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 O N A P P E A L  
 FROM THE FEDERAL COURT OF MALAYSIA
 

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B E T W E E N :

THE GOVERNMENT OF MALAYSIA (Defendant) Appellant  
 -- and --  
 IZNAN BIN OSMAN (Plaintiff) Respondent

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CASE FOR THE RESPONDENTRECORD

- 10 1. This is an Appeal from the Judgment and Order of the Federal Court of Appeal, Malaysia (Suffian L.P. Lee Hun Hoe C.J. Borneo, Wan Hamzah J.) dated 8th day of March, 1975 which dismissed with costs an Appeal by the Appellant from a Judgment and Order of Sharma J., dated 12th day of September, 1973 whereby he adjudged that the Respondent's dismissal from service was null and void, inoperative and of no effect and that he still continues to be a member of the Royal Malaysian Police Force and it was ordered that the Respondent is entitled to all arrears of salary as from the date of his purported dismissal i.e. 19th April, 1967 and it was ordered that the Appellant do also pay the Costs of this Suit to the Respondent whereby the Respondent alleged that the Appellant wrongfully dismissed him and claimed that his dismissal from the Royal Malaysian Police, purported to be effective by the Chief Police Officer, Perak, on the 19th day of April, 1967, was void and inoperative and of no effect and that the Respondent is still a member of the Royal Malaysian Police and further claimed that an account be taken of the salary and emoluments due to the Respondent from the date of such wrongful dismissal to date of reinstatement and costs.
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- 40 2. By his Statement of Claim dated 21st day of August, 1968 and re-delivered on 27th day of April, 1971 the Respondent claimed for reinstatement in the Royal Malaysian Police and for arrears of salary for reasons that his dismissal was arbitrary without an opportunity being given to him to be heard and
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his dismissal was wrong in law and in equity.

pp. 5-6

3. The Appellant's defence to the Respondent's Statement of Claim was delivered on the 22nd day of November, 1968. The Appellant admitted the Respondent's dismissal from the Police Force and averred that the Respondent's service was governed by Police Ordinance 1952, Police Regulations General Order and Commissioner's Standing Order, and further averred that the dismissal was proper and in accordance with law and procedure and the Respondent's Service was not wrongfully determined but that the dismissal of the Respondent was right and proper.

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pp. 8-11

4. In the proceedings before the Trial Judge, the Respondent called one witness, namely, Dato Mohd. Pilus bin Yusoh, Chief Police Officer, Perak, to establish that the dismissal in fact was his own individual decision and did not dismiss the Respondent by virtue of delegated authority of the Police Force Commission.

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The Appellant called one Abdul Rahim bin Mohd. Noor, A.S.P. (Service) Federal Police Headquarters, Kuala Lumpur, who tendered Exhibit D3, the Instrument of Delegation, and testified that the Police Force Commission consisted of eight members on the 9th April, 1962, the date of issue of D3 but is signed by six members.

pp. 20-37

5. The facts of this matter and the evidence relating thereto are summarised from the extracts of the Judgment of N. Sharma J. in the High Court Ipoh as follows:-

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p. 22

"The facts of this case are very brief and simple. It is, however, the law which does not appear to be so easy or straightforward. The Plaintiff was a member of the Police Force and as such the conditions of his service were regulated not only by the Police Ordinance 1952 (which remained in force until it was repealed by the Police Act 1967) but also by the provisions of the Constitution. (See Article 132(2) of the Constitution). Under Article 132(2A) he held office during the pleasure of the Yang di-Pertuan Agong. The power to dismiss at pleasure is however limited by the very opening words of Article 132(2A). The English doctrine of tenure of service solely at the pleasure of the Crown does not prevail here. The effect of Article 135 is to change the pleasure of Article 132(2A) into a statutory pleasure and the tenure of service into

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a statutory tenure. Article 135(1) provides that the Plaintiff could not have been dismissed by any authority unless that authority also possessed the power to employ a person equal in rank to the rank possessed by the Plaintiff at the time of his dismissal. Article 135(2) further ensures that if the Plaintiff was dismissed without being given a reasonable opportunity to be heard such dismissal could be of no effect and would thus be inoperative. The provisions of Article 135(2) are superimposed on the provisions of Article 135(1). If either of the provisions of Article 135 is not observed the order of dismissal is unavailing and of no effect."

