JAMAICA

IN THE COURT OF APPEAL

R.M. COURTS CRIMINAL APPEAL No. 89/66

BEFORE: The Hon. Mr. Justice Lewis, Acting President
The Hon. Mr. Justice Waddington
The Hon. Mr. Justice Shelley (Acting)

R. vs MICHAEL EDWARDS

Mr. W.K. ChinSee for the Crown

Mr. R.N.A. Henriques for the appellant

20th May, 1966.

WADDINGTON, J.A.,

The appellant was convicted in the Traffic Court on the 4th of March, 1966, of charges laid under two Informations. The first Information charged him with using a motor car registered V2655 along the Spanish Town Road in the parish of St. Andrew as a Public Passenger vehicle without there being in force a Road Licence for the purpose, in contravention of Section 53 (1) of Chapter 346, contrary to Section 53 (5) of Chapter 346. On that charge he was fined £10 or one month imprisonment at hard labour. The second Information charged him with unlawfully using the said motor car along the Spanish Town Road without there being in force in relation to him such a Policy of Insurance, or Security in respect of Third Party Risks as complied with the requirements of the Motor Vehicles Insurance (Third-Party Risks) Law, in contravention of Section 3(1) of Chapter 257 and Contrary to Section 3 (2) of the said Law. On that Information he was fined £35 or two months imprisonment at hard labour, and he was disqualified from holding or obtaining a driver's licence for a period of twelve

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months.

The Case for the Crown, briefly, was, that on the 6th of November, 1965, Special Constable Leroy Faulknott was taken up as a passenger in a car being driven by the appellant from Bamboo to Kingston. At the end of the journey the witness asked the appellant how much he had to pay and the appellant said that he would have to pay 4/-. The witness paid this amount, and there was also evidence that on the journey, another passenger was taken up in the car, and that at the end of the journey, that passenger was charged 3/- by the appellant. There was evidence also by one Trevor Chang, an Insurance Clerk in the Caledonia Insurance Company, to the effect that the car in question, V2655, was currently insured in that Company from the 30th of June, 1965 to the 29th of June, 1966, in the name of Michael Edwards. The witness went on to say that the policy would not cover anyone who acted in contravention of his Road Licence.

The defence was, briefly, a denial that any charge had been made of these passengers. The defence being, that the appellant had gratuitously taken up these passengers and offered them a free ride into Kingston. On that evidence, the learned Resident Magistrate convicted the appellant on both charges, and from these convictions he now appeals.

In respect of the first Information for using the vehicle as a Public Passenger vehicle without there being in force a Road Licence, the ground of appeal taken was that there was no evidence that the vehicle was used as a Public Passenger vehicle, as the alleged payment did not represent a fare legally enforceable In support of that ground learned Counsel for the appellant submitted that it must be shown that there was some contractual relationship between the parties, and that the appellant could legally enforce the fare charged. In support of this submission

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the case of Alleyne vs Ricketts, 5 W.I.R. 312 was cited. Counsel for the Crown submitted that on the evidence for the prosecution there was evidence of a legally binding contractual relationship, but that in any event it was unnecessary for the Crown to show that there was a legally binding contract, because the Statute, the Road Traffic Law, Cap. 346, provided that the vehicle was deemed to be a vehicle carrying passengers for reward and that this was so by virtue of the provisions of Sub-section 3 of Section 52 of the Law. That Sub-section reads as follows:-

> "It is hereby declared that where persons are carried in a motor vehicle for any journey for consideration of separate payments made by them whether to the owner of the vehicle or to any other person, the vehicle in which they are carried shall be deemed to be a vehicle carrying passengers for hire or reward at separate fares whether the payments are solely in respect of the journey or not."

There is a proviso to the Sub-section which is not relevant to this point.

We agree with the submissions made by learned Counsel for the Crown, and we are satisfied, that there was evidence on which the learned Resident Magistrate could rightly convict the appellant in respect of that Information.

In respect of the second Information charging a breach of the Motor Vehicles Insurance (Third-Party Risks) Law, four grounds of appeal were taken. Firstly, that there was no evidence that the defendant did not have in force a Policy of Insurance in respect of Third Party Risks as complied with the requirements of the Motor Vehicles Insurance (Third-Party Risks) Law, and that no prima facie case was made out. Secondly, that inadmissible and prejudicial evidence was admitted, namely, the

evidence of the witness, Trevor Chang, who gave evidence of the contents of a written document without the production of the document. Thirdly, the evidence of the witness Chang discloses that the motor vehicle V2655 was currently insured with the Caledonia Insurance Company, and there was no evidence to show that the user of the vehicle, on the particular occasion, was not covered under the Policy, or any evidence to show that the Policy was void or voidable, and fourthly, that the evidence that the Policy would not cover any one who acted in contravention of his Road Licence was inadmissible, in that.-

(a) it is evidence of the contents of a written document;

(b) it is a conclusion of law not given by a witness competent to give this evidence, and,

(c) it has no relevance to the charge as there is no evidence that the defendant had a Road Licence, and if so, what the terms of the Road Licence entitled the defendant to do or that he acted in contravention of any Road Licence.

