1969
June 3
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ANDREAS
KYRIAKOU
KATSIOU
v.
ANTONIOS
N. SHAKALLIS

[TRIANTAFYLLIDES, LOIZOU AND HADJIANASTASSIOU, JJ.]

ANDREAS KYRIAKOU KATSIOU,

Appellant,

v.

ANTONIOS N. SHAKALLIS,

Respondent.

(*Civil Appeal No.* 4653).

Negligence—Contributory negligence—Apportionment of liability—Road accident—Collision at night between motor car driven by the respondent and the appellant's stationary tractor at its resultant position after a previous road accident—Policeman investigating first accident was regulating the traffic at the spot with use of torch—Respondent's failure to see policeman's signal and reduce his speed renders him solely liable—Therefore, the trial Court was wrong in apportioning liability on the basis 1/3 *as against the appellant and* 2/3 *as against the respondent driver—Apportionment clearly erroneous and, consequently, has to be reversed—Principles applicable i.e. principles on which the Court of Appeal will interfere with apportionments of liability made by trial Courts, restated.*

Contributory negligence—Negligence—Apportionment of liability—Approach of the Court of Appeal—Principles applicable—See above.

Apportionment of liability—Appeals against such apportionment—Approach of the Court of Appeal—See above.

Appeal—Appeal against apportionment of liability made by trial Courts in cases of negligence and contributory negligence—Review on appeal in exceptional cases only—Principles applicable—Approach of the Court of Appeal—See above.

Road accident—Negligence—Contributory negligence—Apportionment of liability—See above.

In this road accident case the Court found that the respondent was solely to blame and that the apportionment of liability made by the trial Court (*viz.* 1/3 against the appellant and 2/3 against the respondent) was clearly erroneous. The Court,

applying the well settled principles regarding its approach to apportionments of liability made by trial Courts, allowed the appeal and set aside the aforesaid apportionment, varying the judgment of the trial Court accordingly. The facts sufficiently appear in the judgment of the Court.

Cases referred to:

Hill-Venning v. *Beszant* [1950] 2 All E.R. 1151;

British Fame v. *MacGregor* [1943] 1 All E.R. 33 H.L.;

Brown and Another v. *Thompson* [1968] 2 All E.R. 708;

Stavrou v. *Papadopoulos* (reported in this Part at p. 172 *ante*);

Constantinou v. *Beaumont* (reported in this Part at p. 241 *ante*);

Despotis v. *Tseriotou* (reported in this Part at p. 261 *ante*);

Hairettinis v. *Aristidou* (reported in this Part at p. 283 *ante*).

Appeal and Cross-Appeal.

Appeal and cross-appeal against the judgment of the District Court of Famagusta (Georghiou P.D.C.) dated the 14th July, 1967, (consolidated Action Nos. 2204/65 and 2240/65) awarding, by way of damages for negligence, in a road accident case to the plaintiff in action No. 2240/65 (the appellant herein) £254.666 mils on the basis of 1/3 liability and to the plaintiff in Action No. 2204/65 (respondent in this appeal) £227.– on the basis of 2/3 liability.

K. Saveriades, for the appellant.

Respondent in person.

Cuv. adv. vult.

TRIANTAFYLLIDES, J.: The judgment of the Court will be delivered by Mr. Justice Loizou.

LOIZOU, J.: This is an appeal from the judgment of the District Court of Famagusta in consolidated Actions 2204/65 and 2240/65 awarding, by way of damages for negligence, to the plaintiff in Action No. 2240/65 (the appellant herein) £254.666 on the basis of 1/3 liability and to the plaintiff in Action No. 2204/65 (respondent in this appeal) £227.– on the basis of 2/3 liability.

A few months after the filing of the appeal the respondent

filed a cross-appeal. Both the appellant and the respondent challenged the trial Court's apportionment of liability between the parties. A few days before the hearing of these appeals the respondent filed yet another cross-appeal whereby he also challenged the trial Court's assessment of damages in respect of the personal injuries suffered by him.

