Privy Council Appeal No. 9 of 1972

Arthur Francis - - - - - - - - *Appellant*

v.

The Chief of Police - - - - - - - *Respondent*

FROM

THE COURT OF APPEAL FOR ST. CHRISTOPHER, NEVIS AND ANGUILLA

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 5TH FEBRUARY 1973

Present at the Hearing:
LORD WILBERFORCE
VISCOUNT DILHORNE
LORD PEARSON
LORD KILBRANDON
LORD SALMON

[*Delivered by* LORD PEARSON]

On Sunday 29th June 1969 at a public meeting held in Basseterre in the State of St. Christopher, Nevis and Anguilla the appellant used a loudspeaker without having obtained permission from the Chief of Police to do so. He was charged with an offence against section 5 of the Public Meetings and Processions Act 1969. At the hearing before the magistrate on 12th November 1969 the appellant by his counsel admitted the facts deposed to by the witnesses for the prosecution, but submitted that section 5 of the Act was unconstitutional, in that it purported to give to the Chief of Police an absolute, unfettered discretion to grant or refuse permission for the use of a loudspeaker, and that the effect was to curtail the fundamental rights of freedom of speech and of assembly laid down in sections 10 and 11 of the Constitution. The magistrate found that a *prima facie* case had been made out against the appellant, but at the request of the appellant by his counsel referred to the High Court under section 16 (3) of the Constitution the question which had arisen as to the alleged contravention of sections 10 and 11 of the Constitution by section 5 of the Act. The question for determination of the High Court was stated, with some amplitude of explanation, as follows:—

> " Whether the legislation, by requiring police permission for the use of a microphone or other similar instruments at a public meeting, offends against sections 10 and 11 of the Constitution. In other words, given a situation where police approval has already been obtained to hold a public meeting, should a speaker for that meeting be put to the further requirement of having to seek police permission for the use of a microphone also?

Does the legislation in question have a restricting or qualifying effect on the free exercise of the freedoms guaranteed by the Constitution, such as freedom of speech and of assembly?

Does the said legislation get around, however unintentionally, these guarantees, or inhibit these rights? Does freedom to speak lawfully at a lawful assembly of persons cover only the use of one's mere voice, but not a speaking instrument used for better—or even adequate—communication to the crowd?

This is a nub of the issue raised by the defendant, as understood by the Magistrate. This is the constitutional point on which the ruling of the High Court is sought."

The contentions filed on behalf of the defendant, who is now the appellant, brought out the main issue succinctly, contending:

"1. That section 5(1) of the Public Meetings and Processions Act 1969 No. 4 of 1969 contravenes against sections 10 and 11 of the St. Christopher, Nevis and Anguilla Constitution.

2. That the unfettered discretion of the Chief of Police to grant or refuse permission for the use of noisy instruments at a public meeting indicates that the legislation is an unreasonable restriction of the freedoms laid down in sections 10 and 11 of the said Constitution."

In the High Court Renwick J. gave a reasoned decision holding that section 5 of the Act did not contravene the provisions of sections 10 and 11 of the Constitution. On appeal to the Court of Appeal it was conceded on behalf of the appellant that no question arose with regard to section 11 (which provides protection for freedom of assembly and association) and the argument was confined to section 10 (which provides protection for freedom of expression). The Court of Appeal in separate judgments unanimously held that section 5 of the Act did not contravene section 10 of the Constitution and they dismissed the appeal.

For the purpose of the present appeal the only provisions of the Constitution which need to be set out are sections 1, 10 and 34. They are as follows:—

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

(*a*) life, liberty, security of the person and the protection of the law;

(*b*) freedom of conscience, of expression and of assembly and association; and

(*c*) protection for the privacy of his home and other property and from deprivation of property without compensation,

the provisions of this 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 the said rights and freedoms by any person does not prejudice the rights and freedoms of others or the public interest.

. . . . . .

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.

(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;

(*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,

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.

. . . . . .

34. Subject to the provisions of this Constitution, the Legislature may make laws for the peace, order and good government of Saint Christopher, Nevis and Anguilla."

