1935

Present : **Macdonell C.J.**

WICKREMESINGHE *v.* OBEYSEKERE.

725—P. C. Colombo, 33,533.

Motor Car Ordinance—Causing hurt by driving a car negligently and carelessly—Conviction of minor offence—Driving motor car so as to obstruct —Failing to take action to avoid accident—Ordinance No. 20 of 1927, s. 44 (5) and (13)—Criminal Procedure Code, s. 183—What is criminal negligence.

Where a person was charged under sections 328 and 329 of the Penal Code with causing hurt by doing one or more of the following acts rashly and negligently, viz., (*a*) by driving a motor car so as to cross

or commence to cross in a highway and obstruct another car, (*b*) by driving a motor car, having failed to take such action as may be necessary to avoid an accident,—

Held, that he may be convicted of any of the following minor offences under section 44 (5) and (13) of the Motor Car Ordinance, viz., (*a*) driving a motor car so as to cross or commence to cross a highway and so obstruct traffic, or (b) failing to take such action as may be necessary to avoid an accident.

Where the driver of a mtor car, approaching a highway from a minor road, at a blind corner commenced to cross the highway at a speed of ten miles an hour and collided against a car which was going down the highway,—

Held, that the driver offended against the provisions of section 44 (5) and (13) of the Motor Car Ordinance, No. 20 of 1927.

APPEAL from a conviction by the Police Magistrate of Colombo.

E. F. N. Gratiaen (with him *Earle Wijewardene*), for accused, appellant.

S. J. C. Schokman, C.C., for complainant, respondent.

Cur. adv. vult.

November 29, 1935. MACDONELL C.J.—

In this case the accused was charged as follows:—"That on or about the 1st day of July, 1935, at Alfred place, within the jurisdiction of this Court, (1) You did cause simple hurt to (1) Mr. Louis Adihetty of 17th lane, Bambalapitiya, (2) cause grievous hurt to (2) Mrs. Adeline Weerasinghe of 17th lane, Bambalapitiya, by doing one or more or all of the following rash acts, to wit :—

" (*a*) By driving motor car X 2096 so as to cross or commence to cross in a high way and obstructed motor car F 1737.

" (*b*) By driving motor car X 2096 and failed to take such action as may be necessary to avoid an accident.

" (2) That at the same time and place aforesaid you did cause simple hurt to (1) Mr. Louis Adihetty of 17th lane, Bambalapitiya, cause grievous hurt to (2) Mrs. Adeline Weerasinghe of 17th lane, Bambalapitiya, by doing one or more or all of the following negligent acts, to wit :—

" (*a*) By driving motor car X 2096 so as to cross or commence to cross in a highway, and obstructed motor car F 1737.

" (*b*) By driving motor car X 2096 and failed to take such action as may be necessary to avoid an accident,

" and thereby committed an offence punishable under sections 328 and 329 of the Ceylon Penal Code."

The accused was found not guilty on the first count alleging rash acts, but was found guilty on the second count alleging negligent acts and was sentenced to pay a fine of Rs. 30.

The evidence in the case was that the accused on July 1, 1935, about 3.15 P.M., was driving an Austin Swallow car, X 2096, southward down Charles place with intention to cross Alfred place, and after so crossing to proceed along the southern portion of Charles place into Bagatelle

road, this being a route familiar to her as she had often driven down it before. Charles place, both its northern and southern portion, is a gravel road not provided with drains or Municipal lighting. It starts to the north in Fifth lane (that is, you cannot get further north along its line), it goes south till after crossing Alfred place, it comes into Bagatelle road and then ends a little south of that road; that is to say, it is a short road starting at a definite place to the north and ending at a definite place to the south. Alfred place on the other hand is a tarred road with ditches and Municipal lighting which connects Galle road to the west, one of the principal thoroughfares of the Island, with Thurstan road to the east, itself a considerable Municipal thoroughfare connecting the Victoria Park neighbourhood with Havelock Town. If you have to decide which is the more important of the two roads, it is quite clear that Alfred place is the more important. It is tarred and lighted and it is a direct communication between two important thoroughfares. Both of these roads have, according to the evidence, about the same free space for driving, namely, about 16 feet, on each side of which driving space is grass in both roads. Charles place, as has been said, has a gravel, not a tarred, surface but where it crosses Alfred place the tarred surface of the latter road projects for a distance of four or five feet into Charles place. A person driving south along Charles place intending to cross Alfred place is first of all on gravel, then for the last few feet on tar and during that portion of the journey was a high fence or hedge on either side of him so that he would not be able to see left or right into Alfred place until he got level with this fence or hedge. By the permission of the two learned Counsel who argued this appeal before me, I made an examination of the place in a car and satisfied myself of the above facts, and particularly of this fact, that until you are level with the hedge mentioned you have no view to left or right into Alfred place; the approach is blind. Once, however, you have got level with this fence on either side of you, a view opens to left and right and you can see up and down Alfred place.

