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State v. District Court of the Thirteenth Judicial District, 393 P.2d 39 (Mont. 1964)

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AFFIDAVIT FOR DISQUALIFICATION OF A DISTRICT JUDGE FOR IMPUTED BIAS IN A CRIMINAL CASE NOT TIMELY AFTER VERDICT.—In a trial in the district court defendants were found guilty of murder in the second degree. Defendants moved for a new trial, and a hearing on the motion was set for December 19. The state requested additional time, and the hearing on the motion for a new trial was reset for January 16, and then for January 21. On January 6 the county attorney filed an affidavit of disqualification of the district judge, giving as his reasons that the judge was biased and prejudiced. One day later, a motion to quash the affidavit was filed by counsel for the defendants. The latter motion was sustained at a hearing before another district judge on February 13. On February 27, the county attorney filed a motion requesting the district judge to disqualify himself for actual bias and prejudice. This motion was denied and ordered stricken from the records. The county attorney then petitioned the Supreme Court of Montana for a Writ of Prohibition. *Held:* Writ denied. The court found the allegations of actual bias and prejudice insufficient to disqualify the district judge. Interpreting the statute providing for the disqualification of a district judge for imputed bias and prejudice in criminal cases,[1] the court stated that the affidavit filed January 6, after return of the jury verdict, and after the date originally set for the hearing on the motion for a new trial, but prior to the hearing of such motion, was not timely. *State v. District Court of the Thirteenth Judicial District,* 393 P.2d 39 (Mont. 1964).

At common law the bases for the disqualification of a judge were a relationship between the judge and one interested in the case within a certain degree, or a direct, certain and immediate pecuniary interest in the outcome of the suit.[2] Bias or prejudice on the part of a judge which was not the result of such relationship or interest theoretically did not exist. Thus, absent constitutional or statutory provisions, bias and prejudice could not operate to disqualify a judge from trying a case. Many juris-

[1]REVISED CODES OF MONTANA, 1947, § 94-6913. This statute provides in part:

> A district judge must not sit or act as such in any criminal action or proceeding when either party makes and files an affidavit, as hereinafter provided, that he has reason to believe, and does believe, he cannot have a fair and impartial hearing or trial before a district judge by reason of the bias and prejudice of such judge. Such affidavit may be made by any party to the criminal action, motion or proceeding, personally, or by his attorney or guardian and shall be filed with the clerk of the district court in which the same may be pending, at least fifteen days prior to the trial of said cause, or any retrial thereof after appeal. Upon the filing of the affidavit, the judge, as to whom said disqualification is averred, shall be without authority to act further in the criminal action, motion or proceeding, but the provisions of this section do not apply to the arrangement of the calendar, the regulation of the order of business, the power of transferring the criminal action or proceeding to some other court, nor to the power of calling in another district judge to sit and act in such criminal action or proceeding, providing that no judge shall so arrange the calendar as to defeat the purposes of this section. Not more than one judge can be disqualified for bias and prejudice, in said criminal action or proceeding, at the instance of the prosecution and not more than one judge at the instance of the defendant or defendants. Hereinafter REVISED CODES OF MONTANA will be cited as R.C.M.

[2]State *ex rel.* Mitchell v. Sage Stores Co. *et al.*, 157 Kan. 622, 143 P.2d 652, 654 (1943).

dictions now recognize that bias and prejudice may arise from other factors, and that a person is not necessarily immune to those influences merely because he is a member of the judiciary. If a fair and impartial trial is to be held, the judge must be free from bias and prejudice regardless of its source. Constitutional and statutory provisions forbidding a judge so influenced to act are designed not only for the protection of parties, but are also in the general interests of society. By preserving the purity and impartiality of the courts, the public's respect and confidence in judicial decisions is fostered.[3]

Three general methods of disqualification are utilized under various statutes:[4] (1) By a determination on the facts as to the existence of bias on the part of the judge, usually made by the judge himself, and subject to appeal.[5] (2) By affidavit submitted by the aggrieved party alleging *facts* which give rise to the assertion of bias. The judge passes on the legal sufficiency of the affidavit. If it is sufficient on its face, the judge is disqualified without inquiring whether the allegations of bias are true or false. To be legally sufficient, the facts stated must be such that a reasonable mind might fairly infer bias.[6] (3) Where disqualification is effective on the mere assertion of bias, *without regard to the facts.* Under this approach the theory is that since prejudice is a state of mind, it is often difficult to attribute it to any specific facts. Disqualification in such a manner is based on the belief that the courts should be above even the suspicion of partiality. This is the method allowed by Montana's civil and criminal disqualification statutes.[7]

