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EVGENIOU

v.

THE QUEEN.

ORDER

Appeal dismissed

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JUDGMENT

McTIERNAN J.
MENZIES, J.

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THE QUEEN.

Justus Besiaro died in a collision with the appellant's motor-car just before midday on 29th June, 1963, near Port Moresby. The deceased was crossing the Hubert Murray Highway from north to south and the appellant was driving his motor car along the highway in an easterly direction from Port Moresby. The collision occurred in something over 100 feet to the west of the junction of the Hubert Murray Highway with Hohola Road in an area where speed was restricted to 30 miles per hour.

The appellant was charged under s.291 of the Criminal Code with unlawful killing and Mann C.J. convicted him of manslaughter. From that conviction he has appealed by leave to this Court.

Stated shortly, the facts were that the deceased, carrying a child and an outspread red umbrella to shield the child from the sun, was one of a group of seven native people who had been waiting on the northern verge of the highway for an opportunity to cross to the other side. When a car driven by a witness Martyn and travelling in a westerly direction on the far side of the highway passed the group, the deceased stepped out on to the roadway. Before he had gone more than a few steps he was hit by the appellant's car. The appellant's car passed Martyn's car - which was travelling at about 15 miles per hour - about 20 yards to the west of the place where the deceased had been standing and, as it did so, the loud rush of air which its passage caused attracted Martyn's attention. Looking in his rear-vision mirror, he saw the red umbrella in the air and a body in the air slightly above the level of the bonnet of the appellant's car. The body dropped out of sight and then reappeared some distance ahead of the car on the roadway not far from the intersection of Hohola Road and Hubert Murray Highway. It was established that the appellant's car came to rest about 40 feet west of Hohola Road and the deceased's body was 26 feet 6 inches further on in front

of the car. Tyre marks on the road leading to the rear side wheels of the stationary car measured 115 feet 6 inches. Tests made subsequently to the collision with the appellant's car on the roads showed that with a hard application of the brakes it would pull up from a speed of 30 miles per hour in 36 feet. From the place where the collision occurred it was possible to see 200 yards along the road towards Port Moresby.

Upon this evidence and disbelieving the appellant's written statement to the police and his evidence, Mann C.J. found that the appellant failed, by a combination of reckless speed and failure to observe an actual danger when it arose, to discharge the duty imposed upon him by s.289 of the Queensland Criminal Code as adopted in the Territory of Papua and New Guinea. That section provides as follows :-

"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 dangers; 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 has been established by R. -v- Searth 1945 St.R.Qd. 38 - a decision upon the Code in question - and by a decision of this Court upon the corresponding section of the Western Australian Criminal Code in Callaghan -v- Reg. 87 C.L.R. 115 that negligence sufficient to meet the standard of civil liability is not enough to constitute a breach of s.289; there must be negligence according to the standard of the criminal law, which may be described shortly as recklessness involving grave moral guilt. Mann C.J. understood this and referred to R. -v- Searth and we have no doubt that, when he said: "Even, therefore, on this most favourable view of the duty owed by the accused under Section 289, he failed, by a combination of reckless speed and failure to observe an actual danger when it clearly

arose, to discharge his duty, and on that ground also the accused is guilty of manslaughter", he was applying the correct standard in finding the appellant guilty of negligence according to the standard of the criminal law. We consider, moreover, there was ample evidence to support this conclusion and we would dismiss the appeal.

It appears, however, that the learned Chief Justice, in applying s.289, was embarrassed by the course he took in considering, in the first place, whether the appellant was guilty of manslaughter unless excused from liability by s.23 of the Code. That section had no application because of the opening words: "Subject to the express provisions of this Code relating to negligent acts and omissions". His Honour, however, seemingly considered that, unless the appellant was excused by s.23, he was guilty of unlawfully killing whether or not he had been negligent provided that he had caused the death of Justus Besiaro and his primary finding of manslaughter was reached upon this basis. With respect, we are satisfied that it was wrong to have dealt with the case independently of s.289. It is true that the Code provides that any killing not authorised, justified or excused by law is unlawful (s.291); furthermore, to kill is to cause death directly or indirectly by any means whatever (s.293). It is, moreover, apparent from sections such as 294, 296 and 299 that death may, for the purposes of s.293, be caused by an omission as well as by an act. There are, however, strong indications that it is only an omission to observe or perform a duty that is to be regarded as giving rise to criminal responsibility: see ss.285-290 and 299. These indications we accept. In this case the appellant was at the relevant time a person who had under his control a motor-car, 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 a person may be endangered. We consider that, unless the appellant omitted to use reasonable care or take reasonable precautions to avoid such danger, he did not fail to observe or perform the duty imposed upon him by s.289, which, in the circumstances of the case, was the only relevant duty. If the appellant was in breach of s.289, then he killed Justus Besiaro unlawfully; if not, he is not to be deemed to

