[2010] UKPC 6
Privy Council Appeal No 0023 of 2009

JUDGMENT

Sherman McNicholls (Appellant) *v* Judicial and Legal Services Commission (Respondent)

From the Court of Appeal of the Republic of Trinidad and Tobago

before

Lord Phillips
Lady Hale
Lord Mance
Lord Clarke
Sir Jonathan Parker

JUDGMENT DELIVERED BY

LORD CLARKE

ON

17 February 2010

Heard on 9 November 2009

Appellant	*Respondent*
Michael J. Beloff QC Ian L. Benjamin Tristan Jones	Peter Knox QC
(Instructed by Collyer Bristow LLP)	(Instructed by Charles Russell LLP)

LORD CLARKE:

Introduction

1. In this appeal the appellant is the Chief Magistrate of Trinidad and Tobago. He was appointed a magistrate in December 1982 and has been the Chief Magistrate since April 1999. The respondent ('the JLSC') is the body constituted under section 111 of the Constitution of Trinidad and Tobago to appoint, remove and exercise disciplinary control over all judges and judicial officers except the Chief Justice.

2. The appeal arises out of a decision by the JLSC to prefer six disciplinary charges against the appellant. By letter dated 2 August 2007, it gave notice of the charges, informed him that it proposed to interdict (i.e. suspend) him on full pay and invited him to make representations to it as to why he should not be suspended. On 21 August he replied denying all the charges and on 22 August issued these proceedings for judicial review seeking an order that the JLSC's decision to prefer the charges and its proposal to suspend him be quashed. Various interlocutory matters were resolved by Jamadar J by order dated 31 October 2007 and, on the substantive application for judicial review, by order made on 7 February 2008 Jamadar J quashed four of the six charges but allowed the other two to proceed. Both parties appealed to the Court of Appeal in Trinidad and Tobago but both appeals were dismissed by Warner, Kangaloo and Mendonca JJA. The Court of Appeal gave both parties leave to appeal to the Judicial Committee of the Privy Council but the JLSC decided not to pursue an appeal. As a result there is before the Board only the appeal brought by the Chief Magistrate as appellant.

The issues

3. There are four issues before the Board as follows:

i) Was the JLSC acting ultra vires in preferring the charges?

ii) Was the JLSC acting unfairly and/or contrary to the rules of natural justice in preferring the charges?

iii) Are the charges unsustainable in fact and law?

iv) Was the JLSC's conduct of the disciplinary process fundamentally unfair?

Before considering each of those issues, the Board will consider the background facts which led to the charges.

The background facts

4. The charges arise out of what is said to be a refusal to give evidence for the prosecution in committal proceedings against the then Chief Justice of Trinidad and Tobago, Mr Satnarine Sharma, which took place or were to take place on 5 March 2007. The allegations against the Chief Justice arose out of a complaint made by the appellant to the Prime Minister on 5 May 2006 that the Chief Justice had attempted to influence him in a decision he was to take in the criminal trial of Mr. Basdeo Panday, who was the Leader of the Opposition, on charges brought under the Integrity in Public Life legislation. On 8 May 2006 the Chief Justice made a written complaint to the Commissioner of Police against the appellant about the appellant's own complaint and also made allegations about a land transaction in which the appellant was said to have been involved.

5. On 11 May, 17 May, 24 May and 13 June 2006, the appellant made detailed statements to the police about the Chief Justice and about the land transaction. On 14 July 2006 the State filed criminal charges against the Chief Justice and issued a warrant for his arrest. The Chief Justice challenged the decision to charge him in judicial review proceedings which were resolved by the Judicial Committee in November 2006: see *Sharma v Brown-Antoine* [2006] UKPC 57, [2007] 1 WLR 780. The challenge failed. It was held that, although a decision to prosecute was in principle susceptible to judicial review on the ground of interference with a prosecutor's judgment, such relief would in practice be granted extremely rarely and that the court had to be satisfied, not only that the claim had a realistic prospect of success, but also that the complaint could not be resolved within the criminal process, either at the trial or by way of an application to stay for abuse of process. It was further held that, since all the issues could best be investigated and resolved in a single set of criminal proceedings, permission for judicial review ought not to have been granted and had rightly been set aside.

