SAINT VINCENT

IN THE COURT OF APPEAL

CIVIL APPEAL NO. 5 of 1988

BETWEEN:

EMERY ROBERTSON - Defendant/Appellant

and

OLIN DENNIE - Plaintiff/Respondent

Before: The Honourable Sir Lascelles Robotham - Chief Justice
The Honourable Mr. Justice Bishop
The Honourable Mr. Justice Moe

Appearances: O.R. Sylvester, Q.C., and Mark Williams for the Appellant
H. Matadial for the Respondent

1988: Dece. 12,
1989: Mar. 13.

JUDGMENT

SIR LASCELLES ROBOTHAM, C.J.

The Background

The appellant and the respondent herein are both Barristers and Solicitors admitted to practice in the State of St. Vincent and the Grenadines.

On 16th September, 1987, the respondent Olin Dennie filed a Writ in the Supreme Court claiming the sum of $15,000 being monies paid to the appellant's brother on 22nd August, 1985 at the request of the appellant. The pleading alleged that it was agreed that the appellant would repay to the respondent the said sum of $15,000 within 2 months, and if it was not repaid within that time, interest would be paid thereon at the rate of 8% ~~repayment.~~

The money was not repaid as agreed and by letters dated 20th and 27th August, 1987, the respondent's solicitor made demands for repayment. These letters went unanswered, hence the filing of the Writ.

The defence was a denial that the appellant ever requested the respondent to pay to his brother Maurice Robertson the sum of $15,000 or any part thereof, or that it was paid either on the appellant's behalf, or at his request in order to settle his brother's indebtedness.

The appellant admitted that he had received the two letters of demand, but did not respond to them as he had not borrowed any money from the respondent.

/The action.....

The action was set down for trial on Monday 18th April, 1988. On Friday, 15th April, 1988, Mr. Sylvester, Counsel for the appellant Robertson went into the Chambers of Satrohan Singh J and requested that he disqualify himself from hearing the action in view of previous incidents involving the Judge and his client Robertson.

What transpired in Chambers will be separately dealt with at a later stage, but for the moment it is enough to say that Singh J told Mr. Sylvester that he should make his application in open Court on the Monday.

The application to disqualify was duly made in Court on Monday, 18th April, and the Judge's note is as follows:-

> "Sylvester: Now requests that Court decline to hear the matter. Refers to application filed. The application does not allege bias on part of the Court, or does not allege that Court is biased, it only alleges appearance of bias. Refused."

It should be mentioned here that after leaving the Judge's Chambers on Friday, 15th April, an affidavit was filed in the Registry of the Supreme Court on Saturday 16th April. This was sworn to by the appellant, and it gave particulars of the allegations in support of bias. More will be said on this also at a later stage.

Upon the refusal of the Judge to disqualify himself Mr. Sylvester announced in Court that he would withdraw and take no further part in the proceedings, nor would his client, and that he would take the matter "higher up". Mr. Sylvester, a Queen's Counsel, and his client, departed leaving his junior Mark Williams as an observer. Mr. Williams took no part in the trial which followed.

The plaintiff gave evidence and called his witnesses whereupon judgment was duly entered in his favour in the sum of $15,000 with interest at 8% from 22nd October 1985 until payment with costs to be taxed if not agreed.

It is this decision of Singh J that is now the subject of the appeal.

The Grounds of Appeal

These are: (1) The learned Judge erred in law and or fact in not declining or disqualifying himself from hearing the matter against the Defendant/ Appellant having regard to all the circumstances surrounding the Defendant/Appellant and the Judge and notwithstanding the requirements of the due administration of justice.

(2) Alternatively having regard to all the existing circumstances between the Defendant/Appellant and the learned Judge public policy require that

/he the Judge...

> he the Judge should not sit in judgment in the instant matter as he had placed himself in such a position that he might be suspected of being biased or give rise to a reasonable apprehension of bias thereby casting doubt about the purity of the administration of justice.
>
> (3) The learned Judge allowed irrelevant and inadmissible evidence in the trial which was prejudicial to a fair trial.
>
> (4) There was no credible evidence given upon which the learned Judge could have made a finding in favour of the Plaintiff/Respondent and against the Defendant/Appellant and the decision of the learned Judge was against the weight of the evidence and cannot legally be supported thereby."

There was on the basis of the evidence led absolutely no merit in grounds 3 and 4. They were dismissed and need not be the subject of any further mention.

The Allegations of bias in Chambers

The Judge's handwritten note is the best evidence of what transpired in Chambers:

> "On Friday, April 15, 1988, Mr. Sylvester appeared in Chambers before me and advised me that he finds himself in a very embarrassing position in that he is being advised by his clients the defendant to object to my trying this case on the ground that there was an incident previously between the Court and his client. He stated that his embarrassment was that despite the altercation between the Court and his client, he, having on more than one occasion discussed the incident with the Court, is satisfied that the Court has nothing personal or otherwise against Robertson and he is satisfied that the defendant will be given a fair hearing in this matter and that the Court will give a decision that is proper, unbiased and honest. He repeated this on more than one occasion and advised the Court how embarrassing it would be for him to make the application, because of this. The Court advised him to make his application in open Court at the hearing."

