1990



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

ON 22ND and 23RD OCTOBER 1990

IND. 280 OF 1990

BETWEEN RICHARD PRENDERGAST APPLICANT

AND THE COMMISSIONER OF POLICE AND
THE ATTORNEY GENERAL RESPONDENT

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

CHIEF JUSTICE'S NOTES

MR HILL: Application is for order quashing decision of Respondent. Leave was given on 12th July 1990 to make this application. The grounds are in the statement filed herewith.

Applicant prays for two orders that:

1. Finding that the applicant was guilty be quashed.
2. Finding that the applicant be dismissed be quashed.

Grounds are at pp 25 - 26 of the Judge's Bundle.

Affidavit of Prendergast at p 6 supports the application

Ex RP2 at p 14 of Bundle.

Ex RP3 at p 16 of Bundle.

3rd and 4th paras at p 6 of the transcript attached.

I submit that this is a simple case as what we are concerned with here is - having regard to the admission of Commissioner that he dealt with the matter whilst his Deputy was away and the unambiguous terms of the letter written he acted without jurisdiction and without natural justice as there was a real likelihood of bias and/or reasonable suspicion. It was a trial that would not be unaffected by prior knowledge of the facts.

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

At time of letter of 5th May 1990 the Commissioner is alluding to the fact that criminal investigations

regarding corruption are almost finalised and therefore given that important circumstance there would have been no impediment or concern to the Commissioner apprising himself of all the relevant facts so as to make an informed decision. In fact standing order 31 would have been totally irrelevant as of the 5th May, 1990. Standing Order 31.

When letter was written having regard to the fact that Commissioner was attending to a serious matter against applicant there was nothing to prevent him from satisfying himself as to the nature of the serious outstanding matter. He had to advise himself as Deputy was not there so Commissioner had to make the decision. P 21 of Judge's bundle. He is not saying that at the time he made his decision he was aware only of the "general outline" of the charge and it is clear from the letter of the 5th May that he is not referring to just the general outline. He made an improvised decision. Deputy Commissioner is the person responsible for disciplinary proceedings. At time of letter of 5th May they were thinking only of dismissal proceedings. Therefore the only inference from the letter is that the Crown knew the details.

Given those circumstances I submit that the test to be applied is this:

> Whether there would be the appearance of bias if the Commissioner who wrote the letter of the 5th May heard and determined the allegations of corruption by way of disciplinary proceedings. The test is not whether the Commissioner was affected by the 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 be possible.

There is no difference between the Commissioner sitting in a disciplinary matter and the justices on a criminal

charge. If in either case prior to the hearing taking place the Justices became aware of other pending charges and in the case of the of the time prior to the hearing he had had to make a determination based on his knowledge of the serious criminal charges pending against the accused which were never to be heard by him as disciplinary charge. The reasonable person would consider the case before the commissioner as stronger than that before the Justices.

There is no need for the requirement of proof of actual bias. It is an objective standard of fairness.

Regina v Liverpool City Justices (1983) 1 W.L.R 119.

We submitted before Commissioner of Police that he should not hear the matter and submitted is was not necessary to prove actual bias - p 5 of transcript. I submit the Commissioner applied the wrong test. This is another basis on which the conclusion can be reached that the orders asked for should be granted.

There is no distinction in principle where Justices have to consider what may be described as an interlocutory application in a criminal proceeding. Those same Justices would not be competent to try. Unfortunate the Deputy was away.

p 121 of the Liverpool case.

p 2 of Ackner's decision.

Commissioner of Police is required by public policy to conduct disciplinary proceedings. That is why there is standing order 31 and the objective - not the subjective - is the basis on which the public policy is founded. The letter of 5th May shows there were circumstances for which a reasonable man would consider the Commissioner of Police would favour one side rather than the other. He had made a determination believing that the ordinary Courts would be trying Prendergast.

One might be tempted to say the word "serious" in

the letter of 5th May makes the position different. Clearly the word "serious" puts the matter beyond argument. In the absence of the word "serious" I would still submit that there might be bias. I do submit these words have compelling force.

Test enunciated by Ackner L.J. in the Liverpool case was adopted in Whittaker and Watler vs Reg Headnote and pp 157.

All we need to do is to focus on the letter. We have not to rely on inside information. We do not need to rely on the views of the Deputy Commissioner.

Opinions are statements of facts therefore to construe the letter otherwise that to give it its ordinary meaning ought not to arise.

If any interpretation is to be placed on the letter one must give the interpretation that it is in keeping with the words that is favourable to the accused. So long as what is said or written is capable of being interpreted we do not embark on metaphysical or semantics to find a way around the difficulty that the interpretation presents.

