

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

SUIT M.16 OF 1981

Regina v. Central Area Licensing Authority  
Ex parte National Transport Ltd.

Coram: Parnell, Malcolm & Gordon, JJ.

Heard: May 7, 1981.

Carl Rattray, Q.C. and Arlene Harrison for the applicant  
Durnham Scott, Q.C. for the Licensing Authority, and  
Valentine Bowes (an interested party).

7th May, 1981

PARNELL, J: (~~oral judgments delivered~~)

We will not call on Mr. Scott.

This is an application by National Transport Limited for an order of certiorari to move into this court and quash an order of the Central Area Licensing Authority which on the 6th of March, 1981 granted a licence to interested party Valentine Bowes to operate a route between Port Esquivel in St. Catherine and Kingston.

I will first of all outline the salient facts as I see them and I will refer to the affidavit of Mr. Bowes.

In his affidavit Mr. Valentine Bowes says this in paragraph 2:-

"I applied for a road licence to operate a route between Port Esquivel and Kingston to Central Area Licensing Authority."

The substance of paragraph 3 of this affidavit is that on the 25th of August, 1980 the application came up for hearing before the authority. Mr. Bowes was present, and the applicant James Porteous, who is personally known to him for many years, was also present. Mr. Porteous made an objection to the grant of a road licence. The authority heard from Mr. Porteous; he did not call any witnesses, and his objection was dismissed.

Mr. Porteous is the Managing Director of the Company.

Now let me read this part of the affidavit of Mr. Bowes.

"Upon dismissal of his objection Mr. James Porteous shouted at the top of his voice words to the effect that he was going to put an end to the sitting of the Central Area Licensing Authority and that the Gleaner and the police could be called. He thereupon grabbed all the applications for road licences, including my application, which were on the table at which the Central Area Licensing Authority was sitting, and stormed out of the building. The hearing thereupon came to an abrupt end."

On this portion of the allegation made by Mr. Bowes, Mr. Porteous does not reject it; it is admitted by him in an affidavit sworn to on the 4th or 5th of May - the date is not very clear.

I think it is the 4th of May. Paragraph 5 of his affidavit reads thus -

"That on the 25th of August, 1980 I did strongly object to the Central Area Licensing Authority calling upon the application of Valentine Bowes when in fact several applications of my own, some of which were unopposed and made to the authority prior in time to that of Mr. Bowes, were not being dealt with by the authority; That I, therefore, in protest seized the applications on the table but later returned them to the authority."

But it seems that Mr. Porteous is in conflict with the facts as known and put in affidavit form by the present chairman of the authority. He filed an affidavit and to that affidavit is attached certain enclosures. One of them is a letter that was written to the Commissioner of Police on the 9th of October, 1980 complaining about the conduct of Mr. Porteous, and seeking the help of the Commissioner of Police to recover certain documents which he had taken from the meeting. A part of the letter reads -

"In view of the serious nature of the offence outlined above, as well as the affront it constituted to a public body, and the hardship which has resulted to the party involved, this is to request that immediate action be taken to recover the documents from Mr. Porteous, as well as to prefer such charges against him as your office should deem fit."

So the first part then of this history is in relation to what took place on the 25th of August. The interested party, Mr. Bowes continues with his affidavit, and he states in paragraph 5 --

"I renewed my application which renewal was done at great expense and resubmitted it to the Central Area Licensing Authority, and on the 6th of March, 1981 my renewed application came up for hearing."

It is with respect to the order made by the authority on the 6th of March which is the subject of the application before us.

According to Mr. Bowes, on the 6th of March, he was present.

"James Porteous made objection to my application. The Central Area Licensing Authority after hearing his objection dismissed it. James Porteous did not call any witnesses. The Central Area Licensing Authority granted my application for a Road Licence to operate three (3) omnibuses on the route between Port Esquivel and Kingston."

Now, let's see if we can get anything to support Mr. Bowes on this point.

