

ANTIGUA and BARBUDA

IN THE COURT OF APPEAL

Civil Appeal No.10 of 1997

BETWEEN:

- 1. THE HONOURABLE ATTORNEY-GENERAL**
- 2. THE HONOURABLE MINISTER OF FINANCE**

Appellants

and

- 1. E. ANN HENRY GOODWIN**
- 2. LOCKHART AND DEFREITAS**
- 3. MAXWELL FRANCIS**
- 4. ALVIN EDWARDS**

Respondents

Before:

The Hon. Mr. C.M. Dennis Byron - Chief Justice
The Hon. Mr. Satrohan Singh - Justice of Appeal
The Hon. Mr. Albert N.J. Matthew - Justice of Appeal (Ag.)

Appearances:

Mr. A. Astaphan S.C. and Ms. J. Laurent for the Appellants
Mr. C. Phillips Q.C., Mr. J. Simon and Mr. F. Clarke for the Respondents

**1999: June 08 and 09;
October 25.**

JUDGMENT

MATTHEW J.A. (Ag.)

In November 1994, the Parliament of Antigua and Barbuda enacted the *Business Licence Act, 1994* to provide for the holding of a business licence for persons engaged in any business which was defined to include professional practice and to make provision for regulating the carrying on of businesses licensed under the Act and for other incidental matters.

It was the view of the Respondents that the Act was unconstitutional. The No.1 Respondent was at the material time the

President of the Antigua and Barbuda Bar Association. The No.2 Respondent is a firm of lawyers. The No.3 Respondent is a dental practitioner. The No.4 Respondent was at the time of the passage of the Act the President of the Antigua and Barbuda Medical Association. They decided to challenge the Act and on April 10, 1995 they filed a writ suing on behalf of themselves and all professional persons upon whom a licence is imposed under the *Business Licence Act, 1994*. In their writ of summons indorsed with statement of claim they alleged that several sections of the *Business Licence Act* infringed the provisions of the Constitution of Antigua and Barbuda.

The matter came for trial before *Redhead J.*, as he then was, between July 22 and 29, 1996 after which judgment was reserved. When later on June 30, 1997 he delivered his written judgment, the learned Judge made the following declarations in favour of the Plaintiffs:

- “1. Business Licence Act 1994, is unconstitutional, null and void;
2. The provisions of sections 8 and 9(2) of the Act constitute an infringement of the Plaintiffs’ rights to privacy and protection from search and seizure of property assured to the Plaintiffs by sections 3 and 10 of the Constitution of Antigua and Barbuda;
3. The provisions of sections 12, 13, 20 and 21 of the Act are so disproportionate to the conduct prescribed by the Act that they constitute an arbitrary and unreasonable fetter upon the Plaintiffs’ right to freedom of expression, the enjoyment of property and the protection of the guaranteed sections 3, 9 and 12 of the Constitution;
4. The provisions of section 10 of the Act are null and void and of no effect in that they contravene the provisions of section 100 of the Constitution.
5. The provisions of section 6 of the Act constitute a tax which does not fall within the public interest limitations authorized by section 12 of the Constitution, and is an abrogation of and a fetter upon the Plaintiffs’ right to freedom of expression guaranteed by sections 3 and 12 of the Constitution and is not reasonably justifiable in a democratic society.
6. The jurisdiction vested in the Magistrate’s Court under sections 12, 13, 20 and 21 of the Act constitutes an amendment of the jurisdiction of the Supreme Court affected in a manner inconsistent with the provisions of section 47 of the Constitution and is therefore null and void.”

On July 31, 1997 the Defendants in the original suit filed their notice of appeal expressing their dissatisfaction with the whole of the judgment insofar as it relates to the six declarations and orders enumerated above and their dissatisfaction of the costs order made in favour of the Plaintiffs. Several grounds of appeal were put forward.

On October 3, 1997 the Respondents filed a notice that upon the hearing of the appeal they would seek leave of the Court to contend that the decision of the Court below dated June 30, 1997 should be affirmed on the following additional grounds, namely:

1. That sections 3, 4 and 5 of the Act abrogated or authorised the abrogation of the right of the Plaintiffs to practise their profession acquired by virtue of legislation extant at the time the Act came into force and thereby constituted a deprivation or taking of property contrary to sections 3 and 9 of the Constitution.
2. That section 11 of the Act is a violation of the right of the Plaintiffs to protection of the law to be proved guilty and to be presumed innocent under sections 3 and 15(2)(a) of the Constitution.

During the hearing of the submissions several important issues were raised. I categorise them briefly as follows:

- (1) The right to work or earn a livelihood;
- (2) The right not to be deprived of property;
- (3) The protection of freedom of speech;
- (4) The protection of property from arbitrary search or entry;
- (5) The appointment of the Registrar of Business under section 10 of the Business Licence Act;
- (6) The offence created under section 11 of the Business Licence Act;
- (7) The jurisdiction of the Magistrate under the Business Licence Act; and the penalties imposed for offences created;
- (8) The principle of separation of powers under Westminster Constitutions and the Business Licence Act.

