

24/84

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

O N A P P E A L

FROM THE COURT OF APPEAL OF THE GAMBIA

B E T W E E N :

GEORGE AKL (Plaintiff) Appellant

- and -

JOHN AZIZ (Defendant) Respondent

CASE FOR THE RESPONDENT

Record

10

1. This is an Appeal by Special Leave of the Judicial Committee, from the Judgment of the Gambia Court of Appeal (Forster, Ag.P., Amin, J.A. and Livesey Luke, J.A.) dated the 25th day of May 1981 which allowed an Appeal and set aside a Judgment of the Supreme Court of the Gambia (Aboagye J.) dated the 6th day of March 1981, by which the Appellant herein (original Plaintiff) was awarded, by way of damages for personal injuries arising out of a motor car accident, a total of D 250,951 and D 10,000 costs.

p.63

pp.51-62

pp.38-48

20

2. At about midnight on the 31st October 1975, the Respondent (original Defendant) gave the Appellant a lift from the Casuarina Night Club, Fajora, in his Hillman Avenger car No. GO 717. On the Kambo-Banjul Road, as the car approached a bend near milestone 5, an oncoming vehicle was encountered. The Respondent swerved to his right (near) side of the road, lost control of his car which somersaulted and landed on swampland. As a result, the Appellant was thrown out of the car and sustained serious personal injuries.

30

Record

- pp.1-2 3. By his Writ of Summons dated 23rd March 1977, the Plaintiff alleged that the accident was caused by the Defendant's negligence.
- pp.3-4
pp.5-6 4. The Plaintiff's original Statement of Claim was dated 22nd November 1977, but an amended one was filed on the 26th February 1980. By paragraphs 5 and 13 of the said Amended Statement of Claim it was pleaded as follows:
- p.5 ls.21-
28 "5. Along the Kombo Banjul Road and on approaching Mile 5 the defendant was driving very fast and negligently. As the said vehicle approached a bend near Mile 5 there was an oncoming vehicle from the opposite direction. The Defendant who was still driving very fast swerved to the right, left the road, tried to regain the road and lost control of his vehicle." 10
- "PARTICULARS OF NEGLIGENCE"
- p.6 ls.7-
14 13. 1. The Defendant drove the said motor vehicle GO 717 too fast. 20
2. The Defendant failed to slow down or stop or control his vehicle in such a way as to avoid the accident.
3. The Defendant failed to keep any or any proper look out."
- p.7 5. In his Defence dated the 17th March 1980, the Defendant denied negligence and pleaded in paragraph 4:-
- p.7 ls.11-
18 "4. Coming down from Bakau and arriving before Denton Bridge, the defendant was completely blinded by the high lights of a car coming on the opposite direction and the defendant's lane and it was while the defendant was avoiding this car coming on the opposite direction that the accident the subject matter of these proceedings happened." 30
6. In relation to the accident, the Plaintiff gave evidence as follows:-
- p.13 ls.30-
43 "On our way home John Aziz drove so fast that I felt the car was running at a speed. I looked at the Speedometer and saw that he was driving 80 m.p.h. After passing Milestone 5 we came to a bend. A car was then approaching 40

us from the opposite direction. The bend was to our right. Because of the speed at which John Aziz was driving the two right tyres of his car went off the road. John Aziz is the defendant in this suit. The defendant tried to drive the car back to the road and in doing so he lost control over it and the car sommersaulted. It landed on its canopy in a swamp. I was thrown out of the car into the swamp in the course of the sommersaulting."

Record

10

In cross-examination, he stated:-

Q. Why did you not stop the defendant or call his attention to the speed at which he was driving?

p.19 ls.2-15

A. He was in charge of the car and I did not have time to communicate with him before the accident.

Q. I put it to you that the defendant was not driving fast. He was driving at about 50 m.p.h. when the other driver came at a speed and blinded him with his high lights this causing the accident.

