

AFTERNOON SESSION – CARTER-ARTIS CASE

**Hearing on a Motion to Disqualify Judge Bruno Leopizzi from
Presiding over an Evidentiary Hearing in the Carter-Artis Case, 1981**

JUDGE BRUNO LEOPIZZI: Based upon a per curiam opinion dated March 3rd, 1981, the New Jersey Supreme Court remanded this matter to this Court for an evidentiary hearing to be heard on an expedited bases. In the remand the Supreme Court has delineated this Court's jurisdiction as to the matters that are to be explored. Upon receipt of the remand, this Court notified all counsel by letter dated March 6th, wherein a timetable was scheduled for all proceedings including a tentative date for the hearing.

Subsequently motions for disqualification and change of venue were filed with the Assignment file clerk.

The motion for change of venue was heard and denied on Friday March 27, 1981 by the Assignment Judge.

The motion for disqualification is on before this Court.

In support of this motion to disqualify this Court from presiding over the evidentiary hearing counsel rely on the affidavit of Mr. Beldock. There are three references to disqualification.

2A:15-49 sets forth the standards to be applied. 2A:15-50 provides that the Court may sit in judgement of the challenges. One of the most difficult things a Court is confronted with is disqualification. The easy way out when something distasteful is present is to disqualify himself and impose the burden on his colleagues. As has been indicated, the Statute gives the right to the court to make the determination.

Canon 3 (C) as well as Court Rule 1:12-2 indicate after setting up the standards, that the Judge himself must make the determination.

A review of the basic cases, citing 536 Broad Street v. Valco Mortgage company, 125 Equity, 581, 1944, affirmed, 136 Equity, 513, Errors and Appeals, indicates that the challenger must adduce proof of the truth of the charges and as to the sufficiency of such proofs the Judge himself must decide. The mere filing of an affidavit of prejudice does not deprive the Judge of jurisdiction, but permits him to pass on its sufficiency and to dispose of the question of disqualification raised by it, in the same manner as any other question that may come before him during the trial. As to the sufficiency of such proof of disqualification the Judge himself must decide. Not only is a Judge not required to withdraw from the hearing of a case upon a mere suggestion that he is disqualified to sit, but "It is improper for him to do so, unless the alleged cause of recusation is known by him to exist, or is shown by proof to be true in fact." See Clawans v. Schakat, 49 N.J. Super, 415. The Court held, a mere suggestion that a Court is disqualified to sit is not sufficient and it is in fact improper for him to do so.

In Bonnet v. Stewart, 155 N.J. Super, 326, the parties moved to disqualify the Judge in a motion made before the Assignment Judge. The motion to disqualify should have been made before the presiding Judge since this Judge would be the first individual to pass on the propriety of presiding over the trial.

In State v. Hansen, 59 N.J. Super, again emphasizes the impropriety of a Court to disqualify himself unless the alleged cause of recusation is known by him to exist or be shown by proof to be true in fact.

As a matter of fact it has been held that an accused was not denied her right to a fair trial because the second trial was held before the same Judge who had held defense counsel in contempt of Court during the course of the initial trial. See State v. Risdén, R-I-S-D-E-N, 106 N.J. Super, 226.

Having considered the basic law established by Statute, Rules and Code of Judicial Conduct as well as the leading cases in our jurisdiction on the Court's responsibility, I find it necessary to review those matters presented to me as well as the brief and argument of counsel. It devolves upon the Court to make a determination of the sufficiency of the grounds for disqualification.

This Court has examined the pertinent transcripts in toto, not excerpts of isolated portions, and I readily agree that the episodes referred to by counsel did in fact occur. In addition to reading the sterile transcripts, this Court was able to associate the conditions under which certain colloquy took place and the demeanor of the participants. This Court also considered the totality of the proceedings; that is, a complex and lengthy trial which was preceded by numerous and complex pretrial and post-trial motions. In other words, in deciding the issue, the totality of the proceedings must be considered. By dealing in a void and in isolating miniscule portions of the voluminous transcripts, the danger of an erroneous, illogical and unfair conclusion is inevitable. Fortunately there is a complete transcript of all the proceedings in this matter and this Court will let the entire record speak for itself rather than attempt to dispute counsels' distorted and naked allegations of hostility, bias and prejudice.

