

NML

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 51/96

**BEFORE: THE HON. MR. JUSTICE DOWNER, J.A.
THE HON. MR. JUSTICE BINGHAM, J.A.
THE HON. MR. JUSTICE LANGRIN, JA.**

BETWEEN	HERBERT HALL	APPELLANT
A N D	THE JAMAICA FIRE BRIGADE BOARD	1st RESPONDENT
A N D	HONOURABLE ATTORNEY-GENERAL FOR JAMAICA	2ND RESPONDENT

**Garth Lyttle instructed by Garth E Lyttle & Co.
for the appellant**

**Ms. Cheryl Lewis and Katherine Francis, Crown Counsel
instructed by the Director of State Proceedings for
the respondents**

May 1, and July 19, 2001

DOWNER, J.A.

This is an appeal by Herbert Hall, an Assistant Commissioner of the Fire Brigade, who was charged for breaches of the Fire Brigade Regulations, 1993 (the "Regulations") published in the **Gazette Supplement** of January 21, 1993. These regulations were made pursuant to Sec. 16 of the Fire Brigade Act (the "Act") which reads, in so far as is material:

"(1) The Minister may, after consultation with the Board make regulations generally for the better carrying out of the provisions of this Act and without prejudice to the generality of the foregoing may make regulations in relation to any or all of the following:

- (a) the requirements for admission of members into the Brigade, the period of service, and the training, government and good conduct of such members;
- (b) the uniform to be worn by, the hours and places of training and exercise of, and the distribution of duties among members of the Brigade;
- (c) the services required of the members of the Brigade and the manner of their performance of such services;
- (d) the terms and conditions of enlisting in the Brigade;
- (e) gratuities or awards to any member of the Brigade for extraordinary or meritorious service performed by him while on duty;
- (f) for the purposes specified in section 5."

The relevant part of section 5 reads:

"5A.-(1) For the purposes of this Act, there is hereby established a body to be called the Fire Brigade Board which shall, subject to the provisions of this Act, be responsible under the general authority of the Minister for the command, discipline and administration of the Brigade."

The particulars of the charges read:

"Herbert Hall
NAME

CHARGE

DISOBEDIENCE TO ORDERS CITED UNDER SECTION 33
(c) OF THE FIRE BRIGADE (no. 2) REGULATIONS, 1993

In that he at the Assembly Hall, UWI on Sunday 31 March, 1996 disobeyed an instruction given by the Commissioner on Monday 18 March, 1996 that all officers attending the EMS Graduation were to be in undress uniform.

Herbert Hall

NAME

CHARGE

NEGLECT OF DUTY CITED UNDER SECTION 33 (d) OF
THE FIRE BRIGADE (NO.2) REGULATIONS, 1993

In that you as the Area Officer responsible for Area IV neglected to brief your Divisional Officers about the correct dress for the official Fire Brigade function held at the Assembly Hall, UWI, on Sunday 31 March, 1996 which was your duty to do."

In both instances he was found guilty. For the first charge the punishment was that he was fined three days' pay and the second, a severe reprimand.

The proceedings were held on April 19 and 24, 1996. A letter from the Commissioner to the then Deputy Registrar of the Court of Appeal, dated 17th October, reveals the procedural irregularities which characterised these proceedings from its inception. Here is the letter:

"12 October, 1998

Miss Sherna Reid
Deputy Registrar
Court of Appeal
P.O. Box 629
Kingston.

Dear Madam,

CIVIL APPEAL NO. 51/96
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THE ATTORNEY GENERAL

References:

- A. Your letter of similar subject dated 06 April, 1998.
- B. Your letter of similar subject dated 06 October, 1998.