"Clauses 1 and 2 of Article 135 and Clause 2 of Article 132 of the Constitution provide constitutional limitations upon the right of the Yang di-Pertuan Agong to dismiss members of the various services at his will. These provisions of the Constitution are designed to confer security of tenure upon public servants. The arguments that a government servant can neither recover arrears of pay nor damage on the ground that conferment of the benefit of pay for service rendered to the Crown is a matter of bounty and grace for the Crown, that it is not a matter of right of the public servant and that the Crown can never be made liable for damages in tort cannot in view of the provisions of the Constitution hold good. The prerogative right of the Crown to dismiss its servants at will is exercisable only subject to the limitations contained in the Constitution. It thus follows that if any of those limitations are contravened the aggrieved public servant gets a right to maintain an action against the Crown for appropriate relief. The conditions of service are regulated by Federal law or the State law. (See Article 132(2) of the Constitution.) The rule of English law that a civil servant cannot maintain a suit against the State or against the Crown for recovery of arrears of salary therefore does not prevail here in view of the specific provisions of our Constitution. (Compare Ridge v. Baldwin (1964) A.C. 41)".

p. 32

"The Police Force Commission under Article 144(6) is authorised to delegate its functions to say the Chief Police Officer but those functions have still to be exercised by the Chief Police Officer "under the direction and control of the Commission." In this particular case the direction by the Commission to the Chief Police Officer as evidenced by Exhibit D3 (granting that it was a delegation under Article 144(6)) was clear and

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unmistakable. He was to exercise the functions as prescribed and "specified in the Police Ordinance 1952, and in the rules, regulations and standing orders made or purporting to have been made thereunder."

"He was not required to act under Cap. D of the General Orders but Section 22 of the Police Ordinance 1952 itself made the General Orders applicable to the delegation under Exhibit D3. He was required under Article 144(6) of the Constitution to act under the direction and control of the Commission alone in so far as the question of Plaintiff's dismissal from service was concerned. The Chief Police Officer (P.W.2) in fact was truly and unreservedly candid and frank when he said that in dismissing the Plaintiff (see 45) (sic) he was acting under Section 45 of the Police Ordinance 1952 and Regulation 2(a)(64) of the Police Regulations 1952 and that he was not acting under the delegation of authority from the Police Force Commission but only in exercise of his powers under the Police Ordinance 1952. It was only under pressurised and somewhat suggestive cross-examination that he said that in writing A1 he was acting under Order 43 of Cap. D of the General Orders. A1 in fact was written not by him but by his predecessor. Exhibit D2 reproduces a part of the Standing Orders relevant to this suit and which were issued under Section 82 of the Police Ordinance. P.W.2 was certainly authorised by the Commission to act in accordance with the Standing Orders. Standing Orders 7, 9 and 12 reproduced in Exhibit D2 are important. The action taken by P.W.2 against the Plaintiff seems thus fully covered by the provisions contained in Exhibit D2 and Exhibit D3 and apparently looks unchallengeable so far as due observance of the provisions of the Police Ordinance 1952 and the rules, regulations and standing orders made thereunder is concerned. When one exercises a power delegated to him by another there has to be a conscious awareness not only of the existence of that power but also of the fact that the power is being exercised on behalf of and for the person who has delegated that power. It should not happen merely by chance or coincidence that the person purporting to act on behalf of himself alone under a particular law or authority is in fact at that time also invested with the power or authority from another under another law and thus becomes competent to act although in reality while acting he is not aware that he is clothed with that authority and is competent only to act under it and by virtue of it alone. The question is was P.W.2

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at the time of taking action, alive to the power under which alone he could be competent to act. I am satisfied that P.W.2 when dismissing the Plaintiff did so purely on his own and by virtue of the provisions of the Police Ordinance 1952 without any knowledge of consciousness of the requirements of the Constitution, the rights of the Plaintiff thereunder, or any delegation to him of the functions of the Police Force Commission. The Plaintiff had a right to know that the purported order of dismissal was by or on behalf of the only authority competent under the Constitution to dismiss him. Also direction and control by the Police Force Commission over the order of dismissal by P.W.2 should have continued."