Let us consider the language cited in U.S. v. Valenti, 120 Fed. Supplement, 80, 1954. That case dealt with the application of a Federal Statute which provided for the filing of an affidavit of bias and prejudice seeking the disqualification of the trial Judge. It's stated, "It is the settled law, that an affidavit to disqualify a Judge on the grounds of bias or prejudice must state fact and reasons which tend to show personal bias or prejudice regarding the justiciable matter pending, as distinguished from conclusions of the affiant, and must give support to a charge of a bent mind that may prevent or impede the impartiality of his judgment. Where an affidavit is filed for such purpose, the question to be resolved is whether the affidavit asserts facts from which a reasonable mind might fairly infer a personal bias or prejudice on the part of the Judge. It is a personal sense to which the Statute is directed."

In spite of the seriousness of the charges and the intensity of the trial, this Court was called upon to not only consider and decide the numerous complex legal issues but was responsible to protect the integrity of the trial and on balance insure both the defendants and the State a fair trial. It was incumbent on this Court to maintain the decorum of the Courtroom and direct counsel when indicated to conduct themselves in a professional manner.

In the application to disqualify this Court, counsels' accusatory allegations have described the Court's bias, hostility and prejudice against the defendants and their counsel. They have also described this Court as being intemperate, injudicious and antagonist. These are, to say the least, accusations that, if true, would not only be the basis for disqualification in the instant matter, but should be the basis for a proceeding to remove the Judge from his judicial duties.

In addition to maintaining the proper decorum in the Courtroom it is the Court's responsibility to prevent a circus-like atmosphere and to see to it that the record reflects all that transpires during the Court proceedings. In addition to the testimony, legal arguments by counsel and the rulings by the Court, the record must reflect, if possible, the demeanor of the participants. It is not only incumbent upon the Court to hear and observe, but if the Court does make an observation, it is duty-bound to indicate what it perceives on the record as well as to act in a given situation to prevent a disruption in the proceedings being conducted. Where counsel become disrespectful, unprofessional or contemptuous the Court has a duty to admonish, chastise or discipline if necessary. Likewise, it becomes the duty of the Court to make its observations of counsel's conduct, gestures or demeanor for the record. The Court must conduct the Court proceedings in an orderly, expeditious and efficient manner. When counsel interrupts the examination of a witness without proper reason to interject his opinion as to the witness' credibility, the Court has a duty to advise counsel of the impropriety. When I speak of counsel, gentlemen, I mean all counsel. When the Court attempts to engage — when counsel attempt to engage the Court in collateral matters, it is the duty of the Court to bring counsel to the matters in issue. While a witness is in the process of being examined, it is not proper for counsel to make gestures to the witness, to attempt to influence or control his demeanor, when the demeanor of the witness may very well be considered as affecting his credibility, and if counsel attempts to do that, the Court is bound to note his actions for the record.

Counsel complained that the Court held counsel in contempt during the proceedings — and now I'm referring to defense counsel. Counsel also complained that the Court was discourteous when it walked off the bench during counsel's colloquy. The record reflects that despite the numerous instances where the Court should have imposed sanctions for counsel's unwarranted, disrespectful statements and contemptuous conduct, the fact is that not only did this Court not hold counsel in contempt, but it advised counsel that this Court found contempt citations distasteful and it feared that such action despite the fact that it was warranted might interfere with counsel's undivided attention and his effectiveness as trial counsel, and, in the final analysis might affect his representation of his client.

On occasion this Court did leave the bench while counsel was on its feet. The reasons were twofold — when it became apparent that counsel was making speeches for the benefit of the press and it did not address themselves — and did not address themselves to the issue being discussed, the Court advised counsel that when they were finished with their remarks to the press the Court would reconvene to dispose of the matter under consideration. The record will reflect that at one point the Court found it necessary to remind counsel that he should be more mindful of his obligation to his client who was on trial and who was faced with serious charges than to make statements for the benefit of the press. On occasion the Court left the bench rather than to permit counsel to continue colloquy which might warrant a contempt citation or where the Court had heard counsel and ruled on the issue. This is no indication of bias, hostility or prejudice.

