

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

1973
Nov. 15

TAKIS VARNAVA,

Appellant,

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TAKIS VARNAVA
v.
THE POLICE

v.

THE POLICE,

Respondents.

(Criminal Appeal No. 3473).

Findings of fact made by trial Courts—Credibility of witnesses—Approach of the Court of Appeal to appeals against such findings based on credibility of witnesses—Burden on Appellant to satisfy Court of Appeal that the trial Court erred on the question of credibility—Two conflicting versions—Open to trial Court to prefer the one (that of the Respondents)—Careless driving—Conviction—Appeal against conviction dismissed.

Criminal Procedure—Appeal—Findings of fact—See supra.

Motor Transport—Bus—Disembarking passengers at a place which was not a bus stop—Section 7 (1) (6) of the Motor Transport (Regulation) Law, 1964–1971—Conviction—Ingredients of the offence—No proof of existence of a valid road service licence for bus in question—Conviction quashed.

The facts sufficiently appear in the judgment of the Court allowing in part this appeal.

Cases referred to:

Shioukiouroglou v. Police (1966) 2 C.L.R. 39, at pp. 41–42;

Athanassiades v. The Police (1972) 2 C.L.R. 97;

McMorrowd v. The Police (reported in this Part at p. 273, *ante*).

Appeal against conviction.

Appeal against conviction by Takis Varnava who was convicted on the 13th June, 1973, at the District Court of Famagusta (Criminal Case No. 1453/73) on one count of the offence of driving without due care and attention contrary to sections 8 and 19 of the Motor Vehicles and Road Traffic Law, 1972

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(Law 86/72) and on another count of the offence of using a motor vehicle contrary to the provisions of his road service licence in violation of sections 7 (1) (6) of the Motor Transport (Regulation) Law, 1964–1971 and was sentenced by Artemides, D.J. to pay £7.– fine on the first count with £10.– costs, and no sentence was passed on him on the second count.

N. Zomenis, for the Appellant.

N. Charalambous, Counsel of the Republic, for the Respondents.

Cur. adv. vult.

HADJIANASTASSIOU, J.: The judgment of this Court will be delivered by Mr. Justice A. LOIZOU.

A. LOIZOU, J.: The Appellant was convicted by the District Court of Famagusta of the offence of driving motor vehicle Reg. No. TBN 593 on a road without due care and attention, contrary to sections 8 and 19 of the Motor Vehicles and Road Traffic Law, 1972 (Law No. 86 of 1972) and was fined £7.– and ordered to pay £10.– costs of Prosecution. He was also found guilty of the offence of using the said motor vehicle, contrary to the conditions of his road service licence, in that he disembarked passengers at a place which was not a bus-stop, in violation of sections 7 (1) (6) of the Motor Transport (Regulation) Law, 1964–1971. No sentence was imposed on the second count.

The version of the Prosecution was that on the 29th December, 1972, in the afternoon, the Appellant was driving motor bus Reg. No. TBN 593 along Ayios Athanassios Street, in Famagusta, which, at the point of impact, is 18 ft. wide and with good visibility. There was a ditch on the left-hand side of the road, having regard to the direction of the Appellant's bus. It was usable by pedestrians and Margarita Patroklou (P.W.3), the complainant's wife, was walking along this ditch, holding with her left hand a basket and with her right hand the handle of a gas cylinder, its other handle being held by the complainant Patroklos KaraNicola (P.W.2) who was occupying about one foot inside the edge of the asphalted part of the road. The Appellant turned into the said street and stopped at a distance of 97 feet from the specified bus-stop, so that a passenger, Athanassia Constantinou (P.W.4) would alight from the bus. The complainant and his wife proceeded on their way and

greeted the alighting woman. When they were a few feet ahead of the front part of the bus, the Appellant started off the engine and proceeded on his way. The complainant who was proceeding all this time along the edge of the asphalt, was hit by the left front mudguard of the bus, fell down and the left front wheel of the bus ran over his feet from the ankle downwards, dragging also Margarita to the ground. She started shouting and the Appellant who had in the meantime proceeded for a distance of about 35 feet stopped and came to their aid.

The version of the Appellant was that he did not hit Patroklos with his vehicle, but that the complainant and his wife lost their balance because of the things they were carrying and fell down.

