Michaelmas Term
[2017] UKPC 38
Privy Council Appeal No 0070 of 2014

JUDGMENT

Cleare (Appellant) *v* The Attorney General and others (Respondents) (Bahamas)

From the Court of Appeal of the Commonwealth of the Bahamas

before

Lady Hale
Lord Kerr
Lord Wilson
Lord Hughes
Lord Lloyd-Jones

JUDGMENT GIVEN ON

4 December 2017

Heard on 17 October 2017

Appellant	*Respondents*
Katherine Deal Rowan Pennington-Benton	Navjot Atwal
(Instructed by Tynes & Tynes and Harcus Sinclair LLP)	(Instructed by Charles Russell Speechlys LLP)

LORD WILSON:

1. Mr Cleare appeals against part of the order of the Court of Appeal of the Commonwealth of the Bahamas (Allen P and Blackman and Conteh JJA) dated 14 March 2013. The part against which he appeals is its dismissal of his appeal against part of an order made by Longley J ("the judge") on 23 June 2011.

2. The claims which the judge then determined arose out of the appellant's arrest by the police on 17 January 2007 and of his detention in police custody at the Lucaya Police Station until 22 January 2007. The appellant's claims were brought against four defendants, now the respondents, namely the Attorney General, the Commissioner of Police, Police Sergeant Rahming and Police Sergeant Bowe. One of his claims, conceded by the respondents, was that his detention from 19 to 22 January had been unlawful. In that regard the trial judge awarded to him a sum by way of damages which the Court of Appeal increased. In the appeal to the Board nothing turns on the appellant's claim for unlawful detention. Instead the Board is concerned with two other of his claims. The first is that on 17 January, when following his arrest the police escorted him from the police station to his apartment, Sergeant Rahming assaulted and beat him by punching him in the face and below the neck. The second is that, on about the same day, in the course of an interview back at the police station, Sergeant Bowe cuffed his hands behind his back and, together with another officer, forced plastic bags tightly over his head, thereby depriving him of oxygen and subjecting him to inhuman and degrading treatment contrary to article 17(1) of the Constitution. The judge dismissed these claims. He found that the appellant had fabricated both of them. It is against the Court of Appeal's dismissal of his appeal against the dismissal of these two claims of assault that the appellant brings the present appeal.

3. The appellant frankly acknowledges the weight of the burden which he carries in bringing to the Board an appeal of this character. As it noted in *Central Bank of Ecuador v Conticorp SA* [2015] UKPC 11, para 4, the Board "will as a matter of settled practice decline to interfere with concurrent findings of pure fact, save in very limited circumstances". At para 5 it reminded itself of the inherent advantage enjoyed by the trial judge over courts of appeal in the determination of facts. At para 6, however, it quoted a passage in the speech of Lord Thankerton in *Thomas v Thomas* [1947] AC 484 at 488 to the effect that the reasons given by the trial judge might justify a conclusion that he had not made proper use of his inherent advantage. And at para 8 the Board stressed the need for the judge to have tested the evidence against the background of the available material.

4. In the opinion of the Board the structure of the judge's judgment in the present case is unorthodox. But no complaint was made about it on the appellant's behalf in the

Court of Appeal; and in its judgment, delivered by Allen P, that court made no mention of it.

5. The structure of the judge's judgment was to express a conclusion that the appellant's claims should be dismissed prior to addressing certain medical evidence upon which the appellant heavily relied.

6. (a) Between paras 1 and 27 of his judgment the judge recited the evidence given in relation to all the various claims by the appellant and by five of the witnesses called on behalf of the respondents, namely Police Inspector Hamilton, Police Sergeant Rahming, Police Sergeant Bowe, a man with whom the appellant had shared a cell at the police station and a former girlfriend of the appellant.

(b) Then, in para 28, the judge recorded that the appellant had called three doctors to give evidence on his behalf and at that point he correctly noted that he was required to decide the case on the entirety of the evidence before him. But that is not what he proceeded to do. For some reason he postponed consideration of the medical evidence.

(c) Instead the judge proceeded to assess the appellant's credibility. Between paras 31 and 35 he said that he accepted "nothing" that the appellant had said as being true; that it seemed accurate to describe him as a "con artist"; and that he rejected his testimony.

(d) Thereupon the judge addressed each of the appellant's various claims.