Given those circumstances, I turn to the second point. Clearly, the combination of the two is decisive of the issue where a reasonable person knows of both sets of circumstances.

During the hearing it turned out the Commissioner had been the subject of one enquiry and the only witness called by the applicant happened to be a witness in that enquiry.

The same requirements of public policy would apply even though it happened at a later stage. It is no difference where a justice who is sitting had been tried for driving under the influence and a witness was a witness against him.

Two questions are

1. Do those two circumstances individually or

collectively give rise to an appearance of bias with the principle enunciated:

2. If so what is to the test to be applied in this case?

Nothing McKan - the Deputy - said is relevant. Paras 5, 6, 7, 8 and 9 of it are irrelevant and inadmissible. That includes para 3 of the memorandum Ex K.M.4.

Para 1 of McKan's is admissible

Para 2 is neither here nor there

Paras 3 and 4 are admitted by Prendergast.

The remainder are irrelevant and inadmissible having regard to the issues that have to be determined.

McKan's supplemental affidavit is so late we are not in a position to deal with para. 2.

Standing Order 31 envisages more than one type of tribunal. Commissioner of Police or Chief Superintendent.

Only Commissioner can order a dismissal.

SOLICITOR GENERAL

Mr. McKan's affidavit.

Paras 5 & 6 refer to correspondence from Bruce Campbell & Co. relevant to Prendergast's right of appeal to the Governor from the tribunal. That right of appeal was not pursued. Last para of my outline submission. There is clear authority which shows that exceptional circumstances should be advanced to justify physical review. That demonstrates the relevance of paras 5 and 6 in McKan's affidavit. We do not take it as a preliminary point as we intend to deal with the matter on the merits. R v Chief Constable Merseyside Police (1986) 1 A.E.R. 257.

As regards paragraphs 7,8 and 9 of McKan's affidavit we say they are relevant even if this Court applied the Topping test as the only relevant test. All the relevant circumstances must be considered when one considers whether a reasonable person hearing all

the relevant circumstances. Paras 7 and 8 address circumstances which apply peculiarly within the context of a disciplined force such as the police responsible for its own internal disciplinary matters.

Would a reasonable person hearing all those things about the police force e.g. that it is a matter of routine that the Commissioner would have to consider matters of suspicion of an officer may come back in the form of disciplinary proceedings would a reasonable person hearing that still have misgivings about that letter to Prendergast as to how it might reflect on subsequent disciplinary proceedings. We must look at the nature and structure of the force before we can say all the circumstances are taken into account.

As regards para 9 of McKan's there are passages in DeSmith 4th ed which suggest that in certain types of organisation an applicant for relief needs to show a substantive appearance of bias or actual bias. At this stage the Court can have enquiry as to the circumstances.

The Supplemental affidavit of McKan goes to the 3rd ground of my learned friend. Here we simply traverse the intention in Prendergast's affidavit that Powell was to have been a witness.

MR. HILL: States he is taking objection to the admissibility of the paragraphs 5, 6, 7, 8 and 9 of McKan's affidavit and supplemental affidavit. The objection, he submits, should be ruled on before the evidence is used in the argument. There is a further objection to the supplemental affidavit as it is too late in time. It was submitted after the trial began. At 10.45 to be precise.

As regards paras 5 and 6 of Mr. McKan's affidavit under the local rules. Clearly with prerogative writs there is no requirements that one has to exhaust statutory remedies by way of appeal before one can take

judicial review. Having regard to the nature of the grounds we contend this is a matter that can only be heard by the Court i.e. the determining of questions before the Court.

SOLICITOR GENERAL:

We will rush no figures in this way. Let me go forward with all of my submissions and then Mr. Hill can reply.

COURT: Let Mr. Hill put his question and then you can reply even though it may mean your going over the same ground more than once.

MR. HILL: Paras 7, 8, and 9

Para 7

Totally irrelevant and therefore inadmissible to whether or not those proceedings had been disposed of fairly. The enquiry is outside the scope of the hearing. Mr. McCan's opinion can be of no assistance. This is not a relevant consideration in the Liverpool case. There they tried to justify what had been done in other cases.

Para 7 can be of no assistance in any type of case

Para 8. The fact that regulations and standing orders are left to the attention of recruits is not a factor that constitutes relevant circumstances.

It is not something that affects the question whether the tribunal is or is not.

The standing orders enshrine the principles laid down in the Liverpool case. They bring the disciplined force into line with the ordinary tribunal.

In the Liverpool case the Court expressly excludes the person with inside knowledge. So the fact that terms and conditions are brought to the attention of all persons cannot be relevant.

