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IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

MISCELLANEOUS

M. 100/85

Gordon
Patterson
Walker - J.J.

REGINA vs. COMMISSIONER OF POLICE

EXPARTE JOSEPH MAYNARD

C. Rattray, Q.C. and Brenda Warren for Applicant

R. Langrin, Q.C. and Wendell Wilkins for Respondent

Heard : 3rd, 4th & 7th March, 1986 & 31st July, 1986

GORDON, J.

The applicant is a Sergeant in the Island Special Constabulary Force. By summons dated the 23rd November, 1982 he was summoned to appear before a Board of Enquiry at the Constant Spring Police Station on 14th January, 1983 : for easy reference the summons is reproduced below:-

"BOARD OF ENQUIRY

Memorandum E12/7/W18
M223
N29

CONSTABULARY HEADQUARTERS,
Kingston, 23rd November, 1982

A Board of Enquiry will assemble at Constant Spring Police Station, Saint Andrew on Friday 14. 1. 83

to investigate the following Charges preferred against

No. X1026 SPECIAL SERGEANT J. MAYNARD

OF THE HARMAN BARRACKS Division:-

CHARGE 1:

That you being a member of the Island Special Constabulary Force, disobeyed the lawful command of a Senior in Rank to wit: the Commissioner of Police handed down through Senior Superintendent Vernal McDonald at about 10:00 a.m. 20. 10.82 at Special Constabulary Force Headquarters, Harman Barracks, to postpone addressing a meeting of Special Constables for two weeks, which you requested to do at the said Harman Barracks in the parish of St. Andrew at about 5:00 p.m. on 20.10.82.

CHARGE 2:

That you being a member of the Island Special Constabulary Force, misconducted yourself by making use of the following disrespectful remarks about the Commissioner of Police. "The Commissioner can do anything he wants to do after we address the men, because if Bogle, Sam Sharpe and Nanny had carried out instructions given to them, they would not have

changed the course of history in this country. We are prepared for anything", at the Special Constabulary Force Headquarters at Harman Barracks in the parish of St. Andrew at about 10:00 a.m. on 20.10.82.

CHARGE 3:

That you being a member of the Island Special Constabulary Force, misconducted yourself by making use of the following disrespectful remarks about the Commissioner of Police. "The Commissioner's arrogant behaviour to me and other members of the Select Committee when we had discussions with him on 14.10.82" at Special Constabulary Force Headquarters, Harman Barracks in the parish of St. Andrew at about 5:00 p.m. on 20.10.82.

CHARGE 4:

That you being a member of the Island Special Constabulary Force, misconducted yourself by making use of the following disrespectful remarks about the Commissioner of Police. "All of we voted to put the Labour Party in power as the Government of this country, and if the Labour Party did not win, Joe Williams could not be Commissioner of Police, so a we put him there ", at Special Constabulary Headquarters, Harman Barracks in the parish of St. Andrew at about 5:00 p.m. on 20.10.82.

N.B. These charges are being preferred with a view to dismissal or otherwise as provided for in Part III of the I.S.C.F. Regulations 1950.

Mr. E.H. Wynter, S.S.P.
PRESIDENT:- Mr. C.N. Powell, Dept. Commandant
Mr. D.A. Falla, Commander

Joe Williams
.....
Commissioner of Police

THIS ENQUIRY MUST BE COMPLETED WITHIN TWENTY ONE (21) DAYS."

At the sitting of the Board evidence was taken and the hearing adjourned after submissions were made by the Attorney-at-Law representing the applicant. The Board sought the advice of the Attorney General.

By Force Orders dated October 6, 1983 the Commissioner of Police dismissed the applicant from the Island Special Constabulary Force. The applicant challenged the decision of the Commissioner by motion in the Full Court and on February 14, 1984 the Full Court issued Certiorari quashing "the decision of the Commissioner of Police on the ground that the Disciplinary Board which heard the charges was improperly constituted." The dismissal of the applicant was based on the result of charge(s) not the subject of the application now before us.

