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GOVIND SWAMY NAIDU

v.

REGINAM

B

[COURT OF APPEAL, 1972 (Gould V.P., Marsack J.A., Spring J.A.), 19th, 30th October]

Criminal law—sentence—dangerous driving causing death—whether imprisonment appropriate—deliberate acts known to involve danger seriously regarded—Penal Code (Cap. 11) s.269—Traffic Ordinance (Cap. 152) s.38:

C

In passing sentence for the offence of causing death by dangerous driving a court will regard seriously, deliberate acts which are known to involve danger, such as racing at high speed, driving while drunk and overtaking at high speed without proper visibility. In the circumstances of the case under review the act of the appellant as an unlicensed driver, in deciding to drive a car which he had not driven before, knowing
D himself to be inexperienced and that he was breaking the law by driving at all, was a deliberate acceptance of risk involving danger.

Cases referred to:

R. v. Abdul Razak (1970) 16 F.L.R. 1.

R. v. Hazel [1965] Crim. L.R. 120.

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R. v. Boe and Saunders [1968] Crim. L.R. 171.

R. v. Kashyap [1972] Crim. L.R. 257.

R. v. Dutton [1972] Crim. L.R. 321.

Appeal against a sentence of imprisonment imposed by the Supreme
F Court upon a conviction for dangerous driving causing death.

J. R. Reddy for the appellant.

R. W. Davies for the respondent.

The facts appear from the judgment of the court.

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30th October 1972

Judgment of the court (read by Gould V.P.):

This is an appeal against a sentence for the offence of causing death by dangerous driving contrary to section 269 of the Penal Code (Cap. 11)
H imposed by the Supreme Court of Fiji at Lautoka on the 8th August, 1972. The appellant was sentenced to two years' imprisonment and disqualified from being issued with a driving licence for a period of seven years. The learned judge took into consideration that the appellant had already been in custody for approximately six months.

The appellant is twenty-two years old and was employed until his arrest, as cashier in a newspaper office. On the night of the 11th October, 1971, Krishna Swamy, the person named in the charge as the deceased, and another person, started to walk from the house where the appellant lived, along the Queen's Road towards Lautoka. Krishna Swamy was the appellant's brother-in-law. Some time after these two persons left the house, the appellant decided to take his father's car and follow with the intention of giving them a lift to Lautoka. The car is described as a small one. Krishna Swamy and his companion had rounded a bend and walked from two to three chains along a straight portion of the road, walking on the extreme right hand side in the direction of their travel. The car driven by the appellant rounded the bend, going from side to side, and then went to its incorrect side and collided with and killed both of the pedestrians. The night was fine and no other vehicle was in the near vicinity.

The appellant had been issued with only a provisional licence entitling him to drive only in company with a qualified competent driver. Even this had expired a month before the accident. He had no experience and had not learned to drive in his father's car, but had done some driving in that of a friend. It was accepted that, at the relevant time, the appellant was not affected by drink. The report of a Vehicle Examiner indicated that such mechanical defects as were found were the result of the accident and none was found which could have caused it.

In passing sentence the learned judge said —

> "I have considered the age, antecedents, time in custody with serious charges pending, that accused says he first decided not to drive the car but subsequently changed his mind which is borne out by the evidence and mental suffering due to death but I am unable to regard this offence other than one of a very serious nature. The deceased pedestrian was clearly either just off the road or on the very edge of of the road and the accused was clearly completely on his wrong side. May be the accused lost control on the bend and was unable to straighten up, but this either shows excessive speed in the circumstances or the inability of an unqualified driver to handle a car properly."