6. The criminal proceedings against the Chief Justice accordingly took their course. However, proceedings were also on foot against the Chief Justice under section 137 of the Constitution in which the question for decision was to be whether the Chief Justice should be removed from office. By a letter dated 13 February 2007 to the Director of Public Prosecutions ('the DPP') the appellant asked him to take "immediate steps to stay the instant criminal proceedings" until the proceedings

against the Chief Justice under section 137 had been determined. He explained that his statement to the Prime Minister had been given in support of the section 137 proceedings and that he had supported criminal sanctions only when it became clear that the Chief Justice had blocked those proceedings; hence his request for a stay of the criminal proceedings, now that the Chief Justice had "lifted his protest" to the section 137 proceedings.

7. On 14 February 2007 the Appellant swore written statements for the purpose of the criminal proceedings against the Chief Justice to the same effect as his complaint against the Chief Justice but on the same day he indicated to the DPP, the Deputy DPP (Ms Carla Browne-Antoine) and the lead prosecutor (Mr Gilbert Peterson SC) his reluctance to give evidence in such proceedings. On or about 20 February 2007 he also expressed similar reluctance to the Attorney General, who urged him to give serious consideration to testifying.

8. In the meantime the Deputy DPP had decided that evidence at the committal proceedings would be given by written statements, which were tendered to the court on 26 February. The only witness whom the Chief Justice wanted for cross-examination was the appellant. According to the Deputy DPP, on 27 February she spoke to the appellant, who told her for the first time that he was not going to give evidence in the criminal proceedings. On the same day she drafted a reply to the appellant's letter of 13 February. On the next day, which was the date set for the hearing to resume, the DPP told the Deputy DPP that the appellant had called to say that he was going to attend court to testify and that, although he was not available on 28 February, he would be available to attend on 5 March. The DPP also said that the appellant was asking for copies of the four statements that he had made. In these circumstances Mr Peterson advised that, since the appellant was going to attend court, they should not send the draft reply to his letter of 13 February. The proceedings were accordingly adjourned to 5 March.

9. For present purposes, the critical date is 5 March because the two extant charges both relate to that date. They both assert that the appellant was the chief prosecution witness. One asserts that he "engaged in conduct which brought the Administration of Justice into disrepute" and the other that "he engaged in conduct which brought the Judicial and Legal Service into disrepute". The particulars in both charges are the same:

> "to wit, having previously given sworn statements in the said proceedings you informed the lead prosecutor, Mr Gilbert Peterson, that you were not prepared to testify further therein which conduct resulted in the prosecution being unable to continue the said proceedings, their discontinuance, and the

discharge of the said Satnarine Sharma from the proceedings by the presiding Magistrate."

10. According to Mr Peterson, on 1 March the appellant telephoned him to say that he wanted to make his position clear, namely that he was not giving evidence in the criminal proceedings and that he had already written to the DPP to that effect. Mr Peterson took that to be a reference to the letter of 13 February. Again according to Mr Peterson, in the morning of 5 March the appellant telephoned Mr Peterson, returning a call of the day before, and said that he wanted to make his position clear that he was not prepared to testify. Mr Peterson said 'OK'. He added that he had said that before and that the purpose of his call the day before had been to ensure that the appellant would be attending court later on 5 March. The appellant said he would. Mr Peterson said that some time between 12.10 and 12.30 pm the same day he telephoned the appellant at his office and asked him to give a statement to the police saying that he refused to give evidence and setting out the reasons for his refusal. The appellant said that he did not think that that was necessary since he had already indicated his position to Mr Peterson and that he had also done so in a letter to the DPP.

11. According to Mr Peterson, before the case was called on at 1.00 pm he had a discussion with the Deputy DPP and they agreed that, given the position taken by the appellant, it would be improper to continue the prosecution against the Chief Justice because the charge could not stand without the appellant's evidence. When the case was called on Mr Peterson told the court that the appellant was present, the appellant's name was called and he entered the court room. Before the appellant could be sworn, Mr Peterson told the court that, based on the position which the appellant had indicated to him, the prosecution against the Chief Justice could go no further. The magistrate then discharged Mr Sharma.

12. The various accounts of what occurred on 5 March, while broadly similar, are not entirely consistent and it is not of course for the Board to resolve any differences between them. The Deputy DPP says that Mr Peterson told her that the appellant was not willing to make a further statement and that he would stand by his letter of 13 February. Her account of what happened in court is broadly the same as that of Mr Peterson, except that she says that when the appellant came into court he went into the witness box. After Mr Peterson said that the prosecution was not proceeding further the appellant left the witness box but the Deputy DPP says that she said to Mr Peterson that the appellant should go into the witness box and state his position. Mr Peterson then spoke to the appellant at the prosecutor's table. The Deputy DPP did not hear the conversation but Mr Peterson told her that it was not necessary for the appellant to go back into the witness box and state the position. The appellant then left the court room and the magistrate discharged the accused.

