J. KAMARA BURPHY, Appellant, *v.* THE BUREAU OF TRAFFIC, Appellee.

APPEAL FROM CIRCUIT COURT B, FIRST JUDICIAL CIRCUIT, MONTSERRADO COUNTY.

Argued March 16, 1976. Decided April 23, 1976.

1. Where the witnesses for the prosecution contradict each other, a doubt results which operates in favor of the accused.
2. An accused enters upon his trial on the presumption of his innocence until his guilt is proved beyond a reasonable doubt.
3. Something more than mere negligence in the operation of a motor vehicle is necessary to constitute the offense of reckless driving, and a willful disregard of the consequences is required.
4. A statutory requirement that automobiles display a red tail light when "operated or driven" on any highway at night, applies to an automobile parked on a highway.

The appellant was charged with reckless driving when he allegedly struck the rear of a parked motor vehicle. He was tried in the Traffic Court and found guilty. Upon appeal to the Circuit Court the case was heard *de novo* and final judgment was rendered affirming the lower court's judgment. Appellant took an appeal therefrom to the Supreme Court, primarily contending that the evidence at the hearing in the Circuit Court failed to establish his guilt.

The Supreme Court examined the evidence and found it contradictory and evasive. Therefore, the Court held that the prosecution had failed to establish the guilt of the appellant beyond a reasonable doubt. The judgment was *reversed* and the appellant ordered *discharged* without day.

M. Fahnbulleh Jones and appellant *pro se* for appellant. *Samuel E. H. Pelham* for appellee.

MR. JUSTICE HORACE delivered the opinion of the Court.

On December 13, 1974, an accident occurred in Sinkor, in the City of Monrovia, involving Car No. P-763, owned and operated by Dr. Mike B. Isundu, the private prosecutor in this action, and car No. P-9521, owned and operated by J. Kamara Burphy, appellant in these proceedings. The police charge sheet resulting from an investigation conducted by Traffic Officer Arthur S. Morris, badge No. 875, of the National Police Force, is set forth below.

"Details of Complaint

"On the above date and time mentioned (that is December 13, 1974, at 3:45 A.M.), an accident occurred on Tubman Blvd. involving a 1974 Lada car bearing license plate No. P-9521, owned and operated by J. Kamara Burphy, of Bushrod Island, and a 1973 Peugeot car bearing license plate No. P-763, owned and operated by Dr. Mike B. Isundu of (155) Capital By-pass, Monrovia.

"Police investigation on the scene disclosed that P-763 was properly parked on Tubman Blvd., while the operator of P-9521 was travelling from East to West on Tubman Blvd. and lost control when he got near P-763. As a result P-9521 recklessly skidded 20 feet, hitting P-763 and threw it 45 feet on the sidewalk. Both cars were badly damaged. Defendant J. Kamara Burphy sustained serious injuries, and is now hospitalized at the J.F.K. Medical Center and he is, therefore, held responsible for the accident. He is, therefore, charged accordingly.

"[Sgd.] Patrolman ARTHUR S. MORRIS,
Commander in Charge,
3rd Shift. B/875."

As a result of the foregoing, Mr. Burphy was charged with reckless driving resulting in property damage and injury. Because of what will be said later in this opinion, we draw attention to the time the alleged accident took place, 3:45 A.M., and the distance the other car was

thrown on the sidewalk as a result of the impact of P-9521 : 45 feet.

Apparently, due to the fact that J. Kamara Burphy was seriously injured, he was not arrested until January 27, 1975.

The case was heard by the Traffic Court for Monrovia, Montserrado County, and on February 21, 1975, Burphy was adjudged guilty of the charge of reckless driving resulting in property damage and injury, and sentenced to pay a fine of $75, and upon failure to pay the fine to be imprisoned for ninety days. Defendant Burphy took exception to the judgment of the Traffic Court and prayed an appeal to Circuit Court B for the First Judicial Circuit, Criminal Assizes, Montserrado County, which was granted.

After some delay, due mainly to appellant's failure to respond to several assignments, which we declare improper on his part, the case was heard *de novo* by the said Circuit Court, Judge Napoleon B. Thorpe presiding. After hearing evidence on both sides, final judgment was rendered against appellant affirming the judgment of the Traffic Court. Burphy excepted to the final judgment and announced an appeal to the Supreme Court, which was granted. The case is, therefore, before us on a three-count bill of exceptions.

The evidence adduced at the trial revealed the following:

The first witness for the prosecution was Patrolman Arthur S. Morris, who testified that at 7:00 P.M., on December 13, 1974, he received a telephone call at police headquarters reporting the occurrence of an accident in Sinkor, and he arrived on the scene at 8:30 P.M. He was informed by bystanders that the two drivers were at the J.F.K. Hospital. After waiting about twenty minutes the driver of P-763 arrived, and the officer started the investigation. We set forth his testimony on the investigation.