have killed Justus Besiaro and no authority, justification or excuse by law as provided by s.291 was needed. Mann, C.J. took the view that if the appellant killed Justus Besiaro, even without any negligence, he would be guilty of manslaughter unless excused by s.23. The scheme of the Act is, however, that there being an express provision applicable if the appellant killed Justus Besiaro by an omission to take reasonable care or reasonable precautions to avoid danger to the deceased arising from the use of the motor-car, that express provision (viz.s.289) excluded the operation of s.23 but not with the consequence that, if the appellant were found to have been negligent in any degree so that he could be said to have killed Justus Besiaro, a conviction for manslaughter followed as of course. The Code, as we construe its relevant provisions in the light of authority, does mean that a motor-car driver whose omission to use reasonable care in its management amounting to criminal negligence results in the death of another is guilty of manslaughter; it does not mean that a motor-car driver whose omission to use reasonable care in its management not amounting to criminal negligence results in the death of another can be found guilty of manslaughter unless excused under s.23. To decide that it does would be to disregard Gallagher -v- Reg. (supra) where it was said at p.124: "Without in any way denying the difficulties created by the text of the Criminal Code, we think it would be wrong to suppose that it was intended by the Code to make the degree of negligence punishable as manslaughter as low as the standard of fault sufficient to give rise to civil liability." Even more plainly, it does not mean that a motor-car driver is to be found guilty of manslaughter unless excused under s.23 if, by reason of his use of the car but without any omission to use reasonable care in its management, another person is killed. Accordingly, there was no basis here on which the accused could have been held guilty of unlawfully killing the deceased man except criminal negligence arising out of a breach of the duty imposed by s.289. His Honour, however, instead of dismissing s.23 from attention as irrelevant, entered upon a consideration of it. He negatived accident, finding that, although the appellant ought to have foreseen that in the neighbourhood where the collision occurred there might

be people crossing the road, he nevertheless drove dangerously at a high speed and without a sufficiently careful look-out. His Honour then sought to apply s.289 as an alternative basis for liability under s.291 on the artificial assumption that what he had already found should have been foreseen was in fact unforeseeable. This basis upon which His Honour applied s.289 was, as he said, inconsistent with his finding that "it ought to have been apparent to a person in the position of the accused that a situation of this kind might arise, and that he should have reduced speed as soon as the danger became apparent to a person in his position." His Honour's method of approach naturally enough resulted in some confusion in his reasoning; but when his judgment is looked at as a whole, it is apparent that he had applied s.289 on the basis of his real findings, as he should have done, the case against the appellant must have presented itself to him as far stronger than the one that was nevertheless found to have been established under s.289. Despite the confusion that arose from the unnecessary consideration of s.23, therefore, we are satisfied that there was no miscarriage of justice.

It is not necessary in this case to consider how the Code applies where a person is charged with unlawful killing when the negligent conduct alleged against him does not fall within s.289 but, in a case where what is alleged is death resulting from failure on the part of a person in charge of or in control of a thing that, carelessly used, may endanger life to use reasonable care or to take reasonable precautions as required by s.289, we are satisfied that liability has to be determined by reference to ss.289 and 291 without resort to s.23. When there has been a breach of s.289 causing death, then there is an unlawful killing under s.291, and that, it sufficiently appears, is what His Honour so found upon what seems to us ample evidence.