13. A transcript of what occurred in open court is available. It shows that a number of witness statements were tendered in evidence and that thereafter Mr Peterson told the magistrate that the appellant was outside the court. The magistrate told him to call his witness and then asked the appellant to step into the witness box. Mr Peterson said:

> "Ma'am, having regard to a position indicated to us by this witness, we are adopting a particular course in this matter. We are not proceeding any further with this prosecution. We are asking that the accused be discharged."

The magistrate asked the appellant to step out of the witness box, Mr Peterson reiterated that he had asked that the Chief Justice be discharged and the magistrate said that the prosecution was not offering any evidence in the case and that he was discharged.

14. Later the same day the Deputy DPP altered the draft letter of reply to the appellant's letter of 13 February and sent it to the appellant, who received it on 6 March. The reply stated that it had not been sent earlier because the appellant had indicated that he was going to attend to give evidence. It added that there was no power in the DPP to stay criminal proceedings pending the outcome of section 137 proceedings and gave a number of reasons why the appellant's position was untenable. They included that the integrity of the judiciary would be best served by his giving evidence in support of his sworn testimony, which he had made, not only in the context of section 137 proceedings but also in connection with the criminal proceedings.

15. Also on 5 March the Deputy DPP issued a press release saying that the proceedings had been discontinued because the main witness had indicated that he was no longer willing to give any further evidence in the criminal prosecution. On the next day, 6 March, the appellant also issued a press release explaining his position. He said that in his 13 February 2007 letter he had told the DPP that he was willing, eager and able to "give evidence in the proper forum in relation to the Sharma matter" and that the DPP had never responded to that letter. He continued:

> "What has occurred in fact is that statements have been taken from me for use in both sets of proceedings, in my view, in defiance of the guidelines provided by the Privy Council in the Sharma matter.
>
> Last evening, in keeping with the position adopted in my correspondence I affirmed that I was willing to give evidence

> and eager to do so in proceedings which it is now public record have been instituted under Section 137 of the Constitution of Trinidad and Tobago. Statements have already been given by me to this end. In my judgment those proceedings should have priority on the facts of this case. In my judgment it would have been improper both in principle and in law to allow for the cross-examination of evidence in two separate proceedings which were at roughly the same stage in their development. It should be remembered that in a preliminary enquiry no one is called upon to plead whereas in Section 137 proceedings an answer must be provided to the complaint.
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> As a judicial officer I stand by the courage of my convictions and this is my judgment on the facts and applicable law relevant to the case."

16. The Board is not entirely clear how this matter formally came to the attention of the JLSC but by letter dated 8 March the appellant sent to the JLSC his letter dated 13 February, his press release and the reply dated 5 March, which he had received after issuing the press release. On the same day, on receipt of those documents, the JLSC held an emergency meeting to discuss the appellant's role in the discontinuance of the criminal proceedings against the Chief Justice. At that meeting the JLSC decided that its legal adviser be directed to draft allegations of misconduct against the appellant, that Ventour J be appointed as the investigating officer into the allegations and that the question of the appellant's suspension be deferred until he completed a judicial inquiry upon which he was engaged.

17. By letter dated 9 March the JLSC appointed Ventour J to be investigating officer under regulation 84B of the Public Service Commission Regulations ("the Regulations") into an allegation of misconduct against the appellant. It asked him to carry out an investigation in accordance with regulations 90(3) to (5A). The allegation stated in the letter was said to arise out of the letter from the Deputy DPP dated 5 March (referred to in para 14 above). It alleged misconduct in that without reasonable excuse the appellant acted in a manner which was prejudicial to the administration of justice in that:

> "he Sherman McNicolls, Chief Magistrate on 5th day of March, 2007 at the Fourth (4) Court, Port of Spain Magistrates' Court presided over by her Worship Lianne Lee Kim refused to allow himself to be cross examined on the statements he had made to the police in relation to the criminal proceedings Sergeant Romany v Satnarine Sharma for attempting to pervert the course of justice, which statements had been tendered in the said

> proceedings and formed part of the evidence, and which resulted in the said proceedings being discontinued."

At the hearing of this appeal some attention was paid to the fact that the allegation was that it was 'at' the court that he refused to allow himself to be cross-examined. On the same day the JLSC wrote to the appellant to inform him of Ventour J's appointment, attaching Ventour J's letter of appointment.

18. On 14 March 2007 the JLSC issued a press release, which, among other things, explained that it had appointed Ventour J to investigate allegations of misconduct by the appellant "arising out his refusal to give evidence" in the criminal proceedings which had now been discontinued.