Before I deal with the specific issues, I shall make some observations on some general submissions which were made by learned Counsel on both sides and which are very relevant to cases of this kind. The first observation that I should like to make is that in questions of adjudication upon the validity of ordinary legislation, there is a **presumption of constitutionality**.

The particular submission made stated that the learned trial Judge failed to apply and/or consider it. That presumption was made clear in **Attorney-General and Minister of Home Affairs v Antigua Times** [1975] 21.W.I.R. 560 at pages 573-574 in the judgment of *Lord Fraser*.

Again in **Attorney-General of Trinidad and Tobago v Mootoo** [1976] 28 W.I.R. 304 dealing with the Unemployment Levy Act, Chief Justice *Hyatali* made the same pronouncement. He said at page 311 –

“Before considering the findings and conclusions of the learned Judge it would be useful, I think, to examine the function and responsibilities of a court and the canons by which it should be guided when it is called upon to consider and determine the constitutional validity of an enactment.....

In Fletcher v Peck Marchall C.J. defined the function and responsibility in these terms: `..... but it is not on slight implication and vague conjecture that the legislation is to be pronounced to have transcended its powers and its acts to be considered as void.’

Hence the presumption is always in favour of the constitutionality of a statute; not against it; and the courts will not adjudge it invalid unless its violation of the Constitution is, in their judgment, clear, complete and unmistakable.”

When the case reached the Privy Council *Sir William Douglas* who delivered the opinion of the Board stated at [1979] 30 WIR 411, at page 414:

“It is not in dispute between the parties that in a case involving an Act of Parliament the presumption of constitutionality applies, and that the burden cast on the appellant to prove invalidity is a heavy one.”

See also **King v Attorney-General** [1992] 44 WIR 52 at page 66.

There was another general submission that the learned trial Judge had failed to apply and/or consider or properly apply and/or consider the respective **burdens of proof which apply in constitutional matters.**

Put briefly, the onus of proof is on the person challenging except in the plainest cases. This was the view of Chief Justice *Telford Georges* in **Frederick Smith v Commissioner of Police** [1984] 50 W.I.R. 1 at page 12 where the learned Chief Justice stated:

“The Constitution places the onus of establishing that such an action is not justifiable on those attacking it. In the absence of evidence, except in the plainest of cases, that onus is not discharged.”

And in the **Zimbabwean** case of **Nyambirai v National Social Security Authority** [1996] 1 LRC 64 at page 75, Chief Justice *Gubbay* stated:

“From a procedural aspect the onus is on the challenger to establish that the enactment under attack goes further than is reasonably justifiable in a democratic society and not on the State to show that it does not.”

A third general submission was that the learned trial Judge failed to construe or properly construe the language used in the Constitution of Antigua and, instead, **resorted to “divination”** by the importation of and reliance on language not used in the Constitution of Antigua and on values particularly in regard to the alleged right to work or earn a livelihood purportedly deduced from the provisions of section 5 of the Constitution. I do not propose here and now to adjudicate upon that submission save to highlight a passage in the **South African** case, **State v Zuma** [1995] 1 LRC 145 at page 156 which is instructive on interpretation and construction of constitutional instruments. This case concerned a criminal trial for murder and robbery and the constitutional validity of confessions. In the course of the criminal trial the constitutional issue arose and the case was directed to the constitutional Court. In the course of the judgment, the Court held that

although it should be conscious of the values underlying the constitution, and take account of the historical background and comparable foreign case law, in interpreting the fundamental rights provisions of the Constitution, its task was to interpret a legal instrument and, therefore, it should respect the language used and not ignore it in favour of a general resort to values. *Kentridge J.(Ag.)* who delivered the judgment of the Court stated :-

“We must heed Lord Wilberforce’s reminder that even a constitution is a legal instrument, the language of which must be respected. If the language used by the lawgiver is ignored in favour of a general resort to ‘values’ the result is not interpretation but divination.”

That passage by *Kentridge J* was mentioned in **La Campagnie Sucriere de Bel Ombre v Government of Mauritius** [1995] 3 LRC 494 at page 500. This was a case from **Mauritius** where sugar-cane planters who leased land challenged a law said to deprive them of their property. There it was said that *Kentridge J* reviewed the relevant authorities in a number of Commonwealth jurisdictions. He referred to *Lord Wilberforce’s* comments in **Minister of Home Affairs v Fisher** [1979] 3 AER 21 at pages 25-26, emphasizing two principles which have to be applied when interpreting constitutional provisions of this nature: the first being that they should be given a generous rather than a legalistic interpretation while at the same time giving effect to the purpose for which they were enacted; the second being that respect must still be paid to the language used, while at the same time taking into account the traditions and usage which give meaning to that language.

