24 ta' Ġunju, 1961

Imħallef:—

Onor. Dr. W. Harding, C.B.E., K.M., B.Litt. LL.D.

The Police

versus

Archibald Murray

Traffic — Manslaughter — Driving at an Excessive Speed round a Bend — Error of Judgment — Art. 239 of the Criminal Laws.

Driving at an excessive speed in rounding a bend is tantamount to culpable negligence and gross imprudence.

As a punishment for manslaughter the Criminal Law prescribes imprisonment or a fine.

Error of judgment does not exclude criminal liability; but it may operate as a factor for mitigating punishment. Consequently, if the circumstances of the case justify it, the

Court, even if the accused is guilty of culpable negligence and gross imprudnce, may feel inclined to award a pecuniary punishment instead of one restricting personal liberty, if the accused was misled by an error of judgment.

The Court:— Upon seeing the record of proceedings on the charge brought forward against the accused, for having at Tower Road, Sliema, on the 5th December, 1960, at about 1.15 a.m., through imprudence, carelessness, unskilfulness, and non-observance of the regulations, whilst driving car number 7348 at an excessive speed and in a reckless and dangerous manner, mounted the footpath, dashed into an electric pole, caused damages to the detriment of the Civil Government, and damages to the said car to the detriment of S.L. Mizzi ("Mizzi Bros."); moreover, caused on the person of P/S 958457 A.B. Dennis O'Sullivan injuries of a grievous nature, which resulted in his death within sixteen days, besides injuries of a grievous nature on the person of A.B. Jan Hole and A.B. Keith Knott;

Upon seeing the request of the Prosecution that the accused be disqualified from holding or obtaining a Police driving licence for a period of twelve months or more;

Upon seeing the note of the Attorney General dated 13th January, 1961, whereby the said record of proceedings was transmitted to the Criminal Court of Magistrates for decision;

Upon seeing the judgment of that Court delivered on the 24th January, 1961, whereby the accused was found guilty of having at Tower Road, Sliema, on the 5th December 1960, at about 1.15 a.m., through imprudence, carelessness, unskillfulness, and non-observance of the regulations, whilst driving car number 7348 at an excessive speed, mounted the footpath, dashed into an electric pole, and caused the death of P/S 958457 A.B. Dennis O'Sullivan and damages to the car and to the concrete pole, and was sentenced to imprisonment for a term of six months. The Court, moreover, ordered that the accused be disqualified from holding or obtaining a driving licence for a year;

Upon seeing the application of the said Archibald Murray at page 86, whereby he entered an appeal against the aforesaid judgment, and prayed that it be reversed and that he be acquited;

Upon hearing the appeal;

Considers as follows:—

Briefly, the facts are these. On the night between the fourth and the fifth of December, 1960, at about 1.15 a.m., the appellant was having a drink in a bar at Balluta Bay, St. Julian's. At about 9 p.m. he was joined by three sailors, Denis O'Sullivan, Jan Hole, and Keith Knott. All four had several drings of whisky together, and they stayed on at the bar until closing time after midnight, that is, for about three hours. The appellant was driving a Ford Consul, and he offered a lift to the sailors; which they accepted. After cleaning the windscreen, the appellant got into the car, O'Sullivan sat beside him, and the other two, Hole and Knott, sat at the back. When the appellant was on the point of negotiating the bend at Fond Għadir, near the Meadowbank Hotel, the car got out of control, mounted the curb of the pavement on the left, at a high speed and with no brakes on, and crashed heavily into an electric light concrete pole, totally wrecking the left front part of the car;

As a result of the crash, O'Sulivan died at Bighi Hospital a fortnight after, without ever regaining consciousness. The appellant himself was severely injured, with broken and fractured ribs, broken teeth, damaged liver, and head and face injuries. Both he and O'Sullivan had been pinned in the car and were taken out unconscious. The other two occupants, Knott and Hole, suffered minor injuries;

