Privy Council Appeal No. 9 of 1961

B. Surinder Singh Kanda – – – – – – – *Appellant*

v.

The Government of the Federation of Malaya – – – *Respondent*

FROM

THE SUPREME COURT OF THE FEDERATION OF MALAYA

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 2ND APRIL, 1962

Present at the Hearing:
LORD DENNING.
LORD HODSON.
LORD DEVLIN.
[*Delivered by* LORD DENNING]

The appellant B. Surinder Kanda was an Inspector of Police in the Royal Federation of Malaya Police. On 7th July, 1958, he was dismissed by the Commissioner of Police on the ground that he had been guilty of an offence against discipline. Inspector Kanda brought an action in the High Court challenging this dismissal. On 24th March, 1960, Rigby, J. declared that his dismissal was void and of no effect. The Government appealed. On 14th November, 1960, the Court of Appeal by a majority (Thomson, C. J. and Hill, J. A., with Neal, J. dissenting) allowed the appeal and held that Inspector Kanda was validly dismissed. He now appeals to their Lordships' Board.

The appeal raises two questions: (1) The first question is whether the Commissioner of Police had any power to dismiss him. Inspector Kanda says that under the Constitution the power rested only with the Police Service Commission: (2) The second question is whether the proceedings which resulted in his dismissal were conducted in accordance with natural justice. Inspector Kanda says they were not.

The Federation of Malaya came into being on Merdeka Day, that is, 31st August, 1957. Thence forward the Constitution was the supreme law of the Federation (Article 4). The Supreme Head of the Federation was the Yang di-Pertuan Agong (Article 32). Great changes were made in the structure of government. In particular the public services were placed under commissions. Thus a Police Service Commission was set up with jurisdiction over all members of the police service (Article 140). But the persons serving in the Police Force continued in general to have the same powers and functions as before (Article 176). And for the most part the existing laws were continued unchanged (Article 162).

In September, 1957, after Merdeka Day, two men were charged in the Supreme Court at Penang with uttering forged lottery tickets. The prosecution failed. The reason was because the prosecution called a number of witnesses, including police officers, whose evidence was palpably false. The two accused men were acquitted. The Commissioner of Police ordered an inquiry to be held. The Board of Inquiry was presided over by Mr. D. W. Yates a very senior police officer. It reported that false evidence had been fabricated for use at the trial.

After considering the report the Commissioner of Police decided that proceedings should be taken against Inspector Kanda. Not criminal proceedings before the courts of law. But disciplinary proceedings under

what the Police Regulations call "Orderly Room Procedure". The Commissioner appointed Mr. Strathairn to be the adjudicating officer to enquire into the charges. Mr. Strathairn was junior to Mr. Yates who had conducted the inquiry. Mr. Yates drafted a specimen charge. But Mr. Strathiarn preferred his own. He drafted another. The charge, as eventually laid against Inspector Kanda, was that he had failed to disclose evidence which to his knowledge could be given for the two accused men: or alternatively that he had been guilty of conduct to the prejudice of good order and discipline in that he had submitted investigation papers to his superior officer knowing the same to be false. Another charge was afterwards added that he wilfully disobeyed a lawful command to subpoena a witness.

In April and May, 1958, the charges were heard by Mr. Strathairn the adjudicating officer. He found Inspector Kanda guilty on the original charge of failing to disclose evidence and recommended that he be dismissed from the Force. He also found him guilty on the added charge of disobeying a lawful command and recommended an award of a severe reprimand. The Commissioner of Police approved the recommendations: and on his direction, on 7th July, 1958, Inspector Kanda was formally notified that he was dismissed from the Force. On 14th July, 1958, Inspector Kanda appealed to the Ministry of Defence and also to the Police Service Commission. (He did this because he was not sure which was the right authority to hear his appeal.) Over a year later on 19th July, 1959, the Secretary to the Police Service Commission informed him that his appeal was dismissed. It was not contended that, by this internal appeal within the administration, he in any way waived his right to apply to the courts.

On 1st October, 1959, Inspector Kanda brought this action against the Government of the Federation of Malaya claiming a declaration that his dismissal was void, inoperative and of no effect. He put it on two grounds: (1) His dismissal was effected by an authority which had no power to dismiss him, contrary to Article 135 (1) of the Constitution: (2) He was not given a reasonable opportunity of being heard, contrary to Article 135 (2) of the Constitution. Their Lordships will consider the two grounds separately.

First. The power of the Commissioner to dismiss.

