IN THE SUPREME COURT OF FIJI

Appellate Jurisdiction

Criminal Appeal No.64 of 1984

Between:

DIRECTOR OF PUBLIC PROSECUTIONS Appellant

and

DHARMA NAND Respondent
s/o Shiu Nandan

Mr. I. Khan for the Appellant
Mr. Anand Singh for the Respondent

J U D G M E N T

This is an appeal against sentence by the Director of Public Prosecutions. On the 3rd July, 1984 the respondent pleaded guilty in the Suva Magistrate's Court to the offence of driving a motor vehicle in contravention of Third Party Risk contrary to section 4(1) of the Motor Vehicle (Third Party Insurance) Act. The offence took place on the 29th March. On conviction he was fined $50, had his driving licence endorsed and was disqualified from driving for a period of one month.

The appellant contends that the learned Chief Magistrate who heard the case should have disqualified the respondent from holding or obtaining a driving licence for a period of 12 months from the date of conviction in the absence of special reasons which would enable the court to order otherwise.

The respondent gave evidence in mitigation. He held a driving licence which expired on the 10th January, 1984. He forgot to renew it. The vehicle was otherwise covered against third party risks. In deciding on sentence the learned Chief Magistrate said :

> " I find special reason in that this rule of the insurance policy is really a contractual matter. The third party was valid except for the failure to renew the licence.
>
> I feel he was still a qualified driver which should be the test not whether he has carried out the administrative act of renewing his driving licence. "

I accept that following Whittall v. Kirby (1946) 2 All E.R. 552 a special reason involves a circumstance peculiar to the offence and not to the offender. However, it is often difficult to maintain a sharp distinction between the case and the offender. (Lines v. Hersom (1952) 2 All E.R. 650 at 653). I have been referred to the recent case of the Director of Public Prosecutions v. Mahend Singh Cr. App. 9 of 1983, unreported, in which the learned Chief Justice allowed an appeal such as this on two grounds, namely :

(a) that the magistrate did not hear evidence from the accused as to the existence of the special reasons; and

(b) that it was insufficient for the accused to say that he thought he could "ride this motor cycle for a short distance only".

In the present case the respondent did have a driving licence and a third party insurance. He failed, by inadvertence, to renew his driving licence. Such forgetfulness may be fairly common among drivers. The third party policy which the respondent held provided that cover would not extend beyond 30 days after the

expiry of his existing driving licence. In my view the learned Chief Magistrate was correct in finding that this circumstances amounted to a special reason. This appeal, therefore, must be dismissed.

This case has drawn my attention to a most unsatisfactory state of affairs. It seems that it is the present practice of insurance companies who are approved in terms of section 3(1) of the Act, to issue policies which contain the following clause :

> "4. PERSONS OR CLASSES OF PERSONS ENTITLED TO DRIVE AND INSURED UNDER THIS POLICY -
>
> (a) The Owner, and
>
> (b) Any person who is driving on the Owner's order or with his permission:
>
> Provided that the person driving holds a licence permitting him to drive a motor vehicle for every purpose for which the use of the above motor vehicle is limited under paragraph 5 below or at any time within the period of thirty days immediately prior to the time of driving has held such a licence and is not disqualified for holding or obtaining such a licence. "

The effect of this stipulation is that a motorist, like the respondent in this case, who by mere inadvertence fails to renew his driving licence, may find himself committing an offence which renders him liable to disqualification. The purpose of the statute is to protect the public against the consequences of negligence in the driving of motor vehicles by persons unable to meet substantial claims. That purpose may be defeated if approved insurers are permitted to avoid their liability to compensate the victims of road accidents by reliance upon this term of the policies issued.

