[HIGH COURT OF AUSTRALIA.]

CALLAGHAN . . . . . APPLICANT ;

AND

THE QUEEN . . . . . RESPONDENT.

ON APPEAL FROM THE COURT OF CRIMINAL APPEAL OF WESTERN AUSTRALIA.

H. C. OF A. 1952.

PERTH, *Sept.* 5, 8.

MELBOURNE, *Oct.* 29.

Dixon C.J., Webb, Fullagar and Kitto JJ.

Criminal Law—Manslaughter—Dangerous driving causing death—Failure to use reasonable care and take reasonable precautions in use and management of vehicle—Standard of negligence—The Criminal Code 1913-1945 (*W.A.*) (*No.* 28 *of* 1913—*No.* 40 *of* 1945), *ss.* 23, 266, 268, 280, 291A.

The degree of negligence required to establish manslaughter under *The Criminal Code* 1913-1945 (W.A.) is the same as that required to establish a charge under s. 291A of the Code of failure to use reasonable care and take reasonable precautions in the use and management of a vehicle thereby causing death. The standard of care in each case is that required by common law in cases where negligence amounts to manslaughter.

R. v. *Scarth* (1945) Q.S.R. 38, approved.

Decision of the Court of Criminal Appeal of Western Australia reversed.

APPLICATION for special leave to appeal from the Court of Criminal Appeal of Western Australia.

John William Callaghan was tried on indictment charging manslaughter the charge arising out of his running down and killing one Strickland on 19th April 1952. The trial was held in Perth before *Walker* J. and a jury.

The trial judge directed the jury substantially in the following terms :—" If satisfied that he (the accused) was to some degree negligent then you would have to go further and consider what degree of negligence is indicated. If there were lack of care but not a gross lack of care then your verdict would be dangerous driving causing death. If you think it was gross negligence then your verdict would be one of manslaughter ". The jury retured a verdict of dangerous driving causing death.

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An appeal by Callaghan to the Court of Criminal Appeal was dismissed.

Callaghan sought special leave to appeal to the High Court.

The relevant statutory provisions are sufficiently set forth in the judgment thereunder.

C. B. Gibson (with him *H. N. Guthrie*), for the applicant. The standard of care required by s. 266 of *The Criminal Code* 1913-1945 (W.A.) is the same as that required by s. 291A. The critical words in each section are: " to use reasonable care and take reasonable precautions ". The two crimes are not capable of being distinguished except for the penalty. As the jury found the accused not guilty of manslaughter they should also have found him not guilty of dangerous driving causing death.

R. V. Nevile, Crown Solicitor for the State of Western Australia, for the respondent. The questions raised by this application are of great public importance and the application for special leave is not opposed. The appeal raises not only the question of the standard of care required under s. 291A of *The Criminal Code* 1913-1945 (W.A.), but also the standard of care required under s. 266 in the case of manslaughter. The standard of care in each case is the same and corresponds with the standard of care breach of which would found a civil action in damages. *The Criminal Code* should be interpreted in accordance with the principles established in *Bank of England* v. *Vagliano Bros.* (1) and in *Brennan* v. *The King* (2). The common law has been expressly displaced by statute (*Criminal Code Act* 1913-1945 (W.A.) ss. 2, 4). The words " to use reasonable care and take reasonable precautions " are appropriate to define the standard of care required by the civil law: *Donoghue* v. *Stevenson* (3); *Bourhill* v. *Young* (4); *Hambrook* v. *Stokes Bros.* (5). The sections express the standard of care in positive and not negative terms. A similar expression appearing in *The Criminal Code* (Q.) has been held to define the standard of care required in civil cases (*Hoffman* v. *Nielson* (6)). A similar provision appearing in the New Zealand Code has been interpreted in the same way (*R.* v. *Dawe* (7); *R.* v. *Storey* (8)); *R.* v. *Scarth* (9) is to the contrary but there the dissenting judgment of *Philp* J. is to be preferred. *R.* v.

(1) (1891) A.C. 107.
(2) (1936) 55 C.L.R. 253.
(3) (1932) A.C. 562, at p. 580.
(4) (1943) A.C. 92, at p. 98.
(5) (1925) 1 K.B. 141.
(6) (1928) Q.S.R. 364.
(7) (1911) 30 N.Z.L.R. 673, at pp. 678, 682, 683.
(8) (1931) N.Z.L.R. 417, at pp. 433, 445, 454, 470, 474.
(9) (1945) Q.S.R. 38.

