IN THE SUPREME COURT OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA

In the matter of an application for Special Leave to appeal

Ponnadura Shantha Silva
Ridee Mawatha, Kalamula
Kalutara.

Accused-Appellant

SC Appeal 163/2014
SC (Spl) LA.143/2014
High Court Kalutara
Appeal No.546/2011
Magistrate's Court Kalutara
Case No.97938

Vs.

1. Officer-In-Charge,
   Police Station,
   Kalutara South.
2. The Attorney General
   Attorney General's
   Department,
   Colombo 12.

Complainant-Respondents

And Now Between

Ponnadura Shantha Silva
Ridee Mawatha, Kalamulla
Kalutara.
(Presently in Kalutara
Prison)

Accused-Appellant-Petitioner

Vs.

1. Officer-In-Charge,
   Police Station,
   Kalutara South.
2. The Attorney General
   Attorney General's
   Department,
   Colombo 12.

<u>Complainant-Respondent-Respondents</u>

BEFORE: Buwaneka Aluwihare, PC, J
Priyantha Jayawardena, PC, J &
Nalin Perera, J.

COUNSEL: Shanaka Ranasinghe, PC, with N.Mihindukulasooriya and Sandamali Peiris for the Accused-Appellant-Appellant.
Madhawa tennakoon, SSC for the Complainant-Respondent-Respondents.

ARGUED ON: 29.08.2017

DECIDED ON: 03.08.2018

ALUWIHARE, PC, J:

The Accused-Appellant-Appellant (hereinafter referred to as Accused-Appellant) had been charged before the Magistrate's Court of Kalutara under the following counts:-

(1) Committed an offence punishable under Section 149(1) of the Motor Traffic Act by failure to avoid an accident and thereby

(2) By rash or negligent act as to endanger human life, caused grievous hurt to one Kandadurage Lalithangani Rani, an offence punishable under Section 329 of the Penal Code.

(3) Failed to report an accident and thereby violated Section 161(1)A(iv) of the Motor Traffic Act.

Consequent to the accused appellant pleading not guilty to the charges aforesaid, the case against the accused-appellant proceeded to trial. At the conclusion of the trial, the learned Magistrate found the accused-appellant guilty on counts 2 and 3 aforementioned and proceeded to convict and sentence the accused-appellant.

The learned Magistrate imposed a term of imprisonment of three months and a fine of Rs.1000/- on count No.2 and proceeded to suspend the operation of the term of imprisonment for a period of five years.

With regard to the 3rd count the accused-appellant was imposed a fine of Rs.1,500/- and a default term of one-month simple imprisonment was also imposed.

Aggrieved by the conviction and the sentence imposed by the learned Magistrate the accused-appellant appealed against the judgment to the High Court.

The learned High Court Judge by his judgment dated 28th July,2014 affirmed the conviction of the accused-appellant.

At the hearing of the appeal before the High Court it had been submitted on behalf of the state that the sentence imposed by the learned Magistrate is inadequate when one considers the rashness and the negligence on the part of the accused-appellant and the State moved to have the sentence imposed by the learned Magistrate enhanced.

The learned High Court Judge thereupon had called on the accused-appellant to show reasons as to why the application of the State should not be allowed.

Having heard the accused appellant on the issue of sentence, the learned High Court Judge having set aside the sentence imposed by the learned Magistrate on count 2, substituted the same with a custodial sentence of imprisonment of one year.

When this matter was supported, the court granted special leave on the following questions of law: (Sub-paragraphs (b) (g) (i) and (j) of paragraph 17 of the Petition.)

(i) Has the Provincial High Court erred in Law by failing to appreciate that the Prosecution failed to establish the degree of proof required in establishing a charge of criminal Negligence?

(ii) Has the Provincial High Court erred in Law by affirming the conviction without considering that the Learned Magistrate failed to evaluate the evidence of the defence witnesses as required by the Law?

