

10/1962

1.

IN THE PRIVY COUNCIL

No. 9 of 1961.

ON APPEAL
FROM THE COURT OF APPEAL OF KUALA LUMPUR
SUPREME COURT OF THE FEDERATION OF MALAYA

UNIVERSITY OF LONDON
INSTITUTE OF ADVANCED
LEGAL STUDIES
30 MAR 1963
25 RUSSELL SQUARE
LONDON, W.C.1.

B E T W E E N :

B. SURINDER SINGH KANDA
(Plaintiff) Appellant

- and -

THE GOVERNMENT OF THE
FEDERATION OF MALAYA
(Defendants) Respondents

10 68222

CASE FOR THE APPELLANT

Record

1. This is an Appeal by leave of the Court of Appeal at Kuala Lumpur of the Supreme Court of the Federation of Malaya from a Judgment of the said Court of Appeal dated the 9th day of December, 1960, in Civil Appeal No. 30 of 1960. Page 189

20 2. By the said Judgment the Court of Appeal held that the Appellant was not entitled to the relief granted to him by Order of the Trial Judge, Rigby, J., dated the 24th day of March, 1960, namely :- Page 120

30 (i) A declaration that the dismissal of the Appellant from the Federation of Malaya Police Force purported to be effected by one W.L.R. Carbonell, the Commissioner of Police of the Federation of Malaya, on the 7th day of July, 1958, was void inoperative and of no effect, and that he was still a member of the said Force. Page 120
line 23

(ii) That the Respondents should pay to the Appellant all arrears of pay, allowances and other emoluments due and owing to him as an Inspector in the said Force from the date of the said purported dismissal. Page 120
line 30

(iii) That the Senior Assistant Registrar of

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line 4

the High Court at Penang should take an account of what was due to the Appellant in respect of his salary and emoluments as from the 7th day of July, 1958, to the date of payment.

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line 10

(iv) That the Respondent should pay to the Appellant the sum found due to the Appellant by the Senior Assistant Registrar.

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line 14

(v) That the costs be taxed and paid by the Respondents to the Appellant.

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3. The questions involved in the Appeal are :-

(1) Whether the powers vested in the Commissioner of Police by virtue of the Police Ordinance, 1952, to appoint and dismiss superior Police officers ceased to be vested in him and became vested in the Police Service Commission from and after the 31st day of August, 1957, (Merdeka Day) by reason of the provisions of the Constitution of the Federation of Malaya.

(2) Whether the disciplinary proceedings against the Appellant, which were held before Mr. H.W. Strathairn between the 16th day of April and the 10th day of May, 1958, were conducted contrary to the provisions of Article 135 (2) of the Constitution (which provides that no member of, inter alia, the Police Service shall be dismissed without being given a reasonable opportunity of being heard).

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4. The Appellant was at all material times a superior Police Officer, holding the substantive rank of Inspector, in the Federation of Malaya Police Force.

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5. In September, 1957, two men were tried in the Supreme Court, Penang, on Charges involving possession of forged lottery tickets, contrary to Section 474 of the Penal Code, and were acquitted. At the time of the Police investigations which led to the arrest of the said two men, the Appellant was, among other things, Officer in charge of the Special Crime Branch, and during the course of the said investigations became the Officer in charge thereof.

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6. As a result of the failure of the Prosecution to secure a conviction, a Board of Inquiry was

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convened by order of the then Commissioner of Police. The said Board which was presided over by Mr. D.W. Yates (who was then Acting Senior Assistant Commissioner, C.I.D. Headquarters, Kuala Lumpur) sat for a number of days during December, 1957, and January, 1958, and recorded the unsworn statements of eighteen Witnesses, including the Appellant.

