5 of 1977

IN THE PRIVY COUNCIL

No. 9 OF 1977

ON APPEAL
FROM THE COURT OF APPEAL OF JAMAICA

BETWEEN :

RITA BENNETT (Plaintiff) — Appellant

- and -

PARAMOUNT DRY CLEANERS LTD.
(Defendant) — Respondent

CASE FOR THE APPELLANT.

RECORD

1. This is an Appeal by leave of the Court of Appeal of Jamaica from a Judgment of the said Court (Graham-Perkins, J.A., Hercules, J.A., and Robinson, J.A.) dated the 29th day of November 1974, in Civil Appeal number 46 of 1972.

2. By the said Judgment the Court of Appeal held that the Appellant was not entitled to the relief granted to her by Order of the trial Judge, Melville, J., dated the 8th day of December, 1972, namely :-

> That Judgment be entered for the Plaintiff for $1,534.30. with costs.

3. Action was brought by the Appellant (Suit C.L. 1054 of 1970) on the 7th October, 1970, in the Supreme Court of Judicature of Jamaica to recover damages for personal injuries suffered by her on the 12th May, 1970, as a result of the act of a fellow-servant, Ida Griffiths, in causing the top of a steam-pressing machine to descend on the Appellant's hand at the Respondent's Dry Cleaning and Laundry establishment at 95½ Molynes Road, Kingston, 10, Jamaica.

4. The Respondent was the employer of both the Appellant and the said Ida Griffiths.

RECORD

5. The action was tried by Melville, J., without a jury, on the 7th and 8th December, 1972, and Melville, J., found that the Respondent was 50 per cent to blame for the accident, and that the Appellant was guilty of contributory negligence and was 50 per cent to blame for the accident.

6. Evidence at the trial was given by the Appellant as follows :-

"At about 9.15 a.m. I was operating machine on 12/5/70. Four (4) machines there. Two (2) small and two large. I operate the two small ones. I pressed the top of shirts, shoulder and collar, with the small machine. I then passed the shirt to Ida Griffiths to complete pressing on the large machines. That is (the) normal thing. "Ida also employed there as presser. She operated one of the large machines. Anotheer lady who had just come on operated the other large machine. On 12/5/70 Mr. Chin the owner said there was some rush work to be got through by 12 noon. Mr. Chin told myself and Ida. At 9.15 I was pressing the top of shirt on a small machine. Mr. Chin came and asked me to let him use machine and I gave it to him. So I had one small machine operating. The young lady was absent so I use her large machine to press the bottom of shirt. I put the shirt in large machine and meanwhile Ida put another shirt to the other end of the machine. Machine can take two shirts at a time. I was spraying both shorts with a spray gun with water. The spray gun hangs overhead and I squeezed the bottom of the gun. I said to Ida: 'Mind me hand'. I don't like anyone to use the machine that I am using' Ida touch the button on the machine. Machine top came down on my right hand. My right hand was right down on the machine on the shirt. I should have been the person to press the button. Ida cried out 'Lord me God' and released the machine by pressing another button so it went up off my hand. I saw pure darkness when machine on my hand. I then sat down on the clothes bin. When that happen Mr. Chin was at my left at my small machine operating it. (He) turned and said to Ida: 'What is that Miss Griffiths?' She said: 'I didn't know that Miss Bennett's hand still on the machine' "".

7. The said Ida Griffiths in her evidence at the

trial said:

"I made one step to release the next machine. I glanced behind and saw something stretched out. At first didn't know it was a hand. I turned around fully and saw (Appellant's) hand in machine. I made a scream and release it .....
"(Appellant) working about one yard from me .....
"When I pressed buttons I didn't see (Appellant), but through the argument she was going on she was sideways (shows behind and to her left). I alone alone don't press whole shirt .....
"I didn't see the (Appellant) near to me just before accident. I did see Mr. Chin pressing a skirt that morning. I hesitated because I want to give a true answer .....
"I didn't see Mr. Chin pressing a skirt that morning. I hesitated because I wanted to give a true answer".

