R. v. STANLEY CHARLES JOHNSON

ROUGH NOTES FOR SUMMING UP 51?

(On which oral summing up, delivered on 20/9/~~51~~, was based).

In this case, the accused, STANLEY CHARLES JOHNSON, stands charged with the manslaughter, "on or about the 22nd day of July" 1951, in the Territory of New Guinea, of ADAM CINNAMOND. The Prosecution charges the accused with what is often called "manslaughter by negligence," and alleges that by his criminal negligence in driving a jeep on the day in question he unlawfully killed Adam Cinnamond.

It is necessary, therefore, to explain what "manslaughter" is, and what one particular kind of it - "manslaughter by negligence" - is.

"Manslaughter" has been described as the "most elastic" crime there is, - and that observation has force both in English law and in the law of the Territory of New Guinea. Thus, in the case of Andrews v. D.P.P., 1937 A.C. 576, Lord Atkin said in the House of Lords: - "Of all crimes manslaughter appears to afford most difficulties of definition, for it means homicide in so many and so varying conditions. From the early days when any homicide involved penalty the law has gradually evolved ... ... until it recognizes murder on the one hand, based mainly, though not exclusively, on an intention to kill, and manslaughter on the other hand, based mainly, though not exclusively, on the absence of intention to kill but with the presence of an element of 'unlawfulness' which is the elusive factor ... ..."

When we look for a definition of "manslaughter" in the law of the Territory of New Guinea, we have to seek it in a rather roundabout way. The Queensland Criminal Code, which has been adopted with certain amendments as the law of that Territory, defines "killing" as deemed to have occurred when one "causes the death of another, directly or indirectly, by any means whatever," provided the death takes place within a year and a day of the cause of death: (ss. 293 and 299). Section 291 of the Code makes it unlawful to kill anyone "unless such killing is authorised or justified or excused by law:" a duly authorised judicial hanging is an authorised and lawful killing, and killing in self-defence may, in certain circumstances and within certain strictly prescribed conditions, be a justifiable and lawful killing. As Section 300 of the Code shows, an unlawful killing is a crime and one v.

is "called wilful murder, murder, or manslaughter, according to the circumstances of the case." Wilful murder is defined in Section 301 of the Code as the intentional unlawful killing of another, provided it is not a killing on provocation. Section 302 of the Code defines the crime of murder as excluding a killing on provocation but as occurring in any of the five sets of circumstances specified in that Section; - e.g. when a person, intending to do grievous bodily harm to another, causes the death of another; or e.g. where a person causes death by means of an act done in the prosecution of an unlawful purpose, that act being of such a nature as to be likely to endanger human life, - and this, even though his intention was not even to hurt the person killed. And then we come to Section 303 of the Code, which provides that "a person who unlawfully kills another under such circumstances as not to constitute wilful murder or murder is guilty of manslaughter." I should also mention (though no "provocation" arises in this case) that, by Section 304 of the Code, an unlawful killing which, but for the provisions of that Section would be wilful murder or murder, is manslaughter only if done on provocation.

From what I have said, it will be seen that "manslaughter" has been defined, in a residuary sort of way, as any unlawful killing that is not wilful murder or murder. Perhaps it was inevitable that this manner of definition was adopted when one reflects that manslaughter can occur in so many different ways: a manslaughter at one end of the scale may come close to being wilful murder or murder and at the other end of the scale may come close to being a killing by misadventure.

When the prosecution has charged manslaughter it has the onus of proving that charge beyond all reasonable doubt: and that means it has the onus of proving each and every element of the crime of manslaughter charged. If it fails to do this, there must be an acquittal of manslaughter. There is no onus whatever on the accused to prove his innocence of that charge: although, if the accused raises the defence of insanity, the onus is on him to prove insanity.

The prosecution, therefore, in a manslaughter case, has the onus of proving beyond all reasonable doubt three things. First, it must so prove the death of the deceased. Secondly, it must so prove that the death of the deceased was caused by the accused, directly or indirectly, and whether by some act or some omission on his part. Thirdly, it must so prove that the death of the deceased, caused by the accused, was an unlawful killing (as already defined) and an unlawful killing of the type known as manslaughter.