20

A. That is not correct. There were no high lights from the other car."

7. Two surgeons, Dr. Sheriff Ceesay and Dr. John Kwaku Owusu-Ansah, gave evidence for the Plaintiff in relation to his injuries.

p.20 1.10-
p.22 1.32
p.22 1.34-
p.24

8. The Defendant's evidence in relation to the accident was as follows:

"When we reached a place near Milestone 5 I met an oncoming vehicle. It had its high lights on and it was in the middle of the road. I tried to avoid a collision by keeping close to my nearside of the road. As I got to the edge of the road my car got on some gravel and one of my rear tyres - I am not sure but I think it was the right one - got burst. I then swerved to the left and my car fell in a rice farm about 5 metres from the road."

30

p.26 ls.11-
20

40

And in cross-examination:-

"Cross-examination by N'Jie

p.26 1.50-
p.28 1.9

Q. You were doing at least 70 m.p.h.?

A. I cannot remember that

Record

- Q. You made a statement to your Insurance company in connection with the accident?
- A. That is correct.
- Q. You said in that statement that you were travelling at 70 m.p.h.
- A. I said I was travelling at 70 m.p.h. before the accident but that I had reduced it to 50 m.p.h. at the time of the accident.
- Q. You made that statement on 23.12.75 ? 10
- A. That is correct.
- Q. Was that statement correct ?
- A. Yes.
- Q. Who told you that you had a tyre burst?
- A. I saw that on my way to the Airport on the Sunday to take the plane to Dakar.
- Q. Was that the first time you got to know you had a tyre burst ?
- A. I had been told that by somebody I cannot remember when I was on admission at the Royal Victoria Hospital. 20
- Q. Your car was still in the swamp?
- A. That is correct.
- Q. I put it to you that if you had driven the car at a slower speed the accident would not have happened.
- A. It would not have happened if my speed had been about 30 m.p.h.
- Q. It is correct that you lost control of your car ? 30
- A. That is so.
- Q. You would not have lost control if you had been driving at 40 - 50 m.p.h.
- A. I do not know.

Q. Why did you not stop your car when you saw the other vehicle approach with its highlights on and you could not see ahead?

A. I could not stop because I was speeding. My car would have sommersaulted if I had braked at the speed at which I was driving.

Q. What was the vehicle from the opposite direction.

10 A. It was a Renault 4. It was a white one.

Q. Did you subsequently find out the one who was driving that car?

A. I did not see the registration number so I could not trace the driver. I had been blinded by the high lights.

Q. You were approaching a bend at the time of the accident?

A. There was a slight bend ahead of me.

20 Q. You could have slowed down when approaching the bend. It was your duty to slow down.

A. I did not see the bend before the accident.

Q. How far were you from the oncoming car when you first saw it?

A. It is a long time so I cannot tell.

Q. Is it correct that the plaintiff was seriously injured?

A. Yes."

30 "By Court:

Q. Did you feel or notice in any way that you had had a tyre burst before the accident?

p.28 ls.27-
36

A. No.

Q. How far was the oncoming car from you when you saw that it had its full high lights on?

A. It was about 30 metres away

Record

Q. How far was it from you when you saw that it had occupied the middle of the road?

A. It was between 15 and 20 metres away."

pp.29-31

9. Dr. Willie Thomas Baldeh gave evidence for the Defendant. He differed with the doctors who testified for the Plaintiff on certain aspects of their reports. In cross-examination, he said:

p.31 ls.12-21

"Q. Is it correct that you asked this plaintiff whether the accident was caused by the full lights of an oncoming vehicle?

10

A. I asked him how the accident occurred and he told me that.

By Court

Q. What had that got to do with your examination?

A. I was only interested in how the accident occurred."

pp.32 - p.34
1.11

10. Mr. Badara Fye, the Police Sergeant in charge of the Bakau Police Station, also testified for the defendant. He went to the scene on the same night and then went to the Royal Victoria Hospital where he saw the Plaintiff and the Defendant on admission. He went to the scene again the next day with another policeman. He took measurements and built up a case file which he could not trace. From the scene, he went again to the Royal Victoria Hospital and took statements from the Plaintiff and Defendant. He continued:-

20

p.32 1.40-
p.33 1.4

"The Plaintiff told me that he joined the defendant in his car from Bakau to Banjul and when they reached the place of accident. They met an oncoming vehicle which gave them full high lights at a short distance. He said, as a result, the defendant lost control over the vehicle and it somersaulted on the left side. The defendant told me that the other driver gave him the full highlights when they were so close. He therefore applied his brakes and lost control over the vehicle. The condition of the road was good on the night of the accident. There was no speed limit sign at the scene of the accident. The defendant told me that the other car was a white Renault but he could not give me the registration number. The accident happened just after a bend."