Before coming to the Act itself some account should be given of the history leading up to it. There was a Public Meetings and Processions Ordinance 1948. Under section 3 where at any time it appeared to the Administrator in Council to be in the interest of good order or the public safety so to do, he might by proclamation prohibit in any public place (*a*) all meetings, gatherings and assemblies of persons (*b*) all processions and marches (*c*) all persons from organizing, holding or speaking at or attending any meetings, gatherings and assemblies of persons. Such a proclamation was to remain in force for a period of not more than fifteen days, though without prejudice to the issue of a further proclamation, and there were certain exemptions from the prohibitions. Section 4 provided that so long as such a proclamation was in force no person should within the area to which the proclamation applied (*a*) carry any lighted torch (*b*) beat any drum or blow or use any noisy instrument (*c*) without lawful excuse carry any weapons of offence. Then in 1967 there was an amending Ordinance which inserted a new section 3A. By that section it was provided that (subject to certain exceptions) no person should:

" (*a*) organize, hold or speak at any meeting, gathering or assembly of persons;

(*b*) organize or take part in any procession or march;

(*c*) use any loudspeaker or other noisy instrument for the purpose of announcing or summoning any meeting, gathering or assembly of persons, procession or march,

in any public place . . . without having first obtained permission in writing for such purpose from the Chief of Police (which permission it shall be discretionary in the Chief of Police to grant or withhold)."

The amending Ordinance, which inserted the new section 3A, was passed on 21st February 1967 and came into force on 23rd February 1967. The Constitution came into force four days later on 27th February 1967.

In the cases of *Chief of Police v. Powell* and *Chief of Police v. Thomas* [1968] 12 W.I.R. 403 the defendants were charged with having on 26th February 1967 spoken at a meeting without having first obtained permission in writing for such purpose from the Chief of Police contrary to section 3A. The defendants admitted the facts, but contended that paragraph (*a*) of section 3A contravened section 10 and/or section 11 of the Constitution. In the High Court it was held by Glasgow J. on 23rd July 1968 that paragraph (*a*) of section 3A contravened the provisions of sections 10 and 11 of the Constitution, but that offences contrary to section 3A (*a*) of the Ordinance committed before 27th February 1967 were not affected by such contravention.

Afterwards in March 1969 the Act was passed and came into force on 19th March 1969. It wholly repealed the former Ordinance as amended and did not re-enact any of its provisions.

The new provisions are quite elaborate, and it is reasonable to infer that they were drafted with great care in the light of the fate which section 3A of the former Ordinance had suffered in the High Court, and also in the light of the conditions, known to the Legislature, affecting the preservation of order in the State. The long title is " An Act to repeal the Public Meetings and Processions Ordinance and replace it with provisions calculated to facilitate Police arrangements for the preservation of order at public meetings and processions ". Section 2 contains definitions, one of which is that " noisy instrument " includes loudspeakers, loudhailers, megaphones, amplifiers, tape recorders and gramophones. Under section 3 (1) any person who desires to hold a public meeting in a public place must give previous notice to the Chief of Police of his intention to hold the meeting and of the time and place. Under subsection (2) where notice has been given of the holding on the same date of two or more public meetings within half a mile of each other the Chief of Police may, having regard to the proximity of the meetings and of the times at which they are to be held, prohibit or impose restrictions on the holding of any such meeting, other than the public meeting in respect of which notice was first received, whenever he shall consider it desirable in the interest of public order or safety so to do. But in such a case the organiser of the proposed meeting may appeal to the Governor. Under subsections (4) and (5) if a public meeting is held without adequate previous notice or contrary to a prohibition or restriction, any person holding the meeting or speaking at it is guilty of an offence and any member of the Police Force may stop the meeting and cause it to be dispersed. Under subsection (6) any member of the Police Force not below the rank of Corporal may as occasion requires direct the conduct of all meetings in public places and direct any public meeting to disperse if he has reasonable grounds for apprehending a breach of the peace at such meetings. Subsection (8) provides that it shall be the duty of all members of the Police Force to keep order in public places and prevent obstructions on the occasions of public meetings and in any case where public thoroughfares may be thronged or may be liable to be obstructed. It is to be noted that under this section 3 a person who wishes to hold a public meeting, though he does have to give notice of it, does not have to ask permission, and the holding of the meeting cannot be prohibited or restricted except in special circumstances connected with the preservation of public order.

