A

RAJGOPAL PILLAI

v.

REGINAM

[SUPREME COURT, 1962 (MacDuff C.J.), 22nd June, 20th July]

B

Appellate Jurisdiction

Criminal law—traffic offences—driving motor vehicle without third party insurance—driver person other than owner—onus of proof of existence of valid policy—Motor Vehicles (Third Party Insurance) Ordinance (Cap. 236) s.4(1).

Criminal law—evidence and proof—onus of proof—facts peculiarly within knowledge of accused—proof of existence of third party insurance policy where owner C *of vehicle not the driver—Motor Vehicles (Third Party Insurance) Ordinance (Cap. 236) s.4(1).*

Road traffic—driving motor vehicle without third party insurance—vehicle driven by person other than owner—onus of proof—Motor Vehicles (Third Party Insurance) Ordinance (Cap. 236) s.4(1)

Section 4 (1) of the Motor Vehicles (Third Party Insurance) Ordinance contains an absolute prohibition of a person from using a motor D vehicle unless there is in force a policy of insurance complying with the provisions of the Ordinance. The responsibility of seeing that there is in force such a valid policy of insurance is upon the user of the vehicle, and the existence of such a policy must be held to be a fact peculiarly within the knowledge of the user, notwithstanding that he may not be the owner of the vehicle: there is no onus on the E prosecution to prove the non-existence of such a policy.

Cases referred to: *John v. Humphreys* [1955] 1 All E.R. 793; 119 J.P. 309: *Baljit Singh v. R.* (1958) 6 F.L.R. 80: *Philcox v. Carberry* [1960] Crim. L.R. 563: *R. v. Oliver* [1944] K.B. 68; [1943] 2 All E.R. 800: *R. v. Scott* (1921) 86 J.P. 69: *R. v. Turner* (1816) 5 M. & S. 206: *Williams v. Russell* (1933) 149 L.T. 190.

F

Appeal from a conviction by the Magistrate's Court.

R. A. Kearsley for the appellant.

B. A. Palmer for the respondent.

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

G MACDUFF C.J.: [20th July, 1962]—

The Appellant was charged before the Magistrate, First Class, at Suva, on two counts:

"

FIRST COUNT

Statement of Offence (a)

H DRIVING UNLICENSED MOTOR VEHICLE: Contrary to Sections 7 (5) and 65 of Traffic Ordinance, Cap. 235.

Particulars of Offence (b)

RAJGOPAL PILLAI s/o Punswami on the 17th day of October, 1961, at Suva in the Central Division, drove motor vehicle No. 9881 on Rodwell Road when the said vehicle was not duly licensed in accordance with the provisions of the Traffic Ordinance, Cap. 235.

SECOND COUNT

Statement of Offence (a)

DRIVING UNINSURED MOTOR VEHICLE: Contrary to Section 4 of the Motor Vehicle (Third Party Insurance) Ordinance, Cap. 236.

Particulars of Offence (b)

RAJGOPAL PILLAI s/o Punswami on the 17th day of October, 1961, at Suva in the Central Division, drove motor vehicle No. 9881 on Rodwell Road when there was not in force in relation to the use of the motor vehicle by the said Rajgopal Pillai a policy of insurance in respect of third party risks as complies with the provisions of the Motor Vehicle (Third Party Insurance) Ordinance, Cap. 236."

He was convicted on both counts and fined £2 in default 14 days' imprisonment on the first count and £5 in default one month's imprisonment on the second count, and was ordered to pay 15/- costs. He applied for and was given leave under Section 315(2) of the Criminal Procedure Code to appeal against conviction.

The Appellant's sole ground of appeal is the same in respect of the conviction on both counts and is as follows:

"(a) That as to the first count the learned Magistrate erred in law in holding that the onus was on the Appellant to prove that the motor vehicle was duly licensed;

(b) That as to the second count the learned Magistrate erred in law in holding that the onus was on the Appellant to prove that there was a policy of insurance in force."

