IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN FULL COURT

SUIT NO. M. 79 OF 2000

BEFORE: THE HONOURABLE MR. JUSTICE COOKE
THE HONOURABLE MS. JUSTICE BECKFORD
THE HONOURABLE MRS. JUSTICE M. McINTOSH

IN THE MATTER of Application by Hyacinth E. McPherson-Green [lawful daughter and] Administrator of the estate of Benoi T. McPherson, deceased, intestate, and David McPherson for Leave to Apply for an Order of Mandamus <u>and/or a Declaration</u>

AND

IN THE MATTER of an Application by Hyacinth E. McPherson-Green [lawful daughter and] Administrator of the estate of Benoi T. McPherson, deceased, intestate, and David McPherson to Compel the Commissioner of Police to arrests and/or charge Headley Samuel Lawrence pursuant to Section 13 of the Constabulary Force Act for a breach of Section 5 of the Quarries Control Act <u>and/or a Declaration that the Commissioner of Police is authorized to arrest and or charge Headley Samuel Lawrence pursuant to Section 13 of the Constabulary Force Act for a breach of Section 5 of the Quarries Control Act</u>

AND

IN THE MATTER of the Constabulary Force Act, Section 13

AND

IN THE MATTER of the Quarries Control Act Section 5

Heard: *15th May, 2002*

Mr. Humphrey Lee McPherson instructed by Humphrey L. McPherson & Co. for Applicants.

Miss Katherine Francis instructed by Director of State Proceedings for Respondent.

COOKE, J.

In the parish of Portland there is a property known as Parnassus. This property is now and was at all relevant times the subject matter of litigation as to its ownership between what I will term the McPherson family and Headley Samuel Lawrence. The latter can be regarded as a prominent member of the parish and at one time sat in Parliament. The applicants in this matter Hyacinth E. McPherson Green and David McPherson represent the McPherson family and their complaint pertains to illegal quarrying on Parnassus.

On the 8th day of March, 2001 leave was granted for the applicants to pursue their cause in the Full Court. The leave was as follows: -

> "The Applicants are granted Leave to Apply for an Order of Mandamus to compel the Commissioner of Police to arrest and/or charge Headley Samuel Lawrence pursuant to Section 13 of the Constabulary Force Act for a breach of

Section 5 of the Quarries Control Act and that the Application to be made by Originating Motion to the Full Court within 14 days of the date hereof."

Section 5 of the Quarries Control Act is so far as it is relevant states: -

"5 (1) No person shall open, establish or operate a quarry for the purpose of extracting quarry material or quarry mineral except under and in accordance with a licence granted for the purpose under this Act:

Provided that, on the application of any person, the Minister may, in writing, waive, subject to such terms and conditions as he may specify, the requirement for a licence if he is satisfied that the quarry material or quarry mineral to be extracted by that person from that quarry will not exceed 100 cubic metres.

(2) Not relevant

(3) A person who contravenes the provisions of subsection (1) Shall be guilty of an offence against this Act and on summary conviction in a Resident Magistrate's Court –

a. in the case of a first conviction for such offence, be liable to a fine not exceeding thirty thousand dollars or imprisonment for a term not exceeding twelve months or to both such fine and imprisonment; and

b. in the case of a second or subsequent conviction for such offence, be liable to a fine not exceeding fifty thousand dollars and to imprisonment for a term not exceeding one year, and in default of payment, to imprisonment for a further term not exceeding one year, such further term to run consecutively; and

c. in any event, if the offence continues (whether or not without interruption) after any such conviction, to a fine not exceeding ten thousand dollars for each day on which the contravention continues after conviction or to a term of imprisonment not exceeding two years.

(4) Not relevant
(5) Not relevant

Section 13 of the Constabulary Force Act is now set out: -

> 'The duties of the Police under this Act shall be to keep watch by day and night, to preserve the peace, to detect crime, apprehend or summon before a Justice, persons found committing any offence or whom they may reasonably suspect of having committed any offence, or who may be charged with having committed any offence, to serve and to execute all summonses warrants, subpoenas, notices, and criminal processes issued from any Court of Criminal Justice or by any Justice in a criminal matter and to do and perform all the duties appertaining to the office of a Constable, but it shall not be lawful to employ any member of the Force in the service of any civil process, or in the levying of rents, rates or taxes for or on behalf of any private person or incorporated company."

