IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN MISCELLANEOUS

SUIT NO. M134 OF 2001

BETWEEN	EDWARD SEAGA	FIRST APPLICANT
AND	DESMOND MCKENZIE	SECOND APPLICANT
AND	JULIUS ISAAC	FIRST RESPONDENT
AND	GARNETT BROWN	SECOND RESPONDENT
AND	DR. HYACINTH ELLIS	THIRD RESPONDENT
AND	THE ATTORNEY GENERAL OF JAMAICA	FOURTH RESPONDENT

EX PARTE APPLICATION FOR LEAVE TO APPLY FOR JUDICIAL REVIEW

R.N.A. Henriques, Q.C., Abe Dabdoub and Don Foote instructed by Dabdoub, Dabdoub & Co. for first and second Applicants

Heard on October 5, 8, 2001

CORAM: WOLFE, CHIEF JUSTICE

This is an ex parte application seeking leave to apply for Judicial Review arising out of a ruling made by the Chairman of the Commission of Inquiry, the first respondent, appointed by the Governor General to enquire primarily into the events which took place in West Kingston between September 7 and 10, 2001.

Commissions of Inquiry in Jamaica have their genesis in the Commissions of Enquiry Act. Section 9 of the said Act stipulates:

> "The Commission acting under this Act may make such rules for their own guidance, and conduct and management of proceedings before them, and the hours and time and places for their sittings, not inconsistent with their Commission, as they may from time to time think fit and may from time to time adjourn for such time and to such place as they may think fit, subject only to the terms of their Commission."

It is clear from the above quoted provisions that the legislature intended the Commission to be self regulatory.

Before embarking upon the examination of the arguments advanced by Mr. Henriques, Q.C., on behalf of the applicants, let me point out that before me, the basis of the argument was the breach of natural justice, in that the ruling of the Commission was unfair.

It must be noted that prior to the opening of the Commission, the Commission prepared what may be called Guidelines for the conduct of the Commission and in those Guidelines it was specifically stated that the "duplicating of cross-examination would not be permitted". No objection was raised by anyone participating in the Commission.

Mr. Henriques, Q.C., submitted that the decision of the Commission to preclude the Attorneys representing the applicants from cross-examining witnesses was a breach of the principle of natural justice and that the Commission was duty bound to adhere to the principles to act fairly.

This submission therefore raises the question whether or not the decision to deny Counsel to cross-examine witnesses in the context mentioned by the Commission is a breach of the principle to act fairly.

Mr. Henriques cited and relied upon cases which established the principle that Commission of Inquiries were subject to the jurisdiction of the Court and the need to observe the principles of fairness.

I will not examine the cases dealing with whether or not Commission of Inquiries are subject to the Jurisdiction of the Court.

In ***Re Erebus Royal Commission, Air New Zealand v Mahon No. (2) [1981] 618*** a decision of the New Zealand Court of Appeal, it was held that the rules of natural justice had been breached in that the rules of fairness had not been observed.

The proceedings were brought by way of Judicial Review under the Judicature Amendment Act 1972 in order to challenge statements in the report of a Commission concerning the conduct of certain officers of Air New Zealand.

The questions raised for the Court were:

(i) Was there jurisdiction in the Courts to review in such context as this, taking into account the ambit of sections 3 and 4 of the Judicature Amendment 1972?

(ii) Excess of Jurisdiction on the Part of the Commissioners.

(iii) Considerations of Natural Justice.

In this case the Commissioners made findings of facts which the Court held to be unjustified on the basis that those issues were not specifically raised in evidence or submissions.

In my view the Court correctly held that the rules of natural justice had been breached in that the rules of fairness had not been observed.

In dealing with the concept of FAIRNESS the Court said:

> "The concept of natural justice does not rest upon carefully defined rules or standards that must always be applied in the same fixed way nor is it possible to find answers to issues which really depend on fairness and commonsense by legalistic or theoretical approaches. What is needed is a broad and balanced assessment of what has happened and been done in the general environment of the case under consideration."

This decision was later affirmed by their Lordships of the Privy Council. See ***Mahon v Air New Zealand and Others [1984] 3 WLR 884***

Lord Justice Salmon, as he then was, was appointed in 1966 to review the work of Tribunals of Inquiry (Evidence) Act 1921. In his report he laid down six cardinal principles "governing the principles of procedure designed to achieve fairness to witnesses and others whose interests might be damaged by the Inquiry's proceedings or conclusions".

