

LAW FACULTY
50-227
NO. 227

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

CORAM: SMITHERS J.

THE QUEEN

- v -

BEGARI-DUBERE

J U D G M E N T

I find the Defendant guilty of this manslaughter.

The Crown alleges that the accused killed the deceased unlawfully in circumstances amounting to the crime of manslaughter. It is the duty of the Court to convict if the Crown proves to my satisfaction beyond reasonable doubt that the accused drove the vehicle of which he was the driver at the relevant time with such lack of care that his conduct may be characterised by such a description as grossly careless or reckless.

It must be proved beyond reasonable doubt that there was in the quality of the lack of care which he exhibited an element of culpability or what an ordinary man would understand as criminality surpassing in a material degree mere failure to measure up to the standard of care of the ordinary reasonable man. "For the purposes of the Criminal Law there are degrees of negligence and a very high degree of negligence is required to be proved before the felony is established. Probably of all the epithets that can be applied 'reckless' most nearly covers the case." Andrews v. Director of Public Prosecutions, 1937 A.C. at p. 583. In this case I find considerable assistance in the notion that the conduct constituting manslaughter should be a breach of a duty of care to such an extent as to merit the epithet "culpable". See Callaghan v. The Queen, 87 C.L.R. at p. 115.

It is clear from the evidence that the deceased INOSI-IEREMIA, met his death on the night of the 17th February last by reason of injuries sustained by him when he was struck by a jeep on the Hubert Murray Highway, the jeep being driven by the accused.

The bitumen Highway is 27 feet wide with gravel edges, that on the Chinese store side is very wide indeed. For some 150 yards on the Badili side of the point of collision the

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road is substantially straight. On the Moresby side it turns to the left just past the place where the body of the deceased lay on the road immediately after the material incident. Some 15 feet on the Badili side of the Chinese store, which can be seen in Exhibit "D" there is a small laneway, also to be seen in that Exhibit, and some 50 yards nearer to Badili there is a road known as the Salvation Army Road, which joins the Hubert Murray Highway, not at a right angle, but at a substantial angle slightly favouring a vehicle travelling from Badili and desiring to turn from Hubert Murray Highway into the Salvation Army Road. From the Chinese store to the place where the Highway turns to the right and a vehicle would go out of sight the distance is some 120 to 130 yards.

The night was a fairly dark night, and the evidence concerning the lighting is that the artificial lighting so far as street lamps were concerned was very sparse, and so far as lights in shops or stores are concerned was also quite sparse. There is evidence that this portion of the Highway is in what might be regarded, especially on a Saturday night, as a populous area.

To test the quality of the conduct of the accused, it is necessary for me to state the facts which are established to my satisfaction beyond reasonable doubt.

The accused was driving his jeep from Hohola to Koki for private reasons not involving any haste. The deceased and his companion, who was seriously injured, were at the time of the accident proceeding across the roadway from the side further from Moresby, which I call the Tutt Bryant side, to the side nearer Moresby, which I call the Chinese store side. The accused's vehicle was approaching them on their right as they crossed the roadway. It is established that the impact occurred when the jeep was substantially on the wrong side of the roadway. This follows from the evidence of Trousdale, Exton, Nelson-Tom and Emanuel Torricheba, Maysora-Sogowa, and to some extent, the statements of the accused himself. The three witnesses, Exton, Nelson-Tom and Emanuel Torricheba, were standing on the Chinese store side of the roadway, well off the bitumen, directing their attention to their right and away from the direction in which the jeep was coming, and away from the place where the deceased and his companion were crossing. They were caused to turn left by a loud bang, followed closely by another bang, and each of these witnesses is quite clear that he saw the jeep on its wrong side so far that its right wheels were well off the bitumen. This must have been very close to the time of the actual collision.

One of them observed some object fall from the right hand side of the jeep, and this turned out to be the deceased. He fell on to the bitumen at a position some 2 feet 6 inches from the Chinese store side at a time when these three witnesses, and indeed the accused himself, say that the jeep was taking a course veering from a position which was far on its wrong side in a direction which if maintained would have taken it on to its correct side. The accused says that for some substantial distance after the impact he did not succeed in getting right back to his correct side because the jeep refused to respond to his efforts to steer it to its correct side, and his course was for this distance restricted to the middle of the road. The evidence of Trousdale, who was at the relevant time following the jeep, some 150 yards behind it, was that his attention was attracted to it by the fact that it was on the wrong side of the road, so much so that he thought it was going to turn to the right up the Salvation Army Road. He says he observed it travel on the wrong side of the road from a position some 50 yards on the Badili side of the place where he subsequently saw the body on the roadway, to well beyond that position. He puts its right wheels either off the bitumen or just on the edge of the bitumen.

Although this witness was a considerable distance from the jeep at the relevant time, his evidence in conjunction with that of the other witnesses is most helpful in the solution of the problem of locating the point of collision. He seemed to me to be a reliable and careful person. He could not fail to impress one as trying to give his recollection and not to reconstruct, although Mr. Rissen legitimately but, I think, wrongly submitted that there was a large element of reconstruction in his evidence. There can be no doubt that what caught his attention and held his attention was the fact that the jeep was on the wrong side and remained so while it covered a substantial distance. I find that at the moment of impact the deceased man was practically on the edge of the bitumen on the Chinese store side.

Although it is proved that the body was lying some 25 to 30 feet on the Badili side of the Chinese store, and some 50 yards in the Moresby direction from where Trousdale says he first saw it, the actual distance of the point of impact from the place where the body was deposited remains difficult to determine. It seems certain, however, that the impact occurred after the jeep came under Trousdale's observation.