The evidence to ground this application is to be found in paragraphs 2 and 3 of the affidavit of Humphrey Lee McPherson dated the 3rd of August, 200. I set out hereunder those paragraphs:

> 2. That by letter dated the 28th day of September, 1998, I wrote to the Ministry of Mining & Energy, Mines & Geology Division, requesting that a cease and desist order be immediately issued against Mr. Headley Samuel Lawrence, from engaging in any quarrying operations on the Parnassus land the subject matter of proceeding in the Supreme Court of Judicature of

Jamaica in SUIT NO. E. 302 of 1997, McPherson, et. al v. McConnell, et al., in which Mr. Lawrence is the 2nd Defendant. I hereto attach a copy of the letter marked "HLM1" for identity"

(3) That by letter dated the 19th day of November, 1998, the Ministry of Mining & Energy, Mines & Geology Division, in reply to my aforesaid letter, informed me that Mr. Headley Samuel Lawrence, was informed in a letter dated the 5th day of October, 1998, to cease all quarrying operations on the Parnassus land as he had no quarry license and any quarrying in the area is to be deemed illegal and is to attract the necessary action by the police as Mr. Denver Henry, Superintendent of Police for Portland was also written to. I hereto attach a copy of the letter marked "HLM2" for identity."

The letter mentioned in paragraph 2 supra inter alia complains of illegal quarrying by Headley Samuel Lawrence and ends with this sentence.

> "I look forward to you immediately, terminating Mr. Lawrence's and/or his agents or servants quarry Operations on the disputed Parnassus premises."

It is necessary to reproduce the letter mentioned in paragraph 3 supra in its entirety and I now so do: -

No affidavits were filed on behalf of the respondent the Attorney General of Jamaica. Miss Katherine Francis resisted the application by way of legal submissions.

Mr. Humphrey on behalf of the applicants submitted that "because the police did not respond to the letter to the Commissioner of Mines it is reasonable to conclude that the police failed to act in the prosecution of a criminal cause or matter and to arrest or charge Lawrence." He further submitted that in the instant case the police had no discretion whether or not to arrest /charge Mr. Lawrence. He contended that "where there is a statute that provides a policy discretion to the Commissioner of Police the Commissioner of Police can use his discretion with regard to that Statute but where the offence under the statute is mandatory and provides the police with no discretion the police have a duty to enforce the law without discretion." He concluded that the Quarries Control Act was not "a policy-oriented Act" and therefore the police had no option but to arrest/charge Mr. Lawrence. Mr. McPherson relied on ***R. v Metropolitan Police Commissioner Ex parte Blackburn [1968] 1 A.E.R. 763.*** This reliance is misplaced. This judgment does not contain any proposition as that advocated by Mr. Humphrey. I am unaware of any statute which is "policy-oriented". Mr. McPherson was unable to produce an example of

any such Act. Quite clearly his proposition is without any semblance of merit. In so far as the Blackburn judgment speaks to the exercise of discretion by the police this what Lord Denning M R. had to say at p. 769 G - H:

> **"Although the chief officers of police are answerable to the law, there are many fields in which they have a discretion with which the law will not interfere. For instance, it is for the Commissioner of Police, or the chief constable, as the case may be, to decide in particular case whether enquiries should be pursued, or whether an arrest should be made, or a prosecution brought. It must be for him to decide on the disposition of his force and the concentration of his resources on any particular crime or area. No court can or should give him direction on such matter. He can also make policy decisions and give effect to them, as, for instance, was often done when prosecutions were not brought for attempted suicide; but there are some policy decisions with which, I think, the courts in a case can, if necessary, interfere. Suppose a chief constable were to issue a directive to his men than no person should be prosecuted for stealing any goods less than £100 in value. I should have thought that the court countermand it. He would be failing in his duty to enforce the law."**

I would consider the views of Lord Denning as an acceptable working formulation. It would seem obvious that the determination in any given case will largely turn on the circumstances of that case. I now turn to the circumstances of this case.

The police cannot be unmindful of civil action, which may be successfully taken by any citizen who has been falsely arrested and/or maliciously prosecuted. There is therefore an obligation on the part of the police to have in its possession potential evidence connecting the person to be arrested and or charged with the alleged breach of the law. The alleged breach in this case was the operation of a quarry for the purpose of extracting quarry material without a requisite licence. The applicants have not demonstrated to the court that the police were in possession of material, which could enable them to initiate the prosecutorial process. It cannot be said that the letter from the Commissioner of Mines (supra) provided the police with any basis for immediately proceeding with any criminal action. That letter merely asserted that there was a breach in respect of the Quarries Control Act. There is no indication of the ground(s) upon which the assertion is made. It is therefore impossible to contend, as Mr. McPherson sought, to say that the absence of a response by the police to the letter from the Commissioner of Mines provided an inference that the police had refused to carry out duty to arrest/charge Mr. Lawrence within the context of section 13 of the Constabulary Force Act. It is therefore my view that the application must fail.