Para 9. To admit it is to embark on an enquiry. Behind the scenes as to what the Commissioner may or may not have done. It is totally irrelevant. In fact Ex. K.M.4 relates to matters that took place about 5 months

before the 5th May so it can be of no relevance to this matter. This information cannot affect the issue as to whether or not a reasonable person sitting in court knowledge of the letter would say whether he would not have said there was the appearance of bias.

SOLICITOR:

DeSmith's Chapter 5 p 256.
In exercising the discretion to suspend Prendergast the Crown was following general policy guide lines to the effect that an officer facing serious charges should not be allowed to continue his duties. Commissioner stated as much at the hearing to Mr. Hill. In taking that decision it is being said he had disqualified himself from hearing the disciplinary charge. But the passage at p 256 shows the Commissioner shall not be regarded as disqualifying himself simply because he had taken that decision.

To reinforce my point I refer to para 7 of Mr. McCan's affidavit to show that for many years the Force had taken that position and that would not prevent the due administration.

DeSmith Chap 5 p 256.

I submit the police are within the category. We have to be looking at questions of degrees.

How far is "latitudinarianism? We will be meeting the test of Mr. Hill as to bias but alternatively we shall be saying they should be required to show actual bias given the special circumstances of the Police Force.

Lunch Break.

Relevance of paras 5 and 6 of the affidavit.
The principle in Conolly's case is not one that will be expressed in the rules as these are rules of procedure.

at p 5.

Unless this case provides the exceptional circumstances that justify the exercise of the prerogative remedy

these matters should not be entertained. That is the relevance of para 5 & 6 of the appeal and also 8.

When we come to consider more closely the extent to which the structure of the Police Force will bear on the proceedings and that actual bias need not be shown the fact that the Crown is clearly shown to have had no bias is a relevant factor. This is borne out by the memorandum of the 5th May, 1990. Therefore the memorandum is relevant.

We take all blame for the lateness of the supplemental affidavit. We did not know how to deal with Powell until we elected to enquire of the Deputy Commissioner if any notice had been given to him.

There is no basis for supposing that the Crown at the time he decided to continue with the hearing should have been aware that Powell would be testifying from the affidavit.

Standing Order 33 enables the applicant to notify the officer organising the proceedings of the persons he intends to call as witnesses.

If defence maintains the supplemental is prejudicial we are prepared to withdraw it.

At the disciplinary proceedings it is not suggested that Commissioner should disqualify himself because of Powell. The supplemental did not mention Powell to the Commissioner at the start of the proceedings.

MR. HILL:

Powell. I saw Powell there. I was not aware of Powell's previous testimony until after he had testified.

Where the Rules in Cayman circumscribe what is to be done no reference is had to the jurisprudence elsewhere.

There is no need to read into rules 2 or 3 of the Grand Court applications for mandamus etc. a rule that other courses of action must first be exhausted

The right of appeal is given by section 5 of the Police Law, Under that section one can only deal with the merits. In any event, there is no comparison

between a Council and the Governor before whom there is no appearance. Merely a submission of arguments. In England the Secretary of State does not hear the application.

Cayman did not make exhaustive of other proceduress a requirement of getting certiorari.

198 P 53 r 14. Not 53/1/14 6/

To exhaust other remedies is unnecessary when attacking the judicial making process itself.

In Cayman you may have two parallel or alternate rules.

Para 7. This can have no relevance to an objective assessment of what the law is in relation to the impartiality of the tribunal. It cannot be read as meaning that in event of ..... ..... ..... they happened as in this case. It is an expression f general opinion. It might be that one could get a different opinion. Neither opinion is of significance.

Para. 8.

Without need of para 8 the standing orders would be admissible.

Standing order 31 is directed to correct the mischief at issue in this case.

It destroys any argument based on de Smith at p 256. This is enunciating the principle in the Liverpool case. Three of the passages in de Smith do not provide the authority.

To the extent that 8 does more than exhibit the standing orders is irrelevant.

If Solicitor General can satisfy Court that this case falls outside the ambit of the test enunciated by me and that there is another type of case within which it falls where is the evidence?

Solicitor General is seeking to invite the Court to invent new jurisprudence in saying that having regard to the statutory framework of the disciplined force in the Cayman Islands there is a different type of test.

SOLICITOR GENERAL:

The question whether or not the principles of the Grand Court Rules are different.

At this juncture we are simply deciding admissibility of evidence. The only way in which the argument can be met is by deciding the point of law. The prima facie admissibility of the affidavit is apparent. This is paragraphs 5 and 6.