30

40

In cross-examination it was put to the witness:-

p.33 ls.23-
26

"that the plaintiff never made any statement to you as he was not in a position to do so."

To which he answered

"He made a statement to me."

There was also cross-examination about the tyre burst, viz:-

p.33 ls.36-
39

"Q. Did you notice any of the tyres burst?

A. I cannot remember.

10

Q. Did the defendant mention a tyre burst to you ?

A. I cannot remember."

And also about the position of the other oncoming vehicle, viz:-

p.33 1.49-
p.34 1.2

"Q. Did the defendant tell you where the other vehicle was when they were meeting?

A. He said it was nearly in the middle of the road at the time he applied his brakes."

20

11. In his Judgment, dated 6th March 1981, the learned Trial Judge made the following findings on the issue of liability:-

(1) As to the tyre burst, he said that this matter had not been pleaded, that counsel for the plaintiff should have objected to the evidence in relation to it, and that it should not have been admitted. Therefore, the Trial Judge continued, "I would ignore the defence of tyre burst." Later in the Judgment, the Judge commented that even if he had considered the evidence in relation to the tyre burst, he would have "rejected it as it was most unconvincing."

p.40 -ls.15-
47

30

p.43
ls.15-18

(2) As to the Defendant being blinded by the lights of the oncoming vehicle, the Trial Judge said:

"Common driving experience shows that if indeed the defendant had been completely blinded by the high lights of the oncoming vehicle when he was about 30 metres away from

p.42 ls.23-
48

Record

that vehicle he would not have been able to see anything until that vehicle had passed him. He would therefore not have seen the position of the oncoming vehicle when they were between 15 and 20 metres apart nor would he have seen the type of vehicle and its colour. The defendant further stated that he was driving at a speed of about 50 mph when he was meeting the other vehicle and that he did not apply his brakes to stop when he was blinded by the lights from that vehicle. His explanation for not braking was that because of the speed at which he was driving his car would have somersaulted if he had done so. Again, if the defendant's story was true, common driving experience shows that he would not have had time to think of what would happen to his car if he braked. He would instinctively have applied his brakes. His failure to apply his brakes confirms the plaintiff's case that he was not put into any sudden dangerous situation by the oncoming vehicle. On the evidence I accept the plaintiff's version that the defendant was not blinded by any high lights from the oncoming vehicle." 10 20

(3) As to the speed of the Defendant's car, the Trial Judge set out the evidence and concluded:-

p.43 ls.10-14 "On the totality of the evidence I find that the accident was caused by the defendant driving too fast in the night when he was meeting another vehicle and when he was either in the bend or approaching it." 30

p.41 ls.29-41 (4) As to the question of the oncoming vehicle being in the middle of the road, the learned Trial Judge stated the submission of the Defendant's counsel on the point, (i.e. that all the Defendant could have done in the circumstances was to swerve to his nearside, which he did) but made no finding on the point. 40

12. In the Court of Appeal Judgment, delivered by Forster, Ag. P., the Court criticised all the above four findings, viz.

p.59 ls.1-29 (1) In relation to the tyre burst, the Court pointed out that the Defendant's evidence on this point was not contradicted when he was being cross-examined, nor was any objection taken to it. In this connection the Court referred with 50

approval to what Edmund Davies, L.J. said in Domsalla and Anor v. Barr & Ors. (1969) 3 All E.R. 487 at 493.

Record

(2) In relation to the Defendant being blinded by the highlights of the oncoming vehicle, the Court of Appeal said the Trial Judge fell into error. The Court said

p.56 l.42-
p.57

10

"Assuredly seeing the situation from the passenger seat cannot be the same as seeing that situation from the driving seat, especially in the light of the evidence in the instant case."

