**MUCHATO v THE PEOPLE (1974) ZR 88 (HC)**

HIGH COURT 30

DOYLE CJ

5th APRIL 1974

(HPA/85/74)

**Flynote**

**Criminal Law - Criminal negligence - offence of driving a vehicle on a public**35 **highway in a manner so rash and negligent as to endanger human life or likely to cause harm to another person - section 237 (a) of the Penal Code - Meaning of.**

**Headnote**

A police officer who was checking vehicles told the appellant, a taxi 40 driver, to stop. The appellant appeared to be non-co-operative and whilst the police officer was speaking to him and holding on to the car, the appellant drove his car away. The police officer continued to cling to the vehicle which travelled for some distance. The vehicle then increased its speed and the police officer was clinging and running behind the vehicle.

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Eventually, the police officer had to let go and he then fell down and rolled over. The appellant was convicted by the subordinate court of the offence of driving a vehicle on public highway in a manner so rash and negligent as to endanger human life or to be likely to cause harm to another person contrary to section 237 *(a)* of the Penal Code. The appellant 5 appealed against his conviction.

*Held*, dismissing the appeal:

   That a reference in section 237 *(a)* of the Penal Code to driving in a manner "so rash and negligent" indicated that not only the driving must be negligent but it must also be rash and rash to a degree that endangers 10 human life or is likely to cause harm.

Cases cited:

   (1)   *Dabholkar v R* [1948] AC 221.

   (2)   *Andrews v DPP* [1943] AC 225.

   (3)   *R v Evans* (1963) 1 QB  412. 15

Legislation referred to:

Penal Code, Cap. 146, s. 237 *(a).*

*P T  Banda Esq.,* for the appellant.

*R E M  Mwape, State Advocate,* for the respondent.

**Judgment**

**Doyle CJ:** The appellant was convicted of the offence of driving 20 a vehicle on a public way in a manner so rash and negligent as to endanger human life or to be likely to cause harm to another person contrary to section 237 *(a)* of the Penal Code. It is an offence which has been rarely used in this country, particularly in relation to motor cars, where dangerous driving is an easier charge. 25

The facts of the matter were that a policeman who was checking vehicles went up to the appellant, who was a taxi driver, and told him to stop. The taxi driver was non-co-operative, and there was some argument about taking the keys from him. I have been unable to find any authority by which a policeman can take keys in this way. What 30 happened then was that the policeman was speaking to him and holding on to the car and also to the appellant at the same time. The appellant then drove his car away and the policeman continued clinging to it. It went some distance, not 400 yards as was estimated by one witness, but at least for a fair distance. The car increased its speed and the policeman 35 was clinging and running beside the vehicle. The policeman eventually had to let go. He then fell down and rolled over. The question is, whether such conduct is so rash and negligent as to come within the Section. The section, or rather its identical counterpart in Tanzania, section 222 of the Tanzanian Penal Code, has been considered by the Privy Council in 40 the case of *Dabholkar v R* [1]. Lord Oaksey delivered the judgment of the court. He said that the Court of Appeal for Eastern Africa were

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right in saying that the negligence under that section was not as great as the negligence in the offence of manslaughter. He then went on to say:

   "the analogy between this section and section 11 of the English Road Traffic Act, 1930, is in their Lordships' view a true analogy and just as in *Andrews* v *Director of Public Prosecutions* [2], the House of Lords explained the different degrees of negligence which the prosecution must prove to establish the offences of manslaughter and dangerous driving, so in the case of section 222 the degree of negligence differs in cases of the felony of manslaughter and in 10 cases of misdemeanour under section 222. The circumstances dealt with in the subsections of section 222 are all circumstances which in themselves involve danger and, although the negligence which constitutes the offence in these circumstances must be of a higher degree than the negligence which gives rise to a claim for compensation 15 in a civil court, it is not, in their Lordships' opinion, of so high a degree as that which is necessary to constitute the offence of manslaughter."

The degree of negligence required to constitute dangerous driving has now been settled in *R v Evans* [3] and the cases which follow it being 20 negligence, however slight, provided that the driving caused by such negligence is dangerous.

I do not think that their Lordships in *Dabholkar's* case had in mind such a degree of negligence when they referred to the analogy with the offence of dangerous driving. Their reference to civil negligence seems to 25 me to indicate their view at the time that the negligence under the section must be of a fairly high degree.

I consider that their Lordships' view as to the degree of negligence under the section is a correct one, though their analogy to dangerous driving is no longer correct. The reference in the section to driving in a 30 manner "so rash and negligent" indicates that, not only must the driving be negligent, but it must also be rash and rash to a degree that endangers human life or is likely to cause harm.

In this case I am satisfied that it could not be said that the appellant when he drove off was being so rash and negligent as to constitute an 35 offence under the section. The policeman might have immediately let go and no possible harm could have occurred. When, however, knowing that the policeman was clinging to the vehicle, he increased his speed, a different situation arose. He obviously intended to shake the policeman off and he must have known that as his speed increased so the risk to 40 the policeman increased. I am satisfied that his speed had increased to such a rate that it did or could constitute a risk of injury, even serious injury, to the policeman. In continuing to drive and increase his speed, in these circumstances I consider that the appellant was guilty of a degree of rashness and negligence so as to constitute an offence under the section. 45 Accordingly I dismiss the appeal against conviction.

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As to the sentence I have some doubt as to whether the facts of this case merit six months' imprisonment with hard labour. The appellant clearly should have stopped and should have listened to whatever the policeman had to say. If the policeman was in error that would have been found out. Clearly, the appellant drove off in a temper. There is 5 nothing to show that in fact there was anything wrong with his vehicle, or that he was not licensed or had committed any offence, and clearly he might have envisaged at first that the policeman could have let go. That he continued was, I consider, reckless, but it was not a deliberate attempt to injure the policeman. On the whole, and bearing in mind that 10 he was a first offender, I do not think that a sentence of peremptory imprisonment was justified in this case. I will allow the appeal against sentence and quash the sentence of six months' imprisonment with hard labour and substitute for it a fine of K100 or two months' imprisonment with hard labour. 15

*Order accordingly*

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