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IN THE SUPREME COURT )  
OF THE TERRITORY OF )  
PAPUA AND NEW GUINEA. )

CORAM : FROST, J.

R. v. ELLY

REASONS FOR JUDGMENT.

rt Moresby,  
th June, 1965.

The accused man is charged that on 9/7/1964 in the Territory of Papua and New Guinea he unlawfully killed one, MARI-TURNI. The substance of the charge is that on that day the accused so negligently drove a motor car that it came into collision with deceased, a young woman of 20, and thereby caused her death.

The prosecution is brought under the Criminal Code, Section 289, which provides :-

"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."

It has been established that negligence sufficient to meet the standard of civil liability is not enough to constitute a breach of Section 289; there must be negligence according to the standard of the criminal law, which may be described shortly as recklessness involving grave moral guilt. Evgeniou v. Reg. 37 A.L.J. R 508, per McTiernan and Menzies, JJ. at p. 509. "He must be shown to have acted with such a reckless disregard for the lives and safety of others as to make his conduct

a crime against the state and conduct deserving punishment." R. v. Bateman 19 App. R. 8 cited Owen, J. (ibid) page 513. Thus a high degree of negligence must be proved by the Crown, and, of course, it is necessary that proof of criminal negligence should be established beyond reasonable doubt.

The first witness called by the Crown was Sub-Inspector Roach who on Thursday the 9th July, 1964, at 12.30 p.m., went to inspect the scene of the accident. He went to Wards' Road, which is a road leading off the Hubert Murray Highway to the west, and there nearly a mile from the highway saw a white Holden Sedan off the bitumen. The roadway at this point consisted of a bitumen strip about 20 feet wide running straight but on a definite downhill slope and in a direction approximately north-west/south-east. On the eastern side of the bitumen there was a strip of gravel about 8 or 9 feet wide. He saw the Holden Sedan to the north of the junction of Maple Street, which runs into Wards' Road from the east. It was up against a small gum tree on the eastern side of Wards' Road about 40 feet from the edge of the bitumen. To the rear and slightly behind the Holden was the body of a female native apparently dead, about 7 feet from the car. He spoke to a group of natives who were standing about the body asking in English who was the driver of the car. The accused man then came forward and he was then asked some questions by the Inspector. He told the Inspector that he was travelling to Hohola, that is in a northern direction; in front of him was a 7-ton truck. He was travelling at about 35 m.p.h. He said he was travelling on the left side of the road. "Then I tried to overtake the truck. The truck then moved up into the middle of the road. I thought the truck was going to turn right into Maple Street." The Inspector then asked, "Where did the truck go?" The accused man said, "He kept on going. When I thought he was going to turn in, then I hit my brakes, when I hit my brakes I skidded on to the loose gravel." (indicating the eastern side of the road). "When I skidded I saw the man and woman standing there at the bus stop and all my mind went out of conscious." He said he had a black-out and all his mind went blank after that. The Inspector asked did the car carry the woman all the way to where she was near the car. The accused man said, "Yes, when



I hit her she went up on the bonnet and I carried her across the grass."

The accused was then asked to point out where it was that he hit the woman. He went to a position near and in line with the power pole marked 5059, and he indicated a spot 6 feet from the eastern edge of the bitumen and in line with the power pole. The accused then said, "The man and woman were at this spot" (indicating the spot) - "They both ran back" and he indicated a position about 12 feet further back. The Inspector saw that this position was near the middle of the swath cut through the grass, apparently by the car. It was kunai grass about 4' 6" high and stunted shubbery, and from there to the bus stop and the Holden a swath of about 10 feet was flattened out, the grass being thrown out and down.

The accused man was then asked to go back along the road and indicate to the Inspector the position where he first braked and started to skid. The accused man then went back on to Wards' Road about opposite the doorway of the concrete house marked 25-12B, and there on the roadway the Inspector saw a faint tyre mark on the bitumen which started 5 feet from the eastern edge of the bitumen and ran diagonally to the northern edge for 26 feet, then off the bitumen and on the gravel shoulder. The accused said, "That is my mark". Two marks then commenced and ran along the gravel shoulder for a distance of about 95 feet to the concrete kerb of Maple Street. This concrete kerb showed a rubber mark along the top surface and apparently fresh scratchings on its inner face. The marks were almost parallel to the kerb and then they veered away from the road. The kerb was very sharp on the inside. It was about 8" high above ground level.

