PREMASIRI
v.
OFFICER-IN-CHARGE, POLICE STATION, MATARA

COURT OF APPEAL
GRERO, J.
CA 112/85
MC MATARA 46531
OCTOBER 23, 1991.

Criminal Law – Negligence – Standard of proof – Does error of judgment amount to criminal negligence? – Penal Code, section 298.

Held :

To establish liability for negligence in a criminal case, a very high degree of negligence should be established. In other words, the accident should have been due either to the recklessness of the accused or due to the reckless driving of the accused. Where the accident is attributable to an error of judgment, it is not sufficient to establish criminal liability by negligence or by a rash act.

Cases referred to:

1. *Rex v. Bateman* 94 LJKB 791.
2. *King v. Leighton* 42 NLR. 283.
3. *Lourensez v. Vyramuttu* 42 NLR 472.
4. *Karunadasa v. O.I.C., Nittambuwa,* (1987) 1 Sri LR 155.

APPEAL from judgment of the Magistrate Court of Matara.

R. K. W. Goonasekera for accused-appellant.

S. Jayamanne, SC for the Attorney-General.

Cur. adv. vult.

November 22, 1991.

GRERO, J.

The accused-appellant was charged before the Magistrate's Court of Matara, on two counts, both of which were under section 298 of the Penal Code. After trial, the learned Magistrate found him guilty on both counts and imposed a fine of Rs.1,500 on each count, and a two years' imprisonment for each count ; but such sentence was suspended for a period of seven years. Against the said conviction and sentences, the accused-appellant appealed to this Court.

When this matter came up for hearing the main contention adduced by the learned counsel for the appellant was that a very high degree of negligence on the part of the accused-appellant must be proved by the prosecution in order to make him guilty to a charge punishable under section 298 of the Penal Code. His contention was that in this case, such a high degree of negligence had not been established and therefore the accused-appellant is entitled to an acquittal. The contention of the learned State Counsel was, that the charges were proved beyond reasonable doubt, and therefore the learned Magistrate had quite correctly, convicted the accused-appellant.

The law pertaining to the causing of death by negligence, has been the subject of judicial interpretation not only in this country, but in England not recently, but some long years ago.

In the case of *Rex v. Bateman* [1] Lord Atkin observed thus : " The principle to be observed is that cases of manslaughter in driving motor cars are but instances of a general rule applicable to all charges of homicide by negligence. Simple lack of care such as will constitute civil liability is not enough, for purposes of criminal law, there are degrees of negligence and a very high degree of negligence is required to be proved before the felony is established. "

In the said case Lord Hewart, L.C.J. held as follows : " In order to establish criminal liability the facts must be such that in the opinion of the jury the negligence of the accused went beyond a mere matter of compensation between subjects and showed such disregard for the life and safety of others, as to amount to a crime against the state and conduct deserving punishment. "

Our Courts have followed such decisions of the Court of England from time to time in cases like the *King v. Leighton* [2], *Lourensz v. Vyramuttu* [3], *Karunadasa v. O.I.C., Nittambuwa* [4].

The perusal of the decisions of the above stated cases show, that in order to establish criminal liability in a case of this nature, there should be a very high degree of negligence or in other words the accident should have been due to either recklessness of the accused or due to reckless driving of the accused concerned. An accident may occur due to an error of judgment on the part of an

accused : but that is not sufficient to establish criminal liability when an accused is charged with an offence of causing death of a person or persons by negligence or any rash act.

A Judge hearing a case where an accused is charged under section 298 of the penal code must always address his mind to the said salient principles of law, decided by the said cases, and then apply such principles to the facts of the case and then decide whether the accused is guilty of criminal negligence in conformity with such principles of law.

The virtual complainant in this case had given evidence before the learned Magistrate. In the examination-in-chief, he had stated that on the day of the incident, he was coming along the road, on the left-hand side of the road and he was pushing the bicycle keeping his two children on the frame of the bicycle. Then a vehicle came behind him and struck against his right shoulder and then he fell down and the two children also were thrown away and all of them got injured. Under cross-examination, he admitted that he came pushing the bicycle on his right-hand side. According to him the lorry struck against his right shoulder. The position of the complainant, Sirinayake, as to how he was pushing the bicycle before the accident took place is very material to this case.

Under examination-in-chief, he had stated to Court that when he heard the coming of a vehicle behind him, he had to go to the grass verge of the road which was on his left-hand side ; but yet the vehicle hit against his back. If that is the position then the lorry in question should have gone beyond the edge of the road on to the grass verge. But the evidence of the inquiring officer, I.P. Bakmeedeniya reveals that the place of impact had been 2 feet from the edge of the road towards the road. There is no evidence to show that the lorry had gone beyond the edge of the road on to the grass verge.

A careful analysis of the evidence of Sirinayake does not show the exact manner that this accident had taken place, on the day in question. If his position that he pushed the bicycle, on his right-hand side, was admitted to be true, then he was not going on the edge of the road, but on the road which may give rise to an opportunity to meet with an accident. The fact that the lorry struck against his

right shoulder shows that it is very probable that he had been pushing the bicycle, on this particular day on his right-hand side of the bicycle. Under such circumstances, his action become a contributory factor to this unfortunate accident.

If the position that he was going pushing the bicycle on the left-hand side and after hearing the sound of an on coming vehicle, he went towards the grass verge of the road was accepted to be true, then there should be tyre marks of the lorry on the grass verge to show that it had gone beyond the edge of the road and had gone to the grass verge of the road, then a Court can decide that there was utter recklessness on the part of the accused-appellant. But such evidence has not been placed before Court.

Even if the position that the accused-appellant had gone more towards the left-hand side of the road and as a result this accident took place is to be accepted, yet it is not possible to say that there was a very high degree of negligence on his part to make him criminally liable. Because as the learned Counsel for the appellant argued that due to an error of judgment, the accused-appellant may have thought that without causing any harm to the person going on the left-hand side of the road pushing the bicycle he could overtake him. There is no evidence in this case that he drove the lorry at an excessive speed. There had been no brake marks visible on the road or on the grass verge of the road.

The only other eye witness to this incident was one Wimalasena, and according to his evidence the lorry struck against the bicycle and thereafter his father-in-law (Sirinayake, the virtual complainant) and the two children who were on the frame of the bicycle fell underneath the lorry. It was the evidence of Sirinayake that the lorry did not strike against his bicycle, and if the lorry struck against the bicycle as stated by Wimalasena then it would have some sort of damage. But I.P. Bakmeedeniya's evidence does not reveal that there had been any damage to the bicycle.

Taking into consideration of the above stated facts, this Court is of the view that the prosecution has failed to prove the charge against the accused-appellant beyond reasonable doubt. In any event, the prosecution has failed to establish that there had been a very high degree of negligence on the part of the accused-appellant as laid down in the decided case mentioned in this judgment earlier.

If the learned Magistrate had viewed and assessed the evidence very carefully as stated in this judgment, then he could not have come to the conclusion that the charges were proved by the prosecution beyond reasonable doubt. If he had addressed his mind to the principles of law laid in the said cases adequately then he may not have come to the conclusion that the prosecution in this case was able to establish such high degree of negligence sufficient enough to make the accused liable for criminal negligence as contemplated in section 298 of the penal code.

For the above-stated reasons, the appeal of the accused-appellant is allowed and the conviction and sentences passed by the learned Magistrate are set aside and he is hereby acquitted.

Appeal allowed.