IN THE SUPREME COURT OF FIJI

Appellate Jurisdiction

CRIMINAL APPEAL No. 32 OF 1960

Between:

THE ATTORNEY-GENERAL Appellant

v.

BHASKARA NAND Respondent

Use of a private motor vehicle for hire and reward—whether an offence contrary to section 4 (1) Motor Vehicle (Third Party Insurance) Ordinance (Cap. 236).

The respondent was charged in the Magistrate's Court under two counts, namely with driving his motor vehicle for hire and reward when such vehicle was not licensed for this purpose, in the first count, and with driving his motor vehicle when there was not in force in relation thereto a policy of insurance as required by the Motor Vehicle (Third Party Insurance) Ordinance (Cap. 236), in the second count. It was proved that on the date in question, the 4th December, 1959, the respondent had carried in his motor vehicle, which was registered for use as a private car, passengers for reward. There was no evidence to suggest that this was other than an isolated user of the motor vehicle for hire and reward. The vehicle was insured at the material time under a policy which provided *inter alia* as follows:—

> " Limitations as to use—Premium has been paid only for the use of the motor vehicle for the purposes set out in Item No. 1 of the Schedule on the back hereof. The motor vehicle must not be used for any other purpose unless the policy is endorsed and an extra premium (if any) paid."

Item No. 1 of the Schedule, under the heading " Class of Vehicle ", stated:—

> " Private Car. A motor car which is used solely (*a*) for social, domestic or pleasure purposes."

No extra premium had been paid by the respondent to cover the user on the relevant date for hire and reward.

The respondent contended, in the lower Court, that as this was an isolated user no offence had been committed. The case of *Wyatt v. Guildhall Insurance Coy. Ltd.* (1937) 1 All E.R., 792, was cited in this connexion. The Magistrate distinguished the latter case and rejected this argument. However, the Magistrate declared himself bound by a Revisional Order of the Supreme Court made in *Regina v. Rajaram* No. 115 of 1959. This was a case involving apparently similar facts to those arising here where the Supreme Court had quashed a conviction of the offence here charged in the second count. The Revisional Order referred to another decision of the Supreme Court in *Ram Dayal v. Regina*, now reported in the Fiji Law Reports, 1958/1959 at page 134. Accordingly, while he convicted the respondent upon the first count, the Magistrate acquitted him upon the second count. The appellant appealed by way of case stated against this order of acquittal.

The questions as stated for the opinion of the Court were as follows:—

1. Was the policy of third party insurance as required by law in force in relation to the said motor vehicle when it was being used by the respondent to carry passengers for reward on the 4th day of December, 1959 ?

2. Was this decision in the case of *Regina v. Rajaram* binding on me in relation to this case ?

3. Was the decision in the case of *Ram Dayal v. Regina* binding on me in relation to this case ?

4. If I was not bound by the decision in the case of *Regina v. Rajaram* or *Ram Dayal v. Regina*, was I correct in distinguishing the case of *Wyatt v. Guildhall Insurance Company Limited* as hereinbefore mentioned ?

5. Did I come to a correct determination in point of law upon the above facts when I acquited the respondent and if not what should be done in the premises ?

Held.—(1) By carrying persons for hire and reward the respondent used the car other than " solely for social, domestic or pleasure purposes ", contrary to Item 1 of the Schedule of the policy, and as this user was outside the risks insured against, his policy as required by law was not in force on the 4th December, 1959.

(2) The decision in *Regina v. Rajaram*, being a decision *sub silentio* as regards the issues here arising, was not binding upon the Magistrate in relation to this case.

(3) While the decision in *Ram Dayal v. Regina* is a binding precedent, the *ratio decidendi* of that decision had no application to the facts of the present case.

(4) The Magistrate was correct in distinguishing the case of *Wyatt v. Guildhall Insurance Coy. Ltd.*

(5) The order of acquittal upon the second count was incorrect in law.

Case remitted to the Magistrate's Court with a direction to convict and sentence upon the second count.

