

No. 9 of 1972

IN THE PRIVY COUNCIL

O N A P P E A L

FROM THE COURT OF APPEAL OF ST. CHRISTOPHER
NEVIS AND ANGUILLA

B E T W E E N

ARTHUR FRANCIS

Appellant

AND

THE CHIEF OF POLICE

Respondent

UNIVERSITY OF LONDON
INSTITUTE OF ADVANCED
LEGAL STUDIES
28 MAY 1974
25 RUSSELL SQUARE
LONDON W.C.1

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CASE FOR THE RESPONDENT

RECORD

1. This is an appeal by Special Leave in forma pauperis from the judgment of the Court of Appeal of St. Christopher Nevis and Anguilla (Gordon, C.J. (Ag.) P.C. Lewis, J.A., and St. Bernard, J.A. (Ag.)), dated the 28th July, 1970, which dismissed the Appellant's appeal from a judgment of the High Court of St. Christopher Nevis and Anguilla (Renwick, J. (Ag.)) dated the 10th March, 1970, on a reference by the Magistrate of District "A" (Magistrate Arrindell) arising out of a charge under section 5 of the Public Meetings and Processions Act, 1969 (hereinafter referred to as 'the Act').
2. This appeal raises the question whether section 5 of the Act contravenes sections 10 and/or 11 of the St. Christopher Nevis Anguilla (Constitution) Order, 1967 (S.I. 1967 No. 228) (hereinafter referred to as 'the Constitution').
3. The Appellant was charged with using noisy instruments at Basseterre, in the Parish of St. George, in the Magisterial District "A", to wit, loudspeakers and amplifiers during the course of a public meeting on the 29th June, 1969, without

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pp.23-48

pp. 10-20

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having first obtained the permission in writing of the Respondent contrary to section 5 (1) of the Act. Section 5 of the Act reads as follows:-

"5. - (1) Any person who in any public place or at any public meeting uses any noisy instrument for the purpose of announcing or summoning any public meeting or public procession or during the course of any public meeting or public procession, in any case without having first obtained the permission in writing of the Chief of Police to do so, shall be guilty of an offence against this Act and shall be liable on summary conviction to a fine not exceeding one hundred dollars. 10

(2) The Chief of Police may in his discretion grant permission to any person to use a noisy instrument for the purpose of any public meeting or public procession upon such terms and conditions and subject to such restrictions as he may think fit." 20

pp. 2-5

4. At the trial of the Appellant, after four witnesses had given evidence for the prosecution and at the close of the prosecution's case counsel for the Appellant admitted the facts deposed to by those witnesses and submitted that the Act was unconstitutional in that it curtailed the Appellant's fundamental rights of freedom of speech and assembly laid down in sections 10 and 11 of the Constitution, which read as follows :- 30

"10. - (1) Except with his own consent, no person shall 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 be to the public generally or to any person or class of persons) and freedom from interference with his correspondence 40

(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 -

(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, telegraphy, posts, wireless broadcasting or television; or

(c) that imposes restrictions upon public officers

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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

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11. (1) Except with his own consent, no person shall be hindered in the enjoyment of his freedom of assembly and association, that is to say, his right to assemble freely and associate with other persons and in particular to form or belong to trade unions or other associations for the protection of his interests

(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 -

(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 rights or freedoms of other persons; or

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(c) that imposes restrictions upon public officers

and except as 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"

- p.6 5. The Magistrate decided to refer the matter to the High Court on the question of the alleged curtailment or infringement of the Appellant's constitutional rights. He found as a fact that on Sunday, the 29th June, 1969, at about 8.30 p.m., the Appellant (and others) addressed a gathering of persons in a public place known as Pall Mall Square, in Basseterre, at a public meeting being held by members of the People's Action Movement, a political party in Basseterre; that the Appellant addressed the crowd estimated by one witness at about four hundred to five hundred persons, from the platform of a truck parked in North Square Street, and through a microphone, the loudspeaker for which was mounted on a nearby car; and that no police permission was sought by the Appellant, and none given to him, for the use of the loudspeaker and microphone at the public meeting on that Sunday. The Magistrate found a prima facie case against the Appellant. 10
- p.6
- p.7 6. The Magistrate referred the case to the High Court for determination of the question whether section 5 of the Act offended against sections 10 and 11 of the Constitution. 30
- pp. 8-9 7. Contentions upon the question referred to the High Court were filed on behalf of the Respondent and the Appellant.
- pp.10-20 8. The reference to the High Court was heard by Renwick, J. (Ag.) who delivered his judgment on the 10th March, 1970. The learned Judge set out the facts of the case relevant to the reference and set out the terms of section 5 of the Act and sections 10 and 11 of the Constitution. He considered certain dicta relating to the general approach of the courts where the constitutionality of legislation is challenged. He said that, while section 10 of the Constitution prescribed and protected the fundamental right of freedom of expression, it did not permit a person to what whatever he chose when, where or in any manner he chose. The learned Judge was not aware of any right in a person to the uncontrolled use of a noisy instrument as defined in the Act in the circumstances in which the Act sought to control 40
- pp.10-15
- p.15 1.37 -
p.16 1.43
- p.16 1.44 -
p.17 1.8
- p.17 11.9-12