(e) Between paras 44 and 47 he addressed the two claims of assault. At para 46 he said that they "must fail" and that the appellant had concocted them. At para 47 the judge said:

> "I would dismiss these claims. I will return to the matter of the medical evidence."

(f) It was only from paras 68 to 88 that the judge ultimately examined the medical evidence and concluded that it was "not of much value" to the appellant.

7. The judge was wrong to conclude that the claims of assault should be dismissed prior to considering the medical evidence adduced in support of them. More particularly, he was wrong to reject the appellant's evidence as untrue, indeed as fabricated, without considering it in the light of the medical evidence which was said to

corroborate it. In this respect the Board refers to three authorities in the Court of Appeal of England and Wales. In *Armagas Ltd v Mundogas SA (The "Ocean Frost")* [1985] 1 Lloyds Rep 1, at 57, Robert Goff LJ observed that it was of the first importance to test the veracity of a witness by reference to the facts ascertained independently of his testimony. In *Mibanga v Secretary of State for the Home Department* [2005] EWCA Civ 367, [2005] INLR 377, Buxton LJ held, at para 30:

> "The adjudicator's failing was that she artificially separated the medical evidence from the rest of the evidence and reached conclusions as to credibility without reference to that medical evidence; and then, no doubt inevitably on that premise, found that the medical evidence was of no assistance to her. That was a structural failing ..."

Indeed in para 32 Buxton LJ described it as an error of law or principle; see also paras 24 and 25 of the judgments. So the court ordered that the appellant's claim for asylum be reheard. In *Jakto Transport Ltd v Hall* [2005] EWCA Civ 1327 the trial judge found that the employee's accident at work had been caused by a defective tool. The basis of the employer's appeal was that the judge had expressed a provisional conclusion to that effect before considering the evidence of Mr Glenn, the joint expert, who was a consultant engineer. In paras 28 and 29 of her judgment, Smith LJ held:

> "28. … that was an error of approach.
>
> 29. Where, as here, the expert evidence was relevant to the way in which the accident … might have happened, it was incumbent upon the judge to consider it at the time when he was reaching his conclusions on the credibility of the witnesses."

Nevertheless, with hesitation, the court proceeded to find that Mr Glenn's evidence, when examined in detail, was not such as to lead it to require a judge to re-assess the employee's evidence by reference to it.

8. The Board considers that, unless it is satisfied that, even if the medical evidence adduced by the appellant had been addressed by the judge prior to his assessment of the appellant's evidence, it could not have led him to do otherwise than to reject his evidence, the claims of assault should be ordered to be reheard.

9. On any view of the medical evidence adduced on his behalf, the appellant was suffering injuries to the brain and neck in the weeks and months following his detention by the police. The judge was required only to decide whether they had occurred as a

result of the alleged assaults and, were he to reject that assertion, he had no obligation to decide how they had otherwise occurred. Nevertheless, in reaching the requisite decision, it was helpful for him to consider how they might otherwise have occurred. In that regard the evidence before him identified two possibilities: that the injuries were the consequence of a serious accident which the appellant had suffered at work at the container port at Freeport in 2002 and/or that they were the consequence of his actions in his cell during his detention, in which, according to evidence given by his cell-mate which he denied, he had knocked his head against the bars in order to generate lumps which he hoped to ascribe to police brutality. It is clear from the judge's judgment that he regarded each of these possibilities, particularly the former, as a serviceable explanation for the injuries.

10. The three doctors who gave evidence on behalf of the appellant were

(a) **Dr Bethel**, a general practitioner who attended him on various occasions from 2002 to 2004 and, in particular, on 25 January 2007 following his release from custody;

(b) **Dr Albury-Harris,** a general practitioner who, at the request of the appellant's employers at the port, attended him on occasions in 2005 and 2006; and, most importantly,

(c) **Dr McDowell**, a consultant neurosurgeon, who examined him on 2 February, 23 February and 9 March 2007.

