Rules. Applications to extend the time for doing any act or abridging it in the matter of an intended appeal from the Industrial Tribunal have to be made, according to my analysis of all those rules, to the Supreme Court, and may be made before or after the time has elapsed.

An applicant for the time to be extended after it has elapsed is seeking an indulgence and must not only explain the delay but reveal that the intended appeal has merits and a probability of success, for there can be no profit in giving someone more time to take a step if it is clear that the intended appeal is doomed to failure. This is trite law. The explanation for the delay and the grounds of the intended appeal should be set out in brief form in an affidavit that accompanies the application. Sometimes a draft memorandum of appeal exhibited to the affidavit will do.

The intending appellant was ordered to file an affidavit explaining the reasons for the delay but on that and its affidavit in support of the application, I cannot find any material on which this court can declare that the intended appeal has a possibility of success or some merit or that there are arguable grounds of appeal. The grounds are not in the notice of appeal which, according to the Industrial Tribunal (Appeals) Rules and the Schedule thereto, they should be. They are not apparent from a reading of the judgment.

The consequence is that this court will not exercise its jurisdiction and discretion in favour of the intended appellant but instead will dismiss this application with costs.

*Application dismissed.*

## R. v. GOVERNOR, ex parte VIAGAS

SUPREME COURT (Kneller, C.J.): March 12th, 1993

*Police—disciplinary proceedings—evidence and procedure—no specific procedural or evidential rules apply to Police Disciplinary Board—rules of natural justice to be observed and criminal standard of proof met*

*Police—disciplinary proceedings—appeal—procedural fairness on appeal to Governor cannot cure defect in decision of Police Disciplinary Board, since appeal heard on record of evidence before Board*

The applicant applied for judicial review of a decision of the Governor.

The applicant, a Chief Inspector of Police, was charged before a Disciplinary Board with discreditable conduct and falsehood, contrary to the Police Regulations, reg. 18(1) and (5)(b). It was alleged that he had lied in a report about his instructions to other officers regarding the detention of a suspect. The suspect was a serviceman who had assaulted a police officer's young son on a Friday. Instead of allowing him to return to his ship upon receiving an undertaking to produce him in court, the applicant ordered that he be detained over the weekend until the magistrates sat on the following Monday morning. His own account of his instructions was contradicted by three other officers present at the time. The Board found him guilty on both charges. The Governor set aside the Board's finding on the discreditable conduct charge and upheld it on the falsehood charge. The applicant applied for judicial review of the Governor's decision.

He submitted, *inter alia*, that (a) the officer presenting the case had failed to put to the Board his previous good character and record as a police officer (which was relevant to his credibility) before it reached its verdict; (b) he had been made to produce a duty report by the Superintendent as investigating officer, having already provided a witness statement and without being cautioned that it might be used in disciplinary proceedings against him; (c) the report, which formed the basis of the charge upheld by the Governor, was inadmissible before the Board under the Regulations; (d) allowing his appeal against the charge of discreditable conduct was inconsistent with dismissing the falsehood appeal; and (e) since, on the facts, it was entirely possible that his instructions had been misheard or misinterpreted by the other officers, the case against him had not been proved beyond reasonable doubt.

**Held,** dismissing the application:

(1) The court was satisfied that the applicant had been fairly treated by the Board in accordance with natural justice. It was not required to decide whether the decision was correct on its merits and could not substitute its own decision for that of the Board. No particular rules of evidence (*e.g.* regarding hearsay) or procedure had to be observed by the Board but the standard of proof to be met was the criminal standard. The Board had unanimously accepted the evidence of the other officers over that of the applicant, as it was entitled to do. Since the Board members all knew the applicant well, they had been fully aware of his previous good character and record. Whilst the Governor had not re-heard the case on appeal—and procedural fairness on appeal could not have cured a void decision by the Board—there was no apparent defect in the Board's decision (page 31, line 18 – page 32, line 3; page 32, lines 31–36; page 33, lines 31–37; page 34, lines 9–16; page 35, lines 23–31).

