A **MURTAZA KHAN**

v.

REGINAM

[SUPREME COURT, 1965 (Mills-Owens C.J.), 25th June, 9th July,
B 5th August]

Appellate Jurisdiction

Road Traffic—motor vehicles third party insurance—carrying fare-paying passengers in private car on isolated occasion—conditions of policy—construction contra proferentem—Traffic Ordinance (Cap. 235) s.10(2)—Traffic Amendment Ordinance
C *1958—Motor Vehicles (Third Party) Insurance Ordinance (Cap. 236) ss.4,6,9,10,11 —Motor Vehicles (Third Party Insurance) (Amendment) Ordinance 1964—Law Revision Ordinance 1959.*

Criminal law—traffic offences—motor vehicles third party insurance—driving while uninsured—use of car for carriage of fare-paying passengers on isolated occasion —using vehicle as of a class for which higher licence fee payable—proof of offence—Traffic Ordinance (Cap. 235) s.10(2)—Motor Vehicles (Third Party) Insurance Ordinance (Cap. 236) ss.4,6,9,10,11.

D

The appellant was convicted on (1) a charge of using a vehicle as a motor vehicle of a class for which a higher licence fee is payable and (2) a charge of using the vehicle when uninsured. There was evidence that the appellant, who was the driver, accepted money from persons whom he picked up and carried as passengers. It was accepted that the car was a private car. Condition (1) (c) of the
E relevant insurance policy read :—

> 1. The person insured shall not use the motor vehicle nor shall the owner permit or suffer any person to use such motor vehicle . . . (c) to carry passengers for hire or reward or in pursuance of a contract of employment in contravention of the licence issued for the vehicle described herein.

F

Held: 1. The requirement in section 6(1) of the Motor Vehicles (Third Party) Insurance Ordinance that insurance should cover passengers carried for hire or reward in a passenger vehicle applies to the vehicle and does not extend to a private vehicle in respect of which a fare is charged on isolated occasions.

G *Wyatt v. Guildhall Insurance Co.* [1937] 1 K.B.653; [1937] 1 All E.R.792, followed.

2. Condition 1(c) of the insurance policy was equivocal and must be construed *contra proferentem;* it could mean that the vehicle was not covered for use as a passenger vehicle. In the circumstances it was not proved with the certainty necessary for a criminal conviction
H that the driver was wholly uninsured which is the only basis upon which the conviction on charge 2 could be sustained.

3. As to charge 1 it was not sufficient, in order to establish the charge, to prove that the vehicle was a private car, as the licence fee for a private car might amount to more than the minimum for a public service vehicle.

A

Cases referred to: *Abdullah v. R.* (Cr. App. No. 43 of 1957 — unreported): *Bonham v. Zurich General Accident and Liability Insurance Co. Ltd.* [1945] K.B.292; [1945] 1 All E.R.427: *Attorney-General v. Bhaskara Nand* (1960) 7 F.L.R.51: *Ram Dayal v. R.* (1959) 6 F.L.R. 134.

Appeal from convictions by a Magistrate's Court.

B

R. I. Kapadia for the appellant.

B. A. Palmer and *G. N. Mishra* for the Crown.

The facts sufficiently appear from the judgment.

C

MILLS-OWENS C.J.: [5th August, 1965]—

The appellant was convicted on two charges — (1) using the vehicle as a motor vehicle of a class for which a higher licence fee is payable (Cap. 235, section 10(2)); (2) using the vehicle when uninsured (Cap. 236, section 4).

D

So far as the facts are concerned there was clear evidence that the appellant, who was the driver, accepted money from persons whom he picked up and carried as passengers. The car was said by prosecution witnesses to be a private car, but there was no specific evidence that it was licensed as such. However, the appellant admitted that it was a private car.

E

The policy of insurance contained the following 'Limitation' —

> "5. LIMITATION AS TO USE. — Premium has been paid only for the use of the motor vehicle for the purposes set out in item No. 1 of the schedule on the back hereof. The motor vehicle must not be used for any other purpose unless the policy is endorsed and extra premium (if any) paid."