In an Article by Richard Scott P.C., Vice Chancellor of the Supreme Court, reported in the ***Law Quarterly Review of October 1995 [Vol. III],*** in which he examined the "Six Cardinal Principles" of Lord Salmon, when dealing with the sixth principle which states:

> "He [i.e. the person be called as a witness] should have the opportunity of testing by cross-examination conducted by his own solicitor or counsel any evidence which may affect him"

had this to say:

> "There may be circumstances in which fairness does require that an opportunity to cross examine other witnesses should be given. But the proposition that cross-examination of other witnesses should automatically be allowed to every person affected by the witnesses evidence is one I would unhesitatingly reject."
> (emphasis mine)

The learned author continued:

> "The proposition is one which, in my opinion, fairness does not require and which would be likely in many Inquiries, certainly in my own, to be wholly inimical to, perhaps destructive of, the efficient conduct of the Inquiry. I have to say that I regard this principle as an unnecessary implant from procedures designed for adversarial proceedings."

Lord Scarman in 1974 in the Red Lion Square Inquiry uttered sentiments similar to the view of the Learned author (supra). He said:

> "This Inquiry is to be - and I stress it - by myself. This means that all the decisions have to be taken by me. Let me indicate now so that there be no misunderstanding what are the implications of what I have just said. First of all, it is I and I alone, who will decide what witnesses will be called. I also decide to what matters their evidence will be directed. There is, in an inquiry of this sort no legal right to cross-examination, but I propose, within limits, to allow cross-examination to the extent I think it helpful to the forwarding of the Inquiry, but no further."
> (emphasis mine)

These extracts clearly indicate that mere refusal to permit cross-examination of witnesses in a Commission of Inquiry is not per se unfair or in breach of the Rules of Natural Justice.

This approach is supported by decision from Commonwealth Courts. In ***Ng Tang Chi v Tan Sri Datuk Chang Min Tat and others (Cheah Swee Aun) Intervener [1999] 1 MLJ 485 HC*** the Malaysian High Court held that the Chairman of the Commission had acted within his jurisdiction in refusing to supply counsel representing a party to the Inquiry with reports and plans before hand and also in refusing counsel permission to cross-examine witnesses.

In ***Bushell and Another v Secretary of State for the Environment [1980] 2 All ER 608*** the House of Lord held.

> "The inspector refusal to allow cross-examination of the department's witness on the methodology contained in the Red Book was not a denial of Natural Justice because an inquiry was quite unlike civil litigation."

An interesting observation by ***Lord Diplock*** appears in ***Cross and Tapper on Evidence 8th Edition at p. 18*** where Lord Diplock expressed that contrary to the belief that rights to cross-examination constitute one of the ingredients of a fair procedure they might make it unfair.

> "To 'over judicialize' the inquiry by insisting on observation of the procedures of a court of justice which professional lawyers alone are competent to operate effectively in the interest of their clients would not be fair."

The ruling of the Commissioner is not per se unfair. What in effect the Commissioners were endeavouring to do was to ensure that where the testimony of a witness did not materially affect a party the counsel appearing for such a party would not be permitted to cross-examine such a witness.

This approach is clearly in keeping with the view of Richard Scott and the approach of Lord Scarman in the Red Leon Square Inquiry (supra).

Indeed, the ruling may be said to be protective of such parties. It has been my experience that cross-examination can have the effect of unearthing damaging evidence against a party who was not implicated by the examination in Chief.

In his arguments, Mr. Henriques, Q.C., addressed himself to the general principles of natural justice and fairness. He never attempted to show how the ruling was unfair to the applicants. One has to speculate.

At ***chapter V paragraph 68 page 24 of the Report of the Royal Commission on Tribunals of Inquiry 1966, under the Chairmanship of the Rt. Hon Lord Justice Salmon,*** the following appears.

> "The question arises as to whether or not there should be statutory rules which lay down the procedure to be followed by Tribunals of Inquiry. The disadvantage of having such rules would be that they would necessarily be detailed and rigid. This would enable anyone who wished to obstruct or delay the proceedings of the Tribunal to take advantage of any supposed technical breach of the rules for this purpose."

I understand that the applicants are not alleging a technical breach. They are alleging a fundamental breach of natural justice, the need to act fairly.

The passage, supra, is quoted to illustrate the flexibility which is associated with Commissions of Inquiry even in the face of the need to observe natural justice.

I am satisfied that the authorities and the academic learning on the matter show clearly that there is no automatic right of cross-examination of witnesses at a Commission of Inquiry and that the matter of cross-examination is within the discretion of the Commissioners. Wanting to cross-examine a witness and not being allowed to do so is not per se a breach of the duty to act fairly.

For the above reasons the application for leave to apply for Judicial Review is refused and the summons herein is dismissed.