

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO:73/05

BEFORE: THE HON. MR. JUSTICE PANTON, P.
THE HON. MR. JUSTICE K. HARRISON, J.A.
THE HON. MR. JUSTICE MARSH, J.A. (Ag.)

BETWEEN THE ATTORNEY GENERAL OF JAMAICA APPELLANT
AND KEITH LEWIS RESPONDENT

Curtis Cochrane and Kevin Powell, instructed by the Director of State Proceedings for the appellant
Leroy Equiano for the respondent

November 6, 2006 and July 31 and October 5, 2007

PANTON, P:

1. Our decision in respect of the appeal in this suit for wrongful dismissal was delivered on July 31, 2007. At that time, we allowed the appeal, set aside the order of the Court below and entered judgment for the appellant. We also awarded the costs of the appeal to the appellant, such costs to be agreed or taxed.
2. I agree substantially with the reasons for judgment that have been written by my learned brother, Karl Harrison, J.A. who has given a

full statement of the relevant facts. However, I wish to add a few comments.

3. The respondent, a district constable, had been charged with the offence of conspiracy to defraud. On August 12, 1997, a Senior Resident Magistrate for the parish of St. Andrew made "no order" in the matter. This was due to the fact that the complainant had died. Subsequently, another Resident Magistrate dismissed the case for want of prosecution and a Clerk of Courts issued a certificate of acquittal to the respondent.

4. This Court has on a few occasions, given guidance as to the effect of a "No Order" when such a notation is recorded in criminal proceedings in the Resident Magistrate's Court. One such occasion was in the case of **DPP v Feurtado and Attorney General** [1979] 16 J.L.R 519. At page 528 C-D, Kerr J.A. said:

"It was unanimously agreed by the Judges in the Court below that regardless of the reasons for making a "No Order" such a decision is not a termination upon which a plea of **autrefois acquit** may be founded and although it was so argued there the respondent's attorneys quite properly did not pursue the arguments before this Court.

Accordingly, it is well settled that despite the making of the "No Order" the proceedings can be re-instituted."

5. In the instant case, the certificate of acquittal was obtained nearly four years after the entry of the "No Order" and nearly three years after the respondent had been dismissed from the Force.

6. The respondent sought to use the certificate of acquittal to prove that the criminal charge against him had been dismissed. The consequence of that, it was argued, was that he had been wrongfully dismissed from the Force. However, it is clear that the dismissal of the case by the Resident Magistrate was not a dismissal on the merits.

7. In order to make use of the certificate of acquittal in this manner, it would have been necessary for the respondent to have shown that he had been pleaded, and that there had been an adjudication. The case of ***Dennis Thelwell v Director of Public Prosecutions and the Attorney General*** (SCCA No: 56/98 delivered on March 26, 2007) demonstrates the point. There, a Resident Magistrate who had not been properly seized of the matter purported to dismiss the charges against the appellant ***Thelwell*** on the basis that no evidence had been offered as no Crown witnesses were in attendance and the file was incomplete. When the charges were later presented before another Resident Magistrate, the appellant objected and proceeded to seek relief from the Constitutional Court.

8. It was submitted that it was unconstitutional for him to be placed on trial as he had already been dismissed. The Constitutional Court, by a

majority did not agree with the submission. The Court of Appeal upheld the decision of the Constitutional Court. Forte, J.A. (as he then was) said that the appellant had "failed to prove that he has ever pleaded to these charges and consequently not having joined issues with the Crown, the plea of **autrefois acquit** could not avail him." Langrin J.A. (Ag), (as he then was) said this at page 37:

"At common law and more particularly stated in **Russell on Crimes (7th Edition** [1909] Vol. 2 pp 1982 1983) a man who has once been tried and acquitted for a crime may not be tried again for the same offence if he was in jeopardy:

- (1) The Court was competent to try him for the offence;
- (2) The trial was upon a good indictment on which a valid judgment of either acquittal or conviction could be entered and;
- (3) The acquittal was on the merits i.e. by verdict on the trial or in summary cases by dismissal on the merits followed by a judgment or order by acquittal.

