1959 *Present:* **Sinnetamby, J.**

H. DANIEL, Appellant, *and* H. C. R. LEWIS (Officer-in-Charge, Police Station, Galle), Respondent

S. C. 673—M. C. Galle, 16001

Motor Traffic Act, No. 14 of 1951—Section 150 (10)—Contravention of "off side rule" —Burden of proof—Evidence Ordinance, s. 105.

By section 150 (10) of the Motor Traffic Act—

"Where two or more motor vehicles approach, or arrive at, the intersection of two or more highways at the same time from different directions, and any two or more of the drivers thereof indicate their intention to drive along the same part of the area of intersection, then, if traffic is not regulated at that intersection by a police officer or by means of light signals or of notices under section 152 no such motor vehicle shall be driven along that part of the area of intersection until any other such motor vehicle coming from the right or off side, has passed it."

Held, that in a prosecution for breach of section 150 (10) the burden is on the complainant to establish that, at the area of intersection, traffic was not regulated by a police officer or by means of traffic signals or by notices under section 152.

APPEAL from a judgment of the Magistrate's Court, Galle.

Prins Gunasekera, for Accused-Appellant.

I. F. B. Wikramanayake, for Attorney-General.

Cur. adv. vult.

July 2, 1959. SINNETAMBY, J.—

The accused in this case was charged with driving Motor Vehicle No. CV 6203 along a public highway and with having at a road junction failed to "comply with the off side rule" to wit: "allow Car No. EL 1315 to pass from the off side" in breach of Section 150 (10) of the Motor Traffic Act.

The facts accepted by the learned Magistrate show that at this particular junction the accused who was driving a bus tried to go past a motor car driven by the A. S. P., Galle which was approaching the round about from his right or off side. The A. S. P. had to stop his car to avoid an accident. In his evidence the A. S. P. stated that if he had not applied his brakes the bus would have run over the car. On these facts which were accepted by the Magistrate it is clear that but for the timely action of the A. S. P. the conduct of the accused in not giving way to the car would have resulted in an accident.

Section 150 (10) is in the following terms:—

"Where two or more motor vehicles approach, or arrive at, the intersection of two or more highways at the same time from different directions, and any two or more of the drivers thereof indicate their

intention to drive along the same part of the area of intersection, then, if traffic is not regulated at that intersection by a police officer or by means of light signals or of notices under section 152 no such motor vehicle shall be driven along that part of the area of intersection until any other such motor vehicle coming from the right or off side, has passed it".

The only question that arises for consideration in this case is whether it is incumbent on the prosecution to establish that at the junction traffic was not regulated at the time by a police officer or by means of traffic signals or by notices under section 152 in order to succeed.

It is the contention of the accused's Counsel that the conditional clause in section 150 is an essential element of the offence and that the burden of establishing it is upon the prosecution. The prosecution on the other hand state that by virtue of the section 105 of the Evidence Ordinance these provisions constituted something in the nature of a proviso or exception and that the burden of establishing the facts necessary to establish any or all of these is upon the accused. It is to be noted that the conditional clause is not expressly stated to be either a proviso or an exception, but nevertheless if on a true construction of the section it is so, then the burden would undoubtedly be upon the accused to show that by virtue of the proviso or exception he is not guilty of an offence of which he would otherwise have been guilty.

It seems to me, however, that the state of things contemplated by the clause in question is a necessary element of the offence which the section seeks to penalise. The contravention of the off side rule by itself is not an offence but it becomes an offence only if there is not at the junction either a policeman or traffic lights controlling traffic or there is an absence of notices under section 152 indicating which the major road and which the minor is. If there is a policeman on traffic duty or there are traffic lights or if there is a notice under section 152 then the off side rule has no application and the driver of the motor vehicle is obliged to follow the directions given. In this connection it would be useful to consider the manner in which our Courts have dealt with somewhat analogous provisions under other provisions of the law. It is sufficient if I refer to just two cases. In *Nair v. Saundias* [1] a provision under section 83 (*b*) of the old Motor Ordinance was construed. In that case the driver of a motor car was convicted with taking passengers for hire in a vehicle which was licensed for private use only. The owner was not present but he too was charged under section 80 (3) (*b*) with permitting his car to ply for hire. The relevant parts of the section are as follows :—

"If nothing is done or omitted in connection with a motor car in contravention of any such provision then. . . .

a. . . . . .

b. The owner of the Motor Car shall also be guilty of an offence. . . . . unless the offence was committed without his consent and was not due to any act or omission on his part and he had taken all reasonable precautions to prevent the offence".

[1] *(1936) 37 N. L. R. 439.*

The matter that required adjudication was whether the burden was on the prosecution to prove that the offence was not committed without the consent of the owner and was due to an act or omission on his part and that the owner had not taken all reasonable precautions to prevent the offence. For the prosecution it was contended that these provisions amounted to a special exception or proviso within the meaning of section 105 of the Evidence Ordinance and that the burden was on the accused to establish them if he wished to avail himself of them but the Court held that it was a necessary element of the offence which the prosecution had to prove. Dalton, J. proceeded on the footing that in regard to every criminal offence the presumption of innocence renders it necessary for the prosecution to establish " all the elements which go to make up the offence charged " before the accused " need make any move to bring himself within the exception relied on ". He then proceeded to examine the provisions of section 83 (*b*) to see if there was anything in it, contrary to the general rule, which threw the burden on the accused. He held that there was no express provision changing the general rule and imposing on the alleged offender the burden of proving that the particular offence was committed without this consent and was not due to any act or omission on his part. He continued " if the legislature intended to put the burden of proof here upon the owner as urged by the appellant that condition must be plainly expressed or clearly implied. I cannot find that that intention has been expressed in this sub-section in either way ".

The case under consideration is even stronger. Certainly the intention of the legislature in regard to burden of proof has not been either expressly or impliedly stated. In these circumstances, the ordinary rule that the burden of establishing a charge is upon the prosecution will apply. In the case of *Sanitary Inspector, Mirigama v. Thangamani Nadar*[1] the case for the prosecution was even stronger. Nagalingam, A. C. J. held that the presumption of innocence placed upon the prosecution the burden of proving every ingredient of an offence even though negative evidence be involved. That was a case in which the accused was charged under the Quarantine and Prevention of Diseases Ordinance with " being permanently or temporarily resident in a building in which was a person affected with a contagious disease, to wit : smallpox, and with having failed to inform the proper authorities forthwith ". The prosecution had led no evidence to establish even a prima facie case that the accused had failed to give information. Section 106 of the Evidence Ordinance which was invoked by the prosecution did not, in the Judge's view, apply even though the fact of giving information was within the knowledge of the accused, until some prima facie evidence of failure of the accused to give information was established. The present case is much stronger. The provisions of that part of section 150 (10) which is under consideration did not relate to matters within the special knowledge of the accused : they are matters within the knowledge of all including the prosecution. It is only if any of the conditions set out there do not exist that an offence is committed on the failure to comply with the requirements of the earlier

[1] *(1953) 55 N. L. R. 302.*

part of the Section. In my opinion, there can be no doubt that the burden of establishing the non-existence of the matters referred to in that part of the section 150 (10) is upon the prosecution. In this case they made no endeavour to prove it. The prosecution must therefore fail. The conviction is accordingly set aside and the accused acquitted.

Appeal allowed.