CITATION:	*The Queen v Hillen* [2019] NTSC 27
PARTIES:	THE QUEEN
	v
	HILLEN, Damian
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT exercising Territory jurisdiction
FILE NO:	21820077
DELIVERED:	29 April 2019
HEARING DATE:	26 April 2019
JUDGMENT OF:	Graham AJ

CATCHWORDS:

COURTS AND JUDGES – APPLICATION FOR RECUSAL –– BIAS – REASONABLE APPREHENSION OF BIAS –– CONDUCT OF TRIAL JUDGE

Reasonable perception that judge would be so biased against counsel that their client could not get a fair trial - Allegations of apprehended bias - Application based on Judge's criticism of counsel's conduct in unrelated matter.

DJ Singh v DH Singh and Others [No 2] [2018] NSWCA 31, 13 *Johnson v Johnson* [2000] 205 CLR 337, *Karadaghian v Big Beat Australia Pty Ltd [No3]* [2014] NSWSC 169, *Michael Wilson and Partners Limited v Nicholls* [2011] 244 CLR 427, *R v Doney* [1990] HCA 51, *R v Goussis* [2007] VSC 171, *Ronan v ANZ Banking Group* [2000] 2 VR 531, *R v CCAC* [1969] 122 CLR 546, referred to.

REPRESENTATION:

Counsel:

Prosecution:	D Dalrymple
Accused:	Colin McDonald QC

Solicitors:

Prosecution:	Office of the Director of Public Prosecutions
Accused:	Northern Territory Legal Aid Commission

Judgment category classification:	B
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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

The Queen v Hillen [2019] NTSC 27
No. 21820077

BETWEEN:

THE QUEEN
Prosecution

AND:

DAMIAN HILLEN
Accused

CORAM: GRAHAM AJ

REASONS FOR DECISION

(Delivered 29 April 2019)

[1] This is an application on behalf of the Accused that I recuse myself from being the trial Judge in his jury trial commencing 7 May 2019. Mr McDonald QC appears for Mr Hillen and Mr Dalrymple appears for the Crown. The Accused was present and he is presently on remand. Neither party had sought his attendance, but I arranged for a jail order. It is important that an accused man be present for an application of this kind. I assume the failure by the parties to arrange his attendance was through inadvertence.

[2] Ms Nguyen of counsel is briefed for Mr Hillen at trial.

[3] It is common ground that I do not know any of the witnesses or parties in the trial, I have no knowledge of the facts of the case and there is no reason arising out of those facts that would cause me to recuse myself.

[4] The basis of the application is that it is submitted that there would be a reasonable perception that I would be so biased against Ms Nguyen so that her client could not get a fair trial before me.

[5] The factual circumstances that give rise to the application are that Ms Nguyen appeared before me in a trial in June 2018. During the trial I made a number of criticisms, some trenchant of her conduct of the defence. The trial proceeded to verdict. The accused was found guilty and sentenced to a term of imprisonment. My inquiries have led me to conclude there was no appeal from the sentence or conviction.

[6] Though it has not been argued before me I will address the events that took place subsequent to the trial as they complete the picture that a reasonable observer would have of all the circumstances.

[7] It was submitted by Mr McDonald, that after the trial, an advice was obtained from a Sydney barrister directed primarily to consider whether an appeal would be likely to be successful. Upon receipt of this advice the NT Bar Association lodged a confidential complaint with the Chief Justice about my conduct of the trial. I have not seen the complaint, but the Chief Justice referred me to certain aspects of it. The Chief Justice was informed that no appeal would be lodged and he

correctly, in my respectful view, did not deal with contentions that the verdict was vitiated by error.

[8] The Chief Justice was referred to certain sections of the transcript and was of the view that I should not have questioned the qualifications of Ms Nguyen. I agreed with him that this was a fair criticism. The patience of Job is a necessity for a trial judge and it is difficult to always heed the wise words of Richard Adams in Watership Down: "You're trying to eat grass that isn't there. Why don't you give it a chance to grow?"