Further to the above References, the following are attached as requested:

- a) A written Statement which was provided by the accused before the trial. (Manuscript and typed copies attached.)
- b) Copies of the Charge Sheets. Please note that the one document is issued to record a number of things: the name of the accused the names of the witnesses called to give evidence at the trial, the details of the Charge, the plea entered by the accused after hearing the Charge, the finding of the Board after hearing the evidence and the judgment/decision handed down by the Board.
- c) Letter dated 25 April, 1996 in which the accused first served notice of his challenge to the trial proceedings held the previous day – 24 April, 1996.
- d) Letter dated 06 May, 1996 with the Board's response to the above-mentioned letter.

This trial was conducted as a Summary Trial under the Jamaica Fire Brigade (No. 2) regulations, 1993. Please note that under the Fire Brigade Regulations there is no requirement to record the details of the deliberations made during a Summary Trial. Consequently, there is no detailed record/verbatim report of what actually transpired at the trial. I trust therefore that the documents provided will satisfy your request.

Please accept our apology for not responding earlier. This is so because your earlier letter dated 06 April, 1996 was not, in fact, received.

If additional information is required please do not hesitate to contact us further.

Yours sincerely,

.....
 Major H. G. Benson
 Commissioner"

Once the Notice and Grounds of Appeal is filed, it is open to an appellant in future appeals to request of the Commissioner in writing, to forward the relevant documents to the Registrar of this Court. A fee of \$2,000.00 in accordance with the Resident Magistrates scale may be imposed by the Commissioner.

The inescapable inference was that the then Deputy Registrar requested the essential documents required to complete the record for an appeal. So it is appropriate to examine the statutory provisions which govern summary proceedings to ascertain if the Commissioner's understanding of the Regulations was correct. The regulations read as follows:

"Summary Procedure

36. References in these Regulations to dealing summarily means the hearing and determination by an appropriate superior authority in such manner as it deems fit of a charge against a member after notification of the charge to such member, whether orally or in writing.

37.-(1) Disciplinary offences other than those specified in subsection (2) may be dealt with summarily.

(2) The offences to which paragraph (1) refers are those specified at paragraphs (a), (b) (ii), (b) (v), (e), (f), (g), (h) (ii), (n) and (q) of regulation 33."

The offences for which the appellant was charged did not fall within Rule 37(2) but 33 (1)(c) and 33(1)(d). Then Rule 37(3) states:

"If the appropriate superior authority determines that the accused is guilty of a disciplinary offence if

shall so find, and may sentence the accused to one of the following punishments, that is to say –

- (a) deprivation of a Good Conduct Chevron;
- (b) a fine of a sum not exceeding three days' pay;
- (c) severe reprimand;
- (d) reprimand."

Rule 38 is very important. It reads:

"Upon the conclusion of summary proceedings, the appropriate superior authority shall submit to the Commissioner a report of such proceedings."

The necessary implication that the report should contain at least a summary of the evidence, the composition of the appropriate superior authority and the findings and decision. It should also have the exhibits, and the charge sheet as indicated in the Commissioner's letter. It is clear that this report is mandatory as it is the protection the law affords a convicted officer so that he can challenge the proceedings on appeal or by way of judicial review.

The scope of the summary procedure is not as stated in the Commissioner's letter. Rather it means that the trial takes place without a jury and that the tribunal is competent to make the appropriate order forthwith.

What occurred prior to the commencement of proceedings before the tribunal

The starting point of these proceedings was an invitation to the appellant which reads thus:

"DR. THE HONOURABLE PETER PHILLIPS M.P.
Minister of Health
Requests the pleasure of the company of

Mr. H. Hall

at A Graduation Ceremony

on Sunday March 31, 1996 at 2:00 p.m.
at the University of the West Indies- Assembly Hall

Dress: Semi formal"

It is patent that there was a complaint from the Commissioner after the Graduation Ceremony and the response of the appellant ran thus:

"AREA IV HEAD OFFICE
Ironshore
Montego Bay
St. James
05 April, 1996

The Commissioner
Thru' Deputy Commissioner (Operations)
14 Port Royal Street
Kingston

Sir,

GRADUATION CEREMONY ON 31 MARCH 1996

I intended to attend the function in uniform, but I received a written invitation which said "Dress – Semi-formal". This in my interpretation meant that anyone could have attended in even shirt and tie.