19. By letter dated 15 March Ventour J wrote to the appellant in his capacity as investigating officer seeking a written explanation from him pursuant to regulation 90(3) within 7 days in respect of the charge which he set out in identical terms to those quoted above from the letter of 9 March.

20. On 21 March the appellant provided his written explanation, which was to the following general effect, which we take from the agreed statement of facts and issues:

> i) Before 13 February, he had had a meeting with two representatives from the DPP's office, and told them how he felt about having to testify against the Chief Justice because of his close working relationship and friendship with him since his appointment to the Bench.
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> ii) On the same day as he wrote his letter of 13 February 2007 asking for a stay of the criminal proceedings, he had told the Deputy DPP that when he made his statement about the Chief Justice to the Prime Minister, he intended the matter to be dealt with under section 137, but not by way of criminal proceedings; and that he had cooperated with the police in their investigations because the Chief Justice had made allegations against him in turn in connection with the land transaction. He also told her that he was not willing to testify in the criminal matter.
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> iii) He swore his statements reluctantly and under the impression that the Deputy DPP would revert to him on his concerns.
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> iv) He had spoken about his concerns to the Attorney General, who had advised him on about 23 February that he should give serious consideration to

testifying at the preliminary inquiry. He had also received telephone calls from the DPP urging him to reconsider his position on testifying.

v) He spoke to the DPP on Friday 2 March and told him that if he was going to testify he needed copies of the statements, which the DPP then provided. Up to that point he was still undecided as to whether he would testify.

vi) During the morning of 5 March he telephoned Mr Peterson and informed him that he was not willing to testify. Mr Peterson said 'OK' and that was the end of his conversation.

vii) When he was called into the witness box on the same day and was about to be sworn, Mr Peterson told the court that he was discontinuing proceedings because he was not willing to testify, or words to that effect, whereupon the magistrate discharged the Chief Justice.

viii) In making up his mind whether or not to testify, he had considered the comments of the Court of Appeal (by which he must have meant the Judicial Committee) in the Sharma case and concluded that parallel proceedings against the Chief Justice were oppressive. He agonised over whether he should participate in oppressive conduct. He came to the conclusion "after a great deal of prayer and reflection" that he should not participate.

ix) In spite of the fact that he had come to the conclusion not to testify in the Sharma criminal matter, if the DPP's lawyers or the Presiding Magistrate had indicated to him that his reasons for not testifying were unacceptable he would have testified.

21. On 13 April the JLSC received Ventour J's report and on 24 April decided to prefer charges against the appellant on the basis of it. The JLSC did not however inform the appellant of its decision. Ventour J was asked to reconsider his report for reasons with which we are not concerned in this appeal. He did so but made no material changes to it and resubmitted it on 16 May. On 18 May the President appointed a Tribunal under section 137 of the Constitution to inquire into the question of the removal of the Chief Justice based on the appellant's complaint dated 5 May 2006. On 21 May the JLSC again discussed Ventour J's report and confirmed its decision to prefer disciplinary charges against the appellant.

22. There followed considerable activity in the media, to which we should briefly refer. On 17 June the Express newspaper published Mr. Justice Ventour's report and

quoted verbatim extracts from the JLSC's meetings. That publication excited considerable media comment. On 18 June the JLSC met and decided to defer consideration of the preferment of disciplinary charges and the appointment of a tribunal until 26 June. It decided in the meantime to ask its legal adviser to advise it on the appellant's possible suspension, on the appropriate officer to present the case against him under regulation 98(1)(b) and on whether he would be entitled to legal representation. It also discussed the 17 June article in the Express, and decided to issue a press release in response. On 24 June the Express newspaper published the appellant's written explanation (referred to at para 20 above) verbatim. Another round of media comment followed. On 26 June the JLSC met again and considered the advice of its legal adviser on the setting up of a disciplinary tribunal, the conduct of the hearing and the suspension of the appellant. It also decided to retain senior counsel to advise on regulations 98(1)(b) and (d).

23. By letter dated 4 July the appellant's attorneys wrote

i) complaining of the silence from the JLSC and of the publication in the media of the minutes of the JLSC's private and confidential meetings and of the confidential report prepared by Mr. Justice Ventour;

ii) requesting confirmation of possible disciplinary charges against the Chief Magistrate and the timing of his suspension as reported in the media;

iii) asking to be provided with copies of the minutes and the report so that the appellant could be fully advised; and

iv) observing that the disclosure and the adverse media publicity were to the prejudice of the appellant and undermined confidence in the impartiality and confidentiality of the decision making process embarked upon by the JLSC.

