

GRENADA

IN THE COURT OF APPEAL

CIVIL APPEAL NO. 16 OF 1997

BETWEEN:

JAMES BRISTOL

Appellant

and

COMMISSIONER OF POLICE

Respondent

Before: The Hon. Mr. Dennis Byron Chief Justice [Ag.]  
The Hon. Mr. Albert Redhead Justice of Appeal  
The Hon. Mr. Albert Matthew Justice of Appeal [Ag.]

Appearances:

Mrs. L. Grant & Ms. R. Joseph for the Appellant  
Hon. Errol Thomas, Attorney-General & Ms. T. Gill  
for the Respondent

-----  
1997: November 28;  
1998: February 23.  
-----

*Constitutional/Administrative Law* – Impounding of appellant’s car by a police officer on discovery that his licence had expired the day before – Whether section 30 of the Road Traffic Act contravened section 6 of the Constitution, by making provision for any police officer to compulsorily take possession of property, without making provision for the prompt payment of full compensation – Whether challenge to the constitutionality of section 30 is precluded by section 6[6][a][ii] and [vii] – Breach of the separation of powers doctrine – **Liyanage v The Queen** [1967] 1 AC 259; **Hinds v The Queen** [1977] AC 195; **Astaphan v Comptroller of Customs** Civil Appeal No.8 of 1984 considered – Legal effect and ambit of section 30, Road Traffic Act – Meaning and extent and scope of the power to impound – Whether the offence envisaged by section 30 is one of strict liability – Penalties on conviction – Whether the police have any authority to refuse to inspect the vehicle, thereby making it impossible for appellant to pay the licence fee – Who owns

the beneficial interest in the vehicle after the impounding –  
 Extent of the rights of the vehicle owner after it is impounded  
 – Extent of the authority conferred by statute on the police  
 and licence authority to determine how the vehicle will be  
 dealt with once impounded – Extent of the courts' powers vis-  
 à-vis this authority – The issue of severance – **Learie  
 Alleyne-Forte v A-G** Privy Council Appeal No.31 of 1996  
 [Trinidad] referred to and distinguished. Appeal allowed.  
 Declaration and injunction granted.

## JUDGMENT

BYRON, C.J. [AG.]

This is an appeal against the decision of Alleyne J delivered on 23<sup>rd</sup> May 1997 dismissing an Originating Motion seeking declarations that section 30 of the Road Traffic Act 1993 is unconstitutional and ancillary orders for injunctive relief.

### The Background

The Appellant an Attorney at Law was stopped by a uniformed police officer while driving a motor car owned by his law firm. On enquiry it was discovered that the licence had expired on the previous day. The police officer informed the appellant that he would have to impound the car. The appellant protested, and eventually drove off. Later the same day he went to a police garage to have the car inspected, with a view to licensing it. The officer at the garage refused to inspect the car on instructions from a Sergeant on the ground that the car had been impounded and the plaintiff had driven away.

### The Judgment

The learned trial Judge concluded that the provisions of section 30 of the Road Traffic Act 1993 constituted either a penalty or forfeiture for a breach of the law or were normal police powers to prevent the continuation of an unlawful act, and were therefore within the ambit section 6[6][a][iii] or [vii] of the Constitution.

## The Argument

In brief the appellant contended that section 30 of the Road Traffic Act 1993 contravened section 6 of the Constitution by making provision for any police officer to compulsorily take possession of property, without making provision for the prompt payment of full compensation.

The respondent contended that section 30 was not in contravention of the Constitution because it was authorised by the Constitution section 6 [6][a][iii] or section 6 [6][a] [vii].

## The Effect of the Road Traffic Act Section 30

The section has seven subsections which prescribe the powers of the police,

30 [1] prescribes:

“Any member of the Police Force may impound any vehicle or trailer:

[i] if such vehicle or trailer is being used on a road without being licensed in accordance with this Act when it is required to be so licensed; or

[ii] if such vehicle or trailer is parked at a place or in a manner, or is in a defective condition on a road or is left stationary on a road causing danger or obstruction to other traffic on the road, contrary to this Act or regulations made hereunder.”