Gunter (1) can be distinguished because the *Crimes Act* 1900-1951 (N.S.W.) contains no definition of the standard of care such as is contained in s. 266 and further contains no provision similar to ss. 2 and 4 of the *Criminal Code Act*. *R.* v. *Deady* (2) and *Akerele* v. *The King* (3) can also be distinguished for similar reasons.

H. N. Guthrie, in reply. If it be accepted that the standard of care is the same for both crimes then the proper standard is that required at common law in cases when negligence amounts to manslaughter. Under both sections the standard of care is higher than that required in civil cases. *R.* v. *Storey* (4) was incorrectly decided and should not be followed in Australia. The reasons and the conclusion reached in *R.* v. *Scarth* (5) are to be preferred. The trial judge's direction to the jury as to the standard of care required to establish manslaughter was correct and he should have directed the jury that the same standard of care was applicable to the crime of dangerous driving causing death. The only conclusion to be drawn from the jury's verdict of not guilty of manslaughter is that in their view the appellant was not guilty of the requisite want of care and thus if properly directed they could not have brought in the alternative verdict.

Cur. adv. vult.

Oct. 29.

THE COURT delivered the following written judgment:—

The question for our decision is whether, to warrant a conviction under s. 291A of *The Criminal Code* 1913-1945 (W.A.), no greater degree of negligence need have been exhibited by the accused than would suffice to make him civilly liable in respect of any damage caused thereby.

The accused in the present case was charged upon indictment with manslaughter but convicted under s. 291A of the crime of failure to use reasonable care and take reasonable precautions thereby causing death.

Section 291A was introduced into *The Criminal Code* by the *Criminal Code Amendment Act* 1945 (No. 40 of 1945). It provides: "(1) Any person who has in his charge or under his control any vehicle and fails to use reasonable care and take reasonable precautions in the use and management of such vehicle whereby death is caused to another person is guilty of a crime and liable to imprisonment with hard labour for five years. (2) This section shall

(1) (1921) 21 S.R. (N.S.W.) 282; 38 W.N. 97.
(2) (1896) 2 A.L.R. 298.
(3) (1943) A.C. 255.
(4) (1931) N.Z.L.R. 417.
(5) (1945) Q.S.R. 38.

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not relieve a person of criminal responsibility for the unlawful killing of another person ".

Section 3 of the *Criminal Code Amendment Act* 1945 amended s. 595 of *The Criminal Code* so as to enable a jury to convict a prisoner charged on an indictment with manslaughter of the crime under s. 291A. No verbatim report is available of the charge given to the jury by the learned judge who presided at the trial (*Walker* J.). The absence of such a report might in many cases lead to serious injustice. It is fortunate, however, that in this case the learned judge furnished to the Court of Criminal Appeal a carefully compiled report containing a sufficient account of the substance of his charge. He directed the jury that to justify a verdict of guilty of manslaughter they must be satisfied that the accused had been guilty of a very high degree of negligence amounting to recklessness or complete disregard for the safety of others. His Honour illustrated his meaning by reading from *Halsbury's Laws of England*, 2nd ed., p. 655, par. 925, a passage which stated that the facts must be such that in the opinion of the jury the negligence went beyond a mere matter of compensation between subjects and showed such a disregard for the life or safety of others as to amount to a crime against the State and conduct deserving punishment. His Honour then directed the jury that if they considered that, although the accused had been guilty of some degree of negligence, it fell below that standard, they might find him guilty of dangerous driving causing death within the meaning of s. 291A. If they were satisfied that the accused was to some degree negligent then they would have to go further and consider what degree of negligence was indicated. If there were a lack of care, but not a gross lack of care, then their verdict would be dangerous driving causing death. If they thought it was gross negligence then their verdict would be one of manslaughter. It will be seen that the effect was to require for the purpose of s. 291A no higher degree of negligence than that giving rise to civil liability.