Then followed the Judge's account of the "incident" referred to above.

> "The altercation referred to above relates to a matter where the defendant who is a lawyer was representing two defendants in a civil matter and was found by me to be practising his profession with intellectual dishonesty. He refused to accept and admit that he consented to a certain order made in Chambers in the said matter despite the Court's record showing that he did so and the fact that the other three lawyers involved in matter and who were present at the time he consented telling him that he in fact consented. He was

/adamant....

> adamant that he did not consent because he did not inspect the document and he repeated his denial so often that the Court had no alternative but to pull him up for dishonest practice. As far as the Court is concerned the matter ended there."

When the appeal came on for hearing Mr. Sylvester told the Court that the Judge's account of what transpired in Chambers is not correct. He did not he said, tell the Judge that he is satisfied that the defendant would be given a fair hearing and that the Court would give a decision that is proper, unbiased and honest. To quote him, "If I was of that view as stated, I would not have gone in to the Judge". Mr. Sylvester made no denial however of the statement immediately preceding the above, that he was satisfied that the Court had nothing personal or otherwise against Robertson.

One unsatisfactory feature of what occurred in Chambers is that Mr. Sylvester did not invite Counsel on the other side to go into Chambers with him. He said it was not a formal application, but was being done merely to avoid having to make the application in Court. If the Judge had agreed then and there to disqualify himself, Mr. Sylvester said he would have accepted the Judge's decision, even though Counsel on the other side would have had no say in the matter.

As a matter of correct practice, it is always undersirable for Counsel on one side only to approach a Judge in Chambers with requests concerning the conduct of an action, and it should no more be done by Counsel, than it should be allowed by the Judge. In this case the Judge decided not to commit himself, but directed that the application be made in open Court.

The subsequent Affidavit filed by Robertson

The relevant paragraphs are 3 - 6. They relate to the Judge's explanation of the "incident" referred to in Chambers by Mr. Sylvester. I quote.

> "3. On the 25th January, 1988 I appeared as Counsel in a High Court Civil Suit No. 54 of 1987 on behalf of Luther Robertson and ERC Engineering Limited two of the defendants therein before Mr. Justice Satrohan Singh (hereinafter referred to as the said Judge).
>
> 4. In the course of the hearing of that matter I was subjected to several verbal attacks and abuse which showed hostility and a personal dislike by the said Judge to me and which led me to believe that my clients as well as myself could likely be affected by bias.
>
> 5. The said trial Judge further stated inter alia that when I held the office of Attorney General in the State of Saint Vincent

/and the.....

> and the Grenadines that I had reported him. In fact while I held the office of Attorney General I did report the said Judge to the Honourable Chief Justice Sir Lascelles Robotham for his conduct towards me as Attorney General of the State of Saint Vincent and the Grenadines.
>
> (6) On the said 25th January, 1988 the said Judge referred to me as being "dishonest" "a liar", being "dense" and other phrases and descriptions which were designed to disparage me both in my professional capacity as well as my standing in the community and demonstrated the likelihood of bias which led me to seek leave of the said Judge to withdraw from the matter in the interest of the administration of Justice and of my clients but he refused to grant same."

There is nothing to contradict the Judge's account of this incident or altercation as he related it. If in fact the defendant/appellant an experienced lawyer of 19 years standing had behaved as the Judge's explanation shows that he did in denying his consent to an order, when the Court record and three lawyers engaged in the same matter confirmed that he had consented, then it is not surprising that the Judge found it necessary to issue a stern reprimand on the matter. I would myself have deemed it expedient to do so, but not necessarily by using the actual language recorded in paragraph 6 of the affidavit (above).

The second incident is related in paragraph 7 of the affidavit:

> "On the 8th February, 1988 I again appeared as Counsel in the High Court in a Criminal suit No. 80 of 1987 The Queen v Lennox Bumber Charles and again in the course of that trial the said Judge unleashed another attack on me personally repeating substantially the same statements and even stated "ah bet I tell you something to expose you" which led me and would lead any fair minded observer to entertain a reasonable apprehension that there was and is a personal dislike or even malice whether as Counsel or a party before the said Judge being affected by bias by reason of prejudgment."

This Court is aware of the Criminal case No. 80 of 1987 - The Queen v Lennox Charles, having heard and dismissed the appeal against conviction and sentence. It was a wanton case of shooting with intent, and no complaint was directed to us at the hearing of the appeal on the conduct of the Judge towards the appellant during the trial. Paragraph 8 reads:

> "I also have reason to believe that because of the very close association between Counsel for the plaintiff in this Suit and the said Judge and of an incident wherein the said Counsel confronted me in the presence of the said Judge at a Reception held at Stoney Ground where he raised the subject matter of this action and made certain statements and expressed views thereon despite my objections that I have every

/reason to.....

> reason to believe that those remarks could have a prejudicial effect on the case and lead to pre-judgment of the issues therein."

There are vague assertions contained in this paragraph. In any event the Judge could hardly be held accountable for the behaviour of Counsel for the plaintiff/respondent at a public reception, and there is nothing to suggest that the Judge acted improperly, or took any part in the confrontation as alleged.

