1960 *Present :* **Basnayake, C.J., H. N. G. Fernando, J., and Sinnetamby, J.**

BANDARA, Appellant, *and* INSPECTOR OF POLICE, PADUKKA, Respondent.

S. C. 528—M. C. Avissawella, 35297

Charge—Alternative charge—Duplicity—" Irregularity "—Motor Traffic Act, No. 14 of 1951, ss. 153 (1), 153 (3), 216 (a), 219 (2)—Criminal Procedure Code, ss. 172, 173, 174, 178, 181, 182, 307, 425.

Where a solitary pedestrian walking along the left side of the road was struck by a motor car approaching him at a high speed from the rear when the road was free of other traffic—

Held, by FERNANDO, J., and SINNETAMBY, J. (BASNAYAKE, C.J., dissenting), that the person who drove the motor car could be charged with driving the car " negligently or without reasonable consideration for other persons using the highway " in breach of section 153 (3) of the Motor Traffic Act. Although (*a*) driving a motor vehicle negligently, and (*b*) driving a motor vehicle without reasonable consideration for other persons using the highway, constitute two distinct offences, yet, inasmuch as it was doubtful which of the two offences the facts which could be proved would constitute, section 181 of the Criminal Procedure Code permitted a charge to be framed in the alternative. Accordingly such a charge framed in the alternative would not be bad for uncertainty or duplicity.

Quaere, whether the provisions of section 425 of the Criminal Procedure Code can be applied in a case where section 181 has been wrongly utilized. Meaning of the expression " irregularity " in section 425 considered.

APPEAL from a judgment of the Magistrate's Court, Avissawella. This appeal was referred to a Bench of three Judges under section 48A of the Courts Ordinance in view of opinions expressed in *Edwin Singho v. Sub-Inspector of Police, Kadawatta* (57 N. L. R. 355), *Warlis v. Scott* (59 N. L. R. 46), *Wijesinghe v. Don Martin* (56 N. L. R. 158) and *Sub-Inspector of Police, Dehiowita v. Perera* (27 N. L. R. 511).

S. B. Lekamge, for Accused-Appellant.

D. St. C. B. Jansze, Q.C., Attorney-General, with *Ananda Pereira,* Senior Crown Counsel, and *V. S. A. Pullenayegum,* Crown Counsel, for Complainant-Respondent.

Cur. adv. vult.

May 30, 1960. BASNAYAKE, C.J.—

This appeal was first heard before my brother Pulle, but in view of certain decisions of this Court mentioned in his written order, which appeared to him to be irreconcilable, he has referred under section 38 of the Courts Ordinance the question arising for adjudication in appeal for the decision of more than one Judge. In pursuance of an order made by me under section 48A that the appeal should be heard by a Bench of three Judges, it has come up for hearing before us. The question for

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decision is whether the following charge on which the accused has been convicted is obnoxious to the provisions of the Criminal Procedure Code :—

" You are hereby charged that you did, within the jurisdiction of this Court, at Mawathagama, on 21st November 1957

1. being the driver of car No. CY. 8712 drive the same on a public highway negligently or without reasonable consideration for the other persons using the highway and thereby knocked against one Muhandiramage Marthina Rodrigo of Mawathagama in breach of section 153(3) of the Motor Traffic Act, No. 14 of 1951, and thereby committed an offence punishable under section 219(2) of the said Motor Traffic Act."

Section 153 sub-section (3) of the Motor Traffic Act, No. 14 of 1951, which contains the prohibitions which are declared by section 216 to be offences reads :

" (3) No person shall drive a motor vehicle on a highway negligently or without reasonable consideration for other persons using the highway."

The subsection prohibits two different acts and hence contains two prohibitions. It prohibits the driving of a motor vehicle on a highway negligently and it also prohibits the driving of a motor vehicle on a highway without reasonable consideration for other persons using it. The prohibition is not against driving a motor vehicle. It is against driving it negligently or without reasonable consideration for other persons using the highway. Each prohibition can be violated separately or both can be violated at the same time. I shall elaborate this.

