

**BARBADOS:**

**[Unreported]**

**IN THE SUPREME COURT OF JUDICATURE  
COURT OF APPEAL**

**Civil Appeal No. 7A of 1999**

**BETWEEN:**

**CHRISTOPHER HILL**

**Appellants**

**AND**

**MAGISTRATE DEBORAH HOLDER**

**COMMISSIONER OF POLICE**

**Respondents**

**Before: The Honourable Sir Denys Williams, Chief Justice, The Honourable Mr. Justice George Moe, The Honourable Mr. Justice Colin Williams, Justices of Appeal.**

**2000: February, 14th & April, 4th.**

**Mr. R. Small in association with Mr. W. Abrahams for Appellant.**

**Ms. B. Gadsby for Respondent.**

**DECISION**

On March 18, 1999 the applicant/appellant Christopher Hill moved the High Court for the following relief set out in the notice of motion:-

1. An order of mandamus directing the first respondent, Deborah Holder, to refer to the High Court in accordance with and/or under the provisions of section 24 of the Constitution, the question as to whether the applicant's constitutional rights had been infringed by the execution of the search of the motor vehicle registration number M 2776 and whether there was any discretion in the Court to allow the production of any evidence recovered as a result of the execution of that search, and

2. In the meantime an order prohibiting and/or preventing the respondents from proceeding to hear or adjudicate the charge preferred against the applicant at the Magistrate's Court for District F.

The grounds of the application were stated as follows:-

1. As to (i) the applicant was being tried for an offence by the first respondent at the Magistrate's Court for District F and (ii) during the course of that trial a question was raised as to whether a search of the motor vehicle registration number M 2776 was unconstitutional null and void and (iii) further questions arose as to whether the police officers who had conducted that search were guilty of a violation of the applicant's constitutional rights and if so, whether in determining the guilt of the applicant the first respondent had any discretion to admit anything recovered by the police as a result of that search and (iv) the applicant through his attorney-at-law had objected to the production into evidence of the vegetable matter recovered by the police as a result of the unconstitutional search of the vehicle and had raised the question as to whether the applicant's constitutional rights had been contravened, the first respondent was obligated under and by virtue of the provisions of section 24(3) of the Constitution to refer those questions to the High Court.

2. As the first respondent had so failed, then the High Court ought to grant the applicant the relief set out in the notice of motion.

Payne J, heard arguments and on May 4 refused the relief sought and ordered the applicant to pay the respondents' costs to be taxed or agreed. He granted a stay of execution for six weeks.

In giving the reasons for his decision he reproduced a summary of the evidence and proceedings before the Magistrate:

"3.(a) Constable 501 Ewin Norville was on duty along East Coast Road, St. Andrew on June 18, 1995 at about 15.25 hours in a police motor

van MP 999 accompanied by a special constable and a police constable. They were all dressed in uniform.

(b) Constable Norville noticed a blue and white Suzuki Samurai motor van registration number M 2776 drive past them near the area of Barclays Park and one of the passengers was sitting outside on the spare wheel and appeared to be in a dangerous position.

(c) They pursued the motor van and stopped the vehicle by use of the siren. The female driver brought the vehicle to a halt in Cattlewash, St. Joseph.

(d) Constable Norville became suspicious of the actions of the passenger in the left front seat who quickly pulled the ashtray from the dashboard and threw it under the seat in which he sat.

(e) Constable Norville searched the vehicle and a small quantity of vegetable matter was found in the ashtray and ultimately the person, who is not the applicant was arrested.

(f) A search was carried out in the rear of the vehicle where the applicant was seated and Constable Norville found one three fives cigarette box containing fifteen three fives cigarettes and two other cigarettes without filters wrapped in whitish paper containing a vegetable matter which was suspected to be cannabis.

(g) The applicant told Constable Norville, "Officer don't involve them, them is mine. I buy them from a man who was selling by the road in Bathsheba.

(h) The applicant was arrested and he also gave a written statement in the matter.

4. Sergeant 537 Alwin Edwards, P.C. Anthony Hall and Constable Norville gave evidence for the prosecution. Each was cross-examined by Mr. Shepherd and the prosecution closed its case.

5. Mr. Shepherd objected to leading of evidence of the "further search" of the vehicle, arguing that there was no further conduct to justify the further search of the vehicle which by section 17(1) of the Constitution was considered premises or property.

6. Mr. Shepherd submitted that the applicant's constitutional rights were infringed on the basis that having initially searched the vehicle and dealt with the first passenger the police should not have continued searching the vehicle. He further submitted that the question whether or not the applicant's constitutional rights were infringed should be referred to the High Court for determination.

7. On November 26, 1997 I overruled the submissions made by Mr. Shepherd. The applicant was informed of his rights and elected to say nothing. The matter was adjourned as Mr. Shepherd indicated that he wanted to call witnesses.

