The Hon. Mr Justice G. Henry

IN THE CAYMAN ISLANDS COURT OF APPEAL

CIVIL APPEAL NO. 8 of 1990

BEFORE : THE HONOURABLE MR. JUSTICE ZACCA, President
THE HONOURABLE MR. JUSTICE GEORGES, J.A.
THE HONOURABLE MR. JUSTICE HENRY, J.A.

Between RICHARD PRENDERGAST Applicant/Appellant

and

COMMISSIONER OF POLICE
THE HONOURABLE ATTORNEY GENERAL Respondents

Mr. Norman Hill Q.C and Mr. Graham Hampson for Appellant
Mr. Anthony Smellie, Solicitor General, for Respondents

JUDGMENT

On January 22, 1990 the Appellant, who was then a constable in the Royal Cayman Islands Police Force, was convicted by the First Respondent of three offences against the Police Regulations, 1976 and dismissed from the Force. His application to the Grand Court for an order of certiorari to quash the conviction was dismissed on November 8, 1990. This is an appeal against that decision.

The grounds of the application for certiorari are set out in the statement of grounds as follows:

" (i) That the Commissioner of Police as the Disciplinary Authority acted without jurisdiction and/or in breach of natural justice for the reason that prior to the disciplinary proceeding the said Commissioner made a determination that there was a serious criminal matter outstanding against the Applicant regarding alleged corruption and decided that the Applicant should be suspended from duty by reason thereof.

(ii) That the Commissioner of Police as the Disciplinary Authority acted in breach of Standing Order 31 of the Royal Cayman Islands Police Force Standing Orders in that prior to the disciplinary proceedings the said Commissioner (based on the allegations of fact in the possession of the Police) made a determination that there was a serious criminal matter outstanding against the Applicant regarding alleged curruption and decided that the Applicant should be suspended from duty by reason thereof.

(iii) That the Commissioner of Police as the Disciplinary Authority acted without jurisdiction and/or in breach of natural justice for the reason that at a material time in relation to the disciplinary hearing against the Applicant there was an inquiry taking place in relation to (inter alia) the conduct of the Commissioner of Police and the only witness for the Applicant in the disciplinary proceedings against him had already testified before the inquiry in relation

> to the conduct of the Commissioner in a manner that could be considered adverse to the interests of the said Commissioner of Police."

In response to the application an affidavit by Kevin McCann, the Deputy Commissioner of Police, was filed. Paragraphs 7, 8 and 9 of that affidavit are as follows:

> "7. That during my service of over sixteen years in the Force there have been several cases involving disciplinary proceedings arising from essentially criminal allegations and these have all been disposed of fairly.
>
> 8. I can state that the terms and conditions of service are brought to the attention of all persons who are recruited for service in the Force. The Regulations and Standing Orders which apply to the internal discipline of the Force are in particular brought to the attention of all recruits and form part of the curriculum of the recruit training courses. The Applicant herein PC 117 Prendergast would therefore have been aware at the time he was recruited of the relevant Rules and Regulations which govern disciplinary hearings. An extract of the relevant Standing Order A 17 which deals with Complaints and Discipline Procedures is set out in its entirety in the documents attached hereto as Exhibit K.M.3
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> 9. That I am advised and verily believe that a memorandum dated the 27th January 1989 from the Commissioner of Police (Designate) to myself might be relevant to the proceedings herein. Accordingly, I exhibit a copy of the memorandum as Exhibit K.M.4. I referred a copy of this memorandum to the Honourable Attorney-General on the 31st July 1990. A copy of my memorandum to the Honourable Attorney-General covering Exhibit K.M.4 is attached hereto as Exhibit K.M.5."

These paragraphs and the exhibits to the affidavit give rise to the first two grounds of appeal which are as follows:

> "1. The learned Chief Justice erred in law in admitting into evidence paragraph 7, 8 and 9 of the Affidavit of Kevin McCann sworn on the 19th October, 1990.
>
> 2. The learned Chief Justice erred in law in relying on the contents of paragraphs 7, 8 and 9 of the Affidavit of Kevin McCann sworn on the 19th. October, 1990 and the exhibits attached thereto."

In admitting the paragraphs the learned Chief Justice observed:

> "Those facts are not irrelevant to (the Solicitor General's) submissions which, I accept, give rise to legal issues that demand the consideration of the Court. They are the foundation on which those submissions rest. Not being irrelevant they are admissible, as I do not accept Mr. Hill's submission that to admit those facts the related issues must first be resolved. In due course those issues will doubtless have to be resolved but the time is not now as I am concerned with an issue of admissibility."

We do not consider that the learned Chief Justice erred in admitting the paragraphs in evidence. It is true that the fact that on previous occasions cases involving disciplinary proceedings arising from essentially criminal allegations may have been disposed of fairly could be of no relevance in deciding whether on the facts of this particular case there was the appearance of bias. Still less relevant would be the opinion of the Deputy Commissioner of Police as to the fairness of those other proceedings. The fact that disciplinary proceedings had previously been held in respect of criminal allegations was however relevant as part of the general background information in relation to the proceedings. Similarly although the Appellant's knowledge of the regulations and standing orders could not be relevant to the issue of appearance of bias, the existence and provisions of those regulations and standing orders would be part of the necessary general background information. Indeed the Appellant relied on a breach of one of those standing orders as a ground for alleging that there was the appearance of bias in relation to the disciplinary proceedings conducted by the Commissioner of Police. In so far as paragraph 9 of the affidavit is concerned it is sufficient to say that the Appellant's counsel in the course of his submissions to us found it useful to refer to the exhibit mentioned.

