JAMAICA

IN THE COURT OF APPEAL OF JAMAICA

SUPREME COURT CIVIL APPEAL NO. 75/2004

BEFORE: THE HON. MR JUSTICE SMITH, J.A.
THE HON. MRS JUSTICE HARRIS, J.A.
THE HON. MR JUSTICE DUKHARAN, J.A.

BETWEEN	REGINA ex parte GEORGE ANTHONY LAWRENCE	APPELLANT
AND	THE COMMISSIONER OF POLICE	1ST RESPONDENT
AND	THE ATTORNEY GENERAL	2ND RESPONDENT

Barrington Frankson, instructed by B. E. Frankson and Company for the appellant.

Curtis Cochrane, instructed by the Director of State Proceedings for the respondents.

20, 21 July 2009 and 26 March 2010

SMITH, J.A.

[1] I have read the judgment of my sister Harris, J.A. and agree with her reasoning and conclusion. I have nothing to add.

HARRIS, J.A.

[2] This is an appeal from a judgment of Reid, J., dismissing the appellant's application for judicial review on the 25th May, 2004.

[3] The appellant, a former member of the Jamaica Constabulary Force, was on the 20th August 2001, by order of the Commissioner of Police dismissed from the Jamaica Constabulary Force consequent on the findings of a Court of Enquiry which investigated disciplinary charges against him. At the time of his dismissal he was an acting corporal stationed at Ulster Spring Police Station in the parish of Trelawny. He was charged with five offences, arising out of incidents occurring between 1997 and 1998. These charges are set out hereunder:

> "Charge1. Being a member of the Jamaica Constabulary Force conducted yourself contrary to the discipline, good order and guidance of the Force in using threatening words to... to wit: Bwoy like yuh fi dead cause yuh a news carrier. I am going to shot yuh." at about 7:15 pm. Wednesday 14/01/98 at the Ulster Spring Police Station in the parish of Trelawny.
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> Charge 2. Being a member of the Jamaica Constabulary Force conducted yourself contrary to the discipline, good order and guidance of the Force by leaving your post without permission or being properly relieved at about 7:15pm on Wednesday, 14/01/98 whilst on supervision duty between

the hours of 6:00pm Wednesday, 14/01/98 and 6:00 a.m on Thursday 15/01/98 at Ulster Spring Police Station in the parish of Trelawny.

Charge 3. Being a member of the Jamaica Constabulary Force conducted yourself contrary to the discipline, good order and guidance of the Force in that you refused to pay a lawful debt of Four Thousand, Five Hundred Dollars on 04/09/97 to Olga Hosue, operator of Track Price Plus situated at Market Street, Falmouth in the parish of Trelawny.

Charge 4. Being a member of the Jamaica Constabulary Force conducted yourself contrary to the discipline, good order and guidance of the Force by using filthy language to Olga Hosue ...

Charge 5. Being a member of the Jamaica Constabulary Force conducted yourself contrary to the discipline, good order and guidance of the Force by behaving in an unbecoming manner when you made use of the following words "Nuh more bombo cloth game not playing inside here because deh house master dis me," at about 8:30 p.m on Saturday, 27/12/97 at 11 Duke Street, Falmouth in the parish of Trelawny."

[4] The date 4th September, 1997 which appears in Charge 3 was amended to read 17th September, 2000. The Court of Enquiry found that charges 1-4 had been proved against him. However, it having found charge 5 not proved, that charge was dismissed. By a letter dated 25th July 2001, the Commissioner of Police (hereinafter called the Commissioner) wrote to the appellant informing him of his dismissal from

the Jamaica Constabulary Force with effect from the 20th August, 2001. On October 17, 2001 he obtained leave to apply for judicial review to quash the Commissioner's order and for an order of mandamus to compel the Commissioner to reinstate him.

[5] The following are the grounds of appeal filed:

> "(a) The Learned Judge erred and/or misdirected himself in his findings of fact and/or of law as stated at paragraph 2 hereinbefore, and thereby occasioned a substantial wrong or miscarriage of justice to the Appellant.
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> [The finding of fact/law referred to in paragraph 2 was that the appellant had been lawfully dismissed from the JCF on the date mentioned above.]
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> (b) The Learned Judge ought to have found that:
>
> (i) The said letter/order of the Commissioner of Police dated the 25th day of July, 2001 was unlawful and/or in breach of the Constabulary Force Act and the Police Service Regulations, 1961 and/or in breach of the principles of Natural Justice, the Constitution of Jamaica and the rule of law, and was unjust, capricious, arbitrary, null and void, in that:
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> (ii) The procedure set out by the Police Service Regulations, 1961, Regulation 3 in particular, was not followed by either the Commissioner of Police or the authorised officer, as no advice was sought or obtained from either the Attorney General or the Clerk of

the Courts for the parish of Trelawny, prior to disciplinary proceedings being initiated against the Appellant in respect to Charges 1 and 4.

