

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL APPEAL NO. 33/90

BEFORE: THE HON. MR. JUSTICE ROWE, PRESIDENT
THE HON. MR. JUSTICE FORTE, J.A.
THE HON. MR. JUSTICE DOWNER, J.A.

BETWEEN THE ATTORNEY GENERAL DEFENDANT/APPELLANT
AND CONFIDENCE BUS SERVICE
LIMITED PLAINTIFF/RESPONDENT

Mr. Dennis Morrison & Mr. Lackston Robinson
for The Attorney General instructed by
The Director of State Proceedings

Dr. Lloyd Barnett for the respondent
instructed by Dr. Adolph Edwards.

27th September & 22nd October
1990

DOWNER, J.A.

At the instance of Confidence Bus Service Limited,
Langrin J., in the Supreme Court in proceedings instituted
by an Originating Summons awarded a declaration against the
Attorney General which reads so far as is relevant -

".....IT IS HEREBY ORDERED that
Regulation 123A of the Road Traffic
Regulations has been made without
legal authority and is invalid."

It should be noted that although the affidavit in
support of the summons states that the respondent is a company
which employs drivers and conductors, there is no suggestion
in the record that informations had been preferred against
its drivers or conductors for failing to obey the regulation.
The parent statute and the impugned regulation contemplate
as a sanction for breach of the regulations, criminal
proceedings in the summary court of Petty Sessions and

thereafter on appeal by virtue of Sections 22 and 24 of the Justice of the Peace Appeal Act either to the Circuit Court or by way of case stated to the Court of Appeal.

The nature of the proceedings below and the issue of whether the regulation was valid raised issues of importance in criminal and constitutional law. Paragraphs 1 and 4 of the regulation (see Jamaica Gazette Proclamations Rules and Regulations dated 1st December, 1988) are sufficient to indicate the scope of the regulation and the time when it came into force. These paragraphs read -

" DRIVER'S AND CONDUCTOR'S UNIFORM

123A.-- (1) A driver or conductor shall wear a uniform which shall consist of -

- (a) A badge;
- (b) A bush jacket with short sleeves; and
- (c) trousers or, in the case of a female if she so elects, a skirt with the trousers or skirt having piping on the left side thereof.

.....

(4) This regulation shall come into operation on the 1st day of March, 1989."

The issue posed was to decide whether the Minister was empowered to make this regulation.

The Scope of Part III of the Road Traffic Act (The Act) in relation to Drivers and Conductors

The cross heading to Part III of the Act reads -

"PART III. Regulation of Public Passenger Vehicles and Road Licences."

To ascertain who was eligible to be a conductor in law, it was necessary to examine at least two of the provisions of Section 69 of the Act. They are 69(1) & (4) and they read as follows -

"69.—(1) A person shall not act as conductor of a stage or express carriage on a road unless he is licensed for the purpose under this Part, and a person shall not employ any person who is not so licensed to act as conductor of any such vehicle on a road.

.....

(4) A licence to act as conductor of a stage or express carriage may at any time be suspended or revoked by the Licensing Authority by whom it was granted upon the ground that, by reason of his conduct or physical disability, the holder is not a fit person to hold such a licence."

Be it noted that the conductor's status is regulated by express statutory power and that failure on his part to comply with the provisions of the Act might result in the enforcement of criminal sanctions as stipulated in Section 69(5). Also by virtue of Section 69(4) of the Act, his licence may be suspended or revoked. Additionally, an employer of unlicensed conductors is criminally liable and the preceding Sections 61-68 of the Act pertain to Road Licences for public passenger vehicles.

Section 75 of the Act is important and it is essential to set it out in full as it permits the rules in paragraph 123A of the Regulation.

"75.—(1) The Minister may make regulations as to the conduct of persons licensed to act as drivers or conductors of public passenger vehicles when acting as such.

(2) If any person to whom such regulations apply contravenes or fails to comply with any of the provisions of the regulations, he shall be liable to a penalty not exceeding ten dollars, and the court by which he is convicted may, if it thinks fit, cause particulars of the conviction to be endorsed upon the licence granted to that person under this Part.

" (3) The person who has the custody of the licence shall, if so required by the convicting court, produce the licence within a reasonable time for the purpose of endorsement, and if he fails to do so, shall be guilty of an offence."

