SAINT CHRISTOPHER AND NEVIS

IN THE COURT OF APPEAL

HCVAP. 2007/010

BETWEEN:

[1] THE CHIEF OF POLICE

[2] THE ATTORNEY GENERAL OF SAINT CHRISTOPHER AND NEVIS

Appellants

and

CALVIN NIAS

Respondent

Before:

The Hon. Mr. Hugh A. Rawlins — Chief Justice
The Hon. Mde. Ola Mae Edwards — Justice of Appeal [Ag.]
The Hon. Mr. Errol Thomas — Justice of Appeal [Ag.]

Appearances:

Mr. Arudranauth Gossai for the Appellants
Mr. Damian Kelsick for the Respondent

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2008: January 15;
November 25.

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*Constitutional law – respondent charged in the Magistrates' Court with the offence of using abusive language in a public place under section 8(a) of the Small Charges Act Cap. 75 of the 1961 Revised Laws of St. Christopher (St. Kitts) and Nevis - whether section 8(a) of the Small Charges Act is unconstitutional and of no effect in that it violates the respondent's fundamental right to freedom of expression – sections 3 and 12 of the Constitution - whether the judge erred in dismissing the charge without remitting the case to the Magistrates' Court – section 18(3) and (4) of the Constitution*

The respondent, Mr. Nias, was charged under section 8(a) of the Small Charges Act with the offence of using abusive language in a public place. The trial was stayed in the Magistrates' Court pending the hearing of Mr. Nias' application for a declaration that section 8(a) should be struck down for unconstitutionality, because it infringed his right to freedom of expression. The High Court judge granted the declaration holding that section

8(a) contravened sections 3 and 12 of the Constitution and violated Mr. Nias' right to freedom of expression. The judge consequently quashed the charge. The Attorney General appealed on 2 main grounds. These are that the judge erred in holding that section 8(a) of the Small Charges Act was unconstitutional and also because he quashed the charge instead of remitting the case to the Magistrates' Court.

Held: allowing the appeal with no order as to costs; setting aside the judgment and order of the High Court and remitting the case to the Magistrates' Court:-

1. Although section 3 of the Constitution is a declaratory and pre-ambulatory provision, and section 12 of the Constitution confers the substantive right to freedom of expression, inasmuch as section 3(b) of the Constitution also declares the right to freedom of expression, the learned judge did not err in stating that section 8(a) of the Small Charges Act contravenes sections 3(b) and 12 of the Constitution.

   Observer Publications Ltd v Matthew Others (2001) 58 WIR 188; [2001] UKPC 11 and Matadeen and Another v Pointu and Others, [1998] 3 WLR 18 considered.

2. Although section 8(a) of the Small Charges Act restricts a person's right to freedom of expression, the provision is not unconstitutional since it is protected by the provisions of section 12(2) of the Constitution as a law that is reasonably required in the interest of public morality. Additionally, there is no evidence to show that it is not reasonably justifiable in a democratic society.

   Observer Publications Ltd v Matthew and Others (2001) 58 WIR 188; [2001] UKPC 11 and Henn and Darby v Director of Public Prosecutions [1981] AC 850, considered; The decision in Joseph Solomon Piper v P.C. Fitzroy Galloway and Others, Commonwealth of Dominica High Court Civil Suit No. 140 of 1993 (20th July 1994) doubted.

3. The judge had no jurisdiction to strike out the charge. Section 18(4) of the Constitution required him to remit the case to the Magistrates' Court, in which the charge was being tried, with his decision on the constitutional issue for the guidance of the Magistrate within whose jurisdiction resides the power to finally dispose of the matter.

4. In accordance with rule 56.13(6) of Civil Procedure Rules 2000, the applicant will not be condemned in costs in the High Court or in this appeal since he has not acted unreasonably in making the application or in the conduct of the proceedings.

JUDGMENT

[1] RAWLINS, C.J.: The respondent, Mr. Nias, was charged in the Magistrates' Court with the offence of using abusive language to a woman in a public place, to wit, a public road contrary to section 8(a) of the Small Charges Act[1] ("the Act"). The charge was stayed in the Magistrates' Court while Mr. Nias sought a declaration from the High Court that section 8(a) of the Act was unconstitutional, null and void and of no effect in that it contravenes sections 3(b) and 12 of the Constitution. Section 96(1) and (2) of the Constitution confers original jurisdiction upon the High Court to consider and determine constitutional challenges and to make the appropriate declaration which such challenges might require.

[2] I think that it is necessary for the purpose of this appeal to set out the provisions of section 8 of the Act fully. The section states:

> "8. Any person who makes use of any abusive, blasphemous, indecent, insulting, profane or threatening language -
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> a. in a public place; or
> b. in any place to the annoyance of the public; or
> c. tending to a breach of the peace;
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> shall be liable to a fine not exceeding one hundred and fifty dollars or to imprisonment for a term not exceeding one month."

[3] Having construed section 8(a) of the Act, the learned judge held that it was inconsistent with sections 3(a) and 12 of the Constitution and was therefore null, void and of no effect. The judge accordingly granted Mr. Nias the declaration that he sought; struck down section 8(a) and quashed the charge. He made no order as to costs.[2] The Attorney General has appealed. The statement in the judgment that section 3(a) was contravened was an obvious editorial slip for section 3(b) which the prayer contained and to which the judge had earlier referred.[3]

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[1] Cap. 75 of the 1961 Revised Laws of Saint Christopher (St. Kitts) and Nevis.
[2] In paragraphs 30 and 31 of the judgment.
[3] In paragraphs 1 and 3 of the judgment.

[4] The issues which arise on this appeal are, first, whether the learned judge erred when he found that section 8(a) of the Act contravenes section 3 and/or section 12 of the Constitution. The second question is whether the judge erred, in any event, when he quashed the charge, rather than remit the matter to the Magistrate. These issues will be considered after briefly touching upon the jurisdiction of the High Court to review legislation.

## Review jurisdiction and the process

[5] The jurisdiction of the High Court to review legislation for unconstitutionality in St. Christopher and Nevis is implicit in the construction of various provisions of the Constitution. These are section 2, which is the supreme law clause, as well as sections 18, 37 and 38 of the Constitution.

