DR. KARUNARATNE
v.
ATTORNEY-GENERAL AND ANOTHER

COURT OF APPEAL
D.P.S. GUNASEKERA, J.,
HECTOR YAPA, J.,
C.A. 495/95
H.C. COLOMBO 3249/87
JULY 19, 1995.

High Court Trial – Application to Transfer case to another High Court – Judge Hostile to Counsel – Fair and Impartial Trial – Bias – Real likelihood of Bias – Reasonable suspicion of Bias.

An application was made by the Counsel for the accused Petitioner to the High Court, to transfer the Trial to be heard before another High Court Judge. The basis for this application was that the Counsel had filed an affidavit before the Court of Appeal in an application made by one X for the transfer of his case; from the same High Court and therefore the Petitioner had a reasonable apprehension that his case would be prejudiced, if the Trial is continued before the same High Court Judge. This application was refused by the High Court Judge.

It was urged, that a fair and impartial trial cannot be had before the same High Court Judge who is hearing the Trial and further it is expedient – in the interest of justice.

Held:

(1) The two tests for disqualifying bias are –

(a) Test of Real likelihood of bias;
(b) Test of Reasonable suspicion.

(2) One cannot take the view that the Learned Trial Judge could be said to be biased against the Petitioner solely by the fact of the Counsel having filed an affidavit in a case where an application for Transfer was made by some other accused.

"A judicial officer is one with a trained legal mind and that it is a serious matter to allege bias against a Judicial Officer and that this Court would not lightly entertain such a allegation.

In the present case Court is of the view that there was no real likelihood of Bias.

(3) In regard to the application of the Test of reasonable suspicion it must be shown that the suspicion is based on resaonable grounds which would appeal to the reasonable right thinking man.

It can never be based on conjecture or on flimsy insubstantial grounds. There must be material which shows a tendency to favour one side unfairly at the expense of the other.

Cases referred to:

1. *Perera v. Hasheed* – Vol. I Srikantha Law Reports page 133 at 145.
2. *R v. Rand* – 1866 – L.R. 1 QB, P. 230
3. *R v. Camborne Justices ex Parte Pearce* – 1954 2 AER 850

APPLICATION to Transfer.

R. K. W. Gunasekera with *Ms. Gowri Moragoda* for Petitioner.
Anura Meddegoda, S.S.C. for 1st Respondent.
F. C. Perera with *Ms. Gowri Moragoda* for 2nd Respondent

July 26, 1995.
GUNASEKERA J.,

The Petitioner who is the first accused in Colombo High Court case No. 3249/87 was indicted by the Attorney General with having committed three offences of forgery punishable under section 456 of the Penal Code and with having conspired with the 2nd Respondent who is the 2nd accused in the said case to commit forgery punishable under section 113(A) read with sections 102 and 456 of the Penal Code. The date of offence was 10th December 1980.

The trial commenced in 1988 before the then High Court Judge of Colombo and the Petitioner was represented by Mr. R. I. Obeysekera, P.C. with the elevation of the trial Judge to the Appellate court the trial was continued before his successor and on his retirement, the trial was continued before the learned High Court Judge in Court No. 6. Learned President's Counsel who originally appeared for the petitioner ceased to appear for him after 18-11-1993 and thereafter the petitioner was represented by Mr. U.D.M. Abeysekera, Attorney-at-Law. According to the affidavit of Mr. Abeysekera, (P6) filed along with the petition he had appeared for the petitioner on 27 trial dates commencing from 11-01-1994.

When further trial was taken up on 25-05-1995 which was the 55th trial date an application was made by him to the learned High Court Judge to transfer the trial to be heard before another High Court Judge. The basis for the application of learned counsel for the petitioner was that he had filed an affidavit (P2) before the Court of Appeal in an application made by Rev. Kananke Dhammadinna the accused in High Court Colombo case No. 5930/93 for the transfer of his case from the same High Court and therefore that the petitioner had a reasonable apprehension that his case would be prejudiced if the trial was continued before the learned High Court Judge in court No. 6.

After submissions were made by learned counsel for the petitioner and the learned Senior State Counsel who appeared for the Attorney General learned High Court Judge refused the application for the transfer by his order marked 'X' dated 25-05-1995. The reasons given by the learned High Court Judge for refusing to transfer the case was that he had no power to transfer a case that was being tried before him and being the 55th date of trial in respect of offences which are alleged to have been committed nearly 15 years ago that there were no reasonable grounds adduced on behalf of the petitioner to infer that an affidavit that had been filed by the learned counsel for the petitioner in another case had any bearing on the decision of the petitioner's case.

At the hearing before us it was submitted by learned counsel for the petitioner that according to the petitioner that by reason of Mr. Abeysekera filing the affidavit P2 in the Rev. Dhammadinna case it became apparent to the petitioner that the learned trial Judge became very hostile towards Mr. Abeysekera during the latter stages of the case and that the petitioner reasonably apprehends that a fair and impartial trial cannot be had before him as there is a real likelihood of bias on the part of the learned trial Judge. It was further contended by the learned counsel for the petitioner that according to the petitioner, the Judge's gestures, the tone of his voice and orders made by him refusing applications made by his counsel and the Judge's conduct in permitting interruptions during his counsel's cross examination of witnesses were in marked contrast to the treatment meted out to other counsel appearing in the same court.

Learned counsel for the petitioner urged two grounds in support of his application for the transfer of the petitioner's case from court no. 6 to another High Court.