The facts, which were not disputed, were that on 17th October, 1961, P.C. David Sandy stopped motor vehicle Reg. No. 9881 on Rodwell Road. The vehicle was being driven by the Appellant. The Constable checked the wheel tax sticker on the vehicle and saw that it had expired on the 30th September, 1961. He pointed this out to the Appellant who said that he was a mechanic and was only testing the vehicle. The Constable asked him to produce his Third Party Insurance Policy and Driving Licence within 5 days. Later as a result of enquiries P.C. Krishna Reddy informed the Appellant that he had driven without a Third Party Insurance Policy being in force in respect of the vehicle on the 17th October, 1961, to which the Appellant replied that he did not know that the Third Party premium had not been paid.

As far as the conviction on the first count is concerned the learned Magistrate did not rely only on the fact that the Appellant failed to prove that the motor vehicle he drove was duly licensed. What he said was —

"In this case the prosecution has established sufficient evidence to show that accused drove the car and that the licence sticker,

> which I take judicial notice is the licence for the car, showed that the licence had expired . . . The onus now lies on him to rebut that evidence and show that it was licensed."

A In the view of the learned Magistrate the prosecution had established a *prima facie* case that the vehicle was unlicensed. No attempt was made to rebut it and on that evidence the learned Magistrate convicted. In my view there was evidence before him to justify his so doing. The first ground of appeal, therefore, has no application to this conviction, the appeal against which is dismissed.

B The second count charged an offence contrary to Section 4 of the Motor Vehicles (Third Party Insurance) Ordinance (Cap. 236 Laws of Fiji) which reads, as far as is relevant:

> "4. (1) Subject to the provisions of section 5 of this Ordinance no person shall use, or cause or permit any other person to use, a motor vehicle unless there is in force in relation to the use of
> C that motor vehicle by such person or other person as the case may be such a policy of insurance in respect of third party risks as complies with the provisions of this Ordinance."

There was no direct evidence given by the prosecution that the motor vehicle was not insured against third party risks and the learned Magistrate relied on the decision of Goddard L.J. in *John v. Humphreys* [1955] 1 All. E.R. 793 to the effect that —
D

> "When an act of Parliament provides that a person shall not do a certain thing unless he has a licence, the onus is always on the defendant to prove that he has a licence because it is a fact peculiarly within his own knowledge."

E Counsel for the Appellant first referred to certain dicta of Lowe C.J. in *Baljit Singh v. Reginam* 1958-1959 F.L.R. 80 where at page 81 he is reported as saying —

> "The evidence of the constable did not sufficiently prove that there was, in fact, no such policy in force in respect of the vehicle . . . but the second count cannot stand because of in-
> F sufficient proof, not only as to the existence of a valid third party insurance policy but also . . ."

From this dicta it would appear that there is an onus on the prosecution to prove affirmatively that the person charged was covered by a valid policy against third party risks. On reading the whole of the judgment in that case it appears that this dicta was not necessary to
G the decision and cannot be regarded as of binding authority.

For that reason Counsel for the Appellant did not rely on that dicta as of any authority and contended that the *ratio decidendi* in the English authorities was that the onus of proof of the motor vehicle being licensed or insured was that this was a fact "peculiarly within the defendant's own knowledge". This was the reasoning
H followed by Goddard L.J. in *John v. Humphreys* (supra) which dealt with driving a vehicle while not being a holder of a driving licence.

Counsel also referred to *Philcox v. Carberry,* referred to in the 1960 volume of the Criminal Law Review at page 563, where it was held, allowing the appeal —

> "that although this was a case where one would have expected the prosecution to lead evidence as to whether or not a policy of insurance was in force, the case was concluded by *John v. Humphreys* (1955) 1 W.L.R. 325, which applied the principles of *R. v. Oliver* [1944] K.B. 68 to the Road Traffic Acts. Applying those principles to the present case, the onus of proving that a policy of insurance was in force was upon C. as it was a fact peculiarly within his knowledge. In those circumstances, as he had given no evidence with regard to the policy, the case must be remitted to the justices with the information that the offence under section 35 was proved, leaving them to impose a suitable penalty."

He contended, however, that in both these cases it was either the owner of the vehicle who was charged or the driver without a licence to drive and the same reasoning could not be applied in respect of a driver who is not the owner of the vehicle. It cannot be expected to be peculiarly within his knowledge whether a vehicle is licensed or insured. In that case the ordinary rule in criminal law should be applied that the onus lies on the prosecution to prove the guilt of an accused.