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the use of such instruments, He therefore held that the provision which required that the prior written approval of the Respondent be obtained before any noisy instrument is used at a public meeting was not an infringement of the right of freedom of expression guaranteed by section 10 of the Constitution.

p.17 11.13-19

10 9. The learned Judge then considered section 11 of the Constitution, concerning the rights of association and assembly. He agreed with Professor O. Hood Phillips and a dictum of Wooding, C.J., that it was necessary to draw a distinction between the right of association and assembly on the one hand and the objects to be pursued in association and assembly and the means to be employed to attain those objects on the other. In the light of that distinction, the learned Judge held that the Act by requiring that permission in writing of the Respondent be obtained before using any noisy instrument at a public meeting did not constitute an abridgement of the freedom guaranteed by section 11 of the Constitution.

p.17 11.28-end
p.18 11.1-29

p.17 11.40-end

p.18 11.32-42

20 10. The learned Judge then summarised certain submissions made by counsel for the Appellant that section 5 of the Act was unconstitutional because it did not lay down any rules to guide the Respondent when exercising his discretion, because there was no provision for judicial review of the acts of the Respondent in the exercise of his discretion and because there was no form of appeal against any decision of the Respondent. The learned Judge did not understand from a dictum of Glasgow, J., cited by counsel for the Appellant, that wherever a statute gave an unfettered discretion to a public officer such statute was unconstitutional. He understood Glasgow, J., to be saying that, where a statute authorised the imposition of restrictions on fundamental rights and freedoms, then the fact that the imposition was in the unfettered discretion of a public officer might render the statute unconstitutional as it could not be shown in those circumstances that the statute was reasonably justifiable in a democratic society. The learned Judge considered that the discretionary powers conferred by section 5 of the Act on the Respondent were irrelevant in view of his finding that section 5 did not authorise infringement of the fundamental rights and freedoms guaranteed by sections 10 and 11 of the Constitution. He specifically left undecided the question of judicial review of the exercise of the discretionary powers conferred by section 5 of the Act.

p.19 11.16-26

p.19 1.37-
p.20 1.6

p.20 11.7-10.

p.20 11.11-17

p.20 11.18-23

p.20 11.23-25

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- p.20 11.26-28 11. The learned Judge therefore held that section 5 of the Act did not contravene the provisions of sections 10 and 11 of the Constitution.
- pp. 21-22 12. The Appellant appealed to the Court of Appeal of St. Christopher Nevis and Anguilla. The appeal was heard by Gordon, C.J. (Ag.), P.C. Lewis, J.A., and St. Bernard, J.A. (Ag.) and judgment was given on the 28th July 1970, unanimously dismissing the Appellant's appeal. 10
- pp. 23-25 13. Gordon, C.J. (Ag.) summarised the facts giving rise to the appeal. The learned Chief Justice said that counsel for the Appellant had submitted that permission under section 3 of the Act to hold a public meeting automatically included permission to use a loudspeaker; that any further requirement under section 5 of the Act as to the need for permission to use a loudspeaker would be a hindrance to the freedom of expression and to communicate ideas and information; that any law tending to hinder such enjoyment would be prima facie bad unless it could be shown that it fell within the exceptions laid down in section 10 (2) of the Constitution: that, it was further submitted, as section 5 of the Act had not been shown to be reasonably justifiable, it was unconstitutional; and that the unfettered discretion given to the Respondent was an added reason for section 5 of the Act being unconstitutional. The learned Chief Justice set out the effect of section 10 (2) of the Constitution and expressed the view that the freedoms contemplated by the section could only be enjoyed by individuals insofar as their enjoyment did not constitute a nuisance to others. He said that counsel for the Appellant had conceded that there was nothing unconstitutional in the Legislature regulating the use of loudspeakers but had contended that it was unconstitutional for section 5 of the Act to give an unfettered discretion to the Respondent without providing for any judicial review of that discretion once exercised. The learned Chief Justice did not agree with that contention because there could be no presumption that an unfettered discretion would be exercised arbitrarily. He took into account the fact that the use of loudspeakers at any time and in any place could constitute a nuisance, that the Respondent as the senior officer entrusted with the enforcement of law and order should best be able to assess the extent to which the freedom 20 30 40 50
- p.25 11.5-22
- p.27 11.28-40
- p.27 1.41-
p.28 1.5
- p.28 11.5-10
- p.28 11.11-20

of some individuals might be enjoyed without causing disturbance to others and that the discretionary power under section 5 of the Act was limited in its application and duration; he concluded that in those circumstances there was nothing unconstitutional in the Legislature placing a discretionary power in the Respondent to decide in what circumstances loudspeakers might be used. He considered that it was right to assume that the Respondent would exercise his discretion with reason and justice and in keeping with the responsibilities of his office; his view was that it was speculative argument to suggest otherwise, particularly as the Appellant had made no application for permission under section 5 of the Act.

