1936 *Present :* **Abrahams C.J., Dalton S.P.J., and Akbar J.**

NAIR *v.* SAUNDIAS.

583—P. C. Matale, 13,491.

Motor car—Permitting a private car to be used for hiring—Charge against the owner—Owner absent at the time—Elements of charge—Burden of proof—Ordinance No. 20 of 1927, s. 80 (3) (b)—Evidence Ordinance, s. 105.

Where the owner of a motor car, which was licensed for private use only, was charged under section 80 (3) (*b*) with permitting the car to ply for hire, the owner not being present at the time,—

Held, that the burden was on the prosecution to prove that the owner did consent to the commission of the offence or that the offence was due to an act or omission on his part or that he did not take all reasonable precautions to prevent the offence.

Section 80 (3) (*b*) does not cast upon the accused the burden of proving an exception within the meaning of section 105 of the Evidence Ordinance.

Sub-Inspector of Police, Chilaw v. Croos[1] and *Macpherson v. Appuhamy*[2] overruled.

CASE referred to a Bench of three Judges by Koch J. and Soertsz A.J.

The accused-respondent who was the owner of a motor car, which was licensed for private use only, was charged with permitting the car to ply for hire in contravention of section 30 (1) and section 80 (3) (*b*) of the Motor Car Ordinance. The driver of the car, who conveyed a number of passengers for hire, was also charged under section 30 (1) and convicted. The Magistrate acquitted the owner.

The complainant appealed against the acquittal with the sanction of the Solicitor-General.

[1] *(1933) 35 N. L. R. 189.*

[2] *(1933) 35 N. L. R. 231.*

J. E. M. Obeyesekere, Acting Deputy S.-G. (with him *M. F. S. Pulle, C.C.*), for the complainant, appellant.—Under section 30 (1) of Ordinance No. 20 of 1927, it is an offence to use a motor car for a purpose not authorized by the motor car licence in force. If a car licensed as a private car plies for hire, this is a contravention of section 30 (1). In a charge under section 80 (3) brought against an owner, the prosecution must prove—

(*a*) that something has been done or omitted in connection with a motor car in contravention of any provisions of the Ordinance or of any regulation or order made under the Ordinance; and

(*b*) that the accused is the owner of the car.

If the owner is proved to have been present at the time of the commission of the offence, he is guilty of an offence. This view is supported by the decisions in *Sub-Inspector of Police, Chilaw v. Croos*[1] and *Macpherson v. Appuhamy*[2]. These are both cases where a motor vehicle was found to have defective brakes. In *Sub-Inspector of Police v. Rajalingam*[3], Drieberg J. took the same view. That was a case of a private car plying for hire.

The only defence open to an owner in these circumstances would be either to controvert the facts upon which it is asserted that a contravention of the Ordinance has taken place, or to prove that he was not present. In the case of an absent owner, however, it is open to him to prove that the offence was committed without his consent, that it was not due to any act or omission on his part, and that he has taken all reasonable precautions to prevent the offence. This provision of section 80 (3) (*b*) is in the nature of an exception falling within section 105 of the Evidence Ordinance. The burden of proving facts bringing himself within the exception is, therefore, on the accused. Counsel referred in this respect to the Full Bench decision in *The Mudaliyar, Pitigal Korale North v. Kiri Banda*[4]. Counsel urged, with respect, that the decision of Dalton J. in *de Mel v. Balasuriya*[5] required reconsideration. If it was intended to confine section 80 (3) to matters relating to equipment, construction, registration and the like, it was unnecessary to divide the section in the way it has been divided. It must be presumed that section 80 (3) was intended to provide for something not covered by section 80 (2). On the other hand, Dalton J. in that case appears to have been influenced by the fact that the charge could in his opinion have been brought under section 44, which occurs in a chapter which provides that section 80 (3) (*b*) shall not apply to its provisions. Soertsz, J. in *14 C. L. R. 234* proceeded upon the particular facts of that case.

