

1949

State of Utah v. Joseph Dean Peterson : Brief of Respondent

Utah Supreme Court

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Recommended Citation

Brief of Respondent, *State v. Peterson*, No. 7286 (Utah Supreme Court, 1949).
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In the Supreme Court of the State of Utah

STATE OF UTAH,

Plaintiff and Respondent,

vs.

JOSEPH DEAN PETERSON,

Defendant and Appellant.

Case No. 7286

FILED

MAY 7 - 1911

RESPONDENT'S BRIEF

CLERK, SUPREME COURT, UT

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STATEMENT OF FACTS

Appellant's brief contains a statement of facts and therefore respondent refrains from making any independent presentation of the circumstances except in instances where respondent will refer to certain facts in presenting evidence and testimony which appellant failed to bring out in his brief.

Appellant assigned 33 assignments of error in his brief and organized his argument to cover said errors under four propositions. With this in mind, counsel for respondent will hereinafter answer such arguments with the same organization of subject matter.

ASSERTION NO. 1

THE EVIDENCE OF THE REVOCATION OF THE DEFENDANT'S DRIVER'S LICENSE WAS PROPERLY ADMITTED.

Appellant's contention is that there was no competent evidence introduced at the trial to connect the revocation of defendant's driver's license with the facts and circumstances surrounding the death of James Curwood. A careful review of the transcript of the testimony taken at the trial reveals that there was a definite chain of circumstances which connect defendant's driving after revocation of his license with the death of James Curwood. Briefly this testimony includes the following:

1. Bert Karen at T. 19 testified as follows concerning the truck which ran over the deceased James Curwood:

A. *Well, I see a car light coming down the road, but I didn't pay much attention to that, I just stepped up far enough so that I would be, nobody would see me, you know, as far as what I was doing, and the car came down and it pulled over on that side of the road over there to pass me, when I heard a thud or bump, and just in split seconds, you know, and by the time I got my brain to going and thinking a second, why I said, "God, he has hit or run over something." I don't know just exactly what I said but I said something like that.*

And I broke and run down the road and he was laying right square in the road. And I leaned right over him and put my hand on him like that (indicating).

And I thought I was there quite a little bit, but it might have been just seconds, I don't know for sure, but I just leaned over and put my hand on him and I thought he might gasp or something, but he just—I said, "God, he is dead." And I looked up and there was my brother. And my brother said, "Don't touch him. Let's get the law." And I was scared and dumfounded and I don't know what all, and I looked down the road and the car was still going. So I broke and ran back to the pickup. The thought I had was to get to Harry Au Miller's to the phone and get somebody there that could do something and know something about it. And that's exactly what I did.

The witness placed this occurrence at about 3:00 o'clock a. m.
(T.96)

2. When asked what kind of a vehicle it was he was testifying about, Bert Karen answered that it was "a truck with a box on". (T.22)

3. S. D. Hatch, the State Highway Patrolman, who had received a call from Bert Karen, stated that he was told over the phone by Mr. Karen "to watch for a large truck coming towards Vernal."

4. Concerning the first vehicle coming toward Vernal subsequent to this warning, S. D. Hatch testified as follows:

A. The first thing I observed about the car that came around the turn was that it had clearance lights and one weak light; the lefthand light was not very bright.

Q. Now when you say lefthand light, which one do you mean, lefthand as you were facing it, or what would it be?

A. *It would be the right hand as I was facing it and the lefthand from the rear of the truck.*

Q. *What light do you mean?*

A. *The headlight.*

Q. *And you say—you could see what else on the car?*

A. *I could see some clearance lights on the front, higher than the headlights and a little wider.*

Q. *Was the truck coming towards you?*

A. *Yes, sir.*

Q. *Then what did you do?*

A. *At about, oh, midway in the fourth block in Vernal Main street on U. S. 40 I turned the red light toward the approaching truck, jumped out with my flash light and waved the truck over to the side of the road.*

Q. *Whom did you find, if anyone, in the truck?*

A. *I found one person only in the truck, the defendant Joseph Dean Peterson. (T. 114-115).*

5. The state highway patrolman's first cursory examination of the defendant's truck at this time revealed that the left front fender, the left headlight and the left fog light were bent back and "kind of twisted off to the side." (T.121) Of course, there were numerous references to this condition of the truck later on in the trial together with photographs of the same which were introduced and admitted at the trial.

