CERTIORARI AND THE RULES OF NATURAL JUSTICE

GOULD v. WILY [1960] N.Z.L.R.960

It is clear that bias on the part of a judicial authority determining a question affecting the rights of persons, being a breach of the rules of natural justice, provides a ground for the granting of the prerogative writ of certiorari in respect of that decision. In Gould v. Wily [1960] N.Z.L.R. 960, S.C. a novel basis for the allegation of bias was put forward on behalf of the plaintiff.

The plaintiff, who was an auctioneer, had been convicted in the Magistrate's Court on each of three charges of theft. Evidence was given of a certain practice adopted by the plaintiff in his business as an auctioneer. This practice formed no part of the transactions in respect of which the specific charges of theft were made, but the evidence was admitted as evidence of similar facts admissible to rebut the defence of accidental happenings pleaded by the plaintiff.

In the Supreme Court the plaintiff sought the prerogative writ of certiorari in respect of these proceedings on two grounds. The first ground, and the one with which this note is concerned, was an allegation of judicial bias on the basis of an alleged error of law on the part of the Magistrate in concluding that the practice of which evidence had been given constituted theft. The plaintiff alleged that the Magistrate, in weighing this erroneous conclusion against conflicting evidence of the plaintiff, had brought a biased mind to bear upon the issues he was called upon to decide. Shorland J. expressly did not decide whether or not this conclusion was erroneous in law; neither did he decide that such an error in law, if it was one, was the decisive factor in leading the Magistrate to decide that beyond reasonable doubt theft had been established on the charges preferred. His Honour merely assumed both these facts because they were not material to the particular issue before him. That issue was whether such assumed facts constituted a case of judicial bias. The plaintiff relied substantially upon the decision in R. v. Grimsby Borough Quarter Sessions. Ex parte Fuller [1956] 1 Q.B. 36. In this case the applicant had been convicted by a Court of summary jurisdiction on a charge of being found in enclosed premises for an unlawful purpose, and he appealed to quarter sessions against his conviction. During the cross-

examination of the applicant at the hearing of the appeal, the clerk of the peace, acting in the interests of the accused, handed to the recorder a police report and drew the recorder's attention to a passage which might provide the answer to a matter being put to the applicant in cross-examination. On the same page of the police report, immediately below the passage in question, was set out a list of the applicant's previous convictions. The applicant's character had not been put in issue. The recorder read the passage to which his attention had been drawn, marked it and kept the document. The appeal having been dismissed, the applicant applied for an order of certiorari to quash the order dismissing the appeal.

At page 41 Lord Goddard L.C.J., delivering the judgment of the Court, said:-

> "It is not for every irregularity in the course of a hearing either in petty or quarter sessions that a certiorari would be granted. In our opinion we ought to apply the same rule as in a case where bias on the part of a justice adjudicating is alleged, which was fully considered by this court in the recent case of Reg. v. Camborne Justices. Ex parte Pearce, ([1955] 1 Q.B. 41; [1954] 2 All E.R. 850.) where in the result a certiorari was refused. It was there held that there must be a real likelihood of bias and so here we would say a real likelihood of prejudice. We emphasize it is likelihood, not certainty. We applied the judgment of Blackburn J. in Reg. v. Rand, ((1866) L.R.1 Q.B. 230, 231) and also adopted the words of Lord O'Brien L.C.J. in Rex v. Queen's County Justices ([1908] 2 I.R. 285, 294): "By 'bias' I understand a real likelihood of an operative prejudice, whether conscious or unconscious," and this, in our opinion, amply justifies us in applying the same test in the present case as would be applied where a motion is brought on the ground of bias."

The Court then took the view that as it was impossible to assume that the recorder had not become aware, by virtue of the report, of the previous convictions and since the essence of the charge was the purpose for which the accused was in enclosed premises and information as to previous bad character was accordingly highly prejudicial, the order of certiorari must be granted.

Counsel for the plaintiff in Gould v. Wily (supra) sought to establish a parallel between that case and the present one. He contended that, if knowledge of previous convictions is prejudicial, then (erroneous) belief of previous thefts must be equally prejudicial. Shorland J . correctly pointed out, however, that in the Grimsby case judicial bias was neither urged on behalf of the plaintiff, nor relied upon in the judgment. He then considered that the decision rested upon irregularity in the course of the proceedings giving rise to a real likelihood of prejudice. Irregularity in the course of the proceedings was not suggested in the present case and accordingly His Honour rejected the submission of judicial bias. He concluded that in his view (p.961):-

> "... judicial bias is a leaning of the mind which stems from a source which is extraneous to the matters properly brought before the tribunal, and it does not comprehend error of fact or law arising in the course of regular proceedings, even though such error leads to further or resultant error of fact in the final determination by the tribunal of the issue it is called upon to decide."

