1961 *Present :* **Sansoni, J., and H. N. G. Fernando, J.**

M. SELLADORAI, Appellant, *and* THE QUEEN, Respondent

S. C. 50—D. C. (Criminal) Negombo, 4,587

Negligence—Charge of driving rashly—Evidence that driver was under the influence of liquor—Admissibility—Evidence in rebuttal to impeach credit of accused—Admissibility.

In a prosecution for causing the death of a person by rash driving the mere fact that the accused was smelling of liquor at the time of the accident is not of itself relevant. Evidence as to the drink taken by the driver, to be admissible, "must tend to show that the amount of drink taken was such as would adversely affect the driver, or, alternatively, that the driver was in fact adversely affected."

Evidence of admissible admissions made by an accused that could have been given before the prosecution was closed cannot be given as evidence in rebuttal to impeach the credit of the accused.

APPEAL from a judgment of the District Court, Negombo.

G. E. Chitty, Q.C., with *K. Sivasubramaniam*, for the accused-appellant.

Shiva Pasupati, Crown Counsel, for the Attorney-General.

Cur. adv. vult.

October 18, 1961. SANSONI, J.—

The accused was indicted with having caused the death of a woman by doing one or more rash acts which were specified, or by doing one or more negligent acts which were also specified in the indictment. The learned District Judge found the accused guilty but he has not stated whether he found him guilty of doing a rash act or a negligent act. He does, however, say earlier in his judgment that the accused had driven his car in a reckless manner, so I shall assume that he found the accused guilty of driving rashly, because one of the rash acts specified in the indictment is that the accused drove recklessly.

The case for the prosecution was that the accused drove along the Colombo-Negombo road in the direction of Negombo, and hit the deceased woman who was walking in the opposite direction along a foot-path running parallel to the road but on the accused's right hand side. The prosecution witnesses also spoke to the accused having driven at a high speed. For no reason that appeared from their evidence, the accused appears to have driven across the road from his correct side, hit the woman, struck against two trees which were standing off the road, and then come back to his correct side to halt his car. But there was one prosecution witness who said that while he was riding on the pillion of a motor cycle travelling towards Negombo, the accused overtook him and then went to his correct side. He said that the accused then suddenly crossed towards the right hand side, struck some trees and then crossed again to his correct side. On looking towards the trees he saw a woman lying fallen in a drain. He estimated the speed of the car at 30 or 35 m.p.h. and did not notice anything peculiar about the way that the accused was driving.

The accused's version was that after he overtook the motor cycle he took his car to his correct side. The woman then came from his left hand side on to the road, and to avoid her he swerved to the right and she was knocked by the car and thrown some distance. He lost control of his car which crashed into two trees. He then drove back to his correct side. He denied that he had hit the woman when she was walking on the foot-path.

In this state of the evidence the learned Judge very correctly asked himself the question as to why the accused suddenly went off the road,

for it is common ground that the accused who was travelling on his correct side suddenly crossed the road. In answering that question the learned Judge makes two findings :

(1) that the car was driven at an excessive speed, and

(2) that the accused was driving under the influence of liquor and was not able to control the car.

I do not think that either finding can be supported on the evidence. The learned Judge accepted the evidence of the witness who said that the accused was driving at 30 or 35 m.p.h. very shortly before tho accident occurred. The other prosecution witnesses who said that the accused was driving at a high speed were not in as good a position to estimate the speed at the crucial time. No doubt the woman sustained serious injuries, and the learned Judge thought that this was an additional reason for holding that the accused was driving at an excessive speed. But even at a speed of 30 or 35 m.p.h. those injuries could well have been caused to any person who was hit by a car.

I think the finding that the accused was under the influence of liquor and was not able to control the car has been made without any evidence to support it. When the accused arrived at the Police Station shortly after the accident the Inspector found him to be smelling of liquor. He therefore sent the accused to the doctor who also found him to be smelling of liquor. The accused said that he had drunk a bottle of beer about 5 or 6 hours earlier. Nobody has spoken to the accused having consumed a large quantity of liquor, nor has anybody spoken to the accused showing any signs of being under the influence of liquor. As we have had several cases recently where evidence of the accused being found to be smelling of liquor, and nothing more, has been led, I think it would be useful if I drew attention to the recent decision of the Court of Criminal Appeal in England in *R. v. Mc Bride* [1]. That was a case where the accused was charged with having caused the death of a person by dangerous driving. The judgment of the Court of five Judges contains the following observations, which I have extracted from the judgment :—

(1) " If a driver is adversely affected by drink, this fact is a circumstance relevant to the issue whether he was driving dangerously."

(2) " The mere fact that the driver has had drink is not of itself relevant. "

(3) Evidence as to the drink taken by the driver to be admissible " must tend to show that the amount of drink taken was such as would adversely affect the driver or, alternatively, that the driver was in fact adversely affected. "

(4) The Court has an overriding discretion to exclude such evidence if its prejudicial effect outweighs its probative value. " If such evidence is to be introduced, it should at least appear of substantial weight. "

[1] *(1961) 3 W. L. R. 549.*

I feel sure that if the learned Judge had been aware of these rules he would have excluded all evidence relating to the accused smelling of liquor. There is no doubt that, having admitted it, he has erroneously drawn the inference that the accused was under the influence of liquor at the time of the accident. Such a finding has undoubtedly prejudiced the accused. The accused was cross-examined as to whether he had told the police that he had two bottles of toddy at noon that day. He denied that he said so to the police, and evidence in rebuttal was called to prove that he had said so to the police. This should not have been allowed. Evidence of admissible admissions made by an accused that could have been given before the prosecution was closed, cannot be given as evidence in rebuttal to impeach the accused's credit : see *Thuraisamy v. The Queen* [1].

I would set aside the conviction and acquit the accused.

H. N. G. FERNANDO, J.—I agree.

Appeal allowed.