1985 May 6

[TRIANTAFYLLIDES, P., PIKIS, KOURRIS, JJ.]

ANGELOS GAVALAS,

Appellant,

v.

THE POLICE,

Respondents.

(Criminal Appeal No. 4624).

Criminal Law—Causing death by want of precaution contrary to section 210 of the Criminal Code—Recklessness—Not an ingredient of the offence under the said section—Negligence as an element of the offence under the section—Degree of negligence required to constitute the offence—Whether the approach adopted in Rayas, *infra is still valid—Actus reus and mens rea of offence under section 210—Section 236 of the Criminal Code, Cap. 154 and section 8 of the Road Traffic Law 86/72.*

Words and Phrases—Want of precaution—Rash act—Careless act.

The appellant was found guilty by the District Court of Larnaca of the offence of causing death by want of precaution contrary to section 210 of the Criminal Code, Cap. 154.

The facts on which the charge was based are, shortly, that on the 7th May, 1984 the appellant, driving a lorry, knocked down Soteris Orphanides, who was riding a motorcycle, at the roundabout near the Stadium of Larnaca. As a result, Orphanides suffered grievous injuries that led to his death at the age of 22.

The deceased emerged on the roundabout riding his motorcycle from a direction to the right of the appellant and was, on account of that fact, coupled with his entry on the lane round the traffic island, entitled to priority of passage. This priority was denied him by the appellant who emerged on the periphery of the roundabout regardless of the presence of the motorcyclist with fatal consequences for the rider.

The appellant was sentenced to 3 months' imprisonment

and was disqualified from holding a driving licence for a period of 6 months. He appealed against both his conviction and the sentence imposed on him, but, after judgment had been reserved in this case, he withdrew the appeal against sentence.

Counsel for the appellant complained that the trial Judge in convicting the appellant held erroneously that recklessness was not a constituent element of the offence under section 210 of Cap. 154; he argued further that only if the appellant had been found guilty of recklessness in the sense in which recklessness has been explained in *R.* v. *Lawrence* [1981] 1 All E.R. 974, he could have been found guilty of the offence under section 210.

Held, dismissing the appeal:

(A) *Per Triantafyllides, P.* (i) That regarding the notion of recklessness as it was recently expounded in England it cannot be properly held that recklessness is always an essential element for a conviction under section 210 of Cap. 154; we must adhere to the requirement for a high degree of negligence which was found to be by our Case-law a constituent element of the offence. (ii) That the review of the revelant case-law shows that after a transient uncertainty caused by the case of *Nearchou* v. *The Police* (1965) 2 C.L.R. 34 the approach in the case of *Rayas* v. *The Police,* 19 C.L.R. 308 to the application of section 210 of Cap. 154 as entailing the existence of criminal negligence of a degree lower than that required to establish culpable negligence as an element of the offence of manslaughter but higher than that required to establish the commission of the offence of driving without due care and attention, which is equated to negligence in civil law, has come to be firmly established in the fabric of our case law. There is no reason to cause uncertainty once again by modifying the said approach. (iii) That on the basis of the facts of this case irrespective of whether or not the want of precaution manifested by the appellant can be described as recklessness, nevertheless, it amounted, in any event to the high degree of negligence required as aforesaid for a finding of guilt under section 210, especially since it was found by the trial Court and correctly so that the appellant in entering the roundabout consciously chose to ignore his duty to give priority to the traffic to his

right, thus displaying complete disregard for the safety of other road users.

(B) *Per Pikis, J.*: (i) That the appeal turns primarily on the mental element necessary to prove a charge of causing death by want of precaution contrary to section 210 of Cap. 154. The existence of the roundabout, in itself a factor of importance, coupled with the visibility in the direction of the deceased and the speed with which the appellant approached the scene, were all facts that could be legitimately taken into consideration in determining the appellant's state of mind with a view to deciding whether death resulted because of any lack of precaution on his part. (ii) That section 210 of Cap. 154 makes criminal the causing of death by want of precaution or by any rash or careless act; provided, as laid down in the same section that such negligence or lack of care need not be culpable, a concept importing recklessness. No one doubted the definition of recklessness furnished in *Lawrence*, supra. What is doubted is the relevance of *Lawrence* to the interpreration of section 210 which explicitly excludes recklessness as an element of the offence. Counsel submitted that its relevance lies in discerning the mental element that must accompany the intermediate degree of negligence required for the offence in accordance with *Rayas'* supra. For this submission to have any relevance to the present appeal, the Court should first be satisfied that there is room to interfere with the finding of the trial Court that the appellant took a conscious risk with the safety of the deceased. For such finding imports recklessness and would satisfy the most stringent interpretation of s. 210 respecting the degree of negligence required. On the evidence before the Court its findings were perfectly warranted. Nevertheless it is opportune to express our views on the interpretation of s. 210 hoping thereby to clear some of the mist that clouds its construction. (iii) That in *Rayas* supra the Court indentified three categories of negligence (see page 127, post). In *Nearchou*, supra the Court doubted the usefulness of laying down definite categories of negligence. *Nearchou* did not overrule *Rayas* except doubt the usefulness of reference to categories of negligence as an aid to the construction of otherwise unambiguous statutory provisions. At the root of the division of opinion is the identification of the mens rea necessary to substantiate a charge

