

IN THE SUPREME COURT  
OF THE TERRITORY OF  
PAPUA AND NEW GUINEA

CORAM:

6th February, 1959.

B E T W E E N

R.

and

KENNETH JAMES JULIAN

J U D G M E N T

In this trial one KENNETH JAMES JULIAN is charged firstly that he on the Twenty-eighth of September, 1958 having in his charge a motor vehicle a Ford Customline No. 8588 omitted to use reasonable care and take reasonable precautions in its use and management by which omission bodily harm was actually caused to one WALTER LEONARD BORMANN.

Secondly in the same terms bodily harm was actually caused to one JANET EVELYN BORMANN.

At about ten minutes to eight o'clock on the night of the 28th February, 1958 Walter Leonard Bormann and his wife, Janet Evelyn Bormann, were driving along Ela Beach Road, Port Moresby, inward bound at twenty-five to thirty miles per hour. Bormann was driving the Ford Prefect Sedan and his wife was sitting beside him. There was another car behind the Ford Prefect inbound and driven by one George Charles Morris at about the same speed as the Bormann's Prefect. Morris was about one hundred yards behind the Bormanns. There is no evidence that there were any other vehicles behind Morris and travelling in the same direction. The headlights of both cars were on low beam. When Morris was at about D'Urville Street he noticed the approach of another vehicle outbound at some distance in front of the Prefect Sedan. According to Morris, the oncoming car was travelling very fast. The approaching car swerved acutely across the road and crashed into the smaller car which was on its correct side of the road. Both cars seemed to surge into the air slightly, and the larger car appeared to follow on pushing the other car up against a tree on the side of the road. The large car was Ford Customline.

No. 8588, and as it turned out, was being driven by the accused Julian. According to Morris, the CustomLine appeared to have come from the vicinity of the Returned Soldiers' League premises. It appeared to Morris that this car came from the Returned Soldiers' League parking area when Morris first saw it, but there is a slight curve of the road from where Morris was at the time up to the entrance to the Returned Soldiers' League from Ela Beach Road, which could give the appearance of the car as having come from the Returned Soldiers' League area. This car was coming on its correct side of the road and appeared to be normally driven apart from its speed until it veered across the road and crashed into the other car. After leaving the vicinity of the Returned Soldiers' League it went to its correct side of the road, and it was very shortly after that it veered again and the crash occurred.

At about 8:12 p.m. A/Inspector Cooper of the Police Station, stationed at Port Moresby, arrived on the scene of the collision and he describes that he saw a Ford Prefect Sedan No. 9858, the Bormann car, extensively damaged with its rear jammed against a tree. This vehicle was extensively damaged in the front right hand side, the off side and the rear. Two people, the Bormanns, were trapped inside, and eventually by means of heavy tools the door was opened and the two people extricated. They were attended to by Dr. Scragg and Dr. Todd who were at the scene.

The accused was there standing near his car. Cooper had a conversation with him. He said - "Were you driving this M.A.L. CustomLine, car, Ken?" Accused replied - "Yes". Cooper said - "What happened?" and accused replied - "I was on my way home and the other bloke came across the road and hit me." Cooper said - "Are you injured in any way?" He replied - "My leg and my elbow are sore." Cooper smelt intoxicating liquor on his breath while he was talking to him, but he appeared to be fairly steady on his feet. Cooper said to him - "Do you mind if the doctor gives you a sobriety test and he can treat you at the same time?" Accused replied - "No, I don't mind. I am sober." Later, accused was taken to the Taurama Road Hospital by Sub-Inspector Henney. He spoke to Henney on the way and repeated what he said to A/Inspector Cooper when he said to Henney - "I have nothing to worry about. This fellow came on to my side

and hit me." He was examined by Dr. Todd at the Hospital and Dr. Todd related that accused was aggressive when he wished to make tests as to sobriety. But he did submit to the tests by Dr. Todd and he passed tests of co-ordination, speech and general interrogation quite easily. Accused told Cooper that he had two or three rums at the Returned Soldiers' League, and in his statement from the dock he said he had three small rums with water at the Returned Soldiers' League. As he arrived at the Returned Soldiers' League at between 7.20 and 7.30 and left at 10 to 8 he had these nips of rum during a half hour period.