8. From my understanding of the law, the applicant's constitutional rights were not infringed by virtue of the actions of the police in conducting the search and I formed the opinion that this was not a fit and proper matter to be referred to the High Court as submitted by Mr. Shepherd".

The learned Judge then summarised Mr. Shepherd's submissions, reproduced section 24(3) and (4) of the Constitution and stated that no case had been cited before him which dealt with the scope or interpretation of section 24(3) or with any corresponding or similar provision. He went on to state his views on the case:-

"It seems to me that section 24(3) requires more than a mere submission that one of the provisions of sections 12 to 23 have been contravened. Section 24(3) cannot be invoked every time an accused person is arrested or a search carried out. A question must arise on the evidence as to the contravention of sections 12 to 23, a question which is not in the opinion of the magistrate merely frivolous or vexatious.

In this case one of the occupants of the car was arrested after vegetable matter was found under the seat in which he sat. I do not agree with the submission of Mr. Shepherd that the police had no authority to carry out any further search of the car".

The learned Judge then stated that the Drug Abuse (Prevention and Control) Act Cap. 131 contains comprehensive provisions for the control of narcotic drugs, gave as examples sections 7, 13 and 36 and said that in this case the police in the circumstances clearly had authority to search the car, including the rear of the car where the applicant was sitting. He concluded by saying that he did not consider that any question arose as to the contravention of sections 12 to 23 of the Constitution. In any event, he said, if the matter was referred to the High Court, the applicant's submission was without merit and bound to fail. The raising of the question would therefore in his opinion be frivolous and vexatious.

Section 24(3) and (4) of the Constitution

Subsections (3) and (4) of section 24 enact:

"(3) If in any proceedings in any court subordinate to the High Court any question arises as to the contravention of any of the provisions of sections 12 to 23, the person presiding in that court shall refer the question to the High Court unless, in his opinion, the raising of the question is merely frivolous or vexatious.

(4) Where any question is referred to the High Court in pursuance of subsection (3), the High Court shall give its decision upon the question and the court in which the question arose shall dispose of the case in accordance with that decision or, if that decision is the subject of an appeal under this Constitution to the Court of Appeal or to Her Majesty in Council, in accordance with the decision of the Court of Appeal or, as the case may be, of Her Majesty in Council".

Subsection (3) contemplates that serious issues as to the whether or not any of the provisions of sections 12 to 23 of the Constitution are

contravened are to be determined by the High Court subject to the rights of appeal to the Court of Appeal and Her Majesty in Council as provided by section 87 of the Constitution.

## Section 17 of the Constitution

### Section 17 enacts:-

"17(1) Except with his own consent, no person shall be subjected to the search of his person or his property or the entry by others on his premises.

(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 that is reasonably required.

(a) in the interests of defence, public safety, public order, public morality, public health, town or country planning, the development or utilisation of mineral resources, or the development or utilisation of any other property in such manner as to promote the public benefit.

(b) for the purpose of protecting the rights or freedoms of other persons;

(c) for the purpose of authorising an officer or agent of the Government, or of a local government authority or of a body corporate established directly by law for public purposes to enter on the premises of any person in order to inspect those premises or anything therein for the purpose of any tax, duty, rate, cess or other impost or in order to carry out work connected with any property that is lawfully on those premises and that belongs to the Government or that authority or body corporate as the case may be;

(d) for the purpose of authorising the entry upon any premises in pursuance of an order of a court for the purpose of enforcing the judgment or order of a court in any proceedings; or

(e) for the purpose of authorising the entry upon any premises for the purpose of preventing or detecting criminal offences".

### The Question raised

The police used a siren to cause the female driver of the vehicle M2776 to bring it to a stop and they arrested the left front seat passenger when a small quantity of vegetable matter, suspected to be cannabis, was found in an ashtray after he was seen to pull the ashtray from the dashboard and throw it under the seat in which he sat.

The police then carried out a search of the rear of the vehicle where the applicant was seated and they found two cigarettes wrapped in whitish paper and containing a vegetable matter which they suspected to be cannabis. It was submitted to the Magistrate on the applicant's behalf that the search of the rear of the vehicle was in breach of the applicant's rights under section 17(1) of the Constitution and that the Magistrate was obliged to refer the question raised to the High Court as required by section 24(3) of the Constitution, it being a serious and not a frivolous or vexatious question, that was raised.

### Legality of the Search

It is a good starting point to refer to Lord Diplock's words in *Reg v I.R.C. Exp. Rossminster* [1980] A.C. 952 at p.1008 that

"entering a man's house, searching it and seizing his goods against his will are tortious acts against which he is entitled to the protection of the court unless the acts can be justified either at common law or under some statutory authority".