The governing Article of the Constitution on this point is Article 135 (1) which came into operation at once on Merdeka Day (31st August, 1957):

> "135 (1): No member of any of the services mentioned (the police service is one of these) 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."

Inspector Kanda was dismissed on 7th July, 1958, nearly a year after Merdeka Day. In order to see who had power to dismiss him, it is necessary under Article 135 (1) to ask who had power at that time to *appoint* an officer of his rank: for no one could dismiss who could not appoint.

Under the law as it existed prior to Merdeka Day the Commissioner of Police could appoint superior police officers, including inspectors of police, see section 9 (1) of the Police Ordinance 1952; and if an inspector had been found guilty of an offence against discipline, the Commissioner of Police could dismiss him, see section 45 (1) of that Ordinance. Did this law continue to exist after Merdeka Day? In particular did it continue to exist on 7th July, 1958?

Inspector Kanda says that that law did not continue to exist. It was replaced, he says, by the Articles of the Constitution which set up the Police Service Commission and entrusted to them the power to appoint members of the police service. The power of appointment was, he says, in the Commission. The Commissioner of Police was an authority subordinate to the Commission. He could not therefore dismiss him, because he could not appoint him.

Inspector Kanda relies for this contention on Articles 140 (1) and 144 (1) of the Constitution which read as follows:—

> " 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.
>
> . . . . . .
>
> 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 appoint, confirm . . . promote, transfer and exercise disciplinary control over members of the service . . . to which its jurisdiction extends."

In answer to this contention, the Government of Malaya point to the words " subject to " in both Articles 140 (1) and 144 (1). Those words give priority, they say, to the existing law and preserve it intact, including the power of the Commissioner to appoint superior police officers.

The Government admit that after Merdeka Day a Police Service Commission was established and that since Merdeka Day all superior police officers, including police inspectors, have been appointed by the Police Service Commission. They admit too that on 7th July, 1958, the Commissioner of Police was an authority subordinate to the Police Service Commission. But, despite these admissions, they say that the existing law as to appointment and dismissal was preserved by the opening words of Article 144 (1) which says that the duty of the Commission is " subject to the provisions of any existing law ". This gives priority, they say, to the existing law. The Constitution is subject to the existing law, and not *vice versa*. The words " subject to the provisions of this Constitution " can be amply satisfied, they say, by reference to Article 144 (3) (4) (which refers to special posts) and 135 (2) (which gives a right to be heard).

This argument found favour with Thomson, C. J. and Hill, J.A.: but their Lordships find themselves unable to accept it. Their Lordships realise that it is a difficult point but they prefer the view taken by Rigby, J. and Neal, J. It appears to their Lordships that, as soon as the Yang di-Pertuan Agong appointed the Police Service Commission, that Commission gained jurisdiction over all members of the police service and had the power to appoint and dismiss them. It is true that under section 144 (1) the functions of the Police Service Commission were " subject to the provisions of any existing law ": but this meant only such provisions as were consistent with the Police Service Commission carrying out the duty entrusted to it. If there was in any respect a conflict between the existing law and the Constitution (such as to impede the functioning of the Police Service Commission in accordance with the Constitution) then the existing law would have to be modified so as to accord with the Constitution. There are elaborate provisions for modification contained in Article 162 which run as follows:—

> " 162 (1) Subject to the following provisions of this Article . . . the existing laws shall . . . continue in force on and after Merdeka Day with such modifications as may be made therein under this Article.
>
> . . . . . .
>
> (4) The Yang di-Pertuan Agong may, within a period of two years beginning with Merdeka Day, by order make such modifications in any existing law . . . as appear to him necessary or expedient for the purpose of bringing the provisions of that law into accord with the provisions of this Constitution.
>
> . . . . . .
>
> (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."

It appears to their Lordships that, in view of the conflict between the existing law (as to the powers of the Commissioner of Police) and the provisions of the Constitution (as to the duties of the Police Service Commission) the Yang di-Pertuan Agong could himself (under Article 162 (4)), have made modifications in the existing law within the first two years after

Merdeka Day. (The attention of their Lordships was drawn to modifications he had made in the existing law relating to the railway service and the prison service.) But the Yang di-Pertuan Agong did not make any modifications in the powers of the Commissioner of Police, and it is too late for him now to do so. In these circumstances, their Lordships think it is necessary for the Court to do so under Article 162 (6). It appears to their Lordships that there cannot, at one and the same time, be two authorities, each of whom has a concurrent power to appoint members of the police service. One or other must be entrusted with the power to appoint. In a conflict of this kind between the existing law and the Constitution, the Constitution must prevail. The Court must apply the existing law with such modifications as may be necessary to bring it into accord with the Constitution. The necessary modification is that since Merdeka Day it is the Police Service Commission (and not the Commissioner of Police) which has the power to appoint members of the police service. And that is just what has happened. The Police Service Commission has in fact made the appointments. And their Lordships are of opinion that they were lawfully made.

