1954 *Present :* **Gratiaen J. and Gunasekara J.**

M. S. FERNANDO, Appellant, *and* THE QUEEN, Respondent

S. C. 82—D. C. (Criminal) Balapitiya, 309

Motor vehicle—Negligent driving—Definition of term "driving"—Penal Code, s. 298.

A person who is merely steering a motor vehicle while it is being towed by another motor vehicle is not "driving" it and therefore cannot be convicted under section 298 of the Penal Code upon an indictment charging him with causing death by an act of negligent driving.

APPEAL from a judgment of the District Court, Balapitiya.

M. M. Kumarakulasingham, with *A. C. M. Uvais*, for the accused appellant.

A. E. Keuneman, Crown Counsel, for the Attorney-General.

Cur. adv. vult.

February 10, 1954. GUNASEKARA J.—

The appellant, who was the first accused in this case, was tried before the District Court of Balapitiya upon an indictment charging him with having committed an offence punishable under section 298 of the Penal Code, in that he—

"being the driver of bus No. IC 990 did cause the death of one Wanigamuni Appusingho of Totagamuwa by doing one or more of the following negligent acts, not amounting to culpable homicide, to wit—

(*a*) by driving the said bus without keeping a proper lookout,

(*b*) by driving the said bus without due care and precaution,

(*c*) by driving the said bus without reasonable consideration for other users of the road,

(*d*) by driving the said bus without giving adequate warning to other users of the road of its approach."

He was convicted and sentenced to a fine of Rs. 250 or one month's rigorous imprisonment in default of payment of the fine. (The second accused who was charged with abetment was acquitted.) At the close of the argument in appeal we set aside the conviction of the appellant and stated that we would give our reasons later.

The accident occurred at about 4.45 p.m. on the 18th May, 1952, on the main road from Colombo to Galle. The road at this place was 21

feet wide from turf edge to turf edge, and 16 feet of the width was tarred and metalled. According to the evidence accepted by the district judge, the deceased Appu Singho was walking on the wrong side of the road along the unmetalled area, which was 3½ feet wide, and had just stepped on to the macadam without looking behind him when he was knocked down from behind by the bus in question and thrown some distance forward. This bus, a heavy six-wheeled vehicle, was being towed by a smaller one, at the end of a chain 17½ feet long, and steered by the appellant. The towing bus (which was driven by the second accused) had just passed the deceased when he took a step or two to the right and was run over. A pedestrian who had seen the accident, Gabriel Silva, shouted that a man had been run over, and the buses stopped. The appellant's bus came to rest with its left front wheel on the deceased man's face. Apparently it had also collided with the towing bus, for it was later found that the two buses had suffered some damage which indicated a collision between the right front portion of the appellant's bus and the left and middle rear portion of the other one. Some of the people who came up (about ten to fifteen of them according to one witness) pushed the appellant's bus clear of the deceased, but he must have been dead already for his head and face were crushed. An inspector of police arrived immediately afterwards and held an investigation.

The conviction of the appellant is based upon a finding that he had steered his bus so near the left edge of the road as to occupy the unmetalled area (so that the deceased was already in the track of the approaching bus before he stepped on to the metalled portion) and that he had failed to sound his horn when he approached the deceased. The prosecution led the evidence of five persons who claimed to have seen the accident. The appellant did not give evidence and no witnesses were called for the defence. According to four of the five eye-witnesses called by the Crown the towing bus was driven along the middle of the road and the other followed on the left-hand side. The fifth witness, a woman named Senehamy, gave no evidence on this point, as to the portion of the road along which the vehicles travelled. Only one witness, Jayaneris, stated that any portion of the appellant's bus was on the unmetalled area before the accident. "The small bus came in front along the middle of the road," he said, "and the big bus came along *a little to the edge of the road* on the land side". Then, apparently in reply to a further question from the prosecuting counsel in examination in chief, he said "The left front wheel of the big bus was coming along the clay portion of the road". Gabriel Silva only described the towed bus as travelling "on the land side", that is to say, on the left of the road. Another witness, Kalusingho, stated that "the smaller bus, which came in front came along the middle of the road and the larger bus came along the land edge of the road", but he did not say that any part of it was on the unmetalled area. According to the other witness, too, a woman named Seelin Nona who had been walking with Senehamy 7 or 8 fathoms behind the deceased on the same side of the road when the two buses overtook and passed them, "the small bus went along the middle of the road and the other bus went along the edge of the road"; but obviously, not so near the very edge as to leave her and her

companion no room for themselves on the side of the road. The effect of the evidence of four of these witnesses appears to have been misapprehended by the learned judge, for he says, in his judgment :

> " All the witnesses have stated that the front bus was driven towards the centre of the road while the towed bus was coming on the extreme edge. The photographs produced clearly show that at the time these photographs were taken that the left front wheel and the left rear wheel of the bus IC 990 were out of the tarred portion and they were on the clay portion."

