TRANSCRIPT OF PROCEEDINGS

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SUPREME COURT OF QUEENSLAND OS No 594 of 1994

CIVIL JURISDICTION

LEE J

IN THE MATTER OF THE CRIMINAL JUSTICE ACT 1989

IN THE MATTER OF AN APPEAL BY MICHELLE LEE MULLEN AGAINST A DECISION OF A MISCONDUCT TRIBUNAL EXERCISING ORIGINAL JURISDICTION

BRISBANE

..DATE 24/04/95

JUDGMENT

HIS HONOUR: For the reasons I am about to publish, I order that the decision of the Misconduct Tribunal constituted by one F J Gaffy QC made the 24th day of June 1994 whereby the appellant was found guilty of a charge of official misconduct be quashed.

I will now hear argument as to the appropriateness of any ancillary orders including costs.

...

HIS HONOUR: In the circumstances, the order that I made stands, that is, that the decision of the Misconduct Tribunal constituted by one F J Gaffy QC made the 24th day of June 1994 whereby the appellant was found guilty of a charge of official misconduct be quashed.

I order, that the respondents pay the appellant's costs of and incidental to the appeal to be taxed.

I publish my reasons.

IN THE SUPREME COURT OF QUEENSLAND O.S. No. 594 OF 1994

Brisbane

Before the Honourable Mr Justice Lee

[Re Mullen]

IN THE MATTER of the CRIMINAL JUSTICE ACT 1989

and

IN THE MATTER of an appeal by MICHELLE LEE MULLEN against a decision of a Misconduct Tribunal exercising original jurisdiction

REASONS FOR JUDGMENT - W.C. LEE J.

Judgment delivered 24/04/1995

CATCHWORDS:

ADMINISTRATIVE LAW - judicial review - appeal from decision of Misconduct Tribunal finding appellant guilty of official misconduct - particulars of charge - status and effect - whether particulars must identify essential elements of the charge - effect of deficiency - natural justice - notice of nature of case to be defended - given by way of particulars - whether Tribunal considered particulars sufficient to establish charge.

WORDS AND PHRASES - official misconduct - whether private acts included - whether connection between conduct and office held must be demonstrated.

COUNSEL: S E Herbert QC for the appellant
R V Hanson QC for the respondents
SOLICITORS: Gilshenan & Luton for the appellant
Crown Law for the respondents
HEARING DATE: 08/12/1994
IN THE SUPREME COURT OF QUEENSLAND O.S. No. 594 OF 1994

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Before the Honourable Mr Justice Lee

[Re Mullen]

IN THE MATTER of the CRIMINAL JUSTICE ACT 1989

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IN THE MATTER of an appeal by MICHELLE LEE MULLEN against a decision of a Misconduct Tribunal exercising original jurisdiction

REASONS FOR JUDGMENT - W.C. LEE J.

Judgment delivered 24/04/1995

On 23 June 1994 the appellant, then a constable of police employed by the Queensland Police Service, was found guilty of official misconduct by a Misconduct Tribunal ("the Tribunal") constituted under Part 2, Division 6 of the Criminal Justice Act 1989 ("the Act"). As a result of that finding she was, on 15 July 1994, dismissed from her office. She now appeals against both the finding of guilt and the severity of the penalty imposed on her, pursuant to the provisions of s. 48 of the Act. The respondents are the Tribunal, the Criminal Justice Commission ("the Commission") and the Commissioner of Police.

Due to the technical nature of much of the argument advanced on the appellant's behalf, it is necessary to set out in full the formal charge before turning to the facts said to constitute it. It is dated 22 October 1993 and reads:—

That on the 22nd day of April 1992 at Brisbane in the State of Queensland the said Michelle Lee Mullen being the holder of an appointment in a unit of public administration, namely the Queensland Police Service, did breach the trust placed in her by reason of her holding that appointment, in that she did unlawfully assault one John William Howe thereby causing him bodily harm;

and that such conduct constituted: A criminal offence, namely assault occasioning bodily harm pursuant to Section 339 of the Queensland Criminal Code

or alternatively,

a disciplinary breach (namely misconduct within the meaning of the Police Service Administration Act 1990) as amended that provides reasonable grounds for termination of the services of the said Michelle Lee Mullen in the said unit of public administration.