24. By letter dated 11 July, the JLSC replied that it was impermissible to disclose the matters sought and that the appellant would be advised as appropriate on the disciplinary charges and suspension. On 31 July the JLSC met and decided to prefer the six charges which were initially the subject of these proceedings against the appellant. The four charges which were quashed were in the same form as the two which remain, except that two of the four alleged that the appellant told Mr Peterson on 27 February that he was not prepared to testify further in the criminal proceedings and the other two alleged that he told him the same thing on 1 March. By this time the appellant had finished the inquiry on which he had been engaged. By letter dated 2 August the JLSC informed the appellant of its decision to prefer the six charges and that it proposed to interdict him on full pay in the meantime, and invited him to make representations to it as to why he should not be so interdicted. On 21 August the

appellant denied all six charges and on 22 August issued proceedings for judicial review as stated above.

25. In the meantime, on 27 July the section 137 tribunal chaired by Lord Mustill ('the Mustill Tribunal') conducted a public procedural hearing at which the public hearings of the inquiry were fixed for 17 to 28 September. On 10 August the appellant filed his witness statement before the Mustill Tribunal in which he dealt with the discontinuance of the criminal proceedings against the Chief Justice. On 19 September 2007 the appellant was cross-examined about his role in the collapse of the criminal proceedings against the Chief Justice. In the course of his cross-examination he agreed that he told Mr Peterson on 5 March that he would not testify and that he stood in the witness box, unsworn, while Mr Peterson told the court that because of the attitude he had adopted the prosecution would be or was withdrawn. However, the appellant reiterated the point he had made earlier that he was concerned about the dual proceedings, namely the section 137 proceedings and the criminal proceedings. He also said that, if the court had indicated to him that he must give evidence, presumably on the basis that his concern about dual proceedings was not a good one, he would have given evidence. It is not necessary or appropriate to set out his evidence in detail here save perhaps to note that he appears to have accepted that at some stage he spoke to Mr Peterson at the prosecutor's table. He said that Mr Peterson might have asked him if he wanted to go into the witness box to say that he was not giving evidence and that he said no.

26. Thereafter the proceedings for judicial review were determined as stated above. In the event the appellant was not suspended and remains in office. The issues before the Board, to which we now turn, are those stated in para 3 above.

Ultra vires

27. It is submitted on behalf of the appellant that the JLSC acted ultra vires in preferring the charges. As noted above, the initial allegation against the appellant which was referred to the investigating officer was that "at the Fourth (4) Court" he refused to allow himself to be cross-examined. It was that allegation which was duly investigated and reported upon by the investigating officer. That was not, however the focus of the six charges subsequently preferred against the appellant. Rather, those charges alleged, in summary, that the appellant had indicated in advance of the court hearing and not at it, that he was not prepared to testify, resulting in the discontinuance of those proceedings.

28. The argument is that in preferring the six charges the JLCS was acting ultra vires because on their proper construction, the Regulations provide that charges may only be preferred if they were contained in the allegation which was referred to the

investigating officer, and upon which the officer who is the subject of the allegation has had an opportunity to comment. In order to assess this argument it is necessary to refer to the statutory framework.

29. It is common ground that the JLSC has power to exercise disciplinary control over the appellant as Chief Magistrate under section 111 of the Constitution. Under section 129(1) of the Constitution the JLSC has power to regulate its procedure. By a notice dated 10 February 1984 the JLSC exercised its power to regulate its procedure by adopting the Regulations.

30. The following is not in dispute. By regulation 84 an officer who is alleged to be guilty of misconduct is liable to disciplinary proceedings in accordance with the procedure prescribed in the Regulations. By regulation 84B(1), where the JLSC becomes aware of an allegation of misconduct of a Head of Department, the JLSC must appoint an officer to investigate the allegation and, by regulation 84B(2), regulations 90(3) to 90(6) inclusive apply in respect of such an allegation. The Chief Magistrate is an officer and a Head of Department within the meaning of regulations 84 and 84B respectively.

31. Regulation 90(1) provides that the officer must be warned in writing of the allegation of misconduct against him. Regulation 90 then provides, so far as relevant:

> "(3) The investigating officer shall, within three days of his appointment, give the officer a written notice specifying the time, not exceeding seven days from the date of the receipt of such notice, within which he may, in writing, give an explanation concerning the report or allegation to the investigating officer.
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> (4) The investigating officer shall require those persons who have direct knowledge of the alleged indiscipline or misconduct to make written statements within seven days for the information of the Commission.
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> (5) The investigating officer shall, with all possible despatch but not later than thirty days from the date of his appointment, forward to the Commission, for the information of the Commission, the original statements and all relevant documents, together with his own report on the particular act.

