JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 84/94

COR: THE HON MR JUSTICE CAREY JA
THE HON MR JUSTICE FORTE JA
THE HON MR JUSTICE GORDON JA

BETWEEN	**CORPORAL GLENROY CLARKE**	**APPELLANT**
A N D	**COMMISSIONER OF POLICE**	
A N D	**THE ATTORNEY GENERAL FOR JAMAICA**	**RESPONDENTS**

Chester Stamp for appellant

Lennox Campbell Senior Assistant Attorney General for respondents

31st January 1st 2nd February & 11th March 1996

CAREY JA

The appellant was a corporal of police in the Jamaica Constabulary Force. Since he was about 16 years of age when he enrolled as a cadet he had been associated with that body. He then enlisted in 1978 as a constable. In compliance with the Police Service Regulations, which require that applications for re-enlistment be made every five years, he successfully applied for re-enlistment in 1983 and in 1988. However, in 1993 when he applied for re-enlistment, he was advised on the orders of the Commissioner of Police (the

Commissioner) that his application would not be approved and he was apprised of the reasons for that decision. Subsequently, the appellant sought and obtained an interview with the Commissioner at which he had counsel who made submissions on his behalf. Prior to this event, the chairman of the Police Federation had intervened to make representations on his behalf to the Commissioner. In the result, the decision stood. The appellant's life in the Force was at an end after 15 years. A Force Order dated 18th November 1993 proclaimed his exit as at that date.

He felt aggrieved at this treatment especially because he had received several commendations for his efforts over the years in the execution of his duty as a police officer. He had been appointed corporal in 1992 and in May 1993 he had been appointed to act as a sergeant of police. He acknowledged that save that he had been fined ten days pay at a police court of enquiry for leaving the island without permission in November 1992, he was entirely unaware of any other act of wrongdoing on his part which warranted the refusal of his application. He had entertained a reasonable expectation that he would be re-listed into the Jamaica Constabulary Force.

Thereafter he obtained leave to apply for certiorari to quash the directions of the Commissioner. On 17th June 1994 the Full Court of the Supreme Court (Patterson, Ellis & James JJ) by an order of that date, dismissed the motion.

Before us, Mr. Stamp on behalf of the appellant argued firstly, that he had not been afforded a fair hearing as the Commissioner had predetermined the

matter in that he had stated that he would stick to his decision not to approve re-enlistment. However, this allegation as to that statement being made to the chairman of the Police Federation by the Commissioner amounted to hearsay evidence. In his affidavit in rebuttal, the Commissioner it should be noted, deposed that he did not recall making any such statement. I do not think that statement is admissible having regard to section 484 of the Civil Procedure Code Law which only allows hearsay in interlocutory matters which this matter is not. That section provides (so far as is material):

> "408. Affidavits shall be confined to such facts as the witness is able of his own knowledge to prove, except that on interlocutory proceedings or with leave under section 272A or section 367 of this Law an affidavit may contain statements of information and belief with the sources and grounds thereof.

But I do not wish to rest a determination in this appeal on that ground. Strictly speaking, it is evidentially worthless. Nevertheless, I am prepared to regard the evidence as of significance for purposes of this appeal. I would add parenthetically that this evidence was also put forward as demonstrating bias on the part of the Commissioner and thus providing the second basis for impugning the Commissioner's decision.

In order to deal with the fair hearing point, it is necessary to set out the sequence of events and to understand the nature of the process. As indicated earlier, a member of the Force is enlisted for terms of five years and when he

wishes to re-enlist, he must make an application before the expiration of the current term. It follows that if there is no application, a member's tenure comes to an end. When an application is made, it is considered by the Commissioner who makes a determination. The Constabulary Force Act confers on the Commissioner sole command and superintendence of the Force [section 3(2)(a)] and I would add, the Force is to be regarded as partially under military organisation and discipline (section 3(1)). Although the non-approval by the Commissioner of a member of the Force for re-enlistment removes that member from further service in the Force, it is not a dismissal. As Patterson J (as he then was) pointed out correctly, as I think, in his judgment, "strict laws, rules and regulations govern the exercise of the power of dismissal and also the termination of appointment." Altogether different rules govern re-enlistment into the Force. In the case of dismissal, there is a trial, i.e. an enquiry, witnesses are called, there is cross-examination of the witnesses, the procedure is akin to a trial in a court of law. The officer presiding at this exercise is, plainly, exercising a judicial function. In the case of re-enlistment, the Commissioner is exercising administrative functions in which case, it is trite law that he must act fairly. It seems to me that in the present case the Commissioner was not sitting as a judge, who must of course divorce from his mind all he may have heard of the matter before undertaking the trial. The Commissioner could properly take a decision not to approve re-enlistment of any member even before an application to re-enlist is made. There is no question of hearing the member when that