What is clear in relation of 5 and 6 is that there is a proper legal point to be argued. That point does not arise unless the court knows that an alternative remedy has been pursued. Unless that evidence is before the Court there is no legal point to be agreed.

MR. HILL:

The paragraphs are relevant for the purpose of the legal argument.

23RD OCTOBER 1990

Written ruling delivered.

MR. HILL:

In view of the ruling I wish to make application to cross-examine Mr. McCann.

SOLICITOR GENERAL

I suppose we will deal with that when it arises. (e) of the Outline of Argument deals with actual bias. We have considered cases which show that applicant must show actual bias. We have also considered cases since the Liverpool case and passages in the DeSmith text. The view we now take is that "latitudinarianism" may be taken too far to urge the Court to say that the tribunal in an enquiry of this nature can be or ought to be disqualified only if actual bias is shown. Our concern is because DeSmith's 4th ed was written before Liverpool's case was decided. There may be glosses on those passages had the more recent cases been considered. Nevertheless that is not the same thing as

saying that the Court ought not to examine the nature of the tribunal, its functions and the circumstances ..... it operation in deciding how the modern test should apply to the tribunal. We will submit it is a matter of degree and that the test of reasonable suspicion of bias must be tempered with realism. That question of degree will be determined having regard to the nature of the tribunal and the nature of its functions.

In the alternative we intend to argue that in any event the structure of the Police Law and regulations is such that in a case of this nature the Commissioner was the only suitable tribunal. Although we do not accept there was reasonable suspicion of bias in any event those issues were superseded by the need that the case be tried and brought to a proper conclusion. I would not go as far as to say there should be a trial even though there was actual bias.

On the basis that the test is that of the Liverpool case. Liverpool case and Watler case are easily distinguishable from this case. In this case the complaint is the allegation that the tribunal might have had some prior knowledge of the facts of this case. That is a very different situation from Liverpool and Watler.

Often the Magistrate or Judge who hears an application for bail has to be the tribunal at the end of the day. Yet there can be no question that the application has been dealt with as a matter of obligation. Of course there is a difference between a tribunal and the Commissioner of Police but what must also be recognised is that parliament must have assumed that Commissioner of Police and his officers are able to bring to bear a proper level of judicial impartiality when Parliament provided that the police are to be responsible for their own disciplinary proceedings. So it would therefore be wrong for a reasonable onlooker to assume that the basic level of impartiality could not be

brought to bear in this case. By basic knowledge I mean some prior knowledge of the obligation but still being able to be impartial. All that has been shown in this case having regard to the letter of the 5th May is that some months prior to the hearing the Commissioner had been aware there was serious allegations of corruption which were not proceeded with as criminal charges but out of which disciplinary charges eventually arose and in respect of which he had taken an administrative decision at the time of the allegations of criminal conduct to interdict the applicant.

The reasonable onlooker must be someone with knowledge of all the relevant circumstances. Those circumstances include nature and structure of police force. How it normally conducts its business of discipline. What the law requires to be done in relation to that business. Otherwise the reasonable onlooker might believe the police conduct their disciplinary business in the same way that a Court conducts a trial. For example in Liverpool should not have known of the criminal antecedents whereas in a small force like the Cayman force it is often inevitable the tribunal will know the antecedents.

When this matter first came before the Grand Court on an application to have an attorney for the applicant at the hearing of the disciplinary charge it was then clear that the Commissioner would be the Tribunal. the letter of the 5th May 1990 was on file as part of the pleadings. The point I make is that had the prospect of the matter being tried by the Commissioner been given to such obvious misgiving that a fair hearing was not possible one would expect that objection would have been taken. that point was not, however, raised.

Cites p 1 of Schofield's judgment.

MR. HILL: I agree that no ruling was sought for the Court on the basis of the letter of the 5th of May and that Commissioner would be the tribunal but we did indicate

to the Court that if given legal representation we would take that point before the tribunal.

SOLICITOR GENERAL:

I still think it is fair to say that were the matter so obvious a cause for concern one would have expected relief to have been sought at that time.

Relevant considerations to determine what a reasonable person might think.

Section 46 of the Police Law.

That section reflects on the nature of the decision taken by the Commissioner when he decided to interdict. It confirms that interdiction does not change the status of the officer.

What sort of assessment out of the facts would the Commissioner have to embark on in taking that decision. As he is not making a final decision he has not to consider the details of the obligation.

Section 47 of the Police Law.

Shows to the reasonable person that in cases such as this it is the Commissioner who interdicts. Therefore it is apparent that the Commissioner may have some knowledge of the allegation. There is a difference between prior knowledge of the allegation and having access to the case papers as provided in Standing Order 31.

Provisions dealing with disciplinary proceedings.