under s.210. In *Rayas* reference was made to categories of negligence in order to determine the necessary mens rea under s. 210. In *Nearchou* they felt this exercise was unnecessary and perhaps unhelpful. I, too, think it is unnecessary in view of (a) the clarity with which the ingredients of the offence are defined in s.210; (b) the insight into the mental element necessary to sustain the offence furnished by the law, by the exclusion of culpable negligence (reckless conduct), and (c) the rule that mens rea, at least in criminal offences proper, is deemed to be part of the definition of the offence unless excluded by express words or necessary implication.

(iv) That the actus reus of the offence under section 210 consists of manifestations of negligent conduct that cause the death of a person. Negligence need not be the sole but a substantive cause in the chain of causation of death. The criterion for determining negligent conduct for the purpose of defining actus reus is objective. The mens rea of the offence consists of a state of mind propitious to the production of the acts constituting the actus reus. The test is subjective, but the Court may draw inferences indicative of knowledge and awareness from the surrounding circumstances in order to determine the state of the attention of the accused at the crucial time. Such evidence is not conclusive; opposing evidence may weaken or dissipate its presumptive effect. The law does not require a specific kind of intent in order to substantiate the offence of section 210. Once recklessness is specifically ruled out as an element of the offence there is no justification in principle to gloss the meaning of negligence in section 210 by reference to categories of negligence. The expressions "want of precaution" "rash act" or "careless act" are not terms of art. They are used in their ordinary meaning. The only qualification necessary is the one imported into the definition of every criminal offence proper (other than offences of strict liability); that the test is subjective and that accused will not be judged by the notional reactions of a reasonable person but by his own reactions in the light of the surrounding circumstances. On the other hand the standards of safety expected of him to observe are the same as those expected of every driver. It is in relation to the observance of this duty that he will be subjectively and not objectively judged.

(C) Per Kourris, J.: (i) That "recklessness" is neither an ingredient of the offence under section 210 nor an ingredient of the offence under section 236 of the Criminal Code, Cap. 154; the argument of counsel that the test of "recklessness" as applied in England in the case of *Lawrence,* supra is applicable to Cyprus is not valid. (ii) That on the evidence before him it was open to the trial Judge to find, as he did, "that the appellant consciously chose to ignore his duty to give way to traffic on his right, thus, displaying complete disregard for the safety of whoever was already going on the roundabout from his right". (iii) That the argument of counsel for the appellant that the latter's negligence was not sufficient in degree to support a conviction under section 210 but was only sufficient to support a conviction under section 8 of Law 86/72 for driving without due care and attention, cannot be accepted.

Considering that the degree of negligence is mostly a question of fact in each case and bearing in mind the facts of this particular case and particularly the point of impact, which is on the road by the roundabout indicating that the appellant failed to give priority to the victim who was riding a motor cycle from the right, although he saw that he was about to negotiate the roundabout, there was sufficient evidence of "want of precaution" or "careless act" to support a conviction under s. 210 of the Criminal Code and the trial Judge could not be justified in finding the appellant guilty only of the lesser offence of careless driving under s. 8 of the Motor Vehicles and Road Traffic Law, 1972 (Law 86/72).

Appeal dismissed.

Cases referred to:

Rayas v. *The Police,* 19 C.L.R. 308;

Georghiades v. *The Police,* (1981) 2 C.L.R. 155;

Charalambous v. *The Police* (1982) 2 C.L.R. 134;

Nearchou v. *The Police* (1965) 2 C.L.R. 34;

Kanna v. *The Police* (1968) 2 C.L.R. 29;

Spiritos v. *The Police* (1969) 2 C.L.R. 36;

Mc Leod v. *The Police* (1973) 2 C.L.R. 63;

Mylordis v. *The Police* (1981) 2 C.L.R. 219;

Stylianou v. *The Police* (1981) 2 C.L.R. 245;

Evripidou v. *The Police* (1969) 2 C.L.R. 71;

Ioannou v. *The Police* (1978) 2 C.L.R. 39;

The Republic v. *Demetriades* (1977) 3 C.L.R. 213;

Ioannides v. *The Republic* (1979) 3 C.L.R. 295;

R. v. *Lawrence* [1981] 1 All E.R. 974;

R. v. *Pigg* [1982] 2 All E.R. 591 and on Appeal [1983] 1 All E.R. 56;

R. v. *Boswell* [1984] 3 All E.R. 353;

Elliot v. *C. (a minor)* [1983] 2 All E.R. 1005;

R. v. *Symour* [1983] 2 All E.R. 1058;

R. v. *Caldwell* [1981] 1 All E.R. 961 (H.L.);

Dabholdkar v. *The King* [1948] A.C. 224;

Andrews v. *D.P.P.* [1937] 2 All E.R. 552;

Pentecost v. *London District Auditor* [1951] 2 K.B. 759;

Vakanas v. *Thomas and another* (1982) 1 C.L.R. 530;

Savvides v. *Messaritis and Others* (1985) 1 C.L.R. 261.