decision is taken because the member is not on trial for any charge. The conduct of the officer over the various terms of his enlistment would necessarily be the basis of the Commissioner's decision. The officer may have been charged previously and disciplined therefor. That previous misconduct can properly be taken into account in determining whether he is a fit and proper person to remain a guardian and preserver of the peace. There is no such thing as an automatic right to re-enlistment. Approval should be and doubtless is granted where the conduct of the member is satisfactory. The level of conduct or performance is to be determined by the Commissioner and certainly the court has no power to set the standard of acceptable conduct in the Force.

Where the Commissioner has taken a decision not to approve re-enlistment, then, upon any application of the member for re-enlistment the Commissioner is obliged, in fairness, to supply the reasons for his decision and allow the officer affected, an opportunity to be heard in relation to that material if the officer requests it. In the instant case, the gravamen of the attack on the decision is that the Commissioner intimated to the chairman of the Police Federation his intention not to change his decision to refuse approval upon receipt of the appellant's application. Presumably, it is being said that the Commissioner should await the application before giving a ruling. I have already endeavoured to show that the Commissioner was not acting unfairly if he acted in the way it is said, he did. Any right which the appellant had to be heard, could only arise after the appellant had been advised of the decision not

to approve and the reasons therefor. The opportunity afforded to the appellant to be heard allowed the Commissioner to review his decision in the light of any submissions made to him by the officer or his attorney. The reasons having been supplied, must then be answered by the attorney. Consequently, the exercise is akin rather to an appeal process than to a trial process. The onus is thus on the officer to show cause why he should be allowed to re-enlist.

In this case, the officer and his attorney were heard after reasons had been furnished to the officer. The reasons for refusal were stated thus:

> "a) On November 17, 1979 at 10 p.m., you were dispatched from the Negril Police Station on patrol duty along Norman Manley Boulevard. You left your patrol and found yourself at the home of Merlene Shaw at Sheffield District. Whilst there you were confronted by Leslie Babooram of Port Antonio who had arrived to pay a surprise visit to his girlfriend and baby mother. You used the service revolver with which you were armed to shoot him in his head, claiming that he had attached (sic) you and Shaw with a machete. Babooram died on May 10, 1980, from the effect of the gun shot wound. The matter was investigated and submitted to the Director of Public Prosecutions who sent the matter to the Coroner. The Coroner eventually ruled that no one was criminally responsible.
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> b) In 1982, one David Peters, filed a Suit against you and the Attorney General, claiming that whilst arresting him on July 28, 1982, on a charge of larceny from the person you used your service revolver and gunbutted him on the left side of his head causing a swelling and persistent headache thereafter. You denied this allegation but in the face of the Medical Certificate and other supporting evidence,

Judgment was entered against the Attorney General in the sum of $11,643.

c) In 1983, Hugh Reid, of 3 Fourth Avenue, Vineyard Town, reported at the Police Complaints Office, that on the night of Saturday, October 29, you carried out a most brutal and unprovoked assault on him in the area of Milk Avenue, Montague Street and Langston Road in Rollington Town and Vineyard Town. The matter was investigated but eye witnesses refused to give written statements stating that they were fearful of your aggressiveness and reprisal.

d) On August 27, 1993, you fatally shot Delroy Parchment of Back Bush at Chaves Avenue. The circumstances of the shooting were so bad that the Director of Public Prosecutions ruled that you be arrested on a charge of murder. A Nolle Prosequi was eventually entered by the Director of Public Prosecutions as the witnesses could not be found to attend Court.

e) On Friday July 15, 1988, it is alleged that with gun in hand you chased one Desreen Slowley from the Santa Cruz Police Station and along the public road. A Court of Enquiry was ordered to enquire into your conduct but because Miss Slowley refused to give a statement before the Enquiry, the President returned a verdict of 'Not Proven' on the charges brought against you.

f) On November 27, 1992, you left the island from Norman Manley International Airport and went to Miami, Florida, without first obtaining leave or permission so to do. For this you were tried at a Court of Enquiry and deprived of a total of 10 days pay.

g) You are reported to be a frequent user of indecent language to and within the hearing of members of the public.

