Crim.A. 1/52

SHMLUEL DEUTSCH

v.

THE ATTORNEY-GENERAL

In the Supreme Court sitting as a Court of Criminal Appeal.
[April 29, 1954]
Before Agranat J., Goitein J. and Sussman J.

Criminal Law - Criminal Code Ordinance, 1936, *sections* 212, 217 - *Manslaughter - Causing death through unlawful omission - Culpable negligence - Serious divergence from standard of reasonable care - Recklessness - Sentence - Long period between conviction and appeal.*

The effect of the provision in section 217 of the Criminal Code Ordinance, 1936, [1] that "an unlawful omission is an omission amounting to culpable negligence to discharge a duty (of care)..." is that a person can be convicted of the offence of manslaughter, defined in section 212 [2] as "causing the death of another person by an unlawful act or omission", only where it is proved:

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[1] Criminal *Code Ordinance,* 1936, section 217:
Unlawful omission 217. An unlawful omission is an omission amounting to culpable negligence to discharge a duty, whether such omission is or is not accompanied by an intention to cause death or bodily harm.

[2] Criminal Code Ordinance, 1936, section 212:
Manslaughter. 212. Subject to the provisions of section 214 3) of this Code, any person who by an unlawful act or omission causes the death of another person is guilty of a felony. Such felony is termed manslaughter.

(a) that the lack of care on the part of the accused amounted to "gross negligence", that is to say, was a serious divergence from the standard of reasonable care, and

(b) that the accused acted as he did out of "recklessness", that is to say, after foreseeing that his conduct was liable to endanger the life or person of another.

Semble, where the negligence of the accused does not amount to gross negligence, but his recklessness expresses itself in indifference to the consequences of his omission, it is possible and also right to convict him of manslaughter as defined in section 212.

The accused, an architect supervising the work of repairing the roofs of abandoned houses in a village, being in need of a certain material for the work, went with a party of workmen to dig that material out of a bank at the roadside. The bank had a portion overhanging a cavity like a roof, and the accused, who was supervising the operation, directed the workmen to dig in the cavity. Two officials of the Public Works Department passed by and warned the accused of the danger of a landfall. Notwithstanding that warning, the digging proceeded. The bank fell in and two workmen were killed.

Held : the accused was guilty of manslaughter.

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[3] Criminal Code Ordinance, 1936, section 214:

Murder. 214. any person who: -
(a) by any unlawful act or omission wilfully causes the death of his father or mother or grandfather or grandmother, or
(b) with premeditation causes the death of any person,
or
(c) wilfully causes the death of any person in preparing for or to facilitate the commission of an offence or in the commision of an offence, or
(d) where an offense has been committed causes the death of any person in order to secure the escape or avoidance of punishment in connection with such offence of himself or of any other person associated with him as a principal or an accessory in the commission of such offence, is guilty of a felony. Such felony is termed murder.

Held further: though the sentence of six months' imprisonment imposed upon the accused by the District Court was not, in the circumstances, excessive, it would nevertheless not be confirmed on appeal, the offence having been committed in January, 1950, and the appeal having been heard only in January, 1954.

Israel cases referred to:

(1) *Cr. A.* 125/50 - *David Ya'acobovitz v. The Attorney-General* (1952). 6 P.D. 514.

(2) *Cr. A.* 54/51 - *Shaul Freiberg v. The Attorney-General* (1951), 5 P.D. 1353.

(3) *C.A.* 224/51 - *Noah Pritzker and Ore. v. Moshe Friedman* (1953), 7 P.D. 674.

(4) *Cr. A.* 35/52 - *Shalom Rotenstreich v. The Attorney-General* (1953), 7 P.D. 58.

(5) *Cr. A.* 80/53 - *Dov Herman v. The Attorney-General* (1953), 7 P.D. 1006.

(6) *Cr. A.* 153/51 - *Ben-Zion Shvili v. The Attorney-General* (1952), 6 P.D. 470.

(7) *Cr. A.* 268/53 - *Sara Sofrin v. The Attorney-General* (1954), 8 P.D. 401.

English cases referred to:

(8) *Andrews v. Director of Public Prosecutions* (1937), 26 *Cr. App. R.* 34.

(9) *R. v. Bateman* (1925), 19 *Cr. App. R.* 8.

(10) *R. v. Alexander Gordon Bonnyman* (1942), 28 *Cr. App. R.* 131

(11) *Akerele v. The King* (1943) *A.C.* 255.

(12) *Dabholkar v. The King* (1948) *A.C.* 221.

(13) *The Queen* v. *Senior* (1899) 1 Q.B. 283.

(14) *R.v. Henry Burdee* (1916), 12 *Cr. App. R.* 153.

American case referred to:

(15) *State v. Custer* (1929) 67 *American Law Reports* 909.

Caspi for the appellant.

Miriam Ben-Porat, Deputy State Attorney, for the respondent.

AGRANAT J. The question that arises in the appeal before us is as follows: what elements must the court find to have been proved before it may convict a person accused of manslaughter under section 212 of the Criminal Code Ordinance, 1936, who has been charged with causing the death of another by an unlawful omission. Section 217 of the Ordinance defines the expression "an unlawful omission" as an omission "amounting to culpable negligence to discharge a duty whether such omission is or is not accompanied by an intention to cause death or bodily harm". The problem before us therefore is confined to the question of the meaning to be assigned to the expression "culpable negligence to discharge a duty". However, even if the problem is limited in scope. the solution which the English courts have purported to find is far from clear.

