

NMLS

SUPREME COURT CIVIL APPEAL NO. 60/2005

Arthur G. Kitchen, for the Appellant.

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June 15 ; July 31, 2006 and November 10, 2006

PANTON, J.A.

I have read the reasons for judgment written by my learned brother Cooke, J.A..
I agree with his reasoning and have nothing to add.

COOKE, J.A.

1. On 31st July, 2006, the Court handed down its decision that this appeal was dismissed and that there would be no order as to costs. On that occasion

the Court indicated that written reasons for its decision would be provided. These are those reasons.

2. The appellant Kenyouth Handel Smith, who at the relevant time was a Detective Sergeant of Police, was retired in the public interest. This decision was made pursuant to Regulation 26 of The Police Service Regulations 1961. Proceedings were initiated by communication, dated 27th August 2002 to the appellant, which was in the following terms:

"TAKE NOTICE that pursuant to Regulation 26 (1) of the Police Service Regulations, 1961, and acting on the report of the Commissioner of Police, it has been decided by the Police Service Commission that you be retired from the Jamaica Constabulary Force in the public interest.

FURTHER TAKE NOTICE that the grounds on which the Police Service Commission intends to rely are that on November 23, 2001, you attempted to extort the sum of One Hundred and Fifty Thousand Dollars (\$150,000.00) from Mr. Vasant Parsard who had attended the Duhaney Park Police Station and reported to you that his licensed firearm was missing, in that you represented to Mr. Parsard that if he gave you the sum of One Hundred and Fifty Thousand Dollars (\$150,000.00) he could avoid being arrested and taken to the Remand Centre; that you went to Mr. Parsard's residence at 14 Holland Avenue, Patrick City in the parish of Saint Andrew on the aforementioned date with the intent of receiving the said sum of One Hundred and Fifty Thousand Dollars (\$150,000.00) which you had requested of Mr. Parsard in lieu of his arrest; that it was known to you as a member of the Constabulary Force that such behaviour was unprofessional and criminal; that your conduct is inimical to the good image and reputation of the Jamaica Constabulary Force; that confidence in

your ability to discharge your duty as a Police Officer in an honest and professional manner has been lost; and that you should be retired from the Jamaica Constabulary Force in the public interest under Regulation 26 (1) of the Police Service Regulations, 1961". (Emphasis mine)

The Police Service Commission duly met and considered whether or not the appellant should be so retired. They determined that he should be. By letter dated November 14, 2002 the appellant was informed thus:

"I write to advise that, arising out of a report made against your attempt extortion which occurred in November 2001, the Police Service Commission has advised His Excellency the Governor-General that you should be retired from the Force pursuant to Regulation 26 of the Police Service Regulations, 1961.

However, before His Excellency acts on that advice, you may apply for your case to be referred to the Privy Council for its consideration.

If you choose to do so, you should, within fourteen (14) days of receiving this letter, submit your grounds of appeal through the Commissioner of Police.

Failure to do so will result in His Excellency acting on the advice without any further reference to you".

The appellant accepted the invitation to submit his "grounds of appeal". Those grounds did not find favour. The record does not reveal the communication from the Governor-General to that effect. However, by letter dated July 14, 2003 the Assistant Commissioner of Police for Administration informed the Assistant Commissioner of Police for Area 4 that:

"The Governor General acting on the advice of the Privy Council has ordered that the appeal of the above named Sub-officer, against the decision for his retirement from the Jamaica Constabulary Force in the Public Interest lacked merit and accordingly he is to be retired from the Force in accordance with the provisions of Regulation 26 of the Police Service Regulations, 1961".

On 17th September, 2003 the appellant was granted leave to apply for Judicial Review in respect of the decision of the Police Service Commission retiring him from the Jamaica Constabulary Force. On the 14th January, 2005 the Judicial Review Court refused to quash this decision. The appellant now appeals.

3. Before attention is turned to the grounds of appeal there should be a synopsis of the factual circumstances which the Police Service Commission must have accepted. On the 21st November, 2001 Mr. Vasant Parsard having discovered that his licensed firearm was missing, reported his loss to the Duhaney Park police station. The appellant took charge of the investigation. The next day Parsard and his wife visited the station. The appellant told Parsard that he was in big trouble as he was under instructions of his supervisor to "lock him up", where he would be placed in custody at the Remand Centre "with men from Tivoli Gardens". The Appellant indicated to Parsard that he wanted to help him and had not yet decided "whey mi a duh yet". The appellant enquired of Parsard if he had any money because it was going to cost him (Parsard) a lot of money. The amount of money which would get Parsard out of trouble was stated by the appellant to be One Hundred and Fifty Thousand Dollars

(\$150,000.00). Parsard sought advice and consequently made a report to the Bureau of Special Investigations. A sting operation was set in motion. Parsard obtained One Hundred and Fifty Thousand Dollars (\$150,000.00). The notes comprising this sum were marked. Two policemen from the Bureau of Special Investigations were at hand to witness the handing over of the money. They were secreted in the bathroom of Parsard's house on the 23rd December, 2003. On that day the appellant telephoned Parsard to find out whether "he was ready for him". Parsard went for the appellant and took him to his house. Parsard offered him a meal and the parcel of money. However, the appellant wished to finish his meal before accepting the money. When he was finished eating the appellant requested to see where the firearm had been stored. Parsard took him into his bedroom. When the appellant entered the bedroom, he next opened the door to the bathroom. There he saw the two officers from the Bureau of Special Investigations who was lying in wait. He asked "who dem yah". He then demanded to be let out of the house. He left without taking the money.

