[HALLINAN, C.J., AND MELISSAS, J.]

(April 28, 1952)

LOUTFIG CHOPOURIAN OF LARNACA, *Appellant,*

v.

THE POLICE, *Respondents.*

(*Case Stated No.* 75.)

Motor Car Law, section 5A (*Cap.* 125) *meaningless—Failure to establish prima facie case cured by accused's admissions in evidence—Prosecutor's right to reply.*

The appellant was convicted of driving a motor car in a manner likely to endanger human life contrary to regulation 55 of the Motor Car Regulations, 1951. Section 5A of the Motor Car Law provides that where with the consent of the owner a motor car is used so that its use or operation is an offence the owner of the motor car can be convicted of that offence unless he shows that the offence was committed without his knowledge. The trial Court held that the prosecution had established a *prima facie* case having proved that the motor car of the appellant had been driven at a speed likely to endanger human life, and had been driven either by the appellant or by someone else with the appellant's consent. After this ruling the appellant gave evidence upon which the trial Court could hold that he had driven the car himself. In the closing addresses the Court permitted counsel for the prosecution to have the last word.

Held : (1) Section 5A of the Motor Car Law appears to have little or no meaning, for what it provides amounts to this : A motor car owner who consents to an offence being committed with regard to his car is guilty of that offence unless he did not so consent.

(2) Although the prosecution had failed to establish a *prima facie* case because they had not established that the appellant had driven the motor car on the occasion the subject of the charge, this difficulty was cured later by the appellant's own evidence. *R.* v. *Power* (14 Criminal Appeal Reports 17).

(3) The word " witness " in section 72 (2) of the Criminal Procedure Law (Cap. 14) means a witness other than the accused himself. The prosecution in this case therefore did not have the right of reply. But this was not such an irregularity as would justify the setting aside of the conviction.

Conviction upheld.

Case Stated by the appellant from the judgment of the District Court of Larnaca (Case No. 6386/51).

I. V. Avni, for the appellant.

R. R. Denktash, Junior Crown Counsel, for the respondents.

The judgment of the Court was delivered by:

HALLINAN, C.J.: In this case the appellant was convicted of driving his motor car in Larnaca in a manner likely to endanger human life contrary to Regulation 55 of the Motor Car Regulations of 1951.

At the close of the case for the prosecution there was evidence that the motor car of the appellant had been driven at a speed likely to endanger human life. The complainant stated that the appellant alleged in the presence of a certain Mr. Shahe that he (Shahe) was driving the car, and this fact was denied by Mr. Shahe. At this stage counsel for the appellant submitted that there was no case to answer. The learned District Judge, relying on the evidence already given and on the provisions of section 5A of the Motor Car Law, held that the prosecution had established a *prima facie* case. The appellant thereupon gave evidence on his own behalf in which he denied that he drove the car in Larnaca at the material time but admitted that the car was then under his control at Famagusta. The Court below having considered the evidence both for the prosecution and the defence held that it was proved that the appellant had been driving his car at the material time and had committed the offence with which he was charged.

The first question to consider in this case is whether the complainant's evidence as to what Mr. Shahe had said was properly admitted. From the facts set out in the Case Stated it appears that the appellant made no answer to Mr. Shahe's denial. The authorities on the admissibility of this kind of evidence set out in Phipson on Evidence (8th Edition) at page 241 where it is stated "a party's silence will render statements in his presence .... evidence against him of their truth, provided he is reasonably called on to reply thereto. And even when .... the statements are ..... made by persons not called as witnesses, the evidence is strictly admissible, although its weight may be slight". Although the admissibility of Mr. Shahe's denial was one of the points of law upon which the appellant asked the Court below to state a case, the case as stated does not say whether in fact the circumstances were such that the appellant might be reasonably expected to reply to Mr. Shahe's denial. However the District Judge did find that the appellant "had admitted during the hearing of the case that the car was not with Mr. Shahe but with him as from about 1.30 p.m. on that day." In view of this admission by the appellant the hearsay evidence of what Mr. Shahe said in the appellant's presence would appear to be admissible.

In holding that the appellant had a case to answer the District Judge relied on section 5A of the Motor Car Law which reads:—

"Where with the consent of the owner (whether express or implied) any motor car is used or is operated

in such a manner that its use or operation constitutes an offence against such regulation made under the Law, the owner of such motor car 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."