The facts of the occurrence were detailed clearly by Judge Many in the court below, and we may therefore state them here shortly: -

The appellant, an architect who has experience in building both in this country and in other countries, was employed in January, 1950, by the Jewish Agency to direct the work

of repairing the roofs of abandoned houses in the village of Eshtaol. The appellant was required, in carrying out his task, to bring certain impermeable material known locally as "nari" to the site of the work for the purpose of executing the repairs referred to. On the morning of January 18, 1950, the appellant, therefore, accompanied by eight Yemenite workers and two Arabs who were experts in the repairing of roofs, travelled by truck to a point near Kilometre 31 on the Jerusalem-Tel Aviv highway. The appellant then ordered the workmen to dig the material in question from the side of a hill on the left side of the highway travelling towards Tel Aviv, to gather the material together and to load it on to the truck. The place where the workmen carried out the digging operations is described by the learned Judge as follows:

> "The road at this point was dug into the mountainand passed between two hillsides which were like steep walls. The wall on the left side of the highway opposite which the truck stood was about three meters high, and was about two and a half meters from the edge of the highway. This wall was not straight but arched: the bottom portion of it was dug curving inwards so that the upper portion formed a kind of roof which jutted outwards for a distance of a meter and a half. This stretched for a distance of ten meters parallel to the highway".

While the workmen were busy digging out the material and loading it onto the truck - for the third time - the witness Elkind, who at that time was the Inspector of Roads in the Public Works Department for the District of Jerusalem, and his assistant, the witness

Kalzon, happened to arrive at the spot. They passed under the overhanging rock in which some of the workmen were digging and when they realized the position that had been created as a result of the digging. they warned the appellant of the danger to all those who were there of a possible landfall. In order to stress more strongly the necessity of the immediate removal of the workmen they even told the appellant that when they themselves had to get material of this kind, they did not take it from that place because of the fear of a landfall, but dug it out from a place a few kilometers away. These two witnesses left the place immediately thereafter, and after about twenty minutes a landfall occurred in which two of the workers, Yihye Hazabi and Haim Levi, were killed.

According to the version of the prosecution - which was accepted by the Court in its judgment - the landfall took place at the same spot where the workmen were gathering the material while the witnesses Elkind and Kalzon happened to be there, from which it follows that the appellant paid no attention whatsoever to the warning which he had received.

In the light of the above facts and upon the basis of expert evidence which was led, the learned Judge reached the following conclusions:

> "(a) that the place where the digging operations were carried out was a dangerous place because of its structure, and that it was made more dangerous by these operations and the manner of their executions so as

to constitute a serious danger to the lives and safety of the workmen working there;

(b) that the appellant, by virtue of his duty and his presence at the place, was responsible for the safety of the workmen, and that it was his duty to take appropriate safety measures to eliminate all danger to life and limb:

(c) that the appellant was obliged, therefore, to erect supports to prevent the overhanging roof from collapsing:

(d) that the appellant was in any case obliged after he had been warned of the danger of a landfall, to instruct the workmen to stop working and to leave the place;

(e) finally, that the failure to take the safety measures referred to above constituted culpable negligence in the discharge of his duties by the appellant."

The Judge therefore found the appellant guilty of manslaughter under section 212 of the Ordinance in causing the death of the two workmen mentioned, and sentenced him to six months' imprisonment.

In terms of the definition of "an unlawful omission" quoted above from section 217, the liability of the accused flows from the existence of a specific duty imposed upon him, the breach of which on his part caused the death of the victims. Did the accused, then, owe a duty such as this? And, if so, of what did this duty consist? In my opinion the answer to this latter question may be found, in view of the facts of this case as described above, in the provisions of section 231 of the Ordinance which provides as follows: -

> "It is the duty of every person who... undertakes...to do any lawful act which is or may be dangerous to human life or health, to have reasonable skill and to use reasonable care in doing such act; and he is held to have caused any consequences which result to the life or health of any person by reason of any omission to observe or perform that duty".

There is no doubt that this provision applies also to the case before us: first, because the digging out of the material in the place described - having regard to its structure - was in the nature of a dangerous act, and, secondly, because the appellant was obliged - in the course of his duties as director of the work and in view of the fact that the workmen who were employed there were obliged to obey his instructions - to supervise the execution of the work in such a way that those workmen would come to no harm. It follows indeed from the evidence of the experts that a director of building works possessing normal competence would be alive to the danger of a landfall resulting from the carrying out of digging operations at the place in question, and would do one of two things: (a) either see to it that

the roof was properly supported or (b) refrain from continuing the digging operations at that place. Since the appellant did neither of these things he did not perform the duty described in section 231. More particularly did he fail to perform this duty since the imminent danger of a landfall had been made clear to him by the warning given by Elkind and Kalzon, and he failed to instruct the workmen to stop their work and leave the place.

