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IN THE SUPREME COURT OF FIJI
Civil Jurisdiction
Civil Action No. 547 of 1982

Between:

1. NORTHERN BUS OPERATORS ASSOCIATION
2. EASTERN TRANSPORT LTD. Plaintiffs

and

1. THE ATTORNEY-GENERAL OF FIJI
2. PRINCIPAL LICENSING AUTHORITY
3. THE CENTRAL TRAFFIC AUTHORITY Defendants

Dr. Sahu Khan and Mr. F.S. Lateef for the
Plaintiffs.
Mr. Q. Bale for the Defendants.

DECISION

The plaintiffs seek a declaration that Regulation 55 of the Traffic Regulations is invalid as it is ultra vires the Traffic Act and that all excess permits issued under the Regulation are also invalid.

The Traffic Regulations were originally made by the Central Traffic Authority in 1974. Regulation 55 is a Regulation dealing with the carriage of passengers on goods vehicles and trailers. It is in the following terms:-

"55.- (1) Except with the prior written authorization of a licensing authority, no person shall cause or permit a greater number of passengers to be carried on a goods vehicle or a motor tractor than the number which the vehicle is authorized to carry under the terms of its licence, nor cause or permit the carriage of passengers on a trailer. Such authorization shall be in the appropriate form.

(2) For the purpose of this regulation, a licensing authority may, in his discretion, grant

such authorization, subject to such conditions as may be deemed necessary, for the following purposes:-

(a) on a goods vehicle -

- (i) for the purpose of carrying persons to and from their work and from job to job as may be necessary;
- (ii) for the purpose of carrying labourers to load or unload the vehicle;
- (iii) for the purpose of carrying persons transporting produce to a market for distribution;
- (iv) for the purpose of carrying parties of persons to attend and return from funerals and social occasions when public transport is not readily available;
- (v) for the purpose of carrying persons to and from rural areas not served by public transport, or to and from a point on a bus route.

(b) on a trailer - for the purpose of carrying labourers when engaged on agricultural work from one area to another when it may be necessary to travel on roads for short distances;

(c) on a motor tractor - for the purpose of carrying one person in addition to the driver when such tractor is engaged on agricultural work and it becomes necessary for it to travel on a road.

(2) A licensing authority may in his discretion grant authorization, either in respect of a particular journey or in respect of any journey performed by a particular goods vehicle or trailer during any period not exceeding twelve months:

Provided that -

- (a) the owner or driver of the vehicle or trailer shall prior to the issue of such authorization by the licensing authority obtain from a certifying officer or a person authorized by the Principal Licensing Authority in that behalf, and produce to the licensing authority, a certificate of roadworthiness stating that the vehicle or trailer is suitable for the carriage of passengers; and

- (b) the applicant for such authorization to carry passengers on a goods vehicle or trailer shall pay the prescribed fee; and
 - (c) there is in force in respect of such vehicle or trailer a policy of insurance against third party risks, issued in accordance with the Motor Vehicles (Third Party Insurance) Act;
 - (d) notwithstanding the foregoing provisions of this regulation no fee shall be payable in respect of a motor vehicle which is exempted from the payment of licence fees under the provisions of the Act;
 - (e) no passengers shall be carried on a road in a trailer constructed or intended for living in or for use as an office.
- (4) Every goods vehicle permitted to carry excess passengers under the provisions of this regulation shall be fitted with sufficient seats securely attached to the body of the vehicle. "

There is an error in the revised edition of the Laws of Fiji where it indicates the Traffic Regulations were made under section 89 of the Traffic Act. The correct reference to the Act is section 86.

Section 86 of the Act is a section empowering the Authority to make regulations. It provides a general power and then follows a list of 43 specific matters in respect of which the authority is empowered to make regulations.

The general part of section 86(1) is as follows:

"86(1) The Authority may make regulations for any purpose for which regulations may be made under this Ordinance and for prescribing anything which may be prescribed thereunder and otherwise for the purpose of carrying this Ordinance into effect, and in particular but without prejudice to the generality of the foregoing may make regulations with respect to any of the following matters....."