In this case, the Crown contends that the accused is guilty of "manslaughter by negligence:" in other words, it contends that the accused caused the death of Adam Cinnamond by his gross or criminal negligence in driving a jeep in which he and the deceased and others were travelling. The Defence, on the other hand, contends that the Crown has failed to prove that the death was caused by the accused, and suggests that on the evidence it is open to find that that death was caused by a sudden unexpected extraneous event, the sudden unexpected occurrence of a mechanical defect in the gears of the jeep: that is to say, the Defence suggests that it is possible that the deceased met his death by "accident" or "misadventure." The Defence further denies that the evidence shows that accused displayed gross negligence or the high degree of negligence necessary to establish the crime of manslaughter: on the contrary, the Defence says, the evidence shows that the accused took all reasonable care and precautions, in the circumstances, in driving the jeep on the occasion in question.

Before discussing the question of negligence, I propose to refer to the defence of "accident". Section 23 of the Code provides that "subject to the express provisions of (the) Code relating to negligent acts and omissions, a person is not criminally responsible for an act or omission which occurs independently of the exercise of his will, or for an event which occurs by accident ... ..." What is the meaning of "accident" in such a context? The difficulty is that the word "accident" is a word of flexible meaning and has been used in varying senses. As Lord Lindley said in the House of Lords in the case of Fenton v. Thorley & Co. Ltd., 1903 A.C. 443, at 453: - "The word 'accident' is not a technical term with a clearly defined meaning. Speaking generally, but with reference to legal liabilities, an accident means any unintentional and unexpected occurrence which produces hurt or loss. But it is often used to describe any unintentional and unexpected loss or hurt, apart from its cause; and if the cause is not known the loss or hurt itself would certainly be called an accident. The word 'accident' is also often used to describe both the cause and effect, no attempt being made to discriminate between them. The great majority of what are called accidents are occasioned by carelessness: but for legal purposes it is often important to distinguish careless from other unintended and unexpected events." It would be monstrous to hold a person criminally responsible for the result of some act or happening that was wholly extraneous to himself and that was unexpected or could not reasonably be expected; and the law does not hold him criminally responsible in such circumstances. But what is the

position if what caused the result is not wholly extraneous? It is well settled that when a person, doing a lawful act with no intention of harming anyone, and doing it without culpable negligence, causes death or hurt to another, that is "misadventure" or "pure accident," and something for which the first person is not criminally responsible: an instance of this, cited by Kenny, is of a batsman fatally injured by a short-pitched ball rising sharply from the ground in a game of cricket. But when a person is doing, or omitting to do, something in a criminally unlawful or negligent way, and that conduct produces a result unintended and unexpected, it does not necessarily follow that he is free from criminal responsibility or that the unexpected result is an "accident". For instance, as we have already seen, when a person unlawfully assaults another, intends grievous bodily harm but not death, and unfortunately kills the other, he is guilty, not merely of the grievous bodily harm he intended but of murder he did not intend; in such a case the law does not consider the fatal result an "accident." Here I may refer to a conflict of judicial opinion, on the subject of accident, in the Queensland case of R. v. Callaghan, 1942 Q. S.R. 40. In that case the trial Judge directed the jury that the defence of accident was not open, as a blow deliberately aimed, which had the effect, although not the intended effect, of killing another person, was not an accident within the meaning of Section 23 of the Queensland Criminal Code. On appeal, though the question of accident had by then become academic because of certain findings of the jury, two of the three appellate Judges agreed with the trial Judge that the defence of accident was not open in the circumstances of that case, but the third appellate Judge thought it could be. I do not, however, propose to embark on a discussion about the consequences of the unintended and unexpected results of a deliberate, criminally unlawful act, because what the Crown charges the accused with in this case is not a deliberate criminally unlawful act, but an act of criminal negligence. Is the defence of accident open to an accused who has been negligent? Now, as we have seen, Section 23 of the Code provide that "subject to the express provisions of (the) Code relating to negligent acts and omissions, a person is not criminally responsible for an ... event which occurs by accident." That Section has no epithet qualifying the word "negligent", and we therefore have to look at the "express provisions" of the Code regarding "negligent acts or omissions" to ascertain the meaning of Section 23. The relevant "express provisions", in a case such as the present one, is Section 289 of the Code. That Section provides that "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." It could not be seriously argued that a motor vehicle in motion along a public road is not an object within this Section; obviously it is a thing of such a nature that, in the absence of care or precaution in its use or management, the life, safety, or health of some person may be endangered. It follows that the driver of a motor vehicle is, because of Section 289, under a legal duty to take care when driving it. But what is the standard of care in such a case? The words used in the Section are - "reasonable care" and "reasonable precautions." Does that mean that more inadvertence or some slight negligence amounts to a breach of the duty laid down in Section 289 and renders the inadvertent or slightly negligent person criminally responsible and, perhaps, guilty of manslaughter? Here again there has been a difference of opinion on that very question among the Judges of the Court of Criminal Appeal in Queensland in the case of R. v. Scarth, 1945: Q. S.R., 38. The majority (Macrossen S.P.J., and Stanley A.J.) held that the expressions "reasonable care" and "reasonable precautions" in Section 289 of the Code were not self-explanatory and should be given the well-established meanings given to them by Judges expounding the common law: they considered that the distinction at common law between civil and criminal negligence had been maintained in Queensland, notwithstanding the enactment of the Criminal Code. The dissenting Judge (Philp J.) held that Section 289 of the Code, read with ss. 2 and 5 of The Criminal Code Act 1899 of Queensland, excluded the operation of the common law concept of criminal liability for negligence: he considered that the same standard of care ~~required~~ applied to civil and criminal cases, though there was a stricter standard of proof of negligence in criminal cases. As negligence amounting to mere inadvertence may involve civil responsibility, it would seem to follow that, in the view of Philp J., negligence amounting to mere inadvertence, if strictly proved, could or may amount to a crime. With all respect, I align myself with the view of the majority in that case - (apart from the fact that ss. 2 and 5 of The Criminal Code Act 1899 of Queensland are not law of this Territory). As Stanley, A.J., pointed out, the common law distinction between civil and criminal liability for negligence must have been well-known to Sir Samuel Griffith, who drafted the Queensland Criminal Code, and Section 289 appears to be a copy of a Section in an English draft Criminal Code which pur-