A person can commit a breach of the first prohibition without at the same time committing a breach of the second. In other words, a person can drive a motor vehicle negligently without at the same time committing a breach of the prohibition against driving a motor vehicle without reasonable consideration for other persons using the highway. A motor vehicle can be driven negligently on a highway either when there are other persons using the highway or when there are no other persons using it. If there are no other persons using the highway at a time when a vehicle is driven negligently, the driver cannot be charged with driving a motor vehicle without reasonable consideration for other persons using it. Even where there are other persons using the highway nevertheless an act of driving negligently need not in every case also involve driving without reasonable consideration for others. A person may also drive a motor vehicle both negligently and without reasonable consideration for other persons using the highway.

The next question that calls for attention is whether the violation of each prohibition is a distinct offence for the purposes of the provisions of the Criminal Procedure Code governing the framing of charges. Section 216(*a*) of the Motor Traffic Act declares *inter alia* that any person who contravenes any provision of the Motor Traffic Act shall be guilty of an offence under the Act.

Now what is a provision of an Act in the sense in which it is used in modern legislation ? It is unnecessary here to do more than briefly refer to the development of its meaning in English law. Suffice it to say that in early English law it was a name given to certain statutes or Acts of Parliament, particularly those intended to curb the arbitrary or usurped power of the Sovereign, and also to certain other Ordinances or declarations having the force of law. In the reign of Henry III it was used to designate enactments of the King in Council. The term " statutes " was a later term. It came into use in the reign of Edward I, supplanting " provisions " (Richard & John Maitland—Selected Essays in Anglo-American Legal History 80). It is also an expression which has a special meaning in Ecclesiastical Law to which it is needless to refer for the present purpose.

In modern legislation it has acquired a special and well-understood meaning and is now commonly used in that sense in the legislation of the Commonwealth countries. It means an express statement in a legislative enactment which declares what the legislature wishes to enact in regard to a particular matter. The expression is thus described in " Words & Phrases "—

> " Actual expression in language "—the clothing of legislative ideas in words, which can be pointed out upon the page and read with the eye ; not a conjecture, or a supposition, or an inference drawn from other language referring to a different subject or matter.

The word is used in the Motor Traffic Act in the sense in which I have defined it above. Section 153(3) therefore contains more than one provision and the contravention of each of them is a separate or distinct offence although the punishment for the two offences is the same (Section 219(2)). Section 178 of the Criminal Procedure Code provides that for every distinct offence of which any person is accused there should be a separate charge and every such charge must be tried separately except in the cases mentioned in sections 179, 180, 181 and 184. In the instant case it is submitted that that provision has been violated.

The allegation in the charge is not that the appellant acted in breach of both prohibitions in section 153(3), but that he contravened either one or the other. Is such a charge legal ? The section of the Criminal Procedure Code referred to above requires that for every distinct offence of which any person is accused there should be a separate charge and a separate trial, subject to the exceptions specified therein. The charge under consideration clearly contravenes section 178. Does it come within any of the exceptions to that section ? It does not come within sections 179, 180 and 184. Does it come within section 181 ? To answer that question it is necessary to consider the terms of that section and the facts of the instant case. That section reads :

> " If a single act or series of acts is of such a nature that is it doubtful which of several offences the facts which can be proved will constitute, the accused may be charged with all or any one or more of such offences and any number of such charges may be tried at one trial and in a

trial before the Supreme Court or a District Court may be included in one and the same indictment; or he may be charged with having committed one of the said offences without specifying which one."

An analysis of section 181 will help to determine its scope. The section can be availed of—

(*a*) if a single act is of such a nature that it is doubtful which of several offences the facts which can be proved will constitute,

(*b*) if a series of acts is of such a nature that it is doubtful which of several offences the facts which can be proved will constitute.

In a case to which the section applies the accused can be charged with, and tried for, at one trial—

(*a*) all the offences disclosed by the facts which can be proved, or

(*b*) any one or more of such offences;

for instance, in an appropriate case separate charges of theft, receiving stolen property, criminal breach of trust and cheating may be laid against him and tried at one trial. Or he may, according to the last limb of the section, be charged with having committed one of several offences mentioned in the charge without specifying which one. The kind of charge contemplated is illustrated. The charge in an appropriate case may run as follows:

> "You . . . . . did on . . . . . at . . . . . within the jurisdiction of this Court . . . . . (specify act) . . . . . and did thereby commit one of the following offences, to wit, theft, receiving stolen property, criminal breach of trust and cheating, punishable under sections 367, 394 and 400 of the Penal Code."