(2) Although the Regulations stated that an officer's duty statement was inadmissible at his own disciplinary hearing unless it was prepared under caution and tendered in evidence with his consent, the applicant's report had been made voluntarily in the knowledge (from his professional experience) that it could be used before the Board. He had verified its contents and had since revealed no further relevant details which might have been included had it been made under caution. As a rule, a charge of falsehood should not be based on a statement made in the course of a disciplinary inquiry but an exception could be made to the rule if the report was used to conceal some other wrongdoing and sought to incriminate other officers. In this case the duty report was itself reprehensible, as it implied that the other officers were lying (page 32, lines 3–23; page 34, line 30 – page 35, line 22).

(3) The Governor's decision to set aside the Board's finding on the discreditable conduct charge was not inconsistent with his upholding the conviction on the falsehood charge, since the former charge was based on the applicant's unjustified departure from police practice on the detention of servicemen whilst the latter was based wholly on the false account of his instructions. There was no evidence to suggest that the Governor's reasoning was improper (page 32, line 36 – page 33, line 3).

**Cases cited:**

(1) *Calvin* v. *Carr*, [1980] A.C. 574; [1979] 2 All E.R. 440, applied.
(2) *Chief Const. (N. Wales)* v. *Evans*, [1982] 1 W.L.R. 1155; [1982] 3 All E.R. 141, *dicta* of Lord Hailsham of St. Marylebone, L.C. applied.
(3) *Drew & Lagares* v. *Att.-Gen.*, C.A., Civ. App. No. 12 of 1988, December 18th, 1987, unreported, *dicta* of Fieldsend, J.A. applied.
(4) *Leary* v. *National Union of Vehicle Builders*, [1971] Ch. 34; [1970] 2 All E.R. 713, applied.

(5) *R.* v. *Hull Prison Bd. of Visitors, ex p. St. Germain (No. 2)*, [1979] 1 W.L.R. 1401; [1979] 3 All E.R. 545, applied.

**Legislation construed:**
Police Regulations (1984 Edition), reg. 18:

"Any member of the Force commits an offence against discipline if he commits one or more of the offences set out below (hereinafter in these regulations referred to as the disciplinary code):—

1. *Discreditable Conduct*, that is to say, if he acts in a disorderly manner or any manner prejudicial to discipline or reasonably likely to bring discredit on the reputation of the Force.

…

5. *Falsehood or Prevarication*, that is to say, if he:—

(*a*) knowingly makes or signs any false statement in any official document or book; or

(*b*) wilfully or negligently makes any false, misleading or inaccurate statement; or

(*c*) without good and sufficient cause destroys or mutilates any official document or record, or alters or erases any entry therein."

*S. Ross* and *C. Finch* for the applicant;
*P. Dean, Senior Crown Counsel*, for the respondent.

**KNELLER, C.J.:** On November 17th, 1989 Chief Insp. Glen Viagas was found guilty of: (a) falsehood, contrary to reg. 18(5)(*b*) of the Police Regulations; and (b) discreditable conduct, contrary to reg. 18(1) of the Police Regulations by a Disciplinary Board of the Gibraltar Police Force. The Board consisted of the Commissioner of Police, Mr. Commr. Canepa, Chief Supt. Maginnis and Supt. Azzopardi.

The Board's "award" on each charge was that Chief Insp. Viagas be reduced to the rank of Inspector of Police. The Acting Governor did not confirm these awards but instead varied them to a loss of two increments on each charge making a total loss of four increments. Those varied awards were duly implemented. Chief Insp. Viagas lost some pay as a consequence of the varied awards.

He appealed to the Governor against the findings of guilt on each charge and on March 27th, 1990 the Governor dismissed his appeal against the Board's finding of guilt and award (as varied) on the charge of falsehood but allowed it on the charge of discreditable conduct, and duly quashed the finding of guilt and set aside the sentence of loss of two increments on that charge. Chief Insp. Viagas was therefore not as badly off financially as the Acting Governor's varied awards had made him.