[9] The Chief Justice had two further criticisms of statements that I made, but, in my view, these were of a relatively minor nature and were more the result of clumsy articulation than anything more sinister. In each case I was entitled to intervene, but my verbiage should have been more elegant and there should have been no inference left open that defence counsel had acted unethically.

[10] I make it clear that the Bar is entitled to complain and the Chief Justice is entitled to respond. Judges make mistakes as do lawyers. What occurred subsequent to the trial was neither exceptional nor offensive.

[11] The trial of *R v Hillen* was, at first, listed before me as a T2. Ms Nguyen held the brief to appear for the accused Hillen. She would have been aware the trial was listed before me. On 12 April 2019 the T1 listed to commence on 7 May 2019 became a plea. This left *R v Hillen*

as the T1. Ms Nguyen retained the brief, but seeks my recusal. It is in these circumstances that the matter comes before me on 26 April 2019.

[12] Counsel in argument referred me to a number of sections of transcript during the trial that ran from 18 June 2018 to 22 June 2018 (not 2019 as claimed in the transcript index filed). As a matter of completeness I will deal with these transcript references hereafter. I do however note that the trial ran for 5 days and a cherry pick of a number slices of transcript is not an exhaustive reflection of what occurred. The transcript index filed with the application states as follows:

> This index sets out parts of the transcript of the Matthew Laty [sic] trial over 18 to 22 June 2018 where the trial judge Graham AJ interrupted defence counsel's cross examination of prosecution witnesses and made unfair criticisms of defence counsel, both in the jury's presence and in their absence.

[13] I note that this is a most unusual way to couch a preamble to an index and/or submissions. It would be more appropriate for a lawyer to 'submit' or 'claim' rather than make assertions of fact. Nevertheless I will treat the document as a submission and disregard any lack of propriety in its formulation.

[14] The failure to comply with *Browne v Dunn* on a number of occasions was not the only shortcoming of the defence counsel's conduct of the litigation. I dealt with this issue in my summing up to the jury in a general way and later pointed to some of the particular deficiencies. The defence during the trial appeared to veer between self-defence and accident. This may relate to the instructions received by the lawyer

from the accused and not the conduct of the lawyer. If it was the former, it did not make Ms Nguyen's job any easier.

[15] I set out hereunder a portion of my general remarks to the jury on the issue of the evidentiary shortcomings.

> The second matter I need to deal with in the conduct of the trial is this issue of what we call "puttage". Putting evidence and not putting evidence. What happens in a trial is that lawyers instructed by their clients. Lawyers do not make up facts, lawyers put what their client's tell them to put. And that instructs – those instructions may be in writing, they may be oral or partly both. And as I told you it is a rule of practice that if one party is going to assert a different version of events from the other the witnesses for the – for witness for the opposing party who would be in a position to comment on that version, should be given by the cross examiner.
>
> The cross examiner has – perhaps I will repeat that. If one party is going to assert a different version of events from the other witnesses, from other witnesses, then the version has to – her version has to be put to the other witness so that you as the jury can say Mr Smith has been asked about (a) by counsel for the defence and Mr Jones has also been asked about the same incident. So you have got the story about the same incident, if you have only heard one version of it.
>
> It is like with Goldsmith for example, the police officer. Goldsmith said that the accused called him, told him that Robinson had actually gone on to his yard and he hit him twice and chased him away. Now the counter version which Mr Layt said which was he did [not – transcript error] agree with that at all, was not put to Mr Goldsmith. So you are in a position to say well I have only heard Mr Goldsmith's account of this conversation. I have not heard both sides. That is the importance of it. This is how our system works and how it works so well that both sides of the argument are before the court, before the jury. And unfortunately in various way this has not happened in this case.
>
> Now I am not going to go through the numerous instances where counsel for the defence has either asked questions based on information that her client denies giving. You might remember