[6] Section 2 gives the Constitution general overriding effect over all other laws. It declares that the Constitution is the supreme law of Saint Christopher and Nevis and states that, subject to the provisions of the Constitution, if any other law is inconsistent with the Constitution, the Constitution shall prevail and the other law shall, to the extent of the inconsistency, be void. Section 37 of the Constitution circumscribes the sovereign law-making power of the legislature within the ambit of the provisions of the Constitution. Section 38 stipulates the procedures which the legislature must follow in order to amend the Constitution.

[7] Section 18 of the Constitution confers jurisdiction on the High Court to entertain an application from any person for constitutional redress for violation of a fundamental right provision. Section 18 requires a person who challenges the constitutionality of legislation to have the necessary *locus standi* or nexus to the cause of action. It is common ground that Mr. Nias has the necessary *locus standi* to bring the application. This is because he alleges that his right to freedom of expression was infringed when he was charged under section 8(a) of the Act, which he insists is unconstitutional.

[8] It is of no moment that section 8(a) of the Act was in force since 1892, thus prior to the promulgation of the Constitution. This is because the Constitution of Saint Christopher and Nevis did not save laws that were in existence at the time when the Constitution came into force in 1983. Accordingly, even pre-existing laws, such as the provisions contained in the Act, fall to be reviewed for constitutionality.

[9] The process by which the High Court is enjoined to exercise its power to review legislation was succinctly summarized by this court in Attorney General v Lawrence in the following words:[4]

> "In determining the question of constitutionality of a statute, what the court is concerned with is the competence of the legislature to make it, and not its wisdom or motives. The court has to examine its provisions in the light of the relevant provisions of the Constitution. The presumption is always in favour of constitutionality of an enactment, and the burden is upon him who attacks it to show that there has been a clear transgression of the constitutional principles."

[10] In reviewing legislation for unconstitutionality, the court always applies the presumption of constitutionality. This is the presumption that in making legislation the legislature has not exceeded its constitutional powers to legislate. Legislation is presumed to be constitutional unless there is clear proof to the contrary. The burden is upon the applicant to rebut the presumption.

[11] The practical effect of this principle is that where legislation is found to infringe a constitutional provision, the court would refrain from striking it down if the court can bring the provision into conformity with the Constitution by making reasonable adaptations, additions or modifications to the provision.[5] The court would, to paraphrase the words of Lord Hobhouse in Greene Browne v The Queen,[6] first

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[4] (1983) 31 W.I.R. at page 179j – 180a.

[5] See, for example, Permanent Secretary of the Ministry of Agriculture, Fisheries and Lands and Housing and Others v de Freitas, (1995) 49 WIR 70, per Sir Vincent Floissac CJ, at pages 78e-f and 79g-79j; Attorney General of the Gambia v Momodou Jobe [1984] AC 689, per Lord Diplock at page 702; British American Insurance Company Ltd. v The Attorney General of Antigua and Barbuda, Antigua and Barbuda Civil Appeal No. 20 of 2002, per Sir Dennis Byron, CJ, at paras. 23-27; and Newton Spence and Peter Hughes v The Queen, St. Lucia Civil Appeal No. 14 of 1997 and St. Vincent and the Grenadines Civil Appeal 20 of 1998, per Sir Dennis Byron CJ, at pages 22-24, paras. 56-58.

[6] [2000] AC 45, at page 50.

identify the element of unconstitutionality in the impugned provision (section 8(a) of the Act in the present case). Having done this, the court would determine whether the provision can be amended, adapted or modified to bring it into conformity with the Constitution, without affecting the meaning or purport of the subsection.

[12] One of the actual grounds of appeal states that the judge misinterpreted the doctrine of presumption of constitutionality. However, this falls to be considered only if it is found that the judge was correct in determining that section 8(a) of the Act infringes section 12 of the Constitution.

[13] I shall first briefly visit the decision that section 8(a) of the Act contravenes sections 3(b) of the Constitution.

Section 3 – a declaratory provision

[14] The inalienable fundamental right and freedoms to which a person in Saint Christopher and Nevis is entitled are declared in section 3 of the Constitution of St. Christopher and Nevis. The section states as follows:

> "3. 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 –
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> (a) life, liberty, security of the person, equality before the law and the protection of law;
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> (b) freedom of conscience, of expression and of assembly and association; and
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> (c) protection for his personal privacy, the privacy of his home and other property and from deprivation of 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."

This is a declaratory or preambular statement of the fundamental rights and freedoms to which a person in Saint Christopher and Nevis is entitled. Section 3(b) of the Constitution simply declares the right to freedom of expression.

[15] I earlier noted that the learned judge held that section 8(a) of the Act contravenes sections 3(b) and 12 of the Constitution. However, the judgment does not provide an analysis leading to the decision that section 8(a) of the Act contravenes section 3(b) of the Constitution. The judgment provides an analysis for the decision that section 8(a) contravenes section 12. Once the learned judge found that section 8(a) contravenes section 12 of the Constitution he held that the section also contravenes section 3(b).

[16] At first blush I was of the view that the learned judge may have erred in deciding that section 8(a) of the Act contravenes section 3(b) of the Constitution. This thought resulted from my primeval view that declaratory or pre-ambulatory fundamental rights provisions, such as section 3, do not contain justiciable or enforceable rights, but that the substantive and enforceable right to freedom of expression is provided by section 12 of the Constitution. My secondary thought was that it was unnecessary, in any event, to state that section 3(b) of the Constitution was also contravened. In this regard it is noteworthy that although in Observer Publications Ltd v Matthew and Others,[7] the Privy Council referred to a similar declaratory provision contained in the Constitution of Antigua and Barbuda, their Lordships held that the refusal by the government to issue a broadcasting license to the appellant was a violation of the appellant's freedom of expression and freedom to disseminate information and ideas contrary to section 12 of the Constitution. Their Lordships did not state that the declaratory provision was also contravened.

[17] I was minded to note, however, that in Matadeen and Another v Pointu and

[7] [2001] UKPC 11; [2001] 58 WIR 188, at paragraph 5.

