Criminal Case No. 1 of 1971

The Republic v Maein Deireregea

16th July, 1971.

Criminal law - section 328 of the Criminal Code of Queensland (adopted) - meaning of "driving in an unlawful manner" - degree of negligence required.

Motor Traffic Ordinance 1937-1967 - section 19(1) - meaning of "driving in a manner dangerous to the public" - objective test to be applied.

The accused was charged with driving a motor vehicle on a public highway in an unlawful manner, thereby causing bodily harm, contrary to section 328 of the Criminal Code of Queensland (adopted) and with driving a motor vehicle in a manner dangerous to the public contrary to section 19(1) of the Motor Traffic Ordinance 1937-1967. The motor vehicle he was driving ran into the back of a motor-cycle late at night. Before the accident it was travelling at about 50 m.p.h. The motor-cycle was one of three which were being ridden close to one another, sometimes all three abreast of one another, sometimes in line behind one another. The accident probably occured when the motor-cycle which was struck slowed down in order to drop back into line behind the other motor-cycles and the accused's motor car accelerated in order to overtake.

Held: (1) In order to establish the commission of the offence against section 328 of the Criminal Code, it was necessary for the prosecution to prove culpable negligence of the same degree as is necessary at common law in respect of involuntary manslaughter, i.e. involving a considerable element of recklessness.

(2) Dangerous driving, for the purposes of section 19(1) of the Motor Traffic Ordinance 1937-1967, is to be distinguished from reckless driving; the test is whether the driving, viewed objectively, is dangerous and there is incompetence.

Accused acquitted on the first count and convicted on the second.

P.H. MacSporran for the Republic
P.L. Kelly for the accused.

Thompson C.J.:

Soon after midnight on the night of 23rd/24th April this year three motor-cycles were being driven in a northernly direction along the main circum-insular road near the boundary of Baiti and Ewa Districts when a Ford "Galaxie" motor-car driven by the accused ran into them from behind. The riders of all the motor-cycles fell from their machines; one of them, John Donnelly, received severe leg and brain injuries and another, Anthony Denneman, suffered abrasions of his buttocks. The above facts have not been disputed and I find them proved beyond all reasonable doubt.

The accused is charged with two offences relating to this incident. They are:

(1) driving a motor vehicle on a public highway in an unlawful manner, thereby causing bodily harm to Donnelly and Denneman, contrary to section 328 of the Criminal Code of Queensland (adopted); and

(2) driving a motor vehicle upon a public highway in a manner dangerous to the public contrary to section 19(1) of the Motor Traffic Ordinance 1937-1967.

There appear to be no reported decisions of Australian courts on the meaning of the word "unlawfully" in section 328 and on whether the offence is committed if the act is done merely tortiously so as to give rise solely to a civil liability. However, the judgment of the High Court in

Callaghan v. The Queen (1952) 87 C.L.R. 115 indicates the approach which should be taken in determining the proper construction of section 328.

Prima facie an act causing bodily harm is done unlawfully if it is not authorised, justified or excused by law. Generally an intention to do the act must be proved, because of the provisions of section 23 of the Code. However, that is not so where, as stated in section 23, express provision is made in the Code as to negligent acts or omissions. Such provision is expressly made by section 289. An offence of driving negligently under the Motor Traffic Ordinance is not within the terms of the exception; however, because the provision in respect of the offence is not made in the Code. In order to prove that an act which has caused bodily harm is unlawful in the circumstances of this case it is necessary for the prosecution to prove a breach of the duty imposed by section 289. Section 289 reads as follows:

> "289. DUTY OF PERSONS IN CHARGE OF DANGEROUS THINGS. It is the duty of every person who has in his charge or under his control anything, whether living or inanimate, and whether moving or stationary, of such a nature that, in the absence of care or precaution in its use or management, the life, safety, or health, of any person may be endangered, to use reasonable care and take reasonable precautions to avoid such danger: and he is held to have caused any consequences which result to the life or health of any person by reason of any omission to perform that duty".

