

R. v. ERIYA KAUNGO.

A CRIMINAL REVIEW CASE OF 1937.

Manslaughter—negligence—power of Court to award compensation to widow or children for loss arising out of death caused by the negligent act—Order for Compensation under Criminal Procedure Code section 164—Order under Penal Code section 30 wrong.

Where a person is convicted of manslaughter and the Court considers it desirable to provide compensation for some person who has suffered loss or injury caused by the offence and who could recover substantial compensation from the convicted person in a civil suit, it is permissible under section 164 of the Criminal Procedure Code for the Court to impose a fine (in lieu of or in addition to imprisonment) and to order the whole or any part of such fine if paid to be applied in compensation of the person so injured. The power should, however, be sparingly exercised and only in proper cases.

By virtue of section 162A of the Criminal Procedure Code it is now possible to award compensation to any person who might in the opinion of the Court be able to recover compensation by a civil suit. The amount which might be awarded is, however, limited to £25. Section 164 can be used to go over this figure as suggested in the present case, but see also *R. v. Balenje* 4 N.R.L.R. 1 and *R. v. Kaziwilo Makonda* 4 N.R.L.R. 223; and see also *R. v. Telesa Machiye* 4 N.R.L.R. 221, and the dictum therein to the effect that compensation awarded under the provisions of section 164 of the Criminal Procedure Code should not exceed the amount of special damages incurred by the complainant, and that an award of general damages under that section is not a proper procedure.

Francis, J.: I have reviewed this case and must intervene to amend that part of the sentence which deals with compensation. The record has been referred to the Crown Law Officers who do not desire to adduce legal argument in support of an order under Penal Code section 30.

Compensation under this section may be ordered only in respect to the person injured by the offence, and any such order would not include the next of kin of a deceased person.

The question, however, is soluble under Criminal Procedure Code section 164, under which a fine having been imposed (perhaps with special regard to the matter), the Court is permitted to order the whole or any part thereof to be applied in compensation to any person for any loss or injury caused by the offence, provided however that in any such case the Court is satisfied that substantial compensation is recoverable by civil suit. It is clear that a civil action (e.g., under Lord Campbell's Act) may lie at the instance of a widow or children in respect of a death brought about by a rash and negligent act; and, without seeking expert evidence

from native jurists, I apprehend that the same right of action may lie under native law at the instance, not only of a widow or her children, but possibly of relatives further removed.

Section 164 derives its origin from section 545 of the Indian Code of Criminal Procedure, and it has been held by the Calcutta High Court (which I am prepared in this case to follow), that that section was expressly framed so as to permit compensation being given in such a case as this. I do not say that the procedure is always appropriate, or that it should be followed invariably in preference to procedure by civil action. The reason for this dictum is that it is undesirable to follow a practice of imposing fines for the purpose of awarding compensation therefrom. A fine should be regarded as a punishment and imposed as such, and not for providing a fund out of which compensation may be ordered. Nevertheless, section 164 permits such procedure; but in the light of the principle enunciated above the power should be sparingly exercised and only in proper cases.

The order of the magistrate relating to compensation is hereby quashed.

The accused is to be brought before the Court of the Provincial Commissioner to be given an opportunity of making representations in writing (Criminal Procedure Code section 309 (2)) why the following order in amendment should not be passed by this Court:

“In addition to such imprisonment as aforesaid (one month H.L.) the said Eriya Kaungo shall pay a fine of £..... or in default thereof shall be imprisoned with hard labour for a term of months. It is further directed that the fine, if paid, be handed over to such person or persons as shall be found by the Provincial Commissioner to be, in accordance with native law and custom, the persons who would be admitted to sue before a Native Court in respect of the loss or injury caused by the accused's offence.”

The Magistrate is hereby required to inform this Court of the amount of fine which should be imposed to meet the justice of the case, regard being had to the capacity of the accused to pay. The record then to be returned with necessary endorsement that the requirement above has been complied with.