Langrin J. ignored the implications of this important section. His only reference to it in his judgment is at page 9 of the Record where he said -

" Sections 74-75 deal with Conduct of Passengers, Conductors and Drivers. Again none of these sections deal with Driver's and Conductor's Uniform."

Such a reading of Section 75 fails to take into account that in the context of the section, the requirement that drivers and conductors wear a uniform is an essential part of their conduct and therefore a subject appropriate for ministerial regulations. Also it ignores a basic meaning of the word 'conduct' 'The way of managing a business affair' Collins English Dictionary 'or manner of conducting (business etc.)' The Concise Oxford Dictionary.

Then Section 109 of the Act ordains a summary trial in Petty Sessions either before a Resident Magistrate or at least two Justices, and it also stipulates the venue. That section reads as follows -

"109. Every offence under, and every contravention of, this Act shall, except where otherwise expressly provided be tried summarily and the offence or contravention shall be deemed to have been committed either at the place at which the same was actually committed or in the parish in which the offender resides."

At this point it is pertinent to point out, that since Parliament made it an offence if the regulations were breached, then it would be obligatory to challenge the validity of the regulations in the summary courts and further on appeal as was done in McEldowney v. Forde (1971) A.C. 632. Further any information

charging a defendant ought to set out the substance of the charge letting the defendant know exactly with what he is charged: See Section 64 of Justice of the Peace Jurisdiction Act. In a prosecution, it would be advisable to state that the offence was contrary to Section 75 of the Act and in contravention of paragraph 123A of the regulation, but a failure to do so would not necessarily result in the conviction being upset on appeal. See R.v. Ashenheim (1973) 12 J.L.R. 1066 or 20 W.L.R. 307.

It is true that the introductory part of the regulation reads -

" In exercise of the power conferred upon the Minister by section 76 of the Road Traffic Act, the following Regulations are hereby made."

but if the Minister is accorded the power he assumed by virtue of Section 75 to regulate conduct, so as to compel conductors and drivers to wear uniforms as stipulated in paragraph 123A (supra), the introductory words adverting to Section 76 of the Act which in turn refers to Section 75 cannot create uncertainty so as to render a conviction invalid on the basis of ultra vires.

There is further support for this contention from Part VIII of the Act and it is necessary to refer to Section 107 (1), (2) & (4). These sections read -

"107.--(1) All regulations purporting to be made in pursuance of any Part of this Act shall be published in the Gazette and shall come into operation on such publication or at such other time as may be fixed by such regulations.

(2) All regulations made under any Part of this Act shall have full effect notwithstanding anything in any other Act or any regulations made thereunder.

.....

" (4) Regulations made under any Part of this Act shall be of the same force and effect as if they were contained in and formed part of this Act and shall be judicially noticed."

There was no issue that the regulation was published in the Gazette and made pursuant to Section 76 of the Act. Once it is conceded that the 'conduct of persons' in the context of Section 75 of the Act is capable of embracing the requirement to wear a uniform when acting as a conductor or driver of a public passenger vehicle, then paragraph 123A of the regulation must be *intra vires*. In a summary trial the introductory words of the regulation which states that the Minister was acting pursuant to Section 76 would find no place in the particulars of the information. Further, Section 107(2) of the Act specifically states that regulations are to have full effect notwithstanding anything in any other Act or any regulation. Once paragraph 123A of the regulation was published in the Gazette and conformed to Section 75 of the Act, then it was valid and had full effect. Section 107(4) of the Act is also pertinent and the effect of it is that once paragraph 123A of the regulation is *intra vires* see R.v. Minister of Health ex parte Yaffe (1931) A.C. 494, then it is to be treated as if it were contained in the Act and so must be judicially noticed. Consequently, paragraph 123A of the regulation must be added to the Act and the introductory paragraph in the regulation which specifies that the power to make regulation is conferred by Section 76 of the Act could never create uncertainty so as to make the regulation invalid.

Was there a clear legislative reference in Section 76 to Section 75 the empowering Section of the Act?

