

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

O N A P P E A L

FROM THE FEDERAL COURT OF MALAYSIA (APPELLANT JURISDICTION)

B E T W E E N :

NAJAR SINGH

Appellant

- and -

- (1) THE GOVERNMENT OF MALAYSIA
- (2) THE CHAIRMAN, POLICE PUBLIC SERVICE COMMISSION

Respondents

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CASE FOR THE RESPONDENTS

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1. This is an Appeal from the Judgment of the Federal Court of Malaysia (Azmi L.P.; Suffian, C.J., Malaya; HS Ong, F.J.) dismissing an appeal by the Appellant against an Order by Abdul Hamid J. on the 25th September 1973 dismissing a claim by the Appellant for a declaration that his dismissal from the Federation of Malaya Police Force was void, an Order that he be reinstated therein, and an Order for payment of all arrears of pay, allowances and other emoluments due to him as a Sergeant-Major in the said Police Force from the date of his dismissal.

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2. The facts are not in dispute. On 1st December 1939 the Appellant was appointed a Police Constable and on 1st February 1968 was confirmed in the rank of Sergeant Major in the Federation of Malaya Police Force and put on the pensionable establishment. On 31st May 1971 the Minister of Home Affairs acting under the Internal Security Act 1960, detained him for 2 years from 7th June 1971. He was

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unconditionally released from detention on 25th January 1972. In July 1971 while in detention the Appellant received a letter from the Inspector General of Police on behalf of the Police Force Commission (which had power under the Constitution to dismiss him) dated 5th July 1971 pursuant to General Order 30(2) of the Public Officers (Conduct and Discipline) (General Orders, Chapter D) Regulations 1969 published as P.U.(A) 273 of 1969 and hereinafter referred to as "CAP.D" requiring him to show cause why he should not be dismissed from the Police Force. The Appellant forthwith sent a reply attempting to show cause why he should not be dismissed. The Appellant was nevertheless dismissed from the Police Force by the Police Force Commission on 18th August 1971. There was no formal inquiry and the Appellant neither sought nor received an oral hearing. The Appellant sued the Government of Malaysia, who are First Respondents, and the Chairman of the Police Force Commission, Second Respondent, claiming a declaration that his dismissal was void and consequential relief. 10 20

3. The issues which arise upon this appeal are as follows :-

- (i) Whether the Respondents were entitled to proceed against the Appellant under General Order 30(2) of CAP.D without regard to the Police (Conduct and Discipline)(Junior Police Officers and Constables) Regulations, 1970, Regulations 3, 4, 5 and 6 and the Schedule thereto, hereinafter referred to as "the Police Regulations 1970". 30
- (ii) Whether the Respondents were bound to comply with the disciplinary procedure set out in Regulations 30(5) and succeeding Regulations of CAP.D or the procedure set out in the Police Regulations 1970.
- (iii) Whether the Respondents were bound to give the Appellant an oral hearing.

4. The statutory provisions and General Orders which were considered to be relevant in the Courts below are as follows :- 40

Constitution

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Part X

Article 132 (1) For the purposes of this Constitution the Public Services are :

- (a) The Armed Forces; the Judicial and Legal Service,
- (c) The General Public Service of the Federation;
- (d) the Police Force; . . .

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Article 135(2) Except as otherwise expressly provided by this Constitution, the qualifications for appointment and conditions of service of persons in the public services other than those mentioned in paragraph (g) of Clause (1) may be regulated by Federal Law and subject to the provisions of any such law, by the Yang di-Pertuan Agong;

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Article 132 (2A) Except as expressly provided by this Constitution, every person who is a member of any of the services mentioned in paragraphs (a), (b), (c), (d), (e) and (f) of clause (1) holds office during the pleasure of the Yang di-Pertuan Agong,

Article 150(6) Subject to clause (6A), no provision of any ordinance promulgated under this Article, and no provision of any Act of Parliament which is passed while a Proclamation of Emergency is in force and which declares that the law appears to Parliament to be required by reason of the emergency, shall be invalid on the ground of inconsistency with any provision of this Constitution.

Statutes

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Federation of Malaysia

Police Act 1967, Section 74

"74. All members of the Force shall be subject to the provisions of regulations relating to discipline as may from time to time be made by the Yang di Pertuan Agong under Article 132(2)

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of the Federal Constitution or under section 96 of this Act."

Ordinances

Emergency (Essential Powers) Ordinance 1969

Section 2:

"2.(1) Subject to the provisions of this section, the Yang di-Pertuan Agong may make any regulations whatsoever (in this Ordinance referred to as "Essential Regulations") which he considers desirable or expedient for securing the public safety, the defence of Malaysia, the maintenance of public order and of supplies and services essential to the life of the community."