At the close of the Crown case it was submitted on behalf of the accused that there was no case to answer. His Honour, instead of considering this submission, ruled that the defence must elect either to call evidence or not. We have not found any basis for putting the accused in a criminal case to such an

election and we think that, notwithstanding that he was the judge of fact as well as of law, His Honour should have ruled upon the submission which was made. His not doing so, however, does not afford any ground for interfering with the verdict for it is clear that, had he ruled, His Honour would have said there was a case to answer. Furthermore, the accused's statement to the police was already in evidence and it does not appear that the evidence which he gave added to the case that was made against him.

In our opinion this appeal should be dismissed.

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JUDGMENT

TAYLOR, J.

THE QUEEN.

With respect to the views of the majority of the Court in this case I have formed a firm opinion that the conviction should be set aside and a new trial ordered. I have reached this conclusion because I think that consideration of the facts below proceeded upon principles so erroneous that it is impossible to say that no miscarriage of justice has occurred.

In effect, the learned Chief Justice travelled two routes in reaching his decision to record a conviction against the appellant. First of all, he went to s.23 of the Criminal Code and considered whether or not the killing of Besiaro occurred by accident within the meaning of that section and, having reached the conclusion that it had not, held that the appellant was guilty of manslaughter. Then he went on, alternatively, to consider whether the further conclusion should be reached that there had been such a failure on the part of the appellant "to use reasonable care and take reasonable precautions" as to bring the appellant within the ambit of s.289 of the Code. If there had been, then the appellant should be held "to have caused any consequences" which had resulted to the life or health of any person by reason of his failure.

The first enquiry made by the learned Chief Justice was, as he said, related to the question of causation and did not involve any consideration of the existence of that degree of negligence sufficient to attract criminal liability. As he said, "the real question is one of causation. In other words, was the accused travelling at such a speed or otherwise so unprepared to meet the situation which confronted him that his negligence was a cause of the collision. This depends again on the question of foreseeability, for criminal responsibility attaches notwithstanding s.23 if the accused ran into a situation which was foreseeable as creating a substantial risk of death for the deceased." This line of enquiry assumed in

advance that the evidence established that, irrespectively of any negligence on his part, the appellant had unlawfully killed the deceased and then proceeded for the purpose of determining whether the killing had occurred by accident and, therefore, whether "the defence of accident" arising "under s.23" had been made out. But any such inquiry was quite irrelevant. As was pointed out by this Court in Callaghan -v- The Queen (87 C.L.R. 115) the provisions of s.23 are expressly "qualified by being made subject to the provisions (of the Code) relating to negligent acts and omissions" and "it must be taken that the fact that an event causing death occurs independently of the accused's will or by accident can afford no excuse" in cases of this character. Further, "for that reason, and because of the final part of s.266 (Queensland Code, s.289) by which the person omitting to perform the duty is held to have caused any consequences which result to the life or health of another, breach of the duty of care imposed by the section becomes one of the constituents of the crime of manslaughter". Callaghan's Case, is, of course, a decision on the provisions of the Criminal Code of Western Australia but in all respects material for present purposes its provisions are identical with those of the Queensland Code. I should add that the decision in R. -v- Scarth (1945 S.R.(Q.) 38), which was a decision under the Queensland Code, is quite inconsistent with the notion that s.23 has any relevance to a case where the offence charged rests upon the omission of a duty of the character specified in s.289. The decisions are clear authority for the proposition that s.23 finds no place in cases of this character and, accordingly, the conviction of the appellant cannot be justified on the first ground taken by the learned Chief Justice.

Having concluded that "the actions of the accused and the manner in which he drove the car were the cause of a risk which should have been obvious to him, and that therefore the event which occurred was not an accident within the meaning of s.23 ... and that he is guilty of manslaughter in consequence of his actions", His Honour proceeded to consider the

