Mr. Justice Clarkson 408

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

CORAM : MANN C.J.

REGINA v. ALAN EDMUND MONTGOMERY.

REASONS FOR JUDGMENT.

Port Moresby, 7th, 8th 9th 12th and 13th December, 1966.

It has been submitted at the close of the evidence called by the Crown that there is no case to answer. There are many grounds for suspicion on several important points, but it must be borne in mind that the onus of proof upon the Crown is to establish not only that the accused was driving recklessly or dangerously or with disregard to the risk involved, but that he was driving his car with a criminally reckless disregard for human life likely to be encountered on the journey.

The accused is a member of the South Pacific Sporting Car Club, and takes part in some types of competitive driving. His car is specially equipped and adjusted for high performance.

There is a natural tendency for circumstances like these to induce one to approach the whole question with the prejudice that the victim's death was caused by dangerous or reckless driving. There is a danger of a kind of mosaic being built up in the evidence from which dangerous ingredients may be selected giving an overall picture more highly coloured on first impression than the evidence really warrants.

Three or four different cases against the accused have been suggested in the evidence, and although these matters might have a cumulative effect if the evidence is there to support them, it is desirable to consider each case separately in testing the question of whether the evidence as a whole is sufficient to support a charge of manslaughter.

Case No. 1

This is that the accused and the witness Gough were racing along Racecourse Road when returning from the Car Club premises. There is no

evidence to support this and the witness Gough, who was the only witness able to say anything upon the subject, specifically denied it.

The suggestion that the cars were racing is consistent with the course taken by the car prior to and during the course of the accident. The photographs and the measurements taken after the accident show that the car travelled a distance of over 180 ft. with the right-hand wheels on the gravel part of the road and off the bitumen. Over this distance the track appears to be substantially straight, and assuming that the car driven by the accused was passing, or endeavouring to pass, the car driven by Gough, Exhibit H. indicates that at about the point where the accused's car turned to the left towards the bitumen it was necessary for him to do so to regain the road to avoid obstructions which he would encounter at the point where the gravel narrows considerably. This is also indicated in Exhibits B. C. and D.

Such a case would also be consistent with Gough's car reaching the vicinity of the Sir Hubert Murray Highway intersection, ahead of the accused's car, and not being involved in the collision, which would appear to be practically unavoidable if Gough had been travelling behind and the car driven by the accused had crossed the road diagonally ahead of him, swerving and rolling over.

This case depends wholly upon the suggestion that the two cars were racing and travelling side by side at some stage, and since this is specifically denied by the essential Crown witness, there is no case to answer on this point.

Case No. 2

This is to the effect that the accused was intoxicated to the extent of at least substantially impairing his ability to drive, and his judgment. He had the opportunity to drink any quantity of liquor because he had been on duty that afternoon serving in the club bar for a period of some hours before he and Gough left the club together. Again, the tyre marks would be consistent with such an explanation

and would support the interpretation that in rounding a curve in the road the accused misjudged the curve and ran off the road, and realising his predicament brought the car back on to the roadway too violently, having regard to the fact that two wheels were on the pavement and two were on the gravel.

There is no affirmative evidence that the accused had anything to drink that afternoon, or was in any degree under the influence of liquor.

Case No. 3

That the brakes were defective causing the car, which was already, to some extent, unstable, to skid when a violent turn to the left was being made, and to bind when the two front wheels were on the paved surface, causing the car to swing around and over-turn. Again, this would appear to be consistent with the tyre marks and the subsequent behaviour of the car.

Although mechanical evidence was called to deal specifically with this question, it seems to me that of necessity this evidence is remote from the condition of the car on the evening of the 10th October, and that taking the specific question involved, it would be unreasonable for a jury to conclude on the evidence that this accident happened because of the defects in the braking system.

Allowance is to be made for the fact that the driver had had much experience of this car and was experienced at driving under difficult conditions. I cannot believe that a man in his senses in this situation would turn violently to the left and, at the same time apply his brakes hard. In addition to drunkenness or reckless racing, unknown circumstances might be capable of emerging to explain why such a manoeuvre should be taken but, as the evidence stands, a finding of fact that the brakes had anything to do with the accident would not be warranted.

Case No. 4

In this the violent manoeuvre was due to

the sudden appearance of a pedestrian, forcing the accused to swing hard to the right. Having first crossed to the other edge of the road, the accused then suddenly tried to correct his position to regain the road, but owing to speed, insufficient lights, or other circumstances, the car skidded and over-turned.