Now as criminal proceedings are instituted under section 148 of the Criminal Procedure Code the decision in a case summarily triable whether a charge should be made in the manner prescribed in section 181 would rest on the authority instituting the proceedings who knows the facts which can be proved and who is uncertain, on account of the nature of the act or acts of the accused, which of several offences disclosed by them the accused committed. The facts which can be proved should not be in doubt. The doubt should be only as to the offence or offences constituted by them and should arise from the nature of the act or acts of the accused. The need to resort to section 181 would not arise where the act or acts are of such a nature that the facts which can be proved disclose only one offence. In such a case there would be only one charge as provided in section 178. But where the act or acts are of such a nature that the facts which can be proved disclose several offences and it is doubtful which of them the accused committed, then a charge or charges may be framed in accordance with section 181.

I do not think I need dwell longer on section 181. I shall now turn to the facts of the instant case. The proceedings were instituted by a

written report under section 148(1) (*b*) of the Criminal Procedure Code by the Inspector of Police of Padukka. The report contained the following charges :

"That Don Daniel Emiyage Bandara holding D/L No. 38616 of Pugoda in Dompe did on the 21st day of November 1957 at Mawathagama within the jurisdiction of this Court—

1. being the driver of car No. CY 8712 drive the same on a public highway negligently or without reasonable consideration for the other persons using the highway and thereby knocked against one Muhandiramage Marthina Rodrigo of Mawathagama in breach of section 153(3) of the Motor Traffic Act No. 14 of 1951 and thereby committed an offence punishable under section 219(2) of the said Motor Traffic Act.

2. At the same time and place aforesaid and in the course of the same transaction set out in count 1 above, the accused above named being the driver of car No. CY 8712 on a highway did fail to take such action as may be necessary to avoid an accident in breach of section 151(1) of the Motor Traffic Act No. 14 of 1951 and thereby committed an offence punishable under section 226 of the said Motor Traffic Act.

3. At the same time and place aforesaid and in the course of the same transaction set out in count 1 above, the accused above named did being the driver of car No. CY 8712 fail to keep to the left or near side of the road at a bend in breach of section 150(1) of the Motor Traffic Act No. 14 of 1951 and thereby committed an offence punishable under section 226 of the said Motor Traffic Act."

The charges framed by the Magistrate were in the same terms.

After trial the Magistrate convicted the accused of the first charge and acquitted him of the second and third charges. The prosecution case was that the accused came at a high speed and knocked down from behind and injured the witness Marthina Rodrigo as she was proceeding in the direction of Avissawella along the left edge of the road. The impact threw her some distance on to a heap of metal. After knocking the witness down the car went diagonally across the road a distance of about 60 feet, and turned turtle. There was no other traffic on the road at the time. It is not the prosecution case that there were others using the highway at the time. The prosecution evidence does not therefore disclose that the accused committed the offence of driving a motor vehicle on the highway without reasonable consideration for other persons using the highway. The fact that the accused knocked down Marthina Rodrigo does not bring him within the ambit of the second prohibition. It is not his lack of consideration for Marthina Rodrigo that caused him to knock her down but his inability to control his vehicle and guide it properly. That prohibition is violated when a person drives a motor vehicle on a highway in such a way as to infringe the rights of other users of the road and cause inconvenience to them and prevent them from doing what they are entitled to do. As the evidence

which the prosecution was able to place before the Court did not render it doubtful which of several offences the accused committed the charge in the alternative is unwarranted by section 181.

The question that arises for decision next is whether the prohibition in section 425 of the Criminal Procedure Code applies to the instant case. That section provides—

> " Subject to the provisions hereinbefore contained no judgment passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account—
>
> (*a*) of any error, omission, or irregularity in the complaint, summons, warrant, charge, judgment, or other proceedings before or during trial or in any inquiry or other proceedings under this Code ; or
>
> (*b*) of the want of any sanction required by section 147 ; or
>
> (*c*) of the omission to revise any list of assessors, unless such error, omission, irregularity, or want has occasioned a failure of justice."

