1965 *Present :* Alles, J.

S. R. MUTTIAHPILLAI, Appellant, *and* W. G. ROBERT DE SILVA (Inspector in the Department of the Registrar of Companies), Respondent

S. C. 1381/1964—M. C. Colombo, 1056/A

Company law—Profit and loss account and balance sheet—Prosecution against Director for failure to hold general meeting—Burden of proof—Companies Ordinance (Cap. 145), ss. 121 (1) (2) (3), 262 (1)—Criminal Procedure Code, ss. 168, 169—Evidence Ordinance, ss. 105, 106.

Where, in consequence of his failure to hold a general meeting of the Company within the prescribed period, a Director of a private Company which has been registered under the Companies Ordinance is prosecuted for failing to take all reasonable steps to lay before the Company at a general meeting a profit and loss account, a balance sheet and the report of the Directors as required by subsections (1) and (2) of section 121 of the Companies Ordinance, the evidential burden of proving that he took all reasonable steps to comply with the provisions of section 121 is on the accuesd. In such a case, the question at issue is one that is peculiarly within the knowledge of the accused.

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

H. V. Perera, Q.C., with *N. Nadarasa* and *K. Kanthasamy*, for the accused-appellant.

Ranjit Abeysuriya, Crown Counsel, for the Attorney-General.

Cur. adv. vult.

March 5, 1965. ALLES, J.—

The accused, a Director of Muttiahpillai Estates Ltd., a private Company registered under the Companies Ordinance was charged as follows :

> That he being a Director of the said Company, having a share capital in the calendar year 1962, did fail to take all reasonable steps to comply with the provisions of section 121 of the Companies Ordinance (Cap. 145) to wit :—
>
> (*a*) Lay before the Company in general meeting a profit and loss account in accordance with section 121 (2) of the said Companies Ordinance.
>
> (*b*) Cause to be made out and laid before the Company in general meeting a balance sheet in accordance with section 121 (2) of the said Companies Ordinance.
>
> (*c*) Attach to such balance sheet a report by the directors with regard to the state of the Company's affairs in accordance with section 121 (2) and
>
> thereby committed an offence punishable under section 121 (3) of the said Ordinance.

The accused pleaded not guilty to the above charge but after trial was convicted and sentenced to pay a fine of Rs. 50. The accused has appealed to this Court from his conviction and sentence.

According to document P4 of 21st January, 1957, the accused and his wife were the only two Directors of this Company. By letter P5 of 9th April, 1962, addressed to the accused, the Registrar of Companies called for the annual return for the calender year 1961. The letter also indicated that it was presumed that an annual general meeting had been held. In reply to this letter the Company sent the annual return (P6) dated 14th January, 1962. Since the annual return has to be made up to fourteen days of the general meeting, it was presumed by the Registrar that the general meeting in respect of this Company had been held on 31st December, 1961 ; i. e. two weeks prior to 14th January, 1962. Similarly the return P7 was sent dated 14th January, 1963. Here too it was presumed that the general meeting would have been held on 31st December, 1962. Since, however, there were a number of defects in P7, the Directors were requested to have it amended, but no action was taken. Consequently, the Registrar wrote to the auditors of the Company letter P8 of 12th November, 1963 and received reply P9 of 21st November, 1963 stating that the accounts of this Company had been audited up to 31st December, 1961 and that these accounts were certified by the auditors only on 18th June, 1963. In view of the provisions of the Companies Ordinance, a general meeting has to be held not later than nine months after the date from which the last account is prepared. In the instant case since the last account was prepared up to 31st December, 1961, according to P9, the general meeting should have been held within

nine months of that date i.e. 30th September, 1962 ; but P9 shows that the account referred to was certified by them only in June 1963. Since the account cannot be presented at the general meeting until it is audited, it follows that the account could not have been presented at any general meeting. Therefore this account could not have been presented at any general meeting before 30th September, 1962 and the account could not have been tabled till after it was audited in June, 1963. In view of these matters, the case for the prosecution is that no reasonable steps were taken by the Directors to lay before the Company at a general meeting a profit and loss account, a balance sheet and the report of the Directors as required by section 121(1) and 121(2) of the Ordinance. On 10/4/62, by the Registrar's letter P5 the attention of the accused was pointedly drawn to the fact that he had failed to comply with the provisions of sections 121(1) and 121(2) of the Ordinance, and warned of a possible prosecution under section 121(3) of the Ordinance.

A representative of the Department of the Registrar of Companies and the auditor of the Company gave evidence for the prosecution. The auditor's evidence revealed that the books of the Company for the relevant period were received only on 31st August, 1962, and that the auditors took a further nine months up to June, 1963 to certify the accounts as they had to raise a number of queries and obtain satisfactory answers. The auditor stated that in regard to this particular Company they had always taken a long time to audit the accounts as the books had not been properly maintained.