J. L. M. Fernando (with him *B. H. Aluwihare*), for accused, respondent.—The provisions of the Motor Car Ordinance referred to in section 80, sub-sections (1) and (2) clearly refer to provisions to which a motor car must conform or comply before they are used, in respect of such matters as construction and equipment. When considering sub-section (3) of the same section, the matters referred to therein must be of the same kind as those in sub-sections (1) and (2). The whole section must be read

[1] (*1933*) *35 N. L. R. 189.*
[2] (*1933*) *35 N. L. R. 231*
[3] (*1929*) *31 N. L. R. 157.*
[4] (*1909*) *12 N. L. R. 304.*
[5] (*1934*) *36 N. L. R. 218.*

together and on such a reading, sub-section (3) must refer to matters of construction and equipment. *De Mel v. Balasuriya*[1] supports this contention.

The offence of plying a car for hire without a licence is contemplated by section 30. If section 80 (3) was also intended to catch up the same offence one might expect the same or similar language. But there is no parity of language in the two sections. In fact the words used in the two sections are widely different.

This case is the first one in which an accused has been charged under section 80 for an offence in connection with the licensing of a car. In previous cases, the charge has always been under section 30. (*Hooper v. John*[2], *Police Inspector v. Siyadoris*[3], *Misso v. de Zoysa*[4].)

Section 105 of the Evidence Ordinance throws the burden of proving the circumstances bringing the case within the special exceptions of the section of the law defining the offence on the accused. In this case the offence of plying a car for hire without a licence has not been so defined in section 80 (3), so the burden will not be on the accused, as section 105 of the Evidence Ordinance cannot apply to section 80 (3) in the absence of such a definition of the offence in section 80 (3).

Further section 80 (3) (*a*) and (*b*) is governed by the phrase "unless otherwise expressly provided by this Ordinance". The Ordinance expressly provides for the offence of plying a car for hire without a licence by section 30. So section 80, sub-section (3) (*a*) and (*b*) will not apply.

Counsel for appellant has argued that this case comes under the scope of section 80 (3) and the onus is on the accused. Even if this were so, section 80 being a penal statute the accused is entitled to the benefit of any doubt in the statute or in its interpretation, and further no wide construction of the statute can be permitted to his prejudice.

Halsbury Vol. 27, p. 277, states that the Court should interpret a penal statute benevolently and the construction of the statute is not to be extended by equity or enlarged by parity of reasoning, and the person against whom it is sought to be enforced is entitled to the benefit of a doubt if any.

Maxwell, on the *Interpretation of Statutes (1905 ed.) p. 395,* states that it is the duty of the judicial interpreter to put upon the language of the legislature its plain and rational meaning. And at page 396, "No violence must be done to its language in order to bring people within it, but rather care must be taken that no one is brought within it who is not within its express language".

In the face of these authorities, the construction put upon section 80 by the counsel for the appellant is far too wide and in view of the doubt as to the exact meaning of the section, the appeal cannot succeed.

August 3, 1936. ABRAHAMS C.J.—

The respondent, the owner of a motor car, was charged on the complaint of a Police Sergeant with permitting the car to ply for hire in contravention of section 30 (1) and section 80 (3) (*b*) of Ordinance No. 20 of 1927. The driver of the car was himself charged with plying for hire in

[1] *36 N. L. R. 218.*
[2] *2 C. L. W. 410.*
[3] *30 N. L. R. 410.*
[4] *14 C. L. Rec. 216.*

contravention of section 30 (1) of the same Ordinance. Apparently, the car was licensed for private use only and the driver conveyed a number of passengers for gain.

The Magistrate convicted the driver and acquitted the owner. The complainant then obtained sanction from the Solicitor-General to appeal against this acquittal. The appeal was first heard by Soertsz A.J. who held that he was faced with conflicting Supreme Court decisions and referred the matter for the decision of a Bench of two Judges. The case was then argued before Koch J. and Soertsz A.J. who were unable to agree. Hence this hearing before this Court.

Section 80 upon the construction of which this case hinges reads as follows :—

"80. (1) If any motor car is used which does not comply with or contravenes any provision of this Ordinance or of any regulation, or of any order lawfully made under this Ordinance or any regulation; or

(2) If any motor car is used in such a state or condition or in such a manner as to contravene any such provision; or

(3) If anything is done or omitted in connection with a motor car in contravention of any such provision; then, unless otherwise expressly provided by this Ordinance,—

(*a*) The driver of the motor car at the time of the offence shall be guilty of an offence unless the offence was not due to any act, omission, neglect, or default on his part; and

(*b*) The owner of the motor car shall also be guilty of an offence, if present at the time of the offence, or, if absent, 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".

