1981 December 22

[TRIANTAFYLLIDES, P., DEMETRIADES, SAVVIDES, JJ.]

THEMIS THEMISTOCLEOUS,

Appellant,

v.

THE POLICE,

Respondents.

(*Criminal Appeals Nos.* 4262 *and* 4264).

Criminal Law—Causing death, in a traffic accident, by want of precaution—Section 210 *of the Criminal Code, Cap.* 154*—Appellant driving on avenue—Another car suddenly coming onto the avenue from side-road and practically blocking completely appellant's lane of avenue while another car was coming from the opposite direction—Appellant finding himself in a fateful dilemma, and starting manoeuvring his car, in the agony of the moment, in order to avoid colliding with either of the two vehicles—Succeeding in this effort but colliding with a tree and as a result his co-passenger was fatally injured—Not safe to convict appellant of the above offence—Conviction quashed—Appellant could not, in the circumstances of this case, be convicted of careless driving, in exercise of the Court's powers under section* 145(1)(*c*) *of the Criminal Procedure Law, Cap.* 155.

Criminal Law—Evidence—Failure of accused to give evidence in his own defence—Comment by Judge.

This was an appeal against the conviction of the appellant of the offence of causing, in a traffic accident, death by want of precaution, contrary to section 210 of the Criminal Code, Cap. 154. The accident occurred whilst the appellant was driving at night-time his car, along Grivas Dhigenis avenue, in Nicosia and a car came out suddenly onto the avenue from a side-road and practically blocked completely the lane of the avenue along which the car of the appellant was travelling. At that time, another vehicle was coming from the opposite direction in the other lane of the avenue; and the appellant,

having found himself suddenly and unexpectedly in a fateful dilemma, started manoeuvring his car, in the agony of the moment, in order to avoid colliding with either of the aforementioned two vehicles. He eventually, succeeded in this effort, but his car collided with a tree further down the avenue, after it had skidded along the road for a distance of about one hundred and fifty feet, and as a result his co-passenger was fatally injured.

The trial Judge in commenting on the failure of the appellant to give evidence in his own defence, stated that, by electing to make an unsworn statement from the dock, the appellant showed that he was not telling the truth and intended "to take refuge in the dock" in order not to expose himself to "the fire of cross-examination".

Counsel for the respondents did not support the conviction for the above offence but invited the Court to exercise its relevant powers, under section 145(1)(c) of the Criminal Procedure Law, Cap. 155 and to convict the appellant of careless driving. This submission was based on the fact that a prosecution witness stated that the appellant was driving at a speed of over 30 m.p.h., on the fact that the length of skid marks left by the car of the appellant indicated that the speed at which his car was travelling before the accident was much more than 30 m.p.h. and that this inference could find support, too, in the real evidence as regards the damage which was caused to the car of the appellant, which indicated that it collided with the tree with quite some force.

Held, (1) that this Court is in agreement with counsel for the appellant, with whom, very fairly, counsel for the respondents has, also, agreed, that this is not a case in which it was safe to convict the appellant of the offence of causing death contrary to section 210 and, therefore, the conviction of the appellant, in this respect, is set aside.

(2) That the estimate of the speed of the car of the appellant at more than 30 m.p.h., by the said prosecution witness, who was driving from the opposite direction at night-time, has to be regarded as being unsafe in the circumstances; that there was no evidence on record as regards whether actually the place where the accident occurred was within a speed limit area and

what was the particular speed limit; that as the length of the skid marks of the car of the appellant and the force of its collision with the tree do not appear, on the basis of the material which is before this Court in this appeal, to be clearly connected with the speed of the appellant's car before he found himself in the agony of trying to avoid a collision with the other two vehicles and may be attributable to his manoeuvres to avert such a collision, this Court is not prepared to hold, in this criminal case, that the appellant should be found guilty, beyond reasonable doubt, of the offence of careless driving; and that, therefore, it does not intend to exercise for this purpose its powers under section 145(1)(c) of Cap. 155.

Appeal allowed.

Observations: The trial Judge has, in commenting on the failure of the appellant to give evidence in his own defence, unfortunately exceeded somewhat the by the law prescribed limits in this connection. It is clear that the appellant was fully entitled in law to choose to make an unsworn statement from the dock and the adoption of such a course by him could not be treated by the trial Judge, particularly in the circumstances of this case, in a manner so adverse for the appellant. We would, indeed, be prepared to set aside the conviction of the appellant for this reason, too.

Appeal against conviction and sentence.