ported to declare the common law on this matter. Stanley,A.J., further observed that it would be "ironical if the law of Queensland relating to negligence had been changed inadvertently." After all, Section 289 is part of a Criminal Code, and deals with criminal responsibility. I find it impossible to suppose that it was the intention of the drafter of that Section to revert to the barbarous mediaeval notion that more inadvertence entailed criminal penalties and to ignore the then-current common law rule that distinguished between civil and criminal liability for negligence. As for the view of Philp,J. that, in interpreting the Code, you are bound to keep literally within the four corners of the Code, - that was not the view taken by the High Court of Australia in Mullen v. The King 1938. Q.S.R. 97. In that case, Dixon,J. said - (on the question whether, once a killing had been proved by the prosecution, the accused had the onus of proving accident or provocation) - "The Code does not appear to me either to formulate or necessarily to imply a principle that, upon an indictment for murder, the prisoner must satisfy the jury either on the issue of accident or of provocation:" and he applied the common law rule as laid down by the House of Lords in Woolmington's Case, 1935, A.C. 962.

In my opinion, therefore, the common law distinction between civil and criminal liability for negligence is part of the law of the Territory of New Guinea. What that distinction is may best be illustrated by reference to leading cases:- In Bateman's Case, 1925. 19 Cr.A.R., p. 8, at p.10. (C.C.A.) it was said:- "In expounding the law to juries on the trial of indictments for manslaughter by negligence, judges have often referred to the distinction between civil and criminal liability for negligence. The law of criminal liability for negligence is conveniently explained in that way. If A has caused the death of B by alleged negligence, then, in order to establish civil liability the plaintiff must prove (in addition to pecuniary loss caused by the death) that A owed a duty to B to take care, that that duty was not discharged, and that the default caused the death of A. To convict A of manslaughter, the prosecution must prove the three things abovementioned and must satisfy the jury, in addition, that A's negligence amounted to a crime. In the civil action, if it is proved that A fell short of the standard of reasonable care required by law, it matters not how far he fell short of that standard. The extent of his liability depends not on the degree of negligence but on the amount of damage done. In a criminal Court, on the contrary, the amount and degree of the negligence are the determining question. There must be mens rea ... In explaining to juries the test which they should apply to determine whether the "negligence, in the particular case, amounted or did

not amount to a crime, judges have used many epithets, such as 'culpable,' 'criminal,' 'gross,' 'wicked', 'clear,' 'complete.' But, whatever epithet is 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 a disregard for the life and safety of others as to amount to a crime against the State and conduct deserving punishment ..." It is, in a sense, a question of degree, and it is for the jury to draw the line. (In the later case of Andrews v. D.P.P., the L.C.J., in C.C.A. suggested that the words "conduct deserving punishment" might be better expressed "and to call for a conviction" to guard against confusion, in a careless mind, between the function of Judge and jury.)

