A

DIRECTOR OF PUBLIC PROSECUTIONS

v.

JAI RAJ

B [SUPREME COURT, 1973 (Mishra J.), 11th October]

Appellate Jurisdiction

Criminal law—traffic offences—causing death by dangerous driving—accused falling asleep at wheel—whether constitutes dangerous or careless driving—Penal Code (*Cap.* 11) s. 269(1).

C The respondent was charged with causing death by dangerous driving and in the alternative careless driving. The facts revealed that the respondent's lorry left the road and capsized in a river. In his statement to the police the respondent said that he went to sleep.

The magistrate found that the action of falling asleep in all the circumstances constituted careless driving only and the Director of Public Prosecutions appealed D against this finding.

Held: 1. It is a question of fact for the magistrate as to whether he should convict of dangerous or careless driving.

2. There is no judicial authority to support the view that where death results from a driver's fault a conviction for causing death by dangerous driving must inevitably follow.

E Cases referred to:

The Police v. Ali Mohammed, 3 FLR. 416.

Pasley v. Sharldall [1965] 2 All E.R. 757; [1966] 1 Q.B. 373.

Kay v. Butterworth, 110 J.P. 75; 61 T.L.R. 452.

Henderson v. Jones, 119 J.P. 304.

Attorney-General for Fiji v. Vijay Parmanandam, 14 FLR. 6.

F *Baker v. Williams* [1956] Crim. L.R. 204.

Thompson v. Wigley [1956] Crim. L.R. 205.

Appeal by the Director of Public Prosecutions against the acquittal of the respondent in the Magistrate's Court of causing death by dangerous driving.

D. Williams for the appellant.

M. Pillai for the respondent.

G MISHRA J. [11th October 1973]

The respondent was charged before the Magistrate's Court Nadi with Causing Death by Dangerous Driving contrary to Section 269 of the Penal Code. At the hearing, the charge was amended to include an alternative count of Careless Driving contrary to Section 37 of the Traffic Ordinance. The following extract from the learned trial Magistrate's judgment shows the reason for this amendment—

H "When the accused first appeared in court and was charged he pleaded guilty to the charge of Dangerous Driving Causing Death. After hearing the facts of the case from the Prosecutor I refused to accept the plea and entered a plea of not guilty to the charge. The accused was then charged with the alternative second count and entered a plea of not guilty."

There is nothing in the record to indicate that the learned trial Magistrate directed the Prosecution to include an alternative count for the lesser offence of careless driving. He was quite correct in not doing so, for such directions can only be given by the Director of Public Prosecutions. According to the record of the proceedings the learned Magistrate merely recorded a plea of not guilty to the offence of causing death by dangerous driving, the only offence with which the respondent had been charged, and invited the prosecution to offer evidence whereupon the prosecutor himself, for reasons best known to him, applied for an amendment to the charge. Presumably the prosecution formed the view that the evidence in its possession might possibly justify a conviction for careless driving only.

The learned trial Magistrate found the following facts proved—

> "Unusually in a case of this nature there is no dispute as to the facts which I shall briefly outline. At about 11.00 a.m. on the 3rd of September, the accused loaded his truck with produce intending to take this to the Nadi Market. Amongst other passengers the accused had sittting next to him on his left his brother, next to his brother a Fijian girl Amelini Vualiku and next to her, her father Vatemo PW 1.
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> On the way to Nadi the truck stopped twice firstly at Cuvu for 5 minutes and secondly at Momi also for about 5 minutes. The accused in his statement to the police says that he rested at 2 or 3 places. At about 3.20 a.m. the truck reached Malolo on the Queen's Road. It was travelling at a normal speed at about 30 m.p.h. Somewhere over 114 ft. before the Navo bridge the truck began moving towards the right hand side of the road. The accused kept this course went completely to his wrong side, went off the side of the road, hit a tree and capsized into the river. In his statement to the police the accused said he went to sleep and this statement has not been challenged by the accused. All the passengers from the truck got out except the girl Amelini who was sometime later brought from the river and given artificial respiration. She didn't respond, she was dead and the cause of death was drowning.
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> Now the truck was fully loaded with melons and cassava, it was travelling at a normal speed according to all the witnesses. The night was very dark. The road is gravel, there was no other vehicle on the road at the time, there was no pedestrian and the windows of both sides of the truck were open.
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> The only question to be answered is this, "was the accused's driving dangerous?" The question can be further crystallized and the whole case devolves round this point, in the circumstances does the action of the accused in falling asleep under all the circumstances constitute Dangerous Driving?"

He answered this question in the negative and found the respondent guilty only of careless driving. The Director of Public Prosecutions appeals against the acquittal on the first count on the following grounds:

> " (*a*) The learned Magistrate drew the wrong inferences in finding that the Respondent stopped twice to rest not necessarily; because he was sleeping, there being sufficient evidence to conclude that the Respondent had not gone to sleep suddenly.
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> (*b*) The learned Magistrate erred in law in distinguishing the case of *Police v. Ali Mohammed* (3 F.L.R. 416) from the case in question.
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> (*c*) The learned Magistrate erred in law in holding that the size of the vehicle, time of day, condition of the road, the lack of traffic, that the Respondent had stopped twice to rest, speed and that he was close to his destination enabled him to distinguish the said case of Ali Mohammed.

(*d*) The said factors did not affect the issue of dangerous driving in this case and were not relevant to the dangerous situation which arose.