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10 7. In its findings, the Board of Inquiry stated that they were unanimously of the opinion that the Appellant was the "villain of the piece", and that he had not only suborned Police Witnesses with the motive of simplifying and cutting short the evidence, but had suborned two Police informers so as dishonestly to strengthen the case against both Accused in order to ensure a conviction in Court. The said findings included the following statement :-

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line 8

20 "The Board were forced to the conclusion that Inspector Kanda is a very ambitious and "a thoroughly unscrupulous Officer, who is "prepared to go to any lengths, including the "fabrication of false evidence, to add to his "reputation as a successful investigator. "The Board could not help wondering how many "of his previous successful cases had been "achieved by similar methods".

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line 27

30 8. As a result of the said findings of the said Board, disciplinary Charges were preferred against the Appellant, and by a letter dated the 12th day of March, 1958, the said Mr. D.W. Yates appointed as Adjudicating Officer Mr. H.W. Strathairn, whose first experience this was of hearing a disciplinary Charge against a superior Police Officer. Enclosed with the said letter were specimen Charges, which it was suggested should be preferred against the Appellant, and also a copy of the said findings of the said Board. The Charges, in fact, preferred against the Appellant (the first two of which were alternative Charges, full particulars whereof are set out in paragraph four of the Statement of Claim) were:-

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Pages 228-9

Page 4

- 40 (i) That he failed to disclose evidence which to his knowledge could be given for the two Accused, an offence against Regulation 2 (a) 44 of the Police Regulations, 1952, and punishable under Section 45 (1) of the Police Ordinance, 1952.

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Page 5

(ii) That he submitted a false report to the O.C.C.I., Penang, and was thereby guilty of conduct to the prejudice of good order and discipline, an offence against Regulation 2 (a) 65 of the Police Regulations, 1952, and punishable under Section 45 (1) of the Police Ordinance, 1952.

(iii) That he disobeyed a lawful command, an offence against Regulation 2 (a) 8 of the Police Regulations, 1952, and punishable under Section 45 (1) of the Police Ordinance, 1952. 10

Charge (iii) was preferred immediately before the hearing.

9. The said Charges against the Appellant were heard by the said Adjudicating Officer between the 16th day of April and the 10th day of May, 1958, and on the latter date the said Adjudicating Officer informed the Appellant that the "original Charge" was proved and that the Appellant was accordingly found guilty. The Adjudicating Officer asked the Appellant if he had anything to say, but did not expressly inform the Appellant that he proposed to recommend his dismissal. 20

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10. On the 23rd day of May, 1958, the said Adjudicating Officer forwarded the records of the said proceedings to the Commissioner of Police, together with a recommendation of dismissal on "the original Charge" and an award of a severe reprimand in respect of the Charge set forth in paragraph 8 (iii) hereof. 30

11. As a result of further instructions from Mr. Yates dated the 5th day of June, 1958, the Adjudicating Officer subsequently re-opened the said proceedings for the purpose of hearing and recording the evidence of the two men who had been accused in respect of the said forged lottery tickets. The Adjudicating Officer then replaced the original defaulter report dated the 10th day of May, 1958, by a new report, adding thereto the names of the said two additional Witnesses and certain additional Exhibits thereto, and signed the said new report on the 11th day of June, 1958, but dated the same "10 May 1958". The said new report was then forwarded to the Commissioner of Police. 40

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Ex. A337

12. On the 27th day of June, 1958, the Commissioner of Police approved the said recommendation that the Appellant be dismissed, and the Order of Dismissal was by letter dated the 7th day of July 1958, formally notified to the Appellant by the Chief Police Officer, Perak, on the ground that the Appellant had been found guilty of each of the alternative Charges set forth in sub-paragraphs (i) and (ii) of Paragraph 8 hereof.

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Ex. A77-78

10 13. On the 14th day of July, 1958, the Appellant lodged an Appeal against the said Order of Dismissal. Since he was uncertain who was at that time the appellate authority, he sent copies of his said Appeal both to the Minister of Defence and to the Police Service Commission. More than a year later, namely on the 29th day of July, 1959 the Secretary of the Police Service Commission wrote to the Appellant informing him that his Appeal had been dismissed. By reason of the provisions of Regulation 15 (1) (a) of the Police Regulations, 1952, as modified by paragraph 3 (1) (i) of the Federal Constitution (Modification of Laws) Order, 1957 the Appellant's said Appeal then lay to the Minister of Defence, but was never, in fact, dealt with by the said Minister.

