**IN THE EASTERN CARIBBEAN SUPREME COURT**

**IN THE HIGH COURT OF JUSTICE**

**ON MONTSERRAT**

**CASE MNIHCV 2018/0023**

**IN THE MATTER of sections 6(1), 6(7) and 7(13) of the Montserrat Constitution Order 2010.**

**IN THE MATTER of an Application for an Administrative Order pursuant to part 56.7 of the CPR.**

| Between | **KESTON RILEY** | Claimant |
|---|---|---|
| | **AND** | |
| | **THE ATTORNEY-GENERAL** | 1st Defendant |
| | **DIRECTOR OF PUBLIC PROSECUTIONS** | 2nd Defendant |

APPEARANCES

Mr Warren Cassell for the claimant.

Ms Sherasmus Evelyn for the defendants.

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**2019: OCTOBER 10**

**OCTOBER 14**

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**RULING**

**On recusal**

1 **Morley J**: Following argument on 10.10.19, I am asked to recuse myself. I was the judge who accepted a plea of guilty on 20.03.17 from the claimant Riley[1] when represented by Counsel David Brandt for the offence of fraudulent evasion of duty on 08.08.16, for which on 10.04.17

[1] The parties will be referred to by their names or titles for ease of reading, and no disrespect is intended by not writing out the legalese of whether claimants or defendants.

he was sentenced to two months imprisonment. Later he changed counsel, to Warren Cassell, who it appears on 17.04.18 persuaded the Court of Appeal the prosecution on 22.11.16 had given an 'undertaking' not to prosecute for fraudulent evasion, and in consequence Riley's conviction following his plea was quashed. Attempt was made by the prosecution to appeal to the Privy Council, but this was on 22.08.19 rejected as filed out of time. Counsel Cassell reports that in July 2018, awaiting the outcome of the Privy Council appeal, I commented on this case to the effect, *'hopefully the Privy Council will get it right'*, for which reason he argues I am biased. Further he argues that having dealt with the case at plea and sentence I will appear to be biased. Therefore for both reasons, for actual and apparent bias, he submits I should be recused.

2 The conviction having been quashed, by a fixed date claim form filed on 14.06.18 Counsel Cassell on behalf of Riley seeks damages and 'vindicatory damages' against the DPP Oris Sullivan for having created a miscarriage of justice, for misfeasance in public office, and for wrongful imprisonment.

3 Concerning the offence, in part I said on 10.04.17 the following during sentence (reducing my remarks to writing[2]):

> 1 Keston Riley faces sentence on a single count of fraudulent evasion, contrary to the **s117(1)(a)(i) Customs (Control and Management) Act Cap 17.04** for which the maximum is 2 years. On 20.03.17 he pleaded guilty to unlawfully removing with fraudulent intent four tires from a customs warehouse.
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> 2 He is 25, without previous convictions, and a tally clerk at the Montserrat Port Authority, where he has worked since 2009. He is in a position of trust. His job involves tallying arriving goods against paperwork so that inventory can be taken as to what has arrived, compared to what is supposed to have arrived, so that duty may be payable as required.
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> 3 On 08.08.16, four tires arrived for his car, imported by his friend Jervain Greenaway, who imported 20 others. Riley had paid Greenaway already, and on unstuffing the relevant container, and seeing the batch, removed his four tires, resealed the batch, casually walked the tires out of the bonded warehouse, paid

[2] See R v Keston Riley MNIHCR 2016/0016 at https://www.eccourts.org/regina-v-keston-riley/

> EC$25 to a friend named Antwan Lee to drive them out of the port in his car, lied to security the tires had been cleared by Customs, and was later found at the public works department to be fitting them to his vehicle…

4 Riley was captured on cctv unstuffing the container and walking out the tyres. After his sentence, he has since left Montserrat.

5 Accepting the decision of the Court of Appeal, of interest is the following:

a. During the earlier proceedings, Counsel Cassell represented the co-defendant Greenaway (a civilian, not a customs officer) who agreed he had helped Riley commit the offence, and who pleaded at the same time to fraudulent evasion, receiving a community penalty, and who curiously did not suggest his conviction was illegal as being in the teeth of the so-called prosecution 'undertaking'.

b. After Counsel Cassell filed simple notice of appeal for Riley on 24.04.17, the actual evidence for the complaint of wrongful conviction came from affidavits filed as late as 03.04.18 by Riley, Greenaway (yet who did not appeal his own conviction), and a friend from the public gallery named Roach, just two weeks before the Court of Appeal sitting.

c. Though Riley asserts he was 'forced' to plead, begging waiver of legal professional privilege, Counsel Brandt never provided any affidavit to explain why he pleaded.

d. Having read the decision of the Court of Appeal, Thom JA presiding, which was concerned about a change in indictment numbers and whether there had been on 22.11.16 a prosecution undertaking, it seems there was no discussion during the hearing of how an application by a defendant on 20.03.17 to plead to fraudulent evasion would amount to a request to set aside any earlier undertaking (if one had been given) so that if the offered plea was accepted by prosecution, and court, it would likely reverse, and by implied defence agreement dissolve, any such said earlier prosecution undertaking on 22.11.16.