F

Item No. 1 of the Schedule, which is a schedule of classes of vehicles, such as private cars, goods vehicles, taxis, etc., is as follows, so far as material, —

> "1. PRIVATE CAR. A motor car which is used solely:
>
> (a) For social, domestic or pleasure purposes, or
>
> (b) By the owner, being an individual, for his own carriage in relation to his profession, business or calling ....."

G

Then after reciting that the owner had made a proposal and paid the premium for the issue of a "Third Party Policy to comply with [the Ordinance, Cap. 236]", the policy provided that the Insurance Company agreed subject to the terms limitations exclusions and conditions thereof to insure the owner, and any person driving with his permission, against third-party risks.

H

Thus far there is nothing to exclude insurance cover in the event of a passenger being carried for hire or reward on an isolated occasion, unless the carriage of the passenger were the sole reason for the use of the car on that occasion when it might be said that it was not being used for social or business purposes.

Among the 'Exclusions' was the following (omitting immaterial provisions) —

"1. The Insurer shall not be liable in respect of any claims by any person who at the time of the accident was

(a) .....

(b) driving or being carried in or entering or alighting from the motor vehicle except in so far as the indemnity granted hereby must apply by reason of Sub-section (1) of Section 6 of the Ordinance when the liability of the Insurer shall be limited to the minimum amounts referred to in the Proviso to the said Sub-section of the said Ordinance."

This apparently means that risks to passengers are not covered except when the Ordinance requires them to be covered.

Among the 'Conditions' is the following —

"1. The person insured shall not use the motor vehicle nor shall the owner permit or suffer any person to use such motor vehicle :—

(a) .....

(b) .....

(c) to carry passengers for hire or reward or in pursuance of a contract of employment in contravention of the licence issued for the vehicle described herein."

The relevant provision of Chapter 236 is the proviso (ii) to section 6(1) which, as now enacted, reads as follows —

"Provided that such policy shall not be required to cover —

(i) .....

(ii) save in the case of a passenger carried for hire or reward or under an agreement for hire or reward *in a passenger vehicle* or where persons are carried by reason of or in pursuance of a contract of employment, liability in respect of the death of or bodily injury to persons being carried in or upon or entering or getting on to or alighting from the motor vehicle at the time of the occurrence of the event out of which the claims arise.' '

The underlining is mine. Before dealing with this proviso I would refer to what might at first sight appear to be a variance between the Exclusion 1(b) and the Condition 1(c). The Condition prohibits use of the vehicle for the carriage of passengers for hire or reward, whilst the Exclusion is so worded as to extend to cover passengers if section 6(1) requires them to be covered. There are two, co-existing, explanations. First, the policy is in a form intended to be adapted to serve for vehicles of different classes, including vehicles in which passengers are regularly carried for hire or reward. Whether in any

particular case the cover extends to passengers, according to the terms of the policy, is intended to depend on the clause as to limitation of use. Thus, for example, in the case of a taxi the clause as to limitation of use would refer to Item 4 of the Schedule of classes of vehicles —

> "TAXI. A motor vehicle licensed and used for carrying not more than 6 passengers for hire or reward (including HIRE CARS and DRIVE-YOURSELF CARS)."

Secondly, and more importantly for the purpose of cases of this type, the Exclusion is referring to passengers whereas the Condition is referring to use the vehicle.

In *Abdullah v. R.* (Cr. App. No. 43 of 1957) it was said —

> "The first question is whether the petitioner carried passengers for hire or reward. I think it is quite clear from the evidence that he did carry for reward — the Ordinance uses the words "hire" or "reward" — but I do not think, as contended by learned Counsel, citing *Wyatt v. Guildhall Insurance Company* [1937] 1 A.E.R. 792, that an isolated case of carrying a person or persons for hire enables the owner of the car to escape the penalties prescribed by the Ordinance. In a later case — *Bonham v. The Zurich General Accident and Liability Insurance Company Limited* [1945] 1 All E.R.* — the owner carried regularly three persons, and two of them regularly paid him for the carriage. On 28th January, 1941, there was an accident, as a result of which one of the passengers was killed. The Court of Appeal (Mackinnon L.J. dissenting) held that on the facts of the case the passengers were carried for reward on that day. It was not suggested they were so carried, because they had been carried regularly."

