



Hilary Term

[2019] UKPC 12

Privy Council Appeal No 2017 of 0078

JUDGMENT

**Jamaicans for Justice (Appellant) v Police Service Commission and another
(Respondents) (Jamaica)**

From the Court of Appeal of Jamaica

before

Lady Hale

Lord Kerr

Lady Black

Lord Lloyd-Jones

Lord Briggs

JUDGMENT GIVEN ON

25 March 2019

Heard on 30 January 2019

Appellant

Hugh Southey QC

Philip Dayle

(Instructed by Simons Muirhead & Burton
LLP)

Respondent

Marlene Malahoo Forte QC

Althea Jarrett

(Instructed by Charles Russell Speechlys
LLP)

LADY HALE:

1.

The Jamaica Constabulary Force (JCF) has to contend with some formidable problems. There are, as the Attorney-General reminded us several times, elements in Jamaican society who think nothing of taking life in furtherance of their own criminal ends. The police force must do all it can, within the law, to safeguard the public from crime and bring the criminals to justice. On the other hand, the Inter-American Commission on Human Rights, in the case of Michael Gayle v Jamaica, Report No 92/05, 24 October 2005 took into account, at para 88,

“information indicating that impunity for killings by the police remains a serious problem in Jamaica. As the Petitioners noted in their petition and subsequent submissions, a pattern has been identified in Jamaica whereby a disproportionately large number of killings are associated with the State’s security forces, but where very few prosecutions have been undertaken in relation to those killings”.

2.

The issue in this case is what steps the Police Service Commission (PSC), which is charged with deciding upon the appointment and promotion of police officers, should take to inform itself about officers recommended for promotion who have been involved in fatal incidents before making its decisions. In particular, is there a duty to ensure that allegations of extra-judicial killings against such an officer are fully and independently investigated before accepting a recommendation that he be promoted?

The facts

3.

The issue arises in the context of the promotion of a particular officer, Superintendent Hewitt, to the rank of Senior Superintendent. In July 2009, the appellant, a non-governmental, non-partisan human rights organisation, wrote to the PSC saying that it had received 13 complaints of unprofessional conduct against Superintendent Hewitt, including ten complaints of fatal shootings by officers under his command. It had complained to the Commissioner of Police but received no response. After consulting the Commissioner, the PSC replied in September that the Commissioner

“has always brought reports of complaints made against Superintendent Hewitt to his attention, and has counselled and warned him accordingly. He has also given the assurance that all reports of wrongdoing by Mr Hewitt or any other member of the Force will be thoroughly investigated and that the appropriate action will be taken, as deemed necessary”.

4.

The appellant found this “grossly inadequate” and asked what investigations there had been. The PSC asked the Commissioner to review the complaints with a view to making a more comprehensive report to the appellant. In January 2010, the acting Commissioner sent to the PSC a one page report into allegations of misconduct against Superintendent Hewitt which had been prepared by the JCF’s Bureau of Special Investigations (BSI). Among other things, this said that:

“It is a fact that some of the shootings arising from operations that he has led are questionable, however there is no evidence that he has been directly involved or conspired with the officers involved in these shootings”.

However, it went on to say that the Superintendent had the unenviable responsibility of managing two of the most volatile areas in the Island, requiring firm and decisive leadership in order to meet the challenges they posed.

5.

The PSC did not send this report to the appellant. The appellant wrote again in July and again in November 2010. The November letter referred to the recent Report of the UN Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. This complained of the very obstructive, unco-operative and openly threatening conduct of Superintendent Hewitt and his officers when they had visited his police station in February and urged that disciplinary action be taken against him. The appellant’s letter was forwarded to the Commissioner.

6.