See also **Matadeen v Minister of Education** [1998] 3 WLR 18 at pages 18-25; another case from **Mauritius**. This case had to do with

children's examinations for entry into secondary schools. Some parents had challenged the legislation on grounds of discrimination.

A fourth general submission was that the **preamble of a Constitution was not a useless set of words that can be ignored.** In **Olivier v Buttigieg** [1996] 2 A.E.R. 459 J.C.P.C. *Lord Morris* was considering section 5 of the Constitution of **Malta** which at the time was as follows:

“Whereas every person in Malta is entitled to the fundamental rights and freedoms of the individual, that is to say, has the right, whatever his race, place of origin, political opinions, colour, creed, or sex, but subject to each and all of the following, namely:-

- (a) life, liberty, security of the person and the protection of law;
- (b) freedom of conscience, of expression and of assembly and association; and
- (c) protection for the privacy of his home and other property and from deprivation of property without compensation,

the provisions of this Part of this Order shall have effect for the purpose of affording protection to the said 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 the said rights and freedoms by any individual does not prejudice the rights and freedoms of others or the public interest.”.

A quick glance will reveal the close similarity with section 3 of the Constitution of Antigua.

Lord Morris stated that section 5 of the Constitution of Malta was in the nature of a preamble. At page 461 letter H, he stated:

“It is to be noted that the section begins with the word ‘Whereas’. Though the section must be given such declaratory force as it independently possesses, it would appear in the main to be of the nature of a preamble. It is an introduction to and in a sense a prefatory or explanatory note in regard to the sections which are to follow. It is a declaration of entitlement – coupled, however, with a declaration that though ‘every person in Malta’ is entitled to the ‘fundamental rights and freedoms of the individual’ as specified, yet such entitlement is ‘subject to respect for the rights and freedoms of others and for the public interest’. The section appears to proceed by way of explanation of the scheme of the

succeeding sections. The provisions of Part 2 are to have effect for the purpose of protecting the fundamental rights and freedoms, but the section proceeds to explain that, since even those rights and freedoms must be subject to the rights and freedoms of others and to the public interest, it will be found that in the particular succeeding sections which give protection for the fundamental rights and freedoms, there will be 'such limitations of that protection as are contained in those provisions'."

In **Societe United Docks v Government of Mauritius** [1985]

LRC 801 at page 818, Chief Justice *Rault* stated:

"I find further assurance for my views in the remarkable evolution which has led to the Conseil Constitutionnel in France to assert its powers to protect fundamental rights by construing the Preamble to the 1985 Constitution as forming an integral part of the Constitution, and, in consequence, as operating to protect the rights to which it refers."

At the hearing I discerned that learned Counsel for the Respondent who was making that submission was referring to section 3 of the Constitution of Antigua as the preamble. I do not think learned Counsel for the Appellant was at all doubting the legislative effect of section 3 and was probably regarding the earlier "WHEREAS the People of Antigua and Barbuda –" as the preamble.

It is now time to return to the specific submissions.

The right to work or earn a livelihood

Learned Counsel for the Respondent submitted in a most forceful manner that everyone in Antigua and Barbuda has a right to earn a livelihood and this right is protected under section 3 of the Constitution. Counsel relied on the case of **Nagle v Feilden and Others** [1966] 1 All E.R. 689 at page 693 in support of his submission. Counsel stated that this right of the common law has now become an inalienable right.

Counsel submitted further that the right to work expressly protected under section 3 of the Constitution is either a right to life or if it is not a right to life, it is an inalienable right referable to the dignity of the human person and encompassed in Article 23 of the **Universal Declaration of Human Rights**. Counsel was not able to demonstrate that the Declaration had the force of law in Antigua and Barbuda.

Learned Counsel for the Appellant in his reply submitted that the right to life contained in section 4 of the Constitution related to physical life and the Court would have to find that to deny a lawyer the right to practice would have the inevitable consequence on his physical life.

In the Court below reliance was placed on the case of **Tallis and others v Bombay Municipal Corporation** [1987] LRC, the case of the Bombay pavement dwellers where the learned Chief Justice *Chandrachud* held, *inter alia*, that the right to life is illusory without the means to earn a livelihood. It was quite correctly pointed out in the course of the submissions that unlike the Constitution of Antigua and Barbuda, Article 19 of the Constitution of India confers a fundamental right to carry on any occupation, trade or business. In that case the city dwellers were effectively deprived of their right to work.

