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SOUTH PACIFIC SUGAR MILLS LTD. & ANOTHER

v.

B

SANTLAL

[COURT OF APPEAL* 1972 (Gould V.P., Marsack J.A., Spring J.A.), 26th October, 3rd November]

Civil Jurisdiction

C

Damages—fatal accident—collision between motor vehicle and train engine—findings of fact—finding of no contributory negligence by Supreme Court reversed on appeal—apportionment of negligence.

Appeal—findings of fact—Court of Appeal drawing different inferences from primary facts found by trial court.

Negligence—collision between motor vehicle and train engine—finding of no contributory negligence on part of driver of motor vehicle reversed on appeal.

D

On an appeal from a judgment of the Supreme Court awarding damages in respect of a fatal accident caused in a collision between a motor vehicle and the engine of a sugarcane train, the Court of Appeal applied the principle that in dealing with findings of fact based on the credibility of witnesses, an appellate court will be reluctant to differ from such findings, but that in the evaluataion of inferences from proved and admitted facts it is in a different position and may substitute its own inferences in a proper case. It was held:

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1. That the learned trial judge's finding that the driver of the train was negligent in that he failed to give warning by sounding his horn was to be upheld, but not his finding that the driver failed to keep a proper lookout.

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2. That the learned judge's finding that there was no negligence on the part of the deceased car driver could not be sustained as the evidence entailed a finding that he had not kept a proper lookout or taken all available steps to avoid the collision.

3. The judgment for damages would be reduced by 50% in respect of the contributory negligence of the deceased.

G

Cases referred to:

Benmax v. Austin Motor Co. Ltd. [1955] A.C. 370: [1955] 1 All E.R. 326.

Hicks v. British Transport Commission [1958] 2 All E.R. 39; [1958] 1 W.L.R. 493.

R. G. Kermode for the appellants.

H

K. C. Ramrakha for the respondent.

The facts sufficiently appear from the judgment of Marsack J.A.

3rd November 1972

* The judgment of the Court of Appeal was reversed and that of the Supreme Court restored by the Privy Council in Appeal No. 7 of 1973.

The following judgments were read :

MARSACK J.A. :

This is an appeal against a judgment of the Supreme Court at Lautoka given on the 30th June, 1972, awarding the respondent the sum of $1,300 against the appellants in respect of the death of respondent's son Suresh Pratap in a collision between a car being driven by Suresh Pratap, and a cane train, the property of South Pacific Sugar Mills Ltd., being driven at the time by second appellant Veera Swamy, on the 15th June, 1969. The collision took place at a point where a railway line the property of the Company crosses the main Queen's Road between Nadi Airport and Nadi Township. The learned trial Judge held that the collision was entirely due to the negligence of the Company's driver in —

(a) failing to keep a proper look out;

(b) failing to notice the approach of the deceased's car;

(c) failure to give adequate warning of the approach of the train; and

(d) failure of the driver to stop his train as he should have done to avoid the collision.

The facts as found by the learned trial Judge were, inter alia :—

(a) that the cane train was approaching the main road at a speed of about 5 m.p.h.;

(b) that the notice warning motorists of the railway crossing, which had been erected by the Company, was obscured by the presence of a tree;

(c) that the driver did not sound his klaxon horn as he was approaching the main road in such a manner as to give adequate warning to oncoming traffic; and

(d) that the deceased was driving a small car, containing 6 people, along the Queen's Road at a speed of 50 - 55 m.p.h.

At the hearing of the appeal counsel agreed that there was no substantial question of law involved, and that the fate of the appeal depended almost entirely upon the view taken by this Court of the facts found by the learned trial Judge.

