PARTIES:	**WAYNE BRITTAIN**
	v
	CONSTANTIN PLOCHOROS
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT APPELLANT JURISDICTION
FILE NO:	LA 7 of 1997 (9604293)
DELIVERED:	11 SEPTEMBER 1997
HEARING DATES:	13 & 14 AUGUST 1997
JUDGMENT OF:	MILDREN J

REPRESENTATION:

Counsel:

Appellant:	A H Silvester
Respondent:	D Alderman

Solicitors:

Appellant:	Peter McQueen
Respondent:	NT Legal Aid Commission

Judgment category classification:	B
Judgment ID Number:	MIL970015
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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

No. LA7 of 1997 (9604293)

IN THE MATTER of an appeal under the *Local Court Act*

BETWEEN:

WAYNE BRITTAIN
Appellant

AND:

CONSTANTIN PLOCHOROS
Respondent

CORAM: MILDREN J

REASONS FOR JUDGMENT

(Delivered 11 September 1997)

This is an appeal pursuant to s19(1) of the *Local Court Act 1989*.

On the 27th of February 1996 the respondent commenced proceedings in the Local Court against the appellant to recover the value of Mazda E2000 truck which the respondent had left with the appellant to sell on consignment in the middle of 1980. The respondent has signed the registration papers in relation to the truck which he left with Mr Peter Barr who was then practising as a solicitor in Darwin. The learned Magistrate found that it was the intention of the parties that the appellant would when he effected a sale of the

truck contact Mr Barr to obtain possession of the registration papers which would be needed to effect transfer of the registration to the buyer.

In June or July of 1980 the respondent travelled to Greece where he remained until he returned to Australia on or about the 27th of March 1994. Apart from sending a Christmas card to Mr Barr some time in the early 1980's there was no further contact between the respondent and Mr Barr. There was also no contact between the respondent and the appellant during this period. The learned Magistrate found that in some time in 1980 or 1981 the appellant gave the truck to two men with "dark curly hair" without obtaining from the respondent permission to deliver the truck to them. At that time the company for whom the appellant was working had ceased trading.

In 1980 the truck was valued at $5,500.

On or about the 27th of March 1994, after the respondent returned to Australia, the respondent made enquires in order to ascertain what had happened to his truck. He located Mr Barr who eventually referred him to the appellant with whom he spoke on or about the 22nd of May 1995. The respondent ascertained from the appellant that the appellant did not know where the truck was and that the truck had been picked up by two men purporting to be friends of the respondent. The respondent involved the police and ascertained from a police officer that the appellant had given the truck away to two "Greek men". The learned Magistrate found that the truck was bailed to the appellant for the specific purpose of its sale and that the appellant was then to account to the respondent through Mr Barr for the

proceeds thereof. He found that the appellant did not sell the truck but that he gave the truck away without obtaining the permission of the appellant.

Prior to the 26th of February 1982, the relevant statute of limitations provided a limitation period of 6 years. On the 26th of February 1982 the *Limitation Act* came into force. S9(2) of that Act provides that the time for bringing proceedings in respect of a cause of action that arose before the commencement of the *Limitation Act* shall, if it has not then expired, expire at the time it would have expired had the *Limitation Act* not come into operation. The respondent's cause of action arose at the time the truck was converted in either 1980 or 1981. Consequently the respondent's cause of action became statute barred under the previous Act (the *Limitation of Suits and Actions Act, 1866* (SA), which still applied in the Northern Territory) in either 1986 or 1987. Therefore at the time when proceedings were commenced the plaintiff's action had been statuted barred for approximately 9-10 years. S9 of the *Limitation Act*, however, enabled the plaintiff to apply for an extension of time pursuant to the provisions of Div. 2 of Part III of the *Limitation Act*. The learned Magistrate heard the application for an extension of time at the same time as he dealt with the action on its merits. The learned Magistrate, after hearing the evidence and submissions made an order extending the time within the which the respondent may commence the action against the appellant until midnight on the 26th of February 1996, entered judgment for the respondent against the appellant for the sum of $12,189.21 and ordered the appellant to pay the respondent's costs to be taxed.

The appellant has appealed to this Court on three main grounds, namely:

1. That the learned supendiary Magistrate erred in granting the extension of time within which the respondent may commence his action against the appellant until midnight on the 26th of February 1996 or at all.