All these three conditions must be fulfilled before the plea of **autrefois acquit** can be successfully raised."

9. In the circumstances, it is clear that the respondent in the instant case has no basis for asserting that he had been acquitted and so was wrongfully dismissed from the Force.

HARRISON, J.A:

1. This is an appeal from the judgment of Beswick J, who on the 18th April 2005 awarded the Respondent the sum of \$662,200.00 with costs to be agreed or taxed in a claim for wrongful dismissal.

The background facts

2. The Respondent, a District Constable, was charged with breaches of the Corruption Prevention Act and was suspended from the Rural Police Force ("the Force") with no pay whilst the criminal charges were pending.
3. The charges were never prosecuted due to the death of the virtual complainant and a "No Order" was made by Her Honour Miss Gloria Smith, as she then was, on August 12, 1997. The Respondent was dismissed however, from the Force, by the Commissioner of Police on August 1, 1998 after he failed to respond to a Notice sent to him by the Commissioner of Police informing him that he had seven (7) days within which to respond otherwise his services as a District Constable would be terminated.
4. The Respondent did not challenge his dismissal from the Force but on May 17, 2000 he brought an action in the Supreme Court against the Attorney General seeking damages for:
- (i) wrongful dismissal,
 - (ii) salary for the period of his suspension and;
 - (iii) compensation for vacation leave earned before the date of his suspension.

5. On April 30 2001, an application was made on his behalf before Her Honour Mrs. M. Cole-Smith, as she then was, for the charges to be dismissed for want of prosecution. The application for dismissal of the charges was granted and a document headed "Certificate of Acquittal" was subsequently issued by the Deputy Clerk of Courts. The certificate reads as follows:

"I Donnette Henriques Deputy Clerk of the Courts, Corporate Area, Half Way Tree, DO HEREBY CERTIFY THAT:

On the 30th day of April 2001, at Half Way Tree, before Her Honour Mrs. M. Cole-Smith the accused Keith Lewis was brought before the Court for the offence of Conspiracy to Defraud on Information No. 10095/95. On the said date the case was Dismissed for want of prosecution.
Given under my hand this 1st day of May, 2001.

Sgd. Henriques
Ag. Deputy Clerk of the Courts
Corporate Area".

6. No issue was joined by the Appellant, with regards to the Respondent's claim, regarding his entitlement to 14 days vacation leave which had accrued prior to his suspension. The Appellant denied however, that there was an acquittal of the charges and that he was entitled to the other remedies sought.

The Grounds of Appeal

7. The following grounds of appeal were filed and argued before us:

"a) The judge erred in law when finding that the Claimant's action was properly brought in common law and not public law, thereby ignoring the provisions of Part 56 of the Civil Procedure Rules 2002.

b) The judge erred in law and fact when finding that the Claimant was entitled to pay, amounting to \$632,500.00 throughout the

period in which he was suspended on the basis that he was acquitted of the criminal charges proffered against him, following the charges being dismissed for want of prosecution.

c) The judge erred in law when finding that a dismissal for want of prosecution amounts to an acquittal.

d) The Judge erred in fact when calculating the amount that the Claimant would be entitled to as pay throughout the period that the Claimant was suspended when the claimant led no evidence as to the number of days he used to work prior to his suspension.

e) The Judge erred in law and fact when finding that the Claimant was entitled to 8 weeks notice pay amounting to \$22,000.00 by virtue of the Employment (Termination and Redundancy Payments) Act."

The Issues on Appeal

8. Two major issues arise essentially in the appeal. Firstly, was there an acquittal when the criminal charges were dismissed for want of prosecution? Secondly, should the respondent have sought judicial review of the Commissioner's decision to dismiss him instead of him seeking damages for wrongful dismissal?

Issue No.1

Did the dismissal of the charges for want of prosecution amount to an acquittal for the purposes of the Police Service Regulations?

9. Regulation 44 of the Police Service Regulations (1961) provides as follows:

“A member acquitted of a criminal charge shall be restored to his rank and pay and be paid the full amount of his salary for the period of his interdiction or suspension.”