4. Counsel for the appellant devoted his energies to one ground of appeal which was that:

"The procedure contemplated by the Police Service Regulations, 1961, Regulation 31(5) in particular, was unlawfully circumvented by resort to the provisions of Regulation 26 by the 1st Respondent to effectively dismiss the Appellant from his employment".

It is necessary to reproduce in its entirety Regulation 31 of which 31(5) forms a part:

PART V – Discipline

A- GENERAL

"30. Except where the contrary intention appears the provisions of this Part apply generally to the Force.

31.-(1) The Commission in dealing with disciplinary proceedings against members shall take into consideration reports from the Commissioner.

(2) Subject to paragraph (5) where the Commission is of opinion that disciplinary proceedings ought to be instituted against a member of or above the rank of Inspector, the Commission may recommend to the Governor-General that such proceedings be instituted.

(3) Disciplinary proceedings against members below the rank of Inspector shall be instituted by or by direction of the Commissioner in the light of reports made to him, or otherwise.

(4) Subject to paragraph (5) the Commissioner where he is of the opinion that disciplinary proceedings ought to be instituted against a member below the rank of Inspector, may institute such proceedings or cause them to be instituted.

(5) Where an offence against any enactment appears to have been committed by a member the Commission, or as the case may be the authorized 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 Attorney-General or Clerk of the Courts advises that criminal proceedings ought to be so instituted,

disciplinary proceedings shall not be initiated before the determination of the criminal proceedings so instituted”.

It would seem clear that regulation 31 prescribes a regime which governs the procedural steps pertinent to the initiation of disciplinary proceedings. In particular regulation 31(5) directs that disciplinary proceedings shall not be initiated before the determination of criminal proceedings if such latter proceedings had been instituted. This regulation determines the route to be followed in the institution of criminal proceedings. Regulation 31 sets out a different procedural approach, according to whether or not the alleged offending member is below or above the rank of Inspector.

5. Regulations 46 and 47 deal with the procedure after disciplinary proceedings has been initiated. Regulation 46 is concerned with proceedings for misconduct not warranting dismissal, while 47 is relevant to proceedings for dismissal. Regulations 31, 46 and 47 provide a framework for the conduct of disciplinary proceedings against a member of the Jamaica Constabulary Force. However, these regulations are not all embracing. There is Regulation 26 which is as follows:

“26.-(1) Notwithstanding the provisions of regulation 46 or regulation 47 where it is represented to the Commission or the Commission considers it desirable in the public interest that any member ought to be required to retire from the Force on grounds which cannot suitably be dealt with by the procedure

prescribed by regulation 46 or regulation 47 it shall require the Commissioner to submit a full report.

(2) If after considering the report of the Commissioner and giving the member an opportunity of submitting a reply to the grounds on which his retirement is contemplated, and, having regard to the conditions of the Force, the usefulness of the member thereto, and all the other circumstances of the case, the Commission is satisfied that it is desirable in the public interest so to do, it shall recommend to the Governor-General that the member be required to retire on such date as the Commission may recommend."

6. The relationship between Regulation 26 and Regulations 46 and 47 has received the attention of this court in **Segree v Police Service Commission SCCA 142/2001** (unreported) delivered on March 11, 2005. In that case, as in this, the submission was that the appellant was prejudiced since Regulations 46 and 47 were not employed. In **Segree** that submission was rejected. Downer, J.A. propounded the view that:

"Regulation 26 provides the appropriate procedure where a prior decision has been taken that it is desirable for an officer to be retired in the public interest. It is applicable where the matter requires a speedy disposal in the public interest".

Panton, J.A. had this to say:

"The submissions by Mr. Tenn and Mr. Harper, on behalf of the appellant, were predicated on the right of the appellant to determine the procedure to be adopted in dealing with her miscreant behaviour. Neither attorney-at-law was able to refer to any authority which gives the appellant such a right. That they were not so able to do was not surprising as

there is none. In any event, they apparently overlooked the fact that regulation 47(2)(I) provides for the making of a recommendation by the Commission to the Governor-General for the removal of a member of the Force in the public interest where:

“the Commission is of the opinion that the member does not deserve to be dismissed by reason of the charges alleged, but that the proceedings disclose other grounds for removing him.”

The unlawful circumvention to which this ground speaks is the non-utilization of Regulations 46 and 47. As it was in **Segree**, so it is now, that this ground fails.