6. According to Mr. C. P. Allison, Highway Patrolman for the State of Colorado, the headlights on defendant's truck were normal and of equal intensity at 11:30 p.m. in Artesia, Colorado. (T.377)

7. During the course of the conversation between Hatch and the defendant at the time of the defendant's first arrival in Vernal, the following took place, according to the testimony of Mr. Hatch at 128:

A. The defendant, Mr. Peterson, hollered at me and came across the street to the car, and as I recall, as near as I recall his words, he asked me, he said, "Sam, was that man killed out there?" or something to that effect. To which I told him I didn't know for sure.

He replied, as near as I recall, "He hadn't better be. I hope he is not."

8. Concerning a later examination of defendant's truck at Vernal, in front of the police station, Mr. S. D. Hatch further testified as follows:

A. I observed on the cross members, frame, rear channel bolts that holds the springs to the rear axel, several places along from the driver's door, or the cab of the truck, back to the rear end, marks that had been brushed clean. There was kind of an oily dustry covering substance under the truck, covered with dust. This had been wiped clean at different angles along the frame and some on the cross members, some on the "U" bolts or the channel bolts on the rear. (T. 199).

Thus indicating that the under parts of the truck recently had come into contact with some object or person.

9. During the course of this examination of the truck, Patrolman Hatch discovered a tooth resting on top of the front axel. (T. 200, 203)

10. This tooth was later that day identified by Dr. Stevens

as a tooth from the mouth of the deceased, James Curwood.
(T. 344)

The above evidence certainly tends to connect the defendant with the driving of the vehicle that struck and ran over James Curwood. Though it may be circumstantial evidence, it is equally competent with direct evidence. 31 C.J.S. 907. In prosecutions for manslaughter it has been held that it is not error to admit in evidence circumstances from which the jury may infer the responsibility of the defendant for the death, and especially where such circumstances are consistent with the theory sought to be established by the prosecution. *People vs. Leutholz* (1929) 102 Cal. App. 493, 283 P. 292; *Heatley vs. State* (1929) 39 Ga. App. 550, 147 S. E. 784; *State vs. Flatman* (1931) 172 La. 620, 135 So. 3.

It was not until after practically all of the foregoing evidence was in that the State introduced evidence of the revocation of defendant's driver's license. Therefore, respondent submits that competent evidence had been offered and received upon which the jury could make a finding that the driving of the truck in question by the defendant had a causal connection with the injuring of James Curwood and his subsequent death.

The principal objection of counsel for appellant, however, seems to be that there is no causal connection between the fact that the defendant was driving after having had his license revoked and the death of James Curwood.

The lower court in ruling upon the defendant's objection to the introduction of evidence of the revocation of defendant's license, referred to the decision in *State of Utah vs. Lingman*,

97 Utah 180; 91 Pac. (2d) 457, and the appellant quotes at length from that opinion. Appellant contends that the lower court misinterpreted the law as set forth in the Lingman case. According to that opinion, among the unlawful acts which might be used as a basis for involuntary manslaughter, which are totally prohibited, are the driving without a license and the driving while under the influence of intoxicating liquor. The opinion states that if such totally prohibited acts are "done recklessly or with marked disregard for the safety of others, they are done with criminal negligence and if death results will sustain a charge of manslaughter under arm (a)." 97 Utah p. 200.

Respondent will admit that there are some unlawful acts, the commission of which would have no causal connection with an automobile accident resulting in death, such as the driving of an automobile by a person who was not supporting his wife and family or such as the carrying of concealed weapons, or the driving of an automobile without registration plates. However, one case has gone so far as to say that the carrying of liquor unlawfully was an act which approximately caused the death of the deceased in a manslaughter case. This is *People vs. Harris*, (1921) 214 Mich. 145, 182 N.W. 673; 16 A. L. R. 910, and we quote from the opinion as follows:

" * * * The trial court limited consideration of the proof that defendant was engaged in unlawful transportation of liquor to the question of whether or not his criminal conduct in that particular so affected his mind as to stimulate or induce wanton negligence in recklessly driving the car as claimed, thereby showing its causal connection with the killing.

