POLICE *ats.* ALI MOHAMMED.

[Appellate Jurisdiction (Seton, C.J.) May 31, 1946.]

Traffic Ordinance, 1946—s. 58—dangerous driving—driver asleep at the wheel—conviction under s. 57 (careless driving)—whether acquittal on more serious charge correct—adequacy of sentence—sentence varied.

Respondent, a taxi driver, while driving along the Suva Point Road from the direction of Suva Point overtook and collided with two pedestrians who were walking in the same direction on the seaward (left hand) side of the road. The pedestrians were two of a party of three who were walking abreast, two on the grass verge and the third on the extreme left edge of the tar-sealed surface. The road at this point was flat and straight 21 feet 6 inches wide. It was daylight and there was no other traffic on the road. Respondent admitted being asleep at the wheel and stated that he had been on duty continuously for 30 hours. Giving judgment in a summary trial for the offence of dangerous driving, contrary to s. 58 of the Traffic Ordinance 1946, the Magistrate observed that s. 58 which covers dangerous driving seems to infer a deliberate intention to drive in that manner, whereas s. 57 covers cases where the driver has omitted to do something and, finding as a fact that there was no deliberate intent to drive while asleep but rather that the driver failed to keep awake, found the respondent guilty of driving without due care and attention and sentenced him to a fine of £5 or in default of payment to one month's imprisonment with hard labour.

HELD.—In a prosecution for the offence of dangerous driving contrary to s. 58 of the Traffic Ordinance, 1946, once the prosecution has established that the accused has driven to the danger of the public, the only defence, open to him to show that it was through no fault of his own.

Cases referred to :—

(1) *Andrews v. Director of Public Prosecutions* [1937] 2 A.E.R. 552.

(2) *Kay v. Butterworth* [1945] 61 T.L.R. 452.

APPEAL against acquittal and sentence.

E. M. Prichard, for the appellant, submitted as the first ground of appeal that the Magistrate had no power to convict of the lesser offence unless it was charged. He argued that the only authority for such a course must lie in s. 167 of the Criminal Procedure Code which was only declaratory in nature and prior to its enactment a conviction for careless driving on a charge of dangerous driving was not possible.

SETON, C.J.—I should prefer the remaining grounds of appeal argued first : this need not be decided if the appeal is determined on other grounds.

E. M. Prichard, for the appellant : Ss. 57 and 58 of the Traffic Ordinance are identical in terms with ss. 12 and 11 respectively of the Road Traffic Act, 1930[1]. As regards the element of *mens rea* covered

[1] 20 & 21 *Geo.* 5 *c.* 43.

by those sections there are a number of " degrees of negligence " ranging from a deliberate intent (murder) through various stages to the minor offence of careless driving. This is apparent if the judgment in *Andrews v. Director of Public Prosecutions* is analysed. Lord Atkin observed in that case " I cannot think of anything worse for users of the road than the conception that no one could be convicted of dangerous driving unless his negligence was so great that, if he had caused death, he must have been convicted of manslaughter." In the present case by holding that there must be a deliberate intent to drive dangerously the learned Magistrate has thought of something worse than Lord Atkin could—he has substituted " murder " for " manslaughter ". The true position of cases like the present one in the scale of criminal negligence is made clear by the decision in *Kay v. Butterworth*.

Said Hasan, for the respondent : It is as my friend says a question of degrees of negligence and this is a question of fact. *Kay v. Butterworth* can be distinguished on the facts—there was obviously more traffic on the road in that case and so the degree of negligence was higher. I quoted *Kay v. Butterworth* in the lower Court : there is a difference in the wording of the report my friend has from that in the *Journal of Crimnal Law* for July, 1945 at page 201 where the word " offence " is used and not " offences ".

SETON, C.J.—The respondent was charged under s. 58 of the Traffic Ordinance, 1946, with the offence of dangerous driving, the facts being that he went to sleep at the wheel of his taxi and, on a good road, devoid of traffic, ran into a party of pedestrians who were walking at the side of the road and were clearly visible to anybody who had eyes to see. Two of the pedestrians were knocked down and one of them was seriously injured.

The learned Magistrate thought that, in order to convict the respondent of dangerous driving, it was necessary to prove that he had a deliberate intention to drive to the danger of the public : this not having been established, he decided that the respondent's offence did not come under s. 58 of the Ordinance but under s. 57, and he convicted him of driving without due care and attention, imposing a fine of £5.

The appellants appeal and contend (*inter alia*) that the respondent should have been convicted of dangerous driving under s. 58 and that in any event the sentence imposed was inadequate.

The case of *Kay v. Butterworth*, 61 T.L.R., 452, was mentioned to the learned Magistrate, but unfortunately he was not able to see a copy of the report as the only one in the Supreme Court library was in the hands of the bookbinder. The facts of that case were on all-fours with the facts in this, except that the driver in *Kay v. Butterworth* was charged not only with driving to the danger of the public but also with driving without due care and attention.

He was acquitted by the justices, but on appeal the Divisional Court decided that he should have been convicted of both offences and a direction to this effect was given to the justices. Humphreys J. said in his judgment, referring to the driver, " it was his business to keep awake. If drowsiness overtook him while driving, he should stop and

wait until he recovered himself and became fully awake . . . the driver must have known that drowsiness was overtaking him. The case was too clear for argument."

With the view of the Divisional Court I am in respectful agreement. Once the prosecution has established that the accused has driven to the danger of the public, the only defence open to him is to show that it was through no fault of his own. This the respondent was unable to do: on the contrary, by implication, he admitted his fault ; although drowsy, he had continued to drive.

With regard to the sentence, I think that in the public interest it is necessary to be severe. Drivers of motor vehicles should understand that if they are attacked by drowsiness they must cease driving immediately and not resume until the attack has been overcome. In my view, it would be disastrous if, to a charge of dangerous driving, a defence of asleep at the wheel were to be regarded as a mitigating circumstance.

The judgment of the Magistrate will be set aside and, in lieu thereof, the respondent will be convicted of dangerous driving as originally charged and, for penalty, he will pay a fine of £25 or in default of payment undergo imprisonment for three months with hard labour.

The Court has power, under s. 163 of the Criminal Procedure Code, to award the whole or any part of the fine, if paid, as compensation to the injured party, and if an application of this nature is made I shall be prepared to consider it, but I make no order for the time being.

JAINARAIN *ats.* POLICE.

[Appellate Jurisdiction (Seton, C.J.) July 9, 1946.]

Penal Code—s. 177—being the keeper of a common gaming house—evidence of cards being played on one occasion—whether sufficient to convict—s. 182—cards found on police raid—evidence vague as to exact position of cards—interpretation of " place ".

A police detachment raided a building owned and used as a garage by Jainarain. A man at the window of the garage shouted a warning and several persons, including the accused ran out of the building. A number of others were inside the building and, in a small room partitioned off at the back of the garage, were a number of sacks spread on the floor with seats arranged about them. A pack of playing cards was found by the Police party but although this was referred to in evidence, no evidence was given precisely fixing the position where the cards were found. The raid was made on a search warrant taken out at the instance of an informer who was called as witness for the prosecution. The informer was declared a hostile witness and a statement was proved in which he referred to gambling on the premises on several previous occasions. The Magistrate regarded this statement as evidence of gambling on former occasions.