Much evidence was given relating to what effect a jammed brake would have on the control of a car. There is, however, no evidence that the brakes jammed at any time. The evidence indeed of the experts who examined the car afterwards was that there was no sign of jamming. The accused himself at no time complained that his brakes had jammed or that there was anything mechanically wrong with the Customline. Even in his statement from the dock he made no such complaint. I think all that evidence can be completely discounted. This evidence seems to have begun to appear important in the case only when Counsel for the accused hit upon a happy idea when cross-examining Mr. Cook. Until he made his unsworn statement from the dock the accused had made no reference to bright headlights. He did not complain to the Police that his sight was confused by the lights of the oncoming car. If he had been confused or troubled in his driving by glaring headlights, then he should have slowed down to a slow speed or stopped altogether. Ela Beach Road is a very busy thoroughfare by day and night, particularly at about the time the accident occurred. The accused knew this road well. He said to Cooper when Cooper asked him what speed he was doing - "I can't say. I have travelled that road a thousand times and I was on my way home at this stage; I can't say what speed I was doing." So he knew the road well and he must have known of the white posts which guard culverts at intervals along Ela Beach Road. He also knew that this is dark, unlighted roadway. Outbound from the vicinity of the Returned Soldiers' League there is a slight curve to the right in this perfectly smooth road. The Ford Customline left the bitumen surface at a distance of about two hundred feet from the white post instead of making the slight curve. The wheel track showed the course of the car for two hundred and eleven feet off the bitumen surface until the white

post was reached where re-entry on to the bitumen was made. The greatest distance of the wheel mark was one foot from the base of a large tree to the edge of the bitumen, a distance of eleven feet. The car missed hitting the large Casuarine tree by one foot, then travelled on and hit the guide post.

There is no doubt in my mind that the accused was travelling at an excessive speed which was indeed reckless, having regard to the place and the time. Whether this excessive speed was due to a more careless management of the car engendered by the nips of rum, I am not prepared to say. I believe the evidence of Morris as to speed, an obviously honest witness. That the accused did not have his car under proper control is shown by its leaving the bitumen surface and travelling along a rough semblance of a ditch almost hitting a tree. If the accused had been travelling at the statutory speed of thirty miles per hour or even at forty, I can not see how he could have left the bitumen, nor do I see how he could have hit the white post. How was it that a man who had travelled the road a thousand times ran off the road. The accused himself just says - "I do not know what speed I was travelling at", and leaves it at that. He did not know he had hit the post, although he hit it hard enough to tear the chromium strips off the side. Then there was the statement twice made that the Prefect had come across the road and ran into him. The condition of the two cars is eloquent evidence of the excessive speed of the Customline. One only has to look at the front of the Customline where solid steel cross members are buckled and twisted. Counsel for the Defence suggested that after the car had hit the post it would get out of control. But if this were so, the distance travelled out of control would have been only less than the distance of the diagonal from the base of the post, and the width of the road was twenty-four feet between the white posts. Anyway everything was normal according to the accused and he did not know he had hit the post. The accused failed to take the precautions which the nature of the area demanded.

The accused was in charge of a dangerous thing on a highway, and in the management of it it was his duty to use reasonable care and take reasonable precautions to avoid endangering the life, safety or health of other users of the highway. He is held to have caused any consequences which might

result to the life or health of any person by reason of his omission to perform that duty.

It has been held that the expression "reasonable care" and "reasonable precautions" import the same degree of negligence which is required at common law to make a driver criminally liable for injury. This means that he must be guilty of gross negligence.

I find the accused guilty of gross negligence in the management of the CustomLine car he was driving on the night of the 28th September, 1958.

The consequences which followed from his failure to perform his statutory duty were the injury to the two occupants of the Ford Prefect, Walter Leonard Bormann and Janet Evelyn Bormann, which on the evidence consisted of actual bodily harm.

I find the accused guilty on both counts.

J.