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14. On the assumption that the freedom to use a loudspeaker at a public meeting was a necessary adjunct to the right of free expression and of communication with others, the learned Chief Justice considered that this circumstance in itself could not give the necessary licence to anyone to use a loudspeaker at any time and in any place. In the learned Chief Justice's view, it followed that the Appellant had failed to establish that he had a right to use a loudspeaker at a public meeting and thus to establish that he had suffered a loss of any fundamental right reserved to him by the Constitution. In his view, section 5 of the Act did not in any way contravene the Constitution. The learned Chief Justice was in favour of dismissing the appeal with costs.

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15. In his Judgment, P.C. Lewis, J.A., having stated that counsel for the Appellant had conceded that the right of assembly under section 11 of the Constitution did not arise on the facts and had confined his submissions to section 10, set out the long title to the Act in which its purpose was stated to be 'to repeal the Public Meetings and Processions Ordinance (Cap.302) and replace it with provisions calculated to facilitate police arrangements for the preservation of order at public meetings and processions.' The learned Judge said that one question which necessarily arose for decision having regard to the declared purpose of the Act was whether section 5 thereof made provision that was reasonably required in the interests of public order under section 10 (2) (a) of the Constitution

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p.28 11.20-24

p.28 11.24-28

p.28 11.28-32

p.28 11.33-44

p.29 11.13-18

p.29 11.18-20

p.29 11.20-21

pp.29-46

p.31 11.22-27

p.32 11.21-26

p.33 11.3-10

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p.33 11.15-20 He said that the substantial point argued on behalf of the Appellant was that a law which granted an absolute and unfettered discretion to the Respondent such, as it was argued, as that granted by section 5 (2) of the Act, was ipso facto unconstitutional. He said that it was contended on behalf of the Respondent that the discretion given by section 5 (2) of the Act did not make the sub-section unconstitutional; the Respondent was required to carry out a statutory function which, although of a discretionary nature was not absolutely unfettered because, if he exceeded his powers, he would be answerable for his actions at law. It was further submitted on behalf of the Respondent that the Act was regulatory in purpose and was enacted in the interest of public order as was reasonably required pursuant to section 10 (2) (a) of the Constitution. A further submission made on behalf of the Respondent was that section 5 of the Act took away no fundamental right from the citizen but merely regulated the use of loudspeakers at public meetings which was said to be part of the normal duties of the police in preserving public order; the use of loudspeakers might offend against the rights and freedoms of others. It was therefore submitted that the use of loudspeakers at public meetings could validly be regulated. The learned Judge then considered certain authorities cited on behalf of the Appellant and distinguished the same.

p.34 11.27-34 10

p.34 11.4-11

p.34 11.12-30 20

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p.38 11.38 -
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p.39 11.6-15 40

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p.39 1.6

p.39 11.15-16 50

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only where it was desired to exercise the right in conjunction with the use of a loudspeaker that any question arose. The learned Judge considered that any question thus raised could not cast doubt upon the right to exercise the freedom of expression but was always ancillary thereto.

p.39 11.16-21

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17. The learned Judge then considered the matter of the exercise of a discretion by an executive officer. He considered the case of Roncarelli v. Duplessis (1959) 16 D.L.R. 689 and concluded that in none of the judgments in that case was it said that the grant of a discretion to a Liquor Commission to issue or cancel licences was in itself unconstitutional. He cited a textbook writer and another decided case and concluded that in cases where a discretionary power was granted to an executive authority the mere fact that the power might possibly be exercised arbitrarily was no ground for declaring the law granting such power unconstitutional, for there was no presumption that the power would in fact be so exercised. It should be assumed that the recipient of the power would, in exercising it, act in good faith.

pp. 39-41

p.41 11.11-20

pp. 41-42
p.42 11.30-37

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18. The learned Judge then considered the Appellant's submission that the absence of any provision for judicial review in section 5 of the act was one of the reasons for saying that the discretion of the Respondent, being unfettered, was liable to abuse. The learned Judge cited certain authorities and held that when it is shown that a power had been arbitrarily exercised against an individual, the Courts would not hesitate to interfere for his protection, while it might be difficult to prove the mis-use of a discretionary power, that did not detract from the validity of the principle that the Courts would interfere in cases of such mis-use.