(*e*) In finding the Respondent guilty of the second count, the learned Magistrate impliedly found fault in the Respondent's driving which fault, not negatived by the evidence, was sufficient for a finding of guilt on the first count.

(*f*) The learned Magistrate erred in law in drawing a distinction on the question of fault between the first count and the second count.

(*g*) The learned Magistrate erred in fact in concluding that a dangerous situation had not arisen."

In coming to his finding, the learned trial Magistrate said:

> " For some considerable time now it is becoming increasingly obvious that the prosecution are basing their prosecutions in driving cases not so much on the fault of the driver or the standard of his driving but on the eventual results of his driving. In other words, if someone is killed in an accident, a person is likely to be charged with Dangerous Driving Causing Death".

It seems that the learned trial Magistrate formed the view that it was "the fault of the driver or the standard of his driving" which decided whether or not his driving was careless or dangerous.

This court agrees with the learned trial Magistrate that the extent of the damage actually caused by the driver is irrelevant. It is, however, unable to agree that it is the degree of negligence or fault on the part of the driver that distinguishes careless driving from dangerous driving. In cases of dangerous driving, the main criterion has always been whether or not a dangerous situation is caused by the manner in which a vehicle is driven having regard to all the circumstances of the case. A small degree of fault will suffice if such a situation arises as a result.

In every case where a driver is overcome by sleep while at the steering wheel he has been found guilty generally of dangerous driving, but sometimes of careless driving, depending on whether or not the failure to remain awake caused danger, actual or potential, to other users of the road. In this regard the passengers in the offending car are treated as users of the road [*Pasley v. Sharldall* [1965] 2 All E.R. 757]. In *Kay v. Butterworth* 110 J.P. the driver who had gone off to sleep after after a heavy day's work was held to be guilty of dangerous driving. Humphreys J. in his judgment said:

> "If a driver allows himself to be overtaken by sleep while driving he is guilty at least of the offence of driving without due care and attention under Section 12 of the Road Traffic Act 1930 because it is his business to keep awake."

In *Henderson v. Jones* 119 J.P. 304, a driver who had gone off to sleep while driving, the case was sent back to the Justices with a direction to convict of careless driving which was the only offence with which the respondent had been charged. Giving the judgment of the Appellate Court, Lord Goddard C.J. said

> "The Respondent was at least driving without due care and attention and I should have thought might have been held to be driving dangerously".

The main issue before this court, in my view is:

In what circumstances should an appellate court consider it proper to disturb the finding of a trial court that falling off to sleep in a particular set of circumstances has amounted to careless driving and not to dangerous driving.

In *Kay v. Butterworth* (*supra*) the respondent had been charged both with careless driving and dangerous driving. While at the steering wheel of his vehicle he had been overcome by sleep and driven into the rear of a column of marching soldiers injuring 16 of them. The appellate court in that case allowed the prosecutor's appeal against the dismissal of the information and sent the case back to the Justices with a direction "to find that the offences were proved". A

In *Henderson v. Jones* (*supra*) the respondent had been overcome by sleep while driving along a straight stretch of a road on which there was little traffic at the time and her vehicle had gone off to the wrong side of the road colliding with an oncoming car. She was charged only with careless driving. The prosecutor's appeal against the dismissal of the information was allowed and the case was sent back to the Justices with a direction "that the case was proved". B

In each of these cases the issue was whether or not a driver could, as a matter of law, plead sleepiness as a defence to a charge of careless or dangerous driving. In the instant case the trial court has not acquitted the respondent but found him guilty only of the lesser offence of careless driving. It may well be that on the same facts another tribunal would have found him guilty of the more serious offence of dangerous driving and, therefore, causing death thereby. This court, however, is not sitting as a trial court and is only concerned with whether or not it is proper for it to say that under the circumstances of this case the respondent's driving was not only careless but also dangerous. C

In the *Attorney-General v. Vijay Parmanandam* (22 of 1968) this court allowed the appeal against an acquittal on the charge of dangerous driving on the ground that the trial court had applied the wrong test, namely a subjective rather than an objective test, in arriving at the decision that the prosecution had only proved careless driving and not dangerous driving. The respondent had not been charged with careless driving in that case. In the present case, however, there is no allegation that a wrong test has been applied. In *Baker v. Williams* (1956 Crim. L.R. 204) the prosecutor's appeal against an acquittal on the charge of dangerous driving was allowed. In that case the only charge preferred was that of dangerous driving and even there Stable J., dissenting held that the question raised was one of fact and was therefore a matter for the magistrates. In *Thomson v. Wigley* (1956 Crim L.R. 205) the prosecutor's appeal against an acquittal on the charge of careless driving was dismissed on the ground that this was essentially a question of fact for the justices. D E

In the instant case the trial court came to the view that the facts justified a conviction for careless driving but not for dangerous driving. The appellant's submission seems to suggest that where death results from a driver's fault a conviction for causing death by dangerous driving must inevitably follow. Whatever the logic of this submission it is unsupported by judicial authority. There are numerous cases where death is caused to a user of the road but where the driver at fault is either charged only with careless driving or after a trial for causing death by dangerous driving is found guilty of the lesser offence of careless driving. The superior courts have never attempted to distinguish in detail the act of careless driving from that of dangerous driving, being content generally to leave the matter to the common sense of the trial courts. F G

This court sees no good reason in the instant case to depart from that course.

The appeal is dismissed. H

Appeal dismissed.