It is claimed by learned counsel for the Crown that if the charge contravenes the Code the contravention is an irregularity which has not occasioned a failure of justice. It is therefore necessary to consider what an irregularity is. The word occurs in association with the words " error " and " omission ". Having regard to its associates it should be given a meaning in keeping with them. In such a context it seems something which is irregular, i.e., not regular or not in keeping with practice. And what is contemplated is an irregularity in the charge, i.e., a charge properly laid. A charge in contravention of the Code would not be an " irregularity in the charge ". Where the charge is contrary to the Code no question of irregularity in the charge would arise. The question that arises is the legality of the charge.

To my mind the words " irregularity in the complaint, summons, warrant, charge, judgment, etc." contemplate a charge valid in law but containing some minor departure from the practice in framing such charges. If the legislature meant to do so far reaching a thing as saving invalid charges it would have done so by express words to that effect. The word " irregularity " is not synonymous with either the word " illegal " or the word " unlawful " and in this context contemplates a minor departure from what is regularly done and does not extend to or embrace instances where essential provisions of law have been violated or ignored. Where the Code lays down a rule and prescribes specific exceptions to it, the contravention of the rule in a case that does not fall within any one of the exceptions is illegal and may correctly be described as an illegality and not as an irregularity. In a Criminal Code, it must be presumed that precise language is used, and when the word " irregularity " is used the scope of the expression should not be extended to include illegality. If the legislature intended to extend the ambit of the section to cover acts done in contravention of the Code it would not have been

content with using an expression such as "irregularity" which does not include an illegality. Section 425 is not designed to authorise contraventions of provisions of the Code. A contravention of the rule in section 178 is therefore not saved by section 425 of the Code.

The discussion of the meaning of the expression "irregularity" in Sweet's Law Dictionary is useful in understanding its scope in a procedural enactment.

> "Irregular, Irregularity—When a proceeding (judicial or extra judicial) is done in the wrong manner, or without the proper formalities, it is said to be irregular or an irregularity —as opposed to a proceeding which is illegal or ultra vires. An irregularity may be waived by the consent or acquiescence of the opposite party or (in the case of judicial proceedings) will generally be allowed by the Court to be set right on payment of the costs occasioned by it, while a proceeding which is illegal or ultra vires is, as a rule, wholly null and void."

The view I have expressed above gains support from the decisions of this Court. It has been held—

(*a*) that misjoinder of parties and causes of action (*Banda Korala v. Siyatu et al.* [1], *King v. Arlis Appu* [2]),

(*b*) that a breach of section 179 of the Criminal Procedure Code (*Rex v. Cornelis* [3], *Edwin Singho v. S. I., Police, Kadawata* [4]),

(*c*) that the reading in evidence of the depositions of witnesses without observing the provisions of the Code (*The King v. Don William* [5]) and

(*d*) that an infringement of the requirement of section 297 of the Criminal Procedure Code (*Wilfred v. Inspector of Police, Panadura* [6]),

(*e*) the contravention by a Magistrate of section 187 of the Code. (*Ebert v. Perera* [7]),

do not fall within the ambit of section 425 of the Criminal Procedure Code,

I am unable to reconcile the decision in *Police Sergeant, Lindula v. Stewart* [8] with the above decisions. In my opinion the decision in *Police Sergeant, Lindula v. Stewart* (*supra*) is wrong.

The conviction is therefore quashed.

This offence was committed on 21st November 1957 and no useful purpose would be served in ordering a retrial on the charge of negligent driving nearly three years after the event when the memory of what the witnesses saw over two years ago is bound to have faded.