It would be better, in order to clarify the reasonings of this judgment, to refer, at the very outset, to the statements made by the appellant, and to the line of defence taken by him, directly or through his counsel, before the

First Court, and then, later on, before this Appellate Court;

The appellant was questioned for the first time by Police Inspector Moran at about 2 a.m. He had just recovered consciousness, but apparently, judging by what Police Sergeant Pace states at page 36 (back), he was still very shaken by the grievous injuries he had suffered barely an hour before. He then said, by way of explaining the accident (evid. Insp. Moran p. 32 and Sgt. Pace p. 36 back), that on arriving near Fond Għadir, an unknown pedestrian had crossed the road in front of his car, and he had been compelled to swerve to the left to avoid him. Giving evidence during the proceedings before this Court, p. 146, the appellant stated that he did not recollect having made such a statement to Inspector Moran, and that, now that he was giving evidence, he would say that he did not remember that any person had crossed in front of his car. He was again interviewed by Inspector Moran on the 22nd December, 1960, just a day before he was discharged from Bighi Hospital, and he then said that he had mistaken the bend, as otherwise he would have slowed down. He went on to say that he had struck the curb, ... It seems fair to say that these later statements of the appellant do not quite tally, to say the least, with his earlier satements;

There is also this point to be considered. Even before this appeal was due for hearing, Counsel for the appellant filed a formal written application (p. 89), whereby he requested the appointment of a mechanical expert to examine the car, and particularly the front assembly. Later on, by another application at p. 9. the appellant, besides asking that he be allowed to submit to the Court the matters of mitigration. requested leave to exhibit photographs, taken for his account by a certain Axisa nearly three months after the incident. He also requested leave to produce two new witnesses. But, before the Court below. the appellant did not make one single formal application for the purpose of having the car examined; the written record does not disclose any. There is no application on the part of the appellant to have the car placed under the authority of

the Court so as to have it examined. Counsel for the appellant did ask the first expert to examine the linkages of the car (p. 141), at the time that the expert was inspecting the car at Muscat's garage during the course of the enquiry before the First Court, and the expert had, in fact, duly commented on this matter in his report, filed before the Court below at page 61, by stating that if the linkage had been broken, the car would not have taken a curved course, as it undoubtedly did, but a straight one. In his evidence before this Appellate Court the appellant now says (p. 148) that when he examined the car with the first expert . . . . . This Court asked Counsel for the appellant to explain why the technical matters now raised before this Court were not pressed upon the Court of Magistrates. Counsel for the appellant submitted that this was probably due to the summary nature of the proceedings before that Court. This submission is not correct, and, besides, is unfair to the Court below. The proceedings started as a formal enquiry on the 27th December, 1960, and ended on the 24th January. 1961, after all the relevant evidence had been fully heard, and after a reference had been ordered and the report duly filed. During the hearing before the Court below, the appellant had every opportunity to submit formally the points which he is now putting up on appeal. but, as the record shows, there was no attempt on the part of appellant, directly or through his Counsel to press upon the First Court the matters set up now before this Court . . . . There can be no doubt that, had the appellant followed before the Court of Magistrates the same procedure which he afterwards adopted before this Court, that Court would have granted his request for a further examination of the car in relation to the technical issues which he has raised now on appeal;

Notwithstanding that the varying versions given by the appellant and the belated setting up of new issues not previously pressed upon the Court below was not very reassuring, this Court, in order not to shut up the defence now put on by the appellant, appointed the traffic expert Dr. Lorenzo Cassar and a mechanical expert. John Cassar, in order to report on the issues now raised

by the appellant; and also allowed him to produce the new witnesses. Moreover, when these experts filed their report at page 108, the appellant was allowed to put further questions to them in writing (pp. 154-155), to which they replied in a supplementary report (p. 156);