As noted previously, the learned judge below wrongly disposed of the argument that Section 75 was the empowering section in a single sentence. He was more detailed in his analysis of

Section 76 and since he relied on the plain meaning of the section to reject the submission of counsel for the Attorney General, that section must now be considered. It reads -

"76. The Minister may make regulations for any purpose for which regulations may be made under this Part and for prescribing anything which may be prescribed under this Part, and generally for the purpose of carrying this Part into effect, and in particular, but without prejudice to the generality of the foregoing provisions, may make regulations with respect to any of the following matters -"

It seems that Section 76 of the Act envisages that the Minister may make regulations generally pursuant to Part III which comprises sections 60 to 76 inclusive. This must include regulations made pursuant to Section 75 of the Act. He could also prescribe generally, and also make regulations for carrying the purpose of Part III into effect. Additionally, he could make regulations for the items enumerated in Section 76 one of which Section 76 (e) reads -

"76.(e) the badges to be worn by drivers and conductors of public passenger vehicles and the identification cards, photographs and documents to be carried or exhibited by them;....."

So construed, whether reliance is placed directly on Section 75 or in the alternative reliance is on the reference in Section 76 to Section 75, the answer is the same, paragraph 123A of the Regulation is valid because Section 75 empowers it. Once the learned judge had ignored the effect of Section 75 then section 76, even if he had construed it correctly, would have been of no avail to him, since he could find no specific warrant for the Minister's power in Section 75.

Was the declaration an appropriate relief where the breach of the regulation was enforced by criminal sanctions?

Langrin J., in the Supreme Court recognised that for a breach of regulation 123A, criminal sanctions imposed by Section 75 of the Act could be enforced. Here is how he deals with the matter at p. 12 of the Record -

" It would be unreasonable to conclude that an owner or operator of an Omnibus service is not affected by a restraint placed upon a driver or conductor. Indeed in a proper case the owner may be charged with aiding and abetting the failure of the driver or conductor to wear uniform."

He was responding to the submission by counsel for the Attorney General that Confidence Bus Service Limited had no locus standi to seek a declaration. But the prior submission ought to have been that the court ought not to have exercised its discretion to have granted a declaration.

This issue must be considered not only because of its relevance to this case, but because it may offer guidance for the future. Since the subject matter in issue was a regulation, breach of which would give rise to criminal proceedings, the court should have ordered that the Director of Public Prosecutions be a party at the outset. The matter could have been adjourned to enable this to be done. The court ought to have exercised its discretion to refuse the grant of a declaration if a party whose interest was involved, was not joined. This salutary rule was adverted to in London Passenger Transport Board v. Moscrop (1942) A.C. 332, or (1942) 1 All E.R. 97. At p. 104 of the latter report Lord Maugham said -

" I also think it desirable to mention the point as to parties in cases where a declaration is sought. The present appellants were not directly prejudiced by the declaration, and it might even have been thought to be an advantage to

"them to submit to the declaration; but, on the other hand, the persons really interested were not before the court, for not a single member of the Transport Union was, nor was that Union itself, joined as a defendant in the action. It is true that in their absence they were not strictly bound by the declaration, but the courts have always recognised that persons interested are or may be indirectly prejudiced by a declaration made by the court in their absence, and that, except in very special circumstances, all persons interested should be made parties whether by representation, orders or otherwise before a declaration by its terms affecting their rights is made."

At p. 107 Lord Wright said -

"..... I also agree that the action is not properly constituted in regard to parties."

Had the Director of Public Prosecutions been made a party, then the judge would have had full legal arguments before he made his order.

Secondly, there is a rule of law, that the declaration, a civil remedy, is seldom granted when Parliament has entrusted the contravention of a statute or regulation to criminal tribunals. This issue does not seem to have been examined in the court below. Judicial notice could have been taken of reports that there were criminal prosecutions for breaches of paragraph 123A of the Regulation. These press reports further state that as a result of the declaration granted, prosecutions had been suspended. So Confidence Bus Service Limited, an employer of drivers and conductors halted the prosecution of drivers and conductors who disregarded the law. Lord Dilhorne recognised that such dangers could arise and said of a decision of the Court of Appeal in England in Imperial Tobacco Ltd. v. A-G (1930) 1 All E.R. 866 at 875 -

" Donaldson J thought it could but did not grant it as he thought that the Spot Cash scheme was a lottery and an unlawful competition. The Court of Appeal, holding that it was neither, granted it. That decision, if it stands, will form a precedent for the Commercial Court and other civil courts usurping the functions of the criminal courts. Publishers may be tempted to seek declarations that what they propose to publish is not a criminal libel or blasphemous or obscene. If in this case where the declaration sought was not in respect of future conduct but in respect of what had already taken place, it could be properly granted, I see no reason why in such cases a declaration as to future conduct could not be granted. If this were to happen, then the position would be much the same as it was before the passing of Fox's Libel Act 1843 when judges, not juries, decided whether a libel was criminal, blasphemous or obscene.