The Solicitor General, while agreeing there was no specific mention of carriage of passengers on goods vehicles

and trailers in the Act, argues that section 86(1) is very wide and that the Authority was empowered under the general provision to make Regulation 55. He argues also that items (8) and (9) of the 43 items listed could cover use of goods vehicles and trailers and the Regulation could have been made thereunder.

I will consider items (8) and (9) later. There is only one item specifically dealing with the number of passengers that may be carried on a vehicle and that is item (29) which is in the following terms:-

"(29) the determination of the number of passengers a public service vehicle is adapted to carry and the number who may be carried.
(The underlining is mine for emphasis). "

Section 4 of the Act specifies the powers, duties and functions of the Authority. The section provides:-

"4.(1) The powers, duties and functions of the Authority shall be -

- (a) to advise the Minister and any highway authority in relation to all matters concerning roads, road traffic and traffic signs;
 - (b) to consider and determine any matter relating to roads, road traffic or traffic signs which may be referred to it by the Minister;
 - (c) to co-ordinate and formulate aims and objects of highway and road traffic legislation and to secure the improvement, co-ordination and development and the better regulation and control of all means of and facilities for road transport and all matters incidental thereto; and
 - (d) to perform all powers, functions and duties imposed upon it under the provisions of this or any other Ordinance.
- (2) In the exercise of its powers, duties and functions aforesaid, the Authority shall act in accordance with any general or special directions given to it by the Minister.

Dr. Sahu Khan attacks the validity of Regulation 55 on the following four grounds:-

- (1) The Authority was not empowered under Section 86 of the Act to make Regulation 55.
- (2) The Authority has no power to delegate in the circumstances.
- (3) The Authority has no power in particular to delegate its powers to a Licencing Authority.
- (4) It has no power to impose payment of fees.

I will consider Dr. Sahu Khan's four grounds in the order he argued them although it is only necessary to fully consider the first. He dealt with the first and fourth separately and the second and third together.

1. The Authority was not empowered under Section 86 of the Act to make Regulation 55.

The only specific provision in the Act which confers power on the Authority to make regulations is section 86. Section 4 confers no such powers. Section 86 appears to be a fairly exhaustive list of the matters requiring regulating in accordance with the provisions of the Act.

It must be borne in mind also that the Act sets up three separate and distinct authorities all with specified functions.

There is the Central Traffic Authority whose functions I have already stated.

There is the Principal Licensing Authority appointed by the Minister under section 5(1) of the Act. This Authority is charged with the duty of licensing of motor vehicles and drivers and matters incidental thereto.

The Principal Licensing Authority may under section

5(2) appoint licensing authorities and designate licensing areas as are necessary for carrying out the provisions of Part III of the Act. This part of the Act is confined to regulation of motor vehicles. It covers licensing and registration of motor vehicles, provisions as to driving and offences committed therewith.

The third Authority is the Transport Control Board whose functions are:-

"56(1) The Board shall -

- (a) advise the Minister on all matters concerning the operation of public service vehicles;
- (b) consider applications for licences forwarded to it under the provisions of this Part of this Ordinance and deal with such applications in accordance with the provisions of this Part;
- (c) consider and determine any matter which may be referred to it under the provisions of this Ordinance;
- (d) exercise such further and additional functions as may be prescribed.

(2) In the exercise of its powers, duties and functions aforesaid, the Board shall act in accordance with any general or special directions given to it by the Minister. "

The Board is set up under Part V of the Act which is devoted to transport control. Certain specific powers, which are not relevant to the matter before me are also provided in Part V of the Act.

While these three authorities are separate and distinct and independent of each other the legislature has under section 86 empowered the Central Traffic Authority to make regulations which govern or dictate the duties the other two authorities have to perform in carrying out the duties imposed on them by the Act.

The Minister in addition, by section 87 of the Act, is empowered to make regulations for the purposes

specified in that section.

No affidavit has been filed by the defendants in reply to that sworn by Mr. Sadhu Prasad, the President of the first plaintiff association and managing director of the second plaintiff company.