The Court has examined very carefully the whole of the evidence, including that given by the appellant, both before the First Court and again in the proceedings before this Court, and has also examined the report of the first expert, and the main and supplementary report of the two experts appointed on appeal; and has come to these conclusions;

On the question as to whether the appellant was or was not drunk, and whether his driving ability was in consequence impaired, this Court does not think that there is satisfactory evidence to that effect. The statement of the appellant, at page 32 back, is not an admission of drunkenness, but only implies, properly construed, a statement that, although he had taken some drinks, he still felt that he was able to drive (apart from whether, in point of fact, it was so or not); and the purport of that statement made by him to Inspector Moran is clarified by his evidence at page 72 back. It is true that Dr. Fenech, who was on duty at St. Luke's Hospital when the appellant was brought in, gave it as his opinion that the appellant, who smelt of alcohol, was drunk; but that witness did not give any specific valid reasons for his opinion. He did not mention, probably because in giving evidence before the First Court he was not asked to mention, any of the symptoms which are usually observed in similar cases, and which were listed by a Committtee of the British Medical Association in their report of the 9th February, 1927(vide Crim. App. "The Police vs. Groves", decided by this Court on the 18th October, 1948) apart from the fact that, nowadays, the tendency is to have chemical tests for the blood alcohol level, particularly following a recent report of the British Medical Association drawn up in 1960 on the relation of alcohol to road accidents (vide Crim. Law Review, Jan. 1961, p. 5). Dr. Fenech merely mentions that the appellant smelt of alcohol, and he also used the expression "he look-

ed a little bit unruly". When it is considered that the appellant had just been involved in a very serious car crash, and was in point of fact severely injured at the time, it is not to be wondered at that he could not appear to be normal, and no adverse deduction can, therefore, be fairly made from Dr. Fenech's evidence;

It is also true that Knott, one of the sailors, who was given a lift by the appellant, and himself a certified driver, stated in his evidence, at page 40, that he thought that, although the appellant, before he started driving, was not drunk, still he was, as the witness termed it, "happy". However, this witness, who, as he himself goes on to state, was concerned as to the fitness of the appellant to drive a car, and kept on watching him closely, later on he qualifies his statement, and says that he came to the conclusion that after all the appellant was fit to drive;

This Court, in a case like this, which is not one of obvious and blatant drunkenness, for which no special technical enquiries would be necessary, is of opinion that the evidence is not such as to warrant the Court to come to the conclusion that the ability of the appellant to drive his car was impaired by drink. And, in this connexion the Court again directs the attention of the competent authorities, particularly that of the Attorney General, to the commendations which were made by the sitting Judge in the concluding part of the afore quoted "Groves" judgment;

With regard to the cause of the collision, this Court concurs without hesitation in the opinion expressed by the expert appointed by the Court below and the two experts appointed by this Court, that is, that the collision was due to the fact that the appellant tried to drive round the bend of Fond Għadir at an excessive and unreasonable speed;

Inspector Moran, in his evidence at page 32(back), stated that the appellant (when interviewed on the eve of his discharge from hospital) told him that his speed was approximately 30 miles per hour, and that he had mistaken the bend, as otherwise he would have slowed

down. Later on, when the Inspector read out to the appellant *the notes of his statement, the appellant said that* what he had stated was that he had slowed down on coming to the bend. In his evidence at page 71 the appellant stated . . . . Jan Hole, who was in the car at the time, stated that he could not recollect what the speed of the car was like but in his opinion the car was going too fast for the bend. Keith Knott, a certified driver, stated that when a previous bend was taken (presumably the Tower bend) he thought that the appellant was driving too fast, and the witness was scared . . . . . . The first expert, in *his report before the First Court, gave it as his opinion* that the car was travelling too fast for the locality in question, and he referred to the tyre marks, which were 257 feet in length. The other expert. Dr. Cassar, expressed his opinion that the rate of speed must have been even higher, that is nearer fifty than forty miles per hour, and he referred to the havoc caused to the car and the concrete lamp-post. The speed limit would be 25 miles per hour; but, of course, the driver of a car is bound to slacken his speed at a turn or bend, so as he may negotiate it safely. *The appellant was culpably ignoring the rules of* safe driving, and culpably took the hazardous chance of rounding the curve at a high and risky rate of speed. The disastrous consequences show the grave risk which he took;