> that cross-examination, well where did that come from, where did this come from? And he was essentially saying well I never told her to say that and no that is not what I said or I only saw her once and this sort of thing but – I say this Mrs Grealy – sorry Ms Grealy – I do not know whether it is Ms or Mrs it does not matter. Ms Grealy raised a number of these issues in cross-examination and in her address and I, you might remember, raised a number of these issues saying to Ms Nguyen, "Well that wasn't put." Or something different would have been put.
>
> Now what is the effect of all this? Well we have got to be careful about this because this is a criminal trial and there is no onus that rests on the Crown – on the accused to prove anything.
> But nevertheless, such failure permits you to draw an inference that either the instructions were never given to defence counsel and are simply invented by the client. However, before you draw such inference consider whether there are other explanations. For example, could you shoot all the failure home to Ms Nguyen. Is this her fault? Is there some other explanation? Or is the accused using defence counsel as a shield when his own story is resting on shifting sand.
>
> So you consider all the possibilities. So do not draw any adverse inference to the credibility of Mr Layt unless there is no other reasonable explanation for the failure. I just say to be careful about this even though it has made the trial difficult and it is regrettable.

[16] The majority of the references in the index filed with this application go to criticisms of counsel's failure, in my view, to comply with the rules of evidence during the trial. If, as is alleged, these evidentiary rulings were incorrect they would have been properly the subject of appeal. There was no appeal. These transcript references are 52-53, 58, 217-219, 237, 294, 295, 317, 318 and 319. They bear no relevance to this application as they are simply rulings on evidence. Though the rule of fairness in *Browne v Dunn* was breached a number of times, as I said earlier, that was not the only rule that was violated. On a number of

occasions leading questions were put either without foundation or with a foundation that did not support the question. As a consequence, the Crown had to make objection and I had to make rulings beyond what is normal in a trial.

[17] Other sections of transcript that have been relied on relate to the fact that I asked questions of the accused during the trial. These sections also do not support allegations of perceived bias. These sections of transcript are references 322, 324, 325, 326 and 332. A trial judge is entitled to ask questions and if I ventured into the realm of cross examination it could have been the subject of appeal.

[18] I now deal with some of the other references in the submissions:

> T54.5 – this was simply an attempt to illustrate that a question cannot be based on a false assumption. It does not go to the issue of perceived bias.
>
> T101 – involved a debate over an issue of evidence.
>
> T117 -120 & 349 & following – during the trial the defence raised a claim that the injured party may have been a paedophile. There was no basis for the allegation. This was the reason I raised the matter, properly, with the jury. My comments reflected on the defence case, but not necessarily the defence counsel.

[19] I accept that it is unusual to interrupt a defence closing, but I make no apologies for doing so, as counsel was arguing in support of a proposition that had been ruled against by me earlier in the day. In other words it was a submission that was unsupportable. It is not correct to suggest that earlier in the trial I had approved of counsel

making the submissions she eventually made. I repeat there had been a ruling that very day. I add that the closing address itself created further problems for me. I gave a careful consideration to stopping the trial after the defence closing and then discharging the jury, but after discussion with counsel I determined to proceed, but give the jury a direction, over and above the usual direction, to only take into account those matters that were part of the evidence. In giving these instructions I had to refer to some of the more significant errors made by Ms Nguyen in her closing address.

[20] I set out this section of the summing up below:

> Unfortunately during the final address of defence counsel it was littered with errors of fact. Now I have noticed you are a very careful and you are an engaged jury. You have been paying great attention and you clearly would probably have picked up some of the errors yourselves. But I have to tell you now about some of the more significant mistakes so that you are able to reach a verdict based on the evidence.
>
> Let me make it clear that I have no complaints whatsoever about the address of the Crown prosecutor, it was both fair and logical. However, this is not a debating competition. The accused faces a serious criminal charge, two actually, and he is entitled to have a case determined on the evidence not what is lawyer thinks is the evidence. You will note that I interrupted defence counsel early in her final address. That was very unusual, we do not normally do that but I do so because she had made a significant error in law.
>
> Now to her credit when this was pointed out, she corrected it. Yesterday morning I had ordered that the lesser charge, this is harm, the serious harm and is harm, I had ordered the lesser charge be allowed to be presented. Therefore the opening of the final address from defence counsel in saying that in some way Ms Grealy was unfair – the Crown were unfair in laying that charge, was simply wrong. I had actually made a court order that

morning allowing the charge to be heard and then she proceeded to continue with her final address and made these errors.