Others,[8] the Judicial Committee of the Privy Council held, in effect, that the rights recognized and declared to exist in section 3 of the Constitution of Mauritius are enforceable rights. In that case the applicants for constitutional redress were parents of pupils who challenged amendments to examination regulations which the Minister of Education approved. The amended regulations added an examination in an oriental language for all pupils. Some pupils had studied an oriental language prior to the amendments while others had not. The parents of some of the pupils who had not studied such a language sought a declaration against the Minister and parents of some pupils who had studied such a language. They sought the declaration on the ground of inequality or discriminatory treatment because they were given insufficient notice to commence the study of a language. The Supreme Court of Mauritius held that section 3 of the Constitution expresses a general justiciable principle of equality. Accordingly, that court declared the amended regulations unconstitutional on the ground that they discriminated in favour of those children who were already studying an oriental language and against those who were not. The Privy Council allowed an appeal against that decision and set it aside.

[18] However, in setting aside the decision of the Supreme Court in Matadeen, their Lordships held that the rights and freedoms declared in section 3 of the Constitution were rights to which persons in Mauritius are entitled and were enforceable rights. However, their Lordships noted that section 3 does not declare a general principle of equality, and, additionally, that the heads of proscribed inequality are specified.[9] Their Lordships held that, on a true construction, the right which the applicants claimed did not fall into any of the categories of rights and freedoms declared or recognized by section 3 of the Constitution.[10]

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[8] [1998] 3 WLR 18.

[9] In this regard their Lordships noted that "discriminatory" is defined in section 16 of the Constitution as "affording different treatment to different persons attributable … to their respective descriptions by race, caste, place of origin, political opinion, colour, creed or sex".

[10] See generally pages 25F – 30E.

[19] Section 3 of the Saint Christopher and Nevis Constitution is comparable to section 3 of the Constitution of Mauritius. The Saint Christopher and Nevis provision declares an entitlement to the right to freedom of expression in section 3(b). Section 12 of the Constitution elaborates and circumscribes that right. While the decision in Observer Publications seems to indicate that it may have only been necessary for the learned judge to state that section 8(a) of the Act contravenes section 12 of the Constitution, I do not think that his decision is impeachable merely because he stated, additionally, that the subsection also contravenes section 3(b) of the Constitution.

Section 8(a) of the Act and section 12 of the Constitution

[20] Section 8 of the Act is reproduced in paragraph 2 of this judgment. Section 12 of the Constitution provides as follows:

> "12(1) Except with his own consent, a person shall not be hindered in the enjoyment of his freedom of expression, including freedom to hold opinions without interference, freedom to receive ideas and information without interference, freedom to communicate ideas and information without interference (whether the communication is to the public generally or to any person or class of persons) and freedom from interference with his correspondence.
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> (2) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question makes provision -
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> (a) that is reasonably required in the interests of defence, public safety, public order, public morality or public health;
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> (b) that is reasonably required for the purpose of protecting the reputations, rights and freedoms of other persons or the private lives of persons concerned in legal proceedings, preventing the disclosure of information received in confidence, maintaining the authority and independence of the courts, or regulating telephony, posts, wireless broadcasting and television; or
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> (c) that imposes restrictions upon public officers that are reasonably required for the proper performance of their functions,
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> 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."

## The decision and reasons

[21] In holding that section 8(a) of the Act contravenes section 12 of the Constitution, the learned judge stated as follows:[11]

> "I find therefore that this provision in section 8(a) of the Small Charges Act is archaic and unnecessary and ought to be struck from the statute books as legislation not reasonably justifiable in the interest of public order and not reasonably required in a democratic society. It clearly offends against and is incompatible with the provisions of section 12 of the Federation's Constitution and should be struck from the Small Charges Act leaving the remainder of the section to serve the reasonably required purpose."

[22] In arriving at this conclusion, the learned judge stated that sections 8(b) and (c) of the Act prohibit the use of abusive language in any place to the annoyance of the public or tending to a breach of the peace. According to the judge, it is redundant for section 8(a) of the Act to merely prohibit the use of abusive language in a public place given the provisions of sections 8(b) or (c). Accordingly, the judge agreed with counsel for Mr. Nias that there was no need for section 8(a) on the strength of which a person may be convicted of a criminal charge for merely using the proscribed language in a public place, even if that language annoys no person or may not tend to a breach of the peace.[12] He agreed with counsel that the mere use of abusive language should not be criminalized, if free speech under the Constitution is to prevail. The learned judge held that if the prohibited language annoys anyone or tends to a breach of the peace, sections 8(b) and 8(c) of the Act were ample provisions to ground any charge.[13]

[23] The learned judge further stated that the word "expression" in section 12 protects all free expression unless it could be shown to be a breach of the peace, public order or defence or to be reasonably justifiable in a democratic society.[14] He

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[11] At paragraph 29 of the judgment.
[12] See paragraph 6 of the judgment.
[13] See paragraph 8 of the judgment.
[14] See paragraphs 10-12 of the judgment.

referred to Hector v The Attorney General of Antigua and Barbuda[15] and Taylor and Others v Canadian Human Rights Commission.[16] Both cases considered whether the right to freedom of expression was infringed in the context of the "public order" and "public peace" exceptions contained in constitutional provisions that are similar to section 12 of the Constitution. However, these cases were not relevant since the State's pleaded case was that section 8(a) was reasonably required in the interest of public morality.

Section 12 and the appeal

[24] The appellants stated that the judge erred when he held that section 8(a) of the Act is archaic and unnecessary and should be struck from the statute books because it is not reasonably required in the interest of public order and not reasonably required in a democratic society. They also sought to impeach the judge's interpretation of "presumption of constitutionality".[17] They contend that the judge erred by failing to consider that the social value of the language proscribed by section 8(a) of the Act is outweighed by the social interest in public safety, public order or public morality. They further state that, in any event, even when the judge found that section 8(a) of the Act was unconstitutional, he erred in striking down the charge since the Magistrate could have amended it.

