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EDMUND G. McCARTHY..... APPELLANT;

*Feb. 24.

*Mar. 11.

AND

HIS MAJESTY THE KING..... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR SAS-
KATCHEWAN.*Criminal law—Manslaughter—Person killed by automobile—Criminal liability of driver—Degree of care—Sections 247 and 258 Cr. C.*

The driver of an automobile, who fails to take reasonable precautions against, and to use reasonable care to avoid, danger to human life is, under section 247 of the Criminal Code, criminally responsible for the consequences.

Judgment of the Court of Appeal ([1921] 1 W.W.R. 443) affirmed.

APPEAL from the judgment of the Court of Appeal for Saskatchewan (1), on a reserved case for the opinion of that court. The appellant was convicted of manslaughter for unlawfully killing a workman who was working in a manhole in the street by striking him with his motor car, and the conviction was sustained by the Court of Appeal.

The material facts of the case are stated in the judgments now reported.

Geo. F. Henderson for the appellant.

Harold Fisher for the respondent.

*PRESENT:—Idington, Duff, Anglin, Brodeur and Mignault JJ.

IDINGTON J.—The appellant whilst in charge of and driving an automobile in one of the streets of Regina, ran it over an obstacle described as follows by the learned trial judge:—

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The tarpaulin was thrown over a form extending about five or six feet from north to south, and looking at it from the north or from the south it was in the shape of an inverted V. The top of this V would be somewhere between four and five feet high. Possibly nearer four than five feet. The width of the bottom of the V would be between three and four feet. The measurements were not given at the trial, but a witness erected a tarpaulin at the trial, in the presence of the court and jury to represent its position at the time of the accident.

The structure so described covered a manhole in the street where three men were working for the provincial telephone department, and one of them was killed as the result of this adventure on the part of the appellant.

For so killing that man appellant was indicted for manslaughter and found guilty thereof.

The street in question was a wide one on which there was ample room for appellant to have driven the car in question over the unobstructed part of the street and passed the said structure in safety.

The learned trial judge submitted, after said conviction, a reserved case containing the following question:—

1. Did I properly instruct the jury as to the negligence which under the circumstances of the case, would render the accused guilty of manslaughter?

2.—In view of the fact that there was no evidence that the accused saw the deceased nor knew that the deceased was under the tarpaulin referred to in the evidence, could the accused be found guilty of manslaughter?

The learned judges of the Court of Appeal with the exception of Mr. Justice Newlands, answered these questions in the affirmative and sustained the conviction.

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The opinion of the majority was written by Mr. Justice Lamont who reviewed at length many decisions which support the judgment now appealed from, if any needed beyond the relevant section of the Criminal Code which I am about to quote.

Mr. Justice Newlands held that in light of some expressions in decisions of long ago that

there must be gross negligence before there is criminal liability (and that) the want of ordinary reasonable care which an ordinary prudent man would have observed, although sufficient to render the accused liable in a civil action, is not sufficient in a criminal case.

Several of the cases he cites were mere *nisi prius* expressions which are not at the present day of much value, even if, as I submit, possibly relevant to the then state of the law.

The law applicable to this case is to be found in section 247 of the Criminal Code, cited by Mr. Justice Lamont, which reads as follows:—

247.—Everyone who has in his charge or under his control anything whatever animate or inanimate, or who erects, makes or maintains anything whatever which, in the absence of precaution or care may endanger human life, is under a legal duty to take reasonable precautions against and use reasonable care to avoid, such danger and is criminally responsible for the consequences of omitting, without lawful excuse, to perform such duty.

This was first enacted in the Criminal Code of 1892, section 13.

It leaves no room for the refined distinctions between negligence and gross negligence.

It imposes an absolute duty on the part of him having charge of that which in its use may endanger human life, to take precaution and care.

It should not, I respectfully submit, be frittered away by any refinement on the part of judges.

