

Criminal Case No. 5 of 1979

The Republic v. Tabai Tebetang

13th August, 1979.

Manslaughter - death caused unintentionally - recklessness must be proved - what is recklessness.

The accused was driving a fairly large truck. On a sharp bend in the road at the bottom of a slight hill the speed of the truck was excessive and he lost control of it. It veered onto the right-hand side of the road colliding with the front off-side of a motor car being driven in a proper manner in the opposite direction. The driver of that motor car died at the scene of the collision as a result of the injuries she received. The truck was in sound condition before the collision. The accused knew the road, having been employed for some time to drive the truck on the collection of garbage from Districts all round the island. Before setting off on the journey which ended in the collision, he had consumed a quantity of beer but intoxication was not established.

Held: Recklessness, as an element of involuntary manslaughter, involves grave moral guilt and is constituted by the taking of an unreasonable risk.

Accused convicted of manslaughter.

P.A. Thorpe for the Republic

R. Kun for the accused.

Thompson C.J.:

The accused is charged with manslaughter contrary to section 303 of the Criminal Code which is the First Schedule to the Criminal Code Act, 1899, of Queensland, in its application to Nauru. The offence alleged is one of involuntary manslaughter; the accused is alleged to have unlawfully caused by his reckless driving of a motor vehicle the death of the driver of another motor vehicle.

It is not disputed that the accused was driving a fairly large truck on the main island road at Meneng at about 11.00 a.m. on 31st March, 1979, when it collided with a Toyota Crown motor car being driven by Esther Demaure; that after the collision both the vehicles ran off the road on what, in relation to the direction in which the truck had been proceeding, was the right-hand side of the road and came to rest with both of them facing in the direction in which the truck had been travelling and with the truck in front of the car; and that Esther Demaure died as a result of the injuries she received in the collision. The accident occurred towards what, in relation to the direction in which the truck was travelling, was nearly the end of a long and quite sharp right-hand bend in the road at the bottom of a down-hill slope.

The only persons present at the scene at the time of the collision who gave evidence were the accused himself and a passenger in his truck, Atem Atem, who was called as a witness for the prosecution. Both, however, stated that they did not see Mrs Demaure's car until after the truck had come to a stop following the collision. So there is no direct evidence of the actual impact, of whereabouts on the road it occurred or of the manner in which Mrs Demaure was driving her car immediately before the impact. There is circumstantial evidence relevant to these matters; I shall deal with that later.

Giving evidence in this Court the accused made a number of admissions. He was employed to drive the truck and had done so occasionally over the period of three months before 31st March and on a full-time basis during the week before that date. It was the Nauru Local Government Council's garbage truck. The accused admitted that immediately before the collision he drove it down the slope towards the bend in the road at a somewhat faster speed than usual, although he did not admit that the speed was excessive. He also admitted that he lost control of the truck immediately before the collision. He stated that first he was unable to turn the steering wheel to the right and

that the truck was in danger of running off the road on the left-hand side onto the beach; and that, when eventually he was able to turn the steering wheel to the right, it went too far round to the right and he was unable to turn it back to the left. He stated those facts in terms of the steering wheel "sticking".

Evidence was adduced that, when Mrs Demaure was about 400 yards from the place where the collision occurred, she was driving in the opposite direction to that of the truck at a moderate speed, on her correct side of the road and in a normal manner. The witness who gave that evidence did not see the collision but he heard it very soon after he had seen Mrs Demaure drive past him. I am satisfied that he was a truthful witness.

Evidence that the truck was travelling fast as it entered the bend was given by Atem Atem; but he was unable to say how fast. Evidence of the truck's speed was also given by an experienced motor mechanic who was working about 100 yards from the scene of the collision, in the direction from which the truck approached it. His view of the road was obscured by bushes and he did not see the truck go past. But his attention was drawn to it by the sound of its wheels on the surface of the road, which he recognised was the sound of a heavy vehicle travelling at a high speed. He gave convincing evidence of his experience of working with heavy vehicles and of his ability, acquired by that experience, to recognise the sound of the wheels of a heavy vehicle travelling at high speed, and to distinguish that sound from the sound of the wheels of a similar vehicle being driven more slowly or to which the brakes have been applied. I am satisfied that he was qualified and able to recognise the sound as being what he said it was, that he did hear the sound and that it was the sound of a heavy vehicle being driven at high speed. The witness gave evidence that almost immediately after the vehicle had passed him there was the noise of a collision and the sound stopped; he went to the scene and saw the accused's truck and Mrs Demaure's car which had just collided. I am satisfied, therefore, that the vehicle which passed him and of which he heard

the sound of the wheels was the accused's truck.

