CHUZI v THE PEOPLE (1967) ZR 100 (CA)
COURT OF APPEAL
BLAGDEN CJ, DOYLE JA and RAMSAY J
15th AUGUST 1976.

BLAGDEN CJ

Flynote and Headnote

[1] Road Traffic - Causing death by dangerous driving - Elements of the offence.
The offence of causing death by dangerous driving is not an offence involving absolute liability, thereby differing from the equivalent offence in England, but it involves a measure of culpability on the part of the accused of greater gravity than that involved in the offence of dangerous driving.

[2] Criminal law - Absolute liability - Causing death by dangerous driving.
See [1] above.

[3] Criminal law - Absolute liability - Intention of legislature.

If the legislature intended to create an offence of absolute or strict liability, it is expected that the imposition will be stated expressly in unmistakable terms.

[4] Read traffic and roads - Right turn a dangerous manoeuvre - Prima facie evidence.
Turning right across the face of approaching traffic is *per se* a dangerous manoeuvre; if an accident occurs during its execution there is *prima facie* evidence of dangerous driving and the *onus* is thrown on to the accused to show that his driving was not dangerous.

[5] Criminal law - Res ipsa loquitur - Applicability.
The doctrine of *res ipsa loquitur* has no place in the criminal law; in the absence of direct evidence as to the appellant's manner of driving, no positive assumption on it can be made by the judge, and no *onus* is thrown on the accused to rebut any such assumption.

[6] **Criminal law - Res ipsa loquitur - Applicability**
The maxim of *res ipsa loquitur* indicates no more than the circumstances of an occurrence may be such as, in the absence of an explanation, to justify an inference of negligence; in a criminal case the inference from the facts must be so strong as to exclude any other conclusion than that the accused is guilty.

Cases cited:

(1) *Simpson v Peat* [1952] 2 QB 24; [1952] 1 All ER 447.

(2) *R v Scates* 1957 Crim. L. Rev. 406.

(3) *R v Parker* 1957 Crim. L. Rev. 468.

(4) *R v Curphey* (1957) 41 Cr. App. R 78.

(5) *R v Gould* [1963] 2 All ER 847.

(6) *Hill v Baxter* [1958] 1 QB 277; [1958] 1 All ER 193.

(7) *R v Johnson* 1960 Crim. L. Rev. 430.

(8) *R v Spurge* [1961] 2 QB 205 [1961] 3 All ER 23.

(9) *R v Evans* [1963] 1 QB 412; [1962] 3 WLR 1457.

(10) *R v Ball and Loughlin* (1966) 50 Cr. App. R 266.

(11) *R v Sharmpal Singh* [1962] AC 188; [1962] 2 WLR 238.

(12) *Dobkins v R* 1959 1 R & N.130.

BLAGDEN CJ
Statutes construed:
Roads and Road Traffic Ordinance (1965, Cap. 173), s. 210 (1).
Road Traffic Act, 1930 (England, 20 & 21 Geo. 5, c. 43), ss. 11 and 12.
Road Traffic Act, 1960 (England, 8 & 9 Eliz. 2, c. 16), ss. 1 (1) and 2 (1).