[1] *(1920) 8 C. W. R. 309.*
[2] *(1920) 8 C. W. R. 236.*
[3] *(1911) 5 Weerakoon 89.*
[4] *(1956) 57 N. L. R. 355.*
[5] *(1920) 8 C. W. R. 324.*
[6] *(1945) 46 N. L. R. 553.*
[7] *(1922) 23 N. L. R. 362 (3 Judges).*
[8] *(1923) 25 N. L. R. 166.*

H. N. G. FERNANDO, J.—

I have had the advantage of reading the judgments prepared in this appeal by my Lord the Chief Justice and my brother Sinnetamby. Having regard to the opinion held by them both that (*a*) driving a motor vehicle negligently, and (*b*) driving a motor vehicle without reasonable consideration for other persons using the highway, constitute " distinct " offences within the meaning of section 178 of the Criminal Procedure Code, and having regard also to the similar opinion expressed by the Courts in England on the corresponding provision of the English Traffic Law, nothing would be gained by the statement of any contrary view of mine. Accordingly, but with hesitation, I accede to that opinion, which in practice should not create any substantial difficulty in the matter of the framing of charges in cases under section 153 of the Motor Traffic Act.

Section 178 requires that there shall be a separate charge and a separate trial for each distinct offence, subject to exceptions only one of which is relevant for present purposes, namely, that provided for by section 181 under which a person may be charged with two or more (distinct) offences in the alternative " if it is doubtful which of several offences the facts which can be proved will constitute ". There are several decisions of this Court to the effect that the section should not be utilized unless there is a genuine doubt as to which of two or more different offences the provable facts do constitute : (e.g. *R. v. Gabriel Appu* [1]; *Amerasinghe v. Sherriff* [2]; and *Windus v. Veerappen* [3]). The facts of these cases, in all of which the provisions of sections 181 and 182 were held to be inapplicable, serve to illustrate the object and scope of the sections. For example, a person charged with a contravention of a Municipal by-law prohibiting the occupation of a market stall without a licence, could not be alternatively charged under section 181, or convicted under section 182, of the offence of selling beef without the permission of the proper authority. Again the provable fact that a labourer neglected to perform his duties as such would not justify a conviction for the offence of neglect of duty, if he had been charged, not with that offence, but with the different offence of quitting the service of his employer without reasonable cause. The sections will, however, apply where, to use the language of De Sampayo, J., the alleged act of the accused is of " the ambiguous nature " therein contemplated.

While being willing to concede that the Legislature intended in section 153(3) of the Motor Traffic Act to create two distinct offences, I must confess that I would find much difficulty in attempting to define the distinction between (*a*) " negligent " driving, and (*b*) driving " without reasonable consideration for other persons using the highway ", and do not propose to make such an attempt. One can envisage a motor vehicle being driven in such a manner as to constitute clearly or even manifestly the offence of negligent driving (although even in such a case the prosecution would be faced with the difficulty of deciding whether the offence is not that of " reckless " driving also created by section 153(2)). But where there is no decisive feature in the available evidence concerning a road accident involving a motor vehicle which collides

[1] *(1896) 2 N. L. R. 170.*
[2] *(1918) 5 C. W. R. 81.*
[3] *(1920) 8 C. W. R. 11.*

with another vehicle or injures a pedestrian, both prosecutor and judge would find it quite difficult to decide whether the proper inference from the facts should be one of negligence or else of lack of consideration for other users of the highway. Indeed it seems to me that doubts of the nature contemplated in section 181 of the Criminal Procedure Code would arise quite often in the case of charges to be framed under the second and third sub-sections of section 153 of the Motor Traffic Act.

As my brother Sinnetamby points out, there was on the road at the relevant time the woman who was injured upon being struck by the vehicle driven by the appellant, and I certainly agree with his opinion that the offence secondly mentioned in section 153(3) can be committed in respect of any one person using the highway. If then, as was the case here, a single pedestrian walking along the left side of the road is struck by a motor car approaching him from the rear and the road is free of other traffic, can it be said that a police officer filing a plaint or a Magistrate framing a charge should be in no doubt that the provable facts establish so clear a case of negligent driving that the possibility of the inference of driving without reasonable consideration for other users must necessarily be ruled out ? I can best answer this question that I have posed by stating that, if the learned Magistrate had chosen to draw that inference and entered a conviction accordingly in the present case, I would have found myself quite unable to overrule his decision in appeal. It seems to me that in almost every instance where a pedestrian on a public highway is struck by a motor vehicle in circumstances not in any way beyond the control of the driver, a case of " driving without reasonable consideration " is thereby established beyond doubt. The only doubt that can exist in such a situation is whether the driver is also guilty of " driving negligently ", and I am satisfied that such a doubt in the sense contemplated in section 181 did exist in the present case.

