CASES

DECIDED BY

THE HIGH COURT OF JUSTICE OF CYPRUS

IN ITS ORIGINAL JURISDICTION AND ON APPEAL FROM THE ASSIZE COURTS AND DISTRICT COURTS.

(O' BRIAIN, P., ZEKIA, VASSILIADES and JOSEPHIDES, JJ.)

1961
Nov. 8,
Dec. 11

ARIF AHMED MEHMET PORTOKALLIS

Appellant-Defendant,

v.

LEFTERIS HJI THEODOSSI

Respondent-Plaintiff.

(*Civil Appeal No.* 4346)

ARIF AHMED MEHMET PORTOKALLIS v. LEFTERIS HJI THEODOSSI

Civil Wrongs—Negligence—Motor traffic—Duty to be prudent—The matter has to be decided not on the basis of what an expert motorist would or could have done—But on what an ordinary and reasonably competent driver might be expected to do—No case of res ipsa loquitur—No case for retrial under section 25(3) of the Courts of Justice Law, 1960 (Law of the Republic No. 14 of 1960)—Negligent crossing of the road by pedestrians

The appellant (the first named defendant in this action) was found liable by the trial Court for damages in respect of the injuries caused to the respondent-plaintiff who was knocked down by the motor cycle which belonged to the second defendant and driven by the appellant. Against this decision the defendant No. 1 now appeals on the ground that there was no evidence to support the finding of the trial Court that he was guilty of negligence. The High Court considering the evidence found there was no negligence on the part of the appellant-defendant No. 1 and allowed the appeal.

Held, (VASSILIADES J *partly dissenting*) (1) There was a clear case of negligence on the part of the respondent-plaintiff

(2) It is established by the evidence that when the appellant was ten yards from the respondent there was sufficient room for the former to pass, but at that crucial moment the respondent proceeded to cross the road. In other words he moved

laterally across the space of gap between the two groups of pedestrians.

(3) Whatever the appellant was guilty of, he was not guilty of failing to keep a proper look out.

(4) What the trial Court found as a fact was that when some ten yards away from the pedestrian the motor cyclist (the appellant), who was travelling at a speed that is not clearly found by the trial Court or deposed to by any of the witnesses, observed a gap. He drove at some speed towards that gap and at that moment the respondent's negligent crossing of the road blocked the opening and that was the result of this collision taking place.

(5) The net point is or was it in those circumstances unreasonable for the appellant on his motor cycle to have failed to avoid colliding with the pedestrian? The matter is to be decided not on the basis of what an expert like Sir Malcolm Campbell would or could have done but what an ordinary reasonably competent motorist in these circumstances might be expected to do. We are unable to agree that the motor cyclist in the circumstances was unreasonable or negligent. It seemed that the accident was caused by the unexpected and abrupt crossing by the respondent-plaintiff of the road in a lateral direction right across this gap, without warning and only a short distance in front of the defendant. In the circumstances we decide that the finding that the defendant was guilty of negligence is without evidence.

Appeal allowed. Judgment for the defendant with costs.

Per VASSILIADES J., in his dissenting judgment: I am inclined to the view that this is a proper case for an order of retrial by the Court which heard the action. Section 25(3) of the Courts of Justice Law, 1960, was, in my opinion, intended to give this Court, as the Highest Court of Justice in the new Republic of Cyprus, regarding claims of this nature, very wide powers, including the power to order a retrial, where the circumstances of the case justify, in the opinion of the Court, the taking of such course.

Appeal.

Appeal against the judgment of the District Court of Larnaca (Attalides, P.D.C. and Zihni, D.J.) dated the 3rd

May, 1961 (Action No. 280/60) whereby the sum of £725.500 mils, with costs, was awarded as damages in respect of the injuries caused to the plaintiff by a motor-cycle driven by the defendant.

Ali Dana for the appellant.

George Ladas for the respondent.

The facts sufficiently appear in the judgment delivered by:

O'BRIAIN, P. : In this case the first-named defendant was found liable by the trial Court for damages in respect of the injuries caused to the respondent-plaintiff who was knocked down by the motor cycle which belonged to the second defendant and driven by the first-named defendant. Defendant No. 1 appeals on the ground that there was no evidence to support the finding of the trial Court that he was guilty of negligence.

In the circumstances found by the trial Court, I think, the case is reasonably clear.

A case was made on behalf of the plaintiff, alleging circumstances which I may summarize by saying that it would be a case of *res ipsa loquitur*. It alleged that defendant's motor cycle was driven right off the road on to the Ohto on which the plaintiff at the time was a pedestrian. There it struck and injured the plaintiff.

As I read the judgment, this case was completely rejected by the trial Court and the learned judges, in my opinion, quite properly took the view that the plaintiff himself was guilty of negligence. In the judgment they state in considerable detail the case pro and contra. They proceeded then to consider what evidence is to be accepted by the Court. They rejected the evidence of the plaintiff and his witnesses other than P.W.1, and their findings as set out at page 33 of their judgment, read as follows (Para. B) :

> "We, therefore, find that at the time when the accident happened the plaintiff was on the road and was attempting to cross the road to the other side in order to join his companions on the right hand side of the road and while doing so the motor cyclist hit him and was thrown at point 'C' on the sketch plan and was seriously injured. The plaintiff himself stated that though he heard the

noise of the motor cycle coming from behind he did not look back at all and continued in his way".

