[HIGH COURT OF AUSTRALIA.]

WITTIG . . . . . APPELLANT;

AND

THE KING . . . . . RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF SOUTH AUSTRALIA.

H. C. OF A. 1919.

SYDNEY, *Dec.* 1, 2.

Knox C.J., Isaacs, Gavan Duffy and Rich JJ.

Criminal Law—Manslaughter—Negligence—Burden of proof—Reasonable doubt.

On a trial for manslaughter the Judge directed the jury that the Crown must prove two things to their satisfaction beyond all reasonable doubt: (1) that the deceased was killed by being struck by a motor-car; (2) that the accused was the driver of that car. He then directed them to weigh the evidence for and against the contention that the accused was culpably negligent, but did not tell them that, before convicting the accused, they must be satisfied beyond reasonable doubt of his negligence.

Held, that this was a proper direction.

R. v. *Cavendish*, 8 I.R. C.L., 178, approved and followed.

Special leave to appeal from the Supreme Court of South Australia refused.

APPLICATION for special leave to appeal.

On 12th September 1919 Carl George Wittig was charged before *Gordon* J. and a jury with unlawfully killing one Frances Ann White, and was convicted of that offence. Certain questions were reserved, and subsequently a case was stated by his Honor pursuant to the *Criminal Law Consolidation Act* 1876 (S.A.), for determination by the Full Court of South Australia. The case set out the relevant directions to the jury, which are as follows:—"Gentlemen of the Jury:—The Crown must prove two things to your satisfaction beyond all reasonable doubt, namely, (1) that Mrs. Frances

Ann White was killed by being struck by a motor-car in Rundle Street, Adelaide, on Monday 18th August 1919, and (2) that the accused Carl George Wittig was the driver of that car. If these two facts are not proved to your satisfaction beyond all reasonable doubt, you should acquit the accused. But if you are satisfied that these two facts are so proved you must then consider: (*a*) the evidence placed before you by the Crown to show that the death of Mrs. White was caused by the culpable and negligent way in which accused drove the motor-car upon the occasion in question; and (*b*) the evidence placed before you by the defence to show that the accused drove the motor-car with reasonable care, and that the deceased was the sole and only cause of her own death by stepping in front of the moving car in such a way that the accident, so far as the accused was concerned, became unavoidable. Both the prosecution and the accused have placed before you evidence in support of these opposite propositions. Your duty is to weigh that evidence by taking into account the credibility of the witnesses, the surrounding circumstances as you may find them to have existed, the probabilities of the case, and also any other facts in the case you may think it desirable to consider. Having weighed the evidence on both sides, it will be your duty to decide whether in your judgment accused is guilty of culpable negligence which was the cause or partly the cause of the death of Mrs. White. It would be culpable negligence if the accused at the moment of the collision was driving the car at such a furious speed or in such a negligent manner as to endanger the safety of Mrs. White. It would also be culpable negligence if just before the actual collision accused had been driving his car at a speed dangerous to users of the street and so great that, when the collision with Mrs. White became imminent, the momentum of the car was too great to enable him to avoid it, even though he then did his best to do so. Such an attempt to avoid the consequences of the immediately previous culpable negligence would not avail to exculpate the accused. I further direct you that if you find the accused was guilty of culpable negligence such as I have described, but that such culpable negligence was only partly the cause of Mrs. White's death, the other cause being Mrs. White's own conduct in getting in front of the moving

H. C. OF A. 1919.

WITTIG v. THE KING.

car, the accused is just as guilty as if the conduct of Mrs. White had not in any way contributed to the fatality. But, unless after considering all the facts of the case in the way I have suggested you find the accused guilty of culpable negligence which caused or partly caused the death of Mrs. White, you should acquit him. It is open to you to find in the evidence tendered for the prosecution itself grounds which satisfy you that the accused was not guilty of culpable negligence; or you may find such grounds in the evidence tendered for the defence; or you may find such grounds in inferences drawn from considering the evidence as a whole. You should consider the evidence with the desire if possible—having regard to your duty—to discover reasons for acquittal rather than for conviction. And you should require for a conviction such certainty in the evidence whether direct or circumstantial as you yourselves would act on in a matter of great consequence." The case concluded as follows: "The question reserved for the decision of the Full Court is whether my direction was sufficient in law."

The Full Court (*Murray* C.J., *Buchanan* and *Gordon* JJ.) answered the question in the affirmative.

The accused now applied for special leave to appeal from that decision to the High Court.

Abbott, in support of the application. The decision of the Full Court is wrong in point of law, in that it virtually decides that a person accused of manslaughter can be convicted and sentenced even though there be a reasonable doubt as to his guilt, and that the burden of proof rests upon him. It fails to recognize the presumption of innocence in favour of the accused. The directions of the trial Judge were not sufficient. He should also have directed the jury that the Crown must satisfy them that the accused was driving with culpable negligence. The rule in *R.* v. *Cavendish* (1), which was relied on by the Full Court, applies only in cases of murder, for in murder malice is presumed. If necessary, this Court should say that *R.* v. *Cavendish* was wrongly decided.

[ISAACS J. referred to *R.* v. *Elliott* (2), in which *R.* v. *Cavendish* is distinguished.]

(1) 8 I.R. C.L., 178.

(2) 16 Cox C.C., 710.

R. v. *Cavendish* (1) does not apply to cases of negligence by omission. Further, it is queried in *Taylor on Evidence*, 10th ed., vol. I., pp. 115-116 and note, and is not referred to in *Roscoe's Criminal Evidence*, *Kenny on Crimes*, *Wigmore on Evidence* or *Moore on Evidence*.

[ISAACS J. It is mentioned in *Archbold*, also in *Halsbury* and *Phipson*.]

[PER CURIAM. Apart from the desirability of following *R.* v. *Cavendish* (1), we all agree with it, and regard it as good law.]

The only other point is that deceased was killed by her own act: she stepped in front of the car. This was put to the jury, but the manner of doing so takes no notice of the evidence for the defence.

[*R.* v. *Dalloway* (2) and *Brown* v. *The King* (3) were also referred to during argument.]

PER CURIAM. Special leave is refused.

Special leave to appeal refused.

Solicitors, *Rollison & Abbott*, Adelaide.

N. McT.

(1) 8 I.R. C.L., 178. (2) 2 Cox C.C., 273. (3) 17 C.L.R., 570.