

1966

Present : G. P. A. Silva, J.

A. W. JOACHIM (Inspector of Police), Appellant, and
L. D. DHARMADASA, Respondent

S. C. 20/66—M. C. Horana, 37433

Motor vehicle—Charge of negligent driving—Evidence that accused did not have full control of steering wheel—Effect—Motor Traffic Act, s. 240.

A person who is at the steering wheel of a motor vehicle is not liable to be convicted of the offence of negligently driving that vehicle unless he has full control of the vehicle at the wheel, whether the vehicle moves by mechanical propulsion or by gravitation. He cannot be convicted if he is deprived of the control of the vehicle by an external agency.

The accused-respondent was charged with having negligently driven a motor vehicle on a public highway. The evidence showed that at the time of the accident the accused was at the driving-wheel and that the vehicle was being pushed backwards up a hill by four or five people for the purpose of getting the engine started, when it struck a pedestrian who was legitimately using the road on his correct side and injured him.

Held, that, at the moment of the impact, there was hardly anything which the accused was doing of his own volition, apart from sitting at the driving seat and holding the steering wheel. In the circumstances, the accused was entitled to be acquitted.

Held further, that when the character or attribute of mechanical propulsion is absent in a vehicle even for the time being, such vehicle cannot be regarded as a "motor vehicle" within the meaning of that term in section 240 of the Motor Traffic Act.

APPEAL from a judgment of the Magistrate's Court, Horana.

L. B. T. Premaratne, Senior Crown Counsel, with *F. C. Perera*, Crown Counsel, for the complainant-appellant.

L. W. Athulathmudali, for the accused-respondent.

Cur. adv. vult.

August 28, 1966. G. P. A. SILVA, J.—

The accused-respondent in this case was charged on two counts, namely, that he drove a van on a public highway negligently or, in the alternative, that he drove it without taking such action as may be necessary to avoid an accident. After trial he was acquitted by the learned Magistrate who held that in the circumstances of this case, though the driver manipulated the steering wheel, the vehicle had been set in motion not by the driver but by an outside agency, namely, those who pushed it, and

that the driver was not therefore driving the vehicle. The complainant, with the sanction of the Attorney-General, has appealed against the acquittal by the Magistrate.

The main question that arises for consideration is whether a person can be said to drive a motor vehicle when he is at the wheel and the vehicle is being pushed in the circumstances borne out by the evidence of the witnesses. The evidence on which the learned Magistrate found it prudent to act was that at the time of the accident in question the vehicle, lorry No. CY 4683, was being pushed back by four or five people for the purpose of getting the engine started. It is not clear from the evidence what the state of the road was where this accident occurred but the accused's evidence was that the vehicle was being pushed back up a hill and this position was suggested in the cross-examination of the victim of the accident and the Police Officer. Nor has it been made clear why the vehicle was being pushed up a hill for the purpose of starting, and the reasonable inference one can draw is that the people wanted to push it up to a point and release it so that the driver will have the advantage of getting the vehicle started thereafter when it came down the incline. It can safely be assumed therefore that the vehicle was being pushed backwards up the hill on a public road when it struck a pedestrian who was legitimately using the road on his correct side and injured him.

The decisions on which the learned Magistrate relied as well as some others have been cited by Crown Counsel in support of the appeal. In the case of *Wallace v. Major*¹ a Bench of three Judges, presided over by Lord Goddard C.J., unanimously held that a person, who was at the wheel of a disabled vehicle for the purpose of steering while it was being towed by another motor vehicle, was not a driver and was not driving a mechanically propelled vehicle within the meaning of section 11 of the Road Traffic Act, 1930. Lord Goddard expressed the matter in simple language when he said that a Penal Statute must be strictly construed and that before a person could be convicted of being a person driving a motor car in a dangerous manner it must be shown that he was at least driving it, that is to say, making the vehicle go. Humphreys J., while fully agreeing with these observations, added that it would be a contradiction in terms to say that the person at the wheel of the disabled vehicle which was being drawn by a motor vehicle in those circumstances was driving it. The principle underlying this decision is that a person who is at the driving wheel of a vehicle cannot be convicted of any offence in respect of his driving of that vehicle unless he had control over the vehicle and he propelled it or made it go. This decision was followed by Gunasekara J. in the case of *Fernando v. Queen*², in which the driver of a bus was indicted with having caused the death of a person by a negligent act. It transpired in evidence that the bus, which the accused was alleged to have driven, was being towed by a smaller one at the end of a chain 17½ feet long and steered by the accused.

¹ (1946) 1 K. B. 473.

² (1954) 56 N. L. R. 228.

Gunasekara J. held that in the circumstances the prosecution had failed to prove that the accused was driving the bus in the sense in which Lord Goddard had used the term.

In *Saycell v. Bool*¹, the question arose whether the owner of a lorry which had no petrol in the tank and which stood at the head of an incline could be held to have driven the vehicle when he released the brake and set the lorry in motion by pushing it and later got into the driving seat and steered it into the garage. Goddard C. J. expressed the view that he drove the vehicle.