Now you may wonder well if she is making all these errors why did you not intervene judge, why did not the prosecutor object? Well it has been a long standing tradition in our system, long standing etiquette that nobody interrupts a final address. What you do is you take a note of the errors so they can be corrected later.

Now sometimes these occur simply through a lawyer misreading evidence that happens. We all make mistakes and usually the order is isolated and insignificant but unfortunately this is not the case here.

But I do form the view that with appropriate directions from me you will be able to reach a verdict on the actual evidence and with this in mind I will now turn to a few of these serious mistakes. The defence counsel claimed that Mr Robinson did not tell the court he had long standing depression, he did, twice. Once to her. She claimed Mr Van Eigen had no qualifications other than two memberships of association.

I might say this matter in passing she also said he did not even know how many points he needed to gain yearly accreditation and somewhat ironically referred to similar requirements within the law and actually mentioned evidence as a subject requiring yearly accreditation. Anyway, getting back to Ms Van Eigen he had a Batchelor's degree. He had a Master's degree. He gave evidence about that. She was wrong.

Defence counsel claimed that the ex-wife of the accused corroborated him about having concern about the safety of her child before the altercation with Robinson. That was not the evidence. Defence counsel claimed that Mr Layt took hold of Robinson to stop him trespassing on their property. There was no such evidence. It was suggested that Mr Robinson may have had more than three drinks before leaving for his walk with the dogs. Not only was that never put to Mr Robinson but, in fact, she put to Mr Robinson - Ms Nguyen put to Robinson that he had three drinks. Just three drinks.

It was claimed by defence counsel that the Crown were alleging that the psychological disability of Mr Robinson was the basis of the Crown's serious harm case. It was not. Serious harm can be cumulative – serious harm can be physical plus psychological. I

> will come to that in more detail later. I am just at this stage trying to clear your mind if any of you have taken in some of these errors.
>
> It was claimed that foreseeability is a subjective matter, it is not. It is partly – this is a matter of law, it is partly subjective but partly objective as I will explain to you later when I go through the aide-memoire.
>
> Now that is but a sample. And what happened was when you had gone for the day I raised some of these issues as did the prosecutor – the prosecutor raised these issues too. And I regret to say that later in the summing up I will have something more to say about the way in which the case has been conducted because of the failures to put various things, I explain how that works. The failure by the defence to put aspects of the case to witnesses. The failure to put accurate instructions to witnesses or to not put instructions at all. This, however, may not be necessarily wholly or even largely the fault of counsel and I will come to that later.

[21] The last sentence above has to be viewed in the context of other parts of the summing up including the earlier section referred to by me in this decision.

[22] Unfortunately, there were other rulings that had to be made during the trial to resolve unnecessary evidentiary issues. One example was when the Crown called a witness to give opinion evidence as a psychologist. A voir dire was conducted and I provided a written ruling later. This ruling is set out hereunder:

> On the 19 June 2018 during the trial of Matthew Layt the Crown called a Mr Van Eigen. From the cross-examination of Mr Robinson, the complainant, it was clear the defence strategy was to seek to undermine the medical and quasi-medical evidence led by the Crown. Mr Van Eigen was the treating psychologist. Rather than simply allow Mr Van Eigen the opportunity to give evidence, as a precaution, I asked counsel for the Accused whether she accepted Mr Van Eigen's qualifications. Counsel indicated that she did not.

In the circumstances, I determined to conduct a voir dire. Prior to the trial commencing I had asked counsel whether there were any evidentiary issues outstanding but was told there was not. Additionally, as the witness was already in the witness box and was giving evidence of his qualifications I determined to conduct the voir dire in the presence of the jury. It seemed to me that the jury were entitled to take into account any attack on the witness' credibility during the voir dire and secondly the jury would have the opportunity of seeing defence counsel conduct further cross examination if the voir dire was unsuccessful. In the circumstances there could be no possible prejudice to the Accused. In addition, the jury had already heard the witness give evidence briefly, as to his qualifications.

As the issue was evidentiary in nature it fell to me to make the determination.

In examination-in-chief the witness gave, in my view cogent evidence, of becoming qualified years ago in Holland, later coming to Australia and achieving registration as a psychologist. He has practised in the same premises as a psychologist for 25 years and before that was the head of Relationships Australia in the Northern Territory whilst also acting privately as a psychologist.