On April 30th, 1990 Chief Insp. Viagas filed a notice of application for leave to apply for judicial review of the Governor's decision dismissing his appeal against the finding and award of the Board on the charge of

falsehood. He sought the following relief: (a) certiorari to quash the purported decision complained of; and/or (b) a declaration that the finding and award were unlawful, and/or unreasonable, and/or unfair in all the circumstances of the case.

The grounds on which that relief was sought were: 5

(i) the decision disclosed an error of law on the face of the record;

(ii) the Board took into account evidence at the original hearing which was unlawful, and/or contrary to accepted practice, and/or unfair to Chief Insp. Viagas, which was 10 not corrected on appeal;

(iii) the Board took into account irrelevant considerations and/or failed to take into account relevant ones, and/or came to a decision which no reasonable tribunal properly directing itself could have lawfully arrived at, and those 15 errors were not corrected on appeal;

(iv) further, and in the alternative, in all the circumstances of the case, including the procedure adopted by the Board, the finding on the falsehood charge was unsafe and unsatisfactory, so his appeal against it should have been 20 allowed, the finding quashed and the award set aside.

All this arises out of "an incident" which occurred on the evening of Friday October 6th, 1989 at what was the main entrance to H.M. Dockyard, adjacent to the west side of Ragged Staff Gate. A 13-year-old Gibraltarian boy called Christian Correa, the son of C.I.D. Chief Insp. 25 Correa and brother of Const. Correa, remarked on the height of a Royal Navy Leading Cook, John Anthony Kirwan, and called out "Guirri!" which is the Spanish for "stranger" or "foreigner" or, in Gibraltar, an Englishman. I do not suppose that Mr. Kirwan knew what this word meant. He turned back and struck the boy in the face which made his nose 30 bleed and Christian Correa wept.

Mr. Kirwan was detained by some police officers, told the lad was the son of a police officer, placed in one of the vans from which he saw Chief Insp. Correa in his Vauxhall "staring him up," as he put it, and he was then taken to the Central Police Station. There he was charged with 35 assault, arrested and put in the cells.

When he was interviewed, one of the policemen said to him: "You might as well have raped his wife!" meaning Chief Insp. Correa's wife. Mr. Kirwan claimed that he was told that he would not be given police bail until Monday morning when the magistrates' court sat because he 40 had assaulted a police officer's son, but if the boy had been anybody else's son he would have been taken to the police station, warned and sent back to his ship, *H.M.S. Intrepid*.

Someone from the Royal Naval Patrol in Gibraltar visited him in the cells, told him he would not be given bail until Monday morning and 45

asked him if he had any complaints. Mr. Kirwan said he had none. He told the Leading Regulator that he had not hit anybody.

Another man in the cell next door was shouting and the policemen on duty paid no attention. Mr. Kirwan was thirsty but too frightened to ask for a drink. He contemplated drinking the water in the cell lavatory but found it was saline. He was uncomfortable because he had used a lavatory which had no lavatory paper in it before he had been detained and there was none in the cell. He asked for a drink at 8.30 a.m. the next morning and was given a can of Coke. He was also asked by a police officer on duty if he wanted a Sunday newspaper and when he said he would like one he was told he would have to "wait a fucking day" because it was Saturday. He was not given any breakfast. He was so depressed that he smashed the Coke can, slashed his wrists with its ragged edge and wrote in his blood with his finger on the wall of the cell "I did not mean to let you down Vivienne." She is his wife and was in England at the time.

The police officers on duty sent him up to St. Bernard's Hospital by ambulance and he remained there until he appeared before the magistrates on Monday, October 9th, 1989, pleaded guilty to the charge of assault causing actual bodily harm against Christian Correa and was fined £25. He paid this and rejoined *H.M.S. Intrepid*.

Mr. Kirwan explained that his depression and his slashing of his wrists was due to the way he was treated by the police down at Ragged Staff Gate and in the Central Police Station, together with the fact that he would not be released on bail, to appear before the magistrates on Monday morning.