On May 15, 1984 the applicant was again before a Board to answer the charges listed above. This Board sat at Half-Way-Tree Police Station. After submissions were made by the Attorneys-at-Law appearing for the applicant, the Board again adjourned the hearing to seek legal advice on the submissions made.

Section 23 of the Constables (Special) Act (Section (9) of Law 18 of 1950) provides:-

1. The Minister may make regulations generally for giving effect to the provisions of this part of this Law.

2. Without prejudice to the generality of the power conferred by subsection (1) of this section regulations made under that sub-section may provide for;

(g) The setting up of Disciplinary Boards to investigate breaches of discipline and to award punishment if necessary and the powers and duties of such Disciplinary Boards;

(b) The appointment of Boards of Enquiry and the powers and duties of such Boards of Enquiry.

The Island Special Constabulary (General) Regulations were published in the Jamaica Gazette Supplement (Proclamation Rules and Regulations) on August 9, 1950. Regulations 28 and 29 read:-

"28. A Disciplinary Board may be appointed by the Commissioner of Police to investigate and report upon any case which in his discretion he may think fit. The Board shall consist of a Presiding Officer and two other Officers appointed for the purpose by the Commissioner.

29. A Disciplinary Board shall have the duties and powers hereinafter appearing and such other duties and powers as may from time to time be assigned or conferred on it by the Commissioner:

(a) The Board shall send to all necessary parties to an address or addresses to be furnished by the company commander -

(i) statements showing the breach of discipline complained of or the nature of the matter referred;

(ii) notification of the place, date and time appointed for holding the enquiry;

(iii) an intimation that such parties are summoned or invited as the case may be to attend such

documents as may be necessary and will be at liberty to tender such oral and written evidence as may be necessary and material".

That was the state of the law when the applicant appeared before the tribunal on the 14th January, 1983 and May 15, 1984. The Board on the former occasion was comprised of Mr. E.H. Wynter S.S.P. President, Mr. C.N. Powell, Dept. Commandant and Mr. D.A. Falla Commander. On the latter occasion the members were President: Mr. W.S. Powell S.P., Mr. E. Hart Asst. Commandant, Mr. K.D. Gordon Asst. Commandant.

The Island Special Constabulary Force (General) (Amendment) Regulations 1985 dated 15th August, 1985 and published on the same date provides in section (2) :-

"Regulation 28 of the principal Regulations is hereby revoked and the following substituted therefor -

28. (1) The Commissioner of Police may, from time to time, appoint a Disciplinary Board consisting of one or more persons (who may include the Commissioner or any other member of the Island Special Constabulary Force) to investigate and report upon any case which he in his discretion, may think fit.

(2) A Disciplinary Board shall be selected with due regard to the rank of the Special Constable concerned and to the nature of the charges made against him. (underlining mine)

By summons dated the 24th September, 1985 the applicant was again summoned to and he appeared before a Board of Enquiry on November5, 1985, to answer to the same charges. The enquiry was adjourned to the 25th and 26th of November, 1985 and in the applicant sought and obtained leave granted by Panton J. (Ag.) to move this Court for an order of Prohibition. The Board on this occasion consisted of President Mr. W.S. Powell S.S.P., Mr. J. Mock-Yen Asst. Commandant and Mr. A. Falla, Asst. Commandant.

I have endeavoured to place in chronological sequence the history of the proceedings now before us. Two other members of the Island Special Constabulary Force also sought to move the Court. The

charges against them were similar, the allegations were of even date and, save and except that there was no order of dismissal made against them, the history of their cases is identical to that of the Applicant. Counsel for the parties agreed that the Court should proceed with the hearing of the Applicant's motion and that the decision of the Court should apply to all the cases. The other Special Constables were Inspector Herbert Welch and Sergeant D'Sent Nicholas.

There were three grounds raised in this application. The first was "that a Board of Enquiry set up under Section 23 (1) of the Constables (Special) Act has no jurisdiction to hear disciplinary charges by virtue of Regulation 28 of the Island Special Constabulary Force (General Amendment) Regulations 1985."