The attack on the witness, during the voir dire, in cross examination, was in my view both nebulous and insubstantial. There was no sensible attempt to show the witness was unqualified. The cross examiner largely trawled through the various qualification appellations that the witness possessed seemingly without joy. The cross-examination did not venture into any factual issue that arose in the trial.

It was my view that the witness was qualified to give an opinion. He has qualifications both in Holland and Australia and has practised in Australia for many years. I so ruled.

After my ruling the witness completed his evidence in chief. Prior to the commencement of cross-examination I made it clear to the jury that I had simply determined that the witness was qualified to give an opinion, but it was a matter for the jury as to whether they should accept that opinion.

(The witness was then cross-examined and re-examined).

[23] I add that Ms Nguyen made a submission at the close of the Crown case that there was no case to answer. A 'no case' submission should not be made lightly, as it was in this case. In fact, there was ample evidence upon which a jury could convict and the application was destined to fail.[1] My ruling was made ex tempore and is set out below:

> At the close of the Crown case, Ms Nguyen makes a claim that there's no case to answer. She first of all claims that serious harm has not been made out. In fact, there is ample evidence of serious harm from a psychologist, a doctor, Mrs Robinson and Mr Robinson. The evidence of Mrs Robinson in particular, the jury may find compelling, about the ongoing, continuing problems that her husband has.
>
> It is submitted secondly that causation has not been made out. In fact, the psychologist, Mrs Robinson and Mr Robinson all relate the incident to his ongoing symptoms.
>
> The subsequent incident in November of 2017 may well have exacerbated the original trauma on one view, but one could hardly imagine that this could assist the defence case.
>
> Thirdly, the claim that her client couldn't have foreseen that causing an injury of the type caused was a possible consequence, ignores the definition of serious harm, which includes the cumulative effect of more than one harm and could include psychological and physical trauma.
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> On the face of it, without hearing the defence, it strikes me as being a strong Crown case and the application is dismissed.

[24] I have set out in some detail a number of the difficulties that confronted the court during this trial. It may well have been that Ms Nguyen's client was recalcitrant and his instructions may have been at times wayward. Nevertheless, the various errors meandered through many regions of the evidentiary calendar. However, this does not mean

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1 See, *R v Doney* [1990] HCA 51.

that it could be perceived that I was biased as against Ms Nguyen. I simply sought to conduct the trial so that it was fair to both parties. It is important that one appreciates the true flavour of the earlier trial and not simply some isolated slices of transcript.

[25] I now deal with the remaining references. These are T117-120, 291, 292, 293, 297, 302-304 and 316. I accept that during the trial I made a number of robust criticisms of the conduct of defence counsel. The trial was made more difficult as a consequence of the failure of defence counsel to comply with the rules of evidence. I do not resile from my criticisms, but upon reflection I concede that I should at times have been more patient and diplomatic. In this trial, as I stated earlier, I carefully considered as to whether I should discharge the jury after Ms Nguyen's final address because of a number of factual errors and unsupportable submissions she made. I was concerned to see that the accused received a fair trial. On balance I decided to let the trial proceed to verdict with appropriate warnings from me to only rely on the evidence and to excise from their minds all extraneous matters. In my summing up I made it clear to the jury that they had to determine the case only on the evidence. The claim in the written submissions that I did not put the defence case to the jury, in the first place, is incorrect and would surely have drawn a prompt appeal, but secondly does not go to the issue of perceived bias. The majority of the transcript references relate to appeal points for an appeal that was

never made. I conclude that when one looks at the trial as a whole one can see that the court was faced with numerous challenges, many arising from the manner in which the defence was presenting its case. My task was to do my best to ensure the jury determined the case only upon relevant and admissible material. The jury in the previous trial had to arrive at factual determinations arising out of a physical confrontation at the front gate of the accused's home. As a consequence, the Crown alleged the victim suffered serious harm. The victim was alone, but the accused and his wife were present. The wife, who was separated from the accused, was called as a Crown witness. In these circumstances the minutiae of the respective accounts was important. Counsel had to be accurate in putting instructions in examination and cross-examination. The difficulty a jury is faced with when instructions are not put at all or put inaccurately is that opposing counsel will cross examine on the failure to put or the inaccuracy. The jury is then left with the quandary of sorting out whether the witness is saying something at odds with what was put before because it is invention or because his counsel has been inaccurate. An example of this is set out below. It is the prosecutor cross-examining the accused [T293]:

> Prosecutor: 'So let me be clear, did you say to her, "Go and call police"?
> Accused: I'm sure I did, but I'm unsure.
> Prosecutor: You're unsure?
> Accused: Yeah.