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Ex. A79

20 14. At no time before the 14th day of July, 1958, was the Appellant informed, or aware, of the fact that the said findings were before the said Adjudicating Officer, nor was he aware of the terms of the said findings until the fourth day of the Trial before Rigby, J., namely the 12th day of December, 1959, when the Respondents - who had hitherto claimed privilege in respect of the said findings - produced the same in Court.

30 15. The Writ of Summons herein was issued by the Appellant on the 1st day of October, 1959, and the Action was heard by Rigby, J., on the 9th, 10th, 11th and 12th days of December, 1959, and the 12th, 13th and 16th days of January, 1960.

Pages 1-3

40 16. The provisions of the Federal Constitution were considered by the learned Judge, and subsequently by the Court of Appeal, and in particular the following relevant Articles :-

- 4.(1). This Constitution is the supreme law of the Federation and any law passed after Merdeka Day which is inconsistent with this Constitution shall, to the extent of the

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inconsistency, be void.

132 (1). For the purposes of this Constitution, the public services are :

(d) the Police Service.

135 (1). No member of any of the Services mentioned in paragraphs (b) to (g) of Clause (1) of Article 132 shall be dismissed or reduced in rank by an authority subordinate to that which, at the time of the dismissal or reduction, has power to appoint a member of that Service of equal rank.

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(2) No member of such a Service as aforesaid shall be dismissed or reduced in rank without being given a reasonable opportunity of being heard.

140 (1). There shall be a Police Service Commission, whose jurisdiction shall, subject to Article 144, extend to all persons who are members of the Police Service.

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144 (1). Subject to the provisions of any existing law and to the provisions of this Constitution, it shall be the duty of a Commission to which this part applies to appoint, confirm, emplace on the permanent or pensionable establishment, promote, transfer and exercise disciplinary control over members of the Service or Services to which its jurisdiction extends.

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160 (2). In this Constitution, unless the context otherwise requires, the following expressions have the meanings hereby respectively assigned to them, that is to say -

"Existing law" means any law in operation in the Federation or any part thereof immediately before Merdeka Day;

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"Merdeka Day" means the 31st day of August 1957.

162 (1). Subject to the following provisions of this Article and Article 163, the

existing laws shall, until repealed by the authority having power to do so under this Constitution, continue in force on and after Merdeka Day, with such modifications as may be made therein under this Article and subject to any amendments made by Federal or State Law.

- 10 (6). Any Court or Tribunal applying the provision of any existing law which has not been modified on or after Merdeka Day under this Article or otherwise may apply it with such modifications as may be necessary to bring it into accord with the provisions of this Constitution.
- (7). In this Article "modification" includes amendment, adaptation and repeal.
- 20 176 (1). Subject to the provisions of this Constitution and any existing law, all persons serving in connection with the affairs of the Federation immediately before Merdeka Day shall continue to have the same powers and to exercise the same functions on Merdeka Day on the same terms and conditions as were applicable to them immediately before that day.
- 30 (2). This Article does not apply to the High Commissioner or the Chief Secretary.

Part X of the Constitution consists of Articles 132 to 148 inclusive.

17. The learned Judge's Judgment in favour of the Appellant may be thus summarised :- Pages 99-119

- 40 (i) In view of the purport and intent of Part X of the Constitution, the previously existing statutory powers of the Commissioner of Police to appoint, promote and dismiss superior Police Officers were impliedly revoked by Article 144, and to that extent the relevant Sections of the Police Ordinance, 1952, conferring those powers upon the Commissioner of Police

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must be regarded as "modified", that is to say, repealed.