"On that subject the court charged the jury as follows: 'I have already charged you that defendant, if found guilty, must be found guilty of gross and culpable negligence in striking and killing Miss Cusino, and that such gross and culpable negligence in driving and managing his automobile was the proximate cause of Miss Cusino's death . . . Gentlemen of the jury, there has been some testimony introduced here in reference to the defendant's automobile containing whisky. That testimony was admitted, not for the purpose of proving the guilt of the defendant on the charge here made against him, but was introduced as bearing upon the question of negligence. If the defendant knowingly had in his automobile a quantity of liquor which he was transporting from Toledo, Ohio, to Detroit, Michigan, he would be guilty of a felony under the laws of Michigan, and he would also be guilty of an offense under the laws of the United States. And while the fact, if you find it to be a fact, that he had whisky in his automobile is no evidence of his guilt, and is not to be considered in this light, yet you may consider it as bearing upon his negligence. It is the theory of the prosecution that the defendant was violating the statute referred to and transporting liquor illegally, and was hurrying through the county of Monroe with his illegal load of liquor. This theory of the prosecution must also be proven to the jury beyond a reasonable doubt before the jury can consider the carrying of the liquor as having had anything to do with the accident. In any event, and even though the defendant was knowingly carrying the liquor, he must be found to have driven his machine at the place of the accident with gross and culpable neglect, and that the accident occurred from such gross and culpable neglect.'

"Under the circumstances of this case proof that defendant was engaged in perpetrating a criminal act with the very agency by which he caused the accidental death was competent for the purpose to which the

court carefully limited it in a very plain and fair charge, fully protecting the rights of the accused.

"The conviction and judgment of sentence will stand affirmed."

This cited case demonstrates that there are unlawful acts which, though they may seem to be far afield, do have some causal connection with the death of the victim.

There is evidence in this case that the defendant was arrested for driving while under the influence of intoxicating liquor on June 8, 1947, and that his license, as a result, was subsequently revoked. The law provides that it shall be unlawful for anyone to drive a vehicle on the public highways while his license is revoked. 57-4-32 Utah Code Annotated 1943. Section 57-4-24 id. provides that one year after revocation an applicant may apply for a new license, but that the department shall not grant it until after an investigation of the character, abilities and habits of the driver indicates that it is *safe* for him to drive on the highways. It is plain that the legislature felt that for at least a year after revocation, a driver is not safe on the highways, at least, there would be a presumption to that effect. Therefore, to drive on the highway within that year is *prima facie* unsafe, reckless and in marked disregard for the safety of others. Surely there is no question but what unsafe driving has a causal connection to an accident occurring as a result of that driving. Driving after having had one's license revoked then, so far as this argument is concerned, is not comparable to the driving of a person who is not supporting his wife and family or who is carrying concealed weapons or who is driving without registra-

tion plates. Respondent contends that such an act is not only malum prohibitum but is also malum in se, just as is driving while under the influence of intoxicating liquor. And, under the decision of the Lingman case, it is not necessary that recklessness or a marked disregard for the safety of others be shown. Acts which are malum in se might be said to be in and of themselves reckless and in marked disregard for the safety of others.

Feeling that there is no particular difference between civil and criminal cases on this question, respondent cites the case of Parks vs. Pere Marquette Ry. Co (1946) 23 N.W. (2d) 196; 315 Mich. 38, in which case the deceased was killed in his own automobile by a collision with the defendant's train. The decedent's friend who was driving, had no operator's license. In a suit by the administrator against the defendant railroad, the lower court found against the administrator because of the contributory negligence of the driver. The appellate court upheld the trial court in refusing to instruct the jury that the fact the driver had no license was immaterial. On this point the court said:

"As bearing upon the question of contributory negligence, it was competent to disclose to the jury that the driver of decedent's automobile did not have a license since an unlicensed driver operating an automobile upon the highways of this state does so in direct violation of the statute. * * *

"The statute requiring chauffeurs to be licensed was designed to protect the public against incompetent operators of cars and the employment of an unlicensed chauffeur has, therefore, a bearing upon the exercise of care which the defendant owed toward the plaintiff in the operation of its car * * * *

"It is not an immaterial question like the failure to

have a car licensed, which can have no possible bearing upon the operation of the car. The violation of the ordinance, therefore, is prima facie evidence of the negligence to be submitted to the jury in connection with the other facts in the case to determine the ultimate liability * * * *."