From the kerb the right hand tyre mark continued on about 12" wide where it had previously been fairly narrow, and being wide and fluffy from this point it seemed to the Inspector that it was made by a flat tyre. The marks continued 160 feet to the stub of the bus stop

part of which was found nearby apparently freshly broken. The accused was present when all these measurements were made and indeed he assisted with them. From the bus stop the Inspector went on a further 16 feet to where the accused had previously indicated the point of impact. The marks of the car continued on for a further 70 feet before coming to rest up against a small gum tree. This placed the body 63 feet from the point of impact. The Inspector's measurements showed that it was 367 feet from the tyre mark on the bitumen to the car and 297 feet from that tyre mark to the estimated point of impact. The deceased woman's body was found 37 feet from the bitumen. The front right hand tyre of the Holden car was found to be badly gashed and flattened.

The Inspector then, after cautioning the accused man, again asked for his account and the accused man said, "I put the brake on when I saw the truck move up to the middle of the road. Then I hit the gutter. After that I just hung on to the steering and forgot about the brake." The accused man then left the scene.

The Inspector then examined the front tyre and the brake lining and found them to be intact. However, when checking the front brake pedal he found that on the first pump the pedal went straight to the floor, and it took four attempts to get the brake to a hard position. When he first pushed it to the floor there was no pressure, but on the fourth pedal it seemed normal. He arranged for photographs to be taken and these were duly submitted in evidence (Exhibit "A"). Later that day the accused man called at the Police Station and was further interrogated by the Inspector, but after argument and hearing the accused on the voire dire I decided that although the statement was voluntarily made, I should exercise my discretion and not admit this evidence.

During the hearing of the voire dire certain questions were put to the accused man in cross-examination 134



and when the learned Crown Prosecutor stated that he intended to lead evidence of the answers, asking me to receive them as part of the Crown case, and Mr. Germain for the accused objected to it being received, I upheld this objection. The view I took was that the evidence was prejudicial to the accused having regard to its probative value. I expressly refrained from deciding the question whether the evidence objected to was admissible or not having regard to the fact that it related to evidence given on the voire dire - see R. v. Monks (1955) Tas. L.R.

Inspector Roach further gave evidence that there was a speed restriction of 30 m.p.h. on Wards' Road, although there was no sign on the roadway. He showed the measurements and observations he made later on a plan which was put in as Exhibit "B".

In cross-examination he said that the mark on the bitumen about 26 feet long was even and consistent but faint. At this time he could see nothing on the gravel. Asked whether it was a brake mark he expressed the opinion that it was a tyre mark caused when the car swerved and the driver was at the front wheel.

Now the Inspector was not qualified to give evidence upon the nature of the marks and even although this question was elicited in cross-examination, I consider that I should not act on the Inspector's opinion as to the cause of the marks. In answer to a question put by me the Inspector said that its appearance was not inconsistent with it being a brake mark, but, in his opinion, it was not a fierce application of a brake.

The Inspector described the parallel marks on the gravel as being of even consistency for their whole length, and there was no dragging on the gravel or any sign of the marks which would suggest that the brakes had been applied and then released.

Two witnesses were called who were by-standers and saw the car which was driven by the accused strike the

deceased woman. BASAI-AWATI, the deceased woman's husband, said that he and the deceased, his wife, were standing at the bus stop when he saw the accused man driving his car towards them at a fast speed, and that they had no time to get away although they tried to avoid the car. The car hit his wife and at the same time threw the witness off his feet. He saw the car coming from the direction of the Hubert Murray Highway but as he was looking in the opposite direction for a bus, he only saw the car when he turned and it was very close to him. The other by-stander who gave evidence was a woman, LARI-FAI, who was also standing near the bus stop, but apart from the fact that the vehicle was coming from the direction of the Hubert Murray Highway towards Hohola, and that the vehicle was off the bitumen, she gave no evidence upon which I could act as to the manner in which the car was being driven.

