as a member of the Customary Land Appeal Court.

The facts as I find them therefore are very clear. The appellant was given an opportunity to object to the inclusion of Justice Daka as a member of the Customary Land Appellant Court (M) at the beginning of the hearing, but he chose not to.

Accordingly, ground 1 (b) must fail.

Under ground 1(a) the allegation of bias raised occurred when the court was on a survey of tambu sites and boundaries.

The appellant's argument is that the actions of late Jimmy Ratu at the Kauri/Lolo tambu site and subsequent actions at the beach showed that there was bias as Jimmy Ratu and Justice Daka were closely linked through marriage and that Jimmy Ratu was a supporter of the Respondent (this is implicit from the stated allegation of the appellant, as he described the actions of Jimmy Ratu as amounting to being a principal witness of the Respondent.)

It is not disputed that Daka is married to late Jimmy Ratu's sister. It is not disputed that there was a court case in 1978-1980 between late Jimmy Ratu's son and the Appellant in this case, and that the principal witness for Jimmy Ratu's son (Wicki) was late Lamani Ramo. It is not disputed too that there has been intermarriage between the Respondents family and close relatives of Jimmy Ratu.

The link between Justice Daka and the Respondent is not a direct one. They are not related to each other. The link which the Appellant seeks to put forward as sufficient to associate Justice Daka with the Respondent is through the knot of inter marriage.

I am satisfied he has identified and established the link of close association sufficiently.

It needs to be pointed out that the customary ties and obligations established through the extended family system, through intermarriages and events (such as Land disputes) that may have occurred even 10-20 years back should not be lightly brushed aside.

Within the traditions and customary norms and practices of people in the rural areas, what may be considered to be insignificant or remote through time or distance or relationship by a "**westernised mind**" may not necessarily be so by a "**traditional custom mind**".

The courts in my view need to be aware of this customary setting when applying legal principles.

The court case which was referred to by the Appellant in this appeal which occurred sometime in the late 1970's or early eighties between the late Jimmy Ratu's son (Wicki) and this Appellant and the fact that the late Lamani Ramo was a key witness for that other party does have some significance. On its own however it is not sufficient to establish a close tie or relationship with justice Daka.

However, when the association is linked through the marriage of Justice Daka to the sister of late Jimmy Ratu and that the late Jimmy Ratu was seen to be in collusion with the Respondent and that there had also been intermarriages between their families, I am satisfied as I have stated that their close association and togetherness has been established.

The next important point to consider then is that when the Appellant did not object to Justice Daka sitting as a member of the Land Court (M), had he waived his right to object and acquiesced in having a disqualified adjudicator to sit?

The case authority on this issue is *The Wakefield Local Board of Health v The West Riding and Grimsby Railway Company(1865-1866) I.L.R.Q.B.84.* In that case, it was raised that a justice of the peace had an interest in the matter before him and that as a result he was disqualified. The objection however, was subsequently withdrawn and the justice proceeded to hear the application. On appeal the party objecting argued that by virtue of the justices interest he had no jurisdiction to hear the case.

At page 86 Cockburn C.J. Stated:

> *"I am of the opinion that, although Colonel Smyth may have been interested so as to incapacitate him from acting, yet, as the parties were aware of the objection and waived it, he had jurisdiction to make the order; and nothing is clearer than that having thus waived the objections of interest, and taking the chance of a decision in their favour, the parties cannot afterwards raise it."*

The above statement was quoted with approbation and applied in the case of ***Kevisi v Talasasa and Another*** *[1983] SILR 87.*

The facts in that case briefly involved an allegation of bribery against Kevisi and the Local Court President. It was alleged that Kevisi had made an agreement with the Local Court President to cut copra in his land. At the hearing at the CLAC, Talasasa and Zinihite (the Respondents) agreed not to ask for a retrial even if the bribery point was upheld and asked for the CLAC to dispose of the **"whole appeal"**. The CLAC decided in favour of the Respondents both substantively on the appeal and in relation to the bribery point. The appeal was allowed and the case not remitted. The Appellant (Kevisi) then appealed to the High Court on the ground that the CLAC should have remitted the case to a differently constituted Local Court for a re-hearing.