Appeal against conviction.

Appeal against conviction by Angelos Gavalas who was convicted on the 14th March, 1985 at the District Court of Larnaca (Criminal Case No. 9667/84) on one count of the offence of causing death by want of precaution contrary to section 210 of the Criminal Code, Cap. 154 and was sentenced by G. Nicolaou, D.J. to three months' imprisonment and was further disqualified from holding a driving licence for a period of six months.

A. Andreou, for the appellant.

Cl. Antoniades, Senior Counsel of the Republic, for the respondents.

The following judgments were read.

TRIANTAFYLLIDES P.: The appellant was, on the 19th February 1985, found guilty, by the District Court of Larnaca, of the offence of having caused, on the 7th May 1984, the death of the late Soteris Orphanides, through lack of precaution, contrary to section 210 of the Criminal

Code, Cap. 154, and, on the 14th March 1985, he was sentenced to three months' imprisonment and was disqualified from holding a driving licence for a period of six months.

He appealed against both his conviction and the sentence imposed on him, but, after judgment had been reserved in this case, he withdraw his appeal against sentence and this Court is no longer concerned with it.

Counsel for the appellant has complained that the trial Court in convicting his client held erroneously that recklessness was not a constituent element of the offence under section 210 of Cap. 154; and he went on to argue that only if the appellant had been found guilty of recklessness in the sense in which recklessness has been explained in *R. v. Lawrence*, [1981] 1 All E.R. 974, he could have been found guilty of the offence contrary to section 210 of Cap. 154.

The case of *Lawrence*, supra, was applied, inter alia, in *R.* v. *Pigg*, [1982] 2 All E.R. 591 (which was on appeal reversed on another point in *R.* v. *Pigg* [1983] 1 All E.R. 56), in *Elliot* v. *C. (a minor)*, [1983] 2 All E.R. 1005, and in *R.* v. *Seymour*, [1983] 2 All E.R. 1058.

Regarding the notion of recklessness as it was recently expounded in England in the just referred to case-law I do not think that it can be properly held that recklessness is always an essential element for a conviction under section 210 of Cap. 154; and I think that we must adhere to the requirement for a high degree of negligence which was found to be a necessary constituent element of the offence under section 210 of Cap. 154 on the basis of our case-law to which I will refer in this judgment.

It is useful to start by citing the case of *Rayas* v. *The Police*, 19 C.L.R. 308, where it was held, for the first time, that only criminal negligence which amounts to more than civil law negligence is punishable under section 204. Section 204 of the Criminal Code, Cap. 13, in the 1949 edition of the Laws of Cyprus, is now section 210 of the Criminal Code, Cap. 154, in the 1959 edition of the Laws of Cyprus. It was also held in the *Rayas* case that the criminal negligence required in order to establish liability under section 204—now section 210—is of a lesser degree than culpable negligence required to establish liability for the

offence of manslaughter, but of a higher degree than the negligence required to establish liability for the offence of driving without due care and attention, which was equated to negligence at civil law.

The *Rayas* case was referred to with approval recently in *Georghiades* v. *The Police*, (1981) 2 C.L.R. 155, 159, and in *Charalambous* v. *The Police*, (1982) 2 C.L.R. 134, 143.

It is true that in *Nearchou* v. *The Police*, (1965) 2 C.L.R. 34, the correctness of the ratio decidendi of the *Rayas* case was criticized by Vassiliades J.—as he then was—but it is to be noted that Josephides J., who delivered the first judgment in the *Nearchou* case with which Vassiliades J. agreed, referred to the *Rayas* case without expressly criticizing it and then stated the following (at p. 41): "Now it is always very difficult to lay down definite categories of negligence and I do not propose doing so in the present case. It is, I think, a question of fact in each case"; and in the same case Munir J. said the following (at p. 47): "With regard to the question of the application of the provisions of section 210 of the Criminal Code, Cap. 154, to the facts of this case, I also agree with the proposition that the facts of each case must be considered on their own merits...".

In *Kannas* v. *The Police*, (1968) 2 C.L.R. 29, the Supreme Court referred in its judgment to the above quoted view of Josephides J. in the *Nearchou* case, and proceeded to state that "...whether the negligence involved is such as to support a conviction under section 210 is always a question depending on the facts of each particlar case."

In *Spiritos* v. *The Police*, (1969) 2 C.L.R. 36, Vassiliades P. reiterated the view which he had expressed earlier in the *Nearchou* case and criticized once again the *Rayas* case, but Stavrinides J. (at p. 44) clearly followed the *Rayas* case, by referring to it regarding the interpretation of section 210 of Cap. 154, and L. Loizou J. said the following (at p. 45):

> "I am satisfied that upon these facts there was sufficient evidence of 'want of precaution' or 'careless act' to support a conviction under section 210 of the Criminal Code. Having come to this conclusion I consider it unnecessary to go into the now controversial decision in the *Rayas* case as it is of no consequence,

for the purposes of the present case, whether the decision in that case is or is not still good law."