The appropriate time to apply for the disqualification of a judge, using any of the methods, varies with the statutory authority of the different jurisdictions. Generally, the disqualification must be sought at some specified time before trial, or as soon as the identity of the judge who will preside becomes known,[8] or as soon as the facts which give rise to the allegations of bias become known.[9] A delay in presenting the objection after the party is aware of the facts constituting the alleged bias, may be considered as a waiver of the right.[10] A party should not be allowed to delay in seeking the disqualification, gamble on a favorable decision, and then raise objection if he is disappointed in the result.[11]

A tenuous term at best, "bias" is incapable of precise application to different individuals, on any given set of facts. Bias refers to a state of mind, or a preconceived opinion, which would prevent a judge from exer-

[3]Castleberry v. Jones, Judge, 68 Okla. Crim. 414, 99 P.2d 174 (1940).
[4]ORFIELD, CRIMINAL PROCEDURE FROM ARREST TO APPEAL 373 (1947).
[5]28 U.S.C. § 455 (1958).
[6]28 U.S.C. § 144 (1958).
[7]R.C.M. 1947, § 93-901 provides for disqualification in civil cases, and R.C.M. 1947, § 94-6913 provides for disqualification in criminal cases.
[8]Wolf v. Marshall, 120 Ohio St. 216, 165 N.E. 848 (1929).
[9]State *ex rel.* La Baw v. Sommer, 237 Ind. 393, 146 N.E.2d 420 (1957).
[10]Nebgen v. State, 47 Ohio App. 431, 192 N.E. 130 (1933).
[11]Rohr v. Johnson, 65 Cal. App. 2d 208, 150 P.2d 5 (1944).

cising his function impartially in a particular case. A substantial problem exists in determining, with any certainty, what constitutes a state of mind that would render a judge unable to impartially fulfill the duties of his office. It involves an evaluation of the character of the individual judge, in relation to his own peculiarities and the circumstances of the case. This problem is complicated further because, in theory at least, one of the criteria for the selection of judges is a reduced susceptibility to bias. There may exist in some members of the judiciary a reluctance to find this "fault" in one of their own, especially in an area where there must necessarily be so much doubt. The cases bear witness to the difficulty in establishing bias to disqualify a judge.[12]

By allowing disqualification for "imputed bias," hesitancy to find actual bias is no longer a problem. The term imputed bias refers to a situation where the mere assertion by the challenging party that he cannot have a fair trial before a particular judge because of the judge's bias, is sufficient to disqualify that judge. Rather than being exclusive of actual bias, it seems to be a procedural device to avoid the fine distinctions and limitations which are drawn by the decisions involving disqualifications for actual bias. The essence of this *liberal* method of disqualification is that no inquiry is made into the facts supporting the affidavit alleging bias.[13]

In the statute involved in the instant case, there is no mention of the term "imputed bias." It states: "Upon the filing of the affidavit, the judge, as to whom said disqualification is averred, shall be without authority to act further in the criminal action, motion or proceeding. . . ."[14]

[12]In a criminal action, after counsel for the defendant had exercised a peremptory challenge of a juror, the judge apologized to the juror for the attorney's insinuations and admonished him when he took exception to the judge's remarks: "Your standing before these courts Mr. .... is not such to entitle you to any great consideration." On appeal of the conviction there was a "total failure on the part of appellant to set forth facts which, if true, would show bias or prejudice of the trial judge." People v. Emmett, 123 Cal. App. 678, 12 P.2d 92, 93 (1932).

In a negligence action, after the verdict and before the defendant had moved for a new trial, the judge had written to both counsel that it was his belief that such a motion would have more than usual merit, that it was hard to believe the jury's conclusion that the plaintiff was not contributorily negligent, and that the amount of damages required further consideration. The judge was not disqualified from hearing the arguments on the motion for a new trial, under a procedure allowing disqualification at this point. Wampler v. Muller, 121 Cal. App. 2d 396, 262 P.2d 853 (1953).

If the state of mind of the trial judge is adverse to one of the parties, "but is based upon actual observance of the witnesses and the evidence given during the trial of the action, it does not amount to that prejudice against a litigant which disqualifies him in the trial of the action." People v. Yeager, 10 Cal. Rptr. 829, 359 P.2d 261 (1961).

In addition to illustrating the difficulty of adequately establishing a state of mind necessary to disqualify, such cases as these must leave some doubt in the minds of litigants and the public as to the impartiality of the courts.