Sec. 51 of the Police Law.

The only officer who can impose a penalty may discharge or dismiss is the Commissioner. In any such case the matter must be referred to the Commissioner in one form or another i.e. either he hears it or someone else has heard it and refers it to him.

MR. HILL:

I concede that the Commissioner can impose no higher penalty than the tribunal which hears the charge.

SOLICITOR GENERAL:

Assessment of the degree of seriousness of a case is determined not by the Commissioner but by his deputy

- Standing Order 31.

We submit that in this case the commissioner was the only proper tribunal because of the seriousness of the case.

To the onlooker the letter of the 5th May would be merely a matter of routine having regard to his knowledge of the structure of the force.

Sec. 52 deals with the review of cases by the Commissioner where the trial is by another officer. In view of Hill's concession it has not to be considered in detail.

Section 53. deals with appeals. Mentioned at this stage in passing Sec. 54(1).

On appeal to the Commissioner or the Governor the matter can be dealt with as one of rehearing. It is not limited to representation as stated by Hill. That too I mention only in passing..

McCan's affidavit. Para 7. Confirms that there is nothing exceptional about this case or the procedure that applies to this case. That is a relevant factor for an onlooker to consider.

MR. HILL: We don't accept that to be the meaning of paragraph 7.

SOLICITOR GENERAL:

It indicates there have been several cases in the past where interdiction took place because the allegation was criminal and subsequently the case was dealt with by disciplinary proceedings. That fact should give no cause for alarm. Without this paragraph an onlooker might wonder whether what was done in this case was unusual.

Maynard v Osborn 1977 1 QB 240 at p 243. Shows that McCan could give the opinion he gave.

Para 8 of McCan's affidavit.

Its relevance is that it addresses the question of what is reasonable.

The applicant should have been aware not only of Standing Order 31 but of all the other provisions that bear on discipline. The applicant is entitled to

insist that the provisions, including 31, are applied fairly but applicant's expectation must be tempered with realism.

To say that Commissioner did not observe 31 because he had already exercised his functions under 47 is not to approach the problem with realism as it is not realistic in all the circumstances to conclude that Commissioner who has a statutory duty to perform would be automatically disqualified by performing that duty. That is how the force is structured and how the regulations are structured and is to be accepted by anyone who joins the force.

University of Cylon v Fernando (1960) 1 A.E.R. 631 at p 639 and 642.

In the instant case the law itself contemplates interdiction and trial by the Commissioner.

Maynard v Osmond at p 258. Shows the importance of taking account of the nature of the tribunal. Makes the point that the police force is responsible for its own internal discipline. It is not like the Liverpool case. Different consideration apply. That is not to say that the law and standing orders may not be strictly complied with. On the contrary it is all the more important that the regulation be properly followed.

In light of the last sentence of Standing Order 31, Hill urges a certain interpretation of the letter of 5th May. We say that nothing in that letter can be taken as saying that the Commissioner had prior access to the case papers or statements. The letter is a simple statement of fact, that there was on the 5th May a serious criminal matter outstanding. That statement of fact necessitated nothing more than an administrative assessment and should not be construed as necessitating anything more.

Standing Order 33 describes the case papers. In particular 33 (b), 33 (c), 33 (d). This shows that there is a distinction between case papers and other

documents referred to in the letter of the 5th May. There is in this instance nothing to suggest the case papers were seen by the Commissioner prior to the disciplinary proceedings. It is unreasonable to assume that because Commissioner knew there were outstanding criminal charges that he had had sight of the case papers. No reasonable onlooker knowing the circumstances could have felt a reasonable suspicion of bias based simply on the letter of the 5th May.

Reasonable onlooker has not to be a lawyer but he must know all the relevant circumstances. Whilst he is not to be seen as someone with inside knowledge of the force at the same time he is not to be seen as someone ignorant of the structure of the force.

Da Smith p 263 1st paragraph.

The passage is talking about a reasonable man who is not ignorant of the material facts.

The passage at top of 264 is cited in the Liverpool case so that case must be taken as approving De Smith.

To what extent the reasonable man is reasonably informed will depend on the circumstances.

In this case the reasonable man cannot be an outsider with no knowledge of how the force is structured. If he were ignorant of these matters what yardstick would he use to say there may be a miscarriage here.

The foregoing sums up our response to the Liverpool case and where it has been met in this case.

Para 9.

We will not any longer rely on para 9 because of the further research we have made into actual bias.

DaSmith's passage at p 256 to the extent that it says we must look at the structure of the organisation we rely upon. We are not saying that in this case:

"It may be right to require evidence of actual bias rather than a mere likelihood of bias

before a decision is set aside by the Court".