(iii) Did the Learned High Court err in Law by imposing a custodial sentence of 1-year rigorous imprisonment on the Petitioner contrary to the principles of sentencing?

(iv) In any event was the sentence imposed to the Petitioner is excessive?

At the hearing of this appeal the learned President's Counsel for the accused-appellant confined his submissions to the questions of law referred to in paragraph (i) and (j) of paragraph 17 of the Petition [(i) and (ii) above].

It was contended on behalf of the accused-appellant that he had been employed as a driver with the Sri Lanka Transport Board and that he had no previous convictions. It was also contended that he is a father of three children and two of them were engaged in higher studies.

It was also strenuously argued on behalf of the accused-appellant that the learned High Court Judge misdirected himself with regard to the degree of negligence that is needed to establish criminal negligence and submitted that the principles laid down by courts suggests that the prosecution has to establish a high degree of negligence on the part of the accused, if the accused is to be found guilty for criminal negligence and the prosecution had not adduced sufficient evidence to establish the degree of negligence required to convict a person for criminal negligence.

The facts albeit briefly can be narrated as follows;

The injured who was a teacher; in order to reach the school at which she was teaching, had taken the bus driven by the accused to come to Katukurunda junction. Before the bus could reach the destination, however, the accused-appellant had indicated that the bus will not proceed beyond a particular point and wanted all the passengers to disembark. There had been about 15 passengers, and she was also in the process of getting off the bus as it was announced that the bus would not proceed further.

As she was about to get off, the bus had pulled out and as a result the injured had got thrown off the bus. Due to the impact of the fall, she had suffered a fracture of her left wrist, among other injuries. The bus, however, had proceeded without stopping.

In the case before us the only issue that needs to be addressed is as to whether the learned High Court Judge was justified in enhancing the sentence. Prior to that, the Court must first look to see whether the burden of proof has been discharged by the Prosecution, since that is the predicate for enhancing the sentence.

The requirement of high degree of negligence to establish criminal negligence, referred to by the learned President's Counsel for the Appellant, no doubt, was a reference to the decision in **King Vs. Leighton 47 NLR 283.**, where it was held that "[…] *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.*?" a standard which was articulated by Hewart CJ in ***R v Bateman (1925) 19 Cr App R 8*** - later explained in ***Andrews v DPP [1937] AC 576***—and followed by our Courts in ***Lourenz v Vyramuttu 42 NLR 472*** and in ***King v Leighton*** (*supra*).

However, as explained by Atkins J. in ***Andrews v DPP [1937] AC 576*** and later by Lord Mackay of Clashfern LC in ***Regina V Shulman, Regina V Prentice, Regina V Adomako; Regina V Hollowa [1995] 1 AC 171, [1994] UKHL 6, [1994] 3 WLR 288, [1994] 3 All ER 79*** the circumstances in which negligence has to be considered may make an elaborate and rather rigid directions inappropriate. Trying to achieve a 'spurious precision' in a branch of law, *i.e*,

criminal negligence, which extends not only to acts causing death but also hurt and grievous hurt, the degree of circumspection as is expected of the average man must necessarily be considered vis a vis the circumstances under a particular situation. Although decided in the latter part of 19th century words of O'Brian J in the case of ***R Vs. Elliot (1889) 16 Cox 710*** would be of relevance even of today. O'Brian J observed that, "*the degree of care to be expected from a person, the want of which would be gross negligence or less than that, must in the necessity of things, which the law cannot change, have some relation to the subject and the consequences"* ... What O'Brian J referred to, appears to be, the want of care required, must relate to the act and the consequences.