As I have said, there have been conflicting decisions as to the liability of an owner under that section where the driver has been proved to have committed an offence thereunder. In the case of *Sub-Inspector of Police, Chilaw v. Croos*[1], the owner of a car was convicted because the car was driven when it was not in a fit condition to be driven. The owner was not present when it was so driven, but Macdonell C.J. held that the prosecution had discharged the onus placed upon it by proving that something had been done or omitted in contravention of the Ordinance, and it was then for the owner to satisfy the Court that what had been done or omitted was without his consent, &c. In *Macpherson v. Appuhamy*[2], heard the day before the above-mentioned case, the learned Chief Justice again upheld the conviction of an owner. This appeal seems to have been contested purely on the evidence, and the learned Chief Justice appears to have accepted without any question that there was an onus on the accused to show that he had done everything which was required of him to prevent an offence against the Ordinance. On the other hand, in *de Mel v. Balasuriya*[3], Dalton J. took the view that the owner was not liable unless he abetted the commission of the offence. He said : "The provisions of the Ordinance referred to in sub-sections (1) and (2) are, it seems to me, provisions to which motor cars must comply or conform before they are

[1] *35 N. L. R. 189.* [2] *35 N. L. R. 231.*

[3] *36 N. L. R. 218.*

used, in respect of such matters as equipment, construction, registration, licensing, or conditions. One can understand the owner being made responsible, for instance, for the proper equipment and safe condition of the car he allows his driver to use. Sub-section (3) refers to a contravention of those same provisions. It would appear to provide for anything that may be omitted from sub-sections (1) and (2), for all three sub-sections must be read together." The learned Judge went on to decide that as the owner was prosecuted although it was his driver that contravened what was described in the Ordinance as a driving rule, the prosecution must fail on this construction of sub-section (3). In the case of *Sub-Inspector of Police v. William Singho*[1], this ruling was followed by Soertsz A.J. It will be observed that Dalton J. gave no opinion as to whether the prosecution had done all that the law required by proving that sub-section (3) of section 80 had been contravened, and that it was then for the accused to show that he was excused under paragraph (*b*) of that section or whether the onus was upon the prosecution to prove that the accused was not so excused.

While guarding myself against any inference that I agree with Dalton J's ruling in *de Mel v. Balasuriya* (*supra*), it is not necessary for me to come to any decision on that side of the case, for I am of the opinion that on a proper construction of paragraph (*b*) of section 80 the respondent was not proved to have committed any offence.

The Deputy Solicitor-General who appeared in support of this appeal argued that section 105 of the Evidence Ordinance placed upon the respondent the onus of proving that he had done everything to prevent the offence within the requirements of paragraph (*b*). Section 105 of the Evidence Ordinance is an exact reproduction of section 105 of the Indian Evidence Act which reads as follows :—

> "105. When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any of the General Exceptions in the Indian Penal Code, or within any special exception or proviso contained in any other part of the same Code, or in any law defining the offence, is upon him, and the Court shall presume the absence of such circumstances."

Now in order to see whether the circumstances of excuse in paragraph (*b*) of section 80 constitute a special exception to an offence, it seems to me necessary that that offence should be defined. I think that one can come to a speedy conclusion as to what the offence is under paragraph (*b*) by ascertaining what the accused can be properly charged with under that enactment. Let us suppose the accused was present at the time something was done in connection with his car in contravention of the Ordinance; it seems to me that the charge against him should run something like this :—

> "That you being the owner of a motor car in respect of which an offence was committed under section — of Ordinance No. 20 of 1927, were present at the time of the said offence."

What the prosecution would have to prove then would be, that the accused was the owner of a car, that an offence in contravention of a certain

[1] *14 C. L. Rec. 234.*

section was committed in respect of the car and that he was present when that offence was committed. The accused could only exonerate himself by showing that one at least of these three allegations had not been satisfactorily proved. But where the accused was an absentee the charge cannot run in that way, nor could he be charged with being absent at the time when the offence was committed in respect of the car as that is no offence. There is clearly a differentiation between the responsibility of an owner who is present when an offence is committed in respect of the car and an owner who is absent. That difference can be gathered from the wording of paragraph (*b*) to be in the existence of certain circumstances which the prosecution must prove before the accused can be called upon for his defence. The charge then should run something like this:—

> "That you being the owner of a motor car in respect of which an offence was committed under section — of the Ordinance, being absent at the time when the said offence was committed, did consent to the commission of the offence or (as the case may be), that the said offence was due to such and such an act or omission on your part, or (as the case may be) that you did not take all reasonable precautions to prevent the said offence".

