1938

Present : **Moseley J.**

WIJEYSINGHE (S.-I., POLICE) *v.* DHANAPALA.

182—P. C. Kalutara, 33,408.

Motor Car Ordinance—Load of lorries—Excepted persons—Burden of proof—Ordinance No. 20 of 1927, s. 62 (3).

Where a person is charged with breach of section 62 (3) of the Motor Car Ordinance, viz. : "No person shall be carried in a lorry other than the owner or hirer of the lorry or of the goods carried therein or the servant or agent of the owner or the hirer",—

Held, that the burden of proving that the persons carried in the lorry fall within the excepted class of persons lies upon the accused.

Mudaliyar, Pitigal Korale North v. Kiribanda (12 N. L. R. 304) followed.

APPEAL from a conviction by the Police Magistrate of Kalutara.

Colvin R. de Silva, for accused, appellant.

Jansze, C.C., for complainant, respondent.

Cur. adv. vult.

July 20, 1938. MOSELEY J.—

The appellant was charged that he being the driver of a certain lorry, carried goods and four passengers in contravention of the conditions or other provisions lawfully inserted in the licence, in breach of section 31 of Ordinance No. 20 of 1927 (The Motor Car Ordinance, 1927). The licence authorizes the carriage of goods and persons up to a total weight of 6,552 lb., such persons being the servants or agents of the owner or hirer of the lorry or of the goods carried therein.

It will be observed that the terms of the licence bear a strong resemblance to the provisions of section 62 (3) of the Motor Car Ordinance. The learned Magistrate in fact held that the charge actually came under that section, and he convicted the appellant of an offence against that section. That was one of the grounds of appeal urged before me, namely, that the learned Magistrate was wrong in recording a conviction under section 62 (3), seeing that the charge was laid under section 31. I expressed the view that the accused was in no way prejudiced thereby, and that ground of appeal was not pressed. As a matter of fact, the alteration was in favour of the accused, since the conditions of the licence make no exception in favour of the owners or hirers of the lorry, but only in favour of their respective agents or servants. So, but for the alteration, it would have been of no avail to the accused to prove that the alleged passengers held the status of hirers.

The appeal was then argued on the ground that the learned Magistrate was wrong in holding that the onus of proof that the persons carried in the lorry were owners or hirers of the lorry or of the goods carried therein, or the servants or agents of the owner or hirer was on the accused. I do not know what is meant by the expression "hirer of the goods", but I have set out the words as they appear in section 62 (3). That is, however, beside the point. The only point to be decided in this case is upon whom does the burden of proof lie. The learned Magistrate's finding is as

follows:—"Once the prosecution proves that besides goods there were men travelling in the lorry, it is for the accused to prove in what capacity such men travelled in the lorry". I take it that he meant to say, "it is for the accused to prove that each of them is a hirer or owner of the lorry or servant or agent of one of such persons".

Counsel for the appellant relied upon the case of *Nair v. Saundias* [1], where a Full Bench held that, where it is sought under section 80 (3) (*b*) of the Motor Car Ordinance, 1927, to render the owner of a motor car liable for an offence committed in his absence by his driver, in which case his liability does not arise if the offence is committed without his consent, it is for the prosecution to prove that the offence was committed with his consent. In such a case the gravamen of the charge is that the owner consented and the reasons underlying the decision can be, and I say so with respect, readily appreciated.

It was further contended for the appellant that section 62 (3) describes a class or classes of persons who may be lawfully carried in a lorry and that this description is expressed in negative form merely for the sake of convenience, an ingenious but not convincing argument.

I was also referred to the case of *Dias v. Marcian* [2], where, in the case of a prosecution under section 63 (3) of the Motor Car Ordinance, it was held by Keuneman A.J. that the onus of proof that all passengers carried were adults was on the prosecution. Here again it is an affirmative proposition which the prosecution seeks to establish.

Counsel for the respondent referred me to the following passage in *Archbold's Criminal Pleading* (*30th ed.*) *p. 356*:—"Negative averments, it seems, must formerly have been proved in all cases by the prosecutor (see *Over v. Harwood* (1900) 1 Q.B. 803, 806; 69 L.J. (Q.B.) 272, Channell J.); but the present rule upon the subject appears to be, that, in cases where the subject of such averment relates to the defendant personally, or is peculiarly within his knowledge, the negative is not to be proved by the prosecutor, but, on the contrary, the affirmative must be proved by the defendant, as a matter of defence: . . . .".

He further cited the case of *Perkins v. Devadasan* [3], where a person was prosecuted for that he "not being a medical practitioner" did practise for gain. In that case de Kretser A.J. held that the Ordinance provided an exception in favour of a medical practitioner and that a person who claims the benefit of such an exception must prove that he comes within it.

In the case of *The Mudaliyar, Pitigal Korale North v. Kiri Banda* [4] the question of the burden of proof in a prosecution under section 21 of the Forest Ordinance, No. 16 of 1907, was considered. The relevant part of the section is as follows:—"No person shall clear, set fire to, or break up the soil of . . . . any forest not included in a reserved or village forest . . . .". It was held by a Bench of three Judges that "once the Crown has proved the fact that a clearing has been effected in a *forest*, it rests with the accused to defeat that charge, if he can, by showing that it is a reserved or village forest". The words "not included in a reserved or village forest" were held to be an exception within the meaning of section 105 of the Evidence Ordinance.

[1] *37 N. L. R. 439.*
[2] *10 C. L. W. 57.*
[3] *10 C. L. W. 141.*
[4] *12 N. L. R. 304.*

So here I am satisfied that the words " other than the owner or hirer of the lorry or of the goods carried therein or the servant or agent of the owner or hirer " amount to a specific exception contained in the law defining the offence. The burden of proof was therefore upon the appellant.

For this reason the appeal is dismissed.

Appeal dismissed.