question of negligence under s.289. He said, "Although, on my view of the facts, the question of negligence does not arise, I will deal with it upon the footing that contrary to my view of the matter, the circumstances of this case rendered the event of death an accident within the meaning of s.23. Upon this footing the accused would not be criminally responsible for the event which happened unless he failed to discharge the duty imposed upon him by s.289 ... to take due care in the driving of his motor car, it being in the circumstances an object under his control coming within the terms of s.289". Upon this branch of the case it appeared to him that there was no doubt that "both parties were at fault in some degree", but that "comparisons of the negligence of the two parties could only assist the accused if they led to a conclusion, or at least did not exclude the conclusion, that the deceased unforeseeably stepped on to the road in circumstances creating a situation in which the negligence of the accused was not a contributing cause." "On such a view", His Honour said, "the accused would have hit the deceased at whatever speed he might have been travelling". If, as I think it does, this means no more than that contributory negligence is no defence to a charge of manslaughter where criminal negligence is an ingredient of the offence, I agree entirely. But it must always be remembered that in considering whether the negligence of the accused was so culpable as to attract criminal responsibility it may often be difficult, if not impossible, to exclude from consideration the actions of the victim as one of the relevant circumstances. However, this is by the way for His Honour then proceeded to consider whether there had been a failure on the part of the appellant to exercise the requisite degree of care on the assumption that the killing was "an accident within the scope of s.23". On that assumption he said: "I must treat the facts as revealing that it was not foreseeable to a person in the position of the accused as he was approaching the pedestrians that one of them might step forward into the path of his car. Upon such a view, the accused was taken completely by surprise and it becomes a question of fact at what point of time he had actual warning of the movements of the deceased so that he was not required to predict them but merely to observe them and act according to

what he saw or ought to have seen". Immediately thereafter His Honour attributed to s.289 an operation which, it seems to me, is erroneous. He expressed the view that the section "creates the duty expressly made applicable to accidents arising within the scope of s.23" and added that the section under consideration requires that reasonable care and precautions must be taken to avoid dangers which are unforeseeable. In such cases, he says, the "standard imposed" by the section is much lower than that in the case of foreseeable dangers. But the concept of "accident" within the meaning of s.23 has no relevance when one comes to consider the meaning and effect of s.289. Nor does that section create any duty to guard against any unforeseeable dangers. That, in substance, it speaks of is a duty to avoid dangers by the exercise of "reasonable care" and the taking of "reasonable precautions" and the use of these expressions make it abundantly clear that it was never intended to create any duty to guard against dangers that are not reasonably foreseeable. Nevertheless, His Honour then proceeded to a brief consideration of the facts and said: "On the evidence it appears to me to be clear that at the point at which the car driven by the accused passed the car driven by Mr. Martyn in the opposite direction, there was ample time for the accused to stop. As soon as Mr. Martyn's car passed, the deceased was walking across the roadway in the full view of the accused, and even if, for some reason, the accused could not or did not see this movement until the point at which he was passing Mr. Martyn's car, he still had ample time to pull up at a speed of anything like 30 miles per hour". But this finding takes no account of the facts already found by the learned Chief Justice that the appellant was driving at a "relatively high speed" and "very considerably in excess of the official 30-mile per hour speed limit in that area". Whether this amounted to criminal negligence or not in the circumstances is another matter but that fact must, in my view, invalidate a conviction based substantially upon a finding that after observing the deceased the accused "still had ample time to pull up at a speed of anything like 30 miles per hour". However, His Honour based his final conclusion that the appellant was guilty of manslaughter on the proposition that he "failed,

by a combination of reckless speed and failure to observe an actual danger when it clearly arose, to discharge his duty". The duty of which His Honour speaks in this observation I take to include a duty to take reasonable care to avoid an unforeseeable danger for on this branch of the case he had proceeded to a consideration of the facts on the basis that they revealed "that it was not foreseeable to a person in the position of the accused as he was approaching the pedestrians that one of them might step forward into the path of his car" and for the purposes of dealing with the case he had treated s.289 as requiring that reasonable care and precautions must be taken to avoid dangers "which were not foreseeable".

