1984 June 6

[A. Loizou, Malachtos And Stylianides, JJ.]

1. ANDREAS STYLIANOU,
2. ANDREAS MAKRIS,

Appellants-Defendants

v.

KYRIACOS PETROU,

Respondent-Plaintiff

(Civil Appeal No. 6562)

Master and servant—Vicarious liability—Whether a wrongful act is to be decided in the course of one's employment—Test applicable—Driver allowed to drive employer's car at closing time at 7.00 p.m. from taxi office to his house—Keep it there and not use it until the next morning when he would drive it from his house to the office to resume work—Involved in an accident at 7.30 a.m. and after he had reached his house—Not acting in the course of his employment—Section 13 of the Civil Wrongs Law, Cap. 148.

Findings of fact made by trial Court—And inferences drawn therefrom—Appeal—Principles applicable—In reviewing decisions based on inferences from facts not in controversy Court of Appeal in as good a position as a trial Court to evaluate such facts as no question of credibility arises—Findings and inferences of trial Court unsatisfactory not warranted by the evidence and wrong.

Ex-defendant No. 1 was in the service of defendant 2 ("the appellant") as driver driving a car between Nicosia and Larnaca.

After the day's work at about 7 p.m. he was permitted to drive home with the car of his employer and return back in the morning with the car of his employer. The driver was involved in an accident at Grivas Dhigenis Avenue at 7.30 a.m. that is 7 1/2 hours after he had left the office whilst driving the car of the appellant and in an action against the driver and the appellant the investigating officer of the accident testified that the driver

told him at the scene that he (the driver) was in the employment of the appellant as a driver and that he had a passenger who being injured, had been conveyed to the hospital before the arrival of the investigating officer. The investigating officer did not know whether the passenger to whom the driver referred was carried on reward or not, and he did not know whether at the time of the accident the driver was driving for the appellant. He simply said that he was an employee of appellant's taxi office.

The undisputed and incontestable evidence on record was to the effect that the driver was allowed only to drive the car at closing time, circa 7.00 p.m. from the taxi office directly to his house, keep it there and not use it until the next morning when he would drive it from his house to the office to resume work. He was not permitted to use the car for his own purposes or for any other purpose. His house was at Famagusta Street, No. 35, Nicosia -5 minutes from the appellant's taxi office.

The trial Court found that the driver committed the wrongful act by driving the car in an unauthorised mode of doing something which he was authorised by his employer, to wit, to use the car to go home and come back to his work on the following day. The trial Court further concluded that there was no evidence that the driver was using the car at the time exclusively for his own purposes, and inferred that the driver was at the time driving the car partly for his own purposes and partly for those of his employer, the appellant. On these findings and inference the trial Court held that the wrongful act of the driver was committed in the course of his employment and the employer was held vicariously liable for the negligent driving of the driver.

Upon appeal by the employer it was mainly contended on his behalf that the findings of fact of the trial Court were not warranted by the evidence and the inferences drawn were wrong.

The Court of Appeal after laying down the test as to whether a wrongful act is to be deemed in the course of one's employment —vide pp. 367-374 post— and after stating the principles on which it interferes with findings of fact made by a trial Court —vide pp. 375-377 post

Held, that the decision of the trial Court turns virtually on the inferences to be drawn from undisputed facts; that in reviewing decisions based on inferences from facts not in controversy, this Court is in as good a position as a trial Court to evaluate such facts as no question of credibility arises; that the findings and inferences of the trial Judge that the driver was at the material time in the employment of the appellant and that he committed the wrongful act by driving the car in an unauthorised mode of doing something which was authorised by the appellant, to wit, to use the car to go home and come back to his work on the following day, and that the driver was at the time driving the car partly for his own purposes and partly for those of the appellant are unsatisfactory, not warranted by the evidence and wrong; that whilst driving from the office to his house and back may be considered that he was driving in the circumstances of this case, partly for the purpose of his employer and partly for his own purpose as, besides going to his house, he had to keep the car overnight; that the journey from the office to his house lasted for about five minutes; that any journey after he had reached his house, anywhere during the night was not in any way connected with his employment; and it might be frolic of his own, but definitely, not in the course of his employment; accordingly the appeal must be allowed.