The jeep had travelled on to the wrong side of the road before any of these witnesses saw it. Those who attended the

scene of the collision made no effort to attempt to trace the course of the jeep. Although this might have been difficult, it may well be that an examination of the road and the earth sides of the road would have produced helpful evidence of physical features. The position of the body and bloodstain was not necessarily the significant feature; the significant feature was the location of the point of impact and the course of the jeep. The body may have been, and probably was, thrown or carried a material distance.

On the question of speed, the evidence makes it clear that the jeep was travelling at a substantial speed. Trousdale, who was himself travelling at 30 miles per hour at the time of his first observation of the jeep, states that the jeep was going faster than he was. He estimated the speed at 40 to 45 miles per hour. I think he was the best situated to assess this speed with any accuracy. The native, George Exton, says the jeep was travelling much faster than normal speed. There was very little other evidence of the speed save the damage to the jeep. Although one would not draw any conclusion from this as to any precise speed, it is certainly consistent with high speed. One is amazed that the human body could cause the extent of the kind of damage suffered by the bonnet. I am satisfied that the speed of the jeep was about 40 miles per hour.

As to the speed of the deceased and his companion crossing the road, I accept the evidence of Maysora-Sogowa that the men were walking - not running - but were walking quickly. Having regard to the way in which this evidence was given, I interpret it as meaning that the men were walking at about four miles per hour.

As to what happened before the impact, there is the evidence of Maysora-Sogowa, the passenger of the accused, and two statements of the accused himself, the first to Sub-Inspector Fyfe and the second in an unsworn statement from the dock before me.

The passenger could not be said to be a satisfactory witness with regard to the course of the jeep, but he did say, and I accept, that he saw the deceased and his companion in the lights of the jeep walking from the Tutt Bryant side to the Chinese store side to nearly across the bitumen. The men were walking quickly but not running, and when first seen were some substantial distance in front of the jeep. The distance was demonstrated by the witness as about 22 yards, but I do not accept this as precise. This witness also said that he saw the men when the jeep was opposite the Salvation Army bus stop. This bus stop was on the Badili side of the Salvation Army Road. This witness is unreliable as to whether the jeep was on its correct or incorrect side at the time when he

first saw the men. He gave contradictory answers. He is quite clear, however, that it was on the wrong side at the moment of impact. The accused said to Sub-Inspector Fyfe in substance that he saw the deceased and his companion "coming down" the Tutt Bryant side and "wanting to go" to the Chinese store side and that he decided to go round in front of them by swinging to his right, and that whilst engaged in doing this he saw that he could not get round in front of them without colliding with a vehicle approaching from the other direction, and that he was caused to swing to his left again into the pedestrians. To me he said in substance that the jeep was on the proper side and that he saw the pedestrians run across but come back again towards the Tutt Bryant side because of a car approaching from the other direction, and that he swung "round them" and bumped them and then had difficulty in regaining his proper side and was forced to proceed along the middle of the road. This swing "round them" must have been a move to the right, because according to the accused, it took him to a position from which he was unable to recover more than to reach the middle of the road. He was quite clear that his difficulty was to get the jeep to go back to the left.

I am unable to accept the suggestion of the accused that there was a car approaching from the other direction. Had there been there must have been some incident between it and the jeep or the body on the ground or the natives who gathered to the body forthwith. Trousdale could hardly have failed to see it. Yet Maysora-Sogowa says plainly there was no car coming in the opposite direction and the only car in the vicinity at the time was a stationary car on the Tutt Bryant side of the road. The story of this other car is the figment of the imagination or an invention of the accused's.

It was suggested that the accused perhaps mistook the stationary Peugeot mentioned by Exton for the approaching car. Should this be so, it is a grave reflection on the accused's look out, and of course it would mean that there was no vehicle in existence other than his own which could have influenced the behaviour of the pedestrians.

I reject also the suggestion that the pedestrians having proceeded some distance across the road proceeded back again to the position where they were struck. I am left therefore with a situation in which the jeep struck the pedestrians at a fast speed when they were well on the Chinese store side of the road, and that the accused had made not the slightest effort to reduce speed, although he had seen the pedestrians on the road. In addition the accused gives a description and explanation of the incident which

I am satisfied beyond reasonable doubt that on the facts proved there is no hypothesis reasonably open which is consistent with an absence of reckless or culpable negligence.

For a driver such as the accused with some years of satisfactory driving experience behind him, his conduct on this occasion was surprisingly incompetent, and I have no doubt is genuinely regretted by him now. There is no evidence to explain this lapse. His conduct is left to speak for itself.

It is conceded that in the case of a serious accident at Koki, there is always a reasonable prospect that a driver who stops may be manhandled by the natives. It is said that no significance can be attached to the failure of the accused to stop after the accident. While I accept this, and in this case attach no significance to this aspect of the matter, a responsible driver should, of course, report the accident forthwith at the nearest Police Station. Failure to do this would not always be treated as non-significant.

During the course of this case, my attention was drawn to the law which prevents the Court from convicting for some lesser offence where an accused person is charged with manslaughter, but that charge is not established, although a lesser offence is.

The reasons which induced the State of Queensland to amend the law in this respect would appear to be sound, and fully applicable to this Territory, and could perhaps be considered by the Legislature for adoption in this Territory.

Sentence - 12 months. I.H.L.

9.30 a.m.
12th April, 1962.