Counsel for the appellant has submitted that the word " consent " in this section does not merely mean consent to use or operate a car, but consent to use or operate it in such a manner that its use or operation constitutes an offence. I consider that counsel's interpretation of this section is clearly correct. If the legislative authority meant that the owner's consent merely concerned the operation of the motor car and not the commission of the offence, this section should provide : " where the owner of a motor car permits (expressly or by implication) another person to operate his motor car and that person operates it in a manner that constitutes an offence . . . . " as now enacted section 5A appears to have little or no meaning for what it provides amounts to this : a motor car owner who consents to an offence being committed with regard to his car is guilty of that offence unless he did not so consent. At the close of the prosecution's case, even if it is assumed that there was some evidence that Mr. Shahe or someone other than the appellant had, with the consent of the appellant, been using the motor car at the material time, there was no evidence at all that the appellant had consented to anyone driving his motor car at a speed likely to endanger human life. I consider that the District Judge was wrong in relying on the provisions of section 5A in support of his ruling that the prosecution had established a *prima facie* case. It has been suggested that the facts as to who was driving the appellant's car at the material time were peculiarly within the knowledge of the appellant and therefore that the proof of those facts lay on him. I do not think that this principle of the law of Evidence can be invoked in this case. In Phipson on Evidence (8th Edition), on page 34, it is stated :—

> " The principle of this exception has been recognised chiefly, though not exclusively, in the older cases and by the legislature. Thus, in actions under the old Game Laws . . . . These cases, however, have been considered to rest partly upon the construction of the acts, and in the absence of statutory provision, the better opinion now seems to be that in general some *prima facie* evidence must be given by the complainant in order to cast the burden on his adversary. The difficulty of proving a fact peculiarly known to an opponent may, it has been

said, affect the quantum of evidence demanded in the first instance but does not change the rule of law."

It would, in my opinion, be going far beyond the principle which it is suggested should be here invoked to hold that where a motor car has been driven at excessive speed the burden of proof is on the owner to show that he was not criminally responsible for such driving.

Although at the close of the case for the prosecution I do not consider that a *prima facie* case had been established, nevertheless the appellant elected to give evidence and as a result of admissions made by him it would appear that the District Judge had then evidence before him sufficient for him to hold that it was the appellant who had been driving the car when the offence was committed. The case of *R.* v. *Power* (14 Criminal Appeal Reports, 17) is authority for the proposition that where a submission of "no case" is made at the close of the prosecution's evidence and the submission is overruled but the appellant elects to give evidence, the Court is entitled to look at the case as a whole. In the present case the District Judge was undoubtedly entitled to take account of the appellant's evidence when giving his decision.

In hearing the addresses of counsel at the close of the evidence the Court permitted counsel for the prosecution to have the last word. In doing so the Court relied on section 72 (2) of the Criminal Procedure Law, Cap. 14 :—

> "At every trial, the prosecutor and accused or their respective advocates may open their case and, at the conclusion of the trial, the party who has last called a witness may address the Court and the other party may then address the Court in reply."

The District Judge considered that the appellant when he gave evidence was a witness and being the last, the prosecution had the right to reply. While I agree that an accused person who gives evidence is a witness, the word "witness" in section 72 (2) appears to be ambiguous; for the phrase "the party who has last called a witness" suggests that the legislature is here distinguishing a party from his witnesses. The provisions in the English law regarding this matter are perfectly clear and are contained in section 3 of the Criminal Evidence Act, 1898 : "in cases where the right of reply depends on the question whether evidence has been called for the defence, the fact that the person charged has been called as a witness should not of itself confer on the prosecution the right to reply." Since the law in Cyprus on this point is somewhat ambiguous I think it should be interpreted in favour of accused persons and it seems desirable that the law here should follow the English procedure. I therefore consider that in this case the appellant's counsel should have had the last word.

I consider then that this Court should accept the appellant's contention on two points of law: the proper interpretation of section 5A of the Motor Car Law, and of section 72 (2) of the Criminal Procedure Law concerning the right of reply. The question that remains for decision is whether the appellant's success on these points entitled him to have the conviction in this case quashed.

The fact that the appellant was not given the right of reply is certainly not such an irregularity as would justify setting aside the conviction. Nor do I consider that the misdirection on section 5A of the Motor Car Law in any way affected the ultimate decision of the District Judge. At the close of the prosecution's case he wrongly relied on this section in deciding that the appellant had a case to answer, but the last paragraph of the Case Stated shows that he excluded this section from his mind when he came to his verdict; for he found that the appellant himself had driven the motor car and that section 5A was inapplicable.

For these reasons I consider that the conviction should be affirmed.

MELISSAS, J.: I have had the opportunity of discussing the case with the learned Chief Justice and I agree with the views expressed in the judgment he has just read. I am also of the opinion that the conviction was right and it must be affirmed.