

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA
IN THE FULL COURT
SUIT NO. M79 OF 1986

Regina vs Commissioner of Police
Ex Parte Howard Patrick Brown.

APPLICATION FOR AN ORDER OF PROHIBITION

Coram: Morgan, McKain and Wolfe JJ.

Donald Scharamidth for the Applicant.

Rance Langrin Q.C. and Neville Fraser for the Respondent.

Heard: 16th, 17th, 18th March 1987

WOLFE J.

This is the Judgment of the Court.

The Applicant herein, Howard Patrick Brown is a Corporal of the Jamaica Constabulary Force. Following a jail break at the Port Maria Police Station, where the Applicant was stationed, on the 26th day of December 1984 the Commissioner of Police pursuant to Section 46 (2) (c) of The Police Service Regulations 1961 made under the Constabulary Force Act preferred charges against the Applicant and set up a Court of Enquiry to enquire into the said charges. Senior Superintendent L.A. Cowan, as president, and Assistant Superintendent T.A. Williams were appointed to conduct the Enquiry in accordance with Section 46 (2) (b) of the Police Service Regulations 1961 which empowers the Commissioner to appoint a Court of Enquiry "consisting of one or more persons".

The Commissioner of Police in an affidavit filed under his hand avers that on the opening day of the Enquiry Assistant Superintendent T.A. Williams was absent and that Senior Superintendent L.A. Cowan commenced hearing evidence in the absence of the other member of the panel. At the end of the first day's hearing the matter was adjourned to the 17th day of February 1986 on which date Assistant Superintendent T.A. Williams joined Senior

Superintendent L.A. Cowan to continue the hearing. The presence of Assistant Superintendent Williams was objected to on the basis that he was not present at the commencement of the hearing. Assistant Superintendent Williams, it is alleged, retained his seat but merely as an Observer.

At the close of the case for the Prosecution, Counsel appearing for the Applicant submitted that the Court of Enquiry was not properly constituted and moved that the charges be dismissed. The submission was over-ruled, whereupon the Applicant elected not to give any evidence.

The findings of the court were submitted to the Commissioner of Police who decided that the Court of Enquiry had not been properly constituted, as it failed to sit as appointed by him. He therefore appointed a new Court of Enquiry to hear the matter de novo.

In consequence thereof the Applicant obtained an Order Nisi from Clarke J. (Ag.) on the 27th day of October 1986 to move the Full Court of the Supreme Court for an order of Prohibition.

It is significant to note that Applicant in his affidavit omitted all reference to the circumstances under which the Enquiry was conducted. As far as the Applicant is concerned an enquiry was held in which there was no irregularity and to which jurisdiction he had submitted and that he was patiently awaiting the decision of the Commissioner based upon the findings of the Court of Enquiry. He therefore enjoins the Court to prohibit the holding of a second Enquiry until the Commissioner of Police has ruled upon the findings submitted to him by the Court of Enquiry which enquired into the charges.

For the Applicant to succeed herein he must satisfy this court that there was a proper hearing of the charges preferred against him. In an effort to determine this issue

the question arises as to whether or not the Court of Enquiry, which purported to enquire into the charges, was properly constituted.

Section 46 2 (c) of the Regulations states:

"If a member of below the rank of Inspector does not duly furnish such a statement as aforesaid or if he fails to exculpate himself the Commissioner shall appoint a Court of Enquiry (constituted as under sub paragraph (b) above to enquire into the matter".

Sub paragraph (b) states:

"The Governor shall on the recommendation of the Commission appoint a Court of Enquiry consisting of one or more persons (who may include the Commissioner or other officer) to enquire into the matter, the members of the Court shall be selected with due regard to the rank of the member concerned, and to the nature of the charges made against him".

Against this statutory background, and it must be presumed that the Commissioner is aware of his powers under the Regulations. The Commissioner appointed two persons to hear the charges. These charges involved serious consequences, namely the dismissal of the member, if the charges were established.

It can be argued that the Commissioner required the informed and expert opinion of both persons to assist him in the discharge of his statutory functions. It is patently clear that Assistant Superintendent T.A. Williams having been absent on the first day of the hearing was not competent to be a member of the court when the hearing was resumed. This is such an elementary principle of law that it needs no elaboration. The Applicant himself so contended at the hearing, and in our view quite properly so. An improperly constituted court cannot be seised of jurisdiction and any action taken without being properly seised of jurisdiction is a nullity. If therefore Williams took part in the hearing it would be a nullity.

The hearing being a nullity the report furnished to the Commissioner may properly be viewed as no report at all, acting upon the principle *Ex nihilo nihil fit*.

What then is the position if it can properly be said that Williams did not take part in the proceedings. In our view the result is the same. The Commissioner in exercise of his powers had appointed two persons to hear the matter. He was entitled to receive a report from two persons. Williams was entitled to disagree with Cowan, so was Cowan entitled to disagree with Williams. The Commissioner wished and was entitled to have the view of both men. Any report which did not represent the joint deliberations of both men contravened the terms of appointment and the Commissioner was entitled to disregard same and to appoint a new Court of Enquiry which would act in accordance with the terms of appointment.

For either member to sit alone and to hear the charges is to arrogate unto himself the powers of determining how the Court of Enquiry ought to be constituted. This power is that of the Commissioner, and the Commissioner alone, as set out in Section 46 (2) (c) of the Regulations.

For the aforesaid reasons I hold that the Applicant has failed to establish that the hearing held was a proper hearing. I am constrained to hold that it was a nullity. There was no hearing at all, consequently the Commissioner is entitled to appoint a Court of Enquiry to enquire into the charges which remain outstanding.

I would therefore order that the motion be denied and the Order Nisi discharged.

Morgan J.

I agree.

McKain J.

I agree.