The photographs that are referred to show the two buses and the body of the deceased man in the position in which the inspector of police found them. The near-side wheels of the appellant's bus, which was 7′ 4″ wide, were on the unmetalled portion of the road 1′ 6″ from edge of the macadam and 2′ from the turf edge on the left-hand side. The towing bus, which was about 8′ in front of it was well on the macadamized portion of the road, with its left rear wheel 4′ and front wheel 4′ 6″ from the left edge of the macadam. The width of this bus was 7′, so that it was practically on the middle of the road. The deceased's body lay between the two buses with the upper part of it on the unmetalled area and the lower portion, from the waist downwards, on the macadam. The learned judge holds that these photographs " show that the towed vehicle had been driven on the very extreme edge of the road as stated by the prosecution witnesses " ; and also that " the position of the towed vehicle clearly shows that it was being driven on the very extreme edge of the road, thus proving a danger to pedestrians who may happen to be on the road-side ". These findings clearly involve a misdirection as to the bearing of the evidence about the position in which the appellant's bus was when the inspector of police arrived. That was the position into which it happened to be pushed by a crowd of ten to fifteen persons from the position in which it had come to rest after it had knocked down the deceased, travelled some distance beyond the point of impact, and collided with the towing bus. It seems manifest that the position in which the inspector found the bus cannot indicate at what distance from the extreme edge of the road it was travelling at the time when it knocked down the deceased man.

The finding upon which the conviction was based was the result of a misdirection as to the effect and bearing of the evidence, and the conviction is therefore bad.

It was also contended for the appellant that, far from proving that he had done the negligent act of driving the bus in the manner described in the indictment, the Crown had failed to prove that he drove the bus at all ; for, according to the evidence for the prosecution, he had merely steered a vehicle in tow that was disabled and incapable of being driven. In support of this view the learned counsel for the appellant cited the case of *Wallace v. Major*[1], where it was held that a person steering a disabled motor lorry while it was being towed was not " driving " it and therefore could not be convicted under section 11 of the Road Traffic

[1] *[1946] 1 K. B. 473.*

Act, 1930 (20 and 21 Geo. 5, C. 43), of the offence of driving a motor vehicle in a manner which was dangerous to the public. The same contention was advanced at the trial but the learned district judge rejected it. He held that *Wallace v. Major* " can be distinguished, for the present charge is not under the Motor Traffic Act but under section 298 of the Penal Code ", and that though the appellant has been described in the indictment as the driver of the bus in question " the definition of the word ' driver ' in the indictment should not be given a restricted interpretation ". The learned judge was " satisfied that, due to the faulty steering of the first accused the rear bus had been driven on the extreme edge of the road and it knocked down this unfortunate man ".

The decision in *Wallace v. Major*, however, did not turn on any technical definition but on the question whether a person who merely steers a disabled motor vehicle in tow can be said to " drive " it, in the ordinary acceptation of that term ; and that is precisely the question that arose for the learned judge's decision in the present case. " In my judgment," said Lord Goddard C.J. in *Wallace v. Major*, " it is impossible to say that a person who is merely steering a vehicle which is being drawn by another vehicle is driving that vehicle. No doubt he is controlling it to some extent ; no doubt he is doing many things which a driver would have to do ; but before he can be convicted of being a person driving a motor car in a dangerous manner, it must, it seems to me, be shown that he is at least driving it ; that is to say, making the vehicle go ". It is true that, unlike in the case of the offence of dangerous driving under the English Road Traffic Act of 1930 or our Motor Traffic Act of 1951, driving a motor vehicle is not a necessary ingredient of the offence of causing death by a negligent act punishable under section 298 of the Penal Code ; but the negligent act alleged in the indictment in the present case is an act of negligent driving, and it was therefore necessary for the prosecution to prove such an act by the appellant before he could be convicted without amendment of the indictment. The prosecution failed to prove that the appellant was driving the bus, " that is to say, making the vehicle go ".

It was contended by the learned crown counsel that if the acts proved to have been done by the appellant did not amount to driving the bus, there had only been an error in the indictment in the description of the act as " driving " instead of " steering ". He urged that it was not shown that the error had occasioned a failure of justice, and that therefore the conviction should not be set aside on the ground that the averment of driving had not been proved. That was, however, a material averment, and it can hardly be said that when the Crown adduced no proof of it and the indictment had not been amended the appellant should have given evidence or called witnesses for the purpose of defending himself against the unamended charge as though it had been amended. He was entitled to a finding that the Crown had failed to prove the negligent act that was alleged against him, and not to be convicted upon the footing that he had committed a different act unless the

indictment was first amended and he was given an opportunity of dealing with the charge in its amended form. There has thus been a failure of justice.

For these reasons we quashed the conviction and set aside the sentence passed on the appellant. In our opinion the evidence in the case was not such as to warrant an order for a new trial.

GRATIAEN J.—I agree.

Conviction quashed.