1923
Nov. 9.

THE KING *v.* SUSSEX JUSTICES.

Ex parte McCARTHY.

Justices—Possibility of Bias—Justices' Clerk present at Justices' Consultation—Justices' Clerk interested professionally in Civil Proceedings arising out of Subject Matter of Complaint.

Arising out of a collision between a motor vehicle belonging to the applicant and one belonging to W., a summons was taken out by the police against the applicant for having driven his motor vehicle in a manner dangerous to the public. At the hearing of the summons the acting clerk to the justices was a member of the firm of solicitors who were acting for W. in a claim for damages against the applicant for injuries received in the collision. At the conclusion of the evidence the justices retired to consider their decision, the acting clerk retiring with them in case they should desire to be advised on any point of law. The justices convicted the applicant, and it was stated on affidavit that they came to that conclusion without consulting the acting clerk, who in fact abstained from referring to the case:—

Held, that the conviction must be quashed, as it was improper for the acting clerk, having regard to his firm's relation to the case, to be present with the justices when they were considering their decision.

RULE NISI for a writ of certiorari to bring up, for the purpose of being quashed, a conviction of McCarthy, the applicant for the rule, for having driven a motor car on a certain highway in a manner which was dangerous to the public, having regard to all the circumstances of the case.

On August 21, 1923, a collision took place between a motor cycle driven by the applicant and a motor cycle and side-car driven by one Whitworth, and it was alleged that the latter and his wife sustained injuries in the collision. In respect of those injuries Messrs. Langham, Son & Douglas, solicitors, Hastings, by a letter dated August 28, 1923, made a claim on behalf of Whitworth against the applicant for damages, and the police, after making inquiries into the circumstances of the collision, applied for and obtained a summons against the applicant for driving his motor cycle in a manner dangerous to the public. At the hearing of that summons on September 22, 1923, the applicant's solicitor, who stated in his affidavit that he had no knowledge of the officials of the court, inquired whether Mr. F. G. Langham, the

clerk to the justices and a member of the said firm of Langham, Son & Douglas, was then sitting as clerk, and was informed that he was not, but had appointed a deputy for that day. The case was then heard, and at the conclusion of the evidence the justices retired to consider their decision, the deputy clerk retiring with them. When the justices returned into court they intimated that they had decided to convict the applicant, and they imposed a fine of 10*l.* and costs. Thereupon the applicant's solicitor brought to the notice of the justices the fact, of which he said he had only become aware when the justices retired, that the deputy clerk was a brother of Mr. F. G. Langham, and was himself a partner in the firm of Langham, Son & Douglas, and so was interested as solicitor for Whitworth in the civil proceedings arising out of the collision in respect of which they had convicted the applicant. The solicitor in his affidavit stated that had he known the above facts he would have taken the objection before the case began. This rule was thereafter obtained on the ground that it was irregular for the deputy clerk in the circumstances to retire with the justices when considering their decision.

In their affidavit the justices stated that the clerk to the justices, Mr. F. G. Langham, was on holiday at the date of the hearing and had no knowledge of the proceedings, that in his absence his brother and partner Mr. E. H. Langham acted as his deputy, that no formal objection was taken to the latter acting, that at the conclusion of the evidence the justices retired, the deputy clerk retiring with them in the usual way, taking with him the notes of the evidence in case they should be required, or in case the justices should desire to be advised upon any point of law, that in fact the justices came to their decision to convict the applicant without consulting the deputy clerk, who scrupulously abstained from referring to the case, and that the justices were not in any way biased by the fact that a member of the deputy clerk's firm had written the said letter before action. The justices added that it appeared to them that the applicant's solicitor must have had knowledge of the deputy clerk's connection

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with the firm of Langham, Son & Douglas, and that he waived any formal objection; and that if a formal objection had been taken at the commencement of the proceedings the justices would have followed their usual course in such circumstances by adjourning the hearing and requesting the clerk to arrange with one of his colleagues from a neighbouring division to act at the adjourned hearing.

Russell Davies for the justices showed cause. However undesirable it may have been in the circumstances for the deputy clerk to retire with the justices when they were considering their decision, the fact that he did so does not invalidate the conviction, seeing that he took no part in the justices' deliberations.

[LORD HEWART C.J. In a recent unreported case, this Court quashed a conviction where the chief constable, who was then prosecuting, retired with the justices.]