## The Power to Impound

The Concise Oxford dictionary defines impound as “confiscate; take possession of; shut up [animals] in a pound; shut up [a person or thing] as in a pound; [of a dam] collect or confine [water]. As I looked through various legal dictionaries I discovered that the use of the term in this legislation was unusual.

The term impound has normally been used in statutes connected with animal trespass, distress for arrears of rent and the custody of documents for trial, with the meaning of keeping in an enclosed place.

The context of the section, however, gives a clear indication that the term means "taking possession of". For example, Subsection 2 gives the power to tow to premises controlled by the police, after the vehicle has been impounded. This is a separate power which indicates that the impounding does not include the taking to an enclosed place for safe keeping. In my view, therefore, the power to impound which the statute confers is the power to take the vehicle into possession.

### **How Does the Power Arise**

This is a compulsory and unlimited power. It is not subject to any regulation. For example there is no requirement that the owner of the vehicle need be in breach of the law. This is evident by comparing section 30 with section 12 of the Road Traffic Act by which breach of the statutory obligation to obtain a licence is made an offence.

12. [1] Except as provided in this Act, if –

[a] the owner of any motor vehicle or trailer or bicycle keeps for use or allows to be kept for use, or uses or allows to be used, on a road such vehicle or trailer or bicycle without having obtained, or otherwise fails or omits to obtain, the relevant licence prescribed in respect of that motor vehicle, trailer or bicycle;

the owner, driver or other person in charge of the vehicle each commits an offence and shall each be liable on summary conviction to a fine of five hundred dollars or to imprisonment for three months or to both such fine and imprisonment.

[7] A person shall not be convicted for an offence under this section if he proves that he has not had a reasonable opportunity of obtaining a licence for the motor vehicle, trailer or bicycle and that the vehicle, or trailer was being driven for the purpose of obtaining a licence, or that the contravention was without his knowledge and that he had taken responsible steps to avoid such contravention."

Section 12[7] demonstrates that the offence is not a strict liability offence. The fact that a vehicle or trailer is being used on a road without being licensed in accordance with the Act does not

inevitably lead to a conviction under section 12. Proof of a lack of mens rea as set out in section 12[7] will lead to an acquittal. However, under section 30 the police officer has no statutory obligation to heed to any lawful defence relating to the use of the vehicle. Under the section he would be entitled to impound a vehicle even if the owner could prove that he had no reasonable opportunity to obtain the license, or that he was driving the vehicle to obtain a license, or that he did not know of the breach, or that he had taken reasonable steps to avoid the breach, all reasons which could legitimate the use of an unlicensed vehicle on a road. It is clear therefore that the power to impound is not limited to circumstances where a breach of the law has occurred.

On conviction the court does not have the power to order forfeiture, confiscation and/or sale of the vehicle. The penalties which the court is empowered to sentence on conviction are \$500.00 and/or three months imprisonment under section 12[1]. In addition the magistrate can order payment of the amount of the licence into court to the account of the Accountant General by virtue of section 12[5], and by virtue of 12[6] to produce the vehicle to the licensing authority for inspection, who are directed by the same subsection to issue the licence if satisfied that the license has been paid and the vehicle complies with the regulations. Conviction for contravening an order under section 12[5] carries a penalty of \$750.00 and/or six months imprisonment.

The power to impound, conferred by section 30, therefore, is clearly not connected to any power exercisable by the courts in penalising the breach of the statutory obligation to licence the vehicle or trailer.

