APPELLATE CRIMINAL.

Before Cuming and Mukerji JJ.

H. W. SMITH

v.

EMPEROR.*

1925

Aug. 26.

Rash and negligent act.—Penal Code (Act XLV of 1860) s. 304 A.—Road closed to traffic being under repairs—Coolies sleeping on the road at night—Driving a motor-car running over and killing the coolies—Criminal rashness and negligence.

Where the accused, driving a motor-car at night, entered a road which being under repairs was closed to traffic and ran over and killed two coolies who were sleeping on the road with their bodies completely covered up except for their faces.

Held, that under the circumstances, the accused was not guilty of causing death by a rash and negligent act as it could not be said that he should have looked out for persons making such an abnormal use of the road.

Criminal rashness is hazarding a dangerous or wanton act with the knowledge that it is so and that it may cause injury but without intention to cause injury or knowledge that it will be probably caused. The criminality lies in running the risk of doing such an act with recklessness or indifference as to the consequence.

Criminal negligence is the gross and culpable neglect or failure to exercise that reasonable and proper care and precaution to guard against injury either to the public generally or to an individual in particular which having regard to all the circumstances out of which the charge has arisen it was the imperative duty of the accused person to have adopted. *Empress* v. *Idu Beg* (1), *Reg.* v. *Nidamarti* (2) referred to.

APPEAL by H. W. Smith, the accused. This appeal arose out of an order passed by the Chief Presidency Magistrate convicting the accused under section 304A

*Criminal Appeal No. 458 of 1925, against the order of T. Y. Roxburgh, Chief Presidency Magistrate of Calcutta, dated July 3, 1925.

(1) (1881) I. L. R. 3 All. 776, 779. (2) (1872) 7 Mad. H. C. R. 119.

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of the Indian Penal Code and sentencing him to suffer simple imprisonment for a period of one month and to pay a fine of Rs. 500. It was alleged that on the night of 12th May 1925, the accused by rashly and negligently driving his motor-car caused the death of Basiruddin Sirdar and Doodhya Uria, two coolies, who at the time were sleeping on the side of the Dufferin Road, which being under repairs, was closed to traffic. The defence *inter alia* was that the road was not effectively closed, that the accused entered the road in the ordinary normal way and there was no culpable negligence on his part. The learned Magistrate however, convicted and sentenced the accused as stated above; the accused thereupon preferred this appeal before the High Court.

Mr. Bagram and *Babu Tarakeswar Pal Chowdhury*, for the appellant. The barrier had a large gap in it and did not stretch across the road, effectively closing it, there was nothing to make the accused think that the whole road was under repairs; he entered the road in the "ordinary normal way, no road closed notice" was put up, no warning in fact was given; Ramjan is not a truthful witness and ought not to be relied upon, the occurrence was a mere accident there was no culpable rashness or negligence on the part of the accused.

The Deputy Legal Remembrancer (*Mr. N. A. Khundkar*), for the Crown. The accused drove a motor-car by night on to a road which he knew to be closed to traffic, barricaded and guarded by red lights, this in itself was negligence, but further he failed to exercise that degree of care which would be expected of a reasonable and prudent man under such conditions, he did not look out for signs of that danger of which the red lights gave him notice, he sat back in

his seat and became engrossed in conversation with his companion, ignoring the danger signals. He is guilty of criminal rashness and negligence. *Blyth v. Birmingham Waterworks Company* (1), *Empress v. Idu Beg*, (2), *Intru Souza* (3), *Reg* v. *Longbottom* (4) relied upon.

CUMING J. This is an appeal against an order of the learned Chief Presidency Magistrate, Mr. T. Y. Roxburgh, convicting the accused one H. W. Smith under section 304 A, I. P. C., and sentencing him to one month's simple imprisonment and a fine of Rs. 500.

The fact appears to be these.

The occurrence took place at about 10-30 or 11-30 P.M., on the night of the 12th May last.

The accused Smith lives in Howrah and had come into Calcutta driving his own car, a Mors Car No. 1990 with a friend Mr. William. He got as far as the Mayo Statue and was then coming from west to east. At the Mayo Statue he determined to go home *viâ* the Red Road and therefore turned to the right and went along the Dufferin Road. About half way up the road he ran over and killed two coolies who were sleeping on the road.

The case of the prosecution is that the road was under repairs and that there was a barrier right across the road to prevent people driving along the road and that the accused killed these two coolies by doing a rash and negligent act to wit driving his motor-car rashly or negligently from north to south along the Dufferin Road which was closed to traffic and barricaded and having red lights across the road. The defence case is that there was no barrier across

(1) (1856) 11 Exch. 781, 784.
(2) (1881) I. L. R. 3 All. 776, 779.
(3) (1886) 1 Weir's Cr. R. 327.
(4) (1849) 3 Cox's C. C. 439.

