IN THE SUPREME COURT OF FIJI

Appellate Jurisdiction

Criminal Appeal No. 39 of 1959

Between:

RAM DAYAL — Appellant

AND

REGINA — Respondent

Motor Vehicles (Insurance) Ordinance (Cap. 236)—third party insurance—condition that vehicle will be driven by licensed driver—whether lack of driving licence avoids the contract of insurance.

Held.—(1) A condition in a contract of insurance that " The person insured shall not use the motor vehicle nor shall the owner cause, permit or suffer any person to use such motor vehicle whilst any such person as aforesaid does not hold a licence to drive " the vehicle in respect of which the contract is entered into, is a condition which makes the contract voidable at the instance of the insurer if the condition is not fulfilled ;

(2) Although the insured was not in possession of a valid driving licence at the material time, the insurance policy, not having been avoided at the instance of the insurer, was in full force and effect ;

(3) Section 9 of the Ordinance, although in the same words as section 38 of the Road Traffic Act, 1930, shows a different intention because of the omission of punctuation and must be construed in favour of the insured.

Appeal allowed.

Cases cited:

Goodbarne v. Buck (1939) 4 All E.R. 107 ; *Bright v. Ashfold* (1932) 2 K.B., 153 ; *Gray v. Blackmore* 1934 K.B., 95 ; *Carvill v. Rowland* (1953) 1 All E.R., 486 ; *Edwards v. Griffiths* (1953) 2 All E.R., 874.

Cases referred to:

R. v. Etuate Kaveni Nawalo 1958 F.L.R., 45.

R. A. Kearsley for appellant.

Justin Lewis, Solicitor-General, for respondent.

LOWE, C.J. [20th August, 1959]—

The appellant has appealed against a conviction of driving an uninsured motor vehicle on the 24th February last when there was not in force in relation to the use of the said motor vehicle, a policy of insurance in respect of third party risks. His main ground of appeal against the conviction and the disqualification is that the learned trial Magistrate misdirected himself in law as to the test regarding whether or not a third party insurance was in force. The learned Magistrate stated:

> " The question is ; Was the insurance company legally bound to pay up had there been an accident on the 24th February, 1959, while the accused was driving? Clearly they were not so bound and that is the test—the only one."

There is a subsidiary ground of appeal to the effect that the judgment is unreasonable and cannot be supported having regard to the evidence.

Many authorities were referred to at the hearing of the appeal but I do not find any of them to be directly in point, although I must necessarily refer to some of them. Before doing so, however, I would refer to some of the facts stated in the lower court from which it appeared that, at the time the appellant was found to be driving his motor car, his driving licence had not been renewed. He had had a licence and had made application for renewal but the new licence had not in fact been issued.

The Third Party Insurance Policy was exhibited to the lower court. It is a usual contract for third party insurance and on the face of it has one section headed " Exclusions " which contains the exclusions set out in section 6 of the Ordinance. On the reverse of the only page of the policy are certain conditions but, as I have said on a previous occasion, in view of the fact that the policy forms part of the same sheet of paper upon which the Certificate of Insurance is printed, I think it sufficiently satisfies the law, although not in fact on the portion which embodies the certificate. In any event, the form of certificate shown in the Rules made under the Ordinance makes no provision for conditions.

One of the conditions is as follows:—

> " The person insured shall not use the motor vehicle nor shall the owner cause permit or suffer any person to use such motor vehicle—
>
> (*d*) whilst any such person as aforesaid does not hold a licence to drive a vehicle of the class described herein."

It is interesting to note that other conditions, which are purported to be imposed, are contrary to those which, as set out in section 10 of the Ordinance, would be of no effect. The Insurance Company cannot contract itself out of the law and many of the conditions sought to be imposed conflict with the law itself. However, the condition I have recited is the one which requires consideration.

For the respondent it was argued that, because of the condition, the policy was not properly in force and therefore could not be said to be a policy of insurance which " insures such person . . . in respect of any liability which may be incurred by him . . . in respect of the bodily injury to any person caused by or arising out of the use of the vehicle ", as provided in section 6 of the Ordinance. The policy was issued containing the following words ;

> " The insurer agrees subject to the terms limitations exclusions and conditions contained herein or endorsed hereon and to the provisions of the said Ordinance to insure the persons or classes of persons insured under this Policy . . . against all liability incurred by such persons or classes of persons . . ."

