IN THE SUPREME COURT OF FIJI (WESTERN DIVISION)

A T L A U T O K A

Appellate Jurisdiction

Criminal Appeal No. 3 of 1984

BETWEEN : BRIJE NAND s/o Devi Prasad — Appellant

A N D : R E G I N A M — Respondent

Mr. I. Khan — Counsel for the Appellant

Mr. M. Raza, Principal Legal Officer, — Counsel for the Respondent

J U D G M E N T

Cases referred to:

(1) Tapsell v Maslen (1967) Crim. L.R.53

(2) Lyons v May (1948) 2 All E.R.1002

(3) Lloyd v Singleton (1953) 1 All E.R.291

(4) Goodburne v Buck (1940) 1 All E.R.613

(5) Grays Haulage Co. Ltd. v Arnold (1966) 1 All E.R.896

(6) James & Sons, Ltd. v Smee, Green v Burnett (1954) 3 All E.R.273

(7) Ferrymasters Ltd. v Adams (1980) Crim. L.R.187

(8) Baugh v Crago (1976) Crim. L.R.72

The appellant was convicted by the magistrate's court at Ba on two counts of permitting another to drive a motor vehicle, firstly without a driving licence, and secondly when not covered by a policy of insurance in respect of Third Party risks. He appeals against the first conviction.

The appellant was jointly charged with his son who was, on his own pleas of guilty, convicted of driving the vehicle without a licence and whilst so uninsured. The evidence for the prosecution was brief, that of one police officer: his evidence and the record thereafter for 24th November, 1983, reads as follows:

> "20.3.83 2.30 p.m. King's road Vadravadra stopped Atish Kumar driving a tractor registered D6456. The accused 2. Asked him driving licence and he said no licence. On admission made by him I saw his father the accused 1 who I cautioned and questioned about accused 2's driving of tractor on 20.3.83. He said permitted son to take to Vadravadra garage for repairs and that it was his father who owned tractor but accused 1 looked after it. Accused 1 said was aware about the law: I did not ask him if he knew son had a driving licence but he knew of effect of so driving - no 3rd party cover.

Cross-examination to Govind - Nil.
Re-examination - Nil.
Case.
K. Govind - No questions re accused 1 to show knowledge "permitting" charged section speaks of "employ".
Count 2 cannot stand if count 1 fails.
Counsel - submit no case to answer and will not call any evidence in any event.
Court - Adjourned to 30.11.83 for decision on submission."

The learned trial magistrate duly delivered his decision on 30th November. It reads as follows:

"D E C I S I O N

The accused 1 stands charged on the 1st count of permitting the driving of a motor vehicle when the driver did not have a valid driving licence contrary to section 23 of the Traffic Ordinance Cap. 152.

The offence is one of absolute liability - the prosecution need only to prove the permitting, the onus of proving possession of a licence being on the accused.

Learned counsel, to whom I am grateful drew the court's attention to the amendment in 1978 of this section which added the word "permitting" to the original provision of "employing". There is evidence that when seen by the police the accused admitted permitting driving by accused 2.

As to the offence on count 2 the section speaks of using or permitting a person to use when no 3rd party cover in force. There is evidence which I accept - there being no competing evidence, the admission by the accused that he permitted the accused 1 to drive. The accused is not the owner but admits he was in charge - he does not have to be the registered owner Lloyd v Singleton (1953) 1 AER.

The offence is an absolute one the mere permitting to drive throws the onus on the accused 1 to show a valid insurance cover in respect of such driving. Satisfied of accused's guilt on counts 1 and 2 to the requisite standard - beyond reasonable doubt. He is found guilty and is convicted of offence as charged under such counts 1 and 2."

The learned counsel for the appellant Mr. Khan submits first of all that the learned trial magistrate fell into error in holding that the offence under the first count was one of absolute liability. As to the second count, I consider that the learned trial magistrate was quite correct in holding that the offence was absolute. The relevant wording under section 4 of the Motor Vehicles (Insurance) Act Cap. 153 (1967 Edition) is,

".....no person shall use, or cause or permit any other person to use ....."

The relevant wording under section 143 of the English Road Traffic Act, 1972 is,

"it shall not be lawful for a person to use, or to cause or permit any other person to use....."

Subject to a special defence for employees under section 143(2), it was held in Tapsell v Maslen (1) following Lyons v May (2) that that section imposes an absolute liability in respect of using an uninsured vehicle, or causing or permitting it to be used, irrespective of whether or not the person who uses it, or the person causing or permitting the use of the vehicle knew that the vehicle was uninsured.