At the moment when accused was driving southward down Charles place, the complainant's car, a Baby Austin F 1737, unknown to her. was being driven eastward along Alfred place, that is in the direction of Thurstan road, following a course a trifle to the right of the crown of the road at a pace of between 25 and 30 miles an hour. As the learned Magistrate accepts the defence version of what happened in this case, it is best to give the next events in the words of the accused herself. "I was going across" (*sc.* Alfred place) "to Bagatalle road to turn to the right there. I was not going to turn to the left at the Alfred place junction. I have often taken that route. When I leave our gate I swing round to the left and again to the right into the straight bit of Charles place in a few seconds. You can't attain any speed before reaching the turn"—*i.e.*, the junction. "The straight bit is about 25 or 30 yards. Before reaching the junction I was driving slowly enough to stop in a few feet. Before reaching the juction I tooted my horn several times as I usually do. I heard no answering horn. On previous occasions when I have tooted my horn if there has been traffic coming there was

always a response. If I had heard a response I would have stopped dead. Before you reach the almost common square of the junction you cannot see down Alfred place . . . . Not having heard a horn or seen a car I proceeded slowly across the junction at a pace at which I could have stopped within a very reasonable distance. As you go into the junction your range of visibility gets wider. When I was well within the square I saw Mr. Adihetty's car approaching fast on the right. I realized that nothing could be done by me to avoid a collision. Before I could do anything this car struck me on the right forward end from the right. I can't say which part of the car. My car did not strike any part of his car in front of me. My car was going straight across and I had not swerved it to the left. This all happened in a fraction of a second. It was not very forcible as far as I felt. My car swung round to the left and was facing Charles place. I looked out and saw the other car had fallen in the drain some distance away."

Mr. Adihetty and the lady in the car, his sister, are unable to give any account of what happened. The lady says "I had a glimpse of a car and then there was a big crash. The car came from our left—Charles place. I do not remember what happened after I was on the road." She suffered grievous hurt, namely, fracture of two ribs as well as other injuries. The driver, her brother, says "We turned from Galle road into Alfred place. I went along that road. I can't say how far. The next thing I knew was that I found myself in hospital."

Mr. Bartels, a motor expert witness who was called for the defence gave his considered opinion that the accused's car had been struck on the side of its right front wheel by the front of the complainant's car; therefore it was the complainant's car that struck accused's car rather than the other way. He estimates that the accused's car cannot have been going more than 12 miles an hour and his evidence as to this and other matters is accepted.

In the middle of the junction is a manhole and though the actual point given on the plan as to where the two cars collided was stated to be imaginary, still the evidence as to the wheel tracks of Mr. Adihetty's car enables it to be more or less ascertained as a place about the centre of the junction and near the manhole but a trifle to the right, looking towards Thurstan road, of the crown of Alfred place.

No one else whose evidence can be relied upon saw the accident itself and the Magistrate expressly accepts the version given by the defence. The accused's own account has been quoted above and the motor expert called for the defence estimated the speed of complainant's car F 1737 at the time of the accident as 25 to 30 miles an hour. This evidence also is accepted. The Magistrate found the accused guilty of causing simple hurt to one occupant of the car F 1737 and grievous hurt to its other occupant, by certain negligent acts, and from this decision the present appeal is brought.

In his judgment the Magistrate quotes from the Highway Code published in England that sounding his horn does not excuse a driver from taking every other precaution to avoid an accident, and that it is

the duty of a driver on a minor road when approaching a major road to go dead slow and to give way to traffic on it. This was criticised in the argument before me, since the Highway Code is of no force with us and Alfred place has not been made by regulation a "main road"—see section 44 (8) of Ordinance No. 20 of 1927. But the Magistrate does not treat the Highway Code as an authority but simply draws from it rules that seem to him reasonable. Also, the judgment does not suggest that Alfred place has been declared a main road but only that as between the two, Alfred place is the major and Charles place the minor road. This is a question to be decided by observation and I would say that on the facts there can be no doubt that Alfred place is the more important highway of the two and therefore the major road, while Charles place is the minor one. It may well be, as the expert witness for the defence says, that while making an examination of the spot he observed more cars using Charles place than using Alfred place. But the facts—one road tarred the other gravel, one road a through road the other starting and ending in a dead end—compel you to conclude that Alfred place was the more important of the two roads. From this the Magistrate deduces the conclusion that the complainant was justified in going down Alfred place at 25 to 30 miles an hour even past the junction with Charles place, and that no negligence can be imputed to him. I must not be understood as concurring in this proposition but in the view that I take of the case it is unnecessary to pronounce upon it.