The Court excludes the allegation of the appellant that the front left wheel tyre had become deflated before the collision, and as a consequence had pulled the car to the left and caused it to crash against the concrete pole *on the pavement on that side. Three Police witnesses* . . . . . . There is nothing which warrants the Court to come to the conclusion that the tyre in question was deflated before the crash. In fact, as has been stated . . . . . To conclude, under such circumstances, as Counsel for the appellant pressed upon the Court, that the tyre was deflated before the crash, would be tantamount to putting aside the significance of the facts of the case, and pursuing a wholly hypothetical theory;

The appellant also brought forward, in support of a

deflated tyre prior to the collision, that the tie-rod, which forms an essential part of the steering-wheel, had snapped before the car hit the pole as a result of the prior deflation of the tyre. This contention cannot but be excluded in view of the examination of the tie-rod carried out by the two experts . . . . . ;

In the course of the arguments, Counsel also mentioned the heavy indentations on the rim; but the experts appear to be correct in stating, inter alia, that no account should be taken of changes in the condition of the left front wheel, which might well have occurred during the time when the car was no longer under the authority of the First Court, and indeed had been sold and withdrawn since the 15th. January, 1961, and partly dismantled by the buyers who left it in a place easily accessible to outsiders; just as no account can be properly taken of the photographs filed by the appellant, taken months after the incident and when the car was practically at the mercy of anyone who may have wished to tamper with it;

Counsel for the appellant also stressed, in support of his contention, some other points which seem to be merely hypothetical; that is, that some damaged parts should not have been so damaged, others should have been damaged to a lesser extent, and others which were not damaged should have been severely damaged. But it seems that these arguments are tantamount to losing sight of the fact that this was a heavy impact indeed, which made of the car a mass of entangled metal, and which pushed the front part of the car deep into the pole; and it is, therefore not to be wondered at that certain effects with regard to particular parts appear to be difficult to explain with precision;

In the circumstances, and in the light of the elaborate and painstaking report of the experts, which was of great assistance to the Court, this Court feels unable to come to the conclusion pressed upon it by the defence that the crash was due to the unexpected and accidental failure of some vital parts of the car prior to the crash, and adopts the conclusion reached by the First Court,

that the collision was due to the culpable negligence and grave imprudence of the appellant in taking the bend at an excessive speed;

With regard to the punishment inflicted by the First Court, this Appellate Court considers as *follows*:—

If it had been proved to the satisfaction of this Court that the appellant was driving whilst under the influence of drink, there would have been no question of revising the punishment. The sitting Judge, in this respect, concurs entirely with what was stated in a monograph published in "The Solicitor" (July 1960, p. 209):— "Surely it is time that penalties for road traffic offences were thought of in terms of far greater severity than at present prevails. What is needed is a new social climate which will regard serious driving offences as anti-social as offences against property. After all is said and done, dangerous driving, or driving under the influence of drink, involves the life and limb of Her Majesty's subjects, which is more than can be said of larcency";

But once it has not been satisfactorily proved that the appellant at the time was under the influence of drink, that factor, which otherwise would have been included, together with other factors, under the general terms of sec. 239 Criminal Code. must not be in any way considered for the purposes of punishment. It must be ruled out altogether whatever one may conjecture, outside the ambit of strict legal proof;

Section 239 lays down as follows:— Whosoever, through imprudence, carelessness, unskilfulness in his art or profession, or non-observance of regulations, causes the death of any person, shall, on conviction, be liable to imprisonment for a term not exceeding two years, or to a fine (multa) not exceeding one hundred pounds";