6 An assessment of how Riley claims he has been wronged by the DPP will probably benefit from knowledge of the evidence and plea proceedings, which I have. Knowledge is not automatically bias. Bias suggests an irrational outlook, whereas knowledge suggests a rational one. In principle, being true as best I can to my judicial oath to act fairly without fear or favour,

knowledge will likely add to a just decision, whereas ignorance of the earlier proceedings may tend to an unjust one.

## The law on recusal

7 As this court explored at paras 7-12 in **Wade v Weekes 2018**[3]:

> 7 The law on recusal for apparent bias, often stated in many cases over time, has been neatly restated in the recent case of **O'Neill v Her Majesty's Advocate No 2 (Scotland) 2013** UKSC 36, where Lord Hope at para 49 quoted with approval the Constitutional Court of South Africa in **President of the Republic of South Africa v South African Rugby Football Union 1999** (4) SA 147, 177.
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> "The question is whether a reasonable, objective and informed person would on the correct facts reasonably apprehend that the judge has not or will not bring an impartial mind to bear on the adjudication of the case, that is, a mind open to persuasion by the evidence and the submissions of counsel. The reasonableness of the apprehension must be assessed in the light of the oath of office taken by the judges to administer justice without fear or favour; and their ability to carry out that oath by reason of their training and experience. It must be assumed that they can disabuse their minds of any irrelevant personal beliefs or predispositions."
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> [Underlining added]
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> 8 At para 50, in addressing dicta in **Locabail UK Ltd v Bayfield Properties Ltd 2000** QB 451, Lord Hope went on to say:
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> "While it was emphasised that every application for recusal must be decided on the facts and circumstances of the individual case, the court noted that a real danger of bias might well be thought to arise 'if, in a case where the credibility of any individual were an issue to be decided by the judge, he had in a previous case rejected the evidence of that person in such outspoken terms as to throw doubt on his ability to approach such person's evidence with an open mind on any later occasion'."
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> [Underlining added]
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> 9 Moreover in the **White Book 2016** volume 2 at para 9A-48 (ps 2350-4), *inter alia* we find:

[3] See Wade v Weekes MNIHCV2017/0037, at https://www.eccourts.org/terrance-wade-v-james-weekes-2/

“On the matter of impartiality, the decided cases draw a distinction between actual bias and apparent bias (**Director General of Fair Trading v Proprietary Association of Great Britain and another [2001]** All ER 372). The phrase actual bias has been applied to the situation (1) where the judge has been influenced by partiality of prejudice in reaching his decision, and (2) where it has been demonstrated that a judge is actually prejudiced in favour of or against a party. Examples of actual bias on the part of a judge are rare.

“The court must first ascertain all the circumstances which have a bearing on the suggestion that the judge was biased. It must then ask whether those circumstances would lead a fair-minded and informed observer to conclude that there was a real possibility or a real danger, the two being the same, that the tribunal was biased, (**Porter v McGill [2001]** UKHL 67).

“The fair minded observer is not unduly sensitive or suspicious, (**Helow v Secretary of State for the Home Department [2008]** UKHL 62).

In **Oktritie Internatinnal Investment Ltd v Urumov [2014]** EWCA Civ 1315, the court stated amongst other things: (1) that the general rule is that where a judge is hearing an application (or a trial) which relies on his own previous findings he should not recuse himself unless he considers that he genuinely cannot give one or other party a fair hearing or that a fair minded and informed observer would conclude that there was a real possibility that he would not do so; (2) that although actual bias or a real possibility of bias must conclude the matter in favor of the applicant for recusal, there must be substantial evidence of bias of one form or the other before the general rule can be overcome; (3) that there is a consistent body of authority to the effect that bias is not to be imputed to a judge by reason of his previous rulings or decisions in the same case (in which a party has participated and been heard) unless it can be shown he is likely to reach his decision ‘by reference to extraneous matters or predilections or preferences’; and (4) that it is important that judges should not recuse themselves too readily in long and complex cases otherwise the convenience of having a single judge in charge of both the procedural and substantial parts of the case will be seriously undermined, and the impression would be created that parties were able to select judges to hear their cases simply by criticizing those they did not want to hear them.”

“A judge to whom a case has been assigned for trial has to be very careful, in ruling on pre-trial applications, not to pre-judge any matter that will be argued and decided at trial, and not to preempt any decision that will be made on that occasion….However to characterize too readily a judge’s conduct in this role as

conduct at risk of being perceived as apparent bias would subvert the proactive management of cases expected of judges under the CPR (**AB v British Coal Corporation [2006**] EWCA Civ 172".

[Underlining added]

10 In deciding actual bias, I approach the test in this way: a judge should be sure of none. This should not be a test on the balance of probabilities. A judge should not say it is possible I am biased but will continue as it is not probable.

