

COURT OF APPEAL

**WHITE JA
MARGARET WILSON AJA
DOUGLAS J**

**CA No 201 of 2011
DC No 3095 of 2010**

RUSSELL GORDON HAIG MATHEWS

Appellant

and

COMMISSIONER OF POLICE

Respondent

BRISBANE

DATE 25/11/2011

JUDGMENT

WHITE JA: Mr Mathews has requested that I disqualify myself from sitting on his application for leave to appeal the decision of Judge O'Brien in the District Court hearing an appeal pursuant to s 222 of the *Justices Act* from a decision of a Magistrate made in the course of committal proceedings in which Mr Mathews is the defendant.

The bases that Mr Mathews has advanced for his request that I recuse myself are, first that my husband did not give him a passing mark when he was a student in maritime law at the University of Queensland, I think, some years ago. Secondly, that I am friendly with two women who were involved in the human rights and equal opportunities litigation which involved Mr Mathews, again, many years ago; one as a respondent, as I understand from Mr Mathews' outline, and the other as counsel. Apart from the material which is in Mr Mathews' outline I have no knowledge of those matters at all. The third basis upon which Mr Mathews seeks that I recuse myself is that I have struck out part of a pleading in which he was the plaintiff against a number of parties in civil proceedings. That occurred in August

2005.

As to the first basis, at the time in 2005, I knew nothing of Mr Mathews' status as a student and I had dealt with his request on that occasion that I recuse myself for that reason in the judgment which is [2005] QSC 222. Nothing has changed since then and I take no different view of the matter.

As I said, I have no knowledge at all of the human rights and equal opportunity proceedings to which he refers. They are quite different to these proceedings. They involved an issue far removed and remote from these and I would not regard any personal relationship with the two women as having anything to do with this matter.

The third basis was my ruling in civil proceedings, again, totally unrelated to this matter which is a question of law.

The test for apprehended bias as stated in *Ebner v Official Trustee*, is that a fair minded lay observer seized of all the facts would or would not regard the Judge as demonstrating bias. Such a person would not conclude, armed with all the facts, any risk of bias by me.

If Mr Mathews' complaints of apprehended bias were to prevail I would think there would be few occasions upon which a Judge could sit and carry out his or her duty to do the work of the Court. So, Mr Mathews, I propose not to recuse myself from hearing your application for leave to appeal from Judge O'Brien's order. Thank you.

MARGARET WILSON AJA: Mr Mathews, it's Justice Wilson speaking.

APPELLANT: Yes, your Honour. Thank you.

MARGARET WILSON AJA: Mr Mathews has been highly critical of a recent decision of

the Court of Appeal, *Tierney v Commissioner of Police* [2011] QCA 327. I wrote the principal judgment in that matter and the two colleagues who sat with me agreed with my reasons for judgment.

The question for determination by the Court today is a legal one. It is not a question which arose in *Tierney*. It will not involve any examination of the merits of the charges Mr Mathews is facing. I do not consider that a fair minded lay observer might reasonably apprehend that I might not bring an impartial mind to the resolution of the question before the Court today. I decline to recuse myself.

DOUGLAS J: This is Justice Douglas, Mr Mathews.

APPELLANT: Yes, your Honour. Thank you.

DOUGLAS J: Mr Mathews, the applicant in this proceeding, has asked me to disqualify myself from the hearing of his application on the ground that I am related to a former employee of the State Crown Law Office, Mrs Fran Douglas. Mrs Douglas is married to one of my second cousins. I see her husband regularly because he is my general practitioner. I have met Mrs Douglas, however, on only a handful of occasions over the last 25 or 30 years, normally at larger family functions, and do not know her well.

Mr Mathews' attitude to Mrs Douglas relates to assistance she is said to have provided to a friend of hers who made a complaint of sexual harassment against Mr Mathews to the Human Right and Equal Opportunities Commissioner, probably some time around 1989. That complaint is not related to the matters sought to be argued in this application.

To my recollection I have never spoken to Mrs Douglas about Mr Mathews or his concerns about the complaint of sexual harassment and have no knowledge of it apart from what has been said by Mr Mathews in this proceeding and, from memory, on another occasion when he

appeared before me and asked me to disqualify myself for similar reasons.

The test for disqualification for apprehended bias is whether a fair minded lay observer might reasonably apprehend that the Judge might not bring an impartial mind to the resolution of the question the Judge is required to decide. Judges also have a duty to exercise their judicial functions when their jurisdiction is regularly invoked and they are assigned to cases in accordance with the practice which prevails in the Court to which they belong.

The passage supporting that proposition in *Ebner v Official Trustee* [2005] 205 CLR 337 at 348, paragraphs 19 to 20, goes on to say

"Judges do not choose their cases; and litigants do not choose their judges. If one party to a case objects to a particular judge sitting, or continuing to sit, then that objection should not prevail unless it is based upon a substantial ground for contending that the judge is disqualified from hearing and deciding the case.

[I]f the mere making of an insubstantial objection were sufficient to lead a Judge to decline to hear or decide a case, the system would soon reach a stage where, for practical purposes, individual parties could influence the composition of the bench. That would be intolerable."

In this case the most that was claimed by Mr Mathews was that it was not fanciful to believe that I would wish to protect Mrs Douglas from revelations of alleged misconduct by her in assisting her friend to complain against Mr Mathews dating back to a period during or possibly shortly after 1989.

I know nothing personally about those events and have not discussed them with Mrs Douglas. They are unrelated to the current application dealing with charges against Mr Mathews that he used a carriage service to menace, harass or cause offence. There is no suggestion on the

evidence or material before me that Mrs Douglas has any connection to the relevant events related to those charges.

The particular questions at issue in this application are whether the committal proceeding on foot against Mr Mathews should be stayed as an abuse of process and whether a right of appeal to the District Court exists from a ruling by a Magistrate during a committal hearing referring the question of Mr Mathews' fitness to be tried in respect of the offences with which he is charged to the District Court. Nothing alleged to have been done by Mrs Douglas about 20 years ago has any connection to those issues.

In those circumstances it seems to me that the only sensible conclusion is that a fair minded lay observer would not reasonably apprehend that I might not bring an impartial mind to the resolution of the question I have to decide. Accordingly, I shall continue to hear the application.

WHITE JA: Well, those are the reasons of each member of the Court, Mr Mathews.