(5A) Where the Commission considers that the circumstances before it warrants an extension of time, the period referred to in subregulation (5) may be extended by a period not extending thirty days.

(6) The Commission, after considering the report of the investigating officer and any explanation given under subregulation (3), shall decide whether the officer should be charged with an offence and if the Commission decides that the officer should be so charged, the Commission shall, as soon as possible, cause the officer to be informed in writing of the charge together with such particulars as will leave the officer under no misapprehension as to the precise nature of the allegations on which the charge is based.

(7) Where, in the explanations given under subregulation (3), the officer makes an admission of guilt, the Commission may determine the penalty to be awarded without further inquiry."

32. The investigating officer was Ventour J. As noted at [19] above, he gave the appellant notice of the allegation against him, namely that "at the Fourth (4) Court" he refused to allow himself to be cross-examined, and invited him to give an explanation in accordance with regulation 90(3). As noted at [20], the appellant availed himself of that opportunity on 21 March by giving his written explanation in a detailed document which is summarised at [20 i) to ix)]. That document, in which he set out his understanding of the position in some detail, shows that the appellant was fully aware of the case he had to meet.

33. In particular, the appellant said that he telephoned Mr Peterson during the morning of 5 March and informed him that he was not going to testify. The substance of the original allegation against the appellant was, as shown in the quotation at [17] above, that he refused to allow himself to be cross-examined. In the context of proceedings in which witness statements were tendered to the court in committal proceedings and admitted unless the defendant wished to cross-examine a particular witness, there is no distinction between a person who refuses to be cross-examined and a person who refuses to testify. The whole purpose of the appellant's attendance on 5 March, as everyone knew, was to allow him to be cross-examined on behalf of the Chief Justice. The original allegation was that he refused to be cross-examined. He admits that he refused to testify. That admission is in substance an admission that he refused to allow himself to be cross-examined. Put another way, the allegation that he refused to allow himself to be cross-examined is in substance the same as an allegation that he refused to testify.

34. The allegation of a refusal to allow himself to be cross-examined and the allegation of refusing to give evidence being the same, it follows that the investigation was of both. The report made by Ventour J demonstrates that that is the case. Moreover, there is nothing in the material before the Board that suggests that any significance was attached by anyone to the fact that the allegation was that "at the Fourth (4) Court" he refused to allow himself to be cross-examined. This is almost certainly because, given the fact that the appellant accepted that he had refused to testify, precisely when he did so was of no real significance, at any rate unless he did so after he was sworn, which has never been suggested.

35. We return to the procedure. The Board accepts that under regulation 84B(1), where the JLSC becomes aware of an allegation of misconduct it must appoint an officer to investigate "such allegation" and that under regulation 90(1) the officer being investigated must be informed of the allegation. It accepts that the Regulations do not give the investigator a roving brief to investigate other potential allegations. However, the Regulations must be viewed with an element of common sense. Thus where the matters investigated amount to an investigation of the substance of the initial allegation such an investigation is permitted under regulation 90.

36. The second step is, as correctly submitted on behalf of the appellant, that under regulation 90(3) the officer must be given an opportunity to provide an explanation concerning the "allegation to the investigating officer". The appellant was given that opportunity here and availed himself of it.

37. The third step is that under regulation 90(5) the investigating officer must provide a report "on the particular act". In this case he did that by reporting that there was no dispute that the appellant refused to give evidence in the criminal proceedings, which (as stated above) was the substance of the allegation against the appellant.

38. The fourth step is that under regulation 90(6) the JLSC must consider the report of the investigating officer and any explanation given under regulation 90(3) and decide whether the officer should be charged with "an offence", in which event it must inform the officer of the charge together with such particulars as will leave him "under no misapprehension as to the precise nature of the allegations on which the charge is based". Mr Beloff QC submits on behalf of the appellant that it is not open to the JLSC to prefer charges which have not been the subject of the procedure and that it would be contrary to the express procedure set out in the Regulations for the JLSC to decide to prefer charges which were not the subject of any allegation investigated. In short he submits that it is not open to the JLSC to add further allegations.

