ALBERT JOSEPH ROSE .....APPELLANT;

AND

HER MAJESTY THE QUEEN .....RESPONDENT.

1959

*Feb. 16
Mar. 25

ON APPEAL FROM THE SUPREME COURT OF ALBERTA, APPELLATE DIVISION

Criminal law—Acquittal at non-jury trial on charge of criminal negligence causing death—No evidence offered by accused after Crown's case—Crown nonsuited— Reasonable doubt—Duty of trial judge—Whether Crown entitled to appeal—Whether finding of non-criminal negligence question of law alone—Criminal Code, 1953-54 (Can.), c. 51, ss. 191, 558, 584.

On a trial by a judge alone on a charge of causing death by criminal negligence in the operation of a motor vehicle, the accused, who had driven through a red light and killed W, was acquitted. He did not put in any defence because the trial judge expressed the opinion that the Crown had not furnished sufficient evidence to support the charge. The trial judge held that the facts did not constitute criminal negligence as defined by s. 191 of the *Criminal Code*. On appeal by the Crown claiming that the trial judge had misdirected himself on what constituted criminal negligence and that this was a question of law alone, the Court of Appeal, by a majority judgment, ordered a new trial. The accused appealed to this Court.

Held: The appeal should be allowed and the judgment of acquittal restored.

The appeal involved a combined question of law and fact, therefore the Court of Appeal lacked jurisdiction to hear it. That the accused did not see the red light through an oversight was a question of fact which the trial judge determined after hearing all the witnesses and weighing all the circumstances of the case. The trial judge sitting without a jury was fulfilling a dual capacity. He directed himself properly and, when he decided on the facts submitted that criminal negligence ought not to be inferred, he was fulfilling the functions of a jury on a question of fact.

The contention that the trial judge at the conclusion of the evidence of the Crown should not have given the accused the benefit of the doubt cannot be entertained. Sitting as a jury, the trial judge must reject a motion to dismiss when there is a *prima facie* case. Then, there is no room for the benefit of the doubt. It is only when all the evidence is adduced that this benefit may be granted. Here, no motion was made. The trial judge expressed his views on the case, but he did not then deliver judgment. When, after an adjournment requested by the accused, the latter declared that he had no evidence to offer, the case was complete, and it was then the imperative duty of the trial judge to give the accused the benefit of the doubt he may have had, after hearing the argument of the Crown.

*PRESENT: Kerwin C.J. and Taschereau, Locke, Fauteux and Martland JJ.

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ROSE v. THE QUEEN

APPEAL from a judgment of the Supreme Court of Alberta, Appellate Division[1], reversing a judgment of Riley J. and ordering a new trial. Appeal allowed.

N. D. Maclean, Q.C., for the appellant.

H. J. Wilson, Q.C., for the respondent.

The judgment of the Court was delivered by

TASCHEREAU J.:—The appellant was charged that on the 17th of January, 1958, at Edmonton, he, by criminal negligence, caused the death of Brynjulf Wetting, in the operation of a motor vehicle. He was acquitted by the trial judge, sitting without a jury, but the Appellate Division, Supreme Court of Alberta[1], quashed the judgment of acquittal and ordered a new trial, Mr. Justice Porter dissenting.

It is contended on behalf of the appellant that there was no question of law alone, such as to enable the Attorney General to appeal the judgment of acquittal to the Supreme Court of Alberta. The majority of the Appellate Division held that the finding of fact of the trial judge raised a question of law, as to whether the accused was guilty of criminal negligence in the operation of his motor vehicle.

This exceptional and limited right which the Attorney General has to appeal a verdict of acquittal, is given by s. 584 of the *Criminal Code*, which says:

> 584. (1) The Attorney General or counsel instructed by him for the purpose may appeal to the Court of Appeal.
>
> (*a*) against a judgment or verdict of acquittal of a trial court in proceedings by indictment on any ground of appeal that involves *a question of law alone.*

The Court of Appeal is therefore incompetent to hear the case if the question raised is not a pure question of law, but involves a mixed question of law and fact. I have reached the conclusion that appellant's argument on this point must prevail, as the question raised was not a matter of law alone.

The learned trial judge considered all the evidence. He found that the appellant went through a red light, was not keeping a proper look-out, that his speed was not above

[1] (1957), 26 W.W.R. 710, 122 C.C.C. 185, 29 C.R. 318.

the normal at that intersection and that he stopped within a reasonable distance. He reached the conclusion that he did not see the red light, and that it was his failure to do so that was the determining cause of the accident. That the appellant did not see the red light through an oversight, is a question of fact, which the learned trial judge determined after hearing all the witnesses and weighing all the circumstances of the case. This heedlessness may create civil liability, but the degree of inattention which he found, did not show necessarily in the circumstances, *wanton or reckless disregard* of the lives or safety of other persons, (Cr.Code 191), which the statute requires to make the act criminal.

The trial judge sitting without a jury was fulfilling a dual capacity. He had, therefore, to discharge the duties attached to the functions of a judge, and also the duties of a jury. As a judge he had to direct himself as to whether any facts had been established by evidence from which criminal negligence may be reasonably inferred. As a jury he had to say whether, from those facts submitted, *criminal negligence ought to be inferred. Metropolitan Railway Company v. Jackson*[1], *King v. Morabito*[2]. I think that the trial judge directed himself properly, and that when he decided on the facts submitted to him that criminal negligence *ought not to be inferred,* he was fulfilling the functions of a jury *on a question of fact.*

It was also contended on behalf of the respondent that the *Morabito* case, *supra,* should govern here, and that the judge at the conclusion of the evidence of the respondent, should not have given the appellant the benefit of the doubt. In the latter case, the accused through counsel had made to the trial judge, sitting without a jury, a motion to dismiss, alleging lack of evidence, before declaring whether or not he had any evidence to adduce. In this Court it was said by Kellock J. concurred in by Rand and Locke JJ.:

> It is clear, I think, that no other application could have been made at that stage in the absence of an election on the part of the defence to call or not to call evidence. Had a jury been present, the learned trial judge could have done no more, on the application of the defence, than have decided whether or not there was evidence upon which the jury might convict.

[1] (1877), 3 App. Cas. 193 at 197, 47 L.J.Q.B. 303.
[2] [1949] S.C.R. 172 at 174, 93 C.C.C. 251, 7 C.R. 88, 1 D.L.R. 609.

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Taschereau J.

Of course, when the trial judge sits as a jury, he has to instruct himself as if he were instructing the jury, and if there is a *prima facie* case he must reject a motion to dismiss. Then, there is no room for the benefit of the doubt. It is only when all the evidence is adduced that this benefit may be granted to the accused.

Here, no motion was made. It is true that the trial judge expressed, at that stage, his views on the issue of the case, but he did not then deliver judgment. After an adjournment requested by the accused appellant's counsel, the latter declared that he had no evidence to offer. (558 new Cr. Code) (944 old Cr. Code.) The case was then complete, it was ready to go to the jury or judge, and it was then not only open, but it was the imperative duty of the trial judge to give the accused the benefit of the doubt, he may have had, after hearing the argument for the Crown.

I am of the opinion that this appeal should be allowed and the judgment of acquittal restored.

Appeal allowed, judgment of acquittal restored.

Solicitors for the appellant: Maclean & Dunne, Edmonton.

Solicitor for the respondent: The Attorney General for the Province of Alberta.