Respondent submits that we have here a much stronger case than that of the driving without a license. In the case at bar the driver's license had been revoked for the reason that he was not a safe driver. Nevertheless he drove his truck against the compunction of the law, which makes it a misdemeanor for so doing. Respondent has no quarrel with appellant on the necessity of instructing the jury pertaining to proximate cause. But respondent takes the position that such requirement does not prohibit the introduction of evidence pertaining to facts and circumstances which might be found to have some causal connection with the ultimate result. Appellant cited several cases in his brief as illustrative of the rule that an unlawful act to be the basis of the crime of involuntary manslaughter must be the direct and proximate cause of the death of the deceased. It is interesting to note that in none of these cases is the decision based upon the improper admission of any incompetent evidence pertaining to unlawful acts charged as the basis of the crime of involuntary manslaughter. Most of them pertain to the question of whether or not the Judges' instructions were correct.

ASSERTION NO. 2

THE COURT PROPERLY ADMITTED EVIDENCE ON THE ISSUE OF DEFENDANT'S INTOXICATED CONDITION AT THE TIME OF THE ALLEGED CRIME.

The prohibition against driving while under the influence

of intoxicating liquor is for the purpose of making our highways safe. In fact the Legislature says that it is not safe to drive while in such condition. Anyone who does so, therefore, drives in marked disregard for the safety of others. This court has recently passed upon the question of whether or not causal connection must be directly shown in cases of involuntary manslaughter as the result of intoxication. *State vs. Busby*, 102 Utah 416, 131 Pac. 2d 510. The facts of that case are very similar to this case. There the deceased, a pedestrian, was struck at a crossing in Salt Lake City. A witness testified that he saw the defendant driving the car which struck the deceased, that he took the license number, followed the car, drove up alongside, called to the defendant and told him he had hit a man; whereupon the defendant grunted and drove on. There was considerable evidence of the defendant's having been drinking prior to the accident as well as to his intoxicated condition subsequent thereto. The defendant in attempting to avoid responsibility for the death of the deceased, set up an alibi as his defense. In affirming a conviction of involuntary manslaughter, the court uses the following language:

"Defendant contends (1) That the court erred in admitting in evidence testimony of defendant's intoxicated condition forty-five minutes after the accident and (2) that whether such testimony is admitted or not there is no evidence that the defendant was intoxicated at the time of the accident and (3) that even though there was such evidence and such is criminal negligence within the tests laid down by *State v. Lingman*, 97 Utah 180, 91 P 2d 457, there is no evidence that such criminal negligence caused the accident.

"As to the first proposition, defendant testified that

during the afternoon he had been drinking beer; that he had his last beer about 8 o'clock, and drank nothing after that time. The court admitted evidence that at 9:15 p.m., and for some hours thereafter defendant was drunk. The accident occurred at 8:30 p.m., a half hour after his last drink. On the record the admission of the evidence cannot be error. Where a man has been drinking off and on from 3 to 8 p.m., and is drunk at 9:15 p.m., the jury might, in the light of the evidence of his conduct currently with the accident, well consider those facts and find therefrom that at 8:30 the liquor had so far taken effect that the drinker was so under its influence as to be impaired in his faculties and reactions. In this case, the defendant's apparent unawareness that he hit a man and his unintelligible answer when his attention was called to it within a few moments after the accident, viewed in the light of the testimony that he had been drinking before the accident, are all circumstances from which the jury could conclude that he was intoxicated to the extent that his faculties for keeping a lookout and for control were appreciably impaired.

