IN THE COURT OF APPEAL

AT KISUMU

(Coram: Law, Miller & Potter JJA)

CRIMINAL APPEAL NO. 44 OF 1981

BETWEEN

OKERO.....APPELLANT

AND

REPUBLIC.....RESPONDENT

JUDGMENT

The offence with which the appellant was charged was that of using a vehicle at night contrary to Section 119(1) (n) of the Traffic Act, Cap 403, as read with Legal Notice No 204 made on December 2, 1980. The appellant was convicted by the Resident Magistrate at Kisumu on March 18, 1981 and was fined Kshs 1,000 and also ordered to pay Kshs 450 “as the costs of the Prosecution”. The appellant appealed to the High Court, and on March 30, 1981 his appeal was summarily rejected under Section 352(2) of the Criminal Procedure Code.

Section 119(1) (n) of the Traffic Act empowers the Minister to make rules prescribing ... “(n) measures for controlling or prohibiting the movement of vehicles of any specified class or description between the hours of 6.45 pm and 6.15 am;” In exercise of this power the Minister for Transport and Communications made the Traffic (Movement) Rules, 1980. Rule 2(1) of those Rules provides - “(1) No commercial vehicle having a tare weight of 3 tonnes or over shall be driven on a road between the hours of 6.45 pm and 6.15 am”. Rule 2(2) provides for the penalties.

There is no dispute that on December 26, 1980 at about 7.30 pm the appellant was stopped by police Inspector Onyama while he was driving for his employer a lorry having a tare weight of over 3 tonnes along the Kisumu/Kericho road, or that the lorry was loaded with crates of beer manufactured by Kenya Breweries Limited.

The appellant’s defence was that he was exempted by rule 3 of the Traffic (Movement) Rules, 1980, which provides:

“3. Nothing in those rules shall apply to vehicles

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a) carrying perishable goods; or

b) owned or operated by Kenya Breweries Limited or Kenya Co-operative Creameries or by persons

acting as agents for those organisations on the bona fide business of those organizations: Provided that where any person asserts that he was at the material time so acting as an agent the burden of proving that fact shall lie on him."

The burden was on the appellant to bring himself within the exception in rule 3(b), by reason of the proviso. It is a well established qualification to the general principle of the presumption of innocence that the law may call upon an accused person to prove particular facts, and this is expressly provided for in the Constitution, see Section 77(2)(a) and (12)(a).

The kind of case with which we are concerned was considered in *Ali Ahmed Saleh Angara v Republic* [1959] EA 654, in which Forbes VP, reading the judgment of the court said at page 658 D:

"Where, as in the instant case, there is a specific provision in a statute placing the burden of proof regarding a particular matter on the person accused, there is no need for the prosecution to rely upon Section 105 of the Indian Evidence Act and we think that the application of that section must be excluded, even though it would otherwise have been applicable, and that the principles of English law would apply. Nevertheless, even if it might be thought that by analogy the degree of the burden on the accused should be drawn from Section 105, we do not think that there is any material difference between Section 105 of the Evidence Act and the English law on the point."

The position under English law is stated in Phipson on Evidence (9th Ed) at p 38 as follows:

"When, however, the burden of an issue is upon the accused, he is not, in general, called on to prove it beyond a reasonable doubt or in default to incur a verdict of guilty; it is sufficient if he succeeds in proving a prima facie case, for then the burden is shifted to the prosecution, which has still to discharge its original onus that never shifts, ie that of establishing, on the whole case, guilt beyond a reasonable doubt."

We accept that statement of the law. In *Republic v Carr-Briant* [1943] KB 607, which is one of the cases in Phipson in support of the proposition just stated (and is also cited in the commentary on Section 105 of the Indian Evidence Act in Sarkar on Evidence (4^{th} Ed) at p 808) the Court of Criminal Appeal said, at p 612:

"In our judgment, in any case where, either by statute or at common law, some matter is presumed against an accused person 'unless the contrary is proved, the jury should be directed that it is for them to decide whether the contrary is proved, that the burden of proof required is less than that required at the hands of the prosecution in proving the case beyond a reasonable doubt, and that the burden may be discharged by evidence satisfying the jury of the probability of that which the accused is called upon to establish.'"

Section 111 of the Evidence Act, Cap 80 is now the equivalent of Section 105 of the Indian Evidence Act.