- (ii) All appointments of superior Police Officers since Merdeka Day have, in fact, been made by the Police Service Commission.
- (iii) On a true construction of Article 144 (1), read in conjunction with Article 135 (1), the power to dismiss the Appellant was at the relevant time vested in the Police Service Commission; and the Commissioner of Police, an authority subordinate to the Police Service Commission (and admitted by the Respondents in their pleadings to be subordinate to it) had no power to dismiss the Appellant. 10
- (iv) The furnishing of a copy of the said findings of the Board of Inquiry to the said Adjudicating Officer appointed to hear the Disciplinary Charges, coupled with the fact that no such copy was furnished to the Appellant, most materially and injuriously affected him, not only in relation to the Charges but also as to the matter of sentence upon his conviction on those Charges. The Appellant had no opportunity to deal with the said findings or to refute or challenge them in any way, and this amounted to such a denial of natural justice as to entitle the Court to set aside the proceedings on that ground. There was, therefore, a failure to afford the Appellant a reasonable opportunity of being heard in answer to the Charge preferred against him, which resulted in his dismissal. 20 30

18. The learned Judge accordingly granted to the Appellant the declaration and consequential orders sought by the Statement of Claim. 40

19. The Respondents duly appealed from the said Judgment to the Court of Appeal at Kuala Lumpur on the grounds that the learned Trial Judge erred in law in :-

- (1) Holding that the dismissal of the Appellant by the Commissioner of Police

was void and inoperative on the ground that, by reason of the provisions of Articles 135, 144 and 162 of the Federal Constitution, the Commissioner had no power to dismiss the Appellant at the relevant time.

- 10 (2) Holding that the furnishing to the said Adjudicating Officer of a copy of the said findings of the Board of Inquiry, coupled with the fact that no such copy was furnished to the Appellant, constituted a failure to afford to the Appellant a reasonable opportunity of being heard in compliance with the provisions of Article 135 (2) of the Federal Constitution.
- (3) Making a declaration that the Appellant remained a member of the Police Force after the institution of the suit.
- 20 (4) Ordering an account and payment to the Appellant of salary and emoluments due to him as an Inspector of the Federation Police Force.

20. The said Appeal was heard on the 22nd and 23rd days of August, 1960, when the Court of Appeal at Kuala Lumpur (Thomson, C.J., Hill, J.A., and Neal, J.,) allowed the said Appeal.

30 Thomson, C.J., and Hill, J.A., held that the words "subject to existing law" in Article 144 (1) preserved the powers vested in the Commissioner of Police by the Police Ordinance, 1952, to dismiss the Appellant, since the said Ordinance was an existing law on Merdeka Day; and that it was unnecessary to exercise the powers of the Court to modify the provisions of the Police Ordinance because Article 144 itself envisages the possibility of the existing law differing from the provisions of the Constitution.

40 Neal, J., dissenting, held that the learned Trial Judge was right in having held that the Constitution had given the power to appoint and to dismiss Police Officers to the Police Service Commission to the exclusion of the prior existing powers of the Commissioner of Police; he would, however, have granted the Appeal to the extent of deleting from the declaration the words "and still is a member of the Force" and substituting

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the words "and was at the date of filing of the suit a member of the Force".

21. The Court of Appeal unanimously held that Rigby, J., had been wrong in holding that the furnishing to the Adjudicating Officer of a copy of the findings of the Board of Inquiry, coupled with the fact that no such copy was furnished to the Appellant, constituted either a denial of natural justice or a failure to afford to him a reasonable opportunity of being heard in compliance with Article 135 (2) of the Constitution.