11 In deciding apparent bias, I approach the test in this way: it is not that a judge is sure of none; but instead that a judge considers it is more probable than not that the impartial, reasonable, informed, not unduly sensitive or suspicious observer would not conclude a real danger of bias. As to sureness, logically it cannot be the test as it is unlikely a judge can be 'sure' of what an observer will think. As to 'would not conclude', the test ought not to be 'could not conclude', as the word *'could'* imports into the test what may be a bare possibility that an observer might conceivably *de minimis* conclude bias, which widens the test to something impossible, namely, that a judge would have to be sure there is no bare possibility of apparent bias, which will never be satisfied as far too broad and theoretical. In short, the test can only work realistically if it is 'would on balance', not 'could in theory'.

12 Distilling matters, it seems to me that the questions for a judge accused of bias should be:

a. Concerning actual bias, am I sure that I am not actually biased?
b. Concerning apparent bias, on balance would a reasonable, informed, and not unduly-sensitive or suspicious observer conclude there is no real danger of bias?
c. In weighing matters, as supplementary and guiding questions, I should ask,
    1. Am I sure I have not already expressed an *ad hominem* opinion on the veracity of a party?
    2. On balance, is the application to recuse merely part of a tactic to elongate the proceedings to the advantage of the applicant?

8 Mindful of *Wade v Weekes supra,* concerning apparent bias to my mind a rational and informed third party observer, who is not unduly sensitive or suspicious, on balance would expect the original judge to sit on this case because the reverse would be truer, namely that a third party would more likely fear an uninformed judge might be taken advantage of by the parties, in particular perhaps by Counsel Cassell, which need not arise where there is

knowledge of what has happened in the proceedings. In other words, being rid of me would likely be thought by an observer to be a defence tactic precisely because I do know about the case. Furthermore, it is not uncommon in so small a jurisdiction as Montserrat, and elsewhere within the paradise isles of the Caribbean, for a judge to know more of court matters than in large population groups (where there is also the easy luxury of finding another judge). In this small environment, the third party expects there may often be some knowledge, and this being so the third party further expects that a judge will work carefully within such constraint fairly, being robust in applying her or his oath. Noting I am the lone designated judge on Montserrat, I leave aside it may be too expensive always to find other judges in every case where knowledge arises, as might be easier to do for example in London, and observe merely that in my experience of three years on island the folk of Montserrat will expect me to do this case precisely because I know about its earlier life in court. While there are cases where recusal for apparent bias is appropriate, this is not such a case, like where a party might be thought a personal friend or foe of the judge (noting I do not know Riley), or where both parties ask me to recuse myself (though here Counsel Sherasmus asks that I do not). For these various reasons, I dismiss the argument of apparent bias.

9 Concerning actual bias, I accept in this case it is more nuanced. The test is I must be sure I am not.

10 It is right I should say I know that the plea to fraudulent evasion was offered on 20.03.17 (with a limited maximum of two years) to avoid a trial due to start that day as against Riley and Greenaway for conspiracy to defraud (with a maximum of life imprisonment), which explains why it was attractive to the defence of both to ask so to plead. I also know the quality and strength of the evidence as trial was due to start, and I had seen the video of Riley slipping the goods out of bond without paying duty, meaning I am in a position to adjudicate on whether the DPP was engaged in misfeasance, whether a miscarriage of justice has arisen, and what scale of damages, if any, might arise in light of the conviction being quashed.

11 While it may well be I have early thoughts on the merits, I do not consider this knowledge is bias, in the sense it gives rise to irrational thought processes, and instead am sure I still have an open mind, for now. The undated suggested remark in July 2018, *'hopefully the Privy*

*Council will get it right'*, if it was said, is not *ad hominem*, and it seems does not obviously show a closed mind, but instead a curiosity as to what they will make of Riley's unusual suit, which amounts to complaint he should not have been allowed to ask to plead guilty to lesser fraudulent evasion to avoid trial on conspiracy to defraud. As the case develops, if I or the parties sense my mind is closing unfairly, then I will encourage further argument as to actual bias. But for now, in my judgment the case should proceed to trial before me as the designated Judge on Montserrat who knows what happened earlier, and I look forward to what Riley will say about the cctv footage and why he pleaded, and to what Counsel Cassell will say about the absence of any affidavit from Counsel Brandt, nor appeal from Greenaway who became Riley's witness on appeal, plus how best to assess the alleged undertaking of 22.11.16 and what if any damages arise in the face of the incriminating evidence.

12 This is an interim decision to remain the judge in the case, to be kept under review.

13 There shall be no order as to costs, which though growing shall remain in the cause. It may help the parties to know I have in mind that the costs in due course may be substantial after a full trial, which of necessity to assess fairly if there are damages and misfeasance will involve reviewing all the evidence of criminal wrongdoing.

**The Hon. Mr. Justice Iain Morley QC**

**High Court Judge**

**14 October 2019**