The accident as a result of which these actions were instituted occurred on the 21st November, 1965, at about 7.30 p.m. on the Nicosia/Famagusta road near the village of Prastio. The respondent was at the time driving his car, a Mercedes under registration No. AV186, from Nicosia to Famagusta: he had two passengers with him Zacharias Mylonas, an advocate of Famagusta and Philippos Parisinos, a barber of Nicosia. The former was seated in the front seat next to the respondent and the latter at the back.

Sometime earlier, at about 7.00 p.m., the appellant was driving his tractor under registration No. CE736 in the same direction and between the 22nd and 23rd milestones i.e. at the scene of the accident which is the subject of this appeal, he was involved in another accident with a taxi going in the same direction. We need not, for the purposes of this appeal, concern ourselves with this first accident except to say that the two vehicles involved were left at their resultant positions and the police were summoned to investigate the accident. Acting Police Sergeant Andreas Odysseos, who was in charge of the Prastio Police Station, went to the scene accompanied by a civilian as he had no other policeman available to help him. At the scene he found the two vehicles i.e. appellant's tractor CE736 and the taxi involved in the first accident, in their resultant positions. The tractor had a rake at its back which it had been towing and the rake was raised about three feet above the road level. On the rake there were some bags and they obstructed the rear light of the tractor which was on the offside mudguard about five or six feet above the level of the road. Upon the instructions of the policeman the driver of the tractor, the appellant, lowered the rake to the road level and removed the bags and thereafter, according to the evidence of the policeman, the rear red light of the tractor was visible to any vehicle coming from the direction of Nicosia from a distance of four hundred yards. The asphalted part of the road at the scene of the accident is nineteen feet wide with five feet of usable berm on either side. Appellant's tractor was at its near side of the road with the nearside wheels one foot on

the berm and its offside wheels four feet within the asphalted part of the road. The rake was one foot wider than the tractor and so, on the whole, tractor and rake occupied five out of the nineteen feet of the asphalted part of the road leaving fourteen feet of asphalt road plus the offside berm free for the traffic. The policeman was wearing phosphorus sleeves which, according to his evidence could be seen by the driver of a car, with the the lights on, from a distance of eight hundred yards and in addition he was holding a torch. He started taking measurements and each time that a vehicle was seen coming from either direction he stepped in the middle of the road directing such vehicle to pass safely from the scene and as soon as the vehicle passed he resumed his investigation. It may be added that the headlights of the tractor were also on all the time in order to facilitate the taking of the measurements; and that a number of onlookers had gathered at the scene.

It was during this time that the accident, the subject of this appeal, occurred.

The policeman had just finished with his investigation when he saw the lights of the respondent's car coming from the direction of Nicosia. He, thereupon, stood in the middle of the road at the side of the tractor and signalled to the vehicle to slow down in order to direct it to pass by the side of the stationary vehicles which were involved in the first accident. In his right hand he was holding the torch which was switched on and he was signalling to respondent's vehicle to slow down. When he realized that there was no response and that the vehicle continued at the high speed it was going, up to about fifty yards from the tractor, he took cover behind the tractor in order to protect himself from being run over by respondent's car. The respondent continued at the same speed, it knocked on the rake at the back of the tractor, and so violent was the blow that the tractor was cut in two and the front part knocked the policeman and threw him 42 feet away injuring his arm.

After giving a summary of the evidence the trial Court goes on to say:

"We are satisfied that when the rake was lowered and the bags removed from the tractor on the instructions of police officer Odysseos, a rear red light was exhibited which could be seen by a pedestrian walking on the road from the direction of Nicosia towards the tractor at a good distance

away. But there was no positive evidence from any of the witnesses who were at the scene of the accident that the rear lamp of the tractor was lit at the very time of the impact. Plaintiff had not seen it. Also it was not seen by Mr. Mylonas, a trustworthy witness who was sitting on the front seat, who said that if there was a rear light, he could have seen it. The inference we may draw is that the light, at the time of the second accident was not lit, or if it lit, its visibility was obscured by the lighting of the petrol station which was about two donums further on from the tractor.

On the other hand we find as a fact that Police officer Odysseos was regulating the traffic at the scene of the accident and on seeing the oncoming car driven by Mr. Shakallis he signalled to him with his torch, although in the position he was standing, as described by Mr. Katsios, it is probable that his arm which was wearing the phosporus sleeve was not quite visible, by a driver approaching the scene of the accident, from the direction of Nicosia.