20

The Court went on to refer to that evidence, namely the evidence of the Defendant "Supported by his consistent story, to his insurers, to the interrogating police, two days after the accident and much later to an examining medical officer at the Royal Victoria Hospital." The Court also pointed out that the Plaintiff's evidence about the full lights of the oncoming vehicle was contradicted by the evidence of Plaintiff's own previous inconsistent statements to the Police (Mr. Fye) and to the doctor (Dr. Baldeh).

(3) In relation to the speed of the vehicle, the Court of Appeal said,

p.56 ls.38-
41

"But, with respect to the learned Trial Judge, fast driving on a freeway does not, of itself, amount to negligence. See Quinn v. Scott (1965) 2 All E R 588 at 590."

30

(4) In relation to the position of the oncoming vehicle on the road, the Court of Appeal said

40

"One such error was that considering the case for the Defendant, it was crucial for it that the learned Trial Judge express his finding on the position on the road of the oncoming vehicle whose factual presence was attested to by both parties in their respective evidence, and this he failed to do. Perhaps if he the learned Trial Judge had made a finding, and on a true resolve of the evidence, he may well have found negligence established on the part of the driver of the oncoming vehicle."

p.56 ls.24-
34

13. The Court of Appeal then referred, it is submitted correctly, to the principles on which an Appellate Court can set aside findings of fact by a

p.60 l.33-
p.61 l.34

Record

trial judge. Reference was made to Watt & Thomas v. Thomas (1947) A.C. 484 at 487, to Benmax v. Austin Motor Company Ltd. (1955) 1 All E.R. 326 at 330 and to the Gambia appeal of Shyben A. Madi v. C.L. Carayol (1979) P.C. Appeal No. 12. The Court of Appeal concluded, correctly it is submitted, that the learned Trial Judge failed to evaluate the primary facts correctly.

p.62 ls.8-14

14. In the event, the Court of Appeal allowed the Appeal and set aside the Judgment and Order of costs made by the Trial Judge.

10

p.63

15. On the 9th December 1982, the Judicial Committee of the Privy Council granted the Appellant special leave to appeal.

16. The Respondent respectfully submits that this Appeal should be dismissed with costs for the following amongst other

R E A S O N S

1. BECAUSE the findings made by the learned Trial Judge were wrong.

20

2. BECAUSE the learned Trial Judge wrongly ignored the evidence, relating to the "tyre burst"; and further erred in holding that even if he had considered that evidence, he would have rejected it.

3. BECAUSE upon the totality of the evidence the learned Trial Judge was wrong in accepting the Plaintiff's version that the Defendant was not blinded by any high lights from the oncoming vehicle.

30

4. BECAUSE the learned Trial Judge erred in finding that the accident was caused by the Defendant driving too fast.

5. BECAUSE the learned Trial Judge omitted to make a finding as to the oncoming vehicle's position on the road; and in particular failed to deal with the Respondent's pleading and evidence that the oncoming vehicle was in "the Defendant's lane" or the "middle of the road."

40

6. BECAUSE the Court of Appeal rightly found that the learned Trial Judge failed to evaluate the primary facts correctly.

7. BECAUSE the Court of Appeal applied the correct Record principles in reversing the Trial Judge's findings of fact and rightly did so.

EUGENE COTRAN

IN THE JUDICIAL COMMITTEE OF THE
PRIVY COUNCIL

ON APPEAL
FROM THE COURT OF APPEAL OF THE GAMBIA

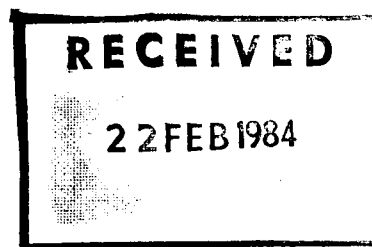
BETWEEN :

GEORGE AKL Appellant

- and -

JOHN AZIZ Respondent

CASE FOR THE RESPONDENT



Philip Conway Thomas & Co
61 Catherine Place
London SW1E 6HB.

Solicitors for the Respondent