The general approach

[25] The general approach to determining whether section 8(a) of the Act infringes section 12 of the Constitution in the circumstances of the present case is provided, for example, in Observer Publications Ltd.[18] The judgment of the Judicial Committee of the Privy Council indicates,[19] in effect, that where a person complains that his or her constitutional right to freedom of expression has been

[15] [1990] 2 AC 312.
[16] [1990] 3 S.C.R. 892.
[17] In paragraph 12 of this judgment.
[18] Op. cit. at note 7.
[19] At paragraph 25.

infringed, that person bears the burden first to show that the right was *prima facie* contravened by the impugned legislation. It is clear that section 8(a) of the Act restricts a person's right to freedom of expression by prohibiting the mere use of abusive, blasphemous, indecent, insulting, profane or threatening language in a public place. It therefore fell for the judge to determine, first, whether section 8(a) of the Act is reasonably required in the interest of public morality as the appellants contend. This is a section 12(2)(a) derogation that is permitted from the substantive right to freedom of expression.

Section 12(2)(a) public morality derogation

[26] In the judgment as well as in the submissions before the High Court and this court much was made of the "public order" limitation on the right to freedom of expression. This was done oblivious to the fact that the State did not argue that section 8(a) of the Act is reasonably required in the interest of public order. The case pleaded by the State in the affidavit of the Commissioner of Police was that section 8(a) of the Act is reasonably required in the interest of public morality.[20] As a result, subsequent to hearing the appeal in January 2008, counsel for the parties were directed to present submissions on the issue whether section 8(a) is reasonably required in the interest of public morality. The case was listed and was mentioned on 28th October 2008.

[27] I agree with the submission by Mr. Kelsick that there is no set formula by which to determine scientifically what the public morality of a particular society is at any specific time. Mr. Kelsick noted that "morality" is not defined in the Constitution and cannot be derived from any particular doctrine or from any one religion because of the provision of section 11(1) of the Constitution.[21] He suggested,

[20] See paragraph 7 of the affidavit deposed by the Commissioner of Police, Robert Jeffers.

[21] This provides as follows:

> "Except with his own consent, a person shall not be hindered in the enjoyment of his freedom of conscience, including freedom of thought and of religion, freedom to change his religion or belief and freedom, either alone or in community with others, and both in public and in private, to manifest and propagate his religion or belief in worship, teaching, practice and observance."

however, that "morality" means the accepted rules and standards of human behaviour which vary from society to society and from time to time. To support this he referred to Henn and Darby v Director of Public Prosecutions,[22] in which the European Court of Justice considered the meaning of "public morality" in Article 36 of the Treaty establishing the European Economic Community[23] in the context of the prohibition of the importation of indecent or obscene articles.[24]

[28] In Henn and Darby the European Court set out the observations of the United Kingdom government on the definition of "public morality" as follows:[25]

> "The term "public morality" does not appear elsewhere in the Treaty. Nor has it been the subject of consideration or comment by the court. Unlike the term "public policy", it is suggested that the term "public morality" is comparatively self-defining. Like "public policy", however, the content of "public morality" must clearly be a matter varying from country to country and indeed time to time. It is thus quite inappropriate for any absolute international standard, and a greater area of discretion must be granted to the member state than might be appropriate with regard to some of the other, more objective grounds of derogation. The definition of the precise content to be given to the words "indecent and obscene" in the United Kingdom or any of its constituent parts can only be for the state and its tribunals".

[29] I agree with the submission by Mr. Kelsick that section 12(2)(a) of the Constitution does not permit the legislature to enforce standards of private morality in derogation from a person's freedom of expression. From this perspective I also agree with Mr. Gossai's submission that "public morality" is referable to notions of good or bad conduct in a society and his further statement that the immorality of an act or representation has to be determined by the moral standards of the society. In my view "public morality" encompasses those normative values of a society, which reflect the principles and moral standards, which form the society's

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[22] [1981] A.C. 850.

[23] Articles 30 and 34 of the Treaty prohibited the imposition of measures having the effect of quantitative restrictions between member states. Article 36 states that articles 30 and 34 shall not preclude prohibitions or restrictions on imports justified on grounds of public morality, public policy or public security.

[24] The appellants were charged, inter alia, with fraudulently evading the prohibition on the importation of such materials contrary to provisions contained in the Customs Consolidation Act 1876 and the Customs and Excise Act 1952.

[25] At page 891 A-C.

code of good conduct, which values are generally accepted and adhered to by the society.

[30] Mr. Kelsick submitted that section 8(a) of the Act should be struck down as a law which is not reasonably required in the interest of public morality because it makes the use of the language which it prohibits a criminal offence if used in a public place. He contended that such an offence can never be required for the protection of public morality. This, he stated, is because it is possible that if a person utters the prohibited expressions even in a deserted public place, that person may be charged with a criminal offence under section 8(a) even if no one hears the words. This, according to Mr. Kelsick, cannot be in the interest of the protection of public morality, particularly since section 8(b) of the Act clearly prohibits the use of the proscribed language when made to the annoyance of the public. In Joseph Solomon Piper v P.C. Fitzroy Galloway and Others,[26] Adams J accepted a similar submission and struck down a provision similar to section 8(a) of the Act as unconstitutional for contravening the applicant's right to freedom of expression.

[31] Mr. Gossai submitted that by section 8(a) of the Act, the legislature has placed a justifiable restriction on the freedom of expression guaranteed under the Constitution by prohibiting the use, in public places, of language that offends against good morals. This, according to Mr. Gossai, is in itself a legitimate legislative aim. Mr. Kelsick agrees that the legislature has a duty to ensure that basic moral standards of the society are upheld and maintained. He submitted, however, that restricting the use of abusive, blasphemous, indecent, insulting, profane and threatening language in public places is not placed at a high standard because it is a basic standard in all civilized societies.

[32] I think that it is easy to perceive of a group of persons gathered in a public place, some of whom are shouting profanities or abusive language to others. This may not annoy any member of the group because they share the same values, which

[26] The Commonwealth of Dominica High Court Civil Suit No. 140 of 1993 (20th July 1994).

render that use of language of no moment to them. The language does not tend to a breach of the peace among them because for them that usage is a matter of course. Suppose, however, there are bystanders or passersby with whose values that use of language does not coincide? It may not be acceptable to them. It may not reflect the prevailing social mores in general. Yet, the passersby or bystanders are not annoyed, outraged or exasperated by it with the result that there would be no evidence upon which to ground charges under sections 8(b) or (c) of the Act. Similarly, one may perceive of the gathering shouting profane or abusive language to others in the group within the hearing of children who may be hearing such language for the first time. The language may only excite their learning curiosity because annoyance and outrage at that use of language are in their distant future. It is apparent that in the foregoing scenarios section 8(a) of the Act could be operative but not sections 8(b) or 8(c).

