CRIMINAL REFERENCE.

Before Mr. Justice Holmwood and Mr. Justice Ryves.

1909
January 13.

EMPEROR
v.
MORGAN.*

Death by rash or negligent act—Criminal rashness or negligence—Firing at object on the sky-line of an eminence near a public road without proper precautions against danger—Indian Penal Code (Act XLV of 1860), ss. 304A, 336, 337 and 338—Compensation to relative for death by rash or negligent act—Criminal Procedure Code (Act V of 1898), s. 545.

Two persons, one a corporal and the other a private, who had both been in the regiment over four years, went to a plantation at the edge of which there was an eminence on which they set up at the sky-line a small tin case as a target, and fired several shots at it, from a distance of 100 feet, with a quarter inch bore saloon rifle sighted to 100 yards. There was a public road used by the villagers about 150 yards away, and 60 feet below the level of the eminence, but in the direct line of fire.

The road was not visible from the firing point, but clearly so from the target. A bullet struck a man passing along the road at a spot in the line of fire, though it did not appear, who had fired the shot. No precautions of any kind were taken to prevent danger to passers-by on the road from such firing.

Held, that they were both guilty of criminal rashness and negligence within section 304A read by itself without reference to ss. 34 and 107, in firing at an object on the sky-line of the eminence, against the light, (which was in itself dangerous), near a public road within the zone of fire with a rifle which, sighted to a 100 yards, they must have known might easily carry some considerable distance beyond and prove fatal, without taking any precautions or using the slightest circumspection with reference to the safety of others.

The words "rash or negligent act" in section 304A of the Penal Code have the same meaning as "does any act so rashly or negligently" in sections 336, 337 and 338. Section 336 renders criminal the doing of any act so rashly or negligently as to endanger human life or the safety of others, irrespective of the consequences. Sections 337 and 338 only impose a greater punishment when hurt or grievous hurt is the result of such rashness or negligence. Section 304A provides for the case of death by such rash or negligent act under circumstances not amounting to culpable homicide.

* Criminal Reference No. 40 of 1908, by F. S. Hamilton, Sessions Judge of Darjeeling, dated the 16th November 1908.

1909

EMPEROR v. MORGAN.

Reg. v. *Salmon* (1) and *Reg.* v. *Nidamarti Nagabhushanam* (2).

Section 545 (1) (*b*) provides for compensation, in cases where it is recoverable under Act XIII of 1855, to the persons therein indicated, *viz.*, "the wife, husband, parent and child, if any" of the deceased.

Yalla Gangulu v. *Mamidi Dali* (3) dissented from.

CRIMINAL REFERENCE.

THE accused, Corporal Morgan and Private Lawson of the Highland Light Infantry, were tried under sections $\frac{304}{114}^{A}$ of the Penal Code before the Sessions Judge of Darjeeling with a Jury, who found that they, or one of them, caused the death of the deceased, that they were careless but not criminally so, and that they were, therefore, not negligent within the meaning of the section. The Sessions Judge refused to accept the verdict, and referred the case to the High Court under section 307 of the Criminal Procedure Code.

On the morning of the 25th October last the accused went out for shooting practice with a quarter-inch bore saloon rifle sighted to 100 yards. They went down the Old Calcutta Road and up the hill-side to a plantation, where they found a tin case about six inches by four, which they set up as a target at a spot (marked *c* on the plan) on the sky-line on a small eminence at the edge of the plantation, and fired several shots at it from a point (marked *b*), a distance of 100 feet, and against the light. The Old Calcutta Road, a bend of which comes directly in the line of fire from *b* to *c*, was not visible from the firing point, but clearly so from *c*, to which the accused admittedly went in order to fix up the tin case. The distance of the road from this place is about 150 yards beyond, and lower by about 60 feet than the level of the eminence. The road was not usually much frequented, but it was a public way used daily by the villagers of Aloobari. A bullet struck the deceased, who was passing along the road, at a point *d*, which was in the direct firing line between *b* and *c*. It was not found, who fired the fatal shot, but the bullet extracted from the body of the deceased fitted the cartridges used by the two accused.

(1) [1880] L. R. 6 Q. B. D. 79. (2) (1872) 7 Mad. H. C. 119, 120.
(3) (1897) I. L. R. 21 Mad. 74.

1909

EMPEROR v. MORGAN.

Mr. Stokes (with him *Babu Lalit Mohan Banerjee*) for the accused. The verdict of the Jury is plain. They found that the accused were negligent, but not criminally so. They are entitled to find the degree of negligence there was in the case as a question of fact. The verdict is not perverse, and should not be interfered with.

The Deputy Legal Remembrancer (*Mr. Orr*) for the Crown. The evidence shows that the accused were guilty of negligence within the meaning of section 304A, and, even if not, the offence under section 336 has been made out.