(1967) RTR. LR53

(1948)All E.R.1062

Again, as the learned trial magistrate correctly observed, on the authority of Lloyd v Singleton (3), the offence of permitting the unlawful use of a vehicle can be committed by anyone in charge of the vehicle and not only by the owner. In the case of Lloyd v Singleton (3) the Queens Bench, consisting of Lord Goddard C.J., sitting with Groom-Johnson J. and Pearson J., declined to follow an earlier ex tempore dictum of MacKinnon L.J. in Goodburne v Buck (4) where he said (at p.616):

(1953)1 W.L.R.291

(1940) 1 All E.R.613

"As at present advised, I can see no ground on which anybody can be in a position to forbid another person to use a motor vehicle except .....where the person charged is the owner of the car."

The Court however approved of an earlier dictum of MacKinnon L.J. in the same judgment (at p.616) namely, that,

"In order to make a person liable for permitting another person to use a motor vehicle, it is obvious that he must be in a position to forbid the other person to use the motor vehicle."

Lord Goddard C.J. illustrated the issue thus (at p.293 at B):

"In the course of the argument I put the illustration of a man, owning a car and employing a chauffeur, who leaves his car in the care of the chauffeur. If, when the master is not in the car, the chauffeur allows somebody else to drive it, the chauffeur is permitting the use of it. The master is not permitting the use of it because he does not know it is being used. He has given no authority to the chauffeur to allow other people to drive. In the ordinary way he would forbid the chauffeur to allow anybody else to drive, but, whether the chauffeur is actually forbidden or not, he is the person who permits the driving, ..."

The question arises as to whether the offence of permitting the driving of a vehicle by an unlicensed driver is an absolute offence. Originally section 23(1) of the Traffic Act made it an offence to drive a motor vehicle without a driving licence or to "employ any other person" so to drive while unlicensed. As the learned trial magistrate observed, the section was amended by Act No. 9 of 1978 introducing the offence of "permitting". The sub-section now reads:

> "23.-(1) Subject to the provisions of the next succeeding section it shall be an offence for any person to drive a motor vehicle of any class upon a road unless he is the holder of a driving licence valid in respect of such class under the provisions of this Part of this Ordinance or to employ or permit any other person so to drive a motor vehicle of any class unless such other person is the holder of such a driving licence."

The learned authors of Wilkinson's Road Traffic Offences 10 Edition observe at p.40:

> "A distinction should normally be drawn between knowledge of the use of the vehicle and knowledge of the unlawfulness of its use. Knowledge of the former kind is an essential ingredient of permitting, knowledge of the latter kind, may or may not be an essential ingredient.
>
> Normally such knowledge of the unlawfulness of the vehicle's use is required to be proved. 'Permitting to be used' in contradistinction to 'using' imports mens rea. Aliter in the case of insurance offences, where knowledge that the vehicle's use was uninsured does not have to be proved."

[1966] 1 Q.B.896

In the case of Grays Haulage Co. Ltd., v Arnold (5) Lord Parker C.J. in the Queens Bench observed (at p.898 at A),

> " In my judgment, there is a tendency today to impute knowledge in circumstances which really do not justify knowledge being imputed. It is of the very essence of the offence of permitting someone to do something that there should be knowledge. The case that is always referred to in this connexion is James & Sons, Ltd. v Smee, Green v Burnett (6), where, in giving judgment, I pointed out that knowledge is really of two kinds, actual knowledge, and knowledge which arises either from shutting one's eyes to the obvious, or, what is very much the same thing but put in another way, failing to do something or doing something not caring whether contravention takes place or not."

[1954] 3 All E.R. 273

Section 84(2) of the English 1972 Act was amended in 1976. It is no longer an offence in England to 'employ' an unlicensed person to drive a motor vehicle, but instead to 'cause or permit' him so to drive. In the case of Ferrymasters Ltd. v Adams (7) employers were convicted of

[1980] Crim. L.R.