We now return to the evidence. The prosecution witnesses said that the appellant was carrying a full load of full bottles and empty bottles of beer. Paul Isaka (DW 1) the owner of the lorry and the appellant's employer, had this to say inter alia:

"l am an agent for Kenya Breweries Limited. I sell in Nyando Division, settlement areas, Nyakach, and urban areas of Kisumu. I am the distributor for those areas. I purchase the beer at Kenya Breweries Limited Kisumu. I pay cash or bank draft ... After purchasing the beer from the Depot, it becomes my property and I sell it at the controlled price authorised by Kenya Breweries Limited. I get monthly commission from Kenya Breweries Limited as a distributor. Commission is paid on the amount of sale I do. I buy the crate of beer at Kshs 105.75 and sell it at the same price. The commission is my profit. Kenya Breweries Limited staff come to visit my store at Ahero every day. They check my routes for the distribution purposes. I make my reports to Kenya Breweries Limited."

The question under rule 3(b) is whether at the material time Paul Isaka was a person acting as an agent for Kenya Breweries Limited on the bona fide business of that organization.

The word “agent” can have numerous meanings, and this was amply demonstrated to us by Mr Owino for the appellant and Mr Mugu for the respondent. We may start with Halsbury’s Laws of England, 4th Edition, Volume 1. In paragraph 701 we read:

‘’The terms “agency” and ‘’agent” have in popular use a number of different meanings, but in law the word “agency” is used to connote the relation which exists where one person has an authority or capacity to create legal relations between a person occupying the position of principal and third parties”.

In paragraph 702 we read:

“In addition to meaning a person employed to create contractual relations between two parties, the word “agent” is used in at least two other senses. Thus it is often used in business in a complementary and not a legal sense, as in the case of the appointment of a “sole selling agent”, “exclusive agent” or “authorised agent.”

And in Treitel on the Law of Contract, 3rd edition, we are told at pages 614 to 615:

“A retailer may describe himself as the “agent” of the manufacturer whose products he sells. Whether this description is legally accurate depends on the nature of the relationship between them. If the retailer accounts to the manufacturer for the or Ice paid by the customer, and is remunerated by a commission or salary paid by the latter, he is the manufacturer’s agent. But this is not the case if he is in fact a middleman who buys from the manufacturer for resale to the customer at a profit.”

When considering the meaning and intention of the Traffic (Movement) Rules 1980, we see no reason to give the narrower legal meaning to the words “persons acting as agents” for Kenya Breweries Limited. The evident object of the Rules is to stop the clandestine movement of certain commodities at night, without restricting the distribution of (a) perishable foodstuffs, and (b) beer and milk products distributed by or on behalf of the national producers of those products. This view is fortified by the fact that rule 3(a) exempts any vehicle (belonging to anyone) which is “carrying perishable goods” .

In our view the evidence adduced by the defence was sufficient to bring the appellant and his employer within the exception in rule 3(b), and on any view of the matter to shift the burden of proof back to the prosecution and to leave a reasonable doubt as to the appellant’s guilt at the end of the day. If the prosecution brought this case as a matter of serious policy, they should have considered calling evidence themselves on the issue, for example from Kenya Breweries Limited.

If the learned judge did not detect an important question of law (or of mixed law and fact) in the appeal, and mistakenly (as he did) rejected the appeal as being based only on the ground that the conviction was against the weight of the evidence, Mr Owino must accept a portion of the blame for burying the point in a ground of appeal. In the charge disclosed no offence known to the law.

For these reasons we quash the conviction and set aside the sentence. The award of costs to the prosecution must fall away with the acquittal, and all monies paid by the appellant by way of fine and costs are to be returned to him. It is so ordered.

In awarding costs to the prosecution the learned magistrate purported to act under Section 171 of the Criminal Procedure Code (Cap 75). We would respectfully draw his attention to the case of *Harbans Singh v Republic* [1958] EA 199.

As **Law** and **Miller** agree, it is so ordered.

Dated and Delivered at Kisumu this 18th day of June 1981.

E.J.E.LAW

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JUDGE OF APPEAL

C.H.E.MILLER

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JUDGE OF APPEAL

K.D.POTTER

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JUDGE OF APPEAL

I certify that this is a true copy of the

original.

DEPUTY REGISTRAR