At the outset I must confess to some hesitation in accepting the finding of the learned trial Judge that the driver of the cane train had not sounded his horn "in the way spoken of in the evidence of the firstnamed defendant (the driver) and the pointsman". Both the driver and the pointsman gave sworn evidence that the horn had been sounded from the time they reached the whistle notice on the track, some distance before the road, and had been kept sounding continuously until the time of the collision. As against this two persons who were in the car deposed that they had not heard the horn. The Judge certainly said —

> "I was not impressed with the second defendant nor the pointsman, and insofar as their evidence conflicts with the evidence given on behalf of the plaintiff I greatly prefer the evidence given on behalf of the plaintiff. . . . ."

Even if full value is given to the evidence on this point by the witnesses called by the plaintiff it amounts to nothing more than saying that they did not hear the whistle. The fact that they did not hear it may have been due to other considerations than failure on the part of the driver to blow the whistle in the manner stated in his evidence. In any event it seems to me a somewhat slender foundation upon which to base a finding that the driver and the pointsman had both given false evidence.

The legal principle to be applied in cases where findings of fact are challenged on appeal is authoritatively expressed by *Viscount Simonds in Benmax v. Austin Motor Co. Ltd* [1955] 1 All E.R. 326 at p. 327 :

> "This does not mean that an appellate court should lightly differ from the finding of a trial judge on a question of fact, and I would say that it would be difficult for it to do so where the finding turned solely on the credibility of a witness",

and by *Lord Reid (ibid)* at p.328 :

> "No one would seek to minimise the advantage enjoyed by the trial judge in determining any question whether a witness is, or is not, trying to tell what he believes to be the truth, and it is only in rare cases that an appeal court could be satisfied that the trial judge has reached a wrong decision about the credibility of a witness."

In the present case, the learned trial Judge has based his findings as to the blowing of the whistle upon the credibility of witnesses, and in these circumstances this Court should be reluctant to reverse that finding.

As therefore it must be accepted that the driver of the cane train failed to blow his horn in such a way as to give adequate warning of the approach of the train, this must amount to a finding of negligence on the part of the driver; negligence which must be taken to have contributed to the collision.

With regard to the learned trial Judge's other findings of negligence on the part of the driver, namely failure to keep a proper look-out and failure to stop his train in time to avoid the collision, I do not think findings can be supported on the evidence accepted by the learned trial Judge. Here the findings are rather inferences from the proved and admitted facts that findings of fact. As is pointed out in *Benmax v. Austin Motor Co. Ltd. (supra) by Viscount Simonds* at p. 327.

> "But I cannot help thinking that some confusion may have arisen from failure to distinguish between the finding of a specific fact and fnding of fact which is really an inference from facts specifically found, or, as it has sometimes been said, between the perception and evaluation of facts."

The principle to be applied in such cases is clearly set out by *Parker L.J. in Hicks v British Transport Commission [1958]* 2 All E.R. 39 at p.50:

> "This court is loath to interfere with an inference drawn by a trial judge who has seen and heard the witnesses. With that, of course, I entirely agree; but at the same time, if this court is satisfied that the inference drawn is the wrong inference then not only has it the power but it is its duty to substitute its own inference for that found by the learned judge."

An Appeal Court is in as good a position to draw inferences as was the Court before whom the hearing took place. Here the evidence shows clearly that when the car was approaching the crossing it was overtaken by another car driving at very high speed; and the overtaking car narrowly avoided collision with the oncoming train by what was deposed to as a matter of inches. The train then must have been on the road itself, or at least on the edge of it. The driver's attention would necessarily for the moment be on the car just passing in front of the train; and the collision with the car driven by the deceased must have taken place in so short an interval afterwards that the train driver could not in my view be said to be at fault in failing to observe the deceased's car in time before the collision occurred.

In the course of the argument some emphasis was placed on the driver's statement, made in cross-examination :

> "Our instructions are to blow the whistle and go. I would not have stopped even I had seen the car coming. If I had stopped I would have been stopped all day till all the cars go past."

In his judgment the learned trial Judge commented on this evidence to the effect that the driver would have been in no different position from a vehicle coming out of a side road to cross the main Queen's Road.