Such a declaration is no bar to a criminal prosecution, no matter the authority of the court which grants it."

Three points should be noted. Firstly, in the Court of Appeal, the Director of Public Prosecutions was struck out as a party to the action but the order of that court was set aside by the House of Lords. Secondly, Lord Edmund-Davies, Lord Fraser, and Lord Scarman expressly agreed with Lord Dilhorne. Thirdly, while in the Imperial Tobacco Ltd. case, a prosecution had already been instituted, in the instant case there is no indication that Confidence Bus Service Ltd. was threatened with prosecutions. However, as adverted to, there were indications that prosecutions were instituted and it is against that background that the following passage in the Imperial Tobacco case is also relevant. At p. 384 Lord Lane said -

" Counsel appearing before your Lordships' House were unable to find any case in which a defendant in criminal proceedings already properly

"and now verbatimly instituted had applied for a declaration that the criminal proceedings were unfounded or based on a misapprehension as to the true meaning of the criminal statute. I do not find that dearth of authority surprising. It would be strange if a defendant to proper criminal proceedings were able to pre-empt those proceedings by application to a judge of the High Court whether sitting in the Commercial Court or elsewhere. What effect in law on the criminal proceedings would any pronouncement from the High Court in these circumstances have? The criminal court would not be bound by the decision. In practical terms it would simply have the inevitable effect of prejudicing the criminal trial one way or the other."

Against this background, Langrin J. ought not to have granted a declaration that paragraph 123A of the Regulation was invalid as that was a matter for the criminal courts.

Conclusion

This was an important and exceptional case. The learned judge below recognised that the Minister ought to have the powers he claimed, yet found that the exercise was an unwarranted arrogation of power. In a characteristic passage at page 11 of the Record the judgment reads -

" A power to require drivers and conductors to wear uniform while on duty may be expedient for the proper delivery of transport facilities to the public but it cannot be regarded as a general purpose of carrying Part III of the Act into effect. Regulation 123A creates a new and radically more extensive set of powers additional to those detailed in the enabling statute. It was a wholly unwarranted arrogation of power."

The learned judge erred because he failed to construe the words "may make regulations as to the conduct of persons licensed to act as drivers and conductors of public passenger vehicles when acting as such" in Section 75 as empowering the Minister to make regulations requiring drivers and conductors to wear a uniform. He thought that by virtue

of Section 76 that the Minister's power to make regulations was confined to the powers enumerated in Section 76. He arrived at that conclusion by failing to note that apart from giving the Minister power to make regulations for enumerated subjects, Section 76 also referred to Section 75 as well as other sections in Part III of the Act. Moreover, the learned judge exercised his power to grant a declaration wrongly as he failed to take into account that the Director of Public Prosecutions who derives his powers from Section 94 of the Constitution was not made a party to the action. It must be emphasised that the issue of the validity of the regulation ought to have been taken by defendants in the criminal courts and further on appeal and in such an event the regulation would have been found to be valid. Consequently, this court allowed the appeal and set aside the declaratory order and made an order as to costs at the end of the hearing, and have now given its reasons in writing because the issues are of legal and public importance.

ROWE, P.

I concur.

FORTE J.A.

I have had the opportunity to read in draft, the judgment of Downer J.A. and agree with the reasoning and conclusions therein.

If for no other reason, but for emphasis, I wish however to express the opinion that section 76 of the Road Traffic Act has a clear reference to other sections of the Act and in particular to section 75 when it states:

"The Minister may make regulations
for any purpose for which regula-
tions may be made under this Part
....."

and consequently since section 75 gives the Minister power to make regulations as to the conduct of conductors, the questioned amendment must necessarily be intra vires the Act. Implicit in this opinion, is the concurrence with the meaning of "conduct" expressed in the judgment of Downer J.A. and the conclusion that the requirement for the wearing of uniforms by conductors in the amendment comes within the powers of the Minister under section 75 to control their conduct by regulations.