[13]This method of disqualification is subject to abuse by allowing the disqualification to be effective for reasons which would not be considered as "disqualifying bias" if passed upon by the courts. It could also be used merely as a device to avoid an expected adverse ruling by the court, or simply to gain additional time. Although such abuse could be a serious problem, it was not mentioned by the court in the instant case.

[14]R.C.M. 1947, § 94-6913.

Similar wording, in the civil disqualification statute,[15] has been interpreted to mean that mere filing of the affidavit ipso facto works the disqualification of the judge against whom it is directed.[16] The imputation of bias in the affidavit may simply be stated in the language of the statute, and proof of facts showing actual bias and prejudice is neither required nor permitted.[17]

The Supreme Court of Montana has interpreted the *civil* disqualification statute to mean that an affidavit filed between the verdict and the hearing on the motion for a new trial is timely. In the case of *State ex rel. Carleton v. District Court*[18] the court said that only by such an interpretation could the words "action, motion and proceeding" have distinct meaning in the statute. The court reasoned that the over all purpose of the statute, which is that a litigant should have a fair and impartial adjudication of his rights, demands that a judge not sit when biased or prejudiced. Limitations within the statute prevent the disqualification from being invoked *during* a hearing, yet the disqualification may be granted before the hearing upon any one of the steps taken in the progress of the case, including the hearing on the motion for a new trial.[19]

In the criminal statute, the timing requirement for exercising disqualification is set out: "and shall be filed . . . at least fifteen days prior to the trial of said cause, or any retrial thereof after appeal."[20] This timing requirement could be considered a procedural technicality, for the convenience of scheduling cases, rather than a limitation of the substantive right granted by the statute. In setting out the right, the statute refers to "hearing or trial" and "action, motion or proceeding." The time for filing refers only to "trial" or "retrial." To give effect other than mere surplusage to the words used in granting the right, the time recited for the exercise of the right should not control the right itself. In view of the similarity in wording and purpose of the civil and criminal statutes, there would be considerable merit in a liberal interpretation of the timing requirement in the criminal statute, thereby allowing disqualification before hearings, motions or proceedings, as well as before trial or retrial.

In the instant case, the decision could have been based on the narrow ground that an affidavit filed after the date originally set for the hearing on the motion for a new trial was not timely. It will be remembered that the hearing was originally set for December 19, and at the State's request was subsequently reset first for January 16, and then for January 21. The affidavit was filed January 6. Such a holding would have been consistent with the interpretation given to the civil disqualification

[15]R.C.M. 1947, § 93-901.

[16]*In re* Woodside-Florence Irrigation Dist., 121 Mont. 346, 194 P.2d 241 (1948).

[17]State *ex rel.* Grogan v. District Court, 44 Mont. 72, 119 Pac. 174 (1911).

[18]33 Mont. 138, 82 Pac. 789 (1905).

[19]*Id.* at 144, 82 Pac. at 791.

[20]R.C.M. 1947, § 94-6913.

statute. In the case of *State ex rel. Jacobs v. District Court*[21] the Montana Supreme Court said that the date *originally* set for the hearing is to be used to determine the time for filing the affidavit.

Instead of utilizing the above suggested approach, the court chose to base its decision regarding the appropriate time to file the affidavit on the much broader ground of the differences between civil and criminal actions. It said that the human rights, life and liberty involved in the criminal trial make it desirable to retain the judge who has gained some insight from the trial to aid in the final disposition of the case.[22] Thus, it held that the right to disqualify a judge for imputed bias should be restricted to the period before "trial" or "retrial." The court looked to the situation that would arise if, after disqualification after verdict, a new trial was not granted, and particularly discussed the function of the trial judge in the sentencing process. In this situation, the substituted judge would have to impose sentence without having presided at the trial. In a criminal action it is important to both the accused and society that the sentence be determined in light of the circumstances of the case and the individual involved. It is felt that a judge who has presided at the trial is in a better position to impose sentence than a judge who did not have the personal contact of the trial.[23]

It is submitted that implicit in the court's reasoning is an evaluation of the statute itself. If bias and prejudice would preclude a fair trial, then the right to disqualify a biased judge would be fundamental to our society in the protection of human rights. The court evidently weighed the relative merits of allowing disqualification for "imputed bias" after the trial against the benefits to be derived through retention of the trial judge. It apparently decided that justice is better served by the latter.