### **Who owns the Beneficial Interest after the Impounding**

The section does not identify the extent of the rights of the owner of the vehicle after it is impounded. The subsection which

deals with the recovery of the vehicle is subsection 3 and it reads as follows:

"[3] When a vehicle or trailer is removed pursuant to subsection [2], no person other than one specifically authorised to do so by the Commissioner of Police shall recover that vehicle or trailer unless he is the owner or an agent of the owner, and has paid the required licence, producing to the member of the Police Force in charge of the premises referred to in subsection [2] the receipt evidencing such payment, has paid any cost incurred in so removing the vehicle or trailer as certified in writing by a member of the Police Force, has paid such poundage fee as hereby may be fixed by the Licensing Authority by order, and has paid any other legal charge or fine where appropriate, or has cured the defect where appropriate."

The section does not say that the owner has a statutory right to recover his vehicle. It specifies the circumstances under which he cannot recover. These seem to require the exercise of unlimited discretions, by a variety of authorities and the payment of unregulated sums of money. The obligation to pay the licence fee and produce the receipt evidencing payment is not protected by any obligation on the licensing authority to receive payment. In this case, the refusal of the police to inspect the vehicle in effect making it impossible for the appellant to pay the license fee highlights the problem. This contrasts the position under section 12 where in response to the order of a Magistrate there is a statutory obligation to issue the license on compliance with the regulations.

The costs incurred in removing the vehicle are not regulated by statute or in any way, and are in the absolute discretion of any member of the Police force, regardless of rank or seniority. The poundage fee is not fixed by statute and is in the absolute discretion of the licensing authority. The requirement to pay any other legal charge or fine where appropriate is vague, in the sense that the section does not specify which authority determines the charge or fine. The word "fine" could suggest that the court is the relevant authority. But the context of the section seems to rebut this,

because subsection [7] places an absolute time limit of 21 days for the discharge of these obligations and recovery of the vehicle making no allowances for any longer period which litigation may require.

All of these additional liabilities are discretionary and exceed the powers exercisable by the court. More importantly they are not related to any function or exercise of judicial power by any court. The police and the licence authority determine how much is to be paid, in an arbitrary fashion, in the sense that their discretion is not regulated or limited by the statute.

[7] If the owner of a vehicle or trailer that has been impounded under this section fails to recover it in accordance with this section within twenty-one days of being so impounded, the Licensing Authority may dispose of the vehicle or trailer as he sees fit.

This provision seems to carry the necessary implication that the property in the vehicle passes to the licensing authority, unless the owner recovers it within 21 days of the impounding. The power to dispose of includes the power of sale and the power of destruction. No provision is made for the owner to recover anything from the authority. For example, if the liability under subsection 3 is quantified and the vehicle is sold, is there an obligation to pay the surplus to the owner? The statute is silent, the effect being that he does not have a statutory right to recover anything. It is possible therefore for an owner to lose his vehicle of any value, by the action authorised by section 30 of the Road Traffic Act in circumstances where he would not be convicted if tried in court of justice, and if convicted the court would not be empowered to order the forfeiture or confiscation of his vehicle.

The powers conferred to "any member of the police force" by this section are therefore different, unrelated to and much greater than the power conferred to the court on conviction.

## The Constitutional Challenge

The appellant contends that the section contravenes section 6 of the Constitution.

“6[1] No property of any description shall be compulsorily taken possession of, and no interest in or right over property of any description shall be compulsorily acquired, except where provision is made by a law applicable to that taking of possession or acquisition for the prompt payment of full compensation.”

It is pellucidly clear that section 30 of the Road Traffic Act empowers any police officer to compulsorily take possession of, and the interest in and right over, any vehicle or trailer being used on a road in the circumstance set out in subsection [1] thereof, and that no provision is made for the prompt payment of full compensation.