Why was he not released on police bail on the Friday night to appear at the magistrates' court on the Monday morning? The short answer, according to Sgt. No. 4 Savignon, is because after he came on duty at 11 p.m. that night and joined the town patrol, ending up at the Dockyard gate, Chief Insp. Viagas told him and other officers to arrest Mr. Kirwan, take him to the Central Police Station, charge him, keep him in the cells until the following Monday morning and then take him to court.

The other officers concerned in all this were Insp. Perera, the station duty officer that Friday evening, and Sgt. No. 6 Baldachino. Inspector Perea told Sgt. Baldachino to keep Mr. Kirwan in the cells until he was taken to court on the Monday morning. The sergeant did not find this order strange. One other man in the cells was kept in until Monday and four other men were bailed out that very night.

One of those four was a Mr. Leeming, who was also charged with the offence of causing actual bodily harm because he had punched a Mr. Bain in the eye and badly bruised it so that it swelled up (but medical treatment was not required for it). I think they were also sailors. Mr. Bain's visible injuries were much worse than those of Master Christian Correa. Inspector Perea told Sgt. Savignon to bail out Mr. Leeming until Monday morning.

Mr. Kirwan was charged at 6.40 a.m. on the Saturday morning. He asked what his rights were and when he was told them he said he wanted his commanding officer to be told and Sgt. Baldachino said that would be done.

On the morning of Saturday, October 7th, Chief Insp. Viagas had no information on Master Christian Correa's condition and did not know what had happened to Mr. Kirwan, so he decided to go down to the Central Police Station. As he was dressing, someone telephoned him from the station to say that Mr. Kirwan had cut his wrists in the cell and had been taken up to St. Bernard's Hospital. Chief Insp. Viagas went to the Central Police Station and was informed by Det. Insp. Barea that he had been told to conduct an investigation into what had happened in the cells, and in particular who had given Mr. Kirwan the can.

Chief Insp. Viagas also learnt that it had been suggested that Mr. Kirwan had been subjected to cruel and inhuman treatment whilst in custody, which had caused him to try to commit suicide. He thought the inquiry would see if Mr. Kirwan's allegations were true and, if so, who were the culprits. He did not know that the inquiry or review was concerned with his own conduct.

Shortly afterwards, Supt. Ullger told him he had joined Det. Insp. Barea in this inquiry. Chief Insp. Viagas was asked to write out a witness statement for them, which he did. He dealt in particular with the question of whether or not lavatory paper was available to Mr. Kirwan in the cell because Det. Insp. Barea seemed concerned about this. Chief Insp. Viagas said in his statement that there were two rolls in the cells as Det. Sgt. Comley's photographs revealed. One had no paper on it and the other one was unused. He was told, however, that they had been put in the cell after Mr. Kirwan had left it for the hospital.

On October 13th, Supt. Ullger asked him for a duty report for the Commissioner of Police, which he provided the same day. In this duty report, he stated:

> "11. When, eventually, Sgt. Savignon came out in the police van with Kirwan I gave him certain instructions. These were to keep Kirwan in custody until he had gathered all the evidence. Once he had done this, we would have to get an undertaking from his ship (which was leaving on Monday, October 9th, 1989) that Kirwan would be produced in court at 10 a.m. on Monday 9th; the first court sitting available after the weekend.
>
> 12. I then told him to see the four children from whom he would have to take statements—in the presence of their parents, as they were all between 11 and 12 years of age. I then returned to the disco.
>
> 13. The following morning, Saturday, October 7th, 1989, I telephoned Sgt. Savignon to find out what progress had been made with the investigation. However, his wife informed me that having been working all night, he was still asleep. I then decided to come

down to the station and see about Kirwan and whilst dressing, at about 12.30 p.m., I received a telephone call from the Central Police Station to inform me that prisoner Kirwan had attempted to commit suicide by slashing his wrists.

5 14. Upon arrival at Police Headquarters I was met by Det. Insp. Barea who informed me of what had happened and who was now conducting the investigation into this.

15. Kirwan had already left the police station for hospital and Det. Sgt. Comley was working inside police cell No. 1, where the attempt 10 had taken place.