Mr. Rattray submitted that his client was "summoned to appear before a creature known to Law but not yet created." He submitted that section 23(1) (g) provided for the setting up of Disciplinary Boards and section 23 (1) (h) provided for the setting up of Boards of Enquiry, and that the Regulations were silent on the latter Boards whereas detailed Regulations were made for Disciplinary Boards. The form of the summons indicated that the applicant was required to appear before a Board of Enquiry.

Mr. Langrin argued that these submissions made by the Applicant were misconceived and should be rejected. The arguments advanced related to a question of form and not of substance and the applicant was not contending that it was not a Disciplinary Board which was being called a Board of Enquiry. He prayed in aid the provisions of section 57 of the Interpretation Act stating that, but for a minor formal deviation, the form complied in all respects with the requirements of the Disciplinary Board and conformed with the statute.

Is the contention of the Respondent correct? In order to answer this question one must examine the relevant enactment. Regulation 29 (c) states:

> "At the conclusion of the enquiry the Board shall submit to the Commissioner a report embodying the findings of the Board if asked for. In such cases the Board may make such recommendations as it may think necessary, and in

particular make recommendations in regard to any Special Constable present at or summoned to attend the enquiry -

(i) That he be dismissed;

(ii) That his service be determined;

(iii) That he be ordered or allowed to resign or alternatively on failure so to do that his service be determined;

(iv) .....

(v) ....."

The power of the Board to make the recommendations mentioned above can in no wise be regarded as trivial. Indeed this power extends to "any Special Constable present at or summoned to attend the enquiry." A "Special Constable present at the inquiry" may be a witness required by the person summoned to attend to give evidence on his behalf. The magnitude of this power, therefore, commends this court to examine with care the requirements of the enactment to see that the provisions thereof were complied with by the Board.

Scrutiny of the summons reveals that in so far as Regulation 29 (a) is concerned sub-paragraph (i) and (ii) were complied with in substance. Regulation 29 (a) (iii) which requires that "an intimation that such parties are summoned or invited ... to attend such inquiry accompanied by such witnesses and documents as may be necessary and will be at liberty to tender such oral and written evidence as may be necessary and material" receives no mention. The summons failed to comply with Regulation 29 (a) (iii). This is a material defect in the proceeding and, I find, a defect in substance which is not saved by Section 57 of the Interpretation Act which reads as follows:-

"Whenever forms are prescribed in any act slight deviations therefrom, not affecting the substance or calculated to mislead shall not invalidate them"

The second ground canvassed by the applicant was:

"That Regulation 28 of the Island Special Constabulary Force (General Amendments) Regulations is not properly applicable to the hearing of this matter. The applicable Regulation is Regulation

28 of the Island Special Constabulary Force (General) Regulations 1950 which was in existence when the alleged disciplinary charges were first made in 1982 and the aforesaid Amendment Regulations of 1985 are not retroactive."

Mr. Rattray submitted that the charges were before the tribunal several times before the Regulations were amended. The amendment gives authority to a member of the Jamaica Constabulary Force to have jurisdiction on a Disciplinary Board. Prior to the amendment no member had such jurisdiction. Special Constables had a right to be tried by officers of their own Force. This is the point he submitted, unchallenged, which was decided on Certiorari in February 1984. The Amendment takes away that right and it is not stated therein that it has retrospective effect. Those in the system who have a vested right to be tried in a particular manner cannot have that right taken away without it being so specifically stated. Support for this proposition he found in YEW BON TEW vs KENDERAAN BAS MARA (1982) 3 ALL E.R. P. 833:-