Days later, the Commissioner wrote to the PSC advising it that there were 24 vacancies in the rank of Senior Superintendent and including Superintendent Hewitt in the list of those he recommended for promotion. His letter said this about Superintendent Hewitt:

“Mr Delroy Hewitt, Superintendent is a hard working dedicated officer who leads from the front. He has commanded several challenging divisions and has succeeded in reducing crime. St Andrew South his current command which was viewed as the murder capital of Jamaica and since taking over, major crimes having been trending down. The figures show that major crimes are down by 19% and murder down by 33% or seventy one (71). The Human Rights lobby groups are recommending that he be removed from front line duties, however he is fearless and prepared to tackle the criminal elements in the society. The Jamaica Constabulary Force needs his experience to help in managing crime and violence. He is recommended for promotion to the rank of Senior Superintendent.”

7.

In December, the PSC requested and received a fatal incident report from the BSI relating to fatal shootings in which the listed Superintendents and deputy Superintendents had been involved. The report consisted of a table giving brief particulars, in the case of Superintendent Hewitt, of no less than 37 incidents. In five of these there had been verdicts of justifiable homicide, but in the rest the investigation was incomplete, or a ruling was awaited from the Director of Public Prosecutions (DPP), or the case was pending before the Coroner’s Court. In only two of these had the Superintendent been the actual shooter as well as the team leader and in both cases the verdict had been justifiable homicide.

8.

The PSC interviewed Superintendent Hewitt on 11 January 2011. It appears that an hour was set aside for this interview, whereas only half an hour was set aside for the other officers interviewed. According to the PSC chairman, Superintendent Hewitt made a favourable impression. It formed the view that he was “a fearless and effective police officer who was placed repeatedly in policing divisions accounting for the highest incidents of crime, particularly murders”. The Commissioner had informed the PSC that “the incidents of crime were reduced in the divisions over which he had command”. The next day the PSC decided to appoint him to act as a Senior Superintendent for three months, during which time it would request further information. The table was expanded slightly in response to its questions. The PSC also met the Commissioner to discuss the concerns raised.

9.

Meanwhile, the appellant wrote to express its concern at the lack of any response to the allegations and at reports in the media of the possible promotion of Superintendent Hewitt. The PSC replied that it had discussed the appellant’s concerns with the Superintendent and with the Commissioner and was satisfied that it had enough information to make a decision. But it also asked the appellant to supply any factual information it might have about the complaints it had received. The appellant sent a list of 28 complaints against the Superintendent and officers under his command (a list which does not appear to correlate with the list compiled by the BSI).

10.

In April, the DPP reported that all outstanding matters relating to officers including Superintendent Hewitt had been reviewed and no recommendations were made for any of them to be criminally or departmentally charged. On 15 April 2011, the PSC recommended to the Governor General that

Superintendent Hewitt be appointed a Senior Superintendent and on 18 April advised the appellant of the appointment.

INDECOM

11.

While all this was going on, the Jamaican Parliament passed the Independent Commission of Investigations Act 2010. This set up a Commission, known as INDECOM, independent of the JCF and security services, “to undertake investigations concerning actions by members of the Security Forces and other agents of the State that result in death or injury to persons or the abuse of the rights of persons”. A complaint may be made to INDECOM by “[any] person who alleges that the conduct of a member of the security forces [which include the JCF] ... resulted in the death of or injury to any person or was intended or likely to result in such a death or injury” (s 10(1)(a)). INDECOM may also investigate on its own initiative (s 13). It is for INDECOM to decide how best to handle the matter, but unless a complaint is resolved through informal mechanisms, it will result in a report that is copied to, among others, the DPP and, if the incident involves a member of the JCF, the PSC (s 17(1),(2),(9),(10)). The JCF has a duty to comply with its recommendations (s 23), but the PSC does not.

12.

The Act was controversial. The background is explained by the Full Court of the Supreme Court in *Gerville Williams v Commissioner of the Independent Commission of Investigations* [2012] JMFC Full 1, a case in which several police officers challenged, unsuccessfully, the constitutionality of INDECOM’s investigatory powers. F Williams J explained that the Act

“seeks to upend a long-standing status quo of ineffective investigations into questionable shootings and allegations of excesses by agents of the state, and to address certain controversial societal concerns. It was meant to represent a paradigm shift from what obtained before.” (para 329)

13.