The criminal disqualification statute was enacted after many years of experience with its civil counterpart, and with interpretation of the civil statute by the court in view. However, the differences in the language of the two statutes are not such as would indicate a legislative intent contrary to the interpretation given the civil statute in the *Carleton* case.[24] In adopting the criminal statute, the legislature must have determined that a need for relief from the evils of a hearing before a prejudiced judge exists, and that the method of imputing bias to the judge was the

[21]48 Mont. 410, 138 Pac. 1091 (1914). *But see* Mead v. Mead, 134 Mont. 391, 332 P.2d 499 (1958), which, while reaching a different result, is seemingly distinguishable on the facts.

[22]Instant case at 42.

[23]The court mentioned several statutes which vest the trial judge with some discretion in the sentencing process. According to R.C.M. 1947, § 94-7411, the jury may assess the punishment or leave the same to the court. R.C.M. 1947, § 94-7412 states that where the jury does not assess the punishment, the court must fix the punishment. R.C.M. 1947, § 94-7415 says that the court has the power to reduce the extent or duration, if the jury fixes the punishment. R.C.M. 1947, § 94-7821 provides that the court may suspend the execution of sentence.

[24]*Supra* note 18.

most desirable means of affording this protection.[25] If the bias and prejudice of judges in fact constitutes a serious problem, then, to give maximum effect to the object of the statute, and to promote substantial justice, the disqualification should be allowed before any of the separate stages in the progress of the case.

LAWRENCE H. SVERDRUP.

REASONABLE MISTAKE AS TO THE AGE OF THE PROSECUTRIX IS AN AFFIRMATIVE DEFENSE TO A CHARGE OF STATUTORY RAPE.—The defendant was charged and convicted of the offense of statutory rape.[1] On appeal to the California Supreme Court, *held,* reversed. Proof of a reasonable belief that the female was older than the statutory age constituted a defense to the charge. *People v. Hernandez,* 39 Cal. Rptr. 361, 393 P.2d 673 (1964).

Before the instant case the unanimous rule in the United States was that mistake of the female's age did not constitute a defense to the crime of statutory rape. Defenses such as a good faith belief that the prosecutrix was above the prohibited age,[2] that the defendant had exercised reasonable care to ascertain her age, or that he was misled by the girl's appearance or misrepresentations were not available.[3] The Montana Supreme Court, in dictum, has concurred with this rule.[4]

[25]Where such a statute is interpreted as allowing disqualification for imputed bias and prejudice, or peremptory challenge, a constitutional problem may arise. In the instant case the court recognized this possibility, but said that this matter was not properly before the court. This question is now before the court, in regard to the civil disqualification statute, in the case of State *ex rel.* Peery v. District Court of the Fourth Judicial District, *petition for Mandamus filed,* No. 10853, Sup. Ct. of Mont., Sept. 8, 1964.

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[1]CAL. PEN. CODE § 261: "Rape is an act of sexual intercourse, accomplished with a female not the wife of the perpetrator, under either of the following circumstances: 1. Where the female is under the age of eighteen years. . . ." Montana has substantially the same statute. REVISED CODES OF MONTANA, 1947, § 94-4101. See note 33, *infra,* for the California statute dealing with the punishment for the offense of statutory rape. The defendant in the instant case had sexual intercourse with a girl seventeen years and nine months of age and was convicted of a misdemeanor under these statutes. REVISED CODES OF MONTANA are hereinafter cited R.C.M.

[2]See discussion and extensive annotation in 44 AM. JUR. *Rape* § 41 (1942). Regina v. Prince, 2 Cr. Cas. Res. 154, 13 Eng. Rep. 385 (1875), was the first case to promulgate this rule and is heavily relied on by modern cases.

[3]Commonwealth v. Murphy, 165 Mass. 66, 42 N.E. 504 (1896); State v. Wade, 224 N.C. 760, 32 S.E.2d 314 (1944).

[4]State v. Duncan, 82 Mont. 170, 184, 266 Pac. 400 (1928); State v. Reid, 127 Mont. 552, 562, 267 P.2d 986 (1954). Neither case involved a defense of mistake as to the age of the prosecutrix. The court in the *Reid* case quoted the following passage from the *Duncan* case as expressing the law on the subject:

> The consent of the female, the lack of knowledge of her age, or even her misrepresentation as to her age . . . are all immaterial matters; a conviction depends solely upon proof of intercourse and nonage, and if a man indulge in promiscuity with strange women he has only himself to blame if it later develops that he has unwittingly committed the crime of rape. Such is the law as declared by the lawmaking body of this state, and the province of the courts is to enforce the law as they find it.

The court in United States v. Red Wolf, 172 F. Supp. 168 (D. Mont. 1959), cited these cases as expressing the Montana law on the subject; but the court held that federal, not Montana, law was controlling.