Cases cited:—

Wyatt v. Guildhall Insurance Coy. Ltd. (1937) 1 All E.R., 792; *Regina v. Rajaram* R. O. No. 115 of 1959; *Ram Dayal v. Regina* F.L.R. 1958/59, p. 134; *John T. Ellis Ltd. v. Walker T. Hyne* (1947) 1 K.B., 475; *Goodbarne v. Buck* (1939) 4 All E.R., 107; *Gray v. Blackmore* (1934) 1 K.B., 95; *Jones v. Welsh Insurance Corporation Ltd.* (1937) 4 All E.R., 149; *Herbert v. Railway Passengers Assurance Coy.* (1938) 1 All E.R., 650; and *Bonham v. Zurich General Accident and Liability Insurance Coy. Ltd.* (1954) K.B. 292; *J. R. M. Plant Ltd. v. Hodgson*, " Times " of 21st May, 1960; *R. v. Warner* (*Ward*) 1 Keb 66, 1 Lev, 8; *Abdullah v. The Police* Cr. App. No. 34 of 1957;

A. M. Greenwood, Q.C., Attorney-General, for the appellant.

K. P. Mishra for the respondent.

KNOX-MAWER, Ag. J. [August 5, 1960]—

The Attorney-General has appealed by way of Case Stated against a decision of the Magistrate's Court of the First Class at Rakiraki, Ra, whereby the respondent was acquitted upon the second of two counts preferred against him. The two counts were as follows:—

FIRST COUNT

Statement of Offence

Using a private car as a taxi, contrary to section 10 (2) and 65 of Traffic Reg. 1955, Cap. 235.

Particulars of Offence

Bhaskara Nand (s/o Sukh Mangal) on the 4th day of December, 1959, at Nanuka, Ra, in the Western Division drove motor vehicle Reg. No. 6481 for which a licence paid as class " B " and used the said motor vehicle for hire and reward for which a higher licence fee was not paid.

SECOND COUNT

Statement of Offence

Driving motor vehicle in contravention of the provisions of the Motor Vehicle (Third Party Risks) Ordinance, 1955, contrary to section 4 (1) (2) of the Third Party Regulations, 1955, Cap. 236.

Particulars of Offence

Bhaskara Nand (s/o Sukh Mangal) on the 4th day of December, 1959, at Nanuka, Ra, in the Western Division, drove a motor vehicle Reg. No. 6481 when there was not in force in relation to such use of that motor vehicle by the said Bhaskara Nand (s/o Sukh Mangal) a policy of insurance in respect of motor vehicle (Third Party Risks Regulations, 1955, Cap. 236).

The appellant contends that the acquittal on the second count was wrong in law.

The Court has been afforded the learned assistance of the Attorney-General who has presented a most lucid and through argument on behalf of the Crown.

The following facts were proved before the lower court. On 4th December, 1959, at Nanuka, Ra, the respondent carried in his motor vehicle, which was registered for use as a private car, passengers for reward. There was no evidence to suggest that this was other than an isolated user of the motor vehicle for hire and reward. The vehicle was insured at the material time with the New India Assurance Co. Ltd. The relevant portions of the insurance policy are as follows:—

" *Limitation as to use*—Premium has been paid only for the use of the motor vehicle for the purposes set out in Item No. 1 of the Schedule on the back hereof. The motor vehicle must not be used for any other purpose unless the policy is endorsed and an extra premium (if any) paid.

SCHEDULE

Class of Vehicles

Item No. 1—*Private Car*—A motor car which is used solely—

(*a*) For social, domestic or pleasure purposes, or

(*b*) By the owner, being an individual, for his own carriage in relation to his profession, business or calling, provided that profession, business or calling is not that of a commercial traveller or travelling salesman, or an insurance agent, inspector or assessor, or an indent or manufacturer's agent.

Exclusions

3. This Policy does not cover any liability in respect of any occurrence which happens when the motor vehicle is being used for any purpose other than that stated by the owner in the proposal for this insurance.

Conditions

1. The person insured shall not use the motor vehicle nor shall the owner permit or suffer any person to use such motor vehicle—

(*a*) whilst such motor vehicle is in an unsafe condition,

(*b*) to convey any load in excess of that for which it was constructed,

(*c*) to carry passengers for hire or reward or in pursuance of a contract of employment in contravention of the licence issued for the vehicle described herein,

(*d*) whilst any such person as aforesaid—

(i) does not hold a licence to drive a vehicle of the class described herein,

(ii) is under the influence of intoxicating liquor, or

(iii) is as a result of age or some physical or mental condition rendered incapable of driving such vehicle with safety."

No extra premium had been paid by the respondent to cover the use of the motor vehicle when carrying passengers for reward on the 4th December, 1959.