It also seems to me that the prosecution in this case unconsciously conceded this construction of paragraph (*b*) when the accused was charged with having permitted the car to ply for hire, for under paragraph (*b*) the correct method of proving how the accused permitted the car to ply for hire would be to show that none of the excusatory circumstances specified in paragraph (*b*) existed.

I think the fallacy underlying this prosecution is due to a misapplication of section 105 of the Evidence Act to paragraph (*b*) of section 80 of Ordinance No. 20 of 1927. What are really the essential elements of an offence have been mistaken for an exception to the offence.

No doubt this construction of paragraph (*b*) imposes a very heavy burden on the prosecution. That is not to the point. It may be that the legislature actually intended that the owner of a car should prove that he was excused from responsibility for another person's act or omission in respect of the car, but it does not appear to me that, if this was the intention, it can be gathered from the wording of paragraph (*b*).

In my opinion this appeal fails and should be dismissed.

DALTON S.P.J.—

This appeal by the complainant in the Police Court against an acquittal, which originally came before one Judge, was referred to a Bench of two Judges on the ground that there are conflicting decisions as to the liability of the owner of a car who is charged with permitting an offence which his driver has committed, and of which he has been convicted. When the appeal came up for hearing before two Judges they were not able to agree, and the appeal now comes before us.

The first accused, the owner of a private car, was charged with "permitting the said car to ply for hire," in breach of section 30 (1) and section 80 (3) (*b*) of the Motor Car Ordinance, No. 20 of 1927. The driver was convicted of the offence, but the first accused, the owner, was

acquitted on the ground that the prosecution had not led any evidence to connect him with the driver's offence. The Magistrate purported to follow a decision given by me in the case *de Mel v. Balasuriya*[1].

In support of the appeal the Deputy Solicitor-General relies upon two decisions of Sir Philip Macdonell C.J., namely, *Sub-Inspector of Police, Chilaw v. Croos*[2] and *Macpherson v. Appuhamy*[3], which are to the effect that, when in a charge under section 80 (3) of the Motor Car Ordinance it is established by the prosecution that something was done or omitted by the driver in connection with a car in contravention of any provision of the Ordinance, the onus is on the owner, if he was absent at the time of the contravention of the Ordinance, to satisfy the Court that the offence was committed without his consent and was not due to any act or omission on his part, and that he had taken all reasonable precautions to prevent the offence.

Mr. Obeyesekere has urged that *de Mel v. Balasuriya* (*ubi supra*) was wrongly decided in so far as it holds that the owner could avoid or escape the effect of the provisions of section 80 (3) (*b*), in respect of any limited class of offences under the Ordinance. It seems to me that on the facts *de Mel v. Balasuriya* (*ubi supra*) can possibly be distinguished from the case now in appeal before us. I had to decide in the former case whether or not the owner was liable under section 80 (3) (*b*) for a contravention by his driver of what is described in the Ordinance as a driving rule, and nothing that I have heard in the argument before us has led me to doubt the correctness of my decision there. I concede that the legislature has given the Courts a difficult puzzle to solve when we are asked to say what they really intended by the words they use, but I feel quite unable to give section 80 the wide construction for which the Deputy Solicitor-General contends. I am still of opinion that the section must be read as a whole, and that the somewhat general words of sub-section (3) must be read as comprehending only offences of the same kind as those in the two previous sub-sections. It is true the two earlier decisions of Sir Philip Macdonell relied upon by Mr. Obeyesekere were not brought to my notice when the case of *de Mel v. Balasuriya* (*ubi supra*) was argued. It is not, however, in the circumstances, necessary, in my opinion, in this appeal to consider whether or not *de Mel v. Balasuriya* (*ubi supra*) was rightly decided, for if one holds that the conclusions in *Sub-Inspector of Police, Chilaw v. Croos* (*supra*) and *Macpherson v. Appuhamy* (*supra*) were not correct, the appeal must necessarily fail. After careful consideration of the arguments before us, I must respectfully differ from the conclusions there arrived at as to the meaning and effect of the provisions of section 80 (3) (*b*) of the Ordinance.