Let me take in this context a set of facts upon which a person is *properly* charged in terms of section 181 with theft or in the alternative with receiving stolen property. It is in practice quite unusual in such a case for section 307 of the Code to be utilized, and ordinarily the trial judge would, if he convicts the accused, find him guilty of *either* theft *or* receiving. If then the conviction is for theft, it would be manifest that the judge's finding of fact is not that the accused " received " the property, but that he stole it, and for legal purposes *there would be no doubt as to which offence the provable facts did constitute.* Nevertheless, the resolution of the doubt by the verdict will not mean that no such doubt should have existed when the charge was framed. The hypothesis I have taken is that the charge was *properly* framed in the alternative, and a charge so properly framed cannot become retrospectively vitiated by reason of the ultimate event. Sections 181 and 182 would lead to absurdity if the extinction of doubt at the stage of conviction means that there should not properly have been doubt at the stage of the charge. In the same way, the fact that the Magistrate in this case reached an irreproachable verdict of guilty of negligent driving does not mean that a doubt within the meaning of section 181 should not and could not have existed at the earlier stages of the proceedings.

My Lord the Chief Justice, in his analysis of possible cases falling within section 153(3), has listed three categories :—(i) cases of negligent driving, (ii) cases of " driving without reasonable consideration ", and (iii) cases which constitute both offences. With respect, I am in full agreement thus far. But it seems to me that the failure of the Legislature to define the two offences satisfactorily, and the inherent difficulties in the way of propounding such a definition, have the consequence that the majority of cases which actually arise fall into the third category and therefore leave prosecutors in understandable doubt when charges are to be preferred. I differ from my Lord only when I take the view that we are concerned in this appeal with a case which falls within the third category.

In view of the conclusion I have reached, having regard to the evidence available, that the charge in this case was duly framed in terms of section 181 of the Code, the question whether the provisions of section 425 can be applied in a case where section 181 has been wrongly utilized does not arise for decision in this appeal. Indeed the learned Attorney-General, while he relied on section 425, did not adduce any elaborate argument on the question, nor were the precedents of *Police Sergeant, Lindula v. Stewart* [1] and *R. v. Perera* [2] discussed at the hearing. It strikes me also that there might well be circumstances in which a trial judge may, upon being satisfied that section 181 has been utilized in error, properly have resort to the provisions of sections 172, 173 and 174 in order to convert into a single charge, one which has been framed in the alternative. At the least, I think that consideration of the question whether section 172 applies at the stage of trial would be relevant to an examination of the question whether, as a last resort, at the stage of appeal, section 425 would permit this Court to disregard an error of a nature as my Lord the Chief Justice finds to have existed in the present case. For these reasons I am not at present disposed to express an opinion on the correctness or incorrectness of the precedents just cited. I would dismiss the appeal.

SINNETAMBY, J.—

The accused in this case was charged, inter alia, with " driving vehicle No. CY-8712 negligently or without reasonable consideration for other persons using the highway " in breach of Section 153 (3) of the Motor Traffic Act of 1951. He was, in due course, convicted.

Objection was taken to the charge. It was contended that a conviction on charges in the alternative in respect of two distinct and separate offences was bad on the ground of duplicity, and in support of this contention reliance was placed on the case of *Edwin Singho v. Sub-Inspector of Police, Kadawatta* [3]. Charges in the alternative may, under our Criminal Procedure Code, be framed only in those cases contemplated by

