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RAM PRASAD

v.

REGINAM

[SUPREME COURT, 1962 (Hammett Ag. C.J.), 12th January,
B 16th, 23rd March, 6th, 13th April]

Appellate Jurisdiction

Road traffic—third party insurance—using vehicle for purpose prohibited by policy—policy rendered voidable and not void—policy in force at material time—Motor Vehicle (Insurance) Ordinance (Cap. 236) s.4(1)(2)—Motor Vehicles (Third
C *Party Insurance) Ordinance (Cap. 236) ss.9,10—Road Traffic Act 1930 (20 & 21 Geo. 5, c.43) (Imperial) s.38.*

Criminal law—traffic offences—using motor vehicle without third party insurance —policy in existence—use of vehicle in breach of condition of policy—policy rendered voidable—in force at material time—Motor Vehicle (Insurance) Ordinance (Cap. 236) s.4(1) (2)—Motor Vehicles (Third Party Insurance) Ordinance (Cap. 236) ss.9,10—Road Traffic Act 1930 (20 & 21 Geo. 5, c.43) (Imperial) s.38.

D The appellant was convicted of using a motor vehicle when there was not in force in relation to the use of the said vehicle a policy of insurance in respect of third party risks. The vehicle was at the material time being used for the purpose of carrying passengers for hire or reward. At the material time the appellant held a third party policy of insurance in respect of the vehicle, upon which was endorsed *inter alia* Condition 1 (C) providing that the person insured, "shall not
E use the motor-vehicle . . . to carry passengers for hire or reward".

Held : That upon the breach of Condition 1 (C) the policy became voidable at the option of the insurance company concerned, and not void. The insurers had not at the material time avoided the policy, which was therefore still in force.

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Ram Dayal v. R. (1958) 6 F.L.R. 134, followed : *Attorney-General v. Bhaskara Nand* (1960) 7 F.L.R. 51, distinguished.

Appeal from a conviction by the Magistrate's Court.

G *A. E. Kearsley* (Mrs.) for the appellant.

K. C. Gajadhar for the respondent.

The facts sufficiently appear from the judgment of the Ag. Chief Justice.

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HAMMETT Ag. C.J. : [16th March, 1962]—

The appellant was charged in the Magistrate's Court sitting at Ba on three counts, the first two of which were as follows :

FIRST COUNT

Statement of Offence (a)

USING A PRIVATE CAR AS A TAXI : Contrary to Sections 10 (1) (2) and 65 of Traffic Ordinance, Cap. 235.

Particulars of Offence (b)

RAM PRASAD s/o KHADERU on the 2nd day of September, 1961, at Varoka, Ba, in the Western Division, did use motor vehicle No. 4338 for the carriage of passengers for reward, this being contrary to the terms and conditions of the private vehicles licence, issued in respect of the said vehicle.

SECOND COUNT

Statement of Offence (a)

USING MOTOR VEHICLE WHEN NOT IN FORCE IN RELATION TO THE USE OF THE SAID VEHICLE A POLICY OF INSURANCE IN RESPECT OF THIRD PARTY RISKS : Contrary to Section 4 (1) (2) of Motor Vehicle (Insurance) Ordinance, Cap. 236.

Particulars of Offence (b)

RAM PRASAD s/o KHADERA on the 2nd day of September, 1961, at Varoka, Ba, in the Western Division, did use motor vehicle No. 4338, when there was not in force in relation to the use of said vehicle by the aforesaid RAM PRASAD s/o KHADERU, such a policy of insurance in respect of third party risks.

The appellant was convicted on both the first and second counts. He does not appeal against the conviction on the first count but he appeals against conviction on the second count on the following ground :

"That there was no or insufficient evidence that the relevant policy of insurance was not in force at the material time."

The question of whether there was a policy of third party insurance in force in relation to the use to which the vehicle was being put at the material time was one peculiarly within the knowledge of the appellant. The prosecution having called evidence to show that the appellant was using the vehicle in question for the carriage of passengers for hire or reward contrary to the terms of its licence, the onus of proof was upon the appellant, if he did not call evidence to the contrary effect, to show that there was a policy of third party insurance in force at the material time in relation to such user. In an attempt to discharge this onus of proof the appellant produced a policy of insurance, Exhibit A, which he contended did cover such use of the vehicle. The learned trial Magistrate held that this policy of insurance was not in force at the material time. It would appear therefore that the sole ground of appeal in this case would have been framed more appropriately if it had been worded to the following effect :

"That there was sufficient evidence that the relevant policy of insurance was in force at the material time."

The appeal was argued on behalf of the appellant as if the grounds of appeal had been so worded.

The facts are not in dispute and are as follows :

A On the 2nd September, 1961, the appellant used motor vehicle No. 4338 for the purpose of carrying passengers for hire or reward. The vehicle itself was registered and licensed as a light goods vehicle and its use for the carriage of passenger for reward was contrary to the terms of that licence. At the material time the appellant held a third party policy of insurance in respect of this vehicle, clause 5 of which B reads :

> "5. LIMITATION AS TO USE.—Premium has been paid only for the use of the motor vehicle for the purposes set out in item No. 3 (a) of the schedule on the back hereof. The motor vehicle must not be used for any other purpose unless the policy is endorsed and extra premium (if any) paid."