It is not doubted that the present situation does not give rise to a case of judicial bias and that Shorland J. was correct in rejecting that contention. Furthermore, it seems clear from decided cases that what is envisaged by an "irregularity in the course of the proceedings" is a departure from prescribed and well established rules of procedure - see McCarthy v. Grant [1959] N.Z.L.R. 1014, 1020-1. It could not be submitted that a wrongful admission of evidence was therefore an irregularity in the course of the proceedings.

However, it is suggested that the matter is not disposed of at this point, as the learned judge and counsel apparently thought it was. A recent decision of the New Zealand Supreme Court, Healey v. Rauhina [1958] N.Z.L.R. 954 was, it appears, neither cited in argument by counsel nor referred to by Shorland J. in his judgment. And yet it is submitted that a strong argument on the basis of this decision could have been tendered on behalf of the plaintiff to the effect, that if the contention of judicial bias fails, then there may nevertheless have been a failure of natural justice because of a view prematurely formed by the

Magistrate adverse to one of the parties. This was exactly the approach taken by Hutchison J. in Healey v. Rauhina.

The circumstances arose in this way. The plaintiff Healey had taken proceedings against the defendant Rauhina alleging negligence by the defendant in the driving of his (the defendant's) car whereby damage was caused to the plaintiff's car. The defendant issued a third party notice to an insurance company claiming indemnity against any liability he might incur in respect of the plaintiff's claim. The issue between the defendant and the third party was tried first and an oral judgment was eventually given in favour of the defendant and it is in respect of that judgment that the issue of certiorari was sought by the third party.

It appears that during the hearing the Magistrate made certain comments adverse to the third party from as early a stage in the proceedings as the opening of the case by counsel for the defendant, and also during the course of the opening by counsel for the third party of its case. Furthermore it was alleged that His Worship had put to the defendant in evidence a leading question the answer to which would be favourable to the defendant. Counsel for the third party tendered to the Magistrate certain written submissions in which he complained about these comments and submitted that because of the circumstances the Magistrate had become disqualified from performing his judicial duty.

After considering the comments of the Magistrate very carefully, Hutchison J. came to the conclusion that the circumstances were not such as to establish judicial bias but, and this is the important point, having rejected this submission, he then went on to consider whether there was nevertheless a failure of natural justice and accordingly grounds for the issue of certiorari because of a view prematurely formed by the Magistrate adverse to the third party.

At p.953 he said:-

> "The question, as I see it, is whether the matters to which I have last referred ... taking them cumulatively, show a real likelihood that the learned Magistrate prejudged the case so that the opportunity of the third party to present its case was no fair

> opportunity at all. The burden of proof resting on the third party I have there stated as being one of establishing a "real likelihood" that the learned Magistrate prejudged the case."

He then came to the conclusion that the cumulative effect of the comments was sufficient to show that the Magistrate prejudged the case and the third party did not have a fair opportunity to present its case. Accordingly certiorari issued on that ground.

To say that a party has not had an adequate opportunity to present his case, and that therefore there has been a breach of the rule known as the audi alteram partem rule, on the ground that a Magistrate has prejudged the case seems to be breaking new ground. But it has never been suggested that each of the two main rules of natural justice viz. that an adjudicator be disinterested and unbiased (nemo judex in causa sua) and that the parties be given adequate notice and opportunity to be heard (audi alteram partem), are comprised of rigid norms that cannot be varied to have application to any new set of circumstanoes that may arise. Both the rules comprise a number of sub-rules and it is suggested that the application of these rules will depend on the particular circumstances of each oase.[1] Accordingly it is suggested, with respect, that the rules of natural justice are elastio enough for it to be admitted that the decision of Hutchison J. stated above was justified.

In a now well known statement, Lord Wright, in General Medical Council v. Spackman [1943] A.C. 627, H.L., said, at p.644, that it was perhaps not desirable to force the expression "contrary to natural justice" into any procrustean bed and the conditions of the validity of any decision were that the tribunal should be impartial and that the person being impugned should be given a full and fair opportunity of being heard.