Appeal allowed.

Cases referred to:

Barnard v. *Sully*, 47 Times L.R. 557;

Hewitt v. *Bonvin* [1940] 1 K.B. 188 at pp. 192, 194-195;

Ormrod v. *Crosville Motor Services Ltd.* [1953] 2 All E.R. 753 at p. 754;

Universal Advertising and Publishing Agency v. *Vouros*, 19 C.L.R. 87;

Akama and Another v. *Tsiakoli* (1967) 1 C.L.R. 206;

HjiTheodossiou v. *Koulia and Another* (1970) 1 C.L.R. 310;

Municipal Corporation of Limassol v. *Constantinou* (1972) 1 C.L.R. 119;

Costa and Another v. *Municipal Corporation of Limassol* (1975) 1 C.L.R. 84;

Tsiopanis v. *Avraam* (1978) 1 C.L.R. 27;

Goh Choon Seng v. *Lee Kim Soo* [1925] A.C. 550 at p. 554;

Canadian Pacific Railway Co. v. *Lochart* [1942] 2 All E.R. 464;

Staton v. *National Coal Board* [1957] 2 All E.R. 667 at p. 669;

Marsh v. *Moores* [1949] 2 All E.R. 27 at p. 31;

Ilkiw v. *Samuels and Others* [1963] 2 All E.R. 879;

Higbid v. *R.C. Hammet Ltd.*, 49 T.L.R. 104;

Hilton v. *Thomas Burton (Rhodes) Ltd. and Another* [1961] 1 All E.R. 74;

Mitchell and Another v. *Crassweller and Another*, 138 E.R. 1189;

Storey v. *Ashton* [1869] 1 K.B. 476;

Polycarpou v. *Polycarpou* (1982) 1 C.L.R. 182;

Droushiotis (No. 2) v. Cyprus Asbestos Mines Ltd. (1966) 1 C.L.R. 215 at p. 228;

Mamas v. *Firm "Arma" Tyres* (1966) 1 C.L.R. 158 at p. 160;

Kyriacou v. *A. Kortas & Sons Ltd.* (1981) 1 C.L.R. 551 at p. 553;

Mentesh and Another v. *Hadjidemetriou* (1983) 1 C.L.R. 1;

Watt or Thomas v. *Thomas* [1947] A.C. 484;

Montgomerie & Co. Ltd. v. *Wallace—James* [1904] A.C. 73 at p. 75;

Benmax v. *Austin Motor Co. Ltd.* [1955] 1 All E.R. 326;

Imam v. *Papacostas* (1968) 1 C.L.R. 207;

Nearchou v. *Papaefstathiou* (1970) 1 C.L.R. 109 at p. 114;

Patsalides v. *Afsharian* (1965) 1 C.L.R. 134.

Appeal.

Appeal by defendant 2 against the judgment of the District Court of Nicosia (Demetriou, Ag. P.D.C.) dated the 25th February, 1983 (Action No. 1832/79) whereby he was held vicariously liable for the negligent driving of defendant 1 and was ordered to pay to the plaintiff the sum of £725.- as damages.

H.M. Kyriakides, for the appellants.

G.A. Georghiou, for the respondent.

Cur. adv. vult.

A. Loizou J.: The judgment of the Court will be delivered by Mr. Justice Stylianides.

STYLIANIDES J.: This appeal is directed against the judgment of the District Court of Nicosia whereby defendant No. 2 —appellant—was held vicariously liable for the negligent driving of defendant No. 1.

