1931

Present: **Drieberg J.**

MEEDIN *v.* PERERA *et al*

356-7—P. C. Kegalla, 16,471.

Motor car—Charge of hiring a private car—Supply of petrol by the hirer—Fee or reward—Liability of owner—Motor Car Ordinance, No. 20 of 1927, s. 2 (1).

Where the owner and the driver of a car, licensed for private use, were charged with hiring the car to a person, who merely supplied the petrol for a journey and gave the driver a gratuity,—

Held, that there had been no hiring of the car within the meaning of section 2 (1) of the Motor Car Ordinance.

Held further, that the owner was not liable unless it was shown that he had authorized or connived at the unlawful use.

APPEAL from a conviction by the Police Magistrate of Kegalla.

Navaratnam, for the accused, appellants.

July 4, 1931. DRIEBERG J.—

The first appellant, the owner, and the second appellant, the driver, of a private car No. W. 1067 were convicted under section 30 (1) of the Motor Ordinance, No. 20 of 1927, of using the car for a purpose not authorized by its license.

The facts as found by the Police Magistrate are that K. M. Perera engaged Wijesingha's car on February 20; on February 21 morning K. M. Perera went to the stand where Wijesingha's car was, but the second appellant met him there and talked to him and K. M. Perera then decided to take the first appellant's car. K. M. Perera is the uncle of the

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prefer the case to be argued after notice to the Attorney-General. In this case I need not decide it, because the next objection taken appears to me to be good. The document tendered as security is not a recognizance at all. The name of the petitioner is not mentioned in the document, and he does not sign it. Rule 15, second paragraph, shows how a recognizance can be acknowledged by sureties. It says that there may be one recognizance acknowledged by both sureties, or separate recognizances each acknowledged by one surety as may be convenient. A recognizance is the document entered into by the person by whom the costs would become payable. The surety is another person, and as it was pointed out in *The Hull Petition Case* the very word " surety " implies a primary liability. The form given in rule 16 also shows in its terms that the party principally liable must be a party to the document. The form starts by saying " Be it remembered that——and——acknowledge themselves jointly and severally to owe *et cetera* ", and in the condition it said that the payment of the costs which shall become payable by the said——. The words, " the said " in this paragraph can only have reference to one of two persons who were mentioned in the first part of the recognizance, and the one referred to is clearly the person liable to pay the costs. In my opinion, therefore, this objection is good, and the document which purports to be a recognizance with two sureties is in fact no recognizance at all. It was suggested that this Court might allow time under rule 21. But in my opinion that rule only applies where the recognizance with two sureties has been tendered, and it is found that the sureties are insufficient, and not in the case where the document itself is not in compliance with rule 12 (1). The application, therefore, made under 12 (3) must be allowed, and I accordingly direct the dismissal of the petition, and order the petitioners to pay the respondent's costs.

first appellant. K. M. Perera gave the second appellant Rs. 2 for one gallon of petrol costing Re. 1.55 and let him keep the change; apparently that was all that was needed. The drive and back, I infer from the evidence, was about 30 miles. On his return he gave the second appellant Re. 1 as a present. In evidence the first appellant said that K. M. Perera asked him for his car saying that if he hired one he would have to pay " detention also ". K. M. Perera admits saying so. The Magistrate thinks this expression significant but I cannot agree. Truly or falsely, the first appellant and K. M. Perera stated that no hire was paid for the car, and I think all that K. M. Perera meant was that the hiring on that occasion would be specially expensive as he was not returning until evening and would have to pay more on account of detention. But apart from this the Magistrate was of opinion that the car was hired by reason of K. M. Perera supplying petrol and giving the driver a gratuity.

Under section 2 (1) of the Ordinance, a car is said to be hired if it is used for the conveyance of passengers for fee or reward. This implies an agreement and an advantage to one side and a fee or reward to the other for it. The owner got nothing by the cost of the petrol being defrayed—it must have been consumed on the trip—and the tip of Re. 1 to the second appellant for a whole day's services, which was nothing unusual, was not the result of a previous arrangement but a spontaneous act of K. M. Perera.

It may be, as the Magistrate observes, that it is within the meaning of the words " fee or reward ", but in the construction of a penal statute a Court can say that an act may be within the words but not within the spirit of the enactment—*The " Gauntlet, " Dyke v. Elliot* [1].

On these facts as found, the second appellant is not guilty of having used the car for the hire of passengers. There is no evidence against the owner, the first appellant. But the Magistrate has convicted him on the ground that the second appellant was presumbly acting on his orders and that he would be guilty of the offence unless he could show that the second appellant received the money against his orders; but this is not so. A master is not criminally liable for the act of his servant unless he is made so by statute expressly or by implication, or unless he has authorized or connived at the act. There is nothing in section 30 (1) of the Ordinance to make anyone but the person using the car liable and the first appellant could not be convicted unless it was shown that he had authorized or connived at the unlawful use of it.

There was, however, some evidence of real importance. Wijesingha's evidence was that the previous day K. M. Perera had agreed to hire his car at 50 cents a mile. Gunasena says that on the morning of the 21st after the second appellant had spoken to K. M. Perera, the latter said that he had engaged a car at 40 cents a mile and that he did not need Gunasena's car. Gunasena repeated this to his master Wijesingha. K. M. Perera denied that he said so. The Magistrate makes no reference to this and I can only conclude that he did not believe Gunasena on the

[1] *(1872) L. R. 4 P. C. appeals 184, at p. 191.*

point, for if he did, it would have been sufficient to support the conviction of the second appellant. If the car had been engaged and used for hire it would not be necessary to prove that payment of the hire had been made—*Katugastota Police Inspector v. Siyadoris Appuhamy* [1].

The conviction is set aside and the appellants acquitted.

Set aside.