Appeal against conviction and sentence by Themis Themistocleous who was convicted on the 8th September, 1981 at the District Court of Nicosia (Criminal Case No. 10627/81) one one count of the offence of causing death by want of precaution, contrary to section 210 of the Criminal Code Cap. 154 and was sentenced by Stavrinides, D.J. to pay a fine of C£200.— and was disqualified from holding or obtaining a driving licence for 18 months.

G.I. Pelaghias, for the appellant.

A. Frangos, Senior Counsel of the Republic, for the respondents.

TRIANTAFYLLIDES P. gave the following judgment of the Court. In this case the appellant was convicted of the offence of causing, in a traffic accident, death, by want of precaution, contrary

to section 210 of the Criminal Code, Cap. 154, while driving at night-time his car, on January 18, 1981, in Nicosia, along Grivas Dhigenis avenue, in a direction away from the centre of the town and towards the Nicosia International Airport. The person who was killed was a passenger in the car of the appellant.

The appellant was sentenced to pay a fine of C£200 and was disqualified from holding or obtaining a driving licence for eighteen months.

The appellant has appealed against both conviction and sentence.

The fatal accident in question occurred because another car, driven by a co-accused of the appellant at the trial, came out suddenly onto the avenue from a side-road, Achaeon street, and practically blocked completely the lane of the avenue along which the car of the appellant was travelling, while, at that time, another vehicle, a taxi, was coming from the opposite direction in the other lane of the avenue.

On the totality of the material before us, including the evidence given by the driver of the taxi, who was a witness for the prosecution at the trial and whom the trial Court treated as a credible witness, it seems to us that the appellant, having found himself suddenly and unexpectedly in a fateful dilemma, started manoeuvring his car, in the agony of the moment, in order to avoid colliding with either of the aforementioned two vehicles; he, eventually, succeeded in this effort, but his car collided with a tree further down the avenue, after it had skidded along the road for a distance of about one hundred and fifty feet, and as a result his co-passenger was fatally injured.

We agree with counsel for the appellant, with whom, very fairly, counsel for the respondents has, also, agreed, that this is not a case in which it was safe to convict the appellant of the offence of causing death contrary to section 210 and, therefore, the conviction of the appellant, in this respect, is set aside.

We would like, at this stage, to observe that the trial Judge has, in commenting on the failure of the appellant to give evidence in his own defence, unfortunately exceeded somewhat the by the law prescribed limits in this connection, by scathingly

stating that the fact that the appellant by electing to make an unsworn statement from the dock showed that he was not telling the truth and intended "to take refuge in the dock" in order not to expose himself to "the fire of cross-examination". It is clear that the appellant was fully entitled in law to choose to make an unsworn statement from the dock and the adoption of such a course by him could not be treated by the trial Judge, particularly in the circumstances of this case, in a manner so adverse for the appellant. We would, indeed, be prepared to set aside the conviction of the appellant for this reason, too. We have been invited by counsel for the respondents to exercise our relevant powers, under section 145(1)(c) of the Criminal Procedure Law, Cap. 155, and to convict the appellant of careless driving. The main elements on which counsel for the respondents has based this submission of his are the fact that the aforementioned prosecution witness stated that the appellant was driving at a speed of over 30 m.p.h., that the length of skid marks left by the car of the appellant indicate that the speed at which his car was travelling before the accident was much more than 30 m.p.h. and that this inference can find support, too, in the real evidence as regards the damage which was caused to the car of the appellant, which indicates that it collided with the tree with quite some force.

The estimate of the speed of the car of the appellant at more than 30 m.p.h., by the said prosecution witness, who was driving from the opposite direction at night-time, has to be regarded as being unsafe in the circumstances, and it is rather significant, too, that this witness merely said that the appellant was driving at more than 30 m.p.h., but he did not say at approximately what greater than 30 m.p.h. speed the car of the appellant was driving.

We might observe, too, at this stage, that there is no evidence on record as regards whether actually the place where the accident occurred is within a speed limit area and what was the particular speed limit.

As the length of the skid marks of the car of the appellant and the force of its collision with the tree do not appear, on the basis of the material which is before us in this appeal, to be clearly connected with the speed of the appellant's car before he found himself in the agony of trying to avoid a collision with

the other two vehicles and may be attributable to his manoeuvres to avert such a collision, we are not prepared to hold, in this criminal case, that the appellant should be found guilty, beyond reasonable doubt, of the offence of careless driving: We, therefore, do not intend to exercise for this purpose our powers under section 145(1)(c) of Cap. 155.

This appeal is, therefore, allowed accordingly.

Appeal allowed.