Neither Mr. Shakallis nor Mr. Mylonas saw the signal of this policeman, and the reason why Mr. Shakallis failed to observe it was because he was not keeping a proper look out in front of him.

There is no doubt that Mr. Shakallis was travelling at a speed of 50-60 m.p.h. which in our mind was excessive in the circumstances especially taking into consideration that the lights of that petrol station according to his own version were interfering with his vision though Mr. Shakallis was travelling on a fast motor-road. It is apparent also from the extensive damage to his own car and to the tractor, which was split into two pieces that his speed was very high".

Further down in their judgment they say:

"We have no doubt, from the whole circumstances under which this accident took place, that if Mr. Shakallis maintained a proper lookout, he would not have banged on the stationary tractor at the speed he was travelling.

We now proceed further to deal with the responsibility, if any, of the owner of the tractor, i.e. Mr. Katsios.

It is a common fact that the accident under review took place at the time that the police was investigating a previous accident in which this tractor was involved".

Then they go on to quote certain passages from the judgment of Lord Cohen in the case of *Hill-Venning* v. *Beszant* [1950] 2 All E.R. p. 1151, to which we shall refer later in this judgment and they conclude as follows:

"The tractor's rear light was at some time before this accident lit but we have doubts whether at the time of the impact it continued to be lit or whether it was clearly visible and the onus of proof being against Mr. Katsíos, we have to rule against him on this point. We have no doubt in our minds that policeman Odysseos was regulating the traffic before and at the time of the second accident and that lot of vehicles had previously passed through the scene of the accident quite safely.

The tractor with its rake protruding within the road as well, was lying on the path of the car of Mr. Shakallis constituting a danger.

On the whole evidence we hold that some responsibility rests on Mr. Katsios".

And following *Hill-Venning* v. *Beszant* they apportioned the liability 2/3 against the respondent and 1/3 against the appellant.

The case upon which the trial Court based its judgment was a case in which the defendant, a motor-cyclist, stopped at night on a highway because the lighting system of his motor-cycle had failed. He alighted leaving the motor-cycle which was about three feet in breadth at its broadest point, on the highway. There was a grass verge, level with the surface of the highway, to which the defendant could have wheeled his motor-cycle without difficulty. He did not do so, however, as he assumed that all that was needed was to change the bulb in the headlight. He then discovered that the fault was in the electric wiring, and when he was about to do the necessary repairs he noticed the light of an approaching vehicle, which was the plaintiff's motor-cycle. The plaintiff, who had his headlight dipped, failed to observe the defendant's motor-cycle in time to avoid it and he came into collision with it. It was not disputed that the plaintiff had been negligent. The Court

of Appeal found that by failing to remove his motor-cycle off the highway, the defendant had not taken all reasonable precautions to prevent danger to other traffic and that he was, therefore, also negligent for the accident by one third.

We are clearly of the opinion that the case cited bears no analogy to the case under consideration. There the defendant knew that both lights of his motor-cycle were out due to a breakdown in the electrical wiring but he, nevertheless, did not remove his motor-cycle from the road because he thought he could put it right before plaintiff's motor-cycle, which he had seen coming, came along. Cohen, L.J. is quoted as saying:

> "Having regard to the fact that he knew by this time that both lights were out and that there was a failure of the electrical system, I do not think it was a conclusion to which he was justified in coming or that he took the action appropriate to the circumstances. We have to be very careful before we take the view that there is no negligence in leaving a stationary obstacle on the road after lighting-up time when it is not plainly visible to approaching vehicles without the aid of full headlights and when it could easily be moved off the road. In those circumstances, some responsibility must rest on the defendant for leaving this obstacle on the side of the road".

In the present case, unlike in the case cited, the appellant knew that the lights of his tractor were on and it seems to us that once the trial Court was satisfied that the lights, especially the rear red light, were on and visible for quite some time shortly before the accident this raises a presumption in favour of the appellant that they were on at the moment of the impact and that, in the absence of any evidence to the contrary, the Court might well infer that the respondent was negligent and in that sense it put a burden on the respondent to discharge it.

