

**SAINT CHRISTOPHER AND NEVIS**

**IN THE COURT OF APPEAL**

**Civil Appeal No.1 of 1999**

**BETWEEN:**

**CLAYTON SOUTHWELL**

Appellant

and

**1. THE ATTORNEY-GENERAL  
2. THE LICENCING AUTHORITY**

Respondents

Before:

The Hon. Mr. Satrohan Singh	-	Justice of Appeal
The Hon. Mr. Albert Redhead	-	Justice of Appeal
The Hon. Mr. Albert N.J. Matthew	-	Justice of Appeal (Ag.)

Appearances:

Mr. E. Ferdinand and Mr. C. Perkins for the Appellant  
Mr. D. Merchant and Miss K. Hughes for the Respondents

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**1999: April 12 and 13;  
May 10.**  
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**JUDGMENT**

**MATTHEW J.A. (Ag.)**

This is an appeal against the judgment of **Cenac J** delivered on December 22, 1998 dismissing an Originating Motion which sought certain declarations and consequential orders pertaining to *section 67* of the *Vehicles and Road Traffic Act, Chapter 270* as amended, and a decision of the Licensing Authority made in expressed reliance on the section.

The relevant facts in this matter are not in dispute and can be briefly stated.

On January 20, 1998 the Appellant was driving his vehicle on Bay Road, Basseterre, St.Kitts when he became involved in a fatal accident. On or about March 26, 1998 he was arrested on a warrant in the first instance charging him with the offence of causing death by dangerous driving contrary to *section 53A(1)* of the *Vehicles and Road Traffic Act*.

At the time of his arrest, the Appellant was the holder of a Class B, St.Kitts and Nevis driver's licence for over 10 years and was engaged in the occupation of a truck driver and operator of heavy equipment for that period. When he was arrested on the warrant, he was served with a copy of a document signed on behalf

of the Licensing Authority informing him that his driver's licence was suspended pending the determination of the charge of causing death by dangerous driving against him.

This letter was, no doubt, done in accordance with *subsection 67(1)* of the *Vehicles and Road Traffic Act*, Chapter 270 which states:

"If and when any person is charged with manslaughter arising out of the use of any motor vehicle or with contravening the provisions of sections 51, 52 and 53A, it shall be lawful for the Traffic Commissioner to order the suspension of the driver's licence of the person so charged pending the determination of the charge."

On June 19, 1998, the Appellant was committed to stand trial at the September Assizes. On October 12, 1998, when he attended Court in answer to the said charge, the Director of Public Prosecutions informed the Court that he had entered a *nolle prosequi* in the case and the Appellant was subsequently discharged.

### **Grounds of Appeal**

As stated earlier the Appellant was unsuccessful before **Cenac J.** On January 29, 1999 he filed four grounds of appeal as follows:

1. The learned Trial Judge erred in law in finding that section 67 of the Vehicles and Road Traffic Act is not unconstitutional.
2. The learned Trial Judge erred in law in not finding that in the circumstances of the case the Licensing Authority failed to exercise and/or to properly exercise the discretion purportedly vested in the Licensing Authority by section 67 of the Vehicles and Road Traffic Act, Chapter 270.
3. The learned Trial Judge erred in law in not finding that the purported suspension of the Applicant's driver's licence was unlawful, null, void and/or of no effect and/or was unreasonable, unfair, and/or oppressive and/or constituted an abuse of discretionary power.
4. The learned Trial Judge erred in law in not finding that the Applicant is entitled to damages and in failing to order that such damages be assessed (if not agreed) and paid promptly to the Applicant.

There are two broad issues covered by these grounds of appeal and they can be divided into constitutionality issues and administrative law issues. I shall now turn to these matters in turn.

### **The Constitutionality Issues**

The main attack on the constitutionality of section 67 was that the pretrial imposition by a member of the executive arm of Government of a penalty constitutes a gross contravention of the principle of the separation of powers and reference was made in this context to the following cases:

**John v D.P.P. [1985] 32 W.I.R. 230 AT 234;**  
**Hinds v D.P.P. [1975] 24 W.I.R. 326 at 331;**  
**J. Astaphan & Co. (1970) Ltd. V The Comptroller**  
**of Customs [OECS Civil Appeal No.7 of 1994];**  
**James Bristol v The Commissioner of Police 1998**  
**[OECS Civil Appeal No. 16 of 1997].**

The principle of the separation of powers is fundamental to the constitutional structure of our Caribbean Governments and is implicit in our constitutional arrangements. This was manifest in the above-mentioned cases.