permitting their employee to drive whilst unlicensed, as the justices held that the employers had failed to adopt any system of checking that employees' licences were renewed. That finding clearly imported mens rea. The Divisional Court held that the case was indistinguishable from Baugh v Crago (8), an insurance case. The Court held that section 84(2) of the 1972 Act concerned driving licences, but "might have serious insurance implications." The learned authors of Wilkinson submit that the ratio decidendi of Ferrymaster (7) is inconsistent with other cases on 'causing' or 'permitting'. In this respect I find myself in agreement with the learned commentators in (1976) Crim. L.R.73 and (1980) Crim. L.R.187. The learned authors of Wilkinson at p.403 submit that,

(1976) 1 W.L.R.72

> "where .....the employee driver has deliberately concealed the fact that he is unlicensed it would seem difficult to argue that the employer 'caused' or 'permitted' his employee to drive unlicensed. The better opinion would appear to be that the prosectuion must prove that the employer either knew or ought to have known (in the sense that he was negligent or shut his eyes to the fact) that his employee was unlicensed."

With those observations I respectfully agree. As I see it, they must apply all the more to someone who, like the appellant, 'permits', but who is nonetheless not an employer as such. In the present case the only evidence before the court as to the appellant's knowledge in the matter was the bare statement: "I did not ask him if he knew son had a driving licence but he knew of effect of so driving." That, on the face of it, seemingly constitutes a contradiction: the latter part of the statement suggests that the witness asked the appellant whether he realised the serious consequences of his son being unlicensed, but that approach is contradicted by the first part of the statement. If, in the latter part of the statement, the witness was merely saying that "ignorance of the law is no excuse", the onus nonetheless rested upon the prosecution of establishing a breach of the law. In any event, I cannot see that there was satisfactory evidence establishing that the appellant knew or ought to have known that his son was unlicensed and I do not see how the conviction on the first count can be sustained.

Mr. Khan further submits that the learned trial magistrate's ruling on the submission of no case to answer was in fact a judgment, that the learned trial magistrate failed to rule on the submission and failed altogether to put the appellant on his defence. Section 211(1) of the Criminal Procedure Code, which applies to trials in a magistrate's court, reads as follows:

"211.-(1) At the close of the evidence in support of the charge, if it appears to the court that a case is made out against the accused person sufficiently to require him to make a defence, the court shall again explain the substance of the charge to the accused and shall inform him that he has a right to give evidence on oath from the witness box, and that, if he does so, he will be liable to cross-examination, or to make a statement not on oath from the dock, and shall ask him whether he has any witnesses to examine or other evidence to adduce in his defence, and the court shall then hear the accused and his witnesses and other evidence (if any)."

The question arises as to whether a magistrate's court must comply with the above provisions where the accused, as in the present case, is represented by counsel. By way of comparison I set out the corresponding provisions relating to trials before the Supreme Court contained in section 293(2) of the Criminal Procedure Code:

"(2) When the evidence of the witnesses for the prosecution has been concluded, and the statement or evidence (if any) of the accused person before the committing court has been given in evidence, the court, if it considers that there is evidence that the accused person or any one or more of several accused persons, committed the offence, shall inform each such accused person of his right to address the court, either personally or by his barrister and solicitor (if any) to give evidence on his own behalf, or to make an unsworn statement, and to call witnesses in his defence, and in all cases shall require him or his barrister and solicitor (if any), to state whether it is intended to call any witnesses as to fact other than the accused person himself. Upon being informed thereof, the judge shall record the same. If such accused person says that he does not mean to give evidence or make an unsworn statement, or to adduce evidence, then the barrister and solicitor for the prosecution may sum up the case against such accused person. If such accused person says that he means to give evidence or make an unsworn statement, or to adduce evidence, the court shall call upon such accused person to enter upon his defence."

In my view those provisions place the duty upon the Supreme Court of putting the accused upon his defence and of informing him what options are open to him. The sub-section contemplates the presence of defence counsel but does not state that the court is thereby absolved from its duty in the matter. The only allowance made for the presence of counsel is that counsel, rather than the accused may address the court, and the court may require counsel, rather than the accused, to state whether it is intended to call any witnesses as to fact other than the accused. While the provisions of the sub-section present some difficulties of interpretation, nonetheless they seem to me to make it clear that it is for the accused and not counsel to state whether he intends to give evidence, or make an unsworn statement.

Those consideration must apply a fortiori to a trial in a magistrate's court. It will be seen that the provisions of the Code again contemplate the possible presence of defence counsel at such a trial: see for example the provisions of section 209 and 213. Indeed, if counsel is not present the additional duty is placed upon the court under section 209 of asking the accused, in respect of each and every prosecution witness, whether he wishes to cross-examine that witness. No allowance for the presence of counsel is made however in the provisions of section 211(1), the court is there required to "again explain the substance of the charge to the accused", as it has already done, and is required to do, under section 206(1). Again, the court is required to inform the accused that he is liable to cross-examination if he goes into the witness box.