[33] From the forgoing, it is apparent to me that by prohibiting the use of the language proscribed by section 8(a) of the Act in a public place, the legislature, which body Mr. Kelsick agrees, has a duty to ensure that basic moral standards of the society are upheld and maintained, has determined what use of language offends public morality. In my view, the court is in no position to decide when the values of the society require otherwise. In the premises, I think that the learned judge should have held that section 8(a) of the Act does not contravene section 12(2)(a) of the Constitution. I think that he erred in deciding that the section was not reasonably required in the interest of public order and accordingly following Joseph Piper. In Piper, the judge actually held that section 8(a) of the Dominica Act was not reasonably required in the interest of public order and public morality and reasonably justifiable in a democratic society.[27] However, there was no discussion of the issues whether the section was reasonably required in the interest of public morality or whether it was reasonably justifiable in a democratic society. I think, therefore, the correctness of the decision in that case is extremely doubtful.

[27] See paragraph 2 of page 17 of the judgment.

Reasonably justifiable in a democratic society

[34] In my view the learned judge erred when he found that section 8(a) of the Act was not reasonably justifiable in a democratic society. His judgment does not reflect any particular reason for this decision. It is noteworthy that in Smith (Frederick) v Commissioner of Police and Another,[28] Telford Georges CJ stated that the Constitution places the onus of establishing that conduct or legislation is not reasonably justifiable in a democratic society upon an applicant who seeks constitutional redress. The Chief Justice noted that no evidence was led by the applicant on this issue.[29] He stated that in the absence of such evidence the onus was not discharged, except in the plainest case. He held that the onus was not discharged in Smith, and, stated further, that it was clear that the power to set up a barrier to bring moving traffic to a halt is reasonably justifiable in a democratic society for the purpose of apprehending criminals, for example.[30]

[35] In the present case the applicant brought no evidence to show that section 8(a) of the Act is not reasonably justifiable in a democratic society. In my view, there is no ground on which to hold that this is a plain case that it is not reasonably justifiable. In the premises, therefore, the learned judge erred when he held that section 8(a) of the Act was not reasonably justifiable in a democratic society. Inasmuch as I had already found that the section was reasonably required in the interest of public morality, I would hold that the learned judge erred in striking down section 8(a) of the Act.

Remitting the case to the Magistrate

[36] The applicant was charged in the Magistrates' Court. That court adjourned the trial at his request to permit him to challenge the constitutionality of the section under which he was charged. The jurisdiction to finally dispose of the charge resides only in that court. When the matter was referred to the High Court its only

[28] (1984) 50 WIR 1.
[29] See page 11 j.
[30] See page 12 a-c.

jurisdiction was to rule upon the constitutional issue which was referred to it. The High Court was then to remit the case to the Magistrates' Court. The foregoing is clear from sections 18(3) and (4) of the Constitution. Section 18(3) provides for referring a bill of rights issue (arising under sections 3-17 of the Constitution) so long as the issue is not frivolous or vexatious. Section 18(4) of the Constitution requires the High Court to give its decision on the issue referred to it and to remit the case to the Magistrates' Court which should dispose of the case in accordance with the decision of the High Court. Accordingly, the judge erred when he struck out the charge instead of remitting the case to the Magistrates' Court with his decision on the constitutional issue.

[37] In the foregoing premises, I would allow the appeal and remit the case to the Magistrates' Court.

Costs

[38] The State has prevailed in this appeal. In proceedings such as this, rule 56.13(4) of CPR 2000 permits the court to make any order as to costs as appears just. However, rule 56.13(6) states that no order as to costs may be made against an applicant unless the court thinks that the applicant has acted unreasonably in making the application or in the conduct of the proceedings. This mirrors the prior practice of our courts in constitutional cases in relation to a private citizen seeking to enforce constitutional rights. I do not think that the applicant acted unreasonably in making the application or in the conduct of his case such as to permit the State to recover costs against him either in the High Court or in this court. Accordingly, I would make no costs order against him in either court.

Order

[39] In summary then, I would allow the appeal with no order as to costs; set aside the judgment and order of the High Court and remit the case to the Magistrates' Court for that court to continue the trial of the applicant.

Hugh A. Rawlins
Chief Justice

[1] EDWARDS, J.A. [AG.]: The issue before the High Court on the respondent's application for an administrative order was: whether section 8 (a) of the Small Charges Act[31]( "the Act") is contrary to sections 3 (b) and 12 of the Saint Christopher and Nevis Constitution Order 1983 ("the Constitution") insofar as section 8 (a) makes it an offence to use abusive language in a public place. The learned judge answered in the affirmative and made the declaration and orders sought. The relevant facts and statutory provisions are reproduced in the judgment of Rawlins C.J. I do not repeat them in my judgment.

[2] The appellants' Notice of Appeal contains 6 grounds:

(a) The learned judge misinterpreted the provisions of sections 3 (a) and 12 of the Constitution.

(b) The learned judge erred in law in holding that he was bound by the Privy Council decision in the case of Hector v Attorney General of Antigua and Barbuda[32] in that he failed, or failed adequately, to distinguish that case from the case at bar.

(c) The learned judge erred in law in holding that the provision of section (8) of the Act is archaic and unnecessary and ought to be struck from the statute books as legislation not reasonably justifiable in the interest of public order and not reasonably required in a democratic society.

(d) The learned judge misinterpreted the doctrine of "presumption of

[31] See Chapter 75 of The Revised Edition 1961 of the Laws of Saint Christopher, Nevis and Anguilla
[32] [1990] 2 AC 312.

constitutionality".

(e) The learned judge failed to, or did not adequately consider the submissions of the appellants that the social value of the language contained in section 8 (a) of the Act is outweighed by the social interest in public order, morality and so on.