The affidavit concluded with the appellant's belief that the interest of justice would be better served and that justice would not only be done but would appear to be done if his case was tried by a different Judge.

The Appeal

Mr. Sylvester for the appellant relied heavily on the case of

LIVESEY v NEW SOUTH WALES BAR ASSOCIATION,

an Australian case reported at 1985 LRC (Const) at pages 1107 - 1116.

This was a case in which the appellant Peter Martin Livesey a member of the New South Wales Bar appealed from a judgment of the Court, ordering that he should be disbarred. In 1979, one Wendy Bacon, then a law student, agreed in Livesey's presence to act as surety for one Sellers who was charged with criminal conspiracy, and she lodged $10,000 cash as surety. Sellers absconded, and Wendy Bacon's bond was forfeited. Subsequently her application for admission to the Bar was rejected by a Court of Appeal (Moffitt, P, Reynolds J.A. and Helsham C.J.), after she had given evidence.

Each member of the Court referred to her part in lodging the surety for Sellers, and Moffitt P and Reynolds J.A. strongly indicated their views that she lacked credit, and credibility as a witness.

Subsequently the Bar Association applied to the Court of Appeal to strike Livesey's name from the roll of Barristers. A necessary witness was the same Wendy Bacon, and the Court hearing Livesey's issue was comprised of Moffitt P.,Hope and Reynolds JJA.

It was submitted in Chambers that Moffitt P and Reynolds JA should not sit because of their previous determination and pre-judgment of Bacon's application and her credibility but the submission was rejected by the Court. Bacon was eventually called as a witness and gave the same evidence as she had given in her own application before Moffitt P and Reynolds JA when she said that the sum of $10,000 put up as security had been loaned to her by Mrs. Altman. Moffitt P and Reynolds JA disbelieved her.

/When she.....

When she gave the same evidence in the Livesey issue she was again disbelieved by the same two Judges and the rest of the Court.

Livesey was disbarred and the Court of Appeal consisting of five Judges allowed the appeal. They held that the appellant or a fair-minded observer might reasonably have apprehended that the views which the two members of the Court had formed in the previous case on a question of fact which was a live issue in the hearing, or on the credit of a witness whose evidence was significant on that question, might result in the proceedings being affected by bias by reason of pre-judgment.

The writer of the Judgment had this to say at page 1111 - Letter d:

> "If a judge at first instance considers that there is any real possibility that his participation in a case might lead to a reasonable apprehension of pre-judgment or bias, he should of course refrain from sitting. On the other hand, it would be an abdication of judicial function and an encouragement of procedural abuse for a judge to adopt the approach that he should automatically disqualify himself whenever he was requested by one party to do so on the grounds of possible appearance of pre-judgment or bias regardless of whether the other party desired that the matter be dealt with by him as the Judge to whom the hearing of the case has been entrusted by the ordinary procedures and practice of the particular Court."

Counsel for the appellant also referred us to the case of Liverpool City Justices (ex parte Topping) 1983 1 All E.R. 490 and to De Smith's Judicial Review (4th ed) Chapter 5, pages 261 - 267 - Likelihood of bias - and concluded his submission by saying that on the affidavit of Robertson and the cases referred to the Judge ought to have disqualified himself.

Mr. Matadial for the respondent agreed with the principles of law as submitted by Mr. Sylvester. However, whether a Judge disqualifies himself or not from hearing a matter, involves the exercise of a discretion with which a Court of Appeal should not lightly interfere.

He submitted that the allegations in paragraph 6 of Robertson's affidavit, about the Judge's remarks being designed to disparage him in his professional capacity and in his standing in the community are conclusions of fact with no evidence to support them. Every practitioner in the High Court, or the Court of Appeal is subject to the supervision and control of the Court, and so is his conduct and behaviour. If therefore any particular conduct of his is regarded as

/manifestly....

manifestly dishonest, the Court should show its disapproval of it by a sharp rebuke. Could it then be said, he asked, that if the conduct is such that it draws a rebuke from the Court, it means that the Court or Judge is exhibiting malice or spite against the practitioner? On the other hand is a Judge to be called upon to ponder whether in a subsequent case involving the same practitioner he might be asked to disqualify himself if he issues the sharp rebuke that his conduct of the moment calls for? In my view the answer to these two questions must be a resounding no.

He further submitted that the Judge put on record (quoted above) an account of the conduct of the appellant. If the appellant Robertson wished to challenge this, he should have attempted to show that when the Judge referred to him as dishonest and dense etc. it was unjustified.

Mr. Matadial referred to the statement which the Judge recorded as having been made by Mr. Sylvester in Chambers (which he denied) and asked whether he Mr. Sylvester as appellant's Counsel was not better qualified than anyone else to come to that conclusion that the Judge was not biased.

Conclusions

Every case has got to be decided on its own merits, and in the light of surrounding circumstances. Social and economic conditions and the environment as it exists in St. Vincent are factors which cannot entirely be overlooked. We are not here dealing with the man in the Clapham omnibus, or the ultra sensitive individual fraught with suspicion. We are dealing with the reasonable fair-minded person with knowledge of the facts and what he would think in any given set of circumstances.