Section 2(4):

"2.(4) An Essential Regulation, and any order, rule, or by-law duly made in pursuance of such a regulation shall have effect notwithstanding anything inconsistent therewith contained in any written law, including the Constitution or the Constitution of any State, other than this Ordinance or in any instrument having effect by virtue of any written law other than this Ordinance."

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Emergency (Essential Powers) Order No.2 1969

"8. The powers conferred by this Ordinance and by any regulations made thereunder shall be in addition to and not in substitution for any powers conferred by or under other written law from time to time in force."

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General Orders

Public Officers (Conduct and Discipline)(General Orders, Chapter D) Regulations 1969.

Para.27: "In all disciplinary proceedings under this Part no officer shall be dismissed or

reduced in rank unless he has been informed in writing of the grounds on which it is proposed to take action against him and has been afforded a reasonable opportunity of being heard."

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10 Para. 30: "(1) Where it is represented to, or is found by, the appropriate disciplinary authority (in this case the Police Force Commission) or the Director-General of Public Service that an officer is guilty of unsatisfactory work or misconduct and such work or misconduct, in the opinion of the disciplinary authority, merits dismissal, or reduction in rank, the following provisions shall apply.

20 (2) The Disciplinary Authority shall after considering all the available information in its possession that there is a prima facie case for dismissal or reduction in rank, cause to be sent to the officer a statement in writing, prepared, if necessary, with the aid of the Legal Department, of the ground or grounds on which it is proposed to dismiss the officer or reduce him in rank and shall call upon him to state in writing within (a period of not less than 14 days) a representation containing grounds upon which he relies to exculpate himself.

30 (3) If after consideration of the said representation furnished by the officer that disciplinary authority is of the opinion that the unsatisfactory work or conduct of the officer is not serious enough to warrant dismissal or reduction in rank, the Disciplinary Authority may impose upon the officer such punishment as it may deem fit.

40 (4) If the officer does not furnish any representation within the time fixed, or if he furnishes a representation which fails to exculpate himself to the satisfaction of the Disciplinary Authority, the Disciplinary Authority shall then proceed to consider and decide on the dismissal or reduction in rank of the officer.

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(5) Where the Disciplinary Authority considers that the case against the officer requires further clarification, it may appoint a Committee of Inquiry consisting of not less than two senior Government Officers who shall be selected with due regard to the standing of the officer concerned and to the nature and gravity of the complaints which are the subject of the Inquiry, provided that an officer lower in rank than the officer who is the subject of the Inquiry or the officer's head of department shall not be selected to be a member of the Committee. 10

(6) The officer shall be informed that, on a specified day, the question of his dismissal or reduction in rank will be brought before the Committee and he will be allowed and, if the Committee shall so determine, shall be required to appear before the Committee and to exculpate himself. 20

(7) If the witnesses are examined by the Committee, the officer shall be given an opportunity of being present and of putting questions to the witnesses on his own behalf and no documentary evidence shall be used against him unless he has previously been supplied with a copy thereof or given access thereto.

(8) The Committee may, in its discretion, permit the Government or the officer to be represented by an officer in the public service or, in exceptional cases, by an advocate and solicitor and may at any time, subject to such adjournment as is reasonably necessary to enable the officer to present his case in person, withdraw such permission; Provided that where the Committee permits the Government to be represented, it shall also permit the officer to be similarly represented. 30

(9) If, during the course of the Inquiry, further grounds of dismissal are disclosed, and the Disciplinary Authority thinks fit to proceed against the officer upon such grounds, the 40

officer shall be furnished with a written statement thereof and the same steps shall be taken as are above prescribed in respect of the original ground.

10 (10) The Committee having inquired into the matter, shall make a report to the Disciplinary Authority. If the Disciplinary Authority considers that the report should be amplified in any respect or that further inquiry is desirable, the matter may be referred back to the Committee for further inquiry and report.

(11) If, upon considering the report of the Committee, the Disciplinary Authority is of opinion -

- (a) That the officer should be dismissed or reduced in rank, it shall forthwith direct accordingly;
- 20 (b) That the officer does not deserve to be dismissed or reduced in rank but deserves some lesser punishment, it may inflict upon the officer such lesser punishment as it may deem fit; or
- (c) That the proceedings disclose sufficient ground for requiring him to retire in the public interest, it shall recommend to the Government accordingly. The question shall be dealt with under the Pensions Legislation."

30 Police (Conduct and Discipline)(Junior Police Officers and Constables) Regulations, 1970

Regulation 3(1)

"3.(1) A charge shall be framed in accordance with the offence as prescribed in the Schedule. The charge shall describe the offence briefly and identify the officer with the unlawful act or omission charged.