The limitations to the prohibition set out in section 6[1] above, which it is contended save the constitutionality of section 30 of the Road Traffic Act found in section 6 [6][a][ii] and [vii] as follows:

“[6] Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of subsection [1] of this section –

[a] to the extent that the law in question makes provision for the taking of possession or acquisition of any property, interest or right–

[ii] by way of penalty for breach of the law or forfeiture in consequence of a breach of the law;

[vii] for so long only as may be necessary for the purposes of any examination, investigation, trial or inquiry or, in the case of land, for the purposes of the carrying out thereon of work of soil conservation or the conservation of other natural resources or work relating to agricultural development or improvement [being work relating to such development or improvement that the owner or occupier of the land has been required, and has without reasonable excuse refused or failed, to carry out],

and except so far as that provision or, as the case may be, the thing done under the authority thereof is shown not to be reasonably justifiable in a democratic society.”

## Separation of Powers

On the analysis that I made of the section 30 of the Act I have concluded that the impounding and subsequent actions do not form part of the penalties prescribed by the Act for conviction for breach of its provisions. This is an entirely separate and arbitrary power exercisable by the police. However, the argument that it is intended to be an additional penalty for breach of the licensing law is untenable for the reason that such a provision would be unconstitutional as offending the basic constitutional principle of the separation of powers.

The police are a branch of the executive, they are not part of the judicature and as such cannot exercise judicial powers and function. Legislation which purports to confer such power cannot stand and must be declared to be invalid.

It is now well established that the basic principle of separation of powers is implicit in the Commonwealth Caribbean Constitutions based on the "Westminster model" and that any law which is inconsistent with that basic concept is unconstitutional and invalid. The distinguished authorities which have affirmed and applied this principle include three Privy Council decisions and a decision of this Court of Appeal.

In **Liyanage v The Queen** [1967] 1 A.C. 259 Lord Pearce delivering the decision of the Privy Council in an Appeal from Ceylon where this issue was considered said at p.287:

"And although no express mention is made of vesting in the judicature the judicial power which it already had and was wielding in its daily process under the Courts Ordinance, there is provision under Part 6 for the appointment of judges by a Judicial Service Commission which shall not contain a member of either House but shall be composed of the Chief Justice and a judge and another person who is or shall have been a judge. Any attempt to influence any decision of the Commission is made a criminal offence. There is also provision that judges shall not be removable except by the Governor-General on an address of both Houses. These provisions manifest an intention to secure in the judiciary a freedom from political, legislative and executive

control. They are wholly appropriate in a Constitution which intends that judicial power shall be vested only in the judicature. They would be inappropriate in a Constitution by which it was intended that judicial power should be shared by the executive or the legislature. The Constitution's silence as to the vesting of judicial power is consistent with its remaining, where it had lain for more than a century, in the hands of the judicature. It is not consistent with any intention that henceforth it should pass to or be shared by, the executive or the legislature."

This rationale is equally applicable to the constitution of Grenada which is structured in the same way and carries the same implication that judicial power shall be vested only in the judiciary and not be shared with the legislature or the executive.

In **Hinds v The Queen** [1977] A.C. 195 the issue was whether the establishment of a Gun Court to try firearms offences offended the Constitution of Jamaica.

Lord Diplock delivering the decision of the majority said at p.212:

"It is taken for granted that the basic principle of separation of powers will apply to the exercise of their respective functions by these three organs of government. Thus the constitution does not normally contain any express prohibition upon the exercise of legislative powers by the executive or of judicial powers by either the executive or the legislature. As respects the judicature, particularly if it is intended that the previously existing courts shall continue to function, the constitution itself may even omit any express provision conferring judicial power upon the judicature. Nevertheless it is well established as a rule of construction applicable to constitutional instruments under which this governmental structure is adopted that the absence of express words to that effect does not prevent the legislative, the executive and the judicial powers of the new state being exercisable exclusively by the legislature, by the executive and by the judicature respectively.....What, however, is implicit in the very structure of a Constitution on the Westminster model is that judicial power, however it be distributed from time to time between various courts, is to continue to be vested in persons appointed to hold judicial office in the manner and on the terms laid down in the Chapter dealing with the judicature, even though this is not expressly stated in the Constitution **Liyanage v The Queen** [1967] 1 A.C. 259, 287-288."

