

[IN REVISION.]

1929.

Present: Driberg J.

SUB-INSPECTOR OF POLICE v. RAJALINGAM et al.

P. C. Jaffna, 4,159.

Motor car—Using private car for carrying passengers for hire—Burden of proof—Absence of explanation by accused—Evidence Ordinance, s. 114.

The accused, who were the owner and the driver of a motor car licensed for private use, were charged with employing it for carrying passengers for hire. It was established by the prosecution that on several days the car was seen driven by the chauffeur with several persons of different nationalities as passengers, the owner himself being present on one occasion.

Held, that, in the absence of an explanation by the accused, the Court was entitled to draw the presumption that the car was not being used for the purpose for which it was licensed.

A PPLICATION for revision of a conviction by the Police Magistrate of Jaffna.

Ramachandra, in support.

Illangakoon, C.C., for the Crown.

July 15, 1929. DRIEBERG J.—

The first accused is the driver and the petitioner the owner of a car which is licensed as a car for private use for the conveyance of passengers. They were charged and convicted of using a car for a purpose not authorized by its licence, *i.e.*, carrying passengers for hire, in breach of section 30 (1) of the Motor Car Ordinance, 1927. They were each sentenced to pay a fine of Rs. 5 or in default three day's simple imprisonment. The case is before me on an application by the petitioner for revision.

These accused were originally charged with committing this offence on August 14, 1928. After the evidence of one witness had been recorded the date of the offence was altered to "November 14, 1928, and thereafter." The petitioner complains that he was prejudiced by the vagueness of the charge, but the dates of the several offences, November 14, 15, 20, 26, and December 6, were stated by the first witness and the alteration was made on a later date; the petitioner was represented by Counsel and no objection was taken to or time asked to meet the altered charge.

On November 14, 1928, P. S. Ratnam saw the car at 8 A.M. at Tinnevely Junction on the way from Point Pedro to Jaffna. It was driven by the first accused and there were five persons, whose names were noted.

1929. On November 15 the car was seen at 8.20 A.M. by Sergeant
 DRIEBERG J. Suppramaniam at " Tinnevely-Urampurai road " being driven by
 the first accused towards Jaffna. There were six persons in the
 car besides the first accused. It was seen later at Anaipanthy
 Junction on its way to Jaffna with five persons in it ; four of these
 were in the car at 8.20 A.M. Two had left and one was a new
 occupant, Samuel Sinnetamby.

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On November 20 it was seen at 3.45 P.M. at the Kaikula road
 being driven in the direction of Point Pedro from Jaffna with
 seven passengers, whose names were noted. Among them were a
 Moorman and a Chetty, the rest being Tamils.

On November 24 the car was seen at 4 P.M. at Puttur going
 towards Jaffna. The petitioner was in the car with the first
 accused and there were five others who were residents of villages
 10, 12, 14, and 16 miles away from Jaffna. Their names were
 noted. The car was seen again at Nallur returning from Jaffna
 with three occupants, besides the two accused. None of them
 were in the car when it was seen at 4 P.M.

The car was seen again on December 6 at 8 A.M. being driven
 by the first accused with eight passengers in it. The movements
 of the car had been under observation during all this time and
 on this occasion the passengers refused to give their names to the
 police.

There was no evidence led for the defence, and it was argued
 for the accused that they could not be convicted unless the occupants
 stated that they paid for their conveyance.

The Police Magistrate convicted the accused in a brief judgment
 which has been of no assistance to me. The contention of the
 defence is wrong. Payment of money is only one, though the
 most obvious, way of proving that the car was used for carrying
 passengers for hire. In " 177, P. C. Kandy, No. 27,731 (Supreme
 Court Minutes of February 19, 1929), " a conviction of his charge
 was based on this evidence—a witness said that he saw the car
 coming, he raised his hand, it halted and he got in, he had no
 money and no money was demanded of him ; he said he meant
 to pay, but after the car had gone some way it was stopped by the
 police. Akbar J. held that there was such a presumption that
 the car was being used for hiring purposes as justified a conviction
 in the absence of an explanation by the accused.

