Case Note: Bureieta Kaitu v Republic of Kiribati

Court of Appeal of Kiribati, Criminal Jurisdiction
21st March 1997

This was an appeal from a decision of the High Court dismissing an appeal from a conviction by magistrates on a charge of criminal trespass.

There were two issues raised on the appeal to the Court of Appeal. The first was whether certain statements were admissible in the proceedings. Two statements were produced by the prosecution in the proceedings, one by the complainant, the other by the appellant. The magistrates themselves apparently suggested the somewhat intriguing course that both statements should be read out by the prosecutor before the court. As the Court of Appeal rightly noted the statement of the appellant might have been admissible under certain circumstances if the required factors were proved. But it would be difficult to justify the admission of a statement by the complainant according to normal concepts of evidence.

The second issue was whether there was bias on the part of the magistrate requiring him to disqualify himself from the hearing of the proceedings. The facts appeared to be that the son of the presiding magistrate was married to a sister of the complainant. The appellant had complained to the clerk of the court before the commencement of the proceedings, saying that he was not happy to have the magistrate hear the case against him. The clerk merely advised him to get a lawyer. The appellant was unrepresented at the proceedings.

The rule against bias is an established rule of natural justice: the so called *nemo debet in sui propria causa judex esse* (i.e. no-one should be a judge in their own case). The rule, as expanded, covers both actual bias and apparent bias on the basis that 'justice must not only be done it must be seen to be done'. There have been various justifications for the rule. The dominant one is perhaps that it reinforces the legitimacy of the courts themselves as institutions for resolving disputes in society. Legal institutions seek to retain this legitimacy on the assumption that their decisions will be accepted. This requires public confidence in an impartial legal institution. An institution which seeks legitimacy, for example, by reliance on the enforcement power of the State alone, rests on very unstable ground of political authority. Hence the rule has come to be seen as an essential means whereby the courts in a democratic society encourage confidence in the role of the courts in such a society.

This, of course, was a case involving apparent bias, on which there have been two dominant approaches. The one approach, favoured by English courts was that of showing a real likelihood of bias. The other, which is favoured in Australia (see Webb v R (1994) 181 CLR 41) is whether the judge could reasonably be suspected of being biased. However both tests are sometimes applied together; see R v Watson: ex parte Armstrong (1967) 136 CLR 248.

In the present case the court found no difficulty in determining which approach should be applied. By either test there was apparent bias based on the relationship mentioned above. Thus the appeal was upheld. During the course of the judgement the Court said:

"It is established that a Judge or a magistrate should not sit to hear a case if in all the circumstances the parties or the public might reasonably suspect that he was not prejudiced or impartial. If fair minded people might reasonably apprehend or suspect that the Judge or magistrate might not decide the case impartially they cannot have confidence in the decision and confidence is essential to justice. The Presiding Magistrate must have known of the fact that his son was married to the complainant's sister, and that by custom the relationship that thus existed might have been exercised to carry with it obligations to act in the complainant's interest. It was his duty to disclose to the parties the existence of the relationship, and to decline to sit unless they waived any objection to his doing so." (pp. 2-3)

The reference, above, to the element of knowledge of the magistrate, is perhaps unfortunate. The test is not based on what the judge or magistrate knew or might have known. It is based on whether bias might be apprehended by a reasonable person in the circumstances; such as the existence of the relationship in the present case. It is interesting however, that the court took cognizance of the obligations or potential

obligations of the magistrate to the complainant under custom. There is no doubt that this might be a proper consideration when applying the rule in the context of its political and social significance for the role of the courts.

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