8. Kingsley Chin, Managing Director of the Respondent Company, in his evidence at the trial said :

"After showing (Appellant) I went away. I was about 15 to 20 feet away when I heard a scream ..
"A second before the accident I wasn't around. I was walking away from (Appellant) and so was not pressing a skirt. (Appellant was not pressing on small machine whilst I was using the other pressing a skirt .....
"After scream I turned back .....
"If (Appellant) was using small machine and I using number one small machine she could also use number three at the same time".

9. Dr. Amos Foster, the Physician who examined and treated the (Appellant) said in his evidence at the trial :

"(Appellant) will never be able to resume her normal work because she has developed extensive scarring of right forearm, wrist and hand. There is also a formation of extensive area of Keloid .. There is no possibility of removing that. That would have to be removed before she can resume normal activity".

10. Melville, J., in giving Judgment at the trial of the action, said :

"Plaintiff's (Appellant's) case grossly exaggerated. Court finds as facts that Chin showing (Appellant) how shirt to be pressed by small number

RECORD

one machine. (Appellant) then by or near number three machine. Reject (Appellant's evidence of how accident happened. Satisfied Griffiths witness of truth when she says she alone operating number three.

"Plaintiff's hand came to be under top of machine. Court rejects (Appellant's) evidence that she was operating number three machine and Griffiths had shirt also on number three and she (Appellant) was spraying back of shirts when Griffiths pressed button and brought down machine on hand. Court satisfied that Chin showing (Appellant) how to press skirt on number one machine. (Appellant) then had hand resting on pad of number three. Griffiths then operate number three and carelessly brought machine down on (Appellant's) hand. Not true (Appellant) spraying with spray in hand when machine brought down or then one would expect top of fingers to be part burnt and not back of hand as actually happens. Closeness of machines. Proximity of (Appellant) to Defendant (Ida Griffiths). Griffiths ought to take care to see no one's hand on machine before pressing buttons to bring down top of machine, and she is (therefore) negligent. (Appellant) not taking care for her safety by putting hand on pad at time, knowing Griffiths using number three. Therefore guilty of contributory negligence. No slamming down of machine as (Appellant) alleges. Accepts Chin's evidence machine in proper working order. Accept that Chin mistaken when he says he had moved off after speaking to (Appellant). Court accepts Griffiths' evidence on this point that (Appellant) and Chin somewhere behind here then proper apportionment 50% - 50%."

11. Graham-Perkins, J.A., giving the Judgment of the Court of Appeal, said:

"In the result, Melville, J., was called upon to resolve a relatively narrow issue as to the (Respondent's) liability. Put simply it was: Did the (Appellant) suffer her injury as the result either of the failure in the (Respondent) to provide a safe system of work and effective supervision of the machines, or of the negligence of a fellow-servant ?..... Let it suffice to say that no valid reason has been advanced why it should be held that Melville J., was in error in rejecting the (Appellant's) evidence, or in accepting the evidence of Griffiths

"In our view once the (Appellant's evidence is rejected, and once the conclusion is reached that it was not open to the learned trial Judge to assign a theory of his own as to the cause of the (Appellant's) injury, there can be no justification in the circumstances of this case for any debate as to the failure in the (Respondent) to provide a safe system of work".

12. In his submissions to the Court of Appeal, Counsel for the Appellant had emphasised the following :

(1) It was obvious that Ida Griffiths, the servant of the Respondent Company, on her own evidence, was in breach of the duty of care owed to the Appellant, in that she brought down the top portion of the number three machine on the Appellant's hand, although she had seen "something stretched out" on the machine, and ought to have known that it was the Appellant's hand.

(2) There was the most fundamental and irreconcilable discrepancies and contradictions in the evidence of Griffiths and Chin, the two witnesses for the Respondent, the out-standing one being that Griffiths swore that at the time of the accident, Chin was himself pressing a skirt on one of the machines while Chin swore that at that time he was not there, and was in the act of walking away, being then about 15 to 20 feet from where the accident occurred. The said discrepancies and contradictions show that the evidence of Griffiths and Chin should have been rejected by the trial Judge wherever it was in conflict with the evidence of the Appellant, who, in fact, was corroborated by Griffiths as to the presence of Chin at the time of the accident.