Section 4 contains equally elaborate provisions relating to public processions. Subsection (1) provides that no person shall hold, organise or take part in any public procession unless the permission in writing of the Chief of Police has been first obtained. Subsection (2) provides that it shall not be lawful for any public procession to take place during the night. Subsection (3) requires previous notice to be given of any intended

public procession. Subsection (4) provides that "If the Chief of Police having regard to the time and place at which any public procession is intended to take place, the route proposed to be taken or any other relevant circumstances, apprehends that the procession may occasion serious public disorder, he may—

(*a*) refuse to grant the application, or

(*b*) give directions, imposing upon the persons holding or taking part in the procession, such conditions as appear to him to be necessary for the preservation of public order, including conditions prescribing the route to be taken by the procession and the hours between which it shall take place, and prohibiting the use of any noisy instrument and the entry of the procession into any specified street or other public place."

Under subsection (5) if the Chief of Police refuses permission for the holding of a public procession, the applicant may appeal to the Governor. Subsections (6) to (10) contain ancillary provisions.

In contrast to the elaborate provisions of sections 3 and 4, section 5 deals shortly and simply with the subject of "noisy instruments". It provides 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 so to do, shall be guilty of an offence against this Act and shall be liable on summary conviction to a fine not exceeding one hundred dollars.

(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."

For the purpose of determining its constitutional validity, this rather summary provision relating to the use of loudspeakers and other noisy instruments should be taken in its context. It refers to the use of such instruments in connection with public meetings and public processions. The principal subjects are the public meetings and public processions, and they are dealt with at some length and in a liberal spirit. The use of loudspeakers and other noisy instruments is an adjunct or accessory, and can suitably be dealt with in a simpler way.

A preliminary question arises as to the effect of section 1 of the Constitution, which is set out above. An almost identical provision in the Constitution of Malta was considered by the Judicial Committee in *Olivier v. Buttigieg* [1967] A.C. 115 and in giving the judgment Lord Morris of Borth-y-Gest said at pp. 128–9—

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

the fundamental rights and freedoms, but the section proceeds to explain that since even those rights and freedoms must be subject to the rights and freedoms of others and to the public interest it will be found that in the particular succeeding sections which give protection for the fundamental rights and freedoms there will be 'such limitations of that protection as are contained in those provisions'. Further words, which again are explanatory, are added. It is explained what the nature of the limitations will be found to be. They will be limitations 'designed to ensure that the enjoyment of the said rights and freedoms by any individual does not prejudice the rights and freedoms of others or the public interest.'"

Similarly in *A. K. Gopalan v. The State of Madras* [1950] Supreme Court Reports 88 at pp. 190–1 Patanjali Sastri said:

"'Liberty', says John Stuart Mill, 'consists in doing what one desires. But the liberty of the individual must be thus far limited—he must not make himself a nuisance to others.' Man, as a rational being, desires to do many things, but in a civil society his desires have to be controlled, regulated and reconciled with the exercise of similar desires by other individuals. Liberty has, therefore, to be limited in order to be effectively possessed."

In the same case at p. 253 Mukherjea J. referred to the question of adjusting the conflicting interests of the individual and of the society. He said:

"What the Constitution, therefore, attempts to do in declaring the rights of the people is to strike a balance between individual liberty and social control."