The particulars of the charge are set out below:

(a) "That at approximately 3.30pm on 22nd April 1992 as a result of a traffic incident John William Howe stopped his motor vehicle in Cavendish Road, Coorparoo;

(b) The said John William Howe alighted from his vehicle then walked towards a vehicle driven by Michelle Lee Mullen which had stopped behind his motor vehicle;

(c) That at the same time Michelle Lee Mullen alighted from her vehicle and walked towards John William Howe;

(d) That when the two met John William Howe was punched by Michelle Lee Mullen a heavy blow to the left side of his chest, followed by a series of further blows followed by his being kicked twice in the genital area followed by a third kick to the side of the knee;

(e) That as a result of this assault by Michelle Lee Mullen, John William Howe suffered soft tissue injuries to his chest and testicles; and

(f) That these injuries constituted bodily harm."

'Official misconduct' is defined in s. 32 of the Act in a manner which, at first sight at least, appears to be

exhaustive. Although the charge does not in terms refer to any specific part of that provision, a simple reading of it makes it plain that the allegation against the appellant was one involving sub-s. (1)(b)(ii), namely that she breached the trust placed in her by reason of her office. This was the approach of both Counsel at the hearing. The further allegation that the conduct involved constituted a criminal offence or alternatively a disciplinary breach was one required by sub-s. (1)(d) of that section.

Although challenge was made on appeal to a number of the Tribunal's essential findings, for present purposes it is sufficient to set out those findings without detailed reference to the evidence on which they are based. They are contained in summary form in the Tribunal's remarks on sanction on 15 July 1994 and the following account is largely extracted from those remarks. Unfortunately, as paragraph (a) of the particulars appears to recognise, these entire proceedings seem to have arisen out of little more than a minor traffic accident.

On 22 April 1992 the complainant, John William Howe, was manoeuvring his 8 tonne Isuzi truck from North Avenue, Coorparoo right into St. Leonard's Street. Due to the narrowness of North Avenue the complainant was required to position his vehicle in such a way that for a short time the entrance to North Avenue from St. Leonard's Street was blocked. At about the same time as this manoeuvre was being undertaken the appellant, driving a small yellow utility owned by one Karen McEvoy, who at the relevant time was also a passenger in that vehicle, was approaching North Avenue from St. Leonard's Street. She was then off duty and in plain clothes. Faced with the obstacle which the complainant's truck represented, the appellant, it appears, became angry and began verbally abusing the complainant. Apparently regaining her control, she then backed the utility away from the intersection to a position near where St. Leonard's Street is met by Gladstone Street. The complainant was then able to complete his manoeuvre. He proceeded to cross St. Leonard's Street and do a left hand

turn into Gladstone Street. In the course of this second manoeuvre the rear of his truck inadvertently and apparently without the knowledge of the complainant clipped the rear of the utility which the appellant was driving, causing some minor damage.

The complainant's vehicle continued on its course in the normal way, turned into Cavendish Road and then proceeded to the intersection of Cavendish Road and Stanley Street East where it stopped at a red light. The appellant and Ms. McEvoy set off in pursuit and for reasons which do not clearly appear collided with the back of the complainant's stationary truck. The complainant alighted from his vehicle in the middle of Cavendish Road and proceeded to its rear where, on the findings, he was subjected to an unprovoked attack by the appellant. According to the evidence of the complainant, corroborated to an extent by that of several independent witnesses, the appellant dealt him a heavy blow to the left side of his chest. A flurry of punches ensued in the course of which and in an endeavour to protect himself the complainant grabbed the appellant's arm. The appellant then proceeded to either kick or knee the complainant several times in the groin area and once to the back of the leg. The appellant was, during this time, also shouting obscenities at the complainant.