However, this would not be of much consequence in the case if the ultimate finding of fact which His Honour made amounted, in substance, to a finding of criminal negligence. His ultimate finding was, in effect, that the appellant had "by a combination of reckless speed and failure to observe an actual danger when it clearly arose", failed to discharge his statutory duty. But it was "clear" to His Honour "that the deceased stepped forward right into the path of danger" and "at the time when the accused in fact became aware of the danger, he apparently had no hope of avoiding the deceased" so that the gravamen of His Honour's ultimate finding must be taken to have been the "reckless speed" at which the appellant was driving and which was variously described by His Honour by the use of the expressions previously mentioned. I would be very loath to treat His Honour's ultimate finding in these circumstances as tantamount to a finding that the appellant had been guilty of criminal negligence. It may be that His Honour had in mind the standard so frequently adverted to but I do not think that his finding, as he stated it, can be equated to the proof which is required in criminal cases. The classic definition of criminal negligence is said to be that contained in Bateman's Case (28 Cox 33) where it was said: "To support an indictment for manslaughter the prosecution must prove the matters necessary to establish civil liability (except pecuniary loss), and, in addition must satisfy the jury that the negligence or incompetence of the accused went beyond a mere

matter of compensation and showed such disregard for the life and safety of others as to amount to a crime against the State and conduct deserving punishment". (See also R. -v- Gunter (21 S.R.(N.S.W.) 282); R. -v- Newell (27 S.R.(N.S.W.)274); Reg. -v- Wood (1957 S.R.(N.S.W.)638); and Akerele -v- The King (1943 A.C.255) and cases there mentioned). It may have been well open, I think, for the learned Chief Justice to have found that the appellant had been criminally negligent but it does not seem to me, even when regard is paid to his reference to R.-v- Scarth (supra), that he did, in fact, make such a finding. Further in order to justify the conviction it was necessary that His Honour should have been satisfied beyond reasonable doubt that the appellant's conduct amounted to criminal negligence. That it was necessary that he should have been so satisfied both as to matters of fact and the degree of negligence which the proved facts established is beyond doubt in spite of cases such as R. -v- Cavendish (8 I.R. C.L.178); Wittig -v- The King (1919 S.A. S.R.181 and 27 C.L.R.158); and Moore -v- The King (1926 S.A. S.R.52). That this is so is clearly implicit in Callaghan -v- The Queen (supra) and in accordance with the decision in Woolmington -v- The Director of Public Prosecutions (1935 A.C.462). But whether His Honour was so satisfied or not does not appear; he merely seems to have considered whether upon a balance of evidence there had been a breach on the part of the appellant of the duty which, according to the view which he expressed concerning the meaning of s.289, that section created.

In the circumstances I think the conviction should not be allowed to stand and that there should be an order for a new trial.

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THE QUEEN.

JUDGMENT

WINDEYER, J.

THE QUEEN.

In my opinion this appeal should be dismissed. I have come to that opinion with some hesitation, caused by the manner in which His Honour, the learned trial judge, expressed his reasons for his decision. He stated the relevant facts as he found them clearly enough. In this part of his judgment he said :

"Between Port Moresby and Boroko there are several places such as the Koki market, Badili and the stretch along which this accident occurred, where at most times, and especially during the week-end, one encounters large numbers of native pedestrians. There are no footpaths for them to walk on, and they normally walk along the gravel edge of the roadway off the bitumen. In a few places there are foot tracks.

A very large number of native people are not trained to traffic conditions and they have a very well-known propensity for walking in the path of an on-coming vehicle without looking and without giving the traffic conditions prevailing any apparent thought. In consequence they frequently walk in amongst moving traffic, and anybody driving a vehicle in the Port Moresby area should be well aware of this.

The fact that a group of pedestrians was apparently waiting at the side of the road would be a presumptive indication that they were aware of the dangers of traffic and would justify a driver in travelling past them at a reasonable rate, provided that he kept them under close observation in the case of a sudden movement of precisely the kind that happened here. To drive past any such group of pedestrians at high speed is, in my opinion, to create a very serious risk."

It was in the light of these facts that His Honour, who was well acquainted with the locality and the ways of the natives there, addressed to himself the question "Was the accused travelling at such a speed or otherwise so unprepared to meet the situation which confronted him that his negligence was a cause of the collision?" He ultimately held, and there was in my view evidence on which he could hold, that the accused "failed, by a combination of reckless speed and failure to observe an actual danger when it clearly arose, to discharge his duty (scil. the duty of care created by

s.289)". His Honour had earlier discussed the provisions of the Code relating to homicide and the impact of s.23 upon those provisions. His observations concerning s.23 of the Criminal Code were I think, with respect to him, irrelevant and erroneous. But what His Honour said was said, it seems, having regard to the arguments he had heard. The argument for the defence apparently proceeded on the basis that s.23 was in some way applicable and into that argument there were introduced some involved and abstract propositions concerning causation and foreseeability.