> "c. On 5th April 1972 in Selangor, Malaysia, a motor bus belonging to the respondents collided with a motor cycle driven by the first appellant with the second appellant as pillion passenger. Both appellants were injured. The respondents were a statutory body and the accident occurred during the course of the respondents' public duties. Consequently, by virtue of s 2(a) of the Malaysian Public Authorities Protection Ordinance 1948, which prescribed a limitation period of 12 months for bringing any action against any person for any negligent act done in the exercise of any public duty, the appellants' cause of action was liable to become statute-barred on 5 April 1973. The Appellants' advisers did not appreciate that the respondents were a public authority, and no proceedings were instituted before the expiration of the limitation period. On 13 June 1974 the Malaysian Public Authorities Protection (Amendment Act 1974 came into force. The 1974 Act amended the 1948 Ordinance by substituting a 36 month limitation period

the original 12 month limitation period. Immediately before the 1974 Act came into force the appellants' cause of action had been statute-barred for 14 months. Nine months later, on 20 March, 1975 i.e. 36 months less three weels after tje date pf tje accodemt. the appellants issued a writ against the respondents claiming damages for injuries caused by the negligence of the respondents' servant. The respondents contended that the claim was statute-barred. The High Court of Malaya rejected that contention, holding that the 1974 Act was retrospective, and gave judgment for the appellants. The Federal Court of Malaysia allowed an appeal by the respondents, holding that the 1974 Act was not retrospective and that accordingly the claim was statute-barred. The appellants appealed to the Privy Council, contending that the 1974 Act was merely procedural and therefore prima facie retrospective and consequently on its coming into force the appellants' cause of action had been revived.

Held - The proper approach to determining whether a statute had retrospective effect was not be classifying it as procedural or substantive but by seeing whether, if applied retrospectively to a particular type of case, it would impair existing rights and obligations; and an accrued right to plead a time bar, which was acquired after the lapse of the statutory period, was in every sense a right even though it arose under a statute which was procedural. The plain purpose of the 1974 Act, read with the 1948 Ordinance, was to give a potential defendant who was not possessed of an accrued limitation defence on the coming into force of the 1974 Act a right to plead such a defence at the expiration of the new statutory period; it was not to deprive a potential defendant of a limitation defence which he already possessed. It followed that the appellants' writ had been issued outside the limitation period, and the [illegible]

be dismissed."

On behalf of the respondent it was submitted that the general intention of the Legislature was that the Island Special Constabulary Force should be supervised by the Jamaica Constabulary Force in that it was placed under the command of the Commissioner of Police vide section 17 of the Constables (Special) Act. There was no evidence that the amended Regulation affected any vested right of the applicant or the charges, the penalty or the procedure at the hearing.

The amendment of 1985 enlarged the powers of the Commissioner of Police. He was no longer restricted to appointing as members of a Disciplinary Board only Officers of the Island Special Constabulary Force. He could appoint a "Disciplinary Board consisting of one or more persons." The amendment of 1985 brings into focus the fact that the Boards appointed in January, 1983 and May, 1984 were improperly constituted in that the Presidents were members of the Jamaica Constabulary Force. The applicant has a right to a fair hearing within a reasonable time before an impartial tribunal. The amendment does not affect that right, it deals with a matter of procedure only. The case of Zollner Ltd. vs. Municipal Council of Sydney /1917/ Vol. 17 N.S.W.S.R. P. 164 is instructive. The headnote reads:-

> "By s. 21 of the Sydney Corporation Amendment Act, 1905 No. 39 actions to recover compensation for land resumed were to be tried before a judge and jury. The Plaintiffs commenced an action in March, 1916, which was ready and set down for trial by jury on the 20th November, but on that date was postponed by consent of both sides. On the 22nd November, the Sydney Corporation Amendment (Costs) Act, 1916 No. 80 was passed, s. 5 of which provided that trials of such actions should be before a judge without a jury. Held, that the alteration so effected in the tribunal was a matter of procedure, and retrospective in its operation, and that the plaintiffs were not entitled to a jury."

In Halsburys Laws of England 4th Edition Volume 44 at paragraph 925 we find:

"Statutes relating to procedure or evidence. The presumption against retrospection does not apply to legislation concerned merely with matters of procedure or of evidence; on the contrary, provisions of that nature are to be construed as retrospective unless there is a clear indication that such was not the intention of Parliament.