(iii) The Appellant was never given a fair hearing or any hearing at all by either the said Court of Enquiry or the Commissioner of Police, as there was no evidence given before the Court of Enquiry to support Disciplinary Charges 2 and 3.

(iv) Alternatively, even if there was sufficient evidence given before the Court of Enquiry to support the findings by the said Court and the confirmation thereof by the Commissioner of Police that the Disciplinary Charges were proven, the said Charges were Minor Offences which ought to have been dealt with summarily by virtue of the Police Service Regulations, 1961, Regulation 46(2)(3) in particular; in any event, the said Charges did not warrant the ultimate disciplinary penalty of dismissal.

(v) The Appellant was denied his legitimate expectation of having the said Disciplinary Charges considered fairly and impartially by the Court of Enquiry and the Commissioner of Police.

(vi) The said letter/order of the Commissioner of Police was so unreasonable and/or irrational that no reasonable tribunal could have arrived at it, given the evidence adduced before the Court of Enquiry and all the circumstances of the case."

[6] It was Mr. Frankson's submission that the Commissioner failed to observe the principles of natural justice, in that, the appointment of the disciplinary tribunal and the appellant's dismissal by the Commissioner were contrary to the provisions of The Police Service Regulations 1961. The relevant procedure outlined in section 30 (1) 5 [31 (5)] of the Regulations, he argued, was not followed by the Commissioner and the authorized officer, prior to the convening of the Court of Enquiry. There is no evidence, he argued, to show that the authorizing officer had obtained either the advice of the Attorney General or the Clerk of the Courts prior to the initiation of the proceedings against the appellant, thus rendering the decision of the Court of Enquiry void.

[7] The ultimate decision of the appellant's guilt was unreasonable and the imposition of a disciplinary penalty amounted to bias and therefore constitutes a breach of his right to a fair trial, he further argued.

[8] Mr Cochrane argued that the procedure as prescribed by regulation 47 of the Police Service Regulations 1961 was followed prior to the commencement of the hearing. The appellant received advanced notice of the charges which were laid against him and submitted himself to the jurisdiction of the Court of Enquiry, he was afforded representation through whom he was permitted to cross examine witnesses and make

submissions, he argued. He further submitted that the appellant was afforded a fair hearing and the principles of natural justice and reasonableness were adhered to. The Commissioner, he argued, has discretion to determine whether to proceed summarily against a member of the constabulary force and is authorized by regulation 40 to impose penalties for offences for which a policeman below the rank of inspector has been found guilty.

[9] The questions which arise for determination are as follows:

1) Whether there was a breach of the Police Service Regulations 1961 so as to render the decision of the Commissioner void.

2) Whether the respondent failed to adhere to the principles of natural justice.

3) Whether there was insufficiency of evidence by virtue of which the appellant was deprived of a fair hearing.

4) Whether the Commissioner acted unreasonably in the dismissal of the appellant.

[10] It is important at this juncture to set out the following provisions of the Police Service Regulations. Regulation 31 (5) provides:

> "31.(5) Where an offence against any enactment appears to have been committed by a member, the Commission, or as the case may be, the authorised officer, before proceeding under this regulation shall obtain the advice of the Attorney General or, as the case may be, of the Clerk of the Courts for the parish, as to whether criminal proceedings ought to be instituted against the member concerned; and if the

be instituted against him or her. The regulation imposes a duty on the authorized officer to seek the advice of the Clerk of the Courts or the Attorney General as to whether the member ought to be subjected to criminal proceedings. If criminal proceedings ought to be brought against that member, then as mandated by the regulation, any disciplinary proceedings flowing therefrom, must abide the outcome of the criminal process.

[13] The language of 31 (5) is mandatory. Its objective is to ensure that a member is not made the subject of simultaneous criminal and disciplinary proceedings, arising out of the same offence. In effect, the regulation operates as a safeguard against any prejudice to the member.

[14] Under regulation 33, the necessity to seek the Attorney General's advice would arise if in the course of a preliminary enquiry or disciplinary enquiry it appears that criminal proceedings ought to be instituted against a member.