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part of the road and that the accused entered the road by the open portion. He went over them to the proper side of the road. He did not see the coolies who were lying wrapt up in *gamchas* on the road, did not even know he had driven over them and knew nothing till he was stopped by the constable at the south end of the road, by the Dufferin Statue. His car is a very old and noisy one. It cannot travel at more than 10 miles an hour and he was not driving negligently or carelessly. The learned Magistrate found that at the time of the accident the barrier did not reach right up to the tram line on the west of the road. The accused, he holds, must have heard one of the warnings he got, one being from the witness Ramzan that there were coolies sleeping on the road. That he must have heard the shouts after the accident and hence knew he had gone over some one. Finally, the learned Magistrate holds that the accused entered a road on which there were warning lights and that he was talking to the man at his side. This was itself negligence and that accused must have known from the lights that special caution was necessary and that had he driven with reasonable care the coolies would not have been killed. He finds that excessive speed has nothing to do with the case as the car cannot do more than 10 miles an hour.

First as to the fact—

Mr. Bagram contends that even if Ramzan did shout to the accused that there were men sleeping on the road it does not necessarily follow that the accused heard him and with this I agree. The coolies in the hut close by did not hear Ramzan. The accused was driving. The car was old and noisy and there is nothing improbable in the allegation of the accused that he did not hear any one shouting that there were coolies sleeping on the road. The

only person who shouted this information was Ramjan. Then there is the evidence of the constable at the north end of the road by the Mayo Statue that he shouted to the accused that the road was under repairs. The evidence when considered would show that he must have been some forty yards from the accused. Again the accused may or may not have heard him and if he did hear him may not have realized what he said or even that he was shouting to him. Even if accused heard him and realized he must not go on the road because it was under repair it does not affect the case as I shall afterwards show. The prosecution contends that accused must have known he had gone over these coolies and still drove on after doing so. It does not follow that because the accused felt a bump he must have known he had gone over any one. The road was under repair and he may well have thought he had gone over some road material though it is his case he noticed nothing. But the accused's conduct after the accident in no way affects his guilt or innocence so far as the present charge is concerned.

The facts which I find proved are that accused entered the road through an opening at the end of the barrier on the west side of the road and then crossed to the east side, the proper side of the road on which to drive, that he was driving at a speed not exceeding 10 miles an hour and he drove over the two deceased who were sleeping on the road killing them. I have now to consider whether the accused caused the death of these two unfortunate men by a rash and negligent act. Criminal rashness is hazarding a dangerous or wanton act with the knowledge that it is so and that it may cause injury but without intention to cause injury or knowledge that it will be probably caused. The

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criminality lies in running the risk of doing such an act with recklessness or indifference as to the consequence. Criminal negligence is the gross and culpable neglect or failure to exercise that reasonable and proper care and precaution to guard against injury either to the public generally or to an individual in particular which having regard to all the circumstances out of which the charge has arisen it was the imperative duty of the accused person to have adopted. This is the law on the point as laid down by Straight J. in the case of *Idu Beg* (1) and with the view of the law I am in entire agreement. Reference may also be made to the case of *Nidamarti Naga Bhusanam* (2). We have then to consider what is the criminal rashness or negligence which has been attributed to the accused and whether what he did comes within the mischief of criminal rashness and negligence. If I understand the case of the prosecution rightly it is that he drove along a road which was under repair and while doing so was talking to a friend alongside of him. Now there is nothing rash or negligent *per se* in driving along a road under repair or partly under repair any more than on a road not under repair except perhaps to the person driving. During the day time no doubt there would be men working on the road the avoiding of whom would require caution as the avoiding of any one on a road does. At night normally it is not to be expected that men would be found working on a road nor is it the allegation of the prosecution that any one was working on the road the particular night. As a matter of fact one would expect less traffic if any traffic at all at night on a road under repair. Any one driving on a road under repair would be called on to exercise the same caution as he would on a road in

(1) (1881) I. L. R. 3 All. 776, 779. (2) (1872) 7 Mad. H. C. R. 119.

its normal condition, that is to say, to look out to see what persons or vehicles were on the road making the ordinary use of the road. What further caution is called for I fail to see. A driver cannot be expected to look out for what can only be described as a very abnormal condition of things. The normal use of a road is for the purpose of passing or repassing on it. It certainly cannot be said that one of the normal uses of a road is for the purpose of sleeping. I do not think that it can possibly be held that a driver should anticipate that he will find persons sleeping on a road, even at night, though a road under repair and that he must look out for persons making such an abnormal use of the road and if he does not do so he is guilty of negligence or rashness.