On coming to the question whether section 5 of the Act contravenes section 10 of the Constitution, one finds there are many relevant cases decided in the United States (*Lieberman v. Van De Carr* (1905) 199 U.S. 552; *Lovell v. Griffin* (1937) 303 U.S. 444; *Hague v. Committee for Industrial Organisation* (1938) 307 U.S. 496; *Cantwell v. Connecticut* (1939) 310 U.S. 296; *Cox v. New Hampshire* (1940) 312 U.S. 569; *Saia v. New York* (1947) 334 U.S. 558; *Kovacs v. Cooper* (1949) 336 U.S. 77) and in Canada (*Roncarelli v. Duplessis* [1959] 16 D.L.R. (2d) 689) and in India (*A.K. Gopalan v. Madras (supra); Thappar v. Madras* [1950] Supreme Court Reports 594; *Madras v. Row* [1952] Supreme Court Reports 597; *Indulal v. The State* [1963] A.I.R. (Gujarat) 259) and in Pakistan (*Safdar v. West Pakistan* (1964) All Pakistan Legal Decisions (Lahore) 718) and in the West Indies (*Collymore v. Attorney General* [1967] 12 W.I.R.5 and [1970] A.C. 538). There are in the judgments many passages which might be cited, but a long series of citations would not be appropriate in this case. Suffice it to say that there is a full review of relevant factors in the judgment of Miabhoy J. in the *Indulal* case (*supra*).

The two conflicting considerations which have to be reconciled or mutually adjusted are stated in the differing opinions that were delivered in the United States Supreme Court in *Saia v. New York* (*supra*) and *Kovacs v. Cooper* (*supra*). By way of introduction it will be convenient to set out the First Amendment and the Fourteenth Amendment to the Constitution of the United States—taking these from the judgment of Hughes C.J. in *Lovell v. Griffin* (*supra*). The First Amendment is as follows:

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof, or abridging the freedom of speech or of the press; or the right of the people peaceably to assemble and to petition the government for a redress of grievances."

The Fourteenth Amendment is as follows:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States, and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

In *Saia v. New York (supra)* in the opinion of the Court by Douglas J., which was a majority opinion, it was said at pp. 560–1:

> "In *Hague v. C.I.O.* we struck down a city ordinance which required a licence from a local official for a public assembly on the streets or highways or in the public parks or public buildings. The official was empowered to refuse the permit if in his opinion the refusal would prevent 'riots, disturbances or disorderly assemblage.' We held that the ordinance was void on its face because it could be made 'the instrument of arbitrary suppression of free expression of views on national affairs.' The present ordinance has the same defects. The right to be heard is placed in the uncontrolled discretion of the Chief of Police. He stands athwart the channels of communication as an obstruction which can be removed only after criminal trial and conviction and lengthy appeal. A more effective previous restraint is difficult to imagine. Unless we are to retreat from the firm positions we have taken in the past, we must give freedom of speech in this case the same preferred treatment that we gave freedom of religion in the *Cantwell* case, freedom of the press in the *Griffin* case and freedom of speech and assembly in the *Hague* case. Loud-speakers are today indispensable instruments of effective public speech. The sound truck has become an accepted method of political campaigning. It is the way people are reached."

On the other side (in the minority in that case, but in the majority in *Kovacs v. Cooper (supra)* there was Frankfurter J. with whom Reed J. and Burton J. concurred. He said at pp. 562–3:

> "The appellant's loud-speakers blared forth in a small park in a small city. . . . The native power of human speech can interfere little with the self-protection of those who do not wish to listen. They may easily move beyond earshot, just as those who do not choose to read need not have their attention bludgeoned by undesired reading matter. And so utterances by speech or pen can neither be forbidden nor licensed, save in the familiar classes of exceptional situations. *Lovell v. Griffin* 303 U.S. 444; *Hague v. C.I.O.* 307 U.S. 496; *Schneider v. Irvington* 308 U.S. 147; *Chaplinsky v. New Hampshire* 315 U.S. 568. But modern devices for amplifying the range and volume of the voice, or its recording, afford easy, too easy, opportunities for aural aggression. If uncontrolled, the result is intrusion into cherished privacy."