"There was sufficient basis in fact for the inference that Busby was in an intoxicated condition at the time he struck the decedent; there is not only a sufficient basis for the inference that he was so intoxicated that the control of his car was appreciably affected by it but a basis for the inference that he was so drunk that he did not know that he had struck the decedent or, knowing it, he had endeavored to escape by leaving the scene of the accident. If the jury accepted the latter, it would find a guilty knowledge which would itself be the basis for a conclusion, in connection with evidence that defendant was criminally negligent, that such negligence caused the accident. If the jury concluded that the defendant was in such condition that he did not know he had hit the decedent it is contended that

the accident might nevertheless have been caused solely by the negligence of the decedent. Even if the decedent was guilty of contributory negligence, if the defendant was guilty of criminal negligence as defined in the case of *State v. Lingman*, supra, and such negligence caused or contributed to the death, the fact that the decedent himself may have been guilty of negligence which also contributed, would not excuse the defendant. The evidence is sufficient to justify a conclusion of criminal negligence as defined in the case of *State v. Lingman*, supra. This being the case the jury was in the position of having to be satisfied that the negligence of the defendant contributed to the accident. No witness saw just how the accident happened. The witnesses in the car which followed Busby saw the decedent's hat fly off and later the body drop to the pavement but did not see the actual impact between the car and the decedent's body nor the conduct of the decedent immediately before the impact. The evidence was sufficient for the inference that the front of defendant's car struck the deceased. The glasses, presumably those of the decedent, were found on the crosswalk; hence the jury could have placed the decedent on the crosswalk when he was struck. There is a duty on the part of the driver to keep a lookout for pedestrians on the crosswalk even though such driver may have a green light. *State v. Adamson*, Utah, 125 P. 2d 429. There is a presumption of fact which is already a part of our common law, that a person acts for his own safety. To repeat: *THE JURY COULD INFER FROM THE EVIDENCE THAT DEFENDANT WAS UNDER THE INFLUENCE OF LIQUOR AT THE TIME OF THE IMPACT. IT COULD FURTHER INFER FROM HIS CONDUCT THAT HE WAS SO BADLY UNDER THE INFLUENCE OF LIQUOR THAT DRIVING IN THAT CONDITION WAS ITSELF A LACK OF DUE*

REGARD FOR THE SAFETY OF OTHERS AND THAT HE WAS, THEREFORE, GUILTY OF CRIMINAL NEGLIGENCE. So it could conclude from the presumption that a man acts¹ for his own safety, that the decedent did not step or jump in front of the car. This presumption should at least serve the purpose of warding off the effect of a legal situation in which a conjecture that the cause of the accident was the negligence of decedent, is equally balanced with a conjecture that such negligence, if it existed, was not a cause of the accident if indeed under the circumstances of this case we can say that without such presumption the mind could be in equipoise in that manner. Thus the presumption that a man acts with regard to his own safety having performed the office of *negating the conjecture that the decedent himself was the cause of the accident, the only other deduction is that it was caused by the defendant AND IF CAUSED THROUGH HIS CRIMINAL NEGLIGENCE WHICH AS WE HAVE SEEN COULD BE INFERRED*, the jury could find him guilty. If a man so blind as not to be able to see pedestrians on the crosswalk kills one, are we to say that the jury cannot infer that defendant's condition was the cause of the accident because the jury would have to speculate that the deceased may have negligently stepped in front of the car? The above conclusion follows from a finding that the defendant failed to see the pedestrian and was unaware that he had hit him, a fact situation from which, with the evidence of drinking and intoxication, it could be inferred that defendant drove with a marked disregard for the safety of others.

"If, on the other hand, the jury concluded that defendant did see the deceased but that he failed to stop and pick him up, it could infer from that a guilty knowledge that his own negligence had caused the accident. It is contended that his going on if he knew he had hit the deceased is equally compatible with a

feeling of fright even though he knew he had not caused the accident. But every reasonable hypothesis consistent with innocence does not require that we construe a man's illegal act of fleeing from the scene of the accident as a neutral factor in disclosing his guilty knowledge or the absence of it. *People v. Newland*, 15 Cal. 2d 678, 104 P 2d 778; *People v. Robinson*, 49 Cal. App. 2d 576, 122 P 2d 77. Public policy demands that a proper balance be struck between the protection which the law throws about an accused and the protection which the law attempts to afford society from the results of criminal conduct. *WE THINK A BASIS WAS LAID IN THE EVIDENCE FOR AN INFERENCE ON THE PART OF THE JURY THAT NOT ONLY WAS BUSBY CRIMINALLY NEGLIGENT IN DRIVING HIS CAR WHILE UNDER THE TELLING INFLUENCE OF LIQUOR BUT THAT SUCH NEGLIGENCE AT LEAST CONTRIBUTED TO THE ACCIDENT AS TO JUSTIFY A VERDICT OF INVOLUNTARY MANSLAUGHTER.* The judgment as affirmed."

