Gairoe v. Director of Public Prosecution

Supreme Court
Donne C.J.
4 June 1986

Criminal law – criminal negligence – distinction between negligence in tort and negligence requisite to impose criminal liability – whether driver of vehicle who fell asleep was culpably negligent – Criminal Code section 328.

The appellant worked a double night shift at the phosphate works. While driving home at 7 a.m. (going the wrong direction around the island) the appellant fell asleep at the wheel and his car crossed the centre line. His car impacted another vehicle being driven properly and caused grievous harm to at least one occupant of the other vehicle. The appellant was convicted of "negligent driving causing bodily harm" under the Criminal Code. He had also been charged with negligent driving under the Motor Traffic Act section 19(1), but no conviction had been entered. The appellant appealed against conviction and against the sentence of two months' gaol.

HELD: The appeal was granted, the conviction under the Criminal Code Act was quashed and a conviction under the Motor Traffic Act substituted.

The degree of negligence needed to establish criminal guilt, under the Criminal Code, is gross or culpable negligence, and there is a distinction between that standard and the lesser standard of completely objective negligence under the Motor Traffic Act.

EDITOR'S OBSERVATION: The Queensland Criminal Code, as adopted in Nauru, is scheduled to the Criminal Code Act 1899 (Q.). Section 289 of that Code provides as follows:

> (289) Duty of Persons in Charge of Dangerous Things. 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 of 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.

Section 328 of the Code provides as follows:

> (328) Negligent Acts causing Harm. Any person who unlawfully does any act, or omits to do any act which it is his duty to do, by which act or omission bodily harm is actually caused to any person is guilty of a misdemeanour, and is liable to imprisonment with hard labour for two years.

In New Zealand, in *R.* v. *Storey* [1931] N.Z.L.R. 47, the Court of Appeal held that there was no distinction between negligence as the foundation of criminal liability and negligence as the foundation of civil liability. *Storey* was cited in the High Court of Australia, in *Callaghan*, and in the Court of Criminal Appeal, in *Scarth,* and expressly not followed in either court.

In *R.* v. *Bateman* (1925) 94 L.J.K.B. 791, Lord Hewart L.J. said:

> In explaining to juries the test which they should apply to determine whether the negligence, in the particular case, amounted or did not amount to a crime, the Judges have used many epithets, such as "culpable", "criminal", "gross", "wicked", "clear", "complete". But, whatever epithet be used and whether an epithet be used or not, in order to establish criminal liability the facts must be such that, in the opinion of the jury, the negligence of the accused went beyond a mere matter of compensation between subjects and showed such disregard for the life and safety of others as to amount to a crime against the State and conduct deserving punishment.

The words of Lord Hewart were quoted with approval by the Privy Council in *Akerlele* v. *R.* [1943] A.C. 255, 262, and in vol. 11(1) (Reissue) *Halsbury's Laws of England* (4th ed.), para. 17 ("Negligence"), the learned editors noted, under the general heading "The Mental Element [of crime]", that "Degrees of negligence are recognized."

Cases referred to in judgment:
Callaghan v. *R.* (1952) 87 C.L.R. 115
R. v. *Bateman* (1925) 94 L.J.K.B. 791
R. v. *Doherty* (1887) 16 Cox C.C. 306
R. v. *Scarth* (1945) Q.S.R. 38

Legislation referred to in judgment:
Appeals Act 1972
Criminal Code Act 1899 (Queensland)
Criminal Code, section 328
Motor Traffic Act 1937-1973, section 1911

Other sources referred to in judgment:
Sir James Fitzjames Stephens, *History of Criminal Law*

Secretary for Justice for the respondent
V. Clodumar for the appellant

DONNE L.J.

Judgment:

This is an appeal against conviction and sentence. The appellant was charged in the District Court of two offences – (1) negligent driving of a motor vehicle causing bodily harm, an offence under section 328 of the Criminal Code, and (2) negligently driving his motor vehicle, an offence under section 19(1) of the Motor Traffic Act 1937-1973. He was convicted on the first charge and sentenced to imprisonment for a term of two months.