[15] By regulation 34, disciplinary proceedings cannot be instituted against a member arising out of any criminal charge until after that criminal charge has been adjudicated upon and the appeal process has been exhausted, or, the time for appealing has expired.

[16] As prescribed by regulations 37, a member who has been acquitted of a criminal charge shall not be subject to any sanctions by way of dismissal or any other punishment in respect of that charge.

[17] Under regulation 38 where criminal proceedings have been adjudicated upon in respect of the member, any decision as to whether disciplinary proceedings should be instituted and what penalties, if any, should be imposed must be postponed to await the outcome of the criminal proceedings.

[18] As seen, regulations 33, 34, 37 and 38 are also mandatory in nature. They operate as a shield against the member being exposed to unfair procedural practice. They also afford protection to a member against double jeopardy.

[19] The foregoing having been said, a further issue to be addressed is whether the advice of the Clerk of the Courts was obtained before the Enquiry was conducted. Charges 1 and 4 contain allegations which would amount to criminal offences. It is clear that in keeping with the dictates of regulation 31(5), the advice of the Attorney General or the Clerk of the Courts would be necessary prior to institution of disciplinary proceedings against a member. As contended by Mr. Frankson, it is true that the transcript of the hearing before the Court of Enquiry does not in fact disclose any evidence being adduced to show that the Clerk of the

Courts had been consulted prior to the hearing. However, as submitted by Mr. Cochrane, there is evidence as disclosed in the affidavit filed by the Commissioner, that the advice of the Clerk of the Courts had been sought prior to the commencement of the disciplinary proceedings against the appellant.

[20] A perusal of the affidavit shows that in March 1998, the Superintendent of Police wrote to the Clerk of Court as follows:

> "Clerk of the Courts'
> Trelawny,
>
> This file is hereby submitted for your perusal and your directive (sic) treating on the subject failing to honour a public debt and using indecent language to a member of the public by A/Cpl G. Lawrence..."

The response from the Clerk is stated hereunder:

> "Supt of Police
> i/c Trelawny,
>
> The recommendation is that A/Cpl Lawrence be tried departmentally..."

[21] Charges 2 and 3 do not fall within the scope of regulation 31(5), they not being criminal offences. A directive from the Clerk of the Courts would not be necessary to enable the Court of Enquiry to proceed against the appellant in respect of those two offences. This regulation applies to charges 1 and 4. It cannot be disputed that the procedure followed did not embrace charge 1. It is immediately apparent that the

letter of March 1998 to the Clerk of the Courts did not explicitly speak to charge 1. In view of this, Mr. Cochrane, submitted that although the instructions to the Clerk may not have specifically included charge 1, the entire file was submitted to him and since all of the charges had occurred between 4th September, 1997 and 14th January 1998, it could be inferred that all the charges were sent to the Clerk of the Courts.

[22] As observed from the correspondence, the entire file was submitted with specific terms of reference and while the instructions seem to have referred to only two allegations, in my opinion, the Clerk would not be confined to examining those allegations only. I am of the view that the Clerk, having received the entire file, in the absence of evidence to the contrary, must be presumed to have considered the entire contents with a view to making a recommendation concerning any possible criminal offence arising from the allegations contained in the statements therein.

[23] It was also contended by Mr. Frankson that the contents of the letter to the Clerk amounted to hearsay evidence. While it is true that the Commissioner who swore to the affidavit was not the author of the letter, it is clear that the document is not hearsay, it being exhibited to prove that the advice of the Clerk was sought and not to show that the offences with which the appellant was charged had been committed. It cannot be

said that regulation 31(5) had not been complied with procedurally or otherwise.

[24] I now turn to the question as to whether there was a breach of natural justice within the context of regulation 31(5) as contended for. The rules of natural justice are primarily concerned with procedural fairness. This rule establishes that a party who is subject to proceedings before a tribunal such as the present one, cannot be lawfully dismissed without first informing him of the charges against him and affording him an opportunity to be heard - See **Ridge v Baldwin** (1964) AC 40. Further, the rule embraces the principle that any such party ought not to be dismissed without reasonable cause (**Endell Thomas v Attorney General of Jamaica** [1982] AC 113).

[25] Regulation 31(5) is not in anyway pertinent to a question as to whether a party is informed of the charges against him and whether he is given an opportunity to put forward his defence, or whether his dismissal is without reasonable cause. Therefore, the failure to observe the requirements of the regulation could not amount to a breach of natural justice.

