JAMAICA

IN THE COURT OF APPEAL

R.M. CRIMINAL APPEAL No. 10 of 1973

BEFORE: The Hon. President.
The Hon. Mr. Justice Grannum, J.A.(Ag.).
The Hon. Mr. Justice Swaby, J.A. (Ag.).

REG. v. ARTHUR WILLIAMS

Mr. Frank Phipps with Mr. A.J. Dabdoub for the appellant.

Mr. C. Orr with Mr. Sang for the Crown.

July 10, 11, 12, 13, 1973
and September 28, 1973

GRANNUM J.A.(Ag.):

On July 13, 1973, we dismissed this appeal and indicated that we would put our reasons in writing. This we now do.

The appellant Arthur Williams was convicted on December 19, 1972 by the learned Resident Magistrate for the parish of Kingston on an information charging him with a breach of the Commissions of Enquiry Law, for that he being a person who was served with a Summons under the said Law to attend as a witness before a Commission of Enquiry which was being held at Headquarters House, Duke Street in the parish of Kingston on October 25, 1972, unlawfully did fail, without sufficient cause, to attend before the Commission of Enquiry, contrary to Section 11 (2)(a) of Cap. 68 as amended by Law 42 of 1969. He was fined $20 and in default of payment ordered to serve two months imprisonment at hard labour. He appealed against his conviction on two main grounds, firstly that the verdict was unreasonable and cannot be supported having regard to the evidence and secondly that the learned Resident Magistrate erred in finding that a prima facie case had been established, in particular when he ruled against the submission that the appointment of the Commission by the Governor-General was a nullity, in that there was no provision in the law for a Commission to be part private and part public. The only two witnesses called were called by the prosecution but in order to appreciate the arguments advanced on the part of the appellant it is necessary to set out in some detail the evidence which was adduced at the trial in support of the charge.

Michael Scott testified that he was the Secretary/Manager of a Commission of Enquiry held at Headquarters House, Duke Street, Kingston and dealing, inter alia, with the award of Government contracts. The Commission was originally appointed - by proclamation signed by the Governor-General and gazetted in the Jamaica Gazette Extraordinary of March 28, 1972. The membership of the Commission was subsequently altered by proclamation published in the Jamaica Gazette dated April 17, 1972. Both Gazettes were tendered in evidence. Mr. Scott produced a letter signed by the Governor-General's Secretary informing him of his appointment by the Governor-General as Secretary to the Commission. This letter is dated December 14, 1972 but his appointment was expressed therein to take effect from May 3, 1972. He also produced a memorandum from the Chief Personnel Officer dated May 2, 1972 referring to his secondment from the Agricultural Development Corporation as Secretary/Manager of the Commission with effect from May 3, 1972. As Secretary, his duties included the preparation of summonses on the instructions of the Commission. On receipt of instructions from the Commission he prepared a witness summons directed to the appellant at Pratville in Manchester. It was signed by the Chairman of the Commission and was a summons ordering the appellant to appear before the Commission on October 25, 1972 at 9.30 a.m. to give evidence respecting the Enquiry. The summons was subsequently returned to Scott with an endorsement to the effect that it had been personally served on the appellant on October 22, 1972. The Commission sat at Headquarters House on October 25, 1972. The appellant's name was called 3 times after the Commission commenced its sittings for that day but there was no answer and Scott testified that he did not see the appellant there on that day. About 2-3 days <u>before</u> the 25th October 1972 he had received a letter from the appellant dated October 17, 1972. The letter was as follows:

"Pratville P.O.
October 17, 1972.

The Secretary Manager,
Commission of Enquiry, Government
Contracts, Work Permits etc.
Headquarters House, Duke Street,
Kingston.

Dear Sir,

I am amazed that members of your Commission can be paid at a fantastic rate, in some instances at $50 per person per hour but it is expected that I should accept $2.00 per day after attending for twelve days. This is adding insult to injury.

I am returning herewith your cheque for $102.50 No.956586 dated 13/10/72 with the request that it be sent as a donation to the School for the Blind.

I had indicated in the past that I would not continue to travel all the way from Pratville to Kingston without an assurance that my expenses would be paid. You have breached your undertaking to me and I will now have nothing further to do with your Tribunal. I am not prepared to waste any more time and money on this expensive farce.

If there is anything further you need in addition to what I have already stated then the Commission can come to Pratville at a convenient time and at its own expense.

I have instructed my attorney Mr. Frank Phipps Q.C. accordingly.

Yours faithfully,
(Sgnd) Arthur H.W. Williams."

It appeared from the evidence that the Commission followed the usual practice with regard to the payment of expenses of persons who attended the Commission as witnesses and such persons were paid in accordance with the Crown Witnesses Expenses Law as provided by Section 11(1)(c) of the Commission of Enquiry Law. After the failure of the appellant to appear before the Commission on October 25, 1972 Mr. Scott received instructions from the Commission and as a result he swore to the information herein before the Clerk of Courts at Sutton Street Court.

