1937 *Present :* **Abrahams C.J.**

CHELLIAH *v.* COOPER.

644—M. C. Colombo, 39,345.

Motor car—Charge of loitering on a highway—Burden of proof—Ordinance No. 20 of 1927, Schedule 4, r. 31.

Where the driver of a motor car was charged under regulation 31 in schedule 4 of the Motor Car Ordinance, which is as follows :—

No driver of a motor cab, while hired shall, unless requested by the hirer, stop his cab for a longer time than is reasonably necessary, and, if he is not engaged for hire, he shall not stop his cab except on a public stand. He shall not loiter by driving his cab in a highway when not engaged for hire.

Held, that the burden was upon the accused of proving that he was engaged for hire.

The Mudaliyar, Pitigal Korale North v. Kiri Banda (12 *N. L. R.* 304) followed.

APPEAL from a conviction by the Municipal Magistrate of Colombo.

L. A. Rajapakse (with him *Colvin R. de Silva*), for accused, appellant.

M. F. S. Pulle, C.C., for complainant, respondent.

Cur. adv. vult.

November 16, 1937. ABRAHAMS C.J.—

The appellant was convicted of the charge of halting a hiring car at a place other than a public stand when not engaged for hire in breach of regulation 31 in Schedule 4 of the Motor Car Ordinance, No. 20 of 1927. That regulation reads as follows :—

> "No driver of a motor cab, while hired shall, unless requested by the hirer, stop his cab for a longer time than is reasonably necessary, and, if he is not engaged for hire, he shall not stop his cab except on a public stand. He shall not loiter by driving his cab in a highway when not engaged for hire."

The evidence against the appellant was that of the Sub-Inspector of the special traffic police. He testified that at 9.30 A.M. he saw the hiring car of which the appellant was the driver halted in Leyden Bastian road. There was no hiring car stand at that spot and the appellant had no entry in his engagement book to show that his car had been hired. Now so far as I understand, hiring car drivers are under no duty to keep engagement books. The Police Officer accosted the appellant who said that he had come to the spot because he was booked for hire. Afterwards (the witness did not say how long afterwards) some passengers from a ship came with a Mr. Dep and went into a shop, and then they came up to the car and after an argument lasting, the witness said, for about ten minutes, they got into the car and drove away. Dep told the witness that he had booked the car for hire. Dep gave evidence and said that he ran a Tourist Agency and had a special clientele of passengers who passed through Colombo. He said that on the day in question he received a letter from a Major Abbot saying that he was passing through Colombo (the production of this letter was objected to and was not admitted). Dep said that on receiving this letter he went on board the "Otranto" that morning and came ashore with Major Abbot and his party of seven. While the passengers were at the money changers changing their money, Dep went to the Victoria arcade which is close by the Jetty and told a certain Wijeratne who was a motor car proprietor to get him three cars and to keep the cars near Siedles as they were going to that shop. Dep then went to the Jetty, rejoined the passengers and went with them to Siedles. Meanwhile the appellant had arrived with his car. Some of the passengers went to the Kodak Company and Dep remained talking with the others. He endeavoured to explain to the Sub-Inspector of Police that the cars were hired. This evidence was corroborated by Wijeratne who said that he had a Tourist Agency Office at the Victoria arcade and that he owned eight cars. A little after 9 A.M. on the day in question Dep booked two cars to go to Kandy and one for town running, and Dep asked him to keep the cars near Siedle's shop and he did so.

The learned Magistrate said that he did not believe the story of Dep and Wijeratne that the cars were booked after the passengers came to the Jetty and that they wanted the cars kept at the spot. He said that if the cars had been booked and the passengers were in the Jetty changing their money he could not understand why the car was kept in Leyden Bastian road a spot not in full view of the Police, and that the correct

thing for the appellant to have done, if the car had been booked, was to have gone to the Jetty and to have picked up the passengers. He held that the truth of the matter was that the car was not booked at the time but that Dep, who he said was a sort of commission agent for hiring cars, had expected to get some bookings and so had these cars kept at this rather out of the way spot till he discovered how many bookings he had. The conversation the passengers had at the spot also indicated that there was some argument and that everything had not been fixed and agreed on after the time that the appellant had been charged.

It was objected that the Magistrate had wrongly placed upon the appellant the burden of proving that he was hired. I am by no means satisfied that he did place the burden of proof upon the appellant, but if he did so, I think that the wording of the regulation which the appellant was charged with infringing warranted the placing of the onus on the appellant. I do not think that it is necessary to discuss any principle of law which warrants the placing of the onus upon the appellant because I think that I am bound by the Full Bench decision in the case of *The Mudaliyar, Pitigal Korale North v. Kiri Banda,*[1] which I find indistinguishable from this case. Learned Counsel for the appellant has cited the more recently decided case of *Nair v. Saundias*[2] where a Bench of three Judges, of whom I was one, decided that the onus of proving that an offence had been committed against section 80 (3) (*b*) was upon the prosecution, but when one examines the reasons for that decision it is obvious that it is not in conflict with the other case cited.

The second ground of appeal is that in any event the appellant had satisfactorily shown that he was engaged for hire. This is not an easy case to decide, in my opinion, and I feel that the learned Magistrate has given undue importance to the ten minutes argument to which the Police Officer testified. There is nothing to indicate between whom the argument was taking place and what was the subject of it. There was no reason to assume that the argument had anything to do with the hiring of a car. It is by no means impossible that whatever the tourists had intended to do during their stay in Colombo it would be necessary for them to have cars, that they agreed to do this, and that Dep had gone ahead, as he says, to have the cars ready at a spot to which some of them said they wanted to go. It is no less possible that the plans were made and that one of the passengers had suddenly remembered that there was some place that he wanted to see, or some person he wanted to visit, and was finding it difficult to fit this in with the plans already made, whatever these might have been. I think that the learned Magistrate has pushed this question of the argument too far. If Dep did go aboard to meet Major Abbot and came ashore with the passengers, why is it to be supposed that no plan had been made for an excursion outside Colombo, or a tour round Colombo, and that Dep was not given permission to engage cars for them ? That seems to me to be more likely than that the passengers would have gone ashore without any plan at all and that Dep had rushed away when they reached the Jetty to procure cars in the hope of being able to persuade them to hire the cars, nor can I see any reason why the appellant's car should not have been

[1] *12 N. L. R. 304.*

[2] *37 N. L. R. 439.*

told to wait in Leyden Bastian road instead of coming to the Jetty. The Jetty is no great distance away, and if a car drives up to the Jetty it is not allowed to wait there. The question is whether the appellant had offered an explanation which the learned Magistrate was justified in rejecting. An accused person in a case where the onus is placed upon him is not obliged to do anything more than to raise a reasonable doubt in the mind of the Court. I think there was a reasonable doubt in this case, and I quash the conviction and acquit the appellant.

Conviction quashed.