39. Mr Beloff submits that that analysis is consistent with regulation 105, which limits the powers of the disciplinary tribunal which must be set up to consider the charges preferred by the JLSC. Regulation 105 provides, so far as relevant, as follows:

> "Where the disciplinary tribunal constituted of three officers in hearing the evidence is of the opinion that such evidence discloses other misconduct … the disciplinary tribunal shall report the matter to the [JLSC] and if the [JLSC] thinks fit to proceed against the officer on such misconduct … it shall cause the officer to be informed in writing of any further charges and the procedure prescribed in these Regulations in respect of the original charge shall apply in respect of such charge."

Mr Beloff submits that it is implicit, if not explicit, in the Regulations that it is not open to the JLSC to prefer charges which go beyond the allegations originally made against the officer and investigated by the investigating officer without beginning all over again so that the procedure in the Regulations applies to the allegations contained in any such new charges.

40. Put as baldly as that, the Board is unable to accept Mr Beloff's submission. Regulation 90 is not expressed as narrowly as he submits. Thus under regulation 90(6) the JLSC must consider the report of the investigating officer and any explanation given by the officer being investigated and decide whether the officer should be charged with 'an offence'. In the opinion of the Board it is plain that, in deciding whether to charge the officer with an offence and, if so, what offence, the JLSC must have regard both to the report and to the explanation. The expression 'an offence' in regulation 90(6) is not limited to an offence identical to or containing only the particulars of the allegation of misconduct originally notified to him. It includes an offence or alleged offence identified in the report of the investigating officer and/or in the explanation given by the officer under investigation. Such an approach makes sense because, if the offence or alleged offence derives from an admission contained in the information, the Board can see no reason why it should not be an 'offence' within the meaning of regulation 90(6). In that event there would be no point in, as it were, starting all over again as required in the circumstances identified in regulation 105. Further, the approach is consistent with regulation 90(7), which enables the JLSC to determine the appropriate penalty where the officer makes an admission of guilt in his explanation given under regulation 90(3).

41. In the instant case the explanation contained a clear statement that on 5 March the appellant telephoned Mr Peterson and informed him that he was not willing to testify. The charges alleged that he was not willing to testify further, which is almost word for word the same. The appellant can have been (in the words at the end of regulation 90(6)) under no misapprehension as to the precise nature of the allegations

on which the charge is based. In these circumstances there can in the opinion of the Board be no basis upon which it could properly be held that the two extant charges are ultra vires. It follows that this ground of appeal fails.

Was the JLSC acting unfairly and/or contrary to the rules of natural justice in preferring the charges?

42. The Board accepts the submission that the appellant was entitled to an opportunity to comment upon the allegations. He had every opportunity to do so. This is plain from the facts set out in some detail above and from the Board's consideration of the two extant charges when considering the issue of ultra vires. The appellant has exercised his right to comment upon the case against him at every stage. In particular, he issued a press release on 6 March, which he sent to the JLSC together with his letter of 13 February and he provided his written explanation on 21 March. In short, he knew the case against him and answered as he thought appropriate at every stage. There is no basis for a conclusion that the JLSC was acting unfairly or contrary to the rules of natural justice in preferring the two charges which are the only extant charges being considered in this appeal.

43. The Board has reached this conclusion notwithstanding the criticisms which the courts below made of Ventour J's report being leaked to the press. Both Jamadar J and the Court of Appeal held that the press activity, including the publication of Ventour J's report, did not affect the appellant's ability to answer the charges or affect in any way his right to a fair trial of the extant charges. The Board agrees. There is no reason whatever why there should not be a fair trial of those charges by an appropriate tribunal. It follows that the second ground of appeal fails.

Are the charges unsustainable in fact or law?

44. Mr Beloff submits that the answer to that question is yes. He submits that the two charges cannot in law constitute misconduct. He correctly notes that 'misconduct' is not defined in the Regulations. He recognises that misconduct does not involve, or necessarily involve, moral turpitude but submits that it is something more than negligence and must be behaviour which would warrant opprobrium. Put more colloquially, it must be a serious matter. The Board would not put it quite in that way. The real question in this context is whether the conduct of the appellant brought the administration of justice or the Judicial and Legal Service into disrepute in a manner constituting misconduct within the meaning of the Regulations.

45. A refusal to answer questions in the witness box without just excuse would be a contempt of court and would be a serious matter but Mr Beloff submits, as is accepted, that this is not a case in which the witness took the stand and was sworn or

affirmed and then refused to give evidence. It is common ground that an indication to a prosecutor that a witness will not testify is not itself a contempt of court. Further, the Board accepts that a judge cannot be guilty of misconduct by virtue of an act which is based on a misunderstanding of the law. Thus it accepts that the mere fact that the appellant may have been mistaken in arguing that the criminal proceedings against the Chief Justice should be stayed pending the determination of the disciplinary proceedings against him under section 137 does not by itself amount to misconduct.