> Prosecutor: But you didn't say it in evidence in chief, did you?---You know what - - -And it wasn't put to Ms Layt during cross examination, was it?
> Accused: Sorry?
> Prosecutor: It wasn't put to Ms Layt during cross examination?
> Accused: I don't recall youse two doing it.
> Prosecutor: And that's because that simply didn't happen. Isn't that right?
> Accused: No, I disagree with that.

What does a jury make of the mare's nest? Is it invention? Is he confused? Is it Ms Nguyen's fault for not putting the allegation to his wife or to him in examination-in-chief? This type of factual dilemma was not untypical.

[26] The fact I was critical of Ms Nguyen in the previous trial does not mean that it could be perceived reasonably that I am biased against Ms Nguyen so as to cause an injustice to the next accused person who she represents before me. One would hope and expect that in her next appearance before me she would comply with the rules of evidence and generally act competently.

[27] The test to be applied as to whether the judge is disqualified by reason of perceived bias is whether a fair-minded lay observer might reasonably apprehend that the judge might not bring an impartial and unprejudiced mind to the resolution of the question the judge is required to decide. It is an objective test and is founded upon the need

for public confidence in the judiciary.[2] Deane J in *Webb v R* [1994] HCA 30 said:

> The area covered by the doctrine of disqualification by reason of the appearance of bias encompasses at least four distinct, though sometimes overlapping, main categories of case. The first is disqualification by interest, that is to say, cases where some direct or indirect interest in the proceedings, whether pecuniary or otherwise, gives rise to a reasonable apprehension of prejudice, partiality or prejudgment. The second is disqualification by conduct, including published statements. That category consists of cases in which conduct, either in the course of, or outside, the proceedings, gives rise to such an apprehension of bias. The third category is disqualification by association. It will often overlap the first ((99) e.g., a case where a dependent spouse or child has a direct pecuniary interest in the proceedings.) and consists of cases where the apprehension of prejudgment or other bias results from some direct or indirect relationship, experience or contact with a person or persons interested in, or otherwise involved in, the proceedings. The fourth is disqualification by extraneous information. It will commonly overlap the third ((100) e.g., a case where a judge is disqualified by reason of having heard some earlier case: see, e.g. *Livesey v. New South Wales Bar Association* [1983] HCA 17; (1983) 151 CLR 288; *Australian National Industries v Spedley Securities* (1992) 26 NSWLR 411) and consists of cases where knowledge of some prejudicial but inadmissible fact or circumstance gives rise to the apprehension of bias.

[28] The only category that could possibly apply in this case would be to argue that category two is applicable. In other words, it is being argued that my conduct in the previous case was so egregious that it would be apprehended that I would be biased against Ms Nguyen, presumably, in any trial she appears in before me in the future and furthermore such

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2 See *Michael Wilson and Partners Limited v Nicholls* [2011] 244 CLR 427.

bias would extend to such a bias against her client that he or she would not receive a fair trial.

[29] The common thread that generally runs through previous cases is that the bias must be apprehended. In *Barakat v Goritsis [No 2]* [2012] NSWCA 36, it was said:

> The fair-minded lay observer is unlikely to apprehend bias against one party merely because the trial judge describes the behaviour of counsel for that party as disgraceful or tendentious, unless the observer would consider such epithets inapt to the extent of being unreasonable and indicative of an inability to bring an impartial mind to bear on the issues in dispute.