As I have pointed out there is no special danger *per se* in driving along a road under repair except perhaps to the driver himself. The accused in this case was not driving recklessly. He was driving at 10 miles per hour. The deceased had wrapt themselves up in *gamchas* and so in the night even though there were lamps would be extremely difficult to distinguish. The accused cannot reasonably be held liable to anticipate that he should find persons sleeping on a road. If therefore he did not look for persons sleeping on a road he cannot be held guilty of rashness or negligence for not doing so. He could not know that his act in driving on the road was dangerous because people were sleeping or might be sleeping on it and yet did the act taking the risk of running over these sleeping people. It is not suggested his speed was excessive. In fact it was very slow for a motor-car. The fact that he was talking to a friend does not show he was driving rashly or negligently. Even if he had not been talking it is highly improbable he would have looked out for persons

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sleeping on the road, there is nothing to prevent a man talking and at the same time taking the ordinary precautions against accident. I do not think that the engaging in conversation, whilst driving, is necessarily a rash or negligent act. It might be in some circumstances, as for instance in busy crowded traffic. The decision to which I must come therefore on a consideration of all the facts of the case is that the accused in acting as he did, did not act either rashly or negligently. That these two unfortunate men have lost their lives is to be much deplored but the accused cannot be held criminally responsible for their death. As to the accused's conduct after the accident, so far as the present charge is concerned, it is immaterial. But in view of the Magistrate's remark in justice to the accused himself I should deal with this point because clearly if he drove on knowing he had run over these men his conduct would be deserving of the severest censure. It would be the act of a man entirely callous and indifferent to the injury he inflicted on his fellow creatures. I am not however satisfied that he must have known he had driven over some one. He may have been aware of the bump although both he and Mr. William state they felt no bumps but bumps would probably be met with on a road under repair and being expected may not have been noticed. No doubt the other coolies there shouted. But it does not follow that the accused necessarily must have heard the shouting or if he did have realised they were shouting at him. The shouting would not begin at once. The car was as has been noted before an old and very noisy one. It is significant that accused when stopped by the police constable on duty at the Dufferin Statue said at once "Why should I stop, I have committed no "offence," and at once went back to the place of

occurrence when requested to do so. The accused at once stopped when asked to by the constable at the end of the road and made no attempt to go away. Taking all the facts and circumstances into consideration I do not think that the learned Magistrate was justified in drawing the inference he did that the accused must have known he had run over some one I think on this point the accused is entitled to the benefit of the doubt. The result is the finding and sentences must be set aside and accused should be acquitted. The fine, if paid, to be refunded.

MUKERJI J. I agree that this appeal should be allowed and the accused acquitted, and I wish to add a few words.

The difficulty in dealing with a case of this nature is to keep out of one's mind the prejudice that inevitably creeps in by reason of the fact that lives have been lost and the responsibility for the same ultimately rests with none else but the accused. This prejudice is bound more or less to reflect on the question of the culpability of the accused and give rise to false issues which tend to cloud judicial vision.

Section 304A has been judicially interpreted in a number of decisions of which two stand out as the most valuable. In the case of *Reg.* v *Nidamarti* (1) Holloway, J. said this: "Culpable rashness is acting "with the consciousness that the mischievous and "illegal consequences may follow but with the hope "that they will not and often with the belief that the "actor has taken sufficient precautions to prevent "their happening. The imputability arises from "acting despite the consciousness. Culpable negli- "gence is acting without the consciousness that the "illegal and mischievous effect will follow, but in

(1) (1872) 7 Mad. H. C. R. 119.

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"circumstances which show that the actor has not "exercised the caution incumbent upon him, and "that, if he had, he would have the consciousness." "The imputability arises from the neglect of the civic "duty of circumspection." In the case of *Reg.* v. *Idu Beg*, (1) Straight, J. observed as follows: "Criminal "rashness is hazarding a dangerous or wanton act "with the knowledge that it is so, and that it may "cause injury, but without the intention to cause "injury or knowledge that it will probably be caused. "The criminality lies in running the risk of doing "such an act with recklessness or indifference as to "the consequences. Criminal negligence is the gross "and culpable neglect or failure to exercise that "resonable and proper care to guard against injury "either to the public generally or to an individual "in particular which, having regard to all the "circumstances out of which the charge has arisen, "it was the imperative duty of the accused person to "have adopted." The learned Deputy Legal Remembrancer has cited before us a number of other decisions in which section 304A of the Indian Penal Code or the English Law of Manslaughter by Negligence has been explained, and also referred to some cases dealing with negligent use of public way, in order to show under what circumstances special care is necessary want of which will make one liable for the offence. The one principle of universal applicability deducible from all these cases is that which was laid down by Alderson B. in *Blyth* v. *Birmingham Waterworks Co.* (2) and adopted by Brett, J. in *Smith* v. *London and South Western Ry. Co.* (3). "Each case must be judged in reference to the precautions, which, in respect to it, the ordinary experience of men has