C Item 3 of the schedule referred to in clause 5 reads :

> "3. GOODS VEHICLE. — A motor vehicle which is constructed or adapted or primarily used for the conveyance of goods or merchandise of any description in connection with trade, business or agriculture. For the purposes of this definition the performance by Government or a local authority of any of its D functions shall be deemed to be the carrying on of a business:
>
> (a) Light goods carrying vehicles with a carrying capacity of up to 2 tons.
>
> (b) Heavy goods carrying vehicles with a carrying capacity of 2 tons and over."

E It will be seen that clause 5 limits the use of the vehicle to the purposes set out in item 3 (a). Item 3 (a) however does not attempt to lay down any purposes for which the vehicle may be used but merely defines what is a light goods vehicle. There is nothing in clause 5 or item 3 (a) which precludes the use of the vehicle for carrying passengers whether for reward or not. Indeed from the wording of item 3 in the schedule and the reference to the "primary" F use of a goods vehicle, it would appear that some unspecified secondary use is also contemplated. This secondary use might well include the carriage of passengers whether for hire or reward or otherwise. I am in considerable doubt of what is the effect of clause 5, as it is at present worded, and I am doubtful whether it has any real effect at all in limiting the use of this vehicle.

G In opposing this appeal learned counsel for the Crown said he relied on the decision of the Supreme Court in the case of the *Attorney-General v. Bhaskara Nand,* (1960) 7 F.L.R. 51, which he said was on all fours with the present case. Learned counsel for the appellant, however, submitted that Bhaskara Nand's case was wrongly decided and that I should not follow it but should follow, what he intimated was, the contrary decision in *Ram Dayal v. Reginam,* (1958) H 6 F.L.R. 134. I have examined and considered carefully both these decisions and have come to the conclusion that neither of them are on all fours with the present case.

In Bhaskara Nand's case the printed words of the third party policy were in virtually identical terms to those in the third party policy in this case. The real distinction between this case and Bhaskara Nand's case is that in Bhaskara Nand's case the "limitation as to use" clause referred to item 1 of the schedule instead of to item 3(a) as in this present case. Item 1 of the schedule in Bhaskara Nand's case read : A

"1. PRIVATE CAR. — A motor car which is used solely

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

(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."

It is clear that the purposes for which the vehicle in Bhaskara Nand's case could be used were for social, domestic, pleasure and, to a limited degree, business purposes and that the use of the vehicle for carrying passengers for hire or reward was clearly outside the uses that were intended to be covered by the insurance policy. It was held in that case that the policy of third party insurance, was not in force in relation to the use of the said motor vehicle when it was being used for the carriage of passengers for reward. C D

The facts in this case are, as I have already explained, different, and, in my opinion, the decision in Bhaskara Nand's case is not on all fours with the present case.

In Ram Dayal's case the decision did not turn upon the construction of the "limitation as to use" clause or the wording of the item in the schedule to the policy referred to therein at all. That decision solely concerned the result that followed the breach by the insured of a condition in his policy that he would not use or permit the use of the vehicle whilst the driver did not hold a licence to drive a vehicle of the class described therein. The facts in this case are not, therefore, the same as those in Ram Dayal's case. E F

In the present case the body of the appellant's policy contains printed matter amongst which the following words appear :

"The insurer agrees subject to the . . . conditions contained herein . . . to insure the persons . . . insured under this policy . . . against all liability etc . . ."

Endorsed on the back of the policy are printed words under the heading "Conditions" of which the material part reads as follows : G

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

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

(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,

A (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

B safety."

Section 10 of the Motor Vehicles (Third Party Insurance) Ordinance, Cap. 236, provides that so much of the policy as purports to restrict the insurance of the person insured thereby in respect of certain matters, are, in respect of such liabilities as are required to be covered by the Ordinance, of no effect. Amongst these are the

C following :

(a) the age or physical or mental condition of persons driving the motor vehicle,

(b) the condition of the motor vehicle,

(c) the weight or physical characteristics of the goods that the motor vehicle carried.

D In these circumstances it would appear that the conditions endorsed on the Policy No. 1(a), 1(b), 1(d) (ii) and 1(d) (iii) are, to the extent indicated by section 10 of the Ordinance, of no effect. This only leaves in full effect conditions 1(c) and 1(d) (i).

In Ram Dayal's case it was decided that the breach of condition 1(d) (i) resulted in the policy becoming voidable on the option of

E the insurance company but did not entirely vitiate the policy which continued to be in force at the material time. It is to be observed that this particular condition does not concern the purpose for which the vehicle was being used but the holding of a valid licence to drive, by the person using the vehicle at the material time.

It was submitted by counsel for the appellant that in similar

F fashion the breach of condition 1(c), which forbade the use of the vehicle for the carrying of passengers for hire or reward in contravention of the licence issued for the vehicle, merely rendered the policy voidable at the option of the insurers and did not vitiate it entirely, so that it was in fact in force at the material time.