It is submitted that we have very nearly the same situation in this case and that there was no error in admitting evidence of the defendant's intoxicated condition.

In the case of *State vs. Palmer* (1929) 147 S. E. 817; 197 N. C. 135; the court in holding that there had been no error on the part of the lower court in refusing to dismiss the involuntary manslaughter charge against the defendant who was driving while under the influence of intoxicating liquor, as well as violating other traffic laws, discusses the rule that responsibility for the death depends upon whether or not the unlawful act is *malum in se* or *malum prohibitum*. We quote from the court's opinion:

"It is, however, practically agreed, without regard to this distinction, that if the act is a violation of a statute intended and designed to prevent injury to the person, and is in itself dangerous and death ensues, the person violating the statute is guilty of manslaughter at least, and under some circumstances, of murder."

In a case singularly similar to the case at bar because parts of two teeth from decedent's mouth were discovered between the hood and fender of the defendant's automobile, the court in its opinion supports the theory that driving while under the influence of intoxicating liquor is culpable negligence. It is the case of *State vs. Kline*, (1926) 168 Minn. 263, 209 N.W. 881. The following is a quotation from the court's opinion:

"The first contention is that the evidence does not support the conviction. It is said the state produced no eyewitness of the tragedy; no one who saw how defendant was driving at the moment of the impact; negligence is never presumed; this may have been an unavoidable accident; or may have been due to the negligence of Stodola; and it was for the state to negative accidental injury and negligence of the victim. These contentions are fallacious. The state had no greater burden than to prove beyond a reasonable doubt that defendant was culpably negligent in driving his automobile against Stodola so as to cause his death. When that is done any other cause of the homicide is negated. Negligence of the victim would not be a defense. *State v. Peterson*, 153 Minn. 310, 190 N. W. 345. We do not mean to hold that, if the defense to the homicide was unavoidable accident, negligence of the victim might not be shown. But no such issue or defense was raised by the evidence. There can be no doubt of the sufficiency of the proof. Defendant was drunk. The law makes it a crime for a person in that condition to drive a car. The law also makes it the duty of the

driver of a car at night to have it lit so that objects in front upon the highway may be seen, and defines how pedestrians should be warned and safeguarded. Defendant either was so drunk that he could not see, or, if he saw, had not the ability to give warning or to avoid striking Stodola. There is evidence from which the jury could find that Stodola was walking west, north of the center line of the road, as defendant was coming east, driving south of the center line, and that within a few feet of Stodola defendant swerved abruptly to the north of the center line, striking him down with the front front light and fender of the automobile, and dragging him some 20 feet easterly.

"Next it is asserted that it was error to charge that to drive an automobile when intoxicated is a statutory offense, and that a violation of that law raises a presumption of negligence. Of course, as stated in *State v. Goldstone*, 144 Minn. 405, 175 N.W. 892, violation of a statutory provision regarding the operation of motor vehicles, such as found in sections 2705-2714, G.S. 1923, does not prove the existence of culpable negligence within the meaning of section 10078, G.S. 1923, defining the crime for which defendant was tried. But a violation of a statute intended for the protection of another, which proximately causes or results in injury to such other, must be held criminal negligence. And surely no one can read this record without coming to the conclusion that defendant's intoxication was the cause of the reckless manner in which the automobile was driven over Stodola. * * *

"Common sense, in the absence of any statute on the subject, suggests that for an intoxicated person to undertake to drive an automobile on a much traveled highway is gross or culpable negligence. And, if such negligence is shown to result in so driving as to strike down and kill a person traveling in the proper

place upon the highway, there should be no difficulty in finding that the driver's culpable negligence caused the homicide."

The question of whether or not evidence of intoxication was properly admitted was raised in *Jones vs. Commonwealth*, (1938) 273 Ky. 444, 116 S. W. (2d) 984, and at page 987 of 116 S.W. (2d) the court includes the following in its opinion:

"Certainly, there was no error in allowing the witness to tell the jury of his finding the empty jug, which smelled of liquor, in appellant's car.