(1) (1881) I. L. R. 3 All. 776. (2) (1856) 11 Exch. 781, 784.
(3) (1870) L. R. 5 C. P. 102.

found to be sufficient, though the use of special or extraordinary precautions might have prevented the particular accident which happened."

The question whether the accused's conduct amounted to culpable rashness or negligence therefore depends directly on the question as to what is the amount of care and circumspection which a prudent and reasonable man would consider to be sufficient upon all the circumstances of the case.

Now as to the circumstances I would prefer to take the findings of the learned Magistrate and rest my judgment on those findings.

The learned Magistrate has found that the barrier at the entrance did not extend right up to the tram lines; in other words that there was a space between the end of the barrier and the tram lines; over this space as also on the space on the other side of the lines there was no barrier. There were also a number of red lights and perhaps also a "Road closed" notice. The accused's conduct in entering the road was unquestionably reprehensible, but the real issue is, what did these circumstances indicate. In my judgment they indicated that the road was up, perhaps not to the extent of its entire width, and certainly also that there was a possibility of men working, walking, or moving about on the road. They would also, in my opinion, suggest that there was every chance of one coming across excavations or obstructions or impassable portion of the road or such portions as were not fit for being used as a road. All these would put one on his guard and call for special care and circumspection on his part, but only to the extent of avoiding or getting round an accident such as would result from the possibilities to which I have referred. The idea, however, would hardly cross the average prudent and reasonable mind that there was chance of people

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sleeping on the road or rather on a side of the road with their bodies covered up except for the faces, and lying partly on the road and partly on the grass.

Then as to the various warnings and shouts alleged to have been given. As regards the warning given by the constable on duty at the Mayo Statue, it conveyed nothing more than what was indicated by the barrier, the lights and the notice. The shouts of Ramzan calling out "Taxiwalla stop, the road is closed, it is forbidden to come" or "Admi sota, Admi," it is reasonable to believe, were either not heard by the appellant or were misunderstood by him. The utmost that it means is that the appellant was not attentive to hear what was being shouted out by people on the road; but it is hardly obligatory on the driver of a car to have his attention directed to shouts so long as he can trust his eyes and sees nothing in front. The question whether the appellant heard the shouts of the coolies after the car had passed over the men and the question whether the appellant did or did not feel a bump are hardly relevant in the face of the finding that the appellant was not driving at an excessive speed. If these shouts were heard and the bump was felt and the appellant understood what had happened and if the circumstances, as deposed to by the constable at the other end of the road, under which the car was stopped be found to have been established, that touches the question of the appellant's conduct as a gentleman, but has very little to do with the question of his culpability or otherwise in respect of the offence with which he was charged.

In my opinion though special care was called for on the part of the appellant, the degree of care which the learned Magistrate has expected of him is not warranted by the circumstances of the case, and it has not been established that the appellant was so rash

or negligent as would render him guilty of an offence under section 304A, I. P. C. The appellant therefore should be acquitted and released from his bail.

In conclusion I should like to observe that though the appellant escapes a conviction as the law is unable to reach him, if he had not chosen to drive on the road which was not open to traffic, the lives of two poor and innocent men who perhaps are the only supporters of their respective families would not have been lost, and the code of honor and morality demands that he should make adequate amends to the very best of his means to the dependents of those two men for the lamentable error of judgment on his part.

A. S. M. A. *Appeal allowed.*

APPELLATE CRIMINAL.

Before Page and Mukerji JJ.

VICTOR

v

EMPEROR.*

1926

Jan. 20.

Vagrancy—Code of Criminal Procedure (Act V of 1898 as amended by Act XVIII of 1923), ss 109(b) and 118, construction of.

If a person is unable to prove the source of his livelihood he ought not to be ordered to execute a bond under sections 109 and 118 of the Code of Criminal Procedure unless there is reasonable ground for suspecting that he is sustaining himself by some dishonest means, for such an order can only be made where "it is necessary for keeping the peace or maintaining good behaviour".

If proceedings under section 109 (*b*) are taken against a person because he "cannot give a satisfactory account of himself", the Court ought not to pass an order under section 118 unless the prosecution satisfies the

*Criminal Appeal No. 747 of 1925 (undefended).