Learned Counsel for the Appellant in referring to the **Astaphan** case submitted that both limbs of the principle seem to be contravened by section 67. The first limb in the **Astaphan** case proscribed against the Executive exercising legislative power without any prescribed guidelines or a policy for the exercise of the power. It is not easy to discern any exercise of legislative power by the Executive in section 67.

The second limb in the **Astaphan** case proscribed against the exercise of judicial power by the Legislature or Executive. This is more relevant to the facts of this case.

In dealing with this matter, the learned Trial Judge spoke of the executive discretion of the Licensing Authority to temporarily suspend the applicant's driving licence pending the determination of the charge. What he was implying is that the judicial power would be exercised by the proper authorities down the road as was in fact done when the Director of Public Prosecutions entered the *nolle prosequi* and the Appellant was discharged by the Judge at the Assize Court.

Learned Counsel for the Respondents quite correctly distinguished the **Astaphan** and **Bristol** cases when he submitted that the acts of the Comptroller and the Commissioner of Police or their representatives were final acts whereas in this case there is a suspension until the determination of the charge by the proper judicial authority.

In the **Bristol** case, *Chief Justice Byron* stated:

*“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.”*

Later he said:

*“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 learned Trial Judge also observed that the act of the Licensing Authority or Traffic Commissioner in temporarily suspending the applicant’s driving licence was the first in three stages; the second being an appeal to the board set up by section 80 of the Act and the third being the determination by the Court subject to the intervention of the Director of Public Prosecutions to discontinue the proceedings as was done in this case. He said the Licensing Authority was not the final arbiter and this is what distinguished this case from the cases of **Bristol** and **Astaphan**.

I therefore agree with the learned Trial Judge that section 67 of the *Vehicles and Road Traffic Act* is not inconsistent with the principle of separation of powers and is therefore not unconstitutional.

I also agree with the learned Trial Judge that the conclusion arrived as regards to the challenge to the principle of separation of powers answers the constitutional challenge to the Appellant’s right to a fair hearing and the presumption of innocence under *section 10* of the Constitution. At the end of the judicial proceedings the Appellant was in fact found innocent, how can he complain that his trial was unfair?

The Appellant, before the learned Trial Judge, mounted a claim that there was an infringement of his property rights based on *section 3* of the Constitution which states:

“Whereas every person in Saint Christopher and Nevis is entitled to the fundamental rights and freedoms, that is to say, the right, whatever his race, place of origin, birth, political opinions, colour, creed or sex, but subject to respect for the rights and freedoms of others and for the public interest, to each and all of the following, namely:-

- (a) .....
- (b) .....
- (c) protection for his personal privacy, the privacy of his home and other property without compensation,

the provisions of this chapter shall have effect for the purpose of affording protection to those rights and freedoms subject to such limitations of that protection as are contained in those provisions, being limitations designed to ensure that the enjoyment of those rights and freedoms by any person does not impair the rights and freedoms of others or the public interest.”

I am not sure that *section 3* gives any protection from deprivation of property and it is not surprising that in the case of **Attorney-General of St.Christopher and Nevis v Lawrence** [1983] 31 WIR 176, a case on which the Appellant relied, Mr. Lawrence was complaining of a deprivation of property without compensation contrary to *section 6* of the Constitution. That provision states:

“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 by or under the provision of a law that prescribes the principles on which and the manner in which compensation therefor is to be determined and given.”

In **Bahadur v Attorney-General of Trinidad and Tobago** [1989] L.R.C. (Const.) 632 the Court of Appeal had to consider a case similar to the present one. In the course of giving the judgment of the Court, *Edoo J.A.* stated at page 641:-

*“ If a driving permit is taken away, a person may be unable to drive his vehicle but he cannot complain that his property has been taken away for his vehicle remains with him. Of course, he has lost something of value, but the value inheres to the rights which he has in the licence not to the rights which he has in the property.*

*In our judgment, property within the meaning of section 4(a) of the Constitution includes tangible forms of real and personal property, but also less tangible forms such as social welfare benefits, public services and other things to which people are entitled by law and regulations. A driver’s licence or permit is not included within this category.”*

I agree. I therefore hold that there has been no contravention of the Appellant’s fundamental rights which are protected by the Constitution.