At 2.30 in the morning of 27th October, 1978, a collision occurred between motor-vehicle Reg. No. No. THD. 636 owned by the plaintiff and motor-vehicle Reg. No. TGY. 507 owned by the appellant and driven at the material time by defendant No. 1. As a result both cars were damaged.

The plaintiff sued the driver and the appellant to recover his damages. The action against the driver was dismissed on 4.12.1980 and the case proceeded between the plaintiff and the appellant.

It was agreed between the parties that the accident was due to the negligent driving of the driver of the appellant's car. The amount of damages was also agreed and the only issue left for determination by the Court was whether the appellant was vicariously liable for the negligence of the person who was driving appellant's car at the material time. The trial Judge decided the issue posed against the owner. Hence this appeal.

Counsel for the appellant submitted that the trial Court misdirected itself in law; failed to evaluate correctly the evidence; the findings of fact are unsatisfactory, not warranted by the evidence and the inferences drawn are wrong and inconsistent with the undisputed evidence before the Court.

The undisputed facts are:-

The appellant runs a taxi service between towns. He keeps offices at Nicosia, Larnaca and Limassol.

Ex-defendant No. 1 was in the service of the appellant, driving the car that came into collision with respondent's car, between Nicosia and Larnaca. He resided in Nicosia and after the day's work, at about 7.00 p.m., he was permitted to drive home with the car of his employer and return back in the morning to resume his duties. His permission was limited to drive from appellant's office at Nicosia to his house in the evening and from his house to the office in the following morning only.

If a plaintiff proves that a vehicle was negligently driven and that the defendant was its owner, and the Court is left without further information, it is legitimate to draw the inference that the negligent driver was either the owner himself, or some servant or agent of his—(*Barnard* v. *Sully*, 47 Times L.R. 557). But in cases that the facts are ascertained, the Judge can draw the inference from the complete data before him.

It is plain that the appellant's ownership of the car cannot of itself impose any liability upon him. It is settled law that where the owner of a carriage or other chattel confides it to another person who is not his servant or agent, he is not responsible merely by reason of his ownership for any damage which it may do in that other's hands. The driver of a car may not be the owner's servant, and the owner will be nevertheless liable for his negligent driving if it be proved that at the material time he had authority, express or implied, to drive on the owner's behalf. Such liability depends not on ownership, but on the delegation of a task or duty—(*Hewitt* v. *Bonvin*, [1940] 1 K.B. 188, at pp. 194-195).

In the present case there was evidence before the Court and, therefore, the ownership of the car by itself does not create even presumption of liability on the appellant.

It is not the law that the owner of a chattel is responsible in law for damage done by the negligence of a person to whom he has lent it or whom he has permitted to use it—(*Ormrod* v. *Crosville Motor Services Ltd.*, [1953] 2 All E.R. 753, at p. 754).

The owner is liable if the driver is his agent, that is to say, if the driver is, with the owner's consent, driving the car on the owner's business or for the owner's purposes. The owner of a vehicle is liable for the negligence of the driver if that driver is his servant acting in the course of his employment.

The law governing liability of the master for acts of his servant is section 13 of the Civil Wrongs Law, Cap. 148, which reads as follows:-

> "13. (1) For the purposes of this Law a master shall be liable for any act committed by his servant—

(a) which he shall have authorised or ratified, or

(b) which was committed by his servant in the course of his employment:

Provided that a master shall not be liable for any act committed by any person, not being another of his servants, to whom his servant shall, without his authority, express or implied, have delegated his duty.

(2) An act shall be deemed to have been done in the course of a servant's employment if it was done by him in his capacity as a servant and whilst performing the usual duties of and incidental to his employment notwithstanding that the act was an improper mode of performing an act authorised by the master; but an act shall not be deemed to have been so done if it was done by a servant for his own ends and not on behalf of the master.

(3) For the purposes of this section act includes omission.

(4) Nothing in this section shall affect the liability of any servant for any act commmitted by such servant".