The accused gave no evidence at the trial and the evidence for the prosecution has not been seriously challenged by the defence. There is therefore no doubt that the accused has failed to comply with the provisions of sections 121(1) and 121(2) of the Ordinance.

The main question that was argued in appeal was the correctness of the charge. Mr. H. V. Perera, Q.C. submitted that the charge was defective as the prosecution did not specify what reasonable steps the accused had failed to take to comply with the provisions of the law. According to him it was only when the prosecution detailed these steps, that the burden was cast on the accused to satisfy the Court that he had in fact taken all reasonable steps. He stressed the fact that the section penalised the failure to take all reasonable steps and not the failure to comply with the provisions of the section. Counsel also brought to my notice the difference in the language of section 121 (3) and section 262 (1). In the latter section the liability of the Director after a Company was wound up for not keeping proper books of account was made punishable, ' unless he shows that he acted honestly or .... the default was made excusable '. These words, he submitted, clearly cast the burden of proving the circumstances of exculpation on the Director whereas under section 121(3), it was not open to such a construction. Further he submitted that as the proviso to section 121(3) provided for the imposition of a term of imprisonment only when the accused's failure to take reasonable steps was wilful it necessarily followed that the court should

be in a position to decide whether the reasonable steps which the accused failed to take were done deliberately or not and therefore it was incumbent on the prosecution to mention the reasonable steps which the accused failed to take. This is however a matter for inquiry by the Magistrate at the time of passing sentence and need not be considered by him at the time the charge is read to the accused. Crown Counsel on the other hand submitted, quite apart from the consideration that on the facts of this case the accused could not have been prejudiced, that the charge conformed to the provisions of sections 168 and 169 of the Criminal Procedure Code and no further particulars other than that specified in the charge was necessary. It seems to me that the correctness of the charge is one that can be resolved from an examination of the particulars mentioned in the charge itself. The charge contains the provisions of section 121, which have not been complied with by the accused—the failure to lay before the Company in general meeting the profit and loss account, the balance sheet and the report showing the state of the Company's affairs. The law casts the duty for compliance with these provisions on the Directors and if there is a non-compliance with these express provisions of the law, it must necessarily follow that the failure to do so was because the Directors had not taken all the necessary steps to ensure that a general meeting was held to enable the accounts, balance sheet and the report to be tabled within the prescribed period. I do not think such a construction of the provisions of section 121 (3) is unreasonable. An examination of the provisions of the Ordinance reveal that the responsibility for the management of the company's affairs rests on the Directors. It is they who have to safeguard the interests of the shareholders and the authorities would look to them for a compliance with the provisions of the law. In *de Silva v. The Registrar of Companies*[1] it was held that it was for the Directors of a Company to establish that no blame could be attached to them for failing to carry out their statutory duties. In dealing with the duties of a Company Director, Lord Coleridge, C.J. said in *Edmonds v. Foster*[2] that 'no step can be taken and no omission can occur in its management without his having the power to raise an objection. He is therefore *prima facie* responsible for any default on the part of the Company and the burden of proof is upon him to show that the failure to do what was required of the Company happened without any blame attaching to him'. In *Cumarasamy v. R. A. de Mel*[3] a Director was charged under section 111(1) of the Ordinance with the failure to hold a statutory meeting and thereby committed an offence under section 111(9) of the Ordinance of knowingly and wilfully authorising and permitting the default. Nagalingam, J. held that in such a prosecution, 'the prosecutor cannot be expected to and need not do more than place before the Court a *prima facie* case against the accused'. The prosecutor had shown that no statutory report was delivered to the Registrar of Companies as required by section 111 (5) which was a necessary prerequisite to the holding of a statutory meeting. In similar

[1] *(1955) 56 N. L. R. 519 at 522.* [2] *(1875) 45 L. J. M. C. 41.*
[3] *(1950) 52 N. L. R. 253.*

circumstances where the Registrar has not received the profit and loss account, the balance sheet and the Director's report within the prescribed period and the correspondence indicates that these steps had not been taken within that period to be presented at a general meeting, there is a *prima facie* case against the Directors that they had not taken all reasonable steps to comply with the provisions of the law and hence the default. Any other conclusion is likely to create an intolerable situation. For instance how is the prosecution able to lead evidence as to the steps which prevented the Directors from complying with the express provisions of the law. This may have been due to a variety of causes—lack of staff, absence from the Island, delay on the part of the auditors, to mention a few, matters which must necessarily be within the peculiar knowledge of the Directors. Although the wording of section 121 (3) might have been framed in language which would clearly cast the burden of proving these matters on the Directors by using such words as ' unless the Director is able to satisfy the Court that he took all reasonable steps ' —words similar to those found in section 262 (1) of the Ordinance—I do not think the section as presently framed could have intended to create the well-nigh impossible task of casting the burden of proving that a Director failed to take all reasonable steps on the prosecutor. It is reasonable to infer, that where the subject matter of the allegation lies peculiarly within the knowledge of one of the parties, that party must prove it.