We say the rules must be tempered with realism and the test of Liverpool must be applied in the particular circumstances and nature of the organisation.

P. 263. Weinberger v Inglis (1919) AC 606.

DeSmith p 269 Reg v Barnes (1962) Q.B. 167

DeSmith p 271 Reg v Nailsworth (1953)

2 A.E.R. 652 (Cases of actual bias p 655 & 654.

Lunch break

R v Camborne Justices (1954) 2 A.E.R. 850. Clear dicta to the effect that the party complaining must be taken to have made all reasonable inquiries to inform himself of the circumstances before he can be heard to say that there is a real likelihood of bias or reasonable suspicion of bias.

Complaint is at p 851 B.

Case shows that the narrow view of the letter of 5th May taken by Hill is an improper view and any person whether the applicant himself or an onlooker who would care to look at all the circumstances should not take such a narrow view. All the relevant circumstances must be considered.

R v Bristol Crown Court (1989) 1 W.L.R p 870. It says the Liverpool test must be applied to licensing justices. It shows the test to be reasonable suspicion of lies.

Pittiman v Trinidad & Tobago (1986) L.R.C. (Const) 580 at p 591.

GROUND 3 Unreasonable to suspect the Commissioner was biased against the applicant because one of the applicant's witnesses had testified in an enquiry held in relation to matters which may have been relevant to allegations made of the Commissioners conduct. The ground is spacious and speculative.

Affidavit of Prendergast at para 6. No reasonable enquiry has been made into what was said by Powell and how it applied to the Commissioner of Police. No

explanation has been given as to how or why it might affect the Commissioner. It is speculative and offers no basis on which a reasonable person could decide whether or not it gives rise to bias. Applicant could by reasonable enquiry have brought matter to the court for the court to assess. It had not done so. Impression of bias should not be formed on speculation. It must be reasonable.

Affidavit para 7.

Rules provide that applicant can get the organiser to ensure the attendance of his witnesses. This does not say that that was done.

No reasonable grounds from Commissioner to hold anything against Powell or that he saw him or seeing him knew he was going to give evidence.

Further, was Powell's testimony pivotal as applicant claims?

The essential question at the enquiry were

(1) Did applicant collect the blood samples?

(2) Did applicant record them?

(3) Did applicant later destroy the samples?

Applicant admits he was approached by a third person on Wiederander's behalf to help Wiederander and he assumed money was involved. The result of the analysis had in fact been collected from the Government Laboratory results recorded was a much less figure than what was found. 128 found. 28 recorded. Subsequently applicant admitted he collected he the results on 8th September. That was the day the analyst's report was issued from the Laboratory. At the hearing he mentioned he did not collect the result on the 8th but had collected them for the first time on the 9th from his cubby hole at the station.

The certificate in question disappeared i.e. the one in which the results had been altered.

Powell testified that on 9th September he saw applicant write entries in the Register but the only person to whom he could swear the entry related was

Robert High - p. 178.

High and Weiderander were involved in an accident and it was that accident which led to an investigation. Powell admits he saw Prendergast write two entries in the Register. He did not say what results were written. He did not say he had seen the certificate nor did he say from where Prendergast had got the samples. Basically what he said was that he saw Prendergast make two entries in the register and one of the parties was Robert High.

Powell said the two entries were made at the same time whilst Bodden said at no time did he see only one entry.

At the best Powell's testimony was not pivotal to the issues to be determined.

The Court is being asked to speculate.

No objection was taken to the Commissioner hearing the matter on the basis that Powell had earlier testified in another matter. Applicant and Powell would have known so it seems they, at the time, did not think it significant.

The reasonable observer would not have that kind of inside knowledge. So if we are going to take account of knowledge of that kind then there should be a full examination. Otherwise the observer the and Court would be left to speculate.

Even if reasonable suspicion of bias has been established, the only proper tribunal contemplated by the law in the final analysis for a case involving serious allegations of this nature would be the Commissioner himself.

Section 55 of the Police Law allows Commissioner to impose a punishment he would not impose on appeal where the offender is referred to him for sentence. for either situation Commissioner remains a tribunal in the structure of the force. Even where it was to him only for sentence he is still the appellate tribunal under section 53. Inevitably the Commissioner is involved

where the allegation is of a serious nature. Only if the Commissioner is the tribunal is the appeal directed to the Governor.

So the Commissioner, ex necessitate, is the only proper tribunal.

