KARUNADASA

v.

OFFICER-IN-CHARGE, MOTOR TRAFFIC DIVISION POLICE STATION, NITTAMBUWA

COURT OF APPEAL.
ABEYWARDENA, J. AND P. R. P. PERERA, J.
C.A. No. 405/83.
M.C. ATTANAGALLA 11804.
OCTOBER 29, 1986.

Criminal Law – Negligence – Penal Code s. 298 – Standard of negligence – Judgment – Reasons must be given – S. 283(1) Code of Criminal Procedure Act – Weakness of defence – Proof required of guilt and not innocence.

Simple lack of care such as will constitute civil liability is not enough for purposes of the criminal law and a very high degree of negligence is required to be proved in order to establish a charge under s. 298 of the Penal Code. The negligence of the accused must go beyond a mere matter of compensation between subjects and show such disregard for the life and safety of others as to amount to a crime against the State and conduct deserving punishment.

The burden is on the prosecution to prove criminal negligence.

Merely reciting the facts and giving no reasons for the judgment is insufficient. The Magistrate must give reasons for his conclusions and scrutinize the evidence led on behalf of the accused. Failure to give reasons can occasion a failure of justice. An outline of the facts embellished with phrases like "I accept the evidence of the prosecution", "I disbelieve the defence" is insufficient to discharge the duty cast on the prosecution. Section 283(1) of the Code of Criminal Procedure Act makes it imperative to give reasons in the judgment. The Magistrate has said "the evidence of the witness called by the accused does not in any manner help the defence. Therefore, I accept the evidence adduced on behalf of the prosecution". This shows that the Magistrate has given his decision very largely on the weakness of the defence rather than on the strength of the prosecution. It is an imperative requirement that the prosecution must be convincing no matter how weak the defence is before the court can convict. The weakness of the defence must not be allowed to bolster up a weak case for the prosecution. The evidence must establish the guilt of the accused, not his innocence. His innocence is presumed by the law and his guilt must be established beyond reasonable doubt.

Cases referred to:

(1) *Andrew v. Director of Public Prosecutions – [1937] 2 All ER 556.*

(2) *Rex v. Bateman – (1925) 94 LJKB 791.*

(3) *Lourensz v. Vyramuttu – (1941) 42 NLR 472.*

(4) *King v. Leighton – (1946) 47 NLR 283.*

(5) *Thuraiya v. Pathaimani – 15 CLW 119.*

(6) *Attorney-General v. Rawther – 25 NLR 385 at 397.*

APPEAL from judgment of the Magistrate of Attanagalla.

U. D. M. Abeysekera for appellant.

S. K. Gamalath, State Counsel for Attorney-General.

Cur. adv. vult.

November 21, 1986.

PERERA, J.

The appellant in this case appeals against his conviction and sentence imposed by the Magistrate, Attanagalla on a plaint filed by the Nittambuwa Police, containing two counts framed under section 298 of the Penal Code, charging him with causing the death of one Kuda Pompelage Romanis by–

(i) doing one or more negligent acts not amounting to culpable homicide, or

(ii) in the alternative, doing one or more rash acts, specified in the Charge.

The appellant was convicted on the first count, and sentenced to a term of one year's rigorous imprisonment. The evidence established that the appellant was, on the day in question driving a Ceylon Transport Board bus bearing registered number 23 Sri 8556, on the Colombo-Kandy road, from the direction of Kandy towards Colombo. At a point close to the Pasyala Pola the deceased attempted to cross the road, in order to fetch his bull which was tethered on the opposite side of the road, when he was knocked down by this vehicle and later succumbed to his injuries. The Pola is situated by the main road, on the right side, when one proceeds in the direction of Colombo. According to the evidence of the witness Wijelathge William, he and

the deceased had both come to the Pola that morning to do business, and shortly after mid-day the deceased attempted to cross the road from the Pola side, to the other, when he was knocked down by a Ceylon Transport Board bus. It was his evidence that he had first seen the bus about 100 feet away from the point at which he was standing. It was also his position, that the bus was travelling at a fast speed and that there was no other vehicular traffic on the road at the time. The right-side front of the bus had hit the deceased. Another witness, R. P. Juliana Ranasinghe has given substantially the same evidence, regarding this incident. It appears however, that while witness William has stated that this bus came to a halt about 8 feet away from the point of impact, witness Juliana Ranasinghe has stated that the bus came to a halt about 25-30 feet away from this point. Police constable Hemachandra of the Nittambuwa Police, who inquired into this matter has testified to the effect that he had proceeded to the scene shortly after the accident had occurred, and had made certain observations of the scene. According to this witness, he observed, on the road, a brake mark 87 feet 9 inches in length, and that this brake mark was that of the right side rear wheel of the bus. He has also noted that the distance from the point of impact to the point at which the brake mark commenced was 99 feet. This fact makes it clear that the brake mark had ended at a point about 11 feet before reaching the point of impact.