Up to this point having regard to the admissions made by the accused man at the scene of the accident immediately after the collision, I was satisfied that the accused man was driving the Holden along Wards' Road in a northerly direction, that just north of Silkwood Street he was on the right side of the roadway, that the car then left the roadway travelling about 95 feet on the gravel before it struck the kerb and then travelled a further distance about 176 feet right off the bitumen roadway, and there on the grass verge struck the deceased, having then sufficient momentum to carry her 63 feet before coming to rest against a small gum tree.

A doctor was called who gave evidence as to the deceased woman's injuries and that they were consistent with her being injured by a motor car, and that those injuries caused her death. It is a sad fact that the deceased woman, about 20 years of age, at the time of her death was about six months pregnant.

The Crown called a witness, John Raymond Hawkins, an experienced motor mechanic to show that the vehicle was at the time of the accident not in a roadworthy condition.



His evidence was that on the 10th July as a result of a request from the Police, he inspected the Holden Sedan car. First of all he checked the steering and he found the king pins which keep the wheels in proper position, to be worn, that the brake link ends had been fitted in incorrectly and that there were parts missing out of the tyre rod of the steering, that the idler arm which holds the tyre rod in position was badly worn and that, in fact, the king pins and the idler arm were not serviceable. He explained the mechanism of these parts and said that as a consequence of the king pins being worn to the extent that he described the steering would be extensively affected and that the wheel would get a wheel wobble. After the car went at about 28 to 30 m.p.h., the wheel wobble would develop and be so great that it would be hard to steer.

Further the steering was loose and indeed upon testing it he found that it was so loose that it would take a turn of three-quarters of the wheel before the wheel would answer. The king pins were so worn that the wheel wobble which would develop at a speed of 28 to 30 m.p.h. was such that it would be really necessary to stop the vehicle, so hard was it to steer. It would be impracticable for it to be steered back on to another course.

Then he examined the braking mechanism. He found that the hand-brake would not work; there was no contact between the brake shoes and the brake linings, as the linings and the shoes had not been adjusted, and this was a long standing condition.

When he examined the foot brake he found that by reason of this lack of adjustment when he depressed the brake pedal on the first occasion it had no effect upon the brakes, nor again on the second application, but on the third application he found that the brake pedal had about 3" of pressure through which it could be applied, and on the fourth attempt he had a good brake. Thus on depressing the brake pedal on the third occasion there was some contact between the brake shoes and the linings

and on the fourth attempt there was a good braking effect. This condition was due to the fact that the brakes had not been adjusted. It was a long standing condition. ~~After~~ By pumping the brake, some effective brake could be achieved. This condition would only last for about three minutes. Naturally it would be impracticable to keep driving the car and keep pumping the brake. His conclusion was that by reason of the defects of the braking and steering mechanisms, the vehicle was not roadworthy and it was unsafe to drive. He said that the defects in the steering and the brakes would be apparent to a normal driver. The steering defects would be at once apparent; naturally the driver would have to apply the brakes first before he would find the brakes defective. He further said that the condition of the steering or of the brakes could not have been caused in the accident.

In answering questions put by me he stated that the steering and the suspension were down on the front right hand side so that if the brake was applied at high speeds of from 40 to 45 m.p.h., it would "dig in" on that side and you would get a mark on the roadway only on that side.

Mr. Germain submitted that there was no case to answer, but I ruled against him and so he called the accused as his only witness.

In evidence the accused said that he was employed by W.N. Johns Ltd. in the garage workshop. His duties were to check the tyres and oil. After leaving school at the age of 16 he was at home until he was 18 years of age. He then got a driver's licence and obtained employment with the Administration Transport as a driver. He stayed there for ten months and then went to the Department of Works, also as a driver and was there for eight or nine months. After being out of employment for about two years, on about 6th March, 1963, he started work at Johns. He worked in the workshop under the supervision of a foreman mechanic, apparently doing some

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mechanical work, but he was also sent outside driving. He had not driven the car in question for about ten months before the date of the accident. He had then stripped the front suspension and put it together again. At Johns there was no system of regular maintenance of vehicles. Repairs were done when cars or trucks broke down.