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"Article 135, however, secures to the servant concerned a constitution guarantee that he shall not be dismissed by any subordinate authority. It thus appears that there is capacity for some conflict between the provisions of Article 144(6) and the provisions of Article 135(1) should the Commission decide to delegate its power of dismissal to some other person or authority. The conflict thus becomes a conflict between the convenience of the Commission and the constitutional rights guaranteed to the public servant. In the event of such a conflict I think it is the duty of the Court to keep preserved the constitutional guarantees enshrined in the Constitution for the benefit of the government servant and the security of his tenure. The conflict between the provisions of the two Articles can, however, be reconciled if it is held the Commission has no power to delegate its functions in so far as they relate to the dismissal or reduction in rank of the public servant and I do so hold."

p. 37

6. The learned Trial Judge, in his Judgment dated 12th day of September, 1973, made the following findings -

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"Having held that the Police Force Commission had no valid powers to delegate its authority to the Chief Police Officer in so far as such delegation related to the dismissal or reduction in rank of police personnel and having found that in dismissing the Plaintiff P.W.2 was in fact not acting under any delegation of authority by the Police Force Commission, there will be a declaration in favour of the Plaintiff that his dismissal from service was null and void, inoperative and of no effect and that he still continues to be a member of

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the Royal Malaysian Police Force and that he is entitled to all arrears of salary as from the date of his purported dismissal, i.e. 19.4.1967. There will also be an order that the Defendant do pay the costs of this suit to the Plaintiff."

pp. 38-39

7. By Order dated 12th September, 1973, the High Court in Ipoh declared that the Plaintiff's dismissal from service was null and void, inoperative and of no effect and that he still continues to be a member of the Royal Malaysian Police and further ordered that the Plaintiff is entitled to all arrears of salary as from the date of his purported dismissal i.e. 19th day of April, 1967 and the Appellant was also ordered to pay the costs of the suit to the Respondent.

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pp. 39-41

8. By Notice of Appeal dated the 28th day of September, 1973, the Appellant appealed to the Federal Court of Appeal on grounds as follows:-

pp. 40-41

- (1) "The learned Trial Judge erred in holding that the Plaintiff could not be proceeded with except in conformity with the provisions of the Police Regulations.
- (2) The learned Trial Judge erred in holding that the instrument of delegation to the Chief Police Officer was defective.
- (3) The learned Trial Judge erred in maintaining that Regulations 29 - 49 of Cap. D. of the General Orders did not apply to the Plaintiff.
- (4) The learned Trial Judge erred in holding that the Commissioner's Standing Order, exhibit D12, was ultra vires Regulation 28 of Cap. D. of the General Orders.
- (5) The learned Trial Judge erred in holding that the Chief Police Officer in dismissing the Plaintiff was in fact not acting under any delegation of authority by the Police Force Commission.
- (6) The learned Trial Judge erred in holding that the Police Force Commission had no valid power to delegate its authority to dismiss the Plaintiff to

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the Chief Police officer."

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9. By Judgment dated 8th day of March, 1975, the Federal Court of Appeal unanimously dismissed the Appellant's Appeal and affirmed the Judgment/Order of the Trial Judge and further ordered that the costs of this Appeal and the costs in the Court below be taxed by the proper Officer of this Court and be paid by the Appellant to the Respondent.

p. 63

10 With reference to the various grounds of the Appellant's Appeal as summarised in paragraph 8 above, Lee Hun Hoe, C.J. Borneo, said

p. 75

"The 1963 delegation being part of the evidence cannot be overlooked. The Chief Police Officer could only have the power of dismissal from the Police Force Commission. Unless it could be shown that the power of appointment had also been delegated to him, his dismissal of respondent must be regarded as void and inoperative."

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Lee Hun Hoe, C.J. Borneo, after finding that the dismissal was wrongful proceeded to deal with the main grounds of appeal as from the extracts of his Judgment as follows :-

"I consider that once the question of wrongful dismissal was put in issue, appellant would have to show that the Chief Police Officer was acting within his authority and had the power to dismiss respondent. By paragraph 3 of the defence, appellant averred that the respondent's dismissal from the police force was proper and in accordance with law and procedure. To my mind, law would include the Constitution. The reason is that under the Constitution the Police Force Commission normally has the exclusive power of appointment and dismissal. (See Articles 140 and 144 of the Constitution.) The Commission may, of course, delegate its various functions to any of its members, the Commissioner of Police, other police officers or boards of police officers.