Crimes of negligence such as the present one, are among the most difficult when it comes to imposing a just and appropriate sentence. By way of illustration, the maximum penalty under section 269 of the Penal Code, under which the appellant was convicted, is five years' imprisonment; the maximum provided for dangerous driving *simpliciter* by section 38 of the Traffic Ordinance (Cap. 152) is two years, with or without a fine. Yet a driver charged with the latter may have performed an act of dangerous driving exactly similar to that of a person charged under the former provision, but been lucky enough to escape killing anyone. Nevertheless, the courts must do their best to assess the different degrees of culpability indicated by the circumstances of each case and with due regard to the intention of the legislature as implied by the differing penalties prescribed for the different charges.

There have apparently been a number of cases of dangerous driving causing death, in the magisterial courts of Fiji — this is referred to in

the judgment of Thompson J. in *Regina v. Abdul Razak* (1970) 16. F.L.R. 1, in which he said that it was no doubt correct that in the majority of such cases only fines had been imposed. He went on to say, however, that even where there was no grossly aggravating feature it was not wrong to impose a sentence of imprisonment. In the case before him (in which the person concerned attempted to overtake just below the brow of a hill) he referred to the prevalence of the offence in Fiji, but reduced a sentence of fifteen months' to one of six months' imprisonment.

Mr. Reddy, for the appellant, referred us to English cases. In *Regina v. Hazell* [1965] Crim. L.R. 120 a sentence of three months' was upheld where the appellant had been racing, attempting to overtake at a speed of seventy miles per hour; the driver had only a provisional licence. *Regina v. Boe and Saunders* [1968] Crim L.R. 171, was another case of racing in a built up area — the sentence, which was upheld, was two years. In both those cases and notably the latter, there were previous convictions for road traffic offences.

In *Regina v. Kashyap* [1972] Crim. L.R. 257 the appellant drove very erratically and killed a cyclist coming the other way. The appellant was heavily under the influence of liquor. A sentence of nine months' was upheld. In *Regina v. Dutton* [1972] Crim. L.R. 321 the appellant had tried, at seventy miles per hour, to overtake a line of cars approaching a shallow bend. His sentence of nine months was also upheld. In neither of the last two cases was there any previous conviction. It should be mentioned though, that in the judgment in *Regina v. Dutton*, the Criminal Division of the Court of Appeal said that, while in the great majority of cases courts did not find it necessary to impose a sentence of imprisonment, any notion that imprisonment was never imposed, or only in outstandingly bad cases, was wrong. Cases in which a deliberate risk had been taken differed from those in which there had been an error of judgment.

The English cases, though decided in a different setting from Fiji, provide a useful background. Deliberate acts which are known to involve danger are seriously regarded; racing at high speed, driving while drunk, overtaking at high speed without proper visibility are such acts, and in some cases of course, a relevant criminal record features.

In the present case, as the learned judge found, there was either excessive speed or the inability of an unqualified driver to handle a car properly. Each of these, in one sense or another, is a deliberate act involving known danger. If the appellant knowingly drove at such a speed that he could not recover from the bend of the road, he was accepting a known hazard. On the other hand if the lack of control was due to incompetence as a driver, his act in deciding to drive a car which he had not driven before, knowing himself to be inexperienced, and that for him to drive at all was in breach of the law, was a deliberate acceptance of risk.

We agree therefore, with the learned judge, that a sentence of imprisonment was the only appropriate sentence. With respect, however, we think that the penalty imposed, as a whole, was more severe than the circumstances necessitated or the requirement of consistency with the

sentances of other courts rendered desirable. The disqualification for seven years was in itself a severe penalty and one which rendered the necessity for a deterrent prison sentence, so far as the appellant himself is concerned, less important. So far as the deterrent effect upon others is concerned we consider a shorter sentence would be equally effective. We note that alcoholic liquor was not a contributing cause to the offence. When the time already spent in gaol is included the total imprisonment to which the appellant may be subjected is two and a half years and we consider that this should not stand.

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We therefore uphold the disqualification period of seven years which the learned judge imposed, but allow the appeal to the extent that the sentence of two years' imprisonment is reduced to imprisonment for one year.

Appeal allowed in part.