This case is the one mainly relied upon by the Crown and it gains support from the statement made to the Police by the accused. Nevertheless, the statement is by no means sufficient on its own to lead to the conviction of the accused, and must be taken against a background of proved circumstances.

The only explanation given by the accused, and the only evidence on the point, is that the accused swerved to avoid a native who was walking near the centre of the road. He said, "I am afraid I hit him". He said, "I do not know what happened after the car started to tip. It all happened so fast." Now whether this explanation given by the accused is right or wrong, and whether it is due to confusion, inattention or alcohol, or any other factor, it seems contrary to all reason to accept it that that particular native pedestrian was the man who was later found mortally injured by the roadside near the accused's car.

According to the Police evidence, the tyre-marks were followed for 560 ft. after the car had reached a position in which its right-hand wheels were off the bitumen and on to the gravel. To reach this position the car had to go diagonally across the road and at the speed at which it was travelling, it is a fair assumption that this position would not have been reached closer than, say, 50 ft. from the point at which the native was first observed. If at some point whilst crossing the road the car struck this native pedestrian, it must, from the medical evidence, have struck him at the front of the car at a point where his head would not have come into immediate contact with the car. The car must then have carried him 600 ft. or more and thrown him another 30 ft. ahead of the car when the car finally came to rest. Moreover, this extraordinary thing must have happened notwithstanding that the car was side-slipping over

a considerable distance, swerving around and rolling over sidewards, then striking a steel post while the car was moving backwards, and then swerving through an arc of almost 180° in order to come to rest with the front of the car facing towards the fence.

After the accident the windscreen was, not unnaturally, shattered and it is always possible that the deceased went into the inside of the car through the windscreen and was carried in it whilst it subsequently went through its extraordinary manoeuvre. He may have been thrown out of the car in the last swerve, or he may have been carried out of the car by some of the native people who arrived on the scene first. But there is no evidence to suggest this. What evidence we have is to the contrary and the witness Gough, who was in an excellent position according to the evidence to notice any collision with a pedestrian, says that he saw no sign of one. If at this early stage the windscreen of the car had been shattered by impact with a pedestrian, it would be a remarkable thing for the car to continue along the right-hand edge of the road in a substantially straight line for a distance of approximately 180 ft., without the witness Gough noticing at this stage the application of brakes.

If, on the other hand, we take the alternative to the effect that the accused managed to miss the pedestrian who caused him to enter into the violent manoeuvre, we get to a position which is still consistent with his statement "I am afraid I hit him". This hypothesis would explain how the accused reached the wrong side of the road and continued in the same direction for some distance before making too violent an attempt to turn back on to the roadway.

Where then did the second pedestrian, who was in fact killed, come from? It is clear that on this hypothesis nothing that the accused could have done would enable him to control the car to avoid collision, and it is pretty obvious that he could not even have seen the second pedestrian. There would be little loss of speed over the distance in which the car was rolling and turning, and it is evident that it was still moving at a considerable

speed backwards when it collided with the steel post. It might be possible for the collision to have occurred at this point, but one could not find this affirmatively as a fact in the circumstances of the present case.

It would appear, on the balance of probabilities on this point, more likely that some other car struck the pedestrian on the left-hand side of the road, throwing him to the side of the roadway, but not a very great distance, for his injuries seem inconsistent with his being thrown through the air over a great distance. The accused's car could hardly have collided with the pedestrian at the front end of the car at this late stage, and there appears to be no damage to the front end of the car, which must have been inevitable if the pedestrian had been struck at the speed of 55 or 60 m.p.h. before the car over-turned.

Taking the case as a whole, I feel that enough is known to reach certain affirmative conclusions as to the handling of the car, but there is not enough evidence to explain how or why the car got into the position it was in in the first place, or to connect the deceased with the particular mishap which undoubtedly happened to the car.

I make no general comment as to the way in which the car was handled, because the circumstances are not sufficiently explained by the evidence, and I want to avoid making any comment which could embarrass any proceedings in another jurisdiction.

I think I should add that this difficult case has been presented and conducted with great fairness to the accused, as one would expect, and that I was most favourably impressed by the care and trouble taken by the Police in their investigations. Sub-Inspector McDonald's work appears to have been most commendable and the photographs were of great assistance to me.

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