Mrs. Ben-Porat, counsel for the respondent, stressed the requirement of "reasonable skill", which, in the definition cited above, is also mentioned as a legal duty - and she submitted that the appellant was guilty of a breach of this duty since he admitted in his evidence that he possessed no experience either in the repair of roofs or in digging operations and the gathering of material. In other words, according to the argument of counsel for the respondent, the very fact that the appellant undertook the duty of supervising the work of repairing roofs and the digging of the material necessary for this task, in itself constitutes negligence, and even culpable negligence. The Judge, however, did not base his conclusions on this evidence of the appellant, and it is doubtful whether he believed the evidence - although it was in the nature of an admission against the accused's interest. In view of the qualifications of the appellant as a building architect, and the period during which he had followed his profession, it is indeed difficult, if not impossible, to accept this evidence as true; it is reasonable to assume that the evidence was given in an effort to find an escape from criminal responsibility by claiming professional ignorance in this field.

Counsel for the appellant submitted that the learned Judge had not weighed the evidence brought by the defence that his client did instruct his workmen, after Elkind and his assistant had left the place, to move a distance of 9 to 10 meters in the direction of Jerusalem, and gather the material in a cavity there, the depth of which was less than that of the area in which they originally worked, and that the landfall actually occurred at this latter place. Had the learned Judge considered this version, Mr. Caspi emphasised, he would perhaps have drawn the conclusion that the appellant - as he stated in evidence - did certainly pay attention to the warning of Elkind and that, in giving his workmen the instruction referred to, he did exercise reasonable care.

Alternatively, counsel for the appellant submitted that the Judge overlooked the evidence of Elkind who said to the appellant that "he must clean the trench as soon as he leaves the place", a fact which shows that even in the opinion of the witness there was no immediate danger.

In my opinion there is no solid foundation for either of these submissions. In the first place the learned Judge held quite clearly that "after the above warning... the accused paid no regard to what was said by the witnesses Elkind and Kalzon - to leave the place - and did not stop the workmen from continuing to gather the material there". It follows from this that the Judge preferred to accept the evidence of those witnesses who testified for the prosecution and who stated clearly that the landfall occurred in the very place where the workmen had been working when those two persons happened to come there - than to believe the version given by the defence. However, even if the version of the defence had

been accepted, it would have no practical importance in regard to the final result of the case, in view of the proximity of the two places in which the cavities referred to were found.

In the second place - and here I deal with the other submission of counsel for the appellant - there is no comparison between the cleaning of the material out of the trench mentioned by Mr. Caspi - which was a matter of a few minutes - and continuing to collect the material which had been dug out of the actual cavity for twenty minutes after the warning had been given. From this it follows that Elkind's request in regard to the cleaning of the trench did not diminish the duty of the appellant to take immediate steps in order to prevent injury to the workmen under his supervision.

It follows from what I have just said that the appellant did not perform the duty which, in the circumstances of this case, was imposed upon him by section 231, and this omission on his part must therefore be regarded as the cause of the death of the two workmen. This conclusion, however, does not complete our enquiry, for we must still determine whether the omission of the appellant constitutes "culpable negligence" in the performance of the duty referred to.

It is my own opinion that the legislator did not quite accurately define in section 217 the expression "unlawful omission". It would have been wiser, in my view, to have used the word "neglect" - or some similar word - in place of the word "negligence" so that the definition would have read: "an unlawful omission is an omission amounting to culpable neglect to discharge a duty...". In order to clarify the basis of my opinion - and more particularly to understand fully the intention of the legislature in regard to the requirement of "culpable negligence (or neglect)" - I find it necessary to deal with the meaning of the

expression "negligence". This expression is used in three different senses, each of which serves its own purpose. It is necessary, therefore, to ascertain the meaning of the expression "negligence" according to the context in which it is used.

. (a) Experience has shown that in many cases a person causes bodily injury to another by an act or omission because he did not anticipate that his conduct would lead to this result, although an ordinary reasonable man in like circumstances would have anticipated such a result as a likely possibility. This mental state of not anticipating the result of one's conduct is therefore called "negligence", to distinguish it from "mens rea" which includes, as a basic element, just such an anticipation of the future.

I have already dealt elsewhere with this aspect of negligence (see *Ya'acobovitz v. The Attorney-General* (l) supra). It means therefore the existence of a negative state of affairs: the person who causes the damage does not anticipate the result of his conduct. It is clear that there is no room here for "degrees" or "standards" of negligence. What I wish to say is this: in all these cases there exists only one of two possibilities, either the person who causes the damage has considered the danger to be anticipated from his conduct, or he has not done so. If he has not done so then he is "negligent", but his failure to do so, that is his negligence, cannot be graded in any form since to a negative idea there are no degrees.

There is no doubt that the legislature did not intend to refer to "negligence" in this sense in section 217. The emphasis at the conclusion of the section that an omission shall also be unlawful when it is accompanied by an intention to cause death or bodily harm

contradicts the idea that the element of anticipation is to be excluded, for intention necessarily includes this element.

(b) The expression "negligence" is also used to indicate conduct which expresses itself in failure to observe an objective standard of care which is determined “according to the understanding and conduct of an ordinary reasonable man" *(Freiberg v. The Attorney-General* (2)). The question when a particular person owes a duty of care (a question with which we are not dealing at this stage) and whether he exercised reasonable care, are two separate and distinct questions, despite the factual connection which sometimes exists between them and which sometimes even obscures their boundaries. This is clear from the eve

nts described in *Pritzker* v. *Friedman* (3), in connection with which I made the following comment: -

> "The truth is that the respondent in fact took no safety measures when he moved or intended to move the car in reverse, and it is this fact which constitutes the reason... for the injury to the deceased. It is in this sense that there exists the "proximity" between the respondent's lack of care and the fatal result. The fact, however, that the respondent took no safety measures whatsoever and thereby caused the result described does not mean that he owed a duty of care towards the victim...".