At a point which is not entirely clear the appellant produced her police identification badge and stated that she was a police officer. Unfortunately the Tribunal does not seem to have attached great significance to this event: no finding was made in relation to it. According to the complainant, he was not made aware of the appellant's position until the physical altercation had ended. On the appellant's version, however, which the Tribunal generally rejected, she first produced her badge upon alighting from the utility. This aspect of the case may have assumed greater importance were it not for the conclusion which I have reached on the primary submission of Senior Counsel for the appellant, Mr. Herbert Q.C.

Before considering that submission though, it should be noted that the appellant had, on 19 August 1993, been acquitted by a Stipendiary Magistrate of a charge, of unlawful assault occasioning bodily harm laid under s. 339 of the Criminal Code. Whilst, notwithstanding that acquittal, it may have been apposite to have alleged that the appellant's conduct constituted a disciplinary breach, it seems strange for the charge to have contained the alternative allegation that it constituted a criminal offence. The effect of the acquittal was obviously that that conduct could never again constitute an assault of any type. It may have been that this approach was thought permissible because of the differing standards of proof and parties involved: see e.g. Helton v Allen (1940) 53 C.L.R. 691. However, no submission was made in respect of any such point and is therefore not necessary to further consider it.

The appellant's principal argument starts with the uncontroversial proposition that the Tribunal only has jurisdiction to inquire into and punish official misconduct. In the present case, it is said, the particulars of the charge disclosed nothing which would brand the appellant's conduct 'official'. In essence it is contended that a necessary element of the charge was neither alleged nor found, that element being the existence of some nexus between the appellant's conduct and her office. The result, it is said, is that the Tribunal's finding of guilt must be set aside either because the particulars were inadequate to make out the charge or because the Tribunal erred in considering them sufficient for that purpose. The submission can, in my opinion, be seen to raise two quite distinct, although somewhat interrelated issues; one procedural, the other substantive. The procedural objection attacks the sufficiency of the particulars to constitute the charge. The substantive one attacks the sufficiency of the Tribunal's findings to do so. Central to the resolution of both of those issues is the meaning of the phrase 'official misconduct'. Despite that, neither Counsel were able to refer the Court to any

direct authority on its scope and it is convenient to deal with that question first.

OFFICIAL MISCONDUCT

Plainly enough if the particulars given in the formal charge were sufficient to allege official misconduct on the part of the appellant then this ground of appeal must fail. On the other hand it seems equally clear that if the particulars were inadequate for that purpose and if, as appears to have happened, the Tribunal in fact proceeded on a different basis without determining whether proof of any further element was required, then the appeal must succeed, for the findings would not be adequate to prove the charge brought.

The starting point for this examination is the particulars themselves. It is at least clear from them that the crux of the complaint against the appellant is her assault of the complainant; it is by reason of that assault and that assault alone that the trust said to have been reposed in her by virtue of the office which she occupied was breached. There is no doubt that official misconduct may be constituted by an act which amounts to a breach of the criminal law: sub-s. 32(1)(d), (e). In a sense, however, the question which arises for consideration in this case is whether the converse of that proposition holds true, namely whether any breach of the criminal law constitutes official misconduct.

As I have noted, 'official misconduct' is comprehensively defined in s. 32 of the Act. Before turning to that section though some general observations can be made about the meaning of the term 'official'. The Macquarie Dictionary, 2nd ed., defines that word as meaning "of or pertaining to an office or position of duty, trust or authority". I do not think that it can be doubted that for conduct in the ordinary sense to be described as 'official' some connection between it and the particular office held must be shown. The existence of such a nexus is

essential to the characterisation of the conduct in the way required.

In the present case of course the particulars of the charge alleged no such connection; on their face they simply speak of an assault which may or may not have exhibited some association with the appellant's position. But these comments must necessarily be by way of background only. They cannot in any way be allowed to override the wording of the section itself if, after giving that wording its full meaning and effect, it turns out that some wider construction is required.