If the invitation was sent out early and we were told that we should disregard the "semi-formal" information, I could fully understand. However, what is written is written and I know of no Court in Jamaica that would interpret "semi-formal" as meaning uniform. The fact that the invitation came from the Commissioner's office would seem to suggest that what was written was meant to be. No one in my opinion can be faulted for interpreting otherwise.

H. Hall
Assistant Commissioner
I/C Area IV"

There is no refutation that the invitation, although issued by the Minister of Health, came from the Commissioner. There are no notes of evidence, nor is there the mandatory report to the Commissioner which would have enabled this Court to see how the tribunal resolved the mixed signals coming from the Commissioner's office. The first signal contained in the charge was that oral

instructions were issued on 18 March 1990, that all officers were to be in undress uniform. It was explained, that means full ceremonial uniform. The second as indicated above, requested the pleasure of the appellant's company in semi-formal attire.

It is important to refer to Rules 39 and 40 as they contain a detailed code of procedure to guide the proceedings of the Tribunal. Rule 39 reads:

"DISCIPLINARY INQUIRY

39.-(1) A disciplinary inquiry shall be heard by a Tribunal consisting of -

(a) the Board, where the relevant charge is against the Commissioner or other officer not below the rank of Assistant Commissioner; or

(b) the Commissioner, in all other cases."

The record shows that the Tribunal was made up of the Chairman, Mr. D.

T. Brown and Mr. Errol Ziadie. Then Rule 40 (1) reads:

"40.-(1) Every member in respect of whom a disciplinary inquiry is to be held shall as soon as possible be informed in writing of the exact charge against him.

(2) The written charge shall disclose a disciplinary offence under these Regulations with specific particulars thereof."

This ambiguity embodied in the mixed signals was certainly a good defence to the charge pursuant to Rule 33(1) which reads as follows:

"33.-(1) A member commits a disciplinary offence if as respects the Brigade he is guilty of -

(a) discreditable conduct, that is to say, if he acts in a disorderly manner or any manner prejudicial to discipline or likely to bring discredit on the reputation of the Brigade;

(b) insubordinate or oppressive conduct, that is to say, if he-

- (i) is insubordinate by word, act or demeanour; or
- (ii) is guilty of oppressive or tyrannical conduct towards a member junior in rank; or
- (iii) uses obscene, abusive, or insulting language to any other member; or
- (iv) willfully or negligently makes any false complaint or statement against any member; or
- (v) assaults any member; or
- (vi) withholds any complaint or report against any member;

(c) disobedience to orders, that is to say, if he disobeys or without sufficient cause, omits or neglects to carry out any lawful order, written or otherwise: (Emphasis supplied)
 ...".

So from the very inception there were procedural irregularities which went to the root of the proceedings. Rule 33(1)(d) governs the second charge. It reads:

"(d) neglect of duty, that is to say, if he -

- (i) neglects, or without good and sufficient cause omits, promptly and diligently to attend to or carry out anything which is his duty; or
- (ii) idles or gossips while on duty; or
- (iii) leaves his place of duty without due permission or sufficient cause; or
- (iv) fails to report any matter which it is his duty to report; or

- (v) omits to make any necessary entry in any official document or book; or
- (vi) neglects, or without good and sufficient cause, omits to carry out any instruction of the Medical Officer, or while absent from duty on account of sickness, is guilty of any act or conduct calculated to retard his return to duty." (Emphasis supplied)

In the absence of the mandatory report to the Commissioner it is impossible to know what evidence was marshalled to support these charges and whether the appellant was allowed to put forward a defence. This is the basis of finding that the proceedings were null and void.