Section 11 of the Motor Vehicles (Insurance) Ordinance (Cap. 236), so far as it is relevant to this case, is as follows:—

> " 11. (1) If after a certificate of insurance has been delivered under the provisions of subsection (4) of section 6 to the person by whom a policy has been effected judgment in respect of any such liability as is required to be covered by a policy under the provisions of paragraph (*b*) of subsection (1) of section 6 of this Ordinance, being a liability

covered by the terms of the policy, is obtained against any person insured by the policy then notwithstanding that the insurance company may be entitled to avoid or cancel or may have avoided or cancelled the policy, the insurance company, shall subject to the provisions of this section, pay to the persons entitled to the benefit of such judgment any sum payable thereunder in respect of the liability including any amount payable in respect of costs and any sum payable by virtue of any written law in respect of interest on that sum.

(2) (*c*) in connexion with any liability if, before the happening of the event which was the cause of the death or bodily injury giving rise to the liability, the policy was cancelled by mutual consent or by virtue of any provisions contained therein . . ."

Subsection (1) of section 11 would appear to be in very clear terms. It refers to " a liability covered by the terms of the policy " and it might be argued that if a condition of the policy is not fulfilled by the insured person then no liability is covered by the terms of the policy. That is the basis of the argument on behalf of the respondent. However, subsection (2) (*c*) makes it clear that the Insurance Company is not required to make any payment under the provisions of subsection (1), if the policy was cancelled by virtue, *inter alia,* of any of the provisions contained therein. If, after the issue of an insurance policy, the insurance company concerned gives notice of an intention to cancel such policy, the policy holder has a right of appeal against such intention to a Magistrate's Court of the first class and the company is bound by the order of the court. It is clear, in my view, that when a company issues a valid insurance policy subject to a condition which makes it voidable, the company might seek to avoid the contract when it ascertains that the condition has not been or is not being, complied with but, in such a case, the liability of the company under the terms of the policy would, meanwhile, remain in being. Section 11 (2) (*c*) of the Ordinance makes provision for such a possibility.

If, for instance, the appellant had a driving licence issued to him on the 1st of March last, and the police had interviewed him on that day while he was in physical possession of the licence, I do not think it could be contended that he was then driving his motor vehicle while there was not in force a valid third party insurance in respect of that vehicle. If he could then be charged with the offence of which he was convicted in the instant case, on the ground that the policy had been avoided by the lapse, it would mean that the police would be required in every case to go into history to ascertain whether at any time during the period for which the policy was issued, the driver had forgotten or otherwise omitted to renew his licence. That was not the intention of the legislature which, however, clearly intended that the Ordinance would protect third parties.

I consider that the condition in the policy merely means that if for any period during the stated term of the policy the insured person, or anyone else with his authority, is driving the vehicle while not in possession of a valid driving licence, the policy is voidable at the instance of the insurer.

In *Goodbarne v. Buck* (1939) 4 All E.R., 107, it was held that:

" until the policy was declared void by the court, there was for the purposes of this action, a subsisting policy of insurance in respect of the van."

There is an interesting Editorial Note to the report of that case, as follows:

> " There is a well-settled distinction between a voidable and a void contract. It is here decided that where a policy of insurance is avoided at the suit of an insurance company after the accident has happened, it is not possible to say that there was not in existence at the time of the accident a subsisting policy with respect to the motor vehicle concerned."

Bright v. Ashfold (1932) 2 K.B. 153 and *Gray v. Blackmore* 1934 K.B., 95, appear to make it clear that where a condition circumscribes the operation of a policy from the beginning, there is no policy in force but, in the first case, the insured person was found to be riding a motor cycle while no side-car was attached thereto whereas the relevant policy of insurance insured him against third party risks on the condition that the insurer would not be liable for any accident loss or damage caused or sustained " while any motor cycle in respect of which an indemnity is granted under this policy is carrying a passenger, unless a side-car is attached." When the insured person was riding the cycle in question, no side-car was attached so the vehicle then being used was not the vehicle insured. In the second case, the vehicle concerned was being used for a purpose other than for which it had been insured. In any event, those cases were decided in 1932 and 1933 respectively and it was not until 1934 that section 10 of the Road Traffic Act, 1934, was enacted, no doubt to ensure the continuation of the protection of third parties who might suffer as a result of the use of an otherwise uninsured motor vehicle.

Section 11 of the Motor Vehicle (Insurance) Ordinance is the same as section 10 of the 1934 English Act.