The relevant portion of Article 3 of the Constitution relied upon by the Respondents is:

“Whereas every person in Antigua and Barbuda is entitled to the fundamental rights and freedoms of the individual, that is to say, the right, regardless of race, place of origin, political opinions or affiliations, 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) life, liberty, security of the person, the enjoyment of property and the protection of the law;”

Earlier on in this judgment I gave an indication as to how section 3 is to be analysed and understood. *Lord Woolf* in the **Mauritius** case of **La Compagnie Sucriere de Bel Ombre Ltee and Others v Government of Mauritius** [1995] 3 LRC 494 at page 501, similarly explains the relationship between sections 3(c) and 8 of the Constitution of Mauritius. He says:

“The correct approach is therefore to read section 3(c) and section 8 together, with the relevant language of each section influencing the interpretation of the other.”

This means for our purposes, section 3(a) as far as it refers to “life” must be read together with section 4 of the Constitution which more specifically deals with “life”.

I do not think any one can deny the importance of a man or woman’s right to practise his or her profession. As *Lord Denning* then M.R. said in **Nagle v Feilden**:

“The common law of England has for centuries recognised that a man has a right to work at his trade or business without being unjustly excluded from it. He is not to be shut out from it at the whims of those having the governance of it.”

And the Courts will protect any person who is unlawfully affected. Indeed right here in Antigua, unlike many other territories, there is a well developed system of industrial relations and an Industrial Court. Nevertheless, I cannot say that there is embedded within the language of sections 3 and 4 or any other section of the Constitution of Antigua a right to work or earn a livelihood.

The right not to be deprived of property

The right to property is guaranteed by sections 3 and 9 of the Constitution. Section 3 gives the general protection from deprivation of

property and section 9 gives detailed provisions governing compulsory acquisition and the payment of fair compensation within a reasonable time. The Court below found that the provisions of sections 12, 13, 20 and 21 of the **Business Licence Act** are so disproportionate to the conduct prescribed by the Act that they constitute an arbitrary and unreasonable fetter upon the Plaintiffs' right to the enjoyment of property, amongst other things, guaranteed by sections 3 and 9 of the Constitution.

Learned Counsel for the Appellants submitted that the learned Trial Judge failed to properly construe and consider the provisions of section 9 of the Constitution. Subsection (1) is as follows:-

“No property of any description shall be compulsorily taken possession of, and no interest in or right to or over property of any description shall be compulsorily acquired, except for public use and except in accordance with the provisions of a law applicable to that taking of possession or acquisition and for the payment of fair compensation within a reasonable time.”

Counsel submitted that section 9 can only be properly invoked and relied on by the Respondents if – (a) property rights exist; and (b) such rights have been compulsorily taken possession of or compulsorily acquired. Counsel stated that save for the imposition of a tax, no provision of the Act compulsorily took possession of or compulsorily acquired any alleged property or right to property of any of the Respondents. In short, section 9 can only be triggered by a compulsory acquisition and no such thing happened.

I did not perceive learned Counsel for the Respondent to make an adequate response to these submissions. Indeed, Counsel in the course of his submissions stated:

“The Respondents never complained of the tax. They complain of their right to earn a livelihood and the radical restrictions placed upon them.”

In this context the case of **Societe United Docks v Government of Mauritius** [1985] 1 AC 585 at page 600 is interesting when it states:

“Loss caused by deprivation and destruction is the same in quality and effect as loss caused by compulsory acquisition.”

I am of the view that the Respondents’ rights to the protection from deprivation of property under sections 3 and 9 of the Constitution were not infringed by the legislation without resort to subsection (4) which provides for certain limitations to the right.

The right to protection of freedom of speech

Sections 3 and 12 of the Constitution deal with the right to protection of freedom of expression, including freedom of the press.

Section 12(1) is as follows:

“Except with his own consent, no person shall be hindered in the enjoyment of his freedom of expression.”

The learned Judge found in two of the declarations that he made in favour of the Respondents that there was an unreasonable fetter or abrogation of the Respondents’ rights to freedom of expression.

Learned Counsel for the Appellants submitted that the learned trial Judge failed to properly construe and consider the provisions of section 12 of the Constitution and to draw distinction between the exercise of the fundamental right of expression and the carrying out of a business. Counsel submitted further that a business is liable to taxation and there is no constitutional prescription against taxation. He stated

that in any event, a tax falls within the permissible limitations prescribed by the provisions of section 12(4)(a)(i) of the Constitution.

Counsel cited the following authorities:

1. **Attorney-General and Minister of Home Affairs v Antigua Times Ltd** [1975] 21 W.I.R. 560;
2. **Indian Express Newspapers (Bombay) v Union of India** [1985] 1 S.C.C.641 at page 673;
3. **Hukum v State of V.P.** [1998] A.I.R. 120 at 124.

In the light of the statement from Counsel for the Respondents that the Respondents never complained of the tax, it is not surprising that Counsel did not resist that submission.

I am of the opinion that the Respondents' rights to the protection of freedom of expression under sections 3 and 12 of the Constitution were not infringed by the legislation.

