

1941 Present : Hearne, Keuneman and Wijeyewardene JJ.

DE ALMEIDA v. ALOYSIUS PERERA.

623—M. C. Panadure, 7,086.

Motor lorry—Charge of possession without a licence—Sale of car to be dismantled—Meaning of word “possession”—Motor Car Ordinance, No. 45 of 1938, s. 29 (2).

Where a person is charged, as registered owner, with having possessed a lorry for which a licence was not in force, it is open to him under section 29 (2) of the Motor Car Ordinance to prove that he did not possess the car during the material period.

The word “possess” in section 29 (2) means *de facto* possession, as understood in the Common Law.

THE accused was convicted under section 29 (1) of the Motor Car Ordinance, No. 45 of 1938, of having possessed in the year 1940 a motor lorry for which a licence was not in force at the said date.

The accused led evidence to prove that he was not in possession of the lorry in 1940, and that he had sold it in 1939 to be broken up for scrap iron.

The Magistrate held that in view of section 29 (2) of the Motor Car Ordinance the accused had to show that notice of non-user had been given by him or that registration had been cancelled.

E. S. Fernando, for accused, appellant.—The appellant was convicted under section 29 (1) of the Motor Car Ordinance, No. 45 of 1938. The point at issue is the interpretation of section 29 (2). Appellant admits that on the date in question he was the registered owner of the car but contends that he did not possess it. The car was dismantled in 1939 and had ceased to be a vehicle. Section 29 (2) is peculiar to the new Motor Car Ordinance, and there was no provision corresponding to it previously. The case of *Colombo Municipal Council v. Perera* will not, therefore, be in any way applicable.

The offence is created by section 29 (1). The sub-section (2) does not enlarge the scope of section 29 (1). It is possession in the ordinary sense which is contemplated. See, for example, section 18. The words in section 29 (2) should be given their ordinary and natural meaning. The presumption created by section 29 (2) is a rebuttable presumption.

H. V. Perera, K.C. (with him *C. S. Barr Kumarakulasingham* and *S. P. C. Fernando*), for complainant, respondent.—According to the scheme of the Ordinance the registered owner is to be regarded as the person who is in legal possession. The word “deemed” in section 29 (2) creates a fiction. The possession which is contemplated by the Ordinance after registration has taken place is different from physical possession; it is possession associated with ownership. See sections 12 (1) and 22. When a person’s name is on the register he cannot be heard to say that he has transferred it to another except only under section 18 (2). When one gets his name registered one acquires a fictional ownership and also a

¹ (1939) 40 N. L. R. 457 ; 14 C. L. W. 145.

fictional possession. "The contrary" in section 29 (2) has to be established in accordance with the law. The notion of "statutory possession" expressed in *Colombo Municipal Council v. Perera (supra)* is applicable, and section 29 (2) does not make any difference as regards the meaning to be attached to "possession".

Cur. adv. vult.

February 13, 1941. KEUNEMAN J.—

This appeal comes before the Divisional Court on a reference by Nihill J.

The accused was convicted under section 29 (1) of the Motor Car Ordinance, No. 45 of 1938, of having possessed in the year 1940 motor lorry No. E 512 for which a licence was not in force at the said date.

The prosecution led evidence to prove that the accused was the registered owner of the motor lorry in question, and it is clear that no licence was issued in respect of the lorry for the year 1940. The prosecution led no evidence as to the actual possession of the lorry, but relied on the provisions of section 29 (2).

The accused led evidence to show that he was not in possession of the lorry in 1940. He stated that he gave up the use of the lorry in June, 1939, and sent a notice of non-user to the licensing authority for the last half of that year. This was conceded by the prosecution, but no notice of non-user was sent in respect of the year 1940.

The evidence for the accused, however, showed that the accused sold this lorry together with two other lorries about September, 1939, and certainly before 1940. The lorries were removed to Colombo by the purchaser and broken up for scrap iron. The accused, the purchaser Murugesu, and another witness Suppiah gave evidence, and no attempt was made by the prosecution to rebut this.

Application for a cancellation of the registration was not made by the accused till about June, 1940, and the registration was cancelled in July of that year.

The Magistrate held that in virtue of section 29 (2) the "contrary" could only be proved according to the provisions of the Ordinance, namely, that notice of non-user had been given, or that the registration had been cancelled.

Section 29 enacts as follows:—

"(1) No person shall possess or use a motor car for which a licence is not in force.

"(2) The person who for the time being is, or is deemed under Part III. to be, the registered owner of a motor car shall, for the purposes of sub-section (1), be deemed, unless the contrary is proved, to possess that car."

The Magistrate was not correct in thinking that the word "contrary" in sub-section (2) (*supra*) has been interpreted by the Supreme Court. The present case appears to be the first where this word comes up for interpretation, and no case previously decided by the Supreme Court has been cited to us. The Magistrate, no doubt, had in mind the *dictum* of Soertsz J. in *Colombo Municipal Council v. Perera (supra)* to which I shall presently refer. But it has to be remembered that this *dictum* did not relate to section 29 (2) of the present Ordinance, but to the provisions of

the earlier Motor Car Ordinance, No. 20 of 1927, and its amending Ordinances which were embodied as Cap. 156 in the Legislative Enactments. There was no section corresponding to section 29 (2) in that Ordinance.

Further, the *dictum* of Soertsz J. in that case was an *obiter*, and did not form the basis of the decision. What was decided was that there must be proof by the prosecution that the car was on a highway at the material time, and this appears to be the point with which the other two Judges concurred. The accused was acquitted because there was no proof on this point.