(3) The theory of Melville, J., based on no evidence whatsoever, and animadverted upon by Graham-Perkins, J.A., that the Appellant had her hand carelessly resting on the pad of the number three machine at the time of the accident, and while Chin was speaking to her, was wrong and fanciful, and this was admitted even by Counsel for the Respondent in paragraph 2 of the Notice and Grounds of the Appeal. <u>This theory of Melville, J., however, was the sole basis for his finding that the Appellant was guilty of contributory negligence, and 50 per cent to blame for the accident.</u>

(4) Even if the theory of Melville, J., were correct, this would not constitute contributory

RECORD

negligence in the Appellant, and the sole cause of the accident would be Griffiths' negligence.

(5) The totality of the evidence in the case, and particularly the evidence of Griffiths and Chin for the Respondent, show that (a) the Appellant was not guilty of contributory negligence, (b) the evidence of the Appellant ought to be accepted and that of the Respondent rejected, and (c) the Appellant ought to have been awarded full damages in accordance with Rule 18(3) of the Court of Appeal Rules, 1962.

(5) Rule 18(3) of the Court of Appeal Rules, 1962, is in these terms :-

> "The Court shall have power to draw inference of fact and to give any judgment and make any order which ought to have been given or made, and to make such further or other order as the case may require".

(6) The gravamen of the Appellant's claim was the absence of a safe system of work and effective supervision, and the Respondent had led no evidence whatsoever to establish that there was such a system answering the three-fold obligation on the Respondent as laid down by the leading case of Wilsons and Clyde Coal Co. v. English, 1938, A.C., 57.

(7) Although the Respondent had pleaded affirmatively that it had provided a safe system of work and effective supervision, it had failed to adduce a single bit of evidence in support of its pleading, and had thus failed to discharge the onus which lay on it.

(8) In spite of what he said, Melville, J., accepted the Appellant's case substantially when he found her fellow-employee, Ida Griffiths, guilty of negligence. Although he purported to reject the Appellant's evidence as to how the accident happened, this was immaterial, since there was no evidence to support his finding as to how the accident happened. In the absence of any such evidence, the learned trial Judge was entitled to apply the doctrine of res ipsa loquitor and not to theorise. The absence of such evidence, however, was merely in the learned trial Judge's view, and was not factually the case, since there was the clear and uncontradicted evidence as to how the accident had

happened, which evidence he misdirected himself in rejecting.

(9) The onus lay squarely on the Respondent, as a matter of law, to prove that it had provided a safe system of work, and this onus was not discharged.

(10) The principles of law governing the case were clearly set out in the following cases:

(a) Wilsons and Clyde Coal Co. v. English, 1938 A.C., 57.

(b) General Cleaning Contractors v. Christmas, 1953, A.C., 180.

(c) Cavenagh v. Ulster Weaving Co. Ltd., 1960, A.C., 145

(d) Paris v. Stepney B.C., 1951 A.C., 367.

(e) Butler v. Fife Coal Co., 1912, A.C., 140.

(f) Yarmouth v. France, 1887, 19 Q.B.D., 647.

(g) Davies v. Mann, 10 M.& W., 546.

(h) The Boy Andrew, 1948, A.C., 149.

(i) Finch v. Telegraph Construction & Maintenance Co., 1949, 1 A.E.R., 452.

(j) Watt v. Thomas, 1947, A.C., 484.

(k) Yuill v. Yuill 1945, P, 15.

(l) Speed v. Thomas Swift & Co. 1943, K.B. 557.

13. On the 28th November, 1974, after Counsel for the Appellant had concluded his submissions to the Court of Appeal, the Court called on Counsel for the Respondent to reply on the question of whether the Respondent had provided a safe system of work. The Court shortly after this adjourned for the day, and on the morning of the 29th November, 1974, just as the Court resumed, Graham-Perkins, J.A., without hearing any submissions from Counsel for the Respondent, proceeded to deliver the Judgment of the Court.

14. The main questions involved in this Appeal are :

RECORD

(1) Whether there was any evidence on which Melville, J., could reasonably find the Appellant guilty of contributory negligence.