Counsel assert in the affidavit that this Court should not sit in the evidentiary hearing since it will be called upon to rule upon the demeanor and credibility of defense counsel. Counsel referred to an incident where the defense counsel complained to the Court that he had not received the courtesy of an adjournment for one afternoon during the trial, the Court characterised

him as being sick. The Court reacted because counsel had attempted to accuse the Court of being discourteous and insensitive to counsel's problems that arose from time to time during the trial. It was in that context that the remark was made. This was unfair and unwarranted. The fact is that the Court was solicitous to all counsel and did in fact offer its cooperation when indicated.

Furthermore, counsel accused the Court of being partial to the State, and without any provocation would ask the Court to disqualify itself because it could not give defendants a fair trial or a fair hearing. The record indicates otherwise. An examination of some of the many discretionary rulings by this Court gives some indication as to the impartial and fair disposition of the decisions that were rendered in favor of the defendants.

For example, at the voir dire proceedings, defense counsel requested additional challenges. The State opposed the request. The request was granted.

A review of the jury interrogation would reveal a thorough and painstaking examination of each juror by this Court in an effort to obtain a fair and impartial trial. After the Court completed the voir dire, counsel were permitted to submit additional questions and request further exploration of different areas. At one point during the voir dire it was the Court who suggested to counsel that perhaps the prospective juror should not be made aware that one of the defendants had a criminal record because in the final analysis the defendant may decide not to testify. Consequently, the jury would not be aware of it. This was done on the Court's own initiative to protect the defendant.

On occasions the attorneys were late. The Court was aware they had to travel from New York. No sanctions were ever imposed.

At defendant's request this Court gave Mr. Carter blanket permission to travel out of the State to attend speaking engagements.

Prior to the trial defendants were permitted not only to file untimely suppression motion but in fact the Court offered to obtain the necessary police witness for them by having to call them on the phone and to ensure his presence. The Court impounded those proceedings to avoid any prejudicial publicity that might affect the defendants and interfere with a fair trial.

On application by defense counsel the Court ordered Detective DeSimone from assisting the Prosecutor at counsel table.

Early in the trial the Court denied the State's offer to permit Mr. Carter's book in evidence, The Sixteenth Round, which the State thought would prove its theory of racial revenge. Defense counsel later in the trial opened the door, clearly making it admissible by the questions that it asked of a witness on the stand. The State renewed its application but this Court again denied its offer on the theory that the prejudice would outweigh the probative value.

In its charge to the jury the Court told the jury that if the jury did not believe Bello, the defendants should be acquitted. The State objected vigorously and requested that the Court instruct the jury that it had presented other evidence for the jury's consideration. The State's request was denied.

The State attempted to offer letters written by Mr. Carter into evidence which would aid the State in proving the false alibi theory. This Court denied the State's request.

The State offered into evidence the transcript of Mr. Carter's testimony at the '66 trial which was perfectly admissible, and in denying it, the Court's thinking was that when Mr. Carter

testified at the '66 trial he did not contemplate that this testimony would be used against him, and it was on that theory that the court again denied the State's request.

The Court charged intoxication despite the fact that Mr. Artis' attorney omitted to request this instruction.

This Court advised Mr. Steel when jury selection was about to start that it would consider a motion to sever Artis despite the fact that counsel had failed to request the severance and refused it at the pretrial conferences.

During the jury misconduct hearings the Appellate Court had remanded the matter to this Court to conduct a hearing and to interrogate jurors. After each juror was questioned, I permitted counsel to make requests to have the Court explore any areas they thought necessary and I asked whatever questions they requested, despite the fact that I was not directed to do so by the Appellate Division. When the hearing first started counsel agreed that the juror witnesses would be given a transcript of the so-called Adamo allegations. When I questioned three jurors along that format, which was agreed to by counsel, counsel asked the Court to change the format and to not give the jurors a transcript of the allegations. The Court granted counsel's motion.