Correspondence after trial and before appeal proceedings were instituted

On 25th April, 1996, the very day after the trial, the appellant wrote to the Chairman of the Fire Brigade Board as follows:

"April 25, 1996

The Chairman
Jamaica Fire Brigade Board
Thro' The Commissioner
Jamaica Fire Brigade Headquarters
14 Port Royal Street
Kingston

Sir,

Re: Disciplinary Trial and Decision
on Wednesday April 24, 1996

I respectfully bring to your attention the fact that the trial and decision of the Board is null and void for the following reasons:-

1. The charges were not brought under the relevant section of the Fire Brigade Act – i.e. Regulations made under section 16 of the Fire Brigade Act. I was charged under section 33 of the Fire Brigade Act which for the purpose of this trial makes it a nullity.

2. There was not present at the sitting a recording secretary, so that accurate notes of the proceedings could have been taken.
3. The officer who prosecuted the case was already named on the charge sheet as a witness.

The board should be advised that this is not an appeal since there's no need to appeal against a decision which is null and void, based on an error in law.

There can therefore be no charges pertaining to this trial recorded on my file or any disturbance of any salary. I'm hoping sir, that good sense and justice will prevail and that I am not forced to seek legal redress elsewhere, since it's not a position that I would readily want to take at this point. Please note that under the doctrine of Double Jeopardy, having been tried and a decision made regarding the charges, that I cannot be tried twice for the same offence.

I respectfully await your written decision.

.....
H. E. Hall
Assistant Commissioner
I/C Area Four (4)" (Emphasis supplied)

The letter makes two important points. Firstly, that the proceedings were a nullity, though not for all the reasons he gave. The proceedings were a nullity because, as was stated previously, the Board failed to send a report as required by law to the Commissioner. Secondly, he complained that there were no notes of evidence taken at the hearing. This ought to be done by the Board or under its directions. Those notes would be a vital part of their report to the Commissioner. This report would be essential for the conduct of an appeal on the merits of the case. The appellant grasped the importance of the concept of nullity which was aptly put by Mr. L. M. D. De Silva delivering the

judgment of the Privy Council in **Chief Kofi Forfie v. Barima Kwabena Seifah**

[1958] 1 All E.R. 289 at 290. The following passage is relevant:

"... A court had inherent power to set aside a judgment which it had delivered without jurisdiction. LORD GREENE, M.R., in **Craig v. Kanssen** ([1943] 1 All E.R. 108 at p. 113), after referring to several decisions, had said:

'Those cases appear to me to establish that an order which can properly be described as a nullity is something which the person affected by it is entitled ex debito justitiae to have set aside. So far as the procedure for having it set aside is concerned, it seems to me that the court in its inherent jurisdiction can set aside its own order; and that an appeal from the order is not necessary.'

Their Lordships were of the same opinion. Assuming that the judge had no power on June 29, 1949, to review his judgment of May 10, 1949, he nevertheless had power to declare it a nullity and proceed to give a fresh judgment. This, in fact, he had done, and the only criticism of the proceedings of June 29 that could be made was that, on a question of procedure, he attributed the authority to do the thing he did to a source from which it did not flow. But, although the source named was, on the assumption made, incorrect, he undoubtedly had had power to do the thing he had done."

The Board's response was as follows:

"06 May, 1996

Assistant Commissioner H Hall
Area IV Headquarters
Jamaica Fire Brigade

Dear Mr. Hall,

DISCIPLINARY TRIAL, WEDNESDAY 24 APRIL, 1996

The Board is in receipt of your letter dated 25 April, 1996 and responds to each point raised by you as follows:

1. When you were warned for Summary Trial the Commissioner handed you draft copies of the Charges that were being laid against you. After Deputy Commissioner Thomas was brought in to be the Prosecuting Officer and the Commissioner then became a witness, the necessary amendments were made and the amended charge read to you before the hearing began – this satisfied the requirements of Section 36 of the Regulations
2. There is no requirement under the Regulations for a recording secretary to be present at a hearing of this nature.
3. The amended Charge as explained at 1 above does not show the Prosecuting Officer as a witness (Copies of the Charges with the amendments in pen and the subsequent typed amendments are on record at the Brigade Headquarters.)