It is well known that St. Vincent is provided with a single High Court Judge, who must hear all cases both Civil and Criminal; a Judge who must in the exercise of his judicial mind deal with a Bar of some 40 or more lawyers, on a day to day basis; a Judge who must of necessity adjudicate on cases brought or defended by persons in the community who may be well known to him. He is a member of the community like anyone else and is not required to lock himself away in an ivory tower in order to avoid the appearance of bias in dispensing justice. Utter chaos and confusion would result if because a Judge has had to rebuke a practitioner in a sharp way on any particular occasion that he should be precluded on the basis of the appearance of bias or accusations of malice and spite from ever again adjudicating in cases involving that particular practitioner, whether as litigant or Counsel.

Judges and lawyers are subject to human frailties like any one else. It is not unknown for tempers to flare and even get out of

/hand on...

hand on occasions. Indeed it should at all costs be avoided, but I cannot subscribe to the view that it automatically opens the door for allegation of bias or the appearance of bias. Such allegations must be firmly established. It must be remembered that a Judge is a trained judicial mind and it is expected of him that he would seriously apply his mind to an application to disqualify himself and act judicially in the exercise of his discretion.

The case of Livesey v. New South Wales Bar Assiciation has been accepted in Australia as the test of reasonable apprehension of basis. It is no differentin essence from the law as applied in other Commonwealth jurisdictions. It came in for some explanations however in a more recent case, also from New South Wales, viz:

> Raybos Australia Pty Ltd and Another v Tectran Corporation Pty Ltd and others (1986) 6 NSWLR 272.

The full report is not available and at the risk of being accused of prolixity, but in an effort not to distort what is itself an extract, I quote in full and adopt the report as it appears in the Commonwealth Law Bulletin Vol. 14 (No.1) January 1988 p. 51:

> "The New South Wales Court of Appeal has held that -
>
> 1. Whether or not a Judge should disqualify himself from hearing a case on the ground of bias requires an objective appraisal of the materials before the court;
> 2. a party has a subjective (albeit firm) apprehension of bias is not of itself sufficient to warrant, or require, the disqualification of a Judge;
> 3. the test to be applied, by objective standards, is whether there is material before the court to support a conclusion of actual bias on the part of the Judge or a reasonable apprehension either by parties or the public that he might not bring an impartial and unprejudiced mind to the resolution of the issues in the case; and
> 4. the duty of a Judge to disqualify himself for proper reason is matched by an equal duty not to disqualify himself save for a proper reason and parties ought not to be encouraged to believe that, by an application for the disqualification of a Judge, they can have their case heard by a Judge thought to be more likely to decide a case in their favour.
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> In his judgment, the member of the Court of Appeal who delivered the Court's principal judgment observed, inter alia -
>
> I take the foregoing statement of the test from the reasons of Mason J in Re Renaud; Ex parte - CJL (1986) 60 ALJR 528, the most recent High Court decision on this subject, Mason J continues (at pp. 531-532): "It seems that the acceptance by this Court of the test of reasonable apprehension of bias in such cases as R v Watson; Ex parte Armstrong (1976) 136 CLR at 258-294 and Livesey v New South Wales Bar Association (1983) 151 CLR 288 at 293-294 has led to an increase in the

/frequency of.....

> frequency of applications by litigants that judicial officers should disqualify themselves from sitting in particular cases on account of their participation in other proceedings involving one of the litigants or on account of conduct during the litigation. 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 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'..... 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 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."
>
> This passage, which in my opinion does no more than state clearly the law as it has long been understood, provides the touchstone by which the present application for leave to appeal must be decided. It is the actuality of bias or the existence of grounds for reasonable apprehension of it which requires the disqualification of a judge from sitting on a particular case. Further, it makes clear that the duty of the judge to disqualify himself for proper reason is matched by an equal duty, in the circumstances stated by Mason J, not to disqualify himself."

I am of the view that the applicant in this case has failed to firmly establish that there existed reasonable apprehension of bias on the part of the Judge and I would dismiss the appeal with costs to the the respondent to be taxed if not agreed.

L.L. Robotham

L.L. ROBOTHAM,
Chief Justice

BISHOP, J.A.

On the 16th September 1987, Olin Dennie, a barrister, filed (through a solicitor) a Writ of Summons endorsed with a Statement of Claim, in which he asked the High Court of Justice for judgment against Emery Robertson, a professional colleague, for the sum of $15,000 with interest at 8% per annum from the 22nd August 1985 until date of payment.

On the 14th October 1987 Emery Robertson (through his solicitor) filed a Defence in which he denied the allegations in the Statement of Claim.

Hearing of the case was fixed for Monday 18th April 1988. Before that date there were the following significant events.

On the 15th April 1988, Counsel for Robertson visited Singh J. the resident judge who was expected to hear and determine the case. In Chambers, Counsel told the Judge; according to the record, that he found himself in an an embarrassing position having been instructed by his client to object to the Judge hearing the case "on the ground that there was an incident previously between the Court and his client". Counsel also explained that he was embarrassed because, "despite the altercation between the Court and his client" and "having on more than one occasion discussed the incident with the Court" he (Counsel) was satisfied that (1) the Court had nothing personal or otherwise against Robertson (2) the defendant will be given a fair hearing in this matter and (3) the Court will give a decision that is proper, unbiased and honest. According to the learned Judge's note, which was made on the 18th April 1988, learned Counsel repeated his statements more than once. The Judge advised Counsel to make his application in open Court on the date of the hearing.

