IN THE SUPREME COURT OF FIJI

Civil Jurisdiction

Action No. 840 of 1983

R. v. TRANSPORT CONTROL BOARD First Respondent

Ex Parte:

SUNBEAM TRANSPORT LIMITED
PACIFIC TRANSPORT LIMITED Applicants

and

K.R. LATCHAN BROTHERS LIMITED Second Respondent
VATUKOULA EXPRESS SERVICE Third Respondent

S.M. Koya and F. Lateef for the Applicants
P. Young Q.C. and H.P. Patel for First Respondent
G.P. Shankar for Second Respondent
V. Parmanandam for Third Respondent

REASONS FOR DECISION

When I gave my decision in this matter on the 18th October, I indicated that I would give reasons at a later date. In doing so I shall confine myself to those submissions which I consider to be important. I shall not repeat anything expressed earlier unless it is necessary to do so and these observations should be regarded as an addendum to my decision.

Mr. Young submitted that the applicants herein do not have a sufficient interest in the matter to which the application relates as is required by Order 53, Rule 3(5) of the Rules of the Supreme Court. He relied upon

Helicopter Utilities Pty Ltd. v. Australian National Airline's Commission (1962) N.S.W.R. 747 in which the Supreme Court of New South Wales followed Pudsey Gas Co. v. Bradford Corporation (1873) 15 Eq. 167 in support of his contention that a commercial interest as a competitor did not constitute a sufficient interest.

Pudsey's case was decided in a Court of Equity and what was at issue was the right of a private individual to maintain a suit seeking an injunction against a public corporation which had entered into a contract potentially injurious to the commercial interests of the plaintiff. Malins V.C. at 173 held following Stockport District Waterworks Company v. The Corporation of Manchester 9 Jur. (N.S.) 267 that the allegation that " 'great loss will be sustained by the plaintiffs if the said illegal acts of the Corporation are allowed to continue' is not such an allegation of a private injury as this Court will allow as the foundation of a bill."

The Australian case referred to was also concerned with the nature of the special damages and the personal interest of a private person seeking to restrain the ultra vires acts of a public corporation. There is no question before this Court as to a cause of action. This is not a civil suit in which the applicants are seeking relief based upon an infringement of their rights. It is an application for judicial review of a decision of a statutory authority. The considerations which were before the courts in the cases cited are not in any way relevant to proceedings of this nature.

Both applicants operate bus services between Suva and Lautoka, in the case of the first applicant, by the Kings Road and the second applicant by the Queens Road. This they have done over a number of years under the authority of licences granted to them by the Transport Control Board. The applicants have alleged that the

services granted to Latchan and Vatukoula have decreased the number of passengers travelling on their buses and the resulting loss of revenue constitutes their interest. Furthermore, in the earlier proceedings, which were heard by Kermode J, no objection was taken by any other party on the grounds of lack of interest. The issue of temporary licences to Latchan and Vatukoula has in effect deprived these applicants of the fruits of their success in the previous proceedings.

I am satisfied, for these reasons, that the applicants had an interest in the decision of the Transport Control Board which entitled them to make the application.

Mr. Young, who represented the Transport Control Board, argued that his client was not a body corporate and could not be sued in a court of law. He submitted that as a result the Transport Control Board was not amenable to proceedings in the nature of certiorari or injunction. He further submitted that the proceedings instituted against his client might be regarded as an action against the Crown and that in consequence the Crown Proceedings Act, Cap.24, section 12(2) applied and the Attorney-General was the proper defendant/respondent.

I am unable to accept the proposition that an application for judicial review is a civil proceeding against the Crown. The old writ of certiorari lay against any authority which was required to act judicially. (See R. v. Manchester Legal Aid Committee Ex Parte R.A. Brand & Co. Ltd. (1952) 2 Q.B. 413 and Rex v. Electricity Commissioners (1924) 1 K.B. 171 per Atkin L.J. at 204 to 206). There is no requirement that a body subject to any form of certiorari or like remedy must be a persona at law capable of suing or being sued. The Transport Control Board is a creature of statute vested with certain duties and obligations. There can be no doubt that in the

exercise of its main function, i.e. the granting and revoking of licences, it must act judicially. If it fails to do so or if it exceeds its authority it is subject to the supervisory powers of this Court.

It was the applicants' contention that the Board did not act judicially, that it failed to take into account the public interest and the other matters which it was obliged to do before it could issue the temporary licences, that the members of the Board were biased in favour of Latchan and Vatukoula and that the Board's decision to invoke section 74 of the Traffic Act was intended to undermine the authority of the Supreme Court and defeat the ends of justice.

The Board had before it the judgment of Kermode J. delivered on the morning of the 9th September and it is recorded in the minutes of the meeting that it was considered. That judgment was critical of the Board and in particular of Mr. G.P. Lala, the Chairman. He was not present at the meeting of the 9th September. In particular Kermode J. held that in granting the original licences the Board ignored the opinions of its own officers, based upon travelling load checks, as to the need or public demand for the services covered by the original licences. The learned Judge said :

> " Had the Board perused the check lists and the reports before it, it could not have come to any other opinion but that on the loading figures disclosed and evidence before them there was justification for Mr. Khan's comment that there was very little public demand for a circular bus service. "

The Judge went on to say:

> "There were grounds for suspecting that Latchan had been given preferential treatment by the Board but before this application was made it was no more than a mere suspicion. The collusion between Mr. Latchan and the Chairman after this action commenced indicates that the earlier suspicions had some basis. "

The members of the Board were not obliged to agree with these opinions, but, they could not ignore them. In the light of what was contained in the Supreme Court judgment they might have been expected to proceed with circumspection and not to take any further action which might appear to give substance to these adverse opinions. It is to be noted that before deciding to grant the temporary licences, the Board did not seek legal advice. The acting Chairman, Mr. Jamnadas, is a barrister and solicitor of this Court but, as a member of the Board he was not in a position to offer objective legal advice. There is nothing to indicate that he did offer any such advice, or that the Board acted on it.