Many years earlier Atkin L.J. in *Great Central Railway Company v Bates* [1921] 2 K.B. 578 had emphasised the need for strict compliance with authority when anyone is exercising a right to enter the premises of another. He said (at p.582) that it appeared to be very important that it be established that nobody has a right to enter premises except strictly in accordance with authority.

So that in this case the onus is on the police to justify the search by pointing to some power at common law or some statutory provision authorising the search. If there is no such common law power or statutory provision, the search would be illegal.

That however is not an end of the matter because, in order to bring the case within section 24(3) of the Constitution, the applicant has to go further and show that a question arises as to the contravention of one of the provisions of sections 12 to 23 of the Constitution.

It is useful at this point to refer to a passage from the opinion of the Judicial Committee of the Privy Council in *Harikissoon v Attorney General* [1979] 31 WLR 348:-

"These proceedings in which the appellant claims a declaration that human rights guaranteed to him by section 1 of the 1962 Constitution had been contravened and seeks redress from the High Court under section 6 are, in their Lordships view wholly misconceived.

The notion that whenever there is a failure by an organ of government or a public authority or public officer to comply with the law this necessarily entails the contravention of some human right or fundamental freedom guaranteed to individuals by Chapter 1 of the Constitution is fallacious. The right to apply to the High Court under section 6 of the Constitution for redress when any human right or fundamental freedom is likely to be contravened, is an important safeguard of those rights and freedoms: but its value will be diminished if it is allowed to be misused as a general substitute for the normal procedures for invoking judicial control of administrative action. In an originating application to the High Court under section 6(1), the mere allegation that a human right or fundamental freedom of the applicant has been or is likely to be contravened is not of itself sufficient to entitle the applicant to invoke the jurisdiction of the court under the subsection if it is apparent that the allegation is frivolous

or vexatious or an abuse of the process of the court as being made solely for the purpose of avoiding the necessity of applying in the normal way for the appropriate judicial remedy for unlawful administrative action which involves no contravention of any human right or fundamental freedom".

In our view these words are no less appropriate to a case in which the jurisdiction of the Court under the subsection (in our case subsection 24(1)) is sought to be invited for the purpose of avoiding the necessity of appealing in the normal way.

In the present case the applicant swore an affidavit on January 9, 1998 which was filed three days later. In this affidavit he deposed as to what occurred and throughout he referred to the Suzuki M 2776 as "the Suzuki" or "the vehicle". Nowhere therein did he refer to the vehicle as his, indeed nowhere in the record is the vehicle referred to as the applicant's and when it was stopped by the police a female was driving it. Therefore according to the evidence he was no more than a passenger in the car.

Section 17(1) of the Constitution prohibits the search of anyone's person or property without his or her consent or the entry by others on anyone's premises without his or her consent. There being no allegation by the applicant that there was a search of his person or that the vehicle belonged to him or was in his possession, there was no basis in the evidence on which it could be held that there was a breach of the provisions of subsection (1) of section 17 in relation to him.

Returning to the passage cited above from *Harikissoon v the Attorney General*, if the applicant wishes to challenge the admissibility of evidence concerning the vegetable matter found when the rear of the vehicle was searched on the ground that the search was illegal, he can so do before the Magistrate; if he is dissatisfied with the Magistrate's decision, and is convicted, he can appeal and renew his challenge at the appellate levels. But he cannot allege the breach of a non-existing section 17(1) right and seek to avoid the normal route by way of an appeal.

This approach is in our view consistent with the scheme of Chapter 111 of the Constitution relating to the protection of fundamental rights and freedoms of the individual section 24(1) of which enables applications to be made to the High Court for redress in respect of breaches of sections 12 to 23 and section 24(2) of which provides:-

"(2) The High Court shall have original jurisdiction -

(a) to hear and determine any application made by any person in pursuance of subsection (1), and

(b) to determine any question arising in the case of any person which is referred to it in pursuance of subsection (3),

and may make such orders, issue such writs and give such directions as it may consider appropriate for the purpose of enforcing or securing the enforcement of any of the provisions of sections 12 to 23:

Provided that the High Court shall not exercise its powers under the subsection if it is satisfied that adequate means of redress are or have been available to the person concerned under any other law".

The High Court, even when a question is referred to it pursuant to section 24(3), is enjoined not to exercise its powers under section 24(2) if it is satisfied that adequate means of redress were or had been available to the applicant under any other law.

In the view of this Court the evidence did not disclose any basis for a reference to the High Court pursuant to the provisions of subsection (3) of section 24 of the Constitution and the Magistrate was right not to so refer it. The application for such a reference could properly be classified as frivolous or vexatious.

The appeal is accordingly dismissed with costs.