In passing, I observe that it seemed that there was only a single incident or altercation to which Counsel referred. Again, Counsel's statements and the Judge's advice were made and given in the absence of Counsel or solicitor for the plaintiff. It was unfortunate, if not improper, for learned Counsel to give such indications to the Judge, in Chambers, without informing plaintiff's Counsel or solicitor of the intention to do so, and inviting him to attend also; nor should the Judge have listened to Counsel for the defendant in the absence of Counsel for the plaintiff after he realised - as he must have done at or near the outset - that the remarks concerned a contested case due to be heard by him.

The Judge's notes remained unchallenged until 12th December 1988 when this appeal came before us. Then, learned Counsel for the appellant sought to challenge their accuracy in one respect - a step that, in my view, he could not take at that stage or in the manner he used. The Record of Appeal stood as a binding source of the facts and circumstances

/on which....

on which we were asked to decide the appeal. I have not given weight to the belated counter-allegations which concerned those aspects with which Counsel was stated as having expressed satisfaction.

On the 16th April 1988, Emery Robertson swore to an affidavit which was filed the same day. It indicated in its last paragraph that he was asking the learned Judge to refrain from hearing the case between Olin Dennie and him (suit 356 of 1987). Paragraphs 3 to 8 inclusive contained the material upon which the request was based. Paragraph 3 referred to the hearing of an earlier case (suit 54 of 1987) on the 25th January 1988, in which the deponent appeared as Counsel for two of the defendants. Paragraph 4 stated: "In the course of the hearing of that matter I was subjected to several verbal attacks and abuse which showed hostility and a personal dislike by the said Judge to me and which led me to believe that my clients as well as myself could likely be affected by bias". This paragraph was in vague and general terms, stating opinions and conclusions rather than specific facts that justified the views expressed. Paragraph 5 referred to a comment allegedly made by Singh J. on the 25th January 1988, during the hearing, and to the effect that the deponent had reported to the Chief Justice on the Judge's conduct towards him when he (the deponent) was Attorney General of St. Vincent and the Grenadines; and that it was a fact that he had made such a report. The particulars of the report and of the Judge's observation were lacking. Paragraphs 6 and 7 read as follows:-

> "6. On the said 25th January 1988 the said Judge referred to me as being "dishonest", a "liar", being "dense" and other phrases and descriptions which were designed to disparage me both in my professional capacity as well as my standing in the community and demonstrated the likelihood of bias which led me to seek leave of the said Judge to withdraw from the matter in the interest of the administration of justice and of my clients but he refused to grant the same.
>
> 7. On the 8th February 1988 I again appeared as Counsel in the High Court in criminal suit No. 80 of 1987.....and again in the course of that trial the said Judge unleashed another attack on me personally repeating substantially the same statements and even stated 'ah bet I tell you something to expose you'; which led me to believe and would lead any fair-minded observer to entertain a reasonable apprehension that there was and is a personal dislike or even malice towards me that might result in proceedings in which I am involved whether as Counsel or a party before the said Judge being affected by bias by reason of pre-judgment."

/Paragraph 8....

Paragraph 8 stated that there was a close association between Counsel for the plaintiff and Singh J. and referred to an occcasion when the said Counsel confronted him (the deponent) in the presence of the said Judge, at a reception at Stony Ground. There Counsel raised the subject matter of the instant case and "made certain statements and expressed views thereon despite my objections"; (the deponent's words). Because of these things the deponent stated that he had "every reason to believe that those remarks could have a prejudicial effect on the case and lead to pre-judgment of the issues therein". Again there is vagueness. What were the statements or views or remarks?

The ninth paragraph set out the deponent's belief that the interest of justice "could be better served and that justice would not only be done but would appear to be done if the above case is heard by a different Judge". Paragraph 10 referred to two facts neither of which in my view lent any assistance to the issue. Paragraph 11 simply indicated legal advice tendered by Counsel to the deponent.

On the 18th April 1988 at the hearing of suit 356 of 1987, the plaintiff and defendant were represented by Counsel who appeared before us; and the affidavit came to the notice of Singh J. who made the following note about the incident mentioned in paragraph 6 thereof:-

> ".....the defendant who is a lawyer was representing two defendents in a civil matter and was found by me to be practising his profession with intellectual dishonesty. He refused to accept and admit that he consented to a certain order made in Chambers in the said matter despite the Court's record showing that he did so and the fact that the other three lawyers involved in the matter and who were present at the time he consented telling him that he in fact consented. He was adamant that he did not consent because he did not inspect the document and he repeated his denial so often that the Court had no alternative but to pull him up for dishonest practice. As far as the Court is concerned the matter ended there....."

As the Record showed, after that note was made, learned Counsel for the defendant made an application that the Judge disqualify himself on the ground of the appearance of bias and not of actual bias. This ground must be borne in mind especially when it is recalled that the affidavit asserted not only the likelihood of bias but also personal dislike and malice towards the defendant and actual bias by reason of pre-judgment.

