1940 *Present :* **Moseley S.P.J.**

JONKLAAS *v.* SILVA *et al.*

424—425—M. C. Colombo, 908.

Causing grievous hurt by a rash or negligent act—Burden on prosecution—Proof of disregard for life or safety of others as to amount to crime.

In a charge of causing grievous hurt by a rash or negligent act, the prosecution must prove that the negligence or incompetence of the accused went beyond a mere matter of compensation and showed such disregard for the life and safety of others as to amount to a crime against the State.

Rex v. Bateman (*19 Cr. App. R. 13*), followed.

APPEAL from a conviction by the Magistrate of Colombo.

R. L. Pereira, K.C. (with him *C. de Jong*), for first accused, appellant.

C. de Jong, for second, appellant.

E. H. T. Gunasekera, C.C., for complainant, respondent.

Cur. adv. vult.

November 21, 1940. MOSELEY S.P.J.—

These two appeals arise out of proceedings against the first appellant in connection with an incident which occurred at Slave Island level crossing. The first appellant was convicted of causing grievous hurt by a rash act. The second appellant, a police constable on point duty at the scene at the time of the incident, was called upon, at the close of the proceedings to show cause why he should not be punished for contempt of Court under section 440 (1) of the Criminal Procedure Code in that he gave false evidence. He was found by the learned Magistrate to have given false evidence, he showed no cause why he should not be punished, and was fined Rs. 25. in default one month rigorous imprisonment.

It is no doubt proper and convenient that, at the hearing of the first appeal, it should be made clear to this Court, that, in the opinion of the learned Magistrate, the second appellant had given evidence which in certain respects was false, and it may also be convenient that the two appeals should be heard together. On the whole, it would seem more appropriate that in such cases the appeals should be heard independently of each other. That, however, is only my individual opinion.

The charge against the first appellant alleged three rash, or, in the alternative, negligent acts, to wit, (1) driving a motor bus at a dangerous speed, (2) driving against the signal of the gateman on duty, and (3) driving when the railway gates were closing in for traffic, whereby grievous hurt was caused to Miss C. M. Ludekens. The description of the second of these alleged rash acts is clear enough. The first and third allegations are somewhat vague, but the appellant has not complained, nor would it seem, that he was prejudiced thereby.

In regard to the first allegation, it was positively established that from the halting place from which the bus moved off to the point of impact with the gate could not have been more than eighty-six feet. The learned

Magistrate found that the damage caused to the bus indicated that it was travelling at "high speed". He also expressed the view that, since the gate was incapable of developing momentum, the damage was caused by the momentum which the bus had gathered in trying to rush through the gate. This theory is not supported by the witness, Mr. Gauder, upon whose evidence the Magistrate placed great reliance. This witness said that the gates start closing slowly, then gain speed and close with a click. In the opinion of the examiner of motor cars "the damage was caused by the bus coming hard up against the rigid gate". He also said that the speed at which the gate was opening would not be a contributory factor to the damage caused. If my interpretation of the latter observation be correct, I have some difficulty in accepting it as beyond argument. In view of the short distance which the bus travelled before the collision it does not seem to me that it could have attained a high rate of speed, nor even a rate at which it could not have been pulled up within a very short distance. I do not think, therefore, that the allegation that the bus was driven at a dangerous speed can be held to be proved.

The third allegation seems to mean that the appellant kept his bus in motion after the gates began to close against him. The evidence on this point is conflicting, even among the witnesses for the prosecution. The events to which the witnesses both for the prosecution and the defence, speak took place according to the evidence of the signalman in the cabin, within the space of less, probably much less, than thirty seconds and while the bus was traversing less than eighty-six feet. The eye-witnesses would have to note at least three factors, viz., the position of the bus, whether or not it was in motion, and whether or not the gates had begun to close. It is not surprising to find Miss Ludekens saying "the gates began closing. The bus driver started off" and then "as he started the gates began closing". Mr. Gauder too seemed to be not very certain as to the sequence of events. According to him the bell rang as the bus started off. According to the signalman, fifteen seconds should elapse between the ringing of the bell, and the gates starting to close. And Mr. Gauder later said that the gates started opening practically when the bus had just started. Now if his first statement is correct, namely, that the bell rang just as the bus started, and if it is also true, as the signalman says, that the gates do not begin to close until fifteen seconds after the bell rings, the bus would have fifteen seconds in which to travel the 110 feet which would bring it safely out on the far side. The driver no doubt would be acting at his own risk if he chose to start after the bell rang. But if Mr. Gauder's evidence is accepted, and the learned Magistrate found him the type of witness whom it is impossible to disregard, "the bell rang just as the bus started off" and although it may be considered an error of judgment to continue in motion after the bell has rung, there would appear normally no difficulty in making the crossing in safety. In this respect I think that the appellant should at least get the benefit of the doubt.

