JAMAICA

IN THE COURT OF APPEAL

R.M. CRIMINAL APPEAL NO. 94/83

BEFORE: The Hon. Mr. Justice Kerr - Presiding
The Hon. Mr. Justice Carey
The Hon. Mr. Justice Campbell

EDWARD FULLERTON v REGINA

Mr. Raymond King for the Appellant
Mr. C.R. Andrade for the Prosecution

11th October, 1983

KERR, J.A.:

This is an appeal from conviction in the Resident Magistrate's Court for the parish of St. James for an offence in breach of section 4 (1) & (2) of the Motor Vehicle Insurance (Third-Party Risks) Act.

The information alleges that the appellant unlawfully did use a motor vehicle, mini bus registered No. N.D. 4135 along Barnett Street main road, Montego Bay, St. James, without there being in force a policy of insurance in respect of Third-Party Risks as required by the Act.

It is an uncontroverted fact that on the 21st July, 1982, the appellant drove a motor vehicle on the road as alleged with more passengers than he was licensed to carry, and for so doing he was properly fined $40. or thirty days imprisonment at hard labour.

It was on the basis of his doing so, that is, carrying more passengers than licensed to carry, that this charge under the Motor Vehicle Insurance Act rested.

At the trial the defendant in answer to the charge, tendered a certificate of insurance - unfortunately it is not with us - and according to the information reaching the Court it was in keeping with section 5(4) of the Act, containing the relevant particulars including the coverage of passengers carried in the motor vehicle. The Resident Magistrate concluded that the defendant did not discharge the onus placed on him to show that he was insured to carry more passengers than stated in his licence, and he rejected the suggestion that he was exempt from criminal liability in regard to section 4(1) of the Motor Vehicles

insurance (Third-Party Risks) Law on the grounds that carrying excess passengers by itself did not render ineffective the defendant's insurance policy as regards third-party risks. Now, section 4 (1) provides that:

> "Subject to the provisions of this Act, it shall not be lawful for any person to use, or to cause or permit any other person to use a motor vehicle on a road, unless there is in force in relation to the user of the vehicle by that person or that other person, as the case may be, such a policy of insurance or such a security in respect of third-party risks as complies with the requirements of this Act.
>
> (2) If any person acts in contravention of this section he shall be guilty of an offence....."

Attorney for the appellant with courage and pertinacity, submitted that having tendered a certificate of insurance that was prima facie evidence that there was a valid policy of insurance with regard to third-party risks in relation to the user of the vehicle, that is the carrying of passengers for hire or reward.

Now section 5 (4) provides that a policy shall be of no effect unless and until there is issued by the insurer in favour of the person by whom the policy is effected a certificate of insurance in the prescribed form; and that different forms and different particulars may be prescribed in relation to different cases and different circumstances.

We accept as unchallenged that the certificate tendered showed that there was an existing policy, the vehicle was used with the permission of the owner, the driver was a person who held a valid driver's licence, not disqualified from driving and that the policy covered the vehicle in its/his user of carrying passengers.

The first point appellant's attorney made then is that on the face of that certificate if the prosecution was seeking to prove its case by showing that there was some condition that rendered the policy ineffective it was for them to so prove, because the certificate of insurance in the form in which it was issued, having regard to the particulars therein, prima facie established that there was the requisite coverage in relation to its user. For that he relied on the English case of Edwards v. Griffiths, (1953)2 A.E.R. page 874. In that case the defendant:

> ..."passed a driving test and was granted a driver's licence for twelve months. After the expiration of the licence he applied for a new licence which was refused because he was under the supervision of the local health authority under the provisions of the Mental Deficiency Acts,...... In February,

1953, he drove a motor tractor belonging to his employer and was charged with driving a motor tractor without a policy of insurance being in force. The certificate of insurance of his employer contained a proviso that the driver must hold a licence to drive the vehicle or that he must have held one and not be disqualified for holding or obtaining such a licence.

HELD: the words "disqualified for holding or obtaining a licence" in the proviso in the certificate must be construed as meaning a disqualification of the driver by an order of the court......; the respondent was not so disqualified; and, therefore, he was covered by the certificate and no offence was committed."

In passing judgment Lord Goddard observed that:

"It would be better in all these cases, and I desire police authorities to take notice of this, always to take the precaution of having the policy before the court. That can be done by issuing a subpoena requiring the assured to produce the policy to the court."

Mr. King made a second point. He said that even if he did not satisfy the requirements as to negative averments the offence of carrying excess passengers was not one within the contemplation of Section 4 because, says he, by Section 8 the insurer was precluded from placing any limitation on passengers, Section 8(2) reads:

"Where a certificate of insurance has been issued under subsection (4) of section 5 in favour of the person by whom a policy has been effected, so much of a policy as purports to restrict the insurance of the persons insured thereby by reference to any of the following matters -
(c) the number of persons that the vehicle carries;
shall as respects such liabilities as are required to be covered by a policy under paragraph (b) of subsection (1) of section 5, be of no effect:"

Now, 5 (1) reads: "In order to comply with the requirements of this Act the policy of insurance must be a policy which -"

(for the purposes of this case) -

(b) insures such person, persons or classes of persons, as may be specified in the policy in respect of any liability which may be incurred by him or them in respect of the death of, or bodily injury to, any person caused by, or arising out of, the use of the motor vehicle on a road:

Provided that such a policy shall not be required to cover -
(1)........"
and (2) -

except in the case of a motor vehicle duly licensed for the purpose in which passengers are carried for hire or reward, and except

> In the case of a motor vehicle in which passengers are carried by reason of, or in pursuance of a contract of employment with a person insured by the policy," etc.

Mr. King submits, therefore, that the act having precluded the insurers from including in their policy any limitation on the number of passengers, it could not be presumed in any degree that there was such a condition in the policy. In support of this contention, he cited as illustrative the case of R. v. Edward Brown, a decision from the Traffic Court, C.A.175/75, delivered on the 6th February, 1976.

In that case there was a breach of the ~~Motor Vehicle Act~~ Road Traffic Law and Regulations there under of driving a motor vehicle without the necessary certificate of ~~Insurance~~ fitness being in effect and it was held this was not in breach of the Motor Vehicle Insurance Act.

In that case the policy was tendered. It was interpreted to mean that that condition was not a condition of the policy. In giving the judgment of the Court, Mr. Justice Hercules said:

> "I do not therefore share the view of Mr. Orr, in support of the decision of the learned Resident Magistrate, that the mere failure to renew a certificate of fitness in breach of Section 7 (1) of the Road Traffic Law constituted a breach of the Motor Vehicles Insurance (Third-Party Risks) Act. This would be tantamount to involving one penal statue to create an offence under another penal statue."

This statement is applicable to the instant case ; the more so, having regard to the provisions of Section 8 (2) which clearly indicates the insurer is precluded from effectively including in the policy any limitation in the number of passengers to be carried.

We are of the view that the Attorney for the appellant was right on both submissions. Having tendered the Certificate of Insurance, if the case for the prosecution rested on the fact that the defendant was in breach of any condition not mentioned in the certificate and which would render the policy null and void as regards Third-Party Risks, then the prosecution should so prove.

Secondly, in the light of section 8 (2) carrying passengers in excess of the number he was licensed to carry was not per se a breach of the Motor Vehicles Insurance (Third-Party Risks) Law.

Accordingly, the appeal is allowed and the conviction quashed.