HOLMWOOD AND RYVES JJ. Corporal Morgan and Private Lawson of the Highland Light Infantry were placed on their trial before the Sessions Judge of Darjeeling and a Jury on the 16th of November 1908. The charge against them, as amended in the Court of Session, was framed under section 304A read with section 114 of the Indian Penal Code, and ran as follows :—"That you, on or about the 25th day of October 1908, at Aloobari Busti, each abetted the other in the causing of death by a rash or negligent act, each being present when the act, which resulted in death, was committed, and the act abetted being committed in consequence of the abetment, and thereby committed an offence punishable under sections $\frac{304A}{114}$ of the Indian Penal Code." We will refer later on to the wording of this charge. The accused pleaded not guilty to the charge and, at the conclusion of the trial, the Jury returned the following verdict: "We find that the accused, or one of them, caused the deceased's death. We find that they were careless, but not criminally so, and that, therefore, they were not negligent within the meaning of the section. We, therefore, find them not guilty of the offence charged." The learned Sessions Judge, however, refused to accept this verdict, and has referred the case to us under the provisions of section 307 of the Code of Criminal Procedure.

The facts of the case are very simple and are admitted. Indeed, almost the entire evidence, which connects the accused

with the death of the unfortunate man Kachar Singh, is to be found in the frank statements which the accused made before the committing Magistrate and to which they have all along adhered. It appears from these statements, which we accept, that on the morning in question the two accused, who belong to a regiment that has been stationed for some time at Jalapahar, went out to practise target shooting. They took with them a "small rifle." This rifle is not before us, but it was before the learned Sessions Judge and the Jury, and has been described as having a small bore, one-fourth inch in diameter, and was sighted for 100 yards. They proceeded down what is known as the Old Calcutta Road and along it to the Bhutia graves, and then climbed up the side of the hill to the cryptomeria plantation. Here they found a small empty tin which they used as a mark. They first stood at a point marked *f* on the plan, and fired a few shots at the tin, which was placed at a point marked *c*. They then went from *f* to a point marked *b*, and placed the tin at a point marked *a*. So far their shooting was perfectly safe. Next, they placed the tin again at *c* on a small eminence on the sky-line, and fired at it from *b*, a distance of 100 feet, against the light. It appears from the evidence that a person standing at *b* and firing at *c*, which was on the sky-line, could not see the Old Calcutta Road, a bend of which comes directly into the line of fire from *b* to *c*, some 640 feet, according to the map, beyond the point *c*, but some 60 feet lower. This measurement, however, is entirely fallacious, as it was made by passing a tape over the very uneven surface of the intervening ground. The actual distance that the bullet would have to travel between the points *c* and *d* does not seem to be more than about 150 yards. For the first 120 yards or so, probably its flight was fairly horizontal; after that the bullet, which had lost much of its velocity would probably have dropped very quickly. It is proved, however, that a person, standing at *c* could plainly see the road. In their statements the accused say they both went to the point *c* to place the tin. They must, therefore, if they had used the least circumspection, have noticed this road. It is true that the road is not one that

1909

EMPEROR v. MORGAN.

is usually much used, but the fact remains that it is a public road and is used daily by the inhabitants of the village of Aloobari. After firing a few shots the accused went home, unconscious that any one had been injured. A man named Kachar Singh, however, who was walking along the road at the point *d* was struck by a falling bullet, which entered the chest and perforated the stomach and wounded the left kidney. Kachar Singh was seen to fall by another way-farer, and was helped to Aloobari Busti and afterwards to the hospital at Jalapahar, where he died some six days later from peritonitis. After a *post mortem* examination the bullet was found in the body of the deceased, and this fitted the cartridges used by the accused. There can, therefore, be no possible doubt that the death of Kachar Singh was caused by this bullet, which had been fired by one or other of the accused. It is impossible to say who fired it. Under these circumstances we have to consider what offence, if any, was committed by either or both of the accused. There would seem to be no doubt that, on similar facts, in England both the accused might be convicted of manslaughter. The case of *Reg.* v. *Salmon* (1) is similar. There three persons took an army rifle and some ball cartridges into a field, and having fixed a board in a tree 8 feet from the ground, began firing at it from a distance of 100 yards. The second shot that was fired happened to kill a boy, who had climbed up a tree distant about 400 yards away. The Jury convicted all the prisoners of manslaughter, and Coleridge C. J. stated a case for the Court of Crown Cases Reserved "whether there was any evidence upon which any one or all of the prisoners could be convicted of manslaughter." The Court consisting of Coleridge C. J., Field, Lopes, Stephen and Williams JJ. held that the conviction must be affirmed. "If," said Lord Coleridge, "a person will, without taking proper precautions, do an act which is in itself dangerous, even though not an unlawful act in itself, and if in the course of it he kills another person, he does a criminal act, which in law constitutes manslaughter. It was manslaughter

(1) (1889) L. R. 6 Q. B. D. 79.

in him who killed the boy. The death resulted from the action of the three and they are all liable."

The learned Sessions Judge, from the way in which he framed the charge, apparently was of opinion that, on the wording of section 304A of the Indian Penal Code, the only person, who could be punished under that section, was the person, who actually fired the shot, which resulted in death. In his charge to the Jury, he said : "It cannot be known which of the accused committed the act charged, that is which of them fired the shot, which caused the death. But if you are satisfied that one of them fired the shot, you will probably find that the other abetted such firing." He goes on to say that sections 34 and 114 of the Indian Penal Code were then explained to the Jury.