His affidavit discloses that persons given "excess permits" have been collecting fares from passengers carried by them. He expressed his belief that more than 700 permits have been issued in the Northern Division alone. He alleges that most of the permits do not specify the purpose of the journey, the number of journeys and time or the route to be followed. This makes it difficult for the police to detect offences. The Solicitor-General while not denying Mr. Prasad's allegations suggested that the situation disclosed in the affidavit may be due to laxity on the part of the licensing authorities concerned in issuing the permits or authorisations but he argues that the regulation is valid.

If Regulation 55 is legal, I am not concerned with the way the licensing authorities are applying it. That is a matter for the Authority.

I would have expected however, to find in Part V of the Act provisions regarding the use of all vehicles used for transport of passengers.

Part V however, is concerned primarily with operation and licensing of public service vehicles.

There is in Part V section 60(1) a provision for certificates of fitness for vehicles which are stage, express, or contract carriages, taxis, hire or rental cars. These vehicles are all public service vehicles.

The Certifying Officer must in respect of each such certificate he issues in respect of the types of vehicle I have mentioned, state:

- (i) The number of seated passengers which the vehicle is fit to carry;
- (ii) The number of additional standing passengers, if any, which the vehicle is fit to carry on occasions when standing passengers are permitted.

He is not required under the Act to issue such certificates in respect of goods vehicles.

Under section 60(2)(b) there is a prohibition of licensing a public service vehicle to carry more than the number in (i) above.

Of some significance is the fact that it is the Board, and only the Board, which is empowered to permit a P.S.V. to carry a number of passengers not greater than the combined total of passengers specified in (i) and (ii) above.

In making regulations under item 29 of section 86 the Authority would be bound by section 60. It could not permit more than the number allowed by section 60(2)(b). Under section 60(2)(c) a certifying officer can vary his certificate in respect of the number of passengers which the vehicle is certified to carry.

I have been unable to find any provision in the Act which deals with or limits in any way the number of passengers that may be carried on vehicles other than those specifically covered by section 60. Specifically I can find nothing in the Act which limits the number of persons that may be carried on a goods vehicle.

The Certificate of Roadworthiness mentioned in Regulation 10 is the certificate mentioned in section 11(2) of the Act. It covers all vehicles but, while covering construction and equipment, it does not cover use or refer

to passengers that may be carried.

The Authority in Regulation 55(1) refers to the number of passengers which a goods vehicle or motor-tractor is authorised to carry under the terms of its licence. The Regulation purports to prohibit carriage of passengers on a trailer. This prohibition appears to be in direct conflict with the intention of the Act. The definition of "trailer" indicates it is designed solely or principally for the carriage of persons or goods. If the legislature had intended to ban carriage of passengers on trailers it would hardly have adopted the definition.

It appears also that the Act confers no specific power on the Authority to limit the number of passengers that may be carried on a goods vehicle. In my view it was never intended that the Authority should seek to regulate the carriage of such passengers.

Regulation 55 was designed to provide for carriage of persons on goods vehicle in the five situations listed.

The fourth situation which I repeat for easier reference is as follows:-

"(iv) for the purpose of carrying parties of persons to attend and return from funerals and social occasions when public transport is not readily available; "

The legislature at the time Regulation 55 was made in 1974 appears to have provided for such a situation. The law was changed in 1978 when the proviso to section 59 subsection (1) was repealed. However what has to be considered is whether the Authority had power to make the

regulation in 1974 because if it was ultra vires then I do not consider the regulation has been validated since and it must still be of no legal effect.

The proviso to section 59(1) in 1974 was subject to five conditions. The operative part of the proviso was as follows:-

" Provided that a motor vehicle shall not be deemed to be a stage carriage or express carriage by reason only that it is used to carry passengers at separate fares on occasions of sporting events, public gatherings and other like special occasions or it is used to carry passengers at separate fares on a journey in relation to which the following conditions are satisfied. "

It should be noticed that the proviso could cover all vehicles including goods vehicles. It referred to "sporting events, public gatherings and other like special occasions".