Under cross-examination he said that some witnesses were examined in private by the Commission but he could not remember on how many occasions witnesses had been so examined. He admitted that the appellant had been first invited to attend the Commission on August 22, 1972 and had in fact attended on ten occasions between

August 22 and October 6, 1972. Scott also testified that he received three copies of a claim by the appellant in respect of his (the appellant's) expenses but these copies were only received by him on the 6th, 11th, and 29th October, 1972 respectively. The first came by hand, the second he received via the Ministry of Labour and the third arrived by registered post dated August 19, 1972.

On October 3, 1972, Scott received the following telegram from the appellant: "Require assurance regarding expense claim before attending on Friday;" and he Scott replied by telegram on October 4, 1972 as follows: "Your travelling expenses attending Commission assured. Letter with claim so far not received by Commission."

It was not disputed that the appellant lived some 50-70 miles away from Headquarters House and that the claim submitted by him in respect of his expenses had not been paid in the amount claimed.

Police Superintendent, A. Williams of Manchester testified that he personally served the summons herein on the appellant on October 22, 1972 and he also told the appellant that he was required to attend the DaCosta Commission of Enquiry at Duke Street to give evidence.

At the close of the prosecution's case the attorney for the appellant made a no case submission which was overruled by the learned Resident Magistrate, whereupon the appellant elected to call no witnesses and closed his case.

The learned Resident Magistrate convicted the appellant and imposed sentence as aforesaid. It is against this conviction that the appellant appealed.

The first ground advanced by Mr. Phipps on behalf of the appellant was that on the facts of the case the learned Resident Magistrate ought not to have convicted because on the evidence the appellant had shown sufficient cause for his non-attendance before the Commission on October 25, 1972. He stressed that the appellant had made it abundantly clear to the Commission that he was dissatisfied about not being sufficiently or adequately compensated for his expenses for attending the Commission. He had submitted claims in respect of those expenses which had not been paid and Mr. Phipps complained that after the appellant had attended on ten previous occasions before the Commission, the very first time he failed to attend he was punished. Mr. Phipps emphasised that the time to consider the question of sufficiency

of cause was when the matter was before the Resident Magistrate and urged that, on a view of the entire background of the case the prosecution had failed to show an absence of reasonable cause for the appellant's non-attendance before the Commission. We agree that it was for the learned Resident Magistrate to consider and decide the question of sufficiency of cause but we were unable to accept Mr. Phipps' contention that the prosecution had not established a prima facie case that the appellant had failed to obey the summons to attend before the Commission without sufficient cause. Section 11 (1) of Law 42 of 1969 provides: "All persons summoned to attend and give evidence ... before the Commission (a) shall be bound to obey the summons served upon them; (c) shall be entitled to be paid their expenses at the rates prescribed by the Witnesses Expenses Law. The evidence before the learned Resident Magistrate was that the appellant had attended before the Commission on various occasions. He sent a telegram on October 3, 1972 requiring an assurance with regard to his expenses before he would attend on Friday 25th October, 1972. He was advised by telegram on October 4, 1972 that his expenses were assured. A cheque was forwarded to him by post in respect of his expenses up to October 6, 1972. On receipt of this cheque he made no attempt to adjust what he may have considered to be an error in respect of the amount. His reply was the letter dated October 17, 1972 to the Commission. The letter was not only written in a strongly vituperative style, but it was nothing less than an utterance of stark defiance of the authority of the Commission and an expression of a settled determination not to attend before the Commission on October 25 in obedience to the summons. Indeed it is difficult to imagine any more positive declaration of a refusal to obey a summons. There was no attempt before the learned Resident Magistrate to plead inability to attend owing to illness or lack of means or any excuse or explanation of that nature. In the face of the uncontroverted evidence presented by the prosecution, we found ourselves unable to hold otherwise than that the learned Resident Magistrate had ample evidence before him to justify the conclusion that the appellant had failed to attend the Commission on October 25, 1972 without sufficient cause. So much for the facts of the case.

Before dealing with the main argument advanced by Mr. Phipps that the appointment of the Commission by the Governor-General was a nullity, it may be convenient at this stage to dispose of a contention put forward by

Mr. Phipps as to the legality of the appointment of Mr. Scott as secretary to the Commission.

It was argued by Mr. Phipps that any acts done by Mr. Scott, as Secretary of the Commission were ultra vires particularly any acts done by him in purporting to institute or prosecute the proceedings against the appellant on the basis that his letter of appointment as Secretary from the Governor-General was dated December 14, 1972 even though his appointment was expressed to have effect as from May 3, 1972. Mr. Phipps contended that there was no provision in the law for the retroactive appointment as a Secretary and therefore he Scott could not validly perform such an important function as instituting proceedings against the appellant at a time when he was not validly appointed Secretary to the Commission.

We saw no merit whatever in this contention.