In *McLeod* v. *The Police*, (1973) 2 C.L.R. 63, it was stated (at p. 65) that the Court was in agreement with the view of counsel appearing for the appellant as well as of counsel appearing for the Attorney-General of the Republic that the *Rayas* case, supra, was still good law and it was pointed out that the *Rayas* case had never been expressly overruled by the majority of the Judges of the Court which decided on appeal the *Nearchou* case, supra.

The *McLeod* case, was referred to with approval in the *Georghiades* case, supra (at p. 159), in *Mylordis* v. *The Police*, (1981) 2 C.L.R. 219, 223 and in *Stylianou* v. *The Police*, (1981) 2 C.L.R. 245, 249. There should, I think, be pointed out that the reference in the judgment in the *Mylordis* case (at p. 223) to *Evripidou* v. *The Police*, (1969) 2 C.L.R. 71, 76, and to the dictum in the judgment of Vassiliades P. in that case that the existence of want of precaution necessary to support a conviction under section 210 of Cap. 154 is mostly a question of fact in each particular case, cannot be fairly construed, when read in the context of the whole judgment in the *Mylordis* case, as having been intended to endorse the view expressed by Vassiliades P. in the *Nearchou* case, supra, regarding section 210 of Cap. 154.

It is to be noted, too, that in *Ioannou* v. *The Police*, (1978) 2 C.L.R. 39, 40, there was followed the approach laid down in the *Rayas* case, supra, of distinguishing the higher degree of negligence required for a conviction under section 210 of Cap. 154 from the less serious degree of negligence required for the offence of driving without due care and attention contrary to section 8 of the Motor Vehicles and Road Traffic Law, 1972 (Law 86/72), even though the *Rayas* case was not expressly referred to in the judgment in the *Ioannou* case; and it is, also, useful to bear in mind that in the *Charalambous* case, supra, Stylianides J. in delivering the judgment of the Court in that case reaffirmed (at p. 143) the view that for a conviction under section 8 of Law 86/72 the degree of negligence required to be established was that which is sufficient for civil liability for negligence.

In my opinion the above review of our case-law shows that after a transient uncertainty which was created by the

Nearchou case, supra, the approach in the *Rayas* case, supra, to the application of section 210 of Cap. 154, as entailing the existence of criminal negligence of a degree lower than that required to establish culpable negligence as an element of the offence of manslaughter but higher than that required to establish the commission of the offence of driving without due care and attention, which is equated to negligence in civil law, has come to be firmly established in the fabric of our case-law; and I see no adequate reason to cause uncertainty in our case-law once again by modifying in any way the approach laid down, as aforesaid, in the *Rayas* case, especially as most of the at the present time Judges of our Supreme Court have at various times in the past, in participating in the delivery of judgments in cases to which reference has already been made in this judgment, have subscribed, in one way or another, to the principles expounded in the *Rayas* case.

Moreover, in my opinion, there do not exist in the present instance the elements which might justify departure from the *Rayas* case by way of exception to the doctrine of judicial precedent, which was expounded in, inter alia, *The Republic* v. *Demetriades,* (1977) 3 C.L.R. 213 and *Ioannides* v. *The Republic,* (1979) 3 C.L.R. 295.

On the basis of the particular facts of this case I have no difficulty at all in holding that irrespective of whether or not the want of precaution manifested by the appellant could be described as recklessness in the sense of the *Lawrence* case, supra, nevertheless, it amounted, in any event, to the high degree of negligence required on the basis of our already referred to Cyprus case-law for a finding of guilt under section 210 of Cap. 154, especially since it was found by the trial Court, and correctly so, that the appellant in entering the roundabout where the accident took place consciously chose to ignore his duty to give way to the traffic to his right, thus displaying complete disregard for the safety of other road users, and, as a result, he knocked down with fatal consequences the deceased.

In the light of all the foregoing this appeal fails and has to be dismissed.

PIKIS J.: The appeal turns primarily on the mental element necessary to prove a charge under s. 210 of the Criminal Code (1), in particular, causing death by want of pre-

(1) Cap. 154.

caution. Appellant, driving a lorry, knocked down Soteris Orphanides who was riding his motorcycle on the circumference of the roundabout near the Stadium of Larnaca (2). As a result, Orphanides suffered grievous injuries that led to his premature death at the age of 22. The deceased emerged on the round-about riding his low-powered motorcycle from a direction to the right of the appellant and was, on account of that fact, coupled with his entry on the lane round the traffic island, entitled to priority of passage. This priority was denied him by the appellant who emerged on the periphery of the round-about regardless of the presence of the motorcyclist with fatal consequences for the rider.