He gave an open statement to the police (*exhibit 2*) in which he stated that he saw the complainant and his wife walking on the side of the street. He overtook them, proceeded for a distance of 3-4 feet, stopped on the left-hand side of the road and Athanassia alighted therefrom. He then set off on his way, when he heard the shouting of complainant's wife and he stopped and went near them and saw the complainant lying on the ground, saying that he had his feet run over by the bus and he was feeling pain. In evidence, however, his version was that the complainant was simply complaining about the pain on his feet, but mentioned nothing about being run over by the wheel of the bus. The Defence called one witness, namely, Georghia Frangou (D.W.1).

The trial Court had to consider two conflicting versions. It accepted the evidence of the complainant and his wife and disbelieved the Appellant and the witnesses Athanassia (P.W.4) and Georghia (D.W.1). It found Georghia to have deliberately gone to Court to lie for the reasons, *inter alia*, that she evaded important questions by referring to her poverty and misery and she nearly used her tears to convince the Court about her misery.

Regarding Athanassia, the learned trial Judge found that she had every reason to support the Appellant in his story, as it was for her convenience that the bus stopped away from the bus-stop.

The appeal against the conviction on count 1, turns on findings of fact based on the credibility of witnesses.

The position arising from findings of fact made by a trial Court has been discussed on a number of occasions by this Court. (See *Shioukiouoglou v. The Police* (1966) 2 C.L.R. 39, at pp. 41 and 42, *Athanassiades v. The Police* (1972) 2 C.L.R. 97 and *Alexander McMorrowd v. The Police* (4th October, 1973 as yet unreported))* . It is well settled that the burden of satisfying this Court on appeal that the trial Court has erred on the issue of credibility lies always with the Appellant. Findings of fact have been stated to be matters primarily within the province of trial Judges who saw and heard the witnesses and had the opportunity of judging their demeanour in the witness box, and if, having regard to the evidence it was reasonably open to them to make such findings, then this Court will not interfere unless it is persuaded that they are unsatisfactory and that they should not be content to let the matter stand as it is, as an injustice has been done.

In the present case, having heard counsel for the Appellant at length arguing his case, we have not been persuaded that the trial Judge erred on the issue of credibility or that on the totality of the evidence the findings of the trial Judge were either unreasonable or unsatisfactory or that it was unsafe for the conviction on count 1 to stand.

We shall deal briefly now with the complaint of the Appellant against his conviction on count 2, which is to the effect that there was no evidence whatsoever what the conditions of Appellant's road service licence were.

Counsel for the Respondents has argued that there was no need to adduce evidence regarding the conditions of such a licence, as under the Motor Transport Regulations made under the provisions of the aforesaid Law (Notification No. 505, Supplement No. 3 to the official Gazette No. 368 of the 19th November, 1964) the conditions of a road service licence include necessarily, and there is no discretion to omit any of those to be found in the Second Schedule, Number 2 to the Regulations, which, *inter alia*, include condition (c) "the obligation to stop at the specified point for the purpose of taking and disembarking of passengers". Before, however, consideration of the point raised is found to be necessary for the purposes of this appeal, it has to be examined whether the prosecution has adduced any evidence whatsoever from which the Court could infer, in the

* Reported in this Part at p. 273, *ante*.

first place, whether the said public service vehicle was used on the road having been duly licensed under the provisions of the aforesaid Law.

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The only reference that might have any bearing on this issue, is to be found in the statement of the accused (*exhibit 2*) that the bus under Registration No. TBN 593 belongs to the Enosis Leoforion Ammohostou and that he drove it regularly and that with the said bus he was running a route; also, that in answer to the formal charge which was framed as follows—"... you were driving parked bus TBN 593 in a non-specified point" and the answer of the Appellant was—"I have to mention that I really stopped away from the stop, the reason being that there was a lorry loaded with timber at the stop".

In our view, the combined effect of these two statements does not amount in law to a proof required in a criminal case that the bus in question was licensed under the provisions of the Law.

Under section 7(7) of the Law, a road service licence shall, unless previously revoked or suspended under the provisions of this Law, continue in force for one year from the date on which it has been granted and shall, on payment of the prescribed fee, be renewed from year to year.

There are too many prerequisites to be satisfied for the existence of a valid licence and there is no presumption in law that the bus, in the circumstances of this case, was used by virtue of a valid road service licence. Therefore, once an essential ingredient of the offence has not been proved, the conviction on count 2 cannot be upheld.

In the circumstances, therefore, and for the reasons we have advanced, the present appeal is dismissed in respect of count 1 and allowed in respect of count 2. Conviction on count 2 set aside.

Appeal partly allowed.