> Your conduct as described above, has demonstrated that you are a person with a very aggressive and violent nature. Many law abiding citizens have expressed fear for your hostile behaviour and this is not in the best interest of the Force."

That was followed by this paragraph:

> " The Commissioner of Police, having assessed your conduct and discipline over the past years and after considering certain intelligence reports he had received, gave instructions that you be advised that your application for re-enlistment would not be approved."

It was argued that the fact that the Commissioner considered "certain intelligence reports" meant that he had come to a decision on the basis of information which had not been supplied to the officer. Accordingly, so the argument runs, the appellant did not have a fair hearing. The question which naturally prompts itself is, assuming for the moment that the Commissioner did consider intelligence reports, was he required to supply these reports to the officer. If it is accepted, firstly that the Commissioner is not engaged in an enquiry or a trial into charges but is reviewing a decision made on reports and recommendations from his divisional officers, then it seems to me entirely fair, not to supply the confidential reports in his possession. Secondly a balance has to be struck between the interests of the individual concerned and the national interest. By national interest, I am to be understood as saying, that the maintenance of the Force as a body of efficient and disciplined persons of

integrity is in the national interest. The divulging of such confidential information might dry up the Commissioner's sources of information his intelligence reports and, in the present environment in Jamaica, might well lead to the elimination of these sources. The rules of natural justice which are not inflexible must be applied having regard to all the circumstances of the case.

At the hearing before the Commissioner, I am not able to discover where any objection was made to any aspect of the proceedings. There was no evidence before us of what did take place. It is inconceivable that those proceedings were other than properly conducted seeing that no complaint has been made or impropriety suggested in that regard. If a request had been made by the appellant or his attorney for the intelligence reports to be produced or supplied, and the request had been denied, it cannot be doubted that that would have provided support for further submissions regarding the denial of a fair hearing at the hearing before the Commissioner.

In the reasons for refusal given on behalf of the Commissioner, the officer stated seven instances involving conduct of the appellant which could hardly qualify as exemplary and the Commission assessed that conduct as demonstrating "a person with a very aggressive and violent nature". The writer then observed that the Commissioner, having assessed the conduct and considered reports he had received, gave instructions. The inference, I venture to suggest, is clear that the misconduct itemized in the reasons is not unrelated to these intelligence reports. If either the appellant or his attorney

thought for a moment that the reports contained matters of which they were ignorant, it would be a matter of great incredulity, that they did not ask for the reports. The absence of any enquiry or request, inclines me to think that the appellant and his attorney were satisfied that the reports contained nothing about which the appellant was ignorant. This leads me to conclude that there was never any belief on the appellant's part that the Commissioner had taken into account any material which he ought not to have done. In the event, I am not persuaded that there is any basis for holding that the Commissioner made use of intelligence reports not disclosed to the appellant, or that these reports were a major factor in the decision arrived at by the Commissioner. He was obliged as I have previously indicated, to consider the conduct of the appellant over the period of the appellant's service. The fact that he may have been disciplined under previous administrations cannot be disregarded as if it had been excused or removed from his record. Any resume of his service must have included that conduct which the Commissioner was obliged to consider. He could not be regarded as a person with an unblemished record by any stretch of the imagination. Those arguments were really quite hopeless especially as it was not shown that those reports contained information not known to the appellant.

It is right to point out that the Commissioner in his affidavit stated that he "considered the submissions made on the 11th November 1993 and took the decision not to re-enlist Glenroy Clarke...". There is absolutely no evidence that

the Commissioner in arriving at his decision as deposed by him, acted other than entirely correctly.

Learned counsel for the appellant also submitted that there was evidence of actual bias or at least a reasonable likelihood of bias. He based this on paragraph 11 of the appellant's affidavit in which he deposed as follows:

> "11. That I have been informed by Sergeant James Forbes, Chairman of the Police Federation, and verily believe that on or about 29th October, 1993, he represented to the Commissioner of Police that I would have a strong legal case if I did not have a hearing whereupon the Commissioner of Police told him that he intended to stick to his decision and not re-instate me."

It was urged that the statement ascribed to the Commissioner meant that he had foreclosed all possibility of giving an objective hearing with an open mind.