Jearey, for the appellant
Thistlethwaite, State Advocate, for the respondent
Judgment
Blagden CJ: This is an appeal against a judgment of the High Court (Evans, J) convicting the appellant of causing death by dangerous driving, contrary to section 210 (1) of the Roads and Road Traffic Ordinance, Cap. 173, sentencing him to three months' simple imprisonment and suspending his driving licence for a period of twelve months.
The facts were that on the 9th January, 1967, the appellant was driving a Vanette out of the main town of Lusaka, along the Great East Road in an easterly direction, with the intention of turning right at the Cecil Rhodes Drive junction. As the appellant was approaching this junction so the deceased, P.C. Godwin Luhanga, riding a Honda motorcycle, was also approaching it, but from the opposite direction. The two vehicles came into collision on the south side of the Great East Road - that is, on the deceased's side of the road - and about opposite to the entrance to the east lane of Cecil Rhodes Drive, the latter being a twin - carriage highway. The police constable died from the injuries he sustained in the collision.
At the trial, evidence was received from two eye - witnesses and also from a police officer, Inspector Mulenga, who arrived on the scene - it does not appear from the evidence how long after - and made a sketch plan (Ex. "P.1") of the scene, showing the position of the vehicles as he found them there.
At the close of the State's case, Mr. Gani, for the appellant, unsuccessfully submitted that there was no case for the appellant to answer. The court duly explained the appellant's rights in making his defence to him, but he elected to say nothing and to call no witnesses. The fact that the court held that the appellant had a case to answer and that he did not proceed to answer it in the sense of adducing evidence or making a statement was not, of course, conclusive in favour of conviction. A *prima facie* case is not necessarily a conviction case. Nevertheless, the court did convict.
The grounds of appeal which Mr Gani, for the appellant, has argued before this court were directed mainly to criticisms of the judge's findings of fact on the evidence before him. He instanced certain inconsistencies between the testimonies of the two eye - witnesses and the police officer who visited the scene, and he submitted that the learned trial judge erred in his resolution of these differences.
It would appear doubtful from the record of the evidence if either of the two eye - witnesses saw the actual collision take place, and but little of the two vehicles before it took place, but they saw what happened immediately afterwards.
Of the two eye - witnesses, P.W.2 John Robert Wood, was himself on a motor - cycle in the west lane of Cecil Rhodes Drive at its junction with the Great East Road awaiting an opportunity to turn into that road. The other, P.W.6 Joseph Sepe, was selling maize on the northern side of the Great East Road, and opposite the Cecil Rhodes Drive junction.
The learned trial judge was quite satisfied that all the prosecution witnesses gave honest evidence but he differentiated markedly between the weight which he felt he could attach to the evidence of Wood and that of Sepe. He said, in regard to Sepe, that he could attach little weight to his evidence, because, as he put it:

". . . he is an unsophisticated middle - aged man (and of the Ndebele tribe) who testified in cinyanja (in which it is difficult adequately to describe traffic accident details such as speeds, directions, distances and relative positions of vehicles and objects because the language lacks a sufficient vocabulary in this respect), and I have little doubt that, in his desire to assist the court, he made certain incorrect assumptions and testified about some events which he did not actually witness."

As to Wood, the learned trial judge described him as:

"the most impressive material prosecution witness . . . who testified in a restrained, convincing and competently truthful manner throughout . . . (and who) was in by far the best physical position to observe events at the scene".

Mr Gani has criticised this assessment of the two eye - witnesses' credibility. But it was a matter for the judge who had the witnesses before him and I do not see how this court can say he was wrong.

Then there was a matter of a serious discrepancy between the evidence of Wood and that of Inspector Mulenga. It related to the actual point of the impact on the road. According to Inspector Mulenga, he found the vehicles in the position he indicated on his plan. Wood disagreed with the marking on the plan. He said: "I never saw the lorry in the position shown on (the plan), even after the police arrived." Inspector Mulenga's plan showed the front of the Vanette and the motor - cycle as right at the entrance of the east lane of Cecil Rhodes Drive - that is, on the extreme south edge of the Great East Road. Wood marked the point of impact on the plan as about the middle of the southern side of the Great East Road and opposite the "Keep Left" sign on the central strip running down Cecil Rhodes Drive.

The judge preferred Wood's evidence. Mr Gani has submitted that he erred in doing so, but here again this was a question of fact for the judge to resolve. He was in a much better position to do so than we are and I do not see how we can upset his finding.

In the result, so far as the manner of the accused's driving was concerned, the learned trial judge was left only with Wood's evidence, and Inspector Mulenga's evidence of what the accused said to him at the scene. This last amounted to no more than that he had been driving east on the Great East Road, had stopped, wanting to drive into Cecil Rhodes Drive, and that when he had just started off he had collided with the motor cycle.

[1] [2] The offence of causing death by dangerous driving is created by section 210 (1) of the Roads and Road Traffic Ordinance, Cap. 173, in the following terms:

"Any person who causes the death of another person by the driving of a motor vehicle on a road recklessly, or at a speed, or in a manner which is dangerous to the public, having regard to all the circumstances of the case, including the nature, condition and use of the road, and the amount of traffic which is actually at the time, or which might reasonably be expected to be, on the road, shall be guilty of an offence and liable upon conviction to a fine not exceeding five hundred pounds or to imprisonment for a period not exceeding five years, or to both such fine and imprisonment."