Their Lordships do not overlook the argument of the Government that there was no conflict. The jurisdiction of the Police Service Commission, they said, would be satisfied by entrusting them with the power to appoint gazetted police officers, leaving the Commissioner of Police to appoint all others. Their Lordships cannot accede to this argument. Under Article 140 the jurisdiction of the Police Service Commission extends to *all* persons who are members of the police service: and their functions under Article 144 apply to all of them also. The Commission has the duty, and therefore the power, to appoint *all* members of the police service, and not merely the gazetted police officers. The Police Service Commission can, of course, delegate any of its functions under Article 144 (6) but still it is its own duty and its own power that it delegates. It remains throughout therefore the authority which has power to appoint, even when it does it by a delegate.

The result is that on 7th July, 1958, the Police Service Commission was the authority to appoint an officer of the rank of Inspector Kanda: and therefore under Article 135 (1) it was the authority to dismiss him. The Commissioner of Police had no authority to dismiss Inspector Kanda as he did. The dismissal was therefore void.

Second. The reasonable opportunity of being heard.

The governing Article of the Constitution on this point is Article 135 (2) which came into operation on Merdeka Day (31st August, 1957).

> " 135 (2) No member of such a service as aforesaid (the police service is one of these) shall be dismissed or reduced in rank without being given a reasonable opportunity of being heard."

Several complaints were made by Inspector Kanda of a failure to comply with this Article, but none of them survived for argument before their Lordships except one complaint which related to the Report of the Board of Inquiry. This complaint was not contained in the Statement of Claim but this was because Inspector Kanda did not know the contents of the Report until the fourth day of the trial. Their Lordships think that an amendment should have been made even at that stage to permit it, but as the case proceeded before Rigby, J. and the Court of Appeal as if an amendment had been made, their Lorsdhips think it would be wrong to shut it out now.

The Report of the Board of Inquiry contained a severe condemnation of Inspector Kanda. It was sent to the adjudicating officer before he sat to enquire into the charge. He read it and had full knowledge of its contents. But Inspector Kanda never had it. He never had an opportunity of dealing with it. Indeed he never got it until the fourth day of the hearing of this action when this took place between the Judge and the Legal Adviser to the Government:

> " *The Court to Legal Adviser:* Am of the opinion that in the interests of justice the Findings of the Board of Inquiry ought to be made available to the Court and to the plaintiff and privilege waived thereon. . . .

Legal Adviser: Must be some misunderstanding—they have always been available—and no privilege claimed thereon.

Court: It is my clear impression that both in Court and throughout earlier proceedings in Chambers, privilege has been consistently claimed in respect of the Board of Inquiry file and the findings thereon."

The Report was then made available to Inspector Kanda and his advisers. It dealt in detail with the evidence of each witness heard by the Board, and expressed views as to the credibility of each witness, and the weight to be attached to his statement. It referred to inquiries made by the Board itself apart from the evidence given by witnesses. In the result it presented, as Rigby, J. said, a most damning indictment against Inspector Kanda as an unscrupulous scoundrel, who had suborned witnesses, both police and civilian, to commit perjury. It said: " The Board are unanimously of opinion that Inspector Kanda is the ' villain of the piece '. . . . 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 considering how many of his previous successful cases had been achieved by similar methods."

The question is whether the hearing by the adjudicating officer was vitiated by his being furnished with that Report without Inspector Kanda being given any opportunity of correcting or contradicting it. Much of the argument before their Lordships and indeed before the Courts in Malaya proceeded on the footing that this depended on this further question: Was there a " real likelihood of bias ", that is, " an operative prejudice, whether conscious or unconscious ", on the part of the adjudicating officer Mr. Strathairn against Inspector Kanda? The well-known line of cases were cited from *The Queen v. Rand* (1868) L.R.1 Q.B. 230 to *Regina v. Camborne Justices* 1955 1 Q.B. 41. Adopting this test, much effort was devoted to showing that Mr. Strathairn was not biassed against Inspector Kanda. Thus he had not adopted the specimen charge drafted for him by his superior officer Mr. Yates but had framed lesser charges of his own. And he deliberately refrained from calling the two accused men as witnesses because he realised that their evidence might be very prejudicial to the accused. He only called them at a later stage because Mr. Yates directed him to do so. The trial Judge, Rigby, J. was not persuaded by these arguments. He held that there was a very real likelihood of bias. But all the members of the Court of Appeal thought otherwise. They held that there was no real likelihood of bias. So Inspector Kanda failed on that way of looking at the case.

