

1935

Present : Soertsz A.J.

DOOLE v. ZUBAIR.

202—P. C. Kegalla, 26,351.

*Motor omnibus—Carrying goods in excess of limit prescribed by licence—Liability of conductor and not the driver—Motor Car Ordinance, No. 20 of 1927, s. 62 (1).*

The conductor of an omnibus and not the driver is liable for carrying goods in excess of the prescribed limit under rule 6 (3) of the rules in Schedule IV of the Motor Car Ordinance.

**A** PPEAL from a conviction by the Police Magistrate of Kegalla. The accused was charged, as the driver of a motor lorry, with carrying goods in excess of the prescribed quantity in breach of section 62 (1) of the Motor Car Ordinance, No. 20 of 1927.

*J. R. Jayewardene*, for accused, appellant.—The accused is the possessor of a motor omnibus licence. He is the driver of the omnibus. Schedule IV of the Motor Ordinance, section 6 (3), makes the conductor and not the driver liable for carrying goods in excess of the licence. There is reason for this. An omnibus is permitted to carry goods up to a certain weight. These goods may be the goods of the passengers who get in at the various halting places. The driver will not be able to control the weight of goods a passenger may bring, nor will he be able to know the weight of goods on the omnibus. The conductor is in touch with the passengers and their luggage ; therefore he is made responsible for overloading.

The Magistrate has held that the accused by carrying goods inside the omnibus and exceeding 537 lb. which could only be carried on the top of the roof, treated and used this vehicle as a lorry. It is submitted that once a vehicle is licensed as an omnibus it is always an omnibus, till the licence is changed. This point is covered by authority—see *P. C. Amath v. De Silva*<sup>1</sup> and the judgment of the Chief Justice in 888 P. C. Galle, 5,047 (S. C. M. of 6.12.33).

The accused, the driver of the omnibus, is therefore not liable to be charged with this offence.

*Cur. adv. vult.*

<sup>1</sup> 10 Times of Ceylon L. R. 84.

June 25, 1935. SOERTSZ A.J.—

In this case, the Magistrate, acting under section 187 of the Criminal Procedure Code, charged the accused from the summons. The charge as laid in the summons filed of record is in these terms:—"Being the driver of lorry No. X 6161, did carry goods up to the weight of 1 ton .13 cwt. 2 qr. and 27 lb. in excess in the said lorry, to wit, 3 tons 12 cwt. 2 qr. and 1 lb. when allowed to carry 1 ton 10 cwt. 2 qr. and 14 lb., in breach of section 62 (1) of Ordinance No. 20 of 1927—an offence punishable under sections 82 and 84 of Ordinance No. 20 of 1927". The accused pleaded not guilty. The only defence ultimately pressed was that the vehicle in question was not a lorry but an omnibus, and that, therefore, the accused who was the driver of the vehicle was not liable to be prosecuted. The liability was the conductor's under rule 6 (3) of the Fourth Schedule.

The first question that arises is whether the vehicle is a lorry or an omnibus. An omnibus is defined in the interpretation clause as "a hiring car having seating accommodation for more than seven passengers." This vehicle has admittedly been licensed as a motor omnibus, that is to say, it has been passed as complying with the requirement of seating accommodation for more than seven passengers. As a matter of fact, it is not denied that it had such seating accommodation, and I find the Magistrate has recorded in the course of the argument before him the fact that this vehicle has adjustable seats provided lengthwise.

But the Magistrate holds this vehicle to be a "lorry" for the purpose of this prosecution, because, "The accused by carrying goods inside it and not on the roof, and because the load exceeded the 537 lb. which could only be carried on the top of the roof, treated and used this vehicle as a lorry" (*sic*). I have no hesitation in holding that this is an entirely erroneous view. I do not think an omnibus has this protean quality of being able to change its essential character. An omnibus remains an omnibus even when it is misused, just as much as a bat remains a bat and does not become a club because I use it to belabour my neighbour, instead of to strike a cricket ball. I use it as a club, but it is still a bat. Lyall Grant J. in the case of *P. C. Amath v. De Silva*<sup>1</sup> says, "I can see no reason to suppose that the Legislature intended that some of these regulations should apply only to vehicles licensed as omnibuses where the vehicle is actually plying for hire. . . . I think it is clear that for the denomination of the vehicle one must look to the licence. This vehicle was licensed for use as a motor omnibus and it must be held subject to the regulations which govern motor omnibuses".

The vehicle in this case was licensed as a motor omnibus, and by the licence issued in respect of it, it was empowered to carry 23 passengers, and goods on top of the roof, and 2 gallons petrol up to 537 lb. weight, or, alternatively, to carry 4,102 lb. and two passengers besides the driver and the conductor. I cannot, then, see how the Magistrate can hold that the accused, by carrying goods inside exceeding 537 lb. treated and used this vehicle as a lorry. The licence had specially empowered it as an omnibus—for it was licensed as an omnibus—to carry alternatively goods to the weight of 4,102 lb. without any qualification as to where they

<sup>1</sup> 10 *Times of Ceylon L. R.* 84.

should be carried, and two passengers besides the driver and conductor. I therefore hold that this vehicle was an omnibus at the time of the alleged offence, and that when the charge was laid against the accused as "being the driver of lorry No. X 6161," the whole question in the case was being begged. Section 62 (1) under which the accused was charged does not, therefore, apply.