Being questioned as to his knowledge of the brakes at the time of the accident he said that he did not know what the state of the brakes were, but he had heard from others about the brakes. The boys had told him that they needed adjustment.

On the day of the accident there was no one in the workshop and he was supposed to go and check a steel roller, so he decided to check the steel roller and then drive on the other mile or so to his house for his lunch. The Holden car in question was the only vehicle in the shop at the time so he used it. He set out at about 11.55 a.m. from Johns' premises at Six Mile, and he said that he had no trouble driving the car before the accident. He could not remember if there was anything unusual about it.

Coming to the time when the accident occurred, he said he was driving behind a 7-ton truck; they were both doing the same speed - about 20 to 30 m.p.h. - the steering was not very bad at that time but there was a bit of play on the steering. He then tried to overtake the truck, going around it. He went on to the right hand side of the road keeping to the bitumen surface. He was accelerating to overtake the truck but the car took its time to pick up. As he came down nearly level with the cabin the truck came and swung to the middle of the road. He said, "I then hit my brakes. I was already on the loose gravel so I skidded on to the gutter. It was 6 to 8" high where I hit the gutter. I then heard a great blow up and after that I could not control the steering, and I did not know what I was doing. I was unconscious after that. I hung on to the steering, tried to turn left but it was loose gravel and the weight of the car pushed the car to the bus stop. I did not know I hit the woman."

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He also stated that when he got near the middle of the truck the steering was shaking. It came suddenly. It was loose as if it had no steering on it. When the truck shifted to the middle, the road ahead was very clear.

He stated that after the accident when he had the conversation with Sub-Inspector Roach and he pointed out the place where he started to brake, he said he was starting to overtake before that. And when he started to overtake he did not see any people on the road. He said he could not remember whether he thought the car was safe to drive or not. In cross-examination he said that he had a black-out after the car struck the kerb. When cross-examined as to his knowledge of the brakes he repeated that he had been told that the brakes needed adjustment, and then qualified it, saying that his information was that a little bit of adjustment was required. He was then cross-examined as to his driving from Six Mile to the scene of the accident. He stated that he did not try the hand brake, that as he moved off he noticed there was play at the steering wheel, which was not very bad, that he did not apply the brakes the whole way before the accident. He stated that he put the car, when driving down hill, from top gear into second gear, once after passing the premises of the A.B.C. and the other as he approached the culvert at Four Mile. He said that he did not stop as he turned right into Wards' Road from the Hubert Murray Highway.

As to his movements at the time of the accident, he said that he went faster to overtake the vehicle but he did not know it was 50 m.p.h., and he said he was in a hurry to get to the steel roller. When he was passing the truck, the steering was shaking and he was off the bitumen. In answer to a question put by me he said that he tried to steer back on to the roadway, but that he could not control the steering.

At the conclusion of the evidence I was asked by the Crown Prosecutor to view the scene of the accident,



and Mr. Germain not objecting I agreed to do this. I then decided that I would be assisted by viewing the workshop at Johns' premises and also the journey made by the accused from Six Mile to the scene of the accident, and both views were held.

I first went to the premises of Johns at Six Mile, and found that the workshop to which the accused referred was un-roofed. He pointed out the position of the car when he got into it as being not in the workshop area but on a gravel track about 30 yards from the gate. After he had entered the car at this position, he would have to drive 30 yards to the gate and then turn left into the Hubert Murray Highway. This is a two lane highway coming from Jackson's Airport. To the right there was a short hill and as this road commonly carried regular traffic the driver would certainly have to look to the right before entering the highway, and it would be unusual, having regard to the lack of vision to the right, if he did not have to stop. The highway then proceeded for about 400 yards to a right angle turn on the right at an intersection. From here the road wound up hill through open country with a number of large double line strips preventing overtaking. On reaching the top of the hill after a number of bends the road again took a number of bends downhill passing the A.B.C. premises and then there is a long downhill strip of over half a mile, to a place called Four Mile.

