THE HIGH COURT

1983 No. 437 S.S.

(STATE SIDE)

496

BETWEEN/

JOHN GRAHAM

Prosecutor

-and-

THE RACING BOARD

Respondent

Judgement delivered by O'Hanlon J., the 22nd November, 1983.

The Prosecutor is a Bookmaker, with an address at Youghal, Co. Cork. On the 4th May, 1983, he appeared before the Racing Board to answer a complaint that at Clonmel Race Course on the 9th March, 1983, he incorrectly entered, or did not enter at all, in his "Book of Standard Sheets" a certain cash bet which had been placed with him at the said race meeting.

Following the hearing of the said complaint the Chairman of the Board announced that they found the Prosecutor guilty of the charge presented against him and that his course-betting permit would be suspended for a period of five years.

The Prosecutor then applied to the High Court for a Conditional Order of Certiorari to quash the said Order of the Racing Board, and on the 25th July, 1983, McMahon J. granted a Conditional Order on the following

three grounds:-

(1) That the Respondent failed to ensure that each Member of the Board was present and listening to the evidence during the entire of the hearing:

(2) That the Respondent caused or permitted a Member of the Board to hand a private note to the Prosecuting Officer in the course of the hearing: and,

(3) That the Respondent, having arrived at a decision as to the guilt of the Prosecutor, proceeded to impose the said penalty without affording the Prosecutor any opportunity to make representations or to call evidence in mitigation of penalty.

An affidavit, sworn by Gerard O'Connor, Assistant Manager of the Racing Board, was filed on behalf of the Respondent for the purpose of showing cause why the said Conditional Order should not be made absolute, and the Prosecutor now moves the Court to make the Order absolute notwithstanding cause shown.

With regard to the first of the three grounds upon which the Conditional Order was granted, the Prosecutor's Solicitor, who represented the Prosecutor at the hearing before the Racing Board, deposed to the fact that a member of the Board was called to the telephone during the hearing

and conducted a conversation while the cross-examination of a witness was in progress. He further claimed that another member of the Board had been called to the telephone at a later stage in the proceedings.

Gerard O'Connor, by way of reply, deposed that one member of the Board had been delayed at the telephone for a period of about two minutes during the hearing, and that on the second occasion a short conversation took place with a person who, he believed, was the Secretary, and not a member, of the Board.

Having regard to this evidence, and to the fact that the Prosecutor's Solicitor did not take exception to the Board member going to the telephone, or suspend his cross-examination while the telephone conversation was in progress, this incident does not appear to me to be capable of vitiating the proceedings or undermining the validity of the Order subsequently made by the Board.

With regard to the allegation that a note was passed, during the hearing, from a member of the Board, to the person who was presenting the case against the Prosecutor, it is admitted in the affidavit of Gerard O'Connor that this incident took place, and the original note has been exhibited in his affidavit. It suggested to the Prosecuting Officer a question he should put to the Prosecutor or to witnesses called on his

behalf. Mr. Liston, for the Prosecutor in the present proceedings before the High Court, argued that the contents of the note were irrelevant; that justice must not only be done but must be seen to be done, and that the exchange of private communications between a member of the adjudicating Board and the officer presenting the case against an accused party was a departure from this principle of a character which paralleled that condemned by the Supreme Court in The State (Hegarty) v. Winters, (1956) IR 320 and by the King's Bench Division in R. v. Sussex JJ, Ex p. McCarthy, (1924) 1 KB 256.

In the latter case Lord Hewart CJ made the rather sweeping pronouncement that, "Nothing is to be done which creates even a suspicion that there has been an improper interference with the course of justice." However, he followed up that statement with the following qualification:-

> "In these circumstances I am satisfied that the conviction must be quashed unless it can be shown that the applicant or his solicitor was aware of the point that might be taken, refrained from taking it, and took his chance of an acquittal on the facts, and then, on a conviction being recorded, decided to take the point. On the facts I am satisfied that there has been no waiver of the irregularity and that being so the rule must be made absolute and the conviction quashed."