(f) The learned judge erred in law in ordering that the summons to the defendant/respondent be quashed as he failed to or did not adequately consider that the said charge could be amended.

The Judgment

[3] In analysing the judgment it appears that the battle in the court below was pitched and decided solely on the basis as to whether insofar as it is necessary to make provision in the Act in the interests of public order against the use of abusive language likely to disrupt or disturb public order, the whole field is not effectively covered by condemnation of abusive language which offends against section 8 (b) or section 8 (c) of the Act, thereby making the provision in section 8 (a) an unnecessary enlargement.

[3[ The learned judge did not address the meaning of "abusive language" in his judgment. In the absence of any statutory definition learned counsel Mr. Gossai relied on the definition in the Oxford English Reference Dictionary which defines "abusive" as:

> "1. using or containing insulting language. 2. (of language) insulting. 3. involving or given to physical abuse."

The same dictionary defines 'insult' as:

> "1. speak to or treat with scornful abuse or indignity. 2. offend the self-respect or modesty of…."

[4] The learned judge was impressed with the decision of Adams J in the Dominica

case, Joseph Solomon Piper v P.C. Fitzroy Galloway and Others[33], which focused only on affording constitutional protection to a questioned provision in criminal law in the interests of public order. He applied the reasoning in Hector v Attorney General of Antigua and Barbuda[34] in deciding the case. Despite the affidavit of the Commissioner of Police, Mr. Robert Jeffers, who deposed that section 8(a) was reasonably required in the interests of public morality, the learned judge omitted to consider whether the interests of public morality provided justification for an infringement of an individual's freedom of expression under the Constitution.

[5] Adams J held in Piper that section 8 (a) of the Small Charges Act of Dominica, (which was in identical terms to section 8 (a) the Small Charges Act of St Christopher Nevis and Anguilla) was unconstitutional. The applicant, Mr. Piper, had been charged under section 8(a) of the Dominica Act for making use of threatening language in a public place, making use of insulting, language in a public place, and being in a public place behaving in an idle and disorderly manner by beating drums. Adams J reviewed authorities from the Caribbean, the United States of America, Australia, India and elsewhere and ultimately decided that the reasoning process adopted by the Privy Council in Hector ought to be followed in the Piper matter.

The Decision in Hector v Attorney General of Antigua and Barbuda

[6] Simply put, the decisions in Piper and Hector hinged on whether the impugned statutory provision which restricted the constitutionally protected right to freedom of expression could be justified on the ground that the State had imposed the restriction in the interest of public order. Having regard to grounds of appeal (b) to (e), it is helpful to state what the Hector case was about, apart from the principles it established. In Hector, a newspaper publisher was charged with printing a false

[33] Commonwealth of Dominica High Court Civil Suit No. 140 of 1993 (unreported judgment) delivered by Adams J on 20 July 1994
[34] See note 32 supra

statement which was likely to undermine public confidence in the conduct of public affairs, contrary to section 33B of the Public Order Act 1972 of Antigua and Barbuda. The appellant made an application to the High Court challenging the prosecution on the ground that section 33B violated section 12 of the Constitution of Antigua and Barbuda.

[7] Section 33B provided that:

> "Notwithstanding the provisions of any other law any person who – (a) in any public place or at any public meeting makes any false statement; or (b) prints or distributes any false statement which is likely to cause fear or alarm in or to the public, or to disturb the public peace, or to undermine public confidence in the conduct of public affairs, shall be guilty of an offence …."

[8] Section 12 of the Constitution of Antigua and Barbuda is, to all intents and purposes, in pari materia with section 12 of the Constitution of St. Christopher and Nevis.

[9] Mathew J declared that the appellant's constitutional rights were contravened by the criminal proceedings and that section 33B was unconstitutional to the extent that it contained the words "or to undermine public confidence in the conduct of public affairs." He ordered that the criminal proceedings be quashed. The Attorney General appealed. The Court of Appeal reversed the judge's order. It held that although there may be other related laws on the statute books of Antigua capable of dealing with the situation contemplated by section 33B, this cannot inhibit Parliament from enacting other laws which it considers necessary and reasonable in the interest of peace, order and good government, and the provision is reasonably justifiable in a democratic society. The appellant appealed to the Privy Council.

[10] Lord Bridge of Harwich in his leading judgment[35] regarded the statements against which section 33B is directed as falling foul of the section on any one of three

[35] At pages 318G – 319G

grounds: (1) that they are likely to cause fear or alarm in or to the public; (2) that they are likely to disturb the public peace; or (3) that they are likely to undermine public confidence in the conduct of public affairs. Learned Queen's Counsel for the respondent, whilst attempting to justify the constitutionality of the impugned provision accepted that, if a statement that is likely to undermine public confidence in the conduct of public affairs is also of such a character that it is likely to disturb public order, prosecution in respect of it under section 33B can be mounted on ground (1) or (2), and to this extent the language of ground (3) is an unnecessary enlargement of the ambit of the section.

[11] The Privy Council rejected that latter submission that the language of section 33 should be construed in the light of the presumption of constitutionality as though the phrase "likely to undermine public confidence in the conduct of public affairs" were immediately followed by the word "in a manner which tends to disturb public order".[36] Lord Bridge stated that such an implication served to emphasise the inherent conflict between the provision which it is seeking to rescue and the constitutional safeguards of free speech, despite their Lordship's willingness to give full weight to the presumption of constitutionality.

[12] Lord Bridge reasoned that: (1) where a false statement likely to undermine public confidence in the conduct of public affairs is also of such a character that it is likely to disturb public order, in such a case an offence under section 33B can be charged on ground (1) or (2) making ground (3) otiose even with the suggested implied term; and (2) where a particular false statement though likely to undermine public confidence in the conduct of public affairs, is not likely to disturb public order, a law which makes it a criminal offence cannot be reasonably required in the interests of public order by reference to the remote and improbable consequence that it may possibly do so. This reasoning drove their Lordships

[36] At page 319C Lord Bridge referred to Lord Diplock's explanation of this presumption in Attorney-General of the Gambia v Momodou Jobe: [1984] AC 689 at page 702 (P.C.). The presumption of constitutionality requires that if it is possible to read the statutory language as subject to an implied term which avoids conflict with the constitutional limitations, the court should be very ready to make such an implication.

inexorably to the conclusion that the words in section 33B "or to undermine public confidence in the conduct of public affairs" offended against the Constitution and cannot therefore have any effect. The appeal was allowed.