16. Once Det. Sgt. Comley had terminated [his investigation] I gave instructions for the cell to be flushed out as there was a large amount of blood in the cell. This was done by Sgt. Perera with a hose pipe.

15 17. Sometime later, I spoke to Sgt. Savignon after which I instructed Det. Insp. Barea that once he had finished with Kirwan in hospital he could be bailed out on condition that his ship would give an undertaking that he would be produced at the magistrates' court at 10 a.m. on October 9th, 1989. All this depended on whether Kirwan 20 was discharged from hospital before Monday, October 9th, 1989."

At 5 p.m. on October 16th, Supt. Ullger served on Chief Insp. Viagas a notice in these terms—

"A report has been received from Insp. Perera, Sgt. No. 4 Savignon and Const. No. 191 Olivera. It appears that an offence 25 may have been committed by you against the Disciplinary Regulations, it being alleged that you, on October 13th, 1989, wilfully and/or negligently, made a false, misleading and/or inaccurate statement in a report by stating that you instructed Sgt. No. 4 Savignon to keep a prisoner, namely Kirwan, in custody until he had 30 gathered all evidence and that when he had done this he would have to take an undertaking from his ship (which was leaving on Monday, October 9th, 1989) that Kirwan would be produced at 10 a.m. on Monday 9th; the first court sitting available after the weekend.

In accordance with the Regulations, I have been appointed 35 investigating officer and I therefore hereby inform you in writing of the report and give you notice that you are not obliged to say anything concerning the matter, but that you may, if you so desire, make a written or oral statement concerning the matter to me as the investigating officer.

40 I further warn you that if you make such a statement it may be used in any subsequent disciplinary proceedings."

When it came to the particulars of the offence on the discipline form, which is similar to a charge sheet, they were as follows:

"Chief Insp. Viagas on October 13th, 1989, in Gibraltar, wilfully 45 made a false statement in a written report addressed to the

> Commissioner of Police that he had given certain instructions to Sgt. Andrew Savignon in relation to a prisoner, John Anthony Kirwan, namely, 'to keep Kirwan in custody until he had gathered all the evidence and once he had done this he would have to get an undertaking from his ship (which was leaving on Monday, October 9th, 1989) that Kirwan would be produced in court at 10 a.m. on Monday 9th; the first court sitting available after the weekend,' whereas in truth the said Glen Viagas had instructed the said Andrew Savignon and also Insp. Andrew Albert Perera to keep the said Kirwan in the cells until his appearance in court without qualification of any description."

Chief Insp. Viagas's complaints are as follows:

1. The presenter, Mr. Payas, outranked two members of the Board.

2. Mr. Payas was advised by members of the Chambers of the Attorney-General, whereas Chief Insp. Viagas was advised and helped by Insp. Guy.

3. Chief Insp. Viagas's affidavit in this application has not been offset by one from any of the members of the tribunal, the presenting officer, Mr. Payas, Supt. Ullger, Det. Insp. Barea, Insp. Perera, Sgt. Savignon or Const. Olivera.

4. The presenter failed to put before the Board during the proceedings the fact that Chief Insp. Viagas had a good character which was something that the Board ought to have taken into account by asking: "Would a man of this standing and experience commit the offence of telling a falsehood?" It was his word against that of Insp. Perera, Sgt. Savignon and Const. Olivera, so his character was relevant.

4. He was made to produce a duty report after he had made a witness statement and he had not been told beforehand that his own conduct was being investigated and he was not cautioned as he should have been.

5. The duty report was admitted by the tribunal and that was wrong according to the police regulations which deal with the hearing of disciplinary charges. There was no evidence of falsehood without that duty report made by Chief Insp. Viagas.

6. No other officer was in peril of any proceedings being taken against him. All the others who were involved were never asked for a duty report and they were never warned they might be facing any investigation.

7. The report did not seek to blame anyone and it was without malice of any sort. The other policemen involved in the event were mistaken, not liars.