Based on the foregoing, your assertions about the trial held on Wednesday 24 April, 1996 are incorrect. Consequently, the trial and the decisions arising from it still stand.

Yours faithfully

.....
 D T Brown (Mr)
 Board Chairman
 The Jamaica Fire Brigade Board."

The point is that given the opportunity to have second thoughts on the matter, the Board Chairman stood firm. So the opportunity to correct the errors and hold a proper inquiry according to law was missed. The statutory route was to appeal pursuant to Rule 44 which reads:

"44. Subject to the provisions of the Judicature (Appellate Jurisdiction) Act, an appeal from any decision of the Board (acting summarily or as a Tribunal) lies to the Court of Appeal."

The Delay in instituting proceedings

Ms. Cheryl Lewis, who argued the case for the respondents, contended that the appellant was too late to seek redress in this Court. In this context she cited **R v Senate of the University of Aston Ex parte Roffey and Another**[1969] 2 All E.R. at 965 and relied on the principle stated in the headnote which reads:

"(iv) despite the breach of the rules of natural justice the prerogative remedies were still discretionary; and because of the applicant's delay in approaching the court his applications would be refused.

QUAERE; whether the examiners could properly have limited themselves to a consideration of his academic performance.

Applications refused."

These proceedings in the above case were by way of judicial review. The instant proceedings however, are by way of appeal which endows this Court with much wider powers than the Supreme Court if it were exercising judicial review. It is true that the proceedings below were on 24th April, 1996. The **Notice and Grounds of Appeal** was filed over one month later on 30th May, 1996. The Judicature (Civil Procedure Code) Law provides for six weeks in the case of appeals from the Supreme Court. For civil appeals from the Resident Magistrate's Court verbal notice of appeal can be given at the conclusion of the hearing or written notice fourteen days thereafter. There are no rules governing the time frame for appeals from this Tribunal, but they should be within a reasonable time. To institute proceedings little over a month was reasonable.

As regards the listing of the appeal, that can hardly be the fault of the appellant. The volume of complex appeals from the Resident Magistrate and Supreme Courts has grown significantly during the past five years and there are also appeals from tribunals such as this.

Turning to the grounds of appeal, they are as follows:

- "(1) The verdict is unreasonable having regards to the evidence.
- (2) The trial of the Appellant was done in a manner contrary to Natural Justice
- (3) The conduct of the Board, Commissioner and Prosecutor at this trial tainted the conviction of Mr. Hall."

Mr. Lytle sought to argue under ground two that the appellant was not accorded a right to a hearing. This Court however took the point, on its own motion, that the proceedings before the Tribunal were invalid because of the failure to forward the report of the proceedings as required by law. A similar failure to follow the mandatory provisions of a statute arose in **R v Monica Stewart** (1971) 17 W.I.R. 381 where the Resident Magistrate did not sign the Order for indictment. The subsequent proceedings were adjudged to be a nullity by this Court. We were entitled to take the point on our own motion: see **Norwich Corporation v Norwich Electric Tramways Ltd.** (1906) 2 K.B. 119; **Westminster Bank v Edwards** [1942] A.C. 29 and **Benson v Northern Ireland Road Transport Board** [1942] A.C. 320.

So considered, we allowed the appeal, set aside the order of the Tribunal and fixed the costs of appeal to which the appellant is entitled at \$25,000 and direct the Registrar to tax the costs on the Resident Magistrate's

scale for the hearing below. The respondents must pay all the costs. Further, we order that the three days' pay deducted from the appellant's salary be returned with interest at the rate of 15% from the date of deduction to 1st May 2001. These are the reasons which we promised to put in writing at the conclusion of the hearing of the appeal.