Grounds (b) to (e) of the appeal

[13] The submissions of learned counsel Mr. Gossai sought to distinguish the reasoning of Lord Bridge on an irrational basis in my view. He argued that the decision in Hector would not apply in the present case as the reasoning behind the Privy Council decision was that a statement likely to undermine public confidence in the conduct of public affairs would also be likely to disturb public order and that section 33B already addressed the offence of public order. He submitted further that section 8(a) is intended to preserve peace and order in a public place apart from preserving public order; section 8(a) seeks to cover those cases where there is no annoyance to the public, and would cover situations where the abusive words are used to someone who may not respond with violence and in such situations a breach of peace may not be likely to occur if at all. He contended that section 8(a) is reasonably required and serves the purpose of regulating and maintaining order in public places unlike the words "or to undermine public confidence in the conduct of public affairs" in section 33B of the Public Order Act of Antigua which serves no useful purpose. Mr. Gossai both in the court below and before us contended that section 8(a) should be presumed to be constitutional because it contributes in some way to the maintenance of public order by prohibiting abusive expressions which serve no useful purpose; the social value of abusive expressions is outweighed by the social interest in public order and the usefulness of the provision which maintains public order.

[14] Learned counsel, Mr. Kelsick, pointed out that Mr. Gossai's interpretation of the Privy Council's decision in Hector was flawed, resulting in an untenable argument. There is no doubt that this decision of the Privy Council has established principles which are of general application when deciding whether any questioned provision in the criminal law can be justified by section 12(2)(a) of the Constitution which

protects any law to the extent that the provision is reasonably required in the interests of public order. I unhesitatingly support the view of learned counsel Mr. Kelsick and the learned trial judge that these principles are applicable and binding on the court.

[15] Adopting the reasoning of Lord Bridge in Hector, and applying it to the instant case, section 8(a) would not be constitutionally protected to the extent that it is reasonably required in the interests of public order because: (1.) abusive language in a public place may be said to be of a nature that is likely or tending to provoke a breach of the peace and disturb public order; and (2.) in such a case the offence of using abusive language in a public place can be charged under section 8(b) where there is evidence that a member of the public was in fact annoyed; or the charge may be brought under section 8(b) thereby making section 8(a) otiose. Where abusive language which is used in a public place is not likely to disturb public order section 8(a) which makes it a criminal offence cannot be reasonably required in the interests of public order by reference to the remote and improbable consequence that it may possibly do so.

[16] I would say, therefore, that the learned judge was correct in his finding at paragraph 29 of his judgment when he said that section 8 (a) is unnecessary and not reasonably justifiable in the interest of public order. In such a case the reasoning in Hector is determinative of the public order exception issue, thereby rendering the complaints in grounds (c) to (e) redundant.

Is section 8(a) reasonably required in the interest of public morality?

[17] We have not had the benefit of any decision in which a court has been asked to determine the scope of the "public morality" exception in section 12(2)(a) of the Constitution. The enforcement of public morality is an elusive and controversial subject. There are no clearly defined rules for the requirements of public morality in St Christopher and Nevis. Traditionally, States have played the role of moral custodian and assume a paternalistic role in applying restrictions for public

morality so as to prevent harm and promote decorum.

[18] Lord Patrick Devlin, in his book The Enforcement of Morals[37], postulates a case for the law's enforcement of society's shared moral values which are associated with its important institutions. Lord Devlin argued that there is a public morality which cements any human society, and that the law, especially the criminal law must regard it as a primary function to maintain public morality. Lord Devlin advocated toleration of individual liberty, but he argued that the limits of tolerance are reached when the feelings of the ordinary person towards a particular form of conduct reaches intensity of "intolerance, indignation and disgust."[38] Lord Devlin propounded that deviation from the shared morality of society results in the weakening of commonly held moral beliefs and the undermining of the whole morality, which causes "intangible harm". When there ceases to be common belief in the value of the moral code, society is threatened with disintegration. [39] I adopt these views of Lord Devlin which I consider to be eminently applicable in deciding the issue raised.

[19] There can be no doubt that the government has an important role to play in upholding moral standards. In Mr. Gossai's subsequently filed written submissions on the 23rd June 2008 and Mr. Kelsick's on the 8th July 2008, both counsel considered the dictionary meaning of "morality" and "moral" in the absence of any statutory definition. "Morality" is:

> "1. the degree of conformity of an idea , practice etc. to moral principles. 2. right moral conduct. 3. a lesson in morals. 4. the science of morals. 5. a particular system of morals…"

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[37] The Enforcement of Morals. London, 1965 at pages 85 to 86.

[38] Op. cit. at page 17.

[39] Professor of Philosophy Chi Liew Ten (University of Singapore) in his book Mill on Liberty, 1980 published by Clarendon Press in Chapter 6 analyses Lord Devlin's theory. The author concludes that Joel Feinberg in his work Social Philosophy 1973 suggests that Devlin's disintegration thesis, with its appeal to the notion of harm to the society, is really an application of the public harm principle that coercion necessary to prevent public harm is justifiable (p.37). "If this is the case, then there is no disagreement of principle between Devlin and Mill, for Mill's notion of harm, as explicated in Chapter 4, embraces both private and public harm. If the factual claims made by Devlin are correct, then even on Mill's liberty principle there is a case for the legal enforcement of the shared morality."

"Moral" is defined as:

> "1a concerned with goodness or badness of human character or behaviour, or with the distinction between right and wrong. b concerned with accepted rules and standards of human behaviour. 2a conforming to accepted standards of general conduct…"[40]

[20] Learned counsel Mr. Kelsick relied also on the European Court of Justice's perception of the term "public morality" in Henn and Darby v Director of Public Prosections[41]:

> "Unlike the term "public policy", it is suggested that the term "public morality" is comparatively self-defining. Like "public policy," however, the content of "public morality" must clearly be a matter varying from country to country and indeed time to time. It is thus quite inappropriate for any absolute international standard…."