Further there is no merits in the alternative ground of appeal that:

“the recourse by the 1st Respondent to the provisions of Regulation 26 were (sic) clearly inappropriate having regard to all the circumstances of the Appellant’s case”.

Here was a member of the Jamaica Constabulary Force whose behaviour was wholly reprehensible - confidence in his ability to discharge his duty as a police officer in an honest and professional manner had been lost.

7. In the written submissions it was contended:

“that regulation 26 places an onus and/or a duty on the Commission to show, albeit on a balance of probabilities, that the grounds on which it is proposed to retire a member in the public interest **cannot suitably be dealt with by the procedure prescribed by regulation 46 or 47** (my emphasis). This is the threshold or bar which it is incumbent on the Commission to hurdle in all cases brought under

regulation 26. It is respectfully submitted that the Commission has obviously failed to do in this case".

It is important to recognise that the condition "on grounds which cannot suitably be dealt with by the procedure prescribed by regulation 46 or regulation 47" in Regulation 26 pertains to retirement in the public interest. It is difficult to perceive the relevance of Regulation 46 since that Regulation is pertinent to proceedings which do not warrant dismissal. The focus of Regulation 26 is the retirement in the public interest. Proceedings under Regulation 47 which may lead to dismissal, requires a more elaborate procedure in comparison with proceedings pursuant to Regulation 26. This is readily understandable since retirement in the public interest calls for expedition. The sooner an unworthy member of the Jamaica Constabulary Force is properly retired in the public interest, the better it is for our society. It would be unwise to attempt to exhaustively categorise the "grounds which cannot suitably be dealt with... or regulation 47". Certainly, the need for of expedition would be a consideration. Another would be whether or not a determination by the Police Service Commission under Regulation 47 would necessarily reveal the full extent of the general culpability of the offending member. It is true that by Regulation 47-2(I) the Police Service Commission has the power to make a recommendation to the Governor-General for dismissal – see para 5 (supra). This would be on the initiative of the Commission. However, the issue of retirement can be put forward by representation to the Commission. [See Regulation 26 (supra).] In

this case there was a representation to that effect by the Commissioner of Police. It is inaccurate to say that the Commission did not show the grounds on which it decided that the issue of retirement in the public interest could not be suitably dealt with by the procedure prescribed by regulation 46 or 47. In the affidavit of Jacqueline C. Hinkson, the Secretary to the Police Service Commission para. 13 states:

"In the exercise of its discretion, the Commission decided to retire the Applicant pursuant to Regulation 26. Before making its decision, the Commission contemplated the institution of criminal or departmental proceedings. This course was not pursued as the evidence was insufficient to establish misconduct to the requisite degree to sustain criminal or departmental proceedings against him. The allegations however amounted to an affront to his integrity and honour and a resultant loss of confidence in him to properly perform his duties".

Whether the contents of para. 13 of the Hinkson affidavit (supra) were sufficient, was not the subject of debate.

8. The judgment of the Judicial Review Court after dealing fully with the submissions of the appellant (most of which were not pursued in this court) concluded as follows:

"Further, the Claimant submitted to the jurisdiction of the Privy Council, participated in that process and the orders made by the Governor General were based on the decision of of the Council. He cannot therefore now seek to return to first base".

The appellant, in his filed grounds of appeal questioned the validity of this statement of the law. This ground was not canvassed in this court, neither was it the subject of the written submissions of either party. However, despite the absence of full argument, it is thought necessary to make some comment on that assertion of the Judicial Review Court. The impugned view would seem to suggest that if an applicant chooses to utilize the procedures provided by the Police Service Regulations and fails - he would be barred from seeking judicial review. This view would necessarily regard the proceedings before the Privy Council as an appellate hearing. No opinion is here expressed as to whether or not such proceedings are properly so characterized. In any event it is well to recognise the essential difference between an appellate hearing and judicial review. The former is concerned with the merits of the case while the latter is concerned with the legality. In **Ridge v Baldwin** [1963] 1 Q. B. 539 the English Court of Appeal held that, the appellant having appealed to the House Secretary and thus utilized the procedure available to him there was a waiver of his right to seek any further redress. The House of Lords [1964] A.C. 40 reversed this decision. **Walter Annamunthodo v Oilfields Workers Trade Union** [1961] A.C. 945 is the advice of the Judicial Committee of the Privy Council. It is only requisite to reproduce a portion of the head note which accurately states:

"Further, the appellant had not, by appealing to the Annual Conference of Delegates, lost his right to complain of rule 11 (7) being invoked. By having appealed he did not forfeit his right to redress in the

courts and could still complain that the original order was invalid for want of the observance of the rules of natural justice".

It is therefore doubted that the challenged proposition made by the Judicial Review Court is correct. The appellant was taking issue with legality of the proceedings at "base".

MARSH, J.A. (Ag.)

I agree and have nothing further to add.

PANTON, J.A.

ORDER

The appeal is dismissed. No order as to costs.