1947 *Present :* **Wijeyewardene S.P.J.**

KALANASURIYA, Appellant, *and* JOHORAN (Inspector of Police), Respondent.

S. C. 541—M. C. Panadure, 41,864.

Criminal Negligence—Charge of causing grievous hurt by negligent act—Circumstances when burden of proof shifts to accused—Penal Code, s. 329.

The accused was charged, under section 329 of the Penal Code, with having caused grievous hurt by doing an act so negligently as to endanger human life or the personal safety of others.

The accused was driving a lorry, and the evidence showed that the lorry left the road, went a distance of fifty feet and injured a person standing eight feet away from the edge of the road.

Held, that there was *prima facie* evidence of negligence casting upon the accused the onus of proving that there was no negligence.

[1] *27 Crim. L. J. (1926) p. 386.*

APPEAL against a conviction from the Magistrate's Court, Panadure.

M. M. Kumarakulasingham, for the accused, appellant.—There is no evidence of criminal negligence. See *Andrews v. Director of Public Prosecutions* [1], *Akerele's case* [2], and the local cases which follow the principle laid down in those cases, namely, *Wickremesinghe v. Obeysekere* [3] *Lourensz v. Vyramuttu* [4], and *The King v. Leighton* [5].

Section 74 of the Penal Code applies to the facts of this case.

Boyd Jayasuriya, C.C., for the Attorney-General.—The doctrine of criminal negligence was first formulated in *Bateman's case* [6]. The House of Lords bowed to it but refused to apply it to the facts of *Andrew's case (supra)*. This doctrine is repugnant to and in conflict with the provisions of our Penal Code, particularly sections 327 and 272. It is submitted that the local cases which follow the rule in *Bateman's case (supra)* should be reconsidered.

The appellant, by season of his speed, found himself in a situation in which he lost control of the lorry. He is therefore answerable for the consequences. See *Rex v. Richard Timmins* [7].

The fact that the lorry left the road is evidence of negligence on the part of the driver. He may explain the circumstances under which it came to leave the road. Those circumstances may have been beyond his control and may exculpate him, but he must prove their existence. See *Ratnam Mudaliar v. Emperor* [8], *Rex v. Walker* [9], *and (1931) Criminal Law Journal, 1061.*

Cur. adv. vult.

July 18, 1947. WIJEYEWARDENE S.P.J.—

The accused was charged with having caused grievous hurt to one Mrs. Eugene de Alwis by doing one or more of the negligent acts specified in the charge and with having committed, thereby, an offence punishable under section 329 of the Penal Code.

The Magistrate convicted the accused on the charge and sentenced him to six week's rigorous imprisonment and cancelled his driving licence for a period of two years.

Counsel for the accused submitted that the charge was defective, as it omitted to state that the negligence of the accused was such "as to endanger human life or the personal safety of others". This point has not been raised in the petition of appeal. The charge mentions section 329 of the Penal Code. The omission referred to by the accused's Counsel could not have misled the accused and I cannot hold that the conviction is vitiated by it (*vide* section 171 of the Criminal Procedure Code).

The accused was carrying a load of tea chests in his lorry at Panadure, in the direction of Galle, about eight o'clock in the morning. The width of the tarred portion of the road is nearly twenty-one feet, and adjoining the tarred road on the left side, as one faces Galle, there is a grass verge

[1] *(1937) A. C. 576.*
[2] *(1943) (1) A. E. R. 367.*
[3] *(1935) 37 N. L. R. 327.*
[4] *(1940) 42 N. L. R. 472.*
[5] *(1946) 47 N. L. R. 283.*
[6] *19 Cr. App. R. 8.*
[7] *173 E. R. 221.*
[8] *(1934) A. I. R. 209.*
[9] *173 E. R. 1213.*

nearly eight feet in width. On the left boundary of the verge is a drain and beyond the drain is a barbed wire fence forming the boundary of an estate.

The accused's lorry left the tarred road and went across the grass verge a distance of nearly fifty feet and was stopped after its impact with the barbed wire fence. Mrs. de Alwis was standing near the barbed wire fence at the point of impact. She received a number of injuries including a compound fracture of both bones of the lower third of her right leg.

According to the evidence given by the accused, he was driving the lorry about fifteen miles an hour. He saw a cyclist thirty yards ahead of him. He blew the horn and then the cyclist turned to the right and tried to cross the road. The right front mudguard of the lorry struck against the cycle, and the cyclist fell down. He swerved to his left to avoid running over the cyclist. In doing so, he applied the foot brakes. Then the lorry left the road and went across the grass verge to the fence.

I am unable to accept the accused's evidence regarding the circumstances in which Mrs. de Alwis was injured. On his evidence, the accused had covered nearly thirty yards in the time taken by the cyclist to go a distance of about ten feet. He could not have possibly covered that distance in that time even if his speed was forty miles an hour. Again he showed the point X 2 in the sketch to the Sub-Inspector of Police as the place where he struck against the cycle. There were signs of brake marks from X 2 for thirty-six feet in the direction of Colombo. If his speed was fifteen miles an hour and there was even a partial application of brakes for thirty-six feet he must have been going very slowly at X 2 when he swerved to the left. If he then applied his foot brakes at X 2—as he says he did—it is difficult to understand how the lorry could have gone a distance of fifty feet after knocking down the cyclist. He does not state that his brakes were defective. Again, though he says he began to apply the foot brakes at X 2, there were no brake marks from the point X 2 to the point, nearly fifty feet away, where the lorry was found ultimately.

This is a case where the mere happening of the accident affords "*prima facie* evidence of negligence casting upon the party charged with it the onus of proving the contrary, for owing to the nature of the accident, *res ipsa loquitur*" (Broom's Legal Maxims, Seventh Edition, page 247). The accused's lorry left the road, went a distance of fifty feet and injured a person standing eight feet away from the edge of the road. The version given by the accused is so inherently improbable and inconsistent that it has to be rejected. The circumstances of the case show that the accused must have driven his lorry at an inordinately excessive speed, and that he was guilty of a very high degree of negligence in the means adopted by him to avoid the risk consequent on the speed of the lorry.

I dismiss the appeal.

Appeal dismissed.