The accused man pointed out the two places where he stated he changed into second gear and it was significant to me that the places he pointed out were, first, a short distance downhill from the top, the other about 400 yards or so at the end of the hill at the culvert. The downhill portion of the road would not require a driver normally to change down hill. Almost from the A.B.C. the highway is flanked by houses on one side, and coming to the culvert at Four Mile there is a strip of road where there are commercial premises, shops and business houses on both sides of the road, and then the highway passes through Boroko still being a two lane highway and again passing houses and commercial premises.

At the intersection of Wards' Road the accused had to make a right hand turn into that road and then travel up-hill for a short distance before travelling on a steady downhill slope for about 600 yards prior to reaching the scene of the accident. Wards' Road is also a two lane bitumen highway with gravel shoulders on each side and coming to the scene of the accident with houses on both sides of the road but some distance from the bitumen.

The total distance from the Johns' premises to the scene of the accident was between 3 and 4 miles. The accused man was then recalled and repeated on oath the information which had given me during the view. He also stated that there was some traffic on the road but it was far away from him, and that he did not pass any vehicle all the way, and that there was no traffic about at Four Mile. He then qualified his previous evidence as to his information about the brakes to state that he was told about six months before the accident that the brakes needed adjustment. He stated before coming out of Johns' premises, whereas it was true that the gateway was in a hollow, that he looked both to the right and the left and there being no traffic, the car being in low gear that there was no need for him to stop.

On this evidence Mr. Germain submitted that it was for the Crown to satisfy me beyond reasonable doubt of the high degree of criminal negligence which the law requires. He asked me to accept the evidence of the accused man, particularly having regard to the fact that a year had elapsed since the accident and the inquest was held only in the month preceding the trial. He submitted that I should consider the defective condition of the vehicle as being subject to the state of knowledge of the accused, and that the only thing that he was aware of was that there had been a defect in the brakes and that was some months before. He conceded that it was open to me to disbelieve the accused and find that he had touched the brakes and so discovered that he had no effective brakes. He submitted that, on the evidence, the mark on the roadway was consistent with the brake working to some extent, that prior to the accident he may



have found that by pumping the brake in a certain way he could get a sufficient use of the brake; that this would have been enough brake for him for normal use on the roadway but for an emergency the brake was not sufficient, particularly when with a dip to the right of the road, he was left with not much room to manoeuvre. He submitted that I should accept the accused's statement that there was some play in the steering but that it was not to the extent indicated by Mr. Hawkins. He further submitted that when the accused was following the truck he did not suffer any wheel wobble when going 20 to 30 m.p.h. It was only when the truck started to go to the middle of the road and he tried to pass that the accused man got the wheel wobble and that this was unexpected.

Mr. Germain further submitted that the marks were consistent with the car going at 35 m.p.h. Assuming that it was going at 35 m.p.h. and there was insufficient braking power, it was not unreasonable for the accused to travel at that speed. He submitted that the Crown could not find that the accused man was negligent in that sense. The accused panicked. If he had been calm and in control he could have brought the car to a stop by crash change of the gears, but I should not find that this was due to criminal negligence - that the accused man, unaware of the state of the steering and the brakes, was faced with an emergency and when he panicked, found himself unable to take any action either to steer back on to the road or to stop the car. His driving should not be considered to be criminally negligent. He finally submitted that even if the accused knew the brakes and steering were defective, he was not criminally negligent to continue driving. It was a matter of degree as to the state of the steering and the brakes, and on the evidence I should not be satisfied that the condition of the steering and the brakes, having regard to the accused's knowledge of them, was such as to render it criminally negligent for the accused man to continue to drive.

Mr. Croft submitted that I should make the following findings of fact :-

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- (1) The car was in fact without effective brake power.
- (2) The car was in fact without effective steering and that a three-quarter turn of the wheel was required before the steering became effective.
- (3) These were matters which any reasonably competent driver would be aware of, having regard to Hawkins' evidence.
- (4) The accused had a mechanical knowledge and was a driver with prior experience.
- (5) The car was driven and came into contact with the deceased woman and therefore caused her death.
- (6) That the car travelled the distance and the course demonstrated by Inspector Roach.