The State offered the dying declaration of a State's witness into evidence. The Court denied the State's application.

Recently this Court ordered Mr. Artis unlimited medical care because of an illness which he has developed. These are but a few of this Court's rulings which categorically indicate that this Court is not bias or hostile against the defendants or counsel.

The defendants argue that because this Court denied their request for an evidentiary hearing after the trial in February of 1977, that the Court should now disqualify itself from conducting the hearing on remand because it has allegedly prejudged the matter. The issue before that Court at that time — or this Court at this time was to consider whether such a hearing should be granted. By virtue of the remand the issue no longer — is no longer whether a hearing should be held. The remand directs this Court to rule on the merits of defendants' application after a full evidentiary hearing has been conducted. At that time this Court merely denied counsel's application to hold such a hearing. Therefore the fact remains that because no hearing was conducted by virtue of the '77 ruling, the Court did not rule on the issues raised by the Supreme Court remand and therefore it did not and could not have prejudged the matter. The remand delineates this Court's function as to the matters that are to be explored in directing that it make findings of fact and conclusions of law after full consideration of the testimony to be adduced.

Now, as stated, the basic proofs presented to this Court to support the application are contained in an affidavit by Mr. Beldock. Reviewing each allegation serially, I find as follows: One, this Court does not have at this time or has had at any other time any hostility, bias or prejudgment regarding any potential defense witnesses. Two, likewise, there is nothing in the affidavit to support the conclusion of the appearance of hostility. The mere fact that the Court may have indicated lack of credibility of defense counsel does not support the conclusion that the Court cannot make a fair determination. Three, there is nothing before the Court to support the allegation that the Court is biased or has prejudged in any manner the credibility of potential prosecution witnesses. Four, there is nothing to support the allegation of the appearance of bias in favor of potential prosecution witnesses. Five, personal knowledge of the Court of relevant facts, if that should be the case from other proceedings in the matter, is not grounds for

disqualification. And I cite James v. State of New Jersey, 56 N.J. Super, 213, Appellate Division, 1959. There the Magistrate who heard the case had personal knowledge because he had seen the defendant in an inebriated condition at the time of his arrest. The Court held the Court should have disqualified himself because of such personal knowledge which he obtained outside the Court proceedings.

Counsel's representation that this Court is a possible witness is without merit, without a showing that this Court possesses knowledge or information as to relevant facts which he did not obtain from the Courtroom proceedings, and further that the sole source of this evidence would come from the Judge and no one else. I refer counsel to Woodward v. City of Waterbury, Supreme Court of Errors of Connecticut. It's cited at 155 Atlantic, 828. And I quote, "For obvious reasons, the calling of Judges of the Superior Court as witnesses should be avoided whenever it is reasonably possible to do so. Counsel should never summon them if the rights of their clients can be otherwise protected. But if summoned, they cannot refuse to testify. We conclude that the moving Judges are not immune from the process served upon them and that it is their duty to respond. Nevertheless, counsel should not summon Judges of the rank of those here involved if the rights of clients can be otherwise protected. Perhaps, in anticipation of the further examination of these officials, we should add that, in our opinion, they are under no obligation to divulge the reasons that motivated them to their official acts and that those acts may well be proved, in the absence of some unusual circumstance, from the Court records. A Judge ought not to be called upon, unnecessarily, to prove such matters. The examination should in no sense and to no degree take past actions of this Court that it cannot provide a fair and unbiased hearing.

Having made specific findings as to each of the allegations and such references to the record made by counsel and those reviewed by the Court to indicate its previous conduct, I find, that neither in the Courtroom or in chambers did this Court indulge in any improper or prejudicial conduct. In this regard the propriety of this Court's action or actions have been considered by the Appellate Division and upheld, and even at this juncture the Supreme Court has not ruled on the propriety of this Court's conduct, and the remand directed to this Court was to determine the propriety of actions taken by the Prosecutor allegedly failing to disclose Brady material. This record does not leave this Court with an abiding impression that it cannot deal with the remand impartially and without bias.

I asked the Prosecutor to submit an order.