Under section 114 of the Evidence Ordinance the Court may
 presume the existence of any fact which it thinks likely to have
 happened, regard being had to the common course of natural
 events, human conduct, and public and private business in their
 relation to the facts of the particular case. This section was
 inserted to meet the objection that the subject of presumptions
 was insufficiently treated in the Ordinance and with a view to

providing for all instances not covered by the provisions of the preceding sections—"Ameer Ali's Law of Evidence, 8th edition, p. 772." The effect of this section coupled with the general repealing clauses in section 2, as stated by Sir. J. F. Stephen in introducing the Act, was "to make it perfectly clear that Courts of Justice are to use their own common sense and experience in judging of the effect of particular facts, and that they are subject to no technical rules whatsoever."

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Ameer Ali also quotes, as well expressing the law on this point, the judgment in an American case. "Where probable proof is brought of a state of facts tending to criminate the accused, the absence of evidence tending to a contrary conclusion is to be considered, though not alone entitled to much weight, because the burden of proof lies on the accuser to make out the whole case by substantive evidence. But when pretty stringent proof of circumstances is produced, tending to support the charge, and it is apparent that the accused is so situated that he could offer evidence of all the facts and circumstances as they existed, and show, if such was the truth, that the suspicious circumstances can be accounted for consistently with his innocence and he fails to offer such proof, the natural conclusion is that the proof, if produced, instead of rebutting, would tend to sustain the charge. But this is to be cautiously applied, and only in cases where it is manifest that proofs are in the power of the accused, not accessible to the prosecution."—"Ameer Ali's Law of Evidence (8th edition), p. 784, from judgment of Chief Justice Shaw in *Commonwealth v. Webster*."

A further point is that in such cases the presumption will be drawn more readily in proportion to the difficulty of proving the fact by positive evidence, and to the facility of disproving it or of proving facts inconsistent with it, if it really did not occur. The present case is essentially one of this nature; proof by direct evidence that the occupants paid for being taken in the car is very difficult, and it must be remembered that if the charge is true the occupants would themselves be guilty of abetting the commission of the offence—section 83, Motor Car Ordinance.

I do not think the use of the car on November 14 by itself calls for any explanation by the accused; it amounts to nothing more than that five persons were being driven in the car.

The conduct of the accused, however, on November 15 and 24, coupled with the conduct of the first accused and the passengers on December 6, stands on a different footing. On the 24th the car was carrying towards Jaffna five persons who lived 10, 12, 14, and 16 miles away from Jaffna; it is a fair inference that they were taken on the way; they did not return, however, and at 5.30 P.M.

1929. on the same day it was seen taking four other persons back from
 DRIEBERG J. Jaffna. The petitioner was in the car and the first accused was driving.

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On December 6 the first accused was driving eight persons on the road from Point Pedro to Jaffna, and they refused to give their names to the police.

Under section 76 of the Motor Car Ordinance a police officer who has reason to suspect that an offence has been committed in connection with a motor car can require the owner to give him all information in his possession as to the name, address, description, antecedents, and whereabouts of the driver and occupants of the car at the time of the alleged offence. It is true that the petitioner was not in the car at the time and the police did not say that they asked the second accused for the names of the occupants, but the fact that the law empowers the police to demand this information from the owner must be kept in mind when it is considered whether the petitioner can claim the privilege ordinarily available to an accused of not being obliged to give evidence against what may be mere circumstances of suspicion.

It appears to me that the obligation of explaining in answer to a charge is stronger when that explanation is one which the law empowers a police officer to demand. In this case the petitioner, in not explaining the use of the car on December 6, by giving full particulars of the occupants, is withholding information which a police officer could have required him to give.

In my opinion the case is one of more than suspicion. The cumulative effect of the evidence leaves one with the conviction that the car was not used in the ordinary way in which private cars are used. There is nothing in the evidence to suggest that these persons were members of the petitioner's household or in any way connected with him ; on the contrary the evidence where some of them reside suggests that they were taken at different points when the car was on its way to and from Jaffna. There is also the fact that in these instances the car was carrying a full load of passengers and that at times it was overloaded. I presume that the petitioner has the same desire for economy as most people and that he would not be transporting full loads of passengers for long distances without some special reason. The petitioner does not say that the use of the car by the second accused was without his consent.

In the absence of any explanation by the petitioner or the second accused I think the Court was entitled to draw the inference that the car was not being used for the purpose for which it was licensed, namely, for private use.

The application is dismissed.

Application refused.