The conception of "contributory negligence", which means no more than lack of care on the part of the victim without the existence of any duty of care on his part, may also serve as an example in the case before us.

Negligence in this sense, therefore, is nothing more than lack of care and is certainly reasonably susceptible of gradation. That is to say, when the discussion relates to a deviation from an objective norm of care the possibility exists - according to the circumstances of the case - of a serious deviation, an ordinary deviation, a negligible deviation and so forth (see Charlesworth on Negligence, second edition, p. 5). 'Gross negligence" says Glanville Williams (in his book "Criminal Law - The General Part", p. 88) means that the conduct of a person who causes harm has deviated widely from that of the reasonable man".

It is obvious that the expression 'negligence" in this sense has no place in the definition in section 217. “The expression negligence - (read: lack of care) - in the discharge of a duty" in respect of one of the types of duty spoken of in section 231, since such duty in itself demands conduct which reaches a certain standard of care, would be tautologous.

(c) There is also the civil wrong of negligence in section 50 of the Civil Wrongs Ordinance, 1944. This tort, as is well-known, contains three elements:

(1) a duty of care (2) breach of this duty (3) the causing of damage. It is clear that the second of these elements is identical with aspect (b) of negligence mentioned above. The civil wrong, however, which is aspect (c) above, is a conception embracing more elements for it also demands the existence of the first and third elements referred to. A person can be careless without committing a breach of any duty and also without causing damage to anyone. As I have already shown, however, a person cannot be liable for the payment of damages for negligence unless a duty of care was imposed upon him and he has caused damage to another.

This aspect - as well as the second aspect mentioned - differs from the first aspect in that it requires the court to conduct a purely objective investigation, that is to say, without ascertaining whether the defendant paid attention to the danger which could be anticipated from his conduct or not. Williams writes (ibid. page 82): "In the law of tort negligence has an objective meaning. It signifies a failure to reach the objective standard of the reasonable man, and does not involve any enquiry into the mentality of the defendant". He adds: "the same rule prevails in criminal law, in those spheres where negligence is recognised at all".

It is for this reason that it was held by Cheshin J. - who was of opinion that in enacting section 218 of the Ordinance the legislature merely introduced into the area of the criminal law the principles of negligence in English Civil Law - that for the purposes of the misdemeanour created by that section, it is only necessary to prove (a) the existence of a duty of care on the part of the accused towards his victim; (b) breach of that duty; (c) and

as a result of that breach, the causing of the death of the victim (see *Rotenstreich v. The Attorney-General* (4)).

This aspect too - including as it does the element of conduct amounting to a lack of reasonable care (the second aspect) - does not explain the use of the expression "negligence" in association with the words "negligence to discharge a duty" in section 217, for again it cannot be said that a man was negligent in the discharge of a duty not to be negligent.

It is for these reasons that I am of the opinion that the expression "neglect" would be more appropriate in the context referred to. I think that this is so not only in regard to the failure to discharge one of the duties of care mentioned in section 231 - and also section 232 - but also where it is intended to refer to the failure to discharge any of the duties mentioned in the remaining sections of Chapter XXIV of the Ordinance to which the legislature has attributed a definite specific content without reference to the standard of an ordinary reasonable man.

And if it be asked why the legislator used the expression "negligence" - of all expressions - in section 217, I would make bold to reply that he copied what seems to me to be a linguistic error in Stephen's Digest of the Criminal Law, in which the offence of manslaughter with which we are dealing is defined as "death caused by an omission amounting to culpable negligence to discharge a duty of care...", (ibid., section 268, eighth edition). Proof of this is furnished by the fact that the learned author was more careful in

the selection of his language when he dealt in detail with the offence and employs the expression "culpable neglect to perform a duty of care" (ibid. section 291), and that is also the case where he deals with failure to discharge one of the other types of duties described in chapter XXIV of our Ordinance (see ibid. section 294). If I am correct in my analysis up to this point of the definition in section 217, it is clear that the word culpable in that section should be descriptive of the term "neglect" instead of the term "negligence", This is Important for, in addition to ascertaining whether there exist the elements described in section 231 - that is to say, whether the accused failed to discharge the duty of care there mentioned, and thereby caused the death of the victim - the legislature imposed the introduction of an additional element, namely, that the conduct forming the subject of the charge of manslaughter must be culpable, and the meaning of the expression culpable may be different depending upon whether it relates to neglect or to negligence, as we shall see later. It follows that the problem which we have to solve may now be formulated as follows: what was the intention of the legislature in requiring that neglect to discharge the duty of care referred to shall be "culpable neglect".