[30] The Crown referred me to a Northern Territory authority that has some relevance to this case, *AG for NT v DPP for NT and others* [2013] NTCA 2. In this case a Registrar, having the powers of a Magistrate, was to hear a summary prosecution. The prosecution sought to have her disqualify herself because she was married to a lawyer for the defendant. Upon appeal, the Northern Territory Court of Appeal concluded that there was no logical connection between the case being heard by the Registrar and any possible failure by her to decide the case on its merits. Though this case rested on the relationship of the judicial officer and a lawyer in the case, it has some relevance to the present circumstances as it cogently points to the necessity of there being a logical connection between the case to be heard and the alleged perceived bias.

[31] It must be said that judges in criminal trials have no responsibility for fact-finding, but nevertheless the rules relating to recusal apply as judges during trials have to make various decisions particularly relating to admission or exclusion of evidence.[3]

[32] In its essence the test for apprehended bias depends upon the establishment of the fact that the trial judge will not be impartial.[4] It is a serious matter for a judge to recuse himself or herself from forthcoming litigation. It is not a step that is taken lightly. In this case I am told the accused man has been in custody upon remand for a year. If the trial date was to be vacated it may cause further delay. This latter matter is not determinative, but it is worth noting.

[33] It is an imperative in a recusal application for apprehended bias to establish a link or logical connection between the cause of the appearance of bias, in this case critical comments about counsel in an earlier case and the case the subject of the recusal application. The application of the test involves two steps. The first step is to identify what it is that has been said or done that may lead the trial judge to decide a case otherwise than on its merits. The second step is to articulate the nexus between those circumstances and the apprehension that the case might not be decided on its merits. It is my view that neither step can be shown in this case, but even if the conduct of the

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3 *R v Goussis* [2007] VSC 171.

4 *Johnson v Johnson* [2000] 205 CLR 337.

previous trial did lead to the first step being proven, there is simply no logical connection between those circumstances and the apprehension that I might determine a forthcoming case other than on its merits.[5]

[34] Expanding upon the latter statement, the difficulty that confronts the applicant in this case is to relate criticism of counsel in one case to an apprehension that there will be criticism of counsel in a forthcoming case. It does not stop there though. The apprehension must be such that the criticism would taint the litigation. The criticism would be such that the accused would not receive a fair trial. It is my view that the argument lacks a logical nexus between the factual basis of the alleged bias and the case where the actual claim for recusal is made. It therefore cannot succeed.

[35] A trial judge has the obligation to conduct every criminal trial in a fair manner. There is a presumption, or what can be described as a rule akin to a presumption, that in every case a judge will act justly and without bias. The reasonable observer is taken to understand that the application is made in the context of the judicial system. Judges are bound by rules of precedent and their decisions have wide-ranging effects. This observer will also understand that judges make decisions in accordance with law and are generally able to ignore the consequential effects of decisions.[6] In addition, the hypothetical

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5 *DJ Singh v DH Singh and Others* [No 2] [2018] NSWCA 31, 13.

6 *Ronan v ANZ Banking Group* [2000] 2 VR 531.

reasonable observer would be well aware that a judge by his or her training is expected to discard prejudicial or immaterial matters.

> The characteristic function of the judge is to preside, to direct the trial procedure and rule on any arguments as to admissibility of evidence, to resolve any other legal issues that arise in the course of the trial, and sum up to the jury at the conclusion of the trial, giving them such instruction on the law as is necessary to enable them to deliver a verdict according to law.[7]

[36] For a recusal application to be successful this rule or presumption would have to be rebutted. The trial to which I am being asked to recuse myself has not commenced and is not due to commence for, in excess of, a week. It is a trial of which I have no knowledge. It is to be conducted with a jury. I do not conclude the rule or presumption has been rebutted.

[37] It is the party submitting apprehended bias that has the onus of establishing that this bias exists. There must be good cause. Furthermore, mere lack of nicety or bad temper displayed during a case would generally not even establish apprehended bias in that case. The hypothetical observer is aware that the relationship of judges, lawyers, parties and witnesses occurs in an adversarial situation where from time to time tempers become frayed. The conduct of a trial is by human beings with all their concomitant frailties.[8]

[38] I have already noted that there was no appeal lodged in this case. I also note that during the prior trial there was no application for the

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7 Gleeson CJ 'The Role of a Judge in a Criminal Trial' [Lawasia Conference Hong Kong 6/6/07].