The application was refused; whereupon senior Counsel and his client withdrew from the Court. Junior Counsel remained "as an

observer" (the Judge's words). It was not clear to me why the defendant was permitted to leave. Nor can I understand why junior Counsel never saw fit to cross-examine the plaintiff or his witnesses in the rather simple case. Be that as it may, before leaving, senior Counsel informed the Court that he would raise the matter "higher up".

The learned Judge heard the case without the assistance of Counsel for the defendant and he ordered that judgment be entered for the plaintiff in the amount claimed, with interest, from the 22nd October 1985, until payment, and costs.

The defendant was dissatisfied and appealed (on the 20th April 1988) on the following grounds: "(1) the learned Judge erred in law and/or fact in not declining or disqualifying himself from hearing the matter against the defendant/appellant having regard to all the circumstances surrounding the defendant/appellant and the Judge and notwithstanding the requirements of the due administration of justice; (2) alternatively, having regard to all the existing circumstances between the appellant and the learned Judge, public policy required that the learned Judge should not sit in judgment in the instant matter as he had placed himself in such a position that he might be suspected of being biased or give rise to a reasonable apprehension of bias thereby casting doubt about the purity of the administration of justice; (3) the learned Judge allowed irrelevant and inadmissible evidence in the trial which was prejudicial to a fair trial and (4) there was no credible evidence given upon which the learned Judge could have made a finding in favour of the plaintiff/respondent and against the defendant/appellant and the decision of the learned Judge was against the weight of the evidence and cannot legally be supported thereby". By way of relief, the appellant asked to set aside the judgment and order judgment in his favour: alternatively, to order a new trial.

There was consensus on the law to be applied. Counsel on each side referred to LIVESEY v. NEW SOUTH WALES BAR ASSOCIATION (1985) LRC (Const) 1107. Additionally, learned Counsel for the appellant referred to an earlier case, R. v. LIVERPOOL CITY JUSTICES ex parte TOPPING, and to the judgment of this Court delivered by Moe J.A. in STAR LESTRADE v. LUKE FAGAN and ANOTHER (Civil Appeal No. 7 of 1984, Dominica, on 9th February 1987). I shall refer to the relevant law later in my judgment.

[1985] 1 All E R 490

I wish now to recall and deal with the material and arguments relied upon by Counsel for the parties. Counsel for the appellant emphasised the incident described in paragraphs 3, 4 and 6 of the affidavit of Emery Robertson. He contended that this was a case in which Singh J. ought to have disqualified himself, since he demonstrated

/a dislike....

a dislike of and malice towards the appellant; and further, that by using the words "liar", "dishonest" and "dense" the trial Judge showed that he had formed before-hand an unfavourable view of the appellant's credibility, even as a witness. Counsel posed the question: Would a person with knowledge of what occurred (as set out in the affidavit) have a reasonable suspicion that a fair trial was not possible? He also answered the question in the affirmative. As for paragraph 5, Mr. Sylvester urged that the Judge was aware that his conduct or attitude to the appellant had been reported earlier to the Chief Justice, and during the hearing of a case in January 1988 the Judge referred to it. Therefore, in the circumstances prevailing at the hearing, a situation was created in which "reason cannot control the subconscious influence of feelings of which it is unaware". (Frankfurter J. in PUBLIC UTILITIES COMMISSION OF THE DISTRICT OF COLUMBIA v. POLLACK (1952) 343 U S 451 at 466 - 467.

Counsel also submitted that the Judge's notes did not form part of the material to be analysed on the 18th April 1988.

Learned Counsel for the respondent submitted that disqualification was not an automatic right available upon the making of a complaint alleging bias or likelihood of bias. He contended that the Court was expected to look at all the facts and then exercise its discretion. In the instant case the facts were contained in the affidavit of 16th April and in the Judge's notes made on the 18th April 1988 .

Counsel submitted further that the Judge of the High Court had a supervisory jurisdiction over the conduct and behaviour of every barrister practising in that Court; and he could rebuke a barrister whenever his conduct was so improper as to necessitate a rebuke. Counsel asked (and answered in the negative) the following questions: Should a judge be so concerned over the consequencies of castigation that he should refrain when it might be said or felt that he bore malice or spite against the person castigated; or where the person castigated, whether counsel or party or witness, might swear to an affidavit seeking his disqualification? In the instant case, it was Counsel's contention that the material before us showed that Singh J regarded the conduct of the barrister Emery Robertson on that particular occasion on the 25th January 1988 as being manifestly dishonest and deserving of censure; and the Judge so indicated.

As far as paragraph 6 of the affidavit was concerned, Mr. Matadial urged that it ought to have shown that the words used in describing the barrister were unjustified if he hoped to succeed with the allegation that the Judge harboured a particular feeling towards him.

/With respect....

With respect to paragraph 8, Counsel contended that the deponent ought to have sworn to specific facts on which he placed reliance to make out a case of pre-judgment.

Counsel expressed the view that on the whole the affidavit seemed to have been tailored to meet the principles of the law on bias.

Mr. Matadial urged that there could be no better fair-minded observer than learned Queen's Counsel who attended in Chambers, and gave the benefit of his views. According to Counsel, the views summarised were: I have absolute confidence in the Judge.

