

1947

Present : Dias J.

WIJESINGHE, Appellant, and RAJAPAKSE, Respondent.

S. C. 1,735—M. C. Colombo, 83,535.

Motor car—Avoiding accident—Duty of driver—Motor Car Ordinance, s. 86 (1).

An accused can be convicted under section 86 (1) of the Motor Car Ordinance only where an accident is imminent or at any rate foreseen or anticipated.

Attygalle v. Sabapathy (1931) 33 N. L. R. 83. distinguished.

A PPEAL against a conviction from the Magistrate's Court, Colombo.

E. F. N. Gratiaen, K.C. (with him *Bawa*), for the accused, appellant.

Boyd Jayasuriya, C.C., for the Attorney-General.

May 27, 1947. DIAS J.—

In this case the accused-appellant started off in his car X. 4078 from a bungalow which he was visiting in order to get to his own home which lay a few yards across the junction between Gregory's Road and Macarthy Road.

The Magistrate has accepted the appellant's evidence almost *in toto*. The appellant came along Gregory's Road going towards Kynsey Road at a slow speed of about 10 to 12 miles an hour. He was quite accustomed to passing through this junction and he says that, in accordance with his usual custom, he slowed down, looked both to the left and to the right and seeing nothing in sight, as he was entitled to do, he proceeded to the centre of the junction, when suddenly a military ambulance driven at a furious speed came along Macarthy Road going towards Ward Place which is from his right, and crashed into him as he was stationary in the centre of the junction. The ambulance then went round his car, crashed through a parapet wall and went into the garden of bungalow No. 96 at the junction. For some reason which is not at all clear, the authorities instead of prosecuting the ambulance driver for reckless driving charged the appellant under two counts. They charged him in the first place, with a breach of section 85 (10) of the Motor Car Ordinance, 1938, for a breach of the off side rule. The accused may have been convicted of that offence, but the Magistrate has acquitted him. The second charge against the accused was, that he committed a breach of section 86 (1) of the Ordinance in not taking such action as may be necessary to avoid an accident. He has been convicted of this offence. It is not at all clear what avoiding action the appellant could have taken under the circumstances. On the contrary, he took the best possible avoiding action, namely, he brought his car to a halt and it was entirely the negligence or recklessness of the military driver which caused this collision.

I think, the accused should have been acquitted on the facts which the Magistrate has found. A case which is almost in point was recently decided by my brother Keuneman in 1831, Municipal Magistrate's Court

of Colombo, 84,623, Supreme Court Minutes of February 7, 1947. Keuneman J., with reference to section 86 (1), said, "Even if the Magistrate is right in ascribing this duty to the driver of a motor car, (that is, to slow down at a junction, look out for traffic on the cross roads and then cross the junction when it is safe for him to do so) I do not quite see how the driver can be convicted under section 86 (1) It is not quite clear exactly what the scope of section 86 (1) is I am inclined to think that this presupposes that an accident is imminent or at any rate foreseen or anticipated. Under such circumstances, no doubt, it will be the duty of the driver of the motor car to take all action necessary to avoid the accident and if he fails to do so he may be made liable under these sections. But, in the present case, there is nothing to indicate that there were any steps either necessary or possible which the accused could take at the time when the accident could fairly be anticipated."

I agree with the reasoning and I think the appellant was entitled to be acquitted. The case of *Attygalle v. Sabapathy*¹ is distinguishable on the facts. The appeal is allowed and the accused is acquitted.

Appeal allowed.

