

**IN THE COURT OF APPEAL OF THE DEMOCRATIC SOCIALIST
REPUBLIC OF SRI LANKA**

In the matter of an appeal under Section
331(1) of the Criminal Procedure code Act
No 15 of 1979.

The Attorney General,
Attorney General's Department,
Colombo.

Complainant

Vs.

C.A No: 232/09

H.C. Case No: 3074/2006

W. Liyanage Don Nalaka Dileep Kumara,
Accused

AND NOW,

W. Liyanage Don Nalaka Dileep Kumara,

Accused-Appellant

Vs

The Attorney General,
Attorney General's Department,
Colombo.

Complainant-Respondent

Before: M.M.A.Gaffoor J &

K.K.Wickramasinghe J

Counsel: R.J. de Silva for the Appellant.

Chethiya Goonesekera DSG for the Respondent.

Argued on: 05.09.2016

Written Submissions on:

Decided On: 22.09.2016

JUDGEMENT:

M.M.A.Gaffoor, J.

The accused -appellant (hereinafter sometimes referred to as the appellant) W. Liyanage Don Nalaka Dileep Kumara, was indicted in the High Court of Colombo under section 298 of the Penal Code for causing the death of one Angodage Alponsu Pigera of Welivita Kaduwela by rash or negligent act, driving vehicle bearing number WPHC- 2054.

As revealed before us the accident referred to in this case had taken place on 22nd April 2005 at Welivita, along Kaduwela- Colombo road between 9.30 and 10.00am

At the conclusion of the trial before the High Court Colombo, the Learned High Court Judge convicted the appellant on the indictment and imposed a sentence of 5 years Rigorous Imprisonment .

Being aggrieved with the said conviction and sentence, the appellant had preferred the present appeal before us.

The Learned counsel for the appellant argued that the prosecution had failed to establish the case beyond reasonable doubt since in a case of criminal negligence there must be proof that the negligence of the appellant went beyond a reasonable doubt.

This court will now discuss the evidence of the prosecution in order to consider the merits of the above argument. Prosecution had relied on the evidence of several witnesses including the evidence of eye witnesses,

owner of the tipper lorry, Doctor, Motor Traffic Examiner and the Police Officer in establishing the prosecution case.

Witness H.K.D.R. Prasanna Amarasena is the eye witness he is a business man who had been running a garment factory along the Colombo – Avissawella Road. He was working that day and after hearing a loud noise he had looked through the glass in his office. He had seen a tipper lorry travelling towards Colombo crashing on to the parapet wall knocking down a man on a bicycle who was on the edge of the road. A car had been parked on the middle of the road. According to him the road is straight where the accident occurred and there was no rain that day.

From the evidence of this witness, even though he doesn't speak of the speed of the vehicle, it is clear that the tipper lorry driven by the appellant had first knocked against the car and then hit the cyclist, crashed on to the electric post and then crashed on to the parapet wall. The electrical post also had been broken owing to the impact.

Doctor who performed the Post Mortem stated that he noted several internal injuries including head and brain injuries which had caused the death. Doctor was of the opinion that the injuries occurred after the road traffic accident and the death could occur in the ordinary course of nature.

Witness from the Motor Traffic Department had examined the tipper lorry and the car. Owing to the damaged caused he had not been able to test the brakes. This witness is of the view that if the brake marks are 31 metres as per the Police observations the speed of the vehicle should be 80kmph as per the motor traffic regulations.

In the case of State of H.P. Vs. Jai Lal (1999) 7SCC 280 who can be considered as an expert witness was discussed as follows;

“An expert witness is one who has made the subject upon which he speaks a matter of particular study, practice or observation and he must have a special knowledge of the subject.

In order to bring the evidence of a witness as that of an expert it has to be shown that he has made a special study of the subject or acquired a special experience there in or in other words that he is skilled and has adequate knowledge of the subject.”

When considering the experience and the training counted by the motor traffic examiner who testified in the High Court, as an officer in the motor traffic department handling traffic accident cases for 20 years with special training he has received in traffic accident inspection, and examining more than 10,000 accident vehicles, I see no reason for this court, not to consider him as an expert in his area of expertise, and to reject his evidence given with regard to the speed of the vehicle at the time of the incident.

Even if this court decides to consider the opinion given by the motor traffic examiner as an expert opinion, this court is not bound to act on the said opinion, unless the said opinion is based on the material that could be justifiable before us.

It is pertinent to note here that no one on the spot had seen that, the appellant drove the tipper lorry. However, the owner of the tipper lorry namely, Don Shiran Niroshan, prosecution witness 5 of the case had given evidence at the trial that the appellant was the driver at the time of this accident and the appellant had informed him about this accident. This position had not been disputed by the defense at the trial. Therefore I hold that the question of the identity of the driver is not an issue before us.