Support comes from the Chairman, Mr. Kandekore, and I return to his Affidavit. Mr. Kandekore says, and he is referring to the hearing on the 6th of March, 1981:

The application of Mr. Bowes --

and this is in paragraph 4 of the Affidavit:

"That the said application which came before me was not opposed by anyone but I was reliably informed by the officers of the Licensing Authority that the applicant herein had made an objection within time and has complied with all the requirements but that the documents were among those forcibly removed by the said applicant; that the content of the objection was heard and ruled 'invalid' by the then Chairman and Board that preceded the present board. Accordingly the application"

which he refers as 'A' above,

"was heard as 'unopposed' but in view of the foregoing which operated on my mind I allowed the Applicant herein to make representations. He used the opportunity to criticize certain members of the board (past and present) as well as officers of the authority but made no point as to why the licence ought not to be granted. I also recall his saying that the Board had no authority to act on a substitute application."

So, on the first view both from the interested party, Bowes, and as far as the second part is concerned, the hearing on the 6th of March, there appeared to have been two areas, the 25th of August, 1980 and the 6th of March, 1981, and on each occasion an opportunity was given to Mr. Porteous to be heard. What was the reason for his opposition? That is shown in paragraph 7 of the Affidavit of Mr. Porteous. His Affidavit is sworn to on the 20th of March, 1981 and paragraph 7 reads:

"That National Transport Limited opposes the grant of the licence to Valentine Bowes because the route applied for traverses the whole of the route on which it operates LS2. Furthermore, the timetable coincides with the times at which LS2 is operated. There does not exist a need for further transport services along the route applied for by Valentine Bowes. The granting of the licence will adversely affect in a substantial way, the operation of route LS2, and will tend to make this route unremunerative and is therefore not in keeping with the needs of the Traffic Area as a whole."

That was the substance of the opposition of Mr. Porteous.

We turn to a section of the Road Traffic Act which Mr. Rattray this morning analysed with great skill and with deliberation. That section is Section 63(1):

"Subject to the provisions of this Part a Licensing Authority may grant to any person applying therefor a road licence of any of the classes specified in Section 62."

Then Section 63(2) outlines the elements that are to be considered by the Authority within their discretion in exercising the discretion to grant or to refuse the application certain things are to be taken into account. One of them that is to be taken into account follows shortly after Subsection (d):

". . . and, in the case of an application for a licence in respect of a stage or express carriage, take into consideration any representations which may be made by persons who are already providing transport facilities along or near to the routes or any part thereof or by any Traffic Area Authority," .

Mr. Rattray submitted, quite correctly, that this section means that where an application is being considered by the Authority, then any person who has registered an objection by following the procedure laid down

under the regulations is entitled to be heard by the Authority; and he is entitled to be heard, first of all, by his knowing when the sitting will take place, and secondly, he should be given a fair hearing so that he can put in his objection and call witnesses, if necessary.

Nobody can quarrel with him for that. That is what one might call putting in statutory form as far as this kind of application is concerned, the rules of natural justice. But Mr. Rattray argues, and I think this is where he used his skill and eloquence - when he was arguing the court asked him what is the complaint of the applicant, and this is how he puts it, or this is what I understand him to be saying, that there was no hearing of the application made by Mr. Bowes and that there was no hearing of the objection. In the alternative, if there was a hearing in August 1980, which made a determination on the objection at the time when the application was not being determined, then the matter was part-heard, and on the 6th of March, 1981 the Licensing Authority which heard it was a differently constituted one; therefore, it would have no jurisdiction to continue the hearing and to make a determination on it.

Now, did Mr. Porteous get an opportunity of putting forward the objection which he had raised against the application of Mr. Bowes? We have to deal with two dates - the 25th of August; there is evidence that he did have that opportunity; that is coming from the interested party Bowes. And on a fair view of the affidavits as given by these persons in the case, the applicant, Mr. Bowes, and Mr. Kandekore, and having regard to what we have seen about the conduct of Mr. Porteous, for myself, even without hearing him, I would be prepared to say that where there seems to be a clash on a material point, as between Mr. Porteous and any other witness, I prefer the evidence of the other witnesses. So there is evidence, which is preferred, that he got an opportunity on the 25th of August. But on the 25th of August, what happened was that the authority examined his objection first, he had no witnesses, the authority ruled on it,

Mr. Porteous seemed to have been incensed at the ruling and he made it very difficult for himself, for the interested party and for the Authority, by grabbing up the papers and walking out, and putting an abrupt end to the proceedings.