8 *R v CCAC* [1969] 122 CLR 546.

discharge of the jury by the defence counsel on the ground of any alleged bias shown by me. There was no application for discharge at all.

[39] There may be circumstances, where a trial judge would recuse himself because of his association or relationship with a lawyer. In this case, it is accepted that I have never met defence counsel and that she has only appeared before me in one trial.

[40] I also do not conclude that because I was critical of Ms Nguyen in one case this would lead to the perception that I would be biased against her in a second case and that such bias would lead to her client not receiving a fair trial. It simply does not follow logically that this would be likely to occur. I would go so far as to say that it is a somewhat novel concept. It is my view that a reasonable observer would conclude that there is no nexus between the events that took place in the previous trial and a forthcoming trial where I do not know the parties or any of the witnesses or know nothing of the facts. I conclude the reasonable observer would expect me to do my job and counsel, whoever they are would act competently.

[41] Generally these applications are made during a trial when something is said or done which may tend to show bias or in circumstances before a trial where the judge knows something of the case or one of the participants. For a situation to arise where a barrister is offered a brief

before a particular judge and then seeks to have that judge remove himself or herself from the case raises a whole new order. It would be an easy option for a judge to take to grant an application for recusal. However, it is necessary that these applications are determined on their merits and "that where the application of the principles do not disqualify a judge from sitting, the judge continue to preside in order to ensure that 'judge shopping' does not undermine the independence, impartiality and legitimacy of the justice system".[9]

[42] In the above at case Rothman J, whilst discussing the principles applicable to disqualification applications, stated as follows:

> Judges should perform the duties of their office which, of their nature, will often be painful and unrewarding. They should do so with courage and decisiveness avoiding the relinquishment of their duties which will then necessarily fall to another judicial officer for whom the task may be no more congenial. Such relinquishment will also involve costs delay and inconvenience to parties who are otherwise entitled to have the decision of the judicial officer appointed to their case.[10]

The learned judge went on to say:

> The legitimacy of the institution and the impartiality of the administration of justice also depends upon the proposition that parties ought not be able to pick and choose the judges who sit on any particular case. That is a matter for the administration of the court.
>
> As a consequence, notwithstanding that the easier option for a judge dealing with a recusal application is to grant it and allow another judge to preside, it is necessary that such an application be dealt with on the basis of principle; that where the application of the principles do not disqualify a judge from sitting, the judge continue to preside in order to ensure that "judge shopping" does

9 *Karadaghian v Big Beat [Australia Pty Ltd [No3]* [2014] NSWSC 169.

10 Ibid, 23(e).

> not undermine the independence, impartiality and legitimacy of the justice system.[11]

I adopt these principles in my assessment of this application

[43] I do not conclude that in this case Ms Nguyen is Judge shopping, though this application does bear some of the hallmarks of a practice that is rightly frowned upon. I say this because counsel on 12 April 2018, a month before the trial was due to commence would have been aware that I was the trial judge. This was because the existing T1 (the listed trial) had become a plea and her case the T2 (the backup trial) had become the listed trial. Ms Nguyen could have returned the brief. She chose not to, but rather sought to have me recuse myself. This is effectively, therefore, an application that seeks in a way to pull itself up by its own bootstraps. It is certainly important that accused are represented by their lawyer of choice. On the other hand it is also important that the court system runs efficiently and cases that are listed for hearing are heard and determined efficaciously. There are a number of barristers in Darwin who would be capable of conducting this litigation and there was ample time for Ms Nguyen to have returned the brief so that this could happen. There is still more than a week before the trial is due to take place. I am not encouraging Ms Nguyen to withdraw. She is welcome to conduct the defence if she so chooses. However, there would be sufficient time for another barrister to be engaged if she now chooses to not appear.

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11 Ibid, 25 and 26.

[44] In conclusion I say that in certain circumstances a judge may need to be subject to recusal, but this is not a common event and the discretion should be exercised carefully but sparingly. This is not such a case.

[45] For all the above reasons the application is dismissed.