"On December 13, 1974, I received a telephone call that an accident had occurred in Sinkor. I left the Headquarters about 7:00 P.M. and got on the scene at 8:30 P.M. I was informed by bystanders that the two drivers were at J.F.K. Hospital. I waited for the two drivers for 20 minutes. The operator of P-763 came and I started my investigation. My investigation revealed that the two vehicles were travelling in the same direction from East to West, with vehicle P-763 leading vehicle P-9521, in the rear following. P-763 stopped to discharge a passenger, and the operator of P-9521, who was in the rear, ran into the rear of P-763. My investigation further revealed that the rear end of P-763 was damaged and the front of P-9521 was damaged, including the headlight, radiator, and other parts. The driver of P-763 was in the hospital when I made the investigation. After investigation at the accident scene, I went to the hospital to interrogate the driver, J. Kamara Burphy, owner of vehicle P-9521. I showed him the diagram of the accident and asked him to explain his side of the case. He said nothing to me that night and the doctor told me not to bother the patient. So I left. The following morning I went back to the hospital, met operator Burphy in bed, and he was able to talk at that time. I asked Burphy to explain to me how the accident happened. He explained to me that he was travelling from Paynesville to Monrovia. When he got to the point where vehicle P-763 was parked, he lost control and ran into the rear of P-763, since it was wrongly parked. Upon this, I informed Burphy that after his discharge from the hospital, he must come to Police Headquarters at Monrovia, because I will hold him for the accident. That is all I know."

On cross-examination he stated that "according to my investigation, defendant was not closely behind P-763. The distance between them was almost a block, about

three hundred feet. The operator of P-763 parked properly and after about three or four minutes, the operator of P-9521 ran into the rear of P-763. I got this information from the skid marks of vehicle P-9521."

According to the charge sheet, P-9521 skidded 20 feet before hitting P-763. It is interesting to note that there is no showing in the record how this witness, who was not present when the accident occurred, arrived at the facts stated in his testimony; for instance, that P-763 was properly parked; that P-9521 which hit P-763 was a block behind P-763; that three or four minutes after P-763 was parked, P-9521 hit it. According to him he got all his information from the skid marks of P-9521. This is unusual indeed. But what is more surprising, is how this witness got to the scene at 8:30 P.M. after receiving a telephone call of the accident, to investigate an accident that, according to his own charge sheet, occurred at 3:45 A.M. of December 13, 1974. Nor is there any testimony anywhere in the record to show that P-763 was thrown 45 feet onto the sidewalk.

When asked who was present when Burphy confessed to him in the hospital that he lost control and hit car No. P-763, he replied that the doctor who was attending Mr. Burphy and the driver of the other car involved in the accident, Dr. Isundu, were also present.

The next witness to testify for the prosecution was Dr. Mike B. Isundu, the private prosecutor. His testimony is also reported.

> "In the early hour of December 13, 1974, I was driving my car from J.F.K. Hospital to Monrovia Town on Tubman Blvd. I made a stop and parked to discharge a passenger. While waiting for the passenger to return which took about ten minutes, I heard a big bang from the rear of my car. And the car and I were thrown out of the road on the sidewalk. When I got out of the car, I saw another car behind me that was crushed and the driver in that car was in an uncon-

scious state. He was rushed to the J.F.K. Hospital. Then I went back to the accident scene where I was interrogated by the police officer. This is all I know."

It should be noted here that there is a variance between this witness' testimony and that of Patrolman Arthur S. Morris as to the time of the accident and the time that elapsed between his parking of the car and the collision. There is no indication in this witness' testimony that appellant's car, as stated by Patrolman Morris, was following the private prosecutor's car, which was travelling in the same direction. On the contrary, according to this witness he had been parked ten minutes before he was hit by appellant's car. It should also be noted that although this witness testified that he and his car were thrown onto the sidewalk by the impact of appellant's car, no distance as to how far his car was driven is mentioned. Further, that although Morris testified that he showed appellant a diagram of the accident when he interrogated him in the hospital, no diagram was offered in evidence during the trial, according to the record certified to us.

We note with particular interest the following question and answer on the cross-examination of this witness:

"Q. Please say if you were present when the police officer interviewed the other driver in the hospital?

"A. No, I was not there."

It will be recalled that Morris had stated unequivocally that Dr. Isundu was present when Burphy confessed to him during his interrogation of him at the hospital that he had lost control and hit the private prosecutor's car.