In Bonham's case the insured claimed against his insurance company to be indemnified under the policy in respect of a judgment obtained against him by the representatives of the passenger who had been carried for payment and been killed when travelling in the car. The sole question was whether the passenger had been carried for reward contrary to the terms of the policy (which incorporated a negative answer to the question in the proposal whether passengers would be carried for hire or reward). Wyatt's case, also a civil case, was one brought by the passenger, who had been carried for payment, claiming against the insurance company for satisfaction of a judgment obtained by him against the insured. In order to succeed the passenger had to show not only that passengers such as he were covered by the terms of the policy but also that, by the relevant statutory provisions relating to third-party insurance (the provisions corresponding to section 6 of Cap. 236) passengers such as he were required to be covered. Wyatt's case therefore deals *(inter alia)* with the question when is there a statutory duty to insure passengers carried for payment, whereas Bonham's case deals solely with the question when is a passenger carried for reward so as not to be covered by the terms of the policy. In my respectful opinion it follows that the passage quoted above from *Abdullah v. R.* does not present the position in its proper perspective.

* Note : p.427.

A. G. v. Bhaskara Nand (1960) 7 Fiji L.R. 51 was apparently a case similar to *Abdullah v. R. Wyatt's* case was distinguished but the report does not make it clear upon what ground.

A The basis of the decision in Wyatt's case, in so far as it is relevant to the statutory duty to insure, was that, as a matter of construction of the words of the statute, one must look to the character of the vehicle. The statutory provision there is question was as follows —

"Provided that such a policy shall not be required to cover —

(i) .....

B (ii) except in the case of a vehicle in which passengers are carried for hire or reward or by reason of or in pursuance of a contract of employment, liability in respect of the death of or bodily injury to persons being carried in or upon or entering or getting on to or alighting from the vehicle at the time of the occurrence of the event out of which the claims arise."

C As the learned Judge (Branson J.) pointed out, the latter part of the proviso refers to the passengers whereas the earlier part refers to the vehicle. *Shawcross on Motor Insurance* (2nd Edn.) at p. 203 says —

"It is possible to see in the form of the language used the distinction between the liability in respect of persons carried in or upon (etc.) the vehicle 'at the time of the occurrence' which is obviously directed to the moment of the accident, and the case of

D a vehicle 'in which passengers are carried for hire or reward'. The words at the commencement of the proviso 'except in the case of a vehicle in which passengers are carried' cannot be read with the words 'at the time of the occurrence'.

.....

The judgment of Branson, J. in this case may be regarded as

E settled law, and the exception may be considered to have been designed to secure that liability in respect of the death of or bodily injury to paying passengers in cars designed to carry paying passengers shall be insured against. Examples of such are passengers carried in taxis, motor coaches, private hire cars, etc."

Halsbury draws the same conclusions, at Vol. 22, (3rd Edn) para. 756 (p. 368) —

F "Inclusion of passengers carried for hire or reward. The first exception to the foregoing rule is that, in the case of a vehicle in which passengers are carried for hire or reward, there is an obligation to insure against liability for the death or bodily injury of a passenger. It is to be observed that the qualification is applied to the vehicle; there is only an obligation to cover pas-

G senger risks if the assured, as distinct from charging a fare or taking a reward on isolated occasions, makes such a regular practice of so doing as to bring the vehicle within the relevant category. There is, therefore, a distinction between the general statutory obligation and a particular condition in a policy precluding user for hire or reward; ....."

H It is readily intelligible that the law should compel the insurance of passengers carried in public service vehicles, while not doing so in respect of passengers in private motor vehicles.