The degree of negligence necessary to constitute a breach of that duty was considered in Callaghan v. The Queen. With respect the reasoning in that case is clearly sound and the degree of negligence which must be proved is the "culpable negligence" necessary under the common law in respect of the

offence of manslaughter. It is negligence involving some considerable element of recklessness.

Mr. MacSporran apparently accepted that this was what the prosecution had to prove in respect of the first count. There are many decisions of the English and Australian courts relating to the test to be applied to determine whether driving is dangerous or not. Two of the foremost are Hill v. Baxter (1958) 1Q.B. 277 and R. v. Evans (1962) 3 All E.R. 1086. Dangerous driving is contrasted with reckless driving, the test of dangerous driving being an objective test while the test of reckless driving is subjective. There is no reason to depart in Nauru from the firmly established construction of these terms in England and Australia. In order to establish its case in respect of the second count, therefore, the prosecution must prove that the manner of the accused's driving was dangerous to other road-users in all the circumstances but it does not have to prove that he was reckless or even negligent; mere incompetence suffices if the resulting driving, viewed objectively, is dangerous.

In addition to the facts already recited, certain other facts are not in dispute. These are that the accused's car skidded for 125 feet, that it collided first with Donnelly's motor-cycle at some stage of the skidding, that it was 4 feet out from the left side of the road and that the impact was on the middle of its front bumper-bar and bonnet-grill. The road at that point was nearly level but sloped very slightly downhill at an angle of about one degree. The night was fine and clear. The motor-cycles all had front and rear lights. The car's brakes and steering were in excellent condition. The accused was alone in his car. Subsequently the car was tested carrying a driver and two passengers during the afternoon on a nearly flat stretch of road and, when the brakes were firmly applied with the speedometer reading 50 m.p.h. the resulting skid marks measured 101 yards.

It appears that no-one saw what happened at the time

of, and immediately before and after, the collision except the five people involved. Indeed, of them, only the accused himself was able actually to see the collision taking place; the others merely felt the impact after seeing the lights of the car approaching and hearing the screech of brakes.

There are some discrepancies between the accounts given by the three motor-cyclists who gave evidence. Two were young Nauruan women who were riding one one motor-cycle. The other was Denneman. Donnelly did not give evidence. It is not disputed that the four of them had ridden from near the post office in one another's company and, although the precise details are not agreed, that they were laughing and joking with one another and changing their positions in relation to one another on the road from time to time. Whether they were riding two or three abreast at any time, and in particular immediately before the collision, is not clearly established. One of the young women, Thelma Ephraim, has given evidence that they were three abreast; Denneman has denied this but has agreed that they did ride two abreast. Miss Ephraim says that the other young woman had only just called out "A car" and the two men were still falling back into line behind their cycle when the collision occured; Denneman has said that they had fallen back into line before it occurred. It is clear, however, from the position of the skid marks of the car and the part of it which was damaged by the impact, that Donnelly's motor-cycle was 6'-7' from the side of the road at the time of the collision. It is impossible, therefore, to accept Denneman's evidence on this point as accurate.

The accused has given evidence that he followed the three motor-cycles for some distance at a speed of 30 m.p.h. and then decided to overtake them immediately after an on-coming car had passed. He said that he sounded his horn as the other car passed but that the motor-cycles, which had gone into single file when that car had approached, went back to riding abreast of one another, with the two men's cycles just behind the young women's cycle. He put his foot onto the accelerator intending

to pass them on the right-hand side of the road when the two men's cycles slowed down without any signals being given or brake lights showing. He said that in order to avoid colliding with them, he applied the brakes. He did not try to steer the car clear of them. The car skidded and the collision occurred. He was unable to say for certain whether his car hit only the one cycle or more.

Mr. Kelly adduced evidence intended to show that the test of the accused's car, which was carried out in conditions which were not identical with those at the time and place of the collision, did not establish accurately the speed at which the car was travelling before it braked immediately prior to the collision. Mr. Harris, a civil engineer, gave evidence most competently regarding braking distances generally and the factors affecting them. He was unable to relate the conditions at the time and place of the test in a detailed manner to those at the time and place of the collision, as he had not been asked to ascertain them or to investigate their respective effects on the braking distances. His evidence did establish, however that the very slight slope at the scene made the skid only a very few feet longer than it would have been if the road had been absolutely flat; and that, as the road on which the test was carried out was also very nearly flat, the skid there was only slightly different in length from what it would have been if the road there had been absolutely flat.