They are :

(a) that a fair an impartial trial cannot be had before the learned trial Judge who is hearing the trial in court No. 6, and

(b) that it is so expedient on any other ground.

The main contention of learned counsel for the petitioner is that in view of the affidavit filed by his counsel in another case where allegations of bias were made against the trial Judge that the petitioner reasonably apprehends that he would be deprived of a fair trial. The question for determination before us is as to whether one could take the view that the learned trial Judge could be said to be biased against the petitioner solely by the fact of his counsel having filed an affidavit in a case where an application for transfer was made by some other accused . In *Perera v. Hasheed* [1] *G. P. S. De Silva, J.* (as he then was) made the observation that it must be remembered that a judicial officer is one with a trained legal mind and that it is a serious matter to allege bias against a Judicial Officer and that this court would not lightly entertain such an allegation. In several authorities which have been considered in the case of *Perera v. Hasheed* (*supra*) two tests for disqualifying bias have been formulated:

(a) The test of real likelihood of bias, and

(b) The test of reasonable suspicion of bias.

In the case of *R v. Rand* [2] *Blackburn, J.* said "wherever there is a real likelihood that the Judge would, from hindered or any other cause have a bias in favour of the parties it would be very wrong in him to act...". This dictum of Blackburn, J. was applied in *R v. Camborne Justices ex parte Pearce* [3] and ruled in favour of the real 'likelihood' test. The possible difference between the two tests arose from the facts in the case. An information was laid against the applicant under the Food and Drugs Act by an officer of the Cornwell County Council. At the trial of the applicant Mr. Thomas who had been elected a member of the County Council acted as clerk to the Justices. After the Justices had retired to consider their verdict, the

Chairman sent for Mr. Thomas to advice them on a point of law. Mr. Thomas adviced the Justices on the point of law but the facts of the case were not discussed at all with him. Having given his advise he returned to the Court. An order for certiorari was sought on the basis that there was a reasonable suspicion of bias because Mr. Thomas was at the time of the trial, a member of the County Council on whose behalf the information was laid against the applicant. It was argued that there was a suspicion of bias but the court rejected that test and stated thus:

> "In the judgment of this court, the right test is that prescribed by Blackburn, J. in R v. Rand, namely that to disqualify a person from acting in a judicial or quasi judicial capacity on the ground of interest (other than pecuniary or proprietory) in the subject matter of the proceeding, a real likelihood of bias must be shown... The frequency with which allegations of bias have come before the courts in recent time; seems to indicate that the reminder of Lord Hewart, C. J. in R v. Sussex JJ *ex parte* Mc. Carthy, that it is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done is being urged as a warrant for quashing convictions or invalidating orders on quite unsubstantial grounds and, indeed, in some cases, on the flimsiest pretexts of bias. While endorsing and fully maintaining the integrity of the principle reasserted by Lord Hewart, C.J., this court feels that the continued citation of it in cases to which it is not applicable may lead to the erroneous impression that it is more important that justice should appear to be done than that it should in fact be done. In the present case, this court is of opinion that there was no real likelihood of bias and it was for this reason that the court dismissed the application...".

In regard to the application of the test of reasonable suspicion of bias it must be shown that the suspicion is based on reasonable, grounds which would appeal to the reasonable right thinking man. It can never be based on conjeture or on flimsy, in substantial grounds. There must be material which shows a tendency to favour one side unfairly at the expense of the orther. It was submitted by learned counsel for the petitioner that the learned trial Judge has made certain orders during the course of the proceedings permitting the prosecuting counsel to call certain witnesses who were listed on the indictment after having overruled the objection raised by learned

counsel for the petitioner and also permitted the prosecuting counsel to produce certain documents such as a photocopy of a bed-head ticket on an undertaking given by the prosecuting counsel to produce the original thereof at a later stage of the trial. The orders made by the trial Judge which were adverse to the petitioner can in no way, in our opinion be considered to have been made as the Judge was biased against the petitioner. We have carefully considered the documents P5D (a), (b), P5G(a), G(b), P5H, P5I, P5K, P5L, and P7 which are relied upon by the petitioner to substantiate his claim that the trial Judge was biased against him, but are unable to agree with this contention.

Having considered the submissions of learned counsel for the petitioner, and the material placed before us we are of the view that the petitioner has failed to establish both the test of real likelihood of bias and the test of reasonable suspicion of bias as against the learned trial Judge. Therefore, we are of the view that the first ground urged that a fair and impartial trial cannot be had before the learned trial Judge is not tenable.

In regard to the second ground urged, namely, that it is expedient on any other ground it has been held in *Perera v. Hasheed* (*supra*) that the expression "expedient" in the context means advisable in the interest of justice. Learned Senior State Counsel who appeared before us at the hearing of this application, upon notice served by the petitioner, submitted that he has reached the tail end of the prosecution case and that he has to call the Notary and a couple of other witnesses and that the prosecution intends closing it's case in about two days of hearing. It was submitted by the Senior State Counsel appearing for the Attorney General that the application of the petitioner is an attempt to deliberately protract the trial which has gone on for a period of over seven years and that the petitioner has not made out a case for a transfer of the trial on either of the grounds urged on behalf of the petitioner. We are inclined to agree with the contention of Learned Senior State Counsel. Accordingly, we refuse the application of the petitioner and dismiss the application.

HECTOR YAPA, J. – I agree.

Application dismissed.