This has been the situation in Fiji since the decision of Kermode J. in Michael Raman v. R. Cr. App. 27 of 1978, (unreported). In the course of his judgment Kermode J. said with reference to the provision in insurance

policies, which I have quoted above :

> "But by virtue of this proviso the legal position now is that a driver who holds no valid driving licence, or did not hold one within 30 days prior to the time of driving, or is disqualified from holding or obtaining a licence, is not covered by the policy at all. There would in fact be no policy in force covering such an unlicensed driver, because the policy does not extend to cover an unlicensed driver. "

The learned Judge went on to recommend a change in the law which would remove the anomaly. Nothing has been done during the past 7 years to give effect to this.

In the course of his judgment Kermode J. referred to a revisional order made by Mishra J. in R. v. Temo Maya (Review No. 6 of 1977), (unreported). Mishra J., following the decision of Mills-Owen C.J., in Murtaza Khan v. R. 11 F.L.R. 161 held that the failure to renew a driving licence within 30 days of its expiry rendered the policy of insurance voidable only. Reference was also made to Ram Dayal v. R. 6 F.L.R. 134 where Lowe, C.J. compared section 9 of the Fiji Ordinance with section 38 of the United Kingdom Road Traffic Act, 1930. He noted the absence of commas present in the English section and gave section 9 a beneficial construction favourable both to motorists and the general public by declaring invalid a condition in a policy of insurance which avoided liability if the vehicle was driven by an unlicensed driver. It is interesting to note that the missing commas were re-inserted by the legislature by section 13 of the Law Reform Ordinance 41 of 1959, thereby reducing Ram Dayal v. R to a case of academic interest only.

I make the observation that in reaching their respective conflicting decisions, neither Mishra J. nor Kermode J. considered the overall effect of section 6(1) of the Ordinance which reads as follows :

> "6(1) In order to comply with the provisions of this Ordinance a policy of insurance must be a policy which -

(a) is issued by an approved insurance company;

(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 vehicle:

Provided that -

(a) such policy shall not be required to cover -

(i) liability solely arising by virtue of the provisions of the Workmen's Compensation Ordinance; or

(ii) save in the case of a passenger carried 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; or

(iii) liability in respect of the death of or injury to a relative of the person using the vehicle at the time of the occurrence of the event out of which the claim arises, or to a person living with the person so using the vehicle as a member of his family; in this paragraph 'relative' means a relative whose degree of relationship is not more remote than the fourth;

(iv) any contractual liability;

(b) such policy shall not be required to cover liability in excess of two thousand pounds for any claim made by or in respect of any passenger in the motor vehicle to which the policy relates or in excess of twenty thousand pounds for all claims made by or in respect of such passengers. The amount herein specified shall be inclusive of all costs incidental to any such claim or claims. "

The provisos need not be considered further. The effect of section 6 is that only approved insurance

companies may undertake this type of business. The type of policy envisaged is one which covers any liability in respect of death of or bodily injury to any person caused by or arisen out of the use of the vehicle. A policy of insurance which contains Clause 4 does not, in my view, satisfy that requirement, as it purports to limit the insurer's liability in a manner not contemplated by section 6. It could be argued in a civil claim that an approved insurer who issues a policy not complying with the requirements of the Ordinance cannot rely on that circumstance in order to avoid liability thereunder. I must express some doubt as to the correctness of the decision in Michael Raman's case. As this is not an appeal against conviction, my views on the matter are purely obiter.

In the course of argument I suggested that I might send the case to the Court of Appeal for decision on a point of law under the provisions of the Court of Appeal Act. However, this course is not open to me as section 37 of the Act provides that a case stated should refer to "any question of law which must be of general public importance and which may have arisen during such hearing". It cannot be said that the point has arisen at this hearing. Section 37 cannot be used in order to obtain an opinion of the Court of Appeal on a point of law that is not actually an issue. I assume that the Court of Appeal would be of that opinion also.

I believe that at the present time a Parliamentary Select Committee is engaged in a review of the law relating to insurance in the country. The question of the practice of insurance companies in this matter might well be referred to that Committee, as it is for Parliament to resolve the question as it deems fit in the public interest. I, therefore, direct the Chief Registrar to send a copy of this judgment to the Committee.

(F.X. Rooney)
JUDGE

Suva,
15th October, 1984