Section 74(1) of the Traffic Act empowers the Board to act without complying with the provisions of section 65. Nothing is in the statute which relieves the Board from its duty to apply sections 64, 66, 67 or any other provisions of the Act which are relevant. It was submitted that section 66(2)(f) inasmuch as it refers to public sitting held in accordance with the provisions of section 65 could have no application. However, the subsection deals with representations from other sources. If the legislature had intended to exclude entirely the provisions of the Act, other than section 65, it could have done so in specific and unambiguous terms. To accept the submissions made in this regard is to ask this Court to re-write section 74, which I am not prepared to do.

In the first instance the temporary licences were granted to Latchan and Vatukoula although no applications for such licences, prepared in accordance with section 64, were before the Board. All the Board had were letters dated 9th September and delivered on the same day from Messrs G.P. Shankar & Co. acting on behalf of Vatukoula and Latchan. Both these letters have referred to the "desperate need" for the continuation of

the cancelled services in the interests of the "travelling public". These letters did not offer the Board any material which might support the view expressed as to the need for the services. In my view the Board was not entitled to act on these letters and they should have awaited applications in the prescribed form accompanied by the prescribed fees. It is noted that section 64 empowers the Board to require any applicant to submit such further particulars as may reasonably be necessary to enable it to discharge its duties in relation to the application. The Board does not appear to have considered anything more from the applicants than the contents of the solicitor's letters.

Section 66(2) makes it mandatory for the Board to have regard to certain matters before exercising its discretion to grant or refuse a road service licence. Of these the most important are those contained in subsection (a), (b), (c) and (f). The Board was fully aware, from the previous proceedings before the Supreme Court, of the objection raised by the present applicants who were carrying on transport services likely to be affected by the grant of temporary licences. There is nothing in the minutes to suggest that the Board gave any thought whatsoever to the effect of their decision upon the position of the present applicants who had fought so vigorously the grant of the licences declared to be invalid. I am obliged to conclude that although the Board considered section 74(1) of the Traffic Act it believed that it was not obliged to pay attention to the provisions of sections 64 and 66 and their failure to do so undermines the basis of their decision.

The Board in its minutes states that it considered the public interest but there is no indication as to how or to what extent or in what particular that interest was considered. They cannot dispose of the obligation to consider the public interest by the use of a form of

words in a resolution.

The Board also referred to load checks by transport officers and the opinions of these officers relating to the public demand and immediate need to establish a new service. What opinion and from what officers they had before them is not stated. But, it is clear from the minutes of the meeting taken as a whole that on the 23rd August Mr. Mustaq, Transport Officer, Higher Grade, Western, complained that the loading of the Vatukoula Express Service was very poor and the Board should cancel the trips. I do not propose to go into details of the load checks available to the Board as they appear to me to be inconclusive. On all the available evidence I am satisfied that when the Board decided to grant these temporary licences it had no information before it which would support the view that the public interest necessitated the immediate establishment of new services over the routes concerned. While it is true that it is for the Board and not for this Court to determine what the public interest is, this Court must be satisfied that the Board did in fact consider that interest.

The resolution granting the temporary licences included a decision to appeal against the judgment of Mr. Justice Kermode. I can only express astonishment that the Board should decide to lodge an appeal without first either taking legal advice or consulting the Minister for Transport. The linking of the decision to appeal with the grant of the temporary licences suggests that the Board wanted to give a semblence of legality to its proceedings. The temporary licences served to preserve the status quo pending an appeal. How otherwise would it be possible to offer any justification for the issue of these licences? If it was not the manifest intention to appeal the temporary licences could not be regarded as anything more than a bare-faced attempt to set at naught the judgment of the Supreme Court.

Mr. Young has described the allegation that a government authority has consciously defied the Supreme Court as "an horrendous submission". The behaviour of public authorities depends upon the actions and intentions of those who control them. Men who act in bad faith in public positions may subvert any institution however sacrosanct it may appear. In this case I am concerned with the intentions of the Board members present at the meeting as appears from their actions. They must have known that the effect of granting the temporary licences was to render negatory, at least for a period of three months, the decision of the Supreme Court quashing the licences granted to Latchan and Vatukoula. They must be deemed to have intended that result.

I did not grant the prayers of the applicant in the form presented. They were far too wide to be acceptable. This Court could not grant injunctions against the Board "as at present constituted". To do so would be to interfere with the right of the Minister to appoint the members of the Board.

Although no injunctions were sought against Latchan and Vatukoula I made orders restraining them from operating services under the authority of any temporary licences which the Board might be tempted to issue. The injunctions impose no burden upon either Latchan or Vatukoula and were issued as a precaution against any further injudicious decisions which the Board might take and which would inevitably lead to further litigation.

(F.X. Rooney)
JUDGE

Suva,

7th November, 1983