

THIS COURT NO LONGER MUTE: CHIEF JUSTICE

The Northern Territory Supreme Court became the centre of national attention on 23 and 24 February in the wake of comments by the Chief Minister and Attorney General Denis Burke. Mr Burke's statements that the justice system was "totally corrupt" led to Chief Justice Martin ruling on an apprehension of bias in the Court.

The following is a transcript of the reasons for Justice Martin's decision.

The attitude of the Crown was that no submission would be made, and obviously no application was made. Mr Adams said that the Crown had no material to suggest that there would be any apprehension of bias on my part. I ascertained from Mr Adams that the material referred to included that which I had mentioned during the proceedings earlier that day.

Senior counsel for the defendants, Mr McDonald QC, submitted I should disqualify myself because his client was concerned and worried about the remarks made by the Attorney General, and the public impact they might have on the perception of the administration of justice. He disavowed any claim that I was actually biased against his client.

During the course of submissions, which I will not go into detail, I made it known, as I thought I should, the Attorney General had telephoned me during the course of the morning and apologised for the use of the word "corrupt" in his remarks. I had no indication of the subject matter of the call until it was received. I had thought that the Attorney General was conveying to me personally that which it was proposed to convey to the court, but that did not happen till some little time later.

I paid regard to the summary of the law given by Mildren J in *Tatum v Barker*, referred to by Mr McDonald. Whether I have offended by receiving a telephone call from the Attorney General is for others to decide.

It was Mr McDonald's submission that it would be impossible for the court to proceed unless the Attorney General publicly recanted. I do not accept that. If the Attorney General wished to say something to the court on the matter, it is open for him to do so. Whatever he had to say would be taken into account. If he did not wish to do so, the matter would fall to be decided in accordance with the material available to the court by applying the relevant law to it.

It was further submitted on behalf of the defendant that, as things stood, it would be impossible for justice to be seen to be done. It was claimed that there could be no public confidence in the court's administration of criminal justice if the remarks of the Attorney General were not retracted by him. I reject that submission for the reasons I have already given in relation to the like.

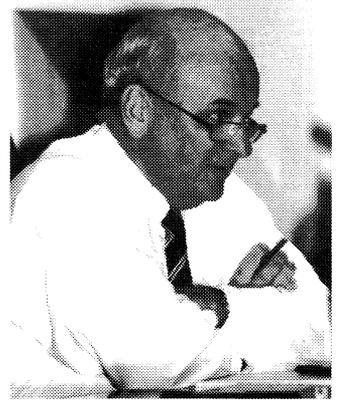
Mr McDonald noted, however, that if I was of the opinion that I should disqualify myself, I may need to pay regard to the doctrine of necessity. That is, even if I decided I should disqualify myself, it may be necessary for me to deal with the matter because all of the judges would presumably be of the same view. That cannot be assumed either.

Mr Tippett, appearing for the Law Society of the Northern Territory, and

"Those in the public eye should be very careful what they say in criticism of the courts."

Mr Southwood, for the Bar Association, both sought leave to appear on the grounds that the issues on this aspect of the case raised significant matters of legal principle and legal policy in respect of which I should hear them as interveners. I do not agree.

Matters of legal principle and legal policy are well known. I do not consider



that either of them would advance my understanding of what is involved beyond that is relevantly put by Mr McDonald.

I note that during the course of the proceedings the Attorney General appeared by counsel and apologised to the court in relation to the use of the word "corrupt".

The test which I must apply has already been referred to, but it is important to note that what is critical are the words "reasonable apprehension". "Apprehension" means, in ordinary language, "to entertain a suspicion or fear". That is qualified by the word "reasonable", which has a meaning in law, "reasonable in regard to the existing circumstances of which the public, under consideration, knows or ought to know."

The circumstances, to my mind, include that the radio statement was made at the commencement of a by-election campaign and with the fervour which accompanies such an event. The other comment came by way of answer in Parliament, again in a highly charged atmosphere of opposing sides of politics; again at the commencement of an election campaign, each according to their own lights and endeavouring to persuade members of the public to vote for their candidate.

The most important circumstances of all, of course, are the words referred to, not as they may have been reported in various forms. I have read them again and, objectively speaking, it is plain

that the remarks are wrong, plainly wrong; clearly represent a misunderstanding of the criminal justice system and the role of the courts in the due administration of justice, according to law.

