

1959 *Present*: H. N. G. Fernando, J., and T. S. Fernando, J.

W. A. GUNASENA, Appellant, and THE QUEEN, Respondent

S. C. 19—D. C. (Criminal) Panadura, 264/48770

Negligent driving of omnibus—Quantum of evidence.

Where sleep suddenly overcomes the driver of an omnibus and there is no technical testimony to establish that a person cannot fall asleep without prior drowsiness, the driver cannot, in the event of an accident, be convicted of negligent driving in that he failed to keep a proper look-out and that he drove the bus without due care and precaution.

APPEAL from a judgment of the District Court, Panadura.

Colvin R. de Silva, with *M. L. de Silva*, for the accused-appellant.

A. C. de Zoysa, Crown Counsel, for the Attorney-General.

Cur. adv. vult.

January 5, 1959. H. N. G. FERNANDO, J.—

The accused in this case has been convicted of negligent driving of a bus in that he failed to keep a proper look-out and that he drove the bus without due care and precaution.

It would appear that a party of about twenty people travelled in the bus to Kataragama from Angoda on 7th July 1957 and were on their return journey having left a place called Nimalawa about 1 P.M. on 8th July 1957. The bus had reached Galle about 2 A.M. on 9th July 1957. Two persons took turns to drive the bus the appellant being the relief driver. The other driver had been driving for the whole or a part of the journey between Nimalawa and Galle and the appellant took over at Galle at about 2.30 A.M.

The evidence for the prosecution relevant to the charge of negligent driving consisted of that of one passenger and of the other driver. All they can say is that they were asleep in the bus and awoke to find that the bus had crashed into a tree by the side of the road and overturned.

The accused himself gave evidence the effect of which was that he was driving the bus but did not realise that any accident had occurred until he found the bus toppling over. In cross-examination he stated that he was not asleep but lost his vision for about two minutes before the bus struck the tree. There were some contradictions of this version in the statement made by the appellant to the Police and for this reason the District Judge was of opinion that the appellant was not speaking the truth. The finding against the appellant is stated in these words; "the accused did fall asleep whilst driving the bus and therefore failed to keep a proper look-out or drive with due care and precaution. Once the accused took up the driving of the bus it was his business to keep awake and if he fails to do so he is answerable. Sleepiness is not a thing that comes in a flash. One feels drowsy and sleepy before one actually falls asleep".

It would seem therefore that the learned Judge took the view that the appellant must have been falling asleep during some period however brief before the accident occurred and that his negligence consisted of his failure to cease driving when he realised his unfitness to drive. Such a view was permissible in the circumstances, but in the absence of evidence, there was not proof beyond reasonable doubt that the appellant did have an opportunity to consider whether he should cease driving and did in fact fail to utilise that opportunity. There is in addition an observation in the judgment which was not justified namely that "the accused did not state or adduce any evidence to show that he had rested and slept for any length of time before he took the wheel at Galle". I do not agree that the appellant need have given any such evidence. The fact that he drove without accident from about 2.30 A.M. and the fact that the speed of the bus must have been moderate having regard to the distance covered before the accident occurred both indicate that the appellant was capable of driving when he took the wheel at Galle.

The evidence in the case is not inconsistent with the view that sleep suddenly overcame the appellant and there was no technical testimony to establish that a person cannot fall asleep without prior drowsiness.

After judgment was reserved Crown Counsel informed me that there are certain English judgments which might be utilised to support the verdict. I should like to state that I have not taken those judgments into consideration.

The appeal is allowed and the conviction and sentence is set aside.

T. S. FERNANDO, J.—I agree.

Appeal allowed.