

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

CORAM : FROST, J.

Monday,

7th October, 1968.

REGINA

v.

BILE LUMAPA

J U D G M E N T

1968

October 2, 3, he unlawfully killed one Anwaraso.

4, 7.

GOROKA

Frost, J.

At the time he met his death, Anwaraso was a passenger at the rear of a utility truck being driven, at night, by the accused on the Highlands Highway at Goroka, when the truck left the roadway and grazed a tree close to the left side of the road, which is narrow at this point. Unfortunately the deceased must have been leaning over the rear side of the vehicle for his head struck the tree and he thereby suffered such serious injuries that he died almost immediately. The only damage to the truck consisted of scratched paint-work.

The indictment is thus brought under Section 289 of the Criminal Code (Queensland Adopted). It is well established that to support such an indictment, the Crown must satisfy the Court that the death of the deceased was caused by criminal negligence on the part of the accused which "went beyond a mere matter of compensation between subjects and showed such disregard for the life and safety of others as to amount to a crime against the State and conduct deserving punishment". R. v. Bateman (1); R. v. Druett (2). As a further matter of law, it is sufficient if the negligence complained of is a direct cause of death or injury. It is not necessary that it should be the, that is, the sole direct cause. R. v. Russell (3).

Now the accused did not give evidence nor did he call any evidence as to the accident, so I take the narrative of the facts of the accident from the witnesses called by the Crown. It commences at about midday on the 15th November, 1967. Kohrae, a committee man

(1) (1925) 94 L.J.K.B. 791, per Hewart L.C.J. at p. 793.

(2) (1965-66) P. & N.G.L.R. 395, (Ollerenshaw, J.).

(3) (1933) V.L.R. 59 at p. 82 cited Carter's Criminal Law, 2nd Edition page 249.

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met the accused at the Goroka market, joined him in his Toyota utility and, with the accused, drove off some distance to a native village delivering passengers. On the return journey it commenced to rain, the road became greasy and slippery, and it is important to note in view of evidence as to the subsequent condition of the vehicle, that there appeared to be nothing wrong with it, or the accused's driving on their return to Goroka. When it was late in the afternoon, the two men went to the Goroka Hotel, where Kohrae saw the accused joined by Anwaraso, the deceased. Anwaraso bought a jug of beer and he and accused sat down to drink, but there were a lot of people in the hotel, and Kohrae did not see them until later when it was quite dark and they left the hotel. The only evidence as to the quantity of drink the accused had was his own subsequent statement to the police that it was three glasses. Another witness, Uwetope, said that he arrived at about half past three, and saw the accused and Anwaraso drinking, but I cannot accept this as a reliable estimate. The accused said he left at 7 o'clock, another witness said that it was at 6 o'clock when he called to the accused to drive him home and that the men left the hotel, but again all I can conclude is that it was soon after dark when they left. The accused got into the driver's seat of his truck, Kohrae sat next to him, and a third man who had been sleeping in the truck, Sonime, also a committee man, sat in the cabin next to Kohrae. Anwaraso, Uwetope and Somiho all climbed on to the rear of the utility. The deceased and Uwetope had had plenty to drink and were the worse for drink. At this stage the deceased asked the accused to pick up a girl. So he drove with his passengers about Goroka for quite some time looking for the girl, whom they eventually found at the Council House. She also got into the back. They then drove to a sawmill in North Goroka to pick up some timber planks. Meanwhile in the back of the truck Uwetope had produced a half bottle of rum which he and his companions at the back were drinking as they drove about Goroka. At the sawmill the truck stopped and some of the men picked up the planks and loaded them on the truck. Whilst they were there, Uwetope held the bottle of rum to the accused's mouth, while the accused

drank the remaining contents of the bottle, but there appears to have been very little left in the bottle. The men then resumed their places in the truck and the accused drove off apparently on their way home towards Asaro.

