

1938

*Present: Maartensz S.P.J.*JOSEPH *v.* SUGATADASA.232—*P. C. Dandagamuwa, 2,744.*

Lorry—Carrying passengers other than owner or hirer of goods—Burden of proving exception—Motor Car Ordinance, No. 20 of 1927, ss. 31, 62 (3)—Offences in breach of more sections than one—Right of prosecution.

In a charge under section 62 (3) of the Motor Car Ordinance against the driver of a lorry for carrying passengers in contravention of section 62 (3) of the Motor Car Ordinance,—

Held, the burden was upon the accused to prove that the passengers came within the category of persons exempted in terms of the section.

Held, further, that if the accused had been charged with carrying persons in contravention of the terms of his licence, the burden of proving that they were persons he was entitled to carry would be on the accused.

Where the accused has committed a breach of more than one section, the prosecution is entitled to select under which he should be charged

Nair v. Saundias (37 N. L. R. 439) distinguished.

A PPEAL from a conviction by the Police Magistrate of Dandagamuwa.

J. R. Jayawardana, for accused, appellant.

E. H. T. Gunasekara, C. C., as *amicus curiae*.

Cur adv. vult.

July 22, 1938. MAARTENSZ S.P.J.—

The accused appellant was convicted on the following charge, that he did on February 5, 1938, being the driver of lorry No. X 9413 carry two passengers inside the lorry being neither the owner nor hirer of the goods carried therein or the servant or agent of the owner or hirer in breach of section 62 (3) of Ordinance No. 20 of 1927—an offence punishable under section 84 of the said Ordinance.

There were three passengers in the lorry besides the driver and the cleaner, one of whom was the owner of the lorry. The prosecution led no evidence as to who the other passengers were, nor did the accused.

The question for decision in this appeal is whether the burden of proving that the other two passengers did not belong to the category of persons who could be carried in a lorry was on the prosecution or on the accused.

In support of the appellant's contention that the burden was on the prosecution, I was referred to the decision of the Divisional Court in the case of *Nair v. Saundias*¹. In that case "the owner of a motor car, which was licensed for private use only, was charged under section 80 (3) (b) with permitting the car to ply for hire, the owner not being present at the time", and it was held "that the burden was on the prosecution to prove that the owner did consent to the commission of the offence or that the offence was due to an act or omission on his part or that he did not take all reasonable precautions to prevent the offence". It was also held that "section 80 (3) (b) does not cast upon the accused the burden of proving an exception within the meaning of section 105 of the Evidence Ordinance".

Section 80 enacts as follows:—

80. (1) If any motor car is used, which does not comply with or contravenes any provision of this Ordinance or of any regulation, or of any order lawfully made under this Ordinance or any regulation; or

(2) If any motor car is used in such a state or condition or in such a manner as to contravene any such provision; or

(3) If anything is done or omitted in connection with a motor car in contravention of any such provision; then, unless otherwise expressly provided by this Ordinance,—

(a) The driver of the motor car at the time of the offence shall be guilty of an offence unless the offence was not due to any act, omission, neglect, or default on his part; and

(b) The owner of the motor car shall also be guilty of an offence if present at the time of the offence, or, if absent, unless the offence was committed without his consent and was not due to any act or omission on his part, and he had had taken all reasonable precautions to prevent the offence.

Abrahams C.J., pointed out that there is a differentiation between the responsibility of an owner who is present when an offence is committed and an owner who is absent and stated that when a charge is made against an owner who is absent the charge must allege that the owner consented to the commission of the offence or that it was due to an act or omission on the part of the owner or that he did not take all reasonable precautions to prevent the said offence, as the case may be. He accordingly held that the excusatory circumstances were essential elements of the offence and not exceptions to which the rule laid down in section 105 of the Evidence Ordinance applied.

I respectfully agree; but I do not think that decision is applicable to the offence defined by section 62 (3) of the Motor Car Ordinance. I agree with the learned Magistrate that the section contains a total prohibition:

¹ 37 N. L. R. 439.

of the carrying of any person in a lorry and then makes an exception in favour of the owner, &c., and that it is for the accused to prove that the passengers in the lorry were persons to whom the exception applied.

The decision applicable to this case is the case of *The Mudaliyar, Pitigal Korale North v. Kiri Banda*, where it was held that in a prosecution under section 21 of the Forest Ordinance, 1907, which prohibits the clearing, &c., of any forest not included in a reserved or village forest, the burden of proving that the forest is not included in a reserved or village forest lies on the accused.

It was next argued that the accused should have been charged for a contravention of the conditions of his licence under section 31 of the Motor Car Ordinance, and that in such a charge the burden of proving that the accused contravened the terms of his licence lies on the prosecution.

The licence authorizes the carriage of goods and persons being the servant or agent of the owner or hirer. In my judgment if the accused had been charged with carrying persons in his lorry in contravention of the terms of his licence, the burden of proving that they were persons he was entitled to carry would be on him.

Moreover, I think that the prosecution is entitled to select the section under which to prosecute if the accused appears to have committed a breach of more than one section.

I dismiss the appeal.

Appeal dismissed.

