1946 *Present :* **Howard C.J. and Canekeratne J.**

THE KING *v.* LEIGHTON.

36—D. C. (Criminal) Kalutara, 6,325.

Criminal negligence—Charge of causing death by negligence—Nature of proof necessary to establish charge—Penal Code, s. 298.

To establish a charge involving criminal negligence the facts proved by the prosecution must be such that, in the opinion of the Court, the accused's 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 punishment.

APPEAL against a conviction from the District Court, Kalutara.

R. L. Pereira, K.C. (with him *H. W. Jayewardene*), for the accused, appellant.—The facts of this case disclose nothing more than civil negligence. Mere fast driving does not amount to criminal negligence. Negligence, to be criminal, must go beyond a mere matter of compensation between subjects and show such disregard for the life and safety of others as to amount to a crime against the State and conduct deserving of punishment—*Scharenguivel v. Charlie* [1]. Simple lack of care such as will constitute civil liability is not enough—*Andrews v. Director of Public Prosecutions* [2]. A very high degree of negligence is necessary and the onus of proving criminal negligence is upon the prosecution—*Lourensz v. Vyramuttu* [3]. What amount of negligence is to be regarded as gross is a question of degree depending on the circumstances of each particular case. Where a medical practitioner injected overdoses of a certain drug through carelessness, which resulted in the death of some of his patients, including the one in respect of which the charge was brought, and in the serious illness of others, it was held that the facts were insufficient to prove criminal negligence. See *Akerele v. R.* [4]

T. K. Curtis, C.C., for the Crown, respondent, addressed on the facts of the case and submitted that there was sufficient evidence to prove criminal negligence.

Cur. adv. vult.

[1] *(1938) 10 C. L. W. 35.*
[2] *(1937) 2 A. E. R. 552 at 556.*
[3] *(1941) 42 N. L. R. 472.*
[4] *(1943) 1 A. E. R. 367.*

June 28, 1946. HOWARD C.J.—

The appellant appeals against his conviction by the District Judge, Kalutara, on an indictment containing two counts framed under section 298 of the Penal Code charging him with causing the death of one H. Udenis Fernando by (1) doing one or more rash acts not amounting to culpable homicide, or (2) in the alternative doing one or more negligent acts. The appellant was convicted on the alternative charge and sentenced to two years' rigorous imprisonment. The evidence established that the appellant was on the day in question about 8 or 8.30 P.M. driving a Naval truck on the Kalutara-Neboda road in the direction of Neboda. The deceased was walking along the edge of the road about a foot and a half on the turf, towards Kalutara. He was on his right side of the road. According to the evidence of a witness called Sinneris who was walking towards Neboda on the same side as the deceased the truck passed him travelling by the edge of the road. It had a faint light on its left side and a strong light on its right side. According to Sinneris the truck which was travelling very fast, when it reached the deceased, struck him down. He cannot say what part of the truck struck the deceased. This witness also states that there was no vehicular traffic on the road at the time, that the deceased was on the turf when he was struck and that there were wheel marks on the turf which he showed to the Police. In connection with this witness's evidence the Examiner of Motor Cars was called as a witness and stated that the truck could not go faster than 35 miles per hour because of a regulator with which it was fitted, and that the bright head-light lit up the road 30 to 35 yards ahead. The Village Headman and the Inspector of Police stated that they did not notice any wheel marks to suggest that the truck had gone on the turf.

The law with regard to the evidence necessary to establish a charge of criminal negligence has been formulated in numerous cases of the highest authority. In *Andrews v. Director of Public Prosecutions* (*1937*) *2 A.E.R.* Lord Atkin at p. 556 formulated the principle governing such charges. Lord Atkin cited with approval the following dictum of Lord Hewart L.C.J. in *R. v. Bateman* [1].

> "In explaining to juries the test which they should apply to determine whether the negligence, in the particular case, amounted or did not amount to a crime, judges have used many epithets, such as "culpable," "criminal," "gross," "wicked," "clear," "complete." But, whatever epithet be used and whether an epithet be used or not 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."

His Lordship then proceeded as follows :—

> "The principle to be observed is that cases of manslaughter in driving motor cars are but instances of a general rule applicable to all charges of homicide by negligence. Simple lack of care such as will constitute civil liability is not enough. For purposes of the criminal

[1] (*1925*) *94 L.J.K.B. 791.*

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. It is difficult to visualize a case of death caused by "reckless" driving, in the connotation of that term in ordinary speech, which would not justify a conviction for manslaughter, but it is probably not all-embracing, for "reckless" suggests an indifference to risk, whereas the accused may have appreciated the risk, and intended to avoid it, and yet shown in the means adopted to avoid the risk such a high degree of negligence as would justify a conviction."

The principles laid down in *Andrews v. Director of Public Prosecutions* and *R. v. Batemun* (*supra*) were followed by me in the case of *Lourensz v. Vyramuttu* (*supra*).

Can it be said in this case that the prosecution have established that the appellant drove the truck in a reckless manner and that his 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 punishment? There was no other vehicular traffic on the road at the time. Nor would it appear that the road was crowded with passengers on foot. In these circumstances the speed of the truck, even if driven at its maximum of 35 miles per hour, was not excessive. It has not been proved that the truck went on to the grass. The medical evidence indicates that the deceased was struck on the right side of his face. It may be that as the truck approached the deceased turned round and stepped into the road. No doubt the truck was driven close to the grass. The accident may have been due not to reckless driving, but to an error of judgment. This is not a case of *res ipsa loquitur* imposing on the appellant the onus of proving how the accident occurred. The burden was on the Crown to prove recklessness. I do not think that burden has been discharged. The appeal must, therefore, be allowed and the conviction set aside.

CANEKERATNE J.—I agree.

Appeal allowed.