## The Administrative Law Issues

Under this head the Appellant submitted that the discretionary power vested by *section 67* was not lawfully or properly exercised by the Licensing Authority because, among other things, he was not given an opportunity to be heard in accordance with the rules of natural justice.

I agree with the submission of learned Counsel for the Appellant that there have been a large number of authorities which support the principle that the Courts can declare a public authority's exercise of its power improper, null and void whether the impugned decision is one which is executive, administrative, judicial or quasi-judicial.

**Ridge v Baldwin [1963] 2 AER 66;**  
**Burroughs v Katwaroo [1985] 40 WIR 287;**  
**Sukhlal v Collector, Santa [1969] AIR 176.**

In **R v Gaming Board**, ex parte **Benaim [1970] 2.A.E.R. 528**, *Lord Denning*, in delivering the judgment of the Court stated:

*“ At one time it was said that the principle of natural justice only applies to judicial proceedings and not to administrative proceedings. That heresy was scotched in **Ridge v Baldwin**”.*

And in **Burroughs'** case *Bernard J.A.* who gave the leading judgment stated at page 307:

*“ If one accepts that `natural justice' is a flexible term which imposes different requirements in different cases, it is capable of applying appropriately to the whole range of situations indicated by terms such as `judicial', `quasi-judicial' and `administrative'. Nevertheless, the further the situation is away from anything that resembles a judicial or quasi-judicial situation, and the further the question is removed from what may reasonably be called a justiciable question, the more appropriate it is to reject an expression which includes the word `justice' and to use instead terms such as `fairness' or `the duty to act fairly'.”*

In this appeal the Appellant relied on the Barbados case, **Hutchinson v Commissioner of Police [1970] 16 W.I.R. 96**. The appellant was charged before a magistrate with driving his motorcar while under the influence of drink. He pleaded not guilty and the trial of the matter was adjourned to a later date. The magistrate then suspended the appellant's driving licence pending the determination of the charge. No evidence was led for the prosecution prior to the order and no opportunity was given to the appellant to oppose the making of the order.

The Divisional Court held that *section 59* of the *Motor Vehicles and Road Traffic Act 1937* merely gives the power to suspend and does not make the suspension obligatory. It must follow that some ground should appear which would provide some justification for the action of the magistrate. In this case it did not appear that there was any judicial exercise of the power in relation to the particular circumstances. *Section 59* states:

“ If and when any person is charged with manslaughter arising out of the use of any motor vehicle or with contravening the provisions of sections 45 or 46 of this Act it shall be lawful for the Court to order the suspension of the driving licence of the person so charged pending the determination of the charge.”

The charge of driving a motor vehicle on a road when under the influence of drink is a charge under *section 45* and *Hanschell J* held that the magistrate clearly had the power to suspend the licence of the appellant. He said further:

“ *There is nothing here which provides any ground for the magistrate’s action. In effect all that the magistrate is saying is that he had the power to suspend the appellant’s licence and he was suspending it..... We do not feel that the order can be supported and it must therefore be set aside..... the person charged must be given a chance to put forward his view of the situation and resist the making of the order. The order must be set aside.*”

I agree with that decision.

Learned Counsel for the Appellant submitted that the Licensing Authority’s policy of suspending the driver’s licence of all persons charged with the offence of causing death by dangerous driving is unlawful since the adoption of a fixed policy in this regard is an abdication of the exercise of flexible discretion which *section 67* expressly contemplates. In this context reference was made to the works of two leading authorities on Administrative Law, one of whom I had the privilege to know very well, in his lifetime. In his sixth edition on Administrative Law, Professor Wade wrote at page 370:

“ An authority can fail to give its mind to a case, and thus fail to exercise its discretion lawfully, by blindly following a policy laid down in advance. It is a fundamental rule for the exercise of discretionary power that discretion must be brought to bear on every case: each one must be considered on its own merits and decided as the public interest requires at the time.”