Miss Katherine Francis submitted that the applicants did not have a sufficient interest in the matter to enable them the relief of mandamus. She relied on 564 C98) of the Judicature (Civil Procedure Code) (Amendment) (Judicial Review) Rules 1998 (the Rules). This states:

> "The court shall not grant leave unless it considers the applicant has a sufficient interest in the matter to which the application relates."

This wording is similar to that of the English R.S.C. Ord. 53. The issue as to standing received the attention of the House of Lords in R. v. Inland Revenue Commissioner ex parte National Federation of Self-Employed and Small Business Ltd [1982] A.C. 617. In respect of this case it is stated in the work 'Administrative Law 7th Edition H W R Wade and CF Forsythe at p. 709 that "the House of Lords gave a new and liberal but somewhat uncertain character to the law of standing in the Inland Revenue Commissioners case." However it would seem that the determination of whether or not the applicant has a sufficient interest in the matter is subject to a two-stage process. The application for leave is stage one. At this stage the court will refuse leave in circumstances where the application is clearly without merit. This is the threshold stage. At the second stage where there is a full hearing the test of standing appears to be whether or not the applicant has demonstrated that his case is meritorious. The applicants in

this case have not done so. Hence, they have not shown a sufficient interest in the matter.

Miss Francis also submitted that the applicant's ought not to be granted the relief sought because there has been delay in moving the court. The delay as she puts it was between on or about November 19, 1998 to the date of the letter from the Ministry of Mines and 19th March 2001 the date of the filing of the application for leave. Admittedly much time has passed between these two dates. However, there is no limitation period in respect of criminal prosecutions. Had the police, after due investigation had potential evidence at its disposal I would be quite reluctant to consider delay in those circumstances as being a bar to the grant of the relief sought. In criminal matters it would have to be distinctly shown that the lapse of time was such that the person to be charged could not have a fair trial.

Finally Miss Francis submitted that there had been no request by the applicants and a refusal by the police. In my view it is quite unnecessary to make any request of the police to do their duty. Therefore there is no merit in this submission.

If the applicants had put forward a position of merit I am not sure I would be disposed to granting the relief sought. It would seem that this application is not born of any wish to uphold the law. The catalyst was not

ecological and/or environmental concerns. The last sentence in a letter dated 5th July 2001 to the Ministry of Mines on behalf of the applicants under the hand of Mr. Humphrey Lee McPherson reads:

> "Your expeditious reply is expected as regards their requirement for the granting of a license (sic) to the McPhersons to mine marl on their land (Parnassus)"

The application for leave was filed on the 19th March 2001. It is to be noted that the letter from the Ministry of Mines is dated November 19, 1998. So some considerable time elapsed between these two dates. It does appear to me that this application is a stratagem in the contest between the McPherson family and Mr. Lawrence. As such in the exercise of my discretion it is doubtful that I would grant the relief of mandamus where there is an oblique motive.

Despite what I have said in the preceding paragraph the letter from the Ministry of Mines (supra) stated that Mr. Denver Henry, Superintendent of Police for Portland was written to pertaining to Mr. Lawrence's illegal quarrying and that was to attract the necessary action of by the Police. There is no evidence that the police did anything that they carried out any investigations. I would be most concerned if nothing was done by the Police. I would be even more concerned if the inactivity of the police – if there was inactivity – was because of the prominence of Mr.

Lawrence. I would therefore instruct the Registrar of the Supreme Court to refer this aspect of the case to the Director of Public Prosecutions. There is an obligation on the Police within section 13 of the Constabulary Force Act "to detect crime" – to carry out investigations in appropriate circumstances – such as this.

Before departing from this case I wish to make two comments. Firstly I wish to remind counsel of Section 564 E (3) of the Rules which demands that the motion is to be "served on all persons directly affected." In this case Mr. Lawrence an affected person was not served. Despite this failing in the instant case, I did not consider the failure as a bar to the hearing of matter. It would have meant another adjournment and there could have been a decision on the merits despite the absence of Mr. Lawrence. I wish to emphasize that this approach is quite exceptional and it must not be taken to mean that there can be a waiver of 564 E (3) of the Rules. Secondly, although it should be unnecessary, counsel are reminded that it is imperative to provide judges with proper bundles. In this case this deficiency was blatant.

It is only left for me to say that I would refuse the relief sought.

I will hear counsel on the question of costs.

BECKFORD, J.

I have read the reasons of my brother Cooke and I agree therewith and have nothing further to add.

McINTOSH, M.

I have read the judgment of the Honourable Mr. Justice Cooke and I agree with the reasons, conclusions and the order made. I therefore have nothing further to add.