p. 65

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Respondent alleged that the dismissal was not only wrongful but void and inoperative. If appellant was not certain on any point arising out of the pleadings he was entitled to ask for further and better particulars, but he did not do so. I do not think appellant was in any way taken by surprise judging by the manner the defence was conducted. How the appellant was going to show that

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the Chief Police Officer had the power of dismissal was simply a matter that must be left in his hands. Appellant tried to do this by relying on the instrument of delegation (Exh. D3) made in 1962."

p. 72-73

"I doubt very much if appellant could be in a position to show that the Chief Police Officer had the power to appoint a police constable at the time of dismissal. Appellant could do no more than by introducing the instrument of delegation (Exh. D3). Any delegation of power to dismiss without delegating the power to appoint would result in breach of the Constitution. Under section 9(3) of the Police Ordinance, 1952 the Commissioner of Police had expressly been given the power of appointment. Even if the Commissioner of Police could delegate his power of appointment to the Chief Police Officer such delegation would be void. Thus in B. Surinder Singh Kanda v. The Government of the Federation of Malaya (1962) 28 M.L.J. 169 at 171 the dismissal of Inspector Kanda by the Commissioner of Police was held to be void by the Privy Council in spite of the fact that the Commissioner of Police had the power to appointment. Since Merdeka the exclusive powers of appointment and dismissal rest with the Police Force Commission. So that there could not be two authorities having similar powers of appointment without conflicting with the provisions of the Constitution. Where there is a conflict the Constitution prevails. The Chief Police Officer cannot be in a stronger position than the Commissioner of Police. The delegation (Exh.D3) states that "the Police Force Commission delegates its functions under Article 140(1)." At a glance this would seem to be sufficiently wide to include the delegation of the powers of appointment and dismissal. But, I do not think the legislature intended to permit the Police Force Commission to delegate its power under Articles 140(6)(b) or Article 144(6) in such a manner as to conflict with Article 135(1). I say this because the intention of the legislature is clearly reflected by the omission of the words "notwithstanding the provisions of Clause (1) of Article 135" from Articles 140(6)(b) and 144(6). These words, however, appear in Clauses (5A) and (5B) of Article 144. The insertion of those words is significant because the person given the power under such a delegation may dismiss a public servant even though he has no power to appoint an officer of a equal rank.

Unless the powers of appointment could be



10 delegated or unless those words mentioned earlier were inserted in a particular Clause then it would be no use for a delegatee to be conferred with the power of dismissal. Since the Chief Police Officer is clearly an authority subordinate to the Police Force Commission with whom lies the power of appointment at the time of dismissal, the exercise of the power of dismissal by the Chief Police Officer must necessarily be void and ineffective. On this aspect of the matter I would refer to what Lord Denning said in Kanda's case (1962) 28 MLJ. 169 at 171."

20 "The learned Judge would have been on firmer ground if he had stated that the delegation (Exh.D3) was invalid because it was superseded by a later delegation. This is precisely the position in this case. I may point out that delegation (Exh.D3) was in fact superseded by a later delegation. It seems to be that at page 107 of the Appeal Record another instrument of delegation was signed by a minimum number of six members as provided by the Constitution on 16th September, 1963 coinciding with the formation of Malaysia. This instrument was couched in a different manner in these terms :-

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30 "In accordance with Article 140(6) (b) of the Federal Constitution, the Police Force Commission hereby delegates its functions under Article 140 (1) to the extent set forth in Schedule "B" to this instrument of delegation to be exercised in accordance with the provisions of Schedule "B" by the officers, board of members of the Commission or boards of police officers specified therein. The composition of the boards specified in Schedule "B" shall be in accordance with Schedule "A" to this instrument of delegation.

Dated this Sixteenth day of September, 1963."

40 At least one of the six members of the Police Force Commission in 1963 was not a member in 1962. I do not think it is possible for appellant to argue that both instruments were in force at the same time. The position is clear. The 1963 delegation must be taken to have put the 1962 delegation out of action. Any other interpretation would create mischief. I do not think the Police Force Commission intended to contradict itself. Since the two instruments are repugnant, it is right to apply the well known rule of construction that the last must prevail. A perusal of the 1963 instrument of

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delegation would show that it is more elaborate and mentions the various functions delegated to various Boards. It does not appear that the instrument delegates any power to any individual. Hence, it is not possible to read in this instrument any delegation of power to the Chief Police Officer. As I mentioned previously the appellant could only clothe the Chief Police Officer with power if he could show that the delegation (Exh.D3) applied. To be blunt, I think the appellant has drawn this red herring across the path of the Court in order that the Court would be drawn off the scent. The Appellant must be aware that the 1963 delegation would in no way assist his case. The Court should brush away the cobweb and show the transaction in its true light. The 1963 delegation being part of the evidence cannot be overlooked. The Chief Police Officer could only have the power of dismissal from the Police Force Commission. Unless it could be shown that the power of appointment had also been delegated to him, his dismissal of respondent must be regarded as void and inoperative.