Counsel for the respondent also urged that the application for disqualification was not made or conceived in good faith; and he relied for this opinion not only upon the statements of Counsel's satisfaction given on the 15th April 1988 but also on the fact that neither senior Counsel nor the appellant remained in Court to participate in the hearing of the merits of the case. Mr. Matadial contended that there was another course open to the appellant when the case was first called for a date of hearing to be fixed. Counsel did not advise the Judge of his intention to seek disqualification and ask that the case not be set down for hearing on a specific date (by the only judge resident in St. Vincent) but he acceded to the fixture without comment; and then failed to participate at the hearing on the merits. In Counsel's views the proper course would have been to take part and if dissatisfied thereafter, for whatever reasons, appeal; it was not correct and it showed bad faith to behave as Counsel and client behaved after the refusal of the application.

I propose now to deal with grounds 3 and 4 of this appeal which concern the evidence that was admitted at the trial. On ground 3, learned Counsel for the appellant pointed out a part of the plaintiff's evidence which referred to a statement by Emery Robertson to him. After telling the Court, among other things, that up to the 18th April 1988, Emery Robertson had not repaid money owed to him, and that he had asked for it several times, Olin Dennie explained that Emery Robertson "kept making excuses"; and it is to the following evidence that Counsel took objection:-

> "He said to me that his salary as Attorney General then was very small and that he was in "financial difficulties"; and that the Prime Minister was spiting him by deducting from his salary back arrears of income tax owing by him to the Government; that his building in Middle Street cost him over $1.M. and he was indebted to the St. Vincent Co-operative Bank in respect of the said building; that he had to pay $4,800.00 every month on loan to the bank; and that the said bank was threatening to foreclose on him."

/Obviously.....

Obviously this evidence contained the alleged excuses that the defendant kept making when repayment was demanded. That evidence was also pertinent to the allegations pleaded by Olin Dennie - as indeed were the cheque and statement of account admitted as exhibits and which also formed part of the evidence to which objection was taken.

In my opinion there was no merit in the grounds of appeal. The passage quoted above also went to assist in determining the credibility of the plaintiff; and even assuming that there was merit in the technical points raised about the exhibits, there was other unequivocal and ample evidence on oath from which the learned Judge could have decided the case as he did. Grounds 3 and 4 failed.

In considering the other grounds of appeal I wish to refer to the law that I regard as important in this appeal. I shall begin with the following passage taken from LIVESEY'S case, parts of which were cited by each Counsel:-

> "..... where there is no allegation of actual bias, the question whether a judge who is confident of his own ability to determine the case before him fairly and impartially on the evidence should refrain from sitting because of a suggestion that that the views which he has expressed in his judgment in some previous case may result in an appearance of pre-judgment can be a difficult one involving matters "of degree and particular circumstances may strike different minds in different ways".... If a judge at first instance considers that his participation in a case might lead to a reasonable apprehension of prejudgment or bias, he should, of course, refrain from sitting. On the other hand, it would be an abdication of judicial function and an encouragement of procedural abuse for a judge to adopt the approach that he should automatically disqualify himself whenever he was requested by one party so to do on the grounds of a possible appearance of prejudgment or bias, regardless of whether the other party desired that the matter be dealt with by him as the judge to whom the hearing of the case had been entrusted by the ordinary procedures and practices of the particular court. Once it is accepted that a judge should not automatically stand aside whenever he is requested so to do, it is inevitable that appellate courts, removed from the pressure of a possible need for immediate decision and enjoying the advantages both of hindsight, and conceivably, further material and information, will on occasion conclude that a decision of a judge at first instance that he should sit was mistaken and has resulted in a situation where one of the parties or a fair-minded observer might entertain a reasonable apprehension of bias or prejudgment."

+ there is any real possibility that

/Then the....

Then the judgment emphasised the meaning of such a conclusion by appellate courts. It stated that it does not involve personal criticism of the trial Judge or any assessment of his qualities or his ability to have dealt with the case before him fairly and without prejudgment or bias; and it continued with these words:-

> "It is simply an instance of the ordinary working of the appellate process in which the views of the judges who constitute the appellate court prevail over the views of the judge.....who constituted the court from which the appeal is brought."

In Livesey's case the parties to the appeal agreed that the principle to be applied was laid down in the majority judgment in R. v. WATSON ex parte ARMSTRONG (1976) 136 CLR 248. That same principle was applied in later cases heard in Australia in 1977, 1979 and 1980.

The judgment in Livesey's case also answered the question whether there was an appearance of prejudgment or bias; and in doing so stated (at p 1115): "The reasonable observer is to be presumed to approach the matter on the basis that ordinarily a judge will so act as to ensure both the appearance and the substance of fairness and impartiality. But the reasonable observer is not presumed to reject the possibility of prejudgment or bias nor is the reasonable observer presumed to have any personal knowledge of the character or ability of the members of the relevant court."