Appellant made conflicting statements to the police as to his state of attention prior to the accident. In the first statement made shortly after the accident to the police who visited the scene, he stated that while he noticed the deceased approaching the round-about and notwithstanding the priority of passage accorded to the latter by the rule of the road, he nevertheless drove ahead in an effort to overtake him. Counsel for the appellant urged us, as he had seemingly urged the trial Judge, to disregard this statement on account of the state of shock under which his client laboured at the time. Understandably counsel was apprehensive about acceptance of the statement sensing its damning implications stemming from the calculated risk taken by the motorist with the safety of the deceased. In a subsequent written statement to the police appellant advanced a different story to the effect that he noticed the deceased at or just before the moment of collision, a version difficult to reconcile with the brake-marks left by his lorry suggesting he apprehended the presence of the deceased before the accident but the belated attempt to avoid him proved unsuccessful. For myself I fail to see in what way the second statement changes the picture as to the responsibility of the appellant for the collision. Approaching a round-about without proper regard to the rights of other users of the road and, more important still, the safety of those on the roundabout, is no less reprehensible than an attempt to overtake traffic users with a right to priority. In both cases the risk to the safety of users of the road is obvious and equally serious.

(2) ΓΣΖ

After thorough review of the evidence surrounding the occurrence of the accident, the learned trial Judge concluded: "...the accused consciously chose to ignore his duty to give way to traffic on his right thus displaying complete disregard for the safety of whoever was moving on the round-about from his right. I am satisfied and I find the conduct of the accused amounted to negligence of an extremely high degree which covers the requirements of s. 210 of the Criminal Code"(1). The Court found the appellant to be an unreliable witness and rejected his testimony as unworthy of credit. Moreover the Judge felt unable to attach any weight to anyone of the statements of the appellant either, having formed the opinion that appellant's sole motivation was to advance whatever story might improve his position. After careful analysis of the evidence before him, coming from prosecution witnesses, the trial Judge found the appellant had sufficient visibility in the direction of the deceased that enabled him to notice his approach and subsequent emergence on the round-about, a fact that should have put him on his guard as to the safety of the deceased. The existence of the round-about, in itself a factor of importance, coupled with the visibility in the direction of the deceased and the speed with which he approached the scene, were all facts that could be legitimately taken into consideration in determining his state of mind with a view to deciding whether death resulted because of any lack of precaution on his part. In the end the Court found the charge of causing death by want of precaution, contrary to s.210, proven and sentenced the appellant to three months' imprisonment and six months disqualification. Apart from the conviction, appellant challenged by his notice of appeal the sentence of imprisonment allegedly unwarranted on the authority of *R.* v. *Boswell*(1).

Appeal against conviction.

The negligence or lack of care or both, necessary to substantiate the offence under s. 210, is succinctly defined by law. The law makes criminal the causing of death by "want of precaution or by any rash or careless act"; provided, as laid down in the same section of the law, that such negli-

(1) Page 82 of the record, lines 23-30.
(1) [1984] 3 All E.R. 353.

gence or lack of care need not be culpable a concept importing, as it is universally acknowledged, recklessness. Notwithstanding the disavowal of recklessness as an element of the offence it was argued on the authority of *Christos Rayas* v. *The Police*(1), seen in the light of the decision of the House of Lords in *R.* v. *Lawrence(2)* that recklessness or a state of mind akin to recklessness is a constituent element of the offence under s. 210. The point directly in issue in *Lawrence* (supra) was the definition of recklessness, particularly the mens rea inherent in recklessness. Recklessness, they observed, is not a term of art and falls to be construed according to its ordinary connotation; it imports a mental state of indifference to obvious risks. Driving that poses obvious and serious risks of causing physical injury to any user of the road, constitutes an outwardly reckless act and composes the actus reus of the offence. Manifestation of recklessness is not conclusive as to the existence of recklessness; it must be accompanied by a mental state propitious to that end. Such state of mind exists, as explained in *Lawrence* and earlier in *R.* v. *Caldwell(3)*, whenever a driver faces the risk without giving any thought to it or having recognized its existence nevertheless takes the risk.

No one has doubted in these proceedings the definition of recklessness furnished in *Lawrence* or if I may say so with respect, the wisdom of the definition. What is doubted is the relevance of *Lawrence* to the interpretation of the offence under s. 210 that explicitly excludes recklessness as an element of the offence. Counsel for the appellant says its relevance lies in discerning the mental element that must accompany the intermediate degree of negligence required for the offence under s. 210 in accordance with *Rayas*. Despite the exclusion of culpable negligence by s. 210, a degree of recklessness is, nevertheless, necessary to sustain the offence, in the submission of counsel, a view reinforced by a comparison of the crime of the offences under s. 210 with the offences created by s. 236 of the Criminal Code and s. 7 of the Motor Vehicles and Road Traffic Law, 1972(4). For this submission to have any re-

(1) 19 C.L.R. 308.
(2) [1981] 1 All E.R. 974.
(3) [1981] 1 All E.R. 961 (H.L.).
(4) Law 86/72.

levance to the appeal, we must first be satisfied there is room to interfere with the finding of the trial Court that the appellant took a conscious risk with the safety of the deceased. For the finding of the Court imports recklessness and would satisfy the most stringent possible interpretation of s.210 respecting the degree of negligence required. To our mind there is no room whatever to interfere with the findings of the Court perfectly warranted on the evidence before it. Nevertheless it is opportune to express our views on the interpretation of s.210 hoping thereby to clear some of the mist that clouds its construction, particularly with regard to the element of negligence necessary to support a charge thereunder; especially as the matter was fully argued by both counsel.