The decision in Wyatt's case, on the construction of the statutory duty to insure, has never, so far as I am aware, been questioned in any subsequent English case. So far as the law in Fiji is concerned, the position is even stronger, especially since the amendment to the proviso effected in 1964, that is to say the amendment effected by Ordinance No. 12 of 1964 to proviso (ii) to section 6 of Chapter 236. Prior to the amendment the proviso opened as follows —

"(ii) save in the case of a passenger vehicle ....."

"Passenger vehicle" was, and is, defined to mean "a motor vehicle used for carrying passengers for hire or reward". The emphasis is on the vehicle . The opening words of the proviso now read —

"(ii) save in the case of a passenger carried for hire or reward or under an agreement for hire or reward in a passenger vehicle ....."

The amendment serves to emphasise the distinction between the passenger and the vehicle; that is to say, to emphasise that risks to passengers are required to be covered only in the case of passenger vehicles.

Ram Dayal v. R. ((1959) 6 Fiji L.R. 134) was a different case. There the policy contained a stipulation that the car was not to be driven by any person who "does not hold a licence to drive ...", and at the material time the driver's driving licence had expired. In the usual form of English third-party policy this would not have mattered; such policies are issued in the form — "Provided the driver holds or *has held* a driving licence and is not disqualified" or words to that effect. However, in Ram Dayal's case the condition distinctly referred to a driver who 'does not hold' a licence. It was held that the stipulation rendered the policy voidable, not void, so that until avoided the policy held good.

In so far as the judgment rested on the construction of section 9 of the Ordinance (see p.138 of the report), it is no longer of authority in view of the amendments to section 9 effected by Ordinance No. 41 of 1959. In so far as the judgment rested on the construction of section 11 of the Ordinance (see pp.135-137), it seems to have been on the basis that the section in some way extends the scope of the indemnity afforded by the policy. With respect, the section has no such operation. The object of the section is to make an insurance company liable, in certain circumstances, to satisfy a judgment obtained by a third party against the insured person in a case where under the terms of the policy the company could, as against the insured and therefore but for the section as against the successful third party, resist liability. The section presupposes a case of non-liability under the policy by reason of the company being entitled to avoid or cancel the policy (or having avoided or cancelled it); and then compels the company to satisfy any judgment obtained against the insured by the third-party; with, possibly, a right in the company to recover what it has been compelled to pay from the insured. The object, very clearly, is to provide for compensating the third party by way of imposing a statutory obligation on the insurance company to do so, but not by way of extending the indemnity afforded by the policy *vis-a-vis* the insured. It does not prevent

the company from avoiding or cancelling the policy *vis-a-vis* the insured. The section contemplates the very form of stipulation which was held to exist in Ram Dayal's case, i.e. a stipulation rendering the policy voidable. As I have endeavoured to indicate the section does not render such a stipulation of no effect as between the insurance company and the insured. Nor does it convert a stipulation excluding liability into a stipulation merely empowering the insurance company to avoid or cancel the policy.

I do, however, agree that if a stipulation is, on its proper construction, a stipulation entitling the company to avoid the policy, the policy holds good until avoided. But this is quite apart from the provisions of the Ordinance.

If therefore a stipulation that the driver must hold a current driving licence is to be held not to disentitle the insured from claiming indemnity under the policy, it can only be, in my view, on the basis that the stipulation is, either, (a) as a matter of construction, a stipulation entitling the company to avoid the policy (not itself avoiding it or excluding liability) or (b) again as a matter of construction, a stipulation which amounts merely to a collateral promise on the part of the insured, in which case his failure to fulfil it will not entitle the insurance company to repudiate liability, though it may entitle the company to damages for breach thereof (see 22 *Halsbury* para. 409 (p.217)). I would emphasise that it is in each case a matter of construction of the policy whether a particular stipulation falls into one or other of these categories (a) and (b). Only general observations can be made. It the stipulation is expressed as a 'warranty', or as a 'condition precedent', or as the "basis" of the policy, or as defining or circumscribing the risk, it will be difficult to say that it is not a fundamental term breach of which renders the driver uninsured. On the other hand, in my view, very clear language would be required to turn a stipulation that a driver must hold a current driving licence into a fundamental term of the policy. One test is whether such a stipulation is material to the risk. It can be understood, for example, that an insurance company would not wish to insure against fire, or would wish to impose a heavy premium on, a person who has already had many fires, or a person with previous convictions for dishonesty, but it is difficult to perceive that the risks under a motor vehicle third-party policy are any greater than usual in the case of a man who is liable to forget to renew his driving licence. (See, generally, 22 *Halsbury* paras. 409 *et seq.*).

