8.11.90

IN THE GRAND COURT OF THE CAYMAN ISLANDS
HOLDEN AT GEORGE TOWN, GRAND CAYMAN

BEFORE THE HON. THE CHIEF JUSTICE

ON 22ND OCTOBER, 1990 CAUSE 280 OF 1990

BETWEEN	RICHARD PRENDERGAST	APPLICANT
AND	THE COMMISSIONER OF POLICE and THE HON. ATTORNEY GENERAL	RESPONDENTS

Mr. N. Hill Q.C. with Mr. G. Hampson - Applicant
Solicitor General with Miss J. Conolly - Respondent

MALONE C. J. JUDGMENT

The applicant was convicted by the first respondent sitting as a disciplinary tribunal of three disciplinary offences and was dismissed from the Royal Cayman Police Force. Application is now made for an order of certiorari to quash the convictions. The purpose of that remedy as Lord Hailsham of St. Marylebone L.C. said in Chief Constable of the North Wales Police v Evans (1982) 3A.E.R. 141 at p 143:

> "is to ensure that the individual is given fair treatment by the authority to which he has been subjected and that it is no part of that purpose to substitute the opinion of the judiciary or of individual judges for that of the authority constituted by law to decide the matters in question."

Tony Smellie
Lorna Dilbert
Jackie Conolly
Twila Escalante
Robert Sheehan
Michael Marsden
Ivor Archie
Angelyn Wong

ely a declaration is asked for in the following terms:

> "that the disciplinary authority (namely the Commissioner of Police) acted without jurisdiction and/or in breach of natural justice on the basis that there was a real likelihood of bias and/or a reasonable suspicion of bias."

In essence, as appears from the language of the declaration sought, the applicant is alleging on the part of the first respondent bias which the applicant submits vitiated his trial. The basic facts relied on individually or collectively by the applicant in proof of bias are two. The first is a letter of 5th May 1989 from the first respondent to the applicant which is as follows:

> "5 May 1989
>
> PC 117 R Prendergast
>
> 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
>
> A B Ratcliffe
>
> Commissioner of Police".

In conjunction with the fact that when the letter was written, the Deputy Commissioner was not in the Islands, the letter, the applicant deposes to in paragraph 4 of his affidavit of the 6th July 1990, discloses.

> "that the Commissioner's involvement at this time with this matter could only mean that he had knowledge of the particular allegations against me."

The second basic fact is that one Powell - a police officer - gave evidence in support of the applicant which was not accepted by the tribunal. Significance is attributed to that fact by the applicant because Powell, at an earlier inquiry into the conduct of the first

respondent, had given evidence which the applicant deposes in paragraph 6 of his affidavit of the 6th July, 1990:

> "could be considered adverse to the interests of the Commissioner of Police."

Before the hearing of the disciplinary charges, representations were made on behalf of the applicant to the first respondent that he should not hear the charges but these representations made no reference to Powell. The applicant, however, deposes in paragraph 7 of his affidavit of the 6th July as follows:

> "7. I am verily informed by Constable Powell that both the Deputy Commissioner and the Commissioner of Police would have known that P.C. Powell was to testify on my behalf at my disciplinary hearing as the need for his attendance as a witness had been intimated. In addition, Constable Powell was present outside the room where the disciplinary hearing was taking place prior to his giving testimony during the 18th and 19th January, 1990. this room was the Conference Room at the Commercial Crime Department of the Royal Cayman Islands Police Force, which said room is adjacent to the Commissioner's office. During Constable Powell's wait to give testimony, he has informed me that he saw the Commissioner going to and from his office and as such the said Commissioner must have seen Constable Powell."

I should make it clear that the Solicitor General has not suggested that assuming the applicant were otherwise entitled to succeed on the second basic fact, the failure to make a representation in respect of Powell would not entitle him to do so.

The test for bias has, over the years, been expressed differently. I, however, accept, as did my learned predecessor Summerfield C.J. in Whittaker and Watler v Reg.(1984) CILR 153, the test formulated by Ackner L.J. in Regina v Liverpool City Justices ex parte Topping (1938) 1 W.L.R. 119. It was expressed at p 123 by Ackner L.J. as follows:

> "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?"