The prosecution rested with the testimony of the two witnesses hereinabove referred to. Burphy took the stand and testified in his own behalf. The gist of his testimony is that while he was on his way from Congo Town to Monrovia, and when he had almost reached the junction of the road leading to the J.F.K. Hospital, while he was

on Tubman Blvd., a Peugeot 404 bus came from the direction of the J.F.K. Hospital and drove straight into the lane in which he was driving, that is, the right lane, and without observing the regular flow of traffic stopped abruptly before him. He testified that because the driver of the Peugeot car did not give any signal or sign of stopping, he could not avoid running into the car's rear, because there were no brake lights nor hand signal to warn an approaching vehicle. He also testified to the fact that he was in a state of unconsciousness after the collision of his car and the private prosecutor's, and was taken to the J.F.K. Hospital, where he was treated and remained for several days. He further testified that after he regained consciousness early the next morning, about 7:00 to 7:30 A.M., Police Officer Arthur S. Morris sought an interview with him, and he was told by him that the officer was in a police car at the scene of the accident, and but for the fact that he drove his car off the road, appellant would have hit him instead of the Peugeot that was struck. He also testified that he was surprised to hear the officer's testimony in court that he was called to the scene after the accident happened, and also that Dr. Isundu was present when the officer tried to interview him at the hospital. He denied ever admitting to the officer that he lost control of his car and that it was the reason he ran into the rear of the other car.

The foregoing is the gist of the evidence adduced at the trial by both sides. Let us now come to the bill of exceptions. The first two counts of the bill of exceptions deal with the overruling by the trial judge of questions put to Arthur S. Morris on cross-examination. While we feel that the rulings were erroneous, we do not consider them to be of such magnitude as to warrant reversal. We consider the third count of the bill of exceptions to be the crux of the case, for it avers that the evidence adduced did not warrant the judgment of guilt rendered by the trial court.

We are inclined to agree with appellant's position that the evidence adduced by the prosecution did not warrant conviction. In the first place, there is patent variance in the testimony of the two witnesses of the prosecution with respect to the time of the accident as well as the attending circumstances. Moreover, the police officer testified that the appellant's car was following the private prosecutor's car at a distance of about a block, and after three or four minutes skidded 20 feet before hitting the other car, which it threw 45 feet onto the sidewalk. Not a single witness was produced to corroborate these facts, and the officer was not present when the accident occurred. There is variance as well in the testimony of the police officer that the private prosecutor was present when appellant confessed to him that he lost control of his car. Dr. Isundu denied that he was present at the time. Moreover, Dr. Isundu testified that he had parked ten minutes before the accident and was waiting for the person he had stopped for. "Where the witnesses for the prosecution contradict each other, a doubt results which should operate in favor of the accused." *Capps* v. *Republic,* 2 LLR 313 (1919).

Appellant in his testimony stated that he did run into the rear of the private prosecutor's car, but that it was due to the fault of the private prosecutor. It is surprising that after the testimony of the appellant the prosecution made no effort to either rebut or impeach any portion of his testimony, which put an entirely different phase on the case.

The prosecution has emphasized both in its brief and in argument before us that it is a settled principle of law that the uncorroborated testimony of the accused is insufficient to acquit. We agree, but we also hold, and this has been stated in numerous opinions of this Court, that the prosecution must establish a *prima facie* case before the accused can be called upon to defend himself. Moreover, it is a settled principle of law that an accused enters

upon his trial on the presumption of his innocence until his guilt is proved beyond reasonable doubt. *Teh* v. *Republic,* 10 LLR 234 (1949); *Hance* v. *Republic,* 3 LLR 161 (1930). We consider this a fundamental principle of the common law, but it goes back to ancient Rome, as shown by the following citation.

> "Ammianus Marcellinus relates an anecdote of the Emperor Julian which illustrates the enforcement of this principle in the Roman Law. Numerius, the governor of Narbonensis, was on trial before the Emperor, and, contrary to the usage in criminal cases, the trial was public. Numerius contented himself with denying his guilt, and there was not sufficient proof against him. His adversary, Delphidius, 'a passionate man,' seeing that the failure of the accusation was inevitable, could not restrain himself, and exclaimed, 'Oh, illustrious Caesar! if it is sufficient to deny, what hereafter will become of the guilty?' To which Julian replied 'If it suffices to accuse, what will become of the innocent?' Rerum Gestarum, LXVIII, c. 1. The rule thus found in the Roman law, was along with many other fundamental and humane maxims of the system preserved for mankind by the canon law." *Coffin* v. *United States,* 156 U.S. 432, 455 (1895).

We cannot ignore the principle that the prosecution must establish a *prima facie* case before the accused can be called upon to defend himself.