Relying on the authority of *Dabholkar* v. *The King*(1) the Court identified in *Rayas* three categories of negligence, that is, (a) the severest, involving recklessness necessary to substantiate a charge of manslaughter, (b) an intermediate one requiring negligence of a kind other than recklessness necessary to substantiate a charge under s.210, and (c) a lesser one required to substatiate a charge of driving without due care and attention under s.8 of Law 86/72(2) indentical in kind to civil negligence. Dicta supporting the division of negligence into three categories appear in *Andrews* v. *The Director of Public Prosecutions* (3) referred to with approval in *Rayas*. By way of explanation of the degree of negligence necessary to support a charge under s.210 it was observed in *Rayas* that it is similar to the negligence required to substantiate a charge under s.236 of the Criminal Code making criminal a series of negligent acts. The offences created thereunder are headed "Criminal Recklessness and Negligence," although it must be noted that neither the word "reckless" nor any other word synonymous to it appear in the body of the law.

In *Nicolaos Nearchou* v. *The Police*(4) the Supreme Court doubted the usefulness of laying down definite categories of negligence, no doubt alluding to the ingredients of the different offences of negligence that bear the

(1) [1948] A.C. 224.
(2) Formerly s.6, Cap. 332.
(3) [1937] 2 All E.R. 552.
(4) (1965) 2 C.L.R. 35.

particular characteristics inscribed in separate enactments and human experience gained from the spread of road accidents. As I understand *Nearchou* it is undesirable to group offences of negligence in different categories and unprofitable to clog the otherwise plain definition of the crime under s.210 with the niceties of gradation of negligence. The factor of each case must guide the Court in determining whether death resulted from anyone of the prohibited acts, namely, want of care, a rash or a careless act or a combination of the three, provided always the act need not amount to culpable negligence, that is, involved reckless conduct. To my comprehension *Nearchou* did not overrule *Rayas*, except doubt the usefulness of reference to categories of negligence as an aid to the construction of otherwise unambiguous statutory provisions. In *Paula McLeod* v. *The Police*,(1) the Supreme Court without purporting to overrule *Nearchou* reverted to the categories of negligence adverted to in *Rayas*. But as it is made clear from the subsequent decision of the Supreme Court in *Mylordis* v. *The Police*,(2) the implications of the facts of each case are, in consonance with *Nearchou*, the all important consideration to the determination of a charge of causing death by want of precaution. Want of precaution, they emphasized, is mostly a question of fact, reaffirming the approach of the Supreme Court in *Charalambos Evripidou* v. *The Police*,(3) decided prior to *McLeod* and fashioned to the direction favoured in *Nearchou*. At the root of the division of opinion, as I perceive the controversy, is the identification of the mens rea necessary to substantiate a charge under s.210.

In *Rayas* reference was made to categories of negligence in order to determine the necessary mens rea under s.210. In *Nearchou* they felt this exercise was unnecessary and perhaps unhelpful. I, too, think it is unnecessary in view of (a) the clarity with which the ingredients of the offence are defined in s.210; (b) the insight into the mental element necessary to sustain the offence furnished by the law, by the exclusion of culpable negligence (reckless conduct), and (c) the rule that mens rea, at least in criminal offences

(1) (1973) 2 C.L.R. 63.
(2) (1981) 2 C.L.R. 219.
(3) (1969) 2 C.L.R. 71, 76.

proper, is deemed to be part of the definition of the offence unless excluded by express words or necessary implication.

In *Lawrence,* Lord Hailsham, L.C., reminded: "'In all indictable crime it is a general rule that there are objective factors of conduct which constitute the so-called *'actus reus,'* and a further guilty state of mind which constitutes the so-called 'mens rea' ". Although in Cyprus we do not have the distinction made by English legislation between indictable and non-indictable offences, the rule referred to by Lord Hailsham is one of universal application and applies to all offences other than offences of strict liability (mostly offences of a regulatory nature coding standards of conduct in public). Certainly the rule applies to all offences embodied in the Criminal Code in the absence of definite provision to the contrary. Therefore, mens rea is part of the offence under s.210. To define it, it is not, to my mind, necessary to compare it to any driving offence or any other offence for that matter under the Criminal Code.