This particular view received emphatic support from Lords Dilhorne and Fraser who delivered a minority opinion at p.238:

“No doubt the Constitution of Jamaica was drafted by persons nurtured in the common law. That is apparent from the Constitution itself. The principle that there should be a separation of powers between the three organs of government is not just taken for granted. Effect is given to that principle by the written terms of the Constitution and consequently there is no room for the assumption.

No question arises in connection with the Full Court of any transfer of judicial power to the executive.”

In **John v D.P.P** [1985] 32 W.I.R. 230 the principle was applied to the Constitution of the Commonwealth of Dominica.

It was again applied by this court to Dominica in **Astaphan v Comptroller of Customs** Civil Appeal No.8 of 1984, in circumstances which in my view are very similar to the instant case. The main issue concerned the validity of section 27 of the Customs [Control and Management] Act which empowered a customs officer to exact from an importer “such further sum as the proper officer may require, that further sum being not less than one half of the estimated duty.” Dominica has section 6 of its constitution in almost identical terms with section 6 of the Grenada Constitution. The State’s rebuttal to the challenge that there was an unconstitutional compulsory acquisition of the “further sum” included the argument that it was a penalty and therefore protected under section 6 [6][a] [ii]. Sir Vincent Floissac C.J. in delivering the judgment of the court said at p.9:

“However, assuming that the appellant committed an offence and that the further sum is a penalty, the question of the basic principle of separation of powers recurs. Admittedly, the power to prescribe a fixed or mandatory punishment or a range of discretionary punishments for a criminal offence is a legislative power constitutionally vested in the Legislature. But the power or discretion to select and inflict a punishment which is subjectively considered to be appropriate to the circumstances of a particular case is a judicial power of discretion which is constitutionally vested in the Judicature

and which cannot legislatively be vested in, usurped by or transferred to the Legislature or the Executive.”

A penalty for breach of the law and a forfeiture in consequence of a breach of the law are judicial remedies, which can only be enforced after the breach of the law has been established in the courts.

It is no argument that the nature of the breach is evident to the police. For example if the driver of the vehicle confesses, the legal effect is that the police have strong evidence but they cannot usurp the judicial function and convict and impose a penalty merely because they have strong evidence. The police are part of the executive branch of government and are not part of the judiciary.

I therefore conclude that the compulsory taking possession is not protected by the provision excepting penalties and forfeitures for breach of the law.

The argument on the constitutional limitation in section 6[6][a][vii] was expressed by the learned trial Judge as follows:

“It cannot, in my view, be seriously argued that the framers of the Constitution intended that the police would be disabled in their effort to restrain a continuing breach of law, in a case such as the present when they have found someone in the process of committing an unlawful act, and clearly intending to continue to do so. While not intending to suggest that driving an unlicensed vehicle is of the same character, to hold as the plaintiff asks me to, would be to say that the police, coming across a person with housebreaking implements in his possession and in the course of breaking into a house, could not seize the said implements without exposing themselves and the state to a suit for a declaration and compensation under section 6 of the Constitution. This court cannot interpret section 6 of the Constitution as intending such a result.”

I would like to take issue with the analogy at once because the police are authorised to take alleged house breaking implements from a suspect in the course of and for the purpose of criminal investigations and judicial proceedings. Their powers do not include the power to keep them and dispose of them as they

see fit. Legislation authorising their conduct is covered by the Constitution section 6 [6] [a] [vii]. It is clear that the police powers in the course of investigating and prosecuting criminal offences differ from the powers conferred by section 30 of the Road Traffic Act 1993.

Although the Honourable Attorney-General placed a lot of emphasis on this argument, it is my judgment that the language of section 30 absolutely negatives its applicability. There is no provision limiting the duration of the time during which the owner is deprived possession of his vehicle or trailer. There is no provision restricting the purpose of the impounding to any examination, investigation, trial or inquiry. The section as a whole gives an absolute power to hold and to dispose of after 21 days. In my judgment therefore, the section is not saved by section 6[6][a][vii].

