1972
June 8

MICHALAKIS OTHONOS
v.
THE POLICE

[HADJIANASTASSIOU, A. LOIZOU, MALACHTOS, JJ.]

MICHALAKIS OTHONOS,

Appellant,

v.

THE POLICE,

Respondents.

(*Criminal Appeal No.* 3342).

Motor Transport—Road Traffic—Permitting use of motor vehicle with defective brakes contrary to Regulations 50(*n*) *and* 66 *of the Motor Vehicles Regulations,* 1959 *and section* 12 *of the Motor Vehicles and Road Traffic Law, Cap.* 332—"*Knowledge*", *necessary ingredient—Burden of proof—It is incumbent on the defendant to satisfy the Court that he had no knowledge—*"*Actual Knowledge*"—"*Knowledge*" *arising either from shutting one's eyes to the obvious, or failing to do something or doing something not caring whether contravention takes place or not—Braking system of said car duly checked by Appellant's mechanic and found to be in good and effective order before hiring the car to a third person—Offence committed without Appellant's knowledge and not due to any act or omission on his part—Appeal allowed and conviction quashed.*

Road Traffic—Permitting use of a motor car with defective brakes—Ingredients of the offence of permitting such use—See supra.

This is an appeal by the Appellant (formerly accused 2) against his conviction by the District Court of Limassol of permitting accused 1 to use on a road motor car ZDH39, the braking system of which was not in good and effective order, contrary to the Motor Vehicles Regulations, 1959, regulations 50(n) and 66, and section 12 of the Motor Vehicles and Road Traffic Law, Cap. 332. It was in evidence that the Appellant at the material time took the said car to the garage of his mechanic D.M. who, after checking the cylinder, told him that the brakes were in good order. As a result of what his mechanic told him, he (the Appellant) hired the car to accused 1 for a period of two hours.

The trial Court misdirecting itself as to the effect of this evidence convicted the Appellant as charged (*supra*). It is against this conviction that the present appeal is taken.

Allowing the appeal and quashing the conviction, the Court:-

Held, (1). In this type of offence *viz.* of permitting an act to be done the burden is imposed on the defendant to establish to the satisfaction of the Court that the offence was committed without his knowledge and was not due to any act or omission on his part. And we are in agreement with counsel for the Appellant that the trend of authorities in England is that, if the charge is of permitting an act to be done, knowledge of the facts must be established. Permitting, of course, imports state of mind, and a person cannot permit without knowledge of the facts which are to be permitted.

(2) (a) It was argued by counsel for the Respondents that on the evidence the Appellant had acted in a reckless manner, allowing accused 1 to use the car, not caring what happens.

(b) It seems to us that there was no knowledge and no evidence that the Appellant had actual knowledge or knowledge of circumstances which fixed him, as it were, with a suspicion of knowledge of circumstances regarding the defectiveness of the braking system, so that it could be said that he had shut his eyes to the obvious or had allowed something to go on, not caring whether an offence was committed or not.

(3) And having carefully gone through the record we are satisfied that the trial Judge misdirected himself on an important factual issue regarding knowledge, because the evidence adduced on behalf of the prosecution did prove that the mechanic of the Appellant, after checking the said motor vehicle, found both the cylinder full of oil and the braking system in order.

(4) We think that the Appellant has, on the evidence on record, established that the offence was committed without his knowledge and was not due to any act or omission on his part once the mechanic was satisfied that the braking system was in good and effective order.

Appeal allowed; conviction quashed.

Cases referred to:

James and Son Ltd. v. *Smee. Green* v. *Burnett and Another* [1954] 3 All E.R. 273, at p. 278;

Reynolds v. *G. H. Austin and Sons Ltd.* [1951] 1 All E.R. 606, at p. 612;

Grays Haulage Co. Ltd. v. *Arnold* [1966] 1 All E.R. 896, at p. 898.

Appeal against conviction.

Appeal against conviction by Michalakis Othonos who was convicted on the 31st March, 1972, at the District Court of Limassol (Criminal Case No. 9871/71) on one count of the offence of permitting another person to drive a motor vehicle with defective brakes contrary to regulations 50(n) and 66 of the Motor Vehicles Regulations, 1959 and section 12 of the Motor Vehicles and Road Traffic Law, Cap. 332 and was sentenced by Kronides, Ag. D.J. to pay a fine of £5.–.