On the natural meaning of the words used I would have thought that before an accused could be convicted of this offence it would have to be proved that, quite apart from the consequences which ensued, his driving was reckless or was conducted at a speed or in a manner which was dangerous to the public - conduct which I would have also thought necessarily involved a measure of culpability on the part of the accused of some gravity, certainly of greater gravity than that involved in the offence of careless driving.

In England, however, where the offences of dangerous driving and causing death by dangerous driving are created by sections 1 (1) and 2 (1) of the Road Traffic Act, 1960, in almost identical language to that of our own legislation here, the courts have interpreted these provisions as creating offences against which there is an absolute prohibition, and in which the incidence or absence of culpability virtually plays no part so far as conviction is concerned.

In 1952, in the case of *Simpson v Peat* [1] where the respondent accused had been involved in an exactly similar type of accident to that suffered by the accused here, the divisional court, comprising five judges, gave consideration to the offences of dangerous driving and driving without due care and attention. At that time dangerous driving was the subject of section 11 of the Road Traffic Act of 1930, and driving without due care and attention came under section 12. Lord Goddard, CJ, delivering the judgment of the court, said, at page 28:

"Whether the charge is under section 11 or section 12, the offence can be committed although no accident takes place; equally because an accident does occur it does not follow that a particular person has driven either dangerously or without due care and attention: but if he has, it matters not why he did so. Suppose a driver is confronted with a sudden emergency through no fault of his own; in an endeavour to avert a collision he swerves

to his right - it is shown that had he swerved to the left the accident would not have happened: that is being wise after the event and, if the driver was in fact, exercising the degree of care and attention which a reasonably prudent driver would exercise, he ought not to be convicted, even though another and perhaps more highly skilled 5driver would have acted differently."

In 1957 two decisions confirmed that the question of dangerous driving was a pure question of fact and that the incidence or absence of *mens rea* was irrelevant; (*see R v Scates* [2]; *R v Parker* [3]). A further case in 1957 (*R v Curphey* [4]) and the case of *R v Gould* [5], both cases of causing death by dangerous driving, made it clear that the dangerous driving of the accused had to be *a* substantial cause but not necessarily *the* substantial cause of the deceased's death.
In 1958 came the first case to suggest that dangerous driving was an offence of absolute prohibition. This was *Hill v Baxter* [6], where Lord Goddard, CJ, said, at page 195B:

". . . the statute contains an absolute prohibition against driving dangerously or ignoring Halt signs. No question of *mens rea* enters into the offence; it is no answer to a charge under those sections to say 'I didn't mean to drive dangerously' or 'I didn't notice the Halt sign'."

In *R v Johnson* [7], it was held that the intention of the driver as to the way in which he was driving was immaterial.
Certain exceptions to the concept of absolute liability promulgated in *Hill v Baxter* [6] were introduced in *R v Spurge* [8], where Salmon, J, delivering the judgment of the Court of Criminal Appeal on which five judges were sitting, said, at page 210:

"If . . . a motor - car endangers the public solely by reason of some sudden overwhelming misfortune suffered by the man at the wheel for which he is in no way to blame - if, for example, he suddenly has an epileptic fit or passes into a coma or is attacked by a swarm of bees or stunned by a blow on the head from a stone then he is not guilty of driving in a manner dangerous to the public:"

The following year the well - known case of *R v Evans* [9] was decided. When that case went before the Court of Appeal, Atkinson, J, delivering the judgment of the court, used words which have often been repeated. He said, at page 1460:

"It is quite clear from the reported cases that if a driver in fact adopts a manner of driving which the jury think was dangerous to other road users in all the circumstances, then on the issue of guilt it matters not whether he was deliberately reckless, careless, momentarily inattentive or even doing his incompetent best."

But even stronger language than this was used in the case of *R v Ball and Loughlin* [10] [where] Parker, L. C. J, delivering the judgment of the court, dismissing the driver's appeal against his conviction for causing death by dangerous driving, said at page 270:

"It has been held time and again that an offence under this section is an absolute offence, . . . it is a liability on the driver which he cannot get rid of, and if the result of his driving produced what the jury considered to be a dangerous situation, a dangerous manoeuvre, then even though he had been completely blameless, he can be held liable."

