Privy Council Appeal No. 34 of 1994

Philip Herman Bethel *Appellant*

v.

(1) Rt. Hon. Sir William Randolph Douglas, KCMG
(2) Edwin P. Minnis
(3) Gerald Montes de Oca and
(4) The Attorney General of the Commonwealth of The Bahamas *Respondents*

FROM

THE COURT OF APPEAL OF THE COMMONWEALTH OF THE BAHAMAS

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, Delivered the 3rd April 1995

Present at the hearing:-

Lord Keith of Kinkel
Lord Lane
Lord Jauncey of Tullichettle
Lord Browne-Wilkinson
Sir John May

*[Delivered by **Lord Jauncey of Tullichettle**]*

On 30th December 1992 the Governor-General of the Bahamas appointed a Commission of three members to inquire into certain specified matters relating to three companies namely Bahamasair Holdings Limited, the Hotel Corporation of The Bahamas, and The Bahamas Telecommunications Corporation. The first three respondents were at all material times the members of the Commission. In early August 1993 the appellant was summoned to appear and give evidence before the Commission and on 16th August he issued an originating summons of some twenty paragraphs in effect challenging the validity of the appointment of the Commission and of its power to summon him to give evidence and seeking appropriate declarations and injunctive relief. That in brief is the background to this appeal.

The originating summons was first heard by the Chief Justice (Gonsalves-Sabola) sitting alone in the Supreme Court. In a carefully reasoned and detailed judgment the Chief Justice rejected each of the several points argued by the appellant and dismissed the summons. All three judges of the Court of Appeal delivered judgments equally reasoned and detailed dismissing the appellant's appeal. He now appeals to Her Majesty in Council.

In order to understand the arguments presented by the appellant it will be necessary to set out a number of constitutional and statutory provisions relevant thereto. The office of what was then Governor and is now Governor-General was reconstituted by Letters Patent of 8th September 1909, of which Article XIII was in the following terms:-

> "The Governor may constitute and appoint all such Judges, Commissioners, Justices of the Peace, and other necessary Officers in the Islands, as may be lawfully constituted and appointed by Us, all of whom, unless otherwise provided by law, shall hold their offices during Our pleasure."

Article XXI of the Instructions to the Governor of the same date was in *inter alia* the following terms:-

> "The Governor shall not (except in the cases hereunder mentioned) assent in Our name to any Bill of any of the following classes:-
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> ...
>
> 9. Any Bill of an extraordinary nature and importance, whereby Our prerogative, or the rights and property of Our subjects not residing in the Islands, or the trade and shipping of the United Kingdom and its Dependencies, may be prejudiced."

Section 2 of the Commissions of Inquiry Act 1911 ("the Act of 1911") as amended provides:-

> "Whenever it shall appear to the Governor-General that it will be for the public benefit so to do, the Governor-General may issue a commission in the form of the First Schedule to this Act appointing persons, not less than three in number, to inquire into and report upon any matter stated in such commission as the subject of inquiry."

Section 10 thereof provides *inter alia*:-

> "10.-(1) Subject to the provisions of this Act, any commissioner shall have the powers of a justice of the Supreme Court to -

(a) summon and compel the attendance of witnesses;

(b) call for the production of documents or things including the power to retain and examine the same;

(c) examine persons appearing before them on oath;

(d) ...

and a summons in the form set out in the Third Schedule signed by one or more of the commissioners ... shall be equivalent to, and for the purposes of any law have the same effect as, in any formal proceedings in the Supreme Court for summoning or enforcing the attendance of witnesses and compelling the production of documents or things."

Mr. Glinton, for the appellant, first of all argued that the appointment of the Commission bore to be under the Royal Prerogative because of the opening words thereof namely:-

"ELIZABETH THE SECOND by the Grace of God, Queen of the Commonwealth of The Bahamas and of Her other Realms and Territories, Head of the Commonwealth.

[signed]
Governor-General"

The power to appoint Commissions in Article XIII of the Letters Patent of 8th September 1909 had been revoked by section 2 of the Bahamas Islands (Constitution) Order in Council 1963 with the result that there was no prerogative power in the Governor to appoint a Commission. Section 2 of the Act of 1911 did not empower the Governor (now the Governor-General) to appoint a Commission, it merely entitled him to clothe with certain powers a Commission otherwise validly appointed. There being no valid appointment there was no room for the application of section 2. This argument overlooks Article 24 of the Constitution annexed to the Order in Council which appears to authorise the Governor to constitute offices for the Bahamas Islands and make appointments thereto. In any event that is all past history since the office of Governor-General is established by Article 32 of the 1973 Constitution which superseded that of 1963 and it was not suggested that the 1973 Constitution had deprived the Governor-General of any prerogative right which he might otherwise have to appoint a Commission. Mr. Glinton also argued, presumably upon the alternative basis that the Governor-General did have prerogative power to appoint a Commission that section 2 must be construed in such a way as not to cut down the prerogative having regard to the provisions of Article XX1 of the Instructions to the Governor. These were