(2) Whether the evidence, read as a whole, shows that the sole cause of the accident was the negligence of Ida Griffiths, an employee of the Respondent Company.

(3) Whether the Appellant was entitled, on the evidence, to full general and special damages for the very serious injuries suffered and the loss sustained.

(4) Whether the sum of $3,000.00 for general damages, as found by Melville, J., is adequate to compensate the Appellant for the personal injuries she has suffered, having regard to the medical evidence.

(5) Whether the Respondent Company provided a safe system of work in its establishment, and whether there is proof that it discharged the onus in law and on the pleadings that it did.

(6) Whether the obiter dictum by Lord Simon in the case relied on by Graham-Perkins, J.A., in delivering the Judgment of the Court of Appeal, which case was not cited nor referred to during the course of the hearing in the Court of Appeal, namely Colfar v. Coggins & Griffiths Ltd., 1945, 1A. E.R. 326, has any application to the instant case, having regard to (a) the explanation of this dictum in General Cleaning Contractors v. Christmas, 1953 A.C., 180, by Lord Oaksey, and (b) the fact that the common law doctrine of common employment has been abolished in Jamaica by the Law Reform (Common Employment) Act since 1961.

(7) Whether the Court of Appeal misdirected themselves on the all-important question of the liability of the Respondent, having regard to the pleadings and evidence in the case and the principles of law applicable thereto.

15. The Appeal was heard by the Court of Appeal on the 27th, 28th and 29th November, 1974, at Kingston, Jamaica, and allowed in favour of the Respondent, and the Judgment of Melville, J., in favour of the Appellant was set aside with costs of the Court below and of the Appeal to be agreed or taxed against the Appellant.

RECORD

16. By an Order of the Court of Appeal pursuant to Section 110 of the Constitution of Jamaica the Appellant was on the 28th day of February, 1975, granted Final Leave to appeal to Her Majesty in Council from the said Judgment of the Court of Appeal.

17. The Appellant submits that the Judgment of the Court of Appeal should be reversed and Judgment for the Appellant restored with the necessary variations as to quantum, for the following among other

REASONS

(1) Because there was no evidence whatsoever on which Melville, J., could properly find the Appellant guilty of contributory negligence to any extent, and he misdirected himself in so finding.

(2) Because Melville, J., misdirected himself in rejecting the evidence of the Appellant as to how the accident happened, when, in fact, the Appellant's evidence on this point was the only evidence he had before him, and this evidence was entirely reasonable and uncontradicted and unchallenged. Melville, J. further misdirected himself in putting forward a theory of his own, which was based on no evidence whatsoever.

(3) Because Melville, J., misdirected himself in holding that the Appellant's case was grossly exaggerated, but gave no reasons for this finding, when un fact, the Appellant gave merely a factual account of the accident, and her physician gave evidence of the serious injuries she suffered.

(4) Because Melville, J., misdirected himself is not properly assessing the evidence of the Appellant that the top of the number three machine slammed down, and did not come down gradually, as it should if it were working normally. Had it come down gradually, the probability is that the Appellant would have had time to snatch away her hand and there would have been no accident.

(5) Because Melville, J., misdirected himself in holding that Griffiths was a witness of truth when she said she alone was operating the

RECORD

number three machine at the time of the accident.

(6) Because the self-contradictions of Griffiths, and the demonstrably false evidence of Chin in denying that he was present when the accident occurred, ought to have made Melville, J., accept the evidence of the Appellant wherever it conflicted with the evidence of Griffiths and/or Chin.

(7) Because on her own evidence, Griffiths showed that she was not a competent worker when she admitted that all her training for the job was by Chin, who merely showed her "a little time".

(8) Because Melville, J., misdirected himself in excusing Chin's obviously false evidence that he was not present when the accident occurred, saying that this was a mistake on Chin's part, instead of properly assessing it as deliberate perjury. It is to be observed that the Appellant's evidence on this important point was accepted by Melville J.