Sheak v PP (1986) C.R.C ( C )

DeSmith p 276

At some stage Commissioner would have to consider the matter. On appeal when he might be asked to treat it as a re-hearing. The matter would be referred to him for sentence. It is in that context that Standing Order 31 is formulated. He would have to deal with the matter notwithstanding he had suspended the official in another context. Therefore any reasonable misgiving that there had not been a fair hearing would have to be put aside.

24th October, 1990

SOLICITOR GENERAL continues:

De Smith p 277

Could Commissioner have disqualified himself and appointed a subordinate to hear the case? Two discretions.

1. The size of the Cayman Force made it impossible that any senior officer would not have had prior knowledge of the allegations against the applicant.
2. If one accepts that it has not been established that the actual case papers were seen by the Commissioner he would be in precisely the same position as any other officer.
3. A case of this nature given the strictness of the law is not contemplated as being within the category of cases which would be ordinarily delegated for trial to an officer subordinate to the Commissioner.

Sec. 55 of the Police Law

This provision contemplates cases that on the

face of them could properly be within the provision of a Senior Officer but during course of inquiry itself it becomes apparent that the allegations were so serious they should be referred to the Commissioner for sentence. That provision is not intended to apply to cases such as this one where from the outset, on the face of the case is one that might require the sort of sanctions only the Commissioner can impose. So by necessary implication it would not have been possible in the circumstances to constitute a different tribunal unaffected by interest any more so than the Commissioner.

DeSmith p 277

Auten v Rayner (1958) 1 W.L.R. 1300 at p 568. Shows that there is an objective way of approaching this matter. Is it reasonable to suppose that Commissioner would have a bias against a junior officer who comes before him? Why should that be supposed?

Continuing at p 568.

Sheak v P.P. (1986)L.R.C. (Const). Held Court was a court of necessity. Ruby's shooting of Oswald. John's trial in Dominica. East End murder case.

Governor at p 136 is not the position here.

Our position on actual bias is that we are not submitting that actual bias in this case needed to have been shown but in light of the authorities and given the nature of the organising involved it could be that in certain circumstances nothing less than actual bias would amount to a disqualification.

DeSmith p 263 footnote 12 refers to Camborne Justices ex parte Pierre (1954) 2 A.E.R. 850 Supports McCann's observation in his affidavit as to the usual procedure. It touches also on ground 3 as we say that ground is so proved that it is speculative.

The principle in Calvely

53/1-14/6

Rule 3 of the Grand Court rules touches this question. It is not silent on the question entirely. It

contemplates the Judge has a discretion having regard to whether or not there is other equivalent of recourse. But I make no big point of this as we have always been prepared to deal with the matter on the merits.

We submit the decision taken by the Commissioner not to disqualify himself was one based on a proper consideration of the relevant principles albeit these principles had been briefly canvassed on both sides before him. It was a proper exercise of his discretion.

Chief Constable of N. Wales v Evans (1982) 3 A.E.R. 141.

It would be inappropriate to grant an order in terms of the declaration sought in para 1 of the notice of motion. That is an order for quashing the Commissioner's decision. The effect of such an order would be that the decision would be a nullity resulting in an automatic reversion to the status quo ante.

For the reasons set out in the Evans' case that would be an undesirable state of affairs as a matter of public policy as regards the administration of the police force. A proper remedy in these circumstances is damages.

MR HILL in reply:

We seek leave to call Constable Powell.

SOLICITOR GENERAL: We object. It can only be for the purpose of making further enquiries which should have been made in the first place to ground the 3rd ground of the application. The test of reasonable suspicion of bias is an objective test. It is what a reasonable person observed in the proceedings on the date when they were held would have thought such person being reasonably apprised of all the relevant circumstances.

So far on the pleadings the Court has been afforded only a little glimpse into those circumstances. We have submitted that would have been insufficient. We do not see how that can be at this stage rectified.

By seeking to bring in that which the reasonable

observer at the time may or may not have been able to contemplate. The ground it should not have given leave in the first place.

MR HILL:

Note 53/1 - 14/37

It is simply a question of whether the nature of our case is not being changed. He is called simply to indicate the nature of the evidence he gave at the enquiry into the conduct of the Commissioner. To put the full information before the Court. So this Court can assess whether or not having regard to those facts the reasonable man knowing of those facts would consider there was bias. In making this application I do not subscribe to the view that what we have heard is not sufficient.

SOLICITOR GENERAL:

What is alleged is that because of the evidence Powell might give, a reasonable person might suspect the Commissioner had biased disbelief of Powell so that bias came in when Commissioner sat in judgment on Prendergast. Would have at this stage to determine whether the Commissioner took any issue with Powell. For if there was no contest why would there be any reason for a grudge? If the testimony was not pivotal to the outcome why would there be a grudge? We accept that actual bias has not be to shown but before any reasonable onlooker could assess reasonable suspicion of bias those would be relevant consideration. The responsibility was on the applicant to make reasonable inquiries even before using the evidence. The fact they are making this application was to show how unsafe the ground was at this late stage. The are now seeking to bolster the ground and that would fundamentally alter the nature of the proceedings and be unfair to the respondent.

