12th December, 1962.

JAMAICA

IN THE COURT OF APPEAL

CIVIL APPEAL No. /62

Before: The Acting President
Mr. Justice Lewis
Mr. Justice Waddington.

Bustamante Industrial Trade Union
United Port Workers & Seamen's Union
The Trades Union Congress of Jamaica
vs.
The Shipping Association of Jamaica.

Mr. E.C.L. Parkinson — for Bustamante Industrial Trade Union.

Mr. David Coore, Q.C. — for United Port Workers Union.
Viscount Bledisloe Q.C. — for Respondents.

APPLICATION FOR LEAVE TO CALL FRESH EVIDENCE

JUDGMENT OF THE COURT DELIVERED BY THE PRESIDENT (AG.)

In this matter, the principles to be applied in the hearing of applications before the Court of Appeal to call fresh evidence or for retrial are clearly enunciated in the cases cited by Counsel.

The deed in Turnbull vs. Duval, 1902 A.C. p.436 (the case from Jamaica) was registered two years after its date but was in Court and could have been produced. There was no discovery of documents. It was stated by Lord Lindly in the Privy Council that the deed might perhaps have been useful to the appellants at the trial for the cross-examination of the wife but that was all that could be said about it. I would say the same of this document herein, exhibit H.L.S.1 dated 17th May, 1961, had it been produced at the trial. The refusal in that case to call fresh evidence was upheld.

In E.H. Lewis & Son Ltd. vs. Morelli et al 1948, 2 A.E.R. page 1021, at the hearing the suggestion that the Rent Acts were not applicable to the premises, as claimed by the defendants, was disclaimed by the plaintiffs. It was held that the plaintiff

would not be allowed to call fresh evidence to dispute, however conclusive the evidence, what she admitted and thereby precluded the defendant from eliciting further evidence. In that case fresh evidence then sought to be adduced, namely, a certificate of the rateable value of the premises, could easily have been obtained. The evidence in the instant case before us certainly could have been disclosed by the deponents - the arbitrators, Mr. Silvera and Mr. Johnstone - in their affidavits but they omitted so to do.

In Rowell vs Pratt, 1938 A.C. page 101, the County Court Judge held that a return that was prohibited from production by statute could not be tendered in evidence. The Court of Appeal held that the Potato Marketing Board was not a Government department and that the return was not privileged from production. On appeal to the House of Lords it was held that if a litigant is unable to secure the production at the trial of a document in the hands of a third party who has no just excuse for withholding it, that alone is not a ground for holding that a substantial wrong or miscarriage of justice has been occasioned, or for ordering a new trial. Such a litigant is in no better position to demand a new trial than one who failed to secure the attendance on subpoena of a witness, the other party to the litigation being in no way responsible for the failure.

In Brown vs Dean, 1910, A.C. (H.L.)374, it was held that a new trial would not be granted on affidavits which show nothing in the nature of surprise, fraud or conspiracy - nothing to show that with reasonable diligence the information alleged could not have been obtained at the first trial. In that case a schoolgirl sued and obtained judgment against the schoolmaster for assault. It was sought to adduce fresh evidence that the child's injuries had been caused from chastisement by her mother on the day after the alleged assault by the schoolmaster. It was alleged in that case also that the fresh evidence could not have been obtained by reasonable diligence. The application to admit fresh evidence was however refused.

The three conditions to be fulfilled, as stated by Denning, L.J., in Ladd vs. Marshall, 1954 (3) A.E.R. page 749, are as follows:

(1) It must be shown that the evidence could not be obtained with reasonable diligence for use at the trial.

(2) The evidence must be such as would have an important influence in the result of the case; and

(3) It must be apparently credible although it need not be incontrovertible.

A somewhat broader approach was enunciated by Lord Halsbury in Re Neath Harbour Smelting & Rolling Works 1885-6 (2) T.L.R. page 94. He said:

> "It would be disastrous to the administration of justice if it could be supposed that by reason of any technicality the real truth could be shut out."

That was the case of the bogus shareholders in a winding up. It was also urged in that case that the petitioner could not with any reasonable diligence have discovered the facts which he then alleged as to those bogus shareholders. The application for fresh evidence was however granted in that case and is strongly relied on by the applicants in this case before us, as also the case of Crook vs. Derbyshire, 1961, (3) A.E.R., page 791.