To understand the considerations upon which the correctness of this view turns, it is necessary to examine the provisions of *The Criminal Code* upon which depends the crime of manslaughter when death is caused by negligence. Chapter XXVIII of *The Criminal Code* deals with homicide. It begins with s. 268 which provides that it is unlawful to kill any person unless such killing is authorized or justified or excused by law. Section 277 says that : " Any person who unlawfully kills another is guilty of a crime which is called wilful murder, murder, or manslaughter, according to the circumstances of the case ". Sections 278 and 279 define wilful

murder and murder and then s. 280 provides that a person who unlawfully kills another under such circumstances as not to constitute wilful murder or murder is guilty of manslaughter. It will be seen that so far there is no reference to negligence and that guilt of manslaughter appears to depend only upon the killing being or not being authorized or justified or excused by law. But s. 23 provides that subject to the express provisions of the Code relating to negligent acts and omissions, a person is not criminally responsible for an act or omission which occurs independently of the exercise of his will, or for an event which occurs by accident. The reference to the express provisions of the Code relating to negligent acts and omissions covers s. 266, which occurs in Chapter XXVII headed " Duties relating to the Preservation of Human Life ". Section 266 is as follows : " It is the duty of every person who has in his charge or under his control anything, whether living or inanimate, and whether moving or stationary, of such a nature that, in the absence of care or precaution in its use or management, the life, safety, or health of any person may be endangered, to use reasonable care and take reasonable precautions to avoid such danger ; and he is held to have caused any consequences which result to the life or health of any person by reason of any omission to perform that duty ". It will be noticed that s. 266 is expressed in terms of duty, so to speak, in gross. It is not connected with criminal liability in itself. But, because s. 23 is qualified by being made subject to the provisions relating to negligent acts and omissions and s. 266 is such a provision, it must be taken that the fact that an event causing death occurs independently of the accused's will or by accident can afford no excuse within s. 268 if it falls within s. 266. For that reason, and because of the final part of s. 266 by which the person omitting to perform the duty is held to have caused any consequences which result to the life or health of another, breach of the duty of care imposed by the section becomes one of the constituents of the crime of manslaughter. The duty is " to use reasonable care and take reasonable precautions to avoid such danger ".

What degree of negligence this contemplates is a question that must be considered. But it is desirable first to compare the provision with s. 291A. Inspection is enough to show that the critical words are identical. It would seem almost inevitably to follow that the standard of duty must be the same. The result, however, is among other things to produce two crimes which are indistinguishable except in their penal consequences. The view upon which *Walker* J. founded his direction to the jury is based

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in the end upon the marked difference in the punishment affixed to the crimes created by the original and the later provisions respectively. In his report, the learned judge carefully works out the reasoning by which the conclusion is produced in a passage too long to set out. But his Honour's concluding observation will make the point clear. "Because the Code treats manslaughter as being a crime more serious than the crime of dangerous driving causing death, the decision as to whether the offender is guilty of manslaughter as against being guilty of dangerous driving causing death will depend upon the degree or extent of his culpability in the matter of negligence which is the cause of the death of the person killed. In other words in order to justify a verdict of guilty of manslaughter there must be proof of a very much greater degree of negligence than will be necessary to justify a verdict of guilty of dangerous driving causing death".

It certainly would appear strange that a subsequent enactment should take so closely the elements by which the Code constitutes manslaughter through negligence and turn it into a new crime of less magnitude. But much the same thing has been done in other jurisdictions and the explanation is to be found in practical rather than logical or juristic considerations. In Manitoba the same difficulty has arisen because the legislature there provided that upon a charge of manslaughter arising out of the operation of a motor vehicle the jury might find the accused not guilty of manslaughter but of criminal negligence. Of this provision, it was said in the Manitoba Court of Appeal: "The inconsistency undoubtedly is real, yet I cannot think it must prevail against the plain words of the enactment which in my opinion must be read literally. As is well known the provision was passed owing to the opposition of juries to find verdicts of manslaughter where the evidence showed death was due to negligence but no heinous element was present. It is not for the judges to deny effect to the enactment because an incongruous result exists where a jury find criminal negligence though it could only do so on facts which prove manslaughter, and in negativing manslaughter negative the other. It is an inconsistency the provision itself contemplates. The assumption in it is that death by culpable homicide has been proven, and that a verdict of manslaughter should follow. Nevertheless the jury is empowered instead of bringing in such a verdict to bring in a verdict of criminal negligence. Construction of the section in accordance with logic or juristic propriety, or common law principle, has nothing to do with it", per *Trueman* J.A. in *R.* v. *Preusantanz* (1). This appears to be the correct view of the Western

(1) (1936) 2 D.L.R. 421, at p. 433.

Australian provision. There is consequently no warrant for giving to the two provisions interpretations involving differing standards of negligence.