S. G. McBride, for the Appellant.

V. Aristodemou, Counsel of the Republic, for the Respondents.

The judgment of the Court was delivered by:–

HADJIANASTASSIOU, J.: The Appellant, (accused 2) was convicted at the District Court of Limassol on March 31, 1972, on a charge containing one count only, charging him with permitting accused 1 to use on a road motor car ZDH 39, the braking system of which was not in good and effective working order, contrary to the Motor Vehicles Regulations 1959, Regulations 50(n), 66 and section 12 of the Motor Vehicles and Road Traffic Law, Cap. 332.

The Appellant is the proprietor of an office in Limassol for the hiring of self-driven cars. On May 28, 1971, he hired to Mr. Elias Charalambous (accused 1) motor car Registration No. ZDH 39, of which he was the owner. On the following day, whilst accused 1 was using the said motor car, he was involved in a traffic accident at Makarios III Avenue, in Limassol town. The police arrived at the scene of the accident, and P.C. 1157, Petros Stylianou examined the braking system of the said motor car in the presence of the driver, and found the foot braking system not functioning at all. Later on, the same police officer obtained a statement under caution from the Appellant (*exhibit* 3) which reads, *inter alia*, as follows:–

" Before I delivered the said motor car to the hirer, I checked its engine, and the braking system was found in good order. The last time I repaired the brakes of the said motor car was either Monday or Tuesday of last week".

However, when the statement was concluded and, was read over to him by the police officer who obtained this statement, the Appellant made a supplementary statement to the effect that Elias Charalambous (the hirer) told him that whilst he was using the said car one of the tubes burst. Moreover, he told him that because the oil of the foot braking system had escaped he had the cylinder repaired by a mechanic from Paphos whilst he was at Tsada village. He checked the cylinder which was full of oil, and in doing so, he noticed that the wires of the stop lights were wrapped with black tape. He took the car to the garage of his mechanic Demetrakis who, after checking the cylinder, told him that the brakes were in order. As a result of what his mechanic told him, he hired the same car to accused 1 for a further period of 2 hours. We find it convenient to state at this stage that the Court was told that the driver had been charged with using the said motor car contrary to the said regulations, and had been convicted.

The case was heard on March 15, 1972, and in accordance with the evidence of P.C. 233 Ioannou, who examined the said motor car, he found that the foot braking system was not functioning due to the fact that there was no oil in the cylinder.

Demetrakis Michael, who gave evidence on behalf of the prosecution, (a mechanic with 24 years experience) told the Court that , the Appellant had asked him to examine the brakes of the said car because the wires of the stop lights were burnt. He opened the bonnet of the car and saw that the cylinder was full of oil. Then he tested the foot brakes and found them in order. He enquired from accused 1, who was also present, whether he had any difficulty with the foot brakes coming from Tsada village to Limassol, and his reply was " No, they were in order". Questioned further, he said " When they told me that the wires were burnt, I did not look at them, because it was the job of an electrician".

As this case raises matters of some importance, it is necessary to look at the relevant legislation:- By s.3(1) of the Motor

Vehicles and Road Traffic Law, Cap. 332, (as amended by Law 40/65 s.2) the Governor, (now the Council of Ministers) may make regulations with respect to the following matters:– " (b) to regulate the construction, dimensions..... fittings, appliances and accessories of motor vehicles..... and to prescribe generally the conditions of their use". Pursuant to that power, the Governor made Regulations 50 and 66 of the Motor Vehicles Regulations, 1959, which, so far as relevant, read:–

> " 50. Subject to the provisions of regulations ..... no person shall cause, suffer or permit a motor vehicle to be used on a road or shall drive or have charge or control of a motor vehicle when so used unless the following provisions are satisfied and observed:–
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> (n) The motor vehicle shall have two independent braking systems in good working order and of such efficiency that the application of one shall cause all of its wheels to be held so that the vehicle shall be effectually prevented from revolving and so that the application of the other shall cause two of its wheels on the rear axle to be effectually prevented from revolving.
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> 66. Any person who contravenes any of these regulations..... shall be guilty of an offence against these Regulations and shall be liable on conviction to imprisonment of six months or to a fine of one hundred pounds or to both such fine and imprisonment".