Section 2(1) of Cap. 148 provides that this Law shall be interpreted in accordance with the principles of legal interpretation obtaining in England, and expressions used in it shall be presumed, so far as is consistent with their context, and except as may be otherwise expressly provided, to be used with the meaning attaching to them in English law and shall be construed in accordance therewith.

The Civil Wrongs Law originated and purported to codify the English Common Law regarding liability ex delicto.

Section 29(1)(c) of the Courts of Justice Law, 1960 (Law No. 14/60) makes the Common Law of England applicable in this country where no express statutory provision exists. This provision was enacted for the first time in 1935—(Courts of Justice Law, 1935, s.49(c)).

In interpreting and applying the provisions contained in the Civil Wrongs Law the Court should not regard this Code as a stockade around the Common Law lest it break out and damage the citizens of Cyprus. They must be interpreted and

applied in such a manner as to give effect to the will and intention of the legislator—(See the observations of Hallinan, C.J., in *Universal Advertising and Publishing Agency* v. *Panayiotis A. Vouros*, 19 C.L.R. 87; *Theofanou Akama and Another* v. *Niki Ioannou Tsiakoli*, (1967) 1 C.L.R. 206, at p. 213; *Hadji-Theodossiou* v. *Koulia N Another*, (1970), 1 C.L.R. 310).

The question of vicarious liability to third persons for the negligence of one's servant came up for consideration by this Court on a number of occasions, and useful reference may be made to the cases of *Municipal Corporation of Limassol* v. *Agathangelos Constantinou*, (1972) 1 C.L.R. 119; *Stavrinou Costa and Another* v. *Municipal Corporation of Limassol*, (1975) 1 C.L.R. 84; *Tsiopanis* v. *Avraam*, (1978), 1 C.L.R. 27.

Regarding the test as to whether a wrongful act is to be deemed to be done in the course of one's employment, this Court adopted in the above cases the following extracts from *Clerk and Lindsell on Torts* and *Salmond on the Law of Torts*:-

> "The question whether a wrongful act is within the course of a servant's employment, or, as it is sometimes put, whether it is within the scope of his authority, is ultimately a question of fact, and no simple test is appropriate to cover all cases. That most frequently adopted is given by Salmond, namely, that a wrongful act is deemed to be done in the course of the employment, 'if it is either (1) a wrongful act authorised by the master, or (2) a wrongful and unauthorised mode of doing some act authorised by the master'. It is clear that the master is responsible for acts actually authorised by him: for liability would exist in this case, even if the relation between the parties was merely one of agency, and not one of service at all. But a master, as opposed to the employer of an independent contractor, is liable even for acts which he has not authorised, provided they are so connected with acts which he has authorised that they may rightly be regarded as modes—although improper modes—of doing them".

In *Goh Choon Seng* v. *Lee Kim Soo*, [1925] A.C. 550; Lord Phillimore said at p. 554:-

> "The principle is well laid down in some of the cases cited by the Chief Justice, which decide that 'when a servant

does an act which he is authorised by his employment to do under certain circumstances and under certain conditions, and he does them under circumstances or in a manner which are unauthorised and improper, in such cases the employer is liable for the wrongful act. .....'. As regards all the cases which were brought to their Lordships' notice in the course of the argument this observation may be made. They fall under one of three heads: (1) The Servant was using his master's time or his master's place or his master's horses, vehicles, machinery or tools for his own purposes: then the master is not responsible. Cases which fall under this head are easy to discover upon analysis. There is more difficulty in separating cases under heads (2) and (3). Under head (2) are to be ranged the cases where the servant is employed only to do a particular work or a particular class of work, and he does something out of the scope of his employment. Again, the master is not responsible for any mischief which he may do to a third party. Under head (3) some cases like the present, where the servant is doing some work which he is appointed to do, but does it in a way which his master has not authorised and would not have authorised, had he known of it. In these cases the master is, nevertheless, responsible".