The contents of paragraph 4 - 392 of Archbold, Criminal Pleading Evidence and Practice, 41 Edition, require a Judge to explain to an unrepresented accused not alone his right of cross-examination of prosecution witnesses, but also the options open to him when put on his defence. The passage indicates that there is no duty to do so when the accused is unrepresented. But as to the latter duty, the passage contemplates trial by Judge and jury, and not trial in a magistrate's court. Again, trials before our Supreme Court and magistrates' courts are governed by the provisions of the Criminal Procedure Code. I am in no doubt that the provisions of sections 210 and 211 clearly place upon a magistrate a duty to inform the accused personally whether or not a case has been made out against him "sufficiently to require him to make a defence", that is, to deliver a ruling in the matter, whether or not a submission of no case to answer has been made by counsel, and thereafter, under section 211 to explain the charge to the accused once again, to explain the options open to him and to ask him whether he has any witnesses to examine or other evidence to adduce in his defence. That duty lies upon the magistrate whether or not the accused is represented by counsel. As an officer of the court, no doubt counsel has carried out his duty in the matter and advised his client accordingly. That does not absolve the court of its statutory duty.

The learned counsel for the prosecution Mr. Raza, Principal Legal Officer, submits that it would be prudent to send the record back to the learned trial magistrate and ask him whether the record is correct. I see no basis for doing so. There might be some basis for such a course where the record has been challenged, by way of affidavit, by the appellant. That is not the case here. It is to be assumed that the record is correct. The learned trial magistrate has countersigned the record as being a true copy of the manuscript record, which latter I have also carefully examined.

The learned counsel for the appellant in the court below indicated that he would not "call any evidence in any event." That statement, as I see it, was no doubt made so as to advise the learned trial magistrate of the likely duration of the remainder of the proceedings, so that the magistrate could fix an appropriate date and time for continued trial. While it might have absolved the learned trial magistrate from enquiring as to whether the appellant intended to adduce evidence from witnesses other than himself (though here again the appellant might well have changed his mind some six days later when the court sat again), it did not absolve the learned trial magistrate from delivering a ruling as to whether or not a case to answer had been established, nor from re-explaining the charge to the appellant, nor from explaining the options open to him and calling upon the appellant personally to indicate what he proposed to do. Mr. Raza submits that in any event there has been no miscarriage of justice. I think there is no means of knowing this. For one thing, the appellant and his counsel were deprived of the right of addressing the court under section 213. Again, there is no means of knowing what course of action the appellant or his counsel might have decided upon, had the learned trial magistrate simply ruled that there was a case to answer.

In any event, the primary question for this court to decide is whether or not the appellant was properly tried. In my view he was not. I do not see how a court can convict an accused without ever putting him on his defence. It is a fundamental principle of any trial that anything less than a prima facie prosecution case cannot place even an evidential burden upon the accused, and he must be acquitted forthwith: this principle is given statutory effect in section 210 of the Code. Similarly if a prima facie case is made out the accused must be informed of such, and thereafter given full opportunity to present his defence, if any. To do any less than that is to deny an accused a fair trial.

I do not see that the learned trial magistrate had any power to record findings of guilty or convictions or to impose any sentences without first complying with the provisions of section 211, 213 and 215 of the Code. Such findings, convictions and sentences must be regarded as nullities. As matters stand I can only regard the learned trial magistrate's Decision as a ruling that there was a case to answer on both counts. As I have indicated, a prima facie case had not been made out in respect of the first count.

The appeal is allowed therefore. For the avoidance of doubt I order that the findings, convictions and sentences in the court below be and are hereby set aside and that the appellant is acquitted on the first count.

As to the second count, in the exercise of my revisional jurisdiction I order that the case be remitted to the learned trial magistrate, that he enter a ruling that a case has been made out against the appellant on that count sufficiently to require him to make a defence, and that he thereafter put the appellant on his defence with regard to the second count, that is, that the learned trial magistrate comply with the provisions of section 211(1) and the relevant succeeding provisions of the Criminal Procedure Code.

Delivered In Open Court At Lautoka This 5th Day of May, 1984

(B. P. Cullinan)
Judge