REGINA *v.* SHIU PRASAD

[Criminal Jurisdiction (Hyne, C.J.) March 24th, 1953]

Penal Code—s. 218—degree of negligence constituting manslaughter.

The accused was the driver of a bus travelling at about 30 miles per hour, driving down a hill near Suva, when a collision occurred. A child who was a passenger in the other vehicle was killed.

It was never satisfactorily proved if the child died as a result of the collision or on account of a sudden reversal after the collision causing the child's body to hit a pillar.

The accused was indicted for manslaughter and at the close of the case for the prosecution defending Counsel argued there was no case to answer.

Judgment on this submission was as follows:—

HELD.—In order to establish criminal liability in a prosecution for manslaughter, where death has resulted on account of negligent driving, in order to establish criminal liability the facts must be such that the negligence went beyond a mere matter of compensation between subjects and showed such disregard for the life and safety of others as to amount to a crime against the State and conduct deserving of punishment.

Cases referred to:

Andrews v. Director of Public Prosecutions (1937) A.C. 576.
Dabholkar v. Rex (1948) A.C. 221.
People v. Dunleavy (1948) I.R. 95.

B. A. Doyle, Q.C., Attorney-General, for the prosecution.

H. M. Scott for the accused.

HYNE, C.J.—The accused is charged under section 218 of the Penal Code which reads as follows:—

> "Any person who by an unlawful act or omission causes the death of another person is guilty of the felony termed manslaughter. An unlawful omission is an omission amounting to culpable negligence to discharge a duty tending to the preservation of life or health, whether such omission is or is not accompanied by an intention to cause death or bodily harm."

There are before this Court two conflicting judgments as to what constitutes manslaughter under this section. As I read his judgment, *Mr. Justice Vaughan* has in effect laid down that simple negligence is negligence constituting manslaughter. It is true that in the course of his judgment in the case of *Bhagat Singh,** he uses the words "culpable negligence", yet he does not explain what is meant by the word "culpable". *Mr. Justice Carew,* on the other hand, in the case of *Rex v. Dayaran** has followed English law and has considered the degree of negligence which would amount to manslaughter if death occurred as the result of negligence.

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* *Not Reported.*

It is conceded that if English law and the law of the Colony relating to manslaughter are the same, the facts in this case do not justify a finding of manslaughter. If they are the same it seems to me this Court is entitled to have regard to English authorities and English decisions in relation to manslaughter cases.

With the greatest respect to the judgment of *Mr. Justice Vaughan* I regret that I find myself unable to accept that his judgment is correct. I agree with *Mr. Justice Carew* that in order to amount to manslaughter there must be a degree of negligence so gross as to amount to recklessness. That the degree of negligence necessary to constitute manslaughter must be greater than simple negligence has been laid down by the Privy Council in the case of *Dabholkar v. The King*. This case is a Tanganyika case under which a certain medical practitioner was charged under *section 222 of the Tanganyika Penal Code*. This section corresponds to section 258 of our Code. The appellant *Dabholkar* appealed against his conviction under section 222 (*e*) (our section 258 (*e*)), namely, treating a certain person in such a negligent manner as to be likely to endanger her life or to cause her harm. Sub-paragraph (*e*) reads:—

> " gives medical or surgical treatment to any person whom he has undertaken to treat."

The judgment of the Privy Council was delivered by Lord Oaksey, in the course of which he said:—

> " The negligence charged in that section is not necessarily as grave, either in its nature or its consequences, as in the offence of manslaughter. The analogy between this section and *s.* 11 *of the English Road Traffic Act,* 1930, is, in their Lordships' view, a true analogy, and just as in *Andrews v. Director of Public Prosecutions* the House of Lords explained the different degrees of negligence which the prosecution must prove to establish the offences of manslaughter and dangerous driving, so in the case of s. 222 (our section 258) the degree of negligence differs in cases of the felony of manslaughter and in cases of misdemeanour under s. 222. The circumstances dealt with in the subsections of s. 222 are all circumstances which in themselves involve danger and, although the negligence which constitutes the offence in these circumstances must be of a higher degree than the negligence which gives rise to a claim for compensation in a Civil Court, it is not, in their Lordships' opinion, of so hgh a degree as that which is necessary to constitute the offence of manslaughter."

Section 185 *of the Tanganyika Code* is in precisely the same terms as our section 218 which deals with this offence. The Tanganyika legislation being identical in every respect with our legislation, this Court is bound to accept that there are degrees of negligence and that only a very high degree of negligence can constitute the crime of manslaughter.

The learned Attorney-General, in his very able address to the Court, has stated that it could be quite clearly said that when the Legislature refers to the offence of driving without due care and attention, they have, in effect, used words which imply negligence or omission. With this I agree, and I think, therefore, that when the Legislature used the words " driving dangerously " or " driving recklessly " in section 56 of the Traffic Ordinance, they referred to offences of omission.