But the question then arises what is the standard of negligence required by s. 266 and s. 291A ? The words " use reasonable care and take reasonable precautions " smack very much of the civil standard of negligence ; yet, particularly of late, defaults involving no moral blame at all are treated as exposing the party to civil liability for negligence in respect of any damage which results. It is out of keeping with the conceptions of the purpose of *The Criminal Code* to regard such defaults as making the person guilty of manslaughter or the lesser crime created by s. 291A. In Queensland in *R.* v. *Scarth* (1), a majority of the Supreme Court, *Macrossan* S.P.J. and *Stanley* J., on the corresponding provisions of *The Criminal Code* 1899 to 1943 (Q.) decided that the expressions "reasonable care " and " reasonable precautions " should be given a well-established meaning which, in their Honour's view, they possessed in Criminal Law and that the distinction between criminal and civil negligence should be maintained. *Philp* J. dissented on the ground that " reasonable care " had been used for many years as defining the duty the breach of which supports a civil action for negligence, whereas the corresponding breach of duty required to support at common law a charge of manslaughter has been described by such epithets as " culpable ", " gross ", " criminal ". In the Supreme Court of New Zealand the same interpretation as that adopted by *Philp* J. had already been placed upon the provisions of the Code with reference to manslaughter by negligence : *R.* v. *Dawe* (2) ; *R.* v. *Storey* (3).

The question obviously is one of difficulty but in the end it appears to depend upon a choice between two courses. One is to treat the omission to perform the duty to use reasonable care and take reasonable precautions as a description of negligent conduct to be applied according to a single and unvarying standard no matter what the purpose for which the description is employed. The other is to recognize that it may have different applications when it is a description of fault so blameworthy as to be punishable as a crime and when it is used to describe a basis of civil responsibility for harm that is occasioned by the omission.

It is to be noticed that in his Digest of the Criminal Law (art. 222) Sir *James Fitzjames Stephen* defines this form of unlawful homicide as occurring when death is caused by an omission,

(1) (1945) Q.S.R. 38.
(2) (1911) 30 N.Z.L.R. 673.
(3) (1931) N.Z.L.R. 417.

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amounting to culpable negligence, to discharge a duty tending to the preservation of life. He has already included among such duties "the duty of every one who does any act which, without ordinary precautions, is or may be dangerous to human life, to employ those precautions in doing it". "Culpable negligence" is an expression which implies more than the negligence which gives rise to a civil liability.

In his judicial capacity Sir *James Fitzjames Stephen* in summing up to a jury explained as follows the neglect which may make a man guilty of manslaughter. "Manslaughter by negligence occurs when a person is doing anything dangerous in itself, or has charge of anything dangerous in itself and conducts himself in regard to it in such a careless manner that the jury feel that he is guilty of culpable negligence and ought to be punished. As to what act of negligence is culpable, you, gentlemen, have a discretion, and you ought to exercise it as well as you can": *Reg.* v. *Doherty* (1).

In *Andrews* v. *Director of Public Prosecutions* (2) Lord *Atkin* deals with the common law felony of manslaughter a little differently: "Simple lack of care such as will constitute civil liability is not enough: for purposes of the criminal law there are degrees of negligence: and a very high degree of negligence is required to be proved before the felony is established. Probably of all the epithets that can be applied 'reckless' most nearly covers the case".

The English Criminal Code Bill the subject of the report of the Royal Commission of 1879 cd. 2345 was founded upon the work of Sir *James Fitzjames Stephen*. In the Australian and New Zealand criminal codes, though largely based upon the English Criminal Code Bill, some variations from its provisions occur in the treatment of homicide. But it is interesting to compare the provisions of the English Criminal Code Bill. Indeed a better understanding of the treatment of the whole subject in the various codes may be obtained from doing so.

Section 163 of the Bill, which roughly corresponds with s. 266 of the Criminal Code of Western Australia, provides 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 care may endanger human life, is under a 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 take such precautions or to use such care".

(1) (1887) 16 Cox 306, at p. 309. (2) (1937) A.C. 576, at p. 583.

This provision occurs in Part XV of the Criminal Code Bill under the heading of "Duties tending to the Preservation of Life". Part XVI deals with homicide. Section 165 says: "Homicide is the killing of a human being by another directly or indirectly by any means whatsoever". Section 167 then deals with what it calls "culpable homicide". The section says: "Homicide may be either culpable or not culpable. Homicide is culpable when it consists in the killing of any person either by an unlawful act or by a *culpable* omission to perform or observe any legal duty, or both combined, or by causing a person by threats or fear of violence or by deception to do an act which causes that person's death, or by wilfully frightening a child or sick person. Culpable homicide is either murder or manslaughter. Homicide which is not culpable is not an offence". Section 177 then provides: "Culpable homicide not amounting to murder is manslaughter".