Some history has now to be related. The appellant applied for re-enlistment on 6th September 1993. On the 15th of that month, he learnt that the Commissioner had intimated that any application for re-enlistment made by him would not be approved. On 27th September he was notified that his application had not been approved and he was supplied with the grounds for that decision. At the same time, he was also advised that he could appear to argue his case before the Commissioner and did in fact appear with his attorney on 11th November 1993. Prior to that hearing, on 29th October, 1993 representations were made on the appellant's behalf by the chairman of the

Police Federation. There was some inadmissible evidence that the Commissioner had stated that he intended to stick to his decision.

I have already expressed the view that the statement attributed to him could not be properly received in evidence as to the truth of its contents. Howsoever, that might be it appears to me that the statement ascribed to him would have been made in response to representations made on behalf of the appellant. I cannot then understand how representations made on behalf of the appellant which called for a decision which was in fact given, can be used as the basis for bias at another hearing. The representations by the chairman of the Police Federation and the submissions by counsel at the subsequent meeting, can only be seen as two hearings being afforded the appellant. In my view, there is no merit in this allegation of bias or likelihood of bias.

For these reasons,I am not persuaded that any good or sufficient cause has been shown to hold that the Full Court came to a determination with which this court ought to interfere. I would dismiss the appeal.

FORTE J A

I have read in draft, the judgment of Carey, J A and concur with his reasons and conclusions. Nevertheless I add a few words of my own.

There was no dispute that the appellant in the particular circumstances had a legal expectation to be re-enlisted, and consequently was entitled to the opportunity for a fair hearing. Also undisputed is the fact that the appellant and his attorney, attended on the Commissioner, at the Commissioner's invitation for the purpose of making representation to the Commissioner as to his decision on the re-enlistment of the appellant. There is no question then, that the appellant did get a hearing, before the refusal of his enlistment was finalized; his discharge on the basis of "non-re-enlistment" taking effect subsequently.

The representations by his attorney, were oral submissions but was followed by written submissions in which he never challenged the Commissioner's decision, on the basis of the Commissioner's failure to reveal the contents of intelligence reports which he alleges formed a part of his (the Commissioner's) decision. His complaints then were inter alia as follows:

> "The grounds for refusal delivered after the decision had been made refer to (i) matters of which Cpl. Clarke had been exculpated or not found guilty of wrong-doing, (ii) matters determined prior to November 1988, which would have been considered by a previous Commissioner when he was then re-enlisted (ii) vague and unconstitutional allegations of misconduct which cannot be answered in the absence of specifics (iv) one matter for which a penalty had been imposed."

The above citation comes, of course, from the grounds for refusal of one appellant's re-enlistment, which have already been set out in the judgment of

Carey J A. However, when read, it is obvious that the reference in the citation, obviously refers to the following words: taken from the "grounds":

> "Your conduct as described above, has demonstrated that you are a person with a very aggressive and violent nature. Many law abiding citizens have expressed fear for your hostile behaviour and this is not in the best interest of the Force."

There being no evidence of what took place at the hearing, it is reasonable to assume that before the Commissioner, no issue was raised as to the content of the intelligence reports, which in any case, in my view, apparently did not contribute, (if at all), in any substantial measure to the Commissioner's decision to refuse the appellant's re-enlistment.

I agree that the reasons given for the refusal, are substantially adverse to the appellant to justify the Commissioner's decision which was within his power, and discretion to make as the person who has sole responsibility for the Constabulary Force. The allegation that the appellant was denied a fair hearing was in my view unsupported by the evidence, and consequently I agree that the appeal should be dismissed.

GORDON J A

The Constabulary Force Act provides that a constable shall hold office for five years from the date of enlistment. That tenure may be extended on application for re-enlistment made by him at the end of each term. The Commissioner of Police is the sole authority by law who approves enlistment. The record of each constable thus falls to be scrutinized by the Commissioner when consideration of his application for re-enlistment is determined. A constable who has a history of aberrant behaviour cannot claim a "legitimate expectation" to re-enlistment.

The conduct of the appellant with particular emphasis on his leaving the island, hence his absence from duty, without leave, in November 1992, is without more, sufficient basis for the exercise of the commissioner's powers not to permit his re-enlistment.

I agree with the reasons advanced by Carey J A in his judgment. I concur in the decision that the appeal be dismissed.