(See also *Canadian Pacific Railway Co.* v. *Lockhart*, [1942] 2 All E.R. 464).

In *Staton* v. *National Coal Board*, [1957] 2 All E.R. 667, Finnemore, J., stated at p. 669:-

"As to the general principle, it is clear, first of all, that for the doctrine of vicarious responsibility to apply there must be the relationship of master and servant. That is not in dispute in this case, because Mr. Townsend was employed by the defendants, the National Coal Board. The second point is that the servant, when he commits the tort, must be acting in the course of his employment. It is on that second limb that the argument and discussion have taken place in this particular matter. The master is not responsible for a wrongful act done by a servant unless it is done in the course of his employment. Most of the cases deal with the point that an act is presumed to

be in the course of the workman's employment if it is. first of all, a wrongful act authorised by the master—that does not apply to this case—or a wrongful, though unauthorised, mode of doing some act which was authorised by the master. Various other tests have been suggested: it is not enough, for example, that the negligence was committed at a time when the servant was engaged on the master's business; it must be committed in the course of that business, so as to form a part of it, and not merely to be coincident in time".

In *Marsh* v. *Moores*, [1949] 2 All E.R. 27, at p. 31, Lynskey, J., said:-

".....if the unauthorised and wrongful act of the servant is not so connected with the authorised act as to be a mode of doing it, but is an independent act, the master is not responsible, for in such a case the servant is not acting in the course of his employment but has gone outside it".

In *Ilkiw* v. *Samuels and Others*, [1963] 2 All E.R. 879, it was said:-

"His employers must remain liable for his negligence so long as the vehicle was being used in the course of their business. As I understand the authorities, the employers escape liability if, but only if, at the time of the negligent act, the vehicle was being used by the driver for the purpose of what has been called a 'frolic' of his own".

MacKinnon, L.J., in *Hewitt* v. *Bonvin* (supra) said at p. 192:-

"But even a man who is in every sense a servant, to make his undoubted employer liable for his negligent act, must at the moment of his act be doing work for his employer. If a regularly employed chauffeur, when driving his master's car, knocks some one down, the employer will yet escape liability if he shows that the chauffeur was using the car on an unauthorised journey for his own purpose or benefit: he is at the time not doing his master's work".

In *Higbid* v. *R.C. Hammett Ltd.*, 49 T.L.R. 104, the wrongdoer's servant had asked the defendants, his employers, for permission to use a bicycle, which belonged to his employers, to ride home to his dinner and his employers had allowed him

to use the bicycle for that purpose. In going home to his dinner on that bicycle the boy negligently rode into the plaintiff who suffered personal injuries. Lord Justice Scrutton held that when an employee, for his own purposes, used his employers' bicycle by the employers' permission, the employers were not liable for the employee's negligence.

In *Hilton* v. *Thomas Burton (Rhodes) Ltd. and Another* [1961], 1 All E.R. 74, the case of *Higbid* (supra) was applied. It was said:-

> "The true test is: Was he doing something that he was employed to do?".

In *Hilton* case any workman who had a driving licence was authorised by the employer to drive the employer's van, and the workmen were permitted to use the van for any reasonable purpose of their own, such as going to get refreshment while out on a job. On the day of the accident the deceased, H. and five other men were working on a site which was about thirty miles from the employer's premises. At about 12.20 p.m., the deceased, H. and another man went to a public house near the site for drinks, stayed there for about an hour, and, on returning to the site, ate their lunches, which they had brought with them. At about 3.30 p.m., these three men and another man decided to go to a cafe, which was about seven miles away, for tea. They started off in the employer's van, with H. driving, but when they were approaching the cafe they realised that there would not be time to go in, as they would have to return to the site to pick up the other three men before returning to the employer's premises. As they were returning to the site, the van overturned on a curve owing to the negligent driving of H., and the deceased was killed. His widow claimed damages against the employer as being vicariously responsible for H.'s negligence. It was held that the employer was not liable, for on the facts H. was not at the time doing anything that he was employed to do.