He then made the following submissions - first as to the accused's state of knowledge; that the accused knew that the brakes needed adjustment by reason of the information which he had received, that I should not accept his later evidence that this information was received six months prior to the accident, and that I should draw the inference that having driven the vehicle on to the main road and along the journey he took, having regard to the traffic normally to be found upon the roadway, that he must have touched the brakes and thus discovered the defect, and that the reason why he changed down on the hill was because he was aware of the defective brakes and that he could only control the vehicle by changing down to a lower gear. The accused admitted that he was aware that there was some play in the steering. He finally submitted that having regard to the fact that it was a two lane highway and the normal amount of traffic to be found on it at lunchtime, from this also I should draw the inference, beyond reasonable doubt, that the accused touched the brake.



He went on to submit that the accused had no control of the car, that he went to pass the truck in spite of the car's defective condition, and that he was therefore responsible for any accident that happened. From the time he started to overtake the truck, having got on to the wrong side of the road, he should have slowed down or turned back to the bitumen but because of the condition of the vehicle he could not do so. He should not have tried to overtake at all or go on to the wrong side because of the defective state of the vehicle and also because of the intersecting roads and the nearby houses. He submitted that because of the distance and course travelled by the car he was travelling at excessive speed.

Finally, he relied upon the following particulars of negligence.

- (1) Driving the car on the roadway, whilst aware of its defects both from prior information and from the journey along which he had driven the vehicle.
- (2) Driving at excessive speed having regard to the condition of the car.
- (3) Attempting to overtake the truck having regard to the condition of the car and the likelihood of pedestrians being found along the road.

Having heard the evidence of the witnesses I accept Sub-Inspector Roach and Hawkins as witnesses of truth. I was much impressed by both witnesses. However, I was not impressed with the accused and I cannot accept his evidence. In particular I do not accept his evidence that he was unaware of the braking defects of the car, or that he did not apply his brakes on the journey before the accident. It is significant that he himself admitted that he was aware that there was a bit of play in the steering, and when asked about the brakes he admitted that he had been told that they needed adjustment. I do not

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accept his evidence that this information was received six months before. I am unable to accept his evidence as to the state of the traffic, that he passed no vehicle and there was no traffic about at Four Mile and that the only traffic was ahead of him. Even if the traffic was lighter than the normal lunch hour traffic on the highway, of which I cannot but be aware, it would have caused him on occasions to slow down. Indeed, I do not believe his story that he was on his way to visit the steel roller, I consider he took the car to go home to lunch.

I was much assisted by the view. A view is part of the evidence; it is in substitution for or supplemental to plans, photographs and the like. Karamat v. The Queen (1956) App. Cas. 256 - "The rule is that a view is for the purpose of enabling the tribunal to understand the questions that are being raised, to follow the evidence and to apply it, but not to put the result of the view in place of evidence." Per Davidson, J. Unsted v. Unsted, (1944) S.R., N.S.W. 495, cited Scott v. Numurkah Corporation, 91 C.L.R. 300 at page 313.

I have stated that I do not accept the accused's statement that he did not apply the brakes on the journey prior to the accident and as to the state of traffic. The view helped me to follow this evidence and to apply it and having been over the journey myself, and having been myself unimpressed by him as a witness, I am satisfied beyond reasonable doubt that he must have applied the brake on that journey and then discovered its defective condition. I consider that the reason he changed down on the long hill at Four Mile was because he had no efficient brake appliances and he was aware of it, and so found it necessary to change down into second gear. He admitted that he was aware that the steering had some play in it, but, as I accept Hawkins evidence, I am satisfied that he was aware that the steering was as loose as Hawkins described. However, I cannot reject his statement to Roach that the reason why he came on to the wrong side of the roadway was to overtake the truck, that the truck moved up on to the middle of the road, when he thought it would turn right, so that he then "hit his brakes". But I am unable to accept his



statement either to Roach or in evidence that when he hit his brakes he skidded. There was no real diminution in the speed of the vehicle and the even tyre marks on the gravel show that the vehicle did not skid. On his account to Roach he was going at 35 miles an hour and he then accelerated to overtake the truck. Plainly the brakes were not applied, or if they were it was only to a negligible degree because the application of the brakes was ineffective to reduce the speed of the car, so that when it hit the kerb, the speed was sufficient for the car to travel on for a further 160 feet or so.

