FILE: 1978/79-9

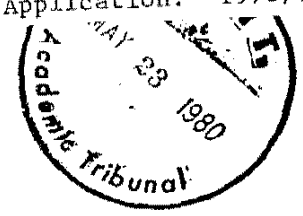
APPEAL

Ref: 1978/79-8
Application: 1978/79-10

IN THE MATTER OF THE UNIVERSITY TRIBUNAL

OF THE UNIVERSITY OF TORONTO

(APPEAL DIVISION)



B E T W E E N:

THE UNIVERSITY OF TORONTO

Complainant
(Respondent)

-and-

Mr. L. + Mr. P.

Accused
(Appellants)

APPEARANCES:

Cynthia L. Zinck, for appellants, accused.

Kathryn Feldman, for respondent, complainant

BEFORE: Messrs. D.S. Affleck, K.D. Jaffary, Q.C., Her Honour Judge Rosalie Abella

R E A S O N S

Both appellants appeal their convictions on June 19, 1979 by a jury in the Local Branch of the Trial Division of this Tribunal and the sanctions imposed by that jury. The Appellant Mr. L was convicted pursuant to Section G.6 (a) (ii) of the University of Toronto Code of Behaviour on Academic Matters (the "Code") and the Appellant Mr. P pursuant to Section E.1 (a) (i) of that Code. Both convictions were unanimous. The sanctions imposed by the jury on the Appellant L. were failure and cancellation

of credit for Physics 110Y, suspension from the University for nine months and the recording of such sanctions on his academic record for a period of two years commencing June 19, 1979. In the case of the Appellant P. , the sanctions imposed were failure and cancellation of credit for Physics 110Y, suspension from the University for one year and the recording of such sanctions on his academic record for a period of two years commencing June 19, 1979.

Both before the Local Branch of the Trial Division and on the appeal, the Respondent argued that sufficient evidence had been adduced to prove that during the examination in Physics 110Y held on the 27th of April, 1979 the Appellant L. had passed a small piece of paper to the Appellant P. on which was written both Arabic and Chinese numerals and that this piece of paper constituted an unauthorized aid as referred to in Section E.1 (a)(i) of the Code.

The following are the points raised on this appeal and our findings in respect thereto:

1. It was argued that the evidence against the Appellant L. was not sufficient to support his conviction. At the hearing before the Local Branch of the Trial Division, Ms. Benson, the invigilator at the examination testified that she "... saw a movement between Mr. L. and Mr. P. that suggested something had been passed". She later identified a report she had prepared at the time in which she had written, somewhat more forcefully, "I observed something being passed from . . . L. to . . . P. ". Later again the Appellant P. stated ". . . what she saw was L. transfer the paper to me". In our view

the jury had sufficient evidence to support the conviction of the Appellant L.

2. The submission was made on behalf of the Appellants that it was not clear on the evidence as to precisely how the small piece of paper might have assisted either of them in the examination. There was, however, evidence from a Chinese scholar, Professor Cho, that showed a correlation between some of the examination questions and answers. Counsel on behalf of the Respondent urged that the University ought not to be forced to fully 'break' every code. We again conclude that the evidence was sufficient to sustain the findings of the jury.

3. Immediately after the examination, the Appellants were asked about the incident concerning the piece of paper. Evidence was given before the jury that they denied knowing each other. In our view this evidence was admissible. The language of Section 28 of the Rules of Procedure of the Tribunal while protecting statements and admissions made following certain alleged academic offences, for example, plagiarism, does not appear to offer such protection in the case of alleged offences at examinations.

4. During the course of argument, the question arose as to whether certain statements made by the Appellants should have been admitted in evidence in the absence of any voir dire. We concluded that it would not

be reasonable or in keeping with the informal nature of proceedings before the Local Branch to require a formal voir dire in such circumstances. There was evidence as to those present when the statements were made and that the statements were voluntary. In any event, counsel for the Appellants raised no objection to the lack of a voir dire relying upon the interpretation of the statements as exculpatory and not incriminatory.

5. Before the Local Branch, hearsay evidence was adduced to show that the Appellants had gone to high school together and knew each other " . . . very, very well". Such evidence would indicate that the Appellants had not been truthful when interviewed after the examination (see point 3 supra). We note that hearsay evidence may, as a discretionary matter, be accepted in this Tribunal and consider that in the circumstances of this case its admission was proper. The Appellants could have contradicted that evidence if they had wished but decided not to offer any evidence on their own behalf.

6. Further hearsay evidence was adduced that indicated that the Appellants had been " . . . on numerous occasions accused of cheating . . . " and had to be " . . . transferred to two different schools as the result of incidents". While the Hearing Officer intervened to stop this evidence, he never specifically instructed the jury to ignore it. Upon reviewing all the evidence, we concluded that the jury would

have come to the same conclusion even if this hearsay evidence had been excluded. Nevertheless, it was our opinion that the prejudicial nature of such hearsay evidence substantially outweighed its probative value.

7. Finally, it was noted that the Hearing Officer delivered his charge to the jury in respect to burden of proof and reasonable doubt at the commencement of the hearing rather than at the end. The hearing, we were advised by counsel, lasted just under two hours. We concluded that this departure from usual practice was undesirable but not fatal in the circumstances of this hearing.

This Tribunal gave some thought to ordering a new hearing. It was noted that the Notice of Appeal did not specify whether the appeal was intended to be to the Senior Branch of the Trial Division, as a trial de novo, or to the Appeal Division. The Notice of Appeal could have been viewed as a request for a trial de novo.

This Tribunal was, however, conscious of the problem of delay. The original hearing took place on June 19, 1979 and the appeal was first scheduled for July 23, 1979. It was subsequently re-scheduled on three different occasions. In addition, Appellants' counsel indicated that should there be a new trial the Appellants would have to retain new counsel. One of the sanctions imposed on both Appellants was suspension from the University. Unless reviewed expeditiously, that sanction would run its course and might just as

well not be reviewed at all.

We have noted that in hearings before the Local Branch the parties are not to be represented by legal counsel whereas no such stricture applies on an appeal by trial de novo before the Senior Branch. The Rules of Procedure of the Tribunal make it clear that Local Branch hearings are to be informal (see Section 52). The failure to adhere strictly to rules of evidence and formal procedure is not required and ought to be excused as long as the informality is consistent with a fair hearing, in accordance with the principles of natural justice and in compliance with the Code and the Rules of Procedure.

In the instant case, we concluded that none of the points raised would have affected the jury's finding that both Appellants were guilty and hence we dismissed both appeals as to conviction.

As regards the sanctions imposed by the jury, this Tribunal was informed that the Appellant L. is in Canada on a student visa and that a suspension from the University for nine months would effectively terminate that visa. We could see no basis for imposing differing sanctions on the Appellants. Further, we were persuaded that in deciding upon sanctions the jury might very well have considered the prejudicial nature of certain of the hearsay evidence adduced before it rather than treating both Appellants as first offenders.

For the foregoing reasons, this Tribunal at the conclusion of the appeal, ordered that the sanction imposed by the jury on each of the Appellants of loss of credit in Physics 110Y be continued, that such sanction be recorded on the academic record of each

Appellant for one year and that no period of suspension be imposed on either Appellant.

"K. D. Jaffary"

K. D. JAFFARY, Q.C.
Co-Chairman

"R. Abella"

JUDGE ROSIE ABELLA
Co-Chairman

D. S. AFFLECK, Q.C.
Co-Chairman

Decision Delivered: September 20, 1979

Written Reasons
Released: May 23, 1980.