We shall derive no assistance in solving this question from definitions in a dictionary. According to the dictionary there are two principal meanings of the word "culpable", one of which is "criminal' and the other of which is "blameworthy". Neither of these meanings throws any light on the question before us, as regards the first because the adjective "criminal' is of no assistance in the definition of criminal offence, and as to the second, because its content is too wide and insufficiently specific. I am compelled, therefore, to refer to English authorities, where we meet the difficulty that the English courts, in dealing

with manslaughter of the kind now under consideration, are undecided, emphasising in some cases the elements of "gross negligence" and in others the element of "recklessness". I have studied these judgments again and again and it is clear to me that the English judges are unanimous today in requiring conduct which amounts to "gross negligence" (that is to say, a serious divergence from ordinary careful conduct), and that they also tend to demand at least some degree of “recklessness”, subject to the one reservation that where recklessness in the sense of "indifference" is found to exist, they are satisfied with conduct which only amounts to ordinary negligence. It is necessary, however, to be careful when dealing with the principles laid down in these judgments. In the first place, the English courts were not bound by a statutory definition of manslaughter and certainly not by a definition which includes the adjective "culpable". On the contrary, they have in recent times desisted from using this expression altogether in this context. In the second place, these judgments were given under the English Criminal Law, which contained no offence parallel to that introduced by the local legislature in section 218. Bearing this reservation in mind, let me now consider the more important of these judgments among those I have mentioned, two of which (the cases of *Andrews v. Director of Public Prosecutions* (8) and *R. v. Bateman* (9)) were considered at length by my colleagues Cheshin and Silberg JJ., in the case of *Rotenstreich v. Attorney-General* (4) in connection with section 218, and by my colleague Landau J., in the case of *Herman* (5) in connection with section 243.

(a) In *Andrew's* case (8) Lord Atkin said:

> "Simple lack of care such as will constitute civil liability is not enough. For purposes of the criminal law there are degrees of negligence and a very high degree of negligence is required to be proved before the felony is established".

It is clear that the meaning of negligence in this context is careless conduct (the second aspect). It follows, therefore, that it is necessary to prove the existence of "gross negligence", that is to say, a serious divergence from the standard of conduct of a reasonable man.

But Lord Atkin went on to say that probably of all the epithets that can be applied "reckless" most nearly covers the case, since "it is difficult to visualise a case of death caused by 'reckless' driving in the connotation of that term in ordinary speech which would not justify a conviction of manslaughter". Nevertheless he found that the word "reckless" was not sufficiently all-embracing since it merely suggests an indifference to risk whereas "the accused may have appreciated the risk and intended to avoid it and yet shown such a high degree of negligence in the means adopted to avoid the risk as would justify a conviction". The state of mind, however, described in the second example mentioned by Lord Atkin is also included in the expression recklessness, as is pointed out by Dean in his article on Manslaughter and Dangerous Driving (see Law Quarterly Review, vol. 53, p. 382). A similar opinion was expressed by me in *Ya'acobovitz v. The Attorney General* (1) at p. 545. It follows from the English authority quoted that negligence in the sense of lack of reasonable care, when associated with recklessness in a form indicating indifference to

the consequences, is sufficient to lead to a conviction for manslaughter. On the other hand, where gross negligence exists it is necessary nevertheless that the accused should have foreseen the danger to be anticipated from his conduct.

(b) *R. v. Bateman* (9).

In this judgment, which still remains the most searching and valuable of all the judgments dealing with the problem now before us, Lord Hewart C. J. said the following (at page 10): -

> "If A has caused the death of B by alleged negligence, then, in order to establish civil liability, the plaintiff must prove (in addition to pecuniary loss caused by the death) that A owed a duty to B to take care, that that duty was not discharged, and that the default caused the death of B. To convict A of manslaughter, the prosecution must prove the three things above mentioned and must satisfy the jury in addition, that A's negligence amounted to a crime".

In this passage the expression "negligence" is used in accordance with the third aspect described above, and there is no clear test in the passage cited which tells us how it is to be determined whether the conduct of the accused amounts to manslaughter, as distinguished from civil negligence. The learned Lord Chief Justice, in continuing his judgment immediately after the passage cited where he employs the expression "negligence"

according to the second aspect mentioned above, touches on this subject. Thus he says - at page 11: -

> "In the civil action if it is proved that A fell short of the standard of reasonable care required by law, it matters not how far he fell short of that standard. The extent of his liability depends not on the degree of negligence but on the amount of damage done. In a criminal court, on the contrary, the amount and degree of negligence, are the determining question".

Here, therefore, there is a clear requirement that the conduct should amount to gross negligence, that is to say, to a serious divergence from the norm of care exercised by a reasonable man. It is clear, however, that the learned Lord Chief Justice was not satisfied with this requirement alone. for he added: -

> "There must be *mens rea"* (ibid.) thus :
>
> "...in order to establish criminal liability the facts must be such that, in the opinion of the jury, the negligence of the accused went beyond the mere matter of compensation between subjects and showed such disregard for the life and safety of others as to amount to a crime against the State..." (ibid.).

And again at page 16: -

> "...The issue they (the jury) have to try is not negligence or no negligence, but felony or no felony".

And to conclude: -

> "It is, in a sense, a question of degree, and it is for the jury to draw the line, but there is a difference in kind between the negligence which gives the right to compensation and the negligence which is a crime". (ibid.)