In Black v, Black [1951] N.Z.L.R. 723, Cooke J. said atpp.726-727:-

> "The injunotion that is contained in the maxim Audi alteram partem is an ancient principle of the common law ... and anything done contrary

1. Local Government Board v. Arlidge [1915] A.C. 120, 140

> to that principle is contrary to natural justice. It is plain that for a tribunal to give a party to a proceeding the opportunity to be heard only after that tribunal had already expressed the view that his evidence would not be believed would be to treat that principle as a dead letter. It is equally plain that for a tribunal to give such a party the opportunity to be heard only after the tribunal had already expressed the view that the decision in the proceeding should be adverse to him would also be to treat that principle as a dead letter. In either of those cases, there would be a departure from natural justice."

Having taken the matter this far, it is now suggested that Healey v. Rauhina (supra) could have been of considerable assistance to the plaintiff in Gould v. Wily on the ground that the particular circumstances were such that, as in Healey's case, it may be shown that the Magistrate prejudged the case and accordingly that the plaintiff did not have an adequate opportunity of presenting his oase.

Shorland J. assumed that the Magistrate reached a conclusion that the applicant had been guilty of theft in other matters, that this conclusion was erroneous in law, and that this error was decisive in leading the Magistrate to decide that beyond reasonable doubt theft had been established on the charges preferred. If indeed these assumptions were justified then it is suggested that by reaching this erroneous conclusion the Magistrate had clearly prejudged the case by forming a view adverse to that of the plaintiff with the consequent result that the plaintiff did not have a fair opportunity to present his case.

The difficulty with this view and the attempt to apply Healey v. Rauhina is, of course, the fact that in Gould v. Wily the Magistrate made no comments which were indicative of a view prematurely formed adverse to the plaintiff. In this case, however, if the Magistrate did reach an erroneous conclusion that the plaintiff had been guilty of thefts in other matters, and that this conclusion was decisive in leading him to find a verdict of guilty in the present matter, this being assumed by Shorland J., it is suggested that by implication this is indicative of a real

likelihood that the Magistrate prejudged the case.

To determine whether the learned judge's assumptions were justified is not the purpose of the present inquiry. It is merely suggested that if Shorland J. was prepared to proceed on the basis of these assumptions he should not, having rejected the contention of judicial bias, have then dismissed the application for certiorari without considering whether there may still have been a failure of natural justice on the ground that the plaintiff did not have a fair opportunity to present his case because of a view adverse to his case prematurely formed by the Magistrate.

One further point is worthy of note in respect of the refusal by Shorland J. to issue the writ of certiorari in the present case. Early in his judgment His Honour referred to the fact that there was an appeal pending lodged by the plaintiff against his conviction.

It is now well established that certiorari is available to quash a conviction regardless of the fact that an appeal is available to the person seeking the issue of the writ and furthermore if there has been a miscarriage of justice it is the appropriate remedy.

In R. v. North Ex parte Oakey 43 T.L.R. 60 Atkin L.J., at p.66, affirmed, in a statement approved by MacGregor J. in Woodley v. Woodley and Meldrum [1928] N.Z.L.R. 465, 472, that where there has been a breach of a fundamental principle of justice the fact that there is a remedy of appeal is no answer to a writ of prohibition or certiorari.

In R. v. Wandsworth Justice, Ex parte Read [1924] 1 K.B. 281 the applicant had been convicted of making misrepresentations on certain tickets as to the weight of articles of food. The tickets were not produced at the hearing. It was suggested that the applicant had a remedy by way of appeal to quarter sessions but the Court, being satisfied that there had been a denial of natural justice, held that the applicant was entitled to an order of certiorari even though another remedy was available to him.

Humphreys J., at p.285, said:-

> "There is no reason why a person who has been wrongly convicted without evidence should assist the prosecution to go to some other tribunal at which, it may be, the necessary evidence will be adduced. He is fully entitled to come to this Court and maintain, on precedent and authority, that he was convicted as the result of a denial of justice, and that he is entitled to justice, which can only be done by the quashing of his conviction."

An application for certiorari was again opposed on the same ground in G.E.Davis & Company Limited v. McLeod [1949] N.Z.L.R. 145, but Stanton J. held that the mere existence of a right of appeal did not exclude the right to obtain certiorari.

A recent affirmation of the above principle can be found in McCarthy v. Grant [1959] N.Z.L.R. 1014.

It is clear then that if there had been a breach of the rules of natural justice in this case then the exercise by the applicant of his right of appeal would not have debarred him from obtaining a writ of certiorari which, in the light of the earlier discussion it is submitted with very great respect was refused by Shorland J. without consideration of all the principles of law involved.