We were told that INDECOM is now “automatically on the scene” if a police officer is implicated in a killing. However, it is of some concern that INDECOM reported in 2017 that no disciplinary proceedings have been instituted against any of the 20 senior officers reported by INDECOM to the PSC and the Commissioner of Police for disciplinary breaches. The earliest case was submitted in 2013 and was the only one to which they had received a response; this was, in 2015, to the effect that, despite a full INDECOM investigation, the PSC had asked the JCF to conduct a further investigation; since then nothing more had been heard (*The INDECOM Quarterly*, 2017, 4th, p 41).

These Proceedings

14.

In June 2011, the appellant, having obtained leave, filed a claim for judicial review of the decision to recommend Superintendent Hewitt for promotion. It sought an order for certiorari to quash the recommendation and orders of mandamus directing the PSC to conduct an effective, thorough and impartial investigation into the 28 allegations of misconduct made by their complaints and to reconsider its decision. These claims failed both at first instance before B Morrison J ([2012] JMCA Civ 153) and on appeal before Morrison, Phillips and McIntosh JJA ([2015] JMCA Civ 12). On the appeal, the focus had shifted from requiring the PSC itself to conduct an investigation to requiring it to cause such an investigation to be undertaken, in particular by INDECOM.

15.

Morrison JA, giving the leading judgment in the Court of Appeal, said this, at para 137:

“I have not found this to be an easy case. For, on the one hand, I cannot doubt for a moment the critical importance of the fundamental rights and freedoms guaranteed to all persons in Jamaica by the Constitution, the supreme law of the land, as well as the central role of the courts as the guardians of the Constitution. Nor, on the other hand, do I minimise in any way the critical importance of the PSC, as an independent body established by the Constitution, in ensuring that the JCF is staffed and led by men and women qualified for the positions which they are expected to occupy and regardful of those fundamental rights and freedoms.”

16.

He had earlier concluded that regulations 9 and 15(2)(k) gave the PSC the power to ask others, including INDECOM, to make further inquiries, but that it was a matter for the PSC whether or not to do so. He concluded that there was no obligation on the PSC to commission an independent, impartial and thorough investigation of the sort contended for by the appellant. Rather, the question was “whether, in the light of the provisions of the [Police Service Regulations] and the material that was available to it for the purpose, the PSC gave proper consideration to the Commissioner’s recommendation for SP Hewitt’s promotion” (para 134) and, in his view, it had done so.

The legislative framework

17.

The PSC is established under section 129(1) of the Constitution of Jamaica. Under section 130, read with section 125, the power to make appointments to the JCF, and to remove and to exercise disciplinary control over officers is exercised by the Governor General on the advice of the PSC. This power is expressly “Subject to the provisions of this Constitution”. The purpose of setting up the PSC, along with the other public service commissions provided for in the Constitution, is to insulate the JCF (and other public office holders) from political influence (*Thomas v Attorney General of Trinidad and Tobago* [1982] AC 113, at 124).

18.

The PSC is regulated by the Police Service Regulations 1961. Regulation 13(a) provides that the PSC shall make recommendations to the Governor General with respect to appointments and promotions of members of the JCF. Regulation 15(1) requires the PSC to take into account in respect of each member of the JCF not only “his seniority, experience and educational qualifications but also his merit, ability and good conduct”. Regulation 15(2) provides that:

“In the performance of its functions under paragraph (1), the Commission shall take into account as respects each member -

(a)

his general fitness

(b)

his seniority

(c)

his basic educational qualifications and any special qualifications;

(d)

any special course of training that he may have undergone (whether at the expense of Government or otherwise);

(e)

markings and comments made in confidential reports by any officer under whom the member concerned worked during his service;

(f)

any letters of commendation in respect of any special work done by the member;

(g)

the duties of which he has had knowledge and experience;

(h)

the duties of the post for which he is a candidate;

(i)

any specific recommendation of the Commissioner for filling the particular posts;

(j)

any previous employment of his in the public service or the Force or otherwise;

(k)

any special reports for which the Commission may call.”