If we carefully examine the contents of each of these four passages, do we not find an unambiguous direction that before a man is convicted of manslaughter the existence of "recklessness" on his part and not merely gross negligence must be established? The first passage speaks for itself. The second passage emphasises the necessity of the negligence showing "disregard for the life and safety of others". This means, in the nature of things, that the *accused* must show (not that the negligence must show) a disregard of the danger to be anticipated for others from his conduct. The third passage indicates the seriousness of the offence of manslaughter, which hints, in my opinion, at the necessity for the existence of a certain degree of mens rea before the accused can be convicted, for this passes like a golden thread through almost all serious offences in English law. And, in conclusion, as was emphasised by Silberg J. in *Rotenstreich v. The Attorney-General* (4) (at page 75), the

fourth passage shows not only the difference in degree between civil negligence and the crime of manslaughter but also the qualitative difference, the meaning of which again is in a case of manslaughter the existence of recklessness on the part of the accused.

(c) *R. v. Bonnyman* (10).

This judgment was delivered in 1942, the court following the judgments in the two criminal appeals cited above, albeit with some confusion between the two tests, the one of degree and the qualitative test referred to. The judge in the trial court directed the jury that before they convict the accused they must find conduct amounting to "reckless negligence". In holding that this direction was well founded, Lord Caldecote said: -

> "There one finds the word "reckless" which has been now approved by the House of Lords as probably in all the circumstances the best epithet to use to help a jury to understand that a special or a high degree of negligence must be found by them before they can return a verdict of manslaughter" (ibid. pages 135-136).

The Chief Justice goes on to clarify his opinion by two examples, the first - mentioned by Cheshin J. in *Shvili v. The Attorney-General* (6) - is the example of a motor driver who, travelling at an excessive speed and turning a corner in too wide a radius, crossed a country road on which he had no right to drive, and came upon what he did not expect to meet - another vehicle coming towards him. In the second example a motorist was warned of the

presence of children in the road, but nevertheless drove at forty miles per hour because he was in a hurry and killed one of them. The learned Lord Chief Justice was of the opinion that the first driver should not be convicted of manslaughter while he thought that the second driver should be convicted of that offence.

It is my opinion that the justification for these conclusions lies in the first that in the circumstances which existed in both of them the element of gross negligence was present, but while in the second example such negligence was accompanied by recklessness, that element was absent in the first example cited.

(d) *Akerele v. The King* (11).

In this case the Privy Council quashed the conviction of a doctor who had caused the death of ten children all of whom were victims of an epidemic which broke out in the district in which they lived. The children had died after taking medicine which the doctor had prepared. It appeared that the accused had dissolved an excessive quantity of powder because his attention had been diverted, with the result that the medicine which he had prepared was too concentrated. The Privy Council quashed the conviction holding, on the one hand, that the trial judge had not made it clear that only one act was of importance - the act of preparing the solution - which was done when the accused's attention was diverted (the opposite of recklessness), and on the other hand, the judge had not considered the necessity of finding the existence of gross negligence (p. 264).

(e) It is also appropriate to mention the important modern judgment of Judge Burch in *State v. Custer* (15) in which the court considered the statutory offence of manslaughter, one of the elements of which is "culpable negligence". After reaching the conclusion that the offence is identical with that of manslaughter in the Common Law of England, and after reviewing the English decisions and literature on this subject, Judge Burch held that the prosecution was obliged to establish (a) conduct amounting to lack of reasonable care; (b) recklessness in the sense of "disregard of or indifference to the consequences in circumstances involving danger to the life or safety of others, although without the intention of causing damage" (page 920).

(f) These are the judicial pronouncements on this topic. Among contemporary writers however on both sides of the Atlantic, there is unanimity of opinion that a man should not be convicted of the crime of manslaughter unless there is mens rea in the sense again of recklessness (see Turner, Modern Approach to the Criminal Law, at pages 224-242, the principal portions of which have been copied into the latests edition of Russell, at pages 640-643, and Kenny, at pages 139-146; Williams, at pages 88-94; and Jerome Hall, General Principles of Criminal Law - chapter on "Recklessness and Negligence", at pages 215 ff.).

I shall now attempt to lay down the principle which emerges from our own law in the light of the authorities I have cited.

(l) It seems to me that the expression "culpable" - where it is used as an adjective to describe the noun "neglect", and where the question deals with neglect to perform one of the duties of care stated in section 231 (and 232) - embraces and may be interpreted to mean the requirements of both gross negligence and recklessness. It is true that this will not be so if we apply the adjective in question to the word "negligence" in its *second meaning,* since the only meaning which can then be given to the expression "culpable negligence" - again on the assumption that negligence means only lack of care - is: lack of care in a high degree, that is to say, gross negligence. As proof of this use of the word "culpable negligence" I point to Stephen (section 291, second paragraph), who says that "the question of what amount of negligence can be called culpable is one of degree... depending on the circumstances of each particular case". And this was also the use to which these words were put by the Mandatory Legislature when it laid down, in section 218 of the Ordinance, the element of lack of care which does not amount to "culpable negligence". This follows clearly from the interpretation of this element by Cheshin J. in *Rotenstreich v. The Attorney-General* (4), where he said (at page 84): -

> "In order to establish a charge of manslaughter by negligence in English law, it must be proved that the accused acted with negligence of an extremely high degree,with culpable negligence, .. .which takes no account of the life of man and pays no regard to the lives of the public,and is like a felony. This felony has its place in the law of this country within the offence stated in section 212 of the Criminal Code Ordinance. But there is a less serious form of negligence which does

> not amount to a felony since it is of a lesser degree. English law does not regard negligence of this kind as an offence at all and provides that it gives rise to civil liability alone, to the payment of damages. As against this the legislature, in enacting the Criminal Code Ordinance, 1936, regarded even a low degree of negligence such as this as a criminal offence -to use the language of the Ordinance: "want of precaution not amounting to culpable negligence."