The Magistrate goes on to say, "As regards what constitutes criminal negligence I have studied the judgment of the English Court submitted by the defence as to what constitutes manslaughter and I have also studied what Mr. Kantawala says in his book on the subject of criminal negligence; I know of no instance in this country where it has been held that a driver though negligent had not been criminally negligent." This, with all respect, is a misdirection. The rule is laid down in the most recent authority, *Bateman's Case*[1], to the effect that in order to establish criminal liability the facts must be such that in the opinion of the jury the negligence of the accused 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 punishment. If this be the law, then it is clear that the Magistrate did not direct himself rightly to the question, was the conduct of the accused criminal negligence or merely the lesser degree of civil negligence? His finding is that the accused by criminal negligence caused hurt, and I do not see how that finding can stand in view of this misapprehension on that essential matter, what constitutes criminal negligence.

It was also argued to me that the accused could not be found guilty because the hurt was not the proximate result of her negligence, or conversely that to find her guilty, her act must have been the proximate and sufficient cause without the intervention of another's negligence. It must have been the *causa causans* and not merely the *causa sine qua non*,

[1] *94 L. J. K. B. 791; 19 c. App. R. 8.*

and *2 Gour (4th ed.), para 3245,* was cited in support of this. This is a criminal charge and it has always been laid down that in criminal law the plea of contributory negligence is of no effect. Usually it is in culpable homicide cases that this argument is raised, namely, that the man killed was also guilty of negligence and so contributed to his own death. As to this it was said by Pollock C.B. in *Swindall's Case*[1], "If two coaches run against each other, and the drivers of both are to blame, neither of them has any remedy for damages against the other. But in the case of loss of life, the law takes a totally different view, for there each party is responsible for any blame that may ensue, however large the share may be; and so highly does the law value human life, that it admits of no justification wherever life has been lost, and the carelessness or negligence of any one person has contributed to the death of another person". I take it that this rule will apply equally in a charge such as the present under section 329 of the Penal Code, namely, causing hurt by doing any act so negligently as to endanger life or the personal safety of others. I have examined a number of English cases of manslaughter where death occurred through negligent driving and have not been fortunate enough to come across any case where the facts are the same as here, namely, two vehicles colliding so that the driver of one of them was injured; in the cases I have examined it is always the passenger who is the person injured, and killed. Consequently, I have not been able to find any case where the driver of one vehicle is accused of killing the driver of the other, so as to let in a defence that the driver killed was going at a much greater pace than the accused, and that therefore it was the pace at which he was driving which really caused his death and not the pace at which the accused was driving. It may be insufficient research but I have not come across a case where this defence has been raised. I would however draw attention to the remark which has appeared in edition after edition of *Archbold's Criminal Pleading (27th ed.), p. 889*— "It is submitted that evidence which in a civil case might be given to prove contributory negligence, might in a criminal case be relevant to show that the death of the deceased was not due to the culpable negligence of the accused", and he cites a Queensland judgment, which is unfortunately not available. This case—collision, the person injured or killed the more negligent of the two, the inference that death would not have occurred or that the bodily injury would have been much less if the deceased or injured man had not been driving so fast himself—does not, as far as I can discover, seem to have arisen. When it does, the surmise just quoted from Archbold will have to be considered, as also the exact meaning of *causa causans* which, as it stands, is rather a jingle but which its first discoveres formulated thus, "the cause which moved at first", and, where the injured person has been the more negligent of the two, it might be argued that his negligence was "the cause which moved at first". This difficult question can be left for decision when it arises. In the present case it does not seem to me to arise in view of the misdirection in the judgment as to what is criminal negligence.

I go back to the facts of the case. The accused was charged with causing hurt by one or more negligent acts, and particulars of those acts

[1] *2 Cox 141.*

were given in the same words as those of section 44 (5) of the Motor Car Ordinance, No. 20 of 1927, namely, driving a motor car so as to cross or commence to cross a highway and so obstruct traffic, namely, another motor car, and in the words of the same section, sub-section (13), failing to take such action as may be necessary to avoid an accident. The charge in this case specifies and sets out certain prohibitions contained in that section. Now section 182 of the Criminal Procedure Code enables a person charged with one offence to be convicted of another, and section 183 says, " (1) When a person is charged with an offence consisting of several particulars a combination of some only of which constitutes a complete minor offence and such combination is proved but the remaining particulars are not proved, he may be convicted of the minor offence though he was not charged with it. (2) When á person is charged with an offence and facts are proved which reduce it to a minor offence he may be convicted of the minor offence although he was not charged with it". This section has been frequently commented on in our Courts and the latest case thereon can be found in 36 N. L. R. at p. 222, where at 224 Dalton J. says as follows, "The section applies to cases in which the charge is of an offence which consists of several particulars, a combination of some only of which constitutes a complete minor offence". It seems to me that this is just such a case. To prove it completely you have to prove certain factors constituting the offence, the negligence, the hurt, and the acts particularized as tending to prove that negligence. The acts are particularized as ' driving so as to cross or commence to cross a highway and so obstructing traffic", and failing to "take such action as may be necessary to avoid an accident". These acts are a necessary part of the charge, and a combination of some of them does constitute, if proved, a complete minor offence. It seems to me therefore that section 183 is applicable to this case.