And *Professor de Smith* was to the same effect in his fourth edition of **Judicial Review of Administrative Action** at page 311 where he wrote:

“A tribunal entrusted with a discretion must not, by the adoption of a fixed rule of policy, disable itself from exercising its discretion in individual cases.”

Learned Counsel for the Respondent in answer to the Appellant's submissions on natural justice relied on the **Trinidad** case of **Bahadur v Attorney-General** [1989] LRC (Const.) where the legislation is almost identical with *section 67*. It is contained in *section 87(1)* of the *Motor Vehicles and Road Traffic Ordinance* and states:

“ If and when any person is charged with manslaughter arising out of the use of any motor vehicle or with contravening the provisions of *section 70* or *section 71*, it shall be lawful for the Licensing Authority to order the suspension of the driving permit of the person so charged pending the determination of the charge.”

*Section 70* deals with the offence of driving when under the influence of liquor and *section 71* with dangerous driving.

In **Bahadur**, the appellant, the driver of a truck involved in a fatal accident in November 1978, was charged with manslaughter and dangerous driving. The Licensing Authority informed the appellant by notice in September 1979 that his driving permit was suspended pursuant to *section 87(1)* pending the determination of the criminal charges against him, and the appellant duly surrendered the permit. He was subsequently acquitted of both charges by February 1983. The driving permit was only returned eight months later and the appellant applied to the High Court for, *inter alia*, declarations that the notice issued by the Licensing Authority purporting to suspend his driving permit was null and void and contrary to *sections 4 and 5* of the Constitution. His application was dismissed and he appealed to the Court of Appeal who, in effect, granted a declaration that the Licensing Authority had unlawfully detained the appellant's driving permit from February 24, 1983 to October 6, 1983, that is the eight-month period after he was discharged from the last charge.



The Court of Appeal held, *inter alia*, that since *section 3(3)* of the *Motor Vehicles and Road Traffic Act* provided for a Board of persons, who would have a wide range of interests, to hear and determine a person's appeal against any order or decision of a Licensing Authority, there was a presumption that Parliament intended, in specific cases where the Authority carried out the purely executive function of suspending a person's driving permit, that an appeal against such action should be heard by a tribunal which was better suited at holding inquiries, more capable and competent than the Authority. Any notice of suspension should contain information of the right to appeal to the Board.

The Court of Appeal held that in the instance case the appellant was not deprived of the right to be heard since he had been in touch with legal advisers as soon as his permit was suspended.

Provision was made by *section 3(3)* for the Transport Board to hear and determine any appeal submitted by any aggrieved person against any order or decision of the Licensing Authority and because of that the Court of Appeal held at page 646 that the appellant had no right to be heard before the Licensing Authority suspended his driving permit.

*Section 80* of the *Motor Vehicles and Road Traffic Act*, Chapter 270 contains a similar provision which states:

“ Any person who is aggrieved by any act, order or decision of the Traffic Commissioner, the Licensing Officer or the Examining Officer, may appeal to the Board and the decision of the Board shall be final.”

Learned Counsel for the Respondent was in some difficulty relying on **Bahadur's** case on the second day of the appeal especially as learned Counsel for the Appellant had on the first day submitted that the right of appeal to the Board may be more illusory than real as it did not appear that the Traffic Safety Board provided for in the *Vehicles and Road and Road Traffic (Amendment) Act 1989 [No.9 of 1989]* was ever established.

Learned Counsel for the Respondent told the Court he could not say that a Board had ever been appointed.

It follows that the automatic suspension of the Appellant's driving licence without giving him a chance to be heard was wrong in law.

### **Conclusion**

I would therefore allow the appeal and set aside the order of the learned Trial Judge. In addition, I make the following declarations and orders:

1. I declare that in the circumstances of this case the Licensing Authority failed to properly exercise the discretion vested in it by *section 67* of the *Vehicles and Road Traffic Act*.
2. I declare that the purported suspension of the Applicant's driver's licence was unlawful, null and void.
3. I order that the Appellant is entitled to damages to be assessed if not agreed.
4. I order the Respondents to pay the Appellant's costs of the appeal.

A.N.J. MATTHEW  
Justice of Appeal (Ag.)

I concur

SATROHAN SINGH  
Justice of Appeal

I concur

ALBERT REDHEAD  
Justice of Appeal