But, in any case, the trial Court did not make a finding that at the time of the actual impact the rear red light of the tractor was not on; what they did say on this point is that because the respondent and his passenger, Mr. Mylonas, did not see it the inference might be drawn that either the light was not on or its visibility was obscured by the lights of a petrol station which was about two donums further away from appellant's stationary tractor; and one may well wonder how in the latter eventuality any fault at all could be attributed to the appellant.

But, quite independently of the question of the rear red light, the trial Court make a definite finding that the policeman at the scene signalled to the respondent with his torch, as he had done to a number of other vehicles which had passed earlier on safely from the scene, to slow down and that the reason the respondent did not observe the signal was "because he was not keeping a proper look out in front of him". We think that it may be added at this stage that witness Mylonas also did not see the policeman's signal and one might reasonably think that, in the circumstances, it is not at all surprising that he did not see the tractor's rear red light, either.

The trial Court were in no doubt that "if Mr. Shakallis maintained a proper look out, he would not have banged on the stationary tractor at the speed he was travelling" but all the same they found the appellant responsible for the accident to the extent of 1/3 on the ground that he failed to remove the tractor from its resultant position after the first accident and it thus constituted a danger to other vehicles using the road.

There is, of course, no doubt that an unlighted vehicle left on the road at night constitutes a danger to traffic and is *prima facie* evidence of negligence on the part of the driver. But in the case before us the evidence does not support the view that appellant's tractor was unlighted; there is, moreover, positive evidence, accepted by the trial Court, that the policeman on the spot signalled with his torch to the appellant to slow down and that the reason the latter did not observe the signal was that he failed to keep a proper look out; and finally there is undisputed evidence that, the police were, at the time, taking measurements in the course of the investigation of the first accident, which fact alone sufficiently and satisfactorily explains the reason why the appellant could not move the tractor out of the way.

Normally, it is only in very exceptional circumstances that an appellate Court will interfere with the degrees of blame attributed by the trial Court to two or more tort-feasors. One of the leading cases, perhaps the locus classicus, on the question of review, on appeal, of the apportionment of blame is the House of Lords decision in *British Fame* v. *MacGregor* [1943] 1 All E.R. p. 33 where a number of leading cases on the point are referred to in extenso. In a more recent case, *Brown and Another* v. *Thompson* [1968] 2 All E.R. p. 708, it was held that

the apportionment of liability made by a trial Judge should not be interfered with on appeal save in exceptional cases, as where there is some error in principle or the apportionment is clearly erroneous, and an appellate Court should not consider itself free to substitute its own apportionment for that made by the trial Judge. (See also, *Stavrou* v. *Papadopoulos* (reported in this Part at p. 172 *ante*), *Constantinou* v. *Beaumont* (reported in this Part at p. 241 *ante*), *Despotis* v. *Tseriotou* (reported in this Part at p. 261 *ante*), and *Hairettinis* v. *Aristidou* (reported in this Part at p. 283 *ante*)).

Having given the matter our best consideration and with the above principles duly in mind, we have come to the conclusion that, in the light of all the circumstances of the present case, the trial Court's apportionment of liability is clearly erroneous. We think that they were wrong in finding that the appellant was negligent at all and in our judgment he should be acquitted of all negligence. Quite obviously the respondent, if he was keeping his eyes open, should have seen the signal of the policeman and should have realized that something was wrong ahead of him which necessitated the reduction of his speed. Had he done that he should have no difficulty in dealing with the situation. We, therefore, find that, in all the circumstances, the appellant was wrongly held to be at fault for this collision and that consequently the respondent must be held solely to blame. Having come to this conclusion we consider it unnecessary to deal with the question of the assessment of damages raised in the cross-appeal.

In the result the appeal is allowed and the judgment of the District Court varied to the extent that judgment for the plaintiff in Action No. 2240/65 is entered in the sum of £382.— against the defendant, respondent in the appeal, with costs here and in the Court below.

The cross-appeal is dismissed.

Appeal allowed. Judgment of the District Court varied accordingly. Order for costs as aforsaid. Cross-appeal dismissed.