The *dictum* in question is as follows:—

“If however there was evidence to show that at any time during 1938 the car was on a highway, then, in my opinion, it would not have availed the accused to prove that, although he appeared as the registered owner, he was not the true owner because he sold the car in October, 1937. I cannot agree with the view taken by Keuneman J. in *Hodson v. Cassim*¹, that it is open to a registered owner to rebut ‘the presumption of possession’ ‘in any way he wishes’. It is not, I submit, correct to speak of a ‘presumption of possession’ arising from registered ownership. It is much more than a presumption that arises. A statutory possession comes into being and overrides *de facto* possession and possession as it is understood in Common Law. This possession imputed to the registered owner by the Ordinance can, in the view I take, be displaced only in the manner provided by the Ordinance.”

I do not think it is necessary to consider whether this *dictum* of Soertsz J. was correct with reference to the Ordinance with which he dealt. The reasoning on this point is to be found in the judgment of Driberg J. in *Government Agent, Central Province v. Beeman*². In this case we have to interpret section 29 (2) which is a new section.

In substance, Mr. H. V. Perera for the respondent argued that once a person was a registered owner of a car or lorry he shall be deemed to possess the car or lorry. He argued that sub-section (2) of section 29 created much more than a presumption. There was a fictional possession created by the Ordinance, which could only be displaced by the manner provided in the Ordinance. This argument ran on very much the same lines as the *dictum* of Soertsz J. (*supra*) which speaks of a “statutory possession”. Mr. Perera emphasized the fact that under section 22 any person who for the time being is the registered owner shall for the purposes of any proceedings under the Ordinance be deemed to be the owner. He also referred to section 12 (1) which provides that no person shall possess or use a motor car unless that car is registered, and the person for the time being entitled to possession of the car is registered as owner thereof.

But I think Mr. Perera failed to bear in mind the distinction between “ownership” and “possession”. It is true that it is the person who is “entitled to possess” the car who can be registered as owner; but a title to possession is to be distinguished from possession. Further, it may be

¹ 40 N. L. R. 83.

² 33 N. L. R. 343.

that once a person is registered as owner, he cannot seek to prove that he is not the owner for the purposes of the Ordinance, unless his name has been removed from the register. But I think these considerations have no bearing on the question of the offence with which the accused is charged namely, possessing a motor car for which a licence was not in force, except to this extent that, if he is the registered owner, he shall be deemed, unless the contrary is proved, to possess the car.

I do not propose to discuss the question whether section 29 (2) only creates a presumption or whether it creates a statutory possession, for in any event this is only created "unless the contrary is proved". The contrary of what? I think this can only mean the contrary of the fact that the registered owner possesses the car. In what sense is the word "possess" used in the Ordinance? Mr. H. V. Perera argues that it is a special "possession" created by the Ordinance, which can only be displaced in the manner provided for in the Ordinance. But I do not think this can be sustained. In section 29 (1) the word "possess" can be interpreted in the Common Law sense. For example, if we can contemplate the case of a person possessing a car in respect of which there is no registered owner, then the prosecution will have to prove that there has been possession as understood by the Common Law. If there is a registered owner, can he be deemed to have a different kind of possession?

Again, if we look at section 18, we see that there may be a "change of possession" under various circumstances. Take section 18 (2) which deals with a "change of possession of a motor car upon a voluntary transfer by the registered owner". In this case, (a) the registered owner shall within fourteen days *after* such change of possession forward to the Commissioner a statement in Form 5 in the Second Schedule together with the licence and deliver to the new owner the certificate of registration, and (b) the motor car shall not be used for more than fourteen days after such change of possession unless the new owner is registered as owner and the licence delivered to him by the Commissioner.

I think in this case what is contemplated is a *de facto* change of possession. After that change has taken place, certain things are required to be done. In the proviso to this sub-section, a change of possession consequent on a hiring of the car is contemplated. If the hiring does not exceed three months, or if the registered owner continues to employ and pay the driver of the car, the sub-section referred to above does not apply. This again, I think, must refer to a *de facto* change of possession.

Section 18 (3) refers also to a "change of possession otherwise than on the death of the registered owner or on a voluntary transfer made by him". Here again, certain acts have to be done by the registered owner within a specified time *after* the change of possession. In neither sub-section are the further acts required to be done regarded as the termination of possession. In fact, the change of possession took place before that, and it was because there had been a change of possession that the acts had to be done.

I do not think notice of non-user under section 30 (1) mentioned by the Magistrate has any bearing on the point now discussed. It is clear that, in section 29 (4), this notice may be given while the possession continues in the registered owner. Notice of non-user cannot be regarded as a

termination of "possession" either *de facto* or statutory. Again, cancellation of registration under section 24 will, I think, only have the effect of putting an end to the "ownership" under the Ordinance. Section 24 appears to be the natural corollary of section 22. No other section has been cited to us, or discovered by us, which can indicate that possession under the Ordinance must be terminated in a particular manner.

After considering all these sections, I am of opinion that the word "possess" in section 29 (2) indicates *de facto* possession as understood in the Common Law, and that it is open to the registered owner to prove that he did not possess the car in that sense during the material period. In this case, I am of opinion that the evidence for the accused, if accepted, establishes the fact that the accused did not have possession of the lorry in question for the whole of the year 1940. The accused's own evidence has been amply corroborated, and no attempt was made to rebut that evidence. I think in the circumstances we must accept the evidence as correct.

I set aside the conviction and acquit the accused.

HEARNE J.—I agree.

WIJEYWARDENE J.—I agree.

Set aside.

