**71/80**

## SUPREME COURT OF VICTORIA — COURT OF CRIMINAL APPEAL

# *R v SHIELDS*

**Young CJ, Anderson and Brooking JJ**

**15 August 1980 — [1981] VicRp 68; [1981] VR 717; 2 A Crim R 237**

**CRIMINAL LAW – NEGLIGENTLY CAUSING GRIEVOUS BODILY INJURY – DEGREE OF NEGLIGENCE: *CRIMES ACT* 1958, S26.**

**The Legislature, in creating in 1862 the misdemeanour of causing grievous bodily injury to a person by negligently doing or omitting to do any act, was concerned with negligent acts or omissions such as would have made the offender guilty of manslaughter had death resulted from them. The act or omission must have taken place in circumstances which involved such a great falling short of the standard of care which a reasonable man would have exercised and which involved such a high risk that grievous bodily injury would follow that the act or omission merits punishment under the criminal law.**

**YOUNG CJ, ANDERSON and BROOKING JJ:** The applicant, Terrence John Shields, was presented in the County Court at Melbourne on four counts. By count 1 he was charged with culpable driving causing death, the form of culpability specified in the presentment being negligence (*Crimes Act* 1958, s318(2)(b)). By counts 2, 3 and 4 he was charged with negligently causing grievous bodily injury (*Crimes Act* 1958, s26), the alleged victim being a different person in the case of each of those three counts.

All four counts arose out of an incident when a motor car driven by the applicant struck four young men who were on the roadway, killing one of them and injuring the others. The jury brought in a verdict of not guilty on counts 1, 2 and 3 and guilty on count 4. The applicant now applies to this Court for leave to appeal against his conviction, the first of the grounds relied upon being that the learned Judge misdirected the jury as to the meaning of "negligently" in s26 of the *Crimes Act* 1958. By s26:

> "Whosoever by negligently doing or omitting to do any act causes grievous bodily injury to any other person, shall be guilty of a misdemeanour."

The learned Judge directed the jury that the negligence necessary to sustain the charges under s26 was less serious than the negligence necessary to sustain the charge of culpable driving and that the negligence required under s26 need not be gross but must be serious. In doing this His Honour relied upon the charge given by Lush J in *R v Bull* (unreported, 9th December 1969). Mr Redlich, who appeared for the applicant in this Court, submitted that this direction was erroneous, his primary submission being that the negligence required by s26 was the same as the negligence required to constitute manslaughter by negligence. The Solicitor-General put as the preferred view the submission that s26 requires only the negligence that will support an action for damages in the alternative he contended that the direction given in *Bull* was correct. *[The Court then traced the history of Section 26 and amongst other Acts referred to]* Act 25 Vict. No. 146 of the Parliament of Victoria, "An Act for the Punishment of any Person who shall by his negligence cause grievous bodily injury to any other Person." By s1 of that Act, which was passed in 1862:

> "If any person shall by negligently doing or omitting to do any act cause grievous bodily injury to any other person he shall be deemed guilty of a misdemeanor."

The preamble of Act No. 146 is illuminating:

> "Whereas a person who by his negligence causes the death of any other person is deemed guilty of a felony but there is in many cases no provision for the punishment of a person who by his negligence causes to another grievous bodily injury not resulting in death and whereas it is expedient that the law should be amended in this respect so that every person guilty of any such negligence as last aforesaid shall be liable to be punished as hereinafter mentioned ..."

Where the enactment is not expressed in unambiguous terms recourse may be had to the preamble to ascertain what was the occasion for the alteration of the law (*Bowtell v Goldsbrough Mort & Co Ltd* [1905] HCA 60; (1905) 3 CLR 444 at p451; 12 ALR 82). The preamble shows clearly that the intention of the Legislature, in creating this offence in 1862, was to impose criminal liability for causing grievous bodily injury in circumstances in which, had death resulted, the offender would by reason of his negligence have been guilty of manslaughter.

Even without the assistance of the preamble to the Victorian Act, we would have concluded that the Legislature, in creating in 1862 the misdemeanour of causing grievous bodily injury to a person by negligently doing or omitting to do any act, was concerned with negligent acts or omissions such as would have made the offender guilty of manslaughter had death resulted from them. *[After making reference to many reported cases concerning directions to juries on the meaning of "negligence" the Court continued]* ... Having regard to the preamble of the Act of 1862 and to the terms in which juries were at the time of that Act directed in cases of manslaughter by negligence, we think it clear that the section under consideration was concerned with negligence such as would constitute the crime of manslaughter.

Since the applicant was acquitted on the count of culpable driving, a new trial should not be ordered on the count of negligently causing grievous bodily injury to Butler. The conviction and sentence are quashed and a judgment and verdict of acquittal will be entered in respect of the count upon which the applicant was convicted.

We consider that we should not part with this case without giving further guidance to trial judges as to how juries should be directed concerning negligence where an offence against that section is charged. If the count under s26 is not joined with a count under s318, no difficulty arises: the direction should be based upon that which would be appropriate to a charge of manslaughter, the usual manslaughter direction being modified so as to reflect the circumstance that s26 is concerned with grievous bodily injury. Accordingly the jury may be directed that the act or omission must have taken place in circumstances which involved such a great falling short of the standard of care which a reasonable man would have exercised and which involved such a high risk that grievous bodily injury would follow that the act or omission merits punishment under the criminal law, compare *Nydam v R* [1977] VicRp 50; (1977) VR 430 at pp444-5. A comparison with civil negligence will also be helpful.

It is when a count under s26 is joined with a count under s318 specifying negligence that the trial judge is likely to experience difficulty. The form of direction to be given to a jury faced with a charge under s318 specifying negligence has been laid down by this Court in *R v Horvath* [1972] VicRp 60; (1972) VR 533 at p539, *R v Lucas* [1973] VicRp 68; (1973) VR 693 at p701 and *R v Stephenson* (1976) VR 376 at p383, and what was there laid down should be adhered to whether the count under s318 stands alone or is joined with a count under s26. How then, is the jury to be charged in relation to s26 once a direction has been given in the usual terms concerning negligence for the purpose of s318? It would tend to produce confusion if the direction concerning s26 were to the effect of that which we have formulated, based upon *Nydam v R* (*supra*). A jury might well inquire as to the difference between that formulation and the statutory formulation appearing in s318.

Negligence is defined in paragraph (b) of s318(2) as failure unjustifiably and to a gross degree to observe the standard of care which a reasonable man would have observed in all the circumstances of the case. In our opinion if negligence in this sense is established the negligence proved is of the same degree as that required to support a charge of manslaughter. Reference may be made, by way of example, to *Akerele v R* (1943) AC 255 at p262; [1943] 1 All ER 367; *Callaghan v R* [1952] HCA 55; (1952) 87 CLR 115 at p123; [1952] ALR 941; *Attorney-General for Ceylon v Perera* (1953) AC 200 at p205. Moreover, the word "unjustifiably" in paragraph (b) of s318(2) adds nothing: in this regard we agree with the tentative expression of opinion in *R v Lucas* (*supra*) at p701. Accordingly a jury faced with a count under s26 and a count specifying negligence under s318 may be told that the direction which they have been given of what constitutes negligence for the purposes of s318 will also serve to define negligence for the purposes of s26, and it is unnecessary and indeed undesirable to furnish the jury with any different definition of negligence for the purposes of s26.