In *Richard Mitchell and Another* v. *Crassweller and Another*, 138 E.R. (C.P.) 1189; Jervis, C.J., said:-

> "That brings us to the principal point, whether, under the circumstances disclosed by the evidence, the defendants are responsible for the injury which the plaintiffs have

sustained. Each case must depend upon its own particular circumstances. No doubt a master may be liable for injury done by his servant's negligence, where the servant, being about his master's business, makes a small deviation, or even where he so exceeds his duty as to justify his master in at once discharging him. But, here it cannot be denied, that, though it was the duty of the carman, on his arrival with the horse and cart at Welbeck Street, immediately to take them to the stable, he, in violation of that duty, and without the sanction or knowledge of his employers, instead of going to the stable, started on a new journey, wholly unconnected with his masters' business—as my Brother Parke expresses it in *Joel* v. *Morrison*, 'on a frolic of his own'. I think, at all events, if the master is liable where the servant has deviated, it must be where the deviation occurs in a journey on which the servant has originally started on his master's business; in other words, he must be in the employ of his master at the time of committing the grievance. I think that was not the case here, and therefere I think the defendants are not liable to this action".

In *Storey* v. *Ashton*, [1869] L K.B. 476, the *Mitchell* case was approved and Cockburn, C.J., said:-

"The true rule is that the master is only responsible so long as the servant can be said to be doing the act, in the doing of which he is guilty of negligence, in the course of his employment as servant. I am very far from saying, if the servant when going on his master's business took a somewhat longer road, that owing to this deviation he would cease to be in the employment of the master, so as to divest the latter of all liability; in such cases, it is a question of degree as to how far the deviation could be considered a separate journey. Such a consideration is not applicable to the present case, because here the carman started on an entirely new and independent journey which had nothing at all to do with his employment".

In the *Storey* case on the way after delivering some wine, on the return, when about a quarter of a mile from the defendant's offices, the carman, instead of driving to the defendant's offices, was induced by the clerk (it being after business hours) to drive in quite another direction on business of the clerk's; and while

they were thus driving the plaintiff was run over, owing to the negligence of the carman.

In determining whether a wrongful act is done by a servant in the course of his employment all the surrounding circumstances must be taken into account and not merely the particular act that leads to the damage.

The question that arises is: Was the driver at the material time doing an act in the course of his employment as a servant? Was he simply deviating from the route in doing an act for his employer?

The trial Judge, after saying that there was no dispute as to the facts, stated (p. 24 of the record):-

> "It transpired from the evidence that the driver was at the material time an employee at the taxi office of defendant No. 2. According to P.W.1, the investigating officer of this accident, the driver told him at the scene where he had arrived to investigate the accident that he (the driver) was driving as an employee of the taxi office of the defendant No. 2. P.W.1 also said that he saw two persons who were at the time passengers of the car driven by the driver. He stated this in clear terms although he did not inquire whether they were passengers with obligation to pay or not".

And at page 27:-

> ".....I find that there is sufficient evidence to establish (a) that the driver was at the time in the employment of defendant No. 2, (b) that the driver committed the wrongful act by driving the car in an unauthorised mode of doing something which was authorised by defendant No. 2, to wit, to use the car to go home and come back to his work on the following day. There is no evidence that the driver was using the car at the time exclusively for his own purposes. It is, therefore, open for the Court to infer, and I do infer, that the driver was at the time driving the car partly for his own purposes and partly for those of defendant No. 2".

And at page 28:-

> "..... on the balance of probabilities the version of the

plaintiff is a more probable one and find that the wrongful act of the driver was committed in the course of his employment within the ambit of the law expounded hereinabove. Defendant No. 2 is held vicariously liable".

The appellant complains that the findings of fact of the trial Court are not warranted by the evidence, and the inferences drawn are wrong.