> "One of the most important legal presumptions is that of innocence. This presumption, which in legal phraseology, 'gives the benefit of a doubt to the accused,' is so cogent, that it cannot be repelled by any evidence short of what is sufficient to establish the fact of criminality with moral certainty.
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> "In mere civil disputes, when no violation of the law is in question, and no legal presumption operates in favor of either party, the preponderance of probability, due regard being had to the burden of proof,

> may constitute sufficient ground for a verdict; but to affix on any person the stigma of crime requires a higher degree of assurance, and juries will not be justified in taking such a step, except on evidence which excludes from their minds all reasonable doubt."

It must not be forgotten that we are concerned with an offense defined by statute as reckless driving, which states that "any person who operates a vehicle in willful or wanton disregard for the safety of persons or property is guilty of reckless driving. A person who violates the provision of this section shall be subject to a fine of not more than $500 or imprisonment for not more than six months or both." Vehicle and Traffic Law, § 10.4. Therefore, all the safeguards attending trial for a criminal offense should obtain in this case.

The common law both supports and amplifies our statutes on the point.

> "The general rule is that what constitutes reckless driving, where the statute does not specifically declare what particular acts shall constitute the offense, is to be determined from all the surrounding circumstances. The core of the offense of reckless driving lies not in the act of operating a motor vehicle, but in the manner and circumstances of its operation. The mere occurrence of an accident does not give rise to an inference of reckless driving, and something more than an error of judgment is required to justify a conviction of that offense. Skidding does not, standing alone, constitute reckless driving, and it has been held that momentary dozing in and of itself is not such. On the other hand, reckless driving may be found even though no person is injured or property damaged. Moreover, last minute attempts to avoid injurious results from reckless driving are not sufficient to preclude a conviction for such driving." 7 AM. JUR. 2d, *Automobiles and Highway Traffic*, § 264 (1963).
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> "The general rule is that something more than mere

> negligence in the operation of a motor vehicle is necessary to constitute the offense of reckless driving, and a willful disregard of the consequences is required. The word 'reckless,' it is said, is an intensive expression of the word 'careless' and means rashly negligent, utterly careless, heedless, indifferent to, or regardless of, consequences. In fact, it has been held that even gross negligence is not enough, in the absence of willful or wanton misconduct, to sustain a conviction of reckless driving." *Id.*, § 265.

In addition, there are safeguards which an operator of a car must take in order to make another driver colliding with a vehicle guilty of reckless driving. Section 6.40 of our Vehicle and Traffic Law in the Revised Code provides that every motor vehicle shall be equipped with at least one tail light mounted on the rear which shall meet the requirement of § 6.41, and that section provides that any tail light shall emit a red light plainly visible 500 feet to the rear. Legal authority, too, deals with the point. "A statutory requirement that automobiles display a red tail light when 'operated or driven' on any highway at night applies to a machine parked on a highway." 3 BERRY, *Automobiles*, § 3.74 (7th ed., 1935).

We mention these points to emphasize the fact that the testimony of appellant clearly shows that his hitting the private prosecutor's car was due to the fact that the parked car had no brake lights to warn him when it stopped suddenly, testimony which, though not corroborated, stands unrebutted and unimpeached.

> "It is particularly noteworthy that, although the above-quoted testimony of the defendant tended to undermine the case for the prosecution, no effort at all was made to bring in any rebutting evidence thereto. . . . We also note, in this connection, that, although the defendant testified that the Chief and his messenger sent her home to the decedent, neither of these persons was produced by the prosecution to testify in rebuttal. To

say that it was the prisoner who should have produced them in corroboration might be plausible argument; yet, the defendant's uncontradicted testimony strongly tends to disprove the evidence introduced by the prosecution, and to create at least a reasonable doubt as to her guilt." *Tendi* v. *Republic,* 12 LLR 109, 115 (1954).

We feel that the quotation above aptly applies to circumstances of this case. In the face of Burphy's testimony, why was not the person who had been let out of the car and for whom the private prosecutor was waiting parked ten minutes before the accident occurred, brought to testify that the driver of P-763, had not just made a turn into the lane in which P-9521 was driving when the said P-763 was hit? Why was no effort made to straighten out the variance and contradictions in the testimony of the prosecution witnesses?

To warrant a conviction in a criminal case the State must prove its case beyond a reasonable doubt; and the burden of proof remains with the prosecution throughout the trial.

We are unconvinced that this condition obtained in this case. The judgment of the lower court is, therefore, reversed, and appellant is ordered discharged without day, and the Clerk of this Court is commanded to send a mandate to the court below to the effect of this decision. It is so ordered.

Reversed; appellant discharged without day.