In my view, if the conditions could have been satisfied in 1974 a goods vehicle could have been used for the carriage of passengers for reward on special occasions within the meaning of that term without the vehicle being classified as a public service vehicle.

The Authority by Regulation 55 purported to authorise a licensing authority to grant exemption from the conditions imposed by the Act when a goods vehicle was used to transport passengers to sporting events and public gatherings. "Social occasions" would in my view include "sporting events" and "public gatherings". Such an authorisation was in my view ultra vires the Act at the time the Authority purported to make regulation 55.

The proviso to section 59(1) was repealed in 1978 and subsection (2) replaced by a subsection which provides that a public service vehicle shall be treated as a contract carriage when it is used where certain specified conditions are fulfilled.

The licensing of contract carriages is mandatory and licences are issued by the Transport Control Board.

Neither item (8) nor (9), in my view of section 86(1) enables the Authority to directly regulate the number of passengers who may be carried on goods vehicle. It can regulate as regards the load carried by goods vehicles. "Load" is defined in the Act as "includes passengers" but "load" does not mean "passengers".

In Regulation 40 the Authority has provisions regarding maximum weight of any vehicle "laden or unladen". Provided the maximum weight is not exceeded it appears that a goods vehicle can be laden with passengers limited as to numbers only by their combined weight which should not exceed the maximum permitted load including the weight of the vehicle.

Item (8) in my view is intended to cover construction of motor vehicles and trailers, the load carried thereby and wheels and tyres. Item (9) covers division of motor vehicles for the purpose of regulations under Part III of the Act whether according to weight, construction, nature of tyres, use or otherwise.

Neither item in my view covers passengers carried in vehicles. I can find no provision in the Act which specifies that the Authority can make regulations regarding carriage of passengers on goods vehicles and trailers.

If the Authority had in fact power to make Regulation 55 then it can only have been under the general provisions of section 86(1).

The general provision in the Traffic Act is in different form to the regulation making powers in the Australian Excise Act 1901-1949 which is referred to in Norton v. The Union Steamship Company of New Zealand Limited [1951] 83 C.L.R., p. 402 a case quoted by Dr. Sahu Khan.

In section 164 of that Act the words used are:-

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"The Governor-General may make regulations not inconsistent with this Act prescribing all mattersas may be necessary or convenient to be prescribed for giving effect to this Act or for the conduct of any business relating to the Excise. "

The full Court of Australia at p. 410 expressed its views on section 164 of the Australian Act which I consider can be applied to section 86(1) of the Traffic Act. The Court said:-

" A power expressed in such terms to make regulations enables the Governor-General in Council to make regulations incidental to the administration of the Act. Regulations may be adopted for the more effective administration of the provisions actually contained in the Act, but not regulations which vary or depart from the positive provisions made by the Act or regulations which go outside the field of operation which the Act marks out for itself. The ambit of the power must be ascertained by the character of the statute and the nature of the provisions it contains. An important consideration is the degree to which the legislature has disclosed an intention of dealing with the subject with which the statute is concerned.

In an Act of Parliament which lays down only the main outlines of policy and indicates an intention of leaving it to the Governor-General to work out that policy by specific regulation, a power to make regulations may have a wide ambit. Its ambit may be very different in an Act of Parliament which deals specifically and in detail with the subject matter to which the statute is addressed. In the case of a statute of the latter kind an incidental power of the description contained in s. 164 cannot be supposed to express an intention that the Governor-General should deal with the same matters in another way. "

Notwithstanding the different wording of the Australian Act the extract from Norton's case can be applied to the instant case.

I have at some length dealt with the question of passengers on motor vehicles.

While the Legislature has in Part V of the Act made provision for the Control of Transport and specifically dealt with passengers in public service vehicles including contract carriages it has not in Part V or anywhere else in the Act dealt with passengers on goods vehicles, tractors, trailers or private vehicles.

Had it intended to control the carrying of passengers on goods vehicles item 29 properly worded was the place to provide power to make regulations in that respect.

If the words "public service" were omitted from item 29 the Authority by regulation could determine what number of persons could be carried on any vehicle. The legislature did not in my view intend to and did not give the Authority such wide powers.