We now come to the second allegation, consideration of which I have reserved to the last. It seems to me the most important feature in the case and there is, as might be expected, a direct conflict between the evidence for the prosecution and defence.

The story of the first appellant is that he was 10 yards short of the gates when he heard the bell. He slowed down and was given the signal to pass by the second appellant. Incidentally I may observe that it does not appear to be, nor should it be, any part of the latter's duty to give any such signal after the bell has been rung. From that time the railway officials are in control. At that time, says the first appellant, the gates were not closing. After the bus had got on to the track the groundman, that is the man who has the flag, stood in front of the bus. The appellant stopped the bus, the groundman got clear, the appellant drove on and the collision with the gate occurred. His story is corroborated by the second appellant.

Against that Miss Ludekens says that when the bell rang, that is to say fifteen seconds before the gates began to close, the porter waved a red flag. By "porter" she meant the groundman. Mr. Gauder heard the bell ring and the gate-keeper then came out and moved to the centre of road and held up a red flag. As the bell started to ring the driver started to move the bus off the halting place. It must be borne in mind that the ringing of the bell is the signal upon which the groundman goes to the middle of the track, waves his flag and blows his whistle, the latter act being the signal upon which the mechanism to close the gates is put into operation. The groundman is certain that when he blew the whistle the bus was at the halting place. Neither Miss Ludekens nor Mr. Gauder speaks of hearing the whistle, but, if fifteen seconds elapse between the ringing of the bell and the closing of the gates, it is impossible to reconcile their evidence, that the bus started at in about the time at which the bell rang, with the groundman's evidence that when he blew his whistle, which would be fifteen seconds later, the bus was still at the halting place. In view of the short period, less than thirty seconds, during which these events took place, one is forced to the conclusion that in confusion that may well have reigned in the minds of all the eye-witnesses, it is likely that the sequence of events has been subject to distortion. If, as the groundman says, the bus was at the halting place when he blew his whistle, whereupon the gates would begin to close it cannot be supposed that any driver, however, reckless, would attempt, from a stationary position, to try to effect a crossing, nor is that situation endorsed by Miss Ludekens and Mr. Gauder. It is much more probable that the bus was already in motion and that the groundman, having by his whistle set the gate in motion, acted as he thought best to avoid a collision which must have seemed imminent. It may also be observed that the man who operated the gates was an extra porter who had only been engaged on this work for 2 or 3 days. It is conceivable that he anticipated the groundman's signal. No doubt the appellant has sought, in his evidence, to exaggerate the facts in his own favour, but I do not think that the evidence of the witnesses for the prosecution, differing as it does in some important particulars, can be accepted as overwhelming proof of the criminal culpability of the appellant. As has often been said, it is not every little trip or mistake that will make a person criminally liable. These words although usually applied to cases of negligence seem to me to be not inappropriate to a case of rashness, and in particular to the case before me. The distinction between the negligence which is sufficient

ground for a civil action and the higher degree which is necessary in criminal proceedings has been sharply insisted on. "The prosecution must satisfactorily prove that negligence or incompetence of the accused went beyond a mere matter of compensation and showed such disregard for the life and safety of others as to amount to a crime against the State and conduct deserving punishment." (*Rex v. Bateman*[1].)

I do not in this case find that satisfactorily proved and the appellant must get the benefit of the doubt.

I would therefore allow the appeal. The conviction, sentence and order for endorsement of licence are set aside.

In regard to the case of the second appellant, I have already observed that the first appellant has no doubt exaggerated facts in his own favour. Equally, without doubt as far as I am concerned he has been assisted in so doing by the second appellant. One would not expect a police constable to give false evidence in favour of an accused person unless he was instigated by that person or someone acting on his behalf. It has been urged that there was no opportunity for the accused to approach this appellant. That there was such opportunity is clear from the entry in the second appellant's diary that while he was taking the accused to the station he met P. S. 2146. There was further opportunity for representations to be made before 6.40 P.M. at which time this appellant was found by the Inspector making the entry "a considerable time after the accident". What impresses me most is the concluding paragraph of the entry. It runs as follows:—"I am quite certain that when I gave the signal to the driver to come on the groundman was not standing in the middle of the road". There appears to me to be no possible justification for the words "I am quite certain" unless the question, "are you quite certain?" had been put to him.

I do not propose to interfere with the Magistrate's order in this connection and dismiss the appeal of the second appellant

Conviction set aside.
2nd appellant's appeal dismissed.