11. **Dr Bethel** gave evidence that he had first seen the appellant on 31 May 2002, about a week after the accident at the container port, in which (so he was given to understand) the appellant, sitting in the cab of a crane, had been suddenly thrown forward; had hit his head against a bar of the windshield guard; and had been concussed. The appellant was then complaining to him of headaches and blurred vision. In July 2002 his complaints were the same; Dr Bethel then noted tenderness of the neck at the level of vertebra C2 and spasms of the trapezius muscle but a subsequent x-ray of the vertebra showed impingement of it but no fracture. Thereafter the symptoms seemed to disappear but by March 2003 they had flared up again. On examination Dr Bethel found that the appellant's tongue deviated to the left (which, so he said in oral evidence, was usually a sign of brain injury); but an MRI scan of the brain, which Dr Bethel then commissioned, proved normal in respect both of trauma and of neurological disease. Dr Bethel then concluded that the renewed symptoms were unrelated to the accident in the crane.

12. At some stage during January 2007, either when he was in custody or immediately after his release, the appellant made a formal complaint of assault to the

Complaints and Corruption Unit of the police. For some reason the unit's record of the complaint was not in evidence. But it was the practice of the unit to make a written reference of a complaint to a doctor; and in its reference, which was made to Dr Bethel, the unit recorded "Alleged to have been punched in the left side of head by the police". The absence in the reference to any complaint of having been smothered with plastic bags led the judge to conclude, as a matter of some significance, that the appellant had not complained about that to the unit. It is however fair to point out, albeit not noted in the judgment, that in his oral evidence Dr Bethel said that, during his examination of him on 25 January 2007, the appellant did refer to a second incident with a bag.

13. For the purposes of his examination on that day Dr Bethel had before him a CT scan of the appellant's head taken two days earlier at somebody's direction. Dr Bethel considered that it disclosed a hypoxic injury but Dr McDowell, with greater expertise, was later to disagree. At all events, upon the part of the unit's reference form which was designed for completion by the doctor, Dr Bethel noted that his physical examination of the appellant was consistent with hypoxic injury; that his tongue deviated to the left, being of course a feature which he had noted in 2003 and on which the respondents therefore heavily relied; that his cerebellar co-ordination was impaired, with the result that he was slow to achieve certain physical movements requested of him; and that he had difficulty in focussing visually. Dr Bethel recorded that he had subjected the appellant to a Mini Mental Status Examination in which he had scored only 19 out of 30, being a score which, as the doctor explained in oral evidence, would in an older person indicate dementia. He had administered the test (so he explained) because the appellant had been unable to give a proper account of what had happened. On the form Dr Bethel also wrote:

> "I have seen [the appellant] prior to this accident and the changes on my exam are new and very unlikely to be able to fake."

Why did Dr Bethel make that observation? It was a question in which, understandably, the respondents and the judge were interested. In cross-examination Dr Bethel accepted that it had gone through his mind that the appellant might have been malingering. He added, however, that there was a cluster of symptoms, new since he had last seen him in 2004, which would be hard to fake; and that it was highly unlikely that the injury which had given rise to them had been self-inflicted, for example by banging his head against a hard surface.

14. **Dr Albury-Harris** gave evidence that, following the referral of him to her by his employers, she had seen the appellant on about four occasions between August 2005 and January 2006. He had complained of dizziness, headaches, blurred vision, episodes of fainting and the sensation of being about to faint; and had alleged that they had begun following the accident in 2002, had got better but then worse again. In her oral evidence Dr Albury-Harris confirmed that her physical examination of him at the first

appointment had revealed no neck or brain injury and that she had not detected any speech or memory deficits; and that a neurologist to whom she had then referred the appellant had confirmed the absence of neurological deficits. She had prescribed medication for the headaches and by January 2006 the appellant's symptoms had improved to the point at which she was able to recommend a return to his normal work.

15. **Dr McDowell**'s written evidence took the form of a report apparently dated 12 February 2008. He wrote that, at the first consultation on 2 February 2007, the appellant was complaining of headaches, speech and memory disturbance and generalised spasms. The doctor's neurological examination on that date revealed three abnormal features:

> (a) The appellant displayed several myoclonic jerks, which in oral evidence the doctor described as subconscious movements of the limbs which result from a disconnection between the brain and the peripheral nerve.
>
> (b) The appellant's speech was hesitant and he had difficulty in finding words.
>
> (c) The appellant's neck had sub-occipital mid-line tenderness with a significantly decreased range of motion both in flexion and in extension.