10. Mr. Cochrane, for the Appellant, submitted that a dismissal of the charges for want of prosecution would not amount to an acquittal since Regulation 44 (supra) contemplated that the constable must be found not guilty after a trial on the merits.

11. Mr. Equiano, for the Respondent, submitted that once the case against the Respondent was dismissed, the criminal matter was at an end. He argued that since there was no verdict of guilty, the Respondent must be presumed to be innocent.

12. Mr. Cochrane submitted that since the word “acquitted” is not defined in the Police Service Regulations, authoritative dictionaries could be referred to in order to find out what is its natural or ordinary meaning. He referred the Court to the House of Lords decision of *Pinner v Everett* [1969] 1 WLR 1266 where Lord Reid said at page 1273:

“In determining the meaning of any word or phrase in a statute the first question to ask always is what is the natural or ordinary meaning of that word or (sic) phrase in its context in the statute? It is only when that meaning leads to some result which cannot reasonably be supposed to have been the intention of the legislature, that it is proper to look for some other possible meaning of the word or phrase. We have been warned again and again that it is wrong and

dangerous to proceed by substituting some other words for the words of the statute”.

13. In “Osborn’s Concise Law Dictionary” 9th Edition, the word “acquittal” is defined to mean “discharge from prosecution upon a verdict of not guilty”. “The Law Dictionary” by Steven Gifis states inter alia:

“an individual is acquitted when, at the close of trial, either a jury or court determines that the person has been absolved of the charges ... a verdict of “not guilty” acquits the defendant”.

Beswick, J. did not consider the dictionary meaning of the word “acquitted”, but had said in her judgment that:

“When the charge is dismissed for want of prosecution, Mr. Lewis is to be taken as being innocent of the particular criminal charge and therefore acquitted.”

14. The authorities have made it abundantly clear however, that when a charge is dismissed for want of prosecution no trial has taken place and charges may be re-listed once witnesses are available to attend the trial. In the instant matter, the virtual complainant had died and although the prosecution could have invoked the provisions of the Evidence Act in order to have the statement of the deceased witness adduced in evidence it chose not to do so. Does this mean that the Respondent was acquitted of the charges? I think not. In my judgment, there would have had to be the pronouncement of a verdict of “not guilty” for there to be an acquittal of the charges. It is for this reason that section 280(3) of the Judicature (Resident Magistrates) Act mandates that at the conclusion of a trial;

"the Magistrate shall declare the accused person guilty or not guilty, and shall thereupon on demand, give such accused person a certificate of conviction or acquittal, as the case may be".

(emphasis supplied).

15. The certificate of acquittal will be certified under the hand of the Clerk of the Courts and section 27 of the Evidence Act provides as follows:

"27. Whenever, in any proceeding whatever, it may be necessary to prove the trial and conviction or acquittal of any person charged with any indictable offence, it shall not be necessary to produce the record of the conviction or acquittal of such person, or a copy thereof, but it shall be sufficient that it be certified, or purport to be certified under the hand of the Clerk of the Court, or other officer having the custody of the records of the court where such conviction or acquittal took place, or by the Deputy of such Clerk or other officer, that the paper produced is a copy of the record of the indictment, trial, conviction, and judgment or acquittal, as the case may be, omitting the formal parts thereof".

(emphasis supplied)

16. In my view, the above provision makes it abundantly clear that a trial has taken place and has resulted in either a conviction or acquittal of the charges. It is in these circumstances that the Clerk of the Courts will be authorized to issue the certificate of acquittal. It is therefore my view, that the document headed "Certificate of Acquittal" was wrongly issued by the Deputy Clerk of the Courts and no reliance ought to have been placed on it by the learned trial judge. In my judgment, Beswick J, was therefore in error when she stated inter alia in her judgment:

"However, the dismissal is what it says. The matter shall proceed no further. That dismissal means that Mr. Lewis must continue to be presumed to be innocent of the crime alleged. Indeed the document from the court certifying the dismissal for want of prosecution is named "Certificate of Acquittal".