It may also be noted that the Queen's Bench Division in the later case of R. v. Camborne Justices, Ex parte Pearce, (1954) 2 AER 850, analysed a large number of cases where the allegation of bias or apparent bias had been made - including the Sussex Justices case, and preferred

the "real likelihood of bias" test prescribed by Blackburn J. in R. v. Rand LR 1 QB 233 to the "suspicion" test which might be derived from the judgment of Lord Hewart C.J.

The Court added the following warning:

> "The frequency with which allegations of bias have come before the courts in recent times seems to indicate that the reminder of Lord Hewart, CJ. in R. v. Sussex JJ. that it is "of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done" - is being urged as a warrant for quashing convictions or invalidating orders on quite unsubstantial grounds and, indeed, in some cases, on the flimsiest pretexts of bias. While indorsing and fully maintaining the integrity of the principle reasserted by Lord Hewart, CJ. this court feels that the continued citation of it in cases to which it is not applicable may lead to the erroneous impression that it is more important that justice should appear to be done than that it should in fact be done. In the present case this court is of the opinion that there was no real likelihood of bias and it was for this reason that the court dismissed the application ..."

This decision, although reported before The State (Hegarty) v. Winters was, in fact, delivered over one year later than the judgment of the Supreme Court in the latter case, in the course of which Maguire CJ said (at p.336): "The action of the arbitrator in going upon the lands the subject-matter of the arbitration might, in the view of this Court, reasonably give rise in the mind of an unprejudiced onlooker to the suspicion that justice was not being done. The fundamental rule that it is necessary not alone that justice be done, but that it must seem to be done was broken and in our opinion the award cannot be allowed to stand."

I do not consider that the passing of a written note by a member of

the Board to the prosecuting officer, openly and in the presence of the Prosecutor and his solicitor, amounted to a breach of the fundamental rule referred to by the Chief Justice in that case, nor do I consider that the contents of the note, when disclosed, gave any indication of bias such as would vitiate the findings of the Board. I am also of opinion that if the Prosecutor wished to take exception to the procedure which was being followed, he or his solicitor should have done so there and then, while the hearing before the Board was taking place, instead of standing by and seeking relief by way of certiorari at a later stage when the Board had made its findings.

This leaves for consideration the third ground upon which the Conditional Order was granted - the failure to give an opportunity to the Prosecutor's Solicitor to make a plea in mitigation after the Prosecutor had been found guilty of the charge brought against him. The replying affidavit of Gerard O'Connor is silent in relation to this allegation. The affidavit of Frank Ward, Solicitor for the Prosecutor, does not suggest that he made any active representations to the Board and was refused an audience by them. It suggests, rather, that he was taken aback by the action of the Chairman of the Board in resuming the hearing after a short adjournment; rejecting the application to dismiss the complaint brought

against the Prosecutor, and proceeding without further ado to announce the penalty which was to be imposed on the Prosecutor. Mr. Ward appears to have refrained from raising any objection to the procedure followed, or from asserting and pressing his right to be heard on his client's behalf on the subject of punishment.

With a good deal of hesitation I have come to the conclusion that there was an inadvertent departure on the part of the Board at this stage from the fair procedures they were bound to observe in adjudicating on the charge brought against the Prosecutor, and in determining the crucial matter of the penalty which should be imposed when the charge was brought home to him. Addressing the Board on the subject of penalty was a matter which the Prosecutor's legal representative would naturally wish to leave unsaid until a finding of guilt had been made against his client, and I am of opinion that there was an onus on the Board to enquire as to whether any further submissions were sought to be made in mitigation of penalty once they had decided the issue of guilt of innocence. The livelihood of the Prosecutor was at stake at that stage and the subject of the penalty appropriate to the offence had not been discussed at any stage throughout the hearing. The existence of the right of appeal to an Appeal Board, which is conferred by the amending Act of 1975, is not a bar to proceedings

by way of certiorari, and I conclude that the Conditionnal Order should be made absolute, having regard to the third ground upon which the Conditional Order was granted, and to that ground only.

R. J. O'Hanlon.

22nd November, 1983.