8. The question of whether or not Mr. Kirwan should have bail or not have bail was not one in the discretion of Chief Insp. Viagas. On the contrary, it was a matter for the station officer who was Sgt. Baldachino and he, as is usual in these matters, sought the instructions of the duty officer who was Insp. Perera.

9. It is very difficult in these matters, Chief Insp. Viagas complained, to

make out exactly what instructions he gave and what the correct translation of them was, for he spoke in Spanish to these other officers in the midst of some excited children from the disco.

10. The comparisons between the police treatment that evening of Mr. Kirwan, Mr. Leeming and any of the others who were in the cells were irrelevant to this charge of falsehood which had been brought against Chief Insp. Viagas.

11. His appeal to the Governor was allowed on the conviction of discreditable conduct, which was inconsistent with the dismissal of his appeal against the conviction for falsehood.

12. No account could have been taken of the evidence of the Leading Regulator Dursley, who saw Mr. Kirwan in the cells and who said that Const. MacDonald had no information about Mr. Kirwan being given bail but he could possibly be bailed out on Saturday, which confirmed Chief Insp. Viagas's duty report. Mr. Kirwan told Mr. Dursley he had been assured he would not get bail before being taken to court on Monday morning. The Disciplinary Board had already admitted hearsay.

The relevant law that was cited on this can be set out in the following way. The principles are:

> 1. "The purpose of judicial review is to ensure that the individual receives fair treatment, and not to ensure that the authority, after according fair treatment, reaches on a matter which it is authorised or enjoined by law to decide for itself a conclusion which is correct in the eyes of the court" (*per* Lord Hailsham of St. Marylebone, L.C. in *Chief Const. of N. Wales* v. *Evans* (2) ([1982] 3 All E.R. at 144)).
>
> 2. "Neither at the stage of the application for leave, nor at the stage of the main application need an applicant for judicial review show that the decision of the body that he challenges was wrong. He merely has to show that the proceedings were so far removed from natural justice that they should not be allowed to stand" (*per* Fieldsend, J.A. in *Drew & Lagares* v. *Att.-Gen.* (3)).

See also *Chief Const. of N. Wales* v. *Evans* (2) (*ibid.*, at 143).

3. The appeal to the Governor is not a re-hearing and if the decision of the Board is void that could not be cured by an appeal merely on the record of evidence: see *Leary* v. *National Union of Vehicle Builders* (4) and *Calvin* v. *Carr* (1) ([1979] 2 All E.R. at 448).

4. There is no rule of law excluding hearsay evidence from quasi-judicial proceedings but great care must be exercised in relying on it in cases which affect a man's career: see *R.* v. *Hull Prison Bd. of Visitors, ex p. St. Germain (No. 2)* (5) ([1979] 3 All E.R. at 552–553).

Together with those guidelines there are principles which are not set out in any authority that was cited to the court but are either matters which are essential for such proceedings before the Board or are to be found in the Home Office *Guidance to Chief Officers on Complaints and*

*Discipline in England.* They include the principle that the standard of proof in such matters should be that in a criminal trial, namely, proof beyond reasonable doubt. The investigating officer must, as soon as is practical, inform the member subject to the investigation in writing of the report made against him and also that he may (but he is not obliged to) make a written or oral statement concerning this matter to the investigating officer. The warning should be that such a statement may be used in subsequent disciplinary proceedings.

It also includes the rule that a duty statement which an officer has been ordered to make in the course of his duty is not admissible in evidence at a disciplinary hearing in which he is said to be the defaulter unless it was made after he had been cautioned and he agrees to it being produced.

A disciplinary charge of falsehood or prevarication should not in general be based on any misstatement contained in a personal explanation made by an officer in any written or oral statement at any stage of a disciplinary inquiry. There are exceptions to this rule. Such a charge would be appropriate, for instance, if the alleged falsehood was used as a means of "covering up" and was more reprehensible than the original offence. This would be when an officer attempted to implicate an innocent colleague as a means of diverting suspicion from himself because in such a case it is reasonable to see the falsehood as a distinct and separate element in the officer's misconduct and deserving separate disciplinary action.