Mr. Hill submitted that Ackner L.J.'s test is applicable in this case to the two basic facts I have mentioned and relied on the second of those facts as reinforcing the first. In relation to the first he applied the test as follows:

> "Whether there would be the appearance of bias if the Commissioner who wrote the letter of the 5th May heard and determined the allegation of corruption by way of disciplinary proceedings. The test is not whether the Commissioner was affected by knowledge but whether a reasonable and fair minded person sitting in Court, aware of the contents of the letter, would have a reasonable suspicion that a fair trial for the applicant would not be possible."

Mr. Hill concluded that the reasonable and fair minded person who, as he expressed it, "focused" on the letter of the 5th May would entertain a reasonable suspicion that a fair trial was not possible. He would also conclude that the Commissioner had acted in breach of standing order 31 of the Police Force Regulations. That order is as follows:

> "If the Deputy Commissioner decides that disciplinary proceedings are necessary he will decide whether the case seems sufficiently serious to be heard by the Commissioner, or if it can be heard by a Chief Superintendent. In either case the Deputy will ensure that whoever hears the matter will not have prior access to the case papers or statements."

Whilst the Solicitor General agreed with the test formulated by Ackner L.J. and that it is not a subjective one as in the language of Lord Denning M. R. in Metropolitan Properties Co (F.G.C) Ltd. v Dannon (1969) 1 Q.B. 577 at p. 599:

> "The court looks at the impression which would be given to other people"

so that it is the appearance of bias rather than actual bias that is

the determining factor, he did not accept that in applying the test to the first basic fact, Mr. Hill had considered all the relevant facts. In his view knowledge of the structure and requirements of the Royal Cayman Police Force would be relevant. In due course, the merits of the Solicitor General's submission on the relevant facts will be considered with other submissions of the Solicitor General. At this stage the application of the test will be confined to the facts considered by Mr. Hill to be the relevant facts. These include, apart from the facts I have mentioned, statements made by the first respondent at the trial of the applicant and a memorandum of the 27th January 1989 from the first respondent to the Acting Deputy Commissioner. Unusually objection was initially taken by Mr. Hill to its admission in evidence. The memorandum is 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."

Mr. Hill's contention is that to a fair minded person the disciplinary proceedings conducted in regard to the applicant might reasonably appear to have been a trial that was not unaffected by bias by reason of prior knowledge of the facts on the part of the first respondent. The essentials of Mr. Hill's argument can best be expressed in his own words:

> "The applicant has established his complaint that the tribunal was affected by bias for two reasons:
>
> I. The letter of the 5th May 1989 when reasonably interpreted by reference to the words used clearly indicates the Commissioner had more than a general

outline of the charges. That is established by:

(a) the wording of the letter in particular in the use of the word "serious" in the first paragraph and in the second paragraph the words that:

> 'the papers relevant to this case are almost finalised';

(b) the Commissioner's statement at p 6 of the transcript of the hearing:

> 'I was left with a decision, in the absence at that time of my Deputy, as to whether Prendergast could be reinstated'

shows that at that time he must have done what had to be done to make that decision;

(c) the third paragraph of the memorandum of 27th January, 1989 would not have been written had not the Commissioner given thought to the file on this case;

(d) any constraint the Commissioner might have had or felt in January does not operate in May for the reason that, as the Commissioner points out, in May the investigation was proceeding along lines of criminal charges. So given that circumstance and the absence of the Deputy he remained the final authority and decided not to proceed along the lines of disciplinary proceedings.

(e) no affidavit from the Commissioner as to what happened in May.

II. Powell did testify at the earlier proceeding concerning the commissioner.

The memorandum of the 27th January 1989 from the first respondent to the Deputy Commissioner is 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. It lends credence to his observations at pages 6 and 7 of the transcript of the hearing where he is reported as follows:

"I am aware of the outlines of what it is that Prendergast is alleged to have done.
I am, in no way, aware of the detail of how these offences are alleged to have been committed. And my aim for sometime, because P.C. Prendergast has been suspended for a much longer period than I would have cared to happen, and my aim is to hear these allegations fairly and, without bias, listen to the evidence that is presented on the prosecution side, if I may term it that, and any witness that PC Prendergast would be calling on his defence.