In the application for fresh evidence before us, an Arbitration Tribunal on the 19th April, 1961, issued its Award contained in four paragraphs relating to the increase of wages to be paid to four separate categories of labourers. It was alleged a fifth paragraph worded as follows:

> "that these wage rates should be retroactive to 15th May, 1960."

was omitted by some unaccountable error or mistake from the written or signed Award.

It was desired to establish that this fifth paragraph was a part of the Award which had been communicated to the Secretary of the Arbitration Tribunal but was inadvertently omitted.

The applicants in the motion before the Chief Justice in this matter submitted two affidavits - one by the Chairman, Mr. Noel Silvera, dated the 25th September, 1961, in which he states as follows:

Paragraph 4: "That on a date subsequent to the 7th of April, 1961, and prior to the 19th April, 1961, the Tribunal met at the Ministry of Labour, Kingston, and gave considerations to the submissions of the parties."

"5. That it was unanimously decided by myself and the other members of the Tribunal that the increases should be made as stated in our Award dated the 19th April, 1961, and also that these increases should be retroactive as of the 15th of May, 1960.

6. That after our decision as stated above, I personally on the said date of the Award, informed Mr. E.G. Gooden and Secretary of the Tribunal of the Terms of the Award."

and by Mr. Roy Johnstone, another Arbitrator. In his affidavit of the same date he states at paragraph 5:

"That on a date between the 11th and 19th of April, 1961, the Tribunal met at the Ministry of Labour, Kingston, and gave considerations to the submissions of the parties."

Paragraph 6: "It was unanimously decided by the Chairman of the Tribunal, Mr. Paul Geddes the Employers' Representative and myself that the increases should be made as stated in the Award dated the 19th of April, 1961, and also that these increases should be retroactive as of the 15th of May, 1960."

The present respondents applied by motion before the Chief Justice to set aside any amendment of, or additions to, the Award of an Arbitration Tribunal appointed under the Public Services Arbitration Law, Cap.329, dated 19th April, 1961.

The Chief Justice in his judgment said that he was satisfied that the Award as signed by three Arbitrators on the 19th April, 1961, exactly expressed the decision of the Arbitrators as what they had then arrived at. That is to say, the fifth paragraph above referred to was not included in the Award.

It was now sought to adduce fresh evidence in the nature of a letter dated the 19th May, 1961, signed by the three Arbitrators and addressed to the Permanent Secretary, Ministry of Labour (a copy of which only has been adduced) in which letter it is alleged that the Arbitrators stated categorically that the Award actually made by them

on the 19th of April, 1961, should have contained the disputed paragraph (5) and that the Tribunal had met in private session at the Ministry of Labour on or about the 19th April, 1961, and that the Award was unanimously agreed upon as stated and that its decision contained the disputed paragraph (5).

The application to call fresh evidence contained in that letter of the 19th May, 1961, is now opposed by the respondents, the Shipping Association of Jamaica.

Mr. Shearer, on behalf of the applicant, in his affidavit dated the 4th of April, 1962, and in support of this application, states that on the 13th of October, 1961, subsequent to the delivery by the Chief Justice of his judgment, he received a copy of this letter dated 19th May, 1961 (Ex.H.L.S.1) which was not available before, and that had it been received prior to the hearing of the matter before the Chief Justice it would have been tendered by his solicitors at that hearing.

It must, however, be pointed out that it is not seriously disputed now that the contents of that letter (Ex.H.L.S1) signed by the Arbitrators must have been known to the Arbitrators when they made their affidavits on the 25th September, 1961; but they made no mention of it.

There is evidence that application was made to the Ministry of Labour by the respondents for a copy of this letter but the same was refused.

In Duncan vs. Campbell Laird & Co. Ltd., 1942,(1) A.E.R., page 587, it was held that an objection to the production of documents duly taken by the Head of a Government department should be treated by the Court as conclusive. The applicants say they made no similar request; they contemplated the receipt of a similar reply.