The learned trial judge's charge throughout was absolutely correct until he momentarily, on objection, interjected the remark that there was a possible distinction between that which would render a man liable for civil damages for negligence, and that which would render him liable criminally.

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Even if the distinction had been maintainable as I hold it is not in the application of this section, he seems to have covered the ground.

I should have preferred the charge before so amended.

Section 1019 of the Criminal Code, which reads as follows:—

1019.—No conviction shall be set aside nor any new trial directed, although it appears that some evidence was improperly admitted or rejected, or that something not according to law was done at the trial or some misdirection given, unless, in the opinion of the court of appeal, some substantial wrong or miscarriage was thereby occasioned on the trial: Provided that if the court of appeal is of opinion that any challenge for the defence was improperly disallowed, a new trial shall be granted,

might, if need be for which in my view there is none, be relied upon. If Mr. Justice Newland's view is correct it should be applied.

The negligence here in question which led to appellant's motor car running over such an obstacle on the street as the above description presents when ample space to pass it without doing so, was so palpably gross that there was not much to be found in the way of palliation even if the old saws about gross negligence could be invoked and relied upon.

There was, in my opinion, no miscarriage of justice.

The appeal should, I think, be dismissed.

DUFF J.—Section 258 of the Criminal Code does not I think, substantially change the common law. In this I agree with the opinion of Mr. Justice Sedge-

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wick delivered on behalf of the court, in the *Union Colliery Company's Case* (1). There may, I think, be cases in which the judges ought to tell the jury that the conduct of the accused in order to incriminate him under this section must be such as to imply a certain indifference to consequences, but such cases, I think, must be rare and this assuredly is not one of them. Where the accused, having brought into operation a dangerous agency which he has under his control, (that is to say dangerous in the sense that it is calculated to endanger human life), fails to take those precautions which a man of ordinary humanity and reasonably competent understanding would take in the given circumstances for the purpose of avoiding or neutralizing the risk, his conduct in itself implies a degree of recklessness justifying the description "gross negligence." The facts of course may disclose an explanation or excuse bringing the accused's conduct within the category of "reasonable" conduct. But as Vaughan J. said long ago in *Bushell's case* (2), the judge does not charge the jury with matters of law in the abstract but only upon that law as growing out of some supposition of fact; and it is much better in such a case as the present, (where, in the absence of explanation, the conduct of the accused—driving a motor through a frequented street at the rate of 12 miles an hour without seeing the road clearly before him—plainly inculpates him) that the trial judge should seek, as Mr. Justice Lamont did, to bring the jury to concentrate their attention upon the various matters alleged in explanation and excuse.

(1) [1900] 31 Can. S.C.R. 81 at p. 87. (2) [1677] Vaughan, 135; 6 State Trials, 999.

ANGLIN J.—I would dismiss this appeal. There was dissent in the court of appeal only upon the first question of the reserved case. To that question s. 247 of the Criminal Code precludes any but an affirmative answer. Failure to take reasonable precautions against, and to use reasonable care to avoid, danger to human life is thereby declared to entail criminal responsibility for the consequences. There is nothing in s. 16, referred to by Mr. Henderson, to qualify this explicit declaration; and s. 258 has no bearing, in my opinion, on a case of manslaughter. It would be most unfortunate if anything should be said or done in this court to countenance the idea that a motor car may be driven with immunity from criminal responsibility if reasonable precautions be not taken against, and reasonable care be not used to avoid, danger to human life. As Mr. Justice Bigham said on the trial of a chauffeur for manslaughter by running over a woman in a London street:—

There is a greater responsibility on a person engineering a dangerous machine like a large motor car about the streets than on a man driving a one horse brougham. *Rex v. Davis.* (1)

What are reasonable precautions and what is reasonable care depends in every case upon the circumstances. Carelessness which ought to have been recognized as not unlikely to imperil human life cannot, in my opinion, be regarded as aught else than culpable negligence.