COURT

Leave is refused. Reasons to be given later.

MR. HILL:

This case is not that proof of actual motive on the part of the Commissioner.

It is not about the tribunal being the only tribunal by necessity competent to hear the disciplinary charge.

It is not about an enquiry on the part of anyone relating to the inner workings of the police force, the interpretation of the Police Law, its regulations and/or standing orders.

It is not asking for an order of mandamus. Merely seeks to quash Commissioner's order.

I submit the applicant has established his complaint that the tribunal was affected by bias for two reasons viz:

I. letter of the 5th May 1989 when reasonably interpreted by reference to the words would clearly indicate the Commissioner had more than a general outline of the charge. That is established by:

1. Wording of the letter in particular the case of the word "serious" in the 1st paragraph and the 2nd para the words that the "papers relevant to this case are almost finalised".
2. Commissioner's statement at p 21 where he says "I was left with a decision" shows that at that time he must have done what had to be done to make that decision.
3. The third paragraph of memo of 27th June 1989 could not have been written had not the Commissioner gone through the file on this case.
4. Any constraint the Commissioner might have had or felt in June does not operate in May for the reason that as the Crown points out in May the investigation was proceeding along lines of criminal charges. So given that

circumstance and the absence of the Deputy he resumed the final authority and decided not to proceed alone the line of disciplinary proceedings.

5. No affidavit from Commissioner dealing with what happened in May.

II. Powell did testify at the earlier inquiry concerning the Commissioner having regard to the test of reasonable suspicion of bias all we have to show is that those two circumstances existed and that a reasonable person knowing those specific circumstances would be entitled to conclude that neither applicant nor his witness could receive impartial consideration by the Commissioner.

The test in Liverpool as compared by Whittaker and opposed by the Bristol Crown Court case is the applicable test. The third page in the Judgment of Ackner in Liverpool when he deals with the reasonable man.

It is clear that having regard to what Commissioner said when he gave his ruling at p 21 of Judge's bundle and at top of p 22 in 2nn para, he determined whether he could have the matter on the basis of the punishment that could be meted out. It is an indication of bias as punishment can only be determined after hearing the matter. Further Sec. 55 permits an officer other than Commissioner to hear disciplinary proceedings and if during the course of these proceedings he finds a serious offence proved he can refer it to the Commissioner. There is the presumption of innocence. The Cayman law permits the establishment of a different tribunal. Sec. 48 shows what offences are serious offences. What I am saying is that the mere fact there was corruption does not make it an offence only the

Commissioner can try. I adopt from Liverpool the penultimate paragraph of Ackner that administrative convenience is not to be given greater priority than justice. Court should reject the submission that Commissioner was the only tribunal competent to try the case. In Bristol Crown Justice Savage adopted Ackner's observation in Liverpool.

Clearly if we were right as to 1 and 2, Court is entitled to come to the view there was an improper exercise of the discretion.

Maynard v Osbourne. Does not dilute the standard of fairness required for disrupted process. Trinidad & Tobago case fits that beyond doubt.

We say that Standing order 31 governs the Commissioner's conduct of disciplinary proceedings. He was bound to observe. Not only the letter but the spirit of the standing order.

This case triggers the applicability of standing order 31. The licensing cases are governed by the Liverpool case (See the Bristol Crown Court case). The passage is at p 878 and sub para 2 of the headnote Wood L.J. p 882-883.

Calveley Principle

The rule of Cayman is not as in England.

O 53 r 4 (1)

p 792 Summary of charges made (3)

Our rule contemplates that the applicant is permitted by rule to bypass the appeal procedure without having to show exceptional circumstances. Even as the exercise of the discretion given by rule 3 the Courts in the Cayman in exercise of this desecration would permit judicial review as an alternative to appeal where the competence of the tribunal is in question. It is not mandatory.

The remedy.

Evans' case.

Attridge v Protection Board. To be found in the Caymanian Reports.

By quashing the order the status quo ante would apply to the applicant but the Commissioner would be at liberty to deal with this matter. It would be mutually inconsistent to say he did not have a proper trial but I am awarding damages.

The fact that the letter was used in the application before Schofield implies nothing.

The significance of Powell giving evidence did not arise until after the hearing. Powell is not a lawyer.

Before Schofield we were concerned with legal representation.

Judgment reserved.