pp.43-44

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p.43 1.43 -
p.44 1.1

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p.44 11.1-17

19. The learned Judge finally considered section 10 (2) of the Constitution in the light of certain concessions made by counsel for the Appellant, in particular that some form of control might properly be imposed on the use of noisy instruments in connection with public

p.44 11.37-46

p.44 1.46 -
p.45 1.1

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p.44 11.43-45	meetings. As the Appellant objected to the method of control envisaged by section 5 of the Act, the learned Judge concluded that it was necessary to consider whether section 5 contained restrictions which might be regarded as reasonable under section 10 (2) of the Constitution. He cited an authority which discussed the test of reasonableness. Applying the considerations set out in that authority, the learned Judge came to the conclusion that section 5 of the Act was designed not to prohibit, but to regulate the use of noisy instruments at public meetings. In his view, section 5 was designed to prevent the mis-use of such instruments, which by their nature were susceptible of easy misuse, leading readily to the constituting of a nuisance and thus becoming objectionable to public order. Section 5 therefore made provision that was reasonably required in the interests of public order within section 10 (2) of the Constitution and was not therefore unconstitutional. In relation to the onus of proving that the provisions of section 5 were not reasonably justifiable in a democratic society under the proviso to section 10 (2) of the Constitution, the learned Judge considered that such onus was upon the Appellant as he was impugning the validity of section 5 of the Act. As no argument had been addressed to the Court of Appeal by counsel for the Appellant on this aspect of the case, the learned Judge therefore held that the Appellant had not discharged the burden of disproving the presumed constitutionality of section 5 of the Act. Accordingly, the learned Judge was in favour of dismissing the appeal with costs.	10
p.45 1.10 - p.46 1.5		
p.46 11.6-11		
p.46 11.11.-20		
p.46 11.21-25		
p.46 11.37-40		30
p.46 11.41-42		
pp.47-48	20. St. Bernard, J.A. (Ag.) agreed that the appeal should be dismissed. The learned Judge said that all the freedoms provided for under sections 10 and 11 of the Constitution were subject to limitations and that counsel for the Appellant had conceded that there was nothing wrong in regulating the use of loudspeakers. Section 5 of the Act simply allowed the Respondent to say when, and under what circumstances, loudspeakers might be used and did not take away any right guaranteed by the Constitution. There was no presumption that the discretion given by Section 5 would be abused as the exercise of a discretion implied its use	40
p.47 11.3-6		
p.47 11.12-14		
p.47 11.32-34 & 11.29-31		
p.47 11.35-37		50

10 in good faith in the discharge of a public duty. It seemed to the learned Judge that, assuming that the use of a loudspeaker at a public meeting was an adjunct of the freedom of expression, the ordinary remedies at common law were open to a person if he could prove that the grant of a permit for such use had been unreasonably withheld or abused. The learned Judge held, however, that there was no
fundamental right under the Constitution for the use of noisy instruments at public meetings.

p.47 1.44 -
p.48 1.2

21. The Appellant was granted special leave in forma pauperis to appeal to the Privy Council by Order dated the 27th October, 1971

20 22. The Respondent respectfully submits that this appeal ought to be dismissed and the judgments of Renwick, J. (Ag.) in the High Court, and of Gordon, C.J. (Ag.) P.C. LEwis, J.A. and St. Bernard J.A. (Ag.) in the Court of Appeal were correct. It is respectfully submitted that section 5 of the Act does not contravene either sections 10 or 11 of the Constitution. There is no fundamental right to use a loudspeaker at public meetings. Assuming the existence of such a right, section 5 does not, nor is it designed to, prohibit the use of loudspeakers at public meetings but regulates such use of loudspeakers so as to make provision that is reasonably required in the interests of
30 public order under Section 10 (2) (a) of the Constitution.

23. The Respondent respectfully submits that the Judgments of the High Court and of the Court of Appeal of St. Christopher Nevis and Anguilla are right and ought to be affirmed and this appeal ought to be dismissed for the following (among other)

R E A S O N S

- 40 1. BECAUSE on a proper construction of section 5 of the Act and of sections 10 and 11 of the Constitution, section 5 of the Act does not contravene the Constitution.
2. BECAUSE section 5 does not contravene sections 10 or 11 of the Constitution.

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3. BECAUSE section 5 of the Act makes provision that is reasonably required in the interests of public order under section 10 (2) (a) of the Constitution.
4. BECAUSE of the other reasons given by Renwick, J. (Ag.), Gordon, C.J. (Ag.), P.C. Lewis, J.A. and St. Bernard, J.A. (Ag.)

STUART N. MCKINNON.

No. 9 of 1972

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CHRISTOPHER NEVIS AND ANGUILLA

B E T W E E N

ARTHUR FRANCIS Appellant

AND

THE CHIEF OF POLICE Respondent

CASE FOR THE RESPONDENT

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Hale Court,

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