When that later case of Andrews v. D.P.P., 1937, A.C. 576, went to the House of Lords, Lord Atkin mentioned that, in treatises written and in cases decided in the earlier days of the common law, expressions could be found which indicated that "to cause death by any lack of due care will amount to manslaughter: but" (he went on) "as manners softened and the law became more humane, a narrower criterion appeared. After all, manslaughter is a felony, and was capital, and men shrank from attaching the serious consequences of a conviction for felony to results produced by mere inadvertence." Lord Atkin then referred to Bateman's Case and he said, in regard to that case:- "I think with respect that the expressions used are not, indeed they probably were not intended to be, a precise definition of the crime. I do not" (he said "myself find the connotations of mens rea helpful in distinguishing between degrees of negligence nor do the ideas of crime and punishment in themselves carry a jury much further in deciding whether in a particular case the degree of negligence shown is a crime and deserves punishment. But the substance of the judgment is most valuable, and in my opinion is correct. ... 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 neatly covers the case. It is difficult to visualise a case of death caused by reckless driving in the connotation of that term in ordinary speech which would not justify a conviction for manslaughter: but it is not all-embracing, for 'reckless' suggests an indifference to risk whereas the accused may have appre-

ciated the risk and intended to avoid it and yet shown such a high degree of negligence in the means adopted to avoid the risk as would justify a conviction." Lord Atkin went on to point out that it was "perfectly possible that a man (might) drive at a speed or in a manner dangerous to the public" (contrary to the provisions of the English Road Traffic Acts) "and cause death and yet not be guilty of manslaughter." And he referred to an instance put in argument in that case, namely, that "a man might execute the dangerous manoeuvre of drawing out to pass a vehicle in front with another vehicle meeting him and be able to show that he would have succeeded in his calculated intention but for some increase of speed of the vehicle in front; a case very doubtfully of manslaughter but very probably of dangerous driving."

When there is a legal duty to take care, the care necessary must, of course, vary with the circumstances. Obviously more care is needed when driving on a wet and slippery road than when driving on a dry and good road; or when driving a large, heavy, cumbersome truck than when driving a manoeuvrable sedan; or when negotiating a steep gradient than when driving on the level. There are times when a speed of 60 m.p.h. is safe and times when a speed of 6 m.p.h. is extremely unsafe. Driving on an open road is quite a different proposition from driving in a crowded street.

I should remind myself that a jury must guard against being unduly shocked and unduly influenced by the actual consequences of an alleged act of "criminal negligence." As is pointed out in Akerela v. The King, 1943, A.C. 255, at p. 264, "The negligence to be imputed" (to the accused) "depends on the probable, not the actual, result" of his act or omission.

I have indicated that, in my view, a person may not, under the law of the Territory of New Guinea, be convicted of the crime of manslaughter arising out of an alleged breach of the legal duty to take care prescribed in Section 289 of the Code unless his negligence is of the very high degree described in Andrew's Case. And, as the defence of accident is, by Section 23 of the Code, made subject (inter alia) to the provisions of Section 289, it seems to me that where a person had, by negligence of that high degree, unintentionally and unexpectedly caused death, it is not open to him to say that this result was "accidental."

In this case, however, the Defence contends that the cause of death was an extraneous event entirely - something quite apart from the alleged negligence of the accused: it is suggested by the Defence that what caused the death was the sudden manifestation of an unexpected and unforeseeable mechanical fault in

the gear mechanisation of the jeep. As to that, the Crown contends that there was no positive evidence of any such mechanical defect, but that what happened is consistent with the gears getting into "neutral" position and with the accused's subsequent inability to get them back into gear when the jeep was travelling at increasing speed. I have not yet reviewed the evidence, but it is necessary for me to remind myself, as a jury, now, that when a defence of accident is raised, there is no onus on the Defence to prove accident but there is an onus on the Crown to refute that defence of accident beyond all reasonable doubt. If, at the end of a case, a jury is left in reasonable doubt as to whether the relevant consequence was caused by pure accident, its plain duty would be to give the accused the benefit of that doubt and to acquit him.

In this case, then, the Crown has to prove beyond all reasonable doubt that the death of Adam Cinnamond was caused by the accused; that the death was not caused by pure accident but was an unlawful killing and one that amounted to the crime of manslaughter in that the accused, in breach of the duty to take care prescribed in Section 289 of the Code, caused Cinnamond's death by negligence of the very high degree specified in Andrew's case.