As regards the powers of this Court on appeal from the findings of trial Courts, under section 25(3) of the Courts of Justice Law, 1960, the Court is not bound by any determinations on questions of fact made by the trial Court and has power to review the whole evidence and draw its own inferences; and although the Court of Appeal would be slow to reverse the findings of primary facts made by the trial Court (though it has done so in proper cases), it would be prepared to form an independent opinion upon the proper conclusion of fact to be drawn from a finding of primary facts— (*Charalambos Droushiotis (No. 2)* v. *The Cyprus Asbestos Mines Ltd.*, (1966) 1 C.L.R 215, at p. 228).

It is the practice of an appellate Court not to interfere with the verdict of the trial Court which had the advantage of hearing the witnesses and watching their demeanour unless some very strong ground is put forward establishing that the verdict is against the weight of the evidence. That this is a most salutary practice there can be no doubt, as a study of the notes of evidence, even when taken with the utmost accuracy, cannot possibly convey to the mind of a Judge the same impression which the oral examination of the witnesses and their demeanour under that process would have made upon the same Judge, if it had been his duty to hear the case in first instance. It is for the appellant to show that the conclusions arrived at by the Court appealed from, are erroneous. In a case where the matter turns on the credibility of witnesses, it is obvious that the trial Court is in a far better position to judge the value of their testimony than we are. We are, of course, not oblivious of the fact that quite apart from manner and demeanour, there are other circumstances which may show whether a statement is credible or not, and we should not hesitate to act upon such circumstances, if, in our opinion, they warranted our intervention— —(*Maroulla Stylianou Polykarpou* v. *Savvas Polykarpou* (1982 1 C.L.R. 182, at pp. 194–195).

In *Sofoclis Mamas* v. *The Firm "ARMA" Tyres*, (1966) 1 C.L.R. 158, at p. 160, Vassiliades, J., as he then was, said:-

> "The findings of the trial Court will not be disturbed on appeal, unless the appellant can satisfy this Court that the reasoning behind such findings is unsatisfactory, or that they are not warranted by the evidence when considered as a whole".

In *Kyriacou* v. *A. Kortas & Sons Ltd.*, (1981) 1 C.L.R. 551, at p. 553, the Court expounded the principles on the strength of which the Appeal Court may interfere with the findings of fact by a trial Court as follows:-

> "It must be shown that the trial Judge was wrong in evaluating the evidence and the onus is on the appellant to persuade the Court that that is so. Matters relating to credibility of witnesses fall within the province of the trial Judge who has the opportunity to see and hear the witnesses. If on the evidence before him it was reasonably open to him to make the findings to which he arrived at, then this Court will not interfere unless the inferences drawn therefrom are not warranted by the findings whereupon this Court can draw its own conclusions".

Malachtos, J., in delivering the judgment of the Court of Appeal in *Osman Mentesh and Another* v. *Evripides Hadji-Demetriou*, (1983) 1 C.L.R. 1, reiterated the same principle and adopted the following passage from the judgment of the House of Lords in *Watt or Thomas* v. *Thomas*, [1947] A.C. 484:-

> "When a question of fact has been tried by a judge without a jury and it is not suggested that he has misdirected himself in law, an appellate Court in reviewing the record of the evidence should attach the greatest weight to his opinion, because he saw and heard the witnesses, and should not disturb his judgment unless it is plainly unsound. The appellate Court is, however, free to reverse his conclusions if the grounds given by him therefor are unsatisfactory by reason of material inconsistencies or inaccuracies, or if it appears unmistakably from the evidence that in reaching them he has not taken proper advantage of having seen and heard the witnesses or has failed to appreciate

the weight and bearing of circumstances admitted or proved".