In theory, at least, there is nothing to prevent an insurance company from imposing whatever conditions it thinks fit, to exclude its liability, subject always to the provisions of sections 9 and 10 of Chapter 236. Speaking generally, these sections invalidate, as respects the cover afforded to third parties *ex post facto* conditions such as a condition that a claim shall be made within a stated period (section 9) and certain conditions such as that the driver shall be over a certain age (section 10). Apart from these statutory exceptions the company may so far as Cap. 236 is concerned, as between itself and the insured, impose whatever conditions it likes. Thus it could impose an absolute condition against liability to anyone (passenger or not) in the event of the vehicle being used, even on a

single occasion, for carriage of passengers for hire or reward. Third-party policies are, however, in my view, to be construed in the light of the object sought to be achieved, namely the provision of insurance against risks which the insured is obliged by statute to insure against.

In the present case the vital provision is Condition 1(c). In my view this Condition is equivocal. It can be taken to mean, either, (1) that there is no liability on the part of the company (for risks to anyone, passenger or otherwise) *whenever* a passenger is carried for hire or reward, or (2) that the vehicle is not covered for *use as a passenger vehicle.* The Condition does not say that the company shall not be liable if — or when — a passenger is carried for hire or reward. It does not distinguish between a case where the carriage of the passenger is the sole object of the journey and the case where, the driver being out for social, domestic or pleasure purposes of his own, he picks up a passenger and accepts a payment. From the point of view of risk and premium one would expect the company to be guarding against habitual user as a passenger vehicle, not the isolated occasion; it is consistent user as a passenger vehicle, obviously, which enhances the risks. What reason is there to exclude the isolated, perhaps single, occasion? The words are — "shall not use the motor vehicle . . . to carry passengers for hire or reward . . . ". It is my view, consistently with the object of section 6, that the Condition may well be construed as prohibiting user as a passenger vehicle. At the risk of repetition I would add that Wyatt's case demonstrates that the statutory duty to insure against risks to passengers arises only where there is a consistent or habitual user of the vehicle for the carriage of passengers for hire or reward; in terms of section 6 of Chapter 236, where the vehicle is a passenger vehicle. These may well be the risks which the Condition is designed to avoid. In case of doubt the Condition must be construed *contra proferentem.* Policies are framed by insurers and it is their duty to express their meaning in clear language. In the circumstances, in my view, it was not proved with the certainty necessary for a criminal conviction that the driver in the present case was wholly uninsured, which is the only basis upon which the conviction could be sustained.

Returning to the first charge on which the appellant was convicted, that of using the vehicle as a vehicle for which a higher licence fee was payable, there are certain aspects to which attention should be drawn. The lowest category of public service vehicle attracts a licence fee of £20. Private cars pay fees dependent on weight. Theoretically, at least, the licence fee for a private car may amount to £20. It might not therefore be enough, for the purposes of section 10(2) of Chapter 235, to prove merely that the vehicle is a private car. Further, as it appears to me, Wyatt's case has precisely the same application to this charge, because "public service vehicle" is defined (section 2 of Cap. 235) to mean "a motor vehicle used for carrying passengers for hire or reward" and section 10(2) refers to using the vehicle "as a motor vehicle of a class" for which a higher fee is payable. The proviso to the definition, added by Ordinance No. 29 of 1958, with respect to self-drive cars, emphasises that it is the vehicle, not any particular occasion, that is in contemplation.

If it is desired to penalise the occasional carriage of passengers for hire or reward in private vehicles it seems that legislation is called for which will not be dependent for its effect on the wording of the policy of insurance in any particular case.

A

For these reasons the appeal is allowed as respects conviction on both charges.

Appeal allowed.