[1] *(1923) 25 N. L. R. 166.* [2] *(1926) 27 N. L. R. 511.*
[3] *(1956) 57 N. L. R. 355.*

Section 181. The first question, therefore, that arises is whether the charge under consideration was in respect of one offence committed in two alternative ways or whether it was in respect of two distinct offences. It was submitted by the learned Attorney-General that it involved only one offence. In support of his argument he drew the attention of the Court to the other two provisions of Section 153 and in particular to sub-section (1). That particular sub-section prohibits a person from driving a motor vehicle on the highway when he is under the influence of alcohol or any drug. The gravamen of the charge under Section 153 (1) is the driving while in a state of incapacity whether induced by drink or by a drug. One can understand the offence contemplated by Section 153 (1) being one offence irrespective of whether it was alcohol or a drug which caused the incapacity. In *Thomson v. Knights*[1] the King's Bench Division took the view that a similar provision in the Road Traffic Act of 1930 was not bad for uncertainty as the section creates only one offence and the words " under the influence of drink or a drug " are merely adjectival. " The offence " Lord Goddard, C.J., in the course of his judgment stated " is driving, or attempting to drive or being in charge of a vehicle, when the man is incapable of having proper control of the venicle, and that incapacity is caused by a drink or a drug." Lord Goddard went on to say :—" I do not think Parliament here meant to create one offence of being incapable by reason of a drug and another offence of being incapable by reason of drink. What Parliament intended to provide was that a man driving or attempting to drive, or being in charge of a motor car in a self-induced state of incapacity, whether that incapacity was due to drink or drugs, the man commits an offence in each of those cases." Section 153 (1) is an abbreviated form of the corresponding provisions of the Road Traffic Act and there is omitted the following additional words which are to be found in the latter enactment, namely :—" to such an extent as to be incapable of having proper control of the vehicle." Nevertheless, it seems to me that what is penalised is the driving while under a state of self-induced intoxication irrespective of whether that intoxication is caused by alcohol or by a drug. When, however, the other provisions of Section 153 of the Motor Traffic Act are considered, considerable guidance is available from the decisions of the English Courts on similar provisions under the Motor Car Act and the subsequent Road Traffic Acts in England. I shall now refer to a few of those decisions. In *The King v. Surrey Justices, Ex-parte Witherwick*[2] the expression " without due care and attention or without reasonable consideration for other persons using the road " was held to constitute two distinct offences ; namely, one offence being the driving without due care and attention, and the other being the driving without reasonable consideration for other persons using the road. The word " or " is used in a disjunctive sense in the context. If, instead of the word " or " the word " and " had been used, a different construction might arise. In *The King v. Jones and*

[1] *(1947) 1 K. B. 336.*
[2] *(1932) 1 K. B. 450.*

other Justices, Ex-parte Thomas[1] the accused was charged with having driven a motor car " recklessly *and* at a speed which was dangerous to the public " in breach of certain provisions of the Motor Car Act of 1903. The Motor Car Act, as pointed out by Lord Coleridge, J. defined four separate offences, namely, (1) driving recklessly, or (2) driving negligently, or (3) driving at a speed which is dangerous to the public, or (4) driving in a manner which is dangerous to the public, but the charge in that case was held to be in respect of one single act, namely the act of driving which was both reckless and at a dangerous speed. Had the charge been in the alternative then the decision in the case of *Rex v. Wells*[2] would have applied. In *Rex v. Wells* (supra) the charge was for driving a motor car " at a speed *or* in a manner dangerous to the public". Lord Alverstone, C.J., in dealing with the question made the following observations :—" It seems to me it is quite impossible to say that the only offence here is ' driving at such a speed as is dangerous ', because it is obvious that there is the offence of driving at a speed which is dangerous to the public, or the offence of driving in a manner dangerous to the public. I do not think you can treat the words ' at a speed ' as surplusage, any more than the words ' or in a manner ' ". The conviction in that case was set aside on the ground of duplicity.