In our view not only was Mr. Scott's appointment as Secretary entirely valid but even if it were not, it could not in any way have affected the legality of the summons to the appellant to attend the Commission. It is abundantly clear from the evidence that Mr. Scott was performing the duties of de facto Secretary from May 3, 1972 and was recognised and dealt with as such by all persons in that capacity.

Section 16 of the Commissions of Enquiry Law, Cap. 68 provides:

> "No proceedings shall be commenced for any penalty under this Law except by the direction of the Director of Public Prosecutions or of the Commissioners. The Commissioners may direct their Secretary, or such other person as they may think fit to commence and prosecute the proceedings for such penalty."

Mr. Phipps' main complaint in the appeal was that the summons issued by the Commission to the appellant emanated from an illegal tribunal and therefore failure to obey such a summons was no offence under the law. His contention was that the Governor-General was vested with a power under Section 2 of the law which he alone could exercise in determining whether the Enquiry should be a public or private enquiry and in purporting to delegate this authority to the Commission for them to decide whether they would hold a public or private enquiry, he was doing something which was outside of the law on the principle "delegatus non potest delegare".

Mr. Phipps' argument was that the law provides in effect that all Commissions of Enquiry constituted under the law must be held in public. There can only be a private enquiry if the Governor-General directs a private enquiry, and in the absence of any such direction the enquiry must be public. There was no authority for the Governor-General to delegate this power of direction as to whether an enquiry should be public or private to the commissioners and there was no power under the law to make the commission partly public and partly private. The power of the Commissioners under the Law to exclude any particular person or persons did not, authorise a private enquiry. According to Mr. Phipps this provision is aimed at the preservation of order at the enquiry and cannot be employed to alter the character of the enquiry from public to private. He contended further that when once there was an attempt on the part of the Commission to exercise this defective power, it vitiated the entire tribunal and the Commission thereby became illegal.

We have examined these submissions in the light of the relevant provisions of the Commissions of Enquiry Law which are as follows:

Section 2 of Cap. 68 specifies:

> "It shall be lawful for the Governor-General, whenever he shall deem it advisable to issue a Commission appointing one or more Commissioners and authorising such Commissioners or any quorum of them therein mentioned to enquire into the conduct or management of any department of the public service ..... or into any matter in which an enquiry would in the opinion of the Governor-General be for the public welfare.
>
> Each such Commission shall specify the subject of the enquiry and may in the discretion of the Governor-General ... direct which Commissioner shall be chairman and direct where and when such enquiry shall be made and the report thereof rendered and prescribe how such Commission shall be executed and may direct whether the enquiry shall or shall not be held in public. In the absence of a direction to the contrary, the enquiry shall be held in public but the Commissioners shall nevertheless be entitled to exclude any particular person or persons for the preservation of order, for the due conduct of the enquiry or for any other reason."

Mr. Phipps urged that we should hold that the words "preservation of order, and due conduct of the enquiry" belong to a special genus and that therefore the general words which followed viz "or for any other reason" should be construed in accordance with the maxim of construction which has been described as "the ejusdem generis rule". Applying this rule of construction he contended that it would follow that the Commission had no power to exclude the public in general or to sit in private. Their power of exclusion was confined to circumstances which are within the limits of the ejusdem generis rule.

We did not think that the ejusdem generis rule is applicable to these words. In the first place we were unable to find any genus which is a prerequisite for the application of the principle and secondly we did not think it was the intention of the legislature to impose any such restriction on the discretion of the Commission to regulate their own procedure.

We were of the view that it would be impossible to enumerate all the contingencies in which the Commissioners might deem it fit and proper to exercise their discretion to sit in private or to examine a witness in private, hence the reason for the unrestricted direction given to them by the Governor-General by his proclamation of March 28, 1972.

We were clearly of the opinion that there was no substance in Mr. Phipps' contention. When one looked at the proclamation of March 28, 1972 which appointed the Commission, it could readily be seen that the Governor-General gave certain directions to the Commission which were obviously within the scope of his power under Section 2 of Cap. 68. Included among those directions was the one about which Mr. Phipps complained viz. "And I do further permit you to conduct such examination of witnesses in private whenever it may appear to you desirable so to do."

What this direction means, in the context of the proclamation is that the enquiry shall be held in public but, that the Commissioners may examine a witness or witnesses in private whenever it appears to them desirable so to do.

The misconception in Mr. Phipps' argument was the assumption that this direction by the Governor-General had the effect of altering the character of the enquiry from public to private. It did no such thing, it merely permitted the exclusion of the public in certain circumstances

when it appeared to the Commissioners desirable so to do. They were given an express authority by the Governor-General to conduct the examination of witnesses in private and to regulate their own procedure for holding the enquiry as they deemed fit. The character of the enquiry remained a public enquiry. It is important to bear in mind that the examination of witnesses is only one facet of an enquiry.

In our view there is no occasion here for any question as to the delegation of powers. The Governor-General was perfectly entitled to direct the Commission with regard to the procedure that they should follow in holding their Enquiry.

We therefore dismissed the appeal.