Section 210, it must be stressed, is not exclusively designed to make criminal negligent driving but negligent conduct generally, causative of death. I appreciate that comparison with s.8 of Law 86/72 (formerly s.6 of Cap. 332) was intended to emphasize that negligent conduct under s.210 is not defined exclusively by objective standards. As indicated above this a sound appreciation of s.210. Whether negligence is determined exclusively on objective standards under s.8 of Law 86/72 is a matter that need not be gone into for the purpose of defining the mental element under s.210. Far less is it necessary to make comparisons with negligence at common law. There are no categories of negligence at common law. As Lynskey, J., observed in *Pentecost* v. *London District Auditor:*(1) "Epithets applied to negligence, so far as the common law is concerned, are really meaningless. Negligence is well known and well defined. A man is either guilty of negligence or he is not guilty of negligence. Gross negligence is not known to the English common law so far as civil proceedings are concerned." As repeated in *Vakanas* v. *Thomas and Another:*(2) "The standard to be observed is fixed impersonally and

(1) [1951] 2 K.B. 759, 764.
(2) (1982) 1 C.L.R. 530, 534.

universally in relation to the safety of other users of the road." It does, therefore, appear that negligent conduct, be it slight or grave, will likewise give rise to the tort of negligence.

In *Rayas* it was considered necessary to refer to common law negligence because of what was perceived to be the application of the doctrine of res ipsa loquitur in the determination of liability in road accidents. The doctrine has very limited application to road accidents as explained in *Charlesworth on Negligence* (1) on analysis of the caselaw, a proposition accepted as a valid statement of the law in the recent decision of *Savvides* v. *Messaritis and Others*(2).

Counsel referred us to the provisions of s. 7—Law 86/72—making criminal certain forms of dangerous driving and argued it is unlikely for the legislature to have envisaged a different mental element for the commission of the offences under s. 210 from that required by s. 7, considering that similar punishment is provided for under both sections of the law. I find the submission unsound. The two enactments punish different forms of conduct; similarity of sentence is no guide to go by in defining the mental element of an offence. Section 7 punishes dangerous driving irrespective of consequences, while s. 210 punishes negligent conduct causative of death. It is not uncommon for the legislature to define the gravity of the offence by reference to the potency of criminal conduct. To give but one example the offences of common assault (3) and assault occasioning actual bodily harm(4) carry a maximum punishment of one and three years' imprisonment respectively despite the fact that the element of mens rea is identical in the two offences.

Somewhat more relevant is comparison of the provisions of s. 210 with those of s. 236 of the Criminal Code, though to my mind unnecessary as the compass of the two enactments is different. However, contrary to the submission of

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(1) 5th Ed., paras. 985, 986.

(2) (1985) 1 C.L.R. 261.

(3) Section 242, Cap. 154.

(4) Section 243, Cap. 154.

counsel s. 236 dispite its heading and marginal note it does not, on consideration of its substantive provisions, require recklessness for proof of anyone of the offences created therein.

I shall end this judgment by an attempt to define the actus reus and mens rea of the offence under s. 210 of the Criminal Code. The actus reus consists of manifestations of negligent conduct that cause the death of a person. Negligence need not be the sole but a substantive cause in the chain of causation of death. The criterion for determining negligent conduct for the purpose of defining actus reus is objective. Does the conduct of the accused, objectively evaluated, amount to negligence? The evaluation is made by reference to a driver's duty to take appropriate precautions for the safety of other users of the road. Next mens rea. It consists of a state of mind propitious to the production of the acts constituting the actus reus. The first step in the process of determining the state of mind of the accused is elicitation of knowledge of the facts requiring caution on his part. The test is subjective, but as in every case the Court may draw relevant inferences indicative of knowledge and awareness from the surrounding circumstances in order to determine the state of attention of the accused at the crucial period of time. Very often manifestations of negligent conduct, coupled with disclosure of the surrounding circumstances and state of traffic at the material time, furnish strong indications of the state of mind of the accused at the particular time. But such evidence, it must be appreciated, is not conclusive; opposing evidence may weaken or dissipate the evidential or presumptive effect of such evidence. The law, it must be emphasized, does not require a specific kind of intent in order to substantiate the offence under s. 210. Negligence may take a variety of forms ranging from inattention to conscious disregard of the safety of others, as in this case. Once recklessness is specifically ruled out as an element of the offence, there is, with respect, no justification in principle to gloss the meaning of negligence in s. 210 by reference to categories of negligence. The expressions "want of precaution", "rash act" or "careless act", are not terms of art and are not used

in any sense other than their ordinary meaning. The only qualification necessary is the one imported into the definition of every criminal offence proper, that is, that the test is subjective and that accused will not be judged by the notional reactions of a reasonable person but by his own reactions in the light of the circumstances of the case. On the other hand, the standards of safety expected of him to observe are the same as those expected of every driver. It is in relation to the observance of this duty he will be subjectively and not objectively judged, whereupon the facts of the individual case as stressed in *Nearchou* become crucial for the determination of his criminal liability.

Appeal against sentence.

After we reserved judgment the appeal against sentence was abandoned, pursuant to the provisions of s. 142 of the Criminal Procedure Law, Cap. 155. It was a wise decision considering the gravity of the conduct of the appellant and its disasterous consequences.

KOURRIS J.: In this case the appellant was convicted of unintentionally causing death by want of precaution or by a careless act, not amounting to culpable negligence, contrary to s. 210 of the Criminal Code, and he was sentenced to three months' imprisonment. He was also disqualified from holding a driving licence for six months.