In the instant case the Certificate of Insurance was delivered to the insured person and was in respect of the liability required to be covered by a policy under the provisions of paragraph (*b*) of subsection (1) of section 6 of the Ordinance and the terms of the policy clearly insured the appellant in respect of any liability which may have been incurred by him in respect of the death of or bodily injury to any person caused by or arising out of the use of his motor car. The condition which I have recited does not go to the root of the insurance contract. It is, in effect, in the nature, although imposed by the Company, of an undertaking by the person insured that he will not use the motor vehicle while he does not hold a licence to drive such vehicle. It is a condition which makes the policy voidable at the instigation of the insurer but, as no action had been taken by the insurer to cancel the policy, section 11 of the Ordinance would have applied had the insured person injured or killed any person and had had judgment entered against him in respect of his liability in damages for such death or injury. If my view is correct, the policy of insurance was effective on the 24th February last and although the appellant had not, on that date, a licence to drive the motor vehicle, the insurance company was under a liability to indemnify the insured person who could not be said then to have been driving a motor vehicle whilst no insurance in respect of third party risks was in force.

It is necessary for me to refer also to section 9 of the Ordinance which is the same, for all practical purposes, as section 38 of the Road Traffic Act, 1930. Section 38 in the English Act is as follows:

> " Any condition in a policy or security issued or given for the purposes of this Part of this Act, providing that no liability shall arise under the policy or security or that any liability so arising shall cease, in the event of some specified thing being done or omitted to be done after the happening of the event giving rise to a claim under the policy or security, shall be of no effect in connexion with such claims as are mentioned in paragraph (*b*) of subsection (1) of section thirty-six."

Then follows the same proviso as is enacted with section 9 of the Ordinance. It will be seen that the commas inserted in the English section 38 make its meaning abundantly clear and there can be no doubt that the two eventualities " that no liability shall arise " and " that any liability so arising shall cease " both relate to the next portion of the section—" in the event of some specified thing being done or omitted to be done after the happening of the event giving rise to a claim ". That section, with omissions which do not apply to this Colony but which do not alter the substance of the enactment, was enacted as section 9 of the Ordinance but the commas were deliberately omitted by the legislature. Section 9 could still be interpreted to mean the same as section 38 but a more natural meaning without the commas would seem to me to be that, " Any condition in a policy . . . that no liability shall arise under the policy . . . shall be of no effect ", and, in addition, " Any condition in a policy . . . that any liability so arising shall cease in the event of some specified thing being done or omitted to be done after the happening of the event giving rise to a claim . . . shall be of no effect."

Had the legislature intended the section to have the same meaning as section 38 of the Act it is reasonable to suppose the commas in the latter would have been repeated in the former.

In *Carvill v. Rowland* (1953) 1 All E.R., 486, at 488 *Lord Goddard* said:

> " If the Insurance Company insert exceptions or conditions in the policy, on the ordinary principles of construction those conditions have, so far as possible, to be read against the insurance company ".

I am, with respect, in complete agreement with that dictum, as I am with the dictum of the same learned Chief Justice in *Edwards v. Griffiths* (1953) 2 All E.R. 874, at 876:

> " It is clear, as it seems to me, that as between the assured and the insurers we have to construe the certificate against the insurers, that is to say, if there is an ambiguity or a doubt as to its extent and the question were to arise as to the liability of the insurers, we should have to put the construction on the certificate most favourable to the assured."

Had I any doubt that the particular condition in question merely made the policy voidable, I would have found it necessary to have applied those principles in the instant case.

I would also feel bound to hold that the insertion of a condition in the policy " that no liability shall arise under the policy " was of no effect because of the interpretation, different from that of section 38 of the Act, which must be given to section 9 of the Ordinance in the form in which it has been enacted in this Colony, as a natural interpretation of section 9 is in favour of the appellant and the same principle of construction should apply as that enunciated by *Lord Goddard* in connexion with the interpretation of certificates of insurance, in the absence of anything indicating to the contrary.

I said in *R. v. Etuate Kaveni Nawalo* 1958 F.L.R., 45, that I agreed with the learned Magistrate where he held that, as the accused learner's licence had expired, his policy of third party insurance was not then in force. The accused in that case had pleaded guilty to driving without a third party insurance policy being in force, but as the record of that case is not available, I have been unable to check the position in relation to my present judgment which, if in conflict with my dictum in that case, is to prevail.

Other cases have occurred in which the Police would appear to have prosecuted on reasonable ground for believing that the accused concerned had committed an offence and those accused have been disqualified for holding or obtaining a driving licence for certain periods. All those cases will require to be reviewed and Magistrates are to be requested to send to this Court a list containing a brief report of the penalties imposed in each case.

I find that the appellant had, on the 24th of February last, a valid policy as required by the Ordinance and I allow this appeal. The conviction is quashed, the fine is set aside and is to be refunded, if it has been paid, and the order for disqualification is also set aside.