The right to protection of property from arbitrary search or entry

Section 10(1) of the Constitution is as follows:

“Except with his own consent, no person shall be subjected to the search of his person or his property or the entry by others on his premises”

Sections 8 and 9 of the **Business Licence Act** are directly related. They provide as follows:

- | | |
|----------------------------------------------------------------|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| “Business to keep proper record books. | 8(1) Every person who carries on business shall keep proper records and books of account.
(2) The Commissioner may request every person who carries on business to prepare a statement of account of his business in such form and manner as he may from time to time direct. |
| Furnishing of particulars and disability of persons in default | 9(1) The Minister or any other person authorised by him may, by notice in writing, require any person to whom this Act or any provision of this Act applies to furnish him within a specified time with any particulars in writing relating to the administration or enforcement of this Act.
(2) Every person who carries on a business under this Act shall permit the Commissioner or any person authorised by him in writing to enter any premises occupied for the purpose of the business and in so far as is necessary for the purpose of section 8 to inspect and take copies of any books, accounts or other documents kept there in relation to the business.” |

From what has been stated above, it goes without saying that sections 3(c) and 10 of the Constitution of Antigua and Barbuda must be read and construed together.

Section 8(1) of the Act appears quite salutary. I think this is in the interest of the owner of the business. Subsection (2) may appear to issue a directive to the owner of the business but I think this is normal in states where the burden of taxation is a reality. This section may, in the long run, assist in the quick dispatch of business if both the business and the inland revenue understand the accounts in the same way. When one goes over to section 9(1) the motive becomes more suspect and the inevitable question raised: "What is that for?" Is it necessary for the purposes of the Act?

Learned Counsel for the Respondents has submitted that this section may interfere with the right against self incrimination.

New Zealand Stock Exchange v Inland Revenue Commissioner [1991] 4 All E.R. 443 at page 448 is authority to seek information on the lines of section 9(1) in the particular circumstances of that tax case; but the provisions of section 9(2) go too far. The subsection authorizes the Commissioner of Inland Revenue or his nominee to enter premises occupied for the purposes of the business to inspect and take copies of books and documents. That power from a mere perusal of the Act is somewhat startling and cannot be shown to be reasonably justifiable in a democratic society. I would hold that section 9 is null and void as infringing the rights of the Respondents under sections 3 and 10 of the Constitution.

The appointment of the Registrar of Business under section 10 of the **Business Licence Act.**

The learned trial Judge, in his judgment, declared that the provisions of section 10 of the **Business Licence Act** are null and void and of no effect in that they contravene the provisions of section 100 of the Constitution of Antigua and Barbuda.

Section 100(1) of the Constitution is as follows:

“Subject to the provisions of this Constitution, the power to appoint persons to hold or act in offices in the public service (including the power to make appointments on promotion and transfer and to confirm appointments), the power to exercise disciplinary control over persons holding or acting in such offices and the power to remove such persons from office should vest in the Public Service Commissioner.”

And section 10(1) of the Act is as follows:

“The Cabinet shall appoint a person with requisite experience in management or administration to be the Registrar of Business.”

Learned Counsel for the Appellants, not with his usual assurance, submitted that the appointment was a statutory one and pointed to a decision of this Court **Savarin v Williams** [1995] 51 W.I.R. 75.

At page 81 of that report *Sir Vincent Floissac, C.J.* who delivered the judgment of the Court stated:

“Counsel evidently persuaded the judge and sought to persuade this court that a person is disqualified to be elected as a Member of the House of Assembly if he is an employee or servant of the Government or of a Department of the Government. Counsel contended that the NDC is an agent or Department of the Government and that, since the general manager of the NDC is a servant or agent of the NDC, he is also a servant or agent of the Government.”

The Court did not accept that submission and held that **Mr. Saravin** was not a person who held or acted in an office in a branch of the public service.

Learned Counsel for the Respondents advanced the submission that the powers of the Public Service Commission were circumvented by the Executive in spite of section 100 of the Constitution. The evidence of Sonia Manning is quite relevant to this issue. She was appointed by the Public Service Commission to the post of Deputy Commissioner of Inland Revenue with effect from March 25, 1991 and she had been acting as Commissioner of Inland Revenue from December 15, 1995. She said she assumed the post of Registrar of Business from January 2, 1995. She was giving that evidence in July 1996. It seems reasonable to assume that she was performing functions normally carried on by persons in the public service.

It is not without interest that section 7(1) of the **Social Security Act** states –

“The Public Service Commission shall appoint a fit and proper person to be the Chief Administrative Officer of the Board (in this Act referred to as ‘Director’)”.

And section 9(1) states:

“The Public Service Commission shall appoint a fit and proper person to be the Director’s deputy.”

The **Medical Benefits Act** at section 4(1) also states:

“The Public Service Commission shall appoint a fit and proper person to be the Chief Administrative Officer of the Scheme (in this Act referred to as ‘the Superintendent’)”.