In my view, the driver of a cane train proceeding along a railway line which crosses the main road is quite in a different position from the driver of a car entering the main road from a side road. In any event I think it would be wrong to make too much of the driver's evidence quoted above. He was clearly thinking of his general instructions. The evidence showed that he had his hand on the brake at all times; and one of the reasons he gave for this was that the road was busy. It is not in my opinion a proper inference from his evidence that he would not have stopped if an emergency had arisen; and he in fact stopped very promptly when the crash with the oncoming car occurred.

The further finding by the learned trial Judge on the question of negligence was in these words —

> "In all those circumstances I am completely satisfied that no blame and no contributory negligence attaches to the deceased in this case."

Here again, I think that it is competent for this Court to examine the facts as found by the learned trial Judge and to draw other inferences from those facts if this Court feels that those drawn by the learned trial Judge were not justified. In the first place it may well be thought that an admitted speed of 50 - 55 m.p.h. in that particular locality would be a dangerous speed, unless the driver was vigilant to keep a proper look-out and alert to take whatever steps were required in the event of emergency. It is quite clear that the train would become visible as soon as it emerged from a cane-growing area by the side of the track. The cane did not grow up to the edge of the road; the evidence on this point, which is not disputed, was that the cane ceased about twelve feet to fifteen feet from the road at this point. Therefore very shortly after it emerged from the growing cane the approach of the train must have been visible to a driver on the main road keeping a proper look-out. The train travelled some nine feet across the road to the point of impact. Consequently, the train had travelled some twenty feet or more, at an admitted speed of 5 m.p.h., after it should have become visible to the driver of an oncoming car.

In my view there is merit in Mr. Kermode's arithmetical calculation that, as the car was admittedly travelling at some ten times the speed of the train, then at the time when the train became visible and should have been seen by the oncoming driver, the car was at a distance of two hundred feet or more. This would have given the driver ample time to avoid the collision if he had been keeping a proper lookout, and had taken the steps open to him to safeguard his car and its passengers. I am firmly of opinion that on the facts accepted by the learned trial Judge the inference is irresistible that there was negligence on the part of the deceased.

In arriving at this conclusion I have not taken into account the fact that the deceased had a light goods licence and therefore in all probability had a good knowledge of the roads in that area; or that his brother Virendra, who was a passenger in the car, stated that everybody would know that the mills were crushing and that the cane is mostly carried by train. The evidence as to the visibility of the railway line across the main road was not sufficiently definite to enable a finding as to the distance from which it could be clearly seen.

The evidence as to the deceased's failure to keep a proper look-out and to take all available steps to avoid the collision is in my view compelling, and entails a finding that the deceased was guilty of negligence which contributed to the collision. That being so, the damages awarded must be reduced in my opinion by an appropriate proportion. The fixing of this figure is always a matter of considerable difficulty; but as in my view deceased's negligence was at least equal to that which the learned Trial Judge found against the driver of the cane train, I would fix the proportion by which damages should be reduced at 50%.

The quantum of damages is also in issue. Appellant contended strongly that the evidence of the dependency of the respondent on the deceased was sufficient to entitle him to damages under this head. In my view, however, this Court should not interfere with the judge's finding on this point. For the reasons given, I would reduce the judgment in the Court below by 50% in respect of the contributory negligence of the respondent, that is from $1,300 to $650, together with costs on that amount. I would order that respondent pay to the appellant one-half of the costs of this appeal.

SPRING J.A. :

I have read the judgment of my learned brother, Marsack J.A. and I agree with his reasoning and conclusions.

I have nothing to add.

GOULD V.P. :

I have had the advantage of reading the judgment of Marsack J.A. and am in agreement with it.

All members of the court being of the like opinion the appeal is allowed to the extent indicated in that judgment and there will be the orders for costs proposed therein.

Appeal allowed in part.