[WILSON, P., ZEKIA, JOSEPHIDES, JJ. and TRIANTAFYLLIDES, AG. J.]

1962
May 3,
Nov. 16

YIANNAKIS KYRIACOU POURIKKOS

v.

MEHMED FEVZI

YIANNAKIS KYRIACOU POURIKKOS (No 2),

Appellant (Defendant),

v.

MEHMED FEVZI,

Respondent (Plaintiff)

(Civil Appeal No. 4344).

Appeal—Further evidence—Principles applicable—Could only be received on appeal if such evidence could not be made available at the trial with reasonable diligence etc.—Section 25(3) of the Courts of Justice Law, 1960—It was never intended to relieve a plaintiff from his duty of placing before the Court all available evidence.

Practice—A party may not split his case.

Practice—Evidence—Evidence in reply solely for the purpose of discrediting a defence witness can only be received under certain conditions.

The respondent-plaintiff applied to the High Court requesting to hear additional evidence which allegedly went to support respondent-plaintiff's version in the Court below. This was opposed by appellant-defendant arguing that such additional evidence could, with reasonable diligence have been produced at the trial.

Held : (1) The purpose of calling in this case additional evidence is to discredit the evidence of a witness whose credibility has been accepted by the trial Court.

(2) The evidence now sought to be introduced was essentially part of the plaintiff's case and the witness who could give it was available at the trial He ought to have been called then, and since he was not he cannot be called in reply. A plaintiff may not split his case (*Jacobs v Tarlton* (1848) 11 Q B 421)

(3) The trial Court erroneously afforded the opportunity to the plaintiff to call additional evidence in reply and although counsel for the plaintiff had ample opportunity to consider his course of action nevertheless he declined to do so.

(4) As the evidence to be called in reply was solely for the purpose of discrediting a defence witness, it could only be received under certain conditions. (Statement of the law by Tucker L.J., in *Braddock v. Tillotson's Newspapers Ltd.* (1950) 1 K.B. 47 p.p. 50 and 53, *adopted*).

(5) The plaintiff has failed to show that the evidence could not have been obtained with reasonable diligence for use at the trial and for that reason alone this application must fail.

(6) Section 25(3) of the Courts of Justice Law 1960 never intended to relieve a plaintiff at the trial from the duty of placing before the Court all available relevant evidence.

Application dismissed. Costs of and incidental to this application will be costs to the defendant in any event.

Cases referred to :

Jacobs v. Tarlton (1848) 11 Q.B. 421;

Braddock v. Tillotson's Newspapers Ltd. (1950) 1 K.B. 47.

Application to hear fresh evidence.

Application to hear fresh evidence made by respondent in the course of the hearing of an appeal against the judgment of the D. Ct. of Famagusta (Vassiliades, P.D.C. and Ekrem D.J.) dated the 8/4/61 (Action No. 141/60) whereby judgment was given for plaintiff in the sum of £441.225 for damages for personal injuiries sustained by him in a road collision.

N. Zomenis for the appellant.

M. Fuad Bey with O. Mehmet for the respondent.

The ruling of the Court was delivered by :---

WILSON, P. : This is an application to this Court to hear further evidence made during the hearing of an appeal from the judgment of the trial Court. The hearing of the appeal was adjourned to permit the plaintiff to make the application now before us in which he applies that the High Court hear "further evidence, namely, Dr. Rose of Pendayia Hospital who examined the plaintiff-applicant and whose

evidence goes in support of the version given by the said applicant in the Court below".

The application is based on section 25(3) of the Courts of Justice Law, 1960 and the Civil Procedure Rules, Order 48, rule 2, etc.

The facts relied upon are set out in the affidavit of the plaintiff which accompanies the application. In paragraph 3 the plaintiff says that "Dr. Rose goes to support my version given by me in the Court below in that I fell onto the road on my back with both arms thrown wide open at right angles with my body extending full out and that the car passed over my right arm".

The purpose of giving this additional evidence is to discredit the evidence given at the trial by the plaintiff's witnesses and accepted by the trial Court.

The defendant opposed the plaintiff's application and filed an affidavit, in support of his notice of intention to opose, in paragraph 2 of which he says : "To the best of my knowledge and belief the respondent — plaintiff had all the opportunity to call Dr. Rose to give evidence in the Court below. Dr. Rose was not an eye witness".

After careful consideration of the submissions made on behalf of the litigants, it is our opinion that the purpose of calling of additional evidence is to discredit the evidence of a witness whose credibility has been accepted by the trial Court.

For the reasons now to be given, however, the application cannot be granted.

In the first place the evidence now sought to be introduced was essentially part of the plaintiff's case and the witness who could give it was available for the trial. He ought to have been called then, and when he was not he cannot be called in reply. As is well known, a plaintiff may not split his case *e.g. Jacobs v. Tarlton* (1848) 11 Q.B.421.