The words " any rash or negligent act not amounting to culpable homicide," which occur in section 304A, were considered and explained by Holloway J. in *Reg.* v. *Nidamarti Nagabhushanam* (1) in the following terms : " Culpable rashness is acting with the consciousness that the mischievous and illegal consequences may follow, but with the hope that they may 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 negligence is acting without the consciousness that the illegal or mischievous effect will follow, but in circumstances which show that the actor has not exercised the caution incumbent upon him, and that, if he had, he would have had the consciousness. The imputability arises from the neglect of the civil duty of circumspection." It seems to us that the words " rash or negligent act," as used in section 304A, must have the same meaning as the words " does any act so rashly or negligently " which are to be found in sections 336, 337 and 338 of the Indian Penal Code, although the phraseology is slightly different. We do not think section 304A of the Indian Penal Code creates any new offence. The object of the Legislature in passing section 336 was to render criminal the doing of any act so rashly or negligently as to endanger

(1) (1872) 7 Mad. H. C. 119, 120.

1909

EMPEROR v. MORGAN.

human life or the safety of others. The mere doing of an act so "rashly or negligently," quite irrespective of the consequences, was made an offence. Now, on the facts of this case, adopting the definition of "criminal negligence" given above, we are clearly of opinion that both the present accused could have been convicted under section 336 because they fired with the rifle from the spot *b*, at a mark which they had placed on the sky-line at *c*, without having taken any precaution or used the slightest circumspection with regard to the safety of others. Section 337 only enables a Court to impose greater punishment when hurt is the result of such criminal rashness or negligence. Similarly section 338 provides for a still further enhanced punishment when, under similar circumstances, grievous hurt is the result. The original Code made no provision for the case of death being caused by such a rash or negligent act. We think section 304A does nothing more than supply the omission by rendering a person or persons, who caused the death of another by a rash or negligent act, under circumstances not amounting to culpable homicide, liable to punishment up to two years' imprisonment, or with a fine or with both. We think, therefore, that both the accused can legally be convicted and punished under section 304A of the Indian Penal Code because the death of Kachar Singh was directly due to what we hold to be a criminally negligent act on the part of both of the accused within the meaning of section 304A. We, therefore, think that the law in India is in accord with what was laid down in *Reg.* v. *Salmon* (1), and that it is unnecessary to call in aid sections 34 or 107, even assuming that either of these sections could possibly apply when the facts showed that at the most the accused were guilty of "negligence" only. It is difficult to see how a person can "abet" the "negligence" of another without himself being equally "negligent" within the meaning of the section, having regard to the definition of "negligence" above quoted. It seems to us that these two soldiers, one of whom is a Corporal, and both of whom have been in the army for over four years and, therefore, must be familiar with the

(1) (1880) L. R. 6 Q. B. D. 79.

use of fire-arms, were bound to use all reasonable precautions to prevent their firing from endangering human life. Although the rifle they were using was not a very dangerous weapon, they must have known that, as it was sighted up to 100 yards at least, it might easily prove fatal for some considerable distance beyond that limit, and the fact that they fired at an object on the sky-line on the hill side and against the light was, as they probably would have themselves admitted, if they had stopped to think for a moment, in itself dangerous. Further when they stood at the point *c* to fix their mark, they should have looked round and satisfied themselves that there was no danger in firing in the direction from *b* to *c*. If they had used the least circumspection, they would have seen that the bend of the public road was in the direct line of fire, a little below them and not more than about 150 yards distant.

For the above reasons we convict both the accused under section 304A of the Indian Penal Code.

We do not, however, think that a severe sentence is called for in this case. We think the ends of justice would be met by imposing a fine. We direct that they be fined Rupees fifty each or, in default, suffer rigorous imprisonment for a period of three weeks. We further direct that the fines, if paid, be handed over to the widow of the deceased or such other person, whom the District Magistrate on enquiry may find entitled to it, under the provisions of section 545 of the Criminal Procedure Code.

We are aware that a Full Bench of the Madras High Court, in the case of *Yalla Gangulu* v. *Mamidi Dali* (1) has held that compensation cannot be given to the widow of a deceased person in a case like this. But, apart from the rulings of the Madras High Court, we know of no ruling which has taken the same view of section 545 as it stands in the present Code, and we prefer to follow the opinion of Benson J. to the contrary in his order of reference to the Full Bench for the reasons which he has given. There are two cases of this Court which interpreted the law in the same way as the Full Bench of the Madras

(1) (1897) I. L. R. 21 Mad. 74.

1909

EMPEROR v. MORGAN.

High Court, but the words of the Code which they had to consider were, as pointed out by Benson J. in his order of reference, entirely different from the words which are now to be found in section 545 of Act V of 1898. We think that clause (*b*) of section 545 has been expressly framed so as to provide for compensation being given in cases where it is recoverable under Act XIII of 1855, and to the persons indicated in that Act, namely, the "wife, husband, parent and child, if any" of the deceased.

Appeal allowed.

E. H. M.