I quote the relevant statement of his Lordship Daly C.J at page 93, last paragraph:

> *"In my judgment, this court should apply the words of Cockburn C.J. in the present situation when dealing with an appeal against an earlier decision. Appeals are necessarily under the control of the parties to the extent that it is a party who raises specific points upon which he seeks to impugn the earlier decision. If a party waives an appeal point which he has brought to the court that might otherwise be decided in his favour, a court must be entitled to proceed on that basis. Despite suggestions to the contrary, it is clear to my mind that the Respondents waived point X in the CLAC and that, had they sought to raise it in this court, they should have been prevented from so doing. To adapt the words of Cockburn C.J. They took the chance of a decision in their favour by waiving the question of partiality and could not raise it subsequently."*

Cockburn J.s statement was also quoted with approval and applied in the case of ***Taurii v Kerehote*** *1985/1986 80* by Wood C.J. His Lordship also cited with approval the statements of Daly CJ in ***Kevisi's*** case.

In ***Tauri'i's*** case the Appellant appealed from a decision of the Makira/Ulawa Civil Land Appeal Court on the ground of bias that one of the justices sitting as a Court member had an interest in the case as his mother and uncle were parties to a previous case over the same land in 1960 which had been decided in favour of the Appellant. At the CLAC hearing the Appellant did not object to that justice when invited to do so.

At page 83, Wood C.J. stated:

> *"I must however in fairness to the Appellant say that there is no suggestion here that he deliberately refrained from making his objection to the CLAC. Far from it. But he did waive his right to object when he remained silent when he was asked if he had any objections to any member of the court. Having done so he cannot now come to this court and say that the court was not impartial. I would also add that as there were five justices and a Clerk sitting the partiality of one of them is unlikely to have affected the result."*

I cannot say that I would agree with the last sentence of the above statement of the learned Chief Justice, however in its context i.e. on the facts as presented to the court, it was an added feature to what was a decision that had already been made based on the same grounds stated by Cockburn C.J.

The facts of the above cases quoted are important to note when considering this Appellants appeal and the distinction on the facts of this case.

In **Halsbury's Laws of England** 4th Edition para 91, the learned author stated:

> *"There is no waiver or acquiescence unless the party entitled to object to an adjudicator's participation was made fully aware of the nature of the disqualification and had an adequate opportunity of objecting. Once these conditions are present, a party will be deemed to have acquiesced in the participation of a disqualified adjudicator unless he has objected at the earliest practicable opportunity."*

The above statement is relevant in the facts of this case.

Professor de Smith in his book **Judicial Review of Administrative Action** (3rd Edition) at p.242 quoted in ***Tauri'i's*** case). stated:

> *"There is also no doubt that a party otherwise entitled to impugn a decision for breach of the rule may forfeit his right to do so by his own conduct in approbating the proceedings...A party may waive his objections to adjudication by persons subject to these disqualifications. Objection is generally deemed to have been waived if the party or his legal representative knew of the disqualification and acquiesced in the proceedings by failing to take objection at the earliest practicable opportunity."*

The two key elements in the waiver and acquiescence argument is that there must be -

(i) knowledge of the disqualification and

(ii) a failure to object at the earliest practicable opportunity.

The distinction in the facts in this case that sets it apart from the cases that have been quoted and the principle of waiver and acquiescence are that (i) the knowledge of the disqualification only became relevant during the hearing itself (specifically during the survey). At the commencement of the proceedings there was no need or no reason for the Appellant to raise an objection to Justice Daka.

It was not and could not have been fore-seen by the Appellant that the late Jimmy Ratu would make his presence more than noticeable during the survey and be allowed to make explanations to the court. The Appellant described late Jimmy Ratu as the principal witness of

the Respondent at the tambu site at Kauri or Lolo. It is not disputed that late Jimmy Ratu was a devil priest and that fact would seem to give some added significance to anything that he may say in-relation to the tambu site that the court visited. In his evidence under Oath before this court, Justice Daka described the late Jimmy Ratu as the last devil priest for Kauri and that he used to cook or offer pig sacrifices at that place. He further stated: "We did not take note of him."

There is then an incident at the beach after the survey in which the Appellant stated that he heard late Jimmy Ratu say to Justice Daka: "**You must give it to our children.**" The implication is that he was referring to the land.

Justice Daka in his evidence in rebuttal stated that Late Jimmy Ratu did approach him at the beach, but asked for tobacco. He did not have any and so gave him $2.00 instead.