Turning to that section, the first observation which I would make is that, consistently with what I have noted in the preceding paragraph, the expression used tends to indicate an intention on the part of the legislature to encompass only that conduct by a member of the public service which can, in a broad sense, be said to relate to the powers, functions, duties or responsibilities which arise out of his or her appointment. The precision of the terminology used is not apt to describe an essentially private act done without any reference to the person's official position: cf. the definitions of 'misconduct' and 'conduct' in ss. 1.4 and 7.2 respectively of the Police Service Administration Act 1990. There is no doubt that many types of personal conduct may demonstrate an individual's unfitness to hold a particular office but it does not follow as a general rule that that circumstance would suffice to brand that conduct 'official'. In the present case, the trust which must have been breached under sub-s. (1)(b)(ii) in order to sustain the charge must have been that which was reposed in the appellant by virtue of her position as a police officer and not merely that which related to society's expectations of her as a private citizen. If then an act is performed in circumstances where the alleged offender is neither actually nor apparently representing the office which they occupy, it would in my opinion be difficult to label that conduct 'official'.

To the extent that it was accepted that any misconduct investigated by the Tribunal must be official, Senior Counsel for the respondents, Mr Hanson Q.C., sought to derive some support for the sufficiency of the particulars and the Tribunal's finding from certain authorities said to establish the proposition that a police officer is always on duty: Attorney-General for New South Wales v Perpetual Trustee Company Limited (1952) 85 C.L.R. 237, 278; Hocken v Pointing [1993] 2 Qd.R. 659, 660-1. Indeed in its remarks on sanction the Tribunal, in the course of rejecting a submission by Mr. Herbert Q.C. that the assault was committed whilst the appellant was not on duty, cited the authorities listed for just such a rule.

In my opinion, however, those authorities do little to advance the respondents' argument. Cases of that nature do not seek to ascribe to an off duty officer's private conduct some official character, nor do they establish that every act done by such an officer no matter how unconnected with his or her position can be punished by official sanction. Perhaps it would be more accurate simply to say that certain of a police officer's functions do not cease at the end of their allocated shift but may be invoked at any appropriate time in order to prevent breaches of the peace: cf. Horne v Coleman (1929) 46 W.N. (N.S.W.) 30. Indeed, they have a duty to do so: Duncan v Jones [1936] 1 K.B. 218; Rice v Connolly [1966] 2 Q.B. 414, 419. Unless invoked in that way, however, it seems to me inappropriate to speak of their actions as official.

Consequently, I would reject outright any argument that, because of their special position or otherwise, any misconduct by police officers may be investigated and punished by the Tribunal. To so conclude would be to divest the word ‘official’ of any useful meaning and place on members of the police force an unjustifiable burden in respect of their private lives. I cannot think that it would have been intended that police officers should, by virtue of their position alone, be treated differently from or subjected to harsher penalties than other public

servants in respect of conduct which is essentially unconnected with their office. There must be misconduct by the officer in the course of or pertaining to the exercise of the powers, function, duties or responsibilities attaching to his or her office. It follows that in the present case the particulars failed to allege a necessary element of the charge.

In reaching this conclusion I do not wish to be taken as deciding that the definition should be read in any narrow or restrictive way. Quite to the contrary, it is easy to envisage a situation in which an individual may, on an essentially private occasion, do an act which may cause their office to be brought into disrepute. A clear example would be that of a person who seeks to invoke his or her office in order to advance some private or closed interest. But in the present case, the particulars did not go so far as to allege any such act. True it is that on one view the appellant may have at some stage during the altercation sought to invoke her position in a way which might be considered reprehensible. Indeed that conduct in itself might be thought sufficient to justify a charge of the nature now under consideration. There is also evidence, apparently accepted by the Tribunal, that the appellant may have revealed her position to civilian bystanders, possibly once more to advance her private interests. Again, however, that which is alleged to constitute the charge does not include any such act. In the present case there is simply no allegation that the appellant assaulted the complainant in a manner or on an occasion which might be said to have touched on her position as a constable of police.