To turn now to the evidence given in this case:- It is clear that late on Saturday afternoon, 21/7/51, the accused set off from RABAUL for TAVILU Plantation in a jeep, No. 446, that he had hired from a Chinese. He had with him, as passengers, Richard Lucker, a motor mechanic, and Richard's sister, Helena Lucker. Shortly after leaving RABAUL, and when descending Tunnel Hill on the RATAVUL side, the accused used his brakes. He had said, in a voluntary statement he made to the Police on 25th July, 1951, that the foot brake of the jeep was not at that time in first-class order but was sufficient to hold the vehicle in second gear. Richard Lucker has said in evidence that on that particular occasion the brakes were used and worked all right. Further along the road to TAVILU, the generator and lights gave trouble and the jeep was halted so that these things might be adjusted. Richard Lucker said that, coming along the road, he had noticed that the brakes were ineffective. He says that the accused said something about the brakes not being good, and having to pump them, but he could not recall accused's exact words. Richard Lucker also said in evidence that "pumping was no good. The brakes wouldn't grip. I saw him pump the brakes and the brakes did not grip." In his statement to the Police, accused had said nothing about that brake trouble: on the contrary, he said:- "I had only one occasion to use the foot brake whilst I was driving to TAVILU that day. That

was going down Tunnel Hill on the RATAVUL side," and, as I have already stated, he said that on that occasion they were sufficient to hold the jeep in second gear. Richard Lucker agreed, in cross-examination, that it was sometimes necessary to pump jeep brakes: but he also said this would not be necessary if the brakes were in first-class order. Helena Lucker says she did not hear brake trouble mentioned on the road out to TAVILU.

There was a party at TAVILU Plantation that night, given at Mr. Janke's residence by the deceased. The accused, the Luckers, and the Cinnamonds, husband and wife, and others, were present. But the Crown does not suggest that the accused was in any way under the influence of liquor when he was about to drive the jeep back from TAVILU to RABAUL next day, Sunday, 22nd July. The time of his departure from TAVILU that afternoon is variously given by various witnesses: Mr. Janke gives it as "between 4 and 4.30 p.m.," Freddie Lourie as at "about 4.30.," and Helena Lucker as at "about 5 p.m." Accused was the driver, and next him in the front seat was Mrs. Olga Cinnamond; the other seat in front was occupied by Helena Lucker: behind the accused in the back seat was Adam Cinnamond and behind Helena Lucker at the back was Freddie Lourie, who was being given a lift as far as Keravat Government Experimental Station, where he was employed as driver and motor mechanic. Just before the party left, Mr. Janke was standing beside the jeep. He says and he maintains that he heard accused say that they had to be getting along as it was getting late and they had no brakes and the lights were unreliable. Freddie Lourie said in his evidence that he heard the accused say at that time that "the jeep hadn't got brakes." Helena Lucker says that she did not hear anything said about brakes but she also says "We were talking but I don't know what about." Olga Cinnamond, called by the Defence, was not asked by the Defence or by the Crown whether she heard the accused say anything about the brakes. Freddie Lourie was asked by the Defence why he, being a mechanic, did not do anything about the brakes: he said there were no tools, but that he had not inquired if there were any at TAVILU Plantation. He also told the Defence that the road from TAVILU to KERAVAT, where he got off, was fairly level; that the accused drove along that stretch carefully and slowly and at KERAVAT brought the jeep to rest, not by using brakes, but by switching off his engine and letting the vehicle come to a stop. The Defence pressed Lourie to say that he was not particularly worried about the lack of brakes; but he would not say that: all he would say was, that he thought that if the jeep was driven slowly and carefully to RABAUL there was no real danger of an accident. Of course, it is the province of the Jury to determine that question.

Having dropped Lourie at KERAVAT, the accused drove the jeep towards RABAUL and got to the Burma Road Turnoff, on what is called the "Upper Road" (i.e., the Upper Road between KOKOPO and RABAUL) where he stopped to adjust the lights which were giving trouble. As to the accused's manner of driving up to that point, Helena Lucker told the Defence, in cross-examination, that accused drove slowly and carefully, and Olga Cinnamond told Mr. Jones, learned Counsel for the Defence, that accused drove "very slowly."

After the lights had been temporarily adjusted, the accused drove along the Upper Road towards RABAUL and at length came to a point about 700 yards or so on the Kokopo side of KAWAWA Village. Here the road commenced to decline; for approximately 600 yards there was a steady down grade - (which, I think, is a fair deduction from Sub-Inspector Palmer's unchallenged evidence that, when traversed in the KOKOPO direction, that 600 yards of road had a "steady up grade"). But, at the end of that 600 yards stretch that was nearer RABAUL, the road, according to Mr. Palmer's uncontradicted evidence, dropped very steeply for 40 yards at least and this part of it was scored and rutted and bordered on the right side (looking towards RABAUL) by a bank about 12 feet high, and on the left side by a washaway about 10 to 12 feet deep: at that point the road was about 24 feet wide.

