[BOURKE, C.J. and ZEKIA, J.]

IOANNIS KALLI

Appellant,

v.

THE POLICE

Respondents.

(Criminal Appeal No. 2140)

1957
Dec. 19
1958
Jan. 9

IOANNIS KALLI
v.
THE POLICE

Motor Traffic — Motor Vehicle — Insurance against third party risks — Using motor vehicle without being covered by insurance — Use of motor vehicle by a servant in the course of his employment and for the master's benefit — Knowledge by master not necessary — "Special reasons" — Motor Vehicles (Third Party Insurance) Law, 1954, section 3.

Criminal Procedure — Adding new count before verdict — Correct procedure — Form of charge — Criminal Procedure Law, Cap. 14, sections 83 (4) and 38.

The appellant, who owned and ran omnibuses and kept other types of vehicles, was charged with permitting a driver employed by him (who was licensed to drive various types of motor vehicles but not omnibuses) to drive one of his omnibuses "whilst not being covered by an insurance against third party risks", contrary to section 3 of the Motor Vehicles (Third Party Insurance) Law, 1954. The appellant's driver was instructed to drive the omnibus by the clerk in charge of the appellant's office who had authority to give directions in connection with the running of his vehicles, though this was done without the appellant's knowledge.

The trial Judge in the course of his judgment, acting under section 83 (4) of the Criminal Procedure Law, Cap. 14, directed another count to be added charging the appellant with using the vehicle "without being covered by insurance in respect of third party risks", contrary to section 3 of the Law; and he then acquitted the appellant of the first offence and found him guilty of the second offence.

Held:

(1) that, since section 83 (4) of the Criminal Procedure Law, Cap. 14, was resorted to before verdict was pronounced, the procedure followed was correct.

A. N. Demetriades v. *The Queen* (unreported) (Criminal Appeal No. 2094) distinguished;

(2) that *mens rea* was not an essential element of the offence of which the appellant was convicted ; and that since the appellant's driver was doing an act as a servant acting in the course and scope of his employment for the appellant's benefit, the appellant was guilty of using the vehicle contrary to the provisions of sections 3 of the Motor Vehicles (Third Party Insurance) Law, 1954, and the fact that he was ignorant of his driver's act was no defence ;

(3) that the circumstances of the case did not disclose any "special reasons" within the meaning of section 3 of the Law, as the appellant had failed to take any steps to find out whether his driver held a licence to drive an omnibus or to ensure that he would not be allowed to drive such class of vehicle on the appellant's account.

Kerr. v. *McNeill* (1949) N.I. 19, distinguished.

Observations by the Supreme Court on form of charge under section 38 of the Criminal Procedure Law, Cap. 14.

Appeal dismissed.

Cases referred to :

(1) *A. N. Demetriades* v. *The Queen* (unreported) (Criminal Appeal No. 2094, decided on May 15, 1957).

(2) *Ellis* v. *Hinds* (1947) 116 L.J. K.B. 488.

(3) *James & Sons Ltd.* v. *Smee, Green & Burnett* (1954) 3 All E.R., 273.

(4) *Griffith* v. *Studebakers* (1924) 87 J.P. 199.

(5) *Kerr* v. *McNeill* (1949) N.I. 19.

Appeal against conviction.

The appellant, Ioannis Kalli of Karavas was convicted by the District Court of Kyrenia (Case No. 1088/57) on 30th November, 1957, of the offence of using a motor vehicle on a road without being covered by insurance against third party risks, contrary to section 3 of the Motor Vehicles (Third Party Insurance) Law, 1954. He was sentenced by Evangelides, D.J., to a fine of £3 and was disqualified for holding or obtaining a driving licence for 12 months.

D. Demetriades for the appellant.

R.R. Denktash for the respondents.

The judgment of the Court was delivered by:

BOURKE, C.J.: It was alleged in the charge as filed that the appellant (Accused 2) had committed two offences, namely, with permitting accused 1 to drive his motor vehicle whilst not being the holder of a driving licence, contrary to regulation 26 of the Motor Vehicles Regulations 1951 - 57 (Count 3); and with permitting accused 1 to drive the vehicle "whilst not being covered by an Insurance against third party risks" contrary to section 3 of the Motor Vehicles (Third Party Insurance) Law, 1954 (Count 4). The appellant was acquitted of these offences but acting under section 83 (4) of the Criminal Procedure Law the trial Judge directed a count to be added as count 5 to the charge whereby the appellant was charged with using the vehicle "without being covered by insurance in respect of third party risks" contrary to section 3 of the Motor Vehicles (Third Party Insurance) Law, 1954. The appellant was found guilty of this offence and was fined £3 and disqualified for holding or obtaining a driving licence for twelve months.

The first ground of appeal on a question of law is set forth in the notice of appeal as follows, "Having delivered judgment and found verdict it was not open to the Court to amend the charge by adding a fresh count and proceed to conviction under that count." In support reference has been made to the decision of this Court in *A. N. Demetriades* v. *the Queen* (Cr. App. No. 2094).* But in that case the circumstances differed in that the trial Court gave judgment and arrived at a verdict of guilty involving the conviction of the accused on count 6 of the charge. Prosecuting Counsel then pointed out that the findings as given did not permit a conviction under count 6. The learned Judge, purporting to act under section 83 (4), sought to remedy matters by proceeding to alter the verdict given to one of not guilty under count 6 and to add a new count to the charge under which a conviction was then entered for another offence. Clearly there was no power to act in this way. But the instant matter is not one of changing a verdict and reaching a new verdict on a count added after judgment had been pronounced and become effective. What the learned Judge did was in the course of his judgment to indicate his reasons for thinking that it was at least doubtful whether the offence

* Unreported (decided on May 15, 1957).