instructions to a Governor appointed under Letters Patent which have been revoked and it seems almost certain that they no longer have force and effect. Their Lordships were referred to no comparable provision in either the 1963 or 1973 Constitutions. A Commission appointed under the prerogative and at common law would, it was said, have no power to summon witnesses and could only have purposes far more limited than would be possible under a liberal construction of section 2, which section should not be allowed to derogate from such limited powers. A number of New Zealand and Australian cases were also referred to in this context but their Lordships do not find them to be of assistance. No authority was cited for the proposition that a Commission appointed under the prerogative can only have limited purposes and the conflicting arguments addressed in support of the attack on the validity of the appointment were not entirely easy to reconcile.

Although the appointment of the first respondent on 11th February 1993 in room of an original grantee who had resigned proceeded upon the narrative that the Commission had issued under section 2 of the Act of 1911 their Lordships do not find it necessary to determine whether the Commission was appointed by the Governor-General in exercise of the prerogative or in exercise of his powers under section 2. If the former were the case section 10 of the Act of 1911 supplemented such powers as he possessed under the prerogative. If the latter were the case the terms of the appointment of the Commission and the subsequent appointment thereto of the first respondent satisfied the requirements of section 2 and the Commission was vested with the powers contained in section 10. Their Lordships therefore have no doubt that under whichever authority the Commission was appointed such appointment was valid and that it possessed all the powers and was subject to all the duties provided in the Act of 1911.

Mr. Glinton's second submission was to the effect that paragraph (h) of the terms of reference of the Commission was contrary to the provisions of section 2. This paragraph was in the following terms:-

> "(h) any and all allegations of fraud, corruption, breach of trust, conflict of interest or any wrongdoing whatsoever made by anyone against any person whatsoever arising out of and in connection with any or all of the affairs of Bahamasair Holdings Ltd., the Hotel Corporation of The Bahamas and The Bahamas Telecommunications Corporation;"

In support of this submission Mr. Glinton accepted that if the Commission was appointed under the Act of 1911 and section 2 was given a liberal construction that paragraph was unobjectionable. However he maintained that there was no authority to inquire into matters involving crime at common law

under the prerogative and that section 2 should be construed to produce a like result. He referred to *Cock v. The Attorney General* (1909) XXVIII N.Z.L.R. 405 which concerned section 2 of the New Zealand Commissions of Inquiry Act 1908 which was in terms much more limited than section 2 of the Bahamian Act of 1911. The Court of Appeal held that a Commission to inquire into allegations as to payment of money to members of a licensing committee in relation to an application by a named individual was not brought within the ambit of the section by the addition of the words "and also as to the necessity or expediency of any legislation in the premises", the allegations themselves relating solely to matters outwith the ambit of the section. That case was not followed in *McGuinness v. Attorney-General of Victoria* (1940) 63 C.L.R. 73 in which the High Court of Australia rejected an argument that the Crown had no power to appoint a Commission to inquire into whether or not any person had been guilty of a crime because such Commission would supersede the ordinary courts of justice without affording the normal rights, privileges and protection to accused persons. Latham C.J. at page 84 said:-

> "But the commission in the present case, though authorized to inquire into the subject matter of alleged bribery of members of Parliament, has no power to find any person guilty of giving or receiving a bribe or to convict him of an offence or to impose any penalty of any kind upon him. The commissioner can only make a report upon the matter to the Governor in Council."

Cock v. The Attorney General turned upon the construction of a statutory power of appointment far more limited in its terms than section 2 of the Act of 1911. The above quoted words were considered to be a device to bring within the power matters which were demonstrably outside it. Their Lordships therefore conclude that the case affords no support to the argument.

It was further argued that paragraph (h) contravened section 3 of the Criminal Procedure Code which provides that only a court shall inquire into and try criminal offences. The short answer to this is to be found in the dictum of Latham C.J. (*supra*).

Mr. Glinton's third submission was that to compel the appellant to give evidence under oath after being summoned to appear before the Commission was contrary to the Constitution and the Evidence Act of which Article 20(7) and section 131 are respectively in the following terms:-

> "20.-(7) No person who is tried for a criminal offence shall be compelled to give evidence at the trial."

> "131. Subject to the provisions of Part VIII of this Act, a witness shall not be compelled to answer any question which would tend to expose the witness or the wife or husband of the witness to a criminal charge or to a penalty or forfeiture."

