

1943

Present: de Kretser J.

EBERT SILVA BUS SERVICE, Appellants, and COLOMBO
OMNIBUS COMPANY, Respondents.

CASE STATED BY THE TRIBUNAL OF APPEAL UNDER THE MOTOR
CAR ORDINANCE, No. 45 OF 1938, AND ORDINANCE No. 47
OF 1942, No. 438.

*Omnibus Service Licence—Conflict of claims for licence—Reasons of the Com-
missioner—Misdirection of facts—Omnibus Service Licensing Ordinance,
No. 47 of 1942, s. 4 (a).*

Where there is a conflict of claims for a licence between rival bus companies, the Commissioner of Transport should state the reasons for his decision. The Supreme Court will not interfere with the discretion of the Commissioner unless it is satisfied that the discretion might have been used to better advantage or unless there has been a misdirection as to facts.

THIS was a case stated by the Tribunal of Appeal under the Motor Car Ordinance.

R. L. Pereira, K.C. (with him D. D. Athulathmudali), for appellants.

Walter Jayawardene, C.C., for the Commissioner of Transport.

Cur. adv. vult.

November 2, 1943. DE KRETSEK J.—

This is a case stated under the Motor Car Ordinance. The appellants have a licence to run two omnibuses from Turret road junction, Colpetty, to the Eye Hospital junction in Cinnamon Gardens, Colombo. They had applied for this licence from the year 1940, and succeeded in obtaining it after a couple of years in spite of the opposition of the B. J. F. Bus Co. which had a licence to run their omnibuses between Borella and Slave Island. The road from the Eye Hospital to Maradana was thrown open to motor bus traffic recently and the appellants then asked for a licence to run between the Hospital and Maradana—this was in November, 1942—a circumstance which the Commissioner appears not to have been aware of, possibly because the application seems to have been largely dealt with by the Director of Transport, who has no place in the scheme of the Motor Car Ordinance.

The B. J. F. Bus Co. seems to have developed into the Colombo Bus Co. which runs a service passing the Eye Hospital and going on to Slave Island. There appears to have been another Company known as the "B. M. R." which had a garage in Dean's road, *i.e.*, the road along which the new licence is claimed. The owners of the B. M. R. are not partners in the Colombo Bus Co., as the Commissioner seems to think. Documentary evidence proves this, and Crown Counsel admits they are not partners. It would appear that the B. M. R. Co. had for many years applied for a licence to run along Dean's road but they were not granted one. The B. J. F. Bus Co. did not apply until the appellants made this application. The Commissioner decided in their favour and refused a licence to the appellants. No reason is given for the refusal and one has to gather what may have been his reasons from his statement before the Tribunal of Appeal when the appellants carried the matter there. In the case of conflicting claims it is desirable, I think, that the Commissioner should state the reasons for his decision. Such a course may conceivably prevent any further step being taken, and would also be fairer to the person injuriously affected.

Before the Tribunal of Appeal the Commissioner appears to have taken up the position that the length of time during which each competitor had been in the field should be taken into consideration, and assuming that the supposed application of the B. M. R. Co. was now vested in the Colombo Bus Co. he decided that the latter had preference over the appellants. That was a mistaken view on his part. Possibly a second reason was that the B. J. F. Bus Co. had been running a service for 15 years and the appellant for only a few years. But that consideration again was irrelevant for each was providing a different service, and what was now being considered was a new service to provide for an area not hitherto served.

The third reason given by the Commissioner was that there are a number of Government offices in the neighbourhood of the Eye Hospital and that a large number of clerks employed therein come by train to Maradana. This by itself is no reason for preferring the one Company to the other. But Crown Counsel explains that the record is too cryptic and that the position is this: between Borella and Maradana there are other means of communication so that few persons will use the bus service; therefore a licence for a service from Borella to Maradana will mean that buses will arrive at the Eye Hospital almost empty when coming from Borella and the clerks would have room in them; similarly the buses would be empty at Maradana on the run to Borella. Crown Counsel points out that before the Tribunal of Appeal Counsel for the appellants contended that their buses would be full by the time they reached the Eye Hospital with passengers from Colombo South for Maradana: that being the case, the clerks would have no room for them. Mr. Pereira for the appellant stated that that would be the position if they were allowed only two buses as at present, and that he was really contending for the four buses they had asked for. The position is not clear from the judgment of the Tribunal. The dissenting Judge made the important point that the Colombo Bus Co. had its garage a mile and a half away from the Eye Hospital and that there would be a wastage of tyres and petrol when their

buses ran empty to the Eye Hospital to begin their service there. It is not likely that he would have used that argument if the position had been that the service would be from Borella to Maradana *via* the Eye Hospital. The Commissioner seems to have met this argument with the information that the B. M. R. Co. had a garage in Dean's road, presumably arguing that that garage would be used for the new service. There appears to be no justification for this assumption.