Isaac J. remarks in Carbines v. Powell [1925] 36 C.L.R. 88 at p. 92 in my view apply to the present case - He said -

"One may also concede that in the absence of express parliamentary direction the power to make such a direction may for weighty reasons be necessary for public safety..... But the question for the Court is not whether that power should, but whether it does, exist. "

Isaac J. went on to quote remarks he made in an earlier case of his. He said:-

" It is not open to the grantee of the power actually bestowed to add to its efficacy, as it is called, by some further means outside the limits of the power conferred, for the purpose of more effectively coping with the evils intended to be met.....The authority must be taken as it is created, taken to the full, but not exceeded. In other words, in the absence of express statement to the contrary, you may complement, but you may not supplement, a granted power. "

There is no mention of passengers being carried for hire or reward in regulation 55. It appears the

Authority was seeking to control carriage of non paying passengers.

If passengers were carried for reward in a goods vehicle the vehicle would then be treated as a public service vehicle as defined in section 2 of the Act. The vehicle could not be used for such purpose without a licence from the Transport Control Board.

The control of public service vehicles is the domain of the Board not the Authority or the Principal Licensing Authority.

Part III of the Act deals with licensing and registration of motor vehicles. There is nothing in that part which enables any authority on registration of a goods vehicle to specify what passengers may or may not be carried in or on the vehicle. For the purposes of licensing fees a goods vehicle is under the definition in section 2 to be deemed a private motor vehicle.

In my view the Legislature never intended to control the carriage of passengers on goods or private vehicles other than to make it an offence, unless licensed or exempted by the Act, to carry them for reward.

The Authority was not and is not in my view authorised by the Act to impose such control and in making regulation 55 it was acting in my view ultra vires.

In my view passengers can legally be carried on goods vehicles if no charge is made for their carriage.

If I am correct in this view Regulation 55 was not necessary for any of the five purposes mentioned in the regulation.

My decision, unless reversed, will invalidate all permits granted under Regulation 55 but this should not inconvenience the public using goods vehicles for transport

of passengers as in my view the only legal restrictions on carriage of passengers on goods vehicles is that they must not be carried for hire or reward unless licensed to do so. This may not be a desirable situation but the remedy is in the hands of the legislature.

2. The Authority has no power to delegate in the circumstances.
3. The Authority has no power in particular to delegate its powers to a Licensing Authority.

Grounds 2 and 3 need not be considered since I am of the view that the Authority had no power to make regulation 55. The question of delegation could only arise if the Authority had the power to make the regulation.

Section 86(2) permits the Authority by order to exempt any provisions of any regulation made under the Act in respect of any specified vehicle or class of vehicle and the drivers thereof. It would have to exercise that power itself and could not authorise the licensing authority to do so.

The only powers which the Act authorises the Authority to delegate are those contained in section 88(2) of the Act. Delegating the power to exempt provisions of a regulation is outside the ambit of section 88(2).

Licensing Authorities duties are confined to Part III of the Act. The Authority could not in my view impose duties on the licensing authority not envisaged by the act any more than it could impose duties on the Board one of whose functions is to control transport.

4. It has no power to impose payment of fees.

As regards the fourth ground it is not the province of the Authority to fix fees but in my view the regulation does not seek to impose a fee but merely to state

that the applicant shall pay the prescribed fee.

It was not necessary to make any reference to fees as there is already provision in the schedule of the Traffic (Fees) Regulations to cover permits. Section H(c) provides:-

" Any other permit, exempted, etc. for which specific provision is not made elsewhere 5.00. "

There is no merit in the fourth ground.

I grant the relief sought and declare that Regulation 55 of the Traffic Act is invalid as being ultra vires the Traffic Act.

There is no need to make any declaration regarding the "excess permits" or authorisations granted by Licensing Authorities under the regulation since there was no legal basis to the issue thereof and per se they must be deemed to be of no force or effect.

The plaintiffs are to have the costs of this action.

(R.G. Kermode)

JUDGE

SUVA,

August, 1982.