The doctor requested an MRI scan of the cervical area of the spine, which was conducted on 19 February, and an EEG test, which was conducted on 6 March 2007. The MRI (so the doctor reported) revealed an undisplaced fracture of the base of the dens with mild inflammation of the surrounding soft tissues. As the doctor explained in his oral evidence, the dens is at the base of the odontoid bone which is a component of vertebra C2 in the neck, namely the second vertebra from the top. The EEG (so the doctor reported) revealed a slight contusion in the left posterior temporal region of the brain. In his report the doctor added that there was "spike activity", which he attributed to a small area of gliosis indicative (so he explained in his oral evidence) of a natural healing process within the brain. At the two later consultations the doctor noted a gradual improvement in the appellant's speech and a reduction of the myoclonic jerks.

16. In his report Dr McDowell ascribed the appellant's *brain injury* to a presumed hypoxic insult, in other words to deprivation of oxygen; and in his oral evidence he adhered to his written ascription of the injury. He said that the nature of the injury, which was at an individual cellular level, was inconsistent with causation by blunt force to the head and that it indicated deprivation of oxygen for no less than about four, but for no more than about five, minutes. The doctor proceeded to tell the court that in his opinion the brain injury had been sustained during the previous two to four weeks, counting back (so it appears) from the date of his first consultation on 2 February 2007.

He explained that he reached this conclusion by reference to the myoclonic jerks: he said that he had seen them only in the short term and that they usually lasted only for a few weeks.

17. In his report Dr McDowell did not identify the likely cause of the appellant's *neck injury* but in his oral evidence he identified it as blunt force trauma; and he proceeded to suggest that, like the brain injury, it had been sustained during the previous two to four weeks. He explained that he reached this conclusion by reference to the inflammation of the soft tissues surrounding the fractured vertebra, which will in his opinion resolve within that sort of time-span; so inflammation indicates a recent fracture or at least a recent re-break of an old fracture.

18. In the light of Dr McDowell's unchallenged evidence that both of the appellant's injuries had been sustained recently, and mindful no doubt of the evidence to be given by the appellant's cell-mate, counsel for one of the respondents pressed the doctor to agree that the injuries might have been self-inflicted, specifically by the banging of the head against a hard surface. But the doctor declined to agree. He said that it would be extremely unusual, indeed almost impossible, for someone to break a vertebra at the back of the neck in that way or by any other mechanism which he could imagine. He also denied that the injury to the brain was likely to have been self-inflicted, adding that it was very difficult for someone to give himself an hypoxic injury without killing himself.

19. In the course of his oral evidence Dr McDowell confirmed that he had at all times been aware of the appellant's medical history, in particular his accident at work in 2002; but he accepted that he had not previously seen a report by Dr Bethel on the appellant dated 11 August 2003. In a comment at the end of his judgment, with which the Board cannot agree, the judge indicated that Dr McDowell's lack of acquaintanceship with that report represented a substantial limitation on the value of his evidence. The judge even added that there was merit in the respondents' argument that Dr McDowell's evidence was therefore suspect at best and should be ignored. Wrongly, as the respondents accept before the Board, the judge had also said that every complaint made to Dr McDowell had been made following the accident at work in 2002. There were of course similarities of symptoms but no clear evidence had emerged prior to the appellant's detention of actual brain injury, still less of a fracture of the neck. And unfortunately the judge ascribed Dr McDowell's diagnosis of the appellant's brain injury only to clinical findings and made no reference to the EEG which had supplied the crucial evidence of it. In the event, therefore, the judge simply put to one side the evidence of Dr McDowell, unchallenged though it was, in which he had explained why both the injuries were likely to have been sustained recently. Indeed the judge had, of course, to put it aside if he was to be consistent with his earlier conclusion that the claims of assault should be dismissed.

20. It is clear that the appellant was an extremely unimpressive witness. Sometimes, however, an unimpressive witness speaks the truth. So there is a need to consider all the other relevant evidence, perhaps particularly unchallenged expert evidence, before rejecting the evidence of an unimpressive witness. Dr McDowell's unrefuted evidence of the nature of the appellant's two injuries and of the way in which, and of the time when, they were likely to have been sustained was, to put it at its lowest, of substantial significance. Yet the judge did not consider it prior to his rejection of the appellant's evidence; and the Board adds, in respectful disagreement with the Court of Appeal, that, when belatedly he did consider it, he did not do so satisfactorily. Satisfactory consideration of it, at the proper time, might have led him not to reject the appellant's claims of assault.

21. So the Board will humbly advise Her Majesty to allow the appeal and to direct that the claims of assault should be reheard by another judge of the Supreme Court.