Briefly, the established facts are that the appellant on 31 May 1985 fell asleep while driving his motor car which veered to the wrong side of the road and collided with another vehicle causing the occupants bodily injury. He had driven from his place of work in the Nauru Phosphate Corporation where he had been on night shift from 11 p.m. on 30 May 1985 to 7 a.m. on 31 May. The accident took place in Baitsi District shortly after the appellant left his place of employment. The appellant would normally have finished work at 3 a.m. but, due to his workmate being absent, he worked on until 7 a.m. He told the Court when he finished his shift he did not feel sleepy, that he had been driving for twelve years and had never before slept "on the wheel". When asked by one of the injured persons, Mr Amoe Deiranauw why he drove on to his incorrect side of the road he said that he was asleep and added "I had just finished a lot of work that night". The appellant lives in Yaren District. He was driving in the opposite direction to his home district.

The learned Magistrate in finding the appellant guilty of the charge of causing bodily harm by negligent driving of his motor vehicle, an offence under section 328 of the Criminal Code said:

> I do not propose to deal with the arguments addressed by the Prosecutor, because I would accept the law laid down in the Authority cited by the defence and proceed on that basis. In my opinion, it is clear that Mr John Mop Gairoe was negligent and reckless. On the night 30/31 of May, 1985, he was on night-shift duty, which was unusually hard for him, because the other person, who was to help him and share the duty, was absent that night. He did the night-shift duty alone, instead of its being shared by the two of them.
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> This situation of doing the night-duty of Watcher alone for the whole time and not only up to 3.00 a.m., certainly impaired the ability of Mr John Mop Gairoe, not only did he not realize the weakness suffered by him on account of doing the hard night watcher's duty alone, he took the reckless step of driving around the island to go home, rather than take the shorter route of coming to Yaren District, where his house was located. It is correct that he could not have avoided the accident, when he woke up only a few yards from the other vehicle, but the antecedent facts clearly show his negligence in not realising that he was not in a fit state to drive around the island to go home, when he could have taken the shorter route.
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> I hold that Mr John Mop Gairoe was reckless and negligent in his decisions. It was by his negligent act that grievous harm was caused to Mr Amoe, and injuries caused to Mrs Amoe and also to a child of theirs, and is clearly guilty of negligent act causing bodily harm contravening Section 328 of the Criminal Code Act 1899 of Queensland (Adopted), and I convict him on that account of charge.

In arriving at his decision, the Magistrate adopted the law quoted to him by the counsel for appellant who relied on the majority decision of the Queensland Supreme Court in *R.* v. *Scarth* (1945) Q.S.R. 38. That case was concerned with facts similar to the instant case. There were three persons killed when a car driven by the accused person veered across the road colliding with them and killing them. The accused in explanation of the driving said he had fallen asleep. He was charged with manslaughter and convicted. Exception was taken to the summing up to the jury of

the trial judge. In the appellate Court, Macrossan S.P.J. said at p. 43:

> The learned judge was asked to direct the jury that, if they were satisfied that the prisoner was asleep at the time of the accident, that was a complete defence to the charge. I think that he rightly refused so to direct the jury. In my opinion, the jury should have been directed that the prisoner would not be criminally responsible for the killing of Jaques if Jaques death was caused by the prisoner's falling asleep without prior warning of his inability to keep awake, and in circumstances in which a reasonably careful driver might not have been aware that he was likely to fall asleep, and that, if the evidence either satisfied them that the death of Jaques was caused in this way or left them in reasonable doubt as to whether it was so caused or not, the prisoner was entitled to be acquitted.

and again at pp. 44-45:

> Section 289 of the Criminal Code imposes upon, inter alios, the driver of a motor vehicle a duty to use reasonable care and take reasonable precautions to avoid danger to the life, safety and health of other persons. The phrases "reasonable care" and "reasonable precaution" are not self-explanatory. What is reasonable care can only be determined in relation to some standard, and the question to be answered is: "What is the standard of care and precaution the breach of which is to impose criminal liability upon the driver of a motor vehicle?
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> There is no doubt that at common law there is a distinction between the negligence which may give rise to an action for damages and the negligence required to impose criminal responsibility. *R.* v. *Bateman* ((1925) 94 L.J.K.B. 791).

This case, of course, is not one of manslaughter, but the injuries caused by the appellant are alleged to be the result of his negligence in breach of the duty imposed upon the driver of motor car by section 289 of the Criminal Code.