As I have said, the enquiry as to the existence of the element stated in section 218 is an objective enquiry. The use of the words "culpable negligence" in that section, therefore, is correct, since their meaning is confined to lack of care of a high degree, that is to say, the minimum requirement demanded by the legislature in this section is conduct which will amount to lack of reasonable care. But the word "culpable" - when it is employed as an adjective to describe the expression "neglect" in the definition in section 217 - so that the neglect spoken of is culpable neglect in the performance of one of the duties of care mentioned - is susceptible of a wider interpretation so as to embrace both the requirement of negligence of a high degree and also the requirement of recklessness.

2. In the light of the dicta of Cheshin J. in *Rotenstreich's* case (4) and the English authorities which I have cited I accept - subject to one reservation which I shall deal with later - the requirement that in order to secure a conviction for manslaughter of the type here discussed, the prosecution must prove lack of care of a high degree, that is to say, "gross negligence".

3. The proof of the existence of this element is not sufficient, for the prosecution must also prove "recklessness" on the part of the accused person, that is to say, that he was aware of the danger to the lives or safety of others to be anticipated from his conduct. In reaching this conclusion I do not rely only upon the opinions of the learned judges and writers I have mentioned nor upon the ground that this discussion relates to an offence which carries with it the maximum penalty of life imprisonment so that the basic requirement of the criminal law, namely, mens rea, cannot be dispensed with. I also rely upon the ground that the expression "gross negligence" or "lack of care of a high degree" is not an exact expression, and its application depends, as is conceded by all, upon the particular circumstances of each case. What I wish to say is that in many cases the question of whether the conduct of the accused amounts to a serious divergence from the norm of reasonable care will be easily answered, but there is no doubt that in other cases - and there are many - the reply to the question of whether the conduct considered falls on one or other side of the dividing line between "ordinary lack of care" and "gross lack of care" will change according to the individual outlook of each particular judge whose duty it is to assess the circumstances of the case.

And that is not all. In *Herman v. The Attorney-General* (5), it was held by Landau J. that the degree of negligence required to justify a conviction under section 243[1)] must at

[1)] Criminal Code Ordinance, 1936, section 243:

Reckless and negligent acts

243. Any person who in a manner so rash or negligent: as to endanger human life or to be likely to cause harm to any other person:-
(a) drives a vehicle or rides on a public way; or
(b) navigates, or takes part in the navigation or working of, any vessel; or

least be greater than that which is required in a civil claim - that is to say, than that required under section 218.

In *Da*bhol*kar v. The King* (12) at pages 224-225, it was held more specifically by the Privy Council in considering a statutory provision identical in content with section 243, that that provision demands "a higher degree (of negligence) than the negligence which gives rise to a claim for compensation in a civil court, it is not of so high a degree as that which is necessary to constitute the offence of manslaughter." It follows that there are at least three different offences each of which requires its own minimum degree of negligence, so that the enquiry whether the conduct of an accused charged with the offence of manslaughter under section 212 reached the high degree required by that section or reached one of the other degrees of negligence, becomes even more complicated. This being the case, it is not possible that the legislature intended to hold an accused such as this responsible according to the quantitative test alone, and did not intend also to include the qualitative test, that is, the test of the existence of mans rea in the sense of recklessness.

(c) does any act with fire or any combustible matter or omits to take precautions against any probable danger from any animal in his possession; or
ession; or
(d) omits to take precautions against any probable danger from any animal in his possession; or
(e) gives medical or surgical treatment to any person whom he has undertaken to treat; or
(f) dispenses, supplies, sells, administers or gives away, any medicine or poisonous or dangerous matter; or
(g) does any act with respect to, or omits to take proper precautions against any probable danger from, any machinery of which he is solely or partly in charge ; or
(h) does any act with respect to, or omits to take proper precautions against any probable danger from, any explosive in his possession; is guilty of a misdemeanour.

Let me consider the following example. A is engaged in dynamiting rock in order to prepare a site for building. The site borders upon a road used by pedestrians. A few moments before the explosion A - in accordance with his experience in the past-warned those who happened to be in the vicinity to move away from the site to a distance of 50 meters, although the rules of care in such circumstances would demand a distance of 80 meters. As a result of the explosion B, who stood in the area between 50 and 80 meters from the site, was killed. Did A's negligence reach a high degree, or an ordinary degree, or somewhere between the two? Should he be convicted under section 212, or under section 218, or is the matter appropriate for the application of section 243(h)? If he is charged with manslaughter no one can say beforehand how the judge will decide the question whether the requirement of "gross negligence" has been fulfilled. Can we in this case dispense with the necessity of the proof of recklessness on A's part in order to lay the foundation for his conviction of so serious an offence?