When the jeep commenced to travel along that 600 yards' downward slope, it was, according to the accused (in his statement to the Police) in first gear. Helena Lucker also says it was then in first gear, and Olga Cinnamond says it was in first gear at the start of that hill. But very soon, things went wrong. In his statement to the Police, the accused says that, about 50 yards down the hill "something happened to the transmission and the vehicle commenced to gain speed ... ... I thought the vehicle had slipped out of gear and I declutched and attempted to pull it back into first gear. I got it into first but the vehicle continued to gain speed without any braking effect from the gear-box. I then put the gear lever into second gear without effect and then into third still without any braking effect. Whilst this was taking place I was attempting to brake the vehicle with the foot brake but despite pumping the brake was ineffective and the vehicle continued to gain speed. I then realised that something must be wrong with the transfer case and that the transfer gears must have slipped into neutral. Paddy" (i.e. the deceased) "then leaned over from the rear and took hold of the steering and he steered the vehicle whilst I used both my hands on the two levers of the transfer gears. By this time we had travelled a considerable

distance downhill and gradually increasing speed. I was unable owing to the speed of the vehicle to get the gears into the driving position. Whilst I was bent down engaged with the gears the vehicle appeared to strike something a glancing blow followed by another blow." From this it would appear that the accused thought that the trouble was that the transfer gears had slipped into neutral and that what he was trying to do, when working at the two small levers, was to get the gears in the transfer case out of neutral: he did not say in his statement to the Police, that he was trying to get into "four wheel drive," a manoeuvre that obviously would have been difficult if the vehicle was travelling at a fast and increasing speed. Helena Lucker's version of this is as follows:- She says that as they were coming down the hill (having begun it in low gear) the jeep "got out of control," and that the accused pumped the brakes several times but the jeep did not stop at all and the brakes did not act at all. (Incidentally, she says she noticed that, before reaching this hill, accused had pumped at the brakes without effect). Then, she says, the accused "tried to put it into gear but it wouldn't go" - (she says nothing about accused having successively got it into 1st, 2nd and 3rd gear as he has said he did). Then, she says, accused "tried to put it into 4-wheel drive. The jeep was going very fast." Then Cinnamond, leaning over from the back and holding on to the jeep with his left hand, took hold of the steering wheel with his right hand. At that time, she says, accused "did not have hold of the steering wheel but was trying to get the jeep into 4-wheel drive with both hands." At that stage, she fainted. It should be mentioned that Miss Lucker, although she says she is familiar with jeeps, also says she cannot drive one. Olga Cinnamond's account of this part of the events is this:- She says that, "coming down the hill, (the jeep) got out of gear. The accused tried to put the jeep into gear but it wouldn't go." What gear he tried to put it into she did not know, but she said that, when doing this, he was not holding the ordinary gear lever but the two small levers (i.e. those of the transfer case). She did not know whether he was trying to get the jeep into ordinary gear or into four wheel drive. He used both hands on the little levers while her husband (the deceased) took hold of the steering wheel with his right hand. Then the jeep dashed into the bank at the right of the road and they were all, except the accused, thrown out of the jeep.

The evidence shows that Helena Lucker's leg was pinned down by the exhaust pipe, but accused got out of the jeep and managed to free her; and he and some natives from the nearby village of KAWAWA carried her to that village. Adam Cinnamond,

however, did not fare so well: within a very short space of time, he died where he had fallen, and medical evidence has been given that the right side of his head was crushed in, with lacerated brain matter visible in that injury, and that he had died of fractured base of the skull. There can be no doubt that he died as the result of the jeep's crash into the bank, and this has not been disputed. There also seems no doubt, on the evidence given at this trial by Olga Cinnamond, on what accused said in his statement to the Police, and from what Mr. Palmer has told us of his observations a few hours later that evening, that the jeep must have struck the bank with very great force with its right hand forward end, and then slowed round to a position of rest about 9 yards further on. Mr. Palmer says that he also noticed, when he inspected the jeep that night, that the foot brake was quite ineffective; that the screw cap which normally secures the gear lever to the gear box was completely unscrewed and loose and that the lever could easily be taken out; that the bonnet of the jeep was under the front wheels, that the front axle assembly was torn from its mounting; that the forward driving shaft was detached from the gear-box and had that end of it resting on the ground; that the rear spring shackles were displaced; that the battery was not in its proper position on the right hand side of the jeep but was lying on the ground to the left of the jeep; that the windscreen had been forced back on to the steering wheel; and that the rear tyres had been forced out of their rims and had earth and grass caked in the spaces so caused: but, of course, he could not say how this state of affairs compared with the state of the vehicle immediately before the crash.