At the conclusion of the judgment, however, the court indicated that such defences as that the driver had been deprived of control by some sudden affliction of his person or by some defect in the vehicle manifesting itself without blame on his part, would still be open to him, thus following the decision in *R v Spurge* [8]; but it was stressed that these would be the only possible defences.
[3] These English decisions are not binding on us but they are, of course, persuasive in the highest degree - the more so because of the almost exact parity that exists between the English and Zambia statutory provisions. But it is for consideration whether the courts of Zambia should follow the English interpretation of these provisions quite as far as it has now gone. Undoubtedly it is open to the legislature to impose an absolute liability or an absolute prohibition in respect of any offence, but one would expect such an imposition to be couched in unmistakable terms. The words "absolute" and "prohibition" do not occur in the relevant provisions here. The formula used is akin to that which appears in numerous sections of the Penal Code and in other penal legislation. It is true that the common Penal Code formula is, "Any person who does such and such a thing is guilty of

an offence", while the penal sections of the Roads and Road Traffic Ordinance speak of "Any person who drives a motor vehicle in such and such a fashion shall be liable upon conviction to such and such a penalty." But I cannot read any great significance into this slight change of formula, nor am I aware of any decision that has managed to do so. In any case, I do not think it can be said that the Roads and Road Traffic Ordinance formula *per se* creates an offence of absolute liability.

In practice, of course, in the vast majority of cases a person who drives dangerously does so either deliberately, or recklessly, not caring whether what he is doing is dangerous or not, or else negligently. In all these cases he is clearly to blame, and thus deserving of conviction. But I find it difficult to accept that a man who has been exercising every prudence but whose driving becomes dangerous through some factor of which he is totally unaware and could not have become aware - in short, a completely blameless man - should ever be convicted of such a serious offence as dangerous driving.

However, one thing is abundantly clear: before a person can be convicted of dangerous driving or of causing death by dangerous driving, it must be proved beyond reasonable doubt that he drove dangerously. I have already made some detailed reference to the evidence which was given by the witnesses in this case. As a result of the learned trial judge's evaluation of that evidence and his assessment of the credibilities of the various witnesses, with which I have no quarrel, it really amounts to this: that as far as the position of the point of impact is concerned, only the evidence of Wood can be considered because the learned trial judge has clearly accepted it and rejected that of Inspector Mulenga; and that, as far as the evidence of the manner of the appellant's driving is concerned prior to the collision, it would be unsafe to rely on the evidence of the witness Sepe. Sepe did say:

"The motor vehicle driver wanted to turn into Cecil Rhodes Drive and he didn't stop before turning - just drove into Cecil Rhodes Drive and struck the motor cycle."

But, as I have already related, the learned trial judge said he could attach little weight to the evidence of Sepe and that he had little doubt that this witness had made certain incorrect assumptions and testified about some events which he did not actually witness. The evidence of Inspector Mulenga as to what the appellant told him at the scene, to which I have already referred, is purely negative.

There remains only Wood's evidence. But Wood did not see the appellant's Vanette before the accident and therefore could give no evidence as to how the appellant was driving. Nor did he even see the actual impact take place: his attention was drawn to it by the noise. He did see something of the motor cyclist when the latter was about fifty yards away and said that, as far as he could remember, he was driving in the middle of his correct lane with no other vehicle ahead or behind him. But he still did not see how the motor - cyclist was driving over the last few vital yards.

[4] Now, clearly the appellant was executing the manoeuvre of turning right from the Great East Road into Cecil Rhodes Drive. That manoeuvre would require care in its execution, especially as the deceased was approaching from the opposite direction. But it could not be accounted *per se* a dangerous manoeuvre; nor could the mere fact of the collision by itself constitute dangerous driving or even carelessness on the appellant's part.

[5] The doctrine of *res ipsa loquitur* has no place in the criminal law. There was in this case, on the vital issues, a marked paucity of evidence. The one person who should have been able to shed some light on what occurred was, of course, the appellant. He declined, however, to give evidence or make a statement. The learned trial judge duly took this circumstance into account and on the authority of *R v Sharmpal Singh*[11] I think he was entitled to do so. He said:

"In the absence of any explanation (other than that given to Inspector Mulenga) by the accused, I can only assume at best that he failed to keep a proper look - out, and so failed to observe the deceased's approach, or that he misjudged its speed or the distances involved. Whatever the reason, I am satisfied beyond reasonable doubt that he drove the vanette in a manner dangerous to the public and that he thereby caused the deceased's death."