4. What degree of recklessness is required to satisfy the qualitative test? My reply would be that it is not essential that the accused should foresee the actual fatal result. It is sufficient - in regard to causing death by breach of one of the duties of care set out in section 231 - that the accused foresaw as a likely possibility that his conduct would cause actual bodily harm. In other words, it is sufficient if the accused were aware of the fact that his act might involve danger to life or health. In short, if the accused showed disregard - to borrow the language of the Lord Chief Justice in *R. v. Baseman* (9) - for the *safety of* the individual, and not necessarily for his life, the necessary degree of recklessness is present.

5. The result is that the prosecution must establish both these requirements: (a) the existence of recklessness within the meaning discussed above and (b) gross negligence. I must add here the reservation of which I hinted in my previous remarks, and that is that where the negligence of the accused does not amount to gross negligence but his recklessness expresses itself in indifference to the consequences. it is possible and also right to convict him of manslaughter under section 212. This, it would seem, is the result of the judgments in England and America. However, as there is no need in the case before us to decide this question I leave it open.

6. Mrs. Ben-Porath, who - if I understood her arguments correctly- submitted that the element of mens rea was not essential to constitute the offence of manslaughter of the type with which we are concerned, relied upon the cases of *Senior* (13), and *Burdee* (14). The accused in each of these cases was convicted of manslaughter despite the absence of recklessness on his part. I shall not give a detailed analysis of these judgments. I would however point out (i) that in the first case cited the fatal consequence was caused by the breach of a duty of the type stated in section 229, that is to say, a type of duty with which we are not here concerned; (ii) that the second case cited dealt with the guilt of a person who took it upon himself to cure the victim by means which were devoid of any scientific basis and without ever having studied medicine, and of him it may be said (as was said in *Bateman's* case (9) supra, at page 13) that the necessary degree of mens rea was proved once it was held that he knew that he had no professional skill; (iii) that the reasoning in both these cases has been the subject of unfavourable criticism (see Glanville Williams, ibid., pages 90, 93).

In the result I summarise the principle as follows: The conviction of a person of the offence of manslaughter because of an omission which expresses itself in the breach of one of the duties of care mentioned in section 231 (or a similar duty) is only possible where it is proved (a) that the lack of care on the part of the accused amounted to "gross negligence" (that is to say, a *serious* divergence from the standard of reasonable care); (b) that the accused acted as he did out of "recklessness", that is to say, after foreseeing that his conduct was liable to endanger the life or person of another; (c) it is also possible that if the recklessness expresses itself in an approach of indifference there may be room to convict the accused of manslaughter even if the degree of recklessness on his part amounted only to lack of reasonable care.

Applying this principle to the facts before us there is no doubt that the conviction of the appellant of the offence attributed to him is correct. In the first place there is no escape from the conclusion that after having received the warning which was given to him the appellant knew of the Iikelihoood that a landfall would take place, and of the danger to the lives of his workmen that was to be anticipated. In the second place, the finding of the learned Judge that the appellant did not stop work in the opening in the rock even after he had been warned and did not instruct the workmen to leave the place, is in effect a finding of "gross negligence". This finding remains valid even if we assume the correctness of the version of the defence relating to the removal of the workmen from the first opening in the rock to the second.

In his argument before us Mr. Caspi emphasised the statement of Lord Porter in *Akerele v. The King* (11) in regard to "the care which should be taken before imputing criminal negligence to a professional man acting in the course of his profession". In my opinion this statement merely means that the demands upon a professional man should not be exaggerated, and that he should not be called upon to show the same brilliance as is shown by those who are outstanding in his profession. If, however, his conduct falls below the accepted standard - he then, as I have said, commits a breach of the duty contained in section 231. In our case, indeed, the evidence of the defence witness Axelrod was clear when he said: "In the fulfilment of his duty the accused should have seen to it that there existed safe conditions of work for the workmen under his supervision. There was no necessity for special technical experience in order to be aware of the danger that lurked in the place where the accident happened".

On the basis of what I have said, it is my opinion that the appeal should be dismissed in regard to both convictions.

GOITEIN J. I agree.

SUSSMAN J. I agree.

AGRANAT J. It is decided therefore to dismiss the appeal on both convictions. In regard to the appeal against the sentence we do not think that the punishment imposed by the Judge - six months' imprisonment - was excessive. It is nevertheless difficult for us to

confirm the sentence having regard to the fact that the occurrence which was the subject of the conviction took place in January, 1950; that the trial and conviction of the appellant took place in December 1951; and that the appeal was heard in this court only in January. 1954 (since the file was received by this court after many reminders only in September, 1953). The result is that the convictions and sentence have been hanging over the head of the appellant for over four years. It seems to us that in these special circumstances it would be appropriate to impose a heavy fine upon the appellant instead of the sentence of imprisonment. The difficulty about that is that our hands are tied by the law which limits the maximum fine in respect of each conviction to an amount of IL. 200.- (see *Sofrin v. The Attorney-General* (7)). Despite this unsatisfactory state of affairs, however, it is our opinion that it would not be right to send the appellant to prison, a solution which, in spite of the serious blow that that would be to the appellant, would, today in any event, not achieve any punitive purpose.

We have decided therefore - not that this decision should be regarded in any sense as a precedent in other cases - to vary the sentence and to impose upon the appellant a fine of IL. 400.- or. in default of payment, imprisonment for a period of three months.

Appeal against conviction dismissed but sentence varied.

Judgment given on April 29, 1954,