I have recently held that the Commissioner has a very wide discretion given him by the Ordinance and that this Court should hesitate to interfere with the exercise of that discretion unless it was satisfied at least that it was due to misdirection or might have been used to better advantage. It seems to me that one has to get established first a clear idea of what is going to be done. Is it a new or separate service which is going to be started? Or is it to be a service linked up with an existing service or is it to be a combination of both?

Section 4 of the Ordinance and only that section applies. This matter seems to fall under section 4 (a) (6). We have no evidence of any representations made under section 4 (b). The Colombo Bus Co. were late in applying for this licence, they were not represented by Counsel before the Tribunal, and they did not appear at all before this Court. Consequently one may presume not merely that they are not keen on pressing their application but also that they have no particular representation to make before this Court. Two of the points on which the Commissioner seems to have gone now appear to be due to a misdirection on the facts. There remains therefore the point made by Crown Counsel, and it is far from clear that it was made by the Commissioner himself.

I do not think the fact that Government offices are only temporarily situated in that locality can be taken into consideration, both because there is no evidence as to how long they will be there and also because existing conditions must be taken into consideration and not mere possible contingencies. Nor is there any evidence as to the volume of traffic expected between the Eye Hospital and Maradana or as to the number of persons from Colombo South who may want to travel to Maradana. If Crown Counsel's contention be correct, the new licence (if given to the successful applicant) will have to be Borella-Eye Hospital-Maradana. How will this be done? The licence applied for is for a *new* service, and one can understand a licence limited to the points between the Eye Hospital and Maradana. But if the proposed extension is taken to be the modification of a route—referred to in section 5, then a mere addition of Maradana to the Borella-Slave Island licence will not do, for if buses are run from Slave Island *via* the Eye Hospital to Maradana there may conceivably be as much inconvenience to the clerks whom the Commissioner is providing for as in the case of the appellants' buses. There will have to be a restriction of some of the buses to the route Borella-Eye Hospital-Maradana. But can such a modification be made under the present Ordinance, which does not provide for licences for each separate bus but only for a road service? If the difficulty is to be met by insisting on a time table, then exactly the same provision can be made with regard to the appellants' buses.

It seems to me also that if, in fact, there be a considerable number of the public who wish to travel from Colombo South to Maradana there is no reason why their interests should not be looked after. If there be that traffic available, presumably those passengers travelling in the appellants' buses as far as the Eye Hospital would enter the other Company's buses and so oust the clerks. It would also mean that they would have the inconvenience of changing buses. If on the other hand the volume of traffic is not so large, then the buses would be empty or nearly so at the Eye Hospital as well as at the Maradana end, and so these clerks will be provided for.

These objections seem to me to be possibly largely fictitious, and if there is a real demand the remedy is to allow more buses or else to limit the service to a certain section only. It seems to me that the situation can be adequately dealt with by allowing the appellants to run the two buses they now have with an extension to Maradana. That would serve the existing passenger traffic. They have applied for licences for two more buses and the licences for these two buses alone should be limited to the section Eye Hospital-Maradana. That will mean a shuttle service between the Eye Hospital and Maradana.

The time table furnished by the appellants provides for a very frequent service, at intervals of 15 minutes at one time and of 10 minutes during the rush hours. If this time table be feasible, (and it has not been objected to as impracticable) I see no reason why all four buses should not run from Colpetty to Maradana.

It seems to me also that the argument of Crown Counsel about buses running empty between Borella and the Eye Hospital is not likely to be correct. Borella is a big business centre, so is Slave Island, and the very fact that the other applicant has been content to run his buses between Borella and Slave Island for 15 years indicates that the traffic is adequate. I believe the Commissioner meant to inaugurate a new service without interfering with the existing service. That will mean adding to the number of buses which the other party now has in operation.

There is no reason why the creation of monopolies should be carried too far. The reasons given at the hearing of this appeal and by the majority of the Tribunal of appeal appear to be based on what are now found to be erroneous facts, and the arguments in favour of the appellants seem to me to have more weight.

In my opinion, therefore, the licence applied for should be granted to the appellants. The fee deposited by them will be refunded.

The licence issued to the rival applicant should be revoked.

Appeal allowed.