(2) Where there are two or more distinct offences a separate charge shall be framed in

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respect of each offence and a separate finding shall be made on each charge:

Provided that where more than one offence is committed in the course of the same transaction, only one charge shall be framed in respect of the most serious offence disclosed.

(3) More officers than one may be charged and tried together for the same or different offences if committed in the course of the same transaction.

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(4) The charge shall be communicated to the officer at least seven clear days before he is required to make his plea thereto.

(5) The charge may be amended or altered at any time before the finding, but the officer shall be informed of the amended or altered charge and shall be given full opportunity to cross-examine or give or call evidence to meet such new charge.

(6) An officer charged with an offence may be found guilty of having attempted to commit, or having abetted the commission of that offence.

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4.(1) An officer who is the subject of a disciplinary charge may, at his own request, be supplied with copies of, or given reasonable access to documents connected with the disciplinary charge, except those documents on which privilege would be claimed before a court.

(2) If for any reason it is necessary for the adjudicating authority to be supplied with, or have access to, any information or document relating to the disciplinary charge, the officer who is the subject of the disciplinary charge shall also be supplied with such information or copy of such document.

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5.(1) An officer who is the subject of a disciplinary charge may, in the discretion of the adjudicating authority, be permitted to be

represented at the enquiry by a police officer of his choice:

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Provided where the adjudicating authority is a police officer delegated with that function, such police officer may not be an officer senior to the adjudicating officer.

10 (2) Application by an officer for permission to be represented in accordance with paragraph (1) above shall be made in writing to his immediate superior officer who shall transmit such application to the adjudicating officer for decision or, if such superior officer is himself the adjudicating officer, he shall give his decision thereon.

20 (3) When an officer, who is the subject of a disciplinary charge, has been granted permission to be represented at the enquiry in accordance with paragraph (1) above, the police officer nominated by the officer shall, subject to his agreement to represent such officer, be made available to appear at the enquiry unless it is inexpedient to do so.

6. (1) The charge shall be read out to the officer by the adjudicating authority and if necessary explained to him. He shall then be called upon to plead to the charge.

(2) If the officer pleads guilty -

- 30 (a) the adjudicating authority shall record briefly the facts in support of the charge and shall explain them to the officer the facts will be obtained by questioning any officer or witness who has knowledge of the facts or, if the adjudicating authority has been supplied with any documents containing the facts of the charge, by reference to such documents;
- 40 (b) the officer shall then be invited to make any statement he wishes in extenuation of the offence. Such statement shall be recorded, or if he has nothing to say, such fact shall be recorded;

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(c) the adjudicating authority shall then record a finding of guilt and award a punishment in respect of the offence.

(3)(a) If the officer pleads not guilty or refuses to plead, the adjudicating authority shall examine the witnesses in support of the charge and their evidence shall be recorded:

Provided that when the evidence of such witness has been previously recorded in writing by a police officer acting in the course of duty, it shall be sufficient if the adjudicating authority reads over the record of such evidence to the witness who shall be required to confirm or, if he so desires, to add to or retract from such evidence. Every such written record so read over to a witness shall, if necessary, be interpreted to the officer and endorsed in the manner required by paragraph (9). 10

(b) The officer or his representative if any, shall be invited to cross-examine the witnesses and examine any documentary evidence. 20

(c) A witness may be re-examined on matters arising out of any cross-examination.

(4) If after hearing the witnesses in support of the charge the adjudicating authority finds that no case has been made out against the officer the adjudicating authority shall dismiss the case, otherwise the officer shall be called upon to state his defence.

(5) If called upon for his defence the officer may give evidence or submit a written statement, and may call witnesses, or he may remain silent. If the officer gives evidence he may be cross-examined, but not as to character or offences with which he is not charged, and he may make any explanatory statement or be re-examined by his representative, if any, on any point arising out of his cross-examination. His witnesses may be cross-examined and he or his representative may re-examine them. 30 40

(6) The adjudicating authority shall record its finding on the evidence. If the finding is one of guilty, the officer shall be invited to make any statement he wishes in extenuation of the offence. Such statement shall be recorded or if he has nothing to say, that fact shall be recorded.

10 (7) The adjudicating authority may question any witness at any time and any witness may be recalled by leave of the adjudicating authority.

(8) If the officer applies to call as a witness a member of the Force or any person employed to perform police duties under any written law, such witness shall be produced unless it is inexpedient to do so.

20 (9) All evidence shall be given in the presence of the officer charged and shall, if in a language not understood by him, be interpreted to him. Evidence shall be recorded in writing and shall be completed by the following endorsement:

"Read over to the witness and stated by him/her to be correct. Interpreted to the officer by..... in the..... language.

Signature.....
Adjudicating authority."

30 (10) The adjudicating authority shall at all times satisfy itself that the officer understands the nature and effect of the proceedings and has a proper opportunity to defend himself."