It is hardly necessary to stress that most highly valued and jealously guarded principle of English law, contained, for us in Ceylon, in the somewhat brief, cold and formal words of section 101 of the Evidence Ordinance. An illustration is added to the section. If A wishes a Court to give judgment that B shall be punished for an offence which A says B has committed, A must prove that B has committed the offence. Section 105 of the Evidence Ordinance, upon which Mr. Obeyesekere

[1] *36 N. L. R. 218.*

[2] *35 N. L. R. 189.*

[3] *35 N. L. R. 231.*

relies, contains no real exception to that general rule, since all the elements which go to make up the offence charged have still to be proved by the prosecution against the person charged, before the latter need make any move to bring himself within any exception relied upon. Even then the onus upon an accused person is not so heavy as that upon the prosecution. There are, however, various Ordinances, which make exceptions to the general rule above mentioned. A useful list of these up to 1920 will be found in Mr. R. F. Dias's *Commentary on the Evidence Ordinance* at pages 136 and 137. To take the Penal Code, 1883, it will be found that sections 392A (*b*), 449 and 467, in clear and express terms, provide that the burden of proof in respect of certain matters, which under the general rule lies upon the prosecution, shall lie upon the accused person. Other Ordinances in the list, which I have examined, contain similar and precise terms as to burden of proof.

In respect of statutes which encroach on the rights of subjects, it is a recognized rule of construction that they should be interpreted, if possible, so as to protect those rights (Maxwell's *Interpretation of Statutes, 7th ed., p. 245*). The learned author points out that the paramount duty of the judicial interpreter is to put upon the language of the legislature its plain and rational meaning and to promote its object. It is to be expected, however, that if the intention is to encroach upon the rights of persons or to impose burdens upon them contrary to other express provisions of the law, it will manifest its intention plainly, if not in express terms, at least by clear implication.

Further, *mens rea*, or a guilty mind, is with some exceptions an essential element in constituting a breach of the criminal law. Maxwell's *Interpretation of Statutes, p. 88*—"The general rule is that unless the contrary is expressed *mens rea* enters into every offence". There is of course a large volume of municipal law to which, by enactment, this rule does not apply, but whether it applies or not depends upon the construction of the particular statute concerned.

The question to be answered here is whether there is anything contained in section 80 (3) (*b*) of the Motor Car Ordinance contrary to the general rule set out above and throwing the burden of proof upon an owner of a car, whose driver, in his absence, has committed an offence against the Ordinance, of showing that he, the owner, is not guilty, after the prosecution have merely established that the driver has committed the offence and that the other person charged is the owner. Sub-section (*b*) is as follows :—

> " (*b*) The owner of the motor car shall also be guilty of an offence, if present at the time of the offence, or if absent, 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 ".

It will be noted that there are no words here referring to the burden of proof, as there are in other statutory enactments changing the general rule to which I have referred. There is no express reference to the burden of proof at all. Further, I can find no words used whence I can say that it is manifest by clear implication that the legislature intended to effect any change in the general law governing the burden of proof. It

has been argued that the prosecution might have difficulty in leading evidence against the owner as to what he had or had not done in preventing the offence, but that kind of argument does not help one. I have already pointed out elsewhere that this is not the only section of the Ordinance which is difficult of interpretation. It is suggested that an owner, if present at the time his driver commits an offence, is equally guilty with the driver, without any exception whatsoever, and even if the driver is acting directly contrary to the instructions of the owner and the latter is striving to do all he can to prevent the offence being committed. Fortunately, it is not necessary here to decide whether that is so or not. I find it impossible, however, to hold, from the words that are used in section 80 (3) (*b*), that the legislature intended to effect any change in this sub-section in the existing law. The words used are not, in my opinion, inconsistent with the general rule. If the legislature intended to put the burden of proof here upon the owner, as urged for the appellant, that intention must be plainly expressed or clearly implied. I cannot find that that intention has been expressed in this sub-section in either way. If the conclusion is that the prosecution still has to prove that the accused person here has committed the offence with which he has been charged, it may be asked what is the purport of enacting section 80 (3) (*b*) at all. It is not for me to supply an answer to that question, but I might suggest as an answer that possibly the legislature was seeking to provide a way in which the defence might meet a charge.

In the result the appeal, in my opinion, must fail.

AKBAR J.—I agree with my Lord the Chief Justice.

Appeal dismissed.