46. Experience shows that applications of this kind themselves cause substantial delay, especially when they lead to one or more appeals. Save perhaps in an exceptional case, the officer against whom a charge is made should not apply for judicial review but utilise the procedure set out in regulation 98, which sets out in detail the procedure which "shall apply" to the hearing by a disciplinary tribunal of a charge of misconduct. Regulation 98 contains detailed provisions which ensure that an officer so charged will be afforded a fair hearing.

47. Regulation 98 includes paragraphs (1)(c) and (2) as follows:

> "(1)(c) Before the case against the officer is presented, the officer may submit that the facts alleged in the charge are not such as to constitute the offence with which he is charged, and the disciplinary tribunal shall make a report of the submission to the Commission for its decision.
>
> (2) Nothing in this regulation shall be construed so as to deprive the officer from at any time making a submission that the facts disclosed in the evidence do not support the charge."

The Regulations thus provide the officer, here the appellant, with an opportunity to submit to the tribunal that the charges are bound to fail, either in fact or law.

48. In any event, it appears to the Board that the appellant has a case to answer, first that he was guilty of misconduct in informing Mr Peterson as prosecutor that he would not give evidence and, secondly, that that misconduct was causative of the criminal proceedings against the Chief Justice being brought to an end. It is at least arguable that, as the Chief Magistrate, who had made serious allegations against the Chief Justice to the effect that he had unlawfully interfered with the exercise his judicial responsibilities, and who had made statements to the police to that effect, it was his duty to agree to give evidence to justify the allegations. It is further arguable that not to do so was to bring the judiciary into disrepute. In this connection, the Board notes that, in the course of the appellant's evidence before the Mustill Tribunal, Lord Mustill, having said to the appellant that he had given a statement to the police,

who were proposing to use it as the basis of a prosecution, which had moved towards the stage of being heard, added this:

> "… and then, like many a Complainant before, you decide that you do not really want the process to go ahead, you would rather not give evidence against the Chief Justice with whom you had always been on good terms. Do you think that that was a tenable position for any witness, let alone a senior judge?"

The appellant replied: "On reflection, Sir, it was not."

49. The Board recognises that the appellant says that he would have given evidence if he had been asked to take the oath, if the magistrate had rejected his point that it was inappropriate to stay the proceedings to await the outcome of the disciplinary proceedings and if the magistrate had indicated that he should give evidence. The accuracy and significance of that may be matters for consideration at a hearing of the disciplinary complaint. But they are matters for the disciplinary tribunal, not the Board, to weigh up when deciding whether the appellant was guilty of misconduct.

50. The same is true of the suggestion that the prosecution was stopped because of what the appellant had told Mr Peterson. In this regard, the appellant again says that he would have given evidence if he had been sworn and matters had been explained to him and that in those circumstances it was not what he told the prosecutor that was the real and effective cause of his not giving evidence. These are all matters for the tribunal. None of them, however, leads to the conclusion that the appellant has no case to answer either in law or fact. It follows that ground three must fail.

Was the conduct of the disciplinary process fundamentally unfair?

51. It is submitted that the conduct of the process from March to August 2007 was fundamentally unfair. In particular it is submitted that the proceedings before the Mustill Tribunal made the proceedings against the appellant unfair. It is said that he was exposed to hostile cross-examination before that Tribunal and that he was compelled to display the nature of his defence to the disciplinary charges in advance. It is true that it was put to him that the case collapsed because he refused to testify and that he refused to testify because he knew that the allegations he had made were untrue. It is also true that he gave his explanation for what he told Mr Peterson.

52. However, the Board is quite unable to see how the appellant was prejudiced by anything which occurred before the Mustill Tribunal. As explained above, he had already set out the nature of his case in response to the allegations made by the JLSC.

He simply did so again and, moreover, will be able to make his case before the disciplinary tribunal in his own defence. There was nothing oppressive in the process before the Mustill Tribunal and his defence will not be prejudiced by it.

Conclusion

53. For the reasons given above all the grounds of appeal fail. The JLSC did not act ultra vires, the appellant was not treated in any relevant respect unfairly and the Board has every confidence that the disciplinary proceedings before an appropriate tribunal will be fair. The appellant has a case to answer but what decision the tribunal reaches will be a matter for it and not the Board. It follows that the appeal must be dismissed. Unless application is made to the contrary within 28 days of 10 February 2010 (in which case the issue will be determined on the basis of written submissions) the appellant must pay the JLSC's costs of this appeal.