That conclusion, however, is not necessarily the end of the matter. Had this been an appeal from a criminal conviction, I would have had no hesitation in upholding the appellant's submissions and quashing the conviction, if not otherwise, on the ground that the indictment, for the reasons outlined, alleged no offence known to law. It was conceded on both sides, however, that the proceedings before the Tribunal were, notwithstanding the severity of

the consequences said to flow from them, essentially administrative in nature: Adamson v. Queensland Law Society Incorporated [1990] 1 Qd.R. 498. The relevant standard applicable to them being the civil standard as understood in Briginshaw v Briginshaw (1938) 60 C.L.R. 336. As a result, considerations relevant to criminal proceedings are not necessarily to be directly imported into a case such as this. Notwithstanding the defectiveness of the formal charge, therefore, it is necessary to consider the status and effect of the particulars and their bearing on the proceedings in this case.

NATURAL JUSTICE

It cannot be doubted that the Tribunal, in the performance of its investigative and determinative functions under s. 46 of the Act, is bound by the rules of natural justice. It is, under s. 55, invested with comprehensive powers of sanction which affect directly the rights and interests of those found guilty by it of official misconduct: Annetts v McCann (1990) 170 C.L.R. 596, 598; Ainsworth v Criminal Justice Commission (1991-92) 175 C.L.R. 564, 576. Although the precise content of the rules of natural justice may vary according to such considerations as the type of proceedings involved or the nature of the interest or interests said to be affected, at the very least they import a requirement that the person whose interests are likely to be affected be given reasonable notice of the nature of the case which he or she is called upon to meet: Re King and Co's Trade Mark [1892] 2 Ch. 462, 482; Kioa v. West (1985) 159 C.L.R. 550, 582; Re Solomon [1994] 2 Qd.R. 97, 108-9. That notice is to be provided, not at the steps of the hearing room, but in such time as would enable that person to reasonably and effectually prepare any case which they would seek to make: Public Service Board of New South Wales v Osmond (1985-86) 159 C.L.R. 656, 666.

Such a requirement has a multitude of purposes. Its primary aim is no doubt to promote a fairer hearing in the

interests of the person or persons likely to be affected by it; it engenders a more expedient and more focused inquiry by narrowing the issues in dispute enabling all involved to more properly and accurately apply the test of relevance to them: Johnson v Miller (1937) 59 C.L.R. 467, 497-8. The consequent saving in time and energy, however, is no doubt a matter of benefit not only to the immediate parties but also in a case like this to the community as a whole: Twist v Randwick Municipal Council (1976) 136 C.L.R. 106, 116.

In the present case, I am persuaded that had the Tribunal purported to rely on any matter essential to the charge outside the particulars that course would have been objectionable on the ground that the appellant had not been given adequate notice of it. In saying that, I am conscious of the fact that the Tribunal is not bound by the rules of procedure existing in this or any other Court: sub-s. 54(1). Consequently, particulars have no formal status in proceedings such as these: cf. s. 573 Criminal Code and R v. Lewis [1994] 1 Qd.R. 613, 632. Nevertheless, and despite no provision being made in the Act itself, I consider that the Tribunal would, by implication, have power to order that particulars be given, if nothing else, to ensure procedural fairness to the person responding to the charge: see Johnson v. Miller, 490, 497; and generally Grasby v. the Queen (1989) 168 C.L.R. 1; Jago v. District Court of New South Wales (1989) 168 C.L.R. 23.

Moreover if, in a case such as this, the particulars are in fact used as the means of giving the requisite notice then they must fully and accurately state the nature of the conduct relied upon as constituting the charge: Pointon v Cox (1926) 91 J.P. 33, 35; Re Solomon [1994] 2 Qd.R. 97, 107. No doubt other more informal means of providing that notice could have been used; Law Liat Meng v Disciplinary Committee [1968] A.C. 391, 404, but it was not suggested in the present case that any such method had been adopted. Nor was it suggested on behalf of the respondents that any deficiencies apparent on the face of the formal charge were ultimately cured by the course which the

hearing took: cf. R v Lewis [1994] 1 Qd.R. 613, 623-5. Indeed, somewhat surprisingly, Senior Counsel for the respondents seemed content to rely on the submission that the appellant did in fact invoke her position as an officer of police "to strengthen her position in a private dispute", notwithstanding firstly that no such finding was made by the Tribunal and secondly that what was charged was not the dishonest or partial discharge of her functions (sub-s. 32(1)(b)(i)) but the assault. It simply cannot be a sufficient answer to the appellant's argument to say that she at some stage throughout the episode in question engaged in official misconduct when the acts said to be relied on in the particular case are identified and consequently restricted by the information which, through the particulars, had been provided to her. That would defeat the entire point of giving notice.