It is important to note that at this time it was dark and raining heavily. The accused drove the truck down Kyle Street, North Goroka, quite a short distance from the sawmill, then down past the trade stores intending to turn right on to the Highlands Highway at the intersection of the Highway and Kyle Street. Kyle Street runs down hill towards the Highway, which for a vehicle turning right also runs down hill in a fairly steep gradient towards Asaro. As the truck came to the corner of the two streets, the accused said to the two committee men in the cabin with him, the truck was going to speed up a bit, so hold on. The speed of the truck then increased, Somiho who was at the back said it was "travelling like an aeroplane". It went on at the same speed around the corner and down the highway, left the road and grazed the tree on the left of the road, where Anwaraso received his fatal injuries. The accused brought the vehicle to a stop after the passengers at the back called out to the committee men that a man had been hurt, and to stop the truck. The tree was about 200 yards north of the intersection of Kyle Street and the Highway, which runs approximately North and South, and about 5'6" left of the road surface which was of compacted metal and gravel. The hill down which the road runs from the intersection flattens out about 20-30 yards south of the tree. The truck came to a stop 105' north of the tree, on the left hand side of the road with its rear side wheels on loose uneven ground to the left of the road. The road surface was of mud and hard packed metal and in the very wet conditions was greasy and slippery. It is important also that the camber of the road was quite noticeably to the left.

Shortly after the accident, at about 7.30 p.m., a cadet officer of police, Billy Kinsin went to the scene and spoke to the accused. He asked him was he the driver, and the accused said Yes. Kinsin noticed that the accused's breath smelt of liquor, and that

he was unsteady on his feet, swaying slightly from side to side.

Kinsin then arrested him for driving under the influence of intoxicating liquor and took him to the Police Station. Shortly after that Inspector Robinson arrived to investigate the matter. He had the body of the deceased removed to hospital, and also made observations of the scene. He then returned to the Police Station and spoke to the accused. He said to him :-

"How much drink have you had this afternoon."

The accused replied :-

"The dead man bought a jug of beer and I had three glasses. Uwetope bought a bottle of rum or gin; I don't know what it was, it could have been rum. Uwetope tipped the bottle up and I drank plenty of it."

Mr. Robinson noticed that the defendant appeared in a dazed condition, and that his breath smelt of intoxicating liquor. A Dr. Brodie then arrived at the police station and made a brief examination of the accused. The accused was then charged with driving under the influence of intoxicating liquor.

Next day Mr. Robinson visited the scene where the vehicle was still, under police guard, in the position in which it was found after the accident, and took measurements, on the basis of which he prepared a sketch plan. Later, after a proper caution, he asked the defendant did he wish to make a statement, the accused agreed, and a statement was taken down and signed by the accused.

In his statement the accused repeated that he had had three glasses of beer, described his movements while he arrived at the sawmill. He then continued :-

"I got out of the car and Uwetope who was sitting in the back held a bottle of rum for me and I drank from it four times. It was his fault for giving it to me. I told him that it was strong and that I couldn't drink it I got back in the car and I drove down past the stores in North Goroka. I couldn't see very well and I wasn't thinking and the car went to the side of the road and hit a tree. I don't know, I can't remember."

There was a crucial piece of evidence called by the Crown as to the condition of the truck. On the day following the accident, Mr. Robinson had a Mr. Turner, a very experienced foreman mechanic, examine the truck. He found that the steering and brakes were in good order, but that it had a sticking accelerator pedal. He noticed this defect immediately after he commenced to drive it. The pedal was very stiff, and the only way he could free it was to reach down and pull it up. He could not discover from the examination he was able to make on the still muddy roadway the cause of the defect. He did notice that when he started the vehicle, the pedal was depressed a little, but not so that it "over-revved". In cross-examination by Mr. Flood he agreed that the cause could have been a broken return spring which it was possible could have broken and come away without warning, that it was unlikely to have been caused as a result of the accident, and that the defect probably existed prior to the accident. Further the defect was so marked that to drive the truck, Mr. Turner had to keep manipulating the pedal by hand or putting his foot under it to get it back.

Now on these broad facts the Crown contends that there was negligence on the part of the accused which caused the deceased's death and that it was of such a degree as to amount to criminal negligence. The particulars of negligence relied on by the Crown are that the accused drove off the roadway so that the truck struck a tree, and so fast that the accused was unable to control it, and that these acts of negligence can be explained by the fact that the accused was under the influence of intoxicating liquor to such a degree that he was incapable of driving the vehicle in a proper manner.