There it was not the duty of the chief constable to retire with the justices; here it was the duty of the deputy clerk to do so in case the justices should desire to consult him upon any point of law. If, however, there was any irregularity in the proceedings, the applicant, through his solicitor, must be taken to have waived it.

[He referred to *Reg.* v. *Brakenridge.* (1)]

W. T. Monckton for the superintendent of police, who had been served with the rule.

H. D. Samuels in support of the rule was not called upon.

LORD HEWART C.J. stated the grounds of the rule and continued: It is clear that the deputy clerk was a member of the firm of solicitors engaged in the conduct of proceedings for damages against the applicant in respect of the same collision as that which gave rise to the charge that the justices were considering. It is said, and, no doubt, truly, that when that gentleman retired in the usual way with the justices, taking with him the notes of the evidence in case the justices might desire to consult him, the justices came

(1) (1884) 48 J. P. 293.

to a conclusion without consulting him, and that he scrupulously abstained from referring to the case in any way. But while that is so, a long line of cases shows that it is not merely of some importance but is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done. The question therefore is not whether in this case the deputy clerk made any observation or offered any criticism which he might not properly have made or offered; the question is whether he was so related to the case in its civil aspect as to be unfit to act as clerk to the justices in the criminal matter. The answer to that question depends not upon what actually was done but upon what might appear to be done. Nothing is to be done which creates even a suspicion that there has been an improper interference with the course of justice. Speaking for myself, I accept the statements contained in the justices' affidavit, but they show very clearly that the deputy clerk was connected with the case in a capacity which made it right that he should scrupulously abstain from referring to the matter in any way, although he retired with the justices; in other words, his one position was such that he could not, if he had been required to do so, discharge the duties which his other position involved. His twofold position was a manifest contradiction. In those circumstances I am satisfied that this conviction must be quashed, unless it can be shown that the applicant or his solicitor was aware of the point that might be taken, refrained from taking it, and took his chance of an acquittal on the facts, and then, on a conviction being recorded, decided to take the point. On the facts I am satisfied that there has been no waiver of the irregularity, and, that being so, the rule must be made absolute and the conviction quashed.

LUSH J. I agree. It must be clearly understood that if justices allow their clerk to be present at their consultation when either he or his firm is professionally engaged in those proceedings or in other proceedings involving the same

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subject matter, it is irrelevant to inquire whether the clerk did or did not give advice and influence the justices. What is objectionable is his presence at the consultation, when he is in a position which necessarily makes it impossible for him to give absolutely impartial advice. I have no doubt that these justices did not intend to do anything irregular or wrong, but they have placed themselves in an impossible position by allowing the clerk in those circumstances to retire with them into their consultation room. The result, there being no waiver, is that the conviction must be quashed.

SANKEY J. I agree.

Rule absolute; conviction quashed.

Solicitor for applicant: *W. C. Crocker.*

Solicitors for justices: *Pettitt & Ramsay, for Langham, Son & Douglas, Hastings.*

Solicitors for police superintendent: *Taylor, Willcocks & Co., for F. Lawson Lewis, Eastbourne.*

J. S. H.

C. A.

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Oct. 24.

[IN THE COURT OF APPEAL.]

HESKETH *v.* BIRMINGHAM CORPORATION. (1)

Public Health—Insufficient Drainage System—Neglect of Local Authority to remedy—Injury to Property by Flooding—Non-feasance—Remedy for—Public Health Act, 1875 (38 & 39 *Vict. c.* 55), *ss.* 15, 16, 17.

The defendants, as the local authority of the district, were the owners of a sewer which ran alongside of a natural stream. In the year 1880 they made a number of storm-water outlets in the sewer to relieve the pressure on it in times of heavy rain by discharging the surplus water into the stream. At the time the outlets were made the stream was of sufficient capacity to carry off all the water that was discharged into it, but in course of time, owing to the neighbouring land having been almost entirely built over, it had become insufficient. In consequence of an exceptionally heavy storm in 1920 so much surplus water was discharged from the sewer into the stream that the adjoining land was flooded and certain houses of the plaintiff on the banks of the stream were damaged:—

Held, (1.) that under ss. 15, 16 and 17 of the Public Health Act,

(1) The reason for reporting this case, which at the time was thought only to affirm a settled rule, appears by the foot-note, p. 264, post.