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Per Thomson, C.J.:

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line 20

"Inspector Kanda's attitude was that this report was something he should have had prior to the disciplinary proceedings in order fully to appreciate the case against him and the case which he had to meet. In my view this complaint is entirely without substance when viewed in the light of all the surrounding circumstances. The charges against Inspector Kanda did not come to him as a bolt out of the blue. To begin with, he was intimately acquainted with the Police investigation of the forged lottery tickets case, for at all material times he was in charge of that investigation. It is difficult to suppose that he did not know what happened at the subsequent Trial of that case. He knew, too, of the Board of Inquiry being set up. He was furnished with full statements made by the Witnesses who gave evidence before that Board, although there is some controversy as to whether he had access at that time, although he must have had it earlier, to the investigation diaries of the Detective Officers concerned. Finally, he was given a copy of the Charges against him which resulted from the Board's enquiries. He is not mentally defective, nor is he entirely innocent of any knowledge of the workings of the Police organisation. These things being so, it is impossible even to suppose that he was not aware and fully aware of the conclusions regarding himself at which the Board of Inquiry had arrived. To anyone with his general Police experience and with his intimate knowledge of the whole lottery tickets affair the Charges themselves must

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have conveyed to him the view regarding himself which the Board of Inquiry had formed. The only thing he was not aware of was the precise words in which these views were expressed. So much for his view of the matter."

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And later :

"Some of the actual words used by the Board are perhaps peculiar. The actual words, however, are of little importance."

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line 20

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22. By an Order of the said Court of Appeal the Appellant was on the 7th day of February, 1961, granted Final Leave to Appeal to His Majesty the Yang di-Pertuan Agong from the said Judgment of the said Court of Appeal, and by virtue of the provisions of Article 131 of the Federal Constitution the said Appeal to His Majesty the Yang di-Pertuan Agong is referred to the Judicial Committee of Her Majesty's Privy Council for hearing.

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23. It is submitted on behalf of the Appellant that his Appeal should be allowed with costs for the following among other :

R E A S O N S

- (1) BECAUSE the power previously vested in the Commissioner of Police by virtue of the provisions of the Police Ordinance, 1952, to dismiss a superior Police Officer was impliedly revoked by Articles 135 (1), 140 and 144 of the Federal Constitution, and the said power was thereby transferred to the Police Service Commission as from Merdeka Day.
- (2) BECAUSE, in the alternative, the said provisions of the Police Ordinance, 1952 must, after Merdeka Day, be modified, that is to say repealed, by the Court applying the same, pursuant to Article 162 (6) and (7) of the Federal Constitution, so as to give effect to Article 144.
- (3) BECAUSE the Judgment of Rigby, J., and the reasoning of Neal, J., that the Commissioner of Police had no power to dismiss the Appellant, were correct.

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- (4) BECAUSE the purported dismissal of the Appellant was in any event invalid in that he was not given a reasonable opportunity of being heard, in accordance with the provisions of Article 135 (2) of the Federal Constitution -
- (a) as to the terms of the findings of the Board of Inquiry, which were unknown to the Appellant but were before the Adjudicating Officer; 10
- (b) As to the penalty of dismissal, the proposed recommendation of which by the Adjudicating Officer was not communicated to the Appellant by the said Adjudicating Officer.
- (5) BECAUSE the Appellant's Appeal to the Minister of Defence pursuant to Regulation 15 (1) (a) of the Police Regulations, 1952 was never disposed of by the said Minister.
- (6) BECAUSE the finding of Rigby, J., that the fact that a copy of the findings of the Board of Inquiry was furnished to the said Adjudicating Officer, coupled with the fact that no such copy was furnished to the Appellant, amounted to both a denial of natural justice and a contravention of Article 135 (2) of the Federal Constitution, was correct. 20
- (7) BECAUSE Thomson, C.J., erred in law in holding that the Appellant must be taken to have known the conclusions regarding himself of the said Board of Inquiry and that the actual words of the said findings were of little importance. 30
- (8) BECAUSE the Judgment of the said Court of Appeal that the Adjudicating Officer's mind could not be assumed to have been influenced by the said findings of the Board of Inquiry was erroneous.
- (9) BECAUSE the Judgment of Rigby, J., was substantially correct and ought to be restored. 40

RODNEY BAX