I can accept that it is possible that the late Jimmy Ratu's actions were indeed innocently done. However, from his status and the way he had conducted himself during the survey, it is clear that his presence and what he offered as explanations to the court at the tambu site were quite significant.

The Respondent in his evidence under Oath stated (referring to Jimmy Ratu):

"He was an independent witness - to show justices the truth. My witness Kabe Deve requested him to come to explain truth about tabu site."

Late Jimmy Ratu had no right to make any explanations to the court unless he had been requested by the court or that both parties had been made aware of his role and had agreed. The Appellant in actual fact disagreed with his role and claim as the last devil priest at Kauri. Late Jimmy Ratu therefore should never have been allowed to make any explanations to the court, or be at liberty to do so.

The distinction in this case is that the taint in the court proceedings and the allegation of bias did not arise until later. It was at that point of time that it seems to me that the Appellant then became conscious or aware of the fact that there was a 'real likelihood of bias' occurring. He then should have raised an objection.

Did he object? The answer is no. Did he know he could object? I do not think so.

Can this court reasonably say that he waived any right to an objection at that point of time by remaining silent?

It needs to be pointed out that the Appellant was not represented. Would he have known that he had a right to make an objection at such a point of time? I do not think so. Did he have a right to make an objection? Yes.

I do not think the requirements of a fair trial can limit objections to be raised only at the beginning of the trial or hearing.

The important distinction to point out in the facts of this case is that had the late Jimmy Ratu not been involved in the proceedings in the manner described, then I would not have found that there was 'a real likelihood of bias', or that there was reasonable grounds for

suspecting Justice Daka would be biased. It was the actions of late Jimmy Ratu at the tabu site and at the beach that provided the grounds for the suspicion or the circumstances under which there was a real likelihood of bias.

There are 2 recognised tests of bias that have been propounded.

The first test is whether there is 'a **real likelihood of bias.**' In the case of ***Metropolitan Properties Co.(F.G.C.)Ltd v Lannon & Others*** *[1968] 3 AII E.R. 304 at Page 310, para.A* Lord Denning stated -

> *"....in considering whether there was **a real likelihood of bias,** the court does not look at the mind of the justice himself or at the mind of the Chairman of the tribunal, or whoever it may be who sits in a judicial capacity. It does not look to see if there was a real likelihood that he would, or did, in fact favour one side at the expense of the other. The **court looks at the impression which would be given to other people.** Even if he was as impartial as could be nevertheless, **if right-minded persons would think that, in the circumstances,** there was a real likelihood of bias on his part, then he should not sit. And if he does sit, his decision cannot stand. Nevertheless, these must appear to be a real likelihood of bias. Surmise or conjecture is not enough. There must be **circumstances** from **which a reasonable man would** think **it likely or probable** that the justice or chairman, as the case may be, would, or did favour one side unfairly at the expense of the other. The court will not enquire whether he did, in fact, favour one side unfairly. Suffice it that reasonable people might think he did. The reason is plain enough. Justice must be rooted in confidence; and confidence is destroyed when right-minded people go away thinking: **'The judge was biased'.**"*

The test recognised by Lord Denning is based on 'a real likelihood of bias.' Its application is in turn based on ***what right-minded or reasonable people would think in the circumstances.***

An off-shoot of the '**real likelihood of bias**', test is added by Devlin L.J. in the case of ***R v barnsley County Borough Licensing Justice*** *[1960] 2 AII E.R. at pages 714, 715*, he states:

> *"We [the court] have to satisfy ourselves that there was a real likelihood of bias, and not merely satisfy ourselves that that was the sort of impression that might reasonably get abroad. **Real likelihood depends on the impression which the court gets from the circumstances** in which the justices were sitting. Do they give rise to a real likelihood that the justices might be biased?"*

(Parenthesis and underlining mine)

Devlins L.J. view is that the real likelihood test should be weighed by the court.

The second recognised test is that based on a 'reasonable suspicion by right thinking people on the circumstances that there may have been bias.

In ***Metropolitan Properties, Ltd v Lannon*** (supra) Edmund Davis. L.J stated:

> *"Nor, in my judgment, will the public interest be served if, in the light of all the circumstances as they finally emerge it appears to right thinking people that there are solid grounds for suspecting that a member of the tribunal responsible for the decision may (however unconsciously) have been biased."*

At page 314, para.E he also states:

"But I cannot bring myself to hold that a decision may properly be allowed to stand even although there is reasonable suspicion of bias on the part of one or more members of the adjudicating body."