In Sir *James Fitzjames Stephen's History of Criminal Law*, vol. 3, pp. 9-11, there is a treatment of the common law in relation to killing by omission representing the same approach as these sections of the Bill exhibit. The author says: "By the law of this country killing by omission is in no case criminal unless the thing omitted is one which it is a legal duty to do. Hence, in order to ascertain what kinds of killing by omission are criminal, it is necessary in the first place to ascertain the duties which tend to the preservation of life". He proceeds to enumerate these duties. In his enumeration, he includes a duty to do dangerous acts in a careful manner, and a duty to take proper precautions in dealing with dangerous things. He deals with the question of the degree of want of care in the following passage: "To cause death by the omission of any such duty is homicide, but there is a distinction of a somewhat indefinite kind as to the case in which it is and is not unlawful in the sense of being criminal. In order that homicide by omission may be criminal, the omission must amount to what is sometimes called gross, and sometimes *culpable* negligence. There must be more, but no one can say how much more negligence than is required in order to create a civil liability. For instance, many railway accidents are caused by a momentary forgetfulness or want of presence of mind, which are sufficient to involve the railway in civil liability, but are not sufficient to make the railway servant guilty of manslaughter if death is caused. No rule exists in such cases. It is a matter of degree determined by the view the jury happen to take in each particular case". It will be seen that here as in his charge in *Reg.* v. *Doherty* (1) the author

(1) (1887) 16 Cox 306.

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makes the word " culpable " perform the duty which the majority of the Supreme Court of Queensland felt must be done by the words " reasonable care and precaution " in *The Criminal Code* (Q.).

In *McCarthy* v. *The King* (1) *Duff* J. expressed his view of a provision of the Canadian Criminal Code taken from s. 163 of the English Criminal Code Bill and therefore similar to s. 266 of the Western Australian Code. He said that it did not, he thought, substantially change the common law. He then proceeded: " There may I think, be cases in which the Judge 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 reasonable competent understanding would take in the given circumstances for the purpose of avoiding or neutralising the risk, his conduct in itself implies a degree of recklessness justifying the description 'gross negligence' " (1).

The conclusion we have formed is that the expression " omission to perform the duty to use reasonable care and take reasonable precautions " which in effect is that of s. 266 and s. 291A must be regarded from the point of view of the context where it occurs. It is in a criminal code dealing with major crimes involving grave moral guilt. Without in any way denying the difficulties created by the text of *The Criminal Code*, we think it would be wrong to suppose that it was intended by the Code to make the degree of negligence punishable as manslaughter as low as the standard of fault sufficient to give rise to civil liability. The standard set both by s. 266 and by s. 291A should, in our opinion, be regarded as that set by the common law in cases where negligence amounts to manslaughter. We, therefore, are of opinion that the direction given is wrong and that a conviction under s. 291A is not warranted by a degree of negligence which is no greater than would suffice to make the accused civilly liable in respect of any damage caused by his fault.

The application for special leave should be granted. It should be treated as an appeal and the appeal should be allowed. The conviction should be set aside.

The verdict of the jury, while finding the appellant guilty under s. 291A, acquitted him of manslaughter. He ought not therefore

(1) (1921) 59 D.L.R. 206, at p. 208.

to be tried again for manslaughter. But that is the crime for which he was indicted. There was no count under s. 291A. The verdict of guilty of the crime created by s. 291A was found as one allowed by s. 595 on an indictment for manslaughter. Nevertheless according to *Kelly* v. *The King* (1) it is possible for this Court to order a new trial upon a charge which, like that under s. 291A, is not made by the indictment but is one of which the prisoner may be found guilty on the indictment. Here however is the complicating circumstance that the jury's verdict ought rationally to mean that the appellant was not guilty of the requisite want of care and precaution. The appellant has served portion of the sentence imposed upon him. In all the circumstances we think that we ought not to order a new trial, but we ought simply to quash the conviction.

Special leave granted. Application to be treated as the appeal and heard instanter. Appeal allowed. Conviction and sentence set aside.

Solicitors for the applicant, *Lohrmann, Tindal & Guthrie.*

Solicitor for the respondent, *R. V. Nevile,* Crown Solicitor for the State of Western Australia.

F. T. P. B.

(1) (1923) 32 C.L.R. 509.