But it is not as if what His Honour said was a summing up to a jury. The irrelevant matter aside, he did, I think, apply the correct test to the facts as he found them. He did ask himself, Was the death of the deceased caused by criminal negligence on the part of the accused? His reference to R. -v- Scarth (1945) St. R. Qd.38 shows that he had correctly in mind the criminal standard of negligence. And this is borne out by his reference to the "element of reckless disregard for the life and safety of other persons". This demonstrates his correct appreciation of the standard of negligence necessary to create criminal responsibility as having a constituent element additional to the element of reasonable care on which liability for negligence in a civil action depends. As to His Honour's statement, compressed and confusing I agree, about an obligation to avoid dangers that are not foreseeable: It can, standing by itself, be justly criticized. But, when read with the rest of what he said, what he was seeking to express was, I think, that the situation was one in which a prudent man would be prepared for sudden, and in that sense unexpected, occurrences. It seems to me that his language reveals that his view was that a prudent driver would have had well in mind the probability that a person might unpredictably, or unexpectedly, or "unforeseeably", step into the roadway; and would have conducted himself accordingly; and that if, in reckless disregard of that risk, the accused drove at a speed and in a manner that made it impossible for him to meet the situation when it in fact arose, then he might be held guilty of criminal negligence. I would not interfere with His Honour's decision.

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JUDGMENT

OWEN, J.

EVGENIOU

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THE QUEEN

The appellant was convicted of the manslaughter of one Besiaro who was killed when he and a motor-car driven by the appellant came into collision on the Hubert Murray Highway near Port Moresby. Section 289 of the Criminal Code in force in the Territory imposes upon every person who has under his control anything 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, the duty to use reasonable care and take reasonable precautions to avoid such danger. The charge of manslaughter was based upon an alleged breach of the duty of care imposed by this section.

It is plain from the decisions of this Court in Callaghan -v- The Queen 87 C.L.R.115 and of the Queensland Court of Criminal Appeal in R. -v- Scarth (1945) Q.S.R.38 that in such a case it must be proved that the person accused was guilty of a high degree of negligence. He must be shown to have acted with such a reckless disregard for the lives or safety of others as to make his conduct "a crime against the State and conduct deserving punishment": R. -v- Bateman 19 C.A.R.8. It is equally clear from Callaghan's Case (supra) that on the trial of a person for manslaughter based upon a breach of the duty imposed by s.289, s.23 which provides that :

"Subject to the express provisions of this 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",

has no application.

Unfortunately the trial proceeded upon the basis that s.23 was the primary matter for consideration and this led to a great deal of confusion.

It is necessary, I think, to state in some detail the two alternative sets of reasons given by His Honour for convicting the appellant. He began by recounting the evidence of some of the events leading up to the collision and went on: "Thus the deceased stepped right into the path of the car driven by the accused, and was struck with very great violence ...". He referred then to evidence given by a witness named Martyn, who was the driver of a car travelling in an opposite direction to that in which the appellant was driving. Martyn had said that, as the two cars passed one another - and this must have been a fraction of time before the collision - he "heard a loud rush of air of such a volume as to make him turn his head quickly to the right to see the car". Of this evidence His Honour said that it, together with certain marks on the roadway, satisfied him beyond doubt that the appellant was travelling at "a relatively high speed". He was, he said, "unable to fix the speed, but the indications are that it was very considerably in excess of the official 30-mile per hour speed limit in that area". He referred next to certain other evidence of "rather erratic driving by the accused" some considerable distance back from the scene of the collision and, after saying that he did not attach much weight to it, went on -

"I gained more support for the finding of undue speed from the evidence given by the accused himself. Even allowing for his difficulty in expressing himself in what is to him really a foreign language, he gave a very strong impression of having no idea of what was going on at the time of the collision, and of a man whose handling of the car was confused either by inadequate observation of his surroundings as he passed or by his apparent clumsiness in handling the car".