It has not been suggested in any way during this trial that the action of the deceased, in taking hold of the steering wheel while accused tried to manipulate the levers of the transfer case, caused the crash: and such a suggestion, had it been made, would not, in my opinion, have been supported by the evidence: on the contrary, the evidence showed that the deceased managed to keep a jeep that was careering down the hill, out of control and gaining speed all the time, on the road for some hundreds of yards, and then for 40 yards of a very steep and rutted grade to a point where the road began to bend. He could not humanly have been expected to do more than he did to avert disaster.

On the evidence I have summarised, it is now for me to consider my findings as a jury, and to consider whether or not the evidence supports the contentions of the Prosecution or those of the Defence, which have already been referred to; but above all to decide whether that evidence establishes beyond all reasonable

doubt, or fails so to establish, the guilt of the accused of the manslaughter charged. The death of the deceased has been clearly established by the evidence: but was it caused by accident, an accident unexpected, sudden, unforeseen, and wholly extraneous to any act or omission of the accused, as the Defence suggests, or was it caused by the gross or reckless negligence of the accused, as the Prosecution suggests or by what?

The Crown suggests that, on the day in question, the brakes of the jeep were wholly ineffective and that the accused knew they were wholly ineffective, yet chose to take the reckless risk of driving the jeep in that condition. On the evidence of Mr. Janke and Freddie Lourie, entirely uncontradicted by the Defence, and that of Richard Lucker to a less degree, I think there can be no reasonable doubt whatever that the brakes were wholly ineffective on the 22nd of July last and that the accused knew that they were wholly ineffective. That he knew this is consistent with the evidence of Leurie as to how the accused drove the jeep, "carefully" and "slowly," to KERAVAT; and with the evidence of Helena Lucker and Olga Cinnamond about the accused's driving slowly and carefully from there to the hill on which the crash occurred, and his being in first gear at the start of that hill. Clearly, he took a grave risk in driving the jeep that day knowing the brakes were ineffective: especially as he must have known that the road to RABAUL was not all level going: he must at least have known that he would have to negotiate the Tunnel Hill (visible from this Court) and have to negotiate its steep down grade on the RABAUL side.

Now the Crown has contended that the taking of that risk by the accused and his knowingly driving without brakes amounted, in themselves, to the very high degree of negligence required to warrant a conviction for manslaughter and the Crown has also submitted that it was that negligence that caused the death of Adam Cinnamond.

The arguments submitted by the Defence, however, are quite to the contrary and are as follows:- First, the Defence contends that driving without brakes did not amount to the high degree of negligence already mentioned because there was evidence to show that the accused drove slowly and carefully from TAVILU until shortly before the crash; his driving without brakes, in such circumstances, was, the Defence contends, a mere error of judgment. With respect, it seems to me that that argument rests on a fallacy. It seems to me to amount to this; - if driving along that road without brakes was criminally negligent, driving slowly and carefully otherwise made it something that was not

criminally negligent: or, if driving without brakes along that road was merely negligent, slow and careful driving converted it into driving without any negligence. To put it very bluntly, it means that to drive negligently slowly and carefully is to drive without negligence. Surely, that is fallacious and it is rather like saying:- "It is true that I took my pet tiger for a walk in the street, but all the time I had a piece of string tied to his collar and I held it carefully: it is not my fault, really, that the tiger devoured the lady at the bus-stop." Further, I find myself unable, as a jury, to find that driving a jeep, loaded with passengers as this one was, without brakes, over the road and hills it had to traverse, was a mere error of judgment. Brakes on a motor-vehicle are obviously not fitted merely to enable a driver to slow down when he wishes to in a normal way: they are also intended to enable him to control the vehicle in an emergency. When the accused decided to drive the jeep back from TAVILU that day, he therefore took a great risk and, as I have found, knowingly took that risk. If he met an emergency he had no brakes to combat it with,- he was without his main recourse against an emergency: all he could do was to endeavour to control the vehicle with his gears. Yet it must be common knowledge today that that is not a wholly certain form of control, especially on a steep grade or on a bending road. The Crown suggests this was "reckless" conduct. I think the accused's conduct is better described in the following passage from Andrew's Case:- "('Reckless') is probably not all-embracing, for reckless suggests an indifference to risk whereas the accused may have appreciated the risk and intended to avoid it and yet shown ... a high degree of negligence in the means adopted to avoid the risk." On the evidence, I am satisfied that the accused "appreciated" that there was a risk in driving with useless brakes, but that he intended to avoid that risk by driving slowly and carefully and by manipulating his gears. But the proper way to have avoided that risk was either not to have driven the jeep at all in that unbrakeworthy condition or to have had the brakes fixed first. Accused did neither. It is said that he was not a mechanic, but that Richard Lucker, Freddie Lourie and Adam Cinnamond (all of whom were at TAVILU that weekend) were mechanics: however there was a suggestion from one witness that there were no tools and from another that the fixing of defective brakes was not a job for the road. In that case, accused should not have driven the jeep at all. When he elected to take the risk of driving the jeep "without brakes", and with the knowledge that the brakes were useless but with the hope of avoiding the risk by driving slowly and carefully and by manipulating the gears, the accused must have known or should as a rational being have known that it was not only possible but probable