In **Cyril Stewart v R** a decision of the Court of Appeal of Jamaica, December 2, 1960 *Cools-Lartigue J* who delivered the judgment of the Court stated:-

“a public officer is an officer who discharges any duty in the discharge of which the public are interested, more clearly so if he is paid out of a fund provided by the public”

And in **Beestonn & Stapleford Urban District Council and Another v Smith** [1949] 1 All E.R. 394, it was held that a clerk of the Urban Council was not a public officer, his salary being paid out of local funds rather than national funds.

I am guided by these authorities and I come to the conclusion that section 10 of the **Business Licence Act** has the effect of eroding the powers of the Public Service Commission provided for in section 100 of the Constitution. I therefore agree with the learned trial Judge that section 10 is unconstitutional, null and void.

The offence created under section 11 of the Business Licence Act.

Section 11 of the **Business Licence Act** is as follows:

<p>“Production of licence for inspection.</p>	<p>The Minister or any officer authorised by him may require any person whom he has reason to believe is carrying on business to produce for inspection by him or the officer so authorised, the licence issued under this Act and any person who refuses, or fails or neglects without lawful excuse to produce such licence is guilty of an offence and is liable on conviction to a fine of five thousand dollars or to imprisonment for two years.”</p>
-----------------------------------------------	-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------

In the Court below the Respondents had unsuccessfully challenged this section as infringing their rights to protection of law namely, that every person who is charged with a criminal offence shall be presumed to be innocent until he is proved or has pleaded guilty. See section 15(2)(a) of the Constitution.

The learned trial Judge did not agree with the argument of learned Counsel for the Respondents but he gave no reasons. So the Respondents have brought the issue in their notice upon the hearing of the appeal.

Learned Counsel for the Respondents submitted that the charge created by the section is based upon the belief of the Minister or any officer or person by him that the accused is carrying on business. Such belief does not have to arise from information or circumstances personally known to the accuser yet on a charge being laid for refusal or neglect or failure to produce a licence, the accused must prove his innocence to escape incarceration.

Learned Counsel for the Appellants submitted that the Act contains no provision which is inconsistent with the fundamental right and freedom guaranteed by the provisions of section 3(a) and section 15 of the Constitution and all that section 11 of the Act imposes is an obligation on the Respondent to produce a licence issued under the Act when required to do so. Counsel cites the case of **R v Edwards** [1974] 2 All E.R.1085.

I think section 11 of the Act does much more than only imposing an obligation on the Respondents to produce a licence when required to do so.

In the case of **Edwards** the appellant was charged on indictment with selling by retail intoxicating liquor without holding a justices' licence or licence of the sale. The Court of Appeal held in such cases it was sufficient for the prosecution to prove the act in question and the burden, in the sense of the legal or persuasive burden, then lay on the accused to prove that the proviso, exception, excuse or qualification applied. It followed that the onus lay on the appellant to prove that a justices' licence had been granted to him.

The Court held that the construction of the enactments had to be looked at. In my judgment, section 11 creates a different offence based, not on facts to be proved, but on the Minister's belief.

One question that needs to be asked on the authority of **R v Oakes** 26 DLR 200 which was dealt with by the learned trial Judge and which this Court has relied on before. Is this section necessary for the purposes of the legislation? Section 10(3) already provides for the Registrar of Business to maintain a register of all businesses to which this Act applies so it is quite easy for the Minister to know all the people who have licences and if there is evidence that a person is carrying on business without a licence then such person may be prosecuted under section 20(1)(a).

In **Attorney-General of the Gambia v Jobe** [1985] LRD (Const) J.C.P.C. the respondent was arrested on suspicion of having committed an offence of stealing public funds and another offence of false accounting. In the course of his prosecution, a constitutional issue arose which eventually reached the Judicial Committee of the Privy Council. The Board held, *inter alia*:

“Section 8(5) of the Act defined new offences which might be committed by the principal suspect or by any other person whose property has been seized and who failed to come forward to prove that the property was acquired lawfully, or who failed to satisfy the Court that the property was acquired lawfully. This provision was *ultra vires* and void as a plain and fragrant infringement of the constitutional provisions protecting the presumption of innocence.”

I agree with learned Counsel for the Respondents that the effect of section 11 of the **Business Act** is that upon the Minister's belief that a person is carrying on a business and that person being unable to

produce a licence, he must prove his innocence or face a fine or imprisonment.

I am of the view that the section infringes the constitutional provisions protecting the presumption of innocence and is therefore unconstitutional, null and void.

The jurisdiction of the magistrate under the **Business Licence Act.**

The learned trial Judge declared that the jurisdiction vested in the Magistrate's Court under sections 12, 13, 20 and 21 of the Act constitutes an amendment of the jurisdiction of the Supreme Court affected in a manner inconsistent with the provisions of section 47 of the Constitution and is therefore void.