19.

In addition, regulation 9 allows the PSC, in considering any matter or question, to “consult with any such public officer or other person as the Commission may consider proper and desirable and may require any public officer to attend and give evidence before it and to produce any official documents relating to such matter or question”. Under regulation 10, it is a breach of discipline for a public officer to fail to appear or to produce documents without reasonable cause.

20.

It is now common ground that the PSC does have the power to call for a report from INDECOM into allegations against any police officer whose promotion or discipline it is considering. The issue is whether there is any duty, either at common law or under the Constitution, to make that or any other inquiry in order properly to inform itself before making a decision.

The Constitution of Jamaica

21.

Chapter III of the Constitution contains the Charter of Fundamental Rights and Freedoms, substituted for the previous guarantees of fundamental rights by the Charter of Fundamental Rights and Freedoms (Constitutional Amendment) Act 2011. It opens with section 13, the material parts of which read as follows:

“(1) Whereas -

(a) the state has an obligation to promote universal respect for, and observance of, human rights and freedoms;

(b) all persons in Jamaica are entitled to preserve for themselves and future generations the fundamental rights and freedoms to which they are entitled by virtue of their inherent dignity as persons and as citizens of a free and democratic society; and

(c) all persons are under a responsibility to respect and uphold the rights of others recognized in this Chapter,

the following provisions of this Chapter shall have effect for the purpose of affording protection to the rights and freedoms of persons as set out in those provisions, to the extent that those rights and freedoms do not prejudice the rights and freedoms of others.

(2) ... save only as may be demonstrably justified in a free and democratic society _ -

(a) this Chapter guarantees the rights and freedoms set out in subsections (3) and (6) of this section and in sections 14, 15, 16 and 17; and

(b) Parliament shall pass no law and no organ of the State shall take any action which abrogates, abridges or infringes those rights.

(3) The rights and freedoms referred to in subsection (2) are as follows

(a) the right to life, liberty and security of the person and the right not to be deprived thereof except in the execution of the sentence of a court in respect of a criminal offence of which the person has been convicted; ...

(g) the right to equality before the law; ...

(r) the right to due process as provided in section 16; ...

(4) This Chapter applies to all law and binds the legislature, the executive and all public authorities. ...

(6) No person shall be subjected to torture or inhuman or degrading punishment or other treatment. ...”

Section 16 is headed “Protection of Right to Due Process” and makes detailed provision for civil and criminal cases along similar lines to article 6 of the European Convention on Human Rights.

22.

The Caribbean Court of Justice, in *Nervais v R* [2018] 4 LRC 545, when construing section 11 of the Constitution of Barbados, which also begins with the word “whereas”, held that this did not mean that the section was merely “aspirational [or] a preliminary statement of reasons which make the passage of the Constitution, or sections of it, desirable” (para 25). It was intended to have the force of law. The court went on to say, of the right to the protection of the law, that it “affords every person . . . adequate safeguards against irrationality, unreasonableness, fundamental unfairness or arbitrary exercise of power” (para 45). This is an echo of the words of the Caribbean Court of Justice in *Maya Leaders Alliance v Attorney General of Belize* [2015] CCJ 15 (AJ), para 47, in turn citing *Attorney General v Joseph and Boyce* [2006] CCJ 3 (AJ), (2006) 69 WIR 104, 226, para 20.

Discussion

23.

It is clear to this Board that the PSC, like the JCF and INDECOM and other organs of the State, must exercise its functions in a manner which is compatible with the fundamental rights of all persons,

including the right to life, the right to equality before the law and the right to due process of law, guaranteed by section 13(2) and (3)(a), (g) and (r). As Morrison JA put it, at para 89,

“...given that all organs of the State are specifically enjoined by the Constitution to take no action which ‘abrogates, abridges or infringes those rights’, it must surely be equally uncontroversial to insist that all such organs are bound to respect and seek to protect the fundamental rights and freedoms guaranteed by the Constitution in all aspects of their activities.”