Evidence of the various police officers who took part in the investigation of the collision has been of little help to the Court. Incredibly, although the police photographer was taken to the scene within an hour after the collision, he did not take any photographs until the following day, by which time the vehicles had been moved - and the car vandalised! He took no photographs showing any skid marks or tyre tracks, although Inspector Gioura, the investigating officer, gave evidence that there were some significant ones. Another officer, a sergeant, was instructed to take measurements at the scene and prepare a sketch plan; according to Inspector Gioura he was instructed to mark in certain significant skid marks and tyre tracks. He did not mark them. Nor did he mark - or apparently even look for - the broken glass, dirt and other indicia of the point of impact. No evidence has been adduced of any mechanical examination of the truck after the collision, although from the photographs exhibited it would appear that it may not have been seriously damaged and tests of the brakes and the steering could have produced significant results. As a consequence of all these omissions Inspector Gioura's evidence of various matters is inconsistent with the plan drawn by the sergeant, and much relevant evidence which should have been available to this Court, and which the police should have taken care to ensure was available, has not been made available. It must be hoped that proper procedures will be instituted and complied with in future to prevent such a state of affairs arising again.

Although there is no evidence of the condition of the truck after the collision, the foreman responsible for the collection of garbage gave evidence that he had driven it that morning and it was in sound condition then, and the accused himself admitted that he had had no difficulty with the steering while driving the truck that morning, until he came to the bend where the collision occurred.

There is evidence that, after the collision, the accused smelled of drink. He has admitted drinking three cans of beer earlier that morning. One police officer gave evidence that the accused appeared to be drunk when he saw him at the scene after the collision; but the accused had received a cut on the head and was doubtless in shock. The symptoms described by the police officer are as consistent with shock as with intoxication. No breathalyser test or breath analysis was carried out; no reason for that was given. I find, therefore, that it has been established, on the accused's own admission, that he had consumed three cans of beer earlier in the morning but it has not been established that he was at all intoxicated.

From the facts which are not in dispute, and from the evidence of Atem Atem and the mechanic as to the speed of the truck, I am satisfied beyond all reasonable doubt that the accused was driving it at a high speed as he came down the slope into the bend, that, as a result of the truck's high speed, he was unable to steer it round the bend and that his efforts to do so caused it to veer sharply to the right, onto the right-hand side of the road and off the road altogether on that side. I find it proved beyond all reasonable doubt that, as the truck careered out of control across the road, it struck the front off-side of Mrs Demaure's car, which was travelling in the opposite direction, smashed in the whole front side of the car and span it round so that it followed the truck off the road.

Mr. Kun, representing the accused, has submitted that, in the absence of evidence showing where the impact occurred, there is a reasonable possibility that some fault on the part of Mrs Demaure caused the accident. But neither the accused nor Atem Atem saw her car before the collision, as they might have been expected to do if it had been on its wrong side of the road or otherwise caused the collision. In view of the accused's own evidence of struggling first to turn the steering wheel to the right and then of struggling to turn it back to the left, and in view of the evidence of his truck's high speed, I am satisfied

beyond all reasonable doubt that it was his loss of control of the truck which caused the collision and not any fault of Mrs Demaure.

As I stated in The Republic v. Inak Scotty (1977) Criminal Case No. 3, this Court is bound by the decision of the High Court of Australia in Evgeniou v R. (1964) 37 A.L.J.R. 508, so that in a case such as the present one liability is to be determined by reference to section 289 of the Criminal Code. That section is as follows:-

"289. It is the duty of every person who has in his charge or under his control anything, whether living or inanimate, and whether moving or stationary, of such a nature that, in the absence of care or precaution in its use or management, the life, safety, or health, of any person may be endangered, to use reasonable care and take reasonable precautions to avoid such danger: and he is held to have caused any consequences which result to the life or health of any person by reason of any omission to perform that duty."

Again as stated in Inak Scotty's case, for negligence to be sufficient to constitute a breach of the duty imposed by that section it must be negligence according to the standard of the criminal law. In Evgeniou's case that was stated by McTiernan and Menzies JJ. to be "recklessness involving grave moral guilt". Recklessness is the taking of an unreasonable risk.

In this case, as in most cases where reckless driving has to be proved, there is no direct evidence, other than the accused's own evidence, of the state of his mind; it has to be deduced from the circumstantial evidence. The period of the accused's driving experience was quite short on the date of the collision. But he was employed as a driver and was familiar with both the truck he was driving and the road on which he was driving. Cross-examined, he admitted that he knew that, if one drives too fast

into a bend, it is difficult to take the bend. I am satisfied beyond all reasonable doubt that he must have realised that, if he drove too fast, there was a substantial risk that he would lose control of the truck and that, if he did so, those with him in the truck and other road users might be killed or injured. He nevertheless took that risk; it was recklessness involving grave moral guilt.

Accordingly I find him guilty of unlawfully killing Mrs Demaure, as charged.