I do not feel called upon to express any opinion on this particular

G issue in this case for seasons which will become apparent. I will only observe that it appears to me that the breach of any one particular condition in a policy of insurance does not necessarily lead to precisely the same result as the breach of another condition in the policy.

It was not mentioned in argument before me in this appeal, that

H the reason for the decision in Ram Dayal's case was, in part at least, due to the construction given to section 9 of the Motor Vehicles (Third Party Insurance) Ordinance, Cap. 236, as it was then, and

the differences in its punctuation from that in the otherwise identically worded section 38 of the English Road Traffic Act 1930. After the decision in Ram Dayal's case section 9 was amended so as to make its punctuation agree with that in section 38 of the English Act. This was not, however, the sole ground for the decision in Ram Dayal's case and I do not, therefore, consider it necessary to deal with that aspect of the matter in greater detail.

The position in this case is that the appellant having been proved to be using a motor vehicle for the carriage of passengers for hire or reward contrary to the terms of its licence, has been charged with using the vehicle when there was not in force in relation to this particular use of the vehicle a policy of insurance in respect of third party risks. In answer to that charge he has produced the third party policy in this case to which I have already made reference. He has done so to show that he did hold a third party policy of insurance insuring him against the liabilities against which he is required to be insured under the provisions of the Motor Vehicles (Third Party Insurance) Ordinance, Cap. 236. He did therefore attempt to show that this policy of insurance covered against liabilities in respect of third parties, which he was, by the provisions of the Motor Vehicles (Third Party Insurance) Ordinance, required to cover whilst the vehicle was being used for the carriage of passengers for hire or reward. On this appeal he has contended that if the policy did not expressly cover such liabilities, the policy was nevertheless still in force whilst the vehicle was being so used and was at the most merely voidable at the option of the insurers for a possible breach of one of the conditions of the policy.

I have examined the terms of his policy with this in mind and I find that at the foot of the front page of this policy is a list of exclusions of which exclusion 3 reads :

> "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."

It appears to me to be clear that the appellant cannot show that the policy which he has produced is one that complies with the provisions of the Motor Vehicles (Third Party Insurance) Ordinance, Cap. 236, and was in force at the material time, unless he can show that it covered liability in respect of any occurrence happening when the motor vehicle was being used for the carriage of passengers for hire. Again he cannot show this unless he can show that that was the purpose or one of the purposes which was stated by the owner in the proposal for this insurance for which the vehicle was to be used. The proposal for this policy of insurance was not, however, produced by the appellant in the court below as evidence in this case.

After giving the matter careful thought I am of the opinion that opportunity should be given for this evidence to be brought before the Court, in case the appellant is able to discharge the onus of proof which rested on him and only failed to do so because it was believed that one of the two previous decisions I have referred to

covered the facts in this case. Before deciding, under the provisions of section 326 of the Criminal Procedure Code, whether to take this evidence myself or to direct that it be taken by a Magistrate's Court, I will give counsel further opportunity of being heard.

HAMMETT Ag. C.J. : [13th April, 1962]—

Further to the ruling I gave on this matter on 16th March, 1962, additional evidence has now satisfied me that in the appellant's proposal for the policy of insurance he replied to the fourth question on the printed form he completed as follows :

> "Q: Will the Motor Vehicle be used for the conveyance of passengers for hire fare or reward?
>
> A: Hire and Fare."

In these circumstances, the Crown concedes that the use of the vehicle for the conveyance of passengers for hire or reward was not a use that was expressly excluded from the cover given by the policy under Item 3 of the "Exclusions" in the policy which reads :

> "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."

The only matter for consideration, therefore, is what was the effect of the breach by the appellant of Condition No. 1 (c) in the policy.

Learned Counsel for the Crown has conceded that the decision of this Court in *Ram Dayal v. Reginam* (1958) 6 F.L.R. 134 held that on the breach of another condition in a similar policy, the policy was not rendered void but voidable. In such circumstances, applying the same principle, he does not now feel able to support the conviction in this case on the ground that until the appellant's insurers had in fact taken advantage of this appellant's breach of this condition of his policy and avoided it, it was still in force and he had not, therefore, been guitly of using the vehicle when there was not in force a third party policy of insurance in respect of third party risks as charged in the second count.

There appears to be a dearth of authority upon this particular point which is not, in my view, an easy point to decide. Further, the Court in all these cases is in the difficult position of not having before it the Insurance Company concerned on whose behalf Counsel could perhaps present cogent arguments that the policy was not meerly voidable on the breach of this particular condition, but void.

After giving the matter careful consideration, since the Crown does not now seek to uphold the conviction, I shall follow the principle laid down in Ram Dayal's case and hold that upon this breach of this condition in the policy, the policy became voidable at the option of the Insurance Company and not void. I do therefore allow the appeal, quash the conviction and set aside the sentence and the order for disqualification passed by the Court below.

Appeal allowed.