The learned Magistrate, however, goes on to say that even if section 62 does not apply, "apart from the question whether this is an omnibus or a lorry, it is a motor car as defined in section 2 (1) of Ordinance No. 20 of 1927, which includes 'a motor cycle and every description of vehicle propelled by mechanical power'". Section 31 of the said Ordinance states that "A motor car shall not be used in contravention of any condition, or other provisions lawfully inserted in a motor car licence; in this particular instance there has been a contravention of a provision in the licence inasmuch as a load of 1 ton 13 cwt. 2 qr. 27 lb. have been carried whereas the licence allows only 4,102 lb. Section 62 (1) states: "It shall not be lawful for a load exceeding the maximum load which a lorry is licensed to carry to be carried in the lorry". With regard to this, first of all, the charge has not been laid under sections 62 (1) and 31, but under sections 62 (1) and 82 and 84 of the Ordinance. Secondly, section 62 does not apply at all. That section applies only to lorries. That is the technical aspect of the matter; but apart from that aspect, as pointed out by Justice Lyall Grant in the case I have referred to, "this vehicle was licensed for use as a motor omnibus and it must be held to be subject to the regulations which govern motor omnibuses". Those regulations are to be found in the Fourth Schedule to the Ordinance. Rule 6 says:

"(1) No goods shall be carried on an omnibus unless permitted by the licence.

(2) No goods or baggage other than spare wheels or spare tyres shall be carried on the roof of the omnibus, or in any place in the omnibus not authorized by the licence.

(3) If there are found in an omnibus goods exceeding the weight, which having regard to the number of passengers in the omnibus, the omnibus is licensed to carry, the conductor of the omnibus shall be guilty of an offence." The defence in this case is laid under sub-section (3) of this regulation, which makes the "conductor" guilty of the offence.

The Magistrate says, "Section 6 (3) of the Fourth Schedule to this Ordinance does not apply to this case; in the first place I hold that at the time this motor car was put to use, it was used as a 'lorry' and not as an omnibus, in the second place the 'goods' mentioned refer to goods in the first of alternative privileges given in the licence because of the words 'having regard to the number of passengers in the omnibus'. This section contemplates a motor car carrying passengers and goods belonging to such passengers". The first point has been dealt with. With regard to the second, I fail to see how the plain meaning of the words allows such a restriction to be imposed. The words, "having regard to the number of passengers in the omnibus" in relation to this omnibus must mean that if there are two passengers besides the driver and conductor it may carry goods up to a weight of 4,102 lb. anywhere on it, and

if there are more than two passengers up to the limit of 23 passengers besides the driver and the conductor, it is restricted to 537 lb. inclusive of 2 gallons of petrol to be carried on the top of the roof.

I cannot agree at all that the section means carrying passengers and the goods belonging to such passengers only. The words, "having regard to the number of passengers" have been introduced for the purpose of defining the limit in weight of goods that can be carried in alternative cases. In the case of an omnibus with only two passengers other than the driver and conductor the limit is 4,102 lb; anything in excess is an offence. In the case of an omnibus with more than two passengers besides the driver and conductor the limit is 537 lb. The Magistrate also refers to sections 80 (1) and 80 (3) of the Ordinance and says that they state "if a motor car is used which contravenes any provisions of this Ordinance or if anything is done in connection with a motor car, in contravention of any provision of this Ordinance, the driver of the car at the time of the offence shall be guilty, unless the offence was not due to any act, omission, or neglect on his part. Section 80 (3) states that unless otherwise expressly provided, the driver is liable. Hence it is for the defence to show that there is a provision casting the liability on the conductor".

Assuming that this section is applicable although no reference is made to it in the charge laid against the accused, in this case the contention of the defence when confronted with this section will clearly be that the driver is not liable as it has been expressly provided by rule 6 (3) of the Fourth Schedule that the conductor is liable.

Arguments based on the appropriateness of the existence of a conductor on an omnibus carrying at most four people and goods up to the weight of 4,102 lb. are matters for the Legislature to consider. The learned Magistrate observes that "the word conductor means a person who conducts another person to the latter's destination; a conductor cannot be said to be conducting an inanimate thing to a destination". If this is a good definition, I cannot say that a conductor is out of place on a vehicle which in addition to 4,102 lb. of inanimate things is carrying a driver, and may be two passengers.

The appeal is entitled to succeed. I allow it and set aside the conviction and acquit the accused.

*Set aside.*