Crown Counsel also referred me to the provisions of sections 105 and 106 of the Evidence Ordinance. Under section 105, *inter alia*, the burden of proving any special exception on which the accused relies is on him. Thus where the words used were ' unless the contrary is proved ' or 'not included in a reserved or village forest' in a charge under section 21 of the Forest Ordinance (*Mudaliyar, Pitigal Korale North v. Kiri Banda*[1]) the burden of proving these exceptions would be on the accused. It seems to me however, that the wording of the charge in the present case must be considered having regard to the provisions of section 106 of the Evidence Ordinance. The language of section 121(3) is in the nature of a statutory exception and the onus of proving such an exception is on the accused as it would be placing an impossible burden on the prosecution to prove the negative. The question at issue in the present case is whether or not the failure of the accused to take reasonable steps to comply with the provisions of the law is one that is peculiarly within the knowledge of the accused. The rule of law, in litigation concerning the construction of statutes and agreements, has been laid down by Bayley, J. in the old case of *R. v. Turner*[2] in the following language :

> 'If a negative averment be made by one party, which is peculiarly within the knowledge of the other, the party within whose knowledge it lies, and who asserts the affirmative is to prove it, and not he who avers the negative.'

[1] *(1909) 12 N. L. R. 304.*

[2] *(1816) 5 M. & S. 206.*

The principle laid down in *R. v Turner* has been adopted in later cases (*R. v. Oliver*[1]) and has been accepted as sound law (*vide* Cross on Evidence (1963) pp. 79–81). Commenting on *R. v. Turner*, which was a case where there were ten possible qualifications available to the accused who was charged with having pheasants and hares in his possession without the necessary qualifications, Cross in his excellent treatise says that 'in the case of a statute containing a plurality of excuses it is not unreasonable to hold that the burden of adducing evidence with regard to any one of them should be borne in the first instance by the party seeking to rely on the excuse.' I am therefore of the view that once the prosecution has discharged its legal burden of proving that the accused has not complied with the statutory requirements of sections 121 (1) and 121 (2) of the Ordinance, the evidential burden of proving that he took all reasonable steps to comply with these provisions is on the accused. Since the accused has not given evidence and discharged that burden, he is guilty of having contravened the provisions of section 121 (3) of the Ordinance.

Counsel for the appellant also invited me to consider the provisions of section 149 (1) of the Motor Traffic Act and cited in support the cases of *Perera v. Perera*[2] and *Doray v. Inspector of Police, Dehiwela*[3]. In *Perera v. Perera* the validity of a charge under section 151 (1) (which corresponded to section 149 (1)) was not directly in issue. This section requires the driver of any motor vehicle on a highway to take such action as may be necessary to avoid an accident. In *Doray v. Inspector of Police, Dehiwala* at p. 153, Basnayake, C.J. held that a charge under this section should contain such particulars as are necessary to give the accused notice of the allegation or allegations of the prosecution.' The section was not designed to penalise the driver of a motor vehicle because he meets with an accident. It must be proved that the accident took place because he intentionally failed, in breach of his duty, to take such action as was necessary to avoid the accident in respect of which he is charged. Mr. Perera submitted that by analogous reasoning, a prosecutor under section 121 (3) of the Ordinance should specify the steps that the accused failed to take to make him culpable. I am unable to agree that there is an analogy between the two sections. Under section 149 (1) of the Motor Traffic Act there is a general duty cast upon the driver of a motor vehicle to avoid an accident and, if he fails to do so, he becomes liable under the section. It may be that he failed in his duty to avoid the accident by doing some lawful act. It is therefore understandable that in such a case he should be informed of what steps he should have taken to avoid the accident. I do not think, therefore, that the decisions under section 149 (1) of the Motor Traffic Act are of any assistance to the defence.

For the above reasons, I hold that the charge as framed by the prosecution is in accordance with the provisions of the law and the appeal is dismissed.

Appeal dismissed.

[1] *(1944) 1 K.B. 68 at 74.*
[2] *(1957) 59 N.L.R. 64.*
[3] *(1959) 61 N.L.R. 152.*