As argued by appellee, the matter of drinking is necessarily an ingredient of recklessness, and this evidence bore upon the Commonwealth's effort to here show that the driver of the car, charged with reckless and wanton driving, was at the time intoxicated.

The evidence submitted was therefore both material and substantial as bearing on the question of whether or not the drinking induced and brought about appellant's charged reckless and wanton driving."

Also, in the case of *People vs. Townsend*, (1921) 214 Mich. 267, 183 N. W. 177, 16 A. L. R. 902, the court held that it was not necessary to set out in the information the specific acts which immediately brought about the death of the deceased because the act of driving while intoxicated was *malum in se*. We quote from the court's opinion on page 905 of 16 A. L. R.:

"Voluntary intoxication is an offense not only *malum prohibitum*, but *malum in se*., condemned as wrong in and of itself by very sense of common decency and good morals from the time that Noah in his drunkenness brought shame to his sons so that they backed

in to cover his nakedness, and Lot's daughters employed it for incestuous purposes. Drunkenness was declared wrong in and of itself, and punishment provided by the Israelites; by the ancient Chinese in an imperial edict about the year 1120 B. C., called "The Announcement About Drunkenness;" in ancient India by the ordinances of Manu. In Rome the censors turned drunken members out of the Senate and branded them with infamy. In England 300 years ago drunkenness was pilloried as the root and foundation of many sins, such as bloodshed, stabbing, murder, swearing, and such like, by the statute, 4 Jac. I. chap. 5, and the Ecclesiastical judges and officers were granted power to censure and punish offenders, and Bacon, in his Abridgment of the Common Law, lists drunkenness as one of the sins of heresy. In Massachusetts Bay Colony in 1633-34 one Robt Coles, for drunkenness, was disfranchised and sentenced to wear a red letter D upon a white background for a year. One of the acts passed at the first session of the General Assembly of the Northwest Territory and approved December 2, 1779, provided a penalty for being drunk in a public highway. Our statute Comp. Laws 1915 Sec. 7774, declares drunkards to be disorderly persons, and Sec. 15530 makes it an offense for any person to be drunk or intoxicated in any street or highway.

"Voluntary drunkenness in a public place was always a misdemeanor at common law; and it was always wrong morally and legally. It is malum in se. State v. Brown, 38 Kan. 390, 16 Pac. 259, 8 Am. Crim. Rep. 165.

"It is gross and culpable negligence for a drunken man to guide and operate an automobile upon a public highway, and one doing so and occasioning injuries to another, causing death, is guilty of manslaughter. It was unlawful for defendant to operate his auto-

mobile upon the public highway while he was intoxicated; made unlawful by statute, and wrong in and of itself, and it was criminal carelessness to do so, and he is guilty of manslaughter, provided the death of Agnes Thorne was a proximate result of his unlawful act. * * * .”

Among other involuntary manslaughter cases relegating the question of proximate cause as unimportant where the driver of the automobile is under the influence of intoxicating liquor is the case of *Keller vs. State* (1927) 155 Tenn. 633; 299 S. W. 803; 59 A. L. R. 685, which was cited by the appellant in his brief. The plaintiff in error was charged with driving an automobile while under the influence of an intoxicant and running over the deceased thereupon causing his death. There was a verdict of involuntary manslaughter and the plaintiff in error appealed, raising the question of the sufficiency of the evidence, and more particularly whether or not his intoxicated condition was a cause or occasion of the decedent's death. In affirming the conviction, the court said:

“We are of opinion that the driving of an automobile upon the public highways of the state by one ‘who is under the influence of an intoxicant,’ as the quoted words are interpreted in *Bostwick v. State*, supra, is an unlawful act *malum in se*. An automobile in the hands of a sober and skillful driver upon the highway, operated according to law, is an instrumentality fraught with danger to others, and careful handling of such an instrumentality is essential to the public safety. It is highly criminal and perilous to life and property for those under the influence of an intoxicant to such an extent ‘as to deprive them of their

sense of discretion,' to undertake to run such a machine on the thoroughfares.