In regard to the question that arises for decision in the present case, I agree with My Lord the Chief Justice that sub-section 3 of section 153 relates to two distinct offences, one being " to drive a motor vehicle negligently ", and the other " to drive a motor vehicle without reasonable consideration to other persons using the highway." Whatever the law may be in England, in so far as joinder of charges is concerned, we, here, are governed by the provisions of the Criminal Procedure Code. Section 181 permits a charge to be framed in the alternative—in this respect apparently differing from the English Law—where it is doubtful which of the several offences the facts which can be proved will constitute. The ordinary rule, however, is that for each distinct offence, there should be a separate charge and a separate trial. In the present case the facts which the prosecution were able to prove are set out in My Lord's judgment. They are, that the accused came at a high speed and knocked down Marthina Rodrigo as she was proceeding on the extreme edge of the road on her correct side ; she was thrown some distance on to a heap of metal, and the car went diagonally across the road for a distance of about sixty feet and turned turtle. Apart from Marthina Rodrigo and the car in question, there was no other road user present in the locality at that time. Upon these facts, is it possible for the prosecution to say with any degree of certainty that the only offence which the accused could have committed was that of driving negligently ? In order to substantiate such a charge there must be established criminal negligence ; and, if that were the only charge brought and criminal negligence was not found to have been established, the accused would have been entitled to an acquittal. The finding of criminal negligence is based on inferences and no prosecutor can ordinarily say that upon the facts available to him a Court must necessarily draw such an

[1] *(1921) 1 K. B. 632.* [2] *91 Law Times Reports 98.*

inference. The facts of this case are consistent both with criminal negligence and with a disregard to the rights of other road users, or, in other words, a lack of reasonable consideration for other persons using the highway. My Lord the Chief Justice in his draft judgment which he so kindly sent to me for my information, has taken the view that on the facts of this particular case the question of whether the accused had or had not acted without consideration for other persons using the highway, does not arise. To use his own words, My Lord states :—" It is not the prosecution case that there were others using the highway at the time. The prosecution evidence does not, therefore, disclose that the accused committed the offence of driving a motor vehicle on the highway without reasonable consideration for other persons using the highway. The fact that the accused knocked down Marthina Rodrigo does not bring him within the ambit of the second prohibition." With great respect, I find myself unable to agree. Marthina Rodrigo is as much a road user as anyone else and although the word " persons ", in the plural, is used in the sub-section, under our Interpretation Ordinance, the use of the plural includes the singular. In my opinion, it is not necessary that there should have been other road users apart from Marthina Rodrigo for the particular provision to apply. If the accused drove the car in a way which justifies the possible inference that he did drive without reasonable consideration for Marthina Rodrigo using the same highway, he would be guilty of the offence contemplated by the second limb of Section 153 (3). On the facts available to the prosecution, the question was whether a conviction could be expected under the first limb of that sub-section or under the second, and that depended on what inference a Judge would draw. In my view, therefore, there was uncertainty as to which of the several offences the facts will constitute and the prosecution was entitled to frame this charge in the alternative. In the case of *The King v. Kitchilan*[1] the Court of Criminal Appeal took the view that where upon the facts the prosecution was in doubt as to which inference the Court would draw, it was entitled to frame a charge in the alternative. In that particular case the inference was with regard to whether all the accused had a common murderous intention or whether they had merely abetted the murder. The observations of Pratt, J.C. in *Ganesh Krishna v. Emperor* was cited with approval. It was to the following effect :—

> " It (Section 236 of the Indian Code which is the same as our Section 181) applies only in those rare cases in which the prosecution cannot establish exclusively any one offence but are able on the facts which can be proved to exclude the innocence of the accused and to show that he must have committed one of two or more offences."

In the present case it cannot be said that the prosecution could exclusively establish that the accused committed only the offence of which he was eventually convicted, but they are certainly able to exclude the innocence of the accused and to show that he had committed one of two or more of the offences.

[1] *(1944) 45 N. L. R. 82.*

It seems to me, therefore, that the charge as framed was in order and although it relates to two offences is not obnoxious to the provisions of section 181 of the Criminal Procedure Code. I agree, however, that it might have been framed with greater care and strictness. Even though the charges may under our Code be framed in the alternative, when it comes to convicting an accused, the Judge must convict him of one or the other of the offences and not in the alternative.

In this particular case, the Judge has apparently convicted the accused of driving negligently and not in the alternative of both offences set out in Count 1 of the charge. His finding is as follows :—" the fact that the woman walking along the left edge of the road was in fact knocked down by a vehicle which came from behind is prima facie evidence of negligence. The accused's explanation is unsatisfactory. I find the accused guilty on Count 1." I take it that by using these words the Court intended to find the accused guilty on Count 1 on the charge of driving negligently. I would accordingly affirm the conviction and the sentence, and dismiss the appeal.

Appeal dismissed.