that an emergency would arise against which those measures would be inadequate and would therefore jeopardise the lives and safety of his passengers, of himself, and perhaps of others. As the jury, I entertain no reasonable doubt that he was guilty of a very high degree of negligence, of "criminal" negligence, in all the circumstances, in driving the jeep from TAVILU that day, knowing as he did that it was in an utterly unbrakeworthy condition.

The second line of argument put by the Defence is this:- The Defence says, that even if the accused was guilty of criminal negligence, the contention for the Defence is, that it was not that that caused the death of Adam Cinnamond, but some concealed defect in the gear mechanism of the jeep which occurred suddenly, without warning, and unexpectedly, and which the accused could not reasonably have foreseen or provided against. In other words, the Defence contends that the death was due to a pure accident, something extraneous to any act or omission on the part of the accused. Now there is no express or direct evidence to show that a concealed defect in the gear mechanism manifested itself, as against the accused's apparent belief that the gears in the transfer case had slipped into neutral, which belief he expressed in his statement to the Police. Yet, admittedly, it cannot be said with certainty that some concealed defect in the gear mechanism did not suddenly show itself. Mr. Palmer says that when he examined the jeep some hours after the crash, the screw-top that normally holds the gear lever in place was unscrewed and quite loose, but he could not say whether it was like that or not just before the crash. There is, however, another aspect to consider. The accused said, in his statement to the Police, that the jeep had only proceeded about 50 yards down the hill, in low gear, when "something happened to the transmission." At this point, on the evidence, the grade was a steady down grade but was not steep. At that moment, acoording to the Crown witness, Helena Lucker, the jeep was travelling in low gear: and, in cross-examination, she agreed that "the moment before the jeep got out of control it was travelling very slowly." And Olga Cinnamond, witness for the Defence, also said that the jeep was travelling "very slowly" "just before it got out of control." On this evidence, it seems to me, as a jury, that, at the moment and place the jeep got out of control, it was not yet travelling fast, but slowly enough for brakes to have controlled the jeep, had the jeep had effective brakes, and in that event the crash could not have occurred. But, the jeep had utterly ineffective brakes, as the accused knew, and again re-discovered when he then immediately began to pump the brake. This was just the sort of emergency for which brakes are provided and the sort of emergency that may happen any time in a motor-vehicle. Whether the jeep got out of control at that point

because of a concealed defect in the gear mechanism or because the gears in the transfer case got into neutral, the jeep, on the evidence before me, was not travelling that fast that proper brakes could not have held it and so avoided the crash. In short, I find that the crash would not have occurred had the accused not elected to drive without any brakes at all, and that this was the cause of the disaster and of the death of Adam Cinnamond.

On the evidence, I am satisfied beyond reasonable doubt, and I find, that the accused was guilty of a very high degree of negligence in the way he drove the jeep that day, that that high degree of negligence was the cause of Adam Cinnamond's death, and that it was such that it warrants his conviction of the crime of manslaughter.

My verdict is, therefore, "Guilty" of the charge.

(SGD.) F.B. PHILLIPS.

C.J.

20/9/51.

In his judgment in this case, His Honour the Chief Judge followed a decision of the majority of the Queensland Court of Criminal Appeal in R. v. Scarth (1945) St.R.Qd. 38. Since His Honour delivered this Judgment, Scarth's case has been approved by the High Court of Australia (Callaghan v. The Queen 1952 A.L.R. 941; 26 A.L.J. 456; 6 L.M.D. Ø1296).