Mr. Harris said that the coefficient of friction of tyres on road surfaces may vary between 0.8 and 0.3 and that this would result in the braking distances varying very greatly; he readily agreed with Mr. MacSporran, however, that as an experienced driver in Nauru he did not find any noticeable difference in the braking conditions here by day and by night. He commented that the most noticeable difference occurred when the road was wet. It is not disputed that the night was fine, although Mr. Kelly has adduced evidence which raises a reasonable possibility that dew may have fallen before the collision occurred. Mr. Harris gave evidence that dust on the

surface of the road would prevent bitumen becoming tacky in the heat of the day. It is reasonable to expect that the same dust would have a similar absorbent effect on the gently falling dew. Certainly there is no reason to think that the dew, if it did fall, would have made the road wet to the extent that the coeffecient of friction was substantially altered.

I am satisfied that, although the test conditions were not precisely the same as the conditions at the place and time of the collision, they approximated sufficiently closely to them to establish beyond all reasonable doubt that, immediately before he applied the brakes, the accused was driving his car at a speed of more or less 50 m.p.h.

In view of the discrepancies in the evidence of the prosecution witnesses as to the positions of the motor-cycles immediately before the collision, it is at least reasonably possible that the accused's account of their positions may be correct. It is necessary for this Court to proceed on that basis. Although the prosecution witnesses do not recall an oncoming car passing them shortly before the collision, they do agree that they were passed at various times by oncoming cars and again I consider that there is sufficient doubt for it to be necessary to accept as reasonably possible that a car did pass shortly before the collision. It is not disputed that the motor-cycles went into line whenever an oncoming car approached. It must, therefore, be regarded as reasonably possible that, as the accused has stated, they went into line and then began to spread out again across the road.

The accused has not sought to allege that the collision occurred because any of the motor-cycles swung out from the side of the road into the path of his car. He has admitted that the motor-cycles were spread out before he came close to them and that he saw them. He has ascribed as the cause of the collision the unexpected slowing-down of the two

motor-cycles ridden by the men at a time when he was accelerating to go past them. Under cross-examination, however, he admitted that he would have expected them to go back into line when he was about to overtake them. He should not have been surprised when they slowed down for that purpose. Furthermore, since according to his account of their positions the whole of the right-hand half of the road, over 9½ feet was clear but they were spread out well across the left-hand side, he should have driven onto the right-hand side of the road to ensure that he passed them safely. To accelerate to a speed of 50 m.p.h., or thereabouts, and to continue to drive straight on towards the cyclists who, by his own admission, had been travelling at only 30 m.p.h. was an act fraught with danger to them. It clearly constituted the offence of dangerous driving charged in the second count.

Whether it constituted the culpable negligence which must be established if the offence charged in the first count is to be proved remains to be considered. The accused has given evidence that when he applied the brakes, he expected the car to stop before it hit the motor-cycles and that that was why he did not swerve. It is not disputed that the brakes were in perfect condition. There is no evidence that the accused was driving at a high speed for any distance; indeed there is no direct evidence of his driving prior to the accident other than his own and no indirect evidence from which inferences about it may be drawn other than the skid marks. They are consistent with the accused's account of how the accident occurred, other than his evidence of his speed immediately before he applied his brakes. His account, except for the part relating to his speed at that point, is inherently reasonably possible. The Court must accept it as the basis on which it should consider whether the accused acted recklessly in breach of the duty of care imposed by section 289. Mere incompetence or less serious negliegence will not suffice. But the manner in which the accused drove could have been due to either; recklessness is not the only reasonably possible explanation of it. That being so, the offence charged in the

first count has not been proved. The accused is entitled to be acquitted in respect of that count.

I find the accused guilty of the offence charged in the second count, dangerous driving, as charged.