Returning now to the complaints made by Chief Insp. Viagas, it should be noted that no objection was taken by him or by Insp. Guy to Mr. Payas, the presenter appearing in this matter. The fact that he outranked two members of the Board does not seem to have had any effect on them, and a reading of the transcript reveals that it did not reduce them to accepting cravenly all his submissions or all that Mr. Payas wished to produce in evidence.

The Disciplinary Board did not have to follow exactly the procedure for a criminal trial in a court of law. It had to carry out the proceedings according to natural justice. It is not shackled by any technical rules of evidence and what hearsay evidence there was did not constitute an irregularity that vitiated the proceedings as being not in accordance with natural justice. The fact that the Governor allowed the appeal on the charge of discreditable conduct, in my judgment, cannot be said to be inconsistent with dismissal of Chief Insp. Viagas's appeal on the charge of falsehood.

They allege different offences: the discreditable conduct was in departing without justification from the police practice of releasing sailors into the care of the regulator and the falsehood was in writing in a duty report something which was not true. We do not know the reasons why the appeal on the charge of discreditable conduct was allowed. There are many reasons why the Governor might have allowed the appeal on one

and dismissed the appeal on the other. Chief Insp. Viagas's complaint is that the investigation of the charges and the procedure before the Board and its rulings were unfair and not that the appeal was so tainted.

It is quite true that the details of the charge of falsehood do not include any matters relating to Mr. Kirwan's slashing his wrists and the reasons for his doing so. They have only been put in the picture as background to what the falsehood was said to be. Bail would be a matter for the discretion of the station officer and, in turn, the police station duty officer in normal circumstances, but in this matter the fact is that Chief Insp. Viagas outranked Insp. Perera, Sgt. Savignon and Const. Olivera and, according to them, he gave orders to them that Mr. Kirwan should be kept in the cells until he went to court on Monday morning.

He says that he merely told them to keep Mr. Kirwan in the cells away from the Correa father and older son, interview the boys who were present when Mr. Kirwan struck Master Christian Correa, find out what had happened to the boy up at the hospital and then, when all was neatly tied up, consider whether or not to release Mr. Kirwan until the magistrates' court began sitting on Monday morning, making sure first of all that the Commanding Officer of *H.M.S. Intrepid* undertook to have Mr. Kirwan produced before the magistrates.

Chief Insp. Viagas claimed there was a hubbub around them all when he gave this order and that he spoke in Spanish, so it was possible that Insp. Perera, Sgt. Savignon and Const. Olivera did not hear clearly what he said or did not understand the Spanish phrases which he used. Inspector Perera, Sgt. Savignon and Const. Olivera flatly contradicted that and declared that they heard quite clearly what Chief Insp. Viagas said and understood his Spanish because it is the same sort as their own. They maintained that Chief Insp. Viagas said that Mr. Kirwan was to be put in the cells and not bailed out before he had appeared before the magistrates on Monday morning.

The members of the Board unanimously accepted the word of Insp. Perera, Sgt. Savignon and Const. Olivera in preference to that of Chief Insp. Viagas, as their findings on each charge reveal. They are members of the same Force, they know these four policemen well, at least two of the three speak Spanish and, all in all, their findings cannot be said to be perverse. It is, after all, unlikely that the police officers misheard or misinterpreted what the Chief Inspector said at two different times.

It is clear that the police were upset by the small son of one of their number being held by the neck and punched by a tall Royal Navy Leading Cook. According to Chief Insp. Viagas, the Royal Gibraltar Police Force has to deal with many tiresome servicemen.

It is not correct to say that no other officer was in peril or charged or warned or asked for a duty report. According to the evidence, Sgt. Savignon was asked to make a witness statement and later a duty report and so was Insp. Perera. They were in peril because if Chief Insp. Viagas

had said: "Bail this man out right now; hand him over to the Leading Regulator and ask for him to be brought back before the magistrates on Monday morning," and they ignored that order and kept Mr. Kirwan in the cells and then, in their witness statements or duty reports or both, gave their version of Chief Insp. Viagas's orders, they would have been facing charges of discreditable conduct or telling a falsehood or both. There was no conspiracy between those three officers to cover up any malfeasance of their own.