The transcript record of the appellant's evidence seems to me to be incapable of supporting a finding of "undue speed". It is a confused account of the events but it is, at least, clear from it that he was insisting - truthfully or otherwise - that the speed at which he was driving was not excessive in the circumstances. His Honour continued :

"The defence to the charge of manslaughter arises under Section 23 of the Criminal Code and constitutes the defence of accident. In cases of this kind, careful scrutiny of the circumstances is called for,

for it is clear that the deceased stepped forward right into the path of danger. At the time when the accused in fact became aware of the danger, he apparently had no hope of avoiding the deceased and struck him at a speed high enough to cause quite extensive damage to the car... It may well be that the deceased himself contributed by his own negligence to the accident, or on the other hand, he may have been misled by the unusually high speed at which the car was travelling. ... Considerations of this kind may be of importance in a civil case, but they could not be resolved precisely on the available evidence, even if they now fall for determination. In my opinion they do not, for regardless of whether the deceased was negligent in the circumstances, the real question is one of causation. In other words, was the accused travelling at such a speed or otherwise so unprepared to meet the situation which confronted him that his negligence was a cause of the collision. This depends again on the question of foreseeability, for criminal responsibility attaches notwithstanding Section 23 if the accused ran into a situation which was foreseeable as creating a substantial risk of death for the deceased. As soon as such a risk was apparent to a person in the position of the accused, it was his duty to reduce his speed, observe the situation more closely, and if necessary stop his car so as to avoid the risk of killing the deceased.

In the circumstances of this case, was it foreseeable to the accused that a native pedestrian, standing on the side of the road and apparently waiting for the traffic to clear, would suddenly step off into the path of an on-coming car. If such a risk were not apparent to a person in the position of the accused, the result would be an accident, and he would not be criminally responsible, but if it were apparent and foreseeable, then he was bound to take the appropriate action, and failed to do so.

I have no substantial evidence upon which to determine this question of foreseeability in the circumstances existing at the time of the collision. I think that it is proper for me to determine that question by taking judicial notice of the circumstances which normally prevail in that area. There is only one major Highway running through Port Moresby and it runs through the centre of the town and out past Boroko, which is a large suburb and the only really substantial residential area outside Port Moresby. Between Port Moresby and Boroko there are several places such as the Koki market, Badili, and the stretch along which this accident occurred, where at most times, and especially during the week-end, one encounters large numbers of native pedestrians. There are no footpaths for them to walk on, and they normally walk along the gravel edge of the roadway off the bitumen. In a few places there are foot tracks.

A very large number of native people are not trained to traffic conditions and they have a very well-known propensity for walking in the path of an on-coming vehicle without looking and without giving the traffic conditions prevailing any apparent thought. In consequence they frequently walk in amongst moving traffic, and anybody driving a vehicle in the Port Moresby area should be well aware of this.

The fact that a group of pedestrians was apparently waiting at the side of the road would be a presumptive indication that they were aware of the dangers of traffic and would justify a driver in travelling past them at a reasonable rate, provided that he kept them under close observation in the case of a sudden movement of precisely the kind that happened here. To drive past any such group of pedestrians at high speed is, in my opinion, to create a very serious risk.

A person, even travelling within the official speed limit, would be wise to act as Mr. Martyn did in driving past at reduced speed and keeping a very careful watch. To drive past at a considerably higher speed is to bring about the very kind of risk which occurred here.

For this reason I think that the actions of the accused and the manner in which he drove the car were the cause of a risk which should have been obvious to him, and that therefore the event which occurred was not an accident within the meaning of Section 23 of the Criminal Code, and that he is guilty of manslaughter in consequence of his actions."

It will be seen that up to this stage His Honour had made no finding of criminal negligence against the appellant and without such a finding the conclusion that the appellant was guilty of manslaughter cannot be supported. That the learned trial judge had not directed his mind to the vital question is apparent from the opening words of the second part of His Honour's reasons for convicting the appellant to which reference must now be made. He said :

"Although, on my view of the facts, the question of negligence does not arise, I will deal with it upon the footing that contrary to my view of the matter, the circumstances of this case rendered the event of death an accident within the meaning of Section 23. Upon this footing the accused would not be criminally responsible for the event which happened unless he failed to discharge the duty imposed upon him by Section 289 of the

Criminal Code to take due care in the driving of his motor-car, it being in the circumstances an object under his control coming within the terms of Section 289".