Section 47 of the Constitution provides for the manner in which the Constitution and the Supreme Court Order establishing the Eastern Caribbean Supreme Court may be amended.

Learned Counsel for the Respondents submitted under this head that the jurisdiction vested in the Magistrate's Court under the Act conjointly effect a transfer of a traditional part of the jurisdiction of the High Court contrary to the Court's Order. He referred in particular to section 20 which enacts the offences and penalties.

Learned Counsel for the Appellants submitted that the learned trial Judge erred in law and/or misdirected himself when he declared that the provisions of the Act conferring penal and forfeiture powers on the Magistrate's Court constituted an amendment of the jurisdiction of the High Court in a manner inconsistent with the provisions of section 47 of the Constitution.

There is no doubt that Parliament has the power to prescribe or impose substantial fines and the power to impose imprisonment on Courts of summary jurisdiction. This has been a growing trend and certainly so for drug offences.

In **Commissioner of Police v Smith** [1993] 3 WLR the power of Magistrates to issue heavy fines was acknowledged. When it came to the issue of a life sentence which is traditionally within the jurisdiction of the High Court, the Court found it was not good enough that the Magistrate determines the issue and sends the offender to the Supreme Court for sentence.

I am in agreement with learned Counsel for the Appellants that the offences created by sections 12, 13, 20 and 21 are not in the nature of serious offences which, historically, were dealt with exclusively or more appropriately by the High Court.

Having regard to the presumption of constitutionality to which I referred earlier on in the judgment, I am not persuaded that there has been a breach of section 47 of the Constitution.

But I have no hesitation in coming to the conclusion that the penalties imposed for offences under the Act, especially under section 20, are unduly severe. Learned Counsel for the Respondents submitted that the penalties are excessive and intimidating and constitute a violation of the right to the protection of law in sections 3 and 15 of the Constitution. I am not sure if Counsel is relying on the “fair hearing” required by section 15(1) of the Constitution. I agree with the learned trial Judge that the penalties under section 20 are highly disproportionate to the offences. The learned Judge referred to a

passage by *Wilson J.* in the case **Reference re Section 94(2) of The Motor Vehicle Act** 24 D.L.R. 536 at page 572:

“I think the conscience of the court would be shocked and the administration of justice brought into disrepute by such an unreasonable and extravagant penalty. It is totally disproportionate to the offence and quite incompatible with the objective of a penal system referred to in paragraph (4) above.

It is basic to any theory of punishment that the sentence imposed bears some relationship to the offence; it must be a ‘fit’ sentence proportionate to the seriousness of the offence. Only if this is so can the public be satisfied that the offender ‘deserved’ the punishment he received and feel a confidence in the fairness and rationality of the system.”

I should like to adopt the words stated above. I declare that the penalties imposed under the Act are disproportionate to the offences to which they are attached.

Separation of powers and the Business Licence Act

It is perhaps under this head that the Business Licence Act has been most wanting. In two recent judgments of this Court we have emphasized the doctrine of the separation of powers built in the Constitution of our territories all based on the Westminster model.

Section 46 of the Constitution allows Parliament to make laws for the peace, order and good government of Antigua and Barbuda but those laws must be subject to the provisions of the Constitution.

Section 2 of the Constitution states that the Constitution is the supreme law of Antigua and Barbuda. That is why all laws passed by Parliament must be subject to the provisions of the Constitution.

The Business Licence Act, 1994 seems to me to enact itself into some superior law over other laws and I doubt strongly that this is the

intention of the framers of the Constitution. Section 3(1) of that Act states:

“Notwithstanding the provisions of any other law, no person shall after the coming into force of this Act, engage in any business without first having obtained an annual licence for that purpose.”

This means very simply, if under another law you have permission or a licence to carry out a function or calling, after the coming into force of this Act, you must obtain a licence under the Business Licence Act.

The intention is further seen in section 5(3) which states:

“Where the carrying on of such business as referred to in subsections (1) and (2) is subject to the grant of a licence under any other law, the application for a licence under that other law shall not be entertained unless it is accompanied by a certified copy of the licence granted under this Act.”

Let us go further to section 5(8) which states:

“Notwithstanding anything to the contrary in any such law as mentioned in subsection (3), it shall be deemed one of the conditions of any licence under that other law in respect of a business that such licence is of no effect if the licensee is not the holder of a licence issued under this Act.”

By this provision the Business Licence Act has the effect of legislating in another statute. And that is what is being done in section 4.

Under section 4 of the Business Licence Act where application is made for a licence the applicant is required to have three certificates with the application as set out in subsection (3). These certificates must be from –

- (3) the Director of the Social Security Board;
- (3) the Superintendent of the Medical Benefits Scheme; and
- (3) Commissioner of Inland Revenue.