I do not see any force in the complaint that the presenter, Mr. Payas, did not tell the Board about the good character of Chief Insp. Viagas until they had found him guilty of these charges. The fact is that all the members of the Board knew Chief Insp. Viagas very well and knew of his excellent record and would have taken that into account when pondering on whether they should believe him or Insp. Perera, Sgt. Savignon and Const. Olivera on the point of what orders they heard Chief Insp. Viagas give about bail or otherwise for Mr. Kirwan.

Chief Insp. Viagas knew he could be represented at the Board's hearing and he chose Insp. Guy who, according to the record, did his job well.

The fact that Mr. Viagas's affidavit was not answered by an affidavit from anyone on the tribunal, the presenting officer or Sgt. Savignon, Insp. Perera or Const. Olivera is of no consequence because the record of the proceedings was also before this court and there was sufficient material provided by all those people in that record.

This leads to the last two issues, namely, first, whether Chief Insp. Viagas was made to produce a duty report without being told that his conduct was being investigated and without being cautioned and, if so, whether it amounted to an irregularity that vitiated the proceedings because it was not in accordance with natural justice? Secondly, was it wrongly admitted by the tribunal according to Police Regulations?

The difference between a statement and a duty report is that a statement is taken from someone who is going to be a witness and has been warned or knows he might be prosecuted if he includes a falsehood in it. A duty report is taken from someone because a policeman's conduct is the subject of investigation or it might be the subject of investigation. Seasoned police officers know that if they are asked for duty reports and not witness statements or they are asked for duty reports after they have made a witness statement it is because the investigating officer is considering who is a possible defaulter, including the ones asked to submit a duty report. Chief Insp. Viagas has been an investigating officer in other cases on a number of occasions and he was no doubt aware of this distinction.

The sequence in this case was that Insp. Barea was appointed investigating officer on October 7th, 1989 and he took certain statements including one from Chief Insp. Viagas. Inspector Barea was replaced as investigating officer by Supt. Ullger on October 9th, 1989. Then, some

time between October 9th and 13th, Supt. Ullger asked for a duty report from Chief Insp. Viagas and on October 13th he prepared and handed over his report. Chief Insp. Viagas's conduct was not under investigation then. Six days later, *i.e.* on October 19th, Supt. Ullger, after cautioning Chief Insp. Viagas, proceeded to interview him.

That report was not obtained by any duress. Chief Insp. Viagas was asked if his report, had he decided to make one, would have been any different if he had been cautioned from the one that he made without being cautioned, and he replied that he would have made a report along the same lines but that it would have been more detailed, much more detailed. It is difficult to think of any other relevant detail he could have given, and no significant extra details welled up in his evidence. He was asked if the report he made was true and he said that it was. Its contents were, of course, different from those in the evidence of Insp. Perera, Sgt. Savignon and Const. Olivera.

It was reprehensible of Chief Insp. Viagas to make such a report because it would indicate that Insp. Perera, Sgt. Savignon and Const. Olivera were telling a falsehood and that one or more of them had kept Mr. Kirwan in the cells without bailing him out, in disobedience of an order made by Chief Insp. Viagas to release him well before the magistrates sat on Monday morning and contrary to local police practice on dealing with ill-behaved sailors.

I do not attempt to make the decision that the Disciplinary Board is entrusted to take. I am not concerned with the merits of the decision but I am concerned with its validity. All this court has to do is to make sure that any such decision was taken according to proper legal process. There was nothing in the record to suggest there was anything unfair in those proceedings. Such irregularities as there may have been in the investigation or at the hearing before the Board of these charges were not enough to vitiate the proceedings. The appeal to the Governor was arranged and conducted with scrupulous fairness.

Accordingly, the application by Chief Insp. Viagas for relief must be rejected. The matter will be re-listed for an application for costs.

*Application dismissed.*

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