[26] A further complaint of Mr. Frankson was that there was procedural unfairness on the part of the Court of Enquiry for it to have heard all the charges together rather than separately, as one charge could have

unreasonably influenced the other. The appellant was always represented by counsel. However, no objection was taken by his counsel to the charges being heard simultaneously. The appellant cannot now successfully seek to raise such an objection before this court when he had ample opportunity to have done so at the hearing. This he had failed to do. Significantly, he has not shown any apparent injustice caused by the charges being heard together.

[27] In the alternative, Mr. Frankson argued that the proceedings were unfair as there was no evidence to support charges 2 and 3 which concerned the appellant leaving his post without permission and refusing to pay a lawful debt, respectively. Thus, he argued, the appellant was not given a chance to explain, correct, or contradict evidence which he considered prejudicial to his case. At this juncture, I think it important to reiterate that since this appeal concerns judicial review proceedings, this court is confined to examining the legality of the decision to dismiss the appellant and will not examine the merits of the decision. However, it is to be noted that courts have been known to quash decisions on a judicial review application on the basis that there was no evidence to support the decision - (see **Re Spence's Application (1976)** 9 JLR 607; **Coleen Properties Ltd v Minister of Housing and Local Government** [1971] 1 All ER 1049). Nonetheless, the primary question for this court is whether the Court of Enquiry had acted in accordance with the law. Secondly, the next

question is whether there was sufficient evidence before it upon which it could have come to a finding of culpability on the part of the appellant, and not if it had been faced with those facts before the Court of Enquiry it would have arrived at a different decision.

[28] It is now necessary to examine the evidence to see whether there was any material upon which these charges could have been supported. In respect of charge 2, Sergeant Calbert Bowen gave evidence that on the 16th January 1988 he visited the Ulster Spring Station where the appellant was attached. He had gone there to carry out his duties as parish supervisor for the period 8:00pm 16th January 1998 to 8:00pm 17th January 1998. He stated that on his arrival at the station, he checked the record from what is apparently known as the 'duty detail'. He did not see the appellant who was assigned to duty from 4:00pm to 12:00 noon on the 16th January 1988 and the record also showed that he had not performed his duty. Sergeant Bowen further spoke to the Sub-Officer in charge at the time about the persons/officers who were assigned to duty for that day, including the appellant and the Sub-Officer informed him that he had not seen the appellant nor had he heard from him. Sergeant Bowen further stated that he made entries in his diary concerning his observation and the report of two other officers concerning the appellant's absence from work.

[29] Sergeant Bowen in examination in chief, in relation to charge 2 did not support that charge, because that evidence concerns the appellant's dereliction of duty on the 16th January 1998 when the charge related to the appellant's absence on the 14th January, 1998. However, it is significant that in cross-examination, the witness said that he sought the appellant between the 15th January 1998 and the 19th January, 1998 and that his reason for doing this was based on the entries in the record at the station that revealed that the appellant had not performed any duty at the station within seventy-two hours. The reasonable inference to be drawn from this evidence is that the appellant failed to carry out his duties, as was required, on the 14th January,1998, since seventy two hours prior to the 16th January, 1998 would have included the 14th January, 1998. Further, counsel who appeared for the appellant at the Enquiry seemed to have accepted that the evidence related to the 14th January, 1998, as he made no attempt to challenge this, either in his cross examination or in his closing arguments. In my view, there was sufficient basis upon which the Court of Enquiry could have formed the view that the appellant had been absent from duty, without lawful excuse, on the day charged.

[30] With respect to charge 3, the witness Olga Hoe-Sue, the manager of the Track Price Plus Betting Shop, gave evidence that the appellant took bets amounting to Six Thousand, Three Hundred and Eighty dollars ($6,380.00). She stated that he brought a cheque to her, apparently to

cover the debt, but she realised that the cheque was irregular in that the words and figures did not correspond. At her request, the appellant took the cheque from her to have it rectified but he also cleared part of the debt before he left her premises that day. Some time later, she discovered that due to a miscalculation, the sum owing to her by the appellant was more than she had indicated to him before he left. She was unable to point that out to the appellant that day.

[31] After giving the appellant about one month to have the cheque rectified, Mrs. Hoe-Sue sent a telegram to him and then a letter through a retired inspector. The letter informed the appellant of the mistake and of the correct sum owed and requested that he settle as soon as possible. Some time later, she saw the appellant but when she tried to explain to him the contents of the letter and the telegram, he started to use expletives which effectively frustrated her efforts. He then walked away from her. She also stated that up to the time of the hearing, she had not received any sum in respect of the debt.