The use of the word "corrupt" in that context, though apologised for, could carry with it notions of dishonesty or something depraved, wicked or perverted, perhaps even open to bribery. At the very least it can convey the impression that the courts may not administer justice impartially and according to law when dealing with convicted offenders.

Much of the language is extreme, exaggerated, and makes claims which simply are beyond reasonable acceptance. None of the claims are supported by reference to any evidence. I read again the extracts earlier referred to, which demonstrate the point I am endeavouring to make. Words employed include the following:

"The justice system per se is totally corrupt as far as I'm concerned."

Answering a question:

"It's as I said all along, the system is one of the fulcrum -"

I think, with respect, the Attorney meant "pendulum":

"- moving totally in favour of the criminal. All of a sudden, as soon as a criminal gets before the justice system, he pleads or she pleads, "I'm a victim, for various reasons: the circumstances of their upbringing or whatever. The whole focus of the justice system, we've been conned to believe that all of these rehabilitation and diversionary programs are the only answer."

In the House the Attorney said this:

"If you listen to the interview, I said, 'that is corrupted in this regard'. What I said was the justice system is corrupt -"

thereby embracing, I would've though, everything involved in the justice system:

- "it is perceived by Australians as being corrupt -"

embracing the whole of the nation:

"- it is perceived by the average law-

abiding Australian citizen as corrupt. It is perceived as not serving their interests in one way, shape or form. It is perceived as having its whole focus on the criminal. As soon as the criminal hits the justice system, all of a sudden he says, 'I'm the victim. I want the whole system to come and protect me.' What does the system do? What do lawyers do? What do all the do-gooders do? The whole system focuses on this guy who, all of a sudden, is a criminal one day and, the minute he hits the system, he is the victim -"

avoiding of course that the same person can fulfil both roles:

"- that's what's happening in the justice system in Australia -"

embracing the whole of the nation:

"- that is why Australians and Territorians are speaking out louder and louder to their politicians and are saying, 'We've had enough. What about me? How about someone fighting back on our behalf?' That's what's happening, and if you don't like those words, if the lawyers don't like those words, if the judges don't like those words, too bad."

A better example of hyperbole, I have yet to strike:

"We've had enough of criminals becoming victims."

The Attorney, in that context, is speaking on behalf of all Australians in respect of the whole of Australia and in respect of all courts in Australia.

I remind those present that the bare expression of an apprehension of bias does not establish it. It is a matter to be determined objectively by the judicial officer hearing the application, and that is me, and I proceed accordingly.

The unrestrained nature of the language is enough to demonstrate that no fair-minded person, acquainted with the facts, especially the remarks that were made in the context in which they were made, could possibly accept that they

represent the truth or even an inkling of the truth.

In those circumstances, and not withstanding the high office and authority the post of the Attorney General usually carries - I note Mr Burke has no training or experience in the law, a fact which also would be well known

- I do not accept that either of the parties or the public would entertain a reasonable apprehensions that I might not bring an impartial and unprejudiced mind to bear on the resolution of this matter.

To reasonably apprehend that those views of the Attorney General expressed in those circumstances might affect my mind in some relevant way, is incredible. I raised the matter to give the parties the opportunity to make submissions. I have heard them. I have considered the circumstances and, applying the test I have already referred to, and decline the defendant's application that I disqualify myself.

Whatever else it may be, the language of the Attorney General does not meet the test to raise an apprehension of bias. This is an appropriate time for me to say, in addition. What I have said publicly to the Attorney General and to the Attorney General personally before.

Those in the public eye should be very careful what they say in criticism of the courts. Fair criticism is, of course, the exercise of free speech in a democracy and cannot be quarrelled with, but criticism couched in extreme language, without foundation in fact, without regard to the institution of the courts as an equal arm of government, or for an ulterior purpose, will not go unanswered.

There was a time when it was part of the traditional role of the Attorney General to protect the courts against unfair criticism. Sadly that is no longer the case and has no been so for some years. Attorneys have been involved in the attacks.

I make it plain that this court at least will no longer stand mute.

"...criticism couched in extreme language without foundation ... will not go unanswered."