In *Bateman's* case (supra), the distinction between criminal and civil liability for negligence was described by Stewart L.C.J. in this way at pp. 10-11:

> The law of criminal liability for negligence is conveniently explained in that way. If A. has caused the death of B. by alleged negligence, then, in order to establish civil liability, the plaintiff must prove (in addition to pecuniary loss caused by the death) that A. owed a duty to B. to take care, that that duty was not discharged, and that the default caused the death of B. To convict A. of manslaughter, the prosecution must prove the three things above mentioned and must satisfy the jury, in addition, and A's negligence amounted to a crime. In the civil action, if it is proved that A. fell short of the standard of reasonable care required by law, it matters not how far he fell short of that standard. The extent of his liability depends not on the degree of negligence, but on the amount of damage done. In a criminal Court, on the contrary, the amount and degree of negligence are the determining question. There must be mens rea.

The case of *Callaghan* v. *The Queen* (1952) 87 C.L.R. 115, approved of the majority decision in *Scarth's* case. In its judgment, the Court cites, with approval, from Sir James Fitzjames Stephen's *History of Criminal Law,* the following extract

where at pp. 123-124 it said:

> In order that homicide by omission may be criminal, the omission must amount to what is sometimes called gross, and sometimes culpable negligence. There must be more, but no one can say how much more negligence than is required in order to create a civil liability. For instance, many railway accidents are caused by a momentary forgetfulness or want of presence of mind, which are sufficient to involve the railway in civil liability, but are not sufficient to make the railway servant guilty of manslaughter if death is caused. No rule exists in such cases. It is a matter of degree determined by the view the jury happen to take in each particular case. It will be seen that here as in his charge in *R.* v. *Doherty* (1887) 16 Cox C.C. 306 the author makes the word "culpable" perform the duty which the majority of the Supreme Court of Queensland felt must be done by the words "reasonable care and precaution" in *The Criminal Code* (Q).]

The learned Magistrate has concluded that in this case on appeal, the prosecution has established the degree of negligence required to establish the appellant's guilt i.e. gross or culpable negligence. He bases his conclusion on his finding of the following facts:

(1) That the working of the appellant on night duty beyond the time normally worked "impaired his ability to drive . . . his vehicle in a careful manner".
(2) That the "driving around the island to go home, rather than take the shorter route . . . to . . . where his house was located" was, a "reckless step" establishing negligence in his not realising he was in an unfit state to drive the longer distance.

Turning now to the evidence, it is true that the appellant worked a double shift. He gave evidence, however, that he did not normally sleep after night shift until midday. He said he did not feel sleepy on this day. This evidence was neither tested nor challenged by the prosecution. He was not asked the reason for his taking the route he did, an inquiry which should have been made to test the "reasonableness" of his decision to do so. For example, he may not have intended to drive to his home, but, rather to some other place. The crux of the matter is whether on this evidence, the necessary element of "mens rea" could be established beyond reasonable doubt; could it be found that, in the circumstances of the case, the appellant ought to have known whether he was likely to fall asleep while driving? The learned Magistrate has found that the appellant "did not realize the weakness suffered by him" in doing the long night shift and further "did not realize he was not in a fit state to drive around the island". The question, is whether he ought to have known this and I am of the view that the evidence falls short of establishing this beyond reasonable doubt. I do not consider the untested evidence of the appellant can be rejected.

In the result, I am satisfied the conviction cannot be sustained on the charge as laid.

However, I am of the view that there is sufficient evidence to sustain a charge of negligent driving contrary to the provision of section 19(1) of the Motor Traffic Act 1937-1973. Unlike in the case of criminal negligence, the test of liability for the offence of negligent driving under the Act is objective; the actual behaviour of the driver of the motor vehicle does not require any given state of mind to be

established as an essential element of the offence. A person is negligent if he fails to exercise such care, skill or foresight as a reasonable man in his situation would exercise. The driving of the motor vehicle by the appellant in this case causing it to veer across to the incorrect side of the road striking as it did the oncoming vehicle is clearly negligent and it is no defence that he was actually asleep at the time.

In the result, pursuant to section 15(2) of the Appeals Act 1972, I propose to
240 quash the conviction in relation to the charge under section 328 of the Criminal Code Act 1899 of Queensland (Adopted) and substitute the charge of negligent driving as provided in section 19(1) of the Motor Traffic Act 1937-1973. I find the appellant guilty of that charge and accordingly convict him thereof. He is fined $150 and disqualified from holding or obtaining a driver's licence for six months.