In the opinion of their Lordships, however, the proper approach is somewhat different. The rule against bias is one thing. The right to be heard is another. Those two rules are the essential characteristics of what is often called natural justice. They are the twin pillars supporting it. The Romans put them in the two maxims: *Nemo judex in causa sua:* and *Audi alteram partem.* They have recently been put in the two words Impartiality and Fairness. But they are separate concepts and are governed by separate considerations. In the present case Inspector Kanda complained of a breach of the second. He said that his constitutional right had been infringed. He had been dismissed without being given a reasonable opportunity of being heard.

If the right to be heard is to be a real right which is worth anything, it must carry with it a right in the accused man to know the case which is made against him. He must know what evidence has been given and what statements have been made affecting him: and then he must be given a fair opportunity to correct or contradict them. This appears in all the cases from the celebrated judgment of Lord Loreburn, L. C. in *Board of Education v. Rice* [1911] A.C. at p. 182 down to the decision of their Lordships' Board in *Ceylon University v. Fernando* [1960] 1 W.L.R. 223. It follows, of course, that the judge or whoever has to adjudicate must not hear evidence or receive representations from one side behind the back of the other. The Court will not enquire whether the evidence or representations did work to his prejudice. Sufficient that they might do so. The Court will not go into the likelihood of prejudice.

The risk of it is enough. No one who has lost a case will believe he has been fairly treated if the other side has had access to the Judge without his knowing. Instances which were cited to their Lordships were *Re Gregson* (1894) 70 L.T. 106, *Rex v. Bodmin Justices* 1947 K.B. 321 and *Goold v. Evans* (1951) 1 T.L.R. 1189, to which might be added *Rex v. Architects Registration Tribunal* (1945) 61 T.L.R. 445, and many others.

Applying these principles their Lordships are of opinion that Inspector Kanda was not in this case given a reasonable opportunity of being heard. They find themselves in agreement with the view expressed by Rigby, J. in these words: " In my view, the furnishing of a copy of the Findings of the Board of Inquiry to the Adjudicating Officer appointed to hear the disciplinary charges, coupled with the fact that no such copy was furnished to the plaintiff, amounted to such a denial of natural justice as to entitle this Court to set aside those proceedings on this ground. It amounted, in my view, to a failure to afford the plaintiff a reasonable opportunity of being heard in answer to the charge preferred against him which resulted in his dismissal." The mistake of the police authorities was no doubt made entirely in good faith. It was quote proper to let the adjudicating officer have the statements of the witnesses. The Regulations show that it is necessary for him to have them. He will then read those out in the presence of the accused. But their Lordships do not think it was correct to let him have the Report of the Board of Inquiry unless the accused also had it so as to be able to correct or contradict the statements in it to his prejudice.

Since their Lordships have already reached the conclusion that the dismissal was void on the ground that the Commissioner of Police had no authority to effect it, it is unnecessary for their Lordships to consider whether the setting aside of the proceedings would result also in avoiding the dismissal or merely in rendering it wrongful. Their Lordships notice that, before Rigby, J., it was suggested that the only remedy was by certiorari. But their Lordships agree with him that the remedy by declaration is available also. There was some question at one time as to the scope of the declaration but it was agreed before their Lordships that it should be limited to the date of the dismissal.

Their Lordships will therefore report to the Head of the Federation as their opinion that the appeal should be allowed, the order of the Court of Appeal should be set aside, and that it should be declared that the dismissal of the plaintiff from the Federation of Malaya Police Force purported to be effected by one W. L. R. Carbonnell, the Commissioner of Police of the Federation of Malaya, on the 7th day of July, 1958, was void, inoperative and of no effect. The respondents should pay the costs of the appellant before their Lordships' Board and in the Court of Appeal and in the High Court.

(85050) Wt. 8233/71 100 4/62 Hw.

In the Privy Council.

B. SURINDER SINGH KANDA

v.

THE GOVERNMENT OF THE FEDERATION OF MALAYA

DELIVERED BY

LORD DENNING

Printed by HER MAJESTY'S STATIONERY OFFICE PRESS,
HARROW

1962