Moreover, it is presumed that procedural statutes are intended to be fully retrospective in their operation, that is to say

are intended to apply not merely to future actions in respect of existing causes, but equally to proceedings instituted before their commencement. Thus, provisions regulating, or empowering the court to regulate, the course of proceedings affect proceedings pending at their commencement unless an intention to the contrary is clearly shown, and new provisions relating to costs and evidence have been similarly construed. However, a procedural enactment will not be applied retrospectively without plain words if the effect would be to deprive a person of a vested right so that, for example, the right of a plaintiff to continue an action already begun was not affected by a subsequent statute imposing a period of limitation, whilst the applicability to pending proceedings of a provision altering the structure of appeal.

I accept as a correct statement of the law the observation of Pring J. in Zollners case at P. 167.

"I feel no doubt whatever that a section which alters the constitution of the tribunal which is to try the issues is a section merely dealing with procedure. It does not affect the right of the parties in any way."

I find thatthe amendment of 1985 is procedural and for the reasons stated above Ground 2 fails.

Ground three embraced two points - one constitutional the other natural justice. The applicant complained:-

1. "That the hearing of these charges have been grossly and oppressively delayed and ought not to be entered upon as any further proceedings are in breach of Section 20(2) of the constitution of Jamaica."

2. "That in any event the hearing of these proceedings at this stage would be oppressive and contrary to the pronciples of natural justice."

It was submitted by the applicant that the period of time which has elapsed since the incidents on which the charges are founded is too long for the charges to be considered now. This is a matter which affects his rights and obligations and he cannot now be given a fair hearing within a reasonable time. Not only is there a constitutional right to a fair hearing within reasonable time but at common law as well he is entitled to a fair hearing as part of the principles of Natural Justice. Support for these submissions is found in Bell vs. D.P.P. of Jamaica (1985) 2 ALL ER 585. The applicant complained "that since November 12, 1982 I have been on no-pay suspension because of the said charges and that my family and myself are thereby experiencing severe

hardship."

The history reveals that the charges were first heard on 14th January 1983. The hearing was adjourned and the Board sought legal advice on the submissions made. Nothing further was done by the Board and the matter was left suspended. Why was this allowed to happen? Was it because the applicant was subsequenly tried on other charges and dismissed from the force or was it because the advise was not forthcoming? It is not an idle exercise to speculate. The legal adviser to the tribunal is the Attorney General. The fact that the charges were revived in identical form in March 1984 may indicate that such advice had been received.

The facts support the first proposition. The dismissal of the applicant was accepted as the end of the matter. The applicant however pursued his rights and on 14th February 1984 the Full Court reversed the decision on which the dismissal was made. Thereafter a summons was issued for the applicant returnable on the 5th May, 1984. The affidavit of Senior Superintendent of Police Winston Powell is instructive. He states in paragraphs 6, 7, and 8:

> "6. That on February 14, 1984, the Full Court quashed the decision of the Commissioner of Police the ground that the Disciplinary Board which heard the charges was improperly constituted.
>
> 7. That on or about March 8, 1984, the same charges were brought against the applicants and were heard on May 5, 1985, when the applicants' Attorney sought and obtained an adjournment of the hearing which was then set for May 29, 1985.
>
> 8. That on the hearing of the Board on May 29, 1985, the Attorney for the applicants made certain legal submissions which necessitated the Board to seek the advice of the Attorney General thereon and consequently the hearing on that day was adjourned sine die."

"The same charges" spoken of by the deponent are the subject of this application and not those that were dealt with by the Full Court. This position is clarified by the applicant in a subsequent affidavit.

The charges were brought back in the same form on the 5th May, 1984. Where Mr. Powell in the paragraphs mentioned above used the year 1985 he was in error; it should have read 1984 as indicated on the summons. The prosecutor insisted on pursuing the matter in the form declared improper by the Full Court hence the delay occasioned as the advice of the Attorney General was again sought (vide paragraph 8 of Mr. Powell's affidavit).