We turn now to what happened on the 6th of March. On the 6th of March, after Mr. Bowes had been put to great expense, what was before them now was a renewed application, but it is called a substitute application. Here again the evidence of the Chairman, supported by Mr. Bowes, is that Mr. Porteous was present and he was given an opportunity to say what he wanted to say. What he did was to use that opportunity to abuse and chastise. He had not one point of merit, according to the Chairman, to show why the application should not be granted, and so it was granted.

What, therefore, is the answer to some of the rhetorical questions put forward by Mr. Rattray in his submissions? Was the applicant given an opportunity to be heard? The answer that I give is yes. The evidence supports it.

Was there a breach of natural justice as far as he is concerned, he being the interested party and objector? The answer is no. So what remains then in the case? I can find nothing whatever to support any suggestion that the authority did anything - that is the authority on the 6th of March - which can be regarded as a breach of any rule of natural justice, or a breach of any of the statutory provisions that are required to be observed in hearing an application.

But let us for the moment assume that something did take place on the 6th of March, which would cause Mr. Porteous to complain. Let us for the moment assume that. What would be the position?

What he is asking for is a discretionary remedy to remove into this court for the purpose of having it quashed the Order of the Authority granting the licence to the interested party, Bowes. In his Affidavit, Mr. Porteous was careful not to mention one thing

about what he did which caused this application to be heard on the 6th of March, and which, no doubt, thwarted the full hearing on the first date, the 25th of August. I have read a passage from the Judicial Review of Administrative Action by S.A. de Smith, p. 257 (First Edition), and it reads thus:

"The Court is entitled to refuse certiorari and mandamus to applicants if they have been guilty of unreasonable delay or misconduct or if an adequate alternative remedy exists, notwithstanding that they have proved a usurpation of jurisdiction by the inferior tribunal or an omission to perform a public duty. On applications by subjects for certiorari to remove indictments, the courts have always exercised a very wide discretion."

What I gather the passage to be saying is this, that even in a proper case, even in a case where the applicant would have substantial grounds for complaint, the court could still refuse the relief sought by way of prerogative order if his conduct, nevertheless, warrants such a course.

The evidence is very clear. Mr. Porteous himself has admitted what has been alleged against him to a certain extent with qualification, that he disrupted a public hearing on the 25th of August by taking away valuable papers including the application of this interested party, Iowes. What is more outrageous than that? He caused a delay in the final hearing of the application made by the interested party until the 6th of March, and he now seeks from this court a prerogative order or remedy in the circumstances that he is applying. I think he is a very brave man to have come here in those circumstances.

I will just make one more comment. Mr. Rattray pointed out to us this morning that under Section 72 of the Road Traffic Act there is a right of appeal against the granting or refusal of an application by the Authority, and the right of appeal is to be taken to a special tribunal that has been set up under the Act. At page 316 of the same work that I have referred to,

Judicial Review of Administrative by S.A. de Smith, there is this passage which says this:

"The existence of a right of appeal to the courts from a tribunal's decision does not deprive the courts of power to award prohibition to restrain the tribunal from acting outside its jurisdiction, unless the statutory provisions for appeal must be construed as an exhaustive statement of the permissible means of challenge. Nor is the applicant obliged to have exhausted prescribed administrative means of redress before having recourse to the courts."

There are other comments that the learned author has made and authorities are cited. What I understand him to be saying is this, that even where in a given case, the applicant could have gone to the tribunal set up as an appeal, nevertheless, in a proper case particularly where it is alleged that the inferior court has gone outside of its jurisdiction or has done something outrageous like denying a man an opportunity of being heard, he need not go to that body at all, he can come to the Queen's court and ask for a remedy in the form of certiorari mandamus or something to that effect. I think, we have already decided that - I sat in a full court way back in 1970, in which that principle was outlined. It is reported in - I have forgotten what volume of the law reports it is mentioned.