The appellant has given evidence in this case and testified to the effect that he had been a driver attached to the Ceylon Transport Board for a period of 8 years, and that he had a valid driving licence for a period of 13 years. He had no endorsements in his driving licence. On this day, he was driving this particular bus and was proceeding from Kurunegala to Colombo. This was an express bus, and he had reached Pasyala about 2.20 p.m. He was entitled to drive at a speed of 40 m.p.h. in rural areas and 30 m.p.h. in urban areas. When he was approaching the place of the accident he was driving at a speed of about 32 m.p.h. The road was clear and straight. When he approached the Pola, there was no other vehicular traffic, and he did not observe any people on the road. As he was approaching the Pola, he observed two persons on the right side of the road, i.e. on the Pola side. He had reduced the speed as he came close to this point because he was aware that there was a Pola. Thereafter he was about

to pick up speed, when the deceased suddenly darted across the road. He had, in the circumstances, no opportunity whatsoever of avoiding this accident. By the time he applied the brakes, the bus had struck the deceased. At the time of the impact, according to the appellant the bus was travelling at a speed of 18-20m.p.h. The appellant also called a witness by the name of Cyril Wickremaratne, who described himself as a teacher, to support the version given by him. This witness who claims to have been a passenger in the bus, has not made any statement to the Police relating to this incident at any stage. He has however given evidence at an inquiry held by the Ceylon Transport Board in connection with this matter.

There is however no real evidence as to the speed at which the bus was driven. The only evidence in regard to the speed of the bus has been given by the two eye-witnesses–William and Juliana Ranasinghe, to the effect that the bus was driven at a very fast speed. There is in fact no other reliable evidence adduced by the prosecution in regard to the speed of the bus.

On a perusal of the entirety of the evidence in this case, I am of the view that the prosecution has failed to establish a charge of Criminal Negligence which is punishable under section 298 of the Penal Code. Simple lack of care such as will constitute civil liability is not enough for purposes of the criminal law and a very high degree of negligence is required to be proved in order to establish a charge under section 298 of the Penal Code. The law with regard to the evidence necessary to establish a charge of Criminal Negligence has been formulated in numerous cases. In *Andrews v. Director of Public Prosecutions* (1) Lord Atkin formulated the principle governing such charges and cited with approval the following dictum of Lord Hewart in L.C.J. in *Rex v. Bateman* (2) "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". The principle laid down in this case has been followed with approval by the Supreme Court in *Lourensz v. Vyramuttu* (3) and *The King v. Leighton* (4). Can it be said in the present case that the prosecution has

established that the appellant drove the bus in such a reckless manner and that his negligence 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? The answer must certainly be in the negative. This is not a case of *res ipsa loquitur,* imposing on the appellant the onus of proving how the accident occurred. The burden was on the prosecution to prove Criminal Negligence. I do not think that this burden has been discharged by the prosecution.

Learned counsel for the appellant has also pointed out, that the judgment of the Magistrate in this case contains only a mere outline of the case for the prosecution and the defence without any reasons being given for the decision. There appears to be substance in this complaint. Nowhere has the Magistrate given any reason for his conclusions, nor does he appear to have considered adequately the evidence given by the appellant and his witness apart from merely reciting the evidence given by them. It is the duty of the Magistrate to scrutinize the evidence led on behalf of the defence. Failure to do so, and the omission to state the reasons for his decision has in my view occasioned a failure of justice in this case. In *Thuraiya v. Pathaimani* (5) Nihill, J. observed thus–

> "A mere outline of the case for the prosecution and defence embellished by such phrases as 'I accept the evidence for the prosecution', 'I disbelieve the defence', is by itself an insufficient discharge of the duty cast upon a Magistrate by section 306(i) of the Criminal Procedure Code".

Section 306(i) of the Criminal Procedure Code is reproduced in the present Criminal Procedure Act as section 283(i). Further, the learned Magistrate concludes the judgment thus–

> "*.... The evidence of the witness called by the accused does not in any manner help the defence. Therefore I accept the evidence adduced on behalf of the prosecution*".

It is apparent from this passage that the learned Magistrate appears to have given his decision very largely on what he would regard as the weakness of the defence rather than the strength of the prosecution, as he was prepared to accept the prosecution story. This is yet another matter which militates against the conviction of the accused-appellant.

It is an imperative requirement in a criminal case, that the prosecution must be convincing, no matter how weak, the defence is, before a court is entitled to convict on it. It has necessarily to be borne in mind that the general rule is that the burden is on the prosecution, to prove the guilt of the accused. The prosecution must prove their case apart from any statement made by the accused or any evidence tendered by him. The weakness of the defence must not be allowed to bolster up a weak case for the prosecution. This rule is based on the principle that every man is presumed to be innocent until the contrary is proved, and criminality is never to be presumed. This presumption is so fundamental and strong, that in order to rebut it, the crime must be brought home to the accused, beyond reasonable doubt. There is only one final question in every criminal case; does the evidence establish beyond a reasonable doubt the guilt of the accused? In the *Attorney-General v. Rawther* (6), Ennis, J. states thus:

> "The evidence must establish the guilt of the accused, not his innocence. His innocence is presumed in law, from the start of the case, and his guilt must be established beyond a reasonable doubt".

The Magistrate in this case has drawn an inference adverse to the accused entirely on the premise that the evidence of the witness called on behalf of the defence has not helped the defence case. In doing so, the Magistrate has in my view, seriously misdirected himself and this has resulted in grave prejudice to the appellant.

We therefore allow the appeal, and set aside the conviction and sentence imposed on the accused-appellant. It would be open however to the prosecuting authorities to file charges against the appellant under the relevant provisions of the Motor Traffic Act, for negligent driving if so advised.

ABEYWARDENA, J. – I agree.

Appeal allowed.