24.

The Board is also disposed to accept that the right to equality before the law, like the right to the equal protection of the law, affords every person protection against irrationality, unreasonableness, fundamental unfairness or the arbitrary exercise of power. These are, in any event, fundamental common law principles governing the exercise of public functions. As there is nothing in the statutory framework governing the PSC to contradict them, they are applicable in this case irrespective of whether or not they have the status of a constitutional right.

25.

The question, therefore, is whether either or both of those principles required the PSC to make further inquiries into the complaints it had received against Superintendent Hewitt before recommending him to the Governor General for promotion to the rank of Senior Superintendent. Mr Hewitt has now retired, and so the question of quashing the decision and requiring the PSC to reconsider it is now academic. The appellant nevertheless challenges the conclusion of the Court of Appeal that there is no duty to call for further investigations in a case such as this.

26.

The Attorney General is correct to say that the shape of the case has changed somewhat over the years since these proceedings were begun. In 2011, the appellant was seeking an order of mandamus compelling the PSC to carry out its own inquiries into those allegations. It was argued that regulations 9 and 15(2)(k) imposed a duty, and not just a power, to make such inquiries. This was successfully resisted on the ground that the PSC was not set up with the staff or resources to enable it to do this. At least until the establishment of INDECOM, it had little option but to ask the Commissioner, and through him the BSI, to make inquiries. And that is what it did. The history shows that the PSC did not turn a blind eye to the allegations against the Superintendent. It asked the Commissioner to report on them before there was any question of promotion and continued those inquiries when Superintendent Hewitt was recommended for promotion. It asked for fatal incidents reports on all the officers recommended. It interviewed Superintendent Hewitt for an hour (longer than the other officers considered). It asked for further information thereafter. By the time of the final decision, the DPP had reported on the results of all the references to the DPP. All matters relating to Superintendent Hewitt had been dealt with. That was, argues the Attorney General, all that could reasonably be expected of the PSC.

27.

However, the focus has now shifted from whether the PSC should carry out its own inquiries to whether it should call for further inquiries to be made, in particular from a body which is independent of the JCF. To rephrase the question posed by Morrison JA, did the PSC give proper consideration to the Commissioner’s recommendation, without exercising its powers to call for further inquiries, when it knew that serious allegations had been made against the officer and that no independent investigation had taken place?

28.

In the Board's view, the common law provides a straightforward answer to that question. Before the Court of Appeal, the case got bogged down in a technical dispute about whether there was an express statutory duty to make further inquiries. Clearly there was not. But that does not answer the question whether the proper discharge of the statutory functions which the PSC did have required it to do so. Clearly it did. While the level of serious violent crime in some parts of Jamaica was a grave concern, there was also a grave concern, both nationally and internationally, that the police, or some members of the JCF, were overly inclined to take the law into their own hands in dealing with it, thus risking violations of the right to life, to due process of the law and to equality before the law of the people involved. Superintendent Hewitt was involved, as team leader, in a large number of fatal incidents. No independent investigation of these incidents had taken place. INDECOM now existed for the purpose of conducting such investigations. The PSC had power to ask INDECOM to investigate. Receiving a formal complaint, or a request to act on its own initiative, from such a source, it would be irrational of INDECOM not to take some action in response. Such an investigation might reveal a different picture from the very summary table of incidents with which the PSC had been provided. It would serve to put the statements of the Commissioner, and of Superintendent Hewitt himself, as to his effectiveness in fighting crime, into context. The final decision would still be that of the PSC, but there was a reasonable prospect that a properly informed PSC might have made a different decision.

Conclusion

29.

The Board will therefore humbly advise Her Majesty that the appeal should be allowed and a declaration made to reflect this Judgment. The parties should make written submissions as to the precise wording of such a declaration, to be agreed if possible, within 21 days.

30.

The parties should make written submissions on costs within 21 days of the delivery of this judgment.