Professor de Smith in **Judicial Review of Administrative Action**, 1959, p.150 states:

"In so far as the 'real likelihood' and 'reasonable suspicion' tests are inconsistent with each other, it is submitted that the former is to be preferred..."

In **Halsbury's Laws of England** 4th Edition para.89,the learned author recognises the '**reasonable suspicion**' test too and says after stating the '**real likelihood**' test:

"Alternatively, it may be sufficient to establish that a reasonable person acquainted with the outward appearance of the situation would have reasonable grounds for suspecting, bias."

In applying the above tests to the facts of this present case, I am convinced that there is a 'real likelihood of bias'. Having found that there is a sufficiently strong link from Justice Daka through to late Jimmy Ratu through to the Respondent by intermarriage and previous court dealings, I am satisfied that the presence of late Jimmy Ratu at the Kauri/Lolo tabu site and the way he acted and portrayed and presented himself to the court clearly amounted to an attempt to influence and affect the mind of the court, and especially through Justice Daka, his brother in-law.

I also find as a fact that his (Jimmy Ratu) actions at the beach demonstrated a familiarity which to right-minded people would give the impression that there was a real likelihood of bias. Such actions of liberty in the particular circumstances of this case can be quite significant to the custom traditional minded reasonable persons within the locality.

Applying the second test, the action of the late Jimmy Ratu together with his connections via Justice Daka and the Respondent, I am satisfied right-thinking people would have a reasonable cause to suspect that there was bias.

I have gone to length to explain the customary and traditional rural setting within which the above legal principals are to be applied. Bearing these in mind, I am satisfied a reasonable man would find that there is a real possibility of bias occurring.

A reasonable man would also find in my view that there are solid grounds, for suspecting that a member of the Customary Land Appeal Court (M) may (however unconsciously) have been biased. (to adapt the words used by Edmund Davies L J).

Justice should not only be done but be manifestly seen to be done. (**R v Sussex Justices, Ex p. McCartny [1923] A11 E.R. Reprint 233 at p.234 per Lord Hewart C.J.**). Justice Daka may have indeed ignored the actions of late Jimmy Ratu and be not influenced and have acted impartially, but at the end of the day, I do not think right-thinking people can say that justice had been manifestly seen to be done.

The decision of the CLAC (m) ought to be quashed and remitted to a differently constituted CLAC (M) with Justice Daka and George Wate excluded.

On the question of survey as raised under ground 2 of the appeal, this is a matter solely within the discretion of the CLAC (M). (See *Lilo v Panda, Lilo v Ghotokera (1980/1981) SILR 155 at p.170*). If it sees the need to carry out a survey to assist it in its decision making process then it may do so. If the CLAC decides to see certain tabu sites or boundaries only, then that is a matter of discretion, but there must be a proper explanation given for that.

In this particular case, it had been explained that the places visited were in dispute and it was therefore important to see them. That would seem to have been a sufficient reason for the visits.

The duty of the court to act fairly and reasonably in the interest of justice must always be borne in mind. Normally, when surveys are done, all the relevant boundaries and tabu sites etc. of both parties are visited. But sometimes that is not necessary, especially with the Customary Land Appeal Court's as the survey if there is any to be done would normally have been made by the Local Courts.

On appeal to the CLAC there may be certain sites only which the CLAC may wish to visit to assist in its decision making. That is perfectly valid provided there is an explanation given and the parties are given the opportunity to raise any objections or matters before the survey is done. As a matter of practice, before any surveys are done the parties should be given the opportunity to raise any objections or matters about the survey, and for the court to dispose of them before carrying out the survey.

In this particular case, it had been explained that the various tabu sites were visited because those were the sites that were disputed by the parties. That would seem to be a justifiable explanation, although the court should have given the opportunity to the parties to raise any objections.

I am not satisfied that the court acted unfairly or unreasonably when it carried out the survey.

Ground 3 has already been dealt with and I need not make any further comments. The appeal is allowed and I order as follows:

(i) The decision of the CLAC (M) dated 12 November 1990 is hereby quashed.

(ii) This case is remitted to the CLAC (M) to be re-heard but excluding Justice Daka and Justice Wate.

(iii) Costs of this appeal to be borne by the parties. However, costs of the Appellant in the CLAC (M) are to be refunded within 30 days.

(A. R. Palmer)
JUDGE