The Respondent was bent on having the Board constituted as he wished and not in accordance with the Regulations as they then stood. I need go no further than paragraphs 9 and 10 of Mr. Powell's affidavit:

> "9. That on receiving the advice of the Attorney General, steps were taken to amend the Island Special Constabulary Force (General)(Amendment) Regulations, 1983, and this amendment was effected in August, 1985 vide the Island Special Constabulary Force (General) Amendment Regulations, 1985.
>
> 10. That on or about September 24, 1985, the same charges were brought against the applicants and were heard on November 5, 1985 and adjourned to November 26, 1985."

Mr. Langrin in his usual competent and eloquent manner sought valiantly to support the Respondents' case and resist the application. He submitted that the applicant should have sought redress in the Constitutional Court, invoking the provisions of section 25 of the Jamaica Constitution. He further submitted that the proper remedy for the applicant would be mandamus. Section 25(1) of the Jamaica Constitution provides:-

> "25(1). Subject to the provisions of Section (4) of this Section, if any person alleges that any of the provisions of Section 14 to 24 (inclusive) of this constitution has been, is being or is likely to be contravened in relation to him, then, without prejudice to any other action with respect to the same matter which is lawfully available, that person may apply to the Supreme Court for redress."

We hold that this section does not exclude this Court from granting the remedy sought. It does not exclude the applicant's right to pursue any other course lawfully available to him in a matter in which his constitutional rights are being infringed.

We accept and adopt the words of Lord Templemann in the well-known case of Bell vs. D.P.P. where he says at page 589 (c):-

> "Since before the coming into force of the Constitution an individual accused of contempt had a right to fair trial carried out in accordance with the principles of natural justice. The right to a fair trial guaranteed by the constitution also preserved the principles of natural justice. The Common Law protection of the individual was not intended to be whittled away by the constitution.
>
> P.589(h) Their Lordships do not in any event accept the submission that prior to the Constitution, the Law of Jamaica, applying the common law of England, was powerless to provide a remedy against unreasonable delay, nor do they accept the alternative submission that a remedy could only be granted if the accused proved some specific prejudice, such as the supervening death of a witness. Their Lordships consider that, in a proper case without positive proof of prejudice, the court of Jamaica would and could have insisted on setting a date for trial, then, if necessary, dismissing the charges for want of prosecution. Again in a proper case, the court could treat the renewal of charges after a lapse of a reasonable time as an abuse of the process of the court."

We also accept the finding of the Board at p. 585.

Held (1) Regardless of the position at Common Law, the express words of section 20 (1) of the Constitution of Jamaica plainly sufficed to confer on an accused the right to a fair hearing within a reasonable time. Furthermore, the accused did not have to show any specific prejudice before being entitled to have charges against him dismissed because of unreasonable delay in bringing him to trial. In determining whether the accused had been deprived of a fair trial by reason of unreasonable delay factors which were relevant were the length of the delay, the reasons given by the prosecution to justify the delay, the efforts made by the accused to assert his rights and the prejudice to the accused. The assessment of those factors would necessarily vary from jurisdiction to jurisdiction and case to case." The footnote on each summons served on the applicant reads:-

"THIS ENQUIRY MUST BE COMPLETED WITHIN TWENTY-ONE DAYS."

This pays lip service to the requirement that the hearing should be within a reasonable time: it was more honoured in the breach than in

its observance. We do not accept the reasons for the delay advanced by the Respondent.

In the ordinary Courts delays are occasioned by the absence of witnesses, and/or Attorneys-at-Law and occasionally by the state of the list. A special tribunal was appointed to hear the charges in the matter before us and there is no acceptable reason advanced why the hearing was so protracted. On March 7, 1986 we held that there was unreasonable delay in the prosecution of these cases and ordered that Prohibition should go to prohibit the Board of Enquiry from hearing the charges preferred against Sergeant Maynary. Costs were awarded to the applicant against the Commissioner of Police.

Patterson, J.

I concur

Walker, J.

I concur