The Chief Justice, after an exhaustive analysis of the evidence, came to the decision above stated but in his judgment he criticised the affidavits of the Arbitrators as to the uncertainty of the date of the Award and also made observations and strictures directed against the Ministry of Labour for refusing to give to the parties copies of the correspondence relating to the Award herein, and in particular this letter, H.L.S. 1.

It is obviously extremely u desirable at this stage to go into a minute examination of the evidence in support of the application. It would seem, however, to us, rather, to me, that the main issue is whether the first limb of Lord Denning's trio has been satisfied, namely, the non-availability of the evidence at the trial which could not be secured with reasonable diligence. This prerequisite cannot be regarded as envisaged by Lord Halsbury in Neath's case as a technicality, for even in that case the absence of prior knowledge of the fact of the shareholders being 'bogus' was a material consideration.

On this issue, these points have to be considered:

Firstly, the Chairman, Mr. Silvera, having signed the letter on the 17th May, 1961, would knowledge of its contents be available to the applicants through their deponents as on the 25th September, 1961, the date of his affidavit? I should think so.

Secondly, would the letter be available to the Chairman on application to the Ministry, or would he be refused access (as indeed it was refused the respondents) to his own Award? I think not.

Thirdly, was any attempt made to obtain it for the purposes of his affidavit, or was it considered unnecessary then in view of the clarity of paragraph (5) of the Chairman's affidavit?

Fourthly, is lack of diligence indicated by the failure of the applicants to make their own request of the Ministry, and failure to issue a subpoena to secure its production?

Fifthly, would Mr. Shearer's late receipt of the letter on the 13th of October, 1961, affect its availability and lack of diligence in not obtaining or attempting to secure it? In his affidavit he says:

> "Had the said copy letter been received by me prior to the hearing of the motion herein, I would have handed it to the solicitor for the appellants for use at the hearing before the learned Chief Justice."

I would regard this as somewhat ambiguous, but one turns to paragraph 2 of his affidavit for some clarification. It says:

> "To the best of my knowledge, information and belief, I would not have received the said copy letter but for the remarks of the Chief Justice in the 'Daily Gleaner'."

Well, this is somewhat vague in a matter of this kind under review to be of real assistance. Certainly, however, he does not say that he made application and that the same was refused. Counsel was constrained to admit no such application was made.

Now, would this statement by Counsel for the applicants that they proposed to call no further evidence with knowledge of the existence of the letter, now preclude them from asking for its production as fresh evidence - ex post facto - after learning but did not anticipate or expect the views taken by the Trial Judge of the affidavits upon which they rested their case?

In my view, it is reasonable to assume that the applicant's advisers relied implicitly and rested their case with confidence, on this issue, on the evidence contained in categorical terms in paragraph (5) of the Chairman's affidavit and ignored the availability and necessity of production of the letter at the trial. This, in my view, would be quite understandable. They had the affidavit from the person who would know more than anyone else of the Award - the originator of the letter or letters to the Ministry, the fons et origo - the Chairman of the Tribunal.

The attitude may well have been, 'Why should we worry? We have the Chairman of the Tribunal who has stated in his affidavit in categorical terms as follows:

> "That it was unanimously decided by myself and the other members of the Tribunal that the increases should be made as stated in our Award dated the 19th of April, 1961, and also that these increases should be retroactive as of the 15th May, 1960"

and we need no more.' That, I think, was quite an understandable attitude.

I have considered all these aspects and at this stage would say no more than that in each of these relevant circumstances, the scale has turned against the applicants. That is the weight of the evidence on my mind and I must give effect to it.

The application, in my view, therefore, ought to be refused.

(Cont'd.)

MR. JUSTICE LEWIS:

I agree. The main issue which was argued before us, as the learned President has said, was the question of diligence on the part of the applicants. Could this document which is now sought to be introduced into evidence have been obtained by the exercise of reasonable care and diligence?

