SCHILLER v. ATTORNEY-GENERAL

COURT OF APPEAL (Neill, P., Waite and Russell, JJ.A.):
September 17th, 1998

Civil Procedure—appeals—re-hearing—no departure from normal procedure on appeal, i.e. re-hearing on evidence from judge's notes of trial, merely because action to protect fundamental rights under Constitution, s.15

The appellant sought to protect his fundamental rights under s.15 of the Constitution.

The appellant claimed that his fundamental rights under Chapter I of the Constitution had been infringed in a number of respects and he accordingly applied to the Supreme Court for redress under s.15. His application was subsequently dismissed.

On appeal, the appellant made the present application for the matter to be heard by the Court of Appeal as a full re-hearing of the issues considered by the Supreme Court, including oral evidence, as if it were a retrial, submitting, *inter alia*, that such a procedure would be appropriate because the case raised unusual questions of constitutional significance which should be considered in depth by the court.

Held, dismissing the application:

There was no justification for departing from the normal appeal procedure in the present case. A re-hearing was normally based on the notes of the trial judge, who had had the opportunity of seeing the witnesses first-hand; these, together with any additional arguments which would be put forward at the appeal hearing, were adequate in the present circumstances (page 158, line 15 – page 159, line 18).

Case cited:

(1) *Powell* v. *Streatham Manor Nursing Home*, [1935] A.C. 243; [1935] All E.R. Rep. 58, *dicta* of Lord Wright followed.

Legislation construed:

Gibraltar Constitution Order 1969 (Unnumbered S.I. 1969, p.3602), Annex 1, s.15:

> "(1) If any person alleges that any of the foregoing provisions of this Chapter has been, or is being or is likely to be contravened in relation to him, then, without prejudice to any other action with respect to the same matter that is lawfully available, that person may apply to the Supreme Court for redress.

(2) The Supreme Court shall have original jurisdiction to hear and determine any application made by any person in pursuance of the preceding subsection, and may make such orders, issue such writs and give such directions as it may consider appropriate for the purpose of enforcing, or securing the enforcement of, any of the foregoing provisions of this Chapter to the protection of which the person concerned is entitled.

(3) The Supreme Court shall have such powers in addition to those conferred by the preceding subsection as may be prescribed for the purpose of enabling that court more effectively to exercise the jurisdiction conferred upon it by this section.

(4) The Chief Justice may make rules with respect to the practice and procedure of the Supreme Court in relation to the jurisdiction conferred upon it by or under this section (including rules with respect to the time within which applications to that court may be made)."

Rules of the Supreme Court, O.59, r.3(1): "An appeal to the Court of Appeal shall be by way of rehearing . . . ."

The appellant appeared in person.
D. Forcer Evans for the Crown.

RUSSELL, J.A.: By a writ issued in these proceedings on May 8th, 1990, the appellant, Mr. David Alexander Schiller, claims damages and other relief against the Attorney-General for Gibraltar. Mr. Schiller alleges that his fundamental rights under Chapter I of the Constitution, contained in Annex 1 to the Gibraltar Constitution Order 1969, have been infringed in a number of respects and the action is brought pursuant to s.15(1) of the Constitution.

The action has had a long and complicated interlocutory history but for the purpose of the present application, it is sufficient to record that the action came on for hearing before the present Chief Justice on February 4th, 1997 and that after a hearing lasting some seven days in court and after an adjournment for the judge to consider his judgment, the action was dismissed by an order dated February 17th, 1997. Mr. Schiller has now appealed to this court and we are concerned today with an application from him as to the manner in which the appeal is to be conducted. It is anticipated that the hearing of the appeal will take place in March 1999 at the next session of this court.

Mr. Schiller has referred the court to the provisions of s.15 of the 1969 Order and has argued that in the absence of any rules made by the Chief Justice under s.15(4), in the particular circumstances of this case, the court should treat the re-hearing to take place next March as a full re-hearing so that the matter is heard with oral evidence as though it were a trial. In support of that submission, Mr. Schiller has advanced three

points. First, he says that this is a constitutional case and it is an unusual one because it is brought under a specific provision which entitles a person to come to the Supreme Court to get redress and that is irrespective of any other claim which he may have. Secondly, he says, without wishing to cast any aspersions on the Chief Justice, there are a number of serious matters to be investigated by the court which ought to be looked at afresh by the Court of Appeal and that the machinery which is appropriate in other cases is not appropriate in this case. Finally, he draws our attention to the difference between the position in England (governed by O.59, r.3 of the Rules of the Supreme Court), where the jurisdiction of the court is a large one in the sense that the community which the court is serving is large, and the position in Gibraltar, where the community is small. The jurisdiction therefore in that sense is a small one and that is a significant point of difference on the facts of this case.

If I may say so, Mr. Schiller has put forward his submissions both very clearly and with great courtesy and he has said everything that could be said in support of his argument, but he has not been able, nor has counsel for the Attorney-General been able, to refer us to any authority which would suggest that some special procedure should be adopted in this jurisdiction in cases under the 1969 Order. For my part, I am quite satisfied that this is a case in which the normal practice should be followed, normal both in this court and in a court in England.

The nature of a re-hearing before the Court of Appeal was described by Lord Wright in the leading authority of *Powell* v. *Streatham Manor Nursing Home* (1). It is an authority which is frequently referred to when a question of this kind is raised in a court in England. In a speech with which Lord Atkin specifically agreed, Lord Wright said this ([1935] A.C. at 263):

> ". . . [I]t is necessary to examine what are the principles which have been established to regulate the duty of the Court of Appeal in cases such as the present. The essence of the matter is now contained in the initial words of Order LVIII, r.1 (which has statutory effect), which are as follows: 'All appeals of the Court of Appeal shall be by way of re-hearing.'"

I interpose to say that that provision in O.58, r.1 is now reproduced in the same words in O.59, r.3 of the present rules in England. Lord Wright went on (*ibid.*):

> "These words apply to an appeal from a decision of a judge sitting without a jury. Where a trial has been before a judge alone the hearing is had on the evidence given before the judge, except in the rare cases where further evidence has been permitted to be called before the Court of Appeal . . . ."

That may be done under r.4, which enables this course to be taken on special grounds only and not without special leave of the court. In effect, therefore, the re-hearing is very different from the original hearing. It is a

re-hearing on documents, including the judge's notes, and sometimes, as in this case, also the shorthand notes, whereas the judge who originally heard the case both saw and heard the witnesses during examination and cross-examination and had an abundant opportunity of forming an opinion of their relative trustworthiness or the reverse. A re-hearing of this character is essentially different from a re-hearing which used to take place on an appeal to quarter sessions.

I am satisfied that we should follow the usual course. The matters which are to be debated on the hearing of the appeal have been referred to in the memorandum of appeal and we have the benefit of a skeleton argument which Mr. Schiller has put before us, which, of course, may be supplemented before the hearing by any additional arguments which are put forward on his behalf. He has told the court that it is his hope that on that occasion he will be represented by counsel but as far as the present application is concerned, I for my part think that the normal practice should be followed and that this matter should be conducted in the way which Lord Wright indicated in the *Streatham Manor Nursing Home* case and I would so decide.

NEILL, P. and **WAITE, J.A.** concurred.

Application dismissed.