A number of matters did give me concern. The accused had seen others drive the car and return without mishap. He was certainly able to drive the car over the journey I have described where he could have to cope with the hill, bends in the road, and the other traffic, and he travelled over three miles without accident. If the brakes were as bad as Hawkins described, he would need to change into a lower gear or drive slowly or keep pumping the brake. If he did drive slowly whilst he would know that the steering was loose, the car may not have developed a wheel wobble, or could it be that neither brakes or steering were in as bad a condition as Hawkins described?

As to the accident itself, could it be said that he was forced off the road by the truck getting into the middle of the road, and in the emergency was it not reasonable for him to panic - remembering he was part-Papuan - and in a black-out, forget about the brakes and steering whilst the car careered along out of control? Certainly it was most unfortunate that the vehicle should have been left in the yard, in its unroadworthy condition, and available for use.

But I came back to these basic facts - I accept the evidence of Hawkins as to the condition of the brakes and the steering, that the accused was an experienced driver, that by reason of the journey he had made he must have been aware of the condition of the brakes and so far as the steering is concerned certainly that the steering was loose. Indeed, he must have been a skilful driver



to have driven the car for the distance he did without mishap.

The conclusion I have come to is that when an experienced driver such as he was found himself off the bitumen, the only reason why he did not pull up or slow down was that he found he "had no brake". If he did then <sup>as I think he did,</sup> panic what caused him to panic was the realisation of the unsafe condition of the car of which he had been aware, so that cannot excuse him.

If the truck driver was negligent, that cannot excuse the accused so long as the accused's negligence was a substantial cause of the deceased's death.

R. v. Curphey, 41 Cr.App.R. 78.

I have decided that in substance I must uphold Mr. Croft's submissions. The car was unsafe to drive and it was certainly unsafe to drive at 35 m.p.h. then to try and overtake a truck going on to the wrong side of the road. I further consider that when the truck moved to the middle of the road the accused man then tried to apply his brakes, found that he had no means of either stopping or slowing down and he was unable to steer the vehicle either along the edge of the bitumen or along the gravel because of the defective steering. Certainly he was unable to steer the car back on to the bitumen and the car went on and down the road. When the vehicle struck the kerb and the tyre blew out, it became even more unmanageable, but the fact that the vehicle would get out of control in this manner was reasonably foreseeable as likely to follow from the car being driven on the roadway in its dangerous condition. So the injury and death of the deceased was a consequence of the accused's negligence which could have reasonably been foreseen by the accused as a consequence of his taking the vehicle on to the roadway in its dangerous condition.

The conclusions of which I am satisfied beyond reasonable doubt are as follows :-

- (1) By reason of the defects explained by **136<sup>1</sup>"**  
Mr. Hawkins the car was in an unroadworthy



condition and unsafe to drive.

- (2) That the accused having been told that the car's brakes needed adjustment, was negligent in that he failed to test the brakes before he left the workshop.
- (3) That in the course of the journey he became aware of the defects in the brakes.- he was aware that there was excessive play in the steering, and he also became aware of the tendency to wheel wobble.
- (4) That having discovered the defects in the steering and brakes in the car, it was negligent for him to have continued driving.
- (5) That proceeding at 35 m.p.h. or so, and then going on to his wrong side of the road to overtake the truck, he carried out a manoeuvre that it was negligent to do, having regard to the conditions of the car, of which he was aware.
- (6) The car having got on to the wrong side of the road and on to the gravel, the accused man was unable to steer it back on to the bitumen or along the gravel, or to stop, or to slow down, by reason of the defective condition of the car.
- (7) As a consequence of these acts of negligence the car struck the deceased woman and thus brought about her death.

It is a question of degree whether the accused's negligence amounts to criminal negligence. I am satisfied beyond reasonable doubt that these acts of negligence of the accused go beyond a matter of compensation between subject and subject, and show a reckless disregard of the safety of others using the highways, and to make his conduct a crime against the State and deserving of punishment. For these reasons I have decided that the accused should be convicted.

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