In the case of RAYBOS AUSTRALIA PROPERTY LIMITED and ANOTHER v. TECTRAN CORPORATION PROPERTY LTD. and OTHERS (1986) 6 NSWLR 272, according to the report at pages 51 and 52 of Volume 14 Number 1 January 1988 Commonwealth Law Bulletin: "The New South Wales Court of Appeal held that 1. whether or not a judge should disqualify himself from hearing a case on the ground of bias requires an objective appraisal of the materials before the court; 2. a party has a subjective (albeit firm) apprehension of bias is not of itself sufficient to warrant, or require, the disqualification of a judge; 3. the test to be applied by objective standards, is whether there is material before the court to support a conclusion of actual bias on the part of the Judge or a reasonable apprehension either by parties or the public that he might not bring an impartial and unprejudiced mind to the resolution of the issues in the case; and 4. the duty of a Judge to disqualify himself for proper reason is matched by an equal duty not to disqualify himself save for a proper reason and parties ought not to be encouraged to believe that, by an application for the disqualification of a Judge, they can have their case heard by a Judge thought to be more likely to decide a case in their favour". In the principal judgment delivered, the following words of Mason J. in RE

RENAUD Ex parte CJL (1986) 60 ALJR 528 were recalled:-

> "It seems that the acceptance by this Court of the test of reasonable apprehension of bias in such cases as R. v. Watson ex parte Armstrong and Livesey v. New South Wales Bar Association has led to an increase in the frequency of applications by litigants that judicial officers should disqualify themselves from sitting in particular cases on account of their participation in other proceedings involving one of the litigants or on account of conduct during the litigation. 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 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 issue 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' ..... 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 of bias, encourage parties to believe that by seeking the disqualification of a judge, they will have their case tried by soneone thought to be more likely to decide the case in their favour."

The Star Lestrade case upon which Counsel for the appellant relied did not show that bias on the part of the trial Judge was the finding of the Court of Appeal. The ground of appeal was that the Judge acted in contravention of the principle that justice must not only be done but should manifestly and undoubtedly be seen to be done and consequently the trial was unfair. In that case Counsel for the appellant contended that where a litigant held the view that he was not going to be afforded a fair trial because of previous statements made about him by the Judge, then that litigant was entitled, as of right, to have his application that the Judge should not hear the case, granted. The Court of Appeal expressed the view that assuming that the statements attributed to the trial Judge by the appellant were made, "they were not.....sufficient to preclude the hearing of the.....action..... A mere suspicion or possibility of bias is not sufficient to preclude the hearing of a matter by a judge". The Court identified a number of unsatisfac-

/tory features.....

tory features aboiut the case, which it said might justify the conclusion that the appellant was not afforded a fair trial; and in the words of Moe J.A. who delivered the main judgment"..... from this perspective I would hold that the fundamental principle has been offended, namely that justice should not only be done but manifestly been seen to be done". Then a new trial was ordered. With due respect to the views of Counsel for the appellant, I have not found his cause to be aided or advanced by Star Lestrade's case.

In the case before us I have already stated that the affidavit of Emery Robertson comprised opinions of the deponent without cogent supportive facts; and facts as set out were imprecise. As far as the incident on 25th January 1988 was concerned, the affidavit, by itself, told only of adjectives used to describe the deponent without any sufficient or clear indication of the circumstances in which they came to be used. The deponent's conclusions were not reliable enough material. In my view the affidavit had to be read with the Judge's notes which were made just prior to the application for his disqualification. Then, the single incident referred to, seemed to be one in which there was room for the deponent to be accused of being untruthful in respect of a particular matter. Perhaps the trial Judge chose indelicate words of description, but the use of more courteous terms would not have effectively altered the substance of his finding that the deponent was being deliberate in denying the undeniable.

I am satisfied that the facts disclosed in the affidavit were, by objective standards, insufficient to hold that the appellant had "firmly established" the presence of actual bias on the part of Singh J. or a reasonable apprehension by the appellant or by the public that Singh J. might not bring an impartial and unprejudiced mind to the resolution of the issues in what was really a relatively simple matter. (See Raybos case). The fact that Emery Robertson had, or may have had a subjective apprehension of bias was not enough to justify the Judge disqualifying himself.. Additionally, in my view the fair-minded observer faced with the facts in the affidavit would not have regarded Singh J. as showing bias such as would merit his disqualification; or, to borrow the words of Lord Denning MR, the circumstances were not such that "a reasonable man would think it likely or probable that the (justice) would.....favour one side unfairly at the expense of the other "(METROPOLITAN PROPERTIES CO. (FGC) LTD. v. LANNON (1968) 3 All E.R. 304 at 310).

I am constrained to find that grounds 1 and 2 of this appeal must fail. The appeal must therefore stand dismissed and I would order costs to the respondent here and in the Court below.

/If this....

If this judgment has appeared lengthy, it is because I regarded it as important to record my views in an appeal which is somewhat unusual and because I trust that in future, it will assist counsel and parties alike on the issue that was raised.

My final words in the matter are that it behoves us all, and particularly those of us who are concerned with seeing that justice is done, particularly in small communities, to choose our words judiciously. We do not need to use the identical style of speaking or writing, but I believe we can be careful not only in the way in which we praise but also in the way in which we castigate.

E.H.A. BISHOP,
Justice of Appeal

MOE, J.A.

I agree that the appeal should be dismissed with costs.

C.C.R. MOE,
Justice of Appeal.

C.H. Rees Farm
Chief Justice