(9) Because on the 12th May, 1970, when the accident occurred, the probability was, as the Appellant said, that Chin directed that the work should be "rushed" one of the three workers, Saunders, having been absent, and the work having to be done by only two workers, namely, the Appellant and Griffiths. This probably also explains why Chin himself had to be doing some of the work, as both Griffiths and the Appellant testified. This "rush" was clearly part of the cause of the accident.

(10) Because the totality of the evidence shows clearly that the sole cause of the accident was the negligence of Ida Griffiths, an employee of the Respondent, whose negligence is regarded in law as the personal negligence of the Respondent.

(11) Because on the evidence of Dr. Amos Foster, the Appellant's physician, the Appellant was entitled to adequate general and special damages which the Judgment of Melville, J., did not allow her.

RECORD

(12) Because the gravamen of the Appellant's claim was the absence of a safe system of work and effective supervision, which ought to have been provided by the Respondent, and the onus of establishing that there was a safe system of work and adequate supervision, both in law and on the pleadings, was on the Respondent, and this onus was not discharged.

(13) Because Graham-Perkins, J.A., gravely misdirected himself in law to stating: "In the result, Melville was called upon to resolve a relatively narrow issue as to the (Respondent's) liability. Put simply it was: did the (Appellant) suffer her injury as the result either of the failure in the (Respondent) to provide a safe system of work and effective supervision of the machines, or of the negligence of a fellow-servant." The fact that he based his Judgment on a dictum in a case decided at a time when the doctrine of common employment was a part of the common law, emphasises the misdirection, and shows that he regards the negligence of a fellow-servant as absolving the employer of any liability.

(14) Because Graham-Perkins, J.A., properly rejected the only ground put forward by Melville, J., on which he found the Appellant guilty of contributory negligence, namely, that the Appellant had her hand resting on the pad of the number three machine at the time of the accident, a finding entirely unsupported by any evidence.

(15) Because Graham-Perkins, J.A., misdirected himself and failed to draw the clear inferences from the evidence in the case when he stated in his Judgment: "Let it suffice to say that no valid reason has been advanced why it should be held that Melville, J., was in error in rejecting the (Appellant's) evidence, or in accepting the evidence of Griffiths". Melville, J., did not reject the (Appellant's) evidence save on the question of how the accident occurred and, as has been shown, he had ample reasons for rejecting the evidence of Griffiths. Melville, J., was in error in rejecting the Appellant's account of how the accident occurred, as has been shown.

(16) Because Graham Perkins, J.A., misdirected

himself in stating:

"In our view once the (Appellant's) evidence is rejected (by Melville, J.) and once the conclusion is reached that it was not open to the learned trial Judge to assign a theory of his own as to the cause of the (Appellant's) injury, there can be no justification in the circumstances of this case for any debate as to the failure in the (Respondent) to provide a safe system of work". Graham-Perkins, J.A., is in grave error in stating that Melville,J., had assigned a theory of his own as to the cause of the (Appellant's) injury. Melville, J., quite clearly found that the cause of the accident was the bringing down the top of the number three machine on the hand of the Appellant by Griffiths, and that Griffiths was by this act, negligent. Melville, J., did not reject the Appellant's evidence, or he would not have found in her favour. All he did was to reject (erroneously, it is submitted) the manner in which the accident occurred. In view of the serious misdirections of Graham-Perkins, J.A., on these fundamental facts, and his failure to draw the proper inferences showing that Melville, J., was wrong in rejecting the Appellant's evidence as to the manner in which the accident occurred, her evidence having been uncontradicted and unchallenged, his conclusions are mere <u>non sequiturs</u>, and ought to be reversed.

(17) Because the Court of Appeal failed to consider the authorities cited by Counsel for the Appellant, failed to elicit from them the principles governing the question of a safe system of work, and failed to take into account the principles of law applicable since the abolition of the doctrine of common employment.

(18) Because the members of the Court of Appeal gravely misdirected themselves is not properly dealing with the many misdirections of Melville, J., and in themselves failing to draw the proper inferences from the facts and the evidence, and to apply the proper principles of law.

EUGENE C.L. PARKINSON, Q.C.

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CASE FOR THE APPELLANT

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