Grounds 3 and 4 of the grounds of appeal may be considered together and are as follows:

> "3. The learned Chief Justice erred in law in holding that the Disciplinary Tribunal applied the correct test when refusing the application of the Appellant that the Tribunal disqualify itself.
>
> 4. The learned Chief Justice erred in law in holding that on the facts disclosed there was no reasonable suspicion of bias and/or a real likelihood of bias."

The Commissioner of Police appears to have refused to disqualify himself on the basis that he was not biased. Counsel for the Appellant submitted - and counsel for the Respondents quite properly conceded - that the appearance or suspicion of bias rather than actual bias was the relevant consideration in deciding whether the Appellant's application to the Commissioner of Police as well

as his application for certiorari ought to be granted. This was in fact the test which the learned Chief Justice applied in considering the application for certiorari. He adopted the following formulation by Ackner L.J. in Regina v Liverpool City Justices ex parte Topping (1983) 1 W.L.R. 119:

> "Would a reasonable and fair minded person sitting in court and knowing all the relevant facts have a reasonable suspicion that a fair trial for the applicant was not possible?"

The learned Chief Justice concluded that the letter of May 5, 1989 from the Commissioner of Police to the Appellant, which is as follows, could not give rise to a reasonable suspicion that a fair trial for the Appellant was not possible:

> "Dear Constable Prendergast
>
> I regret to inform you that you must remain suspended from duty despite the prosecution offering no evidence at the recent trial.
>
> There is a serious criminal matter outstanding against you regarding alleged corruption. The papers relevant to this case are almost finalised and you will be informed what further action is to be taken as soon as possible.
>
> Yours sincerely
>
> (Sgd) A Ratcliffe
>
> Commissioner of Police."

The learned Chief Justice arrived at this conclusion because he regarded the letter as a mere record of the Commissioner's decision to continue the Appellant's suspension and he considered that such a decision did not require knowledge of the details relating to the alleged commission of the offence.

It seems clear however that the Commissioner of Police did have some knowledge of those details. In January 1989 the Deputy Commissioner of Police was away and in his absence the Commissioner of Police had to decide whether the Appellant (who had been suspended on another unrelated charge) could be reinstated having regard to the investigation into allegations of corruption which was then being carried out and which ultimately resulted in the disciplinary proceedings. A memorandum from the Commissioner of Police to the Acting Deputy Commissioner of Police dated January 27, 1989 reads as follows:

> " REPORT RE OFFICIAL CORRUPTION
>
> This file contains recommendations on criminal

> and disciplinary proceedings.
>
> After submission to, and return from, the Attorney General you should consider disciplinary charges and whether I should hear the case.
>
> I should not have seen the file and have refrained from reading it as I should have no knowledge of the facts if it is to result in disciplinary proceedings.
>
> From a brief glance it is obvious that urgent action is required to tighten up our methods of recording, transmitting and supervising the results of blood/alcohol analysis."

The learned Chief Justice regarded this memorandum as "a clear statement by the first respondent of his awareness of his duty not to become involved in the facts of the applicant's case." By the same token an apparent breach of that duty could presumably convey to a fairminded person an appearance of bias if the Commissioner subsequently conducted the disciplinary proceedings. In our view the last paragraph of the memorandum indicates on the face of it that the Commissioner must have had more than "a brief glance" at the file in order to conclude that the methods of recording, transmitting and supervising the results of blood/alcohol analysis had to be tightened by urgent action. Although the precise extent of the knowledge acquired from the file would not be readily apparent, it must have been more than superficial. Standing order 31 seeks to "ensure that whoever hears the matter will not have prior access to the case papers or statements." This provision is no doubt designed to avoid the appearance of bias in relation to the hearing. In view of this provision and the Commissioner's own statement in paragraph 3 of the memorandum we think that there would to a fair minded person be an appearance or suspicion of bias on the part of the Commissioner as a consequence of his prior knowledge. The additional fact that the Appellant's only witness had given evidence adverse to the Commissioner in an earlier inquiry in relation to the Commissioner's conduct would not be designed to dispel that suspicion.

We recognize that in refusing the application for certiorari the learned Chief Justice was exercising a judicial discretion with which an appellate court ought not to interfere unless satisfied that the judge either took into account matters which he ought not to have taken into account, or failed to take into account matters

which he ought to have, or was plainly wrong. In our view the learned Chief Justice failed to recognize the implication of the last paragraph of the memorandum of January 27, 1989 and failed to attach sufficient importance to the fact that the Appellant's only witness had previously given evidence adverse to the Commissioner. The learned Chief Justice as regards the second matter observed that the precise nature of the evidence given by Cons. Powell at the inquiry into the Commissioner's conduct had been disclosed and the evidence given at the disciplinary proceedings was not conclusive of the Appellant's innocence.

Although these observations are accurate we do not consider that they affect the appearance of bias created by the fact that Powell's evidence was adverse to the Commissioner and that he was the Appellant's only witness. We emphasize that it was not necessary for the Appellant to show actual bias on the part of the Commissioner and our decision does not reflect a finding of actual bias.

In our view the learned Chief Justice erred in refusing the application on its merits. We therefore allow the appeal, set aside his decision and grant the Appellant's application for an order of certiorari quashing the decision and order dated June 22, 1990 of the Commissioner of Police whereby the Applicant was found guilty of 3 offences under the Police Regulations.