In the lower court, it was contended on behalf of the respondent that, as this was an isolated user of the motor vehicle for hire or reward, no offence had been committed. The case of *Wyatt v. Guildhall Insurance Coy. Ltd.* (1937) 1 All E.R. 792 was cited in this connexion. The learned trial Magistrate distinguished the latter case and rejected this argument. However, the Magistrate declared that he was bound by a Revisional Order of the Supreme Court made in *Regina v. Rajaram* No. 115 of 1959. In that case the accused had been charged with and convicted of a similar offence to that charged in the second count in the present case. The accused there admitted that his policy was limited to social, domestic or pleasure purposes and it was proved that he had used his motor vehicle for reward. Nevertheless the Supreme Court, in exercise of its revisional jurisdiction, quashed the conviction of the accused " in view of the judgment of the Supreme Court in *Ram Dayal v. Regina* Criminal Appeal No. 39 of 1959 ". *Ram Dayal v. Regina* is now reported in the Fiji Law Reports 1958/1959 at page 134.

The questions which the learned Magistrate has stated for the opinion of this Court are as follows:—

1. Was the policy of third party insurance as required by law in force in relation to the said motor vehicle when it was being used by the respondent to carry passengers for reward on the 4th day of December, 1959 ?
2. Was this decision in the case of *Regina v. Rajaram* binding on me in relation to this case ?
3. Was the decision in the case of *Ram Dayal v. Regina* binding on me in relation to this case ?
4. If I was not bound by the decision in the case of *Regina v. Rajaram* or *Ram Dayal v. Regina*, was I correct in distinguishing the case of *Wyatt v. Guildhall Insurance Company Limited* as hereinbefore mentioned ?
5. Did I come to a correct determination in point of law upon the above facts when I acquitted the respondent and if not what should be done in the premises ?

I shall consider generally the main issue which arises in this appeal, and I shall answer the questions stated at the conclusion of the judgment.

Whether or not the respondent is guilty under the second count depends solely upon this question. Was he, at the material time, protected by an existing policy of insurance in respect of his vehicle ? If the Insurance Company would have been entitled to refuse to indemnify a third party injured by the respondent's vehicle on the day in question then he has committed the offence charged (see *John T. Ellis Ltd. v. Walker T. Hyne* (1947) 1 K.B. 475 per Lord Goddard C.J. at page 481). In *Ram Dayal v. Regina* (*supra*) these words of the trial Magistrate were cited with approval. " 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 ? ".

Section 11 of the Motor Vehicle (Third Party Insurance) Ordinance (Cap. 236) is the same as section 10 of the English Road Traffic Act 1934. Sub-sections 1 and 5 of section 11 are as follows:—

" (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."

" (5) In this section:—

" liability covered by the terms of the policy " means a liability which is covered by the policy or which would be so covered were it not that the insurance company is entitled to avoid or cancel or has avoided or cancelled the policy; "

The question which gives rise to difficulty in this and similar cases concerns the meaning to be given to the words in section 11 (1) " being a liability covered by the terms of the policy ".

A study of the English case law upon this question reveals that four possible interpretations of these words have been argued.

The first suggested interpretation is that the words mean: " a liability prima facie covered by the terms of the policy at the moment in question " (i.e. the accident, postulated or actual, involving the third party) " without reference to anything which the assured had done or not done." If this interpretation were adopted it is difficult to see much purpose in the words at all; for an insurer would seem to be in a largely similar position had these words been omitted altogether from the subsection in so far as a policy once issued must, by this interpretation, cover all liability to third parties in any circumstances.

The second suggested interpretation is that the words mean: " a liability which subsists provided there has been no contravention of any term in the policy which has rendered the policy void *ab initio* ". The editorial note in the report of *Goodbarne v. Buck* (1939) 4 All E.R. 107 is relevant here. This note was cited by the learned Chief Justice in *Ram Dayal v. Regina* and reads 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."

It may be remarked that, in some measure, the English Courts have joined with this suggested interpretation of the words in question the fourth suggested interpretation which I set out below.

The third suggested meaning of the words of section 11 (1) under discussion is " if *any* term *whatsoever* in the policy, including even those, the breach of which renders the policy merely voidable, is unfulfilled by the assured, then it is not ' being a liability covered by the terms of the policy ' ". This seems to have been argued in *Ram Dayal v. Regina*. However, in that case this Court has clearly held that the breach by the assured of a clause which made the policy merely voidable at the instigation of the Insurance Company did not permit the Insurance Company to escape the operation of section 11 (1). As the learned Chief Justice stated in his judgment at page 136:—

> " 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 remain in being."

The judgment proceeds, on page 137:—

> " 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 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 liablity 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 ".

The fourth suggested interpretation of the words in question is this: " that the Insurance Company must pay the third party under section 11 (1) provided the liability falls within a risk apparently insured by the express terms of the policy whether or not it is a liability in respect of which the insurers are entitled to refuse an indemnity on the ground that the assured has committed some breach of the terms of the policy ". Upon analysis, this construction reads the words " a liability " to mean a liability within the risks specified in the policy, the word " terms " to mean terms descriptive of risks, and the word " covered " to mean some risk or loss which is inside the class of risks or the losses insured by the policy.