He has appealled against conviction and sentence but the appeal against sentence was abandonned and is no longer challenged.

The appeal, which was very ably argued before us by Mr. A. Andreou, was mainly based on three grounds:- a) that the trial Court erred in law in finding that the test for "recklessness", as applied in England in the case of *R.* v. *Lawrence* [1981] 1 All E.R. 974, is not applicable in Cyprus, b) the trial Court was wrong in law in finding that the negligence of the accused even if found by the trial Court, was of the type or degree which can support a conviction under s. 210 of the Criminal Code; and c) the find-

ings of the trial Court are against the weight of the evidence and/or the trial Judge ignored, without reason, substantial evidence given by prosecution witnesses indicating that the deceased was to be blamed for the accident.

With regard to the first ground of appeal, counsel submitted that on the authority of *Christos Rayas* v. *The Police,* 19 C.L.R. 308, "recklessness" is an element of the offence and he invited the Court to apply the concept of "recklessness" as expounded by the House of Lords in *R.* v. *Lawrence* (supra). He argued that in *Rayas* case (supra), they assimilated the mental element pertaining to the commission of the offence under s. 210 with that necessary to substantiate the offences under s. 236 of the Criminal Code under the heading "Criminal recklessness and negligence". He laid stress that if the law requires "recklessness" for the offences under s. 236, there is a similar ingredient in s. 210 taking into consideration that a similar sentence is prescribed by both sections of the Law.

Pausing here for a moment, I would like to state the provisions of s. 210 which reads as follows:-

> "Any person who by want of precaution or by any rash or careless act, not amounting to culpable negligence, unintentionally causes the death of another person is guilty of a misdemeanour and is liable to imprisonment for two years, or to a fine not exceeding one hundred pounds".

It would be observed that under the provisions of s. 236 "recklessness" is not an ingredient of the offence.

Section 236 reads as follows:-

> "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 any public way; or
>
> (b) .....

(c) . . . . . .

(d) . . . . . .

(e) . . . . . .

(f)

(g)

(h) . . . . . .

is guilty of a misdemeanour".

It is obvious that the expression "recklessness" is neither an ingredient of the offence under s.210 nor an ingredient of the offences mentioned under s. 236 of the Criminal Code and, with due respect to counsel for the appellant, I find his argument that the test for "recklessness," as applied in England in the case of *Lawrence* (supra), is applicable in Cyprus, is not valid.

I propose now to deal with the grounds of appeal under (b) and (c) above.

The facts on which the charge was based are, shortly, that on the 7th May, 1984, the appellant, whilst driving a small lorry of the type known as "pick-up", collided with a motor cyclist at the roundabout near the Stadium of Larnaca. As a result of this collision the motor cyclist received fatal injuries and died on the same day.

The learned trial Judge, in careful judgment, found that the collision had been caused through the negligence of the appellant and he reached the conclusion that the appellant's negligence amounted to that degree of negligence required under s. 210 of the Criminal Code, and proceeded to convict the appellant and imposed upon him a sentence of three months' imprisonment and six months' disqualification from holding a driving licence.

The learned trial Judge found the appellant an unreliable witness and felt unable to attach weight in any of his three statements or to accept the testimony on oath of the appellant and he relied on the evidence of the witnesses for the prosecution.

Before arriving at his conclusion that the appellant was guilty of the offence charged, he found "that the appellant consciously chose to ignore his duty to give way to traffic on his right, thus, displaying complete disregard for the safety of whoever was already going on the roundabout from his right".

I am satisfied that, on the evidence before him, it was open to him to make such a finding because a driver who is about to negotiate a roundabout, must keep an especially careful lookout and the appellant failed to do so in the circumstances of this case.

Learned counsel for the appellant referred us to the case of *Rayas* v. *The Police,* 19 C.L.R. 308 and particularly to a passage in the judgment at p. 311, regarding the degree and nature of the negligence required according to that case, to support a charge under s.210 and he argued that even if the victim's death was caused by the appellant, the latter's negligence in this particular case same as in *Rayas* case, was not sufficient in degree to support a conviction, but, he contended that the appellant could be found guilty of the offence of driving without due care and attention under s. 8 of the Motor Vehicles and Road Traffic Law, 1972 (Law 86/72).

Considering that the degree of negligence is mostly a question of fact in each case and bearing in mind the facts of this particular case and particularly the point of impact, which is on the road by the roundabout indicating that the appellant failed to give priority to the victim who was riding a motor cycle from the right, although he saw that he was about to negotiate the roundabout, I think that there was sufficient evidence of "want of precaution" or "careless act" to support a conviction under s.210 of the Criminal Code and that the trial Judge could not be justi-

fied in finding the appellant guilty only of the lesser offence of careless driving under s. 8 of the Motor Vehicles and Road Traffic Law, 1972 (Law 86/72).

For these reasons I am disposed to dismiss the appeal.

Appeal dismissed. 5