I have no opinion of Prendergast's guilt or innocence in this matter and that's the whole purpose of this hearing."

That is not to say that a fair minded observer would query Mr. Hill's submission that the first respondent would have given thought to the file in this case. Indeed, he must have done so. However, as any fair minded observer would, I think, find, the fact that thought was given to the file would not be at variance with the first respondent's observations at pages 6 and 7 of the transcript. Nor would a fair minded observer find those observations at variance with a decision by the first respondent to continue the suspension of the applicant. For as the Solicitor General has pointed out, the decision did not require knowledge of the details relating to the alleged commission of the offences since the factual situation was that a serious criminal matter was under investigation. Consequently the letter of the 5th May 1989 which states the factual situation and the decision to continue suspension made known by that letter would not of themselves, I think, give rise in a fair minded person to reasonable suspicion of bias. I would add that I attach no importance to the word:

"serious"

and the words: "the papers relevant to this case are almost finalised"

as they are mere statements of fact which do not indicate that the first respondent had more than a general outline of the charges. Finally there is no evidence to support Mr. Hill's submission of the

taking of a decision not to proceed along disciplinary lines. Investigations into criminal offences, as the letter of the 5th May 1989 discloses, were underway and no decision was taken to disturb them. Subsequently a decision was taken to proceed by way of disciplinary charges but there is no suggestion that the first respondent made that decision or participated in the making of it. Accordingly as on the facts before me there is no evidence that the first respondent had cause to become involved in the facts of the applicant's case, not only is his memorandum of the 27th January 1989 acceptable, but the credence it gives to his observations at pp 6 and 7 of the transcript makes those observations also acceptable. In the result I find there is no substance in that part of the applicant's case that is based on the letter of the 5th May 1989.

The position with respect to Powell is that an invitation is extended by the applicant to the reasonable fair minded observer to speculate. As without knowing the nature of the evidence given by Powell at the inquiry into the conduct of the first respondent, the reasonable and fair minded observer is invited to conclude that the evidence was such as to so affect the first respondent that he could reasonably be suspected of not giving to it fair consideration even though the absence of such consideration would not be harmful to Powell but harmful only to the applicant. When in addition it is apparent that the evidence of Powell at the disciplinary proceedings involving the applicant was not conclusive of the applicant's innocence and there was evidence that pointed to his guilt the supposition of bias is not, I think, within the bounds of objective reasonableness. I agree with the Solicitor General that this ground as he expressed it:

> "offers no basis on which a reasonable person could decide whether or not it gave rise to bias".

There was ample opportunity to lay such a basis if there was one to be laid. That opportunity was not taken. What was done was that Mr. Hill gave notice in the course of the Solicitor General's address in reply to Mr. Hill's opening address that he might wish to apply for leave to cross examine the Deputy Commissioner. That notice was abandoned and at the close of the Solicitor General's address Mr. Hill instead sought leave to call Powell. I refused to grant leave.

The reason for my refusal was that to have granted leave at that very late stage would not have been fair to the respondent. For by acceding to the request, the court would be supporting an attempt by the applicant at that late stage to build a case where there had only been speculation thereby fundamentally altering the nature of the proceedings without affording to the respondent an opportunity to enquire properly into the material used to build the case.

Individually and/or collectively the two basic facts relied on by the applicant, fail, in my opinion, to substantiate the submissions made by Mr. Hill. Nor do I find merit in the comment made by Mr. Hill near the end of his closing address when he said:

> "It is clear that having regard to what the Commissioner said when he gave his ruling at pp 21 and 22 of the transcript he determined whether he could hear the matter on the basis of the punishment that could be meted out. That is an indication of his bias as punishment can only be determined after hearing the matter."

Certainly punishment can only be determined after hearing the matter but that has nothing to do with a determination as to whether a matter should, under standing order 31, be heard by the Commissioner or by another officer and in any event the Commissioner made no determination that he could hear the matter. The statement that he did distorts the facts for as I earlier said there is no suggestion that the eventual determination to proceed by way of disciplinary proceedings was a decision taken by the first respondent.