[21] Speaking of standards in St Christopher and Nevis, people may disagree about what is morally right or wrong and one man's mouthful of vulgar, indecent, or abusive language in public may be quite acceptable to the user though offending community values. Public morality is however not concerned with the acceptability of such language to the user but with upholding moral standards derived from shared community values and ideals. It may be said therefore that public morality regulates the behaviour and values of the community and the individuals who live in that community; and each member of the community has obligations and duties derived from these shared community values and ideals. It is difficult to envisage democracy existing without public moral values.

[22] The appellants have the onus to satisfy the court that the restriction on Mr. Nias' constitutional freedom of expression by section 8(a) of the Act is reasonably required and reasonably justifiable in a democratic society. Counsel for the appellants argued that section 8(a) seeks to protect the public from immoral behaviour that falls short of a breach of the peace. He submitted that the legislature has a duty to ensure that basic moral standards of the society are

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[40] Oxford English Reference Dictionary , Second Edition, Revised.
[41] [1981] AC 850, at 891B.

upheld and maintained; and, restricting the use of abusive, blasphemous, indecent, insulting, profane and threatening language in public places is a basic standard in all civilized societies. He relied on the approach of May L.J. who had to determine whether section 5(1) and 5(6) of the Public Order Act 1986 (U.K.) under which the appellant was charged for displaying a writing or sign which was threatening, abusive or insulting within the hearing or sight of a person likely to be caused harassment, alarm or distress thereby was a justifiable restriction of the right to freedom of expression guaranteed by article 10 of the Human Rights Convention.[42] May L.J. stated:

> "However, if Convention rights are, as it is submitted they should be,… the respondent prosecutor had to show that the interference with Mr. Hammond's freedom of expression was prescribed by law. It was accepted that they were. They had to show that it was for a legitimate aim, and it is not challenged that the magistrates found that the restriction had a legitimate aim of preventing disorder. The third and most important requirement, it is submitted, imports the notion of proportionality; that is to say that the restriction was necessary in a democratic society. In that context, the court has to consider three matters: whether the interference complained of corresponded with a pressing social need, whether it was proportionate to the legitimate aim pursued, and whether the reasons given to justify the interference were relevant and sufficient."

[23] Mr. Gossai concluded that section 8(a) seeks to restrict the type of language that is morally unacceptable in a public place and this is a justifiable restriction on the freedom of expression guaranteed under the Constitution and therefore is a legitimate legislative aim.

[24] Learned counsel Mr. Kelsick argued that the Constitution permits the enforcement of public and not private morality; and if the user of abusive language utters it in a public place that is deserted and no one hears it, the criminalization of that act cannot be in the interest of public morality. He submitted further that the reasoning of the Privy Council in Hector would also apply to public morality. Since section 8(b) deals with a situation where the offending language has been annoying to the public, and public morality is protected where the language used

[42] Harry John Hammond v Department of Public Prosecutions [2004] EWHC 69 at para. 27

is immoral by the standards of St. Christopher and Nevis, section 8(a) cannot be justified in such circumstances for the protection of public morality which is adequately protected by section 8(b), he argued.

[25] Lord Hope of Craighead in Procurator Fiscal v Brown has stated that:

> "The principle of proportionality directs attention to the question whether a fair balance has been struck between the general interest of the community in the realization of that aim and the protection of the fundamental rights of the individual."[43]

[26] It cannot be said that the whole field of public morality is effectively covered by condemnation of abusive language which offends against section 8(b) and 8(c), having regard to the legitimate aim of public morality which is the protection of public and community values. When it comes to public morality, in my view it is irrelevant that there are no bystanders to hear the abusive language uttered in public, or that bystanders present may not have been annoyed by such language. The underlying object of section 8(a) and the evil it was aimed at preventing when considered against Lord Devlin's theory of shared community values and the consequences of deviation from shared community values justifies the retention of section 8(a) as a proportionate response to the social problem of abusive language.

[27] The learned judge opined that statutes such as the Small Charges Act, which was passed in 1892, may project a doctrine of parliamentary sovereignty rather than a presumption of constitutionality, as section 12 of the Constitution, which did not then exist, could not have been contemplated by the framers of such legislation. The learned judge observed that section 8(a) is an archaic provision that should be struck from the statute books.

[28] The issue concerning section 8(a) is not about archaism or modernity but about morality. The question for this court is not whether there are other and better ways

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[43] DRA No. 3 of 2000 (PC) delivered 5 December, 2000 available at http://www.privy-council.org.uk/files/word/margaret%20brown.doc

of achieving the legitimate end, but whether the restriction of freedom of expression is as a result of a measure that is reasonably appropriate and adapted to achieving public morality. The court should be slow to interfere when it comes to moral issues which are better decided by Parliament. Hyatali C.J in Attorney General of Trinidad and Tobago v Mootoo pronounced that:

> "Legislators, as well as judges, are bound to obey and support the Constitution and it is to be understood that they have weighed the constitutional validity of every Act they pass. 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… What the presumption means is that there should be such an opposition between the Constitution and the law that the judge should feel a clear and strong conviction of their incompatibility."[44]

[29] There is no opposition between the Constitution and section 8(a) to the extent that it criminalizes abusive language in a public place, promotes good behaviour and decorum by persons who are in public places in the interests of the society at large, and as such serves a legitimate end that is compatible with the maintenance of public morality. In my view, any prejudicial impact that it may have on the constitutionally protected right of Mr. Nias is commensurate with reasonable regulation in the interests of a democratic society.

[30] In my judgment, section 8(a) has passed constitutional muster with flying colours. I would allow the appeal in the terms expressed by Rawlins C.J.

Ola Mae Edwards
Justice of Appeal [Ag.]

[44] (1976) 28 WIR 304, 312 paras. d and g.

I have had the benefit of reading the judgments of my brother and sister, Rawlins, CJ and Edwards, JA [Ag.] respectively. I agree with their decision and the order of Rawlins, CJ.

Errol Thomas
Justice of Appeal [Ag.]