I have perused the **Social Security Act** Chapter 408 of the Laws of Antigua and Barbuda and I find no authority under that Act for the issue of such a certificate. Under section 7(2) the Director must act in accordance with the Act and the general direction of the Board. The Director cannot comply with what is legislated in section 4(3) of the Business Licence Act hence the subsection is rendered otiose. I shall return to the provisions of the Social Security Act on a different matter.

In like manner I have perused the Medical Benefits Act, Chapter 271 of the Laws of Antigua and Barbuda and find that there is no authority for the issue of the certificate required by section 4(3) of the Business Licence Act so, here again the provision in mandatory form is rendered otiose.

Again I have looked at the **Board of Education Act**, 1994 where the Commissioner of Inland Revenue would need to give the required certificate and there is no provision under the Act entitling him to do the same.

There is something else wrong with the provisions of the Business Licence Act and briefly it is that the conjoint effect of sections 3,4 and 5 is to transfer the judicial power which rests with the Court to the Executive. Let me return to the Social Security Act to illustrate this.

Although the Business Licence Act requires a fee of \$1,000 in respect of a professional who is a citizen, it seems fair to say its main purpose or one of its main purposes is to enforce collection of revenue arising from other sources. Sections 35, 38, 39, 40 and 41 of the Social Security Act under Part IV of the Act headed "*Adjudication and Legal Proceedings*" contain an elaborate judicial process for dealing with claims and questions arising under the Act, interim payments, arrears,

repayments, offences and penalties etc. In like manner, sections 18, 19 and 25 of the Board of Education Act have provisions pertaining to payment by self-employed persons, payment of penalty for default, offences and penalties.

In section 3(4) of the Business Licence Act, the Minister of Finance has a discretion to issue a licence and although an applicant may be ready or willing to pay his \$1,000 for a business licence the Minister may be tempted to consider himself the arbiter in a social security or other dispute and refuse to exercise his discretion accordingly. The effect being that the judicial process is undermined by executive order that may be exercised in such a manner as to interfere with a person's profession. Not a fundamental right as I have already stated but nevertheless a very important right to be zealously guarded.

I am of the view that section 4(3) of the Business Licence Act is *ultra vires* and void as interfering with the judicial power. I believe too that sections 3 and 5 are inextricably bound with section 4 and I hold that all three sections are unconstitutional, null and void.

I have come to the conclusion that several provisions of the Business Licence Act are unconstitutional, null and void.

I perceived that at one time during the hearing learned Counsel for the Appellants was suggesting that the Court should indicate guidelines that would make the legislation valid within its general ambit.

In this particular case if we were to do this we might run the risk of encroaching on the role of the Legislature. **Hunter v Southam Inc.** [1984] 11 D.L.R. 641 was a case dealing with the Canadian Charter of Rights and Freedoms and in particular section 8 of the Charter which guarantees everyone the right to be secure against unreasonable

search or seizure. *Dickson J* who delivered the judgment of the Supreme Court stated at page 659:

“While the Courts are guardians of the Constitution and of individuals’ rights under it, it is the Legislature’s responsibility to enact legislation that embodies appropriate safeguards to comply with the Constitution’s requirements. It should not fall to the Courts to fill in the details that will render legislative lacunae constitutional.”

I agree.

I should therefore consider another doctrine, that of severance, to see how much of the legislation can be saved. I therefore refer to **Hinds v The Queen** [1975] 24 W.I.R. 326 J.C.P.C. where *Lord Diplock* at page 343 referred to the doctrine and to the test of severability laid down by the Board in **Attorney-General for Alberta v Attorney-General for Canada** [1947] A.C. at page 518:

“The real question is whether what remains is so inextricably bound up with the part declared invalid that what remains cannot independently survive, or as it has sometimes been put, whether on a fair review of the whole matter it can be assumed that the legislature would have enacted what survives without enacting the part that is *ultra vires* at all.”

Based on that test, I hold that the **Business Licence Act, 1994** is unconstitutional, null and void in so far as it violates the Respondents’ rights and the provisions of the Constitution and I so declare.

I would therefore dismiss the appeal but vary the order of the Court below accordingly.

I would also order that the Appellants pay the costs of the Respondents here and the Court below, certified fit for two Counsel, to

to be taxed.../27

be taxed, if not agreed.

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

I concur.

C.M.D. BYRON
Chief Justice

SATROHAN SINGH, J.A.

I have had the advantage of reading beforehand the judgment of **Matthew, J.A.** (Ag.). I also agree that this appeal should stand dismissed with costs to the Respondents to be taxed if not agreed. I would accordingly affirm the declaration of *Redhead J.* that the **Business Licence Act 1994**, in so far as it related to the Respondents, is unconstitutional, null and void.

SATROHAN SINGH
Justice of Appeal