At pp. 564–5 he said:

> "It is not unconstitutional for a State to vest in a public official the determination of what is in effect a nuisance merely because such authority may be outrageously misused by trying to stifle the expression of some undesired opinion under the meretricious cloak of a nuisance. Judicial remedies are available for such abuse of authority, and courts, including this Court, exist to enforce such remedies. Even the power to limit the abuse of sound equipment may not be exercised with a partiality unrelated to the nuisance. But there is here no showing of either arbitrary action or discrimination."

Jackson J., also in the dissenting minority, gave a separate judgment.

He said at p. 571:

> " But it is said the State or municipality may not delegate such authority to a Chief of Police. I am unable to see why a State or city may not judge for itself whether a Police Chief is the appropriate authority to control permits for setting up sound-amplifying apparatus. *Cox v. New Hampshire* 312 U.S. 569. It also is suggested that the city fathers have not given sufficient guidance to his discretion. But I did not suppose our function was that of a council of revision . . . I disagree entirely with the idea that ' Courts must balance the various community interests in passing on the constitutionality of local regulations of the character involved here '. It is for the local communities to balance their own interests—that is politics—and what courts should keep out of. Our only function is to apply constitutional limitations."

The American judgments show the principles and policy considerations involved, but may not be a guide to the detailed construction of section 10 of the Constitution of the State of St. Christopher, Nevis and Anguilla, because the First and Fourteenth Amendments have no provision corresponding to subsection (2) of section 10. The American judges look for the inherent limitations which there must be in the fundamental freedoms of the individual if the freedom of others and the interests of the community are not to be infringed. There are two ways of construing section 10. One way is to read into subsection (1) the necessary limitations as inherent in the fundamental freedoms of expression and communication. The other way is to look first at subsection (1) to see whether according to the literal meaning of the words there is a *prima facie* hindering of or interference with the freedoms of expression and communication, and, if there is, look on to subsection (2) to see whether such hindering or interference is justifiable. If the second way is adopted, the phrase " public order " must be given a meaning wide enough to cover action taken for the avoidance of excessive noise seriously interfering with the comfort or convenience of a substantial number of persons. The phrase would of course cover action for the avoidance of any behaviour likely to lead to a breach of the peace, and perhaps excessive noise can be brought under that heading.

Whatever may be the exact construction of section 10, it must be clear that (1) a wrongful refusal of permission to use a loudspeaker at a public meeting (for instance if the refusal is inspired by political partiality) would be an unjustified and therefore unconstitutional interference with freedom of communication, because it would restrict the range of communication, and (2) some regulation of the use of loudspeakers is required in order that citizens who do not wish to hear what is said may be protected against " aural aggression " if that might reach unbearable intensity.

As some regulation of " noisy instruments " is required, and a system of licensing is the natural method, there must be some licensing authority to grant or refuse the permission. The Legislature of the State concerned has decided that the Chief of Police is the suitable officer to be given this power and duty. There is convenience in that choice, as he is concerned with the preservation of public order and knows the prevailing conditions affecting it and therefore is able to give a quick decision. There is no evidence, and no reason to infer, that he has abused the power or would be likely to abuse it in any way. It is reasonable to assume that the Legislature, knowing the local conditions, made a suitable choice of licensing authority.

The final question is whether section 5 of the Act is so defective as to be unconstitutional because it does not expressly lay down guide lines for the exercise by the Chief of Police of his licensing power. Whether or not it might have been better to have some express provision as to the way in which his discretion should be exercised, he is not without guidance. It is plain from the preamble to the Act and from its provisions as a whole that its object is to facilitate the preservation of public order. That being the object of the Act, he must exercise his powers *bona fide* for the achievement of that object. *Roncarelli v. Duplessis (supra) per* Rand J. (with whom Judson J. concurred) at p. 705, *per* Martland J. (with whom Kerwin C. J. and Locke J. concurred) at p. 742 and *per* Abbott J. at p. 729. Section 5 is not defective, or at any rate not seriously defective, in this respect. It does not contravene the Constitution.

Their Lordships will humbly advise Her Majesty that the appeal should be dismissed.

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In the Privy Council

ARTHUR FRANCIS

v.

THE CHIEF OF POLICE

DELIVERED BY
LORD PEARSON

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