2. That the learned supendiary Magistrate erred in law in awarding judgment in favour of the respondent.

3. That the learned supendiary Magistrate erred in law and awarding the respondent damages on the basis of the value of the motor vehicle assessed at $5,500 in 1980 plus interest, thereon, or any damages at all.

An appeal to this Court under s19(1) of the *Local Court Act* is limited to an appeal on a question of law.

Ground 1 of the Appeal - Apparent Bias

Ground 1 of the Notice of Appeal provided a number of "particulars", one of which was that "there is a reasonable apprehension that the learned Stipendiary Magistrate might not have brought an impartial, unbiased, fair and independent mind to the question to be decided, namely whether the granting of an extension of time would prejudice the appellant". The test to be applied is whether a fair minded lay observer with knowledge of the material objective facts might entertain a reasonable apprehension that the magistrate did not bring an impartial and unprejudiced mind to the resolution of the question in issue: see *Webb v The Queen* (1993-94) 181 CLR 41 at 51-52, 57, 67-68 and 87-88; *Minister for Immigration, Local Government and Ethnic Affairs and Another v Mok Gek Bouy* (1994-5) 127 ALR 223.

Counsel for the appellant did not suggest that the learned Magistrate had said anything or conducted himself in any way during the course of the hearing so as to give rise to a reasonable apprehension of bias in this sense. What he submitted was that the learned Magistrate, when he delivered his oral reasons for judgment, demonstrated bias in the relevant sense. Counsel for the appellant referred to the following passages in the judgment:

> "Prejudice to the defendant. Well in this case I can see none, and in order to make that finding I have to make some findings on the credibility of Mr Brittain. Mr Brittain struck me as a person whose evidence was to be received with a grain of salt. He struck me as the archetypal car salesman; in otherwise, a person not to be trusted."

And later his Worship said:

> "The thought has crossed my mind that Mr Brittain disposed of the truck by selling it and pocketed the proceeds of sale."

And later his Worship said:

> "I have a suspicion in this case because Mr Brittain does not give an idea of his accounting system or his recording system. Sorry, I will rephrase that. In this case, Mr Brittain does not give an idea of his accounting system or his recording system."

Mr Silvester submitted that these passages show bias in the relevant sense. He submitted that the first passage showed that the learned Magistrate had a poor opinion of car salesmen and that because Mr Brittain was a car salesman he formed a poor opinion of him. The second and third passages show that the learned Magistrate suspected that the appellant had sold the car

and pocketed the proceeds of the car even though there was no evidence put forward at all to suggest that such was the case, nor did the respondent assert this in the Statement of Claim.

Counsel for the appellant submitted that it was not fatal to his submission that the only material to which he could point in support of the submission of apparent bias appeared in his Worship's reasons for judgment. In this respect he relied up the decision of the High Court in *Vakauta v Kelly* (1989) 167 CLR 568 where comments made by the learned trial Judge during the course of the trial showed that he had a preconceived and adverse view of the reliability of a particular medical witness who gave evidence in the trial before him. No objection having been taken to those comments by counsel, the appellant had waived the right subsequently to object. But when His Honour delivered his reserved judgment he made derogatory and wide sweeping references to the particular witness in question which indicated that His Honour was concerned to vindicate his preconceived and very strong adverse views about the reliability of that person as a witness and had allowed those views to prejudice his whole approach to the case to the detriment of the defendant. Consequently the comments in his Honour's judgment were able to be looked at in the light of the earlier comments made during the hearing as any waiver of any right to complain about the early comments did not go so far as to waive any right to complain if comments made about the witness in the judgment itself, would in the context of the earlier comments, have the effect of conveying an appearance of impermissible bias in the actual decision to a reasonable and intelligent lay observer.

I accept that observations made by a judge or magistrate in the course of delivering judgment, whether orally or in writing, may be of such a kind as to demonstrate a reasonable apprehension of bias even though there was nothing other than those comments which could be pointed to. In a case such as this, the position must be considered objectively from the stand point of the intelligent and reasonable lay observer listening to His Worship's oral reasons at the time they were delivered. In the circumstances of this case it would appear to be necessary to attribute to the intelligent and reasonable lay observer knowledge of the evidence given by the appellant at the trial, and the pleadings, in addition to what fell from the learned Magistrate himself.