This is not a case where the applicants were not aware of the existence of the document and afterwards became aware of it. This is a case in which they knew of its existence but took no steps to procure it. From or about the 24th May, when the applicants received their copy of the letter, or the letter informing them of the change - the purported correction by the Tribunal, they were aware that the Tribunal had written the Ministry the letter which is now sought to be introduced. Between the 24th of May and the 19th of September they took no steps whatever to obtain a copy of this letter. On the 19th of September, Mr.Wilmot swore an affidavit which was put in by the respondents, a copy of which was served upon the applicants, exhibiting correspondence between the respondents' solicitors and the Ministry, in which a request was made by them for a copy of this letter and which the Ministry refused to supply.

It is interesting to note that up to that time the applicants themselves had filed no affidavits whatever in connection with the motion. The motion came on for hearing on the 25th of September, 1961, and on that day the applicants filed two affidavits, one by Silvera, Chairman of the Tribunal, and the other by Johnstone, one of the arbitrators. When these affidavits were sworn it was within the knowledge of the applicants that the Shipping Association had been refused a copy of this letter, and it was also within their knowledge that this letter had been signed by the two persons who were about to swear the affidavits on their behalf. Even then, they made no attempt to obtain a copy of the letter.

Assuming that they thought that it would be useless to do so, one fails to understand why they did not obtain from the Chairman and the other member of the Tribunal either copies of the letter,

if they had them, or, at any rate, the information which was in the letter and to which either of these persons was competent to swear.

It is difficult to believe that the Ministry would have refused to the Chairman of the Tribunal a copy of the letter which he and his colleagues had written to them, if an application had been made for the copy, or even to permit inspection by these persons for the purpose of refreshing their memory in order to assist the Court as to what had happened. But the Court finds that no mention is made in either affidavit of the fact that such a letter had indeed been written. One is tempted to wonder, as the learned President has pointed out, whether it occurred to the applicants at all that this letter was of importance and that it was necessary for them to go into greater detail about its contents either by procuring a copy of the letter or by having its contents sworn to in the affidavit.

The Court has been asked to take a realistic approach to this matter and not to deal with technicalities or to prevent the truth from being brought out by a too narrow approach, and in connection with this it is said that since the applicants knew - I presume by that they mean knew after the 19th of September - that the Ministry had refused to supply the copy to the respondents, that it was useless to subpoena the Ministry to produce the letter. I am not convinced that that is a valid submission. It seems to me that there is a far cry between refusing to supply a copy of a letter before proceedings have commenced and refusing to produce the letter in Court, either at the instance of a party or through the good office of the members of the Tribunal. If a subpoena had been issued, it might very well be that the Ministry would have brought the letter into Court, taking the view that although they would not supply it to one party without the consent of the other, that they would supply it to the Court. But it is unnecessary, in my view, for this Court to speculate about it because the fact is that no subpoena was issued; no application was ever made and no reference was ever made to this letter on behalf of the applicants

even in the affidavits of the members of the Tribunal.

It would appear that the importance of the letter has only become apparent as a result of the strictures and comments made by the learned Chief Justice in the course of his judgment. While that would not be the ground for refusing this application, it is a fact which must be taken into consideration when one looks at the background against which this application is made. Having regard to the view that I have taken, namely, that the applicants did not exercise due diligence to obtain this evidence, it is not necessary for me to consider the submission that was made with respect to its admissibility. It would appear that a copy of the original award was put in and that a copy of the letter of the 24th was put in without objection, and these matters might have been potent in the Court's consideration of what course it should take, had it been minded to grant this application, but I do not think it is necessary to deal further with that aspect of the case.

I agree, therefore, that the applicants have failed to satisfy the Court as to the first condition which is necessary to be fulfilled before an application of this sort could be granted, and I would refuse this application.

MR. JUSTICE WADDINGTON

I also agree with the judgments delivered by the Learned President and my Brother Lewis. I would merely like to add that Mr. Coore in his arguments said that this letter was a document which from its inception the parties were anxious to obtain, yet the only action that was taken by the applicants in this matter was to file two affidavits in the afternoon of the 25th of September, after the learned Counsel for the applicants then had already closed their case, sofaras the facts were concerned, on behalf of the Shipping Association.

I do not think that that action on the part of the applicants - or I should say, rather, the lack of action - could fairly be described as exercise of reasonable diligence enabling them to comply with the first of the three conditions laid down for the exercise of the Court's discretion. I agree, therefore, that the application should be refused.