Article 20(7) clearly has no applications since the Commission has no power to try anyone for a criminal offence. It follows that any attempt to equate proceedings before the Commission with a criminal trial for the purposes of Article 20(7) of the Constitution is doomed to failure. Section 131 was, it was argued, important because of sections 444 and 445 of the Penal Code which render perjury before a Commission of Inquiry an offence. It is not entirely easy to see the relevance of these two sections otherwise than as a complaint that perjury with impunity before a Commission is unavailable. Section 131 must, however, be read together with section 11(2) of the Act of 1911 which is in the following terms:-

> "(2) No person attending before a commission shall be excused from answering any question or producing any document or thing by reason that the answer thereto or the production thereof, as the case may be, would tend to be self-incriminating but notwithstanding any other law to the contrary no answer given or the fact of such production shall be used or be admissible as evidence against that person in any proceedings except in criminal proceedings in which that person may be charged with having given false evidence before the commission or having conspired with or procured others to do so."

This sub-section makes it perfectly clear that no answer given by a witness summoned to appear before the Commission can be used in criminal proceedings against him other than in proceedings for perjury before the Commission. It is therefore entirely consistent with the provisions of section 131. Furthermore it cannot possibly be said to deprive a witness of the "protection of the law" contrary to Article 15(a) of the Constitution. This submission is therefore wholly without merit.

The appellant's next submission related to the Commission's power to call for production of documents under section 10(1)(b) of the Act of 1911, which power was said to be invalid as contravening Article 21(1) of the Constitution which is in the following terms:-

> "21.-(1) Except with his consent, no person shall be subjected to the search of his person or his property or the entry by others on his premises."

There are two answers to this contention. In the first place section 10(1)(b) does not empower the Commission to order a search of persons or property, it merely empowers it to issue a subpoena duces tecum. In the second place, even if the Commission were empowered to order a search, the position would be covered by Article 21(2) which is in the following terms:-

> "Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this Article to the extent that the law in question makes provision -
>
> (a) which is reasonably required -
>
> (i) in the interests of defence, public safety, public order, public morality, public health, town and country planning, the development of mineral resources, or the development or utilisation of any other property in such a manner as to promote the public benefit: or ..."

Mr. Glinton sought to support his argument by reference to the dissenting judgment of Wilson J. in *Thomson Newspapers Ltd. v. Canada (Director of Investigation & Research, Restrictive Trade Practices Commission)* (1990) 67 D.L.R. (4th) 161. However the majority decision appears to be dead against him and it is sufficient only to refer to the following passage in the headnote:-

> "Section 17 of the *Combines Investigation Act* allows the Director of Investigation and Research, in the course of carrying on an investigation under the Act, to apply for an order requiring any person to be examined under oath and to produce business records. Section 20 of the Act provides a number of safeguards for witnesses and persons being investigated, including s. 20(2) which protects persons who are compelled to give self-incriminating evidence from that testimony being used against them in subsequent criminal proceedings. The appellants applied to the Ontario High Court for a declaration that s. 17 of the *Combines Investigation Act* and the orders made thereunder violated ss. 7 and 8 of the *Canadian Charter of Rights and Freedoms*. The judge held that s. 17 violated s. 8 of the Charter but not s. 7. On an appeal of that decision by the appellants and a cross-appeal by the respondents, the Ontario Court of Appeal held that s. 17 violated neither s. 7 or s. 8 of the Charter."

Sections 7 and 8 of the Charter are in the following terms:-

> "7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof

except in accordance with the principles of fundamental justice.

8. Everyone has the right to be secure against unreasonable search and seizure."

The Supreme Court of Canada upheld the decision of the Ontario Court of Appeal. The appellant next submitted that paragraph (h) of the Commission's Reference amounted to a delegation by the Governor-General of the scope of the inquiry to the Commission, relying on the decision of this Board in *Ratnagopal v. Attorney-General* [1970] A.C. 974. Section 2(1) of the Ceylon Commissions of Inquiry Act empowered the Governor-General to appoint a Commission of Inquiry to obtain information as to *inter alia*:-

"(c) any matter in respect of which an inquiry will, in his opinion, be in the interests of the public safety or welfare."