Secondly the trial court gave the plaintiff the opportunity, erroneously for the reason given above, to call such evidence in reply. After ample opportunity to consider his course of action counsel for the plaintiff declined to do so. It is too late now to make such a request, particularly when no reason is given accounting for this change.

Thirdly evidence to be called in reply solely for the purpose of discrediting a defence witness can only be received under certain conditions. In *Braddock v. Tillotson's Newspapers Ltd.* (1950) 1 K.B. 47 the defendant successfully defended at trial a libel action brought against it as the result of the publication of an article written by one of its reporters, who was the principal defence witness. Apparently after the action was dismissed the plaintiff learned the reporter had been many times convicted, over a period of many years, of stealing and other offences involving dishonesty, and that there were recorded eight or nine such convictions. She applied to Lord Chief Justice Goddard for leave to recall the reporter in order that he might be cross examined as to credit. He adjourned the application to the Court of Appeal on appeal, where it was dismissed. At p.50 Tucker, L.J. said :

> "It has been the invariable practice of the Court of Appeal in this country to confine the admission of fresh evidence, in circumstances such as this to evidence which could not reasonably have been discovered before the trial, and to evidence which, if believed, either would be conclusive or, as has been said by some judges, to evidence which would lead to the reasonable probability that the verdict would have been different. But the practice has hitherto been confined to evidence relating to an issue in the case, or at any rate to an issue which could and might yet be raised if there were a new trial in the action. No case has been cited in which this Court has ever admitted or has ever been asked to admit evidence going to credit only. That, of course, is not conclusive ; it is certainly not conclusive as to the jurisdiction of this court and, for myself, I think that this court clearly has jurisdiction to take any course which it thinks fit with regard to a matter of this kind ; but the invariable practice is clear, and furthermore, when one comes to apply the first test, namely, whether the evidence could have been discovered by reasonable diligence before the trial, that language is really hardly applicable to evidence of this kind, because in the ordinary normal events a solicitor or a client would not be expected, in the absence of unusual circumstances, to go rummaging about, if I may so call it, into

the past records of any witness he may think was to be called. In fact, generally speaking, he would not know who the witnesses were who were going to be called. In this particular case it so happens that, owing to the necessity for petitioning the House of Commons with regard to these witnesses, in the course of what took place in the House of Commons the plaintiff's solicitor did become aware of the name of the witness a week or so before the trial. So it is possible, I suppose, if inquiries had been made, that this would have been found out. But I do not think it is reasonable, with regard to a man in this position, that any inquiries should be made ; I am only saying that what has always been regarded as the test — the essential test, namely that the evidence could not have been obtained by reasonable diligence — is hardly applicable to a case of this kind".

After considering several cases notably *Brown v. Dean* (1910) A.C.373, he said at p.53 :

"These varying expressions have, so far as the decisions of the courts in this country are concerned, always been directed to evidence directly relevant to the main issue in the action, or to some issue which could, or would, have been raised at the trial if the evidence had been discovered. It is not necessary in this case to express any opinion as to which is the better view with regard to the quality of the evidence in such a case. If, however, this court is to depart from its invariable practice of confining such evidence to the relevant issues and is to admit fresh evidence directed solely to credit, I am of opinion that such a course would, if ever, only be justified where the evidence is of such a nature and the circumstances of the case are such that no reasonable jury could be expected to act upon the evidence of the witness whose character had been called in question. It would, in my view, be wrong for this court to admit fresh evidence directed solely to credit, merely because there is a possibility, or merely a reasonable probability, that such evidence would result in a different verdict. There are two conflicting principles always operating in these matters ; one is that everything should be done in order to ascertain the truth ; the other is that there should be some

finality in litigation, and, so far as possible, a reasonable limitation of costs. It is in order to achieve the latter result that it is necessary for the court to impose some limit to the re-opening of decided issues, even at the risk that injustice may result, or it may appear that there is a possibility of injustice resulting".

Cohen and Singleton L.JJ., for separate reasons, agreed in the result.

We adopt the law as stated by Tucker L.J.

In the present case the plaintiff has failed to meet the first test namely that it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial and for that reason alone his application must fail.

This is sufficient to dispose of the application. However, reference must be made to one more point. The plaintiff's counsel submitted section 25(3) of the Courts of Justice Law, 1960, applied and permitted him to place before us the evidence he now seeks to adduce. To this there is a very short answer. This statutory provision was never intended to relieve a plaintiff at trial from the duty of placing before the Court all available relevant evidence.

There was no real argument concerning the application of the rules of procedure and we have not considered it necessary to refer to them.

For the reason given the application is dismissed. The costs of and incidental to this application will be costs to the defendant in any event.

Application dismissed. Costs of and incidental to this application will be costs to the defendant in any event.