The particulars took on a significance in this case which could not be ignored. Had Counsel assisting the Tribunal at the hearing sought to rely on matters outside their scope, the proper course would have been to apply to the Tribunal for amendment of them. The appellant would then have been entitled to seek an adjournment of the proceedings to enable her to investigate and prepare her answers to them: cf. Egan v Harradine (1975) 6 A.L.R. 507. Generally speaking, such an adjournment should be granted unless the Tribunal is satisfied, having regard to the severity of both the allegations and consequences said to flow from them if established, that no prejudice would be caused to the appellant in the conduct of her defence.

Strictly speaking, this conclusion is enough to dispose of the appeal. Either the Tribunal considered the particulars sufficient to base the charge, in which case an essential element of it had not been found, or the Tribunal relied for its finding on matters outside those particulars, in which case it denied the appellant natural justice in failing to notify her of its intention to do so. Nonetheless it is appropriate that I consider which approach the Tribunal in fact adopted in the present case.

APPROACH OF THE TRIBUNAL

On behalf of the appellant it was urged that I take the view that the Tribunal considered the particulars sufficient to base the charge and so acted on an erroneous view of what could constitute official misconduct. Having considered the Tribunal's reasons in detail, I have come to the clear conclusion that that is the correct view to take.

Certainly the tribunal made no overt reference to the elements of the charge: the appellant was simply found "guilty of official misconduct as charged". In context of course one must take that statement as referring to the formal charge set out at the beginning of these reasons. It in effect amounts to a finding that the particulars had been proved. For the reasons which I have expressed, I do not consider that a finding that the particulars were proved to the Tribunal's satisfaction, was sufficient to base a finding that the appellant was guilty of official misconduct. Not only then was a necessary element of the charge not alleged, it was not found either.

I am confirmed in this view by two other matters. The first is the Tribunal's reference to the authorities earlier cited, albeit in the context of its remarks on sanction, for the proposition that a police officer is always on duty. As I have mentioned that is a proposition which simply cannot be taken literally. Moreover, it is a proposition which, if so taken, could easily have precipitated the Tribunal's error in approach. Secondly, that such an error was acted upon is apparent from the Tribunal's statement that an affirmative answer to the following question would be determinative of the appellant's guilt:

> "Did Const Mullen commit the act of assault in the way alleged?"

Again, the reference to "the act of assault in the way alleged" can only be taken to mean "the act of assault in the wayalleged in the particulars of the formal charge".

Importantly, the summary of evidence and findings immediately following that question makes no reference to the invocation by the appellant of her position.

It follows that the Tribunal's finding of guilt must be set aside on the basis that an essential element of the charge had not been found.

In the light of this conclusion it is unnecessary for me to consider whether leave ought to have been granted under sub-s. 48(2)(b) to enable the appellant to have relied on certain alleged errors of fact by the Tribunal as a ground of appeal. I would merely observe for future reference that in other contexts a requirement that leave first be granted before an appeal can be made or certain grounds relied upon for it, the Courts have considered it Parliament's intention that the right of appeal be curtailed by requiring the appellant to demonstrate special circumstances in order to justify the granting of that leave. This might indicate that the Court on appeal from the Tribunal would take an even more restrictive approach to reviewing findings of fact than that which currently applies in the case of an appeal as of right from a Judge alone. I add also that in light of my conclusion on the appellant's primary submission and the fact that this matter comes to me by way of appeal, I consider it both unnecessary and undesirable that I should make any comment on the appellant's submissions on sanction.

Accordingly, I order that:

The decision of the Misconduct Tribunal constituted by one F.J. Gaffy Q.C. made the twenty-third day of June, 1994 whereby the appellant was found guilty of a charge of official misconduct be quashed.

I will now hear argument as to the appropriateness of any ancillary orders, including costs.