After referring to evidence suggesting that the deceased had "unforeseeably stepped on to the road in circumstances creating a situation in which the negligence of the accused was not a contributing cause," he went on to say :

"On such a view the accused would have hit the deceased at whatever speed he might have been travelling. Such a view in the present case is inconsistent with my finding that it ought to have been apparent to a person in the position of the accused that a situation of this kind might arise, and that he should have reduced speed as soon as the danger became apparent to a person in his position. Nevertheless, dealing with the case on the assumption that this was an accident within the scope of Section 23, I must treat the facts as revealing that it was not foreseeable to a person in the position of the accused as he was approaching the pedestrians that one of them might step forward into the path of his car. Upon such a view, the accused was taken completely by surprise and it becomes a question of fact at what point of time he had actual warning of the movements of the deceased so that he was not required to predict them but merely to observe them and act according to what he saw or ought to have seen.

Section 289, which creates the duty expressly made applicable to accidents arising within the scope of Section 23, requires that reasonable care and precautions must be taken to avoid such danger (and I say again to avoid dangers which in fact arise but which were not foreseeable). In this case, the standard imposed by the Section is much lower than the obligation to avoid causing death which arises where the event is foreseeable and therefore not an accident. It is a duty to take reasonable care and precautions, but the standard of care as interpreted by R. -v- Scarth (1945) St.R.Q. p.38 and other cases to which I was referred in argument and which have previously been followed by this Court is one the breach of which involves an element of reckless disregard for the life and safety of other persons.

On the evidence it appears to me to be clear that at the point at which the car driven by the accused passed the car driven by Mr. Martyn in the opposite direction, there was ample time for the accused to stop. As soon as Mr. Martyn's car passed, the deceased was walking across the roadway in the full view of the accused, and even if, for some reason, the accused could not or did not see this movement until the point at which

he was passing Mr. Martyn's car, he still had ample time to pull up at a speed of anything like 30 miles per hour. Even, therefore, on this most favourable view of the duty owed by the accused under Section 289, he failed, by a combination of reckless speed and failure to observe an actual danger when it clearly arose, to discharge his duty, and on that ground also the accused is guilty of manslaughter."

With respect, I would make four comments on this part of His Honour's reasons. In the first place s.289 does not impose a duty to take care to avoid dangers which are unforeseeable and in this respect His Honour misdirected himself. In the second place, and on the assumption that "the event of death" was an accident "within the meaning of s.23", criminal responsibility would not attach. In the third place, I think it understates the true legal position to say, on a charge of manslaughter, that a breach of the duty imposed by s.289 involves "an element" of reckless disregard for the life and safety of other persons. What His Honour described as "an element" is the very essence of the offence. And, finally, on the assumption upon which the reasoning proceeds, namely that the act of the deceased in stepping forward into the path of the car was an unforeseeable occurrence, His Honour does not appear to have given consideration to the question whether the speed at which the car was being driven up to the moment of this unforeseeable occurrence was such as to establish a case of criminal negligence. It is not to the point to say that if the appellant had been travelling at 30 miles per hour or less he could have pulled up in time to avoid the collision when, in fact, he was travelling at a higher speed when the supposedly unforeseeable event happened.

It may well be that if s.23 had not been introduced into the case and if the real issue had been considered and decided the appellant would have been properly convicted. On that I express no opinion. But, with all respect to my brothers who think otherwise, I am of opinion that the trial miscarried in material respects. I think, therefore, that the appeal should be allowed, the conviction set aside and a new trial ordered.

I would only add one further matter. It

appears that at the close of the Crown case, counsel for the defence submitted that there was no case to answer. His Honour refused to rule on the submission at that stage, saying that the defence "must elect either to call evidence or not". With all respect this is not the proper practice on a criminal trial. The Crown had, however, led evidence sufficient to justify a verdict of manslaughter and the submission would have been rightly rejected. In that event, no doubt, the appellant would have given the evidence in which His Honour found support for the conclusion that he had been driving at an "undue speed".