Whether a person was negligent or not has to be considered taking into account the facts and circumstances of each case and upon consideration of the duty of care expected of him under the circumstances of the case. The seriousness of the breach of duty must be judged based on the circumstances in which the defendant was placed when it occurred. As Lord Mackay of Clashfern LC observed in relation to the charge of manslaughter in ***R v Adamako*** (*supra*) "*The jury will have to consider whether the extent to which the defendant's conduct departed from the proper standard of care incumbent upon him, involving as it must have done a risk of death to the patient, was such that it should be judged criminal. […] The essence of the matter which is supremely a jury question is whether having regard to the risk of death involved, the conduct of the defendant was so bad in all the circumstances as to amount in their judgment to a criminal act or omission.*" This is similar to what O'Brien J said *"the want of care required must relate to the act and the consequences to some degree"*. He went on to state that ***"if the prisoner was absorbed in the business and interests of the company as to give no heed to their (passengers) safety, that might be considered as negligence". (Elliot supra at page 714).*** It appears here, that O'Brian J referred to an inadvertent state of mind as opposed

to recklessness. Particularly when one is entrusted with a responsibility such as carrying passengers, he is expected, at all times to be mindful of the duty cast on him and there is no room for inadvertence.

In the case before us, the accused-appellant was entrusted with the responsibility of carrying passengers in an omnibus and had a duty of care that by his conduct, he does not expose the passengers to any danger that would result in any injury or harm being caused to them. Pulling away in the middle of passengers disembarking, to say the least is grossly a rash act and, in my view, goes beyond inadvertent state of mind that Judge O'Brian spoke of in the case of **Elliot** *(supra)*.

According to the accused-appellant's own admission under oath he had seen the injured falling. The position taken up by the accused-appellant was that the passenger fell after she got off the bus and that was the reason for him to drive off.

The learned Magistrate had accepted the evidence of the injured and had rejected the version of the accused-appellant and had come to the conclusion that the bus driven by the accused-appellant had pulled off before she could disembark and this resulted her fall, an act imminently dangerous that there was every likelihood of a passenger falling off the bus and coupled with that, the accused-appellant had no excuse for his course of conduct. The accused-appellant had a duty of care to ensure safety of the passengers he carried. The conduct of the accused-appellant is reprehensible to say the least and sufficiently grave to fall within the ambit of criminal negligence.

Under these circumstances I am of the view that the learned High Court Judge was correct in enhancing the sentence imposed on the accused-appellant by the

Magistrate and I see no reason to interfere with the same. One must bear in mind that punitive action is not only to reform the offender but should serve as a deterrence as well.

Chief Justice Basnayake in the case of ***A.G v. H. N De Silva [1955] 53 C.L.W 49*** observed;

"In assessing a punishment that should be passed on an offender. A judge should consider the matter of sentence both from the point of view of the public and the offender. Judges are too often prone to look at the question only from the point of view from the angle of the offender. A judge should in determining the proper sentence, first consider the gravity of the offence as it appears from the nature of the act itself and should have regard to the punishment provided in the Penal Code or other statute under which the offender is charged. He should also regard the effect of the punishment as a deterrent and consider to what extent it will be effective. If the offender held a position of trust or belonged to a service which enjoys public confidence that must be taken into account in assessing the punishment […] I have mentioned where public interest or welfare of the state (which are synonymous) outweigh the previous good character, antecedence and the age of the offender. Public interest must prevail…."

For the reasons set out above, I answer all the questions of law on which leave was granted in the negative and accordingly this appeal is dismissed.

In the Petition filed before this court the accused-appellant has averred that before he could invoke the jurisdiction of this court by way of special leave to appeal, the learned High Court Judge directed the Magistrate concerned to

carry out the sentence which appears to have been complied with by the learned Magistrate.

The court directs the learned Magistrate to ascertain from the Prison authorities, whether the accused-appellant had served any part of the sentence imposed by the learned High Court Judge and if so, to give necessary direction to the Prison authorities that the accused-appellant is required to serve only the balance part of the one-year sentence imposed, after discounting the period of said sentence the accused-appellant had already served.

Appeal dismissed

JUDGE OF THE SUPREME COURT

JUSTICE PRIYANTHA JAYAWARDENA, PC

I agree

JUDGE OF THE SUPREME COURT

JUSTICE H. N. J. PERERA

I agree

JUDGE OF THE SUPREME COURT