and so can the witnesses. If he fails to appear he would then be liable to be apprehended. This court sees no difficulty in this.

We think the information was properly before the judge and we answer his questions as: (1) Does not arise. (2) Does not arise in the particular instance of the case. (3) Again does not arise with particular reference to the facts of this case.

Freetown
Nov. 13,
1963.

Ames Ag.P.,
Cole Ag.C.J.,
Dove-Edwin
J.A.

[COURT OF APPEAL]

FODAY JIBAO . . . . . *Appellant*

v.

REGINA . . . . . *Respondent*

[Criminal Appeal 24/63]

Criminal Law—Homicide—Manslaughter—Causing death by dangerous driving—Road Traffic Act (*Cap.* 132, *Laws of Sierra Leone*, 1960), *ss.* 40 (1), 42—*Judge's direction to assessors—Objective test.*

While driving a land rover in Bo appellant knocked down and killed a boy of 12 years of age. He was charged with manslaughter, tried at Bo by a judge with the aid of assessors and found guilty of causing death by dangerous driving contrary to section 40 (1) of the Road Traffic Act. He appealed on the ground that "The appellant having been indicted for manslaughter in connection with the driving of a motor vehicle by him, it was the learned trial judge's duty to direct himself and the assessors in the terms laid down . . . in *Andrews* v. *D.P.P.* [1937] A.C. 576. . . . In failing to do so fully, the learned trial judge deprived the appellant of a chance of acquittal which was fairly open to him."

The passage referred to in the *Andrews* case was as follows: "It therefore would appear that in directing the jury in a case of manslaughter the judge should in the first instance charge them substantially in accordance with the general law, that is, requiring the high degree of negligence indicated in *Bateman* . . . and then explain that that degree of negligence is not necessarily the same as that which is required for the offence of dangerous driving, and then indicate to them the conditions under which they might acquit of manslaughter and convict of dangerous driving."

In his summing-up, the judge directed the assessors in accordance with the "objective test" as laid down in *Reg.* v. *MacBride* [1961] 3 All E.R. 6 and *Reg.* v. *Evans* [1962] 3 All E.R. 1086.

Held, dismissing the appeal, (1) that the judge's summing-up, taken as a whole, was not at variance with what was said in the *Andrews* case; and

(2) that appellant was not deprived of any opportunity of acquittal which was fairly open to him.

Cases referred to: *Andrews* v. *Director of Public Prosecutions* [1937] A.C. 576; 26 Cr.App.R. 34; [1937] 2 All E.R. 552; *Rex* v. *Bateman* (1925) 19 Cr.App.R. 8; *Reg.* v. *MacBride* [1962] 2 Q.B. 167; [1961] 3 All E.R. 6; *Reg.* v. *Evans* [1963] 1 Q.B. 412; [1962] 3 All E.R. 1086; *Hill* v. *Baxter* [1958] 1 Q.B. 277; [1958] 1 All E.R. 193; *Reg.* v. *Spurge* [1961] 2 Q.B. 205; [1961] 2 All E.R. 688.

Berthan Macaulay Q.C. for the appellant.
Kanju A. Daramy for the respondent.

AMES P. The appellant is a motor driver. In December of last year, while driving a land rover in Bo, he knocked down and killed a boy of 12 years of age. He was tried for manslaughter at Bo by a judge with the aid of assessors, and found guilty of causing death by dangerous driving contra section 40 (1) of the Road Traffic Act (Cap. 132), as can be done under the provisions of section 42 of the Act. This appeal is against that conviction.

There is a single ground of appeal, which is:

"The appellant, having been indicted for manslaughter in connection with the driving of a motor vehicle by him, it was the learned trial judge's duty to direct himself and the assessors in the terms laid down by the House of Lords in *Andrews* v. *D.P.P.* [1937] A.C. 576; 26 Cr.App.R. 34; [1937] 2 All E.R. 552. In failing to do so fully, the learned trial judge deprived the appellant of a chance of acquittal which was fairly open to him."

The relevant part of the judgment in the *Andrews* case is where Lord Atkin said (26 Cr.App.R. 49):

"I cannot think of anything worse for users of the road than the conception that no one could be convicted of dangerous driving unless his negligence was so great that if he had caused death he must have been convicted of manslaughter. It, therefore, would appear that in directing the jury in a case of manslaughter the judge should in the first instance charge them substantially in accordance with the general law, that is, requiring the high degree of negligence indicated in *Bateman*, and then explain that that degree of negligence is not necessarily the same as that which is required for the offence of dangerous driving, and then indicate to them the conditions under which they might acquit of manslaughter and convict of dangerous driving. A direction that all they had to consider was whether death was caused by dangerous driving within section 11 of the Road Traffic Act, 1930, and no more would, in my opinion, be a misdirection."

Mr. Berthan Macaulay, for the appellant, concedes that the learned trial judge's summing-up fulfilled the first and the last part of this dictum but complains that it did not fulfil the middle part, "and then explain that that degree of negligence is not necessarily the same as that which is required for the offence of dangerous driving." (*Andrews*' case was decided before the creation of the statutory offence of causing death by dangerous driving.)