The next important evidence was of the Investigating Police Officer of the Wellampitiya Police station. The accident had been reported to the police station at about 10.20 am. He had visited the scene, recorded statements, and drawn the sketch of the scene.

Police Officer stated there was a car on the left side of the white line on the middle of the road and the front of the car was turned towards the right side. The front as well as the rear of the car had been severely damaged and the tipper lorry had crashed on to the electricity post and then on to the parapet wall damaging the wall. At the scene Police Officer had noted brake marks up to a distance of 31 meters.

The Police Officer had noted severe damage to the front of the lorry. Police officers observations are that the lorry had been driven at an excessive speed considering the damage to the front portion of the tipper lorry.

During the argument before this court the Learned Deputy Solicitor General who represented the Attorney General brought to our notice the importance of the distances referred to by the Police witness and the explanation given by the officer of the Motor Traffic Department, in considering the evidence of both these witnesses we cannot come to a different conclusion but the speed and recklessness of the accused-appellant.

The vehicle driven by the accused-appellant was a tipper lorry which is used to transport sand, Quarry and earth. A person who is driving a heavy vehicle of this nature has a duty to be mindful of the others who use the road and if he drives such a vehicle without due consideration to the others who use the road at an excessive speed it amounts to a grave negligence.

The accused-appellant disregarded the lives and the safety of the others when he drove a tipper lorry at an excessive speed on a busy road.

In this regard this court is guided by the decision in Laurensz V. Vyramuttu 42 NLR 472 where Howard CJ had cited with approval a passage from the English case of R.V. Batsman [94 LJKB 791] as follows;

"In explaining to injuries the test they should apply to determine whether the negligence, in particular case, amounted or did not amount to crime, judges have used many epithets such as 'culpable', 'criminal', 'gross', 'wicked', 'clear', 'competent'. 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 subject and showed such disregard for the life and safety of others as to amount to a crime against the state and conduct deserving punishment."

Therefore we observe that the Learned Trial Judge had carefully evaluated each and every item of evidence led before the High Court and had considered them even though the Learned Judge had not specially referred to the principle behind it. This court is of the view that the learned trial judge with a trained legal mind was alive and mindful of the relevant principles of law and has applied them when arriving at her conclusion.

In the case of Dayananda Loku Galappaththy and eight others V. The State (2003) Sri LR 362 the above position was discussed as follows:

"In a jury trial an accused is tried by his own peers. Jurors are Ordinary laymen. In order to perform their duties in section 232 of the code, the Trial Judge has to inform them of their duties. In a trial by a Judge of the High Court without a jury, there is no provision similar to section 217. There is no requirement similar to 229 that the Trial Judge should lay down the law which he is to be guided by. In appeal the Appellate Judges will consider whether in fact the trial judge was alive and mindful of the relevant principles of law and has applied them in arriving at his conclusion. The law

takes for granted that a judge with a trained legal mind is well possessed of the principles of law, he would apply.”

Now, we have to consider what is the defense taken by the appellant? The only suggestion by the defence was that the cause of the accident was due to the negligence of the driver in the car. Even if the car had stopped on the middle of the road it was the duty of appellant to stop his vehicle. When you see the damage caused by the accident there is no doubt that the lorry driven by the appellant had been driven at an excessive speed.

The defense of accident is concerned, has the appellant been acting as a reasonable and prudent man to raise that defense? Our answer is no. The maximum speed for a vehicle like this is limited to 50 kmph according motor traffic regulations. Whereas the appellant must have driven the lorry much above the prescribed speed limits. So that I conclude that the findings of the trial judge in this case is correct.

I find that the sentence of only 5 years Rigorous Imprisonment has been imposed in this case. Under sec-298- of the Penal Code-Whoever causes the death of any person by doing any rash or negligent act not amounting to culpable homicide shall be punished with imprisonment of either description for a term which may extend to five years, or with fine, or with both.

When we consider the above section the sentence imposed by the learned High Court Judge is lawful.

Further after the Indictment was served on the appellant he pleaded not guilty. Appellant was granted bail, but from 2007.09.21 to date appellant had absconded court. Prosecution lead the evidence under section 241 and with the permission of court proceeded with the trial. Counsel had represented appellant throughout the trial.

For the reasons given above, we see no merit in the appeal before this court. Conviction and the Sentence imposed by the High Court is affirmed.

Appeal dismissed.

JUDGE OF THE COURT OF APPEAL

K.K.Wickramasinghe, J.

I Agree.

JUDGE OF THE COURT OF APPEAL

CASES REFERED TO:

1. State of H.P.,Vs. Jai Lal (1999) 7SCC 280
2. Laurensz Vs. Vyramuttu 42 NLR 472
3. R.Vs. Batsman [94 LKJB 791]
4. Dayananda Loku Galappaththy and eight others Vs. The State (2003) Sri LR 362