BRODEUR J.—This appeal arises out of a conviction for manslaughter in the case of a man driving negligently an automobile.

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(1) [1908] 43 L.T. 38.

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It is contended by the accused that there must be gross negligence to incur criminal liability and that the degree of negligence must be higher in criminal cases than in civil cases.

A large number of cases have been quoted to us on this point and they might appear somewhat conflicting though I think that they could be reconciled by a careful examination of the facts in each case. But the language itself of the Criminal Code disposes of this issue. It says in article 247:—

Everyone who has in his charge or under his control anything whatever, whether animate or inanimate * * * which, in the absence of precaution or care, may endanger human life, is under a legal duty to take *reasonable precautions against*, and use *reasonable care* to avoid such danger and is criminally responsible for the consequences of omitting without lawful excuse to perform such duty.

Nobody will dispute the fact that an automobile negligently driven is a dangerous thing. Then the driver of his automobile on the street is bound to take reasonable precaution and use reasonable care to avoid any danger.

If our legislators intended to state that there would be criminal liability only in the case of reckless or gross negligence, they would certainly have so declared their intent. But they simply incorporated in our criminal statutes these expressions so well known and so fully construed in the cases of civil negligence.

The absence of reasonable care in driving an automobile may then create a criminal liability. The following cases may be quoted in support of this contention: *Reg. v. Murray* (1); *Rex v. Grout* (2); *The Queen v. Dalloway* (3).

Even if we construe the judge's charge as the appellant contends, I consider it legal and sufficient.

The appeal should be dismissed.

(1) [1852] 5 Cox C.C. 509.

(2) [1834] 6 C. & P. 629.

(3) [1847] 2 Cox C.C. 273.

MIGNAULT J.—The appellant was tried on an indictment for manslaughter for having, when driving a motor car in a public street of Regina, caused the death of one Percy Young. The learned trial judge, in charging the jury, directed them as to the law governing the case as follows:—

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It has been decided and I am going to tell you that the law is, that every person who drives a motor car has a duty to drive it with such care and caution as to prevent, so far as is in his power, any accident or injury to any other person; that is, he has got to use all reasonable precaution to see that no person is injured through his want of caution or precaution.

After the charge, counsel for the accused complained that the learned judge should have told the jury that a greater degree of negligence was required in a criminal case than in a civil one, and the learned judge recalled the jury and gave them this further direction:—

I am also asked to direct your attention to the fact that in a criminal case the degree of negligence which renders a man culpably negligent is greater than in a civil case. I think that is quite so, and I am going to charge you to that effect—that while in a civil case a man may be liable to an action for damages, in a criminal case it would take a greater degree of negligence to render him liable. That is so. But in this case it is for you to say whether or not the accused, driving a vehicle of that sort along the streets of the city took that care which it was the duty of an ordinary prudent man to take in order to avoid doing damage to some person else on the street. If you come to the conclusion that he did not take that care, and that it was in consequence of that want of care that the death of Young took place, then he is guilty; if he did take that care he is not guilty.

Notwithstanding Mr. Henderson's able argument, I cannot come to the conclusion that the jury was misdirected. Section 247 of the Criminal Code states the law as follows:—

Everyone who has in his charge or under his control anything whatever, whether animate or inanimate, or who erects, makes or maintains anything whatever which, in the absence of precaution or

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care, may endanger human life, is under a legal duty to take reasonable precautions against, and use reasonable care to avoid, such danger, and is criminally responsible for the consequences of omitting, without lawful excuse, to perform such duty.

I think the charge is fully supported by this section. It was the duty of the accused to take reasonable precautions to avoid endangering human life, and the jury was told so. It was then for the jury to determine whether the accused had taken these precautions.

Naturally, in the offence of manslaughter, there may be a greater or less degree of guilt according to the circumstances of each case. I see no reason to doubt that the degree of guilt in this case will be duly considered when sentence is pronounced on the jury's verdict.

Appeal dismissed.