In support of these grounds, learned Counsel submitted that the evidence of Trevor Chang was clearly hearsay evidence, and as such, was inadmissible, and in support of this submission he cited the case of Myers vs Director of Public Prosecutions (1964) 3 W.L.R. 145. He submitted further, that Trevor Chang, who was not an expert, was stating a conclusion of law which it was for the Court itself to decide, when he said that the Policy would not cover anyone who acted in contravention of his Road Licence. He submitted that the evidence being inadmissible, onece that evidence was removed the only evidence that was left was that the car was insured, and that there was no evidence that the appellant was using the car in breach of the terms of any Road Licence.

In reply to this submission, learned Counsel for the

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Crown submitted that in the case of Myers vs the Director of Public Prosecutions the burden was on the Crown to prove that the cars were stolen cars, but in the instant case, the burden was on the appellant to show that he was insured, as this was a matter peculiarly within his own knowledge; that the question of the insurance on the car was a matter peculiarly within his knowledge, and that he would not be prejudiced as he had his insurance certificate with him. In support of this submission, he cited the case of Williams vs Russel reported at 149 Law Times Report at page 190. In that case, which was a charge for using a motor vehicle without there being in force a Policy of Insurance complying with the English Statute, a police officer was about to give evidence of the contents of a certificate of insurance produced by the defendant at the time when the vehicle was stopped, but objection was taken on behalf of the defendant that, as no notice to produce had been given, secondary evidence of the contents of the document was not admissible. The justices upheld the objection. On appeal, Mr. Justice Talbot, in the Divisional Court of the Kings Bench Division, said this -

> ".....The accused person had notice that he was charged with using a motor vehicle on a road in the county of Brecon without there being in force in respect of that user a policy of insurance complying with Part II. of the Road Traffic Act 1930. Speaking for myself, I doubt very much whether it was necessary for the prosecution to give the evidence which they were not allowed to give. On the principle laid down in Rex v. Turner (5 M.& S. 206) and numerous other cases, where it is an offence to do an act without lawful authority, the person who sets up lawful authority must prove it, and the prosecution need not prove the absence of lawful

authority. I think the onus of the negative averment in this case was on the accused to prove the possession of the policy required by the statute.

But even if the appellant were bound to prove the contents of the policy, I think this evidence should have been admitted, on the authority of the cases referred to by my Lord. It is obvious that the whole convenience and common sense of the matter is on the side of the appellant."

and Mr. Justice Charles in his judgment, said -

"I agree. The information by its very character puts the accused on notice that the policy will be required, without any formal notice to produce. He has, in fact, notice to produce by the very character of the information. If he does not choose to act on it, the magistrate can and should act on what is the best available evidence."

It is our view, that in this case there was in the information a negative averment, and that the principle in such cases is correctly stated in Archbold Criminal Pleading Evidence and Practice, Thirty-fifth Edition, at paragraph 1012 as follows:-

"Negative averments. The present rule upon the subject appears to be, that, in cases where the subject of such averment relates to the prisoner 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 prisoner, as a matter of defence;...."

It is our view, that in this case the onus was on the appellant to satisfy the Resident Magistrate that there was in

force,....

force, at the relevant time, a policy of insurance, or such security in respect of Third Party Risks as complied with the requirements of the Motor Vehicles Insurance (Third-Party Risks) Law in respect of the user of his vehicle at that time. It is true, as learned Counsel for the appellant has pointed out, that there was evidence given by a witness for the prosecution that there was in force, at the time, a current policy of insurance, but that was not sufficient. There was clear evidence, which, if accepted by the learned Resident Magistrate showed that the vehicle in question was being used at the time as a public passenger vehicle, and it was therefore incumbent upon the appellant to satisfy the Court that there was in force at that time a policy of insurance covering the user of the vehicle as such, namely, as a Public Passenger vehicle.

It is our view, therefore, that the learned Resident Magistrate quite rightly convicted the appellant in respect of both of these charges. We see no reason to interfere with the convictions, and both appeals are dismissed.