I now turn to s. 12 of the Motor Vehicles and Road Traffic Law, Cap. 332, which is in these terms.

> " Where with the consent of the owner (whether express or implied) any motor vehicle is used or is operated in such manner that its use or operation constitutes an offence against this Law or any Regulation made under this Law, the owner of such motor vehicle shall be deemed to be a party to the commission of such offence and may be charged and tried with actually committing the offence and may be punished accordingly, unless he establishes to the satisfaction of the Court that the offence was committed without his knowledge and was not due to any act or omission on his part".

It is to be observed that the issue of knowledge arises in-

directly on the interpretation of the word "permits", and in this type of offence of permitting an act to be done, the burden is imposed on the defendant by the terms of our law to establish to the satisfaction of the Court that the offence was committed without his knowledge and was not due to any act or omission on his part.

The learned trial Judge, after weighing the evidence before him, reached his findings of fact and, at p. 11 had this to say:–

> " In the light of the evidence, I find that those facts were known to the two accused. They both knew the reason of the defectiveness of the brakes, they knew that the switch and the wires were completely destroyed and that the repairing was temporary and unsatisfactory. They also knew that in order to repair the car normally, an electrician was required, a point to which the mechanic drew their attention, but in spite of that accused 1 drove the car and accused 2 permitted him to do so in spite of the fact that he knew that it was not repaired by the mechanic because he was not an expert to do so".

Then the learned trial Judge convicted the Appellant and imposed a fine upon him of £5 and ordered him to pay the sum of £1.180 mils costs. The Appellant appealed, and the notice of appeal raises two grounds: (1) The conviction is wrong in law; (2) the conviction is unsupported by the evidence and/or contrary to the weight of the evidence.

It was contended on behalf of the Appellant that the conviction was wrong in law, because the owner of the motor vehicle should not be deemed to be a party to the commission of such an offence, since it was the essence of the offence of permitting that there should be knowledge, and because there was no evidence that the Appellant knew that the vehicle had been driven in contravention of the Regulations. Furthermore, counsel argued, the learned trial Judge misdirected himself on an important factual issue, viz., that the mechanic drew the attention of the Appellant that the car needed the services of an electrician in order to be properly repaired.

We are in agreement with counsel that the trend of authorities in England is that, if the charge is of permitting an act to be done, knowledge of the facts must be established. Permitting, of course, imports state of mind, and a person cannot permit

without having knowledge of the facts which are to be permitted.

In *James & Son, Ltd.* v. *Smee. Green* v. *Burnett and Another* [1954] 3 All E.R. 273 at p. 278, Parker, J., had this to say:–

> " In the present case, however, the maintenance of the braking system is wholly under the control of the master's servants and agents and the prohibition is in our view absolute. Indeed, it is to be observed where in Part III of the regulations exercise of proper care and absence of knowledge is to be a defence, it is so stated: cf. regs. 73 and 80.
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> The Appellants were, however, charged with permitting the use in contravention of reg. 75 which, in our opinion, at once imports a state of mind. The difference in this respect was pointed out as long ago as 1894 by Collins, J., in *Somerset* v. *Wade* [1894] 1 Q.B. 574, where he distinguished an absolute prohibition against a licensee selling to a drunken person and a prohibition against permitting drunkenness. In the latter case he must be shown to have known that the customer was drunk before he can be convicted: cf. also *Ferguson* v. *Weaving* [1951] 1 All E.R. 412. Knowledge, moreover, in this connection includes the state of mind of a man who shuts his eyes to the obvious or allows his servant to do something in the circumstances where a contravention is likely not caring whether a contravention takes place or not: cf. *Goldsmith* v. *Deakin* [1933] 150 L.T. 157; *Prosser* v. *Richings* [1936] 2 All E.R. 1627, and *Churchill* v. *Norris* [1938] 158 L.T. 255."