But are these particulars which constitute a complete minor offence proved? I have said that in my opinion Alfred place was the more important and Charles place the less important road, though I am not quite certain that that finding is necessary to determine this matter. When the accused's motor car got on to the bit of tarred surface in Charles place the view of the driver to left and right was blind, but the driver could see that she was approaching a highway. Then it was her duty, it seems to me, to go absolutely dead slow, crawling as a car can be made to crawl when in bottom gear, until she got level with Alfred place itself and the view opened to left and right, or even to stop when she got level with the hedge till she could look left and right along Alfred place and see if anything was coming. This, on the testimony of her own witness, Mr. Bartels, she cannot have done. He puts her pace at not more than 12 miles an hour—let us say, 10 miles, to be on the safe side—and it seems perfectly clear to me that to cross or commence to cross a highway of this nature at that pace was driving so as to obstruct traffic, that is to cause risk of accident to it, section 44 (10) of Ordinance No. 20 of 1927, or failing to take such action as might be necessary to avoid an accident, section 44 (13) of the same. The offences defined in section 44 (5) and (13) of the Ordinance say nothing about negligence, the prohibition against them is

absolute. They are offences where *mens rea* is shown not by doing something negligently or wilfully or the like but by doing that which a Statute says you shall not do. Do the facts show that a driver commenced to cross a highway so as in the event to obstruct traffic? If the facts do show this then the driver has contravened sub-section (5) of section 44 and *animus* or *culpa*, their presence or absence, are irrelevant. It is an objective test not a subjective one. See for a similar prohibition as to trade marks the authorities cited in the Full Bench decision, *Sahib v. Muthalip* [1]. See also Shearman J. in *Stonehouse v. Masson* [2], 'Before there can be a conviction in a criminal case it is necessary to show *mens rea*. One has to see in each case whether one is dealing with an act prohibited *per se* or an act only criminal when done feloniously or fraudulently with an intent to deceive. In this particular offence the *mens rea* consists in the intention to do the act prohibited by the Statute".

To return to the facts. The offence commenced, in the very words of the sub-section, when the accused driver commenced to cross the highway. The place at that commencement was so blind, and the highway so narrow, that to commence to cross at 12, or, we will say, 10 miles an hour, was to obstruct traffic in the sense that it caused risk of accident to traffic. If that is so, then an offence against this sub-section is clearly proved, also against sub-section (13), failure to take such action as may be necessary to avoid an accident. If it be urged that this is to require too much of drivers of motor cars when crossing such a highway as this, I would respectfully dissent. Motor cars are necessary and dangerous things, and the words of the two sub-sections, 44 (5) and (13), clearly recognize that in a situation such as this the car must be driven at a very slow speed indeed, or that there must even be a stop altogether before coming on to the highway to be crossed. The prohibition in the sub-section is an absolute one, and no one will dispute the necessity of it being so, seeing how easy it is to have accidents in driving motor cars. The speed here was such that it is evident on the accused's own statement that she was in the very middle of the junction before she was aware of the oncoming car F 1737. This clearly was crossing so as to obstruct traffic and failing to take the action necessary to avoid an accident.

It was urged that it would not be fair to convict the accused of this minor offence because her attention was not drawn to it in cross-examination. But her evidence quoted above, shows that her attention was very clearly drawn to it in examination-in-chief. She was fully aware of her duty to commence to cross this highway at such a speed as not to cause risk to traffic, and her evidence is directed expressly to show that she had fufilled that duty. This argument, then, cannot succeed.

It is necessary then to set aside the conviction for causing hurt by negligent act and to substitute for it a conviction for contravening section 44 (5) of Ordinance No. 20 of 1927. As the offence established by section 44 (13) of the same Ordinance is so nearly the same, there need

[1] *34 N. L. R. 231.*

[2] *(1921) 2 K. B. 818.*

be no conviction for that. As on the more serious charge the Magistrate thought a fine of Rs. 30 sufficient, conviction for a lesser offence requires a reduction in the fine also, and I fix it at one of Rs. 5. The conviction so altered must be affirmed and this appeal dismissed.

Conviction varied.