This argument sounds attractive but I am unable to accept it. Goddard L.J. and Ormerod J. in *John v. Humphreys* (supra) considered that the question was disposed of by the decision in *R. v. Oliver* [1943] 2 All E.R. 800 in which case Viscount Caldecote L.C.J., who delivered the judgment of the Court of Criminal Appeal, considered the authorities at some length. That was a case where the Appellant was charged with having sold sugar as a wholesaler without a licence, In his judgment the learned Lord Chief Justice said :

> "In *R. v. Harry Scott* a similar question arose upon an order made under the Dangerous Drugs Act, 1920, which provided that no person should supply any of the specified drugs unless he was licensed by the Secretary of State to supply the drug. The point was taken at the close of the case for the prosecution that there was no evidence that the defendant was an unauthorised person. Swift J. held that, if the defendent were licensed, it was a fact which was peculiarly within his own knowledge and there was no hardship on him in being put to the proof. At p. 70 he says this :
>
>> It might be very difficult or impossible for the prosecution satisfactorily to prove that he did not possess any one or other of the qualifications which might entitle him to deal with the drug. But the defendant could prove without the least difficulty that he had authority to do it.
>
> Unless we are satisfied that this decision is clearly wrong, we should think it our duty to follow the decision of Swift J."

Later at page 803 he said :

> "The prosecution had a complete case when proof had been given that there had been a supply by the appellant unless and until the appellant could escape the prohibition contained in the Order by proving the facts which were necessary to his case. Support for this proposition is to be found in the judgment of the Court of King's Bench in *R. v. Turner*. Bayley J. said at p. 211 :
>
> > I have always understood it to be a general rule, that, if a negative averment be made by one party, which is peculiarly within the knowledge of the other, the party within whose knowledge it lies, and who asserts the affimative is to prove it, and not he who avers the negative.
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> ....
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> The latest case to which our attention was called in this connection was *Williams v. Russell*, where Talbot J., said, at p. 191 :
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> > On the principle laid down in *R. v. Turner*, and numerous other cases, where it is an offence to do an act without lawful authority, the person who sets up lawful authority must prove it, and the prosecution need not prove the absence of lawful authority. I think the onus of the negative averment in this case was on the accused to prove the possession of the policy required by the statute."

and concluded :

> "In the circumstances of the present case, we are of opinion that the prosecution was under no necessity of giving prima facie evidence of the non existence of a licence."

It will be seen that the *ratio decidendi* in *R. v. Oliver* is not necessarily restricted to the reason that a fact must be peculiarly within the knowledge of an accused but is also based on the ground that it is not necessary for the prosecution to prove a negative averment.

Applying that reasoning to the offence created by Section 4(1) of the Ordinance we find an absolute prohibition of a person from using a motor vehicle unless there is in force in relation to the use of that vehicle by such person such a policy of insurance as complies with the provisions of this Ordinance. This throws an onus on the user, in this case the driver, of the vehicle not to drive without a proper insurance which covers him as the user, in this case the driver, of the vehicle. This is borne out by the general intention and scheme of the whole of the Ordinance, an example of which occurs in Section 6 which sets out the requirements of a policy of insurance to enable it to comply with the provisions of the Ordinance. The intention is clearly protection of the third party against risk.

In my view the same reasoning set out in *R. v. Oliver* applies to the Appellant as driver, as it does to the holder of a driving licence, or the owner of a vehicle in respect of his vehicle licence. The effect of Section 4(1) is to throw on the user the responsibility of seeing that there is a valid policy of insurance covering him in respect of his user of the motor vehicle. If he bears that responsibility the fact of

such policy in respect of his user must be held to be a fact peculiarly within his knowledge and to come within the decisions of *John v. Humphreys* (supra) and more so within the decision in *R. v. Oliver* (supra). For that reason I hold that there was no onus on the prosecution to prove that there was no proper policy of insurance covering the Appellant against claims in respect of third party risks in respect of his user of the motor vehicle on the 17th October, 1961. He failed to establish that there was in fact such a policy, the learned Magistrate so found and rightly convicted the Appellant on the second count. Appeal against conviction on this count is dismissed.

Appeal dismissed.