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Present: Lyall Grant J.

MOORMAN *v.* SUGATHADASA.

426, 426a—P. C. Colombo, 29,076.

Motor omnibus—Negligence of driver—Presence of owner—Criminal liability of owner—Vehicles Ordinance, No. 4 of 1916, by-law 32.

The owner of a motor omnibus, who was present in the vehicle, is not criminally responsible for the negligence of the driver of the omnibus, unless the owner was in a position effectively to control the action of the driver.

APPEAL from a conviction by the Police Magistrate of Colombo. The accused, who are respectively the driver and the owner of a motor omnibus, were charged and convicted under section 32 of the Motor By-laws. The driver was charged with having driven his bus in a negligent manner and in a manner likely to cause hurt and with having caused hurt to a person. The owner was charged with allowing the driver to commit the offence charged against him and also with having allowed the bus to be driven in a manner otherwise than reasonable and proper.

On behalf of the owner the point was taken that the by-law, which makes the owner criminally liable for the negligence of the driver, is *ultra vires* of the powers conferred on the Governor in Executive Council by the Vehicles Ordinance of 1916.

J. S. Jayewardene, for appellants.

Fonseka, C.C., for Crown, respondent.

September 26, 1927. LYALL GRANT J.—

These two appeals are taken from convictions under section 32 of the Motor By-laws.

The accused are respectively the driver and the owner of a motor bus. The driver was charged with having driven his bus in a negligent manner and in a manner likely to cause hurt and with having caused hurt to a certain person and thereby having committed an offence. Secondly he was charged with having driven his motor bus negligently at the same time and place and with having caused damage to a bullock cart.

The second accused was charged with allowing the first accused to commit these offences, and also with having allowed the bus to be driven in a manner otherwise than reasonable and proper.

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The undisputed facts in the case were that the bust came into collision with a bullock cart, and that a certain Davith Perera, who was seated in the bus and had his elbow projecting through the window, was struck by a pole projecting from the cart, which passed through his arm.

The evidence as to how the accident came about is conflicting. The story for the prosecution is that some ten bullock carts were halted at a level crossing waiting for the gates to be opened. The bus came along at a furious pace and collided with the rearmost cart that was stationary.

The accused agree that the bust came up while the carts were standing on the road, but they say that the bust waited behind the rear cart until the gates were open—that it then pulled out to the right to pass the cart, and that while it was doing so, the cart made a half turn which projected the overhanging superstructure into the bus and that this was the cause of the accident.

The Police Magistrate has accepted the story for the prosecution and I am not prepared to say that he has no grounds for doing so.

The driver has been found guilty under section 32 of the Motor By-laws of negligent driving and fined Rs. 75. The maximum penalty for a first offence of breaking this rule is Rs. 50, and Crown Counsel intimated that he could not support the fine inflicted by the Police Magistrate. The fine is accordingly reduced to Rs. 50. The case appears to be one of gross negligence, and I think the accused ought to pay the maximum fine sanctioned by law.

On behalf of the owner the objection has been taken that no proper charge has been framed against him, but that the charges have been explained from the police report.

This procedure is permissible in certain cases by the proviso to section 187 of the Criminal Procedure Code, which allows the Police Magistrate to read the police report as a charge to the accused where the report discloses an offence punishable with not more than three months' imprisonment or a fine of Rs. 50.

The question is whether the present offence is one which can be punished with more than the amount specified in section 187.

The first offence is punishable with a fine of Rs. 50, and the second offence with a fine of Rs. 100.

This precise point has already been the subject of a ruling by Garvin J. in *Sub-Inspector, Padukka, v. Perera.*[1]

It was there held that the Magistrate was not entitled in such circumstances to read the report to the accused in lieu of framing a charge, the reason given being that it is obvious that at the time of the institution of the charge the Police Magistrate does not and cannot know whether the offence charged is a first or second offence.

[1] *28 N. L. R. 479.*

I would also refer in this connection to *Soysa v. Davith Singho* [1] and *Jamal v. Samarasinghe.*[2]

The conviction of the owner cannot stand, and the only point which remains is whether the case should be sent back for further proceedings. On this point the question arises whether the by-law making the owner criminally responsible for the negligence of his driver is *ultra vires* of the powers conferred upon the Governor in Executive Council by the Vehicles Ordinance of 1916.

It was held by Schneider J. in the case of *Steuart v. Pakeer Saibo,*[3] that in a case similar to the present one but where the owner was not present at the time of the accident, the reference to " owner " in the by-law in question is *ultra vires.*

The most noteworthy feature in that case was that the proceedings were brought up in revision by the Attorney-General whose submission was that the reference was *ultra vires.* It was there pointed out that the by-law in question could only have been framed under section 22 (1) (*h*), which provides for by-laws as giving such directions as may appear necessary as conducive to the public safety and convenience and for the identification of drivers and those in charge of such vehicles.

The ground of the judgment is stated as follows by Schneider J.:—

> " Now an owner, who was not in the vehicle at the time of the offence by the driver, cannot be regarded as being concerned in any way with the driving and management. Therefore this by-law is *ultra vires* in so far as it seeks to make the owner liable equally with the driver for an offence committed by the driver in the absence of the owner."

It seems to me the same remark applies equally to a case where the owner, though physically present in a car, is not in a position effectively to control the action of the driver.

Although the Attorney-General on that occasion appeared by Crown Counsel to urge upon the Court that the particular reference to " owner " in the by-law was *ultra vires,* in the present case Crown Counsel adduced a long list of authorities to show that the Court has no power to inquire into the question of whether this by-law is *ultra vires.*

Considered in the abstract the question is not free from difficulty, but in view of the fact that the Crown has already sought and obtained a decision of the Court on the point, I do not think there is anything to be gained by my going into the question whether the Court has power to give such a decision. If the Crown wishes to raise this point it must be taken before a larger Court and the case of *Steuart v. Pakeer Saibo* (*supra*) overruled or confirmed.

[1] *8 C. L. R. 148.*

[2] *8 C. L. R. 168.*

[3] *27 N. L. R. 25.*

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I doubt, however, whether it is necessary to read the by-law in such way that it becomes repugnant to one's sense of justice.

The obvious intention of the by-law is to prevent rash and negligent driving, and it is clear that wherever there is rash or negligent driving, the driver is made guilty of an offence under the by-law.

It might seem that the owner is equally made liable, but it would appear from the action of the Attorney-General in the case above referred to that it was not the intention of Government to pass such a by-law, and indeed, it would not be presumed lightly that the legislature intended to make a perfectly innocent person liable for an offence, of the very occurrence, of which he might have no knowledge, and which it would be impossible for him to prevent.

Rather would one read the by-law in such a way as to make the owner guilty of an offence only where the negligence or recklessness was such as he could reasonably have been expected by the exercise of his authority to prevent.

If any other meaning than this is to be attached to the by-law, I agree with Schneider J. that the reference to the owner is *ultra vires*, and that in no circumstances can the owner be held to be guilty of an offence in respect of any act of his driver contravening the by-law.

In the present case there is nothing to show that the accident arose out of the fault of the owner, or that he could in any way have prevented it.

The appeal of the second accused is allowed and his conviction quashed.

Appeal allowed.