alleged in count 4 was brought home to the appellant and to intimate that he was resorting to section 83 (4) to direct that count 5 be added to the charge. This was duly done and only then did the Court proceed to verdict acquitting the appellant on counts 3 and 4 and finding him guilty on count 5. In the case under reference the Court sought, wrongly, to employ section 83 (4) to re-open the trial after judgment and verdict given; while in the present case it is apparent, though indeed the form of the record is at first sight somewhat confusing, such a stage of finality in the proceedings had never been reached when resort was had to the provisions of the section. This ground of appeal must therefore fail. On the question of prejudice to the appellant in his defence through the course adopted, it is evident from the judgment that the Judge applied his mind to this aspect of the matter and came to the conclusion that no such prejudice would arise. We see no sufficient reason to hold that the learned Judge was wrong in that in all the circumstances of the case, and indeed no suggestion has been put before us as to how any real prejudice could have been occasioned. The appellant was represented below and it is not in dispute that no attempt was made either to seek to argue the matter further or obtain an adjournment when indication was given of the course it was proposed to pursue. It is further accepted that the facts were fully before the Court.

It is then submitted that the evidence did not support the finding that the appellant was using the motor vehicle within the meaning of section 3 (1) of the Motor Vehicles (Third Party Insurance) Law, 1954. The appellant owns and runs a number of omnibuses and also keeps a lorry, a van and a private car. On the day in question, that is, the 16th August, 1957, accused 1, who was employed by the appellant as a driver, was driving the appellant's omnibus on a road and did not hold a licence permitting him to drive such a vehicle, though he did have a licence to drive other classes of motor vehicle. The appellant has offices at Karavas, Kyrenia and Nicosia and employs a clerk at each office who gives directions in connection with the running of his passenger-carrying vehicles. According to the evidence of accused 1 he was instructed by the clerk at the Nicosia office to drive the omnibus on the 16th August. The

appellant said in his evidence that he had not told accused 1 to drive the bus on that day and it was done without his knowledge. He said that he did not know who the clerk was in his office on the 16th August and the clerk was not called as a witness. When he came to consider the case against the appellant the Judge came to the conclusion that there was insufficient evidence to establish that the appellant himself permitted accused 1 to drive the omnibus on the 16th August, but he was satisfied the vehicle was driven on the account of the appellant by his driver and servant accused 1; in reaching this finding it seems evident that the Court accepted that the clerk in the appellant's employ at Nicosia had, in pursuance of the authority accorded him to give directions on behalf of the appellant, instructed accused 1 to drive the omnibus with passengers to Karavas. In these circumstances the learned Judge concluded, after referring to *Ellis* v. *Hinds* (1947) 116 L.J. K.B., 488 at 489 and *James & Sons Ltd.* v. *Smee, Green* v. *Burnett* (1954) 3 All E.R. 273, that the appellant was using the omnibus within the meaning of the section under which he was charged. In this we think that the learned Judge was right. Reference may also be made to *Griffiths* v. *Studebakers* (1924), 87 J.P. 199, in which a trade licence issued to a company forbade the carrying of an excessive number of passengers in a vehicle; the company drew its drivers' attention to the licence and ordered them to observe that term. A car driven by an employee carried an excessive number of passengers; the company was convicted of using it and it was said that it would make no difference if the employer had been an individual. In the instant case there was not even a suggestion that the appellant had prohibited his employee accused 1 from driving any of his omnibuses. Liability for contravention of an absolute prohibition depends on the fact of contravention and not upon the intention to contravene. Accused 1 was doing an act as a servant in the course and scope of his employment for the benefit of the appellant his employer, who, on his own admission, had authorised the clerk he had put in charge of his Nicosia office to give directions in his absence to the drivers he employed. We find no substance in this ground of appeal.

Since accused 1 was not licensed to drive an omnibus and the policy forbade unlicensed drivers to drive, the use of

the vehicle by the appellant was not covered by insurance in respect of third party risks. It is contended that there were special reasons and therefore the order of disqualification should not have been made. No submission as to the existence of special reasons appears to have been made to the lower Court. We are quite unable to discern any special reason in the circumstances of this case. There is no evidence that the appellant had taken any step to find out whether accused 1 held a licence to drive an omnibus or to ensure that he would not be allowed to drive such class of vehicle on the appellant's account; when Police Sergeant Haralambides approached the appellant concerning the matter, the latter told him that he did not know that accused 1 was not entitled to drive a motor omnibus. The facts do not resemble those, for instance, in *Kerr v. McNeill* (1949) N.I. 19, which were held to constitute a special reason: in that case an employer told an unlicensed servant to get a licence — the policy forbidding unlicensed drivers to drive — and gave him the licence money; a few days later, without inquiring whether he had the licence and so assuming, the employer (defendant) permitted him to drive.

The appeal must be dismissed. But before we leave the matter we wish to draw attention to the form of the charge, which is most confusing and is typical of charges in certain other cases that have come to our notice. Instead of following the provisions of section 38 of the Criminal Procedure Law and setting out as each numbered count the statement of the offence followed immediately by the particulars of the offence, the draftsman has evidently thought that he should fit everything into the printed part of a form devised to contain the statement and particulars of one offence. He has compressed the statements of four offences together as the first, second, third and fourth counts, and then underneath has bunched together the particulars of the offences under corresponding numbered paragraphs. Moreover these particulars as given in paragraphs 2, 3 and 4 inform as to the time and place of the alleged offences by reference to "count 1"; as count 1 concerned accused 1 and counts 3 and 4 concerned accused 2, conciseness has, to say the least of it, been achieved at the expense of clarity. It is to be hoped that this wrong way of doing things will not be repeated.

Appeal dismissed.