The terms of reference to a Commission so appointed appear from the following passage of the judgment of this Board delivered by Lord Guest at pages 981-982:-

"When the appointment of the commissioner is examined it will be found that the scope of the inquiry is left entirely to the commissioner's discretion. In effect he is empowered to inquire into whether, during the period in question, any abuses occurred in relation to such tenders and such contracts as the commissioner should in his absolute discretion deem to be by reason of their implications, financial or otherwise, on the government of sufficient importance in the public welfare to warrant an inquiry and report. Under the terms of the warrant the commissioner is being entrusted with deciding what tenders and what contracts require to be inquired into. Under section 2 of the Act the matter to be inquired into must be one in respect of which an inquiry will 'in the opinion of the Governor-General' be in the interests of the public welfare. Under the warrant the commissioner is given the power of selecting the matters which he will inquire into and report upon, whereas the selection is by the Act imposed on the Governor-General. The scope of the inquiry, instead of being limited by the Governor-General as in terms of the Act it should be, is to be decided by the commissioner."

The Board concluded that for the foregoing reasons the appointment of the Commissioner was *ultra vires*.

Ratnagopal is authority for the proposition that in appointing a Commission under statutory powers such as were contained in section 2 of the Ceylon Commissions of Inquiry Act and in section 2 of the Act of 1911 the Governor-General must specify the

matters to be inquired into and is not entitled to leave it to the Commission to determine what those matters are to be. In the present case the Governor-General did exactly that by confining the matters to those arising out of or in connection with the affairs of three named companies. There was accordingly no such delegation of discretion as occurred in *Ratnagopal* and no ground for challenging the validity of the reference.

The appellant next sought to argue that the power to appoint a Commission was vested solely in the Governor-General and that the appointment of this Commission was invalid because he had acted on the advice of the Government. The answer to this submission is to be found in Article 79(1) and (6) of the Constitution which provides:-

> "79.-(1) The Governor-General shall, in the exercise of his functions, act in accordance with the advice of the Cabinet or a Minister acting under the general authority of the Cabinet, except in cases where by this Constitution or any other law he is required to act in accordance with the recommendation or advice of, or with the concurrence of, or after consultation with, any person or authority other than the Cabinet:
>
> Provided that the Governor-General shall act in accordance with his own deliberate judgment in the performance of the following functions -
>
> ...
>
> (6) Any reference in this Constitution to the functions of the Governor-General shall be construed as a reference to his powers and duties in the exercise of the executive authority of The Bahamas and to any other powers and duties conferred or imposed on him as Governor-General by or under this Constitution or any other law."

None of the functions thereinafter mentioned relate to the appointment of a Commission. The suggestion of the appellant that "any other law" did not cover section 2 is quite unsustainable.

Finally Mr. Glinton argued that the originating summons should have been heard by two judges and not by the Chief Justice sitting alone. He referred first to section 4 of the Supreme Court (Amendment) Act 1975 which is in the following terms:-

> "4. Section 29 of the principal Act is amended in the following respects -

(a) by renumbering the existing section as subsection (1);

(b) by inserting immediately after subsection (1) as renumbered the following subsections -

'(2) Subject to subsection (3) of this section, any Justice sitting alone shall be qualified to exercise all the jurisdiction, authority and powers of the court.

(3) The Rules Committee may make rules under section 41 of this Act prescribing the jurisdiction, authority and powers of the court which shall be exercised by two or more Justices sitting together.''

He then referred to the Supreme Court (Special Jurisdiction) Rules 1976 of which the relevant parts are as follows:-

"2. Two or more Justices of the Supreme Court may sit together for the transaction in the Supreme Court of any of the business hereinafter mentioned whenever the Chief Justice shall so direct, and in any such case the senior of the Justices shall be the president of the Court.

3. When two or more Justices are sitting together as aforesaid they shall have jurisdiction, power and authority to hear and determine any or all of the following business:

...

(c) Any application for a declaration or other application relating to the Constitution; and ..."

His submission was that the amended section 29(3) of the Supreme Court Act clearly contemplated that the Rules Committee would make the sitting of two judges mandatory in certain cases and that accordingly rule 2 of the 1976 Rules should not have left it to the Chief Justice to determine when two judges would sit to hear the business enumerated in rule 3. The fact that Article 28(5) of the Constitution empowered Parliament to make laws conferring upon the Supreme Court such additional powers as might be necessary to enable it more effectively to exercise jurisdiction in matters involving possible contraventions of the Constitution pointed strongly towards such a result having been intended.

It may well be that Parliament intended that two judges should always sit to hear constitutional matters but the amended section 29(3) left it to the Rules Committee to prescribe when two judges would sit together and rule 2 vests a discretion in the Chief Justice in quite unambiguous terms. It follows that the hearing before the Chief Justice was lawful and cannot be assailed.

Although their Lordships have not found it necessary to refer to the judgments in the courts below they wish to record that they found them impressive and that they are in entire agreement with the careful and detailed reasoning therein. Their Lordships have no doubt that all the arguments presented on behalf of the appellant, albeit not lacking in ingenuity, were unsound.

Their Lordships will accordingly humbly advise Her Majesty that this appeal must be dismissed.