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Although the reason which has led me to the same conclusion as the learned Judge may not be the same, the result is identical. On the evidence the learned Judge was right to decide in favour of respondent. Accordingly, I would dismiss the appeal with costs here and in the court below."

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p. 76

11. The other two Judges, Suffian L.P. Malaysia, and Wan Hamzah J. concurred with the Judgment of Lee Hun Hoe, C.J. Borneo.

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pp. 79-80

12. On the 18th day of August, 1975 an Order was made granting the Appellant Final Leave to appeal to His Majesty the Yang di-Pertuan Agong.

13. The Respondent did object to the grant of Final Leave to appeal on the ground that the quantum on the date of application for Final Leave did not exceed M\$25,000/- (Malaysian Dollars Twenty five thousand) and there was no merits in the Appeal. Ali, F.J. of Federal Court recorded the Respondent's objection and the Federal Court made no ruling whether this Final Leave was granted on merit or not.

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14. The Respondent respectfully submits that the Judgments and reasons of the High Court at Ipoh and the Federal Court of Appeal are right and ought to be affirmed and that this Appeal should be dismissed with costs for the following among

other:-

RECORDR E A S O N S

1. BECAUSE the Appellant was in no way misled or prejudiced by the Respondent's pleadings.
- 10 2. BECAUSE the Appellant's dismissal of the Respondent is wrong in law and unconstitutional the Chief Police Officer PW2 acted particularly in breach of Article 135 (1) and (2) of the Federal Constitution and had no authority to dismiss the Respondent.
- 20 3. BECAUSE the Police Force Commission's Instrument of Delegation P1 and D3, have become defective at the material time of Respondent's dismissal for reasons the Police Force Commission was not properly constituted and D3 was not gazetted and there is no delegation of power to appoint or dismiss to Chief Police Officer as an individual.
4. BECAUSE the Appellant's Notice of Dismissal, Exhibit 6, was wrong in law and the Appellant ought to be estopped from denying the facts averred therein and the Appellant's act of dismissal was not under direction and control of the Police Force Commission.
- 30 5. BECAUSE the Appellant's Notice of Dismissal being exercised with retrospective effect from the date of suspension i.e. 19.4.1967 is against the Police Ordinance, 1952 and Regulations thereunder.
6. BECAUSE the offence alleged to be committed by the Respondent not being a criminal offence the Appellant had no cause to dismiss the Respondent.
- 40 7. BECAUSE the Chief Police Officer PW2 dismissed the Respondent by his own individual decision which is a finding of fact, therefore the Chief Police Officer did not act under delegated authority and the Trial Judge's finding of fact ought not to be upset.

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8. BECAUSE the Appellant failed to comply with Part I Discipline Rule 4 of the Police Regulations 1952 before awarding punishment of dismissal against the Respondent and acted in breach of terms and conditions of service.
9. BECAUSE the Police Force Commission had no power under the constitution to delegate (a) the power of first appointment (b) the right of appeal to Police Force Commission by the Respondent in the case of dismissal. 10
10. BECAUSE every aspect of the case was carefully considered by the Trial Judge and the Federal Court of Malaysia and the Appeal is based on concurrent findings of fact that the dismissal is wrongful which fact ought not to be disturbed on Appeal.
11. BECAUSE the Judgments of the High Court and the Federal Court are right for the reasons given therein. 20

G. T. RAJAN.

No. 11 of 1976

IN THE JUDICIAL COMMITTEE  
OF THE PRIVY COUNCIL

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ON APPEAL  
FROM THE FEDERAL COURT OF  
MALAYSIA

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B E T W E E N :

THE GOVERNMENT OF  
MALAYSIA (Defendant) APPELLANT

- and -

IZNAN BIN OSMAN  
(Plaintiff) RESPONDENT

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CASE FOR THE RESPONDENT

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