But, with respect, I cannot see how the absence of any explanation from the appellant, added to the absence of any direct evidence as to how he was driving, can justify the

positive assumption which the learned trial judge makes that the appellant was at fault and driving dangerously. Nought plus nought still amounts to nought.
I do not think the appellant should have been convicted, and I would allow the appeal.

Judgment
[4] **Doyle JA:** I do not disagree with the statements of law contained in the judgment of the President. I do not, however, agree with his conclusions on the facts. The learned trial judge accepted the evidence of Mr Wood. This witness stopped at the junction of Cecil Rhodes Drive and the Great East Road preparatory to himself turning into the latter road. At that time, it is plain that the lorry was not across the road. If it were he must have seen it. His attention was then directed to the motor cyclist who was travelling on his correct side towards Lusaka. The next moment there was the collision which he did not actually see, presumably because he was still looking up the Great East Road. It seems to me plain beyond any doubt that the lorry driver appellant, through complete inattention or through taking a chance and miscalculating the speed of the motor cyclist, attempted to cross over into Cecil Rhodes Drive at a time when the motor cyclist was only a comparatively short distance away. That was dangerous and in the result cruised the death. There was a conflict of evidence as to where exactly the accident took place and counsel for the appellant has argued that the motor - cyclist might have swerved into the lorry. Accepting this at its most favourable aspect, it merely amounts to the fact that if the motor - cyclist had in the agony of the moment taken a different action, he might have avoided the danger. That would not have made the lorry's manoeuvre non-dangerous. It may be that the lorry driver could have given some explanation which would have explained away or cast some doubt on the facts. I do not see any such possible explanation and in any event he did not attempt one. I would dismiss this appeal.

Judgment
Ramsay J: I also do not agree with the conclusions which the President draws in his judgment on the facts.
It was not disputed that the appellant's driving caused the death of the deceased, and the question which the trial judge has to decide was whether or not the appellant drove in a manner which was dangerous to the public in all the circumstances of the case.
[4] The President has said that the manoeuvre of turning right from the Great East Road into Cecil Rhodes Drive was one which required care in its execution especially as the deceased was approaching from the opposite direction, but that it could not be accounted *per se* a dangerous manoeuvre, nor could the mere fact of the collision by itself constitute dangerous driving or even carelessness on the appellant's part.
With respect, I regard the matter somewhat differently. To my mind it is always potentially dangerous for a driver to turn right across the face of approaching traffic. When such driving results in the death of a motor-cyclist on his own side of the road in good visibility, bright daylight and dry road conditions, and no explanation is offered as to the cause of the accident, the only reasonably possible inference that I can draw from these facts is that the driving was dangerous.
[6] In the instant case the trial judge made no reference to *res ipsa loquitur,* but in *R v Dobkins* [12], when putting the accused on his defence, said, "On the principle of *res ipsa loquitur*, I find that there is a case to answer." The scope of the maxim eventually fell to be considered by the Federal Supreme Court on appeal *(Dobkins v R* [12]). Tredgold, CJ, in delivering the judgment of the court, referred (at page 132) to the meaning of the phrase in civil cases as being a "figure of speech" and continued:

"In other words, the words indicate no more than this, that the circumstances of an occurrence may be such as, in the absence of explanation, to justify an inference of negligence. It is a matter of logical inference and not of presumption, and the danger in its use is that it may distract attention from what has to be proved in the case under consideration. In a criminal ease the inference from the facts must be so strong as to exclude any other conclusion than that the accused is guilty."

In my judgment, the inference from the proved facts in the present case was so strong as to exclude any conclusion other than that the appellant was guilty. To quote from the Board's opinion in *R v Sharmpal Singh* [11] at page 198:

> "This is the sort of case in which a not incredible explanation given by the accused in the witness box might have created a reasonable doubt. But there is no explanation; . . . When the prisoner, who is given the right to answer (the) question, chooses not to do so, the court must not be deterred by the incompleteness of the tale from drawing the inferences that properly flow from the evidence it has got nor dissuaded from reaching a firm conclusion by speculating what the accused might have said if he had testified."

I would dismiss the appeal.
Appeal dismissed.