Maltese Law, considering the wide latitude which it wisely allows in regard to the punishment of manslaughter, is in keeping with accepted principles. Mr. Justice Avory, in Rex vs. Rose (1928) 20 Crim. App. R. 164, in which a

car driver had run into a cyclist and killed him, said:—"No offence varies so much in gravity as manslaughter. One must look at the circumstances in each particular case, and see whether it is an offence which calls for severe or mitigated punishment";

The sitting Judge would add that, in manslaughter in traffic cases, this diversification is even greater, and greater, in consequence, is the anxiety of the Court in assessing the appropriate punishment;

In the reports of the experts mention is made of the treacherousness of this Fond Għadir bend, which is not provided with what is called "banking", or superelevation of the outer curve so as to counteract the disastrous effects of the centrifugal force. Indeed, if there is any banking in this curve, it is on the wrong side probably to facilitate the drain of rain water. However, this circumstance does not operate in favour of the appellant with regard to the punishment, because the appellant has been in Malta for one year and seven months, and has been driving here since the 14th March 1960. Moreover, he lives in Sliema, in Point Street, and has therefore had several opportunities to go round this bend; so much so that, in his evidence at page 146 he states that he is familiar with the particular stretch of road where the mishap occurred. Of course, even if he had not been familiar with it, that would have been an added reason for caution in rounding it;

There is no doubt that, on the proved facts, the appellant was guilty of gross negligence and grave imprudence in attempting to negotiate the bend at a speed which, as the subsequent catastrophic consequences show, was excessive and unreasonable. There may have been, however, in that negligence and imprudence, an element of error of judgment. Any such error of judgment does not exclude the criminal liability of the appellant; because any driver worthy of the name should know that taking a tricky bend, or any bend for that matter, at an excessive speed,

is potentially frought with unpleasant consequences, and any error of judgment in that regard is inexcusable; the risk should not be taken if a driver has, as he undoubtedly has, the duty of driving with proper and reasonable care (Cr. Law Review, p. 635 Sept. 1959);

However, for the purpose of mitigating the punishment. the possible element of an error of judgment, whilst not excluding. as has been said, criminal liability, should be taken into consideration; because it tends to minimise the degree of culpability, in as much as it excludes utter recklessness, or what has been termed "wicked" negligence. *In other words. the appellant was grossly negligent* and gravely imprudent in going round the curve at that speed; but possibly his frame of mind at the time was that he could go round safely, and not that he would take the bend at that speed come what may, and whatever the consequences to himself and others. It is, of course, a well settled principle that, even for the purposes of the criminal law, there are varying degrees of carelessness (vide Lord Atkin in R. v. Baldassare, House of Lords, App. C 1937, 576, pp. 583-585). All in all, this Court feels that. *in the proved circumstances of the case. the punishment* should be pecuniary, rather than restrictive of personal liberty. The conduct sheet of the appellant (p. 5), as far as his stay in Malta is concerned, is clean. The appellant, who is 47 years of age, stated on oath, p. 145, that he has held a driving licence continuously in England since he was seventeen, and that he has never had any convictions whatsoever about driving or any other charges. There is nothing against this statement in the evidence, and it therefore falls to be accepted, although, speaking in general terms. *the Court would strongly recommend to the* Police in similar cases to make enquiries, where possible, with the competent authorities abroad, so as to be able to control such statements and give official information to the Court thereon;

This Court, therefore, gives judgment as follows:—

Affirms with regard to the merits, the judgment of

the Court below. With regard to the punishment, this is hereby varied from a sentence of imprisonment for six months to a fine (multa) of £100, in addition to the disqualification ordered by the First Court, which is hereby maintained and will run from today. Moreover, the Court allows the request of the Prosecution noted down at page 161, and sentences the appellant to pay to the Registrar of these Courts the costs incurred, i.e. fees and expenses, in connection with the reference ordered by this Appellate Court.