17. I would therefore agree with Mr. Cochrane when he submitted that a dismissal for want of prosecution would not amount to an acquittal for the purposes of Regulation 44 of the Police Services Regulations. Ground of appeal (c) therefore succeeds.

Issue No. 2

Should the Respondent have sought judicial review of the Commissioner's decision to dismiss him or was it proper to bring an action for wrongful dismissal?

18. The evidence has revealed that the Commissioner of Police by letter dated August 10, 1998, had informed the Respondent that his services as a District Constable were terminated effective August 1, 1998. This letter states inter alia:

"(a) You obtained or attempted to obtain money from Mrs. Eaves, Miss Reid and or Miss Thompson on divers dates in 1992 through deceit or deception and or you not being entitled to receive any money from the aforementioned persons.

(b) You used undue influence to collect for your own use and benefit, Twenty Thousand Dollars (\$20,000.00) from Miss Reid and or Miss Thompson on February 17, 1992, you not being entitled to this money or any portion thereof.

Notwithstanding the foregoing, you may (if you so desire) respond in writing within seven (7) days of receipt of this Notice stating why you should not be so removed.

Such response should be forwarded through the Commanding Officer in charge of St. Andrew Central.

Sgd.

Asst. Commissioner of Police, Administration.”

19. The Respondent failed to respond to the Commissioner’s letter and on May 17, 2000, some two years later, he filed an action in the Supreme Court claiming damages for wrongful dismissal. The question now for determination is whether it was proper for the respondent to have commenced proceedings for wrongful dismissal.

20. Mr. Cochrane submitted that District Constables are Crown servants and that the relationship between Crown Servant and the Crown was one governed by public law. In the circumstances, he said that the Respondent should have challenged the Commissioner’s decision to dismiss him by instituting judicial review proceedings.

21. Mr. Equiano agreed that the Respondent was a public servant but submitted however, that judicial review was not the only remedy available to the Respondent and that he had the choice of enforcing his rights both in public law and in private law. He referred to and relied upon the authority of ***R v East Berkshire Health Authority exp. Walsh*** [1984] 3 All E.R 425 and submitted that it was proper for the Respondent to have filed a claim seeking damages for wrongful dismissal.

22. Now, it is settled beyond controversy that the Crown can terminate at pleasure the employment of any person in the public service unless in special

cases where it is otherwise provided by law. See ***Inland Revenue Commissioners v Hambrook*** [1956] 1 All ER 807. In the instant case, the Police Services Regulations (1961) sets out the procedure for dismissal. The Respondent was advised by Notice from the Commissioner of Police that he had seven (7) days within which to challenge the termination of his services but he failed to respond. In my view, he could have challenged the Commissioner's decision to dismiss him by instituting judicial review proceedings pursuant to the provisions of The Judicature (Civil Procedure Code) Law (Judicial Review) Rules, of 1998. In the circumstances, he would have been obliged to seek such a review within three (3) months of the date that he was effectively dismissed but he chose not to go by this route. In my judgment, he cannot circumvent the process by recourse to the common law.

23. The ***East Berkshire's*** case relied on by Mr. Equiano, is clearly distinguishable from the respondent's case. In that case the remedies sought by the applicant under judicial review arose solely out of a private right in contract between the applicant and the authority, and not upon some breach of public duty placed upon the authority under a statute.

24. It is also my view that the Appellant ought to succeed on ground of appeal (a).

Conclusion

25. In my judgment, since the Appellant succeeds on grounds (a) and (c) there is no need for me to consider the other grounds of appeal. I would therefore allow the appeal with costs to the Appellant.

MARSH, J.A. (Ag.):

I have read in draft the judgments of Panton, P. and Harrison, J.A. I agree with their reasons and conclusions and have nothing more to add.

PANTON, P.**ORDER:**

The appeal is allowed. The Order of the Court below set aside. Judgment entered for the appellant. Costs of the appeal to the appellant to be agreed or taxed.