In *Reynolds* v. *G. H. Austin & Sons Ltd.* [1951] 1 All E.R. 606 at p. 612, Devlin, J., having dealt with justification of punishing a man for something he knows nothing about said:–

> " If a man is punished because of an act done by another, whom he cannot reasonably be expected to influence or control, the law is engaged, not in punishing thoughtlessness or inefficiency and thereby promoting the welfare of the community, but in pouncing on the most convenient victim. Without the authority of express words, I am not willing to conclude that Parliament can intend what would seem to the ordinary man (as plainly it seemed to the justices in this case) to be the useless and unjust infliction of a penalty".

In *Grays Haulage Co., Ltd.* v. *Arnold*, reported in [1966] 1 All E.R. 896, Lord Parker, C.J. said at p. 898:–

> " In my judgment, there is a tendency today to impute knowledge in circumstances which really do not justify knowledge being imputed. It is of the very essence of the offence of permitting someone to do something that there should be knowledge. The case that is always referred to in this connexion is *James & Sons, Ltd.* v. *Smee*: *Green* v. *Burnett* [1954] 3 All E.R. 273, where, in giving judgment, I pointed out that knowledge is really of two kinds, actual knowledge, and knowledge which arises either from shutting one's eyes to the obvious, or, what is very much the same thing but put in another way, failing to do something or doing something not caring whether contravention takes place or not. Here there is no question of actual knowledge at all, nor is it a case where there is a shutting of eyes to the obvious as, for instance, refraining from looking at the records which had to be kept of hours of work showing that the driver was not complying with the statute. This, of course, goes very much further, because it is said that the mere fact that they did not take steps which would have prevented the driver from doing this, amounts to a permitting. A similar case, *Fransman* v. *Sexton* (1965) 'The Guardian', July 9, came before this Court recently on July 8, 1965. In that case, I tried to limit the tendency that there is today for extending imputing knowledge in this way. The justices there had said that the knowledge could be imputed when a man fails 'to take adequate steps to prevent defects occurring by an adequate system of maintenance of vehicles' ". I said:
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> > " 'For myself I very much doubt whether those words really do properly define what I may call the third category of knowledge (It is really part of the second category of knowledge). If they are meaning merely this, that knowledge was being imputed to the Appellant because in fact he had failed to discover the defect and might have taken steps which would have revealed a defect, then in my judgment the test is completely wrong. Knowledge is not imputed by mere negligence but by something more than negligence, something which one can discribe as reckless, sending out a car not caring what happens' ".

" So, here, it seems to me, there was no knowledge and no *prima facie* evidence that the Appellants had actual knowledge or knowledge of circumstances which fixed them, as it were, with a suspicion or knowledge of circumstances so that it could be said that they had shut their eyes to the obvious, or had allowed something to go on, not caring whether an offence was committed or not".

On the other hand, counsel on behalf of the Respondent, whilst conceding that this case was a border line case, argued that the Appellant, in view of the facts which he had before him, had acted in a reckless manner, allowing the car to be used by accused 1, not caring what happens.

Having heard both counsel, it seems to us, that there was no knowledge and no evidence that the Appellant had actual knowledge or knowledge of circumstances which fixed him, as it were, with a suspicion of knowledge of circumstances regarding the defectiveness of the foot braking system, so that it could be said that he had shut his eyes to the obvious or had allowed something to go on, not caring whether an offence was committed or not.

Having carefully gone through the record of the Court, we are satisfied that the learned trial Judge misdirected himself on an important factual issue regarding knowledge, because the evidence adduced on behalf of the prosecution, did prove that the mechanic of the Appellant, after checking the said vehicle, found both the cylinder full of oil and the foot braking system in order. And, with due respect to the finding of the learned trial Judge, we were unable to find any evidence at all supporting his findings of fact that the Appellant permitted accused 1 to drive the said car though he knew that in order to repair the car an electrician was needed, and that this was pointed out to him by the mechanic.

In our judgment, we think that the Appellant, in view of the evidence before the trial Court, has established that the offence was committed without his knowledge and was not due to any act or omission on his part once their mechanic was satisfied that the foot braking system was in good and effective order.

While sympathising with the learned trial Judge regarding the question of the repairs of the wires, we are of the view

that he came to a wrong conclusion of law regarding the question of knowledge, and we would allow the appeal and quash this conviction.

Appeal allowed.