[32] During cross-examination, the witness admitted that she did not know whether the appellant had received the letter. She also admitted that since the time at which she discovered the discrepancy, she had not seen the appellant to show him the bet that resulted in the increase in the debt. The evidence clearly shows that the appellant prevented Mrs Hoe-

Sue from informing him about the increase in his indebtedness. Further, he gave no evidence that he had not received the correspondence from the Mrs Hoe-Sue. In any event, even if it could be said that there was not sufficient evidence that the appellant knew of the contents of the telegram and the letter, the fact is, that the appellant already knew that a portion of the debt remained outstanding.

[33] With regard to all the charges, I am also of the view that these charges were made out in that there was a sufficiency of evidence to base the finding of guilt on the part of the appellant.

[34] It was Mr. Frankson's additional complaint, that the order of the Commissioner in dismissing the appellant was unreasonable, given the evidence before the Court of Enquiry. The argument is that, the charges being minor in nature could have been dealt with summarily and in any event, did not warrant the ultimate disciplinary penalty of dismissal, even if taken cumulatively. In support of his submissions, counsel for the appellant relied on **Associated Provincial Picture House v Wednesbury Corp.** [1948] 1 KB 223.

[35] It cannot be denied that the decision of a public body can be successfully challenged if it is shown that it acted unreasonably. There are a number of authorities which support this proposition. In **Associated Provincial Picture House v. Wednesbury Corp.** (supra) the principle of

unreasonableness was eminently propounded by Lord Greene at page 229 thus:

> "It is true that discretion must be exercised reasonably. Now what does that mean? ... For instance, a person entrusted with discretion must so to speak direct himself properly in law. He must call his own attention to matter which he is bound to consider. He must exclude from his consideration matters which are irrelevant to what he has to consider. If he does not obey those rules, he may truly be said , and often is said, to be acting "unreasonably"... it is true to say that, if a decision on a competent matter is so unreasonable that no reasonable authority could ever have come to it; then the courts can interfere."

[36] On the one hand, Mr. Frankson contended that the Commissioner considered irrelevant matters but advanced no specific material that was considered by the Commissioner which could be regarded as irrelevant. He also contended that no reasonable authority could have come to the decision to which the Commissioner arrived and that the offences were minor and did not justify dismissal. On the other hand, Mr. Cochrane submitted that the regulations having given the Commissioner the discretion as to the penalty to be imposed, he had acted lawfully.

[37] Since counsel for the appellant has failed to advance any specific irrelevant material that was considered by the Commissioner, there is no basis on which the exercise of his discretion could be impugned as being

unreasonable in this respect. With regard to the contention that the offences were minor and did not warrant dismissal, it is necessary to consider the penalty provisions of the regulations. Part 1 of the Second Schedule contains a list of offences that may be regarded as minor and may be dealt with summarily. Included in that list are the following:

> "Item 2— leaving guards, patrols, beats or posts
>
> Item 16— refusing or neglecting to pay any lawful debt
>
> Item 29 - Any act, conduct, or neglect to the prejudice of good order and discipline other than those which are required to be reported to the Commissioner of Police, whether or not such act, conduct or neglect has been in the execution of duty."

[38] Regulation 46(2) provides that where the authorised officer is of the opinion that the misconduct alleged is not so serious as to warrant proceedings with a view towards dismissal, he "may make or cause to be made an investigation into the matter" and thereafter deal with the matter summarily. Regulation 42 provides that penalties for disciplinary offences shall be in accordance with Parts II and III of the Second Schedule. The Second Schedule provides that where the offences have been dealt with summarily, dismissal is not a penalty which may be imposed. It must be borne in mind however, that the appellant was charged with 5 offences (one of which was not proved). Four of these are listed in the schedule as minor offences, but it is not without significance that charge 1 was not so listed. That charge relates to the

appellant issuing a threat to shoot another member of the constabulary force. Although threats have not been specifically included in the schedule, the words specified in the charge, by their very nature, amount to an offence. In my opinion, charge 1 being an offence, would not fall within the purview of item 29 of the schedule and therefore could not have been tried summarily, in which case, a penalty of dismissal as prescribed by Part III of the Second Schedule, may be imposed. In all the circumstances, while this court cannot say that it would have arrived at the same conclusion as the Court of Enquiry, it equally cannot say that the exercise of the discretion was unreasonable.

[39] We would therefore dismiss the appeal with costs to the respondents to be taxed, if not agreed.

DUKHARAN, J.A.

[40] I too agree.

ORDER

SMITH, J.A.

Appeal dismissed. Costs to the respondents to be agreed or taxed.