5. The Appellant was a member of the Public Service within the meaning of Article 132(1)(d) of the Constitution and was subject to the provisions of the Police Act 1967. This Act repealed the Police Ordinance 1952, though the Police Regulations 1952 made thereunder remained in force until they were revoked by the Police Regulations 1970. It is common

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ground that CAP.D and the 1970 Regulations were in force at the material time.

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6. Abdul Hamid J. held that the Police Force Commission were entitled in their discretion to follow either the disciplinary procedure laid down in CAP.D or in the Police Regulations 1970. He found that the disciplinary procedure adopted by the Respondents under Regulation 30(2) of CAP.D did not fully comply with the requirements of natural justice and was somewhat inconsistent with article 135(2) of the Constitution, but held that CAP.D had been made pursuant to section 2 of the Emergency (Essential Powers) Ordinance 1969 and section 8 Emergency (Essential Powers) Order No.2 1969 and therefore in accordance with Article 150(6) of the Constitution and section 2(4) of the Emergency (Essential Powers) Ordinance 1969 No.1 of 1969, and was perfectly valid despite such inconsistency. The learned Judge further held that as the Appellant held office during the pleasure of the Yang di-Pertuan Agong pursuant to Article 132(1)(d) of the Constitution no inquiry was in any event necessary. Further, the learned Judge held that General Order 27 must be considered subject to General Order 30(2) which laid down a special procedure.

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7. Upon appeal by the Appellant to the Federal Court of Malaysia Suffian C.J. delivering the Judgment of the Full Court likewise held that it was open to the Respondents to proceed either under CAP.D or the Police Regulations 1970. Referring to paragraphs 27 and 30 of CAP.D he held that paragraph 27 repeated the words of Article 135(2) of the Constitution and that it was necessary under paragraph 30(2), which was governed by paragraph 27, to give an accused officer a reasonable opportunity of being heard. But he held that the word "heard" should be given its ordinary and every-day meaning and did not necessarily mean an oral hearing. In the event the Appellant knew the nature of the accusation made against him, had been given an opportunity to state his case, had never demanded an oral hearing either before or soon thereafter, and it was clear that the Respondents had acted in good faith. In these circumstances the Court held

that the Respondents had followed the correct procedure and had given the Appellant a reasonable opportunity of being heard. Accordingly the Court dismissed the appeal with costs.

10 8. The Respondents first submit that, as held by the Federal Court and by the learned Judge at First Instance, power of dismissal was vested in the Police Force Commissioner and that the appropriate procedure was that followed under General Order 30(2) of CAP.D. The alternative procedure under the 1970 Police Regulations, though available, was not appropriate. The choice of procedure was in the discretion of the Respondents and was validly and correctly exercised.

9. The further procedure laid down under Regulation 30(5) onwards of CAP.D was not relevant and need only be followed if the Police Force Commission desired clarification of any issue.

20 10. The Respondents further submit that there was no obligation to provide the Appellant with an oral hearing:

30 (a) Regulation 30(2) was made pursuant to section 2 of the Emergency (Essential Powers) Ordinance 1969, section 2(4) of the Emergency (Essential Powers) Ordinance 1969 No.1 of 1969, and section 8 of the Emergency (Essential Powers) Order No.2 of 1969 and since the said Ordinances were promulgated under Article 150 and in accordance with Article 150(6) of the Constitution the said Regulation is valid notwithstanding that it may conflict with Article 135(2) thereof or the rules of natural justice.

(b) No inquiry was necessary as by Article 132(1)(d) and 132(2) the Appellant held office during the pleasure of the Yang di-Pertuan Agong.

40 (c) In any event neither General Order 27 nor the rules of natural justice required an oral hearing. As rightly held by the Federal Court the Appellant had been informed in writing of the nature of the accusation made against

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him and had been given an opportunity of stating his case in writing. At no time prior to the commencement of these proceedings did the Appellant demand an oral hearing. The Respondents acted in good faith. His "right to be heard", whether arising under Article 135(2) or General Order 27 had been satisfied.

11. The Respondents submit that the Judgment of the Federal Court of Malaysia, Appellate Division, was right and should be affirmed for the following among other 10

R E A S O N S

- (1) BECAUSE the Respondents were entitled to proceed under CAP.D
- (2) BECAUSE the Respondents gave the Appellant a reasonable opportunity of being heard.
- (3) BECAUSE the Respondents were under no duty to give the Appellant an oral hearing
- (4) BECAUSE the Appellant held office during the pleasure of H.M. the Yang di-Pertuan Agong
- (5) BECAUSE the Respondents validly dismissed the Appellant. 20

NICHOLAS LYELL

7 OF 1975

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Respondents

CASE FOR THE RESPONDENTS

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