On a consideration of the two cases decided by Goddard C.J. it seems to me that the fundamental point is whether the person who steers has control of the vehicle and whether there is an external agency which deprives him of that control which he would have otherwise had. In this view of the matter the case of *Shinwell v. Fisher and others*², which was cited by Crown Counsel in support of his contention is of no assistance to decide the question, except to emphasise that full control of the vehicle at the wheel is a *sine qua non* before a person is found to have driven the vehicle, whether the vehicle moves by mechanical propulsion or by gravitation.

Mr. Premaratne has also drawn my attention to the case of *Regina v. Spindley* referred to in the *Criminal Law Review* (1961), page 486, which in many ways bears the closest resemblance to the instant case. The facts of that case would show that a person, who was disqualified from driving, committed the offence of driving a motor vehicle when he steered a van sitting in the driving seat of the vehicle which was being pushed from behind by another. Counsel for the defendant sought to distinguish this case from *Saycell v. Bool* on the ground that in that case only one man had anything to do with the vehicle and that, when the defendant in that case pushed the vehicle downhill and then jumped in and steered, he made it go. The Court held, however, that the fact that propulsion was coming from somebody pushing from behind and not from the force of gravity did not distinguish the case from *Saycell v. Bool*.

The Commentator in this case referring to the cases of *Saycell v. Bool* and *Wallace v. Major* goes on to say at page 488, *inter alia* :—

“This would seem to mean that the control must extend to the forward motion of the vehicle. The driver in *Saycell v. Bool* clearly had this as he could have stopped the vehicle at any time by applying the brake whereas the driver in *Wallace v. Major* might have been liable to be dragged along by the towing vehicle even if he did apply the brake. Where the vehicle is being pushed by manpower it is clearly possible for a person at the controls to stop it at any moment. The case is then not inconsistent with the previous authorities—but the distinction is not a happy one.”

¹ (1948) 2 A. E. R. 83.

² 35 C. A. R. 100.

The cases in which the respective Courts found against the defendants had the following features :—

- (i) forward movement of the vehicle,
- (ii) the driver in full control of the steering and brakes,
- (iii) the movement of the vehicle by gravitation or by force used from behind the vehicle by one human being.

In the instant case, however, the vehicle was being moved backwards by a number of people and the accused was thus not in possession of full control of the vehicle nor had he a clear view of the objects behind him as it happened in the cases cited where the defendants were found guilty. In other words, in the present circumstances, at the moment of the impact, there was hardly anything which the accused was doing out of his own volition apart from sitting in the driving seat and holding the steering wheel. He was not making the vehicle go in any sense of the term and the force exerted by several people may have been of such a degree as to prevent him from exercising full control even if he wanted to, the position being so very different from a case where the vehicle would be moving downhill by gravitation with a man seated in the driving seat and in control of the steering and brakes or from a case where one person would be pushing forwards with the person in control having a clear view of objects facing him. In these circumstances I do not feel sufficiently justified in setting aside the acquittal of the accused basing my decision on the cases cited by Crown Counsel in support.

There is another aspect of this matter which strikes me as being not unimportant. The offences under the Motor Traffic Act, for the purposes of this case, relate to the driving of a motor vehicle. A motor vehicle is defined in section 240 of the Act as meaning any mechanically propelled vehicle intended or adopted for use on roads, and includes a trolley vehicle and a trailer and a tractor. Mechanical propulsion is therefore an essential attribute of a vehicle in order that it may be treated as a motor vehicle. In that view of the matter it seems to me that when one deals with offences such as those referred to in this case one is entitled to consider only vehicles which are not divested permanently or temporarily of the character or attribute of mechanical propulsion at the time of the alleged offence. When this character or attribute of mechanical propulsion is absent in a vehicle even for the time being I do not think that a Court is justified in treating such a vehicle as a motor vehicle. This character, in my view, is implicit in the term "Motor Vehicle" and is inseparable from it. If, for instance, the entire engine is removed from what was a motor vehicle and some sort of brakes remained and a person should be seated at the driving wheel and be steering it either over an incline or being pushed by others from behind I should imagine that the driver cannot be convicted of an offence under the Motor Traffic Act if he caused some injury to a pedestrian on the road by reason of ineffective brakes or for some such reason for which he could have been found guilty if the vehicle was in fact a motor vehicle within the meaning of the Act.

If that be so, the fact that there is an engine attached to the vehicle which is not functioning at the time of the accident would seem to me to make no difference to the question. Viewed from this angle too, there is no reason for me to interfere with the decision of the Magistrate.

I might add that even if I had sufficient grounds to disagree with the learned Magistrate's view of the law, this is a case in which I should have had considerable difficulty on the facts to find the accused-respondent guilty of criminal negligence in doing any of the acts alleged in the charge. Nor would I have found it possible to convict the accused of the alternative charge in the face of the authority of the case of *Perera v. Perera*¹ cited by Mr. Athulathmudali in support of his contention.

The appeal is accordingly dismissed.

Appeal dismissed.