In *Minister for Immigration, Local Government and Ethnic Affairs and Other v Mok Gek Bouy*, Sheppard J said, supra, at 246:

> "It is important to emphasis the fact that the test to be applied is an objective one. It has no element of subjectivity about it. That is so whether one approaches the problem from the point of view of a party or a fair-minded observer. Both are deemed to be acting reasonably. It is the court's assessment of what, in given circumstances, the reaction of such a party or fair minded observer would be. The question is rarely without difficulty. It is impossible to avoid a degree of speculation in the carrying out of the exercise."

Counsel for the respondent, Mr Alderman, submitted that the reasonable lay observer would not entertain a reasonable apprehension of bias because of the care which the learned Magistrate took to explain in some detail why it was that he did not accept the appellant as a credible witness. It was submitted that it is plain from a reading of the whole of the remarks which fell from the learned Magistrate that he based these conclusions on a number of

considerations: his Worship's view of the state of the evidence relating to the conversation which the respondent had with the appellant in May 1995 when the appellant made enquires about the truck; the fact that the appellant had said in his evidence in chief that he given the truck away to two guys who were Greeks or Italians but in cross-examination departed from this description of them; the fact that he raised in his pleading that the truck "would have been collected by the respondent's solicitor or his agent" and made no mention of the two men who were unknown to him; his evidence generally, which indicated that on a number of occasions he was prepared to conjecture in the witness box; the lack of any evidence as to how the appellant had accounted for vehicles in his possession; and in referring to those matters his Worship took into account in favour of the appellant that he may well have had difficulty in remembering certain details after such a long passage of time and that in any event he could not be expected to remember the details of every vehicle which pass through his yard in 1980 and 1981. Mr Alderman submitted that whilst the learned Magistrate disclosed that it crossed his mind that the appellant had disposed of the truck by selling it and pocketing the proceeds, he nevertheless found in the appellant's favour that he gave the truck away to two men with dark curly hair who had the appearance of being gentlemen from a Mediterranean country. Looked at in context, all that the learned Magistrate had indicated was that he was suspicious about the appellant's version of the events for the reasons which he gave, but notwithstanding that suspicion, the learned Magistrate was not prepared to reach a finding that he had actually sold the vehicle and pocketed the proceeds.

There is much force in the respondent's submissions. From the point of view of a judge or someone trained in the law, it is possible to explain the learned Magistrate's comments in a way which would remove any apprehension of bias. But that is not the test. The test is what a reasonable lay observer might apprehend. Of course, there is in popular literature a stereo-type of the fast-talking used car salesman whose promises and representations are not worth the paper they are written on, just as there are less than flattering stereo-types of persons engaged in other occupations. But witnesses' evidence cannot be fairly judged by reference to these irrelevant stereo-types; they must be judged fairly upon their individual merits, and any images of such stereo-types must, no matter how difficult this may seem, be removed from the minds of those acting judicially. In this case the appellant's credit upon the vital issue of whether the appellant would be prejudiced by allowing an extension of time was very important to the outcome of the case. In the context of the appellant giving evidence about a matter some 15 years ago, it is not surprising that he would have had difficulty remembering the details and be inclined to speculate. I think a reasonable lay observer would be likely to apprehend that the learned Magistrate had a stereo-typed adverse image in his mind of car salesmen, that the learned Magistrate approached the evaluation of the appellant's credit as a witness on the basis that it was incumbent upon the appellant to show that he was not of this ilk, and that this appellant had failed so to do for reasons which amounted to a justification by the learned Magistrate of this preconception. In other words, applying the relevant test, I conclude that a fair-minded lay observer with knowledge of the material objective facts might well entertain a reasonable apprehension that

the learned Magistrate did not bring an impartial and unprejudiced mind to the resolution of a question in issue at the trial.

In these circumstances, the appeal must be allowed, and the orders of the learned Magistrate set aside. There were other grounds of appeal as I have mentioned. I was invited by counsel for the appellant to conclude that the discretion of the learned Magistrate to grant the extension of time miscarried and that I should therefore excise the discretion reposed in the learned Magistrate myself. This is not possible in this case, as a critical finding of fact which was decided adversely to the appellant at first instance concerning the lack of any prejudice to him cannot stand. Therefore there must be a new trial before a differently constituted court. There will be orders accordingly. The respondent is ordered to pay the appellant's costs of the appeal to be taxed, the costs of the hearing in the Local Court to abide the outcome of the retrial.