### Severance

Reference was made to the Privy Council decision in **Learie Alleyne-Forte v The Attorney General of Trinidad and Tobago and the Commissioner of Police** Privy Council Appeal No.31 of 1996 to suggest that there was a difference with section 30[1][ii] which relates to impounding vehicles that are badly parked. In that case the car of an Attorney at law was towed away to a local police station on the ground that it was parked illegally. On payment of the statutory charges for towing and storage the car was returned to him. The police acted under the Motor Vehicles and Road Traffic Act. The case for illegal parking was dismissed after several adjournments because the police witness failed to show up. The appellant brought proceedings for damages for the wrongful removal of the car and also to challenge the constitutionality of the law itself. He lost all the way. At first instance the learned trial Judge held that assuming the impugned section was ultra vires the Constitution then in force [the 1962 Constitution] nonetheless the section was validated when the present Constitution [the 1976

Constitution] came into force. It was validated by section 18 of the Constitution of the Republic of Trinidad and Tobago Act, as an existing enactment which had not been declared void by a competent court before the appointed day. The Court of Appeal dismissed the appeal. Before the Privy Council, the appellant accepted the constitutionality of the power to remove the car but challenged the exaction of the removal charge and the daily custody fee before the owner of the car can resume possession of his vehicle.

The particular provisions of the Constitution which were claimed to have been contravened were section 4 and 5 which provided for [section 4[a]] the human right not to be deprived of the right to enjoyment of property except by due process of law, [section 4[b]] the right to equality before the law and the protection of law and [section 5[2][e]] the right to a fair hearing. The court refused to accept the submissions. Lord Nicholls delivered the judgment of the Privy Council and he said at p.5:

“Parking regulations are an unexceptional feature of modern life. They are necessary for the safety and convenience of all road users, pedestrians and motorists alike. The Motor Vehicles and Road Traffic Regulations were made in exercise of statutory powers and they are publicly accessible. Without a power to remove vehicles at once, the object of the regulations would be stultified. In agreement with the Court of Appeal and with the concession made before their Lordships’ Board, their Lordships consider that the removal of a car which is parked illegally, and the consequential temporary loss of use of the car, cannot be regarded as an infringement of section 4[a]. Nor can the attendant obligation to pay a reasonable, statutorily-prescribed sum by way of removal and custody charges.”

This case is definitely different to the instant case. The only issue before the Privy Council was whether the temporary removal of the vehicle was a violation of sections 4 and 5 of the Constitution and the Privy Council considered that it was not the type of property deprivation intended to be protected by the relevant constitutional

provisions. In this case section 30 violates the fundamental constitutional principle of the separation of powers. Their Lordships did not have to consider the effect of the police exercising judicial powers amounting to a forfeiture of property. In this case, the provision dealing with the “impounding” of illegally parked vehicles is subject to the identical constitutional violation of the police discharging functions which ought to be exercised by the judicature raised by impounding unlicensed vehicles. In my judgment, there can be no basis for severing that part of the section to save it as though it were constitutional.

If the legislature desires to make provision for the safety of road users to support parking regulations the law should be clearly designed to effect that purpose. I do not think that section 30 is so designed and I do not consider it reasonable to sever any part of it from the order declaring it to be unconstitutional.

### **Conclusion**

I would therefore allow the appeal and make the declaration that section 30 is unconstitutional and invalid, award the injunction to restrain the impounding and order the respondent to cause the vehicle to be inspected for the purpose of being licensed.

Costs to the appellant to be taxed if not agreed.

**DENNIS BYRON**  
Chief Justice [Ag.]

I Concur.

**ALBERT REDHEAD**  
Justice of Appeal

I Concur.

**ALBERT MATTHEW**  
Justice of Appeal [Ag.]