The judge, when referring in his summing-up to the offence of causing death by dangerous driving, used what has been called the objective test and approved of in England by the Court of Criminal Appeal in *Reg.* v. *MacBride* [1962] 2 Q.B. 167 and *Reg.* v. *Evans* [1962] 3 All E.R. 1086. It is argued that by so doing he was refusing to consider the degree of negligence, or, indeed, whether or not there was any negligence at all. Submissions were made to the judge to the same effect and the judge made the following note:

"Mr. Berthan Macaulay, Q.C., submitted that in considering the alternative verdict of guilty of an offence under section 40 of Cap. 132 I should not apply the objective test laid down in *Reg.* v. *Evans* [1962] 3 All E.R. 1086 but should direct the assessors and myself that some lower degree of negligence than that applicable to manslaughter but greater than driving without due care and attention should be applied. He, however, conceded

that if there had been a separate count for an offence under section 40 the *Reg.* v. *Evans* test should be applied.

"With respect, I cannot agree with him. I think it would be making a nonsense of the law to apply different tests to the same offences depending upon whether the offences were being considered as alternatives or had been specifically charged.

"In directing the assessors on an alternative verdict by virtue of section 42 of Cap. 132 I have applied the objective test as I should have done if there had been a separate count."

The ingredients of the offence of causing death by dangerous driving are the same, whether a conviction for it is had when the charge is manslaughter or when the offence itself is charged. We agree that it would be strange if different tests had to be applied.

The questions which we have to decide are: (a) Was the learned judge's direction at variance with the dictum in the *Andrews'* case? (b) If so, was the appellant "deprived of a chance of acquittal which was fairly open to him"?

The judge's direction as to manslaughter followed the lines of *Bateman's Case* (1925) 19 Cr.App.R. 8. He then continued:

"If you are not satisfied that the accused was guilty of such gross negligence then you still have to consider whether the accused is guilty of an offence under section 40 of the Act. Read section 42 and section 40. Here I differ, with respect, from what Mr. Macaulay says and I have to direct you that the test to be applied is different from that to be applied to manslaughter. In judging the offence set out in section 40 you are not concerned with the accused's attitude of mind. You are concerned purely with the manner in which the vehicle was being driven."

It is the last two sentences which are the main reason for counsel's complaint.

In *Hill* v. *Baxter* [1958] 1 All E.R. 193, Lord Goddard C.J. said (it was quoted and approved in *Evans'* case):

"The first thing to be remembered is that the statute contains an absolute prohibition against driving dangerously or ignoring halt signs. No question of mens rea enters into the offence; it is no answer to a charge under these sections to say: 'I did not mean to drive dangerously' or 'I did not notice the halt sign'."

In *Spurge's Case* [1961] 2 Q.B. 205, it was explained that what to an onlooker might look like dangerous driving could be the result of "some sudden overwhelming misfortune suffered by the man at the wheel for which he is in no way to blame . . . he is not guilty" (of dangerous driving), "because in a sense . . . he was not driving at all" and so could not be driving dangerously. Thus in some cases of this offence one could be concerned with the question of the accused's mind: but no such issue existed in this case, and when a man is indeed driving, no question of a guilty mind enters into it.

The judge explained the "test to be applied," meaning, no doubt, the test which he suggested they should apply, in terms of the "objective test" of putting oneself down at the scene of the accident in one's mind's eye and asking oneself: "Had I seen this, should I have said without doubt: that is dangerous driving?"

Was this to apply a test which had nothing to do with negligence? In our opinion, it was not. It is a matter of language. What is careless driving but driving without care? And without care is negligently. Dangerous driving is likewise negligent, but more so. The very case of *Andrews* itself shows this: ". . . driving without due care and attention. This would apparently cover all degrees of negligence" (at p. 48). And "dangerous driving may be committed, though the negligence is not of such a degree as to amount to manslaughter if death ensued" (at p. 49). And elsewhere, too.

In our opinion, the learned judge's summing-up taken as a whole was not at variance with what was said in *Andrews'* case, and the appellant was not deprived of any opportunity of acquittal which was fairly open to him.

The appeal is dismissed.

[COURT OF APPEAL]

KILBERT TURAY . . . . . *Appellant*

v.

REGINA . . . . . *Respondent*

[Criminal Appeal 23/63]

Criminal Law—Homicide—Murder—Manslaughter—Malice aforethought.

Appellant and two others were tried at Makeni by a judge and assessors for murder. The two others were acquitted and appellant was convicted.

The evidence for the prosecution was that the deceased (Ansumana Kamara), who was an old man of between 60 and 70 years, had a "bush dispute" with appellant's nephew; that one Saturday night appellant "beat up" Kamara, dragged him to appellant's house and tied him to a fence; that he then took his matchet from his house and struck Kamara on the head; and that Kamara then escaped but died the next day. A doctor testified that the cause of death was "syncope resulting from traumatic shock" which could have been caused by the blow on the head or the beating.

The ground of appellant's appeal was that the conviction for murder was unreasonable and unwarranted and such as could not be supported by the evidence. His counsel argued that appellant should have been convicted of manslaughter instead of murder.

Held, dismissing the appeal, that the evidence that appellant intended to cause at least grievous bodily harm to the deceased warranted a finding of killing with malice aforethought.

Ulric Coker for the appellant.
Constant S. Davies for the respondent.

AMES AG.P. The appellant and two others were tried at Makeni by a judge with the aid of assessors for the murder of one Ansumana Kamara. The two others were acquitted at the close of the case for the prosecution, and the appellant was convicted at the end of the trial.

The ground of appeal is that the conviction for murder was unreasonable and unwarranted and such as cannot be supported by the evidence. Mr. Coker's argument for the appellant is not that the appellant should have been