MR. SCOTT: 15 W.I.R., My Lord, R. v. The Licensing Authority, ex parte, Panton.

PARNELL, J: Panton's case. Thank you. If I remember, you were in that case.

Nevertheless, as we say, if there are facts and circumstances which would normally give rise to an application for a prerogative order an applicant can still come and by-pass the tribunal that will hear an appeal.

I have listened with great interest to Mr. Rattray. As usual he was persuasive, eloquent, subtle. In the way he puts it it reminds me of how they described Bowen, L.J., sometimes a little too eloquent and a little too subtle for my ordinary



knowledge. The points made were well put but very subtle. I don't agree with him that there was any cause here for complaint. For my part, I would dismiss this application. The question of the costs will be left open for argument.

MALCOLM, J: Well my learned brother Parnell has outlined the short facts of this matter and has touched on the law relating thereto and I do not think it necessary to reiterate what has been said.

The Attorney for the applicant contends that the proper course that should have been adopted was to start this matter de novo, and he further contends that the objection and hearing are indivisible, and he urged many points eloquently as regards those submissions.

The objector James Portecus, even at the late stage of the hearing in March, 1981, was afforded the opportunity of making representations, as Mr. Kandekore's affidavit puts it, and he squandered the opportunity afforded him. His action, both in August, 1980 and in the subsequent hearing in 1981, left much to be desired, and, fortunately, his attorney did not seek to condone what he did.

Mr. Rattray further contended that the matter was part-heard and he urged that there was no hearing of the objection. Mr. Kandekore's affidavit is saying that there was a hearing of the objection in August which made a determination of the objection at that time when the application was being determined. Mr. Rattray contended that the matter was part-heard on the 6th and ought, as he said, to have been started de novo. I do not agree with the submissions made, and I accept and agree with the order proposed and the conclusions reached by my brother Parnell, and I too would dismiss the application.

I would say nothing as to costs until I hear further on that matter.

GORDON, J: In this matter the tribunal had before it material on which it ruled on the objection on the 25th of August, 1980, and before anything further could be done the proceedings were terminated by the actions of Mr. Porteous.

Mr. Rattray has urged that the act of Porteous, the servant or agent of National Transport Limited, in seizing the papers before the tribunal on the 25th of August, 1980, cannot be used to bar the right of the applicant, National Transport Limited, to be heard in objection on the 6th of March, 1981.

It is worthy of note that in the affidavit filed, it is disclosed that at the sitting on the 25th of August, 1980, James Porteous appeared on behalf of the Company and was heard in objection.

At the hearing on the 6th of March, Porteous again appeared and the tribunal on being informed that the applicant had had before the tribunal a properly filed objection which had been forcibly removed by Mr. Porteous, permitted Mr. Porteous to be heard in objection. Mr. Porteous was heard in objection, but his objection consisted of criticisms. It cannot, therefore be said that the applicant was not heard in objection and that the "audi alteram partem" principle was breached on the 6th of March, 1981.

Further, it is contended that the Chairman of the tribunal on the 6th of March, 1981, in paragraph 5 of his affidavit states that the board was of the view that they were bound by the ruling of the previous board that the objection was invalid. The affidavit discloses that the applicant was given an opportunity on the 6th of March, 1981 to be heard in objection. What he presented to the tribunal was not an objection; what he said was not evidence in objection on which a ruling was required, therefore, the tribunal only had before it an application which to all intents and purposes was not opposed.

I agree that this application should be refused.

(Mr. Scott asked for costs. Mr. Rattray stated that the question of costs is left to the discretion of the court.)

PARALLEL 10:

So the final order of the Court is that the motion is dismissed. The interested party, Qves, is granted his full cost, the Licensing Authority is granted such cost as may be shown to follow its being represented as a respondent in support of its own decisions. One Counsel appears for both.