If this fourth interpretation is adopted it is necessary to look at the policy and distinguish from the other terms those terms which define the subject matter of the insurance or describe and limit the risk insured. Where one of this latter class of terms is operative then an Insurance Company can refuse payment to a third party despite the provisions of section 11 (1), for the liability falls outside the risks apparently insured by the express terms of the policy; and in such circumstances the assured has committed an offence.

It is the contention of the Crown that in so far as by carrying persons for hire on the day in question, the respondent used the car other than " solely for social domestic or pleasure purposes " contrary to item 1 of the Schedule of the policy, such a user was a risk not insured against and hence the respondent is guilty under the second count.

Whatever may otherwise be argued against this fourth interpretation of the vital words in 11 (1), it is favoured by Shawcross, the leading authority on the law of Motor Insurance in England (see Shawcross on the Law of Motor Insurance 2nd Edition page 278 *et seq*). Shawcross endeavours thereby to provide a rationalization which will reconcile the English authorities on the point, although I do not think he altogether succeeds in this latter object.

The English authorities are cited and a number analyzed by Shawcross on pages 283 to 287 (*supra*). I refer in particular to the following cases:— *Gray v. Blackmore*, (1934) 1 K.B. 95; *Jones v. Welsh Insurance Corporation Ltd.* (1937) 4 All E.R. 149; *Herbert v. Railway Passengers Assurance Coy.* (1938) 1 All E.R. 650; and *Bonham v. Zurich General Accidents and*

Liability Insurance Coy. Ltd. (1945) K.B. 292. I also refer to the report, produced to the Court by the learned Attorney-General, from the *Times* of Saturday 21st May, 1960. This is the case of *J. R. M. Plant Ltd. v. Hodgson.* Although this report is not a full one, it is I think, most relevant, and strongly in favour of the Crown in this appeal. Indeed after studying this report and the authorities I have specifically named, I have no doubt that the English Courts would hold that the particular user by the respondent in this case was outside the risks covered by his policy, that the Insurance Company would not be bound to pay a third party under section 11 (1) and therefore the respondent has committed the offence charged in count 2. This Court will therefore hold likewise.

As the Attorney-General has pointed out, there is no doubt that the Revisional Order made in *Regina v. Rajaram* (*supra*) was arrived at *sub silentio.* A precedent *sub silentio* is not authoritative. In Salmond on Jurisprudence, 11th Edition at page 213, the words of Twisden J, in *R. v. Warner* (*Ward*) 1 Keb 66, 1 Lev. 8, are cited in this connexion: " Precedents *sub silentio* and without argument are of no moment ".

Moreover, as regards the present case, the attention of the learned Magistrate in the court below was not drawn to the fact that there was an earlier decision of this Court upon the issue in question. In *Abdullah v. The Police* Criminal Appeal No. 43 of 1957, the appellant was charged, as in the instant case upon two counts, namely, with driving a motor vehicle for hire and reward when such motor vehicle was licensed as a private vehicle only in the first count, and with driving a motor vehicle in contravention of section 4 (1) (2) of the Motor Vehicles Third Party Insurance Ordinance in the second count. The then Chief Justice found that the trial Magistrate in that case had properly convicted the appellant upon both counts.

In my view it is unnecessary in this judgment to consider in any detail the case of *Wyatt v. Guildhall Insurance Coy. Ltd.* (*supra*) because it is clearly distinguishable from the present case.

The answers to the five questions stated by the learned Magistrate are therefore as follows:—

Answer to Question 1—No. The policy of third party insurance as required by law was not in force in relation to the said motor vehicle when it was being used by the respondent to carry passengers for reward on the 4th day of December, 1959.

Answer to Question 2—No. The decision in *Regina v. Rajaram* being a decision *sub silentio* as regards the issues arising here was not binding upon the learned Magistrate in relation to this case.

Answer to Question 3—While the decision in *Ram Dayal v. Regina* is a binding precedent the *ratio decidendi* of that decision has no application to the facts of the present case.

Answer to Question 4—Yes. The learned Magistrate was correct in distinguishing the case of *Wyatt v. Guildhall Insurance Coy. Ltd.*

Answer to Question 5—No. The order of acquittal was incorrect in law.

This case is therefore remitted to the Magistrate's Court with a direction that the learned Magistrate do proceed to convict and sentence the respondent on the second count.