The decision of the trial Court turns virtually on the inferences to be drawn from undisputed facts. In reviewing decisions based on inferences from facts not in controversy, this Court is in as good a position as a trial Court to evaluate such facts as no question of credibility arises. Lord Halsbury in the House of Lords in *Montgomerie & Co. Ltd.* v. *Wallace-James*, [1904] A.C. 73, said at p. 75:-

"But when no question arises as to truthfulness, and where the question is as to the proper inferences to be drawn from truthful evidence, then the original tribunal is in no better position to decide than the judges of an Appellate Court".

(See also *Benmax* v. *Austin Motor Co. Ltd.*, [1955] 1 All E.R. 326).

In our Civil Procedure Rules, Order 35, r. 8, dealing with the powers of the Court of Appeal, it is provided:-

"The Court of Appeal shall have power to draw inferences of fact and to give any judgment and make any order which ought to have been made, etc.".

(See also s.25(3) of the Courts of Justice Law, 1960; also *Iman* v. *Papacostas*, (1968) 1 C.L.R. 207; *Nearchou* v. *Papaefstathiou*, (1970) 1 C.L.R. 109, at p. 114; *Patsalides* v. *Afsharian*, (1965) 1 C.L.R. 134; *Sofoclis Mamas* v. *The Firm "ARMA" Tyres*, (supra)).

As the Judge said, the facts of the case are not in dispute. No question of credibility arose. We observe, however, inaccuracies and discrepancies between the evidence on the record and the judgment under appeal.

In the present case one witness, namely, the investigating officer, P.C. 2838, Loizos Stylianou, testified for the plaintiff and two witnesses, namely, Soteris Petrou (D.W.1), the person in-charge of all the offices of the appellant in the three main towns, and D.W.2, Panayiotis Christou, the person in-charge of the taxi office of the appellant at Nicosia.

At the scene of the accident the investigating officer, P.W.1, P.C. 2838, Loizos Stylianou, put some questions to the driver

who replied that he was in the employment of the appellant as a driver; that he had passengers who, being injured, had been conveyed to the hospital before the arrival of the investigating officer. The investigating officer did not know whether the passengers to whom the driver referred were carried on reward or not. He did not know whether at the time of the accident the driver was driving for the appellant; he simply said that he was an employee of appellant's taxi office.

The undisputed and incontestable evidence on record is to the effect that the driver was allowed only to drive the car at closing time, circa 7.00 p.m., from the taxi office directly to his house; keep it there and not use it until the next morning when he would drive it from his house to the office to resume work. He was not permitted to use the car for his own purposes or for any other purpose. His house was at Famagusta Street, No. 35, Nicosia—5 minutes from the appellant's taxi office.

The findings and inferences of the trial Judge that the driver was at the material time in the employment of the appellant and that he committed the wrongful act by driving the car in an unauthorised mode of doing something which was authorised by the appellant, to wit, to use the car to go home and come back to his work on the following day, and that the driver was at the time driving the car partly for his own purposes and partly for those of the appellant, are unsatisfactory, not warranted by the evidence and wrong. Not only this Court has the power but it is its duty to substitute its own inference for that found by the trial Judge.

Whilst driving from the office to his house and back may be considered that he was driving, in the circumstances of this case, partly for the purpose of his employer and partly for his own purpose as, besides going to his house, he had to keep the car overnight. The journey from the office to his house lasted for about five minutes. Any journey after he had reached his house, anywhere during the night, was not in any way connected with his employment; it might be a frolic of his own, but, definitely, not in the course of his employment. The driver was involved in the accident at Grivas Dighenis Avenue at 2.30 a.m., 7 1/2 hours after he had left the office. The accident did not occur shortly after 7.00 p.m. in the course of a deviation as the driver did not follow the shortest road from the taxi

office to his house. It happened more than 7 hours after he had left the office, at 2.30 a.m.

Having regard to the evidence and the circumstances of the case, we conclude that the driver was not in any way carrying out his master's employment. The master is not liable for his negligence.

The appeal is allowed; the judgment of the trial Court is set aside with costs here and in the Court below.

Appeal allowed with costs.