Section 233 of the Penal Code, which reads as follows:—

> " It is the duty of every person who has in his charge or under his control anything, whether living or inanimate, and whether moving or stationary, of such a nature that, in the absence of care or precaution in its use or management, the life, safety or health of any person may be endangered, to use reasonable care and take reasonable precautions to avoid such danger ; and he shall be deemed to have caused any consequences which adversely affect the life or health of any person by reason of any omission to perform that duty."

gives additional strength to this argument. As the Attorney-General further says, to a large extent all of these matters of motor manslaughter have been dealt with as matters of negligence.

If these offences are—and I believe they are—offences of omission, then under section 218 culpable negligence must be established ; that is to say, in order to establish criminal liability the facts must be such that the negligence of the person went beyond a mere matter of compensation between subjects and showed such disregard for the life and safety of others as to amount to a crime against the State and conduct deserving of punishment.

Lord Atkin says in *Andrews v. Director of Public Prosecutions,* (1937) A.C. p. 576, at p. 583:—

> " Simple lack of care such as will constitute civil liability is not enough: for purposes of the criminal law there are degrees of negligence: and a very high degree of negligence is required to be proved before the felony is established. Probably of all the epithets that can be applied ' reckless ' most nearly covers the case."

In an Irish case, *The People v. Dunleavy* (1948) I.R. 95, the Court of Criminal Appeal in Eire said that to amount to manslaughter the negligence must be such as to involve in a high degree the risk or likelihood of substantial personal injury to others.

Something further must be said about the words " unlawful act ". Is dangerous driving an unlawful act of such a nature that it would, of itself, justify a finding of manslaughter?

The Penal Code of the Colony was enacted in May, 1945. The leading case of motor manslaughter is *Andrews v. Director of Public Prosecutions,* to which I have already referred. This case was decided in 1937, and, as the Attorney-General says, it is reasonable to presume that the framers of the legislation were aware of the existence of this important judgment at the time of the enactment of the Penal Code. In that case *Lord Atkin,* at p. 585, said:—

> " There is an obvious difference in the law of manslaughter between doing an unlawful act and doing a lawful act with a degree of carelessness which the Legislature makes criminal. If it were otherwise a man who killed another while driving without due care and attention would *ex necessitate* commit manslaughter."

I feel I must assume that the Legislature was aware of the difference referred to, and that the distinction mentioned by Lord Atkin is applicable, in considering the laws of this Colony. I am satisfied therefore that in order to establish the offence of manslaughter under section 218,

where the death is alleged to be due to negligence, the degree of negligence must be such as is laid down in the English authorities. That these principles are applicable to this Colony has, I think, been conclusively established by the Privy Council case of *Dabholkar v. The King*, to which I made reference earlier.

Inasmuch as there is no evidence before this Court of the degree of negligence necessary to constitute manslaughter, the charge of manslaughter against the accused cannot be sustained.

The next question is whether the accused, on the evidence, is guilty of dangerous driving. Section 173 of the Penal Code provides that where a person is charged with manslaughter in connexion with driving a motor vehicle, and the Court is of opinion that he is not guilty of that offence but that he is guilty of the offence of dangerous driving under the Traffic Ordinance, he may be convicted of that offence although he was not charged with it. Is there any evidence before the Court which would justify a finding of dangerous driving? I do not think there is such evidence ; or at any rate there is no evidence which places this issue beyond reasonable doubt.

The facts, briefly, are that the bus No. 3525, coming from Suva Point, was being driven down the hill by Vatuwaqa Girls' School, that it was on its right side of the road, and that bus No. 4906, driven by the accused, was coming in the opposite direction. It is contended on behalf of the prosecution that the accused was coming down the hill from Suva past Vesi Street corner, that he was travelling at a speed of some 30 miles an hour, and that when taking the corner at the bottom of the hill he was in the middle of the road. It is also contended that, when some distance up the hill but below Vesi Street, this bus driven by the accused collided with the bus coming from Suva Point.

There is no expert evidence as to the speed at which bus No. 4906 was travelling, and there is some doubt at least as to whether the accident caused to the child was the result of the impact of the two buses, or whether the child was injured as the result of the driver of bus No. 3525 braking suddenly and causing the child to be thrown backwards and to come into contact with one of the pillars of the bus. I agree with Mr. Scott that some doubt has been thrown on the veracity of Ibrahim, the driver, by the story told by Rajpati, the mother of the child, as to taking her to Suva Point and not putting her down at her house as she desired. I cannot, of course, indulge in conjecture as to what the defence witnesses might say, and although Mr. Scott in his cross-examination indicated what his defence might be, that defence is not before me, and I cannot therefore allow these suggestions to affect any decision to which I may come.

I have heard the submissions of both Counsel as to whether the accused has any case to answer, and, since I am satisfied on the evidence for the prosecution that a case of dangerous driving has not been made out, there is, in my opinion, no case to answer, and I accordingly record a finding of " Not Guilty of dangerous driving ".

Negligence of such a degree as to justify a finding of manslaughter not having been established, and there being no evidence of dangerous driving, the accused is acquited and discharged.