Such being our view of the matter, we think the policy of the law forbids an investigation as to probable consequences, when the driver of an automobile 'under the influence of an intoxicant,' as heretofore defined runs his car over another person and kills him on the public highways of the state. There are many things that sober man, in the exercise of due care, would do to avoid such a collision, which would be entirely beyond an intoxicated driver. Fatalities are too numerous and conditions too serious to permit speculative inquiries in a case like the one before us.

There is nothing radical or novel in this conclusion. The efficient cause of this accident was the operation of this car by plaintiff in error while under the influence of an intoxicant. Matters urged by way of defense merely amount to a charge of contributory negligence on the part of deceased and the rule of contributory negligence does not apply in criminal cases. *Lauterbach v. State*, 132 Tenn. 603, 179 S. W. 130."

See also: *Whitman vs. State* (1929) 97 Fla. 988; 122 So. 567; *People vs. Kelly* (1925) 70 Cal. App. 519, 234 Pac. 110; *State vs. Monteith* (1933) 53 Ida. 30; 20 Pac. (2d) 1023; *State vs. Williams* (1931) 161 Miss. 406; 137 So. 106; and 99 A. L. R. 785, 6 and 7.

Appellant argues that there is not sufficient evidence to establish that he was under the influence of intoxicating liquor at the time of the alleged crime. It is submitted that there was sufficient evidence to go to the jury on that question and that it

was not necessary that the defendant be in a stupefied and drunken condition but that it was sufficient to show merely that he was under the influence of intoxicating liquor to any extent. Chapman vs. State (1930) 40 Ga. App. 725; 151 S. E. 410, supports this proposition and holds that:

"It is not necessary for the state to show that the accused was drunk; but it is sufficient if the state shows beyond a reasonable doubt that the accused was under the influence of some intoxicant as charged to any extent whatsoever, whether drunk or not."

ASSERTION NO. 3

THE COURT PROPERLY OVERRULED DEFENDANT'S MOTION TO DISMISS THE INFORMATION AND CORRECTLY REFUSED TO INSTRUCT THE JURY TO RETURN A VERDICT OF NOT GUILTY.

Appellant's argument as set forth in his Proposition No. 3, is based upon his premise that the evidence introduced pertaining to the revocation of defendant's driver's license and his driving while under the influence of intoxicating liquor was incompetent and, therefore, there was not sufficient evidence to go to the jury. Upon the argument set forth above in Assertion No. 2, respondent submits that the evidence was competent and was sufficient to go to the jury.

ASSERTION NO. 4

THE COURT PROPERLY AND CORRECTLY INSTRUCTED THE JURY AS TO THE ELEMENTS OF IN-

VOLUNTARY MANSLAUGHTER AND THE LAW PERTAINING THERETO.

We submit that respondent's argument in answer to appellant's propositions 1 and 2 sufficiently establishes that the court's instructions on driving while under the influence of intoxicating liquor and on driving when one's license has been revoked, were correct. Appellant admits at page 62 of his brief that Instructions 8 and 10 included the necessary "proximate cause" requirement.

In using the word "or" in place of the word "and" in the instructions pertaining to driving recklessly or in marked disregard for the safety of deceased, the court was absolutely proper, for that is the law. The very much cited Lingman case uses the same words in setting forth the law pertaining to criminal negligence and, as a matter of fact, that portion of the Lingman opinion quoted by the appellant in his brief, contains the definition of criminal negligence three times, and in all three definitions the word "or" is used. See appellant's brief page 50, line 24, page 53, line 4 and page 55, line 25.

Appellant contends that Instruction No. 15 was ambiguous and misleading insofar as it refers to the defendant's running into or against the deceased without qualifying such act as being done with criminal negligence. It is submitted that such does not constitute error for the reason that further on in the same Instruction No. 15, and also in Instructions 3 and 4, the jury is adequately directed that they must find beyond a reason-

able doubt, that the defedant ran into or against the deceased in a criminally, negligent manner.

CONCLUSION

A review of the law and authorities pertaining to the admission of evidence and the elements of the crime of involuntary manslaughter, and a review of the record reveals that the appellant was granted a fair, legal trial; that prejudicial errors did not occur; that there was sufficient competent evidence to go to the jury and that the jury was properly instructed in accordance with law and justice.

Respectfully submitted,

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