1941

Present : **Howard C.J.**

LOURENSZ *v.* VYRAMUTTU.

895—M. C. Trincomalee, 8,820.

Negligent or rash act to endanger human life—Proof of criminal negligence—Onus on prosecution—Penal Code, ss. 272, 328 and 329.

The accused was charged with causing hurt and grievous hurt by doing one or more enumerated acts negligently so as to endanger human life and with driving a motor car in a manner so rash as to endanger human life by doing one or more of the enumerated acts. The Magistrate found that the accused drove the van too fast when approaching the junction of two roads, that he had not kept a proper lookout at this junction and that he had driven the van on a prohibited road.

Held, that the prosecution had failed to discharge its onus of proving criminal negligence. In order to establish criminal liability the facts must be such that the negligence of the accused goes beyond a mere matter of compensation and shows such a disregard for the life and safety of others as to amount to a crime against the state and conduct deserving punishment.

APPEAL from a conviction by the Magistrate of Trincomalee.

E. F. N. Gratiaen, for accused, appellant.

E. H. T. Gunasekera, C.C., for complainant, respondent.

Cur. adv. vult.

May 15, 1941. HOWARD C.J.—

This is an appeal from a decision of the Magistrate, Trincomalee, convicting the appellant of (1) causing grevous hurt to one Sivapakkiam by doing one or more or all of certain enumerated acts so negligently as to endanger human life and thereby committing an offence punishable under section 329 of the Penal Code; (2) causing simple hurt to the said

Sivapakkiam by doing one or more or all of the said acts so negligently as to endanger human life and thereby committing an offence punishable under section 328 of the Penal Code; (3) causing simple hurt to one Ratnam by doing one or more or all of the said acts so negligently as to endanger human life and thereby committing an offence punishable under section 328 of the Penal Code; (4) driving motor van No. Z 7462 in a manner so rash as to endanger human life by doing one or more or all of the said acts and thereby committing an offence under section 272 of the Penal Code. The particulars of the negligent acts charged against the appellant were stated as follows: (*a*) by driving motor van No. Z 7462 recklessly; (*b*) by driving the said van at an excessive speed; (*c*) by driving the said van at a speed that was too fast when approaching a junction of a minor road whilst you were driving on the minor road, to wit, Mill street, Trincomalee, and the main road being Court road, Trincomalee; (*d*) by not keeping a proper look-out whilst you approached the said junction; (*e*) by not sounding the horn when you approached the said junction; (*f*) by not taking proper precautions at the said junction; (*g*) by driving the said van along a road which is prohibited for such vans.

The Magistrate in finding the appellant guilty of charges under sections 328, 329 and 272 of the Penal Code has held that, although it cannot be said that the appellant has acted rashly, he has acted negligently and such negligence was gross and criminal. He has further held that in respect to Mill street, Court road is the main road, that the appellant drove the van too fast when approaching the junction of these two roads, that he has not kept a proper look-out at this junction and has not taken proper precautions and has driven a van on a prohibited road. In arriving at these conclusions the Magistrate has stated in his judgment that neither the appellant nor de Mel, the driver of the car with which the van collided, gives the correct version of what occurred. This factor, however, does not, so he states, entitle the appellant to an acquittal inasmuch as the collision had left its tell-tale marks. From these marks the Magistrate finds that both vehicles were moving at the time of the impact, that, if the appellant had looked at the proper time to his left when he was going to turn, he would have had a good view of Court road along which de Mel was coming, could have pulled up his van and so avoided a collision, and that the appellant has driven his van at too fast a speed at the junction. The Magistrate draws the inference that the appellant was driving the van at an excessive speed from the fact that the car driven by de Mel had been pushed out of its way to the left.

It has been contended for the appellant by Mr. Gratiaen that on the evidence the appellant could not be found guilty of criminal negligence. The law with regard to criminal negligence has been considered in a long line of English decisions amongst the more recent being that of the House of Lords in *Andrews v. Director of Public Prosecutions*[1]. In giving the judgment in that case Lord Atkin cited with approval the dictum of the Lord Chief Justice in *R. v. Bateman*[2] as follows:—

"In explaining to juries the test they should apply to determine whether the negligence, in the particular case, amounted or did not

[1] *106 L.J. K. B. 370.* [2] *94 L.J. K. B. 791.*

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."

After citing this dictum, Lord Atkin continued 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 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."

I need hardly observe that the principle formulated for cases of manslaughter is applicable to cases of grievous or simple hurt caused by criminal negligence.

In view of the principle laid down by the highest tribunal in England it is necessary to peruse the Magistrate's judgment to discover whether he has addressed his mind to the question as to whether the negligence of the appellant as inferred from the marks on the vehicles and the road and the evidence of the Examiner of Motor Cars amounted to the high degree required to be proved before the offences of which the appellant was convicted were established. The Magistrate has found that the appellant was driving his van at too high a speed and was not keeping a proper look-out to the left. There is, however, no real evidence as to the speed of either vehicle. In these circumstances it is impossible to say whether, even if the appellant had been keeping a proper look-out, the collision could have been averted. The onus was on the prosecution to establish criminal negligence. In my opinion that onus has not been discharged and the convictions of the appellant of charges under sections 328, 329 and 272 of the Penal Code must be set aside.

Mr. Gunasekera has contended that even if the evidence in this case does not establish criminal negligence it is open to me under the provisions of section 183 of the Criminal Procedure Code to find the appellant guilty of a minor offence. This section reads as follows:—

"183. (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 a 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.

(3) Nothing in this section shall be deemed to authorise a conviction for any offence referred to in section 147 when no complaint has been made as required by that section."

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. The evidence seems to indicate that " the appellant drove his van so as to cross a highway and so obstructed traffic ". Also that " he failed to take such action as was necessary to avoid an accident ". But these acts are not particularized in the charges as negligence on his part nor found as such by the Magistrate. Such of the particulars as have been established against the appellant do not constitute a complete minor offence. In these circumstances, I do not find myself in a position to apply the provisions of section 183 of the Criminal Procedure Code and so find the appellant guilty of a minor offence.

The conviction of the appellant is therefore set aside and he is discharged.

Set aside.