Mr. Flood submitted on behalf of the accused that the evidence was not such as to satisfy the Court beyond reasonable doubt that the accused was under the influence of liquor to such a degree that his driving was affected, and that the Crown have not excluded the real possibility that it was the undoubted defect in the accelerator pedal which was the cause of the accident. He relied on R. v. Spurge (4), which was a case of dangerous driving, but the reasoning of which would be equally applicable to cases of manslaughter. In

that case it was held that it is a defence to a charge of dangerous driving and to a charge of careless driving that the driver, without fault of his own, was deprived of control of the motor vehicle by a mechanical default therein of which he did not know and which was not such as he should have discovered if he had exercised reasonable prudence; the burden of proof of the defence is not on the accused though it is for him to put forward the defence "The essence of the defence is that the danger has been created by a sudden total loss of control in no way due to any fault on the part of the driver." per Salmon J. at page 191, see also McBride v. The Queen (5). He submitted that although the accused did not give evidence, on the whole of the evidence, I should not be satisfied of the guilt of the accused. His main submission was that it was a real possibility on the evidence that the defect had occurred suddenly immediately prior to the accident, causing the pedal to stick as it came down the hill, and the engine to race, that the brakes could have been applied by the accused, and that in the heavy rain, and on the slippery surface, the truck slipped and went over to the side of the road and so struck the tree. Although he did not mention this detail, I would suppose that it could also be contended that by reason of the racing engine, it would have been difficult for the driver to change down in gear and thus render a more sudden application of the brakes likely.

Now the first matter for me to determine is whether I am satisfied that the accused's driving was affected by intoxicating liquor. Uwetope stated that the accused was drunk after he drank the rum at the sawmill, but in view of the evidence that he himself was drunk I am unable to act on his evidence. All the witnesses for the Crown stated that the accused was quite sober at the hotel and also, except for Uwetope, at the sawmill, and that there was nothing wrong with his driving until he came to the hill. Further Dr. Bridgewater who was called for the defence to give a professional opinion, stated that in his opinion that it would take 15-20 minutes for any drink to have effect, and so Mr. Flood strongly submitted that the rum consumed at the nearby sawmill could have had no further

effect, whether it was plenty as the accused admitted to Sub-Inspector Robinson or four drinks as the accused said in his statement, or only a little in the bottle as the passengers said. The Crown contends that the accused had more drink than he admitted to or his companions described, and that I should rely on the independent evidence of the two police witnesses. But the force of Cadet Officer Kinsin's evidence was weakened also by Dr. Bridgewater, who gave as his professional opinion, that the shock of the accident in which a close relative was killed, could have caused the accused to be unsteady on his feet and sway about, and the force of Mr. Robinson's testimony on this point is also weakened by his very fair admission that the accused's dazed condition could have been due to shock. Mr. Robinson did not suggest that the accused's speech was affected, or his movements. Thus the only sign of liquor I am left with is that the accused's breath smelt of intoxicating liquor. It was unfortunate because, no doubt, of his departure from the Territory, that the Crown was unable to call Dr. Brodie, but without his evidence it does seem to me that there is a gap in the proof. I have not overlooked the fact that immediately after the accident the accused blamed Uwetope for giving him the rum as the cause of the accident, but this was said when he was overcome with remorse and ready to blame himself for the accident. It ignores the fact that the accident occurred what must have been only a few minutes later. The same considerations apply to his statement which makes a vague reference to drink. The words "I could not see very well", are quite equivocal having regard to the weather conditions. Accordingly I am not satisfied beyond reasonable doubt that the accused was under the influence of drink to such an extent that his driving was affected, or, in that respect thus explaining the accident.

Of course this is not the end of the matter because the cause of the accident may have been that the accused came down the hill at an excessive speed on the wet and greasy road, and so by his negligence was unable to control the vehicle properly and it ran off the road. Further there is his statement, "I wasn't thinking and the car went to the side of the road and hit a tree", and no

mention whatever of any defect in the car which affected his driving.

Now this is an unusual case. Not only was there an undoubted defect in the car, but also it had a most marked effect on the driving of it. Mr. Turner could only drive it by manipulating the sticking accelerator pedal either by hand or by foot, and the probabilities are that it was in the same condition prior to the accident. Yet there is the significant evidence of the two committee men in the cabin, (whose evidence impressed me), that there was nothing wrong with the vehicle, and it was such a defect that both would have noticed, even although the probability is that neither drives a car. So it seems to me that there is a distinct possibility that this defect did occur immediately prior to the accident. If it did then occur, as the driver would not have left his foot on the accelerator coming down the hill, and as he took his foot off the pedal the engine may well have been racing, making it difficult to change gear and he would be left with the brakes to stop the vehicle with the further possibility on the wet slippery road, conditions which as Mr. Robinson conceded you have to watch in the wet season, of the vehicle slithering off the road.