I must confess I find myself entirely in agreement with the trial Court that on that finding there was a clear case of negligence on the part of the plaintiff.

Then the learned judges go on to say :

"Defendant 1 was travelling on a straight road. He saw the party of men from a considerable distance and in spite of that and in spite of the fact that he was a learner he failed to slow his motor cycle to an extent which he could control".

That as I read it is an indication that whatever he was guilty of, he was not guilty of failing to keep a proper look out. He saw the people ; he saw the emergency which in the opinion of the trial Court was about to arise, and they say he failed to slow his motor cycle. That is challenged here :

"There was sufficient room for him to pass when he was 10 yards behind the plaintiff when the plaintiff attempted to pass to the other side of the road".

That is a finding of fact. I should say that I agree with it and I think it is established by the evidence that when he was 10 yards from the plaintiff there was sufficient room for defendant to pass, but at that crucial moment the plaintiff proceeded to cross the road. In other words he moved laterally across the space or gap between the two groups of pedestrians.

Now, at page 34 of the judgment, paragraph 'A' which is as follows, is challenged :

"We find it as a fact from the evidence that both plaintiff and defendant 1 were to blame. Since the plaintiff was about to cross the road from one side to the other without looking behind him to see whether it was safe for him to do so after hearing of noise of a motor cycle and since defendant 1 was not driving his motor cycle as a prudent man could do we find that both are equally to blame".

I must confess that it seems to me that what they found as a fact was that when some 10 yards away from the pedestrian the motor cyclist, who was travelling at a speed that is not

clearly found by the trial Court or deposed to by any of the witnesses, observed a gap. He drove at some speed towards that gap and at that moment the plaintiff's negligent crossing of the road blocked the opening and that was the result of this collision taking place.

The net point is or was it in those circumstances unreasonable for the defendant on his motor cycle to have failed to avoid colliding with the pedestrian. The matter is to be decided not on the basis of what an expert like Sir Malcolm Campbell would or could have done but what an ordinary reasonably competent motorist in these circumstances might be expected to do. I find myself unable to agree that the motor cyclist in the circumstances was unreasonable or negligent. It seems to me that the accident was caused by the unexpected and abrupt crossing by the plaintiff of the road in a lateral direction right across this gap; without warning and only a short distance in front of the defendant. In the circumstances I am of opinion that that finding that the defendant was guilty of negligence is without evidence. I would, therefore, allow this appeal.

ZEKIA, J. : I agree with the judgment given by the learned President, and I have only a few words to add as to whether this is a proper case for a new trial.

I am satisfied after going through the authorities that this is not an instance which may come within the recognised principles governing orders for retrial. In this connection one may usefully refer to pages 473-477 of Halsbury's Laws of England, 3rd Edition, Vol. 30, entitled "When New Trial will be granted".

VASSILIADES, J. : I am inclined to the view that this is a proper case for an order of retrial by the Court which heard the action. Section 25(3) of the Courts of Justice Law, 1960, was in my opinion, intended to give this Court, as the Highest Court of Justice in the new Republic of Cyprus, regarding claims of this nature, very wide powers, including the power to order a retrial, where the circumstances of the case justify, in the opinion of the Court, the taking of such course.

In this case, the judgment of the trial Court seems to me rather an attempt to find a fair and reasonable settlement of the dispute, considering the grave injuries of the plaintiff, than a judicial decision on the issues raised by the pleadings.

The trial Court apparently took the view that both the driver and the pedestrian were somehow to blame ; and that they should share equally the blame for the accident as well as the consequences resulting therefrom. And upon this view, the Court made their findings of fact in the judgment.

In my opinion this was a wrong approach. The Court should have proceeded first to make their findings from the evidence on the issues of fact raised by the pleadings, and then should proceed to decide on the facts so found, the merits of the claim and the liability, if any, of the defendants. In this respect the judgment is, in my opinion, unsatisfactory and makes a proper case for an order of retrial by the same Court.

I may moreover say that in my view there is more substance in the claim against the second-defendant, the owner of the vehicle, than the trial Court seemed to have thought in the last part of their judgment, against which the respondent-plaintiff has cross-appealed.

In the circumstances, I would set aside the whole judgment and make an order for retrial of the action by the same Court under section 25(3) ; with costs in cause.

JOSEPHIDES, J. : I agree with the judgments delivered by the learned President and Zekia, J.

I am satisfied that on the findings of fact made by the trial Court it has not been proved that the defendant was negligent.

As to the question of retrial, Mr. Ladas for the respondent, frankly admitted that he did not ask for it in his cross-appeal ; and that it only occurred to him to do so in the course of the argument. But the grounds put forward by him do not justify the making of an order of retrial.

I would allow the appeal and dismiss the cross-appeal.

O'BRIAIN, P. : In the result the appeal is allowed and judgment entered for the respondent, with costs.

Appeal allowed. Judgment for the defendant with costs.