Standing Order 31 vests in the Deputy Commissioner the authority to decide whether disciplinary proceedings shall be instituted and the power to appoint the Commissioner or a Chief Superintendent to hear the disciplinary charges if such proceedings are instituted. It is a provision designed to avoid the appearance of bias by ensuring that before trial the trial officer is not involved in the details of the case he is to try. Such involvement is the complaint of the second ground of the application, which, in the Notice of Motion is expressed as follows:

> "(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 the facts in the possession of the Police) 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."

The complaint is simply a repeat of the complaint based on the letter of the 5th May 1989. Having therefore decided that the letter sets out the factual situation which justified the continuation of the applicant's suspension and that that decision required no knowledge of the details relating to the alleged commission of the serious criminal offences, I also reject this ground of the application.

In the result I would refuse the order of certiorari sought even on the basis of the application of the test of bias advocated by Mr. Hill and would also refuse the declaration sought. There is a further point in regard to the declaration to which consideration might have been given. I shall not deal with it at length as the point was not taken. It is that on application for prerogative orders and declarations we follow the practice that existed in England before Order 53 released the English practice from its procedural constraints. To use the language of the White Book, we have have not:

> "a uniform flexible and comprehensive code of procedure for the exercise by the High Court of its supervisory jurisdiction....."

Under our practice, it seems to me, the point might be made that a declaration is a parallel method by writ or originating summons to a prerogative order of certiorari for attacking the order or decision of an inferior court or tribunal especially where the time for doing so by way of certiorari has expired, and is not a relief that can be obtained on a notice of motion for an order of certiorari.

In relation to Ackner L. J's test for bias the Solicitor General's position is that realism must temper the application of the

test. Consequently some circumstances may require proof of a greater degree of the appearance of bias than other circumstances for an applicant to succeed. Nevertheless, latitudinarianism, the Solicitor General conceded, must not be taken so far as to require proof of actual bias. I agree. I think Ackner L.J's test allows of realism as it requires consideration of all the relevant facts and because it does so, latitudinarianism is inevitable. The latter point is supported by the judgment of Lord Goddard C.J. in R v Nailsworth Licensing Justices ex parte Bird (1953)2 A.E.R. 652. At p. 654 he said:

> "licensing matters are left by Parliament to justices for the very best of reasons - the justices have local knowledge - and it is impossible to suppose that any justice who sits on a licensing committee knowing that there is an application for a licence or opposition to the renewal of a licence has not got his own view as to the grant or refusal of the licence. The anomaly has often been pointed out that whereas a person interested in a brewery may not sit as a licensing justice, a person who is a very active teetotaller may do so, but it cannot be said, if an application is refused, that the justice necessarily acted improperly because he happened to be a total abstainer. In all these cases it must be a question of degree."

The Solicitor General also invoked the doctrine of necessity when he submitted that if the only proper tribunal is the tribunal accused of bias, it would not be enough for the applicant to establish reasonable suspicion of bias. As authorities for that submission, the Solicitor General relied on the Malaysian case of Cheak v Public Prosecutor (1986) and Auten v Rayner (1958) 3 A.E.R. 566. Cheak's case (ibid), is overburdened with dicta on the doctrine of necessity when it is plain from the judgment that on the facts, the Court was satisfied there was no issue of necessity. In my view Cheak's case (ibid) is not an authority that supports the Solicitor General's submission. Auten's case (ibid) is also, in my view, no authority for that submission. As I understand that case it is a decision on the application of the principle of "Crown Privilege" declared in Duncan v Cammell Laird & Co. (1942) A.C. 624. It is in

that context that the point is made at p. 570 that even supposing that the test of reasonable suspicion of bias was the test to be applied and that the Secretary of State should be regarded as having in some degree acted judicially the Court was:

> ".... quite unable to accept the plaintiff's contention that the Secretary of State's determination must be treated as disqualified from finality on the ground of liability to bias."

The reason being that the decision of the Secretary of State was in essence a policy decision made in conformity with the prescribed procedure of a statute conferring the power of decision on him. Therefore his action was not open to criticism in the Courts. The soundness of the decision may be in question today now that the House of Lords in Conway v Rimmer (1968) 1 A.E.R. 874 has limited the broad interpretation of "Crown Privilege" which Auten's case (ibid) extended; but that is not the present concern.

Agreed But see J & N 20. P.277 De Smith's.

With Cheak's case (ibid) and Auten's case (ibid) out of the way, I can now state my position on the class of case which is the subject of the Solicitor General's submission on the doctrine of necessity. My position is based on the proposition that bias like other principles of natural justice depends on the doctrine of ultra vires. It is that save where statutory provision expressly or by necessary implication excludes all possibility of judicial review, bias applies as a vitiating element to a judicial decision.

This, clearly, is a case that concerns the making of a judicial decision in circumstances where the law pertaining to the tribunal that made the decision neither expressly nor impliedly excludes judicial review. Therefore bias, by which I mean the appearance of bias, is a relevant consideration. However, as I have accepted the Solicitor General's submission that the test of bias is tempered by realism as it takes account of all relevant facts, I turn to consider the facts which, additional to those relied on by Mr. Hill, the Solicitor General considered relevant.

The basic submissions of the Solicitor General that enlarge

on the points he made and to which I referred when earlier I considered the facts on the basis of Mr. Hill's selection of the relevant facts, were that the police force is a self-disciplinary force and is a small force. The officer who may be disciplined and the officer who may constitute the disciplinary tribunal will probably know one another very well. Accordingly, the Solicitor General submitted that the test of bias should make allowance for that factor. He suggested that the law itself makes allowance. For example section 47 of the Police Law gives to the first respondent the power to interdict an officer although the case of the officer may come to him in one way or another for trial by him, or for sentencing by him, or on appeal. It is, therefore, clear, the Solicitor General submitted, that the law recognises that the first respondent may have some prior knowledge of a pending case. Consequently when standing order 31 provides that the Deputy Commissioner must ensure that:

> "Whoever hears the matter will not have prior access to the case papers or statements"

a distinction is being drawn between a tolerable degree of outline knowledge and detailed knowledge of the facts of a case. Apprised of the law's tolerance of a degree of prior knowledge on the part of the first respondent, the reasonable fair minded onlooker would, the Solicitor General submitted, be equally tolerant and not perceive bias. That tolerance would be enlarged, the Solicitor General submitted, by the facts deposed to by the Deputy Commissioner in paragraphs 7 and 8 of his affidavit of the 19th October, 1990 which are as follows:

> "7. That during my service of over sixteen year 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

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".

For paragraph 7 shows that it is not unusual for disciplinary proceedings to arise from essentially criminal allegations, as happened in this instance; whilst paragraph 8 shows that the applicant must be taken to have agreed when he became a member of the police force to be bound by the law and standing orders governing the force. In those circumstances, as Lord Jenkins pointed out in **University of Ceylon v Fernando** (1960) 1 A.E.R. 631 at p 642, the question is not whether the procedure followed matched the meticulous procedure of a court of law but whether it sufficiently complied with the requirements of natural justice. In my opinion the review of the facts which the Solicitor General invited the Court to consider reinforces the finding made on the review of the facts considered by Mr. Hill to be the relevant facts. It goes to show that the evidence adduced in proof of the allegation of bias falls far short of the evidence a reasonable fair minded onlooker would need to form a reasonable suspicion that a fair trial for the applicant was not possible.

Finally, reference must be made to the Solicitor General's submission in the course of his very helpful address, that the applicant should have but had not shown exceptional circumstances as grounds for seeking judicial review in this case where an alternative statutory remedy of appeal to the Governor had been abandoned. The factual foundation for that submission is in paragraphs 5 and 6 of the Deputy Commissioner's affidavit of the 19th October 1990 where he deposes that the applicant first gave notice of appeal to the Governor, then abandoned it. The submission raises a question of law in relation to which the Solicitor General said that:

"Unless this case provides the exceptional circumstances that justify the exercise of the

prerogative remedy these matters should not be entertained."

However, the point was not taken in limine and subsequently after noting that the Judge had a discretion whether to grant leave to apply for an order of certiorari the Solicitor General said, in effect, that he was not laying emphasis on the point as:

"we have always been prepared to deal with the matter on the merits."

As I have decided this case on its merits and as the resolution of the point of law to which I have referred cannot affect the decision I have reached, it seems to me in the circumstances that as it is not being relied upon by the Solicitor General I need do no more than mention it.

In the result the application is dismissed.

Denis E.G. Malone.

Sir Denis Malone

Dated 8th November 1990.

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