Now what has troubled me in this case is whether this is mere speculation, particularly having regard to the fact that the accused on the day following the accident, makes no reference to defect in the vehicle as a cause of the accident. But the accused's statement that he didn't see well and wasn't thinking and the car went to the side of the road, is quite vague. Further it is the statement of an illiterate Highlander, and if it was a sudden defect occurring immediately prior to the accident, one that he might not have noticed in the agony of the collision.

It is the quite marked and recurrent effect on the driving of the truck as described by Mr. Turner which seems to me to be the crux of this case. Even although by the time of this trial, which has been delayed, through no fault of the accused, until nearly a year after the accident, the witnesses' memories must be fading so far as the details are concerned, if the accelerator pedal had been sticking to that marked degree, they would surely have noticed it

and remembered it. The Crown case leaves two questions unanswered; what was the effect of the sticking accelerator pedal as the truck came down the hill, and how did the accused cope with it. It was possible that it was caused by the accident, but Mr. Turner did not think so, so it might have occurred immediately prior to the accident, and thus there was a mechanical defect of which the accused did not know and which was not such as he should have discovered if he had exercised reasonable prudence. I am left with a real doubt in my mind that its unexpected onset taken with the conditions of heavy rain and slippery road surface and camber to the left, did play a part in this accident. A sudden application of the brakes in those conditions may have caused the truck to go off the road and graze the tree.

For the reasons I have mentioned, this doubt is not removed by the terms of the accused's statement to Mr. Robinson. Further the evidence as to speed is so general and perhaps exaggerated that I am not satisfied that it was a substantial cause of the accident.

R. v. Gould (6).

This is perhaps a case of strong suspicion, but in the end I am not satisfied that the death of the deceased was caused by the manner of driving of the motor vehicle on the part of the accused.

He is accordingly acquitted of the charge of manslaughter.

The Crown relied on the alternative of a charge of dangerous driving, but it is plain that, if this count is open, it must fail for the same reasons. However I propose to refer to Mr. Flood's argument that on an indictment for manslaughter arising out of the driving of a motor vehicle, as in this case, upon the proper construction of Section 328B of the Code, it is not open for the accused to be convicted of the offence of dangerous driving under Section 328A of the Code.

Section 328B is as follows :-

"Upon an indictment charging a person with any offence in connexion with or arising out of the driving of a motor vehicle by him (not being the offence defined in section 328A of this Code), he may be convicted

of the offence defined in section 328A of this Code (with or without a circumstance of aggravation specified in the fourth paragraph of that section), if such offence is established by the evidence."

Mr. Flood relied on Section 576 of the Code, which, *inter alia*, provides :-

"Upon an indictment charging a person with the crime of manslaughter, he cannot, except as herein expressly provided, be convicted of any other offence."

He was able to make the submission because there is omitted from Section 328B, as it appears in the Criminal Code of New Guinea the final paragraph of Section 328B as it appears in the Queensland Criminal Code :-

"The provisions of this Section shall apply notwithstanding the provisions of Section 576 of this Code".

Thus he submitted that in omitting the Queensland provision, the Territory Regulations must be deemed to have intended the Section to have a more limited operation, and that Section 576 should prevail.

However it is the Territory legislation which is to be construed and the provisions of the Code must be construed as a whole. Halsbury's Laws of England, 3rd Edition, Vol. 36 p. 395. Reading the two Territory Sections together, in my opinion, the provisions of Section 328B constitute an express provision within the meaning of the relevant portion of Section 576, which, as in the case of other sections of the Code, is excepted from the general operation of that portion of Section 576, so that on an indictment charging the accused with manslaughter he may be convicted under Section 328A of dangerous driving.

I thus consider that the final paragraph of Section 328B in the Queensland Code was included *ex abundanti cautela*, which seems to have been the view of the Territory Legislature. Accordingly I am of opinion